FELHABER LARSON

ATTORNEYS AT LAW

MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY

Prepared and presented by

Michael G. McNally, Esq.

612-373-8516

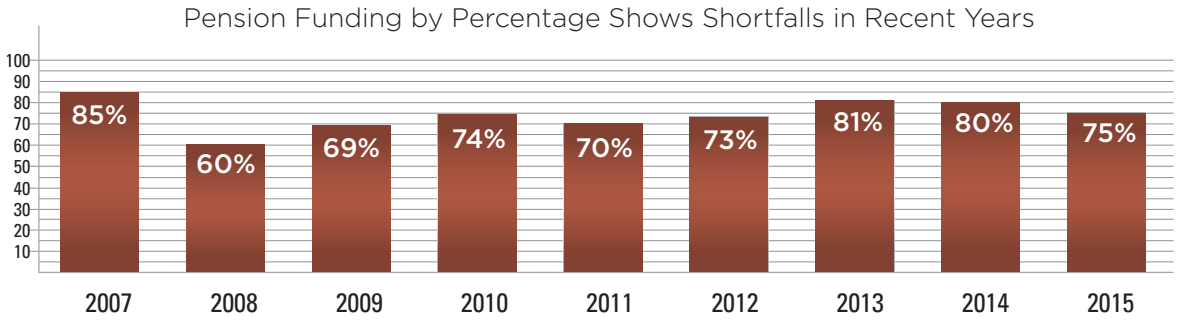
mmcnally@felhaber.com

SMALL FIRM RELATIONSHIPS. **LARGE FIRM IMPACT.**

TABLE OF CONTENTS

INTRODUCTION

Due to a variety of factors, in recent years multiemployer pension plans across a variety of industries have experienced significant funding issues.



It is ever more important for fiduciaries, plan sponsors and contributing employers to understand withdrawal liability. This guidebook is intended to provide an overview of the concepts underlying withdrawal liability, the mechanics of events which trigger liability, how the liability is calculated and paid, special rules applicable to certain industries, and the process for notifying, and disputing, assessments. Advice on understanding these topics in greater depth and guidance on how withdrawal liability applies to a particular set of circumstances may be appropriate.

UNDERSTANDING THE THEORY BEHIND WITHDRAWAL LIABILITY

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) is the statute that amended ERISA to provide for the imposition of withdrawal liability under certain circumstances when an employer stops contributing to a multiemployer defined benefit pension plan. Withdrawal liability is a statutory creation – it is not contractual – and while plans have the ability to adopt certain rules unique to their plans, for the most part the triggering events, liability, and calculation are dictated by MPPAA.

Statutory withdrawal liability applies only to multiemployer defined benefit pension plans, and only those that are underfunded. MPPAA was enacted to protect multiemployer pension plans and their participants from employers terminating participation in less than fully funded plans, thereby leaving the remaining contributing employer(s) with the obligation to fund the participants' vested benefits.

A plan is underfunded when the actuarial value of the vested benefits – the promised future benefits accrued by participants – exceeds the value of the plan's assets. A plan's funding status is determined annually by the plan's actuary. When the plan has unfunded vested benefits (UVBs), withdrawal liability exists for that plan.

There are many reasons why a plan can be underfunded and have UVBs. The actuarial calculations incorporate various assumptions, some, or all, of which may not come true. Investment return, mortality rates, contribution hours, employer bankruptcies, and interest rates all factor into a plan's funding.

Withdrawal liability represents an employer's allocable share of the plan's UVBs. Said differently, it is a fee assessed on an employer for its portion of the plan's costs that are not funded, either through prior contributions or investment returns on those contributions. An individual employer's share of the plan's total unfunded vested benefits is roughly equivalent to the ratio between the employer's contributions to the plan and the total contributions made to the plan by all employers for the same period.

