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Responding to an Assessment of Withdrawal Liability from a Multiemployer Plan

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About Practical Law

- Practical resources covering all major practice areas.
- Overviews, model documents, trend articles and more created by our expert attorneys.
- Dedicated areas for law firms, law departments and law schools.
- Practice centers for specialists
- What's Market for executive employment agreements and more.
- Updates on the latest legal and market developments.
- *Practical Law The Journal* magazine covering today's transactional and compliance topics as well as key issues and developments in litigation practice and procedure.

The screenshot shows the Practical Law website homepage. At the top, there is a navigation bar with 'US' and 'Change country' on the left, and 'Login' on the right. The main header features the 'Practical Law' logo with the tagline 'A THOMSON REUTERS LEGAL SOLUTION' and a search bar. Below the header, a dark blue banner contains the text 'New to Practical Law? We offer lawyers a better place to start.' and a 'Sign Up for a Free Trial' button. The main content area includes a testimonial from Eric Lee, a 'Browse our Content' section with a grid of practice areas, and a 'What Are You Working On?' section with a 'Get Started Now' button. The 'Browse our Content' section lists various practice areas such as Antitrust, Arbitration, Bankruptcy, and Finance. The 'What Are You Working On?' section includes a 'Get Started Now' button. The 'Testimonials' section features a quote from Alan Berkeley and a 'View More' button.

Overview and agenda

- Withdrawal Liability
- The Assessment
- Initial Steps and Information Gathering
- Interim Payment and Default
- The Request for Review
- Initiating Arbitration
- Arbitration Standards
- Appeal Process and Standards

Withdrawal Liability

- Created by MPPAA in 1980
- Employer liable for its share of Unfunded Vested Benefits
- Complete or Partial

Withdrawal Liability

- Complete Withdrawal occurs when employer permanently ceases either:
 - Having an obligation to contribute.
 - All covered operations.

Withdrawal Liability

- Partial Withdrawal occurs when there is a:
 - 70% decline in contribution base units (CBUs) for three consecutive years, compared to high two-year average in preceding five years;
 - Cessation of obligation to contribute under one, but not all collective bargaining agreements (CBAs) and continuation of work in CBA jurisdiction or transfer of such work to another employer location; or
 - Cessation of obligation to contribute at one but not all facilities, and continuation of the work at the facility of the type for which contributions were required.

The Assessment

- When a withdrawal has occurred, the fund must:
 - Determine the amount of the employer's withdrawal liability;
 - Notify the employer of the amount of withdrawal liability, and
 - Collect the amount of withdrawal liability from the employer.

- “As soon as practicable” after withdrawal, the fund must:
 - Notify the employer of the amount of withdrawal liability and the schedule for payments.
 - Demand payment in accordance with the schedule.

Initial Steps and Information Gathering

- Focus should be to learn information and preserve right to contest assessment
- Any dispute between employer and the plan concerning a withdrawal liability determination must be resolved through arbitration
- If employer fails to initiate arbitration, it waives all right to contest the assessment

Calendar the Deadline to Request Review

- Calendar the deadline
- Ninety (90) days from receipt of assessment
 - Consider confirming date of receipt if not certified
- Don't blow the deadline
 - Request for review is prerequisite to initiating arbitration

Gather Appropriate Information

- Items may include:
 - Employer’s contribution history
 - Prior estimates of withdrawal liability
 - The relevant CBAs
 - Governing plan documents
- Consider quick initial response
 - Request documents (trust, plan, financial reports, rules for initiating arbitration, arbitration decisions, etc.)
 - Confirm date of receipt
- Control group issues
 - Gather pertinent info for other “trades or businesses”
 - Joint and several liability within control group

Consult with appropriate professionals

- If no in-house counsel, or in-house counsel does not have experience or expertise
- Consult with:
 - Legal counsel
 - Actuary
- Could assist with:
 - Review of the assessment
 - Preparing the request for review
 - Planning strategies

