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COVID-19 and Withdrawal Liability

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The effect of the coronavirus (COVID-19) on businesses and individuals is unprecedented and staggering. Many employers have or soon will be forced to implement some type of COVID-19-related workforce reduction, which can have far-reaching ramifications. Employers with collectively bargained employees face additional challenges with respect to multiemployer pension plans (MEPPs).

Withdrawal Liability Trigger: Complete Withdrawals

Withdrawal liability is a contingent liability that is triggered when an employer incurs a *complete withdrawal* or a *partial withdrawal* from MEPPs.

A *complete withdrawal* occurs when an employer ceases contributing to a covered plan because it:

1. Has terminated all operations covered by the plan; or
2. No longer has an obligation to contribute to the plan.

ERISA § 4203.

Significantly, the statute requires the cessation to be permanent (*see* ERISA § 4203(a)). It provides that a complete withdrawal occurs when an employer "**permanently** ceases to have an obligation to contribute under the plan" or "**permanently** ceases all covered operations under the plan" (emphasis added).

Many COVID-19-related workforce reductions likely will lack the requisite permanence to constitute the cessation of all covered operations needed to trigger a complete withdrawal. Moreover, an employer's contribution obligations under their collective bargaining agreement (CBA) or applicable law should be unaffected by layoffs and facility closures.

Employers should be mindful of the impact of a permanent cessation, especially when preparing communications involving to COVID-19-related workforce reductions. A fund may assert a withdrawal based on communications that may imply permanence. Employers would be well-served to consult counsel.

Withdrawal Liability Trigger: Partial Withdrawals

Withdrawal liability can also be triggered by a partial withdrawal. A partial withdrawal occurs upon a *"70-percent contribution decline"* or a *"partial cessation of the employer's contribution obligation."* ERISA § 4205.

A *70-percent contribution decline* occurs as of the end of a plan year if the employer's "contribution base units" (*e.g.,* hours worked) in **each** of the three most recent years ("three-year testing period") is less than 30% of its average contribution base units (CBUs) in the two highest of the preceding five years ("base period"). This test seeks to measure substantial and long-term reductions in an employer's contribution level. Because the test requires contributions be less than 30% of the high base year for each year of the three-year testing period, layoffs or furloughs caused by the COVID-19 pandemic would not trigger a partial withdrawal under the 70-percent contribution decline test **unless and until the reduced contribution levels continue for three years.**

For example, if the employer has historically contributed 1,000 CBUs annually to MEPP, including during the 2018 and 2019 plan years, and the COVID-19 pandemic results in 2020 contributions being reduced to 200 CBUs, to determine whether a partial withdrawal occurred as of December 31, 2020 (the end of a plan year), first compute the average CBUs in the highest two years during the base period (*i.e.,* years ending December 31, 2013 through 2017). If the CBUs in each of the years ending December 31, 2018 through 2020 are less than 30% of such two-year average, a partial withdrawal occurs. Since it would not (because the 2018 and 2019 contributions exceeded 300, or 30% of 1,000), a partial withdrawal on the basis of a 70-percent contribution decline would not occur at this time.

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Employers in the retail food industry (many of whom have experienced workforce reductions due to widespread, and often government-mandated, closures) could be affected more severely. Plans in which a majority of the covered employees are employed in the retail food industry can, and often do, substitute the “70-percent” decline with “35-percent” and “30-percent” with “65-percent.” ERISA § 4205(c). These industry-specific rules and reduced thresholds make workforce declines more likely to trigger a partial withdrawal. Again, the reduction must persist for **each year** of the three-year testing period for a withdrawal to be triggered under these.

A partial withdrawal also can occur as a result of *partial cessation of the employer’s contribution obligation.* This can occur if:

- The employer permanently ceases to have an obligation to contribute under one or more, but fewer than all, CBAs under which it has been obligated to contribute under the plan, but continues to perform work in the jurisdiction of the CBA of the type for which contributions were previously required or transfers such work to another location or to an entity or entities owned or controlled by the employer (this is a “bargaining unit take-out”); or
- The employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more, but fewer than all, of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased (this is a “facility take-out”).

These scenarios are unlikely to be implicated by a COVID-19-related workforce reduction. The employer’s obligation to contribute under their CBAs should be unaffected (thus avoiding a bargaining unit take-out), as should their obligation to contribute at each of their facilities (thus avoiding a facility take-out). However, employers would be well-served to consult counsel to avoid communications that may imply that the layoffs would be permanent.

Potential Future Impact

While COVID-19-related workforce reductions may not trigger withdrawal liability for many employers, the long-term effects could be devastating. Even before COVID-19, the MEPP system has long been in crisis. Having already triggered massive volatility (and losses) in the financial markets and workforce reductions, the COVID-19 pandemic could potentially cause the entire system to collapse. This, in turn, could cause widespread mass withdrawals, which significantly increase employer withdrawal liability. Asset depletion will move more MEPPs into “critical status,” resulting in both contribution increases/surcharges for employers and benefit reductions for employees.

Given the complexities involved, employers should consider addressing their specific situation with the assistance of counsel.

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