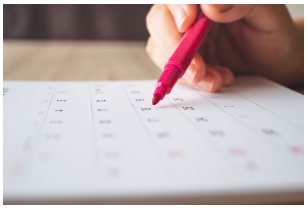

Employer Receives a Multiemployer (Union) Pension Plan Withdrawal Liability Assessment – What To Do Next?

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This blog post summarizes the steps an employer must take if it wants to appeal an assessment of withdrawal liability by a multiemployer pension plan (MPP) to which it contributes.

As a part of the collective bargaining process, employers with union workforces often agree to contribute to a MPP to which other union employers also contribute. But if an employer ultimately withdraws from an MPP and the MPP is underfunded when the employer withdraws, the employer will be assessed "withdrawal liability" pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) and the MPP's contractual terms. The withdrawal liability will be equal to a portion of the unfunded vested benefits in the MPP even if the employer always paid its required annual contributions to the MPP.

Withdrawal liability can be triggered when an employer has a significant reduction in its union workforce (a partial withdrawal), a complete reduction in its union workforce (a complete withdrawal), or a withdrawal of all employers from the MPP (a mass withdrawal). When a withdrawal occurs, the MPP will determine whether all participants' vested benefits exceed the value of plan assets and, if so, the MPP will determine the withdrawing employer's share of the unfunded amount based on the formula in the MPP and send the employer an assessment for the withdrawal liability. If the MPP reasonably determines that additional information is necessary to issue the assessment, ERISA requires the employer to furnish the MPP with such information within 30 days of receiving a written request from the MPP.

Receipt of Withdrawal Liability Assessment and Payment Schedule

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Following an employer's partial, complete, or mass withdrawal from an underfunded MPP, the employer will receive an assessment and a payment schedule for the employer's withdrawal liability from the MPP, sometimes called a "Notice and Demand for payment of withdrawal liability." ERISA requires that an MPP provide this assessment "as soon as practicable" after the employer's withdrawal from the MPP. This time requirement to issue the assessment has been liberally construed by the Pension Benefit Guaranty Corporation (PBGC) and by the U.S. Federal Courts as up to six years after the withdrawal. Six years is the statute of limitations (i.e., deadline) under ERISA for filing civil actions involving multiemployer plans. The PBGC is a federally chartered corporation created pursuant to ERISA which insures private-sector defined benefit pension plans and which issues regulations interpreting the multiemployer pension plan provisions of ERISA.

Upon receiving this Notice and Demand, an employer should immediately calendar the due date for filing the first appeal of the assessment with the MPP, commonly called a "Request for Review". The Request for Review must be filed by the employer within 90 days of receipt of the Notice and Demand. An employer is generally required to file a Request for Review if the employer wants to guarantee its right to later initiate an arbitration proceeding or to dispute the matter in federal court. Federal court case law has generally held that notice of the assessment to all the members of a group under common control with the employer is not required if one member (typically the employer) receives the notice. This can be an issue if the employer does not pay the liability and the MPP attempts to collect the liability from the employer's affiliated entities.

Request for Review

Next, the employer and its advisers should review the Notice and Demand to determine if the calculation of the assessed withdrawal liability and the payment schedule are correct. This process includes verifying the accuracy of the components of the calculation, including the employer's annual contributions to the MPP, employer contribution base units (CBUs), total contributions of

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all employers, and the MPP's unfunded vested benefits (including the interest rate used to make such calculation), some of which may be available online and some of which may have to be requested from the MPP. The employer should also verify whether the employer is eligible for any exemptions or limitations to the liability that are available. See our prior article "17 Ways to Avoid or Reduce Multiemployer Pension Plan Withdrawal Liability". During this process, an employer can request certain MPP information such as copies of the Plan and Trust and MPP financial reports pursuant to ERISA Section 101(k), and such information is required to be provided to the employer within 30 days of the request.

Generally, determinations of withdrawal liability made by the MPP are presumed correct unless the employer shows by a preponderance of the evidence that the MPP's determination was unreasonable or clearly erroneous; that is, the burden of proof is on the employer to convince the MPP, arbitrator, or later a federal court, that the MPP is wrong. Any issues that the employer discovers that may be a basis for decreasing the assessment should be documented in the Request for Review and filed with the MPP no later than the 90-day filing deadline.

Payments

The annual payments of withdrawal liability are calculated based on the employer's CBUs and MPP contribution rates over the last 10 years and an interest rate from the MPP's most recent valuation. Payments are typically required to begin no later than 60 days after demand for payment is received and to be made on a quarterly basis over a 20-year period. While in the past, some courts granted injunctions against collection of the payments during the Request for Review or arbitration steps, most courts now will only issue an injunction against payment if the employer makes an affirmative showing that the MPP lacks a "colorable" or non-frivolous claim and the employer demonstrates that it would suffer irreparable harm if it had to make the payments during the dispute process.

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An MPP is likely to declare the full assessment immediately due (i.e., in "default") if the employer's business is sold or is in financial trouble. The PBGC has taken the position that a default cannot occur as long as the employer is disputing the assessment until a final decision is issued by an arbitrator. However, consistent with the "pay now, dispute later" description, employers are generally required to make periodic payments while disputing the assessment. If the employer does not make such periodic payments as required, a federal court will usually grant an MPP's request for enforcement of the payment requirement and assess interest, liquidated damages, reasonable attorney fees and costs in addition to the delinquent payments. When the dispute process has concluded, the employer must continue to make periodic payments assuming the employer remains liable for withdrawal liability or be subject to a default and an acceleration of the entire balance of withdrawal liability.

Initiate Arbitration

Once an employer files a Request for Review as described above, it should immediately calendar the due date for initiating arbitration because one arbitration deadline runs from the date the employer files the Request for Review. This specific deadline becomes important if the MPP does not respond to the employer's Request for Review. The deadline for initiating arbitration is 60 days after the earlier of (a) the date of the MPP's response to the employer's Request for Review or (b) 120 days after the employer's filing of the Request for Review. The MPP and employer may jointly initiate arbitration within the 180-day period after the date of the assessment. In some situations, an employer and an MPP may enter into a "tolling agreement" by which they agree to extend the date by which the employer is required to file a Request for Review or the date by which either party is required to initiate arbitration.

ERISA generally requires that an employer pursue any objections to the withdrawal liability assessment through the Request for Review and arbitration steps before it pursues the issue in federal court. Some federal courts have accepted certain issues for review before they were arbitrated, such as whether an entity is an "employer"

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subject to withdrawal liability, though it is strongly advised that an entity pursuing this path also timely file a Request for Review and timely initiate arbitration to avoid a finding that federal court jurisdiction is not available because a Request for Review was not timely filed, or arbitration was not timely initiated.

Federal Court Action

Either the employer or the MPP may appeal a decision of an arbitrator to a U.S. federal district court within 30 days after the issuance of the arbitrator's decision. Findings of fact by the arbitrator (but not legal conclusions) are presumed correct and rebuttable only by a clear preponderance of the evidence. Federal district courts review legal conclusions by the arbitrator "de novo" (i.e., as if the case were being heard for the first time, without deference to the arbitrator's decision).

For more background on withdrawal liability generally, visit Frost Brown Todd's website to read our previous articles "Union Pension Plan Participation Can Create Massive Unexpected Liabilities" and "Surprise! You may be Liable for Union Pension Plan Withdrawal Liability" for a full explanation of risks to individuals and entities, other than the employer, when the participating employer becomes insolvent and can't pay the withdrawal liability.

If you need assistance or would like additional information, please contact Michael Bindner, Jeffrey Lindemann, or any other attorney in Frost Brown Todd's Employee Benefits Group.

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