TRIGGERING WITHDRAWAL LIABILITY

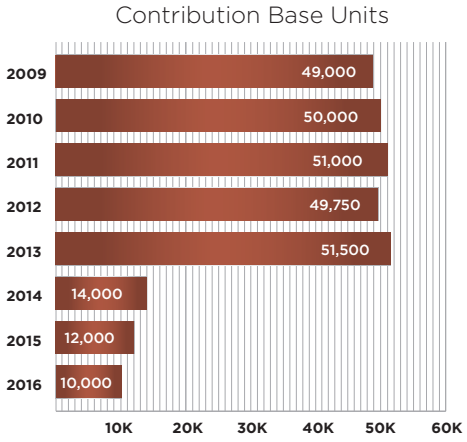
The general rule is that an employer that fully terminates participation in a plan, or substantially reduces its contributions to the plan, has withdrawn from the plan. This can occur in 2 ways:

(1) A complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute to the plan, or permanently ceases all covered operations under the plan. This may occur where an employer goes out of business, sells its assets and negotiates out of its collective bargaining agreement the obligation to contribute to the plan or terminates its collective bargaining agreement all together. In these cases, the employer no longer has an obligation to contribute and a complete withdrawal is triggered. As discussed later, these rules differ in certain industries.

(2) A partial withdrawal occurs when (a) an employer has a decline of 70% or more of its contribution base units (CBUs) over a 3 year period, or (b) has a partial cessation of its obligation to contribute. Partial withdrawal liability is intended to prevent employers that gradually reduce their contributions to the plan from escaping liability. CBUs refers to the unit by which an employer has an obligation to contribute, such as hours or weeks worked, or tons of coal.

Under the 70% test, a partial withdrawal occurs if in each of 3 consecutive years (the "Testing Period") an employer's CBUs are less than 30% of its average CBUs in the 2 highest of the 5 years preceding the Testing Period. This 5 year period is referred to as the "base period."

A 70% decline partial withdrawal can be illustrated as follows:



As illustrated in this table, the Testing Period for determining whether a partial withdrawal occurred in the 2014 plan year is 2014-2016, and the base period is 2009 – 2013. The 2 highest years of CBUs in the base period were in 2013 (51,500) and 2012 (49,750), for an average of 50,625. Because the CBUs in the Testing Period are all less than 30% of 50,625 – or 15,875 – a partial withdrawal occurred in the 2014 plan year.

A partial cessation of the obligation to contribute can occur in 1 of 2 ways:

1. The employer permanently ceases to have an obligation to contribute under 1 or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute to the plan, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work to another location; or
2. An employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities but continues to perform work at the facility of the type for which the obligation to contribute ceased.

Some examples of this are:

- An employer has one collective bargaining agreement providing for contributions to a pension plan. The employer has two facilities at which contributions are made. One of those facilities is shut down but the work is transferred to another non-union facility of the employer within the jurisdiction of the pension plan. This is a partial cessation.
- The employer is a party to two collective bargaining agreements at two different locations contributing to the same plan. Collective bargaining agreement #2 is terminated, but the employer continues to work at the facility that previously was covered by that collective bargaining agreement. This is a partial cessation.

CHANGE OF BUSINESS FORM

A withdrawal is not triggered solely because of a change in corporate structure. For example, if an employer ceases to exist as a result of a merger or if the employer changes from a partnership to a corporation, a withdrawal will not occur provided the new form of business entity continues to contribute to the plan. The contribution history of the employer undergoing the change will be "inherited" for withdrawal liability purposes by the successor employer. If however the change causes an interruption in the obligation to contribute to the plan, a withdrawal may be triggered.

SALE OF STOCK OR ASSETS

A sale of stock does not generally trigger a withdrawal because although there is a new owner of the company, the company is still a contributing employer to the Plan. The transfer of the stock does not change the collective bargaining agreement or the requirement to contribute to the Plan. A sale of assets, on the other hand, may trigger a withdrawal.

In some cases, the sale of assets can be structured to avoid the triggering of withdrawal liability. This will be discussed later in this guidebook.

CALCULATION AND PAYMENT OF WITHDRAWAL LIABILITY

Calculation of Withdrawal Liability

MPPAA established the "presumptive method" for computing and allocating withdrawal liability, however there are several alternative methods which plans may use. The presumptive method is the default method unless a plan adopts an alternative method, and plans which cover employees in the building and construction industry are required to use the presumptive method.