Interim payment and default

- “Pay now, dispute later”
 - Employer must make interim payments of withdrawal liability, even while contesting
 - Must begin within 60 days of assessment
- Very limited exceptions:
 - Equitable exception
 - “Evade or avoid” exception
- Failure to make payments according to the plan’s schedule can result in default and acceleration of the entire amount due plus accrued interest

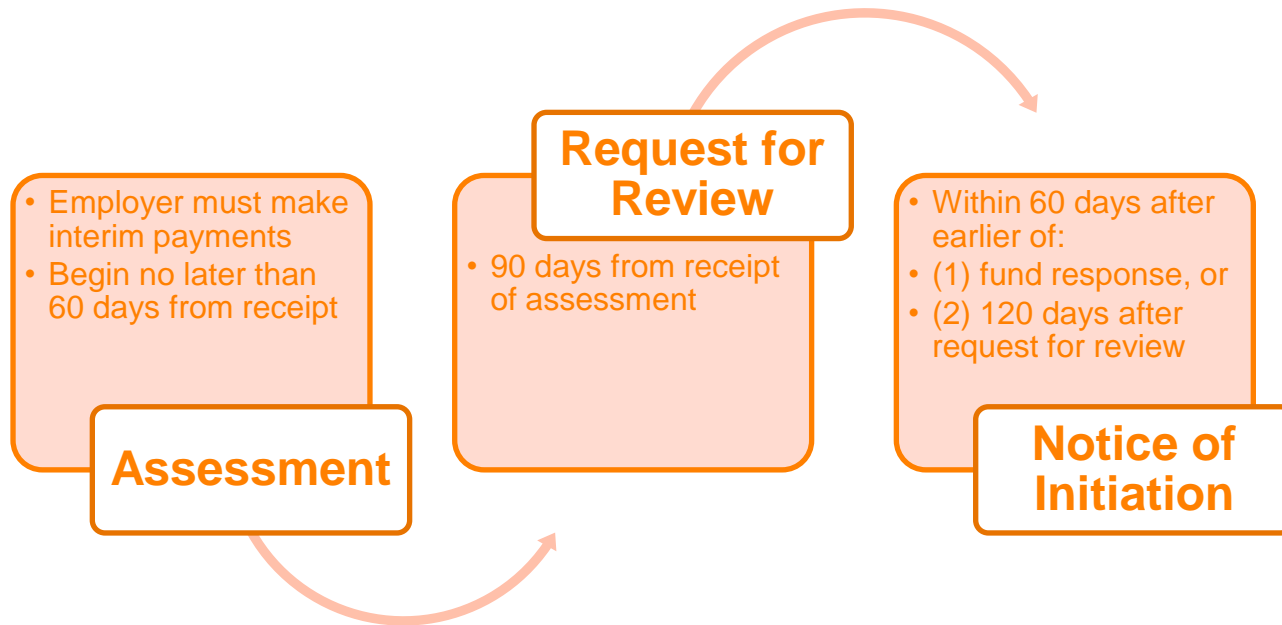
Interim payment and default

- A default is defined as either:
 - The failure to make, when due, any withdrawal payment if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of the failure
 - Any other event defined as a default in the plan's rules that indicates a substantial likelihood that the employer will be unable to pay its withdrawal liability
- If employer requests review or initiates arbitration, no default before the 61st day following the last of:
 - The end of the 90-day period to request review
 - The end of the period to initiate arbitration, if the employer has requested a review of the assessment
 - Issuance of the arbitrator's decision, if arbitration timely initiated

Interim payment and default

- ERISA provides that the plan assess interest on any missed or overdue interim withdrawal liability payments owed by the employer
- Absent default and acceleration, if an employer fails to make interim payments during the pendency of any arbitration, it may be at risk for missed payments and interest, but not for the entire assessed amount
- Additionally, a court may award either double interest, or liquidated damages equal to 20% of the unpaid contributions

