Podcast

Construction Industry: Don’t White-Knuckle Withdrawal Liability

By Dion Y. Kohler, David M. Pixley &

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It’s no secret that the statutory deck under ERISA is stacked heavily in favor of multiemployer pension plans and against employers contributing to—or withdrawing from—Taft-Hartley trust funds. Construction employers should take demands for withdrawal liability seriously. The failure to strictly adhere to statutory deadlines can be, and often is, catastrophic by denying an employer the ability to contest the withdrawal liability in arbitration.

Bonus conversation between Paul Friedman and David Pixley.

Jackson Lewis P.C. · BONUS - Construction Industry: Don't White-Knuckle Withdrawal Liability

Transcript

Alitia Faccone (00:06):

Welcome to Jackson Lewis's podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind; how will my business be impacted?

Alitia Faccone (00:35):

It's no secret that the statutory deck under ERISA is stacked heavily in favor of multi-employer pension plans and against employers contributing to or withdrawing from Taft-Hartley Trust Funds. Construction employers should take demands for withdrawal liability seriously. The failure to strictly adhere to statutory deadlines can be and often is catastrophic by denying an employer the ability to contest the withdrawal liability in arbitration.

Alitia Faccone (01:04):

On this episode of We get work™, we discuss construction employers' withdrawal liability, obligation, and a special exemption that is available to employers in the construction industry. We are joined today by three Jackson Lewis Lawyers.

Alitia Faccone (01:18):

Dion Kohler is a principal in the Atlanta office and co-leader of the firm's construction group. Dion's practices broad in scope and includes traditional labor matters involving labor organizations as well as the defense of employment litigation, and administrative charges. Paul Friedman, a principal in the White Plain's office, has spent the last decade developing a model for use by businesses across a broad spectrum of ERISA issues, from the beginning of the ownership of these companies to their sale, including withdrawal liability. David Pixley is a principal in the Cleveland office. Before joining Jackson Lewis, David served as outside fund counsel to multi-employer pension and welfare plans and has experience with employer withdrawal liability, payroll audits, and delinquent contribution matters.

Alitia Faccone (02:06):

Dion, Paul and David, the question on everyone's mind today is what do I need to know about withdrawal liability and how does this impact my business?

Dion Kohler (02:18):

Let's start off with a question for David. David, would you tell us what withdrawal liability is all about and who needs to be concerned about it?

David Pixley (02:27):

Yeah, absolutely. I would be happy to. So withdrawal liability usually is a big scary number and nobody thinks about withdrawal liability or often folks don't think about withdrawal liability until they see that big scary number, and then that gets their attention, as it's often a seven, eight, even nine-figure number. So where does this big scary number come from? Well, it represents the unfundedness or the funding shortfall of the pension plans for which employers contribute to. I think of it sometimes as like a big nasty pie where the pie represents all the debt that the pension fund owes in the form of vested benefits to the participants. That unfundedness or that debt or that big nasty pie is allocated amongst all the employers contributing to that pension fund. So even if your allocable share, or your little slice of that big nasty pie is small, it's still pretty nasty and unwanted and especially when it's unexpected.

Dion Kohler (03:41):

Thank you, David. My next question is, does withdrawal liability impact all construction industry employers?

David Pixley (03:51):

It does not. It only affects union employers with a CBA that obligates the employer to contribute to a multi-employer plan. Multi-employer pension plan is a defined benefit pension plan, that it's a traditional plan that provides a defined benefit or promised benefit to participants that is not always fully funded. And that, as we've discussed, that unfundedness or that debt is then allocated among the contributing employers.

Dion Kohler (04:23):

How does a construction employer tell if they are participating or in the past have participated in a multi-employer pension plan?

David Pixley (04:34):

Right. So the obligation is not always so obvious. Not every employer has a collective bargaining agreement. If there is a collective bargaining agreement, the obligation should be set forth very clearly and identify the multi-employer pension plan. However, the CBA will not explain and the union will not explain to the employer that the contributions to that pension plan will have an exit fee. Usually an employer is not made aware of that exit fee until that employer actually withdraws from the pension fund.

