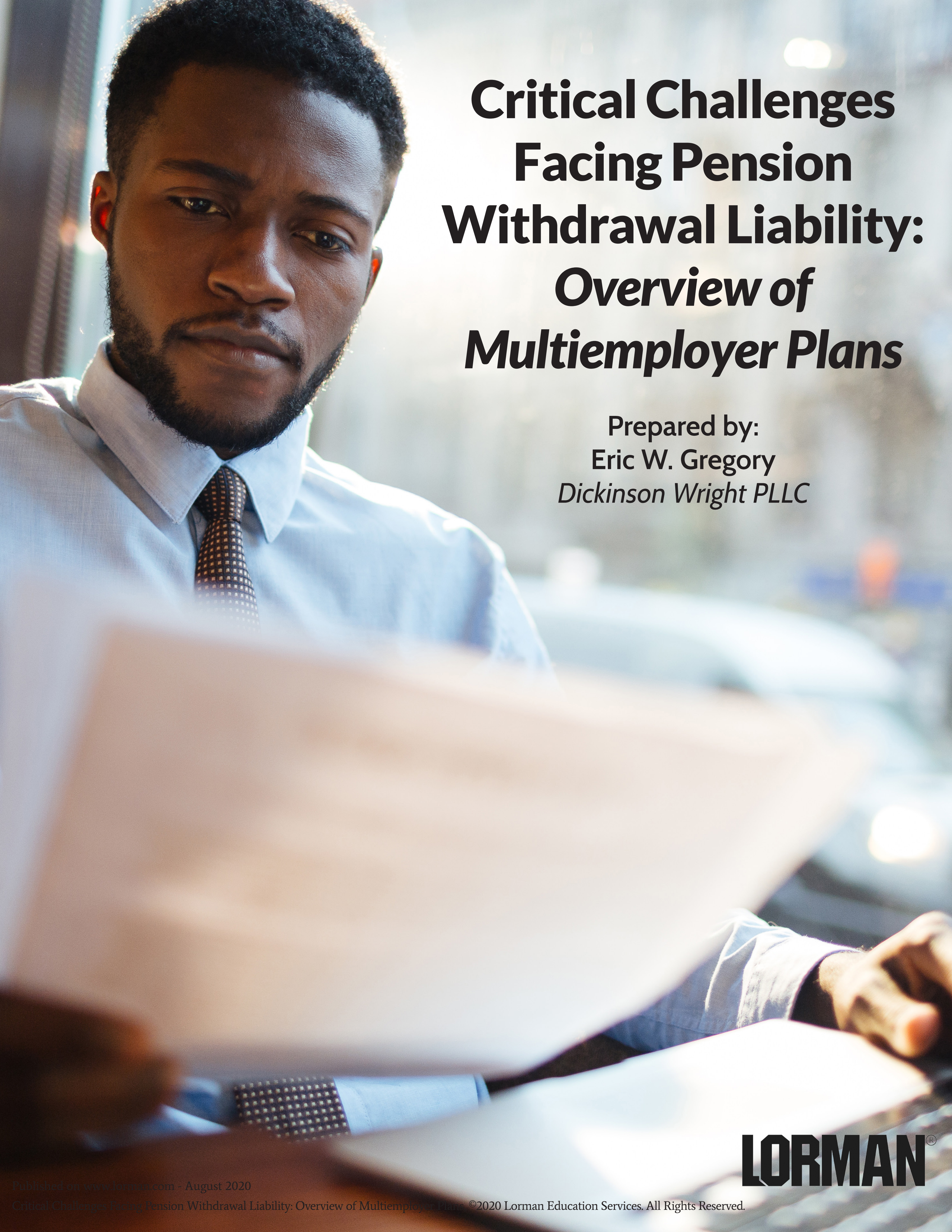

Critical Challenges Facing Pension Withdrawal Liability: *Overview of Multiemployer Plans*

Prepared by:
Eric W. Gregory
Dickinson Wright PLLC

LORMAN®

Published on www.lorman.com - August 2020

LORMAN®

Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

Critical Challenges Facing Pension Withdrawal Liability

By Eric W. Gregory
Member, Dickinson Wright PLLC, Troy, Michigan
EGregory@DickinsonWright.com; 248-433-7669

Eric Gregory's practice is focused primarily in the areas of ERISA, employee benefits, and executive compensation. He advises clients on all aspects of employee benefits including qualified retirement plans, welfare plans, and nonqualified compensation programs. He regularly provides strategic advice and analysis on approaches for employers obligated to contribute to multiemployer pension funds to mitigate withdrawal liability risk

