

EMPLOYER UNABLE TO OFFSET VOLUNTARY PAYMENTS AGAINST WITHDRAWAL LIABILITY THROUGH COURT ACTION

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Dominick's Finer Foods was a contributing employer to the UFCW Unions and Employers Midwest Pension Fund. Pursuant to collective bargaining agreements in effect from 2008 to 2012, Dominick's agreed to make additional voluntary payments to the Fund. These voluntary payments were to be used to improve the funding status of the Fund and not counted as contributions or otherwise used in withdrawal liability calculations. The Fund agreed that if the voluntary payments exceed the amount that Dominick's would have to contribute to the Fund pursuant to a rehabilitation plan schedule, the Fund trustees would provide an equitable credit to Dominick's in the form of a reduced rate of contribution payments. In 2014, Dominick's withdrew from the Fund and the Fund assessed withdrawal liability. Because these voluntary payments could no longer be applied as offsets to contributions, Dominick's asked the Fund to offset its withdrawal liability by approximately \$9.0 million of the voluntary payments that had not previously been offset against Dominick's contribution to the Fund.

Dominick's filed a lawsuit to compel the Fund to credit or refund the voluntary payments. The Fund made a motion to dismiss and claimed that Dominick's failed to state a claim under Section 502(a)(10) of ERISA because Dominick's is not within the scope of persons empowered to bring a civil action. The court agreed that Dominick's could not bring an action under this provision of ERISA because it had withdrawn from the Fund and no longer had an obligation to contribute to the Plan and does not satisfy that Section's stated definition of persons empowered to bring a civil action.

Dominick's also argued that it was entitled to have these voluntary payments offset pursuant to state law. The court held that such an action was preempted by ERISA. The court found no problem with the fact that ERISA did not give Dominick's standing pursuant to ERISA while also finding that ERISA preempted its state law cause of action.

It is unclear whether Dominick's is totally excluded from receiving an offset as this claim may be part of the withdrawal liability arbitration matter that is continuing between the parties. *Dominick's Finer Foods, LLC v. UFCW Unions Emps. Midwest Pension Fund* (N.D. Ill., 2019)

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