

AUGUST 5, 2021 | TRADITIONAL LABOR RELATIONS

Don't "Default" to the Fund's View of Withdrawal Liability

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A recent case out of the U.S. District Court for the Northern District of Illinois provides an interesting window into how opportunistic pension funds attempt, and sometimes succeed, in taking advantage of employers and perhaps recovering more than the amount to which they are entitled under the Multiemployer Pension Plan Amendments Act ("MPPAA").



Background

In *United Food and Commercial Workers International Union-Industry Pension Fund v. Gordon*, Case Number 1:21-cv-01585, the UFCW pension fund declared the withdrawn employer to be in "default" and accelerated the outstanding amount of withdrawal liability it had previously assessed. In a complaint brought against the owner of a now-defunct Connecticut food distributor, the fund alleged that it had previously assessed the withdrawn employer \$2,350,762.00 in withdrawal liability as a result of its shutting down in the summer of 2020. Of course, under the MPPAA's 20-year payment cap, withdrawal liability is limited to no more than 20 annual payments, calculated pursuant to the statute. Thus, the fund prepared an installment schedule which demanded the withdrawal liability be paid in 80 quarterly installments of \$11,216.00. One does not have to be very good at math to realize that this schedule limited the total withdrawal liability to \$897,280.00, payable over twenty years.

The complaint further alleged that shortly after receipt of the assessment the owner requested a waiver of the assessed withdrawal liability because the company no longer existed and had no assets. This request, and the owner's subsequent failure to make the first scheduled payment, caused the fund to declare the employer in default. Finally, the complaint alleged that the employer had failed to either request review or initiate arbitration, "foreclosing any challenge to the Fund's assessment and fixing the amounts due."

However, rather than merely claim entitlement to immediate payment of the "outstanding" 80 quarterly payments pursuant to its assessed installment schedule, the fund asserted the right to collect the more than \$2.3 million in (what must have been the) total unfunded vested benefits attributable to the withdrawn employer, as well as a 20% penalty, interest, and attorneys' fees. Thereafter, the parties engaged in settlement talks, which ultimately resulted in the court signing off on a consent judgment in which the employer agreed to pay \$1,454,500.00, approximately half the total amounts claimed by the fund, but well above the amount due pursuant to the 20-

year schedule of payments.

This case appears to follow a trend in recent years in which funds have become more aggressive and creative in using the concept of statutory default to their advantage. In fact, as the case illustrates, some funds take the position that in a default situation they can ignore the MPPAA's 20-year payment cap on withdrawal liability payments. A few key points (and there are others) should equip withdrawn employers to push back against this trend.

Discussion

First, withdrawal liability must be assessed and paid in level installments for a period not exceeding twenty years. The MPPAA states that a withdrawn employer must pay its withdrawal liability "over the period of years necessary to amortize the amount in level annual payments" and "[i]n any case in which the amortization period ... exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments[.]"^[i] The level annual payments "shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules."^[ii] Moreover, to provide proper notice under the MPPAA, a fund's withdrawal liability assessment must include the "schedule for liability payments" and "demand payment in accordance with the schedule."^[iii] Once assessed, an employer's withdrawal liability "shall be payable in accordance with the schedule set forth" by the fund.^[iv]

Second, nothing in the statute allows a fund to ignore the 20-year cap and collect the total (uncapped) unfunded vested benefits in a default situation. Instead, a default merely allows the acceleration of "the outstanding amount of an employer's *withdrawal liability*" which under the statute is distinct from *unfunded vested benefits* and necessarily includes the 20-year payment cap.^[v] Thus, even where a fund properly declares a default, it is allowed only to *accelerate* (rather than *increase*) the amounts previously demanded in accordance with its installment schedule.

Third and finally, even where an employer fails to initiate arbitration to challenge the fund's assessment of withdrawal liability, it is liable only for the amounts demanded by the fund under its schedule and limited by the 20-year payment cap. The statute states that in such a situation, "the amounts demanded by" the fund "shall be due and owing *on the schedule set forth by*" the fund.^[vi]

Conclusion

As shown herein, the MPPAA places clear limits on the amount of an employer's liability, and those limits do not disappear where the fund declares a default. Accordingly, even in a default situation, counsel and employers should reject the notion that a fund can demand or recover withdrawal liability in amounts greater than allowed by the 20-year payment cap. Indeed, the plain and unambiguous statutory language dictates that even where a withdrawn employer has failed to initiate arbitration, the only amounts for which it can be held liable are those the fund first calculated, presented and demanded in accordance with the required installment schedule. No pension fund is entitled to more.

^[i] 29 U.S.C. § 1399(c)(1)(A)(i) and 29 U.S.C. § 1399(c)(1)(B).

[\[ii\]](#) 29 U.S.C. § 1399(c)(3).

[\[iii\]](#) 29 U.S.C. § 1399(b)(1)(A)(ii) and (b)(1)(B).

[\[iv\]](#) 29 U.S.C. § 1399(c)(2).

[\[v\]](#) 29 U.S.C. § 1399(c)(5) (emphasis added). Thus, a default does not change in any way the *amount* of an employer's withdrawal liability; it affects only the *timing* of the underlying schedule of payments. *See* 29 C.F.R. § 4219.31(b)(2).

[\[vi\]](#) 29 U.S.C. § 1401(b)(1) (emphasis added).