

Going Through Withdrawal: A Step-By-Step Guide to Arbitration in Multiemployer Withdrawal Liability Disputes

Mark M. Trapp*

Many employers with a unionized workforce contribute to multi-employer pension funds established by collective bargaining agreements. In recent years, due to a variety of factors, most multiemployer funds have faced significant underfunding. As employers have exited these funds, either voluntarily through negotiating out or involuntarily because of union decertification, many have had to become familiar with the concept of withdrawal liability.

Withdrawal liability is the employer's proportional share of the pension plan's unfunded vested benefits. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which amended ERISA to establish liability, when an employer withdraws, the plan sponsor must *determine* the amount of withdrawal liability, *notify* the employer of the amount, and *collect* the amount from the employer.¹

Those three words—determine, notify, and collect—sum up the one-sided nature of the process established under the MPPAA and describe what almost always happens: The fund determines, notifies, and collects. Employers simply pay the amount demanded by the fund, usually hundreds of thousands, or even millions, of dollars.²

Of course, no employer wants to pay an inordinate amount in withdrawal liability, especially when (as is often the case) the assessment comes right out of the blue. In many instances, employers have no idea that by failing to take prompt action to challenge the fund's assessment (which may consist of little more than a simple "demand" letter), they may forfeit any right to challenge the assessment. Nor do

*Mr. Trapp is a partner in the Chicago office of Epstein Becker & Green, P.C. He focuses his practice on labor and employment law and litigation, representing employers in a broad range of industries. He has extensive experience in collective bargaining, NLRB proceedings, discrimination and wrongful discharge litigation, and multiemployer pension withdrawal liability matters.

1. 29 U.S.C. § 1382 (2006).

2. In a 1992 article, one prominent arbitrator noted that a "small" case may well involve hundreds of thousands of dollars; large cases involve many millions of dollars." Ira Jaffe, *The Arbitration of Statutory Disputes: The Role of the Arbitrator—Procedural and Substantive Considerations*, 10 HOFSTRA LAB. & EMP. L.J. 317, 327 (1992).

employers realize that failing to make payments in accordance with the assessment may result in the fund holding the employer in default and accelerating the entire amount due. While the MPPAA allows (indeed, requires) an employer to challenge a fund's assessment and determinations through arbitration, it also creates numerous legal and procedural hurdles for employers seeking to challenge an assessment, both before and during the contemplated arbitration.

The large number of employers unfamiliar with the complicated process, and their failure to comprehend or follow the proper procedures, has led to funds winning a substantial percentage of litigated cases. Employers who get to the merits face further challenges, as the statute essentially assumes the accuracy of the fund's calculations and assessment. In short, for multiemployer pension funds, arbitration under the MPPAA is a "home game."

Given the built-in advantage funds already enjoy under the statute, and the harsh results of a failure to arbitrate properly, an employer must not exacerbate its disadvantage by making a procedural error. Accordingly, employers and their counsel need to comprehend fully the mechanics of initiating arbitration, as well as some common mistakes to avoid. With a sound understanding of the basic procedure, employers and their attorneys can navigate the arbitration process with confidence.

I. Arbitration: The Only Way to Challenge Withdrawal Liability

When contesting an assessment of withdrawal liability, it is important to understand that "[a]rbitration reigns supreme[.]"³ The centrality of arbitration flows from the statutory command that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a [withdrawal liability] determination . . . shall be resolved through arbitration."⁴ Further, "[i]f no arbitration proceeding has been initiated . . . the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor."⁵ The resounding message of these provisions "is that arbitration is the preferred method for resolving pension plan disputes and that failure to arbitrate will have adverse consequences."⁶

Because arbitration is generally the only way to challenge a fund's withdrawal liability assessment, one seeking to challenge an assess-

3. See, e.g., *Robbins v. Admiral Merchs. Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988); *Mason & Dixon Tank Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156, 164 (6th Cir. 1988); *IAM Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 422 (D.C. Cir. 1987).

4. 29 U.S.C. § 1401(a)(1) (2006) (emphasis added).

5. *Id.* § 1401(b)(1).

6. *Robbins*, 846 F.2d at 1056.

ment must, from the outset, be mindful of the numerous deadlines and ensure compliance with all statutory prerequisites to arbitration.

II. Prerequisites to Arbitration: The Request for Review

In order to initiate arbitration unilaterally, an employer must first request review of the assessment of withdrawal liability.⁷ This is usually done by sending a letter requesting review to the pension fund or plan sponsor, presumably responding directly to the entity and person that sent the assessment and demand.⁸ There are two main potential pitfalls of which employers should be aware in the request for review stage: the necessary specificity of the contents and the timing of such a request.

A. Contents of a Request for Review

The request for review should ask the plan sponsor to review the assessment and specific matters within the case, identify any inaccuracies in the assessment or determination, and furnish any additional relevant information.⁹ Because an employer may not have much information other than the demand itself on which to base its request for

7. While a detailed discussion of this topic is beyond the scope of this article, it should be noted that the term “employer” is defined broadly under ERISA, and includes related entities commonly referred to as a “controlled group.” See 29 U.S.C. § 1301(b)(1) (2009) (“[A]ll 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 trades and businesses as a single employer.”); Opinion Letter 82-13 from Henry Rose, Gen. Counsel, Pension Benefit Guar. Corp. (Apr. 12, 1982), <http://www.pbgc.gov/documents/ople/82-13.pdf>. Notice of an assessment of withdrawal liability to one member of a controlled group will generally constitute constructive notice to other members of the same controlled group. See, e.g., *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127–28 (3d Cir. 1986). *But see* *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co.*, 525 F.3d 591, 599–600 (7th Cir. 2008) (if the relationship between current and former controlled group members is distant, “the practical justification for recognizing the application of a constructive notice principle loses much of its force”); *Bd. of Trs. of the Plumbers, Pipe Fitters & Mech. Equip. Serv. v. Airstream Mech.*, No. 08-901, 2010 U.S. Dist. LEXIS 96361, at *28 (S.D. Ohio Aug. 11, 2010) (“[D]efendants who are not members of the control group at the time notice is provided are not deemed to have received notice.”).

8. Although it is preferable as a practical matter to send a request in writing, nothing in the statute expressly mandates that a request be in writing. See 29 U.S.C. § 1399(b)(2)(A)(i) (2006) (“[T]he employer . . . may ask the plan sponsor to review any specific matter relating to the determination of the employer’s liability . . .”) (emphasis added); see also *Pension Plan for Pension Trust Fund for Operating Eng’rs v. Weldway Constr., Inc.*, 54 Empl. Benefits Cas. (BNA) 2532, at *31 n.2 (N.D. Cal. 2013) (assuming, without deciding, that oral request for review is sufficient). However, to eliminate any risk, as well as to facilitate proof of compliance with deadlines, the prudent employer will request review in writing (with proof of receipt). While such a rule has never been challenged, the fund may mandate that the request be in writing. For example, the Central States’ pension fund plan document states that the employer must make its request “in writing to the Fund[.]” Cent. States, Se. & Sw. Areas Pension Plan, app. E, § 6(a), at 127 (as amended through Apr. 1, 2013), http://mycentralstatespension.org/media/8476/pl_pension_plan_doc.pdf.

9. 29 U.S.C. § 1399(b)(2)(A) (2009).

review, it may be difficult to prepare a comprehensive request. This is further complicated because at this early stage, it is unclear¹⁰ whether an employer has an absolute right as a result of the withdrawal liability assessment to require the pension fund to provide any additional information pertaining to the assessment.¹¹

This may place the employer in a “catch-22” situation, tasked with identifying inaccuracies in determinations based on information to which it has not been made privy.¹² An employer, even if unable to provide exact details, should state clearly that it disputes the assessment of withdrawal liability and is requesting review pursuant to 29 U.S.C. § 1399(b)(2)(A). An employer should raise all the specific issues it can and provide any additional information relevant to the dispute, as at least one arbitrator has held that “a request for review must be specific, not general.”¹³ If an employer lacks sufficient information on which to base a specific challenge, it should make this clear and provide reasons why such information is necessary.

10. It is unclear because the prior section of ERISA, which allowed an employer to seek information respecting a computation of withdrawal liability, was repealed in 2008. Worker, Retiree, and Employer Recovery Act of 2008, Pub. L. No. 110-458, 122 Stat. 5091, 5105 (codified as amended at 29 U.S.C. § 401 (2012)) (replacing the former section found at 29 U.S.C. § 1401(e)). While employers often seek information and documents from the assessing fund that may assist in challenging a withdrawal liability demand, many funds routinely deny or ignore such requests. Nevertheless, it may be advisable to seek such information, and to do so early enough to receive a response from the fund so that the employer will still have sufficient time to request review. In addition, employers should be proactive in utilizing their rights under 29 U.S.C. § 1021(k) and (l), which entitle employers to information likely to prove helpful. If an employer responds promptly to an assessment, it should be able to secure some information prior to the deadline for the request for review, as 29 U.S.C. § 1021(k) contains a thirty-day time limit to furnish required information. 29 U.S.C. § 1021(k)(2)(A) (2006). While § 1021(k) only applies to “any employer that has an obligation to contribute to the plan,” which may no longer be the case if an employer has been held to have completely withdrawn from the fund, *id.* § 1021(k)(1), the pertinent regulation states that a contributing employer includes “[a]ny employer that . . . may be subject to withdrawal liability.” 29 C.F.R. § 2520.101-6(e)(4) (2012).

11. *Compare* *Brach’s Confections, Inc. v. McDougall*, 320 F. Supp. 2d 726, 734 (N.D. Ill. 2004) (employer entitled to general information necessary to compute withdrawal liability), *and* *John J. Nissen Baking Co. v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 737 F. Supp. 679, 682 (D. Me. 1990) (employer entitled to receive general information), *with* *Reliable Liquors, Inc. v. Truck Drivers & Helpers, Local Union No. 355 Pension Fund*, 240 F. Supp. 2d 450, 452 (D. Md. 2003) (no right to pre-arbitration information).

12. According to one authoritative treatise, a “waiver of rights should not be lightly inferred, particularly in light of the usual situation in which the employer lacks detailed information as to the basis for the withdrawal liability assessment and as to the treatment of other employers at the time that the Act requires the filing of the request for review.” IRA F. JAFFE & ROBERT E. NAGLE, 2-54 LABOR AND EMPLOYMENT ARBITRATION § 54.02[2][b][iii] (2013).

13. *Nat’l Pension Plan of UNITE HERE Workers Pension Fund*, 2005 AAA Lexis 1741, at *15 (2006) (Aige, Arb.), *motion to vacate denied by Nat’l Pension Plan of the UNITE HERE Workers Pension Fund v. Westchester Lace & Textiles, Inc.*, 39 Empl. Benefits Cas. (BNA) 1493 (S.D.N.Y. July 21, 2006).

Unless a purported request for review fails to raise any direct objection to an assessment, arbitrators and courts should view with disfavor a fund's attempts to attack the sufficiency of the review request. A generous reading of requests for review is supported by the clear and broad statutory language that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan . . . shall be resolved through arbitration,"¹⁴ and commands that a plan sponsor notify the employer of its decision "[a]fter a reasonable review of *any matter* raised[.]"¹⁵ It is further supported by the fact that an employer's failure to include a particular issue in its request for review does not bar the employer from raising the issue subsequently in arbitration.¹⁶

Although requests for review should be construed generously, an employer should ensure that its request expresses all potential reasons it disputes the withdrawal liability assessment and includes any potential challenges to the underlying calculations, assumptions, or determinations. It is prudent to retain an actuary to assist in reviewing the assessment. Generally, if an employer raises broad objections and explains any inability to be more specific, this should suffice.¹⁷ Ultimately, "concerns about the sufficiency of the request for review (as part of the withdrawal liability determination process) can and should be addressed in the context of arbitration."¹⁸

14. 29 U.S.C. § 1401(a)(1) (2006) (emphasis added).

15. *Id.* § 1399(b)(2)(B) (emphasis added).

