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ERISA Pitfalls to Avoid for Employment Attorneys Who Do Not Practice ERISA

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I. Introduction

Employers generally provide employee benefits to their employees by two means: (1) employee pension benefit plans, and (2) employee welfare benefit plans. The provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. Section 1001 et seq., are applicable to both types of plans. Employee benefit plans established or maintained in Puerto Rico are subject to the provisions of ERISA as the term "State" is defined by ERISA Section 3(10) to include Puerto Rico. See U.S. Department of Labor Advisory Opinion 1996-01A. Accordingly, employee benefit plans established or maintained in Puerto Rico are generally subject to the reporting and disclosure requirements prescribed by ERISA including submission of Annual Reports (Forms 5500), distribution of Summary Plan Descriptions and Summary Annual Reports. In addition, fiduciary and minimum funding standards provisions of ERISA, among other provisions, might be applicable. See Gatronomical Workers Union Local 610 and Metropolitan Hotel Association Pension Fund v. Dorado Beach Hotel Corporation, 617 F. 3d 54 (1st Cir. 2010).

Many employers participate in multiemployer retirement plans established by workers' unions through which retirement benefits are provided to unionized employees. Employer contributions to such multiemployer retirement plans are generally the result of a collective bargaining process. Multiemployer retirement plans are often defined benefit plans that are also subject to ERISA, and the majority of them are experiencing substantial funding deficiencies. These funding deficiencies raise issues under ERISA, and contributing employers - - - and their attorneys - - - should be aware that the issues can impact employer decisions involving whether to transfer work to or from a facility, whether to shut down or downsize a facility, or even whether to sell or buy a business. The most important of these issues is "withdrawal liability," which can be assessed against an employer that stops contributing to a multiemployer plan, or even reduces its contributions.

II. Multiemployer Retirement Plans and Withdrawal Liability under ERISA

When there is a "withdrawal," ERISA requires the multiemployer defined benefit plan (the "Plan") to calculate the employer's liability attributable to such event. The rules of ERISA are meant to protect the financial security of the pooled resources of all plan participants, not just those of a particular Employer's employees. The amount of withdrawal liability depends on the allocation of unfunded vested benefits ("UVBs") (the amount by which vested –nonforfeitable-benefits exceed plan assets) to the Employer. This allocation must be made using a method prescribed by ERISA Section 4211 and the Pension Benefit Guaranty Corporation ("PBGC"), or certain acceptable alternatives adopted by plan amendment. Retirement plans of this nature generally use the Presumptive Method or the Rolling Five Method for these purposes.

The Presumptive Method distinguishes between employers who contributed to a plan for a plan year ending prior to September 26, 1980, and employers who have only contributed for plan years ending on or after such date. Withdrawing employers who contributed to a multiemployer plan subsequent to September 25, 1980 must fund a share of the increase in the plan's UVBs which occurred during the period for which the employer was required to contribute to the plan.

Under the Rolling Five Method, the unfunded vested benefits allocable to a withdrawing employer are generally calculated as a product of: (1) the unfunded vested benefits as of the end of the plan year before the plan year in which the employer withdraws, multiplied by a fraction: (a) whose numerator is the total amount of the employer's contribution obligations for the last five (5) plan years ending before its withdrawal, and (b) whose denominator is the total amount contributed by all employers during that time.

The determination of withdrawal liability is dependent on the date the plan's assets and benefits are valued, the allocation formula chosen by the plan, and takes into consideration an element of interest and the actuarial assumptions allowed under ERISA. The date of valuation is generally the last day of the plan year preceding the date of withdrawal.

Withdrawal liability is paid over the number of years required to amortize the liability in level annual installments. The annual liability payments are roughly equal to the annual payments of the employer's plan contributions before withdrawal. ERISA Section 4219(c)(1)(B) provides that if the amortization period exceeds 20 years, the employer's liability is limited to the first 20 annual payments.[1] Although withdrawal liability installments are calculated using annual installment amounts, most funds require payments to be made on a monthly or quarterly basis.