Procedural Timeline



Request for review

- Timing issues
- 90 days from receipt to request review
 - Strictly construed
 - Date mailed, or date of receipt by fund?
- Failure to request review forfeits right to commence arbitration
- “tolling agreements”

Request for review - contents

- In its request for review, an employer may ask the plan sponsor to:
 - Review any specific matter relating to the determination of the employer's liability
 - Identify any inaccuracies in the assessment or determination
 - Furnish any additional relevant information
- At a minimum, an employer should specifically state that it disputes the assessment of the withdrawal liability and is requesting review of the determination
- May be sufficient to raise broad objections and explain any inability to be more specific

Initiating arbitration - deadline

- Employer must initiate arbitration within 60-day window that begins on the date the employer is notified of the plan's response to the request for review
- Unclear whether the date of notification is the date the plan mails its response, or the date the response is received by the employer
 - Dating the 60-day period from the date of actual receipt appears to be the most reasonable reading of the statute

Initiating arbitration - deadline

- Even though the statute uses “shall” in establishing a fund’s duty to respond to a request for review, clear that if fund does not respond, 60-day arbitration clock starts 120 days after request
- Therefore, the deadline to initiate arbitration is the earlier of:
 - 180 days after the employer’s request (whether or not the plan has responded to that request).
 - 60 days after the plan has responded to the request.
- Plan response more than 120 days after request for review does not start new 60-day clock
 - Begins running at 120 days if no response

Initiating arbitration - deadline

- An employer who fails to initiate arbitration within the applicable 60-day window waives any defenses to the assessment and the amount demanded by the plan sponsor is “due and owing” on the schedule set forth by the plan sponsor
 - All disputes must be arbitrated
- Narrow exception:
 - Where company contends it has never been “employer” under statute (or member of control group)

Initiating arbitration – establishing timeliness

- Because of importance, prudent to establish timeliness
- PBGC regulations require party initiating arbitration to show timely receipt by other party
 - Employers should require proof of delivery

Initiating arbitration – contents of the notice

- Every notice of initiation of arbitration should state clearly that the employer:
 - disputes the plan sponsor’s determination of its withdrawal liability, and
 - is initiating arbitration.
- “requesting” vs. “initiating”
- Compliance with formal rules of pleading not required, but employer should include all possible issues
 - Include any relevant information

Initiating arbitration – contents of the notice

- Include any issues that may not have been apparent from prior request for review
 - PBGC opinion letter allows

- The employer must attach to its notice:
 - A copy of the demand for withdrawal liability
 - Any request for reconsideration and the response from the plan

Payment of AAA filing fees

- Many plans require the involvement of the American Arbitration Association (AAA) to initiate arbitration, and the payment of the AAA-required filing fee
 - Broadly accepted for decades
- A few courts have held that employers fail to properly initiate arbitration if they do not pay the filing fee
- Potential argument that AAA rules have never been “promulgated,” as required by the statute
- PBGC “approved” 1981 and 1986 rules, but has not done so for 2013 rules

Payment of AAA filing fees

- Under PBGC regulations, arbitration is initiated by one of the parties to a dispute regarding a withdrawal liability assessment by serving the other party with a notice of initiation
- In fact, giving the other party notice of arbitration is the *only requirement* under the PBGC rules for initiating arbitration
- Until clear, if a plan has adopted a rule at odds with the PBGC regulations, an employer should seek to:
 - Resolve any differences with the plan, and get a written agreement on how arbitration is to be initiated
 - Determine how any necessary filing fees will be paid

Arbitration standards

- Matters of fact
 - the arbitrator acts by a preponderance of the evidence

- Matters of law
 - “In reaching his decision, the arbitrator shall follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with enforcement of ERISA, and other pertinent authorities.”

