MULTIEMPLOYER PENSION PLANS

WITHDRAWAL LIABILITY WORKSHOP

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WITHDRAWAL LIABILITY WORKSHOP

INTRODUCTION OF

SPEAKERS

AND

PROGRAM

OUTLINE OF PRESENTATION

- Legal Roadmap
- Actuarial Issues
- Enforcement
- Case Study

LEGAL ROADMAP

- Multiemployer Pension Plan Amendments Act of 1980.
- Protect asset base of pension plan from withdrawing employers
- Exit fee, payment of share of unfunded vested liabilities

BASIC RULES

- **Complete Withdrawal (§4203)**
  - Permanently ceases to have an obligation to contribute, or
  - Permanently ceases all covered operations under plan.

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BASIC RULES

- **Partial Withdrawal (§4205)**
  - 70% decline in contribution base units (usually measured in hours), or
  - Partial cessation of contribution obligation, either
    - Under some but not all CBAs, or
    - For work performed at some but not all covered facilities.
  - Transfer of work to employer controlled entity

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BASIC RULES

- **When Does Withdrawal Occur**
  - Sale of Business
  - Downsizing
  - Going Non-Union
  - Negotiating Plan out of CBA
  - Union Won't Agree to New CBA

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BASIC RULES

- **Who Pays?**
  - Signatory Employer
  - Controlled Group Members
    - Be Careful
      - All Trades or Businesses under Common Control or Ownership
      - Internal Revenue Code §§414(b) and (c)

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BASIC RULES

- **Estimates of Withdrawal Liability**
  - Contributing employer entitled to receive, within **180** days of a written request:
    - Estimated amount of employer's withdrawal liability, if employer withdrew from plan on last day of preceding year, and
    - An explanation of how the estimated liability was determined.

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BASIC RULES

- **Estimates of Withdrawal Liability**
  - Have Right to Request Every 12 Months
  - Timing of Request Critical
  - Official Estimate or Spreadsheet
  - Confirm Plan is Construction Industry Plan and Construction Exemption Applies

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EXCEPTIONS

- **Sale of Assets Exemption (§4204)**
  - May apply if:
    - Purchaser obligated to contribute at same level as Seller, and
    - Purchaser posts bond, and
    - Seller remains secondarily liable.

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EXCEPTIONS

- **Free Look Rule (§4210)**
  - Employer Has No Withdrawal Liability Upon Withdrawal if Obligation to Contribute Lasts No Longer than Number of Years Required for Vesting.
  - Must Satisfy Numerical Tests
  - Plan Trustees Must Adopt Rule.

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CONSTRUCTION INDUSTRY RULES

- **Construction Industry Exemption (§4203(b))**
  - Applies If:
  - Substantially All (≥85%) of the Employees for whom Employer made contributions to Plan are in the Building and Construction Industry, and
  - Plan Must Primarily Cover Building and Construction Industry Employees or Plan Must Adopt Exemption.

CONSTRUCTION INDUSTRY RULES

- **Construction Industry Exemption**
  - Effect:
  - Complete Withdrawal unless Employer ceases to have obligation to contribute, and does not continue to work or resume work in the jurisdiction within 5 years.
  - Partial Withdrawal unless Employer's obligation to contribute continues for no more than an insubstantial portion of its work in the jurisdiction.

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CONSTRUCTION INDUSTRY RULES

- **Construction Industry Exemption**
  - Project Labor Agreements
    - Is there Protection?
    - ERISA Section 4203(b)(2)(B)

      continues or resumes covered work in the jurisdiction of the collective bargaining agreement for which contributions are not made

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CONSTRUCTION INDUSTRY RULES

- **Project Labor Agreements**
  - Avoid Agreeing to Incorporation of Trust Agreements
  - Free Look Rule
  - De Minimis Exception
  - Confirm CBA is PLA: Work outside PLA should never violate CIE
  - Underlying Funds Have Right to Make Determination/Assessment
  - Right or Wrong; May Have to Arbitrate

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MASS WITHDRAWAL LIABILITY

- All Employers in the Plan Withdraw (the obligation to contribute ceases), or
- Substantially All Employers Withdraw pursuant to an Agreement to Withdraw

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MASS WITHDRAWAL LIABILITY

- Three types of Mass Withdrawal Liability
  - Initial
  - Redetermination
  - Reallocation

