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# Multi-Employer Pension Plans: Continued Participation or Withdrawal?

## Evaluating Risks, Meeting Contribution Obligations, and Minimizing Withdrawal Liability

TUESDAY, AUGUST 20, 2013

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# Multi-Employer Pension Plans: Continued Participation or Withdrawal?

August 20, 2013


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# Introduction

- Once upon a time (mostly in the period from 1945 to 1965), multi-employer or Taft-Hartley plans were established by unions and employers to provide benefits to employees represented by the unions
- IRC set minimum funding requirements but this rarely had any practical impact on employers contributing to Taft-Hartley plans (or any pension plans for that matter)
- CBA set contribution rates, subject to approval of Plan Trustees
- Employers could withdraw without penalty

# Introduction

- ERISA enacted in 1974
- Funding requirements were tightened and Taft-Hartley plans were classified as “defined benefit” plans
- However, there was no practical impact on employers
- Still no withdrawal liability
- In 1974, 45% of active private sector workers in the U.S. were covered by a defined benefit pension plan. Less than 20% were covered by a defined contribution plan

# Introduction

- MPPAA enacted in 1980
- Withdrawal liability created, so that an employer who ceased to contribute could be required to pay its proportionate share of the Plan's unfunded vested liabilities, even if the employer had fully paid the contributions required by the CBA

# Introduction

- Since 1980, unions and defined benefit pension plans have fallen out of favor
- Fewer than 20% of active private sector workers are now accruing benefits under a DB plan. Approximately half are eligible to participate in a DC plan
- Private sector defined benefit plan funding index:
  - 2000 121%
  - 2002 81%
  - 2007 109%
  - 2012 71%
- There are approximately 1,500 Taft-Hartley DB plans in the U.S.; almost all of them are not fully funded for withdrawal liability purposes

# Withdrawal Liability

- Withdrawal liability is payable only upon the occurrence of a withdrawal, as defined by ERISA.
- A withdrawing employer is liable to the pension plan for employer's share of plan's unfunded vested benefits ("UVBs"), if any; determination of UVBs depends on actuarial assumptions and methodologies.
- Title IV of ERISA specifies two types of employer withdrawals that can trigger payment of liability
  - Complete withdrawals; and
  - Partial withdrawals

# Complete Withdrawal

- "Complete Withdrawal" is defined under ERISA as:
  - A permanent cessation of the employer's obligation to contribute under the plan; or
  - A permanent cessation of the employer's covered operations under the plan.
- Permanent cessation of employer's obligation to contribute
  - Upon expiration and non-renewal of collective bargaining agreement ("CBA") that obligated employer to contribute to the plan (unless employer has an ongoing duty under the NLRA to continue to contribute under the terms of the expired CBA)
  - Where a fund terminates an employer's participation in the fund. See e.g. *Borntrager v. Central States, SE & SW Areas Pension Fund*, 2008 WL 1800645 (N.D. Iowa, 4/22/08)
  - Where the employees decertify the union

# Complete Withdrawal (cont'd)

- Permanent cessation of employer's "covered operations"
  - Refers to those business activities for which the employer is required to contribute to the plan
  - May be triggered by layoffs, plant closures or sale of the business
- What is "permanent cessation"?
  - Permanence is something less than eternal;
  - An employer's expressed intent to resume operations must be corroborated by extrinsic evidence;
  - Liquidation or total shutdown of the employer is not necessary so long as the employer has ceased conducting business activity that gives rise to the contribution

# Partial Withdrawal

- ERISA § 4205(a) defines a partial withdrawal as follows:
  - 70% decline in employer contributions over three plan years, or
  - A cessation of contribution obligation under one, but not all bargaining agreements, and continuation of work in CBA jurisdiction of the type for which contributions were previously required, or a transfer of such work to another location or another entity owned or controlled by employer, or
  - A cessation of contribution obligation at one but not all facilities, and continuation of work at the facility of type for which contributions previously required.

# Special Industry Rules

- ERISA § 4203 provides for special rules for certain plans in the following industries: Construction (29 USC §1383 (b)); Entertainment (29 USC § 1383(c)); Trucking (29 USC § 1383(d)); Retail Food (29 USC § 1385(c)); and Coal (29 USC § § 1391(d), 1396)

- The special rules applicable to these industries may alter the conditions under which a withdrawal and partial withdrawal occur, the effect of a withdrawal or the method for calculating withdrawal liability in a particular industry

# Special Industry Rules (Cont'd)

- In regard to the Construction Industry, for example: Complete withdrawal occurs in regards to a construction industry plan only if (a) construction industry employer ceases to have an obligation to contribute under the plan and (b) continues to perform work in the jurisdiction of the collective bargaining agreement of for which contributions were previously required. Partial withdrawal occurs only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the CBA of the type for which contributions are required.

