Withdrawal Liability—Special Topics

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Overview

- Partial withdrawals
- Hybrid methodology (old pool/new pool)
- Pension Protection Act (PPA) and Multiemployer Pension Reform Act (MPRA) impact on withdrawal liability
- Mass withdrawal
- Proposed legislation
- Questions/discussion
Definition of Partial Withdrawal

- Occurs on last day of plan year if for such plan year there is:
  - 70% decline in contribution base units; or
  - Partial cessation of the employer’s contribution obligation via:
    - CBA take-out; and/or
    - Facility take-out
There is 70% decline for any plan year if during each plan year in three-year testing period employer’s contribution base units do not exceed 30% of employer’s contribution base units for high base year.
Definitions for 70% Decline

Contribution base unit (CBU) = unit with respect to which employer has obligation to contribute, per a collective bargaining agreement, to a multiemployer pension fund.
Definitions for 70% Decline

“Three-year testing period” means period consisting of plan year and immediately preceding two plan years. The number of CBUs for high base year is average number of CBUs for two plan years for which employer’s CBUs were highest within five plan years immediately preceding beginning of three-year testing period.
Example of 70% Decline

To determine if partial withdrawal occurred in 2015:

Three-year testing period includes 2015 and two immediately prior years.

For high base year, look at five years prior to three-year testing period and find two highest years (2008 and 2011) and average them.

CBUs in high base year is 1000

<table>
<thead>
<tr>
<th>Year</th>
<th>CBUs</th>
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<tbody>
<tr>
<td>2008</td>
<td>1000</td>
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<tr>
<td>2009</td>
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<td>2014</td>
<td>150</td>
</tr>
<tr>
<td>2015</td>
<td>100</td>
</tr>
</tbody>
</table>
Example of 70% Decline

• Compare 1000 CBUs in high base year with each of three years during three-year testing period.
• In each of 2013, 2014 and 2015, CBUs are no more than 30% of 1000 (300, 150, 100).
• Therefore, 70% partial withdrawal occurred in 2015.
• BUT, calculate liability as if withdrawal occurred during 2013
Partial Cessation of the Obligation to Contribute

Besides 70%-decline partial withdrawal, partial withdrawal occurs if there is a “partial cessation of the obligation to contribute,” under either:

- CBA take-out (bargaining take-out); and/or
- Facility take-out
CBA Take-Out
Partial Withdrawal

- Partial withdrawal occurs if employer permanently ceases to have obligation to contribute under one or more, but fewer than all, CBAs, and:
  1) Continues to perform work within jurisdiction of union(s) signatory to CBA; or
  2) Transfers the work to another location (regardless of where located); or
  3) Transfers such work to entity/entities owned or controlled by the employer.
CBA Take-Out
Partial Withdrawal

- Cessation of obligations under CBA does not occur solely because one agreement that requires fund contributions is substituted for another agreement also requiring fund contributions.
- Similarly, no partial withdrawal if covered work is transferred to another location also covered by a CBA requiring fund contributions.
CBA Take-Out
Partial Withdrawal

• But if only *some* work is transferred to non-covered location, partial withdrawal occurs as long as the obligation under the CBA ceases permanently.
• So the mere fact that work is transferred to a non-covered location (or that work is now being performed within jurisdiction of union that is not covered) is irrelevant if employer still has obligation to contribute under CBA for even one participant.
CBA Take-Out
Partial Withdrawal

• PPA added underlined lingo for partial withdrawal where obligation permanently ceases under less than all CBAs and work is transferred “. . . to another location or to an entity or entities owned or controlled by the employer.” [for work transferred after 8/17/2006]

• CAUTION: “owned,” “controlled” undefined
Facility Take-Out Partial Withdrawal

• There is a partial cessation of the employer’s contribution obligation if employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at facility of type for which obligation to contribute ceased.

