Withdrawal Liability Defined

- What is withdrawal liability?
  - Exit fee for employers who cease contributions to a multiemployer defined benefit pension plan with unfunded vested benefits.
    - Established and governed by the Multiemployer Pension Plan Amendments Act of 1980.
    - Requires an employer to pay its share of a plan’s unfunded liabilities that have not been paid through contributions or investment returns.
Understanding The Types of Withdrawal Liability

• Three ways in which withdrawal occurs:
  – Complete withdrawal
  – Mass withdrawal
  – Partial withdrawal

• There are special withdrawal liability rules for certain industries.

• Extension of special rules to other industries.
I. Complete Withdrawal

1. Complete withdrawal occurs when an employer:
   - Has permanently ceased operations, or
   - Has permanently ceased to have an obligation to make contributions to the plan.
   - A sale of assets can (but doesn’t always) trigger withdrawal.
I. Complete Withdrawal (continued)

a. Building and Construction Industry
   • Cessation of contributions is not, in and of itself, considered a withdrawal.
   • Withdrawal liability is triggered if the employer is no longer obligated to contribute, but continues or resumes (within 5 years) the same type of work in the same area that was covered by the union agreement and does not contribute to the affected plan.
b. Entertainment Industry
Employers that contribute to multiemployer plans for temporary or project-by-project work, incur withdrawal liability when, after initially ceasing work, the employer begins working again in the same type of work without contributing.
c. Trucking/Moving/Warehousing

- Applies when substantially all of a plan’s coverage is in the trucking, moving, or warehousing industry.
- Withdrawal liability will attach when an employer continues to do work in the jurisdiction of the plan or if its withdrawal does “substantial damage” to the plan’s contribution base.
- The Pension Benefit Guaranty Corporation determines substantial damage and pending this determination, the employer must post a bond or other security for half of its potential liability.
II. Mass Withdrawal

- Occurs upon the withdrawal of:
  - Every contributing employer, or
  - Substantially all employers pursuant to an arrangement or agreement to withdraw.
- Withdrawal during a period of three consecutive plan years within which substantially all employers withdraw, shall be presumed to be pursuant to an arrangement or agreement to withdraw, unless employer proves otherwise by preponderance of evidence.
III. Partial Withdrawal

1. An employer may be liable to a multiemployer fund as a result of a partial withdrawal.

2. When will a partial withdrawal occur?
70% Decline

a. Occurs on last day of plan year if during each plan year in three-year testing period, employer’s contribution base units (CBUs) do not exceed 30% of its contribution base units for the high base year.

- CBU: unit with respect to which employer has obligation to contribute (e.g., if contribution rate is $10/hour, CBU is hours).
- 3-year testing period: plan year and the immediately preceding 2 plan years.
- CBUs for high base year: average CBUs for two plan years in which employer’s CBUs were highest within five years preceding three-year testing period.
Example—70% Decline Determination

- A 70% decline occurred in 2015:
  - Three-year testing period includes 2013, 2014 and 2015
  - Average of highest two years in five prior years is 1,000 (2008 and 2011)
  - Average CBUs in high base year is 1,000
  - In each of 2013, 2014, and 2015, the CBUs are no more than 30% of 1,000
  - Partial withdrawal triggered in 2015

<table>
<thead>
<tr>
<th>Year</th>
<th>CBUs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>1,100</td>
</tr>
<tr>
<td>2009</td>
<td>650</td>
</tr>
<tr>
<td>2010</td>
<td>850</td>
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<tr>
<td>2011</td>
<td>900</td>
</tr>
<tr>
<td>2012</td>
<td>875</td>
</tr>
<tr>
<td>2013</td>
<td>100</td>
</tr>
<tr>
<td>2014</td>
<td>300</td>
</tr>
<tr>
<td>2015</td>
<td>150</td>
</tr>
</tbody>
</table>
b. Bargaining Agreement Take-Out

- Partial withdrawal occurs when an employer is no longer obligated to contribute for a group covered by a separate bargaining agreement although the employer continues to perform the same type of work within the jurisdiction covered by the collective bargaining agreement.
c. Partial withdrawal also occurs when the employer transfers work covered under a collective bargaining unit to another location or to an entity controlled by the employer.

