

Underfunded Multiemployer Plans Face Negotiation, Liability Withdrawal Issues

Note: Reproduced with permission from Construction Labor Report, 55 CLR 741 (August 6, 2009). Copyright 2009 by the Bureau of National Affairs, Inc. (800-372-1033, <http://www.bna.com>).

Not only has the financial crisis that decimated world equity markets in 2008 and the first half of 2009 resulted in steep asset declines for multiemployer pension plans, but the crisis has made it increasingly difficult for employers to maintain their contribution obligations to such plans. Consequently, across all industries multiemployer plans have become significantly underfunded, thereby threatening the long-term viability of such plans.

In the struggle to deal with such plan underfunding, collective bargaining between contributing employers and unions has become difficult, as both employers and unions seek to protect their respective interests.

PAINFUL BARGAINING CHOICES

In some bargaining situations, the parties have agreed to allocate both employer pension and health plan contributions to cover pension plan obligations alone. In other cases, unions have agreed to sacrifice some or all of their employees' wage increases to maximize pension plan contributions.

Although some employers have sought to completely or partially stop contributing to defined benefit pension plans, such conduct may result in these employers being assessed withdrawal liability by the plans to fund the benefits of their employees. Although employers in the construction industry may be exempt from withdrawal liability under certain circumstances, use of such an exemption may ultimately hurt a plan's funding status.

Poorly funded multiemployer plans may be able to freeze their 2009 funding at the 2008 level, but not all multiemployer plans choose this option because of fears the plans will be even worse off after the freeze ends.

HUGE JUMP IN UNDERFUNDING RATES

A survey of multiemployer plans conducted by the Segal Co. of calendar year plans' zone status shows that multiemployer plans

across all industries are struggling to meet their funding obligations under the PPA as a result of the market collapse. In 2008, only 7 percent of plans surveyed were in the red zone, but that percentage has jumped to 32 percent in 2009.

The Segal survey also reports that in 2008, only 10 percent of plans were in the yellow zone, but 29 percent of plans surveyed in 2009 were in endangered status. Between 2008 and 2009, plans in the green zone dropped by approximately 44 percentage points, with 83 percent of plans falling in the green zone in 2008 but only 39 percent falling in the same zone in 2009.



Last November, multiemployer pension fund expert Rocky Miller of Cox Castle & Nicholson, LLP in Los Angeles delivered a seminar to Builders Association members on the recent financial crisis and its impact on pension funds nationwide. While seven percent of pension plans were classified as "seriously underfunded" in 2008, that number has jumped to 32 percent this year.

BARGAINING ADJUSTMENTS

Goldfarb said the pension funding crisis and the PPA's funding requirements are causing plan sponsors to adjust collective bargaining negotiations such that negotiated increases that normally would go toward compensation or to health care funds are being reallocated to the pension funds. This reallocation to pensions is causing other fringe benefit funds and wages to suffer because they are then losing money, he said.

Thomas Holsman, chief executive officer of Associated General Contractors of California in Sacramento, told BNA July 9 that the emerging trend both in California

as well as across the country in response to the market downturn's impact on multiemployer plan funding is that monetary increases to collective bargaining packages have been between 2.9 percent and 3.2 percent with the increases being allocated toward fringe benefits. Generally, 60 percent to as much as 100 percent of the increases are going toward pension funds, he said. The remaining money, if any, is going toward health and welfare funds.

SPOTLIGHT ON CONSTRUCTION INDUSTRY

While nearly all industries with multiemployer plans have been affected by the financial crisis, the construction industry has felt keenly the bursting of the housing bubble and the contraction in home mortgages.

The current economic crisis and downturn in construction activity means money is tight for contractors across the country, forcing many construction employers to freeze or lower compensation

according to Denise S. Gold, the AGC of America's Associate General Counsel. In response, many multiemployer bargaining groups are asking for wage freezes this year, not only in bargaining over expiring agreements but, in some cases, also in previously negotiated increases scheduled to take effect this year. Gold agreed that negotiated increases are likely to be allocated to the pension funds, with no increase in workers' paychecks.

