



17 Ways to Avoid or Reduce Multiemployer Pension Plan Withdrawal Liability

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A multiemployer/union benefit plan is a plan that two or more employers contribute to under the terms of one or more collective bargaining agreements (“CBAs”). Multiemployer pension plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA), as are most other employer retirement plans, but multiemployer plans are also subject to special rules added to ERISA in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). MPPAA imposes an exit penalty, referred to as “withdrawal liability,” on employers who withdraw from an underfunded plan. The plan must allocate a portion of the unfunded vested benefits in the plan to a participating employer when it withdraws from the plan, and the withdrawing employer must pay this withdrawal liability.

Withdrawal liability can be triggered when an employer has a significant reduction in its participating union workforce (a “partial withdrawal”), a complete reduction in its participating union workforce (a “complete withdrawal”), or when there is a withdrawal of all employers from the plan (a “mass withdrawal”). When a withdrawal occurs, the plan will determine whether all participants’ vested benefits exceed the value of plan assets and, if so, the plan will determine the withdrawing employer’s share of the unfunded amount based on the formula in the plan and send the employer a bill for the withdrawal liability. MPPAA includes several allowable formulas the plan can use to make this determination. For more background on withdrawal liability generally, [click here](#) for our previous article “Union Pension Plan Participation Can Create Massive Unexpected Liabilities.”

There are at least 17 provisions in MPPAA that abate, reduce, offset, or eliminate withdrawal liability. The following is a list of those provisions and a brief explanation of each:

1. Building and Construction Industry Exemption (ERISA § 4203(b))

If substantially all union employees with respect to whom the employer has an obligation to contribute under the plan perform work in the “building and construction industry” (as that term is defined in the Taft-Hartley Act) and the plan primarily covers employees in the building and construction industry or is amended to provide that this exemption applies to building and construction industry employers, then a complete withdrawal is only considered to occur (resulting in assessment of withdrawal liability) if the employer ceases to have an obligation to contribute under the plan and the employer continues to perform building and construction industry work in the geographic area where covered work was previously performed, or resumes such work within five years and does not resume contributions to the plan at that time.

If an employer is eligible for the building and construction industry exception, liability for a partial withdrawal arises only if the employer’s obligation to contribute under the plan is reduced to no more than an insubstantial portion of the type of work in the geographic area covered by the CBA for which contributions are required.

2. Entertainment Industry Exemption (ERISA § 4203(c))

If a plan primarily covers employees in the entertainment industry, an employer has an obligation to contribute to the plan for work in the entertainment industry primarily on a temporary or project-by-project basis, and the plan has not been amended to deny this exclusion to a group or class of employers to which the employer belongs, a complete withdrawal is only considered to occur (i.e., withdrawal liability will be assessed only) if the employer ceases to have an obligation to contribute under the plan and the employer continues to perform entertainment industry work in the jurisdiction of the pension plan, or resumes such work within five years and does not resume contributions to the plan at that time.

“Entertainment Industry” generally means theatre, motion picture,

radio, television, sound or visual recording, music, and dance.

An entertainment industry employer will only be subject to withdrawal liability for a partial withdrawal if the plan has a provision which provides for such liability and the provision has been approved by the Pension Benefit Guaranty Corporation (PBGC).

3. Long and Short Haul Trucking Industry, Household Goods Moving Industry and Public Warehousing Industry Exemption (ERISA § 4203(d))

If an employer has an obligation to contribute to a plan whose contributing employers are primarily engaged in these industries and the employer does not continue to perform work in the plan's jurisdiction, a complete withdrawal will be considered to occur (i.e., withdrawal liability will be assessed) if:

- (1) The employer permanently ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under the plan and;
- (2) Either –
 - (A) The PBGC determines the plan has suffered substantial damage to its contribution base within five years of the cessation of contributions or ceasing of all covered operations; or
 - (B) The employer fails to furnish a bond or an amount held in escrow in an amount equal to 50% of the employer's withdrawal liability at the time of such cessation of contributions or ceasing of operations.

No withdrawal liability will be assessed against such an employer more than five years after the employer ceases contributions to the plan or ceases covered operations under the plan.

4. Special Liability Withdrawal Rules for other than Construction and Entertainment Industries (ERISA

§ 4203(f))

The PBGC may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules for the construction and entertainment industries, if the PBGC determines that use of such exemption will not pose a significant risk to the PBGC's program of insuring a minimum level of benefits provided by multiemployer plans. Though it appears the PBGC approves such amendments infrequently, the PBGC approved these terms for a commercial building and security industry plan in Ohio in 2017.

