

MAY 19, 2022 | TRADITIONAL LABOR RELATIONS

"Pay Now, Dispute Later" Rule Bares Its Teeth

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Under the Multiemployer Pension Plan Amendments Act ("MPPAA"), an employer that withdraws from a multiemployer pension plan is assessed "withdrawal liability" which the fund must demand in accordance with a schedule of installment payments in amounts determined under the statute. Any disputes the employer has as to the fund's assessment must be resolved through arbitration.



Importantly, however, initiating a dispute of the withdrawal liability does not relieve the employer of the duty to make the installment payments as they come due. That is, even where an employer challenges the assessment by requesting review and then initiating arbitration, it still must make interim payments of the assessed amounts in accordance with the fund's demand and payment schedule. These interim payments must begin within 60 days of the assessment, notwithstanding any request for review, and are colloquially referred to as the "pay now, dispute later" rule.

A recent decision from the District of Columbia district court serves as a useful reminder of the potentially strict application of this rule. In *Trustees of the IAM National Pension Fund v. M&K Employee Solutions, LLC*, No. 1:20-cv-433 (D.D.C. 2022), the Court held that where an employer refused to make the required interim payments until after successfully challenging and reducing through arbitration the amount demanded by the fund, it was nevertheless liable for the statutory penalties and liquidated damages associated with its failure to make interim payments.

Relying on cases from the Seventh Circuit, the Court stated:

Put simply, if an employer ignores "pay now, dispute later" and refuses to follow the statutory procedure for challenging assessments of withdrawal liability, it must pay the corresponding penalty: liquidated damages, interest, costs, and attorneys' fees. This portion of the damages for a delinquent withdrawal liability claim is separate from the underlying withdrawal liability itself. Further, the interest and liquidated-damages provisions of ERISA apply to contributions that are unpaid at the date of suit (not the date of judgment, as argued by the defendants). A defendant therefore cannot simply moot an action for delinquent withdrawal liability by paying unpaid contributions before the date of judgment.

Accordingly, even though the employer "won" in arbitration its challenge to the assessment, successfully reducing the claimed amount from more than six million dollars down to less than two million, the Court still

denied the employer's motion for partial summary judgment asserting that once it had paid the reduced award, the claims for delinquent withdrawal liability and liquidated damages were moot.

Thus, despite the fact that the employer paid the full amount of the withdrawal liability (as reduced by the arbitrator), it would still be on the hook for additional interest, liquidated damages, attorneys' fees and costs. The Court concluded:

The statutory penalties, including liquidated damages, give the rule teeth. If an employer could delay payment and then avoid the statutory penalties, interest, and attorneys' fees required by ERISA by simply paying the withdrawal liability in full once a suit had been initiated but prior to judgment, it could violate "pay now, dispute later" with impunity.

While there are situations in which an employer might avoid the harsh application of the "pay now, dispute later" rule, employers should generally make payments consistent with the fund's schedule and demand for payment, even while challenging the assessment. The failure to do so can result in additional (and not insignificant) charges, as well as the possibility of default. Employers are advised to consult with experienced counsel in the face of any assessment of withdrawal liability from a multiemployer pension fund.