Proskauer Benefits Brief: Additional Ways One Can Become Responsible for Withdrawal Liability

February 3, 2026

Last week, senior counsel Neil Shah and partner Anthony Cacace covered the most common way withdrawal liability extends beyond the employer. This week, they cover the rest.

In the second episode on this topic, Neil and Anthony examine five additional federal theories that can expose entities and individuals to withdrawal liability. They also discuss why withdrawal liability carries mandatory damages, interest, and fees, and why understanding these pathways is essential before transactions close or restructurings are finalized.

Neil Shah: Welcome to the Proskauer Benefits Brief: Legal Insight on Compensation & Benefits. I'm Neil Shah, a senior counsel at Proskauer. This is the 4th episode in our multi-part series on withdrawal liability. Today, we're resuming our conversation on who, other than the withdrawing employer, actually owes the withdrawal liability. With us today is Anthony Cacasey, a partner at Proskauer. In our prior episode, we talked about one of the six ways in which someone other than the withdrawing employer could be held liable for withdrawal liability. And that theory was known as control group liability. Today, we're going to talk about the other five ways in which someone other than the withdrawing employer can be held liable.

Anthony Cacace: Thanks for having me back, Neil. I think we covered in depth the rules pertaining to control group liability. And of note, the analysis on control group liability is very rules-based, and the five pathways to liability that we're going to discuss on this episode are less rule-based and more facts and circumstances-based. So, Neil, why don't you start with the single employer theory of liability?

Neil Shah: So, single employer liability comes from labor law, and it looks at whether the two entities, meaning the withdrawn employer and whoever the plan is seeking to hold liable, it looks at whether those two entities operate as a single integrated enterprise. Now, courts look at common ownership, management, centralized control of labor relations, and operational interrelation. They also look at whether there's any type of anti-union animus at play, meaning someone is just trying to avoid their union obligations by separating out the operations of these two companies into two distinct legal entities. A very common example here is a franchise where there's a top-down control despite separate ownership. Now, a finding of single employer liability means that everyone who is deemed a single employer is jointly and severally liable for the withdrawal liability. If it's at issue, it would also mean that they are jointly and severally liable for any contributions that they might owe to a multi-employer pension plan or really any other multi-employer plan.

Anthony Cacace: So, if the facts and circumstances support the finding of single employer liability, every legal entity that is construed by a court, presumably, to be a member of the single joint or integrated enterprise will be liable for the entire enterprise's withdrawal liability. Is that correct?

Neil Shah: Yes, that's right. Just exactly in the same way as control group liability.

Anthony Cacace: Understood. How does this compare to a different theory of liability, which is commonly known as the alter ego theory of liability?

Neil Shah: So, alter ego liability is very similar, and I mean that in a practical sense. It targets sham reshuffling of operations to avoid obligations. Courts consider very similar factors as they do under the single employer theory. They look at continuity of business operations, ownership, management operations, and the intent of everyone involved. Often, a finding of single employer liability coincides with a finding of alter ego liability, and both have the exact same effect. Everyone that is an alter ego is liable for the jointly and severally liable, for the withdrawal liability and for any contributions of the withdrawing employer.

Anthony Cacace: So, on a practical level, findings of either single employer liability or alter ego liability would arise where a contributing employer withdraws, does not have an ability to pay the withdrawal liability, there are no other members of the withdrawn employers control group that could held responsible for the withdrawal liability, and then plan trustees or plan sponsors look beyond the rules-based tests of entities that are under common control and onto facts and circumstances-based tests as to whether or not there are any legal entities out there that could potentially be held responsible for the withdrawal liability. Is that fair?

Neil Shah: Yes, that's exactly the case. If you're representing a plan, you're first looking to the withdrawn employer. If they're not able to pay, most likely you're going to look at any potential control group members because identifying control group members and establishing liability is very rules-based. If you then need to resort to the facts and circumstances theories like single employer liability or alter ego liability, you need a lot of documents. You need a lot of discovery. You need deposition testimony to really prove that out.

Anthony Cacace: And it seems like a lot of work.

Neil Shah: It is. Let's just say that if the liability is on the small side, it might not make sense to be bothering. But as we mentioned in the first episode, withdrawal liability amounts can be very large. They're very regularly into the millions of dollars. There are some that are into the nine figures and ten figures. And it might make sense to actually pursue that. And if you're on the receiving end of that type of a claim, it is also very fact intensive. And it's important to understand all the ins and outs of those theories of liability so that you can properly defend yourself.