Dion Kohler (05:14):

Well David, how is an employer supposed to know, or how do they actually learn if they're subject to withdrawal liability for their participation in one of these types of plans?

David Pixley (05:26):

Yeah, that's a really good question, and though it could be a huge potential liability, the employers contributing to these pension funds usually don't know about their withdrawal liability. And one of the reasons why is because this withdrawal liability is what we refer to as a potential liability, in that it's a contingent liability until the contingency is removed, and that contingency is the obligation to contribute to the pension fund. And again, as you mentioned, some employers are not even aware that they are contributing to a multi-employer pension fund for which there would be withdrawal liability. And the way that some of these retirement plans are designed, it can be confusing to determine whether or not there is any potential withdrawal liability and the best option to determine that is with competent counsel.

Dion Kohler (06:20):

Okay, thank you. Thank you very much. David. Paul, I have a question for you. I would like to know are there any construction industry rules that apply to withdraw liability? In other words, are there special rules that apply for construction employers that don't apply for other types of employers that contribute to these types of funds?

Paul Friedman (06:42):

Yes, there is; the building and construction industry exemption specifically recognizes the nature of building and construction work is different than other employers, and the impact of an employer going out of business is therefore less than it would be with typical companies. For example, an employee that works in a planned year, typically will work for one company. In the construction industry, it's based upon projects. So you build something and then you go to another project. So an employee participant will likely work for several employers during the course of a planned year. As a result, the concerns that Congress confronted with other businesses aren't as strong in this situation. If the plan is in fact a construction industry plan and it goes through certain restrictions, the employer can in fact be exempt from withdrawal liability.

Dion Kohler (07:44):

When do those special exceptions or rules apply, Paul?

Paul Friedman (07:48):

Those special exceptions apply when the employer finds itself in a situation which otherwise would be withdrawal liability creating. In that situation, the employer will look at both the fund and itself for characteristics. If the employer contributes a significant amount of contributions for its employees and those employees are involved in the business in the construction industry, then the employer has met step number one. However, the employer then must look at the fund itself and see if there is significant amount of employees, participants covered by the fund who are in the building and construction industry. There's no hard and fast rule with cases, having said it's 85% in each case.

Dion Kohler (08:43):

Thank you, Paul. What kind of things can an employer or have you seen employers do that takes them out of this exception and takes away this, what I'm going to call a get-out-of-jail-free card from withdrawal liability?

Paul Friedman (08:58):

Yeah, the simplest one is that if an employer does withdraw, requirements are that it does not perform work within the jurisdiction of the bargaining unit that had previously performed as union work. So for example, if you withdraw from the fund and you wait a period of time, and bring in non-union employees, you can retain your exemption. If in fact, within the five years, you bring in non-union employees to perform the same work, you lose the exemption.

Dion Kohler (09:38):

And doing that could potentially trigger liability for withdrawal?

Paul Friedman (09:44):

Yep.

David Pixley (09:45):

This is David. How long does that period last?

Paul Friedman (09:49):

Five years, I believe it's a five-year period.

David Pixley (09:53):

So during that five-year period, what work can the employer do? None?

Paul Friedman (09:58):

The employer can do work long as it isn't the same nature as the work that had been performed under the CBA.

Dion Kohler (10:06):

And most CBAs, David, are restricted by their geographic territory or by the type of work the agreement covers. And as long as the employer stayed away from the geographic area or the type of construction work that's covered by that specific agreement, they would not be performing work that was covered by that agreement.

David Pixley (10:28):

Yes, I do agree with that, and I think that that's helpful to remember for employers that the construction exemption, this exemption, it's very rigid. And I don't know, Paul, in your experience, have funds assessed withdrawal liability even when it seemed obvious that the exemption applied?

Paul Friedman (10:51):

Yep, there was a case we had where the fund went after a company for withdrawal liability, and it turned out that the company did its work... its work was non-union work within the confines of its location. And then after a period of time, it went to the other part of the location. It was a army base. The army base was located both in Texas and in New Mexico.