BNA spoke with a number of participants in the construction industry who detailed how they are being affected.

- William J. Brennan, president of Associated General Contractors of Northwest Ohio, Toledo, Ohio, told BNA July 7 that the Glass & Glazing Employers Association of Toledo and Vicinity and the Painters and Allied Trades District Council No. 6 and Glaziers Local Union No. 948 recently reached a settlement during negotiations over their collective bargaining agreement, which expired at the end of June 2009.
- Jack Ramage, executive director of the Master Builders' Association of Western Pennsylvania, in Pittsburgh, is an employee trustee on several multiemployer plans that were fully funded until the market crashed and are now either in endangered or critical funding status. He told BNA July 7 that these plans are taking steps to reduce benefits and increase funding by reallocating contribution increases to pension funds to the detriment of other fringe benefit funds, usually a savings or annuity plan.
- Although the unions involved in the negotiations are agreeing to benefit cuts, Ramage said they are only agreeing to the least amount of reductions necessary as recommended by the funds' actuaries.
- Pittsburgh-based Cement Masons Local No 526, effective Dec. 1, 2009, will reallocate an additional \$1 per hour to their pension fund by reducing the contribution to the supplemental income fund and the savings and annuity fund, according to Ramage. He said no money is being taken from the base hourly wage rate.
- However, because construction is still relatively strong in Pittsburgh, Ramage said some of the bargaining parties are not negotiating pension fund contributions specifically, but are negotiating monetary packages that leave allocations to the bargaining unions.
- The Greater Pennsylvania Regional Council of Carpenters negotiated a one-year contract with the employer associations for a \$1.50 per hour increase, all going to the pension plan, Ramage said.
- Despite the growing trend of reallocating wages and other fringe benefit monies to the pension fund, the reallocation has caused controversy in at least one instance. In Michigan, a disagreement over the reallocation of pension money prompted a six-week strike between the Laborers International Union Local 1075 and the Associated General Contractors Michigan Chapter. The strike ended when the bargaining parties agreed that future increases required for pension contributions would come out of the negotiated wage package, with workers receiving a \$0.50 per hour wage increase in the first year of the contract's three-year

term.

WITHDRAWAL LIABILITY

Since 1980, when the Multiemployer Pension Plan Amendments Act was passed, multiemployer plans have been able to assess benefit liability on employers that withdraw fully or partially from a plan.

MPPAA contains an exemption for employers in the building and construction industry. If such employers cease making contributions to pension plans on behalf of their employees, the employers are subject to withdrawal liability only if they continue to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or if they resume such work within five years after the date on which the obligation to contribute ended. If an employer withdraws from a multiemployer plan and does not resume work in the same jurisdiction, the plan and the remaining contributing construction employers will absorb the liability of a withdrawing employer.

According to Goldfarb, multiemployer funds are not generally harmed when construction employers go out of business, but instead are harmed when the amount of building and construction work shrinks.

The market collapse has led to a sharp decline of activity in the building and construction industry, leading many construction employers to withdraw from multiemployer funds and cease building activity in the same area served by members of the multiemployer fund, Goldfarb told BNA. In such cases, these employers are not subject to withdrawal liability, which threatens the long-term viability of the plans from which they withdrew, he said.

According to both Goldfarb and Mazo, if several construction employers leave a multiemployer plan without incurring withdrawal liability, that could mean a decline in contributions so that the plans could end up in the red zone and will have to comply with the PPA's requirements for emerging from critical status.

Furthermore, if a construction employer goes bankrupt, a multiemployer plan looking to collect from the employer will be at a loss, Mazo said. The plan will not be able to collect money from the bankrupt employer nor will the plan have a claim in bankruptcy court because there is no official liability.

Goldfarb told BNA that for the first time, he is seeing multiemployer plans threaten to take legal action to collect withdrawal liability from construction employers. Many of these funds have never before had to take such legal actions to collect withdrawal liability, he said.

"The current economic crisis and downturn in construction activity means money is tight for contractors across the country, forcing many construction employers to freeze or lower compensation." - Denise Gold, AGC of America Associate General Counsel