16. This is the view held by the Pension Benefit Guaranty Corporation (PBGC), which has said that "additional issues may be brought to the plan sponsor for review after submission of the initial request." Opinion Letter 91-7 from Carol Connor Flowe, Gen. Counsel, Pension Benefit Guar. Corp. (Oct. 1, 1991), <http://www.pbgc.gov/documents/ople/91-7.pdf>. "An employer may also raise in its arbitration demand additional issues omitted from the written request for review. . . . Neither the statutory provision establishing the arbitration mechanism . . . nor the regulations implementing that provision . . . limits [sic] the arbitration demand to issues raised in the employer's . . . request for plan sponsor review." *Id.* Courts have reached the same conclusion. See *J.J. Taylor Cos. Inc. v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 852 F. Supp. 73, 77 (D. Mass. 1994) ("employer's failure to raise particular issues in his request for review does not bar raising them at arbitration"); *Debrecini v. Merchs. Terminal Corp.*, 740 F. Supp. 894, 901-02 (D. Mass. 1989) (rejecting assertion that a failure to raise issues at request for review stage constituted a waiver of the ability to arbitrate those issues), *aff'd*, 889 F.2d 1 (1st Cir. 1989).

17. See *Sheet Metal Workers Local Union No. 80 Pension Trust Fund v. W.G. Heating & Cooling*, 555 F. Supp. 2d 838, 854 (E.D. Mich. 2008) (request that raised broad objection to the fund's assessment and requested additional information was sufficient). *But see Niagara of Wis. Paper Corp. v. Paper Indus. Pension Fund*, No. 4-83-454, 1983 BL 882, at *5 (D. Minn. Dec. 22, 1983) (letter simply asking for more information and stating employer had no reason to feel the liability and payments were inappropriate was not a request for review).

18. *PACE Indus. Union-Mgmt. Pension Fund v. Troy Rubber Engraving Co.*, 805 F. Supp. 2d 451, 459 (M.D. Tenn. 2011).

B. *Timing of a Request for Review*

The timing of a request for review is crucial, as an employer has only ninety days after receipt of the assessment.¹⁹ While the statute is somewhat ambiguous, a request within the ninety-day timeframe has been held necessary to obtain arbitration.²⁰

The ninety days begin to run upon the employer's receipt of the fund's assessment and demand.²¹ Attention should be paid to the precise date of receipt, as the period is strictly construed.²² Occasionally, a fund will revise its assessment and send a subsequent revised notice to the allegedly withdrawn employer. In such circumstances, it appears that the receipt of a revised assessment will generally reset the ninety-day period.²³

Resetting the period makes sense, as the assessment functions like a civil complaint; hence, a new "complaint" should result in a new period of time in which to respond. Still, an employer faced with such a situation should ensure that its request for review is timely filed, perhaps by seeking the fund's agreement. Because the MPPAA requires interim payments, if an employer has already made payments pursuant to the prior assessment and schedule, it should demand that any overpayments are refunded with interest.²⁴

C. *"Pay Now, Dispute Later": Payment of Assessed Liability Pending Review*

As noted, an employer that contests a fund's assessment of withdrawal liability by filing a request for review must make interim

19. 29 U.S.C. § 1399(b)(1)(B) (2006).

20. See *Amalgamated Lithographers of Am. Lithographic Indus. Pension Plan v. Unz & Co.*, 670 F. Supp. 2d 214, 226 (S.D.N.Y. 2009) ("To invoke either of the unilateral routes to arbitration, [the employer] was first required to ask the Plan to review its liability."); *Cent. States, Se. & Sw. Areas Pension Fund v. St. Louis Post-Dispatch, LLC*, No. 07-1384, 2007 U.S. Dist. LEXIS 64179, at *27 (N.D. Ill. Aug. 28, 2007) ("The more reasonable interpretation . . . is to deem a request for internal review mandatory before arbitration may be initiated.")

21. See 29 U.S.C. § 1399(b)(2)(A) (2006) ("[n]o later than 90 days after the employer receives the notice") (emphasis added).

22. See, e.g., *Einhorn v. Joseph Paolino & Sons*, No. 95-5824, 1996 U.S. Dist. LEXIS 6118, at *6 (E.D. Pa. May 1, 1996) (a request sent ninety-two days after receipt of demand was untimely).

23. See *Nat'l Shopmen Pension Fund v. DISA Indus, Inc.*, 653 F.3d 573, 581 (7th Cir. 2011) ("[W]hen a plan issues a revised notice of withdrawal liability, the revision resets the statutory time limitations governing when an employer may challenge the assessment."); *Sheet Metal Workers Local Union No. 80 Pension Trust Fund v. W.G. Heating & Cooling*, 555 F. Supp. 2d 838, 854 (E.D. Mich. 2008) ("It is sensible that the arbitration clock would start anew with the issuance of a revised notice . . ."); *Trs. of Tampa Mar. Ass'n Pension Fund v. S.E.L. Maduro*, 849 F. Supp. 1535, 1538-39 (M.D. Fla. 1994). *But see Cent. States, Se. & Sw. Areas Pension Fund v. Boise Cascade Corp.*, No. 93-6603, 1994 U.S. Dist. LEXIS 14851 (N.D. Ill. 1994) (ninety-day period not restarted). However, while not expressly overruled, due to the Seventh Circuit's subsequent *DISA Industries* decision, the *Boise Cascade* opinion is likely no longer good authority.

24. See 29 C.F.R. § 4219.31(d) (2012).

payments of the assessed amount pursuant to the fund's demand and payment schedule, even while in the review process.²⁵

The MPPAA requires that these interim payments must begin within sixty days of the assessment.²⁶ Thus, in many instances, an employer must begin paying the assessed amounts even before it has filed a request for review. The rationale underlying “pay now, dispute later” is to alleviate the risk that an employer may become insolvent while challenging the assessment rendering the fund unable to collect.²⁷

D. Limited Exceptions to the “Pay Now, Dispute Later” Rule

Depending on the circuit in which an employer is litigating, there are two potential exceptions to the “pay now, dispute later” scheme. First, a few circuit courts have fashioned a very narrow equitable exception under which a court may decline to order interim payments if (1) the fund's claim is frivolous and (2) making interim payments would irreparably harm the employer.²⁸ Both prongs must be satisfied. Under the first prong, in order to show that the claim is frivolous, an

25. See Cent. States, Se. & Sw. Areas Pension Fund v. Bomar Nat'l, Inc., 253 F.3d 1011, 1015 (7th Cir. 2001) (“[T]he MPPAA establishes a ‘pay now, dispute later’ scheme, under which an employer must make interim payments until liability is finally determined.”); Cent. States, Se. & Sw. Areas Pension Fund v. Nitehawk Express, Inc., 223 F.3d 483, 495–96 (7th Cir. 2000) (“[A]n employer must pay a withdrawal liability assessment according to a schedule set by the pension fund, ‘notwithstanding any request for review or appeal of determinations of the amount of such liability[.]’”); Cent. States, Se. & Sw. Areas Pension Fund v. Wintz Props., Inc., 155 F.3d 868, 876 (7th Cir. 1998) (“[O]ur cases make it equally clear that interim payments must be made pending arbitration.”); Nat'l Integrated Grp. Pension Plan v. Black Millwork Co., No. 11-5072, 2013 WL 3989418, at *5 (D.N.J. Aug. 1, 2013) (“Invocation of arbitration, however, does *not* absolve an employer of its duty to make interim payments. Exactly the opposite: ERISA requires that employers ‘make these payments even if they elect to arbitrate their liability.’”) (emphasis in original) (citation omitted); Cent. States, Se. & Sw. Areas Pension Fund v. Mars Leasing Co., 31 Empl. Benefits Cas. (BNA) 1547, at *4 (N.D. Ill. Aug. 18, 2003) (“[T]he general rule under ERISA is ‘pay now, arbitrate later.’”).

26. See 29 U.S.C. § 1399(c)(2) (2006) (“Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.”).

27. See, e.g., Findlay Truck Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund, No. 12-3450, U.S. App. LEXIS 16520, at *8 (6th Cir. Aug. 9, 2013).

28. See Plumbers & Pipefitters Nat'l Pension Fund v. Mar-Len, Inc., 30 F.3d 621, 626 (5th Cir. 1994); Robbins v. McNicholas Transp. Co., 819 F.2d 682, 685 (7th Cir. 1987); Cent. States, Se. & Sw. Areas Pension Fund v. Mars Leasing Co., 31 Empl. Ben. Cases (BNA) 1547, at *4 (N.D. Ill. Aug. 18, 2003). The equitable exception to interim payments has not been adopted in all circuits. See *Findlay Truck Line, Inc.*, U.S. App. LEXIS 16520, at *34–42 (discussing case law from other circuits and declining to find equitable exception to “pay now, dispute later”); *Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 140 (3d Cir. 1997) (“We have never held that there are any equitable exceptions to the statutory provisions on interim payments . . . and we decline to do so now.”); *Nat'l Integrated Grp. Pension Plan v. Black Millwork Co.*, No. 11-5072, 2013 WL 3989418, at *7 (D.N.J. Aug. 1, 2013) (“Whether such an equitable exception exists is not settled in the Third Circuit.”); *Trs. of the Teamsters Local Union No. 142 Pension Trust Fund v. Enter. Trucking & Waste Hauling, Inc.*, No. 07-433, 2009 U.S. Dist. LEXIS 9028, at *13–14 (N.D. Ind. Feb. 6, 2009) (“The Third Circuit has never recognized such an exception

employer must demonstrate that “the arbitrator is almost certain to rule” in its favor.²⁹ Under the second prong, several courts have noted that “[o]nly the threat of imminent [in]solvency is sufficient to demonstrate irreparable harm.”³⁰ Illustrating the high hurdle presented by this standard, courts have been very reluctant to grant employers relief from making interim payments.³¹ At least one court has held that “the MPPAA divests us of the jurisdiction to bar interim payments.”³²

The second exception was enacted as part of the 2006 Pension Protection Act and provides relief from interim payments when the fund’s assessment is based on the MPPAA’s “evade or avoid” provision. Under this exception, if a fund determines that an employer is liable for a withdrawal due to a transaction designed to avoid or evade liability, an employer may be relieved of its duty to make interim payments.³³ The transaction must have occurred after December 31, 1998, and at least five years (two years in the case of a small employer) before the date of the withdrawal.³⁴ An employer must contest the assessment through arbitration and inform the fund of its election to apply this exception within ninety days of its notice of the assessment.³⁵

and the Fifth and Seventh Circuits only allow for such a rare exception if the employer has enough evidence to prove that the claim is not ‘colorable.’”

29. *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Cent. Transp., Inc.*, 935 F.2d 114, 119 (7th Cir. 1991).

30. *Sheet Metal Workers Nat’l Pension Fund v. Courtad Constr. Sys., Inc.*, 439 F. Supp. 2d 574, 582 (E.D. Va. 2006).

31. *See Giroux Bros. Transp., Inc. v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1, 5 (1st Cir. 1996) (“This scheme puts payment ahead of decision even though the employer might prevail in the end.”); *Mar-Len, Inc.*, 30 F.3d at 626 (“If the claim for withdrawal liability is colorable, the employer must make interim payments while it contests the underlying liability.”); *Mason & Dixon Tank Lines, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156, 165 (6th Cir. 1988) (“[T]his exception is indeed narrow”); *McNicholas Transp. Co.*, 819 F.2d at 685; *Cent. States, Se. & Sw. Areas Pension Fund v. Manning Motor Express, Inc.*, 125 F. Supp. 2d 1113, 1115 (N.D. Ill. 2000) (“no employer has satisfied the test” for applying an equitable exception); *Connors v. Brady-Cline Coal Co.*, 668 F. Supp. 5, 8 (D.D.C. 1987) (enforcing interim withdrawal payments despite employer’s claim that making interim payments would force it to cease operations). In a footnote in the *Mar-Len* case, the Fifth Circuit noted that “in some instances, a withdrawing employer may be at risk of losing the interim payments if the pension fund itself is financially unstable. If such an employer is required to make interim withdrawal liability payments, *i.e.*, the pension fund’s claim is colorable, the district court should take steps to insure that the employer will be able to recover the interim payments in the event that the arbitrator rules in favor of the employer. One possible measure would be the establishment of an escrow account in which the interim payments may be safely held until resolution of the dispute.” *Mar-Len, Inc.*, 30 F.3d at 626 n.12.

