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# **Multi-Employer Pension Plan Withdrawal Liability**

by

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# *Multi-Employer Pension Plan Withdrawal Liability*

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## Table of Contents

I.	OVERVIEW OF WITHDRAWAL LIABILITY.....	11.1
II.	DETERMINATION OF WHETHER A WITHDRAWAL HAS OCCURRED.....	11.2
	A. Complete Withdrawal. ERISA § 4203(a).....	11.2
	B. Partial Withdrawal. ERISA § 4205.....	11.2
	C. Special Rules for Construction Industry. ERISA § 4203(b).....	11.3
	D. Special Rules for Trucking Industry. ERISA § 4203(d).....	11.3
	E. Definition of an “Employer” for Withdrawal Liability Purposes. ERISA § 4001(b)(1).....	11.4
	F. Mass Withdrawal Liability.....	11.5
III.	CALCULATION OF WITHDRAWAL LIABILITY.....	11.6
	A. Methods for Computing Withdrawal Liability. ERISA § 4211.....	11.6
	B. Presumptive Method. ERISA § 4211(b).....	11.6
	C. Reduction Under the <i>de Minimis</i> Rule. ERISA § 4209.....	11.7
	D. Partial Withdrawal. ERISA § 4206.....	11.8
IV.	PAYMENT OF WITHDRAWAL LIABILITY.....	11.8
	A. Information to Be Furnished by Employer. ERISA § 4219(a).....	11.8
	B. Notice and Collection of Withdrawal Liability by Plan Sponsor. ERISA § 4219(b)(1).....	11.8
	C. Payment Schedule Formula. ERISA § 4219(c)(1)(C).....	11.8
	D. Length of Payments: Twenty-Year Payment Cap. ERISA § 4219(c)(1)(B).....	11.9
	E. Commencement of Withdrawal Liability Payments. ERISA §§ 4219(c)(2) and (3).....	11.9
	F. Prepayment of Withdrawal Liability. ERISA § 4219(c)(4).....	11.10
	G. Default. ERISA § 4219(c)(5).....	11.10
	H. Deductibility of Withdrawal Liability Payments. I.R.C. § 404(g).....	11.10
	I. Refund of Withdrawal Liability Overpayments. ERISA § 403(c)(2)(A)(ii).....	11.10
V.	RESOLUTION OF DISPUTES CONCERNING WITHDRAWAL LIABILITY.....	11.11
	A. Request for Review of Plan Sponsor’s Determinations. ERISA § 4219(b)(2).....	11.11
	B. Arbitration Proceeding. ERISA § 4221.....	11.11
	C. Payments During Arbitration Period. ERISA §§ 4221(b)(1) and (d).....	11.12
	D. Preservation of Rights by Employer.....	11.12
VI.	LIABILITY FOR WITHDRAWAL LIABILITY.....	11.12
	A. Common Control.....	11.12
	B. Personal Liability.....	11.13
	C. Voluntary Assumption of Withdrawal Liability by Purchaser of Assets. ERISA § 4204.....	11.14
	D. Potential Liability of Purchaser of Assets.....	11.15
	E. Employer Sale of Assets Limitation. 29 U.S.C. §1405(a).....	11.16
	F. Employer Insolvency Limitation.....	11.16
	G. Statute of Limitations.....	11.16
VII.	THE PENSION PROTECTION ACT OF 2006 (“PPA”): CHANGES TO MULTI-EMPLOYER PENSION PLANS.....	11.17
	A. PPA Modified the Funding Provisions of ERISA for Pension Plans.....	11.17
	B. Withdrawal Liability Changes.....	11.19
	Model Letter Requesting Amount of Withdrawal Liability.....	11.20

# *Multi-Employer Pension Plan Withdrawal Liability*

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## **I. OVERVIEW OF WITHDRAWAL LIABILITY**

- A. The Multi-employer Pension Plan Amendment Act of 1980 ("MPPAA") amended the Employee Retirement Income Security Act of 1974 ("ERISA"), to impose liability for a share of the unfunded vested benefits of multi-employer defined benefit pension plans on employers who withdraw from such plans. MPPAA was amended by the Pension Protection Act of 2006 ("PPA").
- B. Under MPPAA when an employer withdraws from a multi-employer defined benefit pension plan which has unfunded vested benefits, the employer is generally liable to the pension plan for a share of the unfunded vested benefits in an amount determined under MPPAA.
- C. Questions to ask in a merger or acquisition:
  - 1. Is there a collective bargaining agreement?
  - 2. Does the employer contribute to a pension plan on behalf of union employees?
  - 3. Is the pension plan a multi-employer plan or a single employer plan?
  - 4. If it is a multi-employer plan, is it a defined benefit plan or a defined contribution plan?
  - 5. If the plan is a multi-employer defined benefit plan, is it underfunded and is there a withdrawal liability?
  - 6. If there is a withdrawal liability:
    - a. A sale of assets may trigger withdrawal liability for the seller.
    - b. A purchase of stock may result in an assumption of the potential withdrawal liability as a contingent liability of the buyer.

## II. DETERMINATION OF WHETHER A WITHDRAWAL HAS OCCURRED

### A. Complete Withdrawal. ERISA § 4203(a).

A complete withdrawal from a multi-employer plan occurs when an employer:

1. Permanently ceases to have an obligation to contribute under the plan; or
2. Permanently ceases all covered operations under the plan.

The date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

### B. Partial Withdrawal. ERISA § 4205.

A partial withdrawal from a multi-employer plan occurs on the last day of a plan year in which there is either (1) a seventy percent decline in contribution base units; or (2) a partial cessation of the employer's contribution obligation.

