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Costs To Pension Withdrawal Liability May Change

Law360, New York (August 28, 2014, 10:15 AM ET) -- Since 1980, employers withdrawing from participation in underfunded multiemployer defined benefit plans have faced the possibility of paying significant "exit fees" in the form of withdrawal liability. Multiemployer plans have often included any "surcharge" imposed by the Pension Protection Act of 2006 for plans in "critical status" when calculating a withdrawing employer's withdrawal liability. However, the U.S. District Court for the District of New Jersey recently ruled that the common practice of including automatic employer surcharges in calculating withdrawal liability is not supported by the Employee Retirement Income Security Act.

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Board of Trustees of IBT Local 863 Pension Fund v. C&S Wholesale Grocers Inc./Woodbridge Logistics LLC[1] is a departure from how withdrawal liability has been calculated since the PPA, and it may open the door for new challenges that could reduce the amounts owed by withdrawing employers. Given that the amount of withdrawal liability can be millions of dollars, removing a surcharge of up to 10 percent could result in significant cost savings for employers. However, employers seeking to reduce their withdrawal liability based on the arguments presented in this case must still be careful to heed ERISA's strict timing and notice requirements for disputing the multiemployer plan's calculation of the amount of withdrawal liability.

Background on Withdrawal Liability

Under ERISA, a multiemployer plan is a collectively bargained employee benefit plan to which more than one employer contributes.[2] Multiemployer defined benefit pension plans are insured by the Pension Benefit Guaranty Corporation. PBGC's insurance programs were created as part of ERISA in 1974 to "guarantee" or "insure" retiree pension benefits. This means that if a multiemployer plan becomes insolvent and is unable to pay promised benefits, the PBGC will pay participants their pension benefits up to the maximum guaranteed benefit set by law.

In 1980, Congress enacted the Multiemployer Pension Plan Amendments Act, which provided additional protections for multiemployer plans, including the establishment of mandatory requirements for plans in "reorganization status" and withdrawal liability requirements for employers dropping out of the multiemployer plan. Under the MPPAA, an employer that withdraws from participation in an underfunded multiemployer plan must pay "withdrawal liability" to the plan representing its proportional share of the plan's unfunded future vested benefits. An underfunded plan is one where the actuarial value of

the plan's promised future benefits exceeds the value of the plan's assets. The possibility of withdrawal liability under the MPPAA reduces the incentives employers otherwise may have to withdraw from multiemployer plans experiencing financial difficulties. Further, it "insures that [the withdrawing employer's] financial burden will not be shifted to the remaining employers."[3]

The PPA also contained provisions designed to strengthen the funding status of many multiemployer plans. In particular, the PPA established special funding and operational requirements for multiemployer plans in "endangered status" (generally funded less than 80 percent) or "critical status" (generally funded less than 65 percent). For multiemployer plans in critical status, automatic "surcharges" may apply to increase the employer's annual contributions until such time that the employer and union can agree to a new collective bargaining agreement that includes terms consistent with the multiemployer plan's "rehabilitation" plan. The automatic surcharge amount is 5 percent of the contributions the employer is required to contribute under the applicable collective bargaining agreement for the first year the plan is in critical status, with the surcharge increasing to 10 percent thereafter.[4]

Following an employer's withdrawal from an underfunded multiemployer plan, the plan must calculate the amount of withdrawal liability, notify the employer of that amount and then demand payment in accordance with a schedule for payments, usually paid over the course of 20 years.[5] If the withdrawal liability does not fully amortize after 20 years of payments, ERISA limits the amount owed to what is paid in the 20 years. The annual payments are calculated, in part, by using the employer's "highest contribution rate" to the multiemployer plan for the 10-year period preceding the withdrawal.[6] Upon receiving notice of the multiemployer plan's calculation of the withdrawal liability, the employer has 90 days to identify any disputes with the calculation.[7] Regardless of any such disputes, the employer must begin making withdrawal liability payments no later than 60 days after the demand for payment.[8]

Thus, withdrawal liability is a "pay first, dispute later" system, with most disputes over the calculations unresolved prior to the initiation of payments. The penalties for failure to "pay first, dispute later" are steep — a failure to make the required payments may result in a default requiring immediate payment of the entire outstanding amount of the employer's withdrawal liability and may eliminate the ability to dispute the calculation.[9]

If the multiemployer plan does not agree with the employer regarding its dispute over the calculation of the amount of withdrawal liability, the employer's only method to continue challenging the calculation is to proceed to arbitration.[10] However, in arbitration, the multiemployer plan is given a significant advantage, with arbitrators presuming that the multiemployer plan's determinations are correct unless the withdrawing employer "shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."[11] If the employer loses its dispute at arbitration, it may bring a court action to vacate or modify the arbitrator's award.[12] However, the employer still faces an uphill battle in the court system as courts are bound to a presumption that the arbitrator's fact findings were correct.[13]

While multiemployer plans have an advantage in arbitration and legal actions, employers should always review withdrawal liability calculations carefully to allow for timely challenges of any perceived miscalculations. Nonetheless, even if an employer fails to meet the deadline to dispute a calculation of withdrawal liability, the multiemployer plan still has the discretion to refund withdrawal liability payments that the plan administrator later determines were collected due to a mistake of fact or law.[14]

Board of Trustees of IBT Local 863 Pension Fund v. C&S Wholesale Grocers Inc./Woodbridge Logistics LLC

In Board of Trustees of IBT Local 863 Pension Fund v. C&S Wholesale Grocers Inc./Woodbridge Logistics LLC,[15] C&S Grocers withdrew from the multiemployer plan at issue in February 2011. In response, the multiemployer plan engaged its actuary, the Segal Company, to calculate the corresponding withdrawal liability. Segal included the "automatic employer surcharge" imposed by the PPA due to the multiemployer plan's "critical status" in its calculations of the employer's "highest contribution rate" when determining the withdrawal liability, while C&S Grocers disputed the inclusion of the surcharge. The parties first went to arbitration over the issue after neither side relented in their position.

