Withdrawal Liability Assessments by Multiemployer Defined Benefit Pension Plans

A Practical Guidance® Practice Note by Michael G. McNally, Fox Rothschild, LLP

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This practice note discusses withdrawal liability under the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendments Act (MPPAA). The practice note discusses the procedural requirements for responding to withdrawal liability assessments and the mechanism for challenging such assessments. ERISA §§ 4201–4225 (29 U.S.C. §§ 1381–1405).

This practice note is organized around the following topics:

- Withdrawal Liability Background
- Initial Assessment of Withdrawal Liability
- Notice of Liability
- Payment of Withdrawal Liability
- Withdrawal Liability Restrictions and Relief
- Requests for Review
- Arbitration of Withdrawal Liability Assessments

For an overview of ERISA governance of multiemployer plans, see Multiemployer Pension Plan Fundamentals. For a treatise discussion regarding multiemployer plan issues, see Lexis Tax Advisor -- Federal Topical § 1C:15B.02 and Lexis Tax Advisor -- Federal Topical § 1C:15B.04. For a checklist that details steps in addressing withdrawal liability, see Multiemployer Plan Withdrawal Liability Notice Response Checklist. For Pension Benefit Guaranty Corporation (PBGC) guidance on withdrawal liability, see PBGC, Withdrawal Liability. Also see GOING THROUGH WITHDRAWAL: A STEP-BY-STEP GUIDE TO ARBITRATION IN MULTIEMPLOYER WITHDRAWAL LIABILITY DISPUTES, 29 ABA Journal Lab. & Emp. Law 145.

Withdrawal Liability Background

Many employers with a unionized workforce contribute to multiemployer defined benefit pension funds pursuant to the terms of collective bargaining agreements (CBAs) on behalf of their unionized employees. As employers cease having an obligation to contribute to these funds, either voluntarily through negotiation or involuntarily because of union decertification or covered operations having terminated, employers are introduced to the concept of withdrawal liability. See PBGC Opinion Ltr. 1986-7 (Mar. 24, 1986). As amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. Law No. 96-364, the MPPAA), ERISA introduced the requirement of withdrawal liability to maintain or buttress a plan's funded status where a contributing employer to a multiemployer defined benefit pension plan completely or partially ceases to contribute to the plan. The exiting employer is liable to the fund, with certain exceptions, for withdrawal liability, which is based on the employer's allocable share of the fund's unfunded vested benefits (UVBs). ERISA § 4201 (29 U.S.C. § 1381).

Specifically, withdrawal liability can occur in three circumstances:

- **Complete withdrawals.** A complete withdrawal is the permanent cessation of an employer's obligation to contribute to the plan, either because:

- It no longer has an obligation in a CBA to contribute to a plan –or–
- It has ceased the operations for which contributions are required

ERISA §4203(a) (29 U.S.C. §1383(a)). The reason for the withdrawal usually makes no difference, and withdrawal liability may result even if another company (e.g., a purchaser of assets from the withdrawing employer) assumes the obligation to contribute. There are, however, some exceptions. For example, an asset seller can avoid withdrawal liability by posting a bond and meeting other conditions. In some plans, notably those in the building and construction industry, withdrawal liability is imposed only if the employer continues to perform work within the jurisdiction of the plan. Other special rules limit withdrawal liability in plans in the trucking and entertainment industries, and plans may, with the PBGC's approval, fashion their own special rules. For a further discussion on complete withdrawals, see Lexis Tax Advisor -- Federal Topical § 1C:15B.04, paragraph [2].

- **Partial withdrawals.** A partial withdrawal occurs in either of the following circumstances:
  - **70% contribution decline.** Here, a sustained reduction has occurred in the number of contribution base units (CBUs) over a three-year period for which the employer is obligated to contribute.
  - **Partial cessation of the obligation to contribute.** Here, a partial withdrawal occurs because an employer that contributes under more than one CBA, or for more than one facility, (1) ceases to have an obligation to contribute for covered operations under one or more (but not all) agreements or facilities, and (2) continues to perform work of the same kind within the jurisdiction of the agreement, or at the facility. ERISA §4205(b)(1)(B)(i) (29 U.S.C. §1385(b)(1)(B)(i)). Upon a partial withdrawal, the employer's liability is calculated in the same manner as for a complete withdrawal, but its installment payments of the liability are reduced to reflect the extent to which it continues to have an obligation to contribute to the plan.
- **Mass withdrawals.** A mass withdrawal is the complete withdrawal of all contributing employers. Various rules that ordinarily mitigate withdrawal liability, such as the waiver of de minimis amounts, do not apply to a mass withdrawal. For a further discussion on mass withdrawals, see Lexis Tax Advisor -- Federal Topical § 1C:15B.04, paragraph [4][e].