The above may be explained with the following example: In year 2, an employer withdrew from a multiemployer plan. The employer's withdrawal liability, determined as of the end year 1, was $23.4 million. The employer normally contributed about $4 million and the

[1]The 20 year cap does not apply in the event of a mass withdrawal.

plan used a 7% interest rate. The employer would have to make 8 annual installments of approximately $4 million, the number of payments actuarially determined to be necessary to pay off $23.4 millions assuming an interest rate of 7%. See Milwaukee Brewery Workers Pension Plan v. Joseph Schlitz Brewing Co., 513 U.S. 414 (S. Ct. 1995).

If there is a mass withdrawal[2], the liability for the Plan's total unfunded vested benefits must be fully allocated among the existing employers. In such case, the actuary must use assumptions specified by ERISA and the PBGC, which often result in higher costs, particularly in a low interest rate environment. PBGC Regulation Section 4219.12(g) provides that an employer that withdraws during the three consecutive plan years (immediately preceding the mass withdrawal date) during which substantially all employers withdraw is presumed to have withdrawn pursuant to an agreement or arrangement to withdraw. This presumption may be rebutted by a preponderance of evidence. If an employer or some employers withdraw[3] but a mass withdrawal does not occur, the Plan continues in operation and withdrawal liability is assessed under the Plan's Presumptive or Rolling Five Method against the withdrawing employer(s). The remaining employers would then pay the remaining ongoing obligations.

III. Demand for Payment of Withdrawal Liability

In accordance with ERISA Section 4219(b)(1), the Plan's Board of Trustees must notify an employer and demand payment of the employer's withdrawal liability *as soon as practicable* after the employer's complete or partial withdrawal. Thus, ERISA neither specifies a time limit, nor provides a sanction for delay, nor limits the pension fund to a single notice. However, it is provided in ERISA Section 4219(c))(2) that withdrawal liability must be payable according to the plan sponsor's schedule, beginning no later than 60 days after the date of the sponsor's demand. Therefore, ERISA requires only that withdrawal liability payments begin *no later* than 60 days after the date of the demand for payment.

This arrangement of ERISA affects when payments may begin because the payment period starts running when there is a demand for payment.

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[2]A mass withdrawal occurs pursuant to ERISA Section 4041(a)(2) if: (1) Every employer withdraws from the plan, or (2) The obligation of all employers to contribute to the plan ceases.

[3]A partial withdrawal occurs when: (a) There is at least a 70% decline in the employer´s contribution base units (e.g., hours worked) (PBGC Opinion Letter 93-2); (b) the employer ceases to have an obligation to contribute to the plan under at least one, but not all, of its CBAs and continues the same type of work in the geographical area covered by the agreement; or (c) the employer ceases to have an obligation to contribute to the plan for work performed at one or more, but fewer than all, of its facilities covered under the agreement. In either of these situations, a partial withdrawal is understood to occur under ERISA Section 4205 only where the employer continues to perform the type of work for which contributions would be required.

A 70 percent decline in contribution base units (CBUs) 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 (CBUs) for which the employer was required to make as plan contributions did not exceed 30 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.

IV. Payment of Withdrawal Liability

Once withdrawal liability is assessed, the employer may either prepay the withdrawal liability in a lump sum or commence periodic payments pursuant to the schedule provided by the Board of Trustees. If the alternative of paying in a lump sum is contemplated, the employer should seek an adjustment of the amount that needs to be paid as the time value of money principles will dictate a lesser amount of withdrawal liability. This alternative will have to be discussed with the Board of Trustees.

V. Dispute of the Withdrawal Liability Determination

If the employer does not agree with the withdrawal liability assessed or with the payment schedule established by the Board of Trustees, the employer must request the Fund to review its decision internally. If the Fund rejects the employer's request for review, the employer must demand arbitration. There are very short and strict time limitations within which the employer must request review and arbitration. Failure to meet the time restrictions results in waiver of all defenses to the withdrawal liability demand. If an employer disputes the withdrawal liability claim or payment schedule, the employer must make payments in accordance with the schedule until the arbitrator issues a final decision with respect to the dispute. To the extent that the decision of the arbitrator results in overpayments or underpayments having occurred, ERISA Section 4221(d) provides that necessary adjustments will be made in subsequent payments.