Under the presumptive method, the amount of UVBs allocable to a withdrawing employer is that employer's proportional share of the unamortized amount of the change in the plan's UVBs for each plan year (not to exceed 20) for which the employer is obligated to contribute to the plan ending with the plan year preceding the plan year of the employer's withdrawal. The total change in UVBs for each plan year is allocated to each employer by multiplying the UVB change by a fraction, the numerator of which is the total contributions of that employer in the 5 plan years before the year of withdrawal, and the denominator is the total contributions of all employers in the same 5 preceding plan years. The product is the liability allocated to the employer for that year. This method creates 20 different pools of changes, which when added together, amount to the employer's withdrawal liability. The UVB changes may be positive which adds to withdrawal liability, or negative which decreases withdrawal liability. These UVB changes are phased out of the formula over a 20 year period at the rate of reduction of 5% per year.

One of the major features of the presumptive method is that it protects newly entering employers from inheriting UVBs that built up in prior years.

The statute also provides a *de minimis* rule, whereby an employer's withdrawal liability will be reduced by the lesser of (1) $50,000; or (2) three-fourths of 1% of the plan's UVBs determined as of the end of the most recent plan year ending before the date of withdrawal. The amount offset under the *de minimis* rule is reduced, dollar-for-dollar, as an employer's withdrawal liability, determined without regard to the *de minimis* rule, exceeds $100,000. Therefore, the exemption under the *de minimis* rule is only applicable when an employer's withdrawal liability is less than $150,000.

A calculation of a complete withdrawal in the 2015 plan year is shown in this example:

Year End *(Dec 31)*	Basic Pools	Reallocated Pools	Affected Benefits Pools	Total Plan Contributions	Obligated Employer Contributions	Liability Allocated
1999	$184,065,340.00	$0.00	$0.00	$978,758,381.00	$92,608.75	$17,416.01
2000	$79,870,036.00	$848,757.00	$0.00	$1,049,198,648.00	$98,577.50	$7,583.94
2001	$264,757,139.00	$513,153.00	$0.00	$1,108,035,485.00	$102,206.25	$24,468.78
2002	$278,271,337.00	$301,904.00	$0.00	$1,156,086,641.00	$101,813.75	$24,533.27
2003	$62,443,231.00	$762,584.00	$0.00	$1,180,264,191.00	$102,593.75	$5,494.13
2004	$194,961,465.00	$2,235,406.00	$0.00	$1,193,749,349.00	$109,267.50	$18,050.03
2005	$120,727,614.00	$321,730.00	$0.00	$1,210,189,788.00	$113,685.00	$11,371.35
2006	$395,864,573.00	$1,060,855.00	$0.00	$1,275,299,752.00	$124,781.25	$38,837.03
2007	$227,745,066.00	$1,781,290.00	$0.00	$1,367,978,490.00	$130,031.25	$21,817.30
2008	$(116,654,238.00)	$589,884.00	$517,190,631.00	$1,498,738,835.00	$138,492.50	$37,066.49
2009	$382,032,672.00	$3,815,382.00	$75,461.00	$1,579,997,694.00	$138,610.00	$33,856.29
2010	$445,013,366.00	$7,348,016.00	$59,350,731.00	$1,618,194,282.00	$146,250.00	$46,247.78
2011	$501,504,349.00	$5,813,369.00	$8,164,718.00	$1,654,151,482.00	$156,000.00	$48,614.21
2012	$615,843,256.00	$7,714,343.00	$152,796.00	$1,689,780,634.00	$167,075.00	$61,668.60
2013	$152,143,792.00	$6,297,909.00	$1,520,337.00	$1,706,299,106.00	$180,865.39	$16,955.76
2014	$618,872,884.00	$13,269,251.00	$0.00	$1,791,923,116.00	$203,116.00	$71,653.85

A	Gross Liability	$485,634.80
B	*De minimis*	$50,000.00
C	Deductible: $100,000 + (B)-(A), but not greater than B, nor less than zero	$(0)
D	Allocable Unfunded Vested Liability: (A)-(C), not less than zero and without regard to annual payment limitations	$435,634.80

Payment of Withdrawal Liability

MPPAA does not require that withdrawal liability be paid in one lump sum although an employer may choose to do so. The statute requires that there be an annual payment, which can be divided into quarterly or monthly payments.