#### 1. Seventy percent contribution decline.

A seventy percent decline in contribution base units occurs if, during the plan year and each of the preceding two plan years (the three-year testing period), the number of contribution base units (the units upon which contributions to the plan are based, such as "hours worked" or "weeks worked") for which the employer was required to make plan contributions did not exceed thirty percent of the number of contribution base units for the "high base year." The "high base year" is determined by averaging the employer's contribution base units for the two plan years for which such units were the highest within the five plan years preceding the three year testing period.

#### 2. Partial cessation of an employer's contribution obligation. A partial cessation occurs in either of the following situations:

##### a. A "bargaining unit take-out."

If an employer who is required to contribute to a plan under two or more collective bargaining agreements ceases to have an obligation to contribute under at least one but not all of the agreements, but continues work in the jurisdiction of the agreement of the type for which contributions were previously required or transfers such work to another location.

##### b. A "facility take-out."

If an employer permanently ceases to have an obligation to contribute under the plan for work performed at one or more but fewer than all of its facilities covered under the plan, but continues to perform work at the facility of the type for which the obligation to contribute ceases.

C. Special Rules for Construction Industry. ERISA § 4203(b).

The construction industry is afforded a partial exemption from the employer withdrawal liability rules. Generally, a construction industry employer will be permitted to withdraw from a plan without incurring any liability, unless it continues to perform work in the covered area of the sort performed by the covered employees. The special rules apply to an employer contributing to a plan only if substantially all of the employees for whom the employer has an obligation to contribute perform work in the building and construction industry. In addition, the plan must (a) cover primarily employees in the building and construction industry; or (b) be amended to provide that the rules apply to employers with an obligation to contribute for work performed in the building and construction industry.

1. Complete withdrawal.

For plans and employers that qualify for the construction industry exception, a complete withdrawal occurs only if the employer ceases to have an obligation to contribute to the plan, and, in addition, either (a) continues to perform the same or similar work (*i.e.*, work of the type for which contributions were previously required) in the jurisdiction of the collective bargaining agreement; or (b) resumes such work within five years after the cessation of the obligation to contribute, and does not renew the obligation at the time of the resumption.

2. Partial withdrawal.

Under the construction industry exception, a partial withdrawal occurs only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of the potentially covered work which the employer performs in the craft and area jurisdiction of the collective bargaining agreement. According to the Joint Committee Explanation, a partial withdrawal occurs only when an employer has substantially shifted its work mix in the jurisdiction so that only an insubstantial part of such work in the jurisdiction is covered.

D. Special Rules for Trucking Industry. ERISA § 4203(d).

A limited exemption applies to plans in which substantially all the contributions are made by employers in the long and short-haul trucking industry, the household goods moving industry, or the public warehousing industry. In *Continental Can Company, Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F.2d 1154 (7th Cir. 1990), the U.S. 7th Circuit Court of Appeals ruled that the term "substantially all" for purposes of the trucking industry exception means that at least 85% of the contributions to the plan are made by employers who are primarily engaged in the specific industries.

An employer primarily engaged in such work who ceases to perform work within the geographical area covered by the plan will be considered to have completely withdrawn from the plan only if the employer permanently ceases to have an

obligation to contribute under the plan or permanently ceases all covered operations under the plan, and either:

1. The PBGC determines that the cessation has caused substantial damage to the plan's contribution base, or
2. The employer fails to post a bond or put an amount in escrow equal to fifty percent of its potential withdrawal liability.

If, after the employer posts the bond or escrow, the PBGC determines that the employer's cessation has substantially damaged the plan, the entire bond or escrow is to be paid to the plan. In such case, the employer will be considered to have withdrawn from the plan on the date that the cessation occurred and the employer will be liable for the remainder of the withdrawal liability in accordance with the usual withdrawal liability rules. In determining whether substantial damage has been done to the plan, the PBGC will consider the employer's cessation in the aggregate with any cessations by other employers.

The time period for the PBGC to make its determination cannot exceed sixty months after the date on which the obligation to contribute for covered operations ceased. After that time, the bond will be cancelled or the escrow returned, and the employer will have no further liability. The PBGC has authority to order the bond cancelled or the escrow returned at any time within the sixty-month period upon a determination that the employer's cessation of contributions (considered together with cessations of other employers) has not substantially damaged the plan.

It is important to note that the trucking industry exception does not automatically apply to every plan covering employees in the trucking industry. For example, the Teamsters Central States, Southeast and Southwest Areas Pension Fund is *not* considered to be a trucking industry plan to which the special rules apply. Therefore, an employer must check with the particular pension fund under which its trucking or warehouse employees are covered to determine whether the trucking industry rules are applicable to such pension fund.

E. Definition of an "Employer" for Withdrawal Liability Purposes. ERISA § 4001(b)(1).

For purposes of Title IV of ERISA, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such commonly controlled trades and businesses are treated as a single employer. In Opinion Letter No. 82-13 issued by the Pension Benefit Guarantee Corporation (PBGC), the PBGC stated that the term "employer" as defined in § 4001(b) applies for all purposes under Title IV of ERISA, including a determination by a multi-employer pension plan of whether a complete or partial withdrawal has occurred. The PBGC also stated that all members of a controlled group of corporations are responsible for the withdrawal liability attributable to one of the controlled group members.