Anthony Cacace: What about when companies are bought and sold and those companies have an obligation to contribute to a defined benefit pension plan? In that context, successor liability is a theory of liability that's at play. Can you outline some of the considerations around successor liability?

Neil Shah: Yeah, so this comes up very frequently in the multi-employer space. You're a contributing employer to a multi-employer plan and you want to get out of the business or maybe divest of a particular unit of your business. Now, if you engage in a stock sale, obviously whoever buys your stock is going to succeed to all the assets and liabilities. More commonly in this industry, we see asset sales. When you have an asset sale, I think the parties to that transaction assume that the liabilities stay with the seller. Now, a buyer might not want to succeed to any withdrawal liability of the seller, but it may still face exposure under what's developed as a successor liability theory. So, the standard for that is that the buyer needs to have had actual or constructive notice of the liability. That's one element. And then the second element is that the buyer needs to have substantially continued the predecessor's operations. Now, standard for notice is actual or constructive. And courts have found that buyers have constructive notice if they knew that they were buying the assets of a unionized business. or that they were rehiring a union workforce. And that's the case even if the withdrawal liability had never been discussed or withdrawal liability has not even been assessed on the withdrawing employer.

Anthony Cacace: So, that's interesting, Neil, but there are two more ways that plans pursue entities beyond the withdrawn employer, correct?

Neil Shah: Yes. So, there's no formal name for the 5th way, but it's basically a combination of the theories we've discussed so far. So, for example, a company might be a single employer with the withdrawing employer, and then that entity's own control group could be brought in. Asserting this type of a theory is very fact intensive and complicated. When we have these cases, I'm actually drawing diagrams connecting parties like in some type of a police drama. and then engaging an intensive discovery to actually prove out liability. And then the 6th and last way is called evade or avoid liability. So, the best way to explain what that is with an example. So, let's say that a company is contributing to a multi-employer pension plan, and just before shutting down its operations, it decides that it wants to insulate itself from liability. The way it does that is the owner of the company has a property holding company and decides that he doesn't want to expose that company's assets to the withdrawal liability. And so, he changes the ownership of that company to one of his acquaintances that is not a family member. Now, a plan can challenge that transaction as being a transaction designed to evade or avoid withdrawal liability. If it prevails, that means that divestiture is void, and it's as if that property holding company is still owned by the owner of the withdrawing employer, and both the property holding company and the withdrawing employer would still be held jointly and separately liable for the withdrawal liability. Another way in which this comes up is transfers of assets to dodge liability. So, let's use the same example. The employer is expecting to withdraw from the plan and shut down operations and doesn't want to expose the company's assets to withdrawal liability. So, the owner might issue bonuses to his employees, some of whom may be family members, or issue dividends or distributions to himself or to others. All of those transfers can be clawed back as transactions to evade or avoid withdrawal liability, which in that type of a situation could create personal liability for both the transferor, the person who authorized the transaction, or the transferee, the person who received the benefits of the transaction.

Anthony Cacace: I find it interesting, Neil, both the single employer theory of liability, the alter ego theory of liability, and then you move on to successor and also transactions to evade or avoid. You can do separate podcast episodes on each one of these topics individually. And on top of that, there's a whole body of case law that has been developed with respect to each one of these theories of liability. So, it's something I think that we can think about going forward to really drill down on some of the details and some of the interesting fact patterns that courts have evaluated when reaching conclusions that entities were liable and also were not liable. So, it is definitely an area of the law that continues to develop and there continues to be disputes between plan sponsors and employers. So let me ask you, Neil, in your opinion, the stakes are higher here in withdrawal liability disputes than in just general contract disputes where there's an amount due. Why is that?

Neil Shah: So, the reason is because the statutes allow for a much larger recovery than just the withdrawal liability. If you're held liable for withdrawal liability, not only do you owe the withdrawal liability, which might be sizable, you also will be liable for interest at a rate set potentially by the plan. You'll be liable for liquidated damages, which could be double the amount of interest, or it could be 20% of the withdrawal liability, whichever one is larger. And you'll be reliable for attorney's fees and costs. The award of all of these amounts is mandatory. It's not discretionary with the court. And what that means is that it raises the stakes for the employers or assess the withdrawal liability, the plans who are seeking to collect this liability, and anyone who might be counterparties to them. So, the takeaway from all that is fairly simple. If you are anywhere near a withdrawal event on the plan side or on the employer side, you need to have a proper understanding of who can be in the circle of responsibility and how these theories will work before decisions get locked in. That's our episode for today. 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. Today's discussion is for general information and is not legal advice. Thanks for listening to the Proskauer Benefits Brief.

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