Complete Withdrawal

The intent underlying the payment schedule in the case of a complete withdrawal is for the payments to be approximately equal to the contribution amounts that were made under the collective bargaining agreement while the employer was contributing to the Fund. The payment can be accelerated and required in a lump-sum if the plan determines there is a likelihood the employer will not be able to pay the liability.

The amount of each annual payment is the product of two numbers:

1. The average annual number of CBUs for a period of three consecutive plan years during the period of ten consecutive plan years ending before the plan year in which the withdrawal occurs in which the number of contribution base units is the highest. This number is multiplied by:

2. The highest contribution rate at which the employer had an obligation to contribute under the plan during the ten plan years ending with the plan year in which the withdrawal occurs.

Once the annual amount is determined, the plan has the ability to require these annual payments be made in quarterly amounts or monthly amounts. The annual payment is capped at 20 years or until the liability is paid in full with interest, whichever is shorter. Interest is included in the annual payment to account for the fact that the total withdrawal liability is not being paid at once, but over a period of time. The interest does not increase the payment amount, but does increase the number of payments to be made.

The annual payment calculation, and the effect of the 20 year cap, is set forth in this example:

Annual Payment Calculation		
E	Average Base Units for highest 3 consecutive years during 10 years ended December 31, 2015	1819
F	Highest contribution rate during 10 years ended December 31, 2010	$4.64
G	Payment Amounts (A) Annual payment = E x F, rounded up to nearest $4 (B) Quarterly Payment = (A)/4	 $8,444.00 $2,111.00
H	Total number of full quarterly payments	80
I	Total of payments	$168,880.00

Because the payments are capped at 20 years, here the liability will not be paid in full.

The Multiemployer Pension Reform Act of 2014 (MPRA) changed these rules for plans operating under a Funding Improvement Plan (FIP) or Rehabilitation Plan. For those plans, for withdrawals which occur while a plan is in endangered or critical zone status, required employer surcharges and contribution increases are to be disregarded in determining the highest contribution rate. In addition, surcharges required under Rehabilitation Plans are to be disregarded in the allocation of UVBs.

Partial Withdrawal

In the case of a partial withdrawal, the amount of the withdrawal liability is computed based on the unfunded liability of the plan in the year immediately prior to the withdrawal, the same measurement as a complete withdrawal. However, depending on the type of partial withdrawal – a 70% decline or partial cessation – the calculation of the liability and payment differ.

In the case of a partial cessation, the liability is determined as of the plan year in which the partial cessation occurs. The partial withdrawal liability valuation is then assessed based on the complete withdrawal liability for the year immediately prior to the withdrawal.

In the case of a 70% decline in contributions, the liability is not determined until the end of the three-year testing period, but once determined, it will be assessed as though it occurred in the first year of the Testing Period.

Partial withdrawal liability is calculated as a pro rata portion of the employer's complete withdrawal liability. The ratable portion, in the case of a partial cessation, is a fraction that compares the employer's contribution base units in the plan year after the plan year in which the partial withdrawal occurred, to its average CBUs for the five years before the withdrawal. But in the case of a 70% decline, the denominator in the fraction is the average base units for five years immediately prior to the three year testing period. The fractions are as follows:

Partial cessation:

$$\text{Total withdrawal liability} \times \frac{1 - \text{CBUs for year following year of withdrawal}}{\text{average CBUs for five plan years immediately prior to withdrawal year}}$$

70% decline:

$$\text{Total withdrawal liability} \times \frac{1 - \text{CBUs for year following year of withdrawal}}{\text{average CBUs for five plan years immediately prior to the three year testing period}}$$

Both are basically a computation of how much the CBUs have declined as a result of the partial withdrawal.

For a partial withdrawal, the annual payment is reduced using the identical fraction as above, depending on the type of partial withdrawal.

In the case of a partial cessation, if the CBUs are increased in the year following the partial cessation, the withdrawal liability is zero.