d. Facility Take-Out
Partial withdrawal occurs when an employer ceases to be obligated to contribute for a facility, even though work that had been covered continues at the facility.
3. Liability for Partial Withdrawal
   a. Prorated part of the liability for complete withdrawal.
   b. Plans are required to review data on fluctuations in employers’ contribution history going as far as eight years back.
4. Special Rules Related to Partial Withdrawal
   a. Construction Industry
      No partial withdrawal unless the employer continues under the plan for only an insubstantial portion of its total work in the jurisdiction (e.g., a contractor goes non-union but keeps a handful of employees under the contract that called for contributions to the plan).
   b. Entertainment Industry
      Generally there is no partial withdrawal for employers covered by the entertainment industry rule.
Rules for Selected Industries
(continued)

c. Retail Food Industry
   The plan may define the contribution decline test as a 35% reduction contribution decline, rather than a 70% reduction.

d. Bituminous Coal Miners Fund
   The plan may define other conditions of partial withdrawal.
IV. Special Scenarios and Their Impact on Withdrawal Liability

1. Sale of Assets
   a. When a participating employer sells assets such that all or some of the covered work ceases, this may trigger a complete or partial withdrawal.
   b. Ordinarily, only the seller has withdrawal liability but liability can attach to a purchaser if:
      i. The purchaser has notice of the liability; and
      ii. There is “substantial continuity” in the operation of the business before or after the sale.
c. Section 4204(a)(1)—Partial withdrawal does not occur if:
   i. Sale is a *bona fide*, arm's-length sale of assets to an unrelated party.
   ii. The purchaser has an obligation to contribute to the plan for substantially the same number of contribution base units as the seller.
IV. Special Scenarios and Their Impact on Withdrawal Liability

(continued)

iii. The purchaser provides a bond or escrow for five years in an amount equal to either:
   – The greater of the seller’s average annual contribution for the 3 plan years preceding the sale of assets, or
   – The annual contribution for the last plan year before the sale of assets.
iv. The sale agreement provides that the seller is secondarily liable for any withdrawal liability that it would have had to the plan if the purchaser withdraws from the plan within the first 5 plan years after the purchase.

v. The seller must provide security if it distributes all or substantially all of its assets or otherwise liquidates within 5 years of the sale.

- Two (2) exceptions to bond/security requirement:
  » De Minimis Test; and
  » The “Solvency” Test (net income/net tangible asset).
IV. Special Scenarios and Their Impact on Withdrawal Liability (continued)

2. Reorganization
A change in an employer's identity as a result of a merger, spinoff, or change in structure will not trigger withdrawal liability so long as the employer's obligation to contribute continues.

3. Insolvency
One-half of the withdrawal liability will be contingent on whether there is significant dissolution value to pay it after the other creditors have been paid.

4. Personal Assets
Generally, personal assets, i.e., that of a partner or principal, are exempt from liability.
IV. Special Scenarios and Their Impact on Withdrawal Liability (continued)

5. Control Groups
   All trades and businesses under common control are treated as a single employer, and employees of each of these trades or businesses are treated as if employed by a single employer.
   
a. Control group liability may be used to hold trades and businesses under common control jointly and severally liable for the withdrawing employer’s liability.
6. De Minimis Rule
This rule may exempt smaller employers from withdrawal liability. Per §4209 of ERISA, 29 U.S.C. §1389:

a. Withdrawal liability is reduced by the lesser of $50,000 or 0.75% of UVB.
   • If ≤$50,000, employer pays nothing
   • If >$50,000 but ≤$100,000, liability is reduced by $50,000
   • Phases out dollar for dollar above $100,000

b. Plan can be amended to substitute $100,000 minimum for $50,000.

c. The De Minimis Rule doesn’t apply to a mass withdrawal.
V. Payment Schedules/Recourse for Default

1. 29 U.S.C. §1399, ERISA §4219 sets out the statutory framework for the collection of withdrawal liability.

2. The plan sponsor is responsible for notifying the employer of the amount of the withdrawal liability and the appropriate payment schedule. The notification must occur "as soon as practicable" after the withdrawal occurs.
Payment Schedule

a. Annual amount payable is based on employer’s highest 3-year average CBUs over the last 10 years times employer’s highest contribution rate for the last 10 years, including year of withdrawal

b. Length of schedule is variable

c. Payments usually quarterly, but plan can provide otherwise

d. 20-year cap on payments, generally
e. The amortization period is to be based on the assumptions used for the most recent actuarial valuation for the plan.

f. If a multi-employer plan terminates due to a mass withdrawal, the total unfunded vested benefits of the plan shall be fully allocated among all such employers.
3. The withdrawing employer has 90 days from the date of notification to contest the calculation.