For a further discussion on partial withdrawals, see Lexis Tax Advisor -- Federal Topical § 1C:15B.04, paragraph [3].

Transactions That Do Not Result in Complete Withdrawal

The following transactions bring an employer's obligation to contribute to an end without incurring withdrawal liability:

- **Changes in business structure.** A change in business structure, in which an employer is replaced by a successor without any substantive change, generally is not a withdrawal by the predecessor employer.
- **Sale of stock or spinoff of a controlled group member.** A controlled group's sale or spin-off of the stock of a member that contributes to a multiemployer plan is not a withdrawal by the members that do not contribute to the plan, nor is the change of ownership a withdrawal by the company that has been sold.
- **Sale of assets.** A sale of the assets of an operation that contributes to a multiemployer plan is not a withdrawal if the buyer assumes the contribution obligation and other conditions are met.
- **Changes in bargaining representatives with transfer of assets.** When a company's workers change bargaining representatives and contributions to a multiemployer plan are required both before and after the change, the employer can avoid a withdrawal from the first plan by compelling a transfer of assets and liabilities between the two plans, subject to some restrictions.
- **Transfer of assets to a single employer plan.** It is also possible to avoid withdrawal liability by arranging a transfer from a multiemployer plan to a single employer plan, although the consent of the multiemployer plan is needed.
- **Strikes or lockouts.** Because a withdrawal arises only from the permanent cessation of the obligation to contribute, an employer's suspension of contributions during a strike or lockout does not result in withdrawal liability until and unless the dispute results in (1) the permanent cessation of covered operations, (2) a new CBA applying that does not include an obligation to contribute, or (3) the bargaining representative is decertified.

Initial Assessment of Withdrawal Liability

After an employer's obligation to contribute ceases, the multiemployer plan sponsor (which is the board of trustees) must, as soon as practicable:

- Determine the amount of withdrawal liability
- Notify the employer of the withdrawal liability –and–
- Demand payment according to the schedule

ERISA § 4202 (29 U.S.C. § 1382). This notice and demand is commonly referred to as an assessment. Disputes over withdrawal liability assessments are governed by a statutory time line, and the assessment begins that process.

Determining the Amount of Withdrawal Liability

The trustees of a multiemployer pension plan will assess withdrawal liability against a participating employer that makes a complete or partial withdrawal from the plan to the extent UVBs are allocable to the withdrawing employer. ERISA § 4201 (29 U.S.C. § 1381).

Methods for Calculating Withdrawal Liability

An employer's withdrawal liability is calculated by allocating the plan's UVBs among the contributing employers. There are several permissible methods that plans may use for allocating UVBs:

- **The presumptive method.** Informally known as the "20-pool" method, the presumptive method is the default choice for most plans and mandatory for plans in the building and construction industry. This method looks at the change in the plan's UVBs in each of the 20 plan years preceding the year of withdrawal and allocates those changes to employers in proportion to their contributions during the five-year period ending with each of those years. Each pool is amortized over 20 years on a straight-line basis. ERISA § 4211(b) (29 U.S.C. § 1391(b)). An employer's withdrawal liability is the sum of its shares of all the pools. A notable feature of this method is that a plan may impose withdrawal liability even if it is fully funded in an employer's year of withdrawal. 29 C.F.R. §§4211.3(a), 4211.21(b).
- **The rolling-5 method.** Also called the "one-pool" method, this method of determining withdrawal liability simply allocates the plan's UVBs as of the close of the plan year preceding the year of withdrawal in the same proportion as the employer's contributions to the plan during that year and the preceding four years. ERISA §4211(d)(1) (29 U.S.C. §1391(d)(1)); 29 C.F.R. §4211.3(b). –and–
- **The direct attribution method.** This method of determining withdrawal liability attempts to allocate UVBs as if the contributing employers maintained separate plans. It achieves only a rough approximation of that goal. Plan assets and UVBs are allocated separately. ERISA §4211(c)(4)(A) (29 U.S.C. §1391(c)(4)(A)).
  - By definition, UVBs equal the difference between the values of vested benefits and of the assets that fund them. Vested benefits, in turn, have two components:

    — Those attributable to service with employers that currently contribute to the plan –and–

    — Those attributable to withdrawn employers, since the latter cannot be allocated simply and directly to any of the current employers

  An employer's withdrawal liability, before any reductions, equals the UVBs directly attributable to services rendered to it by its employees plus its share of the UVBs attributable to withdrawn employers. To arrive at this amount, the direct attribution method proceeds in three steps:

    — Allocation of vested benefits attributable to service with current employers

    — Allocation of assets to fund the benefits allocated in step one –and–

    — Allocation of all remaining assets and benefits

  In all cases, assets and vested benefits are valued and allocated as of the last day of the plan year preceding the year of withdrawal. Whether an employer is treated as having an obligation to contribute depends on whether it was obligated during that year.

Plans are, with some exceptions, free to adopt any of these methods, or a plan may devise a different method with PBGC approval.

Notice of Liability

Plans are responsible for ascertaining that employers have withdrawn and then must assess complete or partial withdrawal liability. ERISA § 4219(a) (29 U.S.C. § 1399(a)).

As soon as practicable after an employer's withdrawal, the plan must notify the employer of the amount of its withdrawal liability and the schedule of installment payments. ERISA § 4219(b)(1) (29 U.S.C. § 1399(b)91)). The calculation does not have to be exact. An estimate is sufficient to start the period running during which the employer can request review of the assessment. Retirement Plan of the National Retirement Fund v. Lackmann Food Service, Inc., 2011 U.S. Dist. LEXIS 83458 (S.D.N.Y. July 29, 2011); Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Loyal Casket Co., 2008 U.S. Dist. LEXIS 27832 (N.D. Ill. Apr. 7, 2008);

PBGC Op. Ltr. 92-2 (Apr. 22, 1992. The fund may compel employers to furnish the information needed for purposes of determining the amount of liability. The notice does not have to be given to all members of the contributing employer's controlled group, only to the entities that directly employ plan participants. IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 127–28 (3d Cir. 1986).

If the plan later determines that the amount of withdrawal liability originally assessed was erroneous, it has the right to issue a revised assessment, regardless of how much time has elapsed, so long as the delay does not unduly prejudice the employer. Masters, Mates & Pilots Pension Plan v. USX Corp., 900 F.2d 727, 735–36 (4th Cir., 1990). See also PBGC Op. Ltr. 90-2 (April 20, 1990.

Payment of Withdrawal Liability

Withdrawal liability is paid in quarterly installments (or at other intervals specified by plan rules). The amount to be paid each year is the product of:

- The employer's average CBUs for the three consecutive years, out of the 10 years preceding the year of withdrawal, for which it had the largest total number of CBUs –and–
- The highest contribution rate that it was obligated to pay pursuant to the terms of a CBA during the same 10-year period

Payments continue until the employer's withdrawal liability is fully amortized, based on the same interest rate used for plan funding purposes, but in no event for longer than 20 years, unless the employer participated in a mass withdrawal. The employer may prepay its liability at any time without penalty.

Due Date

Although the duration of the withdrawal liability payments is calculated as if they were made annually on the first day of the plan year, they are actually due quarterly or at whatever other interval the plan rules specify. No additional interest is charged to reflect the fact that payments are made later than was assumed in calculating the length of the amortization period. ERISA §4219(c)(3) (29 U.S.C. §1399(c)(3)).

The plan may demand the immediate payment of all or any part of the liability in a lump sum if the employer fails to make a scheduled payment and does not correct the deficiency within 60 days after receiving written notice from the plan. ERISA §4219(c)(5) (29 U.S.C. §1399(c)(5)); 29 C.F.R. §4219.31(b). A plan also may adopt its own rules defining as a default any other event that "indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." ERISA §4219(c)(5)(B) (29 U.S.C. §1399(c)(5)(B)); 29 C.F.R. §4219.31(b)(1)(ii). Interest runs on the entire accelerated payment from the date on which the defaulted payment was due. ERISA §4219(c)(6) (29 U.S.C. §1399(c)(6)); 29 C.F.R. §4219.32(a)(2).

The employer may prepay all or any part of its withdrawal liability without penalty. A partial prepayment shortens the installment period but has no other effect. ERISA §4219(c)(4) (29 U.S.C. §1399(c)(4)).

Overpayments

The return of a withdrawal liability payment that has been determined to be an overpayment is allowed within six months later after the date of the determination. ERISA § 403(c)(4) (29 U.S.C. § 1103(c)(4)).