The regulations issued under § 414(c) of the Internal Revenue Code define a controlled group of corporations for all purposes under Title IV of ERISA, including multi-employer pension plan withdrawal liability. A brother-sister controlled group is defined as two or more organizations conducting trades or

businesses if (1) the same five or fewer persons own, singly or in combination, a controlling interest (defined as at least eighty percent of the voting power or total value of stock) of each organization; and (2) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control (defined as more than fifty percent of the voting power or value of the stock) of each organization. IRC §§ 414(b) and (c), 1563(a).

F. Mass Withdrawal Liability.

1. A multi-employer pension plan can terminate due to the "mass withdrawal" of all contributing employers. 29 U.S.C. §1341a(a)(2). A "mass withdrawal" means:
  - a. the withdrawal of every employer from the plan,
  - b. the cessation of the obligation of all employers to contribute under the plan, or
  - c. the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw.

29 C.F.R. §4001.2; 29 U.S.C. §1341a(a)(2).
2. A plan which terminates due to a mass withdrawal is subject to a notice and substantive obligations, including possible benefit reduction or suspension. 29 U.S.C. §1441; 29 C.F.R. §§4041A and 4268.
3. Employers involved in a mass withdrawal not only have to pay the "initial" withdrawal liability as outlined above, but also must pay the amounts which would otherwise be excluded under the *de minimis* and 20-year limitation provisions. 29 U.S.C. §§1389(c), 1399(c)(1)(D); 29 C.F.R. §§4219.11, 4219.12.
4. Further, employers who withdraw within three years of a mass withdrawal are presumed to have withdrawn pursuant to an agreement or arrangement to withdraw and may be liable for reallocation liability. This presumption may be rebutted by a preponderance of the evidence. 29 U.S.C. §§1389(d), 1399(c)(1)(D); 29 C.F.R. §4219.12(g). Reallocation liability is an amount of UVBs which are not otherwise collected or collectible by the pension plan, such as amounts uncollectible due to the bankruptcy of employers.
5. From the mass withdrawal or termination of the plan due to a mass withdrawal, a sequence of deadlines for computing and giving notice of liability occur under the regulations (29 C.F.R. §4219). This can be a lengthy period of time, extending over one year after the mass withdrawal occurs.

6. Any additional amounts owed due to a mass withdrawal are either added into the employer's withdrawal liability payment schedule or, if the employer has no withdrawal liability payments, a new payment schedule is established in the same manner as an initial withdrawal liability payment schedule. 29 C.F.R. §4219.16(f).
7. The review and arbitration procedures for withdrawal liability (discussed below) also apply to mass withdrawal liability determinations. 29 C.F.R. §4219.16(g). If the plan sponsor later determines that a mass withdrawal has not occurred, then withdrawal liability payments and interest must be refunded to employers. 29 C.F.R. §4219.16(i).

### **III. CALCULATION OF WITHDRAWAL LIABILITY**

#### **A. Methods for Computing Withdrawal Liability. ERISA § 4211.**

The Multi-employer Pension Plan Amendments Act of 1980 established a “presumptive method” for computing and allocating withdrawal liability. The Act also provides several alternative methods upon which plans may compute withdrawal liability. However, the presumptive method will generally apply unless a plan specifically adopts one of the alternative methods. Multi-employer plans which primarily cover employees in the building and construction industry were required to use the presumptive method prior to 2007.

#### **B. Presumptive Method. ERISA § 4211(b).**

The presumptive method for computing withdrawal liability distinguishes between employers who contributed to a plan for a plan year ending prior to September 26, 1980, and employers who have only contributed for plan years ending on or after such date. Withdrawing employers who contributed to a multi-employer plan subsequent to September 25, 1980 must fund a share of the increase in the plan’s “unfunded vested benefits” (the amount by which the plan’s vested [non-forfeitable] benefits exceed the plan’s assets) which occurred during the period for which the employer was required to contribute to the plan. Employers who were required to contribute to a multi-employer plan for plan years ending prior to September 26, 1980, and who subsequently withdraw from the plan, must also fund a share of the plan’s unfunded vested benefits for the years prior to September 26, 1980 during which such employers were required to contribute to the plan.

Withdrawal liability under the presumptive method is a combination of three factors:

1. The employer’s proportional share (unamortized amount) of the change in unfunded vested benefits for plan years ending after September 25, 1980, during which the employer was obligated to contribute under the plan; and
2. The employer’s proportional share (if any) of the unamortized amount of the unfunded vested benefits for the plan years ending prior to September 26, 1980 (applicable only to employers who were obligated to

contribute to the plan for plan years ending prior to September 26, 1980); and

3. The employer's proportional share of the plan's reallocated unfunded vested benefits (if any).

The "reallocated unfunded vested benefits" for a given plan year equal the sum of the amounts which the plan sponsor determines during such year (1) to be uncollectible from an employer due to bankruptcy or similar proceedings; (2) will not be assessed because of the *de minimis* rules (discussed below), the twenty-year payment cap (discussed below), or certain dollar limitations applicable to insolvent employers, non-corporate employers, and asset sales to unrelated parties; and (3) to be uncollectible or unassessable for other reasons which are not inconsistent with regulations prescribed by the PBGC.

An individual employer's percentage share of the plan's total unfunded vested benefits is basically equivalent to the ratio between the employer's contributions to the plan and the total contributions made to the plan by all employers for the same period. For example, an employer who contributes one percent of the total contributions made to the plan will have a withdrawal liability equal to approximately one percent of the plan's unfunded vested benefits.