# Identifying the Employer

- Employer's contribution obligation arises in its collective bargaining agreement.
- Many Trust Funds require a separate agreement between the employer and Trust.
- An employer's liability is determined by the bargaining agreement, any agreements with the Trust Fund, the Trust document and bylaws, Trust Agreements, and any other documents under which the Trust Fund operates.
- Employers may be unaware of the obligations imposed by these documents, unless employer obtains and reviews them. Agreements often bind the employer to rules that the employer has never seen.
- Union does not speak for and does not bind the Fund.

# Identifying the Employer

- For purposes of withdrawal liability, all corporations, “trades or businesses” under common control are treated as a single “employer” and are jointly and severally liable for withdrawal liability of any controlled group member.
- Section 4001(b)(1) of ERISA: "Under regulations prescribed by [PBGC], all employees of trades or business (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. [Such] regulations . . . shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under Section 414(c) of the [tax code]."
- Under “controlled group” rules, if several members of a controlled group contribute to the same multiemployer plan, when one member stops contributing, there may be no withdrawal, or at most a partial withdrawal.
- If one member of the controlled group withdraws, all members have joint and several liability and must timely exercise their rights to challenge the assessment of liability.

# Who is in the Controlled Group?

- In general, there is no shareholder responsibility for withdrawal liability. However, the Seventh Circuit held an individual personally liable for withdrawal liability because the individual owned the stock of the withdrawing corporate employer and also engaged in activities that qualified as trades or businesses by (i) owning and leasing property to the employer; and (ii) providing management services as an independent contractor. *Central States Pension Fund v. Nagy*, 2013 U.S. App. LEXIS 7912 (7th Cir. 2013). In so holding, the Seventh Circuit confirmed that certain leasing activity is categorically a trade or business for purposes of individual liability under ERISA.
- A 2007 PBGC Opinion Letter opined that a private equity fund was a trade or business and was therefore jointly and severally liable for the underfunded liabilities of a pension plan sponsored by one of its portfolio companies.
- First Circuit has ruled that a private equity fund is a "trade or business" that could be liable for the multiemployer pension plan withdrawal liability of one of their portfolio companies. *Sun Capital Partners III LP v. New England Teamsters & Trucking Indus. Pension Fund*, U.S. App. LEXIS 15190 (1st Cir. July 24, 2013).
- *Board of Trustees, Sheet Metal Workers' National Pension Fund v. Palladium Equity Partners, LLC*, 722 F.Supp. 2d 845 (E.D. Mich. 2010) denied summary judgment motion of private equity firm for withdrawal liability as owners of a bankrupt company. Case settled before trial.

# Business Transactions and Successorship

- Business reorganizations (mergers, spin-off, or change in structure) are not a withdrawal if no interruption in contributions and the obligation to contribute continues. ERISA 4218; *see Central States v. Sherwin-Williams,* 71 F.3d 1338 (7th Cir. 1995); *Teamsters Pension Trust Fund of Philadelphia v. Central Michigan Trucking, Inc.* 857 F.2d 1107 (6th Cir. 1988); PBGC Opinion Letters 82-4 (Feb. 10, 1982), 84-7 (Dec. 20, 1984).
- BUT sale of assets cuts off seller's contribution obligation, and ERISA 4204 must be followed for seller to avoid withdrawal liability.
- ERISA 4212(c) permits a court to disregard transactions whose purpose is to "evade or avoid" withdrawal liability.
- The Seventh Circuit has held that a Chapter 7 liquidation proceeding was not a per se bar to successor liability for withdrawal liability. Court denied the new company's motion to dismiss on the theory that the Fund could recover if the successor had notice of the withdrawal liability claim before acquiring the old company's assets and there was substantial continuity in the operation of the business. *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.,* 59 F.3d 48 (7th Cir. Ill. 1995)