Withdrawal Liability of Controlled Group Members

Withdrawal liability is unique in that the liability may be collected not only from the contributing employer, but also from all other trades or businesses under common control.

Controlled Group Liability

Trades or businesses that form a controlled group are jointly and severally liable for withdrawal liability incurred by any member of the group. The statute and regulations provide that "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 trades or businesses as a single employer." ERISA § 4001(b)(1) (29 U.S.C. § 1301(b)(1)); 29 C.F.R. § 4001.3(a)(2). The definition of "trades or businesses under common control" is identical to that in I.R.C. § 414(c), which is used for numerous qualified plan purposes. For information in that regard, see Controlled Group and Affiliated Service Group Rules for Employee Benefit Plans.

However, there are two prongs for determining whether a particular entity is part of a controlled group with a withdrawn employer. One is the criteria for "common control" that follows IRS regulations. The other is determining whether the putative controlled group member is a "trade or business," which issue has become significant in withdrawal liability disputes. An employer that is insolvent at the time of withdrawal may be owned by individuals with substantial investments. If those investments can be characterized as "trades or businesses,"

they may form a controlled group with the employer and be reachable by the plan. For an in-depth discussion of these issues, see 2014 NYU Review of Employee Benefits § 8.03, "Defining Trade or Business' (Three Overlapping Approaches)."

Withdrawal Liability Restrictions and Relief

The law contains special relief provisions to soften the impact of withdrawal liability. Among them are:

- A de minimis reduction
- A 20-year payment cap
- A credit for a prior partial withdrawal –and–
- A limitation on liability under ERISA § 4225 (29 U.S.C. § 1405)

De Minimis Reduction

Under a de minimis rule, the smaller of (1) $50,000 or (2) 0.75% of the plan's UVBs is subtracted from an employer's withdrawal liability in determining the total. This exclusion is reduced dollar for dollar by the amount by which the withdrawal liability would otherwise exceed $100,000, so that it is not available to an employer whose unadjusted liability is $150,000 or greater. ERISA § 4209 (29 U.S.C. § 1389). It works like this:

- The base reduction is the lesser of $50,000 or 0.75% of the plan's UVBs as of the end of the plan year preceding the withdrawal.
- If the gross liability is $100,000 or less, it is reduced by the base reduction (but not to less than zero, of course).
- If the gross liability is above $100,000 but less than $100,000 plus the base reduction, it is reduced by the base reduction minus the excess of the gross liability over $100,000 (i.e., a dollar-for-dollar reduction for gross liability above $100,000).
- If the gross liability is above $100,000 plus the base reduction, there is no de minimis reduction.

ERISA § 4209(a) (29 U.S.C. § 1389(a)).

20-Year Cap

If an employer's withdrawal liability is so large in relation to its past contributions that it will take longer than 20 years to pay off, only the first 20 years' installments need to be paid. ERISA § 4219(c)(1)(B) (29 U.S.C. § 1399(c)(1)(B)).

Credit for Prior Partial Withdrawal

Withdrawal liability will be offset (credited) by the amount of partial withdrawal liability already incurred. ERISA § 4206(b)(1)(B) (29 U.S.C. § 1386(b)(1)). This credit reduces the hypothetical complete withdrawal liability at the time of the second partial withdrawal. The credit does not, however, simply equal the amount previously assessed or the portion that has been paid as of the time of the second withdrawal. Instead, it is reduced over time. See 52 Fed. Reg. 37,329, 37,330 (Oct. 6, 1987).

Limit for Liquidating or Insolvent Employers

Two provisions reduce withdrawal liability for employers that are liquidating. One is useful primarily to small companies and limits withdrawal liability when an employer liquidates by selling substantially all of its assets. ERISA §4225(a) (29 U.S.C. § 1405(a)). The other limits the extent to which claims for withdrawal liability compete for the assets of insolvent employers that are undergoing liquidation. ERISA §4225(b) (29 U.S.C. § 1405(b)). Like other reductions, this one does not apply to I.R.C. § 404(c) coal industry plans and their continuations unless they are amended to adopt it. ERISA § 4211(d)(2) (29 U.S.C. § 1391(d)(2)). ERISA § 4225 (29 U.S.C. § 1405).

