Edward A. Burke (at mike), Managing Director of the Building Contractors Association of New Jersey, was among the speakers at a recent seminar sponsored by his group to answer numerous questions concerning the Employment Retirement Income Security Act (ERISA). It was the second in a series as contractors and others who serve as trustees on various pension plans seek to determine their responsibilities—and liabilities.

Construction Employer's Pension Plan Liability

by McNeill Stokes & Tony Ponticelli

Until 1974, employers in the construction field generally provided pension benefits for their employees by contributing a specified amount into a pension fund established under the provisions of the Taft-Hartley Act. These contributions were based on a number of hours actually worked by an employee and the amount to be contributed was generally established in a collective bargaining agreement with the union representing the employees. The pension fund was directed by a board of trustees which determined the level of benefits which could be sustained given the amount paid into the fund by employers. In the event that the assets of the fund were insufficient to pay benefits, participating employers were not obligated to increase their contribution to the-fund.

It was to address this problem of underfunding that Congress passed the Employee Retirement Income Security Act of 1974 (ERISA). Under the Act, contributing employers were required to adequately fund the trustee-established benefits and generally to pay for unfunded guaranteed benefits up to 30 percent of an employer's net worth if the plan was terminated. Termination liability, under Title V of ERISA, was to be administered by the Pension Benefit Guaranty Corporation (PBGC). However, it quickly became apparent that PBGC could not guarantee an adequate amount of insurance to cover the potential liability under such plans. Therefore, Congress delayed

About the Author . . .

Tony Ponticelli is an attorney and a member of the Bar of the District of Columbia. He is of counsel to the law firm of Stokes & Shapiro based in Atlanta, Georgia, and is Executive Secretary of the National Construction industry Council. Mr. Ponticelli also serves as Washington Counsel for the Prestressed Concrete Institute and represents a number of construction industry trade associations in Washington, D. C. Previously, Mr. Ponticelli was a member of the law firm of Webster, Chamberlain & Bean in Washington, D.C., and prior to that served as Director of Government Relations for the National Asphalt Pavement Association. Mr. Ponticelli was born in New York City and completed undergraduate and law school at the University of Florida in Gainesville, Florida.

the effective date of insurance coverage until the problem could be adequately addressed by new legislation.

Late in 1980, the Congress finally amended the law and established a new and more complicated termination insurance program for multi-employer plans. The Multi-Employer Pension Plan Amendments Act of 1980 created new, additional liabilities for employers withdrawing from multi-employer plans. Under ERISA prior to the 1980 Amendments, an employer was generally not liable for unfunded vested benefits unless the employer withdrew within five years of the plan termination where such liabilities were present; even in such event, the employer was liable only to the extent of a pro-rata contribution to the plan for the five years preceding the plan's termination in an amount not to exceed 30 percent of the employer's net worth. It was believed that the old law encouraged employers who were participating in a financially distressed plan to abandon the plan in order to minimize this exposure or to avoid liability altogether. Consequently, the 1980 Act contained amendments to ERISA which triggered liability for the employer for unfunded vested benefits upon withdrawal rather than upon plan termination.

The Amendments also have the affect of increasing the liability of employers who withdraw from a multi-employer plan. Now a contributor can potentially be liable for 100 percent of its net worth when the employer withdraws from a plan which has unfunded liabilities.

Under the Amendments, employers who contribute to multi-employer defined benefit (pension) plans must pay withdrawal liability if they cease contributions other than an insubstantial amount 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 liability unless they cease to have an obligation to contribute under the plan and they also:

(i) continue to perform covered work in the jurisdiction of the relevant collective bargaining agreement, or (ii) 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, if, when the employer resumes work, (1) other employers have an obligation to contribute under the plan, and (2) the plan would have permitted the employer to contribute.