C. Reduction Under the *de Minimis* Rule. ERISA § 4209.

An employer's withdrawal liability will be reduced by the lesser of (1) \$50,000; or (2) three-fourths of one percent of the plan's unfunded vested benefits determined as of the end of the most recent plan year ending before the date of withdrawal. The amount offset under the *de minimis* rule is reduced, dollar-for-dollar, as an employer's withdrawal liability, determined without regard to the *de minimis* rule, exceeds \$100,000. Therefore, the exemption under the *de minimis* rule is only applicable when an employer's withdrawal liability is less than \$150,000.

Examples (assuming that three-fourths of one percent of the plan's unfunded vested benefits exceed \$50,000):

1. Withdrawal liability of \$45,000 would be reduced to \$0;
2. Withdrawal liability of \$75,000 would be reduced by \$50,000 and final liability would be \$25,000;
3. Withdrawal liability of \$110,000 would be reduced by \$40,000 and final liability would be \$70,000; and
4. Withdrawal liability of \$150,000 would not be reduced at all.

A Plan may be amended by the plan trustees to provide for the use of a "discretionary" *de minimis* rule, in lieu of the "mandatory" *de minimis* rule discussed above. Under the discretionary rule, an employer's withdrawal liability will be reduced by the greater of (1) the amount of the reduction determined under the mandatory *de minimis* rule; or (2) the lesser of (a) three-fourths of one percent

of the plan's unfunded vested benefits determined as of the close of the most recent plan year ending before the date of withdrawal; or (b) 100,000. The amount offset under the discretionary *de minimis* rule is reduced, dollar-for-dollar, as an employer's withdrawal liability, determined without regard to the *de minimis* rule, exceeds \$150,000.

If the discretionary *de minimis* rule is adopted by a plan, the mandatory *de minimis* rule will not be applied separately (*i.e.*, the discretionary and mandatory rules cannot be used together to produce a double reduction). If a plan does not adopt the discretionary *de minimis* rule, the mandatory *de minimis* rule will automatically apply. Several large multi-employer plans have adopted the discretionary rule.

D. Partial Withdrawal. ERISA § 4206.

An employer's withdrawal liability for a partial withdrawal is a *pro rata* portion of the liability the employer would have incurred for a complete withdrawal. The partial withdrawal adjustment reflects the decline in the withdrawing employer's contribution base units and is applied to withdrawal liability after the application of the twenty-year payment cap or other special limitations on the amount of withdrawal liability.

The precise method of computing the partial withdrawal adjustment depends on whether the partial withdrawal resulted from a seventy percent decline in contribution base units or from a partial cessation of an employer's contribution.

#### IV. PAYMENT OF WITHDRAWAL LIABILITY

A. Information to Be Furnished by Employer. ERISA § 4219(a).

An employer withdrawing from a multi-employer pension plan must, within thirty days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to comply with its duties in computing and collecting withdrawal liability.

B. Notice and Collection of Withdrawal Liability by Plan Sponsor. ERISA § 4219(b)(1).

1. As soon as practicable after an employer's complete or partial withdrawal from a multi-employer pension plan, the plan sponsor must notify the employer of (1) the amount of withdrawal liability; and (2) the payment schedule for such liability payments. The plan sponsor must demand that withdrawal payments be made in accordance with the payment schedule.

2. An assessment of withdrawal liability is mandatory under ERISA § 4201.

C. Payment Schedule Formula. ERISA § 4219(c)(1)(C).

The payment schedule under which the withdrawing employer is required to pay its withdrawal liability is determined by the plan sponsor pursuant to the following formula:

Annual amount of withdrawal liability payment equals

Average annual number of contribution base units ( <i>e.g.</i> , hours worked or weeks worked) for the three consecutive plan years during the ten consecutive plan year period ending before the plan year in which the withdrawal occurs in which the number of contribution base units for which the employer had an obligation to contribute under the plan were the highest.	X	Highest contribution rate ( <i>e.g.</i> , cents per hour or dollars per week) at which the employer had an obligation to contribute under the plan during the ten plan years ending with the plan year in which the withdrawal occurs.
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The amount determined under this formula is the level annual payment which is to be paid over a period of years necessary to amortize the liability, subject to the twenty-year payment cap discussed below.<sup>1</sup>

D. Length of Payments: Twenty-Year Payment Cap. ERISA § 4219(c)(1)(B).

The employer is required to make level annual payments to the pension plan for the lesser of (1) the number of years it would take to amortize its withdrawal liability (determined under the actuarial and interest assumptions used in the most recent actuarial valuation of the plan); or (2) twenty years. In other words, the employer's liability shall be limited to the first twenty annual payments as determined above.

The twenty-year payment cap does not apply if a multi-employer pension plan terminates due to the withdrawal of all employers from the plan or if substantially all of the employers withdraw under an agreement or arrangement to withdraw. In such a case, the total unfunded vested benefits of the plan are allocated to all employers under PBGC Regulation § 2676.<sup>2</sup>

E. Commencement of Withdrawal Liability Payments. ERISA §§ 4219(c)(2) and (3).

Payment of withdrawal liability must begin no later than sixty days after the date on which the plan sponsor demands payment, notwithstanding any request for review or appeal of the determination of the amount of the liability or the payment schedule. Payments are to be made in four equal quarterly installments unless the plan specifies other intervals. If a payment is not made when due, interest will accrue on the unpaid amount based on the prevailing market rate.

The U.S. Supreme Court has held that interest on an employer's amortized charge for withdrawal liability begins to accrue on the first day of the plan year following

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<sup>1</sup> Department of Labor Opinion No. 90-2 (April 20, 1990) states that the Trustees may calculate the amount of the annual payment of withdrawal liability by applying the formula described above on a contract-by-contract basis rather than using a cumulative approach. In other words, an employer's annual withdrawal liability payment would equal the sum of the payments computed separately for each of the employer's contracts.