Small Employers

If an employer liquidates all or substantially all of its assets in an arm's-length sale to an unrelated party and is not in bankruptcy reorganization under Chapter 11 of the Bankruptcy Code or a similar state law, its withdrawal liability is limited to a percentage of its liquidation value, as determined after the sale but before taking into account claims for withdrawal liability. ERISA §4225(a)(1)(A), (d)(2) (29 U.S.C. §1405(a)(1)(A), (d)(2)). The percentage is based on a sliding scale, from 30% if the liquidation value is $5,000,000 or less to 80% if it exceeds $25,000,000. The main beneficiaries of this limitation are relatively small employers in plans with high levels of UVBs.

Insolvent Employers in Liquidation

The withdrawal liability of an insolvent employer in liquidation is limited to 50% of its allocable UVBs plus its liquidation value after subtracting the former amount. ERISA §4225(b) (29 U.S.C. §1405(b)). As with the limitation for solvent employers, all plans from which the employer withdraws as a result of its liquidation are aggregated in applying the limitation. ERISA §4225(e) (29 U.S.C. §1405(e)).

An employer is defined as "insolvent" if the value of its liabilities, including withdrawal liability (without regard

to Section 4225(b)), exceeds the value of its assets as of the time that its liquidation or dissolution begins. ERISA § 4225(d)(1) (29 U.S.C. § 1405(d)(1)).

Free Look Rule

Multiemployer plans can offer a rather meager enticement to new contributing employers. A plan may be amended to provide that an employer will not have any withdrawal liability if it meets these conditions:

- It had an obligation to contribute for no longer than the number of years required for vesting under the plan (typically five years) before it withdrew. ERISA § 4210(a)(2) (29 U.S.C. § 1390(a)(2)).
- It never had an obligation to contribute 2% or more of the total employer contributions to the plan. ERISA § 4210(a)(3) (29 U.S.C. § 1390(a)(3)).
- It had not previously avoided liability the plan by applying the free look rule. ERISA § 4210(a)(4) (29 U.S.C. § 1390(a)(4)).
- In the year preceding its entry into the plan, the ratio of plan assets to benefit payments was at least eight to one. ERISA § 4210(b)(3) (29 U.S.C. § 1390(b)(3)).

In addition, if the plan provides past service benefits for any period before the employer had an obligation to contribute, employees of "free look" employers must forfeit those if the employer withdraws from the plan during the free look period. ERISA § 4210(b)(3) (29 U.S.C. § 1390(b)(3)).

Requests for Review

Disputes concerning liability for or the amount of withdrawal liability must be resolved through arbitration conducted in accordance with PBGC rules or other arbitration rules that have received PBGC approval. While the case is being resolved, the employer must make payments according to the plan's determination. If the arbitrator determines that it owes less, it is entitled to a refund. Arbitration awards are enforceable in federal court. ERISA § 4221 (29 U.S.C. § 1401).

The initial step upon receipt of an assessment is to identify if there are grounds to dispute it. If so, the employer must set forth the grounds upon which it disputes the assessment in writing, in what is referred to as a request for review. The request for review must be sent to the plan sponsor no later than 90 days after the date the assessment is received. ERISA § 4219(b)(2)(A) (29 U.S.C. § 1399(b)(2)(A)).

It is paramount that an employer submits this request for review as courts have held that an employer cannot demand arbitration without submitting a request for review. See, e.g., Amalgamated Lithographers of Am. Lithographic Indus. Pension Plan v. Unz & Co., 670 F. Supp. 2d 214, 226 (S.D.N.Y. 2009); Central States, Southeast & Southwest Areas Pension Fund v. St. Louis Post-Dispatch, LLC, 2007 U.S. Dist. LEXIS 64179, at * 27 (N.D. Ill. Aug. 28, 2007). That request for review should:

- Ask the plan sponsor (trustee) to review any specific matter relating to the assessment and the schedule of payments
- Identify any inaccuracies in the determination of the amount –and–
- Furnish any additional relevant information

ERISA § 4219(b)(2)(A)(i–iii) (29 U.S.C. § 1399(b)(2)(A)(i–iii)).

While a request for review should be specific, and not general, an employer is not later barred from raising additional issues subsequently in an arbitration. Pension Benefit Guaranty Corporation (PBGC) Opinion Ltr. 91-7 (Oct. 1, 1991). In certain instances, a plan sponsor will send a revised assessment to an employer. Courts that have considered the issue have generally held that such a revised assessment resets the 90-day period. National Shopmen Pension Fund v. DISA Industries, Inc., 653 F.3d 573, 581 (7th Cir. 2011); Sheet Metal Local Union No. 80 Pension Trust Fund v. W.G. Heating & Cooling, 555 F. Supp. 2d 838, 854 (E.D. Mich. 2008).