32. *Findlay Truck Line, Inc.* U.S. App. LEXIS 16520, at *42.

33. *See* 29 U.S.C. § 1401(f) (2006).

34. *Id.* § 1401(f)(1)(B).

35. *Id.* § 1401(f)(2)(A). Since an employer cannot actually file for arbitration without first going through the request for review process, and the timeframe to initiate arbitration is contingent on the response from the fund, it does not seem likely that a court would compel an employer actually to initiate arbitration to allow it to apply the exception and avoid interim payments. This comports with the statutory language,

If the arbitrator or court has not rendered its final decision within twelve months of the employer's notice, the employer must post a bond (or place money in escrow) equal to the amount of the interim withdrawal liability payments that would otherwise be due in the next twelve-month period, and increase the bond or escrow each twelve-month period thereafter.³⁶

E. Default

Due to the limited nature of the exceptions to the interim payment scheme, employers will nearly always be compelled to make interim payments even while challenging the assessment. However, in many instances, getting an arbitration decision following an assessment may take several years. The employer must make payments in accordance with the fund's schedule for this entire period. The employer's failure to make payments according to the fund's schedule during the review process can result in default and the fund's acceleration of the entire amount due.³⁷ While a fund may file a lawsuit to collect the overdue amounts, most generally do not immediately do so because they are limited to recovering only the amounts currently overdue. For this reason, most funds delay bringing a court action until the employer is in default, as defined by the MPPAA.

The MPPAA defines a default as "the failure . . . to make, when due, any" withdrawal payment "if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure" or "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability."³⁸ The sixty-day period is extended such that default will not occur before the sixty-first day following (1) the ninety-day period to request review, (2) the expiration of the period to initiate arbitration (if the employer has requested a review), or (3) if arbitration is timely initiated, issuance of the arbitrator's decision.³⁹

which allows an employer to contest the assessment either "through an arbitration proceeding . . . or as otherwise permitted by law[.]" *Id.* § 1401(f)(1)(B). While the notice need not be in writing or contained within the request for review, this is obviously preferable, especially since in order to apply the exception, an employer must contest the assessment, which requires a timely request for review.

36. *See id.* § 1401(f)(2)(B),(f)(4).

37. *See, e.g.,* *Trs. of the Local 531 Pension Fund v. Flexwrap Corp.*, 818 F. Supp. 2d 585, 589 (E.D.N.Y. 2011).

38. 29 U.S.C. § 1399(c)(5)(A)–(B) (2006). An employer cannot be in default unless the fund has provided written notification that the employer has failed to make a payment when due, and the employer then fails to cure within sixty days of the notice. *See* *Chi. Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. El Paso CGP Co.*, 38 *Empl. Benefits Cas.* (BNA) 1391, at *8 (N.D. Ill. June 9, 2006) (default "requires a notice from the pension plan to the employer that the employer does not heed.").

39. *See* 29 C.F.R. § 4219.31(c)(1)(i)–(iii) (2012).

Consistent with the statute and regulations, if an employer fails to initiate arbitration timely, “the amounts demanded” by the fund “shall be due and owing” immediately.⁴⁰ In contrast, when the employer has initiated arbitration, the fund cannot accelerate the full amount of withdrawal liability until at least sixty-one days after the arbitrator’s decision.⁴¹ Ultimately, if the arbitrator rules in favor of the employer, the fund must refund the overpayments in a lump sum, with interest.⁴²

III. Initiating Arbitration

Prior to initiating arbitration, an employer should file a proper and specific request for review in a timely manner, and be current on any required interim payments due under the fund’s assessment and schedule. Disputes remaining between the employer and the fund following the request for review must be arbitrated.⁴³

The process itself is straightforward: Under the Pension Benefit Guaranty Corporation (PBGC) regulations, “[a]rbitration is initiated by one of the parties to a dispute by service on the other party of a notice of initiation.”⁴⁴ A “notice of initiation” need be nothing more than a simple document, serving notice of a dispute about the fund’s determination of withdrawal liability and stating clearly that the employer is initiating arbitration. While the process is uncomplicated, there are several issues that have tripped up unsuspecting employers. These include timeliness, disputes as to whether the notice actually initiated arbitration, and the payment of filing fees.

A. *Establishing the Deadline to Initiate Arbitration*

Under the MPPAA, it is likely that an employer cannot initiate arbitration unless and until the fund has either responded to the request for review or 120 days have passed after its request.⁴⁵ Under

40. See 29 U.S.C. § 1401(b)(1) (2006).

41. See *Ch. Truck Drivers, Helpers & Warehouse Union Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 533 (7th Cir. 1997) (fund cannot accelerate entire amount due before arbitrator renders decision if employer has requested arbitration); *Nat’l Pension Plan of the UNITE HERE Workers Pension Fund v. Swan Finishing Co.*, 37 Empl. Benefits Cas. (BNA) 2609, at *22–23 (S.D.N.Y. May 11, 2006) (declining to accelerate payments).

42. See 29 U.S.C. § 1401(d) (2006); 29 C.F.R. § 4219.31(d) (2012); see also *Cent. States, Se. & Sw. Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1341 (7th Cir. 1992) (“If he wins the arbitration he will get back whatever he has paid but the rule is pay first, arbitrate after.”).

43. See 29 U.S.C. § 1401(a)(1) (2006). Courts have recognized a few very limited exceptions to MPPAA’s arbitration requirement. For a thorough discussion of the exceptions and their limited application, see *In re BFW Liquidation, LLC*, 459 B.R. 757, 766–73 nn.4–5 (Bankr. N.D. Ala. 2011).

44. *Arbitration of Disputes in Multiemployer Plans*, 48 Fed. Reg. 31,251 (July 7, 1983).

45. See *Amalgamated Lithographers of Am. Lithographic Indus. Pension Plan v. Unz & Co.*, 670 F. Supp. 2d 214, 226 (S.D.N.Y. 2009) (“To invoke either of the unilateral routes to arbitration, Unz was first required to ask the Plan to review its liability.”);

the statute, two scenarios open the sixty-day window within which arbitration can be initiated. First, a fund response to the request for review within 120 days triggers a sixty-day period in which the employer may initiate arbitration.⁴⁶ Second, if the fund fails to respond to the request for review within 120 days, the employer has 180 days from the date of its request for review to initiate arbitration (sixty days from the 120th day).⁴⁷ Thus, the deadline to initiate arbitration depends on whether the fund responds to the employer's request for review, and "is either 180 days after the employer's request, or 60 days after the plan sponsor has responded to the request—whichever comes first."⁴⁸

Employers should be cautious of a third potential scenario in which a fund responds more than 120 days after the request for review. The fund's response in such a situation does not afford the employer sixty days from the "tardy" response; instead, as noted above, the sixty-day arbitration clock begins ticking after 120 days without response from the fund.⁴⁹ The sixty-day clock only starts once, and there is no "reset" for a subsequent fund response.⁵⁰

Even though the MPPAA uses the mandatory word "shall" in establishing a fund's duty to respond to a request for review,⁵¹ it is clear that if a fund does not respond, the sixty-day arbitration clock starts 120 days after the request was made.⁵²

Cent. States, Se. & Sw. Areas Pension Fund v. St. Louis Post-Dispatch, LLC, No. 07-1384, 2007 U.S. Dist. LEXIS 64179, at *27 (N.D. Ill. Aug. 28, 2007) ("The more reasonable interpretation . . . is to deem a request for internal review mandatory before arbitration may be initiated."). This may provide funds with yet another leverage point over employers—by waiting up to 120 days, a fund can compel an employer to begin or continue payment of the assessed schedule of payments with no opportunity to initiate arbitration to contest the assessment.

46. 29 U.S.C. § 1401(a)(1)(A) (2006).

47. *Id.* § 1401(a)(1)(B).

48. *Unz & Co.*, 670 F. Supp. 2d at 225; *see also* Cent. States, Se. & Sw. Areas Pension Fund v. Carstensen Freight Lines, Inc., No. 99-2256, 2000 U.S. App. LEXIS 16212, at *5 (7th Cir. July 10, 2000).

49. *See* Robbins v. Chipman Trucking, Inc., 866 F.2d 899 (7th Cir. 1988) (fund response beyond 120 days after request for review did not absolve the employer of the responsibility to timely request arbitration); *N.Y. State Teamsters Conf. Pension & Ret. Fund v. Seaway Motor Express, Inc.*, 1990 U.S. Dist. LEXIS 4223, at *9 (N.D.N.Y. 1990) (no new sixty-day clock triggered by fund response after 120-day period expired).

50. *See* 29 U.S.C. § 1401(a)(1) (2006) (sixty-day period starts after "the earlier of" either the fund's response or 120 days); *Assonet Sand & Gravel Corp. and N.E. Teamsters & Truck. Ind. Pension Fund, 13 Empl. Benefits Cas. (BNA) 2318, 2325* (1991) (McCausland, Arb.) ("There is no provision in the statute that allows the Company, or the Fund, to stop the clock once it has begun . . .").

51. 29 U.S.C. § 1399(b)(2)(B) (2006).

52. *See* Rao v. Prest Metals, 149 F. Supp. 2d 1, 10 (E.D.N.Y. 2001); Cent. States, Se. & Sw. Areas Pension Fund v. Louisville Auto Rail Servs., Inc., 67 F. Supp. 2d 933, 936 (N.D. Ill. 1999) ("Given that defendants requested review . . . and that plaintiffs did not respond to this request, the 60-day window within which defendants might have demanded arbitration began running 120 days later[.]"); Cent. States, Se. & Sw. Areas Pension Fund v. Six Transfer Cartage Co., No. 98-2632, 1999 U.S. Dist. LEXIS

Accordingly, a careful employer will calendar its sixty-day deadline to initiate arbitration based on the earlier of 120 days after its request for review or the response from the fund. Under the statute, it is also permissible for the parties to initiate arbitration jointly, even in the absence of a request for review, if done within 180 days of the initial demand.⁵³

Often the employer and fund will exchange communications that one of the parties might consider to be either a request for review or a response to a request for review. In such circumstances, the employer should understand that the sixty-day period to initiate arbitration begins with the first response to the employer's request for review, and not from any subsequent response.⁵⁴ This is true even if an employer sends a second request for review after denial of its first.⁵⁵

Although the statute is clear that the sixty-day period begins after "the date of notification to the employer" of the fund response, it is not entirely clear what constitutes the "date of notification" under the statute.⁵⁶ While the plain meaning of the statute seems to support the date of receipt as the date of notification, the perceived ambiguity has led to disputes over whether the sixty-day arbitration clock begins

8329, at *12 n.5 (N.D. Ill. May 19, 1999) ("After the passage of 120 days, [the employer] was entitled to demand arbitration, regardless of whether the Pension Plan had responded to [its] request for review."); *Seaman Patrick Paper Co. & Cent. States Pension Fund*, 10 Empl. Benefits Cas. (BNA) 1985, 1998 (1989) (Jaffe, Arb.) ("The time frame for initiating arbitration is not delayed indefinitely even if the Fund fails to respond at all to an Employer request for review.")

53. See 29 U.S.C. § 1401(a)(1) (2006) ("The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1)."). Of course, this outcome is highly unlikely if the employer has failed to request review within ninety days after the demand, as the plan has little incentive to potentially snatch defeat from the jaws of victory—in the absence of arbitration, all amounts demanded "shall be due and owing on the schedule set forth by the plan sponsor." *Id.* § 1401(b)(1). At least one court has remarked upon the slim chance of a plan agreeing to such an idea. *Unz & Co.*, 670 F. Supp. 2d at 226 (the employer and the plan "could have jointly sought arbitration . . . although the Court very much doubts that the Plan would have consented to such a course of action"). However, if both parties understand their respective positions and see no need to "jump through the hoops" of filing a request for review, followed by a response and then the initiation of arbitration, the use of this alternative process may serve as a shortcut to arbitration.

