



Union Pension Plan Participation Can Create Massive Unexpected Liabilities

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Authors:

[Michael T. Bindner](#)

When a participating employer stops contributing to, or stops having a bargaining agreement obligation to contribute to, a multiemployer (union) pension plan that is underfunded, the employer may be subject to what ERISA refers to as “withdrawal liability” regardless of whether the employer always paid its required contributions to the plan. Withdrawal liability can be triggered when an employer has a significant union workforce reduction (a “partial withdrawal”), a complete union workforce reduction, or when there is a withdrawal of all employers from the plan.

The employer is primarily responsible for the withdrawal liability, but other businesses which have common ownership with the employer, shareholders of an incorporated business, partners in a partnership, or a successor business can be liable for withdrawal liability if the employer does not pay the liability.

Many multiemployer plans are underfunded and some are in “critical and declining status,” which allows them to apply to the U.S. Treasury Department to reduce the benefits to be paid in the future to Plan participants, which can reduce withdrawal liability assessments. However, only one employer’s application to reduce benefits has been approved so far, and quite a few have been rejected.

Employers who contribute to a multiemployer plan should annually request a written estimate of the withdrawal liability they would be assessed if they withdrew at that time.

The history and details of these issues are as follows:

A multiemployer benefit plan is a plan that two or more employers contribute to under the terms of one or more collective bargaining agreements (“CBA”). These plans are sometimes referred to as Taft-Hartley plans because amendments to the National Labor Relations

Act in the Labor–Management Relations Act of 1947 (referred to as the Taft–Hartley Act) allow a group of employers to contribute to a joint trust fund for employees and their dependents. Multiemployer plans are administered by a board comprised of union and employer representatives and most, but not all, are defined benefit pension plans.

Multiemployer pension plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA), as are most other employer retirement plans, but they are also subject to special rules adopted in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). One of the goals of MPPAA was to create a system that would discourage employers from bargaining to end ongoing employer contributions to underfunded multiemployer pension plans. Prior to MPPAA’s passage, employers were increasingly ending contributions to multiemployer plans, in part for fear they would be the last employer responsible for the unfunded liability. MPPAA imposes an exit penalty, referred to as “withdrawal liability,” on employers who withdraw from an underfunded plan by allocating a portion of the unfunded vested benefits in the plan to a participating employer when it withdraws from the plan. When a withdrawal occurs, the plan will determine whether the plan has vested benefits that 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. MPPAA includes several allowable formulas the plan can use.

Withdrawal liability can occur in three different situations:

- A **complete withdrawal** occurs when an employer permanently ceases to have an obligation to contribute to the plan or when the employer permanently ceases all covered operations under the plan.
- A **partial withdrawal** occurs when there is (a) a 70% decline in the employer’s contribution obligation to the Plan, or (b) a partial cessation of the employer’s contribution obligation to the plan and the employer still performs work covered by the CBA or at a facility for which the contribution obligation ceased. An employer can experience more than one partial withdrawal from the same plan if it meets one of these tests

in successive time periods.

- A **mass withdrawal** occurs when every employer withdraws from the plan or the obligation of all employers to contribute to the plan ceases.

The employer, and all entities considered part of a controlled group with the employer as determined by the Internal Revenue Code, are liable for the withdrawal liability. Owners of a corporation are generally not liable for withdrawal liability assessed to such an entity unless the multiemployer plan can “pierce the corporate veil” under state law, which sometimes is allowed if owners do not respect corporate formalities. Individuals have also been found personally liable for withdrawal liability when an unincorporated business they owned was in common control with the employer that was assessed withdrawal liability. This can result when an individual owns real estate which it leases to the employer or the individual operates an unincorporated business with no connection to the employer. Successor businesses to an entity which is assessed withdrawal liability have even been found liable for withdrawal liability if they had notice of the liability and continued the business of the predecessor entity after purchasing the assets of such entity.

Some industries benefit from special rules under MPPAA that reduce or eliminate any withdrawal liability. For example, a withdrawal will not occur if an employer in the building and construction industry (as defined in the Taft-Hartley Act) ceases contributions to the plan, but does no work in the respective CBA jurisdiction for at least five years.

Because many multiemployer pension plans are underfunded and employers have heard stories of shockingly large withdrawal liabilities incurred by withdrawing employers who always paid their pension plan contributions on a timely basis, employers are reluctant to agree to participate in these plans and employers who remain in these plans are understandably concerned about their exposure to future withdrawal liability. One recent study by Milliman, Inc. determined that multiemployer pension plans, of which there are approximately 1400, have an aggregate funded percentage of 77%. Employers have the right to request an annual

written estimate of withdrawal liability from any multiemployer pension plan in which they participate. The plan may charge a reasonable fee for the request and may take up to 180 days to comply with the request. An employer who participates in a multiemployer pension plan should request such an estimate on an annual basis so it is aware of the amount of any potential withdrawal liability.

The underfunded status of some of these plans has become so dire that Congress enacted legislation in 2014 (the “Multiemployer Pension Reform Act of 2014”), which allowed plans that are considered in “critical and declining” status to temporarily or permanently reduce retiree benefits if they find that would prevent the plan from becoming insolvent. A plan in “critical or declining status” is less than 65% funded or meets one of three other funding deficiency tests and is otherwise expected, under most circumstances, to become insolvent in the next 14 years . A multiemployer plan which hopes to reduce benefits using this mechanism must submit an application to the Secretary of the U.S. Treasury Department. The Treasury Department has approved only one of the benefit reduction applications submitted as of this date. There are approximately 100 multiemployer plans which are currently in “critical and declining status.”

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

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