# Fund is a Separate Entity Independent of the Union

- Funds audit employers to be sure all proper contributions are being made.
- The employer's obligations under Trust Fund rules may control over inconsistent terms in the bargaining agreement as to which employees are covered, what contribution rates apply, what hours of work are covered, and what compensation is the basis for contributions.
- "In a collection action based on [ERISA] section 515, a multiemployer plan can enforce, as written, the contribution requirements found in the controlling documents*." Bakery & Confectionary Workers Union Trust Fund v. Ralph's Grocery,* 118 F.3d 1018 (4th Cir. 1997).
- Trustees may not be able to impose new, inconsistent bargaining obligations. *See LaBarbera v. J.D. Collyer Equip. Corp*., 337 F.3d 132 (2d Cir. 2003)

# Calculating Withdrawal Liability

- A withdrawing employer is liable to the pension plan for employer's share of plan's unfunded vested benefits, if any; determination of UVBs depends on actuarial assumptions and methodologies.
- There are several different calculation methods.
- Withdrawal can be triggered by any significant reduction in the duty to contribute, including layoffs, plant closures, sales, or changes in the bargaining agreement.
- ERISA imposes no withdrawal liability with respect to welfare plans, but some welfare plans impose such liability by contract. Some pension Trust Funds impose contractual withdrawal liability in excess of the ERISA withdrawal liability.

# Allocation Formulas

- ERISA §4211 and PBGC regulations permit the Fund to select one of four allocation methods or to develop its own allocation method subject to PBGC approval.
- The allocation method must be spelled out in the Fund's trust documents or the statutory "presumptive", "20-pool" method will apply.
- Once adopted, the method must be followed by the Fund.
- Disputes over application of the allocation are subject to mandatory arbitration under the dispute procedures.

# Actuarial Assumptions and Methods

- Actuarial assumptions are critical in calculating withdrawal liability,. Small changes in the discount interest rate greatly impacts valuation of the Fund's future benefit obligations.
- The UVBs are determined by the Fund's actuary, who must make that determination based on "assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience." ERISA §4213(b)(1). In *Concrete Pipe, Inc. v. Construction Laborers Pension Trust,* 508 U.S. 602, 635 (1993), the Supreme Court found that the plan actuary, rather than the plan trustees, must select the assumptions and methods and calculate withdrawal liability. Challenges to actuarial methods and assumptions have rarely succeeded, other than on grounds that they were improperly adopted.
- Disputes over actuarial assumptions must be brought in arbitration.
- The Fund must provide employers, upon request, copies of all arbitration decisions involving the Fund. 29 C.F.R. §4221.8(g).

# Dates of Withdrawal and Valuation

- ERISA §4203(e) defines the date of an employer's complete withdrawal as "the date of cessation of the obligation to contribute or the cessation of covered operations." The date of valuation is usually the last day of the plan year preceding the date of withdrawal. For withdrawal from calendar year plan in 2009, the valuation date will be December 31, 2008.

- ERISA §4205(a) defines the date of an employer's partial withdrawal as the last day of the plan year in which such partial withdrawal occurs. Under ERISA §4206(a),
  - the valuation date for 70% decline is the last day of the first plan year in the three year testing period.
  - the valuation date for partial cessation of contribution obligation is the last day of the plan year preceding the date of withdrawal.

- The determination of the date of withdrawal liability is fact dependent and subject to determination of the arbitrator.

- Withdrawal date is the date for determining controlled group members.

# Adjustments to Withdrawal Liability

- The *de minimis* rules requires that small amounts of withdrawal liability be overlooked. ERISA 4209(a).
- Net worth limitation upon sale of all assets and insolvency. ERISA 4225.
- 20-year cap on withdrawal liability periodic payments.
- Special rules apply to increase liability in the case of "Mass Withdrawals" under ERISA 4219 and PBGC regulations.
  - *De minimis* rule and 20-year cap do not apply and different actuarial assumptions may apply.
  - Employers face "redetermination liability" and "reallocation liability."

# What Is a Mass Withdrawal?

- Under ERISA 4219, "mass withdrawal" occurs
  - upon withdrawal of every employer from the plan, or
  - upon withdrawal of substantially all the employers pursuant to an agreement to withdraw.
- An employer that withdraws during the three plan years preceding the mass withdrawal date during which substantially all employers withdraw is presumed to have withdrawn pursuant to an agreement to withdraw.
  - This presumption may be rebutted by a preponderance of the evidence.
- An employer that withdraws after the beginning of the second full plan year preceding the date of the plan termination caused by the withdrawal of all employers has mass withdrawal liability.

