Legal Update Article

Manufacturers and Multiemployer Pensions — The Importance of Monitoring Withdrawal Liability

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Approximately a quarter of the workforce covered by a traditional pension plan is in a multiemployer plan, according to the U.S. Bureau of Labor Statistics. Many manufacturers that participate in such plans are unaware their largest contingent liability may stem from their allocable share of unfunded vested benefits, or withdrawal liability.

A product of collective bargaining agreements, multiemployer defined benefit pension plans are jointly administered by a board consisting of an equal number of trustees from labor and management. As of February 28, 2020, 431 of 1,229 multiemployer pension plans were "endangered" (less than 80% funded), "critical" (less than 65% funded), or "critical" and "declining" (scheduled to become insolvent).

A host of multiemployer plans include unionized manufacturing employers. Two of the largest are the International Association of Machinist (IAM) National Pension Fund and the Sheet Metal Workers' National Pension Fund. The IAM National Pension Fund has reported a funding shortfall of approximately $1 billion. The Sheet Metal Workers' National Pension Fund has reported a funding percentage of only 60% and overall funding shortfall of more than $3 billion. For smaller multiemployer pension plans covering manufacturers, the situation often is worse. The backstop for the failing plans is also failing. In its 2019 annual report, the Pension Benefit Guaranty Corporation (PBGC) projected that its multiemployer insurance program would be insolvent by 2025 (and possibly sooner).

The PBGC is required by ERISA to be self-supporting and receives no appropriations from general revenue. The PBGC multiemployer insurance program has two sources of revenue: (i) premiums paid by the sponsors of the multiemployer plans; and (ii) interest income from holdings of the U.S. Treasury debt. The premium rate is set by Congress and indexed to increases in the average national wage. There does not seem much the PBGC can do to avoid insolvency of its multiemployer insurance program without financial assistance. Employers are one of the potential sources of additional revenue to finance such assistance.

In addition, funding shortfalls can affect manufacturers at the bargaining table. Employers might be frustrated by the demand for additional pension contributions or have increased rates unilaterally imposed on them by failing pension plans.

An uninformed employer may be tempted to cease participation to avoid the rising costs of employer contributions to these plans. However, an employer that ceases to have an obligation to contribute or permanently ceases covered operation will be assessed withdrawal liability calculated as that employer's share of pension plan funding shortfall. Even for a relatively small bargaining unit, exiting an underfunded plan can result in a multimillion-dollar assessment. In mergers and acquisitions, multiemployer plan liabilities can jeopardize the deal or cultivate post-closing litigation, unless properly addressed in the asset purchase agreement or stock purchase agreement.

What can participating employers do? Employers contributing to multiemployer pension funds would be well-advised to monitor their contingent withdrawal liability, as they do with all other sources of potential liability. The first step to monitoring withdrawal liability is to request an estimate from the pension fund. Under Section 101(l) of ERISA, an employer may make a written demand for an estimate of its withdrawal liability once during any 12-month period. Pension funds may charge a fee of up to $2,500 to prepare the estimate. In evaluating the value of a business for purposes of mergers and acquisitions transaction, the most recent estimate of withdrawal liability provides essential information about the plan and an employer's contribution history.

It is important that employers proactively address this liability issue, not waiting until the plans in which they participate experience funding difficulties. If a plan terminates in a mass withdrawal, participating employers could be assessed liability in addition to withdrawal liability and lose certain protections. Therefore, it is important to develop a long-term plan to protect the company from being caught off guard.

Jackson Lewis attorneys can assist with requesting an estimate of withdrawal liability, explaining the estimate, and developing a strategy to address these liabilities. Please contact a Jackson Lewis attorney for assistance.