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Proskauer Benefits Brief: The Withdrawal Liability Lifecycle

January 20, 2026

In the second episode of their multipart series on withdrawal liability, senior counsel Neil Shah and partner Justin Alex walk through the various deadlines that apply in the withdrawal liability lifecycle, from a plan's initial notice and demand to an employer's review, arbitration, and potential litigation. They explain why these timing rules matter, how they affect employers, plans, and actuaries alike, and the potential risks of missing deadlines.

Neil Shah: Welcome to the Proskauer Benefits Brief, legal insight on compensation and benefits. I'm Neil Shah, senior counsel at Proskauer.

Justin Alex: And I'm Justin Alex, a partner at Proskauer. This is the second episode in our multi-part series on withdrawal liability. Today, we'll talk about all the deadlines that come into play after a withdrawal liability assessment and why they matter.

Neil Shah: In the opening scene of the movie "Castaway," Tom Hanks says, "Time rules over us without mercy. It's like a fire. It could either destroy us or keep us warm. We never turn our back on it, and we never, ever allow ourselves the sin of losing track of time."

Now, as the movie proceeds, he goes from fighting time to surviving it to living with it. In a certain way, so, too, with withdrawal liability. For multiemployer pension plans, there are deadlines to demand and collect withdrawal liability, and missing them can make amounts uncollectible. For employers, there are deadlines to challenge the plan's demand, and missing them can waive defenses. For actuaries, timing affects how much is owed and when. Rather than fight the clock, we'll try to explain what the deadlines are and why they matter so that you can deal with them.

Justin Alex: So Neil, all the deadlines start with an employer's withdrawal. That can happen in circumstances like when a company shuts down, goes non-union, sells operations, or negotiates to stop contributing to a plan. Once a withdrawal is triggered, the plan will send a notice and demand for withdrawal liability, which tells the employer that it withdrew, how much the employer has to pay in either a lump sum or over time with interest, and when those payments are due. Now, when does the plan have to send the notice and demand? As soon as practicable after the employer's withdrawal.

Neil Shah: The language in the statute is, quote, "As soon as practicable." Now, that sounds a little squishy. What exactly does that mean?

Justin Alex: There isn't any specific guidance, and no one really knows. Employers arguing that a notice wasn't sent as soon as practicable almost never avoid liability. Exceptions are rare and usually involve extreme delays, like when the assessment took more than a decade after the withdrawal allegedly happened. But practically speaking, plans want to send notices quickly because no money is actually recoverable until the notice goes out. And waiting increases the risk that an employer will be unable to pay.

Neil Shah: Alright, so the plan will send a notice and demand for payment. What is the employer supposed to do next?

Justin Alex: So, two things. The first, and one that's very important, is that they need to make the first payment within 60 days after getting the assessment and continue making payments in accordance with the schedule and the demand.

And then second, if there are any issues with the assessment, the employer needs to send a request for review within 90 days explaining what those issues are. Both rules are part of what's known as the "pay now, dispute later" scheme, which means an employer has to pay the plan what it demands, unless and until an arbitrator or court says otherwise, or if they're able to voluntarily get the plan to revise the assessment.

Neil Shah: Now, what happens if the employer just doesn't pay?

Justin Alex: Nothing good happens when payments aren't made. Plans typically will send a missed payment letter with 60 days to cure, and if there is no cure, the full amount of the withdrawal liability is accelerated and becomes immediately payable. A plan could then go to federal court at any point to compel payment. The court can order payment of the missed or accelerated amounts, interest, liquidated damages, and attorney's fees and costs. If the employer later wins on the merits, some amounts may be returned, but liquidated damages and fees generally will always stay with the plan.

Neil Shah: Now, we talked about what happens if the employer doesn't pay. What happens if the employer doesn't request a review at all, or doesn't do so within the 90-day deadline?

Justin Alex: Yeah, this is a really important point. So, if an employer doesn't file the request for review within 90 days, it waives all of its defenses, even arguments that there was no withdrawal, a major calculation error, or unreasonable assumptions. After the 90 days pass, the withdrawal liability is set in stone, and that's what the employer will need to pay.

Neil Shah: Now, I'm sure there are times when employers know the withdrawal liability is coming, don't have any disputes, and just pay. But let's say an employer does request a review. What exactly is the plan being asked to review?

Justin Alex: So a request for review usually has two parts. The first sets forth the employer's arguments for why the assessment should be lower or zero, such as that no withdrawal occurred, there are calculation errors, improper assumptions were used, or maybe there are statutory exceptions that apply to the withdrawal liability. Then, a request for review will often include requests for documentation or additional substantiation from the pension fund to help refine the employer's arguments and points.