• CAUTION: “facility” undefined
Partial Withdrawals

• Before a complete withdrawal, there can be one or more partial withdrawals.
• For each successive withdrawal, liability is adjusted to account for earlier withdrawal.

IF 70%-decline partial withdrawal
THEN liability can be reduced/eliminated if employer has two consecutive plan years of CBUs at least 90% of high base year
Partial Withdrawals in Special Industries

• Construction-industry employers incur partial withdrawal only if employer’s obligation to contribute is continued for “no more than an insubstantial portion” of its work in craft and area jurisdiction of CBA of type for which contributions are required.

• Entertainment-industry employers have no partial withdrawal until PBGC issues regulations.
Partial Withdrawals in Special Industries

- Retail food-industry funds may define partial withdrawal based on 35% decline rather than a 70% decline.
  - Easier to trigger partial withdrawal
- BUT such funds must also provide for equitable reduction of partial withdrawal liability based on subsequent increase in employer’s CBUs.
Calculation of Partial Withdrawal Liability: Partial Withdrawal Fraction (Other Than 70% Decline)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CBUs</th>
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<tr>
<td>2009</td>
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<tr>
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<td>1,100</td>
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<td>2014</td>
<td>750</td>
</tr>
<tr>
<td>2015</td>
<td>200</td>
</tr>
<tr>
<td>Avg (‘09-‘13)</td>
<td>1,000</td>
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</tbody>
</table>

- Withdrawal Year 2014
- Complete withdrawal liability = $1,000,000
- Average CBUs for five years preceding withdrawal (2009-2013) is 1,000.
- CBUs in 2015, year after withdrawal = 200.
- Quotient = 200/1000 = 0.2
- Fraction = 1.0 - quotient = 0.8
- Partial Withdrawal = Complete*(pwdl fraction) = $1,000,000*0.8 = $800,000
## Calculation of 70% Partial Withdrawal Liability

<table>
<thead>
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<th>YEAR</th>
<th>CBUs</th>
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<td>2014</td>
<td>200</td>
</tr>
<tr>
<td>2015</td>
<td>150</td>
</tr>
<tr>
<td>Avg (‘07–‘11)</td>
<td>1,000</td>
</tr>
</tbody>
</table>

- Although withdrawal year 2014, calculate AMOUNT of complete withdrawal assuming 2012 wdl.
- Liability for complete 2012 withdrawal = $1,000,000
- Average CBUs for five years preceding 3-yr testing period (2007-2011) = 1,000.
- CBUs in year after 2014 withdrawal = 150.
- Quotient = 150/1000 = 0.15
- Fraction = 1.0 – quotient = 0.85
- Partial Withdrawal = Complete*Fraction = $1,000,000*0.85 = $850,000
Multiple Partial Withdrawals: Credit

• An employer may have one or more partial withdrawals in plan years prior to a complete (although only one event per plan year)
  IF prior partial withdrawal[s]
  THEN employer is entitled to a **credit** for prior partial withdrawal[s] toward subsequent partial or complete withdrawal
  • Credit for each partial reduces over time [often, five years]
  • Generally more costly to trigger partial withdrawal[s] prior to complete withdrawal.
Hybrid Withdrawal Liability Methodology

• Designed to mitigate employers’ fear of increased withdrawal liability due to
  – Effect of contribution rate increases, often mandated by:
    • Funding improvement plans and
    • Rehabilitation plans
      – Somewhat mitigated by MPRA [slide 37]
      – Defaulting employers
• Also intended to encourage new employers to join
Background: Withdrawal Liability Methods

• Two basic statutory approaches
  – Pro-rata (presumptive, modified presumptive and rolling five): Allocates liability according to alternate formulas based on employer’s contribution history to determine employer’s proportionate share of unfunded vested benefits (UVB)
  – Direct attribution: Allocates liability based upon UVB and assets attributable to the withdrawn employer’s own employees
Background: Withdrawal Liability Methods

• Direct attribution was considered too data-intensive for most plans in the early 1980s
• Virtually all multiemployer plans adopted one of the statutory pro-rata methods, but
  – Reallocation of defaulting employers’ liability to remaining employers drives up their liability and encourages withdrawals
  – Increased contributions increase installments
    • Again, somewhat mitigated by MPRA [slide 37]
Background:
Withdrawal Liability Methods

• §4211(c)(5)(A) allows plan to adopt an alternative method, as long as
  – It does “not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation [PBGC].”

