


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



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- ▶ ERISA Applicability to Employee Pension Benefit Plans and Employee Welfare Benefit Plans
  - ▶ In General
  - ▶ Puerto Rico

- ▶ Multiemployer Plans
- ▶ - In General
  - ▶ What are they?
  - ▶ How they differ from single employer plans
  - ▶ PBGC
  - ▶ Zone status
- ▶ - Collective Bargaining Process
  - ▶ Employer Contribution Amount might be the result of:
    - ▶ Negotiations
    - ▶ Plan Funding Level
    - ▶ Minimum Funding Standards
- ▶ Participation Agreements

## ▶ Withdrawal Liability under ERISA

### ▶ Employer may withdraw from a Multiemployer Defined Benefit Plan due to:

- ▶ Closing of a Business
- ▶ As a result of negotiations with the Union
- ▶ Sale of the business
- ▶ Involuntary Circumstances

Depending on the type of employer withdrawal, there may be a:

Complete Withdrawal

Partial Withdrawal

## ▶ Withdrawal Liability under ERISA

### ▶ Exception for Building and Construction Industry

- ▶ If substantially all of the employer's employees covered under a CBA are engaged in building and construction work and the plan is a construction industry plan, the employer would not be subject to withdrawal liability if it goes out of business or moves its business operations to another area completely outside of the jurisdiction of the CBA, as long as the employer does not resume such work in the CBA's jurisdiction within 5 years from the withdrawal.
- ▶ Thus, unlike other employers, construction industry employers that go out of business completely generally do not incur withdrawal liability.

## ▶ Withdrawal Liability

- ▶ Multiemployer Pension Plan Amendments Act of 1980, as amended requires employers withdrawing from a multiemployer pension plan to pay a share of the plan's Unfunded Vested Benefits (UVBs)
- ▶ Who is an “Employer”?
- ▶ An employer's withdrawal liability is based on its pro-rata share of the plan's UVBs
- ▶ This share depends on the value of the plan's assets and benefits, which in turn, depends on:
  - ▶ (1) the date the assets and benefits are valued (generally the last day of the plan year preceding the date of withdrawal).
  - ▶ (2) the actuarial assumptions and methods used to value the assets and benefits; and
  - ▶ (3) the allocation formula chosen by the plan.
- ▶ Actions to avoid or evade withdrawal liability.

## ▶ 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 high average annual payments of the employer's contributions before withdrawal
- ▶ 20 year cap
- ▶ Contribution rates for critical plans frozen as of first day of plan year beginning on or after January 1, 2014

## ▶ Demand for Payment of Withdrawal Liability

- ▶ The Plan's Board of Trustees must notify an employer and demand payment of withdrawal liability *as soon as practicable* after the employer's complete or partial withdrawal
- ▶ A Payment Schedule will be provided
- ▶ Payments will begin no later than 60 days after the date of the Demand for Payment
- ▶ The employer may either prepay the withdrawal liability in a lump sum or begin periodic payments pursuant to the Payment Schedule
- ▶ Defaults and acceleration

## ▶ Dispute of Withdrawal Liability Determination

- ▶ ERISA Section 4219(b)(2) provides that an employer has a right to request review of the withdrawal liability demand within 90 days after receiving the notice and demand for payment.
- ▶ Failure to timely request review waives all defenses
- ▶ Arbitration may be initiated by either the employer or the pension fund within 60 days after the earlier of: (i) the date the Pension Fund denies the employer's request for review or (ii) 120 days after the employer's request for review.
- ▶ If the employer fails to timely and properly initiate arbitration, the employer waives all defenses.
- ▶ Burden of proof
- ▶ AAA vs. PBGC rules
- ▶ Litigation to enforce, vacate or modify arbitration award must be brought within 30 days of final award (Section 4221(b)(2)).

# PENDING LEGISLATION

# QUESTIONS

