The Mother of All Assessments May Be About to Hit Members of Private Clubs and It Won't Be for Clubhouse Repairs

You are relaxing in the men's lounge of the prestigious Jupiter Fields Country Club sharing a cold drink with your golfing buddies after the best round of golf you've played in years when the Club Manager hurries into the room holding a crumpled piece of paper and announces that the Club will be closing in 30 days unless it can raise $8,000,000 which will mean a $300,000 assessment for each member. This is beyond shocking to you because Jupiter Fields is one of the most exclusive clubs in the country and although the Club never bothered to incorporate it has no debt. You know this because you serve on the Finance Committee and you have seen the books.

The room is in an uproar. An explanation is demanded. The General Manager tells you that the landscape contractor that has serviced the Club for 50 years is going bankrupt and the Club has been notified that it owes the contractor's union pension plan $8,000,000 in something called "withdrawal liability". But, you say, the Club is current is in all the contributions it is required to make to its own union pension plan. How can it be responsible for the contractor's pension obligations? The General Manager looks at the crumpled piece of paper and tells you that the trustees of the contractor's pension plan consider Jupiter Fields a "joint employer" of the contractor's employees and, as such, responsible for the contractor's share of the "unfunded liability" of their plan. What the General Manager does not know is that the $300,000 assessment may be even higher for some of the members because the Club is not incorporated which means that the members are jointly and severally liable for the Club's debts.

This is not some fantasy. This can and probably will happen to some clubs unless they act now. The story of how we got to this point is sadly reminiscent of the evolution of the crisis with Social Security and it's largely a story of mistakes, incompetence, and Congressional inaction.

Lost amidst the chaos caused by the recent shutdown of the federal government was the failure of the Standing Committee on Multi-employer Pension Funds to issue its report containing recommendations to address and correct the financial crisis facing underfunded multi-employer defined benefit funds before the entire system collapses. The Standing Committee, touted as being a bi-partisan effort to forestall the impending financial disaster for millions of retired union workers, quietly announced in a statement over the 2018 Thanksgiving holiday that it would not meet the November 30, 2018 deadline for the report. No further information was provided.

"Collapse of the entire multi-employer pension system?" "Millions of workers affected"? How is it that we didn't hear of this before? The answer is that for years the problem has been ignored. Multi employer plans, sometimes referred to as "Union" Plans or "Defined Benefit Plans" collect money from employers pursuant to the terms of their agreements with labor unions. The money is supposed to be invested in such a way that the income earned on the investments together with the contributions received from employers based upon hours worked by active employees generates enough revenue to pay for the specific amount of pension benefits guaranteed to retirees. To do this, actuaries are hired to make a variety of mathematical calculations considering, among other factors, the anticipated life expectancy of retirees, and the number of active employees for whom contributions will be made over time. If those assumptions are incorrect or the investment decisions of the plan trustees are poor, there won't be enough money in the plan to pay the "vested" level of benefits guaranteed to each retiree and the plan is said to be "underfunded".

Unbelievable as it may seem, Congress has been aware for decades that many multi-employer funds have been underfunded.

Ok, you say, but what does all this have to with Jupiter Fields? The answer is that under legislation passed by Congress in 1980 and a decision of the National Labor Relations Board called **Browning Ferris**, employers, including private clubs may become legally required to bear the burden of the underfunding despite the fact they may not be unionized themselves or, if they are, have never been delinquent in their contributions.

Some of the largest plans are projected to become insolvent within a few years. The extent of the disaster has been highlighted by a statement recently released by the Pension Benefit Guaranty Corporation ("PBGC"). The PBGC which is the federal insurance company with the mandate of backstopping insolvent multi-employer funds, has announced that its multi-employer account would be depleted by 2025. The year 2025 is the same year that the Central States Pension Fund with 400,000 participants will become insolvent. If nothing is done to address and correct the problem, the safety net for these pension obligations will cease to exist.

Although extreme, the Central States dilemma is not unique nor isolated. The PBGC has estimated that approximately 130 pension funds with 1.3 million participants will become insolvent in the next twenty (20) years! Those obligations will fall upon contributing employers across the American economy and private clubs will not be immune. The statutes which govern all non-public retirement funds mandate that employers become liable.

Specifically, pension funds are governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and by the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA"), which made employers responsible for those pensions if a fund was underfunded.

Under MPPAA, upon the occurrence of specific triggering events, employers, without any culpability for underfunding, will become liable for the underfunding. The liability known as "withdrawal liability" often runs into millions of dollars. Once imposed, it will be borne by employers including clubs and, in one form or another, borne by individual members depending on the structure of the club. In some cases, the liability will be paid by the members in the form of increased assessments. However, unlike typical assessments for projects such as repairs that can be delayed, payment of withdrawal liability must be addressed and paid upon demand. Failure to do so can result in judgements against the club and possibly against the members!