54. See *Cent. States, Se. & Sw. Areas Pension Fund v. Carstensen Freight Lines, Inc.*, No. 96-6252, 1997 U.S. Dist. LEXIS 15316, at *9 (N.D. Ill. Sept. 26, 1997) ("[I]t is the first response to the employer's request that starts the 60-day clock within which arbitration must be sought."); *J.J. Taylor Cos. v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 852 F. Supp. 73, 77 (D. Mass. 1994) ("[W]here multiple requests and responses are filed within the 90 days after the receipt of withdrawal liability, the 60 day limitation . . . is triggered by the first response.")

55. See *Seaman Patrick Paper Co. & Cent. States Pension Fund*, 10 Empl. Benefits Cas. (BNA) 1985, 1998 (1989) (Jaffe, Arb.) ("Nothing in the Act suggests that employers may file second requests for review following receipt of denial decisions regarding initial requests for review and thereby extend the time limits for initiation of arbitration.")

56. See 29 U.S.C. § 1401(a)(1)(A) (2006); see also *Seaman Patrick Paper Co. and Central States Pension Fund*, 10 Empl. Benefits Cas. (BNA) at 1997 (unnecessary to decide between date sent or received).

ticking on the date the fund mails its response or on the date the response is received by the employer.⁵⁷ While there does not appear to be a definitive answer, dicta in at least one case suggests that the clock starts on the date of mailing.⁵⁸ Conversely, language in several other decisions supports the date-received rule.⁵⁹

The date-received rule is the most reasonable reading of the statute. Notification implies actual receipt, and it hardly seems fair that an employer could have been “notified” within the meaning of the statute simply because the fund has placed its response in the mail.⁶⁰ Moreover, the MPPAA mandates that following “a reasonable review,” the fund “*shall notify* the employer” of its decision, which further suggests a fund’s duty to provide actual notice to the employer.⁶¹ At any rate, the sixty-day period is hardly lengthy; courts should not strain to shorten it. Prudent employers will avoid this issue by timely initiating arbitration, whichever rule applies.⁶²

57. Some funds may have adopted language in their plan documents that might affect the answer. For example, the Central States Fund adopted the date-received rule. See Cent. States, Se. & Sw. Areas Pension Plan, *supra* note 8, app. E, § 6(b), at 127 (arbitration may be initiated “[w]ithin 60 days following the earlier of receipt of a written decision from the Trustees . . . or 120 days after an Employer has made a timely written request for review”) (emphasis added). It should be noted that if a fund adopts the date-mailed rule, the rule may be subject to challenge as inconsistent with the statute’s notice requirement, and would only be effective to the extent it is consistent with the PBGC regulations and adopted by the arbitrator. See 29 C.F.R. § 4221.1(b) (2012).

58. *Lyons v. Raymond Rosen & Co., Inc.*, 18 Empl. Benefits Cas. (BNA) 1037, at *5 (E.D. Pa. 1994) (“The arbitration period expired . . . 60 days after *the date of plaintiffs’ letter* in response to the employer’s request for review”) (emphasis added).

59. Cent. States, Se. & Sw. Areas Pension Fund v. Carstensen Freight Lines, Inc., No. 99-2256, 2000 U.S. App. LEXIS 16212, at *5 (7th Cir. July 10, 2000) (“[T]he employer must seek arbitration within 60 days of *its receipt* of the plan’s decision”) (emphasis added); see also Cent. States, Se. & Sw. Areas Pension Fund v. C. & V. Leasing, Inc., 49 Empl. Benefits Cas. (BNA) 1886, at *12 (N.D. Ill. July 30, 2010) (dating sixty-day period from receipt of the fund’s response); Cent. States, Se. & Sw. Areas Pension Fund v. T.W. Servs., Inc., No. 89-7145, 1989 WL 157519, at *2 n.4 (N.D. Ill. Dec. 13, 1989) (same). In another case, the Third Circuit calculated the “date of notification” from the employer’s receipt of the fund’s response. See *Doherty v. Teamsters Pension Trust Fund of Phila.*, 16 F.3d 1386, 1391 (3d Cir. 1994).

60. See *RP Baking LLC v. Bakery Drivers & Salesmen Local 194*, No. 10-3819, 2012 U.S. Dist. LEXIS 44870, at *20 n.3 (D.N.J. Mar. 30, 2012) (“[B]ecause of the harsh results of failing to comply with the strict 60-day rule, the date-received rule appears to be more logical than the date-mailed rule.”) (dictum).

61. 29 U.S.C. § 1399(b)(2)(B) (2006) (emphasis added).

62. It should be noted that the PBGC has implemented regulations that could be pertinent in such circumstances, and might lend slight support for the date-mailed rule. For instance, under the regulations, an “issuance” is defined as “any notice or other information you provide to any person other than us under our regulations.” 29 C.F.R. § 4000.2 (2012). The PBGC regulations appear to treat a response as “issued” on the date it is mailed. *Id.* § 4000.24(a). While a fund’s response to an employer’s request for review would seem, at first glance, to come within these regulations, several troubling questions arise. For example, is a response something that is provided “under [PBGC] regulations”? Seemingly not, as the fund’s response is required directly by the statute. 29 U.S.C. § 1399(b)(2)(B) (2006). Moreover, an assessment and demand for payment of withdrawal liability would also fall within this regulation, yet the statute

B. *Establishing the Timeliness of the Initiation of Arbitration*

The consequences of failing to initiate arbitration within the applicable sixty-day window are severe: The employer waives any defenses and “the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor.”⁶³ Further, the sixty-day arbitration period is strictly construed.⁶⁴

Because the failure to initiate arbitration timely has such significant repercussions, establishing timeliness is of the utmost importance. PBGC regulations state that “[a] party that unilaterally initiates arbitration is responsible for establishing that the notice of initiation of arbitration was timely received by the other party.”⁶⁵ Pursuant to this regulation, an employer must demonstrate *actual receipt* by the fund of the notice of initiation of arbitration within the sixty-day timeframe. In *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, the parties agreed to “a stipulation extending [the employer’s] time to initiate arbitration to August 16, 1988.”⁶⁶ The employer sent a letter requesting arbitration on August 16, 1988, but the

itself states that the ninety-day request for review period does not begin until the employer *receives* the notice. *Id.* § 1399(b)(2)(A). Thus, applying this regulation to an initial notice and assessment would place it in direct conflict with the statute. Further, establishing an “issuance date” says nothing about whether such an “issuance” constitutes the *date of notification* to the employer within the meaning of the statute. *Id.* § 1401(a)(1)(A) (emphasis added). In addition, the PBGC regulations on their face state only how *the PBGC* will treat the issuance, not how the parties, an arbitrator, or a court should. See 29 C.F.R. § 4000.23(a) (2012) (“Generally, *we treat* your submission as filed, or your issuance as provided, on the date you send it, if you meet certain requirements.”) (emphasis added). Finally, the PBGC “retain[s] the discretion to waive any requirement under this part, at any time, if warranted by the facts and circumstances.” *Id.* § 4000.5. Does this place the PBGC in the position of determining whether documents were timely for purposes of arbitration? The suggestion seems far-fetched, as it would unnecessarily entangle the PBGC in the arbitration. The foregoing reinforces the view that these regulations have little to say about whether particular items are timely.

63. See 29 U.S.C. § 1401(b)(1) (2006); see also *Robbins v. Admiral Merchs. Motor Freight, Inc.*, 846 F.2d 1054, 1056 (7th Cir. 1988) (“Failure to initiate arbitration has a simple result—the amount demanded by the pension plan sponsor becomes due and owing.”); *Operating Eng’rs’ Pension Trust Fund v. Fife Rock Prods. Co.*, No. 10-697, 2011 U.S. Dist. LEXIS 9045, at *5 (N.D. Cal. Jan. 24, 2011) (“If arbitration is not timely initiated, all affirmative defenses to withdrawal liability are waived.”) (citing Bd. of Trs. of Trucking Empls. of N.J. Welfare Fund, Inc. Pension Fund v. Centra, 983 F.2d 495, 507 (3d Cir. 1992)); *Einhorn v. Kaleck Bros., Inc.*, 713 F. Supp. 2d 417, 424 (D.N.J. 2010) (“failure to arbitrate under MPPAA waives a defense to withdrawal liability”); *N.Y. State Teamsters Conf. Pension & Ret. Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003, 1006 (N.D.N.Y. 1985) (“By failing to timely request arbitration, defendant’s withdrawal liability assessed by the Fund has become fixed.”).

64. See *N.Y. State Teamsters Conf. Pension & Ret. Fund v. McNicholas Transp. Co.*, 848 F.2d 20, 23 (2d Cir. 1988) (request for arbitration made sixty-three days after response untimely); *C. & V. Leasing, Inc.*, 49 Empl. Benefits Cas. (BNA), at *12 (finding untimely arbitration demand filed sixty-one days after receipt of the fund’s response); *T.W. Servs., Inc.*, 1989 WL 157519, at *2 n.4 (request two days late untimely).

65. 29 C.F.R. § 4221.3(c) (2012).

66. 974 F.2d 887, 889 (7th Cir. 1992).

letter was not received by the fund until August 17, 1988.⁶⁷ The court held the arbitration request untimely, stating that because the PBGC regulation “uses the term ‘received’ instead of ‘filed’ or ‘served’ [it] conclusively shows that” it “requires actual receipt of the notice” by the fund.⁶⁸ To avoid this, employers should require a return receipt or obtain other proof of delivery to document actual timely receipt.

Under PBGC regulations, the parties may, at any time, waive or extend time limits for initiating arbitration.⁶⁹ Most funds are willing to agree to such “tolling agreements,” at least if the employer is current on all interim payments.

C. *Requesting vs. Initiating Arbitration*

To avoid confusion or argument that it has failed to initiate arbitration properly, an employer should leave no doubt that it is actually commencing arbitration in its notice of initiation.⁷⁰ A mere general statement of desire to arbitrate leaves an employer open to risk.⁷¹ One court has stated that “[s]imply making it known to the plan sponsor that the employer would like to arbitrate is not enough to constitute an initiation of arbitration sufficient to prevent the liability amount from becoming ‘due and owing.’”⁷² While an arbitrator could easily find that a letter merely requesting arbitration “initiated” arbitration within the meaning of the MPPAA, the better practice is to leave no doubt.

D. *Contents of the Notice of Initiation of Arbitration*

Every notice of initiation of arbitration should state clearly that the employer “disputes the plan sponsor’s determination of its withdrawal liability” and “is initiating arbitration.”⁷³ In addition, the employer must attach to the notice a “copy of the demand for withdrawal

67. *Id.* at 892.

68. *Id.* at 893.

69. See 29 C.F.R. § 4221.3(b) (2012).

70. See *Robbins v. B & B Lines, Inc.*, 830 F.2d 648, 651 (7th Cir. 1987) (“There is a clear distinction between a *request* for arbitration and the *initiation* of arbitration.”) (emphasis in original).

71. See *Rao v. Prest Metals*, 149 F. Supp. 2d 1, 8–9 (E.D.N.Y. 2001) (“nothing in the statute indicates that once one party expresses an interest in arbitration, the other is under a duty to commence such a proceeding.”); *Robbins v. Braver Lumber & Supply Co.*, No. 85-8332, 1987 WL 18557, at *5 (N.D. Ill. Oct. 15, 1987) (“the fact that [the employer] sent a letter indicating its desire to submit the dispute to arbitration is insufficient to meet its burden”); *ILGWU Nat’l Ret. Fund v. Rothauswer*, No. 84-1761, 1985 U.S. Dist. LEXIS 20178, at *6 (S.D.N.Y. May 2, 1985) (“A mere letter request for arbitration . . . in the absence of any formal action to initiate arbitration in the subsequent two years, is not sufficient.”).

72. *PACE Indus. Union-Mgmt. Pension Fund v. Troy Rubber Engraving Co.*, 805 F. Supp. 2d 451, 463 (M.D. Tenn. 2011).

