Pointers on Collectively Bargained Pension Plans

By Justin W. Stemple, Warner Norcross & Judd LLP

They say everyone likes surprises, but the pension to which you contribute for your union employees may come with a few surprises you won't like.

Unions sometimes negotiate for their members' retirement benefits to be provided through a multiemployer pension plan. Each payroll period, the participating employer contributes the negotiated amount to the pension fund. When the union employee retires, the pension fund pays the retirement benefit. But that is not always the end of the story.

The first surprise may be additional liability. Even if a participating employer has made all of the required contributions to the plan, it may still be required to contribute more.

Like many single-employer pension plans, many multiemployer pension plans today are underfunded. Although the calculations are complex, the concept is simple: The plans have promised more in benefits than they currently have in funds. There are many factors that contribute to that result, including the decline in the number of unionized employees, participating employers that went bankrupt with outstanding liabilities and insufficient investment returns. When a participating employer withdraws from a multiemployer pension plan, also known as a "Taft-Hartley plan," the law provides that the withdrawing employer is liable for a portion of that underfunding.

Although there are limits on how much withdrawal liability may be imposed, the liability can be very significant, even for an employer with relatively few union employees.

Fortunately, the law requires that a multiemployer pension plan provide a participating employer with an estimate of potential withdrawal liability. If you have union employees participating in a multiemployer pension fund and have not previously requested an estimate of your potential withdrawal liability, we strongly suggest you do so. It is a vital piece of information for future planning. Asking for this number is a common practice and will not attract undue attention.

Related-company Liability

Another surprise is that withdrawal liability may not be limited to the company that employs the union employees. Withdrawal liability applies to all members of a group of companies that are closely related. A detailed discussion of those rules is beyond the scope of this article, but the rules can result in both parent and subsidiary companies and companies with substantially similar ownership becoming liable for withdrawal liability, just as if each company directly participated in the plan. Family-owned businesses are particularly at risk in this analysis because there are many "attribution" rules that deem one family member (for example, the parent) to own stock held in the name of another family member (such as a child) and the ownership of the businesses may have been the result of estate planning rather than reflecting combined business operations.

Company Breakup, Personal Liability

Another surprise is that if you break up a group of related companies before withdrawing from a multiemployer pension plan, the plan may claim you took that action in order to "evade or avoid" withdrawal liability. If the plan is able to establish that was the case, then withdrawal liability may also be imposed on the former members of the group.

Yet another surprise is that it isn't just corporations, LLCs or other formal business entities that may be brought into the related group of companies. Anyone engaging in a trade or business may become part of such a group and be subject to withdrawal liability. That means if you own shares in a corporation that has potential withdrawal liability and you personally own a few rental homes, or perhaps the building in which the business operates, you may become personally liable for the withdrawal liability. For example, if Aunt Mary owns stock and is also an artist who sells her work at art fairs, she may also become personally liable for withdrawal liability. That result may seem strange, but the law permits multiemployer pension plans to impose withdrawal liability on individuals who are conducting a trade or business. Most plans are extremely aggressive in pursuing any source of funds that may be available to them.

If your company contributes to a multiemployer pension fund, planning for your potential withdrawal liability should be a primary business concern.

Justin W. Stemple, a partner at Warner Norcross & Judd law firm in Grand Rapids, Mich., focuses his practice on qualified retirement plans, non-qualified deferred compensation plans and executive compensation, with an emphasis on employee stock ownership plans, incentive programs and equity compensation.