David Pixley (11:21):

So it could be that they moved to a different location?

Paul Friedman (11:27):

They moved to a different location. But the reason it was okay is because the contract said specifically the location would be in San Antonio, Texas. The work was done in the other part of this military base which was located in New Mexico.

David Pixley (11:47):

Well, I think that's a very helpful example there Dion, that Paul's referring to because it really highlights that yes, you can do work, you can do work, but you just cannot do work within the jurisdiction and the type of work covered by the CBA [inaudible 00:12:03].

Paul Friedman (12:03):

Now some employers get mixed up, because they look at it within the jurisdiction of the union. It's not the jurisdiction of the union; it's within the jurisdiction of the specific collective bargaining agreement.

David Pixley (12:15):

So in your example Paul, the collective bargaining agreement did not cover the work being performed in the other location.

Paul Friedman (12:22):

That's right, it only covers San Antonio, Texas. So my client moved to New Mexico. The fund assessed withdrawal liability and then had to give the money back

Dion Kohler (12:33):

All right. Thank you for that explanation Paul. I have a question I'd like to throw open to both of you, and that is, what should an employer do if they get a letter from a trust fund saying that they have triggered withdrawal liability and they owe X amount of dollars?

Paul Friedman (12:50):

First thing they should do is document the receipt of the letter, because everything under MEPA is controlled by dates. The second thing they should do after making that... marking is to call an ERISA attorney who specializes in MEPA work. There are many ERISA attorneys who don't know anything about MEPA. Especially within a specialty, you want someone who's been to the wars under MEPA.

David Pixley (13:21):

And those deadlines that Paul was referring to there Dion, they are very unforgiving, specifically, if the employer fails to preserve its defenses within 90 days of the date of receipt, as Paul indicated was so important, then all defenses to that assessment will be waived. The consequence of that is profound, in that if you have an assessment or in a material amount, and there are viable defenses such as the building and construction industry exemption that Paul has helped us work through just now, and that exemption could exempt the employer from all the assessed withdrawal liability. If that objection and that defense is not properly waived timely in a request for review, it cannot be ever raised in later proceedings. The only defense going forward would be payment in full.

Dion Kohler (14:22):

Thank you David. That's good advice. I did want to ask, Paul and David, feel free to jump in, but are there strategies that an employer can use to contest or attack the calculations that the trust fund has put together of what they claim the employer owes as withdrawal liability, or should they just say, "Well, this is probably right. They used a real accounting firm to come up with these numbers"?

David Pixley (14:51):

I think you can assume that the demand is likely wrong or incorrect when you receive it, because this area of law and related regulations are subject to some amount of discretion by the trustees on how to interpret these requirements on the calculations and the guidance on how to calculate these amounts. And it's extremely complex. So the funds, of course, will interpret these provisions the most favorable to the trust fund, whereas employers may have viable defenses to the positions taken by the fund in the assessment. So many of the actuarial assumptions that are used to calculate the withdrawal liability are extremely complex, and you can arrive at different amounts.

And we often work with consulting actuaries and have very good relationships with actuarial firms that help these employers do the calculations so that the employer can have a third party objective source of information.

Dion Kohler (16:07):

Paul, did you have something you wanted to add to that?

Paul Friedman (16:09):

Yeah, many of the actuaries that perform work for the pension funds only perform work for pension funds, therefore is to their advantage if they come up with large numbers. And they will come up with some strange numbers, they will justify it under the actuarial regulations. The one thing about actuaries is that an actuary is deemed to be correct by virtue of being an actuary in many instances. So we've had cases where one actuary came up with a number. The other actuary came up with a different number, and the judge in that case said both of them were right. So it's a very difficult area to be in. You have to have a good actuary on your side. You have to recognize it is to the advantage of the funds actuary to calculate high, so they will continue to be the funds actuary.

