

AUGUST 17, 2023 | TRADITIONAL LABOR RELATIONS

# In withdrawal liability, a non-employer may always employ its defense that it was never an “employer”

BY MARK M. TRAPP

When a multiemployer pension fund determines that an employer owes withdrawal liability, the fund must send the employer a notice and demand for payment. 29 U.S.C. § 1399(b)(1). To challenge the fund’s withdrawal-liability assessment, the employer must timely request a review by the fund, 29 U.S.C. § 1399(b)(2)(A), and if the employer disagrees with the results of the review, it must timely initiate arbitration.

An employer that fails to initiate arbitration waives any defenses to the assessed withdrawal liability and the amount demanded becomes due and owing. The Multiemployer Pension Plan Amendments Act (“MPPAA” or  “the Act”) states:

**If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor ... shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection. 29 U.S.C. § 1401(b)(1).**

Thus, the failure to initiate arbitration has a simple result – the amount demanded by the plan sponsor becomes due and owing. Numerous court decisions have noted this harsh consequence of the failure to initiate arbitration, stating “In short, arbitration reigns supreme under the MPPAA.” *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1057 (7th Cir. 1988).

But what if the entity claims not to have been an “employer” at all? Does the failure to initiate arbitration preclude such an entity from contesting the withdrawal liability assessment? The short answer is “no” – whether a company is an “employer” within the meaning of the MPPAA is a threshold question for the court. And since only an “employer” is required to arbitrate, a district court may address this threshold question before arbitration.

This exception was at issue in *Central States, Southeast and Southwest Areas Pension Fund v. Event Productions, Inc.*, No. 21-cv-5695 (N.D. Ill. June 1, 2023). In that case, a purported employer (Event Productions) moved to dismiss a suit for the collection of withdrawal liability asserting it was not an employer under the Act. The pension fund contended that Event Productions had waived that defense (and all others) because it failed to timely initiate arbitration of its assessed liability under the MPPAA’s mandatory arbitration provision.

The court first rejected the pension fund’s argument that Event Productions had waived its defense that it was

not an “employer” under the Act by failing to raise it in arbitration, finding that the determination of whether an entity has ever been an employer is one for the court. The court also rejected the fund’s argument that the defense could only be raised prior to an arbitration already underway, reasoning that nothing prevented it from addressing the same question after the timeframe for initiating arbitration has expired. Thus, the court held that Event Productions had not waived the defense by failing to timely initiate arbitration.

Turning to the merits of the defense, the court began by noting that an “employer” for purposes of MPPAA liability is an entity that has assumed a contractual obligation to make contributions to a pension fund. Event Productions contended that because it had not signed the collective bargaining agreements under which it had made contributions to the fund, it had no contractual obligation to contribute to the fund and could not be an “employer.”

But the court rejected this argument, noting that the pension fund had alleged that even though it did not sign the agreements, Event Productions had made contributions consistent with the terms of the written agreements for 14 years. Because of this fact, the court found the pension fund had plausibly alleged that Event Productions had thereby manifested its assent to the underlying written terms of the agreements, and thus could be an employer within the meaning of the Act. Accordingly, the court denied Event Productions motion to dismiss the complaint for withdrawal liability.

Several lessons can be drawn from the *Event Productions* case: first, to preserve its defenses to an assessment of withdrawal liability, a purported employer should request review and timely initiate arbitration. Second, where an entity has failed to preserve its defenses by failing to initiate arbitration, it may still be able to defend the case on the basis that it was never an employer within the meaning of the MPPAA. And finally, even a non-signatory can be held to the terms of a written contract with which it has complied.

In sum, while an entity faced with an assessment of withdrawal liability would be well advised to preserve all its defenses by timely requesting review and initiating arbitration, it may always challenge whether it was ever an employer under the Act in the first place.