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MASS WITHDRAWAL LIABILITY

- Liability is calculated under the normal withdrawal liability rules, except:
  - 20 year cap lifted
  - Ability to Use De Minimis Reduction for Prior Withdrawals Curtailed (3 year lookback)

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OTHER ISSUES

- ERISA Section 4235
  - Union Decertified/Thrown Out
  - New Union/New Plan
  - Can Avoid Withdrawal Liability Assessment
  - Must Follow Specific Procedures and New Plan Must be Financially Solid

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OTHER ISSUES

- **Get Union to Indemnify Employer for Liability in Excess of Contractual Contribution Amounts**
  - 3rd Circuit Says OK
    - Pittsburgh Mack Truck Sales v. Int'l Union of Operating Engineers, Local Union No. 66, 07-3938, 9-4-09
  - 6th Circuit Says OK
    - Shelter Distribution, Inc. v. Gen'l Drivers, Warehouseman & Helpers Local Union No. 89, No. 11-5450, 3-16-12

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Calculating Withdrawal Liability

Actuarial Issues

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Actuarial Standards

- **Actuaries practicing in the US are governed by different standards promulgated by the American Academy of Actuaries (AAA)**
- **The AAA:**
  - Establishes professional standards of actuarial qualification, practice, and conduct
  - Advances actuarial practice by informing and educating its members on public policy and professionalism issues and current and emerging practices

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Actuarial Standards (cont'd)

- **Selected Standards of Practice**
  - Measuring Pension Obligations (#4)
  - Data Quality (#23)
  - Selection of Economic Assumptions for Measuring Pension Obligations (#27)
  - Selection of Demographic and Non-Economic Assumptions for Measuring Pension Obligations (#35)

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Actuarial Standards (cont'd)

- **Selected Standards of Practice (cont'd)**
  - Actuarial Communications (#41)
  - Selection and use of Asset Valuation Methods for Pension Valuations (#44)
- **Qualification Standards for Actuaries Issuing Statements of Actuarial Opinion in the US**
- **Code of Professional Conduct**

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Assumptions/Methodology

- **MPPAA stipulates that PBGC may promulgate regulations regarding the determination of UVB**
  - 30 years later—no regulations
  - "Actuary's best estimate" applies otherwise
- **Identify/understand your Plan's methodology**

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Assumptions/Methodology *continued*

- **Ongoing valuation assumptions for liabilities and actuarial value of assets**
- **"Segal Blend" assumptions for liabilities and market value of assets**
  - Has withstood all challenges to date
- **PBGC-based interest assumptions only with either asset value**

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Assumptions/Methodology *continued*

- **Assumptions beyond the interest rate**
  - Mortality
  - Retirement ages/rates
  - Plan-specific assumptions

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Assumptions/Methodology *continued*

- **Supreme Court decision: Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California 113 S.Ct. 2264 (1993) ("Concrete Pipe")**
  - Ongoing valuation assumptions and actuarial value of assets may be alternative method to compute UVB
  - If adopted by the Board, not necessarily the actuary's "best estimate"

Procedural Requirements

- **For each Plan Year that a "pool" exists, required information is:**
  - Total dollars of contributions for that year and prior 4 years
  - Total "contribution base units" (typically hours)
  - Highest contribution rate during last ten years

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Allocation Method for Construction Funds

Presumptive Method

- **Each year's change in UVB creates a "pool" of liability**
  - Pools can be positive or negative
- **Each pool is allocated based on contribution history over 5 years**
- **Pools written down 5% per year from inception**
- **Maximum of 20 pools can apply**
- **Only method available to construction industry plans**

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Presumptive Method - Example

- **Develop the pools of liability for each year**

		Pools			
12/31:	**Plan Wide UVB for W/L**	**2008**	**2009**	**2010**	**2011**
2007	$0				
2008	$8,800,000	$8,800,000	$8,360,000	$7,920,000	$7,480,000
2009	$112,000,000	N/A	$103,640,000	$98,458,000	$93,276,000
2010	$100,000,000	N/A	N/A	-$6,378,000	-$6,059,100
2011	$40,000,000	N/A	N/A	N/A	-$54,696,900
Total		**$8,800,000**	**$112,000,000**	**$100,000,000**	**$40,000,000**

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Presumptive Method—Example *continued*