73. 29 C.F.R. § 4221.3(d) (2012); *cf.* *Teamsters-Emp’rs. Local 945 Pension Fund v. Waste Mgmt. of N.J., Inc.*, No. 11-902, 2011 U.S. Dist. LEXIS 59090, at *6 (D.N.J. June 2, 2011) (employer letter stated that the company “initiates arbitration of its withdrawal liability dispute,” citing regulation).

liability and any request for reconsideration, and the response” from the fund.⁷⁴ The employer may also include any other relevant information.⁷⁵

Although compliance with formal rules of pleading is not required, an employer should strive to be as comprehensive as possible in its notice of initiation of arbitration.⁷⁶ By the time the employer initiates arbitration, an employer has had additional time to ascertain the facts and basis on which the fund’s assessment is founded, conduct additional research, engage an actuary, and recognize additional defenses. Thus, an employer should include in its notice of initiation any additional issues that may not have been apparent from its prior request for review, notwithstanding the fact that “it is clear that an employer is not required to perfect its case and flesh out every issue in its arbitration demand.”⁷⁷

To ensure the full airing of all relevant issues, the arbitration process allows for discovery through such methods as interrogatories, depositions, and requests for production.⁷⁸ The arbitrator will determine whether the employer may raise additional issues that arise through the discovery process that were not included in the request for review or notice of initiation of arbitration.⁷⁹ Presumably, an arbitrator has relatively broad discretion in allowing such issues.⁸⁰

One of the few courts to address arbitral discretion suggested that arbitrators are free to consider issues, regardless of whether raised previously. Quoting the PBGC, the court noted that “the withdrawal

74. 29 C.F.R. § 4221.3(d) (2012).

75. See *Arbitration of Disputes in Multiemployer Plans*, 48 Fed. Reg. 31,251 (July 7, 1983) (“Nothing in the regulation would preclude the initiating party from including other information that could serve to resolve the dispute.”).

76. 29 C.F.R. § 4221.3(d) (2012) (“In no case is compliance with formal rules of pleading required.”).

77. See *Opinion Letter 91-7*, *supra* note 16 (“An employer may also raise in its arbitration demand additional issues omitted from the written request for review . . .”).

78. 29 C.F.R. § 4221.5(a)(2) (2012).

79. See *U.S. Steel Corp. & Cent. States Pension Fund*, 10 Empl. Benefits Cas. (BNA) 2324, 2327 (1989) (McAllister, Arb.) (“Such a decision involves equity considerations, the purpose of the statute, prejudice to the Fund, and determining whether or not the Employer unduly delayed requesting the change . . .”); *Opinion Letter 91-7*, *supra* note 16 (“whether an employer may raise additional issues after it has filed its initial demand for arbitration should be decided by the arbitrator based on the facts and circumstances of the case”).

80. See *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985) (“[a]n arbitrator has wide latitude in conducting arbitration proceedings . . .”). At least one fund maintains language in its plan documents purporting to restrict the authority of an arbitrator to allow additional issues. Complete Rules and Regulations for the New England Teamsters & Trucking Industry Pension Plan, § 15.05(c), at 74, http://www.nettipf.com/pdf_files/Rules&Regulations.pdf (last visited Oct. 26, 2013) (“The employer shall not include in its Statement of Issues any issue not initially raised in its request for review . . . and the arbitrator shall have no authority to allow the submission of additional issues.”). Given the PBGC regulations, it is doubtful that funds can restrict the authority of the arbitrator in such a manner.

liability arbitration is not an appellate proceeding but a plenary one, where the first record is made, and where the arbitrator may consider facts and issues not previously raised between the parties.⁸¹ The court then concluded that “[i]t is within the purview of the arbitrator to consider the scope of the dispute submitted to him”⁸² Based on the foregoing reasoning, it can generally be assumed that absent prejudice, an employer should be free to raise any issue appropriate to the determinations submitted to the arbitrator, regardless of whether the issue was expressly stated in its notice.⁸³

Finally, if the fund has an objection to the employer’s notice of initiation of arbitration, it must object promptly in writing.⁸⁴ At least one court has assumed, without deciding, that “promptly” means within ten days.⁸⁵ Whether the regulation’s concept of waiver is broad enough to encompass an *untimely* notice of initiation of arbitration, or simply applies to deficiencies in the *content* of the notice, is an open question.⁸⁶

E. *The Payment of American Arbitration Association Filing Fees to Initiate Arbitration*

As noted, the “distinction between requesting arbitration and initiating arbitration is crucial”⁸⁷ This distinction is perhaps nowhere more apparent than in some cases dealing with payment of the filing fees required by the American Arbitration Association (AAA).⁸⁸ If a fund’s rules require use of AAA procedures (and the

81. *Debrecini v. Merchs. Terminal Corp.*, 740 F. Supp. 894, 902 (D. Mass. 1989) (quoting Brief for Appellant at 5, *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987)).

82. *Id.*

83. *See* U.S. Steel Corp. & Cent. States Pension Fund, 10 Empl. Benefits Cas. (BNA) at 2328 (denying request to add new issue because it “would, in fact, prejudice the Fund”); *Bldg. Servs. Pension Trust & Ogden Corp.*, 10 Empl. Benefits Cas. (BNA) 1401, 1409 (1989) (Brand, Arb.) (employer not entitled to raise new issue at hearing where parties previously stipulated to the issues); 29 C.F.R. § 4221.6(e)(2) (2012) (“The arbitrator shall establish the procedure for presentation of claim and response in such a manner as to afford *full* and equal opportunity to all parties for the presentation of their cases.”) (emphasis added).

84. *See* 29 C.F.R. § 4221.3(e) (2012) (“If a party fails to object promptly in writing to deficiencies in . . . a notice of initiation of arbitration, it waives its right to object.”).

85. *See* Cent. States, Se. & Sw. Areas Pension Fund v. C. & V. Leasing, Inc., 49 Empl. Benefits Cas. (BNA) 1886, at *16–18 (N.D. Ill. July 30, 2010). *But see* Seaman Patrick Paper Co. & Cent. States Pension Fund, 10 Empl. Benefits Cas. (BNA) 1985, 1998–99 (1989) (Jaffe, Arb.) (finding fund promptly objected when it challenged arbitration in letter to AAA forty-one days after fund received copy of employer’s arbitration demand).

86. *C. & V. Leasing, Inc.*, 49 Empl. Benefits Cas. (BNA), at *14–16. A waiver argument might be better asserted under a different regulation. *See* 29 C.F.R. § 4221.11 (2012) (“Any party that fails to object in writing in a timely manner to any deviation from any provision of [the PBGC regulations] is deemed to have waived the right to interpose that objection thereafter.”).

87. *Combs v. W. Coal Corp.*, 611 F. Supp. 917, 921 (D.D.C. 1985).

88. AAA rules require the “initiating party” to pay the “appropriate administrative fee” in order to initiate arbitration. *See Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes*, § 7(a) Initiation of Arbitration, AM. ARBITRATION

payment of the AAA-required filing fee to initiate arbitration properly), some courts have held that employers failed to properly initiate arbitration if they did not pay the filing fee.

For example, in the leading case on this issue, the Seventh Circuit concluded that the employer had not timely initiated arbitration because it failed to include the filing fee with its arbitration request.⁸⁹ The court noted that the fund's "rules, read in conjunction with the AAA arbitration rules, explicitly require a party initiating arbitration to pay the initial filing fee."⁹⁰ Although the employer requested arbitration in a letter mailed to the AAA, and indicated that a check to cover the filing fee would be forwarded shortly, no filing fee was ever paid. The court ultimately upheld the district court's grant of summary judgment in favor of the fund, agreeing that the employer's "failure to pay the AAA filing fee rendered the initiation of arbitration untimely."⁹¹

In a similar case, the employer sent its arbitration demand to the fund but "objected to a requirement in the [fund's] Arbitration rules that it file copies of its demand and submit a filing fee to the [AAA]."⁹² The court held that the employer had not initiated arbitration, and in denying the employer's motion for reconsideration, stated:

Although [the employer] did make a demand for arbitration to the plan sponsor, it did not take the steps necessary to *initiate* arbitration. Under the arbitration rules agreed to by the parties, [the employer] was required to file a demand for arbitration *with the AAA* and pay the AAA's *administrative filing fee* as a condition precedent to its initiation of arbitration before that agency. [The employer] did neither . . . [and] therefore, cannot escape the consequences of its choice not to initiate arbitration.⁹³

Despite these decisions,⁹⁴ there are good arguments why a fund cannot compel an employer to utilize the AAA rules or require the pay-

Ass'n, at 5, http://www.adr.org/aaa/ShowPDF?url=/cs/groups/lee/documents/document/dgdf/mda0/~edisp/adrstg_004372.pdf (last visited Oct. 26, 2013); *see also id.* at 12 ("An Initial Filing Fee is payable in full by a filing party when a claim . . . is filed."). On February 1, 2013, the AAA drastically increased its filing fees, resulting, in most cases, in four, five, or even tenfold increases. *See* Mark M. Trapp, *Avoiding Rookie Mistakes in Multiemployer Pension Withdrawal Liability Disputes*, PENSION & BENEFITS DAILY (June 11, 2013).

89. *Robbins v. B & B Lines, Inc.*, 830 F.2d 648, 651 (7th Cir. 1987).

90. *Id.*

91. *Id.*

92. *Bd. of Trs. of W. Conf. of Teamsters Pension Trust Fund v. F.C. Parsons, Inc.*, 5 Empl. Benefits Cas. (BNA) 2277, 2278-79 (W.D. Wash. June 1, 1984).

93. *Id.* at 2280 (emphasis in original).

94. In another case, the district court relied on *B & B Lines* in finding that "an employer fails to 'initiate' arbitration when it fails to comply with a pension fund's rule that the party initiating the arbitration pay the initial filing fee." *Cent. States, Se. & Sw. Areas Pension Fund v. Hribar Trucking, Inc.*, No. 87-168, 1987 U.S. Dist. LEXIS 9021, at *2 (N.D. Ill. Oct. 1, 1987). Moreover, at least one arbitrator has determined that the

ment of a filing fee to initiate arbitration. To begin with, courts and arbitrators alike have recognized that the MPPAA itself “does not require a filing fee to be submitted with a request for arbitration . . .” nor does it require (or even suggest) the involvement of the AAA.⁹⁵ Likewise, PBGC regulations do not impose or imply any filing fee; instead, an employer initiates arbitration simply by giving notice to the fund.⁹⁶ Nevertheless, payment of AAA filing fees as part of the initiation process has been broadly accepted by arbitrators and practitioners for the past three decades.

In fact, many pension plan rules mandate the use of AAA rules; some even explicitly state that the filing fee must be paid to initiate arbitration.⁹⁷ For example, the Central States, Southeast and Southwest Areas Pension Plan states in its plan document:

Arbitration is initiated by written notice to the Chicago Regional Office of the American Arbitration Association (“AAA”) with copies to the Fund (or if initiated by the Fund to the Employer) and the bargaining representative (if any) of the affected employees of the Employer. Such arbitration will be conducted, except as otherwise provided in these rules, in accordance with the “Multiemployer Pension Plan Arbitration Rules” (the “AAA Rules”) administered by the AAA. The initial filing fee is to be paid by the party initiating the arbitration proceeding. *Arbitration is timely initiated if received by the AAA along with the initial filing fee* within the time period prescribed by ERISA Section 4221(a)(1).⁹⁸

Such a rule seems to conflict directly with PBGC regulations governing the initiation of arbitration. Section 4221.3 is titled “Initiation

payment of AAA filing fees was necessary to “perfect” the initiation of arbitration under AAA rules. *See* Seaman Patrick Paper Co. & Cent. States Pension Fund, 10 Empl. Benefits Cas. (BNA) 1985, 1997 (1989) (Jaffe, Arb.) (“one requirement for initiating arbitration under the AAA rules is the payment of the AAA’s fees”). It should be noted that the *Western Coal Corp., B & B Lines*, and *Parsons* cases arose before the PBGC issued its first set of regulations, which became effective on September 26, 1985. *See* Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679 (Aug. 27, 1985).

