

# Building and Construction Industry Exemption: Tool to Contest Withdrawal Liability

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The Multiemployer Pension Plan Amendments Act of 1974 (MPPAA) was enacted purposefully by Congress to seize moneys from contributing employers to fund multiemployer defined benefit pension funds regardless of the employers' culpability for the underfunding of those plans. However, the construction industry is one of a few industries in which the impact of withdrawal liability upon employers has been eliminated.

### Background

The goal of MPPAA practitioners who represent employers in arbitrations against the funds is to eliminate or reduce withdrawal liability. Unlike other aspects of American jurisprudence that provide a defendant or charged party a presumption of innocence or lack of liability, MPPAA presumes that an employer owes withdrawal liability.

Moreover, MPPAA imposes the burden of proof upon the withdrawn employer to prove it does not owe withdrawal liability. To ensure that such liability exists, all actions of a pension fund or its trustee are presumed to be correct. By a preponderance of evidence, an employer must rebut the presumption of correctness that attaches to the determinations of the trustees that withdrawal liability is due and owing.

MPPAA provides a few exemptions to help an employer. One is the labor dispute exemption that recognizes that a permanent cessation of operations (the reason for a withdrawal) cannot occur in a strike or lockout, both of which are presumed to be short term.

The other major exemption is the building and construction (B&C) exemption (Section 4203(b) of ERISA). It reflects the successful efforts of lobbyists for the construction industry to educate Congress about the unique characteristics of their industry.

### B&C Exemption

Unlike other industries where employees typically work for a single employer during a Plan Year, a B&C employee will most likely work for several employers during a Plan Year because they work on building projects. As projects are completed, new projects begin. Therefore, termination of work for projects will not put employees out of work for an extended period of time or cause contributions to cease.

Accordingly, application of the B&C exemption will excuse employers from owing withdrawal liability, despite the withdrawal liability demanded by a pension fund. However, to successfully utilize the exception to a client's advantage, a MPPAA practitioner must know the nuances of the exception.

The B&C exception has two major provisions. The first is the "de facto" exception, which occurs when (1) the employer's business and (2) the operation of the pension fund meet the provisions of exemption. The plan must primarily cover employees in the building and construction industry as participants. This means that the majority of contributions to the plan must come from contributing employers that work in the construction industry. However, ERISA does not define the activities that are included within the term "building and

construction industry.” Rather, plan sponsors are directed to use labor-management relations law in defining “building and construction industry.”

The second requirement is that “substantially all” the employees for whom an employer is obligated to contribute perform work in the building and construction industry. Again, ERISA provides no guidance as to the term “substantially all.” Case law primarily within the U.S. Court of Appeals for the Seventh Circuit has defined it to mean 85% or more, which refers to the number of employees, not the number of contribution base units. (The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.)

The next task is to determine what is the work that building and construction includes. Again, one is directed to labor law and the specifics of the work involved. For example, employers engaged in the provision of labor whereby materials and constituent parts may be combined on the building site are covered, but employers carrying out the manufacturing and assembly of products installed by others at a construction site are not covered. This requires a detailed factual analysis of each situation.

The exemption contains a second provision for a plan to be a B&C plan. Typically, a fund must possess many, but not all, of the characteristics of a B&C fund. In that case, a fund is permitted to file an application for approval of special withdrawal liability rules with the Pension Benefit Guaranty Corporation (PBGC).

The PBGC application should include copies of the fund’s most recent actuarial valuation reports. Plan costs for funding purposes are determined, typically, using entry age normal level method (the cost of each individual’s pension is allocated on a level percent of payroll between the time employment starts, entry age, and the assumed retirement date). Benefits are subject to collective bargaining and contributions are allocated among contributing employers on the basis of ERISA minimum requirements. The PBGC will determine whether the application satisfies the rules and the application can be approved. In some instances, the application review time can be lengthy.

Jackson Lewis attorneys are available to answer questions about ERISA and employers’ obligations.

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