Troubling Court Decision Sends Withdrawal Liability Warning To Employers

Insights
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A federal appeals court has handed multiemployer pension plans a blank check to assess increased withdrawal liability against employers exiting a plan. The 11th Circuit Court of Appeals' recent decision in *Westrock RKT Company v. PACE Industry Union-Management Pension Fund* is bad news for employers already saddled with statutory withdrawal liability costing millions of dollars. This new decision means multiemployer pension plans in "critical" status are free to add their own assessments on top of existing obligations under the Multiemployer Pension Plan Amendments Act of 1980 (MEPPAA).

Background: Withdrawal Liability Basics

"Withdrawal liability" is a monetary exit penalty imposed on employers that stop contributing to multiemployer pension plans. Multiemployer plans are pension arrangements associated with various unions and industries, administered by boards of trustees consisting of half union and half employer representatives. These arrangements date to the 1950s; they were formed so employees could shift between employers without losing benefits, and employers could provide pensions to unionized employees without the administrative burden of running a pension plan.

They have come under increased funding pressure as the cost of benefits has risen much faster than the value of plan assets. In 1980, Congress enacted withdrawal liability to better fund the plans and force employers to remain in them. However, because many employers exit these plans through bankruptcy, most withdrawal liability is never paid, leaving remaining employers facing larger and larger liabilities. Contrary to the intent of Congress, employers who can afford to pay withdrawal liability are actually motivated to exit multiemployer plans before their potential liability becomes so large that they cannot leave. Moreover, new employers resist entering such funds because of the virtually unlimited liability with which they are associated. The result has been a number of large multiemployer plans losing employers, many of which are projected to become insolvent in the next 10 years. To make matters worse, Pension Benefit Guaranty Corporation (PBGC), the government agency charged with backstopping these plans, is itself projected to become insolvent.

Federal Appeals Court Deals Employer Bad Hand

The 11th Circuit's *Westrock* decision now gives employers even more incentive to avoid or leave multiemployer plans. The case involved an employer that contributed to a multiemployer plan classified as being in a "critical" or "red zone" status. Funds in critical status are required by law to

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develop "rehabilitation plans," which are formal combinations of benefit reductions and contribution rate increases designed to improve the fund's financial health over a period of years. As part of its rehabilitation plan, the fund in *Westrock* decreed that the withdrawing employers must pay a portion of the fund's "accumulated funding deficiency," which is a measure of underfunding. This amount was to be assessed, in addition to the statutory withdrawal liability owed under MEPPAA.

The employer in *Westrock* challenged the fund's ability to impose this additional liability, but the appeals court held in May 2017 that the employer had no cause of action to assert such a claim under federal benefits laws. As a result, the measures imposing employer liability on top of statutory withdrawal liability remained in place.

What Does This Mean For Employers?

The implications of this decision are ominous for contributing employers. Although the *Westrock* fund was in critical status and imposed additional withdrawal liability as part of its rehabilitation plan, there is no reason any multiemployer pension fund (or for that matter, multiemployer welfare fund) could not impose its own version of withdrawal liability on contributing employers, regardless of funding status. The only check on the fund's ability to do so is the employer trustees, who may have motivations adverse to those of other contributing employers. Indeed, many funds seek to maximize their revenue from employers, limited only by the extent to which the trustees believe that employers can remain viable.

Given the *Westrock* decision and the overall favoritism that courts show multiemployer plans, contributing employers have few options other than minimizing their participation to the extent possible, and, if economically feasible, withdrawing from multiemployer plans. Contributing employers should carefully monitor the amount of withdrawal liability they face from multiemployer plans, and be aware of any plan rules that could increase that liability.

Further, contributing employers should pay close attention to legislative efforts to shore up multiemployer plans, since the pending insolvencies of several large multiemployer plans and PBGC will likely drive a change in the law in the next few years. For those employers who do not contribute, the *Westrock* decision should be a strong warning against ever agreeing to join multiemployer plans.

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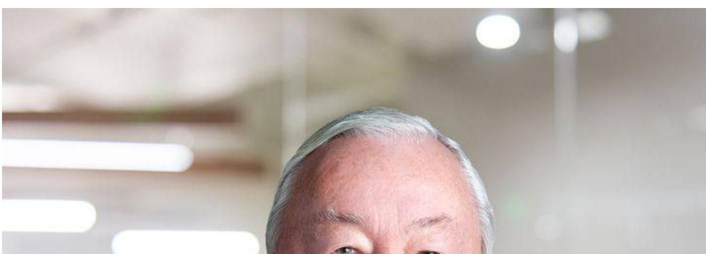

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