95. *Doherty v. Teamsters Pension Trust Fund of Phila.*, 16 F.3d 1386, 1392, n.6 (3d Cir. 1994); *see also* 29 U.S.C. § 1401(a)(1) (2006) (allowing either party to “initiate the arbitration,” with no mention of fees) (emphasis added); *Operating Eng’rs’ Pension Trust Fund v. Fife Rock Prods. Co.*, No. 10-697, 2011 U.S. Dist. LEXIS 9045, at *12 (N.D. Cal. Jan. 24, 2011) (“there is nothing in ERISA Section 4221 or the regulations that require a party to initiate arbitration pursuant to the AAA rules in order to ‘initiate’ arbitration under ERISA”); *J.L. Denio, Inc. & Operating Eng’rs Pension Trust*, 8 Empl. Benefits Cas. (BNA) 1978, 1979 (1987) (Slater, Arb.) (“There is no statutory requirement for a filing fee.”).

96. *See* Arbitration of Disputes in Multiemployer Plans, 48 Fed. Reg. 31,251 (July 7, 1983) (“Arbitration is initiated by one of the parties to a dispute by service on the other party of a notice of initiation.”); *see also* Cent. States, Se. & Sw. Areas Pension Fund v. Ditello, 974 F.2d 887, 893 (7th Cir. 1992); 29 C.F.R. § 4221.3 (2012).

97. *See* Jaffe, *supra* note 2, at 327 (“The AAA rules are referenced specifically in many multi-employer pension plans and plan rules.”).

98. *See* Cent. States, Se. & Sw. Areas Pension Plan, *supra* note 8, app. E, § 6(b)(1), at 127 (emphasis added).

of Arbitration,” and requires that a party initiate arbitration in accordance with that section, even if the parties have previously agreed otherwise:

Arbitration shall be initiated in accordance with this section, notwithstanding any inconsistent provision of any agreement entered into by the parties before the date on which the employer received notice of the plan’s assessment of withdrawal liability.⁹⁹

Thus, *even if the parties have previously agreed to use AAA rules*, once an employer is assessed withdrawal liability, arbitration “shall be initiated in accordance with” the PBGC regulation, rather than the AAA rules or any other procedure on which the parties have previously agreed.¹⁰⁰ The simple process intended by the PBGC regulation does not require filing fees, or the involvement of the AAA, or any other third party. Instead, “[a]rbitration is initiated by one of the parties to a dispute by service on the other party of a notice of initiation.”¹⁰¹

Allowing a fund to require that arbitrations proceed under AAA rules results in the mandated payment by the employer of a (now large)¹⁰² filing fee not required by either the statute or the regulations, and creates at least two additional artificial hurdles an employer must clear simply to afford itself the opportunity to contest the fund’s assessment.¹⁰³ Such a requirement seems highly suspect simply on policy grounds: can it really be fair to allow a fund—which has every interest in *preventing* an arbitration challenge—unilaterally to impose extra-statutory conditions on an employer seeking to initiate arbitra-

99. 29 C.F.R. § 4221.3(b) (2012).

100. *Id.* Since a required filing fee is inconsistent with § 4221.3, it should not restrict the initiation of arbitration. *Id.* Furthermore, because “this section” applies even when the parties have entered into an agreement to the contrary, it surely applies when the parties have not entered into any such agreement. It goes without saying that if a fund cannot limit an employer’s rights to initiate arbitration even with the employer’s consent and prior agreement, surely it cannot do so unilaterally (for example, through a fund rule). Presumably, the parties could enter into an agreement altering the manner of initiating arbitration *after* the employer has received notice of the plan’s assessment of withdrawal liability.

101. Arbitration of Disputes in Multiemployer Plans, 48 Fed. Reg. 31,251.

102. As of February 1, 2013, the AAA drastically increased its fee schedule. *See Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes*, *supra* note 88, at 12. To illustrate the magnitude of the increases, consider that the prior fee schedule charged only \$650 for any dispute up to \$1 million, and only \$1,450 for up to \$5 million, whereas the new standard schedule charges an “initial filing fee” of \$8,200 plus a “final fee” of \$3,250 for claims from \$1 million to \$5 million.

103. Under PBGC regulations, an employer “need only give notice” to the fund to initiate arbitration, while under plans requiring the use of the AAA, an employer must (1) provide written notice to the fund, (2) provide written notice to the AAA, and (3) pay the AAA filing fee. *See* Cent. States, Se. & Sw. Areas Pension Fund v. Ditello, 974 F.2d 887, 892–93 (7th Cir. 1992).

tion, especially when arbitration is the sole forum in which the employer may contest the fund's assessment?¹⁰⁴

In support of mandated filing fees, a fund may point to language from a PBGC regulation that it would argue allows fund rules to require the use of the AAA.¹⁰⁵ However, that regulation may itself exceed the scope of authority granted to the PBGC by the MPPAA. Furthermore, even if the PBGC may allow alternative procedures, it has done so only for the *conduct* of arbitration, and not for the *initiation* of arbitration, which must be done in conformity with the pertinent regulation.¹⁰⁶ In any event, reading the regulations in harmony, it is clear that the specific command that arbitration "shall be" initiated in accordance with section 4221.3 supersedes the general allowance of the use of other procedures for conducting arbitrations.

Congress delegated to the PBGC (not the AAA) the role of creating and implementing procedures under which arbitrations would be conducted.¹⁰⁷ Although the MPPAA was enacted in 1980, the PBGC did not issue proposed regulations until July 7, 1983, and the regulations did not take effect until September 26, 1985.¹⁰⁸ It is under federal

104. Indeed, the employer is truly the sole party with an interest in initiating arbitration, since if no arbitration is initiated "the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor." 29 U.S.C. § 1401(b)(1) (2006); *see also* Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985) ("A withdrawing employer must resort to arbitration if it wishes to challenge the plan sponsor's assessment of liability, while parties to a commercial contract, for instance, are under no obligation to agree in advance to arbitrate rather than litigate their disputes."). Because it "wins" if no arbitration is initiated, a fund's interest lies in *avoiding* arbitration. Thus, while in theory a fund could choose to initiate arbitration and be forced to pay the filing fee, as a practical matter, the employer is the only party with a real interest in initiating arbitration. *See Nat'l Shopmen Pension Fund v. DISA Indus., Inc.*, 653 F.3d 573, 579 (7th Cir. 2011) ("The upshot is that either party may seek arbitration, but only the employer suffers a consequence for failing to do so.").

105. 29 C.F.R. § 4221.14(a) (2012) ("A plan may by plan amendment require the use of a PBGC-approved procedure for all arbitrations of withdrawal liability disputes, or the parties may agree to the use of a PBGC-approved procedure in a particular case.").

106. The MPPAA and the PBGC regulations draw a clear difference between the initiation and the conduct of arbitration. *Compare* 29 U.S.C. § 1401(a)(1) (2006) (allowing either party to "*initiate* the arbitration") (emphasis added), *and* 29 C.F.R. § 4221.3(b) (2012) ("Arbitration shall be *initiated* in accordance with this section . . .") (emphasis added), *with* 29 U.S.C. § 1401(a)(2) (2006) ("An arbitration proceeding under this section shall be *conducted* in accordance with fair and equitable procedures to be promulgated by the corporation.") (emphasis added), *and* 29 C.F.R. § 4221.14(a) (2012) ("In lieu of the procedures described by this part, an arbitration may be *conducted* in accordance with an alternative arbitration procedure approved by the PBGC . . .") (emphasis added).

107. 29 U.S.C. § 1401(a)(2) (2006).

108. *See* 29 C.F.R. § 4221.1(b) (2012) ("This part applies to arbitration proceedings initiated pursuant to section 4221 of ERISA and this part on or after September 26, 1985."); Arbitration of Disputes in Multiemployer Plans, 48 Fed. Reg. 31,251 (July 7, 1983) (proposed); Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679. During the five-year period between the passage of the MPPAA and the effective date of the regulations, the PBGC allowed employers to "use any reasonable procedures,

regulations, rather than AAA (or any other) rules, that any arbitration “is to be conducted,” according to the MPPAA.¹⁰⁹

On the other hand, the PBGC long ago approved the AAA rules. Assuming arguendo that the PBGC approval amounts to the AAA rules having been “promulgated” by the PBGC,¹¹⁰ it is clear that when the PBGC first approved the AAA procedures in 1985, it approved only the rules (and presumably the fees) then in effect.¹¹¹ This is supported by the fact that when the AAA subsequently amended its rules, the PBGC reviewed the proposed amendments and approved the revised rules in 1986.¹¹² The PBGC has not approved any amendments (or fee increases) to the AAA rules since. Instead, the AAA unilaterally implemented its current filing fees, which appear never to have been reviewed or approved—certainly not “promulgated”—by the PBGC.

It seems that the 1977 version of the AAA rules required only a fifty dollar filing fee, which increased to one hundred dollars in 1983.¹¹³ At best, then, it appears that the PBGC may have approved filing fees of fifty or one hundred dollars in 1986, but it has not approved the recent large fee increase implemented by the AAA. Thus, even if the AAA rules could be utilized to initiate arbitration, they should not compel payment of fees never approved by the PBGC.¹¹⁴

such as those established by the American Arbitration Association and the Federal Mediation and Conciliation Service.” See Opinion Letter 82-32 from Henry Rose, Gen. Counsel, Pension Benefit Guar. Corp. (Oct. 28, 1982), <http://www.pbgc.gov/documents/oplet/82-32.pdf> (referencing § 405(a) of the Multiemployer Act, 94 Stat. 1303). This letter further supports the assertion that the PBGC was not contemplating outside entities regulating the initiation, but rather only the conduct of the arbitration. Importantly, the letter noted that the parties had a dispute regarding the selection of the arbitrator, which shows that the arbitration had already been initiated.

109. Opinion Letter 82-32, *supra* note 108.

110. Courts have never addressed the question of whether the AAA rules have been “promulgated” by the PBGC within the meaning of the MPPAA, such that an arbitration may be conducted using such rules. See 29 U.S.C. § 1401(a)(2) (2006).

111. See PBGC-Approved Arbitration Procedure, 50 Fed. Reg. 38,046 (Sept. 19, 1985) (noting that PBGC has “determined that the Multiemployer Pension Plan Arbitration Rules effective June 1, 1981, sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute and that the American Arbitration Association is neutral and able to carry out its role under the procedures”) (emphasis added).

112. See PBGC-Approved Arbitration Procedure, 51 Fed. Reg. 22,586 (June 20, 1986) (“the PBGC hereby approves the AAA/IFEBP Multiemployer Pension Plan Arbitration Rules, as revised effective September 1, 1986”) (emphasis added).

113. See *Robbins v. B & B Lines, Inc.*, 830 F.2d 648, 651 n.6 (7th Cir. 1987) (taking judicial notice that the filing fee was one hundred dollars on December 8, 1986). When announcing its 2013 fee increase, the AAA noted that it had not increased its fees since 1990. See *Pension and Employee Benefit Plan Claims*, AM. ARBITRATION ASS’N, <http://www.adr.org/aaa/faces/aoe/lee/pensionemployeebenefitplanclaims> (last visited Oct. 27, 2013) (“For over 23 years, the AAA has held the line on implementing any fee changes for these caseloads.”).

114. Furthermore, it is not clear the PBGC applied the proper statutory standard to the AAA rules. The PBGC determined that the 1981 AAA rules “will be *substantially*

Moreover, as noted, even where the parties have agreed to utilize an alternative procedure such as the AAA to *conduct* the arbitration, the alternative procedure may not alter the official manner of *initiating* arbitration, which applies “notwithstanding any inconsistent provision of any agreement entered into by the parties before the date on which the employer received notice of the plan’s assessment of withdrawal liability.”¹¹⁵

It is certainly true that “[t]he cases in which courts have held that the failure to initiate an arbitration with AAA constituted a failure to ‘initiate’ arbitration under ERISA Section 4221 have done so where the trust funds’ rules specifically required the employer to initiate arbitration pursuant to the AAA rules.”¹¹⁶ However, this statement fails to dispel the same doubtful impression relied on by those courts—namely, that an employer is bound by the fund’s rules regarding the initiation of arbitration, including the payment of a filing fee.