David Pixley (17:13):

Yeah, I think that's right. I agree with that. And Dion, I think that you used an important word. When you asked the question, you mentioned the word strategy. There absolutely is strategy in managing withdrawal liability. In my opinion, withdrawal liability should be managed just as any contingent or potential liability that threatens the solvency of any business. When you're talking about potential liability in the number and the range that we have seen, then the strategy needs to be part of the planning process, so that when a demand is received, it's not a surprise. In fact, the demand should be something that you're already familiar with, and that you've been planning and anticipating. Because if you have a consulting actuary and you have competent ERISA counsel, you can identify the risks associated with your participation in these multi-employer pension plans, and you can manage the liability in such a way that it reduces the risk of a withdrawal.

Dion Kohler (18:13):

I have one follow-up question for Paul; I'll throw this one out to you. What happens if you're not able to negotiate a mutually agreeable number with the trust funds? Who decides what the amount, if any of withdrawal liability exists? And how often are you able to work out a resolution through negotiation?

Paul Friedman (18:38):

In the normal circumstance, the matter will go to arbitration, which is the statutory mandated dispute resolution mechanism. We haven't noted yet, but you cannot go to court for this subject, you'll go to arbitration. And the deadline that David referred to of missing is the time with which you start an arbitration before an arbitrator. So that's the first instance. The second one is it's how good your witnesses are going to be before the arbitrator. The arbitrator is supposed to have sufficient knowledge of MEPA to be able to understand what works and what doesn't. So in many instances you will have the arbitrator make a determination. Now, in some cases, we have bifurcated the issues to whereas the facts of the case would be step number one, and then if there is withdrawal liability, step number two is the arbitrator determining how much that is. So the arbitrator in the normal circumstance has the decision making process.

David Pixley (19:47):

I agree with Paul, and I think that there are many opportunities to settle these withdrawal liability matters, but every case is different of course. One of the most important things to consider are whether you have any underlying defenses. Sometimes there aren't really great underlying defenses. Some of these funds do calculate and do calculate withdrawal liability properly. And in those instances it doesn't always make sense to pursue arbitration. So there's kind of two sources for settlement, and the first one is the underlying defense; how strong are your defenses? And like I said, sometimes they're stronger than others. The other element that is the kind of linchpin to these... withdrawal liability is that withdrawal liability is not immediately payable normally. Normally, you're entitled to the benefit of a 20-year statutory schedule.

David Pixley (20:44):

Well, usually these funds would prefer to have all of the lump sum payment, or the 20 years of payments all up front. Well, if it desires that, then you might be able to negotiate what's called a present value discount. And the actuary that we engage and work with can help assist in calculating discounts based on various present values. And the different funds, we have a pretty good idea of what some of the larger pension funds in the country will accept as a discount rate. And sometimes in addition to a discount relating to underlying defenses, you might also, if it works for your client, consider a present value discount based on a lump sum payment rather than utilizing the 20 years under the statute.

Dion Kohler (21:37):

Thank you Paul and David for that. I want to switch gears with the... we don't have a lot of time left, but I want to address something that I think is important to our listeners, and that is the work we do... we work with many clients who are looking to acquire a company that's in the construction industry. What type of due diligence should they do to help avoid buying into this type of liability during the transaction?

David Pixley (22:06):

Yeah, that's a big one. Thanks Dion. So due diligence in the context of labor and employment should include requests for documents relating to multi-employer pension plans. That due diligence process is something that we've developed in the transactional groups, the transactional service group, to have such that our questions and our inquiries and our requests for documents are designed, number one, to identify potential risks for the target entity, but also what impact that acquisition could have on the acquiring control group. For example, if you are purchasing in an entity with contribution history to a building and construction fund, and that employer becomes part of your control group within the five-year period, and you perform work in the area, as Paul had described, another member of the control group could actually possibly trigger the assessment of withdrawal liability, whereas otherwise the exception may apply. So the due diligence process is extremely complex and one that we have evolved as a practice group.

Paul Friedman (23:33):

David raises a very good point in the term control group, where control group is ownership. It means the other company does not have to be in the same business as the contributing company, but if the ownership matches up in their criteria for that, and that control group is considered to be a single employer along with the contributing company. So, that could change the whole complexity. For example, if you are in fact operating under the building and construction industry exemption and you're fine, but your control group company is within the jurisdiction of your contract and is performing non-union work, you by virtue of the control group relationship will lose the exemption. You have to be aware of that. And as David said, the due diligence is broad. We have to ask the specific questions, which obviously we've gotten down to a science now.

