

Cautions To Employers Considering A Multiemployer Plan

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Are you a small employer that has been faced with the possibility of participating in a multiemployer plan for your union employees? If so, before you sign up, you should carefully consider the pros and cons (especially cons!) of such a plan.

WHAT ARE MULTIEMPLOYER PLANS?

Multiemployer plans are union plans sponsored by two or more unaffiliated employers based on a common collective bargaining agreement. Most multiemployer collective bargaining agreements provide a cluster of employee benefit plans: pension, health, vacation, holiday, apprenticeship and training. The pension plans sometimes include one or more types of defined contribution plans but usually are centered on a traditional defined benefit pension plan.

WHY (OR WHY NOT) A MULTIEMPLOYER PLAN?

Employers may be attracted to multiemployer plans by the prospect of obtaining lucrative union work or by the availability of a pool of trained employees who can be employed or laid off as the employer's workload varies. Employers also may be attracted by the prospect of no longer bearing the burden of managing employee benefits for their employees. However, these attractive features can come with significant disadvantages, especially for the small employer. Many employers subscribe to a multiemployer collective bargaining agreement without any awareness of the burdens and disadvantages associated with the multiemployer benefit plans that come with the agreement.

The burden is that the employer will still have to fund the employee benefit plans in which its employees participate by making regular contributions. The main disadvantage is that the smaller employer surrenders control of the employee benefits provided to its employees and the costs of funding those benefits to the union and the largest employers who control the collective bargaining agreement and the employee benefit plans. Control of such matters – plan design, benefits, and funding – lies with the joint labor-management board of trustees, which is usually dominated by the union and the largest sponsoring employers.

The employer is obligated to make regular contributions to the plans, and the board of trustees is required to vigorously enforce that obligation. Payment of those contributions may appear easy during periods when business is good. In tough economic times, however, it is easy to fall into arrears and end up facing a

lawsuit, legal fees, and liability, not only for the delinquent contributions, but also for liquidated damages, interest, and the plan's fees and costs.

UNDERFUNDED PLANS

Even if the small employer has steady union work and keeps current with its contribution obligations, the current underfunded status of the plans may burden the small employer. This may be especially true now, after an earlier period of bullish stock market investments, reduction of employer contribution rates, and the recent downturn in investment earnings or losses. If contribution rates fail to keep up with increases in benefit liabilities, the small employer may keep its contributions current and still find itself burdened with increasing contribution rates to cure the plans' underfunded status. The newly participating employer thus may be burdened by increasing contribution rates intended to cure the underfunding incurred by the participating and larger employers who had failed to keep the plan adequately funded.

This problem has been aggravated by the Pension Protection Act of 2006, which imposed more rigorous requirements that defined benefit plans, including multiemployer plans, take corrective action to restore the plan to adequate funding. The trustees of the plan may be required to impose on the employers either an increased contribution rate or a reduction in benefit options or both. Small employers will have little voice or leverage in any of these decisions. Unfortunately, the recent downturn in the stock market has pushed many formerly adequately funded plans into critical status and the necessity of imposing such corrective measures.

WITHDRAWAL LIABILITY!

The defined benefit plan may present another unanticipated disadvantage – withdrawal liability. A sponsoring employer that partially or fully withdraws from a multiemployer defined benefit plan may be hit with an accelerated obligation to fully fund the benefits accrued under the plan by its employees, resulting in a much larger than normal contribution to the plan for a period of years after withdrawing from the plan.

Future benefits under a multiemployer defined benefit plan are not fully funded as they accrue but are funded by future contributions and trust fund earnings. If the benefits accrued by the employer's employees are not fully funded when a sponsoring employer withdraws, the employer's obligation to fully fund benefits is accelerated.

Withdrawal liability may be triggered, not only by the employer's decision to withdraw from the plan or to terminate the collective bargaining agreement, but also by events beyond the employer's control: a vote by employees to leave the union, a decline of business and lay-off of union employees, closure of the business, a sale of the business, or a merger. Any total cessation of the obligation

to contribute will result in an assessment of withdrawal liability. Thus, any merger, acquisition, or sale of a business must be carefully structured to avoid incurring withdrawal liability. Partial withdrawal liability will also be assessed whenever the employer's level of annual contributions substantially declines. Thus, any plan to avoid withdrawal liability by gradually reducing the contribution obligation over a series of years must be carefully managed to avoid triggering partial withdrawal liability.

WHAT TO DO?

The small employer should be cautious about signing a multiemployer collective bargaining agreement. The employer should carefully examine the current funding status of the multiemployer plans, the economic prospects for itself and the other participating employers, and whether the gains from participation outweigh the risks and loss of control of benefits and funding that will follow. If the employer finds itself stuck in a cluster of multiemployer plans from which it would like to withdraw, it should consult legal counsel to weigh the options for doing so.

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