- Allocate the unfunded vested benefit liability pools

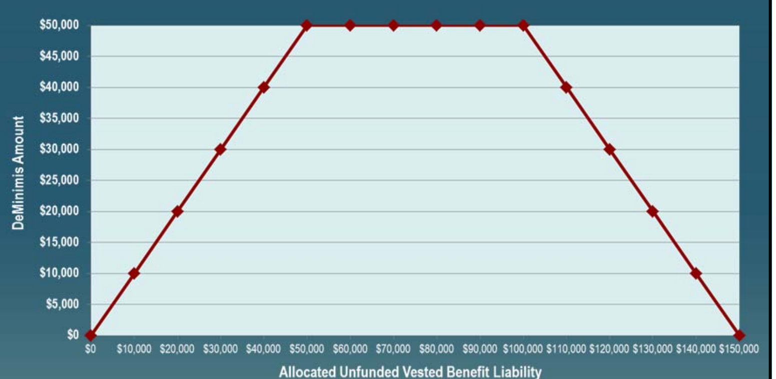
	5-Year Contributions			For a 2012 Withdrawal	
	Plan	Employer	Percentage	Pools	Allocated Amount
2008	$25,000,000	$2,579,250	10.317%	$7,480,000	$771,712
2009	$27,000,000	$2,754,270	10.201%	$93,276,000	$9,515,085
2010	$30,000,000	$3,124,500	10.415%	-$6,059,100	-$631,055
2011	$28,000,000	$3,251,640	11.613%	-$54,696,900	-$6,351,951
					$3,303,791

DeMinimis Amount

- **Subtracted from Allocated Amount of UVB**
- **Amount based on Allocated Amount**
  - Total UVB if UVB < $50,000
  - $50,000 if $50,001 < Allocated Amount < $100,000
  - If Allocated Amount > $100,000
    - $50,000 minus excess over $100,000
  - $0 if Allocated Amount > $150,000

  Example:
    - Allocated Amount = $120,000
    - DeMinimis = $50,000 - $20,000 = $30,000
    - Withdrawal Liability = $120,000 - $30,000 = $90,000

DeMinimis Amount Graphically



Payment Amount

- **Uses highest contribution rate in last 10 years**
- **Uses highest 3-consecutive year contribution base units in last 10 years**

Year:	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Hours:	31,200	35,360	**39,520**	**37,939**	**36,421**	34,964	33,565	32,222	30,933	29,696
Rate:	$1.00	$1.05	$1.10	$1.10	$1.15	$1.20	$1.25	$1.25	$1.35	**$1.40**
Contributions:	$31,200	$37,128	$43,472	$41,733	$41,884	$41,957	$41,956	$40,278	$41,760	$41,574

Highest 3-consecutive year average (2002 – 2004) = 37,960
Highest contribution rate = $1.40
Annual payment amount = $53,144

- **NOT a function of Withdrawal liability**
- **20-year payment cap applies**

Payment Cap - Example

- **Suppose employer is allocated $1 million of total Unfunded Vested Benefits (UVB)**
- **Suppose annual payment amount is $53,144**
  - Not based on UVB amount allocated but past hours and contribution rate history
- **Present Value of 20 years of annual payments of $53,144 is $582,409**
- **Employer's liability is "effectively" limited to $582,409**

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Partial Withdrawal

- **Triggered by**
  - Transfer of work out of CBU to employer
  - Expiration of one, but not all, collective bargaining agreements
  - Work at some, but not all, covered facilities
  - A 70% decline in contribution base units (CBUs)
- **70% decline "trigger"**
  - Examine CBUs in "3-year testing period"
  - Compare to "high base year" CBUs
  - Partial withdrawal if CBUs in 3-year testing period is not greater than 30% of CBUs in high base year

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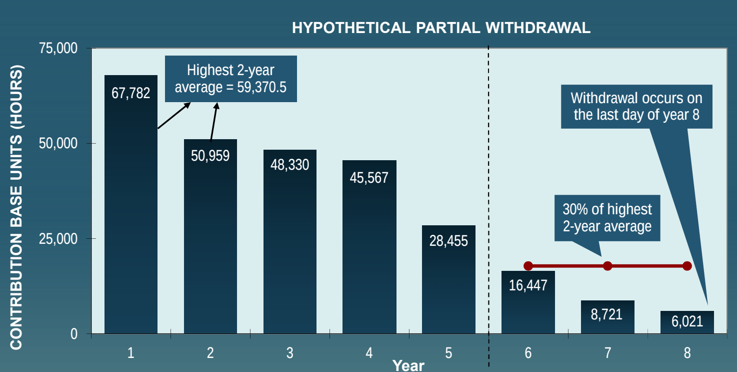
Partial Withdrawal—Example