Appeal Process and Standards

- Either party may seek review in federal district court within thirty days of the arbitrator's award
- Arbitrator's findings of fact presumed correct, rebuttable only by a clear preponderance of the evidence (i.e., clearly erroneous)
- Legal conclusions fully reviewable, *de novo* review by district and appellate courts

Questions

Relevant Practical Law Resources Available with a *Free Trial* to Practical Law

- [Responding to an Assessment of Withdrawal Liability from a Multiemployer Pension Plan](#)
- [Multiemployer Pension Plans](#)
- [Responding to an Assessment of Withdrawal Liability from a Multiemployer Pension Plan Checklist](#)
- [Qualified Retirement Plans in Mergers and Acquisitions](#)

About the Speakers

Mark M. Trapp, Member, *Epstein Becker & Green, P.C.*

Mark M. Trapp is a Member of the Firm in the Labor and Employment and Litigation practices, in Epstein Becker Green's Chicago office. He is admitted to practice in the state courts for the District of Columbia, Illinois, and South Carolina, as well as numerous federal district and appellate courts. His practice focuses on national and state labor and employment matters.

Mr. Trapp:

- Counsels clients on a broad range of labor and employment issues involving the National Labor Relations Act; state and federal anti-discrimination laws, such as the ADA, the ADEA, and Title VII; pension withdrawal liability; trade secrets and non-competes; and general labor and employment law
- Advises employers on union election campaigns and provides training in union avoidance and labor relations
- Negotiates collective bargaining agreements
- Represents employers in all aspects of NLRB and arbitration proceedings and before state and federal trial and appellate courts

Mr. Trapp has negotiated many collective bargaining agreements around the country, tried numerous cases before juries, and successfully handled appellate court matters at the state and federal levels. In addition, he has lectured to numerous business and professional groups and has written articles for professional publications on labor and employment issues.

About the Speakers

Lee T. Polk, Member, *Epstein Becker & Green, P.C.*

Lee T. Polk is Of Counsel to Epstein Becker Green in the Employee Benefits practice, in the firm's Chicago office.

Mr. Polk:

- Represents management and plan fiduciaries in employee benefits law, on the business planning and compliance side of employee benefits (i.e., the design, establishment, administration, and termination of pension and welfare plans under ERISA and the Internal Revenue Code)
- Represents management and plan fiduciaries in business transactions and dealings with government agencies (the Internal Revenue Service, U.S. Department of Labor, and Pension Benefit Guaranty Corporation)
- Represents management and plan fiduciaries in employee benefits disputes, litigation, and arbitration, involving both single-employer and multiemployer plans

Mr. Polk is the immediate past chair of the Qualified Plans Committee of the American Bar Association's Section of Real Property Probate & Trust Law. He is a charter fellow of the American College of Employee Benefits Counsel and a fellow of the American Bar Foundation. He is past chair of the Chicago Bar Association's Employee Benefit Committee and past chair of the Midwest Pension Conference. He has spoken at meetings of various business and governmental organizations, including at the headquarters of the U.S. Department of Labor.

Mr. Polk has authored numerous articles for legal and business publications and is the author of a four-volume treatise entitled *ERISA Practice & Litigation*, published by West Group and updated annually for legal developments.

Selected for inclusion in *The Best Lawyers in America*, in the Employee Benefits and Labor Law areas, Mr. Polk has also been listed in *Illinois Super Lawyers* and *Leading Lawyers*.

Mr. Polk has also served on various not-for-profit boards, including Heartland Alliance, a large social service agency, and Friends of Battered Women and Their Children, as well as organizing committees for alumni of his law school, college, and high school.

Outside of the office, Mr. Polk's other activities and interests include the Chicago North Men's Senior Baseball League (wooden bat), handball, scuba diving, camping, and canoeing.

About the Speakers

Ray Kaplan, *Editor, Practical Law Employee Benefits and Executive Compensation*

Ray Kaplan joined Practical Law from Epstein Becker & Green, P.C., where he was an associate in the Employee Benefits department. Previously he was with Deloitte LLP and the Segal Company specializing in employee benefits and executive compensation.