<sup>2</sup> See also PBGC Regulation § 2640.7 for definitions for withdrawal liability upon mass withdrawal.

withdrawal.<sup>3</sup> Rejecting an argument that interest should begin to accrue on the last day of the plan year preceding withdrawal, the Supreme Court reasoned that one does not pay interest on a debt until the debt arises. Under ERISA § 4211, withdrawal liability is treated as arising on the first day of the plan year following withdrawal since the calculation of payments treats the “first payment” as if it were made on the first day of the year following withdrawal.

F. Prepayment of Withdrawal Liability. ERISA § 4219(c)(4).

The employer is entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments, plus accrued interest, if any, in whole or in part, without penalty.

G. Default. ERISA § 4219(c)(5).

If an employer defaults in payment of its withdrawal liability, the plan sponsor may require immediate payment of the balance of the employer’s withdrawal liability plus any accrued interest from the due date of the first payment which was not timely made. Default occurs if the employer fails to make any payment of its withdrawal liability when due and then fails to make payment within sixty days after receiving written notice from the plan sponsor of such failure. A plan may also adopt rules defining other instances of default where it is indicated that there is a substantial likelihood that an employer will be unable to pay its withdrawal liability.

H. Deductibility of Withdrawal Liability Payments. I.R.C. § 404(g).

Any amount paid by an employer as a withdrawal liability payment will be deductible as an employer contribution under I.R.C. § 404 (which considers amounts paid by an employer under Part 1 of Subtitle E of Title IV of ERISA as a contribution) to a stock bonus, pension, profit-sharing, or annuity plan.

I. Refund of Withdrawal Liability Overpayments. ERISA § 403(c)(2)(A)(ii).

Permits the return of payments made by a mistake of fact or law to an employer from a multi-employer plan within six months after the date the plan administrator determines that such a mistake has occurred. ERISA § 403(c)(3) permits the return of withdrawal liability payments determined to be overpayments within six months after the date of such determination. The plan administrator may make refund payments to an employer under ERISA §§ 403(c)(2)(A)(ii) or 403(c)(3) without review or arbitration initiated under ERISA §§ 4219 or 4221.<sup>4</sup>

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<sup>3</sup> Milwaukee Brewery Workers’ Pension Plan v. Joseph Schlitz Brewing Company, 115 S. Ct. 981 (1995).

<sup>4</sup> Department of Labor Opinion No. 95-24A (Sept. 8, 1995).

## V. RESOLUTION OF DISPUTES CONCERNING WITHDRAWAL LIABILITY

### A. Request for Review of Plan Sponsor's Determinations. ERISA § 4219(b)(2).

An employer may request that the plan sponsor review any specific matter relating to the determination of the employer's withdrawal liability and schedule of payments within ninety days after the employer receives the initial notice and demand for payment of its liability. During the ninety-day period, the employer may identify any inaccuracies in the determination of the amount of the employer's withdrawal liability and furnish the plan sponsor with any additional relevant information.

The plan sponsor must conduct a reasonable review of any matter raised and notify the employer of (1) its decision; (2) the basis for its decision; and (3) the reason for any change in the determination of the employer's liability or schedule of liability payments.

### B. Arbitration Proceeding. ERISA § 4221.

Any dispute between an employer and the plan sponsor relating to withdrawal liability is to be resolved through an arbitration proceeding. Either party may initiate the arbitration proceeding within a sixty day period following the earlier of (1) the date the plan sponsor notifies the employer of its decision after a reasonable review of any matter raised under ERISA § 4219(b)(2)(B); or (2) 120 days after the employer requests a review of the plan sponsor's determination of withdrawal liability under ERISA § 4219(b)(2)(A). The plan sponsor and the employer may jointly initiate arbitration within a 180-day period following the date of the plan sponsor's initial notice of withdrawal liability and demand for payment.

For purposes of the arbitration proceeding, ERISA § 4221(a)(3)(B) states that any determination of withdrawal liability or of liability payments by a plan sponsor will be presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the actuarial assumptions or methods used in the determination were, in the aggregate, unreasonable. The U.S. Supreme Court has affirmed (by an equally divided Court) a decision holding that the presumption favoring the correctness of multi-employer pension fund trustees' withdrawal liability determinations is unconstitutional. *PBGC v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), affirmed 481 U.S. 735 (1987).<sup>5</sup> However, in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264 (1993), the Supreme Court skirted this issue while referring to ERISA § 4221(a)(3)(B) as "incoherent" and "ambiguous" and stated that a statute should be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress' intent. Thus, the Supreme Court interpreted ERISA § 4221(a)(3)(B) such that the presumption is construed to place the burden on the employer to disprove the trustees' factual determinations by a preponderance of the evidence. The Supreme

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<sup>5</sup> The companion case of *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan, et al v. Yahn & McDonnell, Inc., et al*, No. 86-253 was decided and cited with *PBGC v. Yahn & McDonnell, Inc.*

Court further stated that MPPAA does not violate an employer's due process rights or its Fifth Amendment rights.

Within thirty days after the issuance of the arbitrator's award, any party to the arbitration proceeding may bring an action in U.S. District Court to enforce, vacate, or modify the arbitrator's award. In the court proceeding, there is a rebuttable presumption that the arbitrator's findings of fact were correct.

