

***Multi-Employer Pension Plan  
Withdrawal Liability: Buyer Beware***

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## Table of Contents

I.	OVERVIEW OF WITHDRAWAL LIABILITY .....	11.1
II.	DETERMINATION OF WHETHER A WITHDRAWAL HAS OCCURRED .....	11.2
	A. Complete Withdrawal. ERISA § 4203(a). .....	11.2
	B. Partial Withdrawal. ERISA § 4205. ....	11.2
	C. Special Rules for Construction Industry. ERISA § 4203(b). ....	11.3
	D. Special Rules for Trucking Industry. ERISA § 4203(d). ....	11.3
	E. Mass Withdrawal Liability.....	11.4
III.	CALCULATION OF WITHDRAWAL LIABILITY .....	11.5
	A. Methods for Computing Withdrawal Liability. ERISA § 4211. ....	11.5
	B. Presumptive Method. ERISA § 4211(b). ....	11.6
	C. Reduction Under the <i>de Minimis</i> Rule. ERISA § 4209.....	11.6
	D. Partial Withdrawal. ERISA § 4206. ....	11.7
IV.	PAYMENT OF WITHDRAWAL LIABILITY .....	11.7
	A. Information to Be Furnished by Employer. ERISA § 4219(a).....	11.7
	B. Notice and Collection of Withdrawal Liability by Plan Sponsor. ERISA § 4219(b)(1). ....	11.7
	C. Payment Schedule Formula. ERISA § 4219(c)(1)(C). ....	11.7
	D. Length of Payments: Twenty-Year Payment Cap. ERISA § 4219(c)(1)(B). ....	11.8
	E. Commencement of Withdrawal Liability Payments. ERISA §§ 4219(c)(2) and (3).....	11.8
	F. Prepayment of Withdrawal Liability. ERISA § 4219(c)(4). ....	11.9
	G. Default. ERISA § 4219(c)(5). ....	11.9
	H. Deductibility of Withdrawal Liability Payments. I.R.C. § 404(g). ....	11.9
	I. Refund of Withdrawal Liability Overpayments. ERISA § 403(c)(2)(A)(ii). ....	11.9
V.	RESOLUTION OF DISPUTES CONCERNING WITHDRAWAL LIABILITY .....	11.9
	A. Request for Review of Plan Sponsor's Determinations. ERISA § 4219(b)(2). ....	11.9
	B. Arbitration Proceeding. ERISA § 4221.....	11.10
	C. Payments During Arbitration Period. ERISA §§ 4221(b)(1) and (d).....	11.10
	D. Preservation of Rights by Employer. ....	11.11
VI.	EMPLOYER LIABILITY.....	11.11
	A. Controlled Group. ....	11.11
	B. Sun Capital — Possible Controlled Group Expansion.....	11.12
	C. Successor Employer Liability. ....	11.13
	D. Corporate Alter-Ego Issues. ....	11.14
VII.	SPECIAL CIRCUMSTANCES .....	11.15
	A. Voluntary Assumption of Withdrawal Liability by Purchaser of Assets. ERISA § 4204. ....	11.15
	B. Employer Sale of Assets Limitation. ERISA § 4225(a); 29 U.S.C. § 1405(a).....	11.16
	C. Employer Insolvency Limitation. ERISA § 4225(b); 29 U.S.C. § 1405(b). ....	11.16
	D. Statute of Limitations.....	11.17
VIII.	THE MULTI-EMPLOYER PENSION REFORM ACT OF 2014 ("MPRA") AND THE PENSION PROTECTION ACT OF 2006 ("PPA"): CHANGES TO MULTI-EMPLOYER PENSION PLANS. ....	11.18
	A. PPA and MPRA Modified the Funding Provisions of ERISA for Pension Plans. ....	11.18
	B. Withdrawal Liability Changes. ....	11.19

