WITHDRAWAL LIABILITY: A Good Idea Gone Sour

Multiemployer Agreements Are Often Found in Seasonal or Irregular Employment Industries ie., Construction, and Therein Lies Legal Problems

If your company is a member of a multiemployer pension plan and you don’t know about or understand the changes in your obligations to the pension brought about by the Employee Retirement Income Security Act (ERISA) and the Multiemployer Pension Plan Act Amendments of 1980, then you and your company may be headed for big trouble.

Consider the plight of the following companies who got caught up in the complexities of these laws and found themselves in court fighting over pension assessments that, in some instances, exceed the assets of the company and, in almost all cases, far exceed the prior contribution of the company to the pension plan.

• Republic Industries of Kansas City, Missouri, closed one of its subsidiaries and was slapped with a $16.5 million withdrawal assessment, the first two month’s payment of which would equal the 1980 annual gross income of the firm. Oh yes, the liability is more than twice the value of the firm.
• Willet Motor Coach, a Chicago bus company, was forced to lay off most of its bus drivers after losing a major school board contract to a non-union

Editor’s Note: This article by Mike Romig first appeared in the Business Action Network in October 1984. Because many wall and ceiling contractors are involved in multiemployer pension plans—and face legal problems on the issue of withdrawal—the article is reprinted in Construction Dimensions by permission of Romig and the U.S. Chamber of Commerce.
“An important distinction is that the seeds of the (liability) problem began in 1974 with the enactment of ERISA when . . . industries’ pension plans were converted from “defined contribution” to “defined benefit” plans.

... competed. Willet was hit with a $1.4 million withdrawal liability, a sum the beleagured bus company couldn’t afford.

- Keith Fulton & Sons, Inc., a small trucking firm in Cambridge, Massachusetts, lost the land on which it was located to eminent domain proceedings. Unable to find suitable land at an affordable price, the firm liquidated. Two weeks before doing so, the new law became effective, resulting in a withdrawal assessment of $468,000 or nearly 40 percent of the proceeds of the Fulton family’s life work.

How could such a law be enacted? Strange as it may seem, a great many employers and their trade associations supported it.

The Multiemployer Industry

In some industries, it is readily apparent that private pension and other employee benefit plans can be established only on a multiemployer basis, since no one firm may be large enough or have sufficient continued employment to justify the major expense of a pension. Multiemployer collective bargaining agreements are generally, but not always, found in industries characterized by seasonal or irregular employment. They are also found in industries comprising many small firms, where because of the nature of the employment or the size of the employer it would be impractical to furnish a full complement of employee benefits. Many large firms join these agreements too, and it is not unusual for such firms to participate in dozens of such agreements.

Multiemployer agreements are generally viewed positively by both union members and participating employers. The latter find them to be a convenient labor management tool that frees them from the responsibility of a full-scale personnel department, and makes it possible for these firms to compete for highly qualified employees.

The Multiemployer Pension

Most multiemployer collective bargaining agreements call for a pension plan. The pension seldom is found in the agreement itself. Rather, the agreement specifies that there is a plan, that it will be jointly administered by representatives of both the union and employers, and that the signatory employers will pay the costs of the plans based on a cents-per-hour assessment on each employee taken on by an employer during the period of the contract. The joint board of trustees decides what benefits can be supported by the employer contributions.

As such, these plans have all the characteristics of a “defined contribution” pension in which the eventual benefit payable to any worker eligible for retirement would be equal to the contributions, plus interest, which had been made on his behalf. Before the enactment of ERISA, most plans did not grant a retirement benefit to any employee who had fewer than 20 or 25 years of service.

Impacts of ERISA

With ERISA’s passage, Congress added to the obligations of contribu-
The 1980 Amendments

In 1978, the Pension Benefit Guarantee Corporation (PBGC), an agency that administers ERISA’s pension guarantee insurance program, revealed that about 10 percent of the multiemployer pension plans in the country were nearly insolvent. Most of these unfunded plans were expected to be terminated at a cost to the yet to be fully implemented guarantee insurance program of nearly $5 billion.

To meet this challenge, the fledgling PBGC estimated that the then-current 50¢ per employee premium might have to be increased to $80 or more. If premiums were not increased, there were other options. The multiemployer insurance program could be merged with the larger single insurance pro-
gram, or general revenues could be used to support the program. Neither alternative was attractive to the business community or the government. Little thought was given to abandoning the insurance program.