This special rule permits an employer in the building and construction industry to bail out of a financially troubled plan and to escape liability so long as the employer does not continue or resume work within the geographic area of the agreement within the following five years. Therefore, if the employer shifts to working in another jurisdiction, there would be no withdrawal liability so long as the employer does not resume operation for five years in the union jurisdiction. Even if the employer returns to the area within five years, there would be no liability if the employer resumes paying contributions under the plans. The Act also contains provisions which determine the amount an employer must pay towards the unfunded vested benefits of a plan upon that employer's withdrawal. A "new" contributing employer would be liable for a share of the annual changes in the plan's unfunded liabilities only during the employer's period of participation. "Old" employers are similarly liable but are also liable for a share of unfunded liabilities as of the end of the plan year before April 29, 1980.

Because of the withdrawal rules, construction employers who continue to pay into a plan face a number of serious concerns. An employer who, for any number of legitimate reasons, completely withdraws can leave behind unfunded benefits attributable to its employees as well as other liabilities.

The Amendments also contain language which allows the withdrawing employer to further reduce his share of liabilities. These provisions include the *de minimis* rule, the 20 year limit on periodic liability payments, and certain limits related to asset sales, non-corporate employers, and employer liquidations. Thus, it is the remaining employers contributing to the plan who must bear these funding burdens.

Furthermore, as employers withdraw from a plan, thus reducing its revenue base, a higher level of funding can be required from the remaining participants to meet obligations. Pension plans with financial difficulties may be reorganized under the Act to permit the remaining participants to meet a minimum contributions requirement. Theoretically, this places a limit on yearly increases to the plan. However, with a declining base, the rate of contribution per hour must increase to maintain the same level of funding. This, of course, increases the liabilities for the remaining participants.

It is precisely this kind of inequity which is forcing Congress to again explore new statutory solutions. Senator Orrin Hatch (R-Utah) has already held hearings this year in the Senate Labor & Human Resources Committee with an eye towards possible solutions. Generally, industry favors a return to a defined contribution plan rather than a defined benefit approach. In addition, it can be expected that there will be an attempt made to exempt certain multiemployer plans from coverage under the plan termination provisions of ERISA. New legislation might seek to remove employers who have only negotiated contribution levels in their collective bargaining agreements from the withdrawal and termination provisions of ERISA. In the case of employers who have negotiated benefit levels, the withdrawal and termination provisions would continue to apply.

Predictably enough, the Act and the 1980 Amendments are returning to haunt the very groups who sought the legislation in the first place. Union contractors are just finding out the most devastating effects of the 1980 Amendments. Open-shop construction has been making huge inroads into the construction market and new contractors are hesitating to enter into collective bargaining agreements because of the huge potential withdrawal liabilities thus reducing the number of firms supporting the multi-employer pension plans. Contractors are finding that attempts to get plan trustees to limit the increase in unfunded benefits have been unsuccessful. Other attempts to get union officials to use a larger portion of the employer's fringe benefits in order to increase the funded portion of a plan have been similarly unsuccessful.

Former union contractors who have withdrawn from collective bargaining agreements and their pension programs to cut costs and increase flexibility by continuing to do business as open-shop contractors, are finding out that they may be hit with huge bills from the union's pension plan. Trustees of the Southern California Carpenter's union Pension Fund sent bills totally $8.5 million to 42 previous union employers. One contractor alone was billed for $1.3 million.

The Amendments are also restricting the growth of union companies. Union contractors are finding that they be accumulating withdrawal liabilities by acquisitions, sale of assets or relocation of facilities. The Financial Accounting Standard Board is in the process of determining exactly how the Act's withdrawal liabilities are to be reflected on an employer's financial statement. Obviously the appearance of significant financial liabilities in a firm's financial statement would make it more difficult for the company to secure performance bonds, to obtain loans or to sell the business.

(Editor's Note: This is the first of a two-part series on the Construction Employer's Pension Plan Liability. The final part will appear in the February, 1982 edition of Consrtuction Dimensions.)