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

- A. The Multi-employer Pension Plan Amendment Act of 1980 ("MPPAA") amended the Employee Retirement Income Security Act of 1974 ("ERISA"), to impose liability for a share of the unfunded vested benefits of multi-employer defined benefit pension plans on employers who withdraw from such plans. MPPAA was amended by the Pension Protection Act of 2006 ("PPA") and the Multiemployer Pension Reform Act of 2014 ("MPRA").
- B. Under MPPAA when an employer withdraws from a multi-employer defined benefit pension plan which has unfunded vested benefits, the employer is generally liable to the pension plan for a share of the unfunded vested benefits in an amount determined under MPPAA.
- C. Questions to ask in a merger or acquisition:
  - 1. Is there a collective bargaining agreement?
  - 2. Does the employer contribute to a pension plan on behalf of union employees?
  - 3. Is the pension plan a multi-employer plan or a single employer plan?
  - 4. If it is a multi-employer plan, is it a defined benefit plan or a defined contribution plan?
  - 5. If the plan is a multi-employer defined benefit plan, is it underfunded and is there a withdrawal liability?
  - 6. If there is a withdrawal liability:
    - a. A sale of assets may trigger withdrawal liability for the seller.
    - b. A purchase of stock may result in an assumption of the potential withdrawal liability as a contingent liability of the buyer.
    - c. A purchase of assets may also result in assumption of the potential withdrawal liability by the buyer.

## II. DETERMINATION OF WHETHER A WITHDRAWAL HAS OCCURRED

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

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

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

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

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

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

#### 1. Seventy percent contribution decline. ERISA § 4205(a)(1).

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

#### 2. Partial cessation of an employer's contribution obligation. ERISA § 4205(a)(2). A partial cessation occurs in either of the following situations:

##### a. A "bargaining unit take-out." ERISA § 4205(b)(2)(A)(i).

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

##### b. A "facility take-out." ERISA § 4205(b)(2)(A)(ii).

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

to perform work at the facility of the type for which the obligation to contribute ceases.

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

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

1. Complete withdrawal.

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

2. Partial withdrawal.

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

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

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

An employer primarily engaged in such work who ceases to perform work within the geographical area covered by the plan will be considered to have completely withdrawn from the plan only if the employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and either:

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

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

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

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

E. Mass Withdrawal Liability.

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

29 C.F.R. § 4001.2; 29 U.S.C. § 1341a(a)(2).

2. A plan which terminates due to a mass withdrawal is subject to a notice and substantive obligations, including possible benefit reduction or suspension. 29 U.S.C. § 1441; 29 C.F.R. §§ 4041A and 4268.
3. Employers involved in a mass withdrawal not only have to pay the "initial" withdrawal liability as outlined below, but also must pay the amounts which would otherwise be excluded under the *de minimis* and 20-year limitation provisions. 29 U.S.C. §§ 1389(c), 1399(c)(1)(D); 29 C.F.R. §§ 4219.11, 4219.12.
4. Further, *employers who withdraw within three years of a mass withdrawal* are presumed to have withdrawn pursuant to an agreement or arrangement to withdraw and *may be liable for reallocation liability*. This presumption may be rebutted by a preponderance of the evidence. 29 U.S.C. §§ 1389(d), 1399(c)(1)(D); 29 C.F.R. § 4219.12(g). Reallocation liability is an amount of UVBs which are not otherwise collected or collectible by the pension plan, such as amounts uncollectible due to the bankruptcy of employers.
5. From the mass withdrawal or termination of the plan due to a mass withdrawal, a sequence of deadlines for computing and giving notice of liability occur under the regulations (29 C.F.R. § 4219). This can be a lengthy period of time, extending over one year after the mass withdrawal occurs.
6. Any additional amounts owed due to a mass withdrawal are either added into the employer's withdrawal liability payment schedule or, if the employer has no withdrawal liability payments, a new payment schedule is established in the same manner as an initial withdrawal liability payment schedule. 29 C.F.R. § 4219.16(f).
7. The review and arbitration procedures for withdrawal liability (discussed below) also apply to mass withdrawal liability determinations. 29 C.F.R. § 4219.16(g). If the plan sponsor later determines that a mass withdrawal has not occurred, then withdrawal liability payments and interest must be refunded to employers. 29 C.F.R. § 4219.16(i).