• Alternative method must be approved by the PBGC.
Alternative Hybrid Method

• Plan is divided into two pools for withdrawal liability purposes.
  – First pool uses plan’s existing method (e.g., one of the pro-rata methods)
  – Second pool uses direct attribution method
Hybrid Method

• Existing employers may move to new pool by satisfying withdrawal liability and participating in the direct-attribution pool for future
  – Insulates employer from increasing liability
• New employer’s exposure to withdrawal liability in new pool is limited through plan design which insures contribution rates more than cover normal cost
Hybrid Method

• Other incentives to remain in plan:
  – Limiting/eliminating contribution rate growth mitigates pension costs; allows union to bargain for increases to wages/health/etc. that would otherwise have gone to pension
  – Labor peace (e.g., labor dispute over remaining in or leaving plan)
  – No reductions and continued accrual of benefits for participants
Hybrid Method

Benefits to plan:

- Withdrawal liability paid now rather than in the future (plus earnings on same)
- Continued contribution revenue from employers that continue to participate rather than leave plan
- Preservation of benefits for participants
Reentry/ Hybrid Plan

• Situation—Financially distressed employer (usually in bankruptcy) cannot afford current contributions and cannot pay withdrawal liability
  – If employer liquidates, plan will receive little or no withdrawal liability and no more contributions
  – If employer reorganizes and attempts to withdraw, likely labor unrest
Reentry/ Hybrid Method

- Solution—Employer has withdrawal liability discharged in bankruptcy, and reenters the plan under the hybrid method
  - Lower contribution rate due to reentry after a withdrawal
  - Employees may lose adjustable benefits, but continue to accrue benefits toward normal retirement benefit
Reentry/Hybrid Method

- Incentives to employers and unions in remaining in plans with hybrid method after bankruptcy:
  - Improved financing prospects with existing withdrawal liability satisfied
  - Lower contribution rate assists employer in bankruptcy reorganization
  - Labor peace (e.g., labor dispute in bankruptcy likely to cause employer to fail)
  - Continued accrual of benefits for participants
Reentry/ Hybrid Method

- Continued contributions without withdrawal liability is better than receiving neither the contributions nor the withdrawal liability
PPA Amendments to Withdrawal Liability

- New “fresh start” rule:
  - Plans using the presumptive method may substitute a designated plan year which had no unfunded vested benefits for the plan year ending before 1980 for withdrawals on and after January 1, 2007
- Free look permitted for construction industry plans for withdrawals occurring on or after January 1, 2007
- PBGC expanded fresh start via 2008 regulations
PPA Amendments to Withdrawal Liability

• “Bargaining out” partial withdrawal includes cessation of employer’s obligation to contribute under one or more, but not all, CBAs, but continues to perform the same type of work as previously performed under those agreements, or transfers that work on or after August 17, 2006 to another location “or to an entity or entities owned or controlled by the employer.”
PPA Amendments to Withdrawal Liability

• Employers relieved of interim payment obligation if plan assesses withdrawal liability based on the sham transaction rule until a final decision is rendered by an arbitrator or court
PPA Amendments to Withdrawal Liability

- Benefit reductions affecting adjustable benefits are not included in determining UVBs for withdrawal liability calculation
  - PBGC simplified calculation (Technical Release 10-3)
- Withdrawal liability also excludes 5% and 10% surcharges payable if employer does not agree to schedules in rehabilitation plan
  - PPA excluded surcharges from liability calculation, but was silent on payment schedule
MPRA Amendments to Withdrawal Liability