IDENTIFYING ENTITIES LIABLE FOR WITHDRAWAL LIABILITY

Under MPPAA, the "employer" is liable for withdrawal liability. The term "employer" includes all "trades or businesses" under "common control" of individuals or corporations with the employers, as defined in the Internal Revenue Code, even if the entities are legally organized separately. This is referred to as controlled group liability. The trades or business do not have to be in the same business or even a related business; commonality of ownership and being a business enterprise are all that is required. The Code provides three types of control groups applicable to withdrawal liability scenarios:

1. Parent-Subsidiary

When one or more corporations are connected through stock ownership with a common parent and:

(a) Stock possessing at least 80% of the total combined voting power of all classes of voting stock or at least 80% of the total value of the shares of all classes of stock of each of the corporations, except the common parent corporation, is owned by one or more of the other corporations, and

(b) The common parent corporation owns stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of all shares of stock of at least one of the other corporations, excluding, in calculating voting power or value, stock owned directly by those corporations.

2. Brother-Sister

Two or more corporations exist that are owned by five or fewer individuals, estates or trusts that own stock possessing:

(a) At least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of each corporation, and

(b) More than 50% of the total combined voting power of all classes of stock entitled to vote or more than 50%t of the total value of all shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each corporation.

An individual's stock is taken into account under the 80% test only to the extent that the individual owns stock of each member of the controlled group.

3. Combined Group

This consists of three or more corporations, each being a member of a parent-subsidiary or brother-sister controlled group. One of the corporations must be a common parent included in a parent-subsidiary controlled group and included in a brother-sister controlled group.

Whether a particular entity constitutes a "trade of business" in contrast to a "passive investment," such as a private equity fund which maintains an ownership interest in an employer, is a developing area of the law. Several decisions have held that passive ownership where there is some degree of control or a right to exercise control by an owner, such as a private equity fund, constitute a trade or business.

Withdrawal liability may also be assessed on a company's "alter-ego" or on a successor entity even if there is no common ownership.

Corporate shareholders and officers will not be held personally liable unless the court can "pierce the corporate veil" under the general principles of corporate law or unless the officers or shareholders have personally guaranteed the payment

SPECIAL INDUSTRY RULES

MPPAA contains several special rules applicable to certain industries, including the building and construction industry, the entertainment industry, the retail foods industry, the Great Lakes Maritime Industry and the United Mine Workers Plans. The MPPAA also provides special rules for plans in the "long and short haul trucking industry, the household goods moving industry or the public warehousing industry," although the "trucking industry" rules have not applied in most instances because the major Teamsters plan (Central States) and many other smaller Teamsters plans receive more than 15% of their contributions from employers outside the industry.

Building and Construction Industry

In the case of an employer that contributes to a plan for work performed in the Building and Construction Industry, a complete withdrawal only occurs if the employer ceases to have an obligation to contribute under the plan and either continues to perform work in the jurisdiction of the CBA of the type for which contributions were previously required or resumes such work within five years after the date on which the obligation to contribute ceases.

These rules apply only if: 1) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the Building and Construction Industry, and; 2) the Plan primarily covers employees in the Building and Construction Industry, or is amended to provide that the rules will apply.

The term building and construction industry has generally been defined as work performed at a jobsite, as contrasted with producing material for installation at a project or delivery of materials to a project. "Substantially all" has been interpreted to mean 85% in most cases. Many plans have, however, adopted their own rules defining each of these.

In the simplest sense, if a building and construction industry employer moves its operations to a non-union work force, or negotiates out of its collective bargaining agreement the obligation to contribute to the pension plan, the employer will trigger a withdrawal.

There are additional considerations in other arrangements, such as subcontracting. If an employer terminates its collective bargaining agreement, and instead of self-performing the work for which it had an obligation to contribute, elects to subcontract that work, whether or not this triggers a withdrawal depends upon the terms of the collective bargaining agreement which the employer terminated. If the employer had an obligation under the collective bargaining agreement to assume the liability for the delinquent fringe benefit contributions of its subcontractors, then subcontracting following termination of the collective bargaining agreement will lead to assessment of withdrawal liability. On the other hand, if the collective bargaining agreement imposed no such obligation on the employer, then withdrawal liability will not be triggered.