4. Once the employer contests the calculation, the plan must review the employer’s response and notify the employer of the plan's decision, the basis for its decision, and the reason for any change in the calculation.
a. Payments must begin, pursuant to the schedule, no later than 60 days after the date of the demand irrespective of any request for review or appeal made by the employer.

b. If payment is not made when due, interest accrues from the due date.
Payment Schedule (continued)

c. If an employer fails to make any payments under the schedule, the plan may require immediate payment of the outstanding amount of the withdrawal liability plus accrued interest from the date of default.

i. The plan must provide written notice and an opportunity to cure within 60 days.

ii. A plan may adopt additional rules defining a default in the context of any employer that is substantially unlikely to be able to pay its withdrawal liability.
Example of Payment Schedule

- Highest 3-year average CBUs—2012-2014
- Payment period as defined by plan (e.g., quarterly, monthly)

<table>
<thead>
<tr>
<th>Plan Year Ending</th>
<th>Hours</th>
<th>Total Hours for 3-Year Period Ending With Given Year</th>
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</thead>
<tbody>
<tr>
<td>2006</td>
<td>6,000.00</td>
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<tr>
<td>2015</td>
<td>4,000.00</td>
<td>25,000.00</td>
</tr>
<tr>
<td>Highest 3-Year Average:</td>
<td>10,000.00</td>
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</tr>
</tbody>
</table>

2015 Hourly Contribution Rate: \( \times 5.00 \) per hour

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<table>
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<tr>
<td>Annual Payment:</td>
<td>$ 50,000</td>
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<tr>
<td>( \times \frac{1}{12} )</td>
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</tr>
<tr>
<td>Monthly Payment:</td>
<td>$ 4,167</td>
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</tbody>
</table>
VI. Pension Protection Act

1. Under the PPA, reductions of adjustable benefits are disregarded when computing plan’s UVB
   a. PBGC Technical Update 10-3: provides a simplified method for valuing reductions.

2. Red zone surcharges and funding improvement or rehabilitation plan contribution increases are disregarded for computing UVBs (in most cases) and payment schedule.
VI I. Resolution of Withdrawal Liability Issues

1. Section 4221 provides that any dispute between an employer and a plan sponsor related to withdrawal liability shall be resolved through arbitration.

   a. The employer or the plan may initiate arbitration within 60 days of the earlier of the date of notification to the employer of the plan’s withdrawal liability claim or 120 days after the date of the employer’s request for the plan sponsor to review the determination of withdrawal liability.
b. The plan’s determination of its unfunded vested benefits is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the actuarial assumptions and methods used were, in the aggregate, unreasonable or that the plan’s actuary made a significant error.

c. The arbitrator may award costs and attorneys’ fees to the plan.
2. If the parties do not initiate arbitration, the withdrawal liability amount calculated by the plan is due and owing, and the plan may file suit in a State or Federal court of competent jurisdiction for collection.

3. If an arbitration hearing is held, any party to the arbitration may file suit within 30 days of an award, in the appropriate U.S. District court to enforce, vacate, or modify the award.

4. The arbitrator's findings are presumed to be correct and are rebuttable only by a clear preponderance of the evidence that the findings of fact made by the arbitrator were incorrect.
VI I . Resolution of Withdrawal Liability Issues (continued)

5. During the arbitration proceedings, the employer is required to pay the withdrawal liability payments in the schedule. Failure to make payments during the arbitration renders the employer delinquent under §515 of ERISA.

6. After the arbitration award is issued, any overpayments or underpayments must be reconciled.
7. Litigation
   a. Delinquent withdrawal liability payments are enforceable pursuant to §515 of ERISA.
   b. In suits to enforce §515, a prevailing plan is entitled to delinquent contributions, interest, liquidated damages and attorney's fees/costs.
In a §515 action, the employer's defenses are extremely limited. Generally, the employer’s only viable defenses would be:

i. That making the contributions would be illegal.

ii. That the collective bargaining agreement which called for the contributions to be made is void ab initio.

iii. Where the employees had de-certified the bargaining representative.
VIII. Collection Strategies

1. Judgment enforcement

2. What parties are responsible for payment.
   a. Control Group Liability
   b. Alter-Ego Liability

3. Efforts to achieve settlement of withdrawal liability claims.
   a. Issues for settlement discussions
Website Resources

https://www.ifebp.org/inforequest/ifebp/0200053.pdf

2017 Educational Programs

Pensions

63rd Annual Employee Benefits Conference
October 22-25, 2017
Las Vegas, Nevada
www.ifebp.org/usannual

Trustees and Administrators Institutes
February 20-22, 2017
Lake Buena Vista (Orlando), Florida
June 26-28, 2017
San Diego, California
www.ifebp.org/trusteessadministrators

Certificate of Achievement in Public Plan Policy (CAPPP®)
Part I and Part II, June 13-16, 2017
San Jose, California
Part II Only, October 21-22, 2017
Las Vegas, Nevada
www.ifebp.org/cappp

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