A plan sponsor may require an employer to provide any documents and information that the plan sponsors reasonably determines is necessary to assist the plan sponsor in determining or collecting withdrawal liability. ERISA § 4219(A) (29 U.S.C. § 1399(a)). Such requests sometimes are sent when an employer is believed to have triggered a withdrawal, and other times are sent along with an assessment. It is unsettled whether an employer has a right to request and receive information from a plan sponsor relating to the assessment prior to the commencement of an arbitration. However, requesting needed information, and doing so in a timely manner so that it can be received and reviewed prior to the deadline for submitting a request for review, may be prudent. ERISA § 101(k)–(l) (29 U.S.C. § 1021(k)–(l)).

Pay Now, Dispute Later

An employer must make all payments required according to the schedule in the assessment, even if it disputes the assessment. ERISA § 4219(c)(2) (29 U.S.C. § 1399(c)(2)). Two circuits have recognized limited exceptions to this rule, where:

- The plan sponsor's claim "is frivolous—if the arbitrator is almost certainly to rule for the employer" –or–
- The claim is "not colorable"

Robbins v. McNicholas Transportation Co., 819 F.2d 682, 685 (7th Cir. 1987); Trustees of Plumbers & Pipefitters National Pension Fund v. Mar-Len, Inc., 30 F.3d 621, 626 (5th Cir. 1994).

Failure to make payments when due will result in a notice from the plan advising that the payments are overdue. Missed payment must be cured within 60 days. If the payment is not made within 60 days from when the notice is received, the employer will be considered to be in default, and the plan can accelerate the outstanding amount of the withdrawal liability. ERISA § 4219(c)(5) (29 U.S.C. § 1399(c)(5)). Obviously, this should be avoided. Where an employer has submitted timely requests for review and arbitration, the fund cannot declare a default and accelerate the liability, except where are facts supporting a substantial likelihood of an employer's inability to pay. 29 C.F.R. § 4219.31(c); Cent. States Southeast & Southwest Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co., 620 F.3d 766 (7th Cir. 2010).

Notice to One Is Notice to All

In general, as indicated above in "Controlled Group Liability" all trades or businesses "under common control" are treated as a single employer for purposes of withdrawal liability. ERISA § 4001(b)(1) (29 U.S.C. § 1301(b)(1)). This means that all controlled group members are jointly and severally liable for withdrawal liability. As it relates to the notice and request for review, courts have consistently held that notice to one member of a controlled group, constitutes notice to all members of the controlled group. See, e.g., Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc., 888 F.2d 1161, 1163 (7th Cir. 1989); IUE AFL-CIO Pension Fund v. Barker Williamson, 788 F.2d 118 (3d Cir. 1986).

Where a controlled group member is assessed liability, other controlled group members, who ultimately may become responsible for the liability, should take notice and ensure that the member receiving notice submits an appropriate request for review, if warranted.

Arbitration of Withdrawal Liability Assessments

As indicated above, disputes over an assessment must be resolved through arbitration conducted in accordance with PBGC rules or other arbitration rules that have received PBGC approval. While the case is being resolved, the employer must make payments in accordance with the plan's determination. If the arbitrator determines that it owes less, it is entitled to a refund. Arbitration awards are enforceable in federal court. ERISA § 4221(a)(1) (29 U.S.C. § 1401(a)(1)).

Arbitration may be initiated by either the employer or the plan sponsor, and must be done within a 60-day period after the earlier of:

- The notification date of the plan sponsor's (i.e., the board of trustees') response to the request for review –or–
- 120 days after the date of the employer's request for review

The parties may also jointly initiate arbitration within the 180-day period after the assessment. ERISA § 4221(a)(1) (29 U.S.C. § 1401(a)(1)).

If an employer fails to initiate arbitration timely, it will waive its challenges to the assessment and the amounts demanded are due. ERISA § 4221(b)(1) (29 U.S.C. § 1401(b)(1)); Robbins v. Admiral Merchants Motor Freight, 846 F.2d 1054 (7th Cir. 1988). An employer that does not make a timely demand for arbitration will lose the right to present any defense that it may have against the assessment, so initiating arbitration is generally prudent, where an employer has available defenses. The parties may agree to extend the time limits for initiating arbitration. 29 C.F.R. § 4221.3(b).

