Proskauer Benefits Brief: Withdrawal Liability at the Bargaining Table

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What happens at the bargaining table may lead an employer to close a facility, exit a line of business, go non-union, or opt for an entirely different compensation mix for its employees. All of these can trigger the employer's obligation to pay withdrawal liability.

In this episode of our multi-part series on withdrawal liability, senior counsel Neil Shah and partner Josh Fox unpack the ways in which withdrawal liability surfaces in labor negotiations and what employers can do about it.

Neil Shah: Welcome to the Proskauer Benefits Brief: Legal Insight on Compensation and Benefits. I'm Neil Shah, Senior Counsel at Proskauer. This is the fifth episode in our multi-part series on withdrawal liability. Today, we're talking about how withdrawal liability comes up in collective marketing. We're joined today by Josh Fox, a Partner in Proskauer's Labor and Employment Department, and a member of our Labor Management Relations Group.

Josh, welcome. Why don't you tell us a little bit about what you do at Proskauer and the way in which withdrawal liability comes up as part of your own practice?

Josh Fox: Thanks, Neil, it's great to be here. So, I focus on what happens at the bargaining table. I'm a traditional labor lawyer, I represent employers in pretty much every type of industry, and in terms of withdrawal liability, I deal with a variety of issues, including when terms in a collective bargaining agreement intersect with multi-employer plan obligations. That's really where the withdrawal liability risk often gets shaped by the day-to-day negotiations and the terms that are in the collective bargaining agreement.

I work on these matters with ERISA colleagues like yourself, Corporate M&A, Tax, litigation teams, potentially, to model different outcomes, sequence proposals and do so in a way to ensure that our clients preserve leverage and options in their negotiations. In my experience, I've dealt with a number of withdrawal liability issues, and I always think it's so important to look to spot issues as early as possible, avoid common pitfalls and try to map out plans while building a favorable record to ensure that our clients are timing and flexible structure with the various options that are on the table.

Neil Shah: So how frequently does withdrawal liability actually come up during bargaining negotiations, and, and what are the typical circumstances in which it comes up?

Josh Fox: Yeah, I mean, look, it doesn't come up incredibly frequently as a direct issue between the parties at the table. I think it certainly comes up frequently when you're a unionized employer and you're either being bought or you're selling, right? There are always questions about withdrawal liability there. But in terms of at the table, there are always questions that the employer is thinking about, right? When there are proposals that affect the contributions, the contribution rates, the unit scope, right? Like, those are usually defined early on in the first contract, but sometimes new positions are added and there are different unit scope issues that are discussed at the table. And also, what are the covered operations under the collective bargaining agreement? Is the employer closing a plant, or a shop or reducing workforce significantly at a location? Are they relocating? Is there subcontracting that's being done? And those are all types of things where withdrawal liability considerations, along with the labor law obligations, come into play.

Another time it happens is decertification, or significant restructuring of the bargaining unit, or, in the construction industry, if the employer is withdrawing recognition under section 8(f) of the National Labor Relations Act, which allows you to end the relationship with the union, but only in the construction industry at the end of the term. So, when those kinds of issues come up, we're thinking about how big the workforce is, how much contributions have been made, what are the withdrawal liability risks of either proposals that are being made at the table or transactions or big operational decisions that are happening? And then we coordinate with folks in your group and the litigation group to kind of map out how that would play out and best position our clients.

Neil Shah: Let’s unpack that a little. I think you mentioned a couple items there, and maybe it’s helpful for the listeners to distinguish between the impacts of both of them. You talked about a number of things that could trigger a withdrawal, meaning some event happens and as a result of that, withdrawal liability might be owed by the employer. And then a number of other things that go to, how much withdrawal liability it would — can you just talk about that in a little bit more detail?

Josh Fox: So, as to the first item that there is either considerations of complete withdrawals or partial withdrawals, right? So, partial withdrawals, you’re not ceasing contributions completely, and those are typically big circumstances like a sale, a closure, withdrawing recognition from the union — construction industry is an example where you could do that. Or, the union’s decertified. Or the union disclaims interest, right? The union steps out of the picture and you don’t have an obligation to contribute. I guess in rare cases, you could have a multi-employer plan, and I guess, potentially, you negotiate around that to change the obligation in the collective bargaining agreement. Very difficult to do, you don’t usually like doing that, depends on the nature of the plan, and those can trigger complete withdrawals.

Partials are 70% decline to trigger a lesser, but not a complete withdrawal, a partial withdrawal. And those are cases where maybe you have a more seasonal business and the number of employees that you have, you know entertainment is one of them, I know there are exceptions to that.

But there are ways to manage the workforce in a way to not trigger partial withdrawals, and that also comes up in just the unit composition, even if you don’t have a seasonal business, right? Like, you may shift the workforce, you may go to subcontracting, you may not directly make contributions for the workforce in the same way that you have before, and you have to navigate whether that triggers a partial withdrawal, and we’ll speak to your team. And then, how does that impact the negotiations at the bargaining table?

