

Multiemployer Benefit Plans-- Reducing Employer's Exposures

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Employers with collectively bargained employees need to be aware that the costs of participating in a union sponsored benefit fund (i.e., a multiemployer plan) may be much greater than the negotiated contributions. The greatest exposure commonly comes from withdrawal liability — generally an employer’s pro rata share of a multiemployer pension plan’s unfunded vested benefits that is assessed when the employer “withdraws” its participation from the plan. However, a myriad of other statutory and contractual issues with multiemployer pension and welfare plans creates traps for the unwary. What follows are *certain liabilities* which unionized employers should be considering:

- **Mass Withdrawal Liabilities For Multiemployer Pension Funds**

Withdrawal liability must be considered whenever an employer will incur a complete or partial cessation in its obligation to contribute to a multiemployer pension plan – e.g., due to a facility closing, asset sale, bargaining unit “takeout,” workforce reduction, or transfer of work. ***But even if the employer does not incur such a “withdrawal,” liabilities may be imposed at any time, – as a result of a “mass withdrawal”*** occasioned by actions of the plan trustees, or other participating employers.

- **Fund Assessments**

Trustees of pension and welfare funds may impose costs on employers pursuant to the terms of trust documents, (usually incorporated by reference in the CBA), or participation agreements. These “blank check” provisions can result in “contractual”

withdrawal liability (in both a pension and welfare plan context) and midterm contribution increases, among other midterm “surprises.”

- **New Personal Liability Exposures**

Trust documents for multiemployer plans are increasingly designating contributions which are “owed” as “plan assets.” On this basis, courts are sustaining actions for unpaid contributions against individual company officials and owners as “fiduciaries” who are *personally liable*.

- **Liabilities As a Joint or Successor Employer, or for Subcontractors**

Withdrawal liability and other funding exposures can arise in a number of unexpected contexts – even when the employer is not the contributing employer. For example, such liabilities can be imposed for utilizing subcontractors (particularly in a construction industry context), and funds are increasingly pursuing contributions and unpaid withdrawal liability payments from successor or joint employers based, in large measure, upon labor law principles – and courts are increasingly sustaining such actions.

Measures to Address Plan Exposures

The foregoing are *only some* of the potential liabilities that unionized employers should now be reviewing. Consider the following:

- **Get Proactive:** Employers should not be passive participants in multiemployer plans; they should become proactive and coordinate with the employer trustees to address developments *before* liabilities are imposed, — like forming action groups (or bargaining associations) with other employers.
- **Plan Initiated Programs:** Be creative: a number of multiemployer pension plans are offering to renegotiate the terms of employer participation; for example, by retiring potential withdrawal liability while offering participation in a new “plan” with theoretically minimal future liability exposure. Other funds have agreed to “spinoffs” of liabilities and assets to new employer sponsored plans on favorable terms. Structured solutions are possible.
- **Review Controlling Plan Documents:** Trust documents, trustee rules, and participation agreements should be reviewed and appropriately addressed.
- **Obtain Withdrawal Liability Estimates:** Request an estimate of withdrawal liability annually. The plan must provide the estimate within 180 days and may charge for the estimate.
- **Renegotiate Agreements:** No CBA, renewal CBA, or participation agreement should ever be entered into without a review of potential exposures.

In the present legal climate, employers can no longer participate in multiemployer pension plans on the basis of “business as usual.” By adopting a proactive posture, employers, acting individually, but preferably in unison, can recapture rights in collective bargaining, and/or seek the appointment of employer trustees with proper regard for plan funding administration both in the long and short term. The range of

considerations and possible initiatives is considerable, and the foregoing is simply an overview of this complex subject.

Steven Baderian is co-author of this article.

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