Finally, while a multiemployer fund is free to “adopt rules for other terms and conditions for satisfaction of an employer’s withdrawal liability,” any such rules must not be “inconsistent with regulations of the” PBGC.¹¹⁷ Obviously, any fund rule that requires paying a filing fee is inconsistent with the PBGC regulations, under which no fee is required.

In sum, the payment of a filing fee in order to initiate arbitration is solely a creature of the AAA rules; neither the statute nor the regulations contain or authorize such fees. Because the imposition of a filing fee to initiate arbitration is inconsistent with both the MPPAA and the PBGC regulations, any fund rule mandating such a payment should not be given effect.¹¹⁸ Accordingly—notwithstanding any inconsistent fund rule—an employer should be free to initiate arbitration solely

fair to all parties involved,” 50 Fed. Reg. 38,046 (emphasis added), rather than “fair and equitable” as required by the MPPAA. 29 U.S.C. § 1401(a)(2) (2006). The PBGC applied the same standard in 1986. 51 Fed. Reg. 22,585 (applying 29 C.F.R. § 2641.13(c) (2012)). While there may not be a tremendous difference, it is not clear that “substantially fair” is the same as “fair and equitable.” Compare 50 Fed. Reg. 38,406, with 29 U.S.C. § 1401(a)(2) (2006). Even if prior AAA filing fees could be deemed “fair and equitable,” the recent large increase may subject the current fees to attack on that basis—is it really “fair and equitable” to force one party to the dispute to shoulder the entire arbitration fee, when that party will “lose” if it does not pay the fee? Such a result appears to contradict yet another regulation, which states that “the parties shall bear the other costs of the arbitration proceedings equally.” 29 C.F.R. § 4221.10(b) (2012). The imposition of a filing fee paid solely by the employer is inconsistent with 29 C.F.R. § 4221.14(b)(5), which directs that even when the parties utilize an alternative PBGC-approved procedure, the “costs of arbitration shall be allocated in accordance with § 4221.10.” 29 C.F.R. § 4221.14(b)(5) (2012).

115. 29 C.F.R. § 4221.3(b) (2012).

116. *Operating Eng’rs’ Pension Trust Fund v. Fife Rock Prods. Co.*, No. 10-697, 2011 U.S. Dist. LEXIS 9045, at *12–13 (N.D. Cal. Jan. 24, 2011).

117. See 29 U.S.C. § 1399(c)(7)(B) (2006).

118. See 29 C.F.R. § 4221.1(b) (2012).

under the PBGC regulations, and may not be compelled first to pay a filing fee to accomplish initiation.¹¹⁹

In light of the conflicting authority, an employer planning to initiate arbitration should familiarize itself with the relevant plan documents to ensure that the fund has not adopted any rule purporting to alter the requirements for initiation of arbitration. If a fund has adopted a rule at odds with the PBGC regulations, to reduce risk and avoid needless legal wrangling, an employer should seek to resolve any differences with the fund and get a written agreement on how arbitration will be both *initiated* and *conducted*, and how and by whom any necessary filing fees (if any) will be paid.¹²⁰ In the absence of an agreement, an employer faced with fund rules mandating either the use of AAA or the payment of a filing fee may seek to initiate arbitration strictly under PBGC regulations, or file with the AAA in accordance with the fund requirement while making clear in its notice of initiation that it disputes the requirement and seeks reimbursement of its costs due to the fund's improper rule.

IV. The Arbitration

Once an employer has properly requested review and timely initiated arbitration, the employer has cleared two major procedural hurdles. Thereafter, the arbitration will proceed in typical fashion. However, employers should be aware that the arbitration must be conducted in a manner consistent with the relevant PBGC regulations, and that any fund rules inconsistent with the regulations may be challenged.

A. Appointment and Selection of an Arbitrator

The selection of the arbitrator is potentially one of the most important aspects of the challenge process, and employers should treat it

119. See *Teamsters-Emps. Local 945 Pension Fund v. Waste Mgmt. of N.J., Inc.*, No. 11-902, 2011 U.S. Dist. LEXIS 59090, at *7-9 (D.N.J. June 2, 2011). The Third Circuit has indicated that “[w]hether or not a request for arbitration without the fee initiates arbitration under AAA rules is a question for the AAA to decide.” *Doherty v. Teamsters Pension Trust Fund of Phila.*, 16 F.3d 1386, 1392, n.6 (3d Cir. 1994). This remark seems at odds with the accepted principle that courts will decide questions of law under the MPPAA. See, e.g., *Cent. States, Se. & Sw. Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1322 (7th Cir. 1995) (de novo review of question of law under MPPAA). It also makes little sense to give the AAA (as opposed to the arbitrator) such authority. The AAA is plainly not a neutral party when determining whether the arbitration should move forward, as it has an interest in collecting its fees. See 29 C.F.R. § 4221.14(d) (2012) (organization must be “neutral and able to carry out its role under the procedures”). While the same may also be largely true of the arbitrator, the arbitrator is not determining an arbitrator's own fee for initiation and the arbitrator at least is authorized to determine disputes between the parties. See *Seaman Patrick Paper Co. & Cent. States Pension Fund*, 10 *Empl. Benefits Cas. (BNA)* 1985, 1994 (1989) (Jaffe, Arb.) (finding that arbitrators have jurisdiction to resolve timeliness objections).

120. The recently raised AAA fees charged to secure a list of arbitrators may not be worth the price, especially when an employer can otherwise initiate arbitration for free.

accordingly.¹²¹ Given the numerous advantages possessed by the fund in arbitration, the selection of a fair and knowledgeable arbitrator is of utmost importance. Many employers are unaware that they have the right to consent to the arbitrator that will hear their dispute and, if the employer withholds consent, neither the fund nor the AAA can unilaterally appoint an arbitrator. In this regard, the PBGC has stated:

Fundamental fairness demands that the impartiality of one in whom such powers are vested be free from reasonable doubt, and the best way to ensure that all parties will have confidence in his impartiality is to have him selected by mutual consent.¹²²

Accordingly, PBGC regulations provide several safeguards to assure the employer an opportunity to exercise its consent. First and foremost, selecting an arbitrator must come *after* the arbitration's initiation.¹²³ This requirement holds true even if the parties have elected to use PBGC-approved alternative procedures, such as the AAA.¹²⁴ The rationale in avoiding preselection is that the withdrawing employer cannot "have any confidence that his interests will have been taken into account, at least at second hand, in the choice of an arbitrator" as "there is no feasible means by which an arbitrator could be preselected by representatives of both the plan sponsor and the employers that will withdraw in the future (whose interests are materially different from those of the employers who will not withdraw)."¹²⁵

While the parties may utilize the AAA for a list of potential arbitrators, it is not required (and, presumably, the parties would have to pay the filing fee to acquire a list from the AAA). To those who wonder how the parties will select an arbitrator without the involvement of the AAA, the PBGC regulations provide the (simple) answer: the parties will select their own arbitrator, and they have forty-five days to do so.¹²⁶ Either party is free to propose or reject arbitrators until they mutually consent to an arbitrator. If the parties fail to select an arbitrator within forty-five days (or to agree to an extension of time), either or both "may seek the designation and appointment of an arbitrator

121. Prior to selecting the arbitrator, to assist in its own preparation, the employer may want to request from the fund all prior arbitration decisions involving the fund. *See* 29 C.F.R. § 4221.8(g) (2012).

122. Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985).

123. *See* 29 C.F.R. § 4221.4(a) (2012).

124. *See id.* § 4221.14(b)(2).

125. *See* Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985).

126. *See* 29 C.F.R. § 4221.4(a) (2012).

in a United States district court pursuant to the provisions of” the Federal Arbitration Act.¹²⁷

Once the parties have agreed upon an arbitrator, they must notify the arbitrator of the appointment, which becomes effective upon written acceptance.¹²⁸ The arbitrator must disclose “any circumstances likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration and any past or present relationship with the parties or their counsel.”¹²⁹

This mandated disclosure triggers another safeguard, as each party may determine for itself whether information disclosed by the arbitrator merits disqualification.¹³⁰ A party has ten days to disqualify the arbitrator, and if either party elects to take this step, the “arbitrator shall then withdraw.”¹³¹ In that event, the parties will select a new arbitrator.¹³² Upon the arbitrator’s selection by mutual consent, if neither party has elected disqualification, any further challenges to the impartiality of the arbitrator must be brought to the arbitrator in a timely fashion. The arbitrator will determine in the first instance whether the arbitrator’s impartiality has been affected.¹³³

B. Time and Place of Hearing and Prehearing Discovery

The arbitrator, upon selection and confirmation, will generally hold an initial conference with the parties to discuss preliminary matters and set a discovery schedule.¹³⁴ One preliminary matter, which should occur within fifteen days after the arbitrator accepts his or her appointment, is to establish a date and place for the hearing.¹³⁵

Some funds have rules purporting to establish the location of the hearing. For example, the Central States, Southeast and Southwest Areas Pension Fund’s rule states flatly that “[a]ll arbitrations under this Section shall be conducted in Chicago, Illinois.”¹³⁶ That rule appears inconsistent with the PBGC regulations, which state that the parties and the arbitrator shall “establish a date and a place for the hearing.”¹³⁷ Accordingly, while as a practical matter it may not

127. *See id.* § 4221.4(e); *see also* Opinion Letter 82-32, *supra* note 108 (“[I]f the parties are unable to agree on the naming of an arbitrator . . . they may apply to the court for appropriate relief.”).

128. 29 C.F.R. § 4221.4(a) (2012).

129. *Id.* § 4221.4(b).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* § 4221.4(c) (the arbitrator must determine whether the “circumstances adduced are likely to affect his or her impartiality”).

134. The arbitrator may direct a prehearing conference at any time prior to the commencement of the arbitration hearing. *Id.* § 4221.5(b).

135. *Id.* § 4221.6(a).

136. *See* Cent. States, Se. & Sw. Areas Pension Plan, *supra* note 8, app. E, § 6(b)(2), at 127.

137. 29 C.F.R. § 4221.6(a) (2012).

make much difference, a party may challenge a fund rule that unilaterally sets a hearing location as inconsistent with PBGC regulations.¹³⁸

The relevant regulation for hearing timing provides that “[t]he date set for the hearing may be no later than fifty days after the mailing date of the arbitrator’s written acceptance.”¹³⁹ However, this time-frame is entirely unrealistic—there is very little possibility that a hearing can take place within fifty days if the parties engage in any of the discovery allowed under other regulations. Accordingly, in most cases, the parties will agree to ignore the fifty-day deadline.

PBGC regulations establish guidelines for discovery and provide that even if PBGC-approved alternative procedures are utilized, “[t]he arbitrator shall give the parties opportunity for prehearing discovery substantially equivalent to that provided” by the regulation.¹⁴⁰

Under the PBGC regulation, the parties will generally be allowed “to conduct prehearing discovery by interrogatories, depositions, requests for the production of documents, or other means, upon a showing that the discovery sought is likely to lead to the production of relevant evidence and will not be disproportionately burdensome to the other parties.”¹⁴¹ Of course, an employer desires access to all relevant information pertaining to the subjects in dispute, including the actuarial assumptions and valuations, unfunded vested benefits, and withdrawal liability worksheets. The PBGC has noted that, in general, “the arbitrator should grant a discovery request if it appears likely to lead to the production of relevant evidence and the burden on the other parties is not disproportionate to the probable importance of that evidence.”¹⁴²

In addition, “[t]he arbitrator may subpoena witnesses or documents upon his or her own initiative or upon request by any party after determining that the evidence is likely to be relevant to the dispute.”¹⁴³ The arbitrator may require the parties to provide advance notice of expert or other witnesses.¹⁴⁴ If a party fails to respond to discovery in good faith or engages in harassment, the “arbitrator may impose appropriate sanctions.”¹⁴⁵

138. *See id.* § 4221.1(b). *But see* Merchs. Grain & Transp. Inc. & Cent. States, Se. & Sw. Areas Pension Plan, Case No. 51-621-0011-89-V (AAA Oct. 27, 1989) (Szuter, Arb.) (fund rule mandating locale not inconsistent with PBGC regulation). In addition, some case law favors the fund’s location, in order to avoid imposing additional collection costs on the fund. *See, e.g.*, Cent. States Pension Fund v. Don Reed Chevrolet, 11 Empl. Ben. Cases (BNA) 1910 (N.D. Ill. 1989); Sheet Metal Workers Nat’l Pension Fund v. Baylor Heating, Inc., 702 F. Supp. 1253 (E.D. Va. 1988).

