Legal Update Article

Multiemployer Plan Audits During a Pandemic — Mitigating the Employer's Risk

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A global pandemic has not stopped multiemployer plans from conducting employer payroll audits. To the contrary, an uptick in the number of these payroll audits is noticeable. While employers are under no statutory mandates to comply with these audits, they typically are contractually obligated to comply. Further clouding the matter, the Department of Labor has yet to issue formal guidance outlining procedures for these audits or provide any reprieve for employers during the COVID-19 pandemic.

Responding to these audits can be time-consuming, invasive, and costly. COVID-19 has further complicated the logistics of a traditional in-person audit. It is important for employers to understand their obligations and develop cost-effective strategies to mitigate the risks associated with these audits and the alternatives to an in-person audit.

Multiemployer Plans Generally

Multiemployer plans are employee benefit plans to which more than one employer is required to contribute. These plans are established by a written trust agreement and jointly administered by an equal number of management and labor trustees.

Signatory employers may be obligated to make contributions to these benefit plans under a collective bargaining agreement (CBA). The terms of the CBA often operate to bind employers to the terms of the underlying trust agreements. Such terms often include payroll audit policies and procedures. Additionally, without notice or consent of the bargaining parties, the trustees may subsequently amend these trust agreements. As a result, employers can find themselves bound by onerous provisions of which they had no prior knowledge.

Selection for Audit

Trustees typically conduct some form of "random" audit program as part of their fiduciary responsibilities. Under these programs, employers normally are selected for an audit based on a five-year or three-year cycle. Trustees typically adopt a policy that gives them the flexibility to audit employers more or less often than the adopted audit cycle. The frequency and scope of payroll audits also may depend on the number of discrepancies in previous audits and other circumstances (such as an employer's withdrawal from a multiemployer pension plan). In such cases, these "random" audits might be characterized as "for cause" audits.

Refusal to Comply

Although an employer may refuse to comply with a payroll audit, this may not be the best strategy. Thus far, no guidance has been issued that would operate to relieve employers from their obligation to submit to a payroll audit.

If there is a valid obligation to make contributions under the CBA and trust documents, the trustees may file a complaint in federal district court seeking to enforce their right to audit.

The trustees may bring claims against the employer under both the Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act for violating the terms of the CBA and trust documents. If successful, the trustees may obtain an injunction to compel compliance. In addition, Section 502(g)(2) of ERISA provides a *mandatory* award of delinquent contributions, interest, liquidated damages, costs of the action, and attorneys' fees. These mandatory costs can significantly increase the employer's costs.

While limited defenses may be available to the employer, there is rarely a genuine dispute over the existence of a valid contractual obligation. The dispute often relates to the scope of the audit itself. Here, trust agreements often provide that the trustees are entitled to perform audits and the employer is obligated to provide access to all information that is relevant to the administration of the plan, as determined by the trustees in their discretion. In other words, the pertinent inquiry is the determination of the information that is relevant to the proper administration of the fund by the trustees and, in turn, must be produced by the employer to the fund's auditors. In many circumstances, this dispute is not a particularly efficient use of the employer's resources.

Information Relevant to Administration of Benefit Plan

The U.S. Supreme Court has weighed in on the scope of multiemployer plan trustees' audit powers in *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). In this case, the employer had argued that it satisfied its obligations by self-reporting all records relating to participants in the funds; the pension fund, on the other hand, argued that under the trust documents, its audit powers expanded beyond the employer's self-reporting. In reversing the U.S. Court of Appeals for the Sixth Circuit's judgment in favor of the employer, the Supreme Court held that the fund's demand for records was consistent with the fund trustees' authority as outlined in the trust agreements. However, the it also held the trustees' right to audit is limited to prudent actions that further legitimate purposes of the plan. Another important takeaway is that the trustees' right to conduct an audit are defined by the terms of the trust documents under contract law, not ERISA.

Courts generally are willing to enable trustees to take legitimate steps to properly administer the benefit plan. However, courts have held that the trustees' right to audit is not unlimited and the trustees must not abuse such contractual rights. *See New York State Nurses Ass'n Benefits Fund v. Nyack Hosp.*, 2019 U.S. Dist. LEXIS 167067 (S.D.N.Y. 2019) (*citing New York State Teamsters Conference Pension and Ret. Fund v. Boening Bros., Inc*, 92 F.3d 127 (2d Cir. 1996)). Accordingly, courts have excluded from the permissible scope of an audit payroll records work performed outside of the geographical jurisdiction of the CBA (*see Trustees of Michigan Regional Council of Carpenters Employee Benefits Fund v. Exhibits Works, Inc.,* 868 F. Supp. 2d 592 (E.D. Mich. 2012)) and work outside of the scope of work performed by the bargaining unit members. *See New York State Nurses Ass'n Benefits Fund*. Courts also have found that, where the CBA allows the employer to subcontract, the trustees do not have a right to audit the payments made to the employer's subcontractors. *See Bensi v. El Camino Hosp.*, 2012 U.S. Dist. LEXIS 23380 (N.D. Cal. 2012).

Common law is informative, but each case is fact intensive. The courts tend to focus their analysis on the scope of the employer's contractual obligations and whether the trustees' demand for information is relevant to their legitimate efforts to properly administer these benefit plans.

Mitigate the Risk

The following can help limit an employer's audit risk:

- Propose a limited scope audit that can be completed remotely by providing copies of documents required to complete audit procedures modified by COVID-19.
- Before entering into a CBA, review any trust agreements to which it would be bound and explore how to lessen the burden.
- Upon receipt of an audit notice, look to the applicable CBAs and trust agreements to understand the scope of the employer's contractual obligations, if any, to comply with these payroll audits.
- Provide only what is contractually required to avoid offering excessive and irrelevant information.
- Identify requests that might be illegitimate or serve the interests of the union, rather than the benefit plans.
- Understand what the auditor needs to complete the audit and avoid providing information that could cause confusion or unwarranted discrepancies.
- Contact the fund's trustees to discuss eliminating overreaching audit procedures.
- Limit the period covered by the audit.
- Proceed with caution as auditors are looking for underpayments, not overpayments.

Having strategies in place can help employers mitigate the risks associated with these audits.

For additional guidance on this issue, please contact the Jackson Lewis attorney with whom you regularly work.