The PBGC report went on to note that this problem was compounded by several other circumstances. First, multiemployer pension plans allowed firms to withdraw without payment beyond the collectively bargained contribution, even though that contribution might not be sufficient to cover the pension credits earned by the employees on the withdrawing employer. Second, many multiemployer pension plans were in declining industries so that as the work declined, so did the number of participating firms. This resulted in an ever-growing liability falling on fewer and fewer remaining employers to financially support the pension. Finally, the new insurance program itself was flawed in that it encouraged pension trustees to dump weak pension plans on the insurance fund rather than work toward a strong pension within the financial capability of the covered industry.

Solution Offered

The PBGC report also offered a comprehensive solution that included tougher funding rules, higher premiums, reorganization assistance, and withdrawal liability. After two years of legislative maneuvers, a legislative solution was enacted which, for the most part did not stray too far from the PBGC proposal.

Officially known as the Multiemployer Pension Plan Amendments Act (MEPPA), it was signed into law by President Carter on September 26, 1980 (P.L. 96-364). As enacted, MEPPA was to rescue the PGC multiemployer insurance program by reducing the insurable risk and increasing the insurance program’s revenues.

Revenues would be increased by raising premiums over a nine-year period from 50¢ to $2.60. The insurable risk would be reduced by: (1) increasing ERISA’s funding requirements for multiemployer plans, (2) reducing the amount of vested pension benefits that would be guaranteed; (3) limiting guarantee insurance benefits to insolvent plans; and, (4) imposing withdrawal liability upon firms leaving the collective bargaining agreement.

When MEPPA was enacted, its supporters included a wide array of unions and covered industries. Today, many of these former supporters are now contesting MEPPA in Congress and in
courts across the land. All are challenging just one aspect of the new law—withdrawal liability.

**Withdrawal Liability**

What is withdrawal liability? Why was it incorporated in MEPPA?

Before passage of ERISA, terminations of multiemployer pension plans were rare. This occurred because most covered industries were growing and growth ensured a stable base on contributions. Where a declining industry had shrinking contributions, the plans were able to reduce benefits and be merged into other plans. ERISA restricted these options but did not provide effective substitutes.

ERISA did offer two substitutes. The first was to subject firms participating in a terminated plan to a claim equaling up to 30 percent of their net worth. The second required a withdrawal assessment upon (1) substantial employer leaving the plan, and (2) a retroactive assessment on any employer who left within five years of the termination of the plan. But ERISA’s withdrawal assessments were seldom involved because these situations seldom arose.

Note, however, that withdrawal liability had already been a feature of the law before 1980. What the 1980 amendments did was make it the rule rather than the exception. The rationale for universal withdrawal liability was twofold. First, it seemed only fair that no one should be permitted to walk away scott free from the cost of a plan and thereby leave to others the responsibility for meeting these obligations. The second was an incentive to remain in the plan and prevent abuse. Because withdrawal liability was seldom assessed, neither objective was being achieved before the 1980 amendments.

The withdrawal liability imposed by MEPPA was more severe than the ERISA termination liability in that the 30 percent new worth limit was repealed, and triggering the imposition of the liability was changed from “plan termination” to the more frequent “withdrawal of an employer” from a plan. To make matters worse, “withdrawal” was defined by MEPPA to include a host of events many of which were beyond the control of the employer. For example, a decrease in business, a decertification or switch in unions, or the death of a key person in the firm are all factors that can result in withdrawal liability.

**Adverse Reaction**

Many of the firms who are participants in such plans now believe a calamity has befallen them. They have learned, in many instances for the first time, that the pension plan has a claim on 100 percent of their assets, that the size of the claim is set by the pension trustees, that it may have little resemblance to their contributions to the plan, and that they seemingly have little control over its magnitude.

Other firms, however, have a different reaction. They now feel secure in the knowledge that they, as among the last to leave a plan, will not be stuck with the liabilities of firms who leave the pension. Some believe the new law has sown the seeds for more effective control over pension trustees. Others believe that in time their industries will be able, as a result of MEPPA, to terminate the pension and replace it with a defined contribution plan while continuing to fund (payoff) the old pension plan.

Who is right? Both groups are. But both share the same risk of unwanted withdrawal liability. Can it be avoided?

Neither the 97th nor the 98th Congress was able to advance legislation providing relief from withdrawal liability. The 1984 tax bill did eliminate the retroactive features of the 1980 Act. So the effort begins again in the 99th Congress. But this time, everyone will have to get behind an agreed bill, something that earlier efforts never accomplished. Unifying efforts are now under way and you should be checking to see if your firm and association are participating.

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