

PRIMER ON WITHDRAWAL LIABILITY

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What is Withdrawal Liability?

- Withdrawal liability only accrues when the Employer has contributed to a defined benefit (DB) plan and the DB plan is not fully funded.
- It is equal to the Employer's share of a DB plan's Unfunded Vested Benefits (UVB).
- Liability is triggered upon complete, partial or mass withdrawal of Employers without regard to the reason for the withdrawal.
- The amount of the withdrawal liability assessed against an Employer is dependent upon the Employer's calculated share of UVB and the Employer's past participation in the DB plan. There are many exceptions, industry and plan rules which may apply to the calculated liability.

Determination and Collection of Withdrawal Liability

When an Employer withdraws from a multiemployer plan, the plan sponsor (i.e., Board of Trustees) is legally obligated to:

- Determine the amount of the Employer's withdrawal liability;
- Notify the Employer of the amount of the withdrawal liability; and
- Collect the amount of the withdrawal liability from the Employer.

Determining Whether a Withdrawal Has Occurred

Complete Withdrawal:

Generally stated, a complete withdrawal from a multiemployer pension plan occurs when an Employer:

- Permanently ceases to have an obligation to contribute (i.e., terminates CBA); or
- Permanently ceases all covered operations under the plan (i.e., closes up shop).

Building and Construction Trades Exception:

If the plan primarily covers Employees in the building and construction trades (BCT), and "substantially all" Employees for whom the Employer contributes work in the BCT, then there is no withdrawal liability IF the contributions end BUT,

- 1) the Employer does not perform the same work in the same jurisdiction, OR
- 2) resume such work within five (5) years.

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Partial Withdrawal: (has industry specific rules)

Partial withdrawal generally occurs when:

- (For BCT's) there is a 70% contribution base unit decline (as determined over an eight-year testing period);
- "Bargaining Unit take-out" – Employer no longer has contractual obligation to contribute under one or more, but not all CBA's, but continues to perform same type of work in jurisdiction of CBA or transfers such work to another location; or
- "Facility take-out" – Employer no longer has obligation to contribute under the plan for work performed at one or more, but not all, of its locations, but continues to perform work in at least one location of the type for which there exists a contractual obligation to contribute.

Mass Withdrawal:

A mass withdrawal occurs when:

- Every Employer has a complete withdrawal from the plan, or
- All Employers cease their obligation to contribute under the plan.

Thus resulting in a termination of the multiemployer plan.

Special Industry Rules:

Because of the nature of certain industries (e.g., BCT), there are special rules to determine whether a withdrawal that would trigger withdrawal liability has occurred.

Examples of Events That Can Trigger Withdrawal Liability:

- Sale of business, substantially downsizing a business, going non-union or double-breasted shop, moving the business, or involuntary termination of CBA.

Who is the Employer – Who Is Responsible for Withdrawal Liability?

In general, all trades or businesses "under common control" are treated as a single employer for purposes of withdrawal liability.

- A business under common control or a "control group" is a partnership, proprietorship, trust or other organization that conducts "trade or business" and shares requisite percentages of common ownership specified under the law.
- Generally, the key is 80% common ownership (this is fact and federal circuit specific).

Common Control and Withdrawal:

- Common control is measured at the time of withdrawal. If control ceases prior to the date of withdrawal, then other entities aside from the Employer actually making the contributions would not be liable.
- Complete withdrawal does not occur until all members of controlled group permanently cease operations/obligation to contribute under CBA.
- When a complete withdrawal occurs, all control group members' contribution histories are factored into liability calculation.

- For partial withdrawal, all members' contribution histories are considered and liability mitigating provisions (i.e. "de minimis" rules) are applied to the "Employer" as a whole, not just to separate contributing member organizations.

Sale of a Company and Liability:

Sale of Stock:

- Typically, buyer assumes liability for continuing company obligations.
- Does not trigger liability if no change in obligation to contribute to the plan, even if the shareholder control is completely changed.
- Successor entity treated as the original employer. It inherits contribution history.

Sale of Assets:

- Often triggers liability because buyer is not liable for old company's obligations unless obligations are assumed by contract.
- Buyer may cease covered operations.
- Buyer may cease obligation to contribute where it no longer has employees under a CBA.
- However, buyer in some circumstances can be liable. Substantial continuity in the operation of the business (same employees, plant, equipment, management used) before and after sale may result in liability.

Exception to Asset Sale:

The sale of assets is not treated as a withdrawal (and no withdrawal liability would generally be assessed) if:

- Bona fide sale – arm's length transaction between unrelated parties.
- Assumption of Obligation – buyer assumes obligation at "substantially" the same rate as the seller.
- Bond – buyer bonds an amount equal to one year of the seller's contributions (or posts a letter of credit); **and**
- Secondary liability – contract of sale states that if the buyer withdraws within the next five plan years, the seller will be secondarily liable for any liability.

Four Methodologies Used to Calculate Withdrawal Liability:

1. The Presumptive Method – Default method. Recognizes 5% of each UVB piece over 20 years.
2. Modified Presumptive Method.
3. Direct Attribution Method.
4. Rolling-Five Method.

"Free Look" Rule Exception:

- Allows certain Employers the ability to participate in a plan without incurring possible withdrawal liability.
- The Exception provides that no withdrawal liability will be assessed if:
 - 1) the plan is amended to adopt the Free Look Rule,
 - 2) the Free Look exception was not used by that Employer before; and

- 3) the Employer's contributions for each of the five consecutive plan years prior to withdrawal (or, if less, the number of years required for vesting), were less than 2% of the sum of all employer contributions to the plan.

Mandatory 'De Minimis' Rule:

- The law requires a reduction in "small" amounts of liability. In most cases liability below \$50,000 is reduced to zero or $\frac{3}{4}$ of one percent of the plan's UVB.
- The law allows a higher De Minimis amount if a plan amendment is adopted.
- De Minimis phases out until it has no effect for allocated withdrawal liability above \$150,000 (\$200,000 for plan amendment).
- Reduced amounts become obligation of remaining Employers.
- Policy considerations
 - Equitable treatment for Employers.
 - Administration.

"Fresh Start" Rule:

The Pension Protection Act (PPA) added a "Fresh Start" option for BCT plans, which permits plans that adopt the option to use any year after 1980 in which the plan had no UVB's as the initial "pool" year to be used in calculating the amount of withdrawal liability for Employers withdrawing after 2007.

How is Withdrawal Liability Calculated?

If a complete, partial or mass withdrawal has been deemed to occur on a particular date, the plan sponsor:

1. can request all necessary information for calculation, clarification and collection of withdrawal liability from the Employer (The Employer has 30 days to respond.);
2. should analyze any possible effects of industry specific exceptions (e.g., BCT exception), the "Free Look" rule, the "Fresh Start" option, etc.;
3. must determine plan's UVB liability at applicable valuation date prior to plan year of withdrawal assuming a complete withdrawal;
4. must allocate UVB to Employer using selected or defaulted calculation methodology;
5. must reduce liability for any De Minimis limitation;
6. must reduce liability due to sale of assets, liquidation, dissolution or insolvency;
7. must adjust liability by partial fraction if partial withdrawal;
8. must determine annual payment amount;
9. must develop payment schedule; and
10. must limit initial withdrawal liability to that produced by payments for 20 years.

Right to Notice of Potential Withdrawal Liability Amount

Under the PPA, Employers are entitled, upon written request, to receive from the plan sponsor:

1. the estimated amount of what that Employer's withdrawal liability would be if the Employer withdrew on the last day of the proceeding plan year; and
2. an explanation of how this estimated withdrawal liability amount was determined.