• Employer surcharges excluded from payment schedule for surcharges accruing on or after 12/31/14 other than under direct attribution rule
• Contribution increases for plan years beginning after 2014 required to meet FIP or RP are excluded in determining liability and payment schedule, except under direct attribution rule
  – PBGC to issue simplified methodology
MPRA Amendments to Withdrawal Liability

- If an employer withdraws from a partitioned plan within 10 years following partition order, its withdrawal liability will be computed with respect to both the plan that was partitioned and the plan created by the partition order.
- If withdrawal is later than 10 years after partition order date, withdrawal liability is computed only with respect to the remainder of the original plan that was partitioned.
MPRA Amendments to Withdrawal Liability

- Benefit suspensions for plans in critical and declining status are disregarded for calculating withdrawal liability, unless withdrawal occurs more than 10 years after effective date of suspension.
Mass Withdrawal

- Withdrawal of every employer or cessation of obligation of all employers to contribute to plan
  - Plan terminates under ERISA §4041A(a)(2)
- Withdrawal of substantially all the contributing employers pursuant to an agreement or arrangement to withdraw
  - Plan does not necessarily terminate
Mass Withdrawal

- Employer who withdraws within three plan years of substantially all employers’ withdrawal is presumed to have been part of the arrangement or agreement, unless “the employer proves otherwise by a preponderance of the evidence”
- PBGC opined that “substantially all” may be defined by trustees and that arrangement/agreement to withdraw may be inferred
Mass Withdrawal Liability

- Mass withdrawal liability consists of
  - Redetermination liability, plus
  - Reallocation liability
- Application of either depends on type of
  mass withdrawal and timing of employer’s withdrawal
Redetermination liability

• Redetermination liability
  – Eliminates the *de minimis* rule with respect to employer who withdraws:
    • Pursuant to an agreement or arrangement of substantially all employers to withdraw during a period of one or more years; or
    • In the same year as substantially all employers withdraw
Redetermination Liability

• Eliminates 20-year cap on employer who withdraws:
  – Pursuant to an agreement or arrangement of substantially all employers to withdraw
    • BUT NOT if the employer withdraws *not* pursuant to the agreement or arrangement; or
  – From plan from which all employers withdraw
Redetermination Liability

- Note: PBGC opined that where all employers withdraw, all employers lose the 20-year cap, regardless of when withdrawal occurred, though courts have not ruled on this and statute arguably says otherwise
  - PBGC Op. Ltr. 94-3
Reallocation Liability

- **Reallocation liability** is the allocation of all of a plan’s unfunded vested liability upon a mass withdrawal
  - Determined using PBGC-prescribed interest, mortality, and administrative expense assumptions
  - Determined as of **reallocation record date**, that is, no later than one year after the mass withdrawal valuation date (last day of plan year in which plan terminates or in which substantially all employers withdraw)
Reallocation Liability

- Applies to
  - Employers who withdraw from a plan pursuant to agreement/arrangement to withdraw, and
  - Employers who withdraw from a plan from which all employers withdraw (or contribution obligation ceases) within two plan years preceding the plan’s termination date (earlier of date of last employer withdrawal or first day of plan year for which no contributions are required)
Payment of Mass Withdrawal Liability

- Mass withdrawal liability is payable according to a payment schedule with no 20-year cap, if the employer is subject to redetermination liability
- Employers may end up owing liability forever
- Payments cease when plan distributes all assets in full satisfaction of nonforfeitable benefits
- Even before a mass withdrawal, in settling regular withdrawal liability, employers may seek a release from mass withdrawal liability
Mass Withdrawal Administration

- Detailed notice requirements to employers and PBGC, and, depending on the type of mass withdrawal and the plan’s financial condition, to participants.
- If plan terminates, plan can not pay lump sums (unless valued at $1,750 or less, or based solely on employee contributions), or benefits other than nonforfeitable benefits, as of the plan terminate date, without PBGC approval.
- Plan can also pay QPSA for participants who die after plan termination, as long as assets are not insufficient to pay nonforfeitable benefits.
Mass Withdrawal Administration

• IF assets are less than value of nonforfeitable benefits THEN trustees must reduce benefits that are not subject to PBGC guarantee.