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

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

MPPAA established a "presumptive method" for computing and allocating withdrawal liability. ERISA also provides several alternative methods upon which plans may compute withdrawal liability. However, the presumptive method will generally apply unless a plan specifically adopts one of the alternative methods.

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

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

1. The employer's proportional share (unamortized amount) of the change in "unfunded vested benefits" (the amount by which the plan's vested [non-forfeitable] benefits exceed the plan's assets) for plan years ending after September 25, 1980, during which the employer was obligated to contribute under the plan; and
2. The employer's proportional share (if any) of the unamortized amount of the unfunded vested benefits for the plan years ending prior to September 26, 1980 (applicable only to employers who were obligated to contribute to the plan for plan years ending prior to September 26, 1980); and
3. The employer's proportional share of the plan's reallocated unfunded vested benefits (if any).

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

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

A plan may calculate an employer's withdrawal liability percentage based on the employer's contributions to the plan over a specific period such as the 5 or 10 year period prior to the withdrawal.

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

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

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

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

D. Partial Withdrawal. ERISA § 4206.

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

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

#### IV. PAYMENT OF WITHDRAWAL LIABILITY

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

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

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

1. As soon as practicable after an employer's complete or partial withdrawal from a multi-employer pension plan, the plan sponsor must notify the employer of (1) the amount of withdrawal liability; and (2) the payment schedule for such liability payments. The plan sponsor must demand that withdrawal payments be made in accordance with the payment schedule.
2. An assessment of withdrawal liability is mandatory under ERISA § 4201.

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

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

Annual amount of withdrawal liability payment equals

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

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

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

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

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

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

The U.S. Supreme Court has held that interest on an employer's amortized charge for withdrawal liability begins to accrue on the first day of the plan year following withdrawal.<sup>1</sup> Rejecting an argument that interest should begin to accrue on the last day of the plan year preceding withdrawal, the Supreme Court reasoned that one does not pay interest on a debt until the debt arises. Under ERISA § 4211, withdrawal liability is treated as arising on the first day of the plan year following

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<sup>1</sup> Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Company, 115 S. Ct. 981 (1995).

withdrawal since the calculation of payments treats the "first payment" as if it were made on the first day of the year following withdrawal.

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

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

G. Default. ERISA § 4219(c)(5).

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

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

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

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

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

## V. RESOLUTION OF DISPUTES CONCERNING WITHDRAWAL LIABILITY

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

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

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<sup>2</sup> Department of Labor Opinion No. 95-24A (Sept. 8, 1995).

employer's withdrawal liability and furnish the plan sponsor with any additional relevant information.

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

**B. Arbitration Proceeding. ERISA § 4221.**

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

For purposes of the arbitration proceeding, ERISA § 4221(a)(3)(B) states that any determination of withdrawal liability or of liability payments by a plan sponsor will be presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the actuarial assumptions or methods used in the determination were, in the aggregate, unreasonable. Determinations made by the plan sponsor are presumed correct under a clearly erroneous standard. ERISA § 4221(a)(3).

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

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

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

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

D. Preservation of Rights by Employer.

It is critically important that an employer take immediate action to preserve its rights if it receives a notice of withdrawal liability from a multi-employer plan. *If the employer fails to request a review of the plan sponsor's determinations (see V.A. above) and does not request arbitration within the appropriate time periods (see V.B. above), the employer may have waived all of its rights to challenge the assessment of the withdrawal liability.*<sup>3</sup>

## VI. EMPLOYER LIABILITY

A. Controlled Group.

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

For purposes of Title IV of ERISA, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such commonly controlled trades and businesses are treated as a single employer. In Opinion Letter No. 82-13 issued by the Pension Benefit Guarantee Corporation (PBGC), the PBGC stated that the term "employer" as defined in § 4001(b) applies for all purposes under Title IV of ERISA, including a determination by a multi-employer pension plan of whether a complete or partial withdrawal has occurred. The PBGC also stated that all members of a controlled group of corporations are responsible for the withdrawal liability attributable to one of the controlled group members. PBGC Opinion Letter 97-1.

