

You Can Be Personally Liable For Withdrawal Liability Despite A Company's Limited Liability Status

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Unionized employers participating in an underfunded multiemployer pension plan face significant financial exposure when withdrawing (completely or partially) from the plan. The cost (called “withdrawal liability”) is generally based on the employer’s pro rata share of the pension plan’s unfunded vested benefits and typically amounts to hundreds of thousands or millions of dollars. This withdrawal liability must be imposed even though the employer has made all required contributions to the plan.

Accounting for the risk of withdrawal liability requires understanding the many intricacies of the law, including when a shareholder or officer may be personally liable despite the business being a corporation or limited liability company.

Liable Employer – The Controlled Group Concept

All trades or businesses under sufficient common control or ownership to be a *controlled group* (as defined by IRS regulations) constitute the “employer” for withdrawal liability purposes. Thus, if one member of a controlled group ceases contributions to a multiemployer pension plan, causing a complete withdrawal, then

all related members of the group will be *jointly and severally liable* for payment of the liability.

Personal Liability

If the withdrawn employer fails to make the required withdrawal liability payments, the trustees of the multiemployer pension plan will often initiate action against current and former related entities to the signatory employer, including individuals.

Owners must pay special attention to whether any personal holding or investment entity could be considered a “trade or business” for controlled group purposes (particularly in the situation of a business closely held by a small number of individuals). If the controlled group includes a partnership or sole proprietorship, then the liabilities of that business pass through to the owners. For example, a shareholder in a limited liability entity that withdraws from a multiemployer plan may find that an economic side activity such as renting out a piece of property is considered to be a sole proprietorship that is a “trade or business” within the controlled group of the withdrawn employer. By being a controlled group member, this rental business would be jointly and severally liable for withdrawal liability, and **by being a sole proprietorship, the business’s liability would pass through to the owner as a matter of law** even if the withdrawn employer was a corporation with limited liability for its shareholders.

Along with the controlled group concept, pension funds may use other theories to try to impose withdrawal liability upon an individual (or related entity):

Alter ego/piercing the corporate veil: an affiliated company, shareholder, or officer may be held liable for the withdrawal liability

of a corporation under its control if it acted as the “alter ego” of the corporation or otherwise met the requirements for “piercing the corporate veil.”

Individual signatories: an individual signing a CBA in an individual capacity on behalf of an employer may also agree to assume personal liability for the employer’s unpaid plan contributions and withdrawal liability.

The above theories are not the exclusive mechanisms in which multiemployer pension funds have tried to extend withdrawal liability to other parties. The range of issues relating to withdrawal liability is significant and distinct for each employer. Given the complexities involved, employers should evaluate specific scenarios with the assistance of counsel.

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