The Demand for Arbitration

A demand for arbitration does not need to take any particular form, but it must include the following:

- A statement that the employer disputes the plan sponsor's determination of withdrawal liability and is initiating arbitration –and–
- A copy of the demand for withdrawal liability, the request for review, and the response thereto

29 C.F.R. § 4221.3(d). An employer should state in the demand for the arbitration any additional reasons it disputes the assessment. Though an employer is not obligated to fully set forth all basis on which it contests the assessment in the demand for arbitration, it is prudent to avoid any allegations of prejudice or waiver that an employer advise the plan sponsor of any further grounds that it seeks to argue in the arbitration. The arbitrator controls the proceeding and commonly requests the parties to identify the scope of the issues to be presented.

It is important to review the fund's procedures for initiating arbitration as they can vary. Some require that a request

for arbitration be submitted to the American Arbitration Association (AAA). Others also require that a request to initiate arbitration is only perfected if the filing fee is paid to AAA by the employer and submitted together with the request. See Robbins v. B&B Lines, Inc., 830 F.2d 648, 651 (7th Cir. 1987) (holding that an employer had not timely initiated arbitration because it failed to include the filing fee with its arbitration request).

The Arbitration Proceeding

The PBGC has established default arbitration procedures for conducting an arbitration. These include rules for the appointment and powers of the arbitrator; discovery and hearings; and awards, costs, filing, and service. 29 C.F.R. §§ 4221.4–4221.13.

Establish a Time and Place for the Hearing

The arbitrator, once selected and confirmed, will generally hold an initial conference with the parties to discuss preliminary matters and set a discovery schedule. 29 C.F.R. § 4221.5(b). As a preliminary matter, establish a date and place for the hearing within 15 days after the arbitrator accepts his or her appointment. 29 C.F.R. § 4221.6(a). You may be thwarted from establishing the date and place if the governing plan has established rules in this regard, which often, but not always, govern. See ERISA § 4221.1(b) (29 U.S.C. § 1401(b)). For a further discussion of the topic, see GOING THROUGH WITHDRAWAL: A STEP-BY-STEP GUIDE TO ARBITRATION IN MULTIEMPLOYER WITHDRAWAL LIABILITY DISPUTES, 29 ABA Journal Lab. & Emp. Law 145, Paragraph IV "The Arbitration."

Conducting the Arbitration

Instead of the PBGC's default procedures, an arbitration can be conducted consistent with alternative arbitration procedures that have been approved by the PBGC. 29 C.F.R. § 4221.14(c). For a plan to require the use of an alternative, PBGC approved procedure, the plan must be so amended. The parties can also agree to using an alternative, PBGC approved procedure. 29 C.F.R. § 4221.14(a).

The PBGC has approved the AAA's 2013 Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, effective January 1, 2020. See Notice of Approval of Alternative Arbitration Procedure; American Arbitration Association, 84 Fed. Reg. 67,484 (Dec. 10, 2019).

Fees

AAA rules require the "initiating party" to pay the "appropriate administrative fee" to initiate arbitration. See Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 7(a). Importantly the rules have a newly reduced fee schedule and clarify that while the initial filing fee is to be paid by the filing party, the arbitration fees are borne equally, subject to the discretion of the arbitrator. Additionally, either party may object to an arbitrator within 10 days of appointment. See Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes and How PBGC Rules Cut Fees For Fighting Withdrawal Liability.

Appointing an Arbitrator

In the technical and complex area of withdrawal liability, selecting a knowledgeable and experienced arbitrator is important.

Under either the PBGC's default rules, or the AAA's, both parties must consent to the appointment of an arbitrator. 29 C.F.R. § 4221.4(a); Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 11. The parties shall select the arbitrator within 45 days after the arbitration is initiated, or within such other period as is mutually agreed after initiating arbitration and must mail to the designated arbitrator a notice of his or her appointment.

If arbitration is conducted with the AAA serving as the administrator, following the initiation of the arbitration, the AAA will provide a list of five arbitrators, together with a brief biographical profile and fee structure for each. 29 C.F.R. § 4221.4(a); Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 11.

If the parties are not utilizing AAA's services, the parties are free to propose and reject arbitrators, until the parties mutually agree upon the appointment of an arbitrator. 29 C.F.R. § 4221.4(a).

