Contractor’s withdrawal from Multi-Employer Pension Plan triggers Liability for Non-Funded Benefits
Under New Amendments to ERISA

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After considerable controversy and debate, the Multi-Employer Pension Plan Amendments Act of 1980 was passed by Congress and signed into law on September 26, 1980. The Act, which amended the Employee Retirement Income Security Act (“ERISA”), drastically alters employers’ liability with respect to under-funded multi-employer pension plans. Every multi-employer pension plan will have to be amended as a result of the Act, but more importantly, participating contractors must now consider the possibility of withdrawal liability when making decisions concerning such matters as the sale of company assets; whether to operate as a sole proprietorship, partnership, or corporation; whether to liquidate the business; and whether to go non-union or establish a dual shop.

Under ERISA prior to the 1980 Act, an employer who withdrew within five years of plan termination was liable for a share of unfunded vested benefits, but only to the extent of his pro-rata contribution to the multi-employer plan for the five years preceding the day of plan termination, in an amount not to exceed thirty percent of the employer’s net worth. It was widely believed that the old law encouraged employers who participated in financially distressed multi-employer plans to “abandon ship” in order to minimize this exposure or avoid liability altogether. Consequently, the 1980 Act was deemed necessary to avoid the financial ruin of a significant number of multi-employer plans and restore those plans to a sound financial basis. Under the new Amendments, employer withdrawal, rather than plan termination, triggers liability for unfunded vested benefits.

As in the past, liability is limited to “defined benefit plans” and not “defined contribution plans.” Generally, “defined contribution plans” provide for an individual account for each participant and the participant’s benefit is based solely on the amount in his account. A “defined benefit plan” is essentially any plan that is not a defined contribution plan. The focus of a defined benefit plan is on the benefits promised to the employee, rather than the amount of the employer’s contribution.

Complete and Partial Withdrawal

Under ERISA, as currently amended, employers who contribute to multi-employer defined benefit plans must pay withdrawal liability if they cease contributions, in whole or in sufficient part, regardless of when and if the plan terminates. Complete withdrawal occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan; however, employers in the building and construction industry do not trigger withdrawal unless they cease to have an obligation to contribute under the plan, and they also:

• continue to perform covered work in the jurisdiction of the relevant collective bargaining agreement, or
• resume covered work within five years after the obligation to contribute under the plan ceases and do not renew the obligation at the time of resumption.

Thus, under the new version of ERISA, an employer in the building and construction industry may discontinue covered work within the jurisdiction of the collective bargaining agreement without triggering liability, but if it resumes similar work in that jurisdiction within five years, it must renew its obligation to contribute to the multi-employer plan. This special rule permits an employer in the building and construction industry to bail out of a financially troubled pension plan and to escape complete or partial withdrawal liability, so long as the employer does not continue or resume work within the geographic jurisdiction of the relevant collective bargaining agreement within the following five years. Of course, this does not relieve the employer of liability for any delinquent contributions for covered work which was previously performed.

Under the amended Act, employers are also liable for partial withdrawal from a multi-employer plan. For employers in the building and construction industry, an employer is liable for a partial withdrawal only if the employer’s obligation to contribute is continued for no more than an “insubstantial portion” of its work in the jurisdiction of the collective bargaining agreement of the type for which contributions are required. A partial withdrawal by an employer in the building and construction industry occurs when an employer has substantially shifted its work distribution within the geographic jurisdiction.
jurisdiction of the collective bargaining agreement so that only an insubstantial portion of its work being performed in that jurisdiction is covered by the plan.

Amount of Withdrawal Liability

The Amendments require the plan administrator to promptly compute an employer’s withdrawal liability, and to take steps to collect it. Once the amount of liability is determined, the employer must pay it off in quarterly installments over a period of up to 20 years. The employer is liable to the plan in an amount equal to its share of the allocable unfunded vested benefits. However, this liability is adjusted as follows: first, by applying a de minimis rule; next, to account for a partial withdrawal, if applicable; then, to the extent necessary to reflect a limitation on the amount of annual payments provided in the Act; and finally, liability cannot extend for a period of time which exceeds twenty annual payments. These calculations can be better explained as follows:

• The amount of unfunded vested benefits allocable to a building and construction industry employer, who completely or partially withdraws from a plan, is determined by applying a complicated formula. Generally speaking, as to unfunded vested benefits for plan years ending before April 28, 1980, a pro-rated share of the total unfunded vested benefits, existing at the end of the last plan year ending before April 29, 1980, is allocated among all employers participating in the first plan year ended after April 29, 1980. The employer’s individual pro-rated share of this liability is based upon the amount of its required contributions in relation to the total contributions made by all participating employers who have not withdrawn from the plan before such date. As to unfunded vested benefits for plan years ending after April 28, 1980, the plan sponsor will determine the annual change in its unfunded vested benefit liability and pro-rate each year’s change to each of the participating employers in proportion to their contributions in the preceding five years. Any amount which the plan sponsor determines to be uncollectable because of employer bankruptcy, withdrawal liability limitations in the Act, or similar reasons, is also pro-rated among participating employers on a yearly basis.