I. Overview of Multiemployer Plans

A. Brief History and Background on Multiemployer Plans

1. The Taft-Hartley Act and Basic Labor Rules for Multiemployer Plans

Most discussions of employee benefits issues have a starting point in 1974, with the passage of the most significant overhaul of the private pension system: the Employee Retirement Income Security Act of 1974 ("ERISA"). The history of multiemployer plans, however, begins significantly earlier with the Taft-Hartley Act of 1947, which was the first major revision of New Deal labor law passed by a post-war Congress. Section 302 of the Taft-Hartley Act governs the operation of multiemployer plans (sometimes referred to as "Taft-Hartley plans").[1]

After a trust agreement is completed, a fixed rate of employer contributions to the trust fund is negotiated and set forth in the collective bargaining agreement ("CBA"). This rate is usually a set amount per hour worked or per units of production (e.g., per tons of coal mined). This is now known as a "contribution base unit" or CBU.[2] Subsequently, the trustees set benefit levels.

2. Growth in Popularity of Multiemployer Plans

Multiemployer plans' popularity grew significantly during the 1960s and 1970s, particularly in the construction, miming, apparel, and service industries.

During the 1960s and 1970s, the number of participants in multiemployer plans grew at twice the rate of single employer plans. Almost nine million participants were covered by a multiemployer plan in 1975, meaning nearly fifteen percent of the private sector workforce was covered by a multiemployer plan at that time.[3]

---

[1] Codified at 29 U.S.C. §186.
[2] ERISA §4001.
[3] Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs, 1975-2017* (September 2019).

3. **The Withdrawal Problem**

A problem with the multiemployer model eventually became apparent, however: an employer that stopped contributing to a multiemployer plan could generally walk away from the plan without further liability. This was true even if that employer's previous contributions did not fully fund the benefits earned by its employees.

4. **MPPAA's Answer to the Withdrawal Problem**

Because employers had the ability to avoid withdrawal liability if the plan survived for five years after their date of withdrawal, Congress became concerned that ERISA did not adequately protect multiemployer pension plans from the adverse consequences that result when individual employers terminate their participation or withdraw.[4] Therefore, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") was enacted and was designed to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and to encourage the growth and maintenance of multiemployer plans in order to ensure benefit security to plan participants.[5]

To solve this problem, MPPAA added a requirement that a withdrawing employer pay its share of the plan's unfunded vested benefits (or "UVBs"), which represent the difference between the present value of the plan's guaranteed benefits, and the plan's assets as of a given date.[6] This proportionate share of the plan's vested benefits constitutes an individual employer's "withdrawal lability."[7] The withdrawal liability is intended to act as a kind of "exit fee" for employers who cease contributions to a multiemployer plan with unfunded vested benefits.

B. The Basics of Withdrawal Liability

1. The Withdrawal

MPPAA imposes withdrawal liability on employers without regard to the reason for the withdrawal. Under ERISA §4202, when an employer withdraws from a multiemployer plan, the plan sponsor is charged with determining the amount of the employer's withdrawal liability, notifying the employer of the amount of the withdrawal liability, and collecting the amount of withdrawal liability from the employer.

The withdrawal liability may be triggered in one of two ways: a complete withdrawal or a partial withdrawal.

---

[4] Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214* (1978).
[5] *Id*.
[6] ERISA §4201.
[7] *Ibid*.

a) Complete Withdrawal

Under ERISA §4203, an employer completely withdraws when the first of the following two conditions occur: (1) the employer permanently ceases to have an obligation to contribute to the plan; or (2) the employer permanently ceases all covered operations under the plan. The effective date of withdrawal is either the date of the cessation of the obligation to contribute, or the cessation of all covered operations.

b) Partial Withdrawal

In addition to complete withdrawals, MPPAA also provides for the triggering of withdrawal liability in the case of partial withdrawals.[8] A partial withdrawal can be triggered by a seventy percent decline in CBUs, or by one of two types of "partial cessations:" bargaining agreement take-out and facility take-out.

c) Withdrawal Liability Reductions and Adjustments

Under certain conditions and circumstances, an employer's actual withdrawal liability and payment obligations may be subject to certain reductions and adjustments.

