

Finally Some Good News for Employers Challenging Pension Withdrawal Liability Assessments

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On January 1, 2020, new arbitration procedures for the American Arbitration Association (AAA) with respect to withdrawal liability assessments will go into effect. It is not uncommon for employers—and a good many labor lawyers—to think that the Employee Retirement Income Security Act of 1974’s (ERISA) provisions regarding withdrawal liability are among the most “unfair” laws they have to contend with. However, changes to the arbitration fee structure and fee allocation rules will give employers some relief.

Withdrawal liability applies when an employer participating in a multiemployer pension plan withdraws from that plan and is allocated a portion of the plan’s unfunded pension liability. When this allocation occurs, the employer and its commonly-controlled affiliates may be liable for millions of dollars—even though the employer made 100% of its bargained-for contributions in a timely manner—due to the failure of *other* employers to meet their obligations, or because the plan’s trustees failed to properly manage the pension fund’s assets. Further, the process for disputing withdrawal liability claims is remarkably pro-pension fund and anti-employer.

ERISA requires that employers demand arbitration in a timely manner in order to contest a withdrawal liability assessment and must begin paying that assessment while the arbitration is pending. Failure to comply with the statutory process for disputing such an assessment will result in a full waiver of the employer’s possible defenses. The costs to initiate the arbitration are based in part on the amount in dispute, potentially adding tens of thousands of dollars to an employer’s arbitration challenge that is mandated by the statute.

The new AAA procedures with respect to arbitration of withdrawal liability assessments were approved by the Pension



Benefit Guarantee Corporation after it had raised concerns about escalating AAA fees. First, the fee structure for withdrawal liability claims has been simplified as follows:

- disputes under \$1 million require a fee of \$2,500;
- disputes between \$1 million and \$5 million require a fee of \$3,750; and
- disputes over \$5 million require a fee of \$5,000.

This is a major change from current practice, in which disputes over \$5 million can incur a fee of \$77,500 to initiate arbitration with the AAA.

In addition, the new rules allow an arbitrator to allocate a portion of the fee responsibility directly to the pension fund. Current rules require the initiating party—almost always the employer—to pay the full fee. Employers may now get an additional break if the arbitrator provides that arbitration costs will be borne equally between the parties. Finally, the new rules provide additional guidance about settling disputes over the choice of an arbitrator through the AAA's mutual selection process.

Withdrawal liability remains one of the most challenging areas of the law that a union employer must face. The new rules provide welcome relief for employers dealing with a withdrawal liability challenge. Employers should review these new AAA procedures to determine the risks associated with withdrawal liability and ensure they are prepared for the changes ahead.

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