MASS WITHDRAWAL

A mass withdrawal occurs when: (1) all employers withdraw or cease to be obligated to contribute to the plan, or (2) substantially all employers withdraw pursuant to an agreement or arrangements. Liability for employers withdrawing within the plan year in which a mass withdrawal occurs will be calculated without applying the *de minimis* reduction or the 20 year cap on payments. This is referred to as redetermination liability.

In addition, employers that withdrew during the three years prior to the mass withdrawal are presumed to be part of the arrangement or agreement and are treated as if they had withdrawn in a mass withdrawal. Those employers will be subject to reallocation liability. Reallocation liability is where the amount required to fully allocate a plan's unfunded vested benefits is allocated among withdrawing employers. The unfunded vested benefits of the plan are recalculated based on PBGC required assumptions and interest rates, that are generally far lower than what is used by most plans in a standard withdrawal. In addition, the liability of employers that, as of the reallocation record date established by the plan, have been liquidated or dissolved or are undergoing bankruptcy proceedings is allocated to the employers subject to reallocation liability.

Alternative Rules for a Mass Withdrawal

Mass withdrawal liability can in many cases result in crippling financial burdens to contributing employers. The ability of these employers to obtain financing to maintain their business operations can be compromised, and can result in employers seeking protection in bankruptcy court. This can result in a domino effect among other employers.

A plan can adopt alternative rules for a mass withdrawal which are designed to avoid this scenario. Referred to as a "managed" mass withdrawal, the plan trustees, in coordination with the bargaining parties, can develop rules and submit them to the PBGC for approval. The PBGC will look to determine that the plan is protected and that the alternative payment rules would not adversely affect the plan. The plan will need to demonstrate to the PBGC's satisfaction that the total amounts collected under the alternative rules will equal or exceed the amounts that are likely to be recovered by that plan by applying the statutory payment rules.

SALE OF ASSETS

An employer who is going to cease contributing to a plan by reason of a sale of assets will trigger a withdrawal, but may avoid that liability by complying with § 4204 of ERISA. The parties to the transaction must inform the plan of the intent to comply with § 4204, and demonstrate to the satisfaction of the plan that the criteria are met.

A. Requirements to Comply with § 4204

The § 4204 requirements that should be set forth in the asset purchase agreement are:

1. The purchaser must have an obligation to contribute to the plan for substantially the same number of contribution base units (CBUs);
2. The purchaser must post a bond for 5 years, unless one of the exceptions is met; and
3. The seller remains secondarily liable if the purchaser withdraws from the plan within 5 years of the sale and does not pay its withdrawal liability.

Each of these warrants further discussion.

1. Substantially the Same Number of CBUs

The asset purchase agreement should recite that the buyer will continue to contribute substantially the same number of CBUs that the seller contributed prior to the sale. The policy underlying this requirement is to protect the plan's funding base following a cessation of contributions by a withdrawing employer.

There are some differing views on how this provision is to be interpreted. Some arbitrators have suggested it is sufficient for the asset purchase agreement to create the obligation on the part of the buyer, without regard to whether the CBUs actually decline after the sale. Other arbitrators have considered whether events following the sale that lead to the decline in contributions were normal or foreseeable.

A circuit court has held that whether the requirement is met is judged at the time the asset purchase agreement is entered into; what occurred after the sale, and whether the purchaser fulfilled its obligations, is irrelevant.

Another circuit court ruled that the "substantially the same" refers to the contribution base units, and where an asset purchase agreement only refers to the same contribution rate, and not the number of hours of employee pay, it failed to satisfy the requirements.

"Substantially the same" has been interpreted generally to mean 85%.

2. Purchaser's Bond Requirement

The purchaser is required to post a bond with the plan to guarantee both the payment of the buyer's potential withdrawal liability, and/or the payment of fringe benefit contributions, for 5 plan years.

The amount of the bond is the greater of: 1) the average annual contribution required to be made by the seller with respect to the operations under the plan for the three plan years preceding the plan year in which the sale of assets occurred; or 2) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of assets occurs.

The regulations provide for some exceptions to this requirement:

The first is the *de minimis* transaction. If the amount of the bond that would be required does not exceed the lesser of $250,000 or 2% of the average total contributions made by all employers to the plan for the 3 prior plan years, then the purchaser's bond requirement is waived.