The regulations issued under § 414(c) of the Internal Revenue Code define a controlled group of corporations for all purposes under Title IV of ERISA, including multi-employer pension plan withdrawal liability.

Parent-Subsidiary Controlled Group.

A parent-subsidiary controlled group is defined as one or more chains of businesses connected through ownership with a common parent organization if at least 80% of the control or value of the organizations is controlled by one organization. IRC § 1563(a)(1). Eighty Percent control is defined as a "controlling interest". Treas. Reg. § 1.414(c)(2)(b).

Brother-Sister Controlled Group.

A *brother-sister controlled* group is defined as two or more organizations conducting trades or businesses if (1) the same five or fewer persons own, singly or in combination, a controlling interest (defined as at least eighty percent of the voting power or total value of stock) of each organization; and (2) taking into account the ownership of each such person only to the extent such ownership is

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<sup>3</sup> *Trustees of Colorado Pipe Industry Pension Trust v. Howard Elec. & Mechanical Inc.*, 909 F.2d 1379 (10th Cir. 1990).

identical with respect to each such organization, such persons are in effective control (defined as more than fifty percent of the voting power or value of the stock) of each organization. IRC §§ 414(b) and (c), 1563(a). Treas. Reg. § 1.414(c)-2(c).

The business must be involved in a "Trade or Businesses". A Trade or Businesses must be regular and continuous and performed with a profit motive, even if not profitable.

Special rules apply for determining controlled groups for non-for-profit organizations.

#### Potential Personal Liability for Sole Proprietorships.

It has been held that sole proprietorships may be considered "employers" under the common control rules of IRC § 414(c) for purposes of determining withdrawal liability, and, therefore, making the sole proprietor himself personally liable for the outstanding withdrawal liability. For example, in *Board of Trustees v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988), a suit was brought by the trustees of a multiemployer pension plan to collect outstanding withdrawal liability from the owners of a truck leasing company. The court held that for purposes of determining withdrawal liability, a husband and wife could be considered employers based on their status as the sole proprietors of an unincorporated trade or business under common control. Because sole proprietors are not shielded from personal liability, the husband and wife were held personally liable for purposes of assessing withdrawal liability.

Courts have held that the businesses need not be economically related to satisfy the common control test. Thus, the sole owners of corporations who were also sole proprietors of real estate activities<sup>4</sup>, leasing and consulting services<sup>5</sup>, or real estate leasing activities<sup>6</sup> have been found to satisfy the common control test and the sole proprietors have been held liable for the withdrawal liability of the commonly controlled corporations.

#### B. Sun Capital — Possible Controlled Group Expansion.

Two cases involving an investment by private equity fund sponsors appear to have expanded potential controlled group liability in some circumstances.

In *Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013), the First Circuit held that pursuant to an "investment plus" test, a private investment fund was engaged in a trade or business and could be part of a controlled group with a company owned or partially owned as part of its investment portfolio.

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<sup>4</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992).

<sup>5</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992).

<sup>6</sup> *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992).

In *Sun Capital Partners III, LP v. New England Teamsters and Trucking Industry Pension Fund*, No. 10-10921 – DPW, 2016 WL 1239918 (D.Mass. 2016), the district court held that two separate Investment Funds (Fund III and Fund IV) operated by Sun Capital constituted a "partnership-in-fact" that was engaged in a trade or business with an underlying company owned by both Funds and, thus, constituted a controlled group with such company. As members of a controlled group, Fund III and Fund IV were jointly and severally liable for withdrawal liability with the other company.

