Legal Update Article

Understanding the Multiemployer Pension Plan Construction Industry Exemption

By

December 30, 2021

Related Services

Construction
Employee Benefits
ERISA Complex Litigation
Wellness Programs

The Multiemployer Pension Plan Amendments Act (MPPAA), the Employee Retirement Income Security Act's (ERISA) progeny, can create significant unexpected liabilities for companies that have agreed to collective bargaining agreements (CBAs) requiring participation in and contributions to multiemployer-defined benefit pension funds (often referred to as Taft-Hartley Funds). However, a special exemption is available to employers in the construction industry.

Background: Withdrawal Liability

An ostensibly minor term in a CBA as to which fund an employer must contribute for its employees' retirement can handicap and restrict how the company may be operated, sold, or even shut down.

The financial burdens on such employers are caused by a penalty known as withdrawal liability. Withdrawal liability was a Congressional effort to correct "underfunding" of many pension funds. In this area, underfunding means the pension fund does not have sufficient assets to pay all its liabilities. In business parlance, it means a company cannot pay its bills that, in the economic marketplace, can lead to insolvency, bankruptcy, and imposition of liability upon owners. This logic of the marketplace does *not* apply in the world of ERISA. The liabilities of the funds fall directly upon contributing employers, even though they did nothing to cause the financial problems and, in many situations, were unaware. In the world of ERISA, the contributing employers are burdened with those obligations, which often are a multiple of all contributions they ever made to the fund. Shockingly, this concept has been addressed and accepted by the U.S. Supreme Court.

The genesis of an employer's liability can be traced back to execution of a CBA containing a seemingly innocuous and often insignificant contribution amount to a pension fund. The union representative may refer to that provision as housekeeping to be addressed only after resolution of the "important money provisions" of the CBA. However, this "minor point" can have far-reaching impact not only on the signatory employer, but also on the employer's other businesses that are unconnected to the CBA under a control group theory.

Building & Construction Industry Exemption

For employers in the building and construction industry (B&C), Congress provided some leverage. Congress recognized the nature of B&C was different from other industries. Employees may perform work for several employers during a plan year as construction jobs are started, worked, and completed. Employees can work full-time during a typical business year, but for several employers.

The B&C exemption can serve as a life preserver for a business: a way to avoid costly withdrawal liability. An employer (and counsel) must understand the requirements of the exemption as to the fund and the union.

Requirements of the fund:

1. The multiemployer direct benefits fund:

a. Must be a definitionally B&C fund. The "DNA" of such a fund must require that the plan "primarily covers employees in the building and construction industry." Although not defined in MPPAA, "primarily covers" has been interpreted to mean at least 85 percent of the participants; or
b. Has been amended to provide that the B&C exemption applies to employers described in Section 4203(b) of MPPAA. This requires not only an amendment to plan documents, but an application by the fund to the Pension Benefit Guaranty Corporation (PBGC), accompanied by an actuarial report, and approval by the PBGC that the proposed amendment is accepted because it will not harm the funding base of the plan. Not all applications are approved by the PBGC.

2. The employer must demonstrate that substantially all the employees with respect to whom it has an obligation to contribute under the plan perform work in the building and construction industry. "Substantially all" has interpreted to mean at least 85 percent.

3. The employer does not perform work of the type for which contributions were previously made within the jurisdiction of the CBA or resumes such work within five years of the disruption. The jurisdiction of the CBA is important. For example, consider an employer that performed work in New Mexico and Fort Bullis, Texas, but the CBA's jurisdiction was limited to San Antonio. In this scenario, non-union work performed in New Mexico (for which contributions were made in San Antonio) would not destroy the exemption.

As suggested, consideration of the efficacy of this exemption should not be an afterthought, but should be analyzed before the CBA negotiations and with an attorney well-versed in ERISA and MPPAA.

Please contact a Jackson Lewis attorney with any questions.