5. Sale of Assets Exemption (where buyer has withdrawal liability exposure) (ERISA § 4204)

Assuming no other exemption applies, a bona-fide, arm's length sale of assets to an unrelated party which causes the seller to cease covered operations or cease to have an obligation to contribute for such operations will trigger withdrawal liability to the seller unless:

- (1) The buyer agrees in the purchase agreement or in another binding commitment to contribute to the plan for substantially the same number of contribution base units for which seller contributed;
- (2) The buyer provides a bond or escrow to the plan for five years equal to the greater of the average of the seller's plan contributions for the prior three years or the seller's plan contribution for the prior year; and
- (3) The contract for sale provides that the seller is secondarily liable to the plan for five years for any withdrawal liability it would have had but for this provision if the buyer withdraws from the plan and does not pay the withdrawal liability allocable to the buyer.

The seller is also required to post a bond or escrow for the withdrawal liability it would have had but for this provision, if all or substantially all of the seller's assets are distributed or the seller is

liquidated before the end of the five-year period. PBGC regulations allow variances to the bond/escrow and sale-contract requirements under certain circumstances.

6. Free Look (no withdrawal liability for certain temporary contribution obligation periods) (ERISA § 4210)

An employer will not be assessed withdrawal liability for a complete or partial withdrawal if:

- (1) The employer had an obligation to contribute to the plan for the lesser of six consecutive plan years or the number of years required for vesting under the plan;
- (2) The employer contributed less than 2% of the total contributions to the plan by all employers for each year in item (1) above;
- (3) The employer has never avoided withdrawal liability on this basis with respect to the plan (i.e., an employer only gets to use this exemption once per plan); and
- (4) The ratio of the plan assets to the benefit payments made by the plan in the year prior to the employer's first participation year was at least eight to one

7. De Minimis Rule (ERISA § 4209)

A withdrawing employer's share of unfunded vested benefits (i.e., its withdrawal liability) in a complete or partial withdrawal is reduced by the smaller of (1) \$50,000 or (2) 0.75% of the plan's unfunded vested benefits, reduced by the amount the unfunded vested benefits exceed \$100,000. The 0.75% alternative to the \$50,000 base amount is only relevant if the plan's total unfunded vested benefits (not just those allocable to the employer) are less than approximately \$6.6 million, in which case the \$50,000 threshold would be replaced in this example by \$49,500 [\$6.6 million x 0.75%]. Assuming the plan's unfunded vested benefits exceed \$6.66 million, an employer would have no withdrawal liability if its allocable unfunded vested benefits were less than \$50,000, and the

employer would not benefit from this rule if its allocable unfunded vested benefits were more than \$150,000.

A plan may replace the \$50,000 and \$100,000 amounts with \$100,000 and \$150,000 respectively, which would result in a larger reduction of withdrawal liability.

8. No Withdrawal Considered to have Occurred in Certain Situations (ERISA § 4218)

An employer shall not be considered to have withdrawn from a plan solely because of:

- (1) A sale of stock of the employer or certain changes in corporate structure (e.g., merger, liquidation into parent, etc.) or a change to an unincorporated form of business enterprise, if the sale of stock or the changes described cause no interruption in employer contributions or obligations to contribute under the plan; or
- (2) An employer suspends contributions under the plan during a labor dispute involving its employees (e.g., strike, lockout).

9. Sale of Assets Limitation on Withdrawal Liability (ERISA § 4225(a))

If a seller sells all or substantially all of its assets in a bona-fide arm's length transaction to an unrelated party, the employer's withdrawal liability is limited to the greater of:

- (1) A sliding scale portion (from 30% to 80%) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets) [e.g., 30% for liquidation or dissolution value not exceeding \$5 million]; or
- (2) In the case of a plan using the attributable method of calculating withdrawal liability, the unfunded vested benefits attributable to employees of the employer.

One plan argued recently that this limitation was not available to an employer which sold its assets to more than one party, though an arbitrator reviewing this issue disagreed with the plan holding that

the bona-fide arm's length sale could be made to more than one buyer with the employer still qualifying for this limitation.

If the employer qualifies for this limitation on withdrawal liability and is considered to have withdrawn from more than one multiemployer plan, this limitation shall be apportioned among each of the plans based on the ratio of each plan's withdrawal liability assessment to the total assessment of all the plans.

10. Insolvent Employer Limitation (ERISA § 4225(b))

An insolvent employer undergoing a liquidation or dissolution is always liable for an amount equal to 50% of its normal withdrawal liability. However, the employer's exposure for the next 50% of its normal withdrawal liability is limited to the employer's liquidation or dissolution value.

For example, the withdrawal liability allocable to an employer which had \$266,000 allocable unfunded vested benefits and \$220,000 liquidation proceeds, would be calculated as follows:

(1) \$266,000 X 50%=		\$133,000
Plus		
(2) Liquidation Value	\$220,000	
Reduced by (1)	<u><133,000></u>	<u>87,000</u>
Maximum withdrawal liability		<u>\$220,000</u>

If the employer's liquidation proceeds were equal to or less than \$133,000, its withdrawal liability would be \$133,000.