Fund III and Fund IV, respectively, owned 30% and 70% of Scott Brass, Inc. Scott Brass went into bankruptcy and defaulted on its withdrawal liability obligations to the New England Teamsters and Trucking Industry Pension Fund. Based on the investment plus test, the First Circuit determined that the Sun Capital Funds III and IV were more than just passive investors and were engaged in a trade or business with Scott Brass for purposes of the controlled group rules. The First Circuit did not establish specific guidelines regarding what constitutes the "plus" in the investment plus test. The Court did, however, note that Fund IV received certain economic benefits beyond the benefits that a true passive investor may receive.

The District Court held that Fund III and Fund IV engaged in joint activity when deciding to invest in Scott Brass and in the management of the company. As such, the ownership percentages of Fund III and Fund IV could be lumped together as a "partnership-in-fact" for controlled group analysis. Since the combined percentages of Fund III and Fund IV exceeded 80% of the stock of Scott Brass, the three entities constituted a controlled group.

#### C. Successor Employer Liability.

Under the common law, an asset purchaser does not assume the liabilities of an asset seller. Starting with *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), however, the U.S. Supreme Court signaled that a successor liability exception may apply for certain labor and employment related issues.

The Seventh Circuit applied the doctrine to withdrawal liability in *Chicago Truck Drivers, Helpers & Warehouse Workers Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995). The court noted that the doctrine of successor liability could apply if a court found both:

1. the successor had notice of the predecessor's liability, and
2. there was substantial continuity in the operation of the businesses before and after the sale.

Indices of continuity includes continuity of workforce, management, equipment and location, constancy of customers, and completion of work orders begun by the predecessor.

In *Tsareff v. ManWeb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015), the Seventh Circuit expanded its application of the successor liability doctrine in the

withdrawal liability context by, inter alia, holding that a buyer's knowledge of a seller's contingent withdrawal liability satisfied the notice requirement. In *Tsareff*, a unionized electrical contractor (Tiernan) sold its assets to a non-union employer (ManWeb). As a result of the sale, Tiernan ceased operations and ceased contributions to a multiemployer pension fund. The Fund asserted that this resulted in a complete withdrawal and assessed withdrawal liability. Tiernan failed to seek review or arbitration and the Fund filed suit against Tiernan and ManWeb (as a successor employer). The district court granted ManWeb's motion for summary judgment and ruled that a pre-acquisition notice of contingent liabilities was not sufficient to satisfy the notice requirement to find liability as a successor employer.

The Seventh Circuit reversed, finding that notice of contingent withdrawal liability is sufficient to satisfy the notice requirement and that ManWeb's notice of contingent liability could be "both reasonably inferred and directly proven by evidence in the record." In support of this position, the Seventh Circuit cited provisions in the asset purchase agreement stating that ManWeb was not obligated to assume any liability or obligation "arising out of or related to union related activities, including, without limitation, pension obligations." *Id.* at 848.

In *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir. 2015), the Ninth Circuit extended the successor employer liability theory to a subsequent employer that had purchased certain assets of a predecessor employer at a public auction. In *Resilient*, Studer's Floor Covering, Inc. ceased doing business and ceased making contributions to a construction industry multiemployer pension fund. A former salesman of Studer's started Michael's Floor Covering, Inc. and continued in the floor covering business. Michael's hired five of Studer's former employees, leased the same premises, obtained the same phone number, used similar signage and purchased 30% of Studer's tools, equipment and inventory at a public auction.

The parties did not have a contractual relationship and no transfer of customer lists or customer information occurred between Studer's and Michael's.

The Ninth Circuit held that there was no reason why the successorship doctrine should not apply to either MPPAA withdrawal liability generally or to the construction industry exception in particular so long as the successor had notice of the liability.