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Sample Withdrawal Liability Spreadsheet

		Unamortized Balance of Pools		Contributions During 5 Year Period Ending With Date Pool Established		
	Year Ended December 31	Basic Pools	Reallocated Pools	Total Pension Plan Contributions	Obligated Employer Pension Plan Contributions	Liability Allocated: (5) divided by (4), times the sum of (2) and (3)
	1	2	3	4	5	6
1	1995	$1,031,438	$0	$9,761,967	$16,218	$1,714
2	1996	-735,641	0	10,001,470	21,397	(1,574)
3	2003	-171,449	0	13,857,043	158,045	(1,955)
4	2004	22,450,979	0	15,519,950	199,812	289,046
5	2005	-4,923,687	0	16,602,171	239,999	(71,176)
6	2006	5,820,336	0	17,401,723	237,685	79,498
7	2007	521,745	0	17,556,231	303,351	9,015
8	2008	-5,970,510	0	17,581,443	375,873	(127,643)
9	2009	-150,717	0	18,721,787	484,563	(3,901)
10	2010	6,252,544	0	21,058,605	535,823	159,092
11	2011	19,969,989	0	22,456,546	658,727	585,788
				Gross Liability (Sum of Column 6)		$917,904
				De minimis		50,000
				Deductible: $100,00 + (B) - (A), but not greater than (B) nor less than zero		0
				Net Withdrawal Liability: (A)-(C), but not less than zero		$917,904

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Documentation

- **What documents should an employer have to evaluate the withdrawal liability assessment?**
  - Plan document
  - Summary Plan Description
  - Withdrawal Liability procedures
  - Valuation report/withdrawal liability report

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Enforcement of Withdrawal Liability

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Enforcement of Withdrawal Liability Assessments

- **Assessment to be issued "as soon as practicable" [§4219(b)(1)]**
  - Statement of Business Affairs ("SOBA") form
  - SOBA is to be returned within 30 days of demand [§4219(a)]
  - "as soon as practicable" is NOT a limitations period
- **Controlled Group rules (notice to one = notice to all) [§4001(b)(1)]**

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Enforcement of WL Assessments *continued*

- **Form of Notice:**
  - the total due
  - a demand for payment
  - a schedule for payments (starting 60 days after demand - 20 year cap)
  - a lump sum option
  - a worksheet showing the calculations, rules for review, etc.

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Enforcement of WL Assessments *continued*

- **Pay-as-you-go statute [§4219(c)(5) & 4221(d)]**
  - 60-day notice letters after first missed payment
  - Failure to cure accelerates the entire debt - for all Controlled Group members
  - Even while review/arbitration/litigation is ongoing.

Procedural Requirements

- **"Request for Review" must be made within 90-days of receipt of the WL assessment**
- **Deadline applies to all Controlled Group members as well**
  - Claims of "not or no longer in the Controlled Group as of the withdrawal date"

    v.

  - Claims of "never in the Controlled Group"

Procedural Requirements *continued*

- **Request information needed early on to be able to meet the 90-day limit**
- **Be specific in your Request for Review, to avoid potential waiver issues**
- **PBGC Opinion Letter 91-7 (additional issues may be raised during review but do not toll the period for demanding arbitration)**
- **Trustees must issue written response to Request**

Procedural Requirements *continued*

- **Arbitration follows review, and is mandatory [§4221]**
  - Failure to Request Review may = no right to arbitration
- **Employer (including Controlled Group members) must file arbitration demand**
  - within 60 days after Trustees notify of their disposition of the Request for Review, or
  - within 120 days of the filing of the Request if no response has been received

Procedural Requirements *continued*

- **Check Plan rules for applicable arbitration rules and venue**
- **PBGC rules (29 CFR Part 4221)**
- **AAA rules (www.adr.org)**
- **PBGC Opinion Letter 91-7 (issues may be raised in arbitration demand that were not in the Request for Review – ability to raise additional issues at an even later date is a determination for the arbitrator)**

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Failure to Initiate Arbitration

- **The entire assessment becomes due and owing as a matter of law. There are virtually no defenses to its enforcement.**
  - Controlled Group members are foreclosed from litigating their own liability except where they are able to assert that they were never in the Controlled Group.
  - Evade or avoid determinations must be arbitrated – challenges cannot be presented first in litigation.