The second is the net income test. If the purchaser's average net income for the 3 most recent fiscal years equals or exceeds 150% of the amount of bond that would be required, no bond is required.

The third is the net tangible assets test. If the purchaser's net tangible assets at the end of the most recent fiscal year equals or exceeds: 1) if the purchaser was not previously required to contribute to the plan, the amount of UVBs allocated to the seller; or 2) if the purchaser was previously required to contribute to the plan, the amount of UVBs allocated to the purchaser and the seller, no bond is required.

The parties to the sale must inform the plan in writing of their intention that the sale be covered by § 4204 and demonstrate to the plan's satisfaction that one of the variances is satisfied.

3. Seller's Secondary Liability

To protect the plan's ability to recover liability tied to the buyer's future withdrawal and inability to satisfy the liability, the seller must remain secondarily liable.

The asset purchase agreement must provide that if the purchaser withdraws during the five plan years following the sale, and the purchaser fails to make withdrawal liability payments when due, the seller will be secondarily liable to the plan. The seller's liability is capped at the amount that seller would have been required to pay had it withdrawn at the time of sale.

If all or substantially all of the seller's assets are sold in connection with the asset purchase agreement, or if the seller is liquidated before the end of the fifth plan year following the sale, then the seller is required to provide a bond equal to the amount of withdrawal liability it would have had at the time of the sale. The plan can agree to waive this bond.

B. Purchaser's Assumption of 5 Years of Buyer's Contribution History

When the parties comply with § 4204, the purchaser assumes the contribution history of the seller for the plan year of the sale, and the 4 preceding plan years. For those plans using the presumptive method, the purchaser's future liability, in the event it withdraws within 15 years of the sale, will be determined including the seller's contribution history for the 5 plan years prior to the sale. That is because this method of computing withdrawal liability uses a 20 year contribution history. If, for example, the purchaser withdraws 25 years after the sale, the seller's CBUs would not be factored into the computation.

If the purchaser does not have its own contribution history – i.e. a non-signatory or non-contributing employer – then its initial liability to the plan will only be 5 years' worth of CBUs. This liability is obviously less on the day after the sale than the seller's liability would have been had it withdrawn the day before the sale.

On the other hand, if the purchaser has its own contribution history – i.e. a signatory, contributing employer – then the purchaser's CBUs are aggregated together with the seller's 5 plan year contributions.

§ 4204 and its requirements may bear upon the negotiations of the purchase price.

PROCEDURE FOR NOTIFYING AND DISPUTING ASSESSMENT

Notice

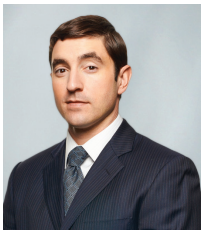
A plan is required to provide a notice and assessment of withdrawal liability to an employer after a withdrawal occurs and demand payment in accordance with a payment schedule. The notice does not need to inform the employer that it has a right to request a review of the assessment. It is important to point out that notice to one employer within a control group constitutes notice to all members of the control group. That is, a control group member cannot deny they were never notified of the assessment if any member of the control group received an assessment.

Dispute

Disputes between a plan and an employer involving withdrawal liability must be resolved through arbitration. The law imposes strict requirements on the timeliness of initiating arbitration which if not followed may bar any challenges to an assessment. In addition, during the period in which an employer is disputing an assessment, it is obligated to make all scheduled payments. Failure to make those payments can trigger a default, entitling the fund to immediate collection of the full amount.

No later than 90 days after receipt of a notice of assessment an employer may request that the plan review any aspect of the assessment or identify any inaccuracy as a challenge to the determination or to furnish additional relevant information to the plan. The plan then responds to that request for review.

An employer must initiate arbitration via the required procedures within the earlier of 60 days after the fund responds to the request for review or 120 days after the request for review is sent.



About the Author:

Michael G. McNally, Esq., is a partner in the
Firm's Benefits and Labor and Employment groups.
He may be reached by telephone at
(612) 373-8516, or by e-mail at mmcnally@felhaber.com.