The Ninth Circuit gave significant weight to the portion of Studer's business that Michael's retained (the "*market share capture*") and stated that the focus should be the relative amount of revenue generated by Studer's former customers. The Court also stated that workforce continuity should focus on the employees to whom pension contributions would be due and whether "a majority of the new workforce once worked for the old employer." The Ninth Circuit remanded the case to the district court for proper consideration of the factors.

#### D. Corporate Alter-Ego Issues.

It is possible for two unrelated entities (not members of a controlled group) to be held jointly liable for withdrawal liability under an "Alter-Ego" theory.

In *Local 134 Board of Trustees of the Toledo Roofers Pension Plan v. Enterprise Roofing and Sheet Metal Co. and Enterprise Roofing and Remodeling Surfaces, Inc.*, Case No. 3:10CV1869 (N.D. Ohio 2013) Judge James Carr essentially provided a checklist for the determination of potential alter-ego status.

In *Enterprise*, Judge Carr found that two separate entities were both liable for the multiemployer pension plan liability triggered by one of the entities by holding that the two entities were related under an alter-ego theory. Judge Carr noted numerous factors showing that two different companies are essentially the same company for labor law and pension liability purposes under the alter-ego theory. Judge Carr based his decision on several factors, including:

1. The companies had the same or similar management;
2. The companies had the same physical location;
3. The companies shared phone lines or separate phone lines which ended up at the same phone;
4. Family members owned both companies;
5. The companies had similar names;
6. There was lending of money between the companies (furthermore, the loans were neither documented nor repaid);
7. The companies shared tools;
8. The companies frequently serviced the same clients;
9. There was confusion by the clients as to which company is which;
10. The companies had similar ownership (although the companies were not members of a controlled group of corporations);
11. The companies had some of the same officers; and
12. The business of the companies overlapped to a considerable degree.

## **VII. SPECIAL CIRCUMSTANCES**

- A. Voluntary Assumption of Withdrawal Liability by Purchaser of Assets. ERISA § 4204.
  1. An employer selling assets to an unrelated third party purchaser is relieved of primary withdrawal liability if certain conditions are satisfied.
    - a. The purchaser assumes substantially the same number of contribution base units that the seller had prior to the sale;

- b. The purchaser posts a bond for five years equal to the greater of:
    - i. The average annual contribution required to be made by the seller for the three plan years prior to the plan year in which the sale of assets occurs; or
    - ii. The annual contribution that the seller was required to make for the last plan year prior to the sale of assets.
  - c. The contract of sale provides that the seller is secondarily liable if the purchaser completely or partially withdraws during the five-year period following the sale and the purchaser fails to pay its withdrawal liability.
- 2. If the purchaser withdraws after the sale, the determination of the purchaser's liability takes into account the seller's required contribution for the year of the sale and the four preceding plan years. ERISA § 4204(b)(1).
  - 3. If the seller distributes all or substantially all of its assets or liquidates before the expiration of the five-year period, the seller must post a bond or establish an escrow account equal to the present value of the withdrawal liability that the seller would have had but for the application of ERISA § 4204. ERISA § 4204(a)(3).
- B. Employer Sale of Assets Limitation. ERISA § 4225(a); 29 U.S.C. § 1405(a).
- 1. Withdrawal liability of employers who sell all or substantially all of their operating assets is limited by 29 U.S.C. § 1405(a) (ERISA § 4225(a)).
  - 2. In the case of a bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of 29 U.S.C. § 1384(d)), a graduated schedule limits the employer's liability to 30% of the liquidation or dissolution value of the employer if such value is \$5,000,000 or less up to a maximum of 80% of such value if the value exceeds \$25,000,000.
- C. Employer Insolvency Limitation. ERISA § 4225(b); 29 U.S.C. § 1405(b).
- Unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution.
- 1. Insolvency of employer; liquidation or dissolution of employer.
    - a. An employer is insolvent if the liabilities of the employer, including withdrawal liability under the plan (determined without regard to § 1405(b)), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and