• There are two de minimis rules. The statutory rule applies unless the plan is specifically amended to elect the alternative rule.

(a) The statutory rule provides that an employer’s withdrawal liability shall be reduced by the smaller of (i) ¾ of one percent of the plan’s unfunded vested obligations, existing at the end of the plan year ending before the date of withdrawal, or (ii) $50,000, reduced by the amount by which the unfunded vested benefits allocable to the employer exceeds $100,000. Note that under this formula, an employer incurs no liability whatsoever if its pre-de minimis withdrawal liability is less than $50,000 and also less than ¾ of one percent of the total unfunded vested liability of the plan. On the other hand, an employer with unfunded vested benefits allocable to, and in excess of, $150,000, gets no de minimis deduction.

(b) A plan may be amended to adopt the alternative de minimis rule. The alternative de minimis rule provides for a reduction of unfunded vested benefits allocable to the employer in an amount not to exceed the greater of (i) the amount which would be deducted under the statutory de minimis rule, or (ii) the lesser of ¾ of one percent of a plan’s unfunded vested obligations existing at the end of the plan year ending before withdrawal of $100,000, reduced by the
amount the unfunded vested benefits allocable to the employer exceed $150,000. Note that under the alternative de minimis rule, an employer incurs no liability whatsoever if its pre-de minimis withdrawal liability is less than $100,000 and also less than ¾ of one percent of the total unfunded vested liability of the plan. On the other hand, there is no deduction if the unfunded vested benefits allocable to the employer exceed $250,000.

(c) Finally, the de minimis rule does not apply to a withdrawing employer in a plan year in which substantially all employers withdraw, or in the case in which substantially all employers withdraw from the plan pursuant to an agreement to withdraw. If substantially all employers have withdrawn from a plan within a period of three plan years, there is a presumption that each employer did so pursuant to an agreement or arrangement.

(3) Partial withdrawal liability, if applicable, equals the amount of unfunded vested benefits allocable to the employer if it had completely withdrawn, reduced by any de minimis reduction, multiplied by one minus a fraction, the numerator of which is the employer’s contribution base units for the plan year following the plan year in which partial withdrawal occurs, and the denominator of which is the average of the employer’s contribution base units for the five plan years immediately preceding the plan year for the partial withdrawal. However, in the case of a partial withdrawal because of a seventy percent decline in contributions, the denominator is the average of the employer’s contribution base units for the five plan years immediately preceding the time period comprised of the withdrawal year and the immediately preceding two plan years.

(4) There is a limitation on the amount of annual payments. Payments are made in equal quarterly installments based on an annual amount equal to the employer’s highest contribution rate in the preceding ten years multiplied by the employer’s average contribution base (for example, covered hours) in the three years of the ten preceding years in which the contribution base was the greatest.

(5) The quarterly payments continue until the employer’s withdrawal liability is completely satisfied, but for not more than twenty years regardless of the amount of total withdrawal liability.

As noted above, the plan administrator determines and notifies the employer of the amount of withdrawal liability. The employer may contest the plan’s finding; however, the employer is required to make payments within sixty days of demand, and continue such payments notwithstanding any request for review or appeal.

Sale of Assets

The Act provides that complete or partial withdrawal does not occur as a result of an arms-length sale of assets to an unrelated party if:

- the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units as the seller; and
- the purchaser posts a bond or places in escrow for a period of five plan years an amount equal to the greater of (i) the average annual contribution required of the seller for the three preceding plan years, or (ii) the annual contribution that the seller was required to make for the last plan year preceding the sale of assets; and
- the contract for the sale of assets provides that should the purchaser...
completely or partially withdraw within five plan years, the seller is secondarily liable for any withdrawal liability it would otherwise have had to pay to the plan.

Thus, there is a five year waiting period before the seller/employer can eliminate its potential withdrawal liability. The seller/employer cannot avoid this potential liability by liquidation or distribution of its assets because the 1980 Act specifically provides that if the seller distributes or liquidates its assets before the end of the five plan year period, then the seller must provide a bond or place an amount in escrow equal to the present value of the withdrawal liability. The new Amendments also require the seller to post bond or place an amount in escrow under regulations to be prescribed by the Pension Benefit Guarantee Corporation (“P.B.G.C.”), in the event that only a portion of the seller’s assets are distributed during the five year waiting period.

If an employer withdraws in connection with the sale of all, or substantially all, of its assets and the purchaser does not take over the obligation to contribute for a base of substantially the same size, the seller/employer incurs withdrawal liability which is limited to the greater of (1) the unfunded vested benefits attributable to the employees of the employer, or (2) a percentage of the employer’s liquidation or dissolution value determined after the sale, ranging from 30% of such value for the first $2 million to 80% of such value in excess of $10 million. In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to the employer will not exceed an amount equal to the sum of (1) fifty percent of the unfunded vested benefits allocable to the employer, and (2) that portion of the fifty percent of such unfunded benefits which does not exceed liquidation or dissolution value of the employer as of the commencement of liquidation or dissolution after reducing the liquidation or dissolution value of the employer by fifty percent of the unfunded vested benefits allocable to the employer. Withdrawal liability is counted in determining whether the employer is insolvent (i.e., liabilities exceed assets) with regard to this provision of the 1980 Act.

