Employee Relations
LAW JOURNAL

Think Twice Before Agreeing to Contribute to a Multiemployer Pension Plan, Especially If It Is Not at Least 100% Funded

By Michael T. Bindner

In this article, the author discusses the issues for an employer to consider when deciding whether to agree to contribute to a multiemployer pension plan.

Many union employers agree to contribute to a multiemployer (union) pension plan and in most cases, these are employers who enter into a collective bargaining agreement (CBA) with a union. A multiemployer benefit plan is a plan that two or more employers contribute to under the terms of one or more CBAs. These plans are sometimes referred to as Taft-Hartley plans because amendments to the National Labor Relations Act in the Labor-Management Relations Act of 1947 (referred to as the Taft-Hartley Act) allow a group of employers to contribute to a joint trust fund for employees and their dependents. Multiemployer plans are administered by a board comprised of an equal number of union and employer-appointed representatives and most, but not all, are defined benefit pension plans.

Multiemployer pension plans (MPPs) are governed by the Employee Retirement Income Security Act of 1974 (ERISA) and special rules adopted in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The MPPAA imposes an exit penalty, referred to as "withdrawal liability," on employers who withdraw from an underfunded plan by allocating a portion of the unfunded vested benefits in the plan to a participating employer when it withdraws from (i.e., stops contributing to) the plan. When a withdrawal occurs, the plan will determine whether the plan

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has vested benefits that exceed the value of plan assets and, if so, the plan will determine the withdrawing employer's share of the unfunded amount based on the formula in the plan. Withdrawal can occur due to events beyond the control of the participating employer. A withdrawal can occur if the union is decertified by a vote of the union employees or if the union withdraws representation of the union workforce, in addition to actions the employer may take which results in a withdrawal (e.g., negotiating a different retirement plan in its CBA).

Benefits provided by MPPs are insured to some extent by the Pension Benefit Guaranty Corporation (PBGC), a federally chartered corporation which, until recently, has not been funded by general tax revenues but by insurance premiums paid by MPPs and investment earnings from insolvent plans it takes over.

MPPs were created, in part, to allow union employees who work for multiple employers over the course of their career to earn pension credit in the same plan, presumably accruing more retirement benefits that they might in various individual employer plans. There are approximately 1,300 MPPs in the United States. Many of these plans are well funded but as many as 200 of these plans are significantly underfunded.

CONSIDER FUNDED STATUS OF A MPP

An employer considering whether to agree to contribute to a MPP should initially determine the funded status of the plan. For ERISA minimum funding and reporting purposes, a fund will calculate its funded status based on the pension plan's assumed future investment rate of return. Some plans calculate funded status for withdrawal liability using a different (and recently lower) interest rate than is used for minimum funding and reporting purposes. For example, a pension plan which reports that it is 95% funded may look like a 75% funded plan when it calculates withdrawal liability which means more withdrawal liability for a withdrawing employer to pay.

The use of a lower interest rate for calculating withdrawal liability than used for minimum funding and reporting purposes has been challenged by employers in federal courts. The MPPs won most of those cases until a few years ago, though more recently employers have won some high-profile cases presumably resulting in lower withdrawal liability assessments for those employers.

The PBGC has had the power since 1980 to issue regulations for MPPs to use for purposes of determining withdrawal liability but only recently issued such regulations in proposed form in October 2022. These regulations are intended to allow MPPs to use a lower interest rate to determine withdrawal liability than is used for minimum funding and reporting purposes, which would increase withdrawal liability assessed against withdrawing employers. Based on comments received by the PBGC on the proposed regulations, it is highly likely these regulations, if finalized in their current form, will be challenged in the courts because they effectively do not require that the interest rate used to compute withdrawal liability be a "reasonable" interest rate as is otherwise required by ERISA.