• IF plan becomes insolvent THEN further reductions to the amount guaranteed by PBGC will be necessary, though plan can also apply to PBGC for financial assistance payments.
Pending Legislation: Relief for PBGC

- NCCMP has proposed composite plans:
  - To shield contributing employers from financial risks that could jeopardize viability of their businesses
  - To provide adequate, reliable retirement income but with sharing risk
- MPRA did not include NCCMP’s proposals
- Being discussed now
Pending Legislation: Legacy/Composite Plans

• Existing multiemployer pension funds could be amended:
  – NOT for funds in red zone or red-in-five
  – Current plan becomes legacy plan
  – Composite plan would apply prospectively
    • Defined-benefit features
    • Defined-contribution features

• Employers cannot withdraw from legacy plan within five years of joining composite plan
Pending Legislation: Legacy Plan

• Benefits are frozen upon amendment
• Current funding requirements would apply
  – PPA certifications continue annually
  – MPRA provisions continue
• Contributions to fund legacy benefits continue
  – FIPs and RPs
• Cannot exclude younger/newly hired workers
Pending Legislation:
Legacy Plan

• “Transition minimum contribution” [“TMC”] might be added
  – 25-year amortization (current funding over 15 years)
    • Prior proposal: 30 years
  – Adjusted annually, subject to market/demographic fluctuations
    • Add new 15-year amortization of experience each year
    • But, in event of good experience, not less than original TMC
    • Prior proposal: TMC fixed; not subject to market/demographic fluctuations

• Subject to withdrawal liability
• Subject to PBGC premiums
Pending Legislation: Composite Plan: DB Features

• Benefits are paid as monthly income
  – QJ SA: spousal consent required
• Trustees set plan provisions, *e.g.*,  
  – Eligibility
  – Benefit types and amounts:
    • Normal, early, disability, death
• Vesting required
Pending Legislation:
Composite Plan: DC Features

- Contribution rates bargained between employers and union
- No withdrawal liability
- No PBGC premiums—or guarantees
- Benefits are *adjustable*
  - Goal is to maintain full funding
Pending Legislation: Composite Plan: Funding

- Must be projected to reach 120% funding within 15 years; otherwise, adopt realignment program with 3 tiers of remedies
Pending Legislation: Composite Plan: Realignment

– Tier 1
  • Ask for, but not demand, additional contributions
  • Reduce future accruals but not less than 1% of contributions
  • Reduce adjustable benefits not in pay status

– Tier 2
  • Reduce accrued benefits for non-retirees
  • Reduce adjustable benefits in pay status

– Tier 3
  • Reduce future accruals below 1% of contributions
  • Reduce accrued benefits for retirees
    – Not subject to minimums, federal approval, participant vote
    – Could disappear entirely?
Trustees have a requirement to monitor events triggering partial withdrawals.

Hybrid method requires immediate payment of withdrawal liability plus new-pool contributions with limited withdrawal liability exposure for the future.

Assure your funds are abiding by new PPA and MPRA rules when assessing withdrawal liability.

Mass withdrawal can be long, arduous process.

Stay tuned for developments on proposed legislation.

- Consider becoming involved.

Website Resources
https://www.ifebp.org/inforequest/ifebp/0165998.pdf
https://www.ifebp.org/inforequest/ifebp/0166665.pdf
2017 Educational Programs

Pensions

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

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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February 20-22, 2017
Lake Buena Vista (Orlando), Florida
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San Diego, California
www.ifebp.org/trusteesadministrators

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