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Analysis of Assessment

- **Are there "unnotified" controlled group members?**
- **Has there been a complete ("C") or partial ("P") withdrawal?**
  - Termination of CBA and obligation to contribute - C
  - Withdrawal of recognition - C
  - Cessation of operations - C
  - Cessation of contributions over time – C or P
  - Decline of contributions (P for non-construction plans) or Insubstantial union v. non-union work (P for construction plans)
  - Disclaimer of representation – C or P (PBGC Op. 95-2)

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Analysis of Assessment *continued*

- **When was the withdrawal?**
- **Is the plan a construction industry plan or has it adopted the construction industry exemption?**
  - Teamster Plans – some have and many have not
- **If "yes" – are the employees for whom contributions have been made, engaged in the construction industry?**
  - Primarily a Teamster Plan issue
- **If "yes", the construction industry exemption applies.**

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Analysis of Assessment *continued*

- **Has the construction industry exemption been violated (continuation or resumption of covered work within the jurisdiction within 5 years)**
  - Nonunion v. other union
  - Subcontracting
  - Controlled Group members
    - Date of entry into common control
  - PLAs

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Analysis of Assessment *continued*

- **What information should be requested?**
  - The most recent annual valuation reports
  - Does it show the assumptions for WL? If not, ask for them.
  - The current SPD and Plan document, with all the benefits described.
  - What benefits are included in the UVB analysis?
    - Only non-forfeitable benefits may be included.
    - If the Report does not show, ask for this too and then consult your actuary.

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Defenses to Withdrawal Liability

- **Challenge the Plan determinations (the fact of withdrawal, the date of withdrawal, application of an exemption, evade or avoid, controlled group member, etc.)**
  - Such determination are presumptively correct [§4221(a)(3)(A)]
  - Burden on the Employer to show by a preponderance of the evidence that a challenged determination was unreasonable or clearly erroneous

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Defenses to a Withdrawal Liability *continued*

- **UVB calculations are also presumptively correct [§4221(a)(3)(B)(i)(ii)]**
  - Employer must show by a preponderance of the evidence that either
    - (a) the actuarial assumptions and methods used were unreasonable in the aggregate [meaning a combination of methods and assumptions "not acceptable to a reasonable actuary" *Concrete Pipe,* 508 U.S. 602, 634 (1993)], or
    - (b) the actuary made a significant error in applying the actuarial assumptions or methods.

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Defenses to a Withdrawal Liability *continued*

- **Laches – available but unlikely to succeed**
  - Defined as inexcusable delay AND undue prejudice to the Employer (delays of up to 12 years have been found acceptable – based on the specific facts of the case)

Actions to Vacate an Arbitration Award

- **Must be filed within 30 days of the issuance of the aware [§4221(b)(2)]**
- **Presumption of correctness to the arbitrator's findings of fact [§4221(c)] – rebuttable only by a clear preponderance of the evidence**
- ***Beware* – attorneys fees and costs generally not recoverable in arbitration (absent bad faith, etc.) – will be recoverable in litigation when you do not prevail**

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Civil Actions - Statute of Limitations

- **Statute of Limitations [§4301(f)] – civil action may not be brought after the later of**
  - 6 years after the date the cause of action arose –*but the cause of action only arises with the first missed payment*
  - 3 years after the earliest date when the Plan knew or should have known of the cause of action, except that fraud or concealment extends that time to 6 years after the date of discovery of the existence of the cause of action

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CASE STUDY

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CASE STUDY

- Request for Estimate of Withdrawal Liability (Attachment A)

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CASE STUDY

- Statement of Business Affairs (Attachment B)

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CASE STUDY

- Assessment (Attachment C)

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CASE STUDY

- Request for Information (Attachment D)

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CASE STUDY

- Request for Review (Attachment E)

CASE STUDY

- Request for Review – Construction Industry Exemption (Attachment F)

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CASE STUDY

- Request for Arbitration (Attachment G)

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DISCUSSION
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QUESTIONS

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