



Considerations When Preparing to Withdraw From a Pension

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Critical Challenges Facing Pension Withdrawal Liability

Written by Eric W. Gregory

Considerations When Preparing to Withdraw

Obtaining Information from the Fund

Prior to considering withdrawal, it is to the employer's advantage to having every piece of information at their disposal. Under ERISA §101(I), a contributing employer to a multiemployer plan is permitted to request a notice of potential withdrawal liability. Upon request, the plan sponsor or administrator of a multiemployer plan must provide this notice within 180 days of request. If the plan fails to provide this information within the 180-day period, it is subject to a penalty of up to \$1,000 per day (as adjusted for inflation). The contributing employer is permitted to make this request once in every twelve-month period.

Other Methods to Consider to Reduce Exposure to Withdrawal Liability

Before withdrawing, it may be worth considering alternatives. Employers may consider a gradual reduction of CBUs over a long period of time, while avoiding a partial withdrawal. This might allow an employer to decrease its exposure to withdrawal liability in the long run.

Bankruptcy is another option. Generally, in bankruptcy, the multiemployer plan becomes a creditor, and the amount of withdrawal liability is limited to the amount of existing assets transferred to the trustee in bankruptcy.¹ However, it is important to note that controlled group members will still be jointly and severally liable.

Another Trap: The “Exit Fee”

While one might think that withdrawal liability might be the only worry for an employer that withdraws from a fund, there is sometimes an additional concern: an “exit fee.” In at least two cases, courts have rules that a fund may impose an “exit contribution” fee on employers that withdraw from the fund who have no withdrawal liability.²

Statement of Business Affairs and Audit

Upon learning of a possible withdrawal, many funds will send out a notice to employers requesting information known as a “statement of business affairs.” This requests information about why the employer withdrew and the identities of the employers in the controlled group. This will frequently be followed by an audit from the fund, which helps the fund determine whether it has received all of the necessary contributions from the employer.

¹ ERISA §4225.

² *Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. DCI Signs & Awnings, Inc.*, No. 1:08CV15JCC, 2008 WL 640252, at *1 (E.D. Va. Mar. 5, 2008); *Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Four-C-Aire, Inc.*, 929 F.3d 135 (4th Cir. 2019)

Notice and Demand for Withdrawal Liability

Under MPPAA, the plan administrator has a responsibility to calculate the amount of withdrawal liability and notify the employer of that amount. Then, the employer has ninety days to request a review of that notice, state whether there are any inaccuracies in the notice, and provide any additional information with respect to the assessment. Under the “pay now, dispute later” framework of MPPAA, the employer must begin payment of the amount shown on the assessment within sixty days after the date of the demand.

Acceleration

MPPAA operates under a “pay now, dispute later” scheme pursuant to a schedule that is calculated by the plan and set forth in the initial notice of assessment. However, in certain circumstances, a plan is permitted to accelerate the scheduled payments.

Submitting a Request for Review

To preserve its ability to object to the assessment, the employer must submit its “request for review” within ninety days after receipt of the plan’s notice of withdrawal liability.³ It is possible to obtain an extension from the fund on this timeline. Funds tend

³ ERISA § 219(b)(1)(B).

to be more willing to do this when they are engaged in settlement discussions with the employer.

Resolving Disputes

Arbitration Deadline and Notice

After submitting the request for review, the plan has a chance to respond to the request for review. The employer has a sixty-day period that typically begins on the date that the employer is notified of the plan's response to the employer's request for review to begin arbitration.⁴ Under PBGC regulations, arbitration is initiated by serving the other party with a notice of intention of arbitration.⁵

Arbitration Fees and Selection

For years, steep arbitration fees have made employers think twice about contesting a questionable withdrawal determination. The PBGC, however, just recently approved a lower fee schedule. Under the new AAA schedule approved by the PBGC, disputes carry a maximum AAA fee of \$3,750 if under \$5 million, and disputes over \$5 million are \$5,000.

Discovery

Discovery in withdrawal liability arbitrations is more comprehensive than most general labor arbitrations—but it is

⁴ ERISA §4221(a)(1)(A).

⁵ 29 CFR §4221.3.

really at the discretion of the arbitrator under the PBGC regulations.⁶ So, in practice, this means that the arbitrator and parties will agree that discovery will be subject to the rules and decisions that govern discovery in federal regulation under the Federal Rules of Civil Procedure.

Presumptions

It is important for employers to recognize that the determinations of both the plan and the arbitrator are awarded great deference as a part of these proceedings. At the arbitration stage, any determination that was made by the plan sponsor with respect to the determination of withdrawal or limitations on withdrawal liability is presumed correct unless the employer contesting the determination can demonstrate by a preponderance of the evidence standard that the determination was unreasonable or clearly erroneous. However, issues that are mixed questions of fact and law are not provided deference under MPPAA. For example, the date that an obligation to contribute ceased.

Judicial Review

If an employer or the fund wants to bring a judicial action to enforce, vacate, or modify an arbitrator's award, MPPAA requires that action be brought no later than 30 days after the issuance

⁶ 29 CFR §4221.5.

of the arbitrator's award.⁷ Again, the findings of the arbitrator are presumed correct, rebuttable by a clear preponderance of the evidence.

Settlement Strategy

How you are going to approach settlement will depend on the strength of your defenses, your client's ability to pay, and may also depend on the desire of the fund to have cash in hand.

⁷ ERISA §4221(b)(2).

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