CONGRESS BAILOUT OF UNDERFUNDED MPPS NOT LIKELY TO HELP EMPLOYERS

Federal legislation enacted in 2021 allocated approximately $90 billion to the PBGC to fund approximately 200 underfunded MPPs. The funds, which are referred to as "Special Financial Assistance" in the legislation, are intended to allow these plans to pay full pension benefits for 30 years through 2051.

Employers which withdraw from a MPP should not expect that any withdrawal liability they are assessed will be reduced due to bailout funds the MPP receives. The PBGC has issued regulations to ensure that the bailout funds do not subsidize employer withdrawals from participation in MPPs which receive such funds. To achieve this objective, the PBGC requires any MPP which receives bailout funds to use a lower interest rate to calculate withdrawal liability than might otherwise be used and to "phase-in" recognition of the bailout funds as a "plan asset" when calculating withdrawal liability (i.e., even though the MPP receives the bailout funds in a lump sum, only part of the funds will be considered a plan asset when calculating withdrawal liability.)

Now that Congress has created a precedent in some people's minds that they will bailout significantly underfunded MPPs, we are likely to see a push for this again in the future if significant underfunding reappears. Better funded MPPs makes for happier employees and retirees but employers who contemplate a MPP withdrawal should not expect that any future bailout will lower their withdrawal liability assessment.

In collective bargaining, the union may press for the employer to agree to contribute to the union's MPP even if it is underfunded. The union will likely have other participating employers in that plan and will believe you contributing to that plan will help the plan's funded status. In addition, union employees may feel more comfortable with the union plan until they consider that they or their beneficiary may be alive after the 30-year bailout funds run out (assuming they last that long) and their funded retirement may depend on another bailout that (in present day politics) will be dependent on one party controlling the presidency and both houses of Congress.

OTHER ECONOMIC EFFECTS OF WITHDRAWAL LIABILITY EXPOSURE OR ASSESSMENT ON EMPLOYERS

Possible exposure to withdrawal liability may make it difficult or impossible to sell your business. Unless an employer qualifies for an exemption from withdrawal liability, sale of a business either results in an assessment of withdrawal liability to the seller or an effective assumption of the withdrawal liability by the buyer, the latter of which most buyers would not want perhaps unless the buyer is a union employer and is already participating in the same MPP. In some cases, the potential withdrawal liability may exceed the value of the business so the employer cannot practically sell the business if the sale causes a MPP withdrawal.

The funded status of some MPPs is so bad that no new employer wants to join such MPPs. Large, financially healthy employers may choose to pay their withdrawal liability and get out leaving a disproportionate number of financially weaker employers who cannot afford to get out.

Bad markets, bad investment management, ill-advised benefit increases and decreasing union membership all contribute to underfunding, none of which individual participating employers can effectively control. Withdrawing employers are not solely allocated their fair share of the MPP's unfunded vested benefits for their own employees (allocated typically based on contributions, not specific employees), but they are effectively allocated some of the unfunded vested benefits of employees of bankrupt employers which withdrew but did not pay withdrawal liability. This is at least one of the faults of the withdrawal liability methodology that punishes employers which stay in such a plan. PBGC insurance premiums are not large enough to pay for the debts that these bankrupt employers leave behind. Employers which adopt a single employer defined benefit plan still have to contend with the equity markets, and manage the investments and administer the plan, but they have some measure of control, and they do not pay for benefits provided to employees of other employers.

Significantly underfunded plans (labeled as endangered, or critical) generally must adopt funding improvement or rehabilitation plans which can require employers to make contributions to the MPP in addition to amounts the participating employer has agreed to pay in the CBA.

Lenders do not typically consider withdrawal liability exposure prior to assessment of the liability when considering a loan application but employers should expect lenders to consider an assessment of withdrawal liability even if it is under dispute.

Employers may expect that the MPP's management representative trustees will look out for the employers' interest but do not expect them to look out for a withdrawing employer. Their job is to essentially run a good pension plan but that hasn't prevented many plans from becoming significantly underfunded.

So, after you have digested all of this, do you still want to contribute to a multiemployer pension plan?