Multiemployer Plan Pitfalls and Assistance for Employers Navigating the Coronavirus Crisis

Article By:

Thomas Vasiljevich

Grace H. Ristuccia

For those employers that have obligations under collective bargaining agreements to contribute to multiemployer benefit plans, the employment implications of the COVID-19 crisis may have significant consequences. Below are some potential pitfalls and possible advantages to participating in multiemployer plans for employers grappling with the coronavirus pandemic.

1. Plan Contribution Issues

As social distancing and stay-at-home orders slow economic activity and affect the operations and cash flow of businesses, large and small, employers may be tempted to control costs by eliminating their fringe benefit payments to multiemployer benefit plans. The legality of ceasing contributions to multiemployer plans depends, in the first instance, on whether contributions are for work already performed.

For work already performed, there is typically a lag between the work month and the payment month. For example, work performed in March may not be required to be paid until April or May. If an employer does not timely make contributions for work already performed without a viable defense, there is a substantial risk of delinquent contribution collection proceedings with imposition of interest charges, liquidated damages and other costs of collection, including attorneys’ fees. Before an employer embarks on a non-payment strategy for work already performed, it should evaluate the impact of additional collection liabilities and penalties and consider contacting the plan to mitigate these financial consequences (e.g., negotiate payment terms, provide an installment note).

If active work has already ended (i.e., employees are laid off, furloughed or on sick leave), payments to employees may be required for sick leave, vacation, and other paid time off—which raises the issue whether fringe benefit contributions are required to be made based on these other payments. The answer will usually depend on the language in the applicable collective bargaining agreement or participation agreement with such plans or past practice: Do the agreements require contributions only on hours worked? Do they require contributions on any compensation paid to the covered employee? Do they require contributions on sick leave, vacation, and other paid time off? Some collective bargaining agreements may also lock an employer into making contributions so long as its employees are eligible for welfare coverage, and such eligibility might be locked in for a certain period of time into the future (e.g., quarters). An employer in such a situation may therefore not easily shed its contribution obligation, even if its unionized workforce is not working.

2. Multiemployer Pension Plans

For most mature multiemployer pension plans, investment returns are a primary driver for determining the funded status, and the funded status directly affects a pension plan's zone status: "green zone" for healthy pension plans (generally funded 80 percent or higher), "yellow zone" for endangered (generally funded 65 percent or higher), and "red zone" for critical (generally under 65 percent funded). A multiemployer pension plan's funded status affects the potential liabilities an employer could face upon its exit (referred to as "withdrawal liability"). Due to the recent market decline and given the reasons discussed below, an employer should consider, if feasible, possible opportunities to withdraw in 2020.

a. Market Declines to Affect Funded Status and Zone Status

Equity markets have decreased substantially year to date in 2020. The precise impact on any particular multiemployer pension plan depends on its asset allocation, but the market decline is likely to have a significant impact on the funded status of pension plans. Since funding and zone status determinations are based on a moment in time (beginning of the plan year), the impact of the volatile market will be particularly pronounced for plans with a fiscal plan year ending soon. With the dramatic market decline, many multiemployer pension plans that were once in the green zone may will easily drop into the deep yellow, if not the red, zone.

Congress may provide some temporary relief (as it did in 2007) so that multiemployer pension plans can maintain a prior year's zone certification and permit expanded smoothing of investment losses that will spread the negative effective of the market decline over several years. Note that these measures do not change the reality of the loss in the market value of assets; rather these measures delay the impact of the market decline on the pension plan's funded status on a pro forma basis.

Poor underfunding only hastens an already bleak future for multiemployer pension plans, absent legislative intervention. While some observers wonder why a nearly 11-year bull market did not substantially improve funding, for many plans, that was not a reality for numerous reasons. Before the coronavirus crisis, the Pension Benefit Guaranty Corporation (PBGC)—the government agency responsible for assisting and insuring insolvent pension plans—was predicted to be insolvent by 2025. The projected date of 2025 may only accelerate given the recent market decline.

b. Potential Withdrawal Liability

Further underfunding injects additional uncertainty into an already precarious situation, and employers should consider the potential liabilities that could result upon an exit from the pension plan. Many employers are understandably planning reductions in force to address the slowed business of uncertain duration, scaling back or shutting down operations. Such actions might trigger either a complete or partial withdrawal.

A complete withdrawal exists when there is a permanent cessation of the obligation to contribute—for example, as a result of the expiration or termination of all collective bargaining agreements requiring contributions to that particular pension fund. An employer who has a permanent cessation of operations can also trigger a complete withdrawal, although there may be a dispute about whether the cessation of operations is permanent.