On Nov. 21, 2012, the arbitrator resolved the issue in favor of the multiemployer plan. The arbitrator reasoned that the surcharge is treated like a contribution under ERISA, such that it should be considered a contribution in calculating withdrawal liability. The arbitrator also determined that Congress' failure to expressly exempt such surcharges from inclusion in the calculation of withdrawal liability meant that it should be included by negative implication.[16]

The parties sought review of the arbitrator's opinion, leading the U.S. District Court for the District of New Jersey to issue what appears to be the first court decision to consider whether automatic employer surcharges should be included in the calculation of withdrawal liability. Ultimately, the court disagreed with the arbitrator's opinion, instead granting summary judgment in favor of C&S Grocers on this issue.

The district court determined that the text of ERISA is unambiguous because the variables in calculating withdrawal liability are well-defined and do not include the surcharge. Withdrawal liability is calculated by multiplying the "contribution base units" (units by which the employer's contribution is measured, e.g., in hours or weeks worked) by "the highest contribution rate at which the employer had an obligation to contribute under the plan."[17] ERISA explicitly defines the term "obligation to contribute" to mean an obligation arising "under one or more collective bargaining (or related) agreements," or "as a result of a duty under applicable labor-management relations law."[18] Finding that the surcharge arises under ERISA (through the PPA) and not a collective bargaining agreement or labor-management relations law, the court determined that ERISA unambiguously excludes adding automatic employer surcharges in calculating the "highest contribution rate." Thus, it was improper for Segal to include the surcharge when it calculated C&S Grocers' withdrawal liability.

This case is significant for employers because it conflicts with accepted practice in calculating withdrawal liability. Since PPA, it has been common practice for multiemployer plans to assume that "the highest contribution rate" included any surcharges. Given that up to a 10 percent surcharge may impose significant additional liability — particularly for those employers whose withdrawal liability is not fully amortized over 20 years — withdrawing employers should be aware of this issue and consider using the arguments presented in this case as a framework for challenging the inclusion of such surcharges in future withdrawal liability calculations.

However, because any challenges to a plan sponsor's calculation of the amount of withdrawal liability are subject to strict timing requirements, namely that the dispute must be raised in 90 days and that arbitration must be initiated shortly thereafter, this case will likely not help employers who missed their deadlines to challenge the calculation and are currently paying withdrawal liability calculated by including the automatic surcharges. Of course, it is still possible that multiemployer plans may be convinced by the arguments presented in this case, and refund withdrawal liability payments attributable to the automatic employer surcharges on the basis that such payments were included by a mistake of law.[19] However, given the common practice of including automatic employer surcharges, it is unlikely that multiemployer plans will issue refunds on their own initiative based on this one court opinion.

We can also expect that this will not be the final word on this issue, either in this case or another case with similar facts. Indeed, the parties have already filed cross appeals to the Third Circuit, with briefing set to conclude early this fall.[20]

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[1] --- F. Supp. 2d ---, No. 12-7823, 2014 WL 1687141 (D.N.J. Mar. 19, 2014).

[2] ERISA § 4001(a)(3), 29 U.S.C. § 1301(a)(3).

[3] SUPERVALU Inc. v. Bd. of Trs. Of Sw. Pa. & W. Md. Area Teamsters & Employers Pension Fund, 500 F.3d 334, 337 (3d Cir. 2007).

[4] ERISA § 305, 29 U.S.C. § 1085.

[5] ERISA § 4219(b)(1), 29 U.S.C. § 1399(b)(1).

[6] ERISA § 4219(c)(1)(C), 29 U.S.C. § 1399(c)(1)(C).

[7] ERISA § 4219(b)(2)(A), 29 U.S.C. § 1399(b)(2)(A).

[8] ERISA § 4219(c)(2); 29 U.S.C. § 1399(c)(2).

[9] ERISA § 4219(c)(5); 29 U.S.C. § 1399(c)(5).

[10] ERISA § 4221(a)(1), 29 U.S.C. § 1401(a)(1).

[11] ERISA § 4221(a)(3), 29 U.S.C. § 1401(a)(3).

[12] ERISA § 4221(b)(2), 29 U.S.C. § 1401(b)(2).

[13] ERISA § 4221(c), 29 U.S.C. § 1401(c).

[14] ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii); see also U.S. Department of Labor Advisory Opinion 95-24A ("Thus, it is the view of the department that, if the board, acting in its capacity as "plan administrator," determines that payments of withdrawal liability have been made by a mistake of fact or law, Section 403(c)(2)(A)(ii) permits the return of such mistaken payments within 6 months of the Board's determination.").

[15] --- F. Supp. 2d ---, No. 12-7823, 2014 WL 1687141 (D.N.J. Mar. 19, 2014).

[16] Id. at *7.

[17] ERISA § 4219(c)(1)(C)(i), 29 U.S.C. § 1399(c)(1)(C)(i).

[18] ERISA § 4212(a),29 U.S.C. § 1392(a).

[19] ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii).

[20] Nos. 14-1957 and 14-1956 (3d Cir.).

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