ERISA and YOU

You Have Responsibilities—and Liabilities—in Your Involvement With Pensions

by McNeill Stokes & Tony Ponticelli

Under the Amendments, an employer is not treated as having withdrawn from a plan solely because of certain changes in its business structure. Generally, there is no liability when a company goes out of business or sells off its assets, or is only out of work for a time. Once the business is liquidated, the obligation to contribute ceases and the employer should not incur any withdrawal liability unless it begins non-union construction work within the bargaining agreement's jurisdiction within five years. If the employer does engage in such non-union work under a new identity, the plan may be able to collect on withdrawal liabilities under the statute if the principal purpose of the asset sale was to evade or avoid liability.

However, withdrawal will not be deemed to occur as a result of an arms-length sale of assets to an unrelated party if the purchaser has a obligation to contribute to the plan, the purchaser posts a bond, and the contract for the sale of assets provides that the seller is secondarily liable for any withdrawal liability it would otherwise have had to pay to the plan. An employer will also not be considered to have withdrawn from a plan simply because the employer ceases to exist by reason of a change in corporate structure or a change to incorporated form of business from an unincorporated form if the change causes no interruption in the employer's contributions or obligations to contribute. In addition, withdrawal does not take place merely because an employer suspends making plan contributions during a labor dispute which involves its employees. With respect to an employer who completely withdraws from a plan and subsequently resumes covered work or renews an obligation to contribute to the plan, the Pension Benefits Guaranty Corporation may promulgate regulations providing for the reduction or waiver of the employer's liability to the extent consistent with the protection of the participants. The PBGC is also to provide a procedure whereby a plan can provide rules so that, in an appropriate situation, it can reduce or waive an employer's liability.

If a construction industry employer withdraws from a multi-employer plan and continues operating in the same area, the employer is liable to the plan in an amount equal to its shares of the allocable, unfunded vested benefits. Therefore, if there are no unfunded vested benefits, no liability is created.

Employers who are double-breasted (having both union and non-union operations) must be careful to consider the impact of any potential withdrawal liability. Where a double-breasted contractor sells off the assets of its union operation to a purchaser and liquidates, the contractor may face substantial withdrawal liabilities. This is because the employer ceased its contribution obligation, and the contractor, through the non-union subsidiary, continues to do construction work in the bargaining agreement's jurisdiction.

There remains considerable uncertainty with regard to the operation of the withdrawal liability rules under the Act and the Amendments where a group of businesses under common control is involved. A recent court decision found that where such withdrawal liability exists, it is payable by any member of the controlled group. Therefore, a union employer who withdraws from a multi-employer plan incurs withdrawal liability not only for that union employer, but also for all other members of the controlled group should the union employer be unable to satisfy the liability. However, continuing to operate and to make contributions of more than an insubstantial amount on the part of the union employer will avoid withdrawal liability in a double-breasted situation. There is no liability for a construction company who continues to make contributions to a union plan even if the plan is grossly underfunded or essentially goes bankrupt.

The Amendments impose no liability on an employer in the case

(This is Parr II in a two-part series on the Employee Retirement Income Security Act (ERISA) and spells out the responsibilities and liabilities that are involved in this important legislation. Part I appeared in the January edition and was also written by AWCI counsel McNeill Stokes and Tony Petrocelli.)

where the withdrawal liability of such an employer would be less than the greater of $50,000 or .75 percent of the plan's unfunded benefit obligations as of the close of the plan year immediately preceding the withdrawal. These are the so-called *de minimis* rules. These rules do not apply, however, when an employer withdraws from a plan and substantially all of the other employers withdraw in the same year. If substantially all of the employers withdraw from a plan within a three-year period, it is assumed that there was an agreement to do so unless the contrary is proved by a preponderance of the evidence.

Under the Amendments, 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 of the type for which contributions to the plan are required. A partial withdrawal by an employer in the building and construction industry occurs when an employer substantially shifts its work distribution within the covered area so that only an insubstantial portion of its work being performed in that jurisdiction is covered by the plan. As mentioned earlier, a specific formula exists for determining employer withdrawal liability under the Act. Although there are several alternative formulas available, a plan in the building and construction industry must adopt those alternative formulas as plan amendments or the primary formula will apply. Once the amount of an employer's liability is determined, the employer has twenty years to pay it off in quarterly installments.

While a corporate employer is liable for withdrawal liability, there would be no personal liability of officers or stockholders of corporate employers who contribute to pension plans. The 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.

As mentioned earlier, the affect of the 1980 Amendments was to encourage contractors to seek ways of reducing their potential liabilities. Obviously, if the contractor is willing to leave the collective bargaining jurisdiction and continue his business elsewhere, he can leave the present plan without any liability. Another tactic is for the employer to go double-breasted and to reduce its union work and related pension obligations up to the point where a partial withdrawal would be deemed to occur. Contractors who want to remain in a bargaining jurisdiction and continue to do business may engage in a sale of assets or stock. Once again, however, a contractor wishing to make such a sale may find that it is difficult to obtain a favorable price since pension plan liabilities may exist for possible purchasers.

When contemplating a sale, an employer will wish to obtain as much information as possible with respect to its liabilities. Under the Act, an employer has the right to request general information from the plan's sponsor and may also request that the sponsor estimate the employer's potential withdrawal liability. Such information must be provided in writing and the plan's sponsor may, in certain instances, require that the employer pay the reasonable cost of responding.

It cannot be overemphasized that, where a contractor seeks to reduce its plan obligations and liability, expert legal and accounting advice be sought before any steps are taken. Should an employer take actions which trigger withdrawal liability, the language of the Act can operate against the interest of the employer. Where a plan's sponsor determines that an employer has withdrawn, the sponsor's determination as to withdrawal liability is presumed to be correct unless it is shown by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. Other language in the Act creates an additional presumption in favor of the sponsor's determination of the plan's unfunded vested benefits. Generally, these issues go to arbitration and the arbitrator's decision may be subsequently appealed to a Federal District Court. Finally, if an employer is deemed to have defaulted on his payments with respect to withdrawal liability, the employer may be faced with having to pay the total outstanding amount due plus any interest.

Although there are serious Constitutional questions relating to the ERISA Amendments, there has not yet been a successful challenge to the Act. There is a general constructional prohibition against states impairing the right to contract and these prohibitions are generally applied to the federal government also. Congress, under ERISA, initially sought to guarantee benefits that were promised to employees by companies and independent trustees. However, the government also changed the conditions under which these benefits were promised. The plan provisions as to vesting, minimum hours worked during the year, funding requirements, guarantees, and many other conditions were unilaterally changed by legislation. It is certainly legal and appropriate for the federal government to guarantee employee benefits as a public policy; however, for the government to then turn around and require private industry to pay the government back for these benefits is essentially the taking of private property without just compensation. Until Congress effectively addresses the problems created by the Act and its Amendments, one can continue to expect confusion, disputes and legal challenges.