The new Amendments also provide that the personal assets of an individual employer, operating as a sole proprietor or member of a partnership, are exempt from satisfaction of withdrawal liability to the same extent as his assets would be exempt under the federal bankruptcy laws.

An Employer Does Not Trigger Withdrawal Liability Merely Because of A Change in Business Form or Suspension of Contributions During Labor Disputes

An employer is not considered to have withdrawn from a plan because the employer ceases to exist by reason of a change in corporate structure or a change to an incorporated form of business, if the change causes no interruption in the employer’s contribution or obligations to contribute. An employer may also suspend contributions under a plan during a labor dispute involving its employees without triggering withdrawal liability.

“Free Look” Rule

A newly-created, so-called “free look” rule that permits employers to join a multiemployer plan for up to six years without risking withdrawal liability, is not available to employers in the building and construction industry.

Some Non-Union Contractors Could Be Liable for Withdrawal Liability of an Affiliated Union Company

Dual shops must be particularly careful under the new law. In a recent decision, the court held that all members of a “controlled group” are
AWCI ESTABLISHES NEW INSURANCE PROGRAM

Last month, AWCI announced the establishment of a new property/casualty and workers’ compensation insurance program designed for our members. The new program is called “Step Ahead” and it offers an opportunity to receive cash dividends on business insurance. The “Step Ahead” program emphasizes competitive up-front pricing, a comprehensive array of coverages, loss control service, and a dividend feature to reduce the net cost of business insurance.

AWCI’s “Step Ahead” program is written by AIU Insurance Company, a subsidiary of American International Group (AIG), one of the world’s largest insurance groups. AIG is one of the most progressive insurance companies in the world and has assets in excess of $6 billion. Coordinating the program is another AIG subsidiary, Marketpac International.

The program is being handled by Rich Turner, Vice President-National Accounts, Marketpac International, who notes that “the key to any association-sponsored insurance program is participation. Considering the cooperation and support we have received from AWCI, we anticipate that the program will provide a real cost-savings to members.”

Agents from Marketpac International will call AWCI Members shortly regarding this program. They, or any present agent, can obtain a quotation under this program. Call either Rich Turner or Rick Wigmore at Marketpac (800) 523-1193; in Pennsylvania dial (215) 667-1490 for quick contact.

Disclosure of Liability

The new Amendments require pension plans to provide a statement of an employer’s potential withdrawal liability if the employer requests it. However, a reasonable fee may be charged.

Other Changes

The new Amendments also make sweeping changes in many other aspects of ERISA. Changes of interest in the construction industry include:

Termination of Plans

Under the new Amendments, when a plan is terminated, it continues for the purpose of completing the funding of existing unfunded vested benefits at variable rates sufficient to fund the terminated plan, but no new contributions or vesting of benefits takes place. New rules go into effect regarding termination of plans. A multi-employer pension plan may be terminated by (1) plan amendment, (2) by the withdrawal of every employer from the plan, (3) by the cessation of the obligation of all employers to contribute under the plan, or (4) by proceedings instituted by the P.B.G.C. Upon plan termination, the plan sponsor may limit the payment of benefits to the payment of nonforfeitable benefits, alter the mode of payment or benefits, or reduce and suspend the payment of certain benefits, depending upon the method by which the plan was terminated. If the plan terminates by amendment, the rate of an employer’s contribution on the plan for each plan year beginning on or after the plan termination date shall equal or exceed the highest rate of employer contributions at which the employer had an obligation to contribute under the plan in the preceding five plan years, unless the P.B.G.C. approves a reduction in the rate based on a finding that the plan is, or soon will be, fully funded. There are special provisions in the new Amendments for handling terminated plans which differ from the operation of non-terminated plans.

Guarantee of Benefits

Prior to the 1980 Amendments, any guarantee of pension benefits at fixed levels were discretionary with the P.B.G.C. Under the 1980 Act, the P.B.G.C. must guarantee employees’ vested benefits at the following levels — (1) 100% of the first $5.00 of monthly benefits per year of service; and (2) 75% of the next $15.00 of monthly benefits per year of service. To help fund these mandatory benefit guarantees, all participating employers will pay increasing pre-insurance rates to the P.B.G.C. over the next nine years. The amount of premium per participant will increase from the present rate of $.50 per participant per year on an escalating basis until it reaches a rate of $2.60 per participant per year in 1989. The P.B.G.C. is given the power to accelerate the increasing rate schedule in the event that current schedule is not sufficient to meet the needs of troubled plans.

Refund of Contributions

Contributions made by mistake (i.e., overpayments) may now be recovered from a plan, provided that a claim is made within one year.

Delinquent Collections

The new Amendments strengthen the hand of plan trustees claiming unpaid contributions. Under ERISA as currently amended, an obligation to contribute to a plan is enforceable in court, and judgments rendered against employers must include interest, 20% liquidated damages, attorney’s fees, and costs. The court also has discretion of award additional legal or equitable relief.