It may be prudent to review prior withdrawal liability arbitration decisions by the proposed arbitrators, and research whether they have previously ruled on the issue(s) presented in the arbitration.

If the parties fail to select an arbitrator, or are otherwise unable to agree upon an arbitrator, within 45 days, either party may apply to a U.S. District Court for the appointment of arbitrator. 29 C.F.R. § 4221.4(e).

Prehearing Discovery

Both the PBGC's default rules and the AAA rules provide for prehearing discovery, including requests for answers to interrogatories, production of documents and depositions, where the information sought is relevant and its production will not be disproportionately burdensome. 29 C.F.R. § 4221.5(a)(2); Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 16.

The Hearing

The PBGC's default rules prescribe that the date set for the hearing may be no later than 50 days after the arbitrator's written acceptance of the appointment. 29 C.F.R. § 4221.6(a). AAA's rules merely indicate that the arbitrator shall establish a date and time for the hearing. Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 17.

It may be unworkable to conduct a hearing with 50 days if there is even a minor amount of discovery to be completed, and that generally leads the parties to agree to waive that deadline. However, given the obligation of employers to continue making interim payments, it is generally preferable for employers to conduct the discovery and hearing process as expeditiously as possible.

The parties may elect to proceed without a hearing and rely solely upon a written submission. 29 C.F.R. § 4221.5(c).

The procedure for the hearing generally follows that of other arbitrations:

- Parties are to be given a full and fair opportunity to put on their case.
- Witnesses shall testify under oath and be subject to cross-examination.
- A stenographic record may be prepared.
- The admissibility, relevancy, and weight of evidence is determined by the arbitrator. –and–
- The parties may file post-hearing briefs.

29 C.F.R. § 4221.6.

The Award

The arbitrator's award is to be set forth in writing; state the basis for the award, including findings of fact as necessary to resolve disputed issues; set forth any adjustments to the amount or schedule of payments; and allocate costs and expenses. 29 C.F.R. § 4221.8(a). Both the PBGC's default rules and AAA's rules provide that the award is to be issued within 30 days unless the parties agree to extend the deadline. 29 C.F.R. § 4221.8(b), (e); Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes, Section 36.

Challenging the Award

Either party may bring an action in the proper U.S. District Court to enforce, modify, or vacate the award. The action must be initiated within 30 days after the arbitrator issues its award. ERISA §4221(b)(2) (29 U.S.C. §1401(b)(2)). The exact nature of this deadline has been a matter of controversy. A presumption exists, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct. ERISA §4221(c) (29 U.S.C. §1401(c)). Courts have deemed this standard to be whether the findings of the arbitrator are "clearly erroneous." 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 Intl Union of Operating Engrs & Participating Emplrs. v. Wolf Crane Serv., 374 F.3d 1035, 1037 (11th Cir. 2004). However, contrasted with applying a deferential standard to an arbitrator's factual findings, district courts review an arbitrator's legal conclusions de novo. 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.").

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Michael works with clients in all aspects of benefits and labor law, with a focus on collectively bargained benefit plans. He counsels clients on day-to-day employee benefits issues and navigating the interplay between collective bargaining and benefit plan obligations. He assists clients on issues involved in the participation in, and withdrawal from, multiemployer defined benefit pension funds, devising and implementing strategies for reducing exposure and litigating withdrawal liability disputes.

In the employee benefits area, Michael's practice ranges from the establishment and design of pension, profit-sharing, welfare and executive compensation plans to the administration, regulatory compliance and termination of such programs. He serves as counsel to numerous multiemployer funds in a variety of industries, and also advises corporate plan sponsors on single employer plans. He also has extensive experience representing employers in managing withdrawal liability exposure.

Michael has developed a particular fluency in the highly technical and specialized area of withdrawal liability. Advising employers that contribute to multiemployer defined benefit pension plans, Michael provides strategic guidance and long-term planning to clients regarding pension obligations, counsels clients on tools to mitigate liability, represents clients in requests for review of assessments, and in dispute resolution through arbitration and federal court litigation. He also has a deep understanding of withdrawal liability considerations in mergers, acquisitions and sales, and has guided clients on the important intersection of collective bargaining strategy and withdrawal liability risk management.

In his labor practice, Michael focuses on the construction industry, assisting clients in collective bargaining strategy and negotiations and represents clients before the National Labor Relations Board, state and federal courts and in arbitration proceedings. He also advises clients on compliance with project labor agreements, prevailing wage laws and Davis Bacon requirements.