# Notice of Withdrawal and Payment Schedule

- "As soon as practical" following withdrawal (ERISA 4219(b)), the Fund must provide the employer notice of withdrawal and demand payment, giving the employer the option of 1) lump sum payment or 2) periodic payments (monthly or quarterly).

- Periodic payments are based on the employer's pre-withdrawal contribution rates. It is possible that the value of total periodic payments will be less than the lump sum withdrawal liability.

# Challenging the Liability Calculation

- In general, when an employer withdraws from a multiemployer pension plan, it is compelled to make withdrawal liability payments pursuant to a payment schedule determined by the Plan, as provided in ERISA, that is designed to replicate the employer's recent contribution history to the plan.
- A challenge to the Fund's withdrawal liability calculation does not excuse the employer from making required payments while the dispute is being resolved and arbitrated: 29 U.S.C. § 1399(c)(1)(E)(2).
- ERISA provides detailed dispute resolution procedures, including mandatory arbitration. 29 U.S.C. §§ 1399 and 1401. If errors are found in the original computation, these may be corrected by the arbitrator, 29 U.S.C. § 1401(d), or by judicial review, 29 U.S.C. § 1401(b)(2). *Marvin Hayes Lines, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 814 F.2d 297, 299 (6th Cir. 1987)

# Default and Acceleration of Liability

- When an employer defaults, a fund is allowed to accelerate the withdrawal liability payments and require an employer to pay the entire lump withdrawal liability.
- ERISA §4219(c)(5) defines default as
  - (A) the failure of an employer to make, when due, any payment under that section if the failure is not cured within 60 days after an employer receives written notification of the failure, or
  - (B) any other event defined in a plan's rules that indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability.
- *See Central States Southeast and Southwest Areas Pension Fund v. O'Neill Bros. Transfer & Storage Co.,* 620 F.3d 766 (7th Cir. 2010); *Central States, Southeast and Southwest Areas Pension Fund v. Telegraph Paving Co.,* 2010 U.S. Dist. LEXIS 89856 (N.D. Ill. Aug. 31, 2010).

# Sale of Businesses

- Stock sale generally does not cause a withdrawal
- Asset sale does cause seller to withdraw unless parties comply with ERISA §4204

- But beware of the alter ego doctrine (Retirement Plan of UNITE HERE National Retirement Fund v. Kombassan Holdings, 629 F.3d 282 (2d Cir. 2010)

- And beware of successorship liability (Einhorn v. Ruberton Construction Co., No. 09-4204 (3d Cir. 2011)(not a withdrawal liability case)

# Sale of Businesses

- 4204 requires “a bona fide, arm’s length sale of assets to an unrelated party”
- Purchaser must have an obligation to contribute for substantially the same number of  contribution base units and must timely post a bond for five years (unless exemption applies)
- Seller must agree, in the sale contract, to secondary liability in the event buyer defaults within five years
- Seller also must post bond or escrow in the event of liquidation or distribution of substantially all assets within the five year period

# Transactions to Evade or Avoid Liability

- ERISA § 4212(c) provides:

  "If a principal purpose of any transaction is to evade or avoid liability under [the provisions governing employer withdrawals from multi-employer plans, those provisions] shall be applied (and liability shall be determined and collected) without regard to such transaction."

- Test for disregarding a transaction:
  - Was a principal purpose to evade or avoid withdrawal liability
  - The transaction need not be a sham or constitute fraud
  - See *Santa Fe Pacific Corporation v. Central States S.E. & S.W. Area Pension Fund*, 22 F.3d 725, 727 (7th Cir. 1994) ("It needn't be the only purpose; it need only have been one of the factors that weighed heavily in the Seller's thinking")

# Transactions to Evade or Avoid Liability (cont'd)

- Can cover otherwise bona-fide, arms-length transactions. See *e.g.*, *SuperValu, Inc. v. Bd of Trustees of S.W. Pa. and W. Md. Teamsters & Employers Pension Fund*, 500 F3d 334 (3rd Cir. 2007)(Section 4212(c) applied to CBA where the union understood, and agreed with, company's goal of avoiding liability).

- Where § 4212(c) applies, the transaction in question must be disregarded in determining withdrawal liability

- Courts have allowed the assertion of liability against non-employers under this provision. See *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2d Cir. 1993)(assets transferred by an agreement that violates §4212(c) are recoverable from transferee).

