MULTIEMPLOYER PENSION PLANS

WITHDRAWAL LIABILITY WORKSHOP

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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.

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

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)

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
**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.

**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.

**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

**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.
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

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.

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*

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
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

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)

MASS WITHDRAWAL LIABILITY

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

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
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

Calculating Withdrawal Liability

Actuarial Issues

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

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)
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

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

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

Assumptions/Methodology continued

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

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

Presumptive Method - Example

<table>
<thead>
<tr>
<th>12/31: Plan Wide UVB for W/L</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>$8,800,000</td>
<td>$8,800,000</td>
<td>$8,360,000</td>
<td>$7,920,000</td>
</tr>
<tr>
<td>2009</td>
<td>$112,000,000</td>
<td>N/A</td>
<td>$103,640,000</td>
<td>$98,458,000</td>
</tr>
<tr>
<td>2010</td>
<td>$100,000,000</td>
<td>N/A</td>
<td>N/A</td>
<td>-$6,378,000</td>
</tr>
<tr>
<td>2011</td>
<td>$40,000,000</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Total</td>
<td>$8,800,000</td>
<td>$112,000,000</td>
<td>$100,000,000</td>
<td>$40,000,000</td>
</tr>
</tbody>
</table>
Presumptive Method—Example continued

• Allocate the unfunded vested benefit liability pools

<table>
<thead>
<tr>
<th>5-Year Contributions</th>
<th>Percentage</th>
<th>For a 2012 Withdrawal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plan</td>
<td>Employer</td>
<td>Revenue</td>
</tr>
<tr>
<td>2008</td>
<td>$25,000,000</td>
<td>$2,579,250</td>
</tr>
<tr>
<td>2009</td>
<td>$27,000,000</td>
<td>$2,754,270</td>
</tr>
<tr>
<td>2010</td>
<td>$30,000,000</td>
<td>$3,124,500</td>
</tr>
<tr>
<td>2011</td>
<td>$28,000,000</td>
<td>$3,251,640</td>
</tr>
</tbody>
</table>

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

Payment Amount

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

<table>
<thead>
<tr>
<th>Year</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hours</td>
<td>31,200</td>
<td>35,360</td>
<td>39,520</td>
<td>37,939</td>
<td>36,212</td>
<td>34,964</td>
<td>33,965</td>
<td>32,222</td>
<td>30,933</td>
<td>29,696</td>
</tr>
<tr>
<td>Rate</td>
<td>$1.00</td>
<td>$1.05</td>
<td>$1.10</td>
<td>$1.10</td>
<td>$1.15</td>
<td>$1.20</td>
<td>$1.25</td>
<td>$1.35</td>
<td>$1.40</td>
<td>$1.40</td>
</tr>
<tr>
<td>Contributions</td>
<td>$31,200</td>
<td>$37,128</td>
<td>$43,472</td>
<td>$41,733</td>
<td>$41,884</td>
<td>$41,957</td>
<td>$41,956</td>
<td>$40,270</td>
<td>$41,760</td>
<td>$41,574</td>
</tr>
</tbody>
</table>

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

**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

**Partial Withdrawal—Example**

<table>
<thead>
<tr>
<th>Year</th>
<th>Hypothetical Partial Withdrawal</th>
<th>Contribution Base Units (Hours)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>67,762</td>
<td>75,000</td>
</tr>
<tr>
<td>2006</td>
<td>50,959</td>
<td>50,000</td>
</tr>
<tr>
<td>2007</td>
<td>48,330</td>
<td>45,000</td>
</tr>
<tr>
<td>2008</td>
<td>45,567</td>
<td>42,000</td>
</tr>
<tr>
<td>2009</td>
<td>28,455</td>
<td>25,000</td>
</tr>
<tr>
<td>2010</td>
<td>8,721</td>
<td>5,000</td>
</tr>
<tr>
<td>2011</td>
<td>6,021</td>
<td>3,000</td>
</tr>
</tbody>
</table>

**Partial Withdrawal—Example**

- Withdraw occurs on the last day of year 8
- 30% of highest 2-year average = 55,370.5
- 30% of highest 2-year average = 55,370.5

**Sample Withdrawal Liability Spreadsheet**

<table>
<thead>
<tr>
<th>Year Ended December 31</th>
<th>Basic Pools</th>
<th>Reallocated Pools</th>
<th>Total Pension Plan Contributions</th>
<th>Obligated Employer Pension Plan Contributions</th>
<th>Liability Allocated: (b) divided by (d), times the sum of (2) and (3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 1995</td>
<td>$1,231,438</td>
<td>0</td>
<td>$6,761,907</td>
<td>$16,218</td>
<td>$1,714</td>
</tr>
<tr>
<td>2 1996</td>
<td>-735,641</td>
<td>0</td>
<td>10,001,470</td>
<td>21,397</td>
<td>(1,974)</td>
</tr>
<tr>
<td>3 2003</td>
<td>-171,449</td>
<td>0</td>
<td>13,857,043</td>
<td>158,046</td>
<td>(3,955)</td>
</tr>
<tr>
<td>4 2004</td>
<td>22,450,979</td>
<td>0</td>
<td>15,519,950</td>
<td>196,812</td>
<td>(389,546)</td>
</tr>
<tr>
<td>5 2005</td>
<td>-4,923,687</td>
<td>0</td>
<td>16,002,171</td>
<td>239,999</td>
<td>(71,176)</td>
</tr>
<tr>
<td>6 2006</td>
<td>5,020,338</td>
<td>0</td>
<td>17,481,723</td>
<td>237,685</td>
<td>75,498</td>
</tr>
<tr>
<td>7 2007</td>
<td>151,745</td>
<td>0</td>
<td>17,595,233</td>
<td>303,351</td>
<td>9,015</td>
</tr>
<tr>
<td>8 2008</td>
<td>-5,970,510</td>
<td>0</td>
<td>17,581,443</td>
<td>375,873</td>
<td>(127,043)</td>
</tr>
<tr>
<td>9 2009</td>
<td>-150,717</td>
<td>0</td>
<td>18,721,787</td>
<td>484,563</td>
<td>(3,901)</td>
</tr>
<tr>
<td>10 2010</td>
<td>6,252,544</td>
<td>0</td>
<td>21,055,806</td>
<td>530,833</td>
<td>150,092</td>
</tr>
<tr>
<td>11 2011</td>
<td>19,965,989</td>
<td>0</td>
<td>22,456,546</td>
<td>585,788</td>
<td>$917,904</td>
</tr>
</tbody>
</table>

- Gross Liability (Sum of Column 6) $917,904
- De minimis: $50,000
- Deductible: $100,000 + (b) - (a), but not greater than (b) nor less than zero
- Net Withdrawal Liability: (A) - (C), but not less than zero
- (a) $50,000
- (b) $583,788
- (c) $917,904
- (d) $0

**Sample Withdrawal Liability Spreadsheet**

- Column 6 is the liability allocated to the employer.
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

Enforcement of Withdrawal Liability

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)]

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.
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”
  • 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)

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.

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)

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.
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

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

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.

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.
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 award [§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

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

CASE STUDY
CASE STUDY

- Request for Estimate of Withdrawal Liability (Attachment A)

CASE STUDY

- Statement of Business Affairs (Attachment B)

CASE STUDY

- Assessment (Attachment C)

CASE STUDY

- Request for Information (Attachment D)
CASE STUDY

- Request for Review (Attachment E)

CASE STUDY

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

CASE STUDY

- Request for Arbitration (Attachment G)

DISCUSSION and QUESTIONS