LINDABURY
McCORMICK, ESTABROOK & COOPER, P.C.
Attorneys at Law

Employee Benefits Law *Alert*

August 10, 2011

The EMPLOYEE BENEFITS LAW GROUP *provides counsel to trustees of single and multi-employer Taft Hartley funds regarding ERISA fiduciary liability, legal standards for plan design, participation, benefit accrual, vesting, and funding as well as other implementation and administration issues impacting the tax qualified status of such plans.*

JAMES K. ESTABROOK
ELIZABETH ENGERT MANZO

Westfield Office
P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
908-233-6800

Summit Office
480 Morris Avenue
Summit, NJ 07901
908-273-1212

Red Bank Office
One River Centre, Bldg. 1
331 Newman Springs Road
Red Bank, NJ 07701
732-741-7777

New York Office
Suite 2300
26 Broadway
New York, NY 10004
212-742-3390

Pennsylvania Office
Two Penn Center Plaza
Suite 200
Philadelphia, PA 19102
215-854-4090

www.lindabury.com

FASB Changes Accounting Rules for Employers Contributing to Multiemployer Pension Plans

By James K. Estabrook

After nearly a year of collaborative, good-faith effort, the Financial Accounting Standards Board (FASB) with input from the Construction Industry FASB Coalition (CIFC)[1] agreed on new accounting standards for employers that contribute to multiemployer pension plans. Lindabury, McCormick, Estabrook & Cooper served as legal counsel to the CIFC and was pleased to play a role in bringing about a favorable outcome for employers across the spectrum of unionized industries that contribute to Taft-Hartley multiemployer plans. The result is a balanced framework that enhances transparency for the users of financial statements while protecting affected employers from the financial, competitive, and market risks that overbroad disclosure requirements would pose.

In particular, the agreement eliminates certain burdensome and dangerous components of the initial FASB Exposure Draft released in September, 2010. Reflective of feedback FASB received on its original exposure draft, the new standard:

1) <u>*Does not*</u> require disclosure of an employer's withdrawal liability to all pension plans in which they participate, as the parties agreed this was a poor proxy for a contributing employer's potential liability. Assessment of withdrawal liability is unlikely in many cases, due to its contingent nature and the variety of exceptions to its application. Moreover, the amount of withdrawal liability varies greatly with time. Such information would be meaningless to those ultimately reading the financial statements.
2) <u>*Does not*</u> mandate a "point-in-time" estimate of an employer's obligations with respect to the underfunded status of individual plans, nor an estimated liability for retiree health care coverage. Again, an employer's obligations in connection with a plan vary from year to year, which undercuts the validity of any "point-in-time" determination.

[1] The CIFC was composed of trade associations in the construction industry, such as MCAA, NECA, SMACNA, FCA, TAUC and AGC.

(cont'd →)

2389300v1

3) Establishes use of Pension Protection Act plan disclosures already in place and Labor Department plan reports – Form 5500 – as the most cost effective way to provide improved and non-misleading disclosures to increase transparency and disclosure in footnotes to audited financial statements.

FASB's new standards, adopted July 27, 2011, address the core concerns of employers including: (1) increased cost and labor due to excessive data harvesting requirements, particularly for employers contributing to numerous funds; (2) misleading financial data arising from the reporting of contingent liability without regard for other factors such as year-to-year variability and probability of liability assessment; and (3) decreased willingness on the part of financial institutions to lend to companies based on misleading financial information.

Particularly compelling were the results of a field study overseen by the CIFC Advisory Group, which demonstrated the cost, complexity, and overall infeasibility of implementing the standards set forth in FASB's September, 2010 Exposure Draft. The results of the field study aided in the creation of a compromise disclosure table, which will form the basis of the final disclosure rules.

Although the new disclosure rules eliminated the most hazardous proposals, modification of the old accounting standard, which only required employers to reveal their total contributions to all of the multiemployer pension plans in which they participated, was needed in the opinion of FASB. Therefore, the new standard mandates disclosure of the following in the notes of a contributing employer's financial statements:

1) The plan's legal name, plan number and employer identification number.
2) The amount an employer contributes to *each* significant plan *and* to all plans combined.
3) Whether an employer's contributions to a particular plan constitute more than five percent of total contributions to that plan.
4) Which plans, if any, are subject to a funding improvement plan.
5) The date(s) collective bargaining agreement(s) are set to expire, and any minimum funding arrangements.
6) The funded status of the plan, (known as the plan's "zone status") as required by the Pension Protection Act of 2006. If "zone status" cannot be ascertained, an employer must disclose whether the plan is:
   a. Less than 65% funded
   b. Between 65% and 80% funded
   c. Greater than 80% funded
7) A description of the nature and effect of any changes affecting comparability for each period in which a statement of income is presented.

The actual written changes to the FASB rules should be finalized in September, 2011. Meanwhile, employers contributing to Taft-Hartley multiemployer funds should familiarize themselves with these new requirements and be prepared to comply with them once they go into effect. Public entities will be subject to the enhanced standards in fiscal years ending after December 15, 2011, while nonpublic entities must meet the new requirements in fiscal years ending after December 15, 2012.

The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact James K. Estabrook at jestabrook@lindabury.com. Jim acknowledges the assistance of law clerk Steven Andreacchi in preparing this Alert.