# Procedure for Disputing Withdrawal Liability

- Once the Fund determines that a withdrawal has occurred, it must notify the employer as soon as practicable of the withdrawal liability and the schedule of payments. Courts have ruled that notice to any member of the controlled group constitutes notice to all controlled group members. *I.A.M. Nat'l Pension Fund, Plan A. v. Slyman Industries, Inc.,* 284 U.S. App. D.C. 21, 901 F.2d 127, 129 (D.C. Cir. 1990) (holding that notice to a bankrupt member of a controlled group also constituted constructive notice to the other members of the group); *McDonald v. Centra, Inc*., 946 F.2d 1059 (4th Cir. 1991).
- The employer (including any controlled group members) has 90 days to ask the Fund to review any matter relating to the determination of the withdrawal liability and the schedule of payments.
- An employer must notify the Fund within 90 days of receipt of a notice for partial or complete withdrawal liability to request a review of the liability—either to dispute the imposition of liability or the calculation of liability. The Fund must then conduct a "reasonable review" based on the employer's request and notify the employer of its decision.

# Arbitration

- Arbitration may be initiated by either the employer or the fund within 60 days after the earlier of (i) the date the Fund denies the employer's request for a review or (ii) 120 after the employer's request for review of the initial notice. Any further dispute regarding withdrawal liability must be resolved through arbitration.
- If the employer fails to timely request arbitration, the employer is precluded from challenging the assessment or determination of amount of withdrawal liability.
- The issue of whether or not an entity ceased to be an employer by reason of a transaction or otherwise must be resolved in arbitration. *Galgay v. Beaverbrook Coal Co*., 105 F.3d 137, 141 (3d Cir. 1997); *Trucking Empls. of N. Jersey Welfare Fund, Inc. v. Bellezza* Co., 57 Fed. Appx. 972, 974 (3d Cir. 2003). "Where a party against whom withdrawal liability is being asserted is certainly a part of the controlled group of an employer subject to MPPAA at some point in time, and where the issues in dispute fall within the purview of MPPAA provisions that are explicitly designed for arbitration, the Act's dispute resolution procedures must be followed." *Bellezza* , 57 Fed. Appx. at 974 ; see also *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1247 (3rd Cir. 1987).

# Courts Must Decide Employer Status

- The majority of courts have ruled that disputes over whether an entity was ever an employer a member of the controlled group - and thus an "employer" under MPPAA - are for the court to determine. See *Rheem Mfg. Co. v. Central States,* 63 F.2d*; Connors v. Incoal, Inc.*, 995 F.2d 245, 250-51 & n.6 (DC Cir. 1993); *Central States Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 794 (7th Cir. 1992); *Central States Fund v. Slotky,* 956 F.2d 1369,1374 (7th Cir. 1992).

# Requesting Information From the Plan

- ERISA §101(k) requires that "[e]ach administrator of a multi-employer plan shall, upon written request, furnish to … any employer that has an obligation to contribute to the plan" the following:
  - A copy of any periodic actuarial report (including any sensitivity testing) received by the plan for any plan year which has been in the plan's possession for at least 30 days,
  - A copy of any quarterly, semi-annual, or annual financial report prepared for the plan by any plan investment manager or advisor or other fiduciary which has been in the plan's possession for at least 30 days, and
  - A copy of any application filed with the Secretary of the Treasury requesting an extension under section 1084 of this title [minimum funding standards for multiemployer plans] or section 431(d) of Title 26 [extension of amortization periods for multiemployer plans] and the determination of such Secretary pursuant to such application.

# Requesting Information From the Plan (cont'd)

- Information shall **not** include any individually identifiable information regarding any plan participant, beneficiary, employee, fiduciary or contributing employer
- Information shall **not** include any proprietary information regarding the plan or any contributing employer, or entity providing services to the plan
- Information must be provided within 30 days after the request
- Information may be provided in written, electronic, or other appropriate form
- The plan may require payment of a reasonable charge for copying, mailing and other costs of furnishing copies of information
- Employer is entitled to receive no more than one copy of any such report or applications during any one 12-month period

# Requesting Information From the Plan (cont'd)

- Under ERISA § 101(l), a plan sponsor or administrator of a multi-employer plan shall, upon written request, furnish to any employer who has an obligation to contribute to the plan a notice of
  - the estimated amount of the employer's withdrawal liability, if the employer withdrew on the last day of the plan year preceding the date of the request, and
  - An explanation of how such estimated liability amount was determined, including the actuarial assumptions and methods used to determine the value of the plan liabilities and assets, the data regarding employer contributions, unfunded vested benefits, annual changes in the plan's unfunded vested benefits, and the application of any relevant limitations on the estimated withdrawal liability

# Requesting Information From the Plan (cont'd)

- Notice must be provided within 180 days after the request (or such longer time, subject to DOL regulations, as may be necessary in the case of a plan that determines withdrawal liability based on any method described in paragraphs (4) or (5) of 29 U.S.C. §1391(c).