David Pixley (24:36):

And oftentimes, we'll request estimates of withdrawal liability. In the context of a deal, things are happening fast, Nobody's going to want to wait the 180 days ERISA gives these ERISA trust funds to provide estimates of withdrawal liability. So again, our relationship and our partnership with consulting actuaries who can turn around estimates to withdrawal liability very quickly, sometimes within a day or two to facilitate a deal, so that information could be made available to the business folks and the deal attorneys that we usually support in navigating this withdrawal liability in the context of an M&A and a deal.

Dion Kohler (25:20):

Thank you both. I have one last question, and then I'll see if you all have any questions for each other. But my last question is, in your experience, are there today a substantial number of pension funds that are underfunded that can trigger an employer to liability if they cause a withdrawal?

Paul Friedman (25:45):

There are underfunded pension funds all around the country. Some of them have been propped up this past year by monies coming from the federal government. But ironically, that money coming into the funds, which is in the millions of dollars, specifically is not earmarked for withdrawal liability. You'll deal with other aspects of the fund. So yeah, you have to go on the assumption that most pension funds do not have sufficient monies to pay all of its obligations.

David Pixley (26:17):

I agree with that, Paul, and in fact, only approximately 200 of the most underfunded pension funds are going to benefit from that bailout, whereas more than 1,000 of these MEPs will not. And even the MEPs that are better funded, well even 100% funded, have manipulated the actuarial assumptions and the interest rate assumptions such that even a pension fund, a multi-employer pension fund that is 100% funded for reporting purposes can still generate significant withdrawal liability by manipulating the interest rate assumptions used for liabilities and assets when calculating withdrawal liability, such that amazingly, even a fund that on paper represents itself as fully funded can generate debt when it comes to assessing withdrawal liability.

Paul Friedman (27:10):

There are several parameters, as David just alluded to, which determine the funding of a pension plan and one does not exclude the other. So there are statutes that were passed after MEPA, which will show the funding of a pension plan is fairly decent, if you go back to MEPA, is still in a bad situation. You have to understand those measurements are for a particular purpose. You may not deal with MEPA, so your first question is, I don't care what do they say on those four reports, if you basically, under MEPA, what is your situation? So that's the kind of due diligence you have to do. You have to let the client know. You have to ask a lot of questions, go in to a lot of different areas, which on first blush don't appear to be relevant. And so it is a process.

David Pixley (28:05):

And funding assumptions change, funding statuses change. And a diligent employer could inquire about potential withdrawal liability, and sign a CBA with a pension fund that's 100% funded, and does not manipulate the interest rates. Well, three, four, five years later, by the end of the term of the CBA, the funding position of that fund could have changed substantially, especially for a smaller fund, and especially for a building and construction fund. I represented as fund counsel many building and construction funds, and their funding status changed rapidly and drastically, because like Paul mentioned, those funds are driven by projects, not employers. Employers come and go, and there are more challenges sometimes to the funding levels of a building construction fund that can make it even more volatile and even more risky for construction employers.

Dion Kohler (29:06):

Well, thank you David and Paul. I think that has been very helpful and educational for businesses that are engaged in the construction industry, that have questions about this particular issue. What should anybody listening to this podcast do if they have questions or would like additional information?

Paul Friedman (29:27):

Well, they should reach out to an experienced MEP attorney.

David Pixley (29:33):

Yes, I agree, not just an ERISA attorney, but somebody that has experience with a multi-employer pension plan withdrawal liability. If you are the employer, that is that first experience for that attorney, that will not be a good situation for you. You need competent and experienced counsel.

Paul Friedman (29:56):

You don't want to learn MEPA with your attorney.

Dion Kohler (29:59):

Well, thank you David, and thank you Paul for your participation today. That was very helpful and educational. And thank you anyone out there who was listening. I hope you found this to be beneficial.

Alitia Faccone (30:14):

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