There's no fixed deadline for a plan to actually respond to a request for review, and there's technically no penalty if they choose not to respond at all. But the response by the fund or the passage of time will eventually start the next clock, which is the deadline for the employer to initiate arbitration. That deadline is 60 days after the earlier of the date on which the plan responds, or 120 days after the employer's request for review is filed. So, if you have a situation where the fund hasn't responded, the deadline to initiate arbitration is actually 180 days after the employer submitted the request for review.

Neil Shah: So, what are the chances that anything in a request for review that an employer submits changes the plan's mind, or that the plan actually provides requested documentation?

Justin Alex: It depends, but most plans will respond and address the issues that are raised. And if there's an undisputed calculation error, or maybe a misunderstanding of the facts that led to the withdrawal, it's in everyone's interest to correct it, and plans typically will. If an exception potentially applies, plans may take the opportunity to ask the employer to provide documentation to support the application of the exception. Then, on the plan providing documents or responding to information requests, plans typically will provide basics, like actuarial valuations, plan documents, and withdrawal liability procedures that may rebuff requests for anything else.

Neil Shah: Alright, so let's say that the plan does in fact respond and it stands by its assessment. What happens next?

Justin Alex: So, now we're in the arbitration phase if the employer wants to continue with the dispute. If the plan responds and is going to stand by the original assessment, the employer then has 60 days to commence arbitration. Missing that waives all of the defenses in the same way as if the employer never requested a review of the withdrawal liability assessment at all. And commencing the arbitration is a formal process. Plans can specify where and with which arbitration organization the notice has to be filed, and failing to follow those steps can also be treated as a waiver of arbitration, and with it, the employer's defenses.

Neil Shah: Alright, so let's say that we have a plan. It sends a notice and demand for withdrawal liability. The employer requests to review. The plan stands by its assessment of liability. The employer commences arbitration, we go through arbitration, and the arbitrator upholds the plan's assessment of withdrawal liability. Then what happens?

Justin Alex: So, at that point, the employer has 30 days to file, in federal court, an action to vacate or modify the arbitrator's award. Plans also have 30 days to confirm the award, though they often wait unless the employer's not making its required payments. In court, the judge reviews legal rulings de novo and can set aside clearly erroneous factual findings. The court can also remand to the arbitrator or the actuary for further review or development.

Neil Shah: Alright, so that's the dispute aspect of withdrawal liability. Let's turn now to collection. What deadlines apply if payments aren't made?

Justin Alex: So, if a payment's missed, plans generally have at least six years to sue to collect the missed payment. But that window can be extended in certain circumstances where there may be fraud, concealment, or where essential information about other liable parties wasn't available, like discovering control group members or suspect asset transfers later on. Time also plays a significant role in what the plan is entitled to recover. The plan gets to collect interest, and the interest is calculated from the date of the first missed payment. If the litigation is prolonged enough, the plan may also be entitled to an award of double the interest in the form of liquidated damages.

Neil Shah: Okay, so far we've covered how time plays a role in how the withdrawal liability is assessed, how it's challenged by the employer, and how it may be collected by the plan if the employer doesn't pay. How does time play a role in how actuaries calculate the actual withdrawal liability?

Justin Alex: So, as we mentioned in our first episode, the Supreme Court is weighing whether there's a deadline by which actuaries must select the methods and assumptions that are used to calculate withdrawal liability. More fundamentally, an employer's withdrawal liability is based on the plan's assets and liabilities as of the last day of the plan year before the year in which the withdrawal occurs. If you withdraw this year and the plan uses a calendar year, the calculation would look to the plan's assets and liabilities as of December 31, 2025. That could be important depending on what happened in the interim. If markets fell, that drop wouldn't be reflected. But if they soared, those gains wouldn't be reflected either. There are other ways in which time plays a role in the actuaries' calculations as well that are quite technical, and we'll cover them in a later episode.

Neil Shah: Time runs through every step of the withdrawal liability life cycle, and missing a date can reshape outcomes for everyone involved. If we missed any deadlines today, or if there are any others you're interested in, we'll try and adjust them in a future episode. Thanks for listening.

Justin Alex: If you found this useful, be sure to follow us and subscribe on Apple Podcasts, Spotify, and YouTube so you don't miss the next episode. If you liked what you heard or want to know more, drop us a line at wl@proskauer.com. That's wl@proskauer.com. I'm Justin Alex.

Neil Shah: And I'm Neil Shah. Today's discussion is for general information and is not legal advice. Thanks for listening to the Proskauer Benefits Brief.

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