Withdrawal liability occurs when there is a cessation of operations by an employer or if the employer ceases to have an obligation to contribute. This is a "complete withdrawal". An employer could also suffer a "partial withdrawal" if there is a significant reduction in pension contributions. Some events such as a complete shutdown of an employer's business are within the control of an employer. However, in the case of some triggering events, an employer has no control or even knowledge. Those include a decertification; or a disclaimer by the Union.

Recent cases have extended the liability to entities such as purchasers of assets. In addition, as noted earlier, federal labor law has provided a fertile ground to extend the responsibility through the application of its "joint employer" doctrine, pursuant to which a club can incur withdrawal liability as result of a triggering event caused by an affiliated company or a third party like a contractor.

Moreover, increased assessments are not the limit of a member's liability. The structure of a club and its charter may expose member to liability because he could be viewed as an owner. Many private clubs are unincorporated associations. An unincorporated association has no legal identity of its own. Legally it is a collection of individuals each of whom is jointly and severally liable for the club's debts if the assets of the club cannot satisfy those debts. There are certain corporate forms that can be adopted to limit the exposure of individual members to club debts. However, in some instances, assessments are not affected by corporate structure. A club facing millions of dollars in withdrawal liability would certainly need to collect some or all of the amount due through assessments that the members are obligated to pay by virtue of their agreements with the club.

An example of the imposition of withdrawal liability is the Rancho Murietta Country Club in California. Rancho Murietta had a collective bargaining agreement with Operating Engineers, Local 3 covering the club's grounds, maintenance, and heavy equipment operators. The agreement required the Club to contribute to a pension fund which became severely underfunded. The Club was always current in contributions to the pension fund. For business reasons it was determined to be in the best interests of its members to sell the Club. A buyer eventually came forward but did not want to assume the union agreement. Consummation of the sale would have resulted in a cessation of contributions to the underfunded Local 3 Plan, which would trigger withdrawal liability. After the Plan learned of the club's desire to sell, it notified the Club that it would assess withdrawal liability of $3,000,000 if the transaction was consummated.

The Fund's strategy was successful as the deal fell through. At present, the Club continues to contribute to the underfunded plan. Only time will tell whether it would have been cheaper to pay the $3,000,000.

So, where does that leave clubs and their members? Are they powerless in the face of this impending disaster? The answer is that there are many things they can and should do immediately:

1. Do not be an ostrich and hope that this too shall pass. Determine the annual withdrawal liability exposure of your club and of the vendors and contractors with which your club does business. Withdrawal liability is calculated for each plan year. ERISA mandates that a contributing employer on an annual basis may request and receive an estimate of its current withdrawal liability. Although there is an administrative cost to obtain same, it is worth the money. Under ERISA, a fund must provide the information. If it does not, an employer can contact the Department of Labor, Employee Benefits Security Administration and ask that agency to become involved;
2. If you are unionized, review Plan documents such as the Trust Agreement, Plan Document and amendments as well as annual reports/filings which a fund is required to provide. If you are non-union but have business relationships with companies that are, require them to do the same and to share the results. You may not be able to afford to continue your relationship with some of them.

3. Analyze potential triggering events for withdrawal liability and be sure to include affiliated clubs as well as contractors and vendors with which the club does business. These would include asset sales, corporate restructurings or collective bargaining strategies that might result in a cessation or significant reduction in pension contributions. For example, an employer might bargain to impasse on a demand that it cease making contributions because it feels that is cheaper for it to pay the withdrawal liability now rather than face even greater exposure in the future.

4. Understand the corporate structure of your club. Are the members directly or indirectly exposed to withdrawal liability? If the club is an unincorporated association, it should consider adopting a corporate or LLC form. Does the club have an individual or corporate owner and, if so, will that individual or entity be especially vulnerable?

5. Are there potential joint employers? How much does the club know about the potential withdrawal liability of the club's maintenance contractor? Has the Club reviewed its agreement with that contractor as well as the extent of the club's control over the activities of the contractor to avoid a finding of joint employer status?

6. Determine if this a "special liability" situation. Is this a "Last Man Standing" scenario in the sense that so many other contributing employers are closing or laying off that your club may get hit with a big bill? The club needs to more closely monitor actions by its own union pension fund and its trustees to understand how the fund is being administered. One solution may be to form an association of unionized clubs to share information on particular pension funds or to develop coordinated bargaining strategies.

7. If you are hit with a withdrawal liability bill, don't despair. Although MPPAA is decidedly anti-employer and very complex, withdrawn employers have prevailed in arbitrations and have been successful in negotiating nominal settlements. The key to a successful defense of a withdrawal liability arbitration is for an employer to recognize the problem and to immediately pro-actively adopt a strategy to reduce its exposure. MPPAA purposefully contains deadlines which if missed will eliminate the ability to fight an assessment.

Finally, although it is possible that Congress may act in a decisive and constructive way, don't count on it. The inability of the Standing Committee to meet its own deadline for a report on a legislative solution speaks volumes. This is the time for clubs and their members to become proactive. Failure to do so could mean disaster.

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