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

D. Statute of Limitations.

1. ERISA § 4301(f)(1) provides that a multiemployer pension plan must file a MPPAA action within six years after the date on which the cause of action arose.
2. The United States Supreme Court held in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal., Inc.*, 522 U.S. 192, 194, (1997), that a cause of action for withdrawal liability arises under the MPPAA each time an employer fails to make a payment as scheduled by the plan trustees, and the trustees have no obligation to accelerate the debt when an employer defaults. However, where the trustees elect to accelerate the liability by demanding payment in full following an employer's default, the six-year period begins to run when the liability is accelerated.
3. In *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc.—Pension Fund v. Kero Leasing Corporation*, 2004 WL1666445 (3rd Cir. 2004) the U.S. Court of Appeals for the Third Circuit held that a multiemployer pension plan's suit for recovery of withdrawal liability from an individual as a participating employer was time-barred since the complaint was filed seven years after the cause of action accrued, one year beyond the statute of limitations provided by the MPPAA. The Third Circuit refused to recharacterize the action as one enforcing a pre-existing default judgment against the individual who was not part of the original suit.

## VIII. THE MULTI-EMPLOYER PENSION REFORM ACT OF 2014 ("MPRA") AND THE PENSION PROTECTION ACT OF 2006 ("PPA"): CHANGES TO MULTI-EMPLOYER PENSION PLANS.

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

PPA modified the funding provisions of ERISA for pension plans, including provisions to shore up ailing defined benefit pension plans.

1. PPA creates three status groups for funds:
  - a. funds which meet the funding standards (Green Zone);
  - b. "endangered" or "seriously endangered" funds (Yellow Zone); and
  - c. "critical" or "critical and declining" funds (Red Zone).

The fund's actuary must certify the fund's status within 90 days of the start of each plan year.

2. Endangered Status (Yellow Zone). A fund is in endangered status if it either: (a) has a funding percentage of 80% or less or (b) faces a funding deficiency within the next 6 years. A fund is in seriously endangered status if it satisfies both conditions. Effects:
  - a. The fund must adopt a funding improvement plan to increase its funding over 10 years (15 if seriously endangered).
  - b. The fund must provide the bargaining parties with two schedules to pick from for the next CBA:
    - i. One to maintain the current contributions but reduce benefits (the default schedule).
    - ii. One to maintain benefits and increase contributions.
    - iii. If the parties don't select a schedule within 180 days after the contract expires (or upon impasse) the fund must implement the default schedule.
  - c. Generally, there can be no plan changes or benefit increases that increase the pension fund's benefit obligations.
  - d. The fund cannot accept a CBA or participation agreement that provides for:
    - i. a reduction in the level of contributions for any participants;
    - ii. a suspension of contributions with respect to any period of service, or

- iii. any new direct or indirect exclusion of younger or newly hired employees from plan participation.
  - e. Fines or excise taxes can be assessed against trustees that don't comply with the funding improvement plan and employers that don't make the required contributions under a default schedule.
- 3. Critical Status (Red Zone). A funding percentage of 65% or less or projected to have a funding deficiency or cash-flow crisis within 3 to 6 years. The effects are the same as being endangered, plus:
  - a. Fund must adopt a "rehabilitation" plan to emerge from critical status in 10 years.
  - b. Within 30 days of receiving notice from the fund, the employer must pay a 5% surcharge on contributions (10% after the initial year) until the effective date of a CBA in which the parties adopt one of the fund's contribution schedules.
  - c. Prospective benefit reductions are permitted for "adjustable benefits", such as full early retirement, post-retirement death benefits, disability benefits not in pay status, or 60-month guarantees.
  - d. Future benefit accrual rates can be reduced, but not to less than 1% of contributions.
- 6. An employer can file suit to compel a plan in endangered or critical status to adopt, update, or comply with a funding improvement or rehabilitate plan.

B. Withdrawal Liability Changes.

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