What leverage do we have — and, your second question, which was — what is the figure, what’s the, what’s the withdrawal liability amount? Right, like, that’s always top of mind for clients, right? Because it’s a dollars-and-cents issue. So, we work with you guys, we work with actuaries, we, we make requests of estimates. But estimates are only at a particular point in time, so it’s really about mapping strategies, and then also playing out, “How do we avoid disputes from the funds? How do we exit from the fund, either with paying withdrawal liability or without? And how do we navigate future disputes from the fund?” So, all of those factors come into play. They come to play at the bargaining table sometimes, directly, but, more so, it’s ,“we have a union in place, and we’re trying to help the client map out, ten steps down the road, to get the most optimal outcome.”

Neil Shah: So, just to summarize, it looks like complete withdrawal is where union is exiting left and there’s no relationship anymore, either with the union or with the fund at all. And then the other circumstance is a partial withdrawal, and that’s where the contributions might decline substantially over some period of time, or maybe there’s some type of utility closure, or something like that. When it comes to clients just completely withdrawing from a fund, either they are becoming a non-unionized business, or maybe they bargain out and say that, instead of contributing to a multi-employer pension plan, they’re going to start contributing to some type of a defined contribution plan, like a, a 401(k) plan. What role do you play in that?

Josh Fox: Really, the way I look at it is, there are really two steps of that, right? It’s, one is, we’re advising our clients — we try to understand their objectives and what they want to accomplish, and what the reasons are, right? So, is it cost — usually — does it cost, and then, what are the alternative options, right? So, we try to map out what their goals are. This is really with any issue in collective bargaining.

And we have a union involved and a multi-employer plan. You have to negotiate with the union to get that outcome in the collective bargaining agreement, right? So really, if it’s going to be a withdrawal and change in direction in terms of what the contributions are going to be, right, in the example that you shared, right, if you go to a 401(k) from a multi-employer plan, you need the union’s sign-off on that. And that’s always challenging, and there are going to be dynamics there around the overall negotiations that are taking place.

And then the next step of it is working with the benefits folks, and understanding the impact of this change, whatever it is, in that could happen in the collective bargaining agreement, and estimating and getting real data in terms of whether that would trigger a partial or complete withdrawal, when, and what the cost would be. And so those are really like the three main points that we focused on. I mean, they all kind of have to work together to get to the end goal, whatever that goal the client has.

Neil Shah: Yeah, so you mentioned understanding what the final dollar amount is going to be of the withdrawal liability, and, and it's obvious why employers, in bargaining, would want to know that number. We haven't gone over, in the series so far, the nuts and bolts of how exactly withdrawal liability is calculated and what goes into it. I think you mentioned that it is a complicated process. What do you, as part of your practice, bring to the table for clients in helping them understand what their actual withdrawal liability is, what potential challenges might exist and what implications that might actually have for their business?

Josh Fox: I think from the Labor Management Relations practice group, right, that I'm, I'm a part of, kind of what we do with our clients is, we're considering what's the withdrawal date, what's the legal basis for the withdrawal, and we really want to firm that up. Right? That, that's like, our role. And if, you know, the legal basis is based on the circumstance, right, like a sale or a subcontract — or something like that? Okay, that's essentially in the client's control, fine. But if it's something that has to be negotiated with the union, then we, we step in on that.

In terms of figuring out what the magnitude of the dollars would be, in terms of the withdrawal, that's outside of my expertise and above my pay grade. We work with your team in the ERISA group, and also frankly with either actuaries or making requests of the fund themselves, of what the withdrawal liability would be. It'll depend on, you know, the various factors and contribution amounts and number of people and, and number of years to assess that. And then once you get that number on a piece of paper that allows you to focus on a plan, to, if you want to execute a withdrawal or if a withdrawal's going to happen, even without your desiring to do that, right, you have to plan for that. You have to ensure that the client is, is well-aware and can account for that in their budget and move forward.

Neil Shah: Now when it comes to actually having a withdrawal, you mentioned that sometimes it's things that is within the client's control, sometimes it's things that are within the plan's control and sometimes it's something that needs to be negotiated. What are some examples of an employer avoiding a withdrawal? Is there a way to kind of negotiate around that? How does that actually come up?

Josh Fox: Yeah, I think that, that the best example that I can think of is in the context of transactions, right, where you're selling a business or you're selling a property, and you contributed — you're the seller, you've contributed to multi-employer plan, and then, as a result of the sale, you're not going to continue to employ the people for whom you were contributing. And subject to other considerations, you may have either a partial or complete withdrawal, depending on other employees for whom you may be contributing to the same plan.

But there's a tool in, in an asset sale, under ERISA section 4204, which essentially is a, is a powerful tool to ensure that you have the buyer assume the collective bargaining agreement. You have specific language in the purchase and sale agreement, or whatever the asset sale agreement is, that provides for 4204 coverage and that ensures that the seller does not incur withdrawal liability as a result of the sale. Then contributions continue for those employees after the sale.

That's a powerful tool, there's a monetary component to that, there's risk, there's essentially conveyance of the, the contributions from the seller to the buyer, so the buyer takes on that risk going forward. But from a seller perspective that's a valuable tool, and it's a negotiable point in asset sales when withdrawal liability would otherwise be triggered.

Neil Shah: Well, thanks so much, Josh. That was all great. Maybe in another episode we can explore in more depth partial withdrawal liability mechanics, the credits that apply, dispute resolution, section 4204 asset sales in much more detail. A lot of other things that you mentioned.

Josh Fox: It was great to be here, Neil. And I'd be glad to come back again. Thanks so much.

Neil Shah: 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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