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Union Multi-Employer Pension Plan Withdrawal Liability/An Employer Mine Field

Client Alert

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Many employers with a unionized workforce contribute to multi-employer pension funds established by a collective bargaining agreement. In recent years, and as the result of numerous factors such as employer attrition, financial setbacks and recessions, many multi-employer funds have faced significant financial difficulties and under-funding. As employers have left these funds, either voluntarily through negotiations or involuntarily because of union decertification, many have had to become familiar with the statutory concept of withdrawal liability.

A withdrawal liability is the employer's proportional share of the pension plan's unfunded vested benefits or, in other words, the amount of money that is set aside for future pensioners by estimating actuarially the number of individuals who are likely to retire in the future. Under the Multi-Employer Pension Plan Amendment Act of 1980 (which is codified as part of ERISA) ("MPPA"), what usually occurs following an employer leaving the multi-employer fund is a funds-issued withdrawal assessment coming out of nowhere. In many instances employers have no idea that by failing to take prompt action to challenge these withdrawal assessments they may forever forfeit any right to challenge the assessment in the future. In other words, failing to immediately contact the funds and protesting the assessment in accordance with the detailed regulations of the MPPA may lead to the employer being held irrevocably liable without any way to subsequently defend the assessment.

In other words, by failing to make payments in accordance with the assessment even before the actual litigation may result in the fund holding the employer in default and accelerating the entire amount due. This withdrawal law allows an employer to challenge the funds assessment determinations through arbitration. It also creates many legal and procedural hurdles for employers to challenge the assessment both before and during the arbitration.

Even those employers that do issue a timely challenge to a withdrawal liability assessment face a substantial legal hill to climb, since the MPPA, which provides that such challenges are accomplished through arbitration, essentially pre-assumes the accuracy of the fund's calculations and assessment.

Despite this "home field advantage" to the multi-employer funds, employers are not without rights. Moreover, given the fund's uncertainty in being able to collect on withdrawal liability assessments, the potential liquidation or bankruptcy of the leaving employers, and the cost to the funds in prosecuting these claims, many funds are amenable to settlements (and indeed as fiduciaries are legally-required to consider the prospect of early resolution for the sake of financial expediency and certainty in collectability). Utilizing experienced legal counsel can greatly facilitate this process.

Therefore, you should be very aware about withdrawal liability and seek counsel under the following circumstances:

1. When you are renegotiating a new collective bargaining agreement and are considering cutting back on the pension.
2. If you are considering cut-backs in union or employees or layoffs.
3. If you are considering selling your company.

4. If you are negotiating a new contract or adding a pension.
5. Any circumstances where you are changing or reducing pension contributions even if they are not substantiating, they should be reviewed by counsel.

Again, with proper counsel many mistakes can be avoided and employers can get through this process.

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