(1) Free Look Rule

Under a special rule that only applies if a plan has specifically adopted it, employers may leave without liability if the withdrawal occurs within six years of initial participation, subject to some additional requirements.[9] This rule is technically titled "No Withdrawal Liability for Certain Temporary Contribution Obligation Periods," but is most frequently referred to as the "free look rule."

(2) 20-Year Cap

Withdrawal liability payments are computed to in annual installments. Once the annual installment is computed, the number of annual payments required to amortize the withdrawal liability is determined. The amortization period, however, is capped at twenty years. Therefore, the employer pays the annual payment for as long as it takes to pay off the withdrawal liability, or twenty years, whichever comes first.[10]

---

[8] ERISA §4205.
[9] ERISA §4210.
[10] ERISA §4219(c)(1).

(3) *De Minimis* Rule

A withdrawing employer's withdrawal liability in a complete or partial withdrawal is reduced by the smaller of: (1) $50,000; or (2) 0.75% of the plan's UVBs, reduced by the amount the UVBs exceed $100,000.[11] The purpose of this "*de minimis* rule" is to relieve employers with small liabilities form withdrawal liability assessments. A plan has the choice to replace the $50,000 amount with $100,000, and the $100,000 with $150,000, respectively, which results in a larger reduction of withdrawal liability.

d) Mass Withdrawal

If all of the contributing employers to a multiemployer plan withdraw, the plan is terminated in what is known as a "mass withdrawal."[12] A "mass withdrawal" also occurs upon the cessation of the obligation of all employers to contribute under the plan, or the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw.[13]

C. Special Industry Rules

MPPAA also provides a number of statutory exemptions from withdrawal liability for certain industries. It is important to understand, however, that in many cases the relief only exists in narrow circumstances, so not all employers in the identified industries will be able to take advantage of the exemptions.

1. Building and Construction

The building and construction industry exception is likely the most commonly relied-upon industry exception. In the case of this exemption, a complete withdrawal occurs only where the employer with the obligation to contribute ceases to have an obligation to contribute under the plan, and either: (1) continues to perform work in the jurisdiction of the CBA of the type of work for which contributions were previously required; or (2) resumes such work within five years from the date the obligation ceased without renewing the obligation to contribute.[14]

Stated another way, building and construction complete withdrawal only occurs if the employer continues or resumes (within five years) non-union work in the same geographical jurisdiction of the CBA. The theory behind this rule is that an employer leaving the jurisdiction of the plan or going out of business does not typically reduce the plan's contribution base. Instead, an employer reduces the plan's contribution base only if it continues to do what would have been covered work but does not have an obligation to contribute to the plan for that work. In order to protect

[11] ERISA §4209.
[12] ERISA §4041A(a);
[13] *Id*., 29 CFR §4001.2.
[14] ERISA §4203(b)(2).

het plan, the continuation of work without contributions is treated as a withdrawal in the building and construction industry.[15]

There is also a separate statutory provision that provides relief in reduction of partial withdrawal liability.[16]

2. Entertainment

Another special industry exemption applies to the entertainment industry. Under MPPAA, this includes business in theater, motion picture, radio, television, sound or visual recording, music and dance, and similar entertainment activities as the PBGC deems appropriate.[17]

3. Trucking, Household Goods Moving, and Public Warehousing

If a plan is composed "substantially" of employers in the long and short-hall trucking industry, the household goods moving industry, or the public warehousing industry, another limited exception applies for withdrawal liability.[18]

4. Other Exceptions: Retail Food and Coal Industry

Finally, there are special withdrawal liability calculations for certain coal industry plans and partial withdrawal liability rules for the retail food industry.[19]

II. Controlled Group Rules

A. Background on Controlled Groups

For purposes of determining withdrawal liability, any "trade or business (whether or not incorporated)" that is under "common control" is treated as a single employer.[20] The regulations issued by the PBGC for this purpose provide that the PBGC will determine that trades or businesses are under "common control" if they meet the definitions provided by the regulations prescribed under Internal Revenue Code ("Code") Section 414(c).[21] Those Department of Treasury regulations are commonly referred to as the "controlled group" rules.[22]

---

[15] Joint Explanation, 126 Cong. Rec. S10111, S10116 (Daily Ed., 7/29/80).
[16] ERISA §4208(d)(1).
[17] ERISA §4203(c)(2).
[18] ERISA §4203(d).
[19] ERISA §§4205(d), 4211(d), 4205(c).
[20] ERISA §4001(b)(1).
[21] 29 CFR §4001.3.
[22] 26 CFR §§1.414(c)-1 through (c)-6.