139. 29 C.F.R. § 4221.6(a) (2012).

140. *Id.* § 4221.14(b)(3).

141. *Id.* § 4221.5(a)(2).

142. Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985).

143. 29 C.F.R. § 4221.5(a)(4) (2012).

144. *Id.* § 4221.5(a)(2).

145. *Id.*

C. *The Arbitration Hearing*

The parties may elect to proceed without a hearing if they “agree and file with the arbitrator such evidence as the arbitrator deems necessary to enable him or her to render an award.”¹⁴⁶ If the parties elect to hold a hearing, the arbitrator may conduct a prehearing conference to clarify the issues and discuss stipulations, witnesses, and any other matters that could expedite the proceeding.¹⁴⁷

The MPPAA states that an arbitration “shall be conducted in accordance with fair and equitable procedures to be promulgated by the [PBGC].”¹⁴⁸ Whether this statutory language might preclude the parties from proceeding under rules—such as the AAA’s—other than those “promulgated” by the PBGC is not clear.¹⁴⁹ Under the regulations, the arbitrator will determine the hearing’s procedure “in such a manner as to afford full and equal opportunity to all parties for the presentation of their cases.”¹⁵⁰

Witnesses are to testify under oath or affirmation and must be subject to cross-examination.¹⁵¹ The arbitrator may call expert witnesses *sua sponte* “on any issue raised in the arbitration,” and any associated costs are to be shared equally by the parties.¹⁵² “The arbitrator determines the relevance and materiality of the evidence offered during the course of the hearing and is the judge of the admissibility of the evidence offered. Conformity to legal rules of evidence is not necessary.”¹⁵³

In arbitration, the key determinations made by the trustees and their actuary are “presumed correct” unless the employer “shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.”¹⁵⁴ The fund’s calculation of the unfunded vested benefits is also presumed correct unless the employer shows that “the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable” or that the fund’s actuary “made a significant error in applying the actuarial assumptions or methods.”¹⁵⁵

146. *Id.* § 4221.5(c).

147. *Id.* § 4221.5(b).

148. 29 U.S.C. § 1401(a)(2) (2006).

149. As used in the MPPAA, “promulgate” might generally be interpreted as “to put into legal effect.” One prominent source defines it as “[t]o publish; to announce officially.” BLACK’S LAW DICTIONARY 1093 (5th ed. 1979). At least the 1985 edition of the AAA rules (having been officially approved by the PBGC) would seem, perhaps imperfectly, to fit within this definition; it is less clear whether any subsequent changes made solely by the AAA would.

150. 29 C.F.R. § 4221.6(e)(2) (2012).

151. *Id.* § 4221.6(e)(3).

152. *Id.*

153. *Id.* § 4221.5(a)(3).

154. 29 U.S.C. § 1401(a)(3)(A) (2006); see *Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 611 (1993).

155. 29 U.S.C. § 1401(a)(3)(B) (2006).

Either party may request a court reporter, with each party equally sharing the costs, but if only one party requests a transcript, that party bears the transcript cost.¹⁵⁶ For good cause shown, the arbitrator may grant a continuance of the hearing.¹⁵⁷ Once the hearing is closed and before a final award is rendered, only limited circumstances allow for reopening the case.¹⁵⁸

D. *The Award*

The regulations provide each party the right to file both a post-hearing brief and a reply brief.¹⁵⁹ The proceedings are considered closed “on the date on which the last brief or reply brief is due.”¹⁶⁰ Thereafter, the arbitrator has thirty days within which to render the award.¹⁶¹ The parties may extend this period.¹⁶²

“In reaching his decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of ERISA, and other pertinent authorities.”¹⁶³ Accordingly, the arbitrator “is not free to disregard settled legal principles in pursuit of an individual perception of justice or equity.”¹⁶⁴

The award must be in writing and must include the basis for the award and “such findings of fact and conclusions of law . . . as are necessary to resolve the dispute.”¹⁶⁵ In addition, the written award must adjust the amount or schedule of payments to reflect overpayments or underpayments.¹⁶⁶ A fund must refund any interim payments found by the arbitrator to be overpayments in a lump sum, with interest.¹⁶⁷

Finally, the written award must allocate costs.¹⁶⁸ Generally, “the parties shall bear the . . . costs of the arbitration proceedings equally unless the arbitrator determines otherwise.”¹⁶⁹ The parties may agree

156. 29 C.F.R. § 4221.6(d) (2012).

157. *Id.* § 4221.6(f).

158. *See id.* § 4221.7; *see also* Casablanca Indus., Inc. & UFCW Local 23-Giant Eagle Pension Fund, 9 Empl. Benefits Cas. (BNA) 1537, 1542 (1987) (Jaffe, Arb.).

159. 29 C.F.R. § 4221.6(g) (2012).

160. *Id.* § 4221.8(f).

161. *Id.* § 4221.8(b).

162. *Id.* § 4221.8(e).

163. *Id.* § 4221.5(a)(1).

164. *Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436, 444 (E.D.N.Y. 1989).

165. 29 C.F.R. § 4221.8(a)(1) (2012).

166. *Id.* § 4221.8(a)(2).

167. *See id.* § 4219.31(d).

168. *Id.* § 4221.8(a)(3).

169. *Id.* § 4221.10(b); *see also* 29 U.S.C. § 1401(a)(2) (2006) (“If the parties have not provided for the costs of the arbitration, including arbitrator’s fees, by agreement, the arbitrator shall assess such fees.”); *Cent. States, Se. & Sw. Areas Pension Fund v. Osseo Lumber Ctr., Inc.*, No. 07-4551, 2008 U.S. Dist. LEXIS 43773, at *6 (N.D. Ill. May 29, 2008); *Commercial Carriers, Inc. & IAM Nat’l Pension Fund, 9 Empl. Benefits (BNA) Cas. 1101, 1115 (1987) (Cornelius, Arb.)* (noting that the PBGC regulations “make splitting the costs of arbitration the norm”); *Arbitration of Disputes in Multiemployer*

to a different allocation of costs only “if their agreement is entered into after the employer has received notice of the plan’s assessment of withdrawal liability.”¹⁷⁰

The MPPAA allows the arbitrator to “award reasonable attorney’s fees.”¹⁷¹ The regulations clarify that the standard for awarding attorney’s fees is high, essentially amounting to misconduct.¹⁷² As noted by the PBGC, under this standard, “awards of attorney’s fees should be utilized only as a sanction against parties that initiate or defend an arbitration in bad faith or conduct themselves in a vexatious manner during the proceedings.”¹⁷³ Despite the regulation’s clear standard, some funds maintain rules purporting to provide for reimbursement of their attorney’s fees and expenses if the fund prevails in arbitration. Employers should challenge any fee-shifting provisions.¹⁷⁴

The written award must be available to the PBGC and to all companies that contribute to the plan.¹⁷⁵ Employers should utilize this regulation to keep abreast of any arbitration decisions involving the fund in which they participate.

E. Post-Arbitration Procedure

Either party may seek review in federal district court within thirty days of the arbitrator’s award.¹⁷⁶ During the pendency of any motion to modify or reconsider the award, the thirty-day time period is tolled.¹⁷⁷ “The 30-day statutory period again begins to run when the arbitrator denies the motion . . . or renders a revised award.”¹⁷⁸ There is “a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were

Plans, 50 Fed. Reg. 34,679, 34,680 (Aug. 27, 1985) (“the costs of arbitration will ordinarily be shared equally by the opposing sides”).

170. 29 C.F.R. § 4221.10(b) (2012).

171. See 29 U.S.C. § 1401(a)(2) (2006).

172. 29 C.F.R. § 4221.10(c) (2012) (arbitrator can assess fees against party who “initiates or contests an arbitration in bad faith or engages in dilatory, harassing or other improper conduct during the course of the arbitration”); see *Cent. States, Se. & Sw. Areas Pension Fund v. Lady Balt. Foods, Inc.*, 960 F.2d 1339, 1347 (7th Cir. 1992) (arbitrator cannot award fees in the absence of misconduct or bad faith); *Trs. of the Utah Carpenters & Cement Masons Pension Trust v. Loveridge*, No. 10-809, 2012 U.S. Dist. LEXIS 90274, at *26–28 (D. Utah June 28, 2012). The question of the arbitrator’s power to award attorney’s fees is separate from the question of a court’s authority to award fees on review of such an award. See *Lady Balt. Foods*, 960 F.2d at 1347; *Cent. States, Se., & Sw. Areas Pension Fund v. Sherwin-Williams Co.*, 879 F. Supp. 867, 877–78 (N.D. Ill. 1995).

173. *Arbitration of Disputes in Multiemployer Plans*, 50 Fed. Reg. at 34,681.

174. See 29 C.F.R. § 4221.1(b) (2012) (plan rules are effective only to the extent that they are consistent with PBGC regulations and adopted by the arbitrator).

175. *Id.* § 4221.8(g).

176. See 29 U.S.C. § 1401(b)(2) (2006).

177. 29 C.F.R. § 4221.9(a) (2012) (“The filing of a written motion for modification or reconsideration suspends the 30-day period . . .”).

178. *Id.*

correct.”¹⁷⁹ Courts have deemed this standard to be whether the findings of the arbitrator are “clearly erroneous.”¹⁸⁰ As noted by the Seventh Circuit, this “standard is one of deference to the person who hears the evidence—although not as deferential as the ‘reasonable person’ standard that applies to ordinary arbitration.”¹⁸¹ In contrast to deferring to an arbitrator’s factual findings, district courts review an arbitrator’s legal conclusions *de novo*.¹⁸²

V. Conclusion

In any withdrawal liability dispute, the fund has numerous structural advantages. The MPPAA substantially advantages multiemployer funds, not only on the merits, but procedurally as well. Understandably, going through withdrawal is not a pleasant process for employers. It is fraught with peril, and a misstep can potentially cost millions. Moreover, because funds operate and repeatedly litigate under the unique rules of the MPPAA, they are much more familiar with the process than most employers, for whom a withdrawal liability assessment is likely a once-in-a-blue-moon event.

This guide has sought to shed light on a process unfamiliar to most employers and may help level what many perceive to be an unbalanced procedural playing field. Successfully challenging an assessment of withdrawal liability is difficult enough without making any unforced errors. By avoiding procedural mistakes, a knowledgeable employer can keep the focus of the proceedings on the merits of the fund’s assessment and maximize its chances of prevailing.

179. 29 U.S.C. § 1401(c) (2006).

180. *See, e.g., Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers’ Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993); *Trs. of the Cent. Pension Fund of the Int’l Union of Operating Eng’rs v. Wolf Crane Serv., Inc.*, 374 F.3d 1035, 1037 (11th Cir. 2004).

181. *Joseph Schlitz Brewing Co.*, 3 F.3d at 999.

182. *See HOP Energy, L.L.C. v. Local 553 Pension Fund*, 678 F.3d 158, 160 (2d Cir. 2012) (“Other courts of appeals have found the proper standard of review to be *de novo*; we agree.”); *Trs. of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208, 211 (7th Cir. 1989) (“Like every other federal appellate court which has addressed this question, we hold that district courts may fully review the arbitrator’s legal determinations.”); *Union Asphalts & Road oils, Inc. v. MO-KAN Teamsters Pension Fund*, 857 F.2d 1230, 1233 (8th Cir. 1988) (“Under MPPAA, the district court has full review of the arbitrator’s legal determinations.”); *Trs. of Amalgamated Ins. Fund v. Geltman Indus.* 784 F.2d 926, 929 (9th Cir. 1986).