C. Payments During Arbitration Period. ERISA §§ 4221(b)(1) and (d).

Pending resolution of the dispute and during arbitration, the employer is required to pay withdrawal liability payments in accordance with the determinations made by the plan sponsor. Subsequent payments will be adjusted for any overpayments or underpayments arising out of the arbitrator's decision on the determination of withdrawal liability. If the employer fails to make timely payment in accordance with the arbitrator's final decision, the employer will be treated as being delinquent in making a required plan contribution and could be liable for interest or liquidated damages.

If no arbitration proceeding is initiated, the amounts demanded by the plan sponsor will be due and owing on the payment schedule issued by the plan sponsor. The plan sponsor may bring an action in a state or federal court of competent jurisdiction for collection.

Notwithstanding the provisions cited above, several federal district court decisions have granted temporary restraining orders barring plan sponsors from collecting withdrawal liability payments pending resolution of disputes concerning such liability. It should be noted, however, that other federal court decisions have upheld the plan sponsor's right to receive payments pending resolution of disputes.

D. Preservation of Rights by Employer.

It is critically important that an employer take immediate action to preserve its rights if it receives a notice of withdrawal liability from a multi-employer plan. If the employer fails to request a review of the plan sponsor's determinations (*see* IV.A. above) and does not request arbitration within the appropriate time periods (*see* IV.B. above), the employer may have waived all of its rights to challenge the assessment of the withdrawal liability.<sup>6</sup>

## VI. LIABILITY FOR WITHDRAWAL LIABILITY

A. Common Control.

To establish a "single employer" for purposes of determining withdrawal liability, the entities involved must be under common control. Common control is defined in I.R.C. § 414(c) and includes parent-subsidiary and brother-sister organizations.

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<sup>6</sup> *Trustees of Colorado Pipe Industry Pension Trust v. Howard Elec. & Mechanical Inc.*, 909 F.2d 1379 (10th Cir. 1990).

Courts have held that the businesses need not be economically related to satisfy the common control test. Thus, the sole owners of corporations who were also sole proprietors of real estate activities<sup>7</sup>, leasing and consulting services<sup>8</sup>, or real estate leasing activities<sup>9</sup> have been found to satisfy the common control test and the sole proprietors have been held liable for the withdrawal liability of the commonly controlled corporations.

## B. Personal Liability.

Personal liability of shareholders, officers and directors for pension liabilities may be established by courts in cases where the corporate veil can be pierced. Whether a corporate veil may be pierced is an issue of state law.

In *Scarborough v. Perez*, 870 F.2d 1079 (6<sup>th</sup> Cir. 1989), the Sixth Circuit held that the owner-operator of a company was not liable for withdrawal liability payments since ERISA does not provide for personal liability. The Court explained that personal liability would discourage controlling shareholders and officers from directing their corporations to contribute to multi-employer pension plans. Moreover, the Court noted that “when Congress wants to disregard the fact of incorporation, it knows how to say so.”<sup>10</sup>

In *Trustees of Asbestos Workers’ Local Union No. 25 Insurance Trust Fund, v. Metro Insulators, Inc.*, 902 F.2d 1569 (6<sup>th</sup> Cir. 1990), the Trustees sued Metro Insulators, Inc. (“Metro”) for unpaid fringe benefit contributions owed to the Trust fund. The Trustees alleged that Metro’s sole shareholder, officer and director was also liable for the unpaid contributions. The Sixth Circuit noted that, although the sole shareholder was the legal owner of Metro, he was not statutorily defined<sup>11</sup> as an “employer,” responsible for making the contributions to the benefit plan. Thus, where a court is without justification for piercing the veil separating a corporate employer from its owner-executive, the owner-executive should not be personally liable for the corporation’s delinquent contributions. (Citing *International Brotherhood of Painters v. George A. Kracager, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) which concluded that Congress did not intend to impose personal liability on a shareholder or high ranking officer of a corporation for ERISA contributions owed by the corporation.)

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<sup>7</sup> *Central States, Southeast and Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7<sup>th</sup> Cir. 1992).

<sup>8</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Koder*, 969 F.2d 451 (7<sup>th</sup> Cir. 1992).

<sup>9</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7<sup>th</sup> Cir. 1992).

<sup>10</sup> See also *Central States Southeast & Southwest Areas Pension Fund v. Johnson*, 991 F.2d 387 (7<sup>th</sup> Cir. 1993). In this case, the Trustees sued an individual for multi-employer withdrawal liability. In its decision, the court stated that:

although Congress did not preclude the possibility of individual liability under MPPAA, it also did not design a broad scheme of attaching personal liability in all cases where pension debts go unsatisfied. Congress did not, for example, generally authorize pension funds to disregard the corporate form and hold shareholders directly responsible for unfulfilled ERISA obligations.

<sup>11</sup> ERISA § 3(5).

However, in *Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702 (6<sup>th</sup> Cir. 1988), the Sixth Circuit held that the corporate veil of a dissolved corporate employer could be pierced where the corporate form was not followed and the shareholder was held liable under ERISA for the corporation's failure to properly fund employee benefit packages.

Similarly, in *Sasso v. Cervoni*, 985 F.2d 49 (2d Cir. 1993), the Court considered the circumstances under which a corporate officer may be personally liable for pension contributions owed by a corporation. The defendant was the sole officer, director and shareholder of a bankrupt corporation. The Second Circuit stated that there may be special circumstances which could warrant the imposition of personal liability for a corporation's ERISA obligations. For example, an individual corporate officer may be liable for ERISA obligations upon evidence that the officer acted in concert with fiduciaries in breaching fiduciary obligations, intermingled assets of the corporation with personal assets or assets of related corporations and used corporate assets for personal benefit instead of meeting ERISA obligations. Further, a corporate officer may be liable for the ERISA obligations of his corporation where he has been convicted of engaging in a criminal conspiracy to defraud the funds of owed contributions.

