What Obligates an Employer to Pay Withdrawal Liability

By William Daniels

⇛ **Withdrawing from** a multiemployer pension plan can result in a devastating liability to the employer responsible for making contributions to the plan. It is often a hidden liability that can cost the employer hundreds of thousands, even millions, of dollars. But what exactly is withdrawal liability, how does an employer become exposed to such liability and when is the liability triggered? These are questions that this article will answer.

Withdrawal liability is what is charged to an employer that withdraws from a multiemployer pension plan. Use of unionized labor at trade shows is often required and/or necessary. Most union employees are also participants in multiemployer pension plans and the use of union labor often requires contributions to such plans. If the union plan to which an employer is required to make contributions is underfunded (i.e., the plan does not have enough money to pay all promised current and/or future benefits), then each employer obligated to make contributions to such plan is subject to potential withdrawal liability. This liability does not necessarily relate to just the employees of the employer, but can also include liability for other employers' employees.

For example, a large employer employs union employees and is obligated to make contributions to the XYZ Pension Plan. Unfortunately, the large contributing employer goes bankrupt and its employees are laid off as the employer shuts down its business operations. Because the employer has no money or assets, it cannot pay its share of withdrawal liability. Since the XYZ Pension Plan cannot collect that money from the employer, it then redistributes that liability to all other remaining contributing employers. Basically, the fund spreads the loss among those employers still operating in proportion to the amount of contributions they make to the fund divided by the total contributions of all remaining contributing employers. The larger the unpaid liability, the more that is redistributed to the remaining contributing employers.

Other factors can result in an underfunded plan as well. If a plan's investments do not hit certain benchmarks established by the plan's fiduciaries and actuary, then underfunding will occur. Large downturns in the market (like what we saw in 2008) can have a devastating negative financial impact on a plan's funded status. It is easy to see how over time, underfunding and liability can add up. Also, there is a cascading effect; the larger the underfunding, the larger the withdrawal liability, and for each employer that fails to pay their fair share of the withdrawal liability, the liability of the remaining employers increases. For declining industries, we often see that the few employers who remain in the industry receive the largest portion of the unfunded liability.

How does an employer get exposed to withdrawal liability? This question is not as intuitive as you may think. An employer becomes exposed to withdrawal liability once it becomes required to make contributions to a multiemployer pension plan. Traditionally, an employer becomes exposed by executing a collective bargaining agreement with a union that requires contributions to a multiem-

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ployer pension plan that is either already underfunded or becomes underfunded at some future point in time. With good legal representation, the employer should take the issue of withdrawal liability into consideration when negotiating the agreement with the union.

However, this is not the only means in which an employer can become obligated to make contributions to a multiemployer pension plan, and thus, be exposed to withdrawal liability. Some unions use short form agreements (a.k.a. "me too" agreements) where a master collective bargaining agreement already exists. The short form is typically one or two pages and the union will state that in order to operate in the jurisdiction of the union (e.g., at a particular trade show), the employer must sign the agreement. Such agreement will obligate the employer under the master collective bargaining agreement, which often mandates contributions to a multiemployer pension fund.

Another means by which employers become obligated to make contributions to multiemployer plans is through a participation agreement. These agreements are often one or two pages and simply state that while the employer is engaging in covered work, it will make contributions on behalf of its employees to the multiemployer pension plan. Such agreements will have a provision that the signatory employer is subject to the terms of the plan document and/or trust agreement.

Even if the employer does not execute any of the above documents (or more likely the above document expires and the employer does not renew), the employer can still be exposed to withdrawal liability if it makes or continues to make contributions to a multiemployer pension plan. In other words, making contributions to such a plan directly or allowing a third party to make contributions on behalf of the employer is enough basis for a plan to assess the employer withdrawal liability. For example, an employer executed a short form "me too" document in 1977. In accordance with the terms of that document, the employer made contributions to the XYZ Pension Fund (an underfunded multiemployer pension plan). Although the "agreement" expired in 1980, the employer continued to make contributions to the Fund on behalf of its employees through the 80's, 90's, 2000's and into the present. After years of service the employer closes its business. That employer may be subject to withdrawal liability. The pension plan does not need to produce a written document in order to assess withdrawal liability against an employer. The employer's history of making contributions to the plan is likely enough for the plan to establish an obligation and allow it to assess withdrawal liability.

Another issue that is prevalent in the tradeshow industry is the use of a third party for labor concerns. A company can hire a third party to hire, maintain and manage employees. Often the company may not see itself as an employer as the third party will provide employees, handle payroll, be a signatory to a collective bargaining agreement with the union and/or provide other services related to such employees. A company may believe that is has no exposure to withdrawal liability because it has no employees and instead uses a third party to handle its labor issues. This may not be true. The company should carefully review its agreement with the third party.

Who is obligated to make contributions under the third party agreement? Often, a third party will simply agree to make contributions on behalf of a company, not in lieu of the company. Accordingly, the agreement will specify that contributions are being made to the multiemployer plan by the third party on behalf of the company. If the company has the obligation to make contributions to the multiemployer plan, then it will have the obligation to pay withdrawal liability.

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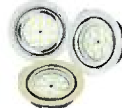
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