To qualify for this limitation, an insolvent employer need not undergo a formal liquidation or dissolution. The employer must, however, be insolvent and wind up its business affairs. The insolvency limitation applies in the aggregate to total withdrawal liability at the time of insolvency in the event the insolvent employer withdraws from more than one plan.

11. 20-year “cap” on payments of withdrawal liability (ERISA § 4219(c)(1)(B))

The employer is required to pay the withdrawal liability over the period of years necessary to amortize the liability in level annual payments determined under a formula in ERISA and based on the employer’s prior contribution history, but, if the amortization period exceeds 20 years, the liability is limited to the first, 20 annual payments.

12. Individual Property not subject to Enforcement (ERISA § 4225(c))

To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the bankruptcy estate under the U.S. Bankruptcy Code, or under similar provisions of law, shall not be subject to enforcement of such liability.

13. Reduction or Waiver of Complete Withdrawal Liability (ERISA § 4207)

PBGC regulations provide special terms for the possible reduction or abatement of withdrawal liability of an employer which withdrew from a plan and subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan. The regulations also contain rules for determining withdrawal liability for any employer that resumes participation in a plan and subsequently withdraws a second time.

14. Reduction of Partial Withdrawal Liability (ERISA § 4208)

ERISA contains three alternatives for reducing or abating previously determined partial withdrawal liability for a “recovering” employer. These alternatives are generally based on the employer making contributions to the plan for higher levels of contribution base units

than had been made by the employer in the years in which a partial withdrawal was considered to have occurred and, in the case of one of the options, is also based on the total number of contribution base units with respect to which all employers under the plan have an obligation to contribute to the plan.

15. Offset for Prior Partial Withdrawal Liability (ERISA § 4206(b)(1))

In the case of an employer that has withdrawal liability for a partial withdrawal from a plan, any withdrawal liability of that employer for a complete withdrawal or another partial withdrawal from that plan in a subsequent plan year shall be reduced by the amount of any partial withdrawal liability (reduced by any abatement or reduction of such liability) of the employer with respect to the plan for a previous plan year.

16. Transfer of Liabilities (ERISA §§ 4211(e) and 4235)

In the case of a complete or partial withdrawal by an employer from a multiemployer plan, liabilities for the benefits earned by the employer's employees may be transferred from the plan to which the employer made contributions for its employees to another plan in which the employees will participate in the future, for example, pursuant to a change in bargaining representative. In the case of such a transfer, the employer's liability for withdrawal liability to the transferring plan will be reduced by the value of the transferred unfunded vested benefits.

MPPAA includes an ordering process for the determination of withdrawal liability by reducing the employer's allocable unfunded vested benefits:

- (1) First, by any de minimis reduction (Item #7);
- (2) Next, in the case of a partial withdrawal, in accordance with the formula for calculating partial withdrawal;

(3) Next, to reflect any limitation on annual payments (Item #11); and

(4) Finally, to apply any limitation due to a sale of assets (Item #9) or insolvency (Item #10).

17. Certain adjustments to contribution or benefits disregarded in determining withdrawal liability (ERISA § 305(g))

Certain benefit reductions or benefit suspensions to benefits otherwise payable by a plan and certain contribution surcharges and increases in the contribution rate made to a plan which is in endangered status, critical status, or critical and declining status are disregarded in determining an employer's withdrawal liability and the required annual payment amount of withdrawal liability. Some of these adjustments will no longer be disregarded as of the expiration of the collective bargaining agreement in effect when the plan emerges from endangered or critical status, or if the withdrawal occurs more than 10 years after the effective date of the adjustment in the case of a plan in critical and declining status. These adjustments were added to ERISA and the Internal Revenue Code by the Multiemployer Pension Reform Act of 2014.

This summary does not cover all possible details of the calculation of withdrawal liability. There are special withdrawal liability calculation rules for the coal industry and special partial withdrawal liability rules for the retail food industry. Some of the exceptions to withdrawal liability do not apply to a mass withdrawal (e.g., de minimis reduction (Item #1); 20-year "cap" (Item #11)). For some exceptions or limitations to apply, the plan must be amended to provide that the exception or limitation applies (e.g., free look (Item #6)). In some situations, the selection of one exception or limitation precludes the selection of another. For example, an employer cannot claim both the sale of assets limitation (Item #9) and insolvent employer limitation (Item #10) based on a Ninth Circuit U.S. Court of Appeals decision (*Amalgamated Insurance Fund Trustees vs. Geltman Industries, Inc.*, 1986). If the employer is insolvent, it can claim the insolvent employer limitation and, if it is not insolvent, it can claim the sale of assets limitation.

For more information, please contact [Michael Bindner](#) or any other attorney in Frost Brown Todd's [Employee Benefits Group](#).

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