Finally, it has been held that sole proprietorships may be considered "employers" under the common control rules of IRC §414(c) for purposes of determining withdrawal liability, and, therefore, making the sole proprietor himself personally liable for the outstanding withdrawal liability. For example, in *Board of Trustees v. Lafrenz*, 837 F.2d 892 (CA9 Wash. 1988), a suit was brought by the trustees of a multiemployer pension plan to collect outstanding withdrawal liability from the owners of a truck leasing company. The court held that for purposes of determining withdrawal liability, a husband and wife could be considered employers based on their status as the sole proprietors of an unincorporated trade or business under common control. Because sole proprietors are not shielded from personal liability, the husband and wife were held personally liable for purposes of assessing withdrawal liability.

- C. Voluntary Assumption of Withdrawal Liability by Purchaser of Assets. ERISA § 4204.
  - 1. An employer selling assets to an unrelated third party purchaser is relieved of primary withdrawal liability if certain conditions are satisfied.
    - a. The purchaser assumes substantially the same contribution obligation that the seller had prior to the sale;
    - b. The purchaser posts a bond for five years equal to the greater of:
      - i. The average annual contribution required to be made by the seller for the three plan years prior to the plan year in which the sale of assets occurs; or
      - ii. The annual contribution that the seller was required to make for the last plan year prior to the sale of assets.

- c. The contract of sale provides that the seller is secondarily liable if the purchaser completely or partially withdraws during the five-year period following the sale and the purchaser fails to pay its withdrawal liability.
2. If the purchaser withdraws after the sale, the determination of the purchaser's liability takes into account the seller's required contribution for the year of the sale and the four preceding plan years. ERISA § 4204(b)(1).
3. If the seller distributes all or substantially all of its assets or liquidates before the expiration of the five-year period, the seller must post a bond or establish an escrow account equal to the present value of the withdrawal liability that the seller would have had but for the application of ERISA § 4204. ERISA § 4204(a)(3).

#### D. Potential Liability of Purchaser of Assets.

A purchaser of the assets of an employer which has outstanding withdrawal liability payments may be held liable for such payments as a successor if (1) the purchaser had notice of the claim before the acquisition; and (2) there was "substantial continuity in the operation of the business before and after the sale."<sup>12</sup> In *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7<sup>th</sup> Cir. 1990), the Seventh Circuit held that a corporate entity that made an arm's length purchase of the assets of a company was a "successor employer" under ERISA and responsible for the predecessor's delinquent contributions.<sup>13</sup>

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<sup>12</sup> *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995).

<sup>13</sup> The Seventh Circuit found the following facts to be significant:

- (1) The successor employed substantially all of the predecessor's work force and supervisory personnel;
- (2) The successor used the predecessor's plant, machinery and equipment and manufactured the same products;
- (3) The successor completed work orders not completed by predecessor prior to termination;
- (4) The successor agreed to honor warranty claims for goods sold by predecessor;
- (5) Several of the predecessor's vice-presidents stayed in the same position under the successor's management.

*Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1329 (7th Cir. 1990).

See also *Central States, Southeast and Southwest Areas Pension Fund v. Hayes*, 789 F. Supp. 1430 (N.D. Ill. 1992) (In addition to the factors noted above, the Court found the successor's use of the predecessor's bank account and holding itself out to the public as the predecessor for at least the first two months of operations to be indicia of successor liability.); *Stotter Division of Graduate Plastics Co., Inc. v. District 65, United Auto Workers, AFL-CIO*, 991 F.2d 997 (2d Cir. 1993) (one of the facts that the Court found compelling was the crediting by the successor of vacation benefits and sick leave to employees on the basis of their time employed by both the predecessor and successor).

- E. Employer Sale of Assets Limitation. 29 U.S.C. §1405(a).
1. Withdrawal liability of employers who sell all or substantially all of their operating assets is limited by 29 U.S.C. §1405(a) (ERISA §4225(a)).
  2. In the case of a bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of 29 U.S.C. §1384(d)), a graduated schedule limits the employer's liability to 30% of the liquidation or dissolution value of the employer if such value is \$5,000,000 or less up to a maximum of 80% of such value if the value exceeds \$25,000,000.

F. Employer Insolvency Limitation.

Unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution. 29 U.S.C. §1405(b).

1. Insolvency of employer; liquidation or dissolution of employer.
  - a. An employer is insolvent if the liabilities of the employer, including withdrawal liability under the plan (determined without regard to §1405(b)), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and
  - b. The liquidation or dissolution value of the employer shall be determined without regard to such withdrawal liability.
2. In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of:
  - a. 50% of the unfunded vested benefits allocable to the employer (determined without regard to this section), and
  - b. that portion of 50% of the unfunded vested benefits allocable to the employer (as determined under paragraph a.) which does not exceed the liquidation or dissolution value of the employer determined:
    - i. as of the commencement of liquidation or dissolution, and
    - ii. after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph a.

G. Statute of Limitations.

1. ERISA §4301(f)(1) provides that a multiemployer pension plan must file a MPPAA action within six years after the date on which the cause of action arose.