- Notice may be provided in written, electronic, or other appropriate form

- Employer is entitled to receive only one Notice in any one 12-month period

- Administrator may require payment of a reasonable charge for copying, mailing and other costs of furnishing notice.

# Pension Protection Act

- Enacted in 2006 to become effective in 2008
- Main purpose was to strengthen required funding levels
- Timing was not too good, and technical details have been tweaked due to the recession
- Endangered ("yellow zone") plans must adopt Funding Improvement Plan (FIP)
- Critical ("red zone") plans must adopt a Rehabilitation Plan

# Pension Protection Act

- Actuary must issue certification of zone status within 90 days after start of each plan year and must certify whether plan is meeting requirements of its FIP or Rehab Plan
- An FIP or Rehab Plan generally will require increased contributions to improve plan funding. There may be multiple schedules with different contribution and benefit levels

# Pension Protection Act

- A red zone plan also must collect a 5% or 10% surcharge from employers whose CBA's do not meet the Rehab Plan requirements (even though they were signed before the Rehab Plan) until a new CBA is put in place. A new CBA **must** meet the Rehab Plan requirements if employer is to remain in the Plan
- Rehab plan also can reduce employees' future benefit accruals and certain "adjustable" benefits (such as early retirement subsidies) despite ERISA's anti-cutback rule. However, the plan cannot reduce benefits of current retirees or the age 65 accrued benefits of actives
- Default schedule cannot reduce future accruals below one percent of contributions

# Pension Protection Act

- Employer who does not withdraw from Plan after expiration of CBA must agree to one of the contribution schedules permitted by the FIP or Rehab Plan
- Trustees must implement the default schedule 180 days after the CBA expires (assuming that the parties have not reached agreement and employer has not bargained to impasse and withdrawn)
- Excise tax is imposed on employer who fails to make timely required contributions in accordance with the FIP or Rehab Plan

# FASB Standard Requires Employers to Make Multiemployer Plan Disclosures.

- The Financial Accounting Standards Board ("FASB"), subject to SEC oversight, sets standards for Generally Accepted Accounting Principles ("GAAP") for publicly traded companies whose securities are publicly traded and others obligated to follow GAAP.
- FASB's Accounting Standards Update No. 2011-09 requires additional financial-statement disclosure by employers contributing to multiemployer plans.
- Disclosures are effective for public companies for fiscal years ending after December 15, 2011 and for non-public entities for fiscal years ending after December 15, 2012.

# Impact of the GAAP Rules Change

- FASB adopted the Update in response to requests by users of financial statements for additional disclosure to increase awareness of the commitments and risk involved with contributing to multiemployer plans.
- The Update does not change standards for *recognition* of liabilities associated with multiemployer plans (i.e., booking a charge to income on the employer's financial statement). Instead, the Update requires tables and narrative footnotes to the employer's financials.
- Information disclosed could impact credit ratings, stock price, financings, loan covenants, etc.

# Required FASB Disclosures

For each individually-significant multiemployer pension plan to which an employer contributes, the employer must disclose:

- Each plan's name, employer identification number and three-digit plan number.
- The most recent "zone" status provided by the plan.
- Expiration dates of each CBA requiring contributions to the plan.
- For each income period presented, (i) the employer's contributions to the plan and (ii) whether those contributions are more than 5% of total contributions to the plan as reported in the Form 5500.
- Whether a funding improvement plan or rehabilitation plan, has been implemented or is pending; whether the employer paid a surcharge to the plan; a description of minimum contributions required for future periods by each CBA, statute or other contract.
- Any significant changes that affect comparability of total employer contributions from accounting period-to-period, such as mergers or divestitures, a change in contribution rate or change in number of employees covered by the plan.
- If certain information (such as zone status and whether the contributions are more than 5% of total contributions) cannot be obtained without undue cost and effort, the employer must describe what information has been omitted and why, and must provide current qualitative information that would help users understand the financial information that otherwise is required to be disclosed.
- Total contributions made to all multiemployer pension plans that are not individually significant and total contributions to all multiemployer pension plans.

