The Myths of ERISA

It’s a Critical Point So Contractors Should Review Their Withdrawal Liability When They Seek to Change Their Company or Corporate Structure

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”), alters employer’s liability with respect to under-funded multi-employer pension plans.

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.

When the Act was first passed most people in the construction industry thought that the liability would arise if a defined contribution plan was unfunded. The Act has been interpreted to provide for withdrawal liability when a defined benefit plan is unfunded. 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. The liability arises because the trustees have promised employees a certain benefit.

Although potential withdrawal liability is a matter with which every contractor should be seriously concerned, there are many myths concerning the imposition of liability under ERISA. There are various methods available to contractors to explode the myths and avoid incurring withdrawal liability.

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:

(i) continued 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 there is no unfunded liability in a particular plan the contractor would have no liability under any circumstances. The plan trustees can advise whether there is any unfunded liability in the plan. One way around ending up with an unfunded liability...
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As long as a contractor is “obligated to contribute” there is no liability because the Act requires three things in concert: one, an unfunded liability; two, the contractor must cease to be obligated to contribute; and three, the contractor must continue to work in the area or reenter in the same territory with the same or an affiliated corporation.

A contractor could go double breasted. If the union company still has an obligation to contribute, there would be no liability. An employer is not considered to have withdrawn from a plan because the employer changes corporate structure or changes the form of business if the change causes no interruption in the employer’s contributions or obligations to contribute.

If however, a contractor chooses to go double breasted and phase out the union operation, then the open shop company should be a non-affiliated corporation where there is an ownership differential. Then there would be no liability because the open shop operation would incur no liability on
behalf of a nonaffiliated corporation. 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 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.

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 of the collective bargaining agreements so that only an insubstantial portion of its work being performed in that jurisdiction is covered by the plan.

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, 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.

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 for withdrawal liability to the same extent as the assets would be exempt under the federal bankruptcy laws. Although the potential withdrawal liability under ERISA is a matter of concern, there are ways to work with the provisions in order to avoid liability. There are also some challenges being made to the Act itself. For example, the Hatch Bill is proposed as an amendment to the Act to change the interpretation of the Act so that withdrawal liability applies only to unfunded defined contribution plans. That is as the Act should have been interpreted originally and it is time that the Act be amended to conform to the realities of the industry.