A partial withdrawal occurs when there is: (1) a 70 percent decline in contributions to the pension plan measured over a 3-year period; or (2) a partial cessation of the employer's obligation to contribution. This partial cessation can occur in one of two ways. First, if the employer no longer has an obligation to contribute under one—but not all—collective bargaining agreements requiring contributions *and* the employer continues to perform covered work in the jurisdiction without contributing or transfers such work to another location or entity. Second, if the employer ceases covered operations at one but not all facilities for which contributions are required *and* the employer continues to perform work at that facility without making contributions.

A particular risk of severely underfunded pension plans is that all employers may withdraw at the same time, resulting in a mass withdrawal. A mass withdrawal is the withdrawal of all employers or the withdrawal of substantially all employers pursuant to an agreement or arrangement to withdraw. Employers that withdraw within three plan years of each other are deemed to have withdrawn pursuant to an agreement or arrangement. In the event of a mass withdrawal, employers are required to pay not only the withdrawal liability otherwise assessable had there not been a mass withdrawal, but also additional reallocated liabilities as a result of the mass withdrawal primarily due to insolvent or bankrupt employers.

Employers that contribute to a multiemployer pension plan should consider carefully all implications of any business plan to understand the probability of triggering a complete or partial withdrawal and the potential liability. The amount of withdrawal liability is based on a plan's financial situation as of the end of the plan year *before* the withdrawal and the historical contributions of the employer. For example, if the plan year is on a calendar year (many plans are), the withdrawal liability for a withdrawal in 2020 is based on the December 31, 2019, plan financials. Plan financials in 2019, which are not impacted by the current market dislocation, are presumably better, and this factor should be taken into account, especially if triggering a withdrawal in 2020 is feasible for the employer. In any event, employers should regularly (at least annually) request estimates of withdrawal liability and so track the potential liability upon exiting multiemployer pension plans.

3. Multiemployer Welfare Plans

Many multiemployer welfare plans are exploring avenues to assist participants through these challenging times, and employers may capitalize upon these benefits as a way to provide relief to employees. Since eligibility in these plans often depends on a lookback "hours" bank (e.g., hours worked in January through March result in coverage for April through June), some welfare plans are taking action to amend their eligibility provisions to extend eligibility—regardless of hours worked—to the next eligibility period, so that employees who are laid-off, are furloughed, or experience a reduction in hours due to the coronavirus do not lose eligibility in the near-term.

Another benefit that may be available to employees facing termination of employment is benefits from a supplemental unemployment benefit (SUB) plan. These SUB plans provide an unemployment benefit in addition to any state-provided assistance. Keep in mind that termination of employment triggers the employee's right to continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), so the employer should provide timely notice to the multiemployer welfare plan to ensure such continuation coverage is extended to its affected employees.

Multiemployer welfare plans must also comply with the federally-mandated coverage with no cost-sharing (e.g., diagnostic testing for COVID-19), and some plans are taking this opportunity to also adopt special, temporary benefits—whether in the form of expanded short-term disability and telemedicine coverage, waiver of waiting periods, increased benefit amounts, and/or subsidized COBRA payments.

Some of these benefit enhancements require action by the Board of Trustees to amend the plan, while others might be existing—but not widely publicized—benefits. Regardless, when making business decisions regarding their unionized workforces, employers should investigate and understand what, if any, benefits provided by multiemployer welfare plans may assist in providing relief and manage morale and expectations.

4. Multiemployer Annuity or 401(k) Plans

Multiemployer annuity or 401(k) plans may provide relief to participants by permitting withdrawal of accumulated account balances. For example, since the distribution rules for employer contributions are more relaxed than the rules for participant deferrals, a multiemployer 401(k) plan might permit a participant to take a loan from the employer contribution portion of his or her account, subject to applicable taxes. Many multiemployer annuity or 401(k) plans also permit hardship distributions, and multiemployer annuity or 401(k) plans may also be amended to take advantage of any rules that Congress may temporarily relax (e.g., tax-favored hardship withdrawals, plan loan relief). Similar to multiemployer welfare plans, some benefit enhancements will require trustee action to amend the particular annuity or 401(k) plan, but some relief might exist under the current plan terms.

Employers should not hesitate to investigate its options by contacting the administrative office responsible for administering these plans (Fund Office). Despite some state-wide shelter-in-place or similar orders, Fund Offices might physically remain open as an “essential business operation.” A Fund Office might also maintain an online presence with updates and notices posted to its website. Ultimately, as employers navigate the coronavirus crisis, they may want to keep in mind that participation in multiemployer plans poses not only potential pitfalls but also possible relief to assist employees—and employers can strategize to mitigate the pitfalls and maximize the relief.

National Law Review, Volume X, Number 90