2. The United States Supreme Court held in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal., Inc.*, 522 U.S. 192, 194, (1997), that a cause of action for withdrawal liability arises under the MPPAA each time an employer fails to make a payment as scheduled by the plan trustees, and the trustees have no obligation to accelerate the debt when an employer defaults. However, where the trustees elect to accelerate the liability by demanding payment in full following an employer's default, the six-year period begins to run when the liability is accelerated.
3. In *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Fund v. Kero Leasing Corporation*, 2004 WL1666445 (3rd Cir. 2004) the U.S. Court of Appeals for the Third Circuit held that a multiemployer pension plan's suit for recovery of withdrawal liability from an individual as a participating employer was time-barred since the complaint was filed seven years after the cause of action accrued, one year beyond the statute of limitations provided by the MPPAA. The Third Circuit refused to recharacterize the action as one enforcing a pre-existing default judgment against the individual who was not part of the original suit.

## **VII. THE PENSION PROTECTION ACT OF 2006 ("PPA"): CHANGES TO MULTI-EMPLOYER PENSION PLANS.**

### **A. PPA Modified the Funding Provisions of ERISA for Pension Plans.**

PPA modified the funding provisions of ERISA for pension plans, including provisions to shore up ailing defined benefit pension plans. The additional/corrective funding provisions are effective through 2014.

1. New funding rules begin the first plan year beginning after 2007, with a phased transition from 90% funding to 100% funding by 2011.
2. A pension fund can obtain an automatic 5-year amortization extension, plus 5 additional years at the discretion of the IRS, for unfunded past service liability, investment loss, or experience loss.
3. PPA creates three status groups for funds: funds which meet the funding standards; "endangered" or "seriously endangered" funds; and, "critical" funds. The fund's actuary must certify the fund's status within 90 days of the start of each plan year.
4. Endangered Status. A fund is in endangered status if it either: (a) has a funding percentage of 80% or less or (b) faces a funding deficiency within the next 6 years. A fund is in seriously endangered status if it satisfies both conditions. Effects:
  - a. The fund must adopt a funding improvement plan to increase its funding over 10 years (15 if seriously endangered).

- b. The fund must provide the bargaining parties with two schedules to pick from for the next CBA:
    - i. One to maintain the current contributions but reduce benefits (the default schedule).
    - ii. One to maintain benefits and increase contributions.
    - iii. If the parties don't select a schedule within 180 days after the contract expires (or upon impasse) the fund must implement the default schedule.
  - c. Generally, there can be no plan changes or benefit increases that increase the pension fund's benefit obligations.
  - d. The fund cannot accept a CBA or participation agreement that provides for:
    - i. a reduction in the level of contributions for any participants;
    - ii. a suspension of contributions with respect to any period of service, or
    - iii. any new direct or indirect exclusion of younger or newly hired employees from plan participation.
  - e. Fines or excise taxes can be assessed against trustees that don't comply with the funding improvement plan and employers that don't make the required contributions under a default schedule.
5. Critical Status. A funding percentage of 65% or less or projected to have a funding deficiency or cash-flow crisis within 3 to 6 years. The effects are the same as being endangered, plus:
- a. Fund must adopt a "rehabilitation" plan to emerge from critical status in 10 years.
  - b. Within 30 days of receiving notice from the fund, the employer must pay a 5% surcharge on contributions (10% after the initial year) until the effective date of a CBA in which the parties adopt one of the fund's contribution schedules.
  - c. Prospective benefit reductions are permitted for "adjustable benefits", such as full early retirement, post-retirement death benefits, disability benefits not in pay status, or 60-month guarantees.
  - d. Future benefit accrual rates can be reduced, but not to less than 1% of contributions.

6. An employer can file suit to compel a plan in endangered or critical status to adopt, update, or comply with a funding improvement or rehabilitate plan.

B. Withdrawal Liability Changes.

1. Partial withdrawal for contracting out work. If an employer permanently ceases to have an obligation to contribute under one or more of its collective bargaining agreement, but not all of its CBAs, under which the employer is obligated to contribute, but the employer transfers such work covered by the CBA to an entity or entities owned or controlled by the employer, a partial withdrawal occurs.
2. Building and construction industry pension plans can adopt the six-year free look provision and can use methods of calculating withdrawal liability other than the presumptive method (effective January 1, 2007).
3. Surcharges are disregarded in determining an employer's withdrawal liability (except for purposes of determining the unfunded vested benefits attributable to an employer under the direct attribution method of calculation).
4. Benefit reductions are disregarded in computing an employer's withdrawal liability.

Model Letter Requesting Amount of Withdrawal Liability

(Date)

The Trustees of the *(Name of Plan)*

Pension Fund

Re: Potential Employer Withdrawal Liability for *(Name of Company)*

Gentlemen:

In order to prepare the annual financial statement for *(Name of Company)*, our Accountant has requested that I contact you concerning our Company's potential withdrawal liability with regard to the *(Name of Plan)* Pension Fund. Therefore, pursuant to ERISA Section 4221(e), *(Name of Company)* hereby requests that the Trustees of the *(Name of Plan)* Pension Fund make available to us general information necessary for us to compute our withdrawal liability with respect to the Pension Fund. Please also make an estimate of our potential withdrawal liability with respect to the Plan. Additionally, please provide me with the fiscal year end of the Plan and the annual date on which the level of employer withdrawal liability changes.

Our Accountant desires to complete our report as soon as possible. Therefore, I specifically request that you provide us with the requested information no later than \_\_\_\_\_ . If you are unable to provide us with the information by such date, please contact me in order that we may further discuss this matter.

Thank you for your prompt attention in regard to this matter.

Sincerely,