# Can You Get Out? What Are Options?

- Many employers are unwilling to seriously consider a strategy for withdrawal and prefer to kick the can down the road, hoping that things will improve. Some employers study the issue carefully but conclude that this is a problem without a practical solution
- Employer who really wants to withdraw must consider
  1. how to pay withdrawal liability;
  2. whether and when to offer an alternative retirement plan; and
  3. whether it can take a strike.
  4. whether a mass withdrawal may be imminent.

New "hybrid" concept has been adopted by Central States and New England Teamsters Plans to offer a "new employer" pool and opportunity for existing employers to pay withdrawal liability and "start fresh"

# Can You Get Out? What Are Options?

- Bargaining to impasse
- Operating during a strike
- Economic vs. unfair labor practice strikes
- Is decertification a realistic possibility?
- Will the Union cooperate with withdrawal?

# Can You Get Out? What Are Options?

- Some employers should consider Chapter 11 bankruptcy reorganization and/or Section 363 sales

- Can you negotiate reduced withdrawal liability with the Pension Trust?

- Tweaking contract language if you remain in the plan--

  Can wages be reduced to pay surcharges or unexpected contribution increases?

  Will union indemnify the employer for withdrawal liability?

  Can employer elect to withdraw during term of agreement?

  What about new hires?

# Michael A. Alaimo

Michael A. Alaimo has been actively involved in the field of employee benefits and ERISA litigation for almost 20 years. He frequently represents employers, Fund Trustees and Plan Administrators in litigation involving alleged statutory violations, breach of fiduciary duty claims, denial of benefits, retiree health benefits and ERISA discrimination claims.

He is a member of the American Bar Association Employee Benefits Committee, Management Co-Chair of the Jointly Administered Plan Subcommittee, and a Chapter Editor for *Employee Benefits Law* treatise published by BNA. He also counsels clients regarding best practices for achieving statutory compliance, in particular, with regard to the handling of benefit claims.

# James P. McElligott, Jr.

- Mr. McElligott is a partner in the Richmond, Virginia office of McGuireWoods LLP. He handles employee benefits, executive compensation, and labor relations matters for employers and fiduciaries. He has an active litigation and arbitration practice and is a member of the bar of the U.S. Supreme Court and several Courts of Appeal. He is a Fellow of the College of Labor and Employment Attorneys and is listed in Chambers USA, Best Lawyers in America, and SuperLawyers under Employee Benefits, Management Labor Law and Litigation, and ERISA Litigation.
- He is a member of the Employee Benefits Committees of the ABA Sections of Labor and Employment Law and Taxation, a member of the US Chamber of Commerce Employee Benefits Committee, former President of the Federal Bar Association, Richmond Chapter, and former president of the Central Virginia Employee Benefits Council. Mr. McElligott is a Phi Beta Kappa graduate of the University of Illinois and received his law degree, cum laude, from Harvard Law School, where he served as Note Editor on the Harvard Journal on Legislation.

# Charles B. Wolf

**Charles B. Wolf** (Chuck) is a shareholder in the Chicago law firm of Vedder Price P.C. and concentrates in labor, employment and employee benefits law and litigation, representing employers and multiemployer funds. He was a member of the firm's executive committee for nine years and a former leader of the labor, employment and benefits practice area. He has been lead counsel in several well-known employee benefit cases and has extensive experience in benefit plan administration, collective bargaining, NLRB and arbitration proceedings, and all types of employment law litigation. He is co-author of the treatise, *ERISA Claims & Litigation,* a Senior Editor of the ABA's Employee Benefits Law treatise, and a frequent speaker and author in his fields of practice.

He was co-chair of the ABA Labor Section, Committee on Employee Benefits, having previously served as co-chair of the subcommittees on multiemployer plan withdrawal liability and on collective bargaining and employee benefits. He was named by the *National Law Journal* as one of the top benefits lawyers in the country and by *SuperLawyers* as one of the top 100 lawyers in Illinois. He is listed in *Who's Who in America* and *Chambers USA Guide to America's Leading Lawyers* and is a fellow of the American College of Employee Benefits Counsel He is a member of the bar of the United States Supreme Court and numerous Courts of Appeal. Wolf is a graduate of Brown University and the University of Chicago Law School.