

Ninth Circuit Clarifies Withdrawal Liability Industry Rules

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The Ninth Circuit recently issued a pair of decisions clarifying how the rules governing withdrawal liability apply to employers in certain industries. In *Walker Specialty Const., Inc. v. Bd. of Trs. of the Constr. Indus. & Laborers Joint Pension Tr. for S. Nev.*, No. 24-1560, 2026 WL 21743 (9th Cir. Jan. 5, 2026), the Court held that an employer did not withdraw from a multiemployer pension plan, and thus did not owe withdrawal liability, because the employer's asbestos abatement work qualified for the "building and construction industry" exemption. And in *Nevada Resort Ass'n-Int'l All. of Theatrical Stage Emps. & Moving Picture Mach. Operators of the U.S. and Can., Local 720 Pension Tr. v. JB Viva Vegas, LP*, Nos. 24-3047 & 24-2791, 2026 WL 32577 (9th Cir. Jan. 6, 2026), the Court held that the plan primarily covered employees in the entertainment industry because the majority of employees in the plan performed at least some entertainment-related work.

Background

An employer's obligation to pay withdrawal liability to a multiemployer pension plan is triggered by either a complete withdrawal, such as when a company's obligation to contribute to the plan permanently ceases; or a partial withdrawal, such as when an employer's contributions to the plan decline by 70% over a statutory testing period, or when it closes one (but not all) of its facilities and continues to perform the same work in the same geographic jurisdiction without agreeing to contribute to the plan.

Different rules apply to eligible employers in the building and construction industry and the entertainment industry. In these industries, the employer's obligation to contribute is often tied to employees' work on discrete projects. In the absence of a special rule, once a project ends, the employer's obligation to contribute may cease, thereby triggering an assessment of withdrawal liability. Congress determined that this assessment of withdrawal liability would discourage employers from agreeing to contribute to multiemployer pension plans. As a result, Congress decided that different rules should be used to determine whether employers in these industries have withdrawn, namely, that a complete withdrawal only occurs when an employer continues to perform the same type of work in the same jurisdiction on a non-contributory basis. (There are also special rules for when a partial withdrawal occurs in these industries.)

Eligibility for these special rules differs depending on the industry. In the building and construction industry, the exemption only applies if: (i) substantially all the employees with respect to whom an employer has an obligation to contribute to the plan perform work in the industry, and (ii) the plan primarily covers employees in the industry, or the plan has been amended to allow employers to exercise the exemption. In the entertainment industry, the exemption only applies if: (i) the plan primarily covers employees in the industry, and (ii) the employer has an obligation to contribute to the plan for work performed in the industry primarily on a temporary or project-by-project basis.

If an employer is eligible for either of these exemptions, it will only be deemed to have completely withdrawn from the plan if its obligation to contribute to the plan permanently ceases and at any point during the next five years it resumes or continues to perform work of the type for which contributions to that plan were previously required in the geographic jurisdiction of the collective bargaining agreement (in the case of the building and construction industry) or the plan (in the case of the entertainment industry), without agreeing to contribute to the plan.

There is little statutory and regulatory guidance as to the threshold questions of what it means to work in the "building and construction industry" and how to determine whether a plan "primarily" covers employees in the entertainment industry. The Ninth Circuit addressed the first question in *Walker Specialty* and the second question in *JB Viva Vegas*.

Walker Specialty

Walker Specialty was an asbestos removal company. It contributed to the Construction Industry and Laborers Joint Pension Trust until 2019, when it ceased all covered operations. The plan assessed Walker Specialty with \$2,837,953 in withdrawal liability, which Walker Specialty disputed and commenced arbitration to challenge. Walker Specialty argued that it was a building and construction industry employer that did not continue to perform the asbestos removal work for which contributions were required, nor resume such work, and thus it never withdrew from the plan.

The arbitrator rejected that argument. He determined that “building and construction industry” work under the statute means work done to form, make, or build a structure. The arbitrator concluded that asbestos removal did not qualify for the exemption because it involved tearing down structures, not building them. The district court reversed, concluding that the arbitrator had interpreted the term too narrowly. Relying on legislative history indicating that the term should be given the same meaning as developed in administration of the Taft-Hartley Act, the district court pointed to NLRB and PBGC guidance that broadly defined the “building and construction industry” to include not only building structures, but also alterations and repairs. Applying that interpretation, the district court concluded that asbestos removal qualified as building and construction work because it involves the alteration, demolition, repair, or improvement of fixed structures in buildings.

The Ninth Circuit affirmed. The Court held that the term “building and construction industry” means work involving the erection, maintenance, repair, and alteration of buildings and structures because that was the settled meaning of the term at the time Congress enacted the statute. Applying that definition, the Ninth Circuit held that asbestos abatement work qualifies as building and construction industry work. Thus, Walker Specialty was eligible for the exemption and could only be deemed to have withdrawn if it performed the type of work for which contributions were previously required in the same jurisdiction on a non-contributory basis.

JB Viva Vegas

JB was a musical production company that produced the show *Jersey Boys*. JB contributed to the Nevada Resort Association-International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 720 Pension Trust for employees that worked on the production. After the production ended, the plan assessed JB with \$913,315 in withdrawal liability, taking the position that the entertainment industry exception did not apply because the plan did not primarily cover employees in the entertainment industry. JB disputed the assessment and commenced arbitration, arguing that the plan primarily covered entertainment industry employees, and that an effort by plan trustees to eliminate the exemption was void.

The arbitrator sided with the plan, reasoning that the requirement that a plan primarily cover entertainment industry employees could only be satisfied if at least 50% of the earnings for at least 50% of the employees covered by the plan were for entertainment industry work, which the arbitrator concluded had not been established.

The district court confirmed the arbitrator's award on the same grounds, but the Ninth Circuit reversed. The Court held that the plain meaning of the phrase "employees in the entertainment industry" counts each employee that performs entertainment work, regardless of how much work they performed or what proportion of their total work the entertainment industry work comprised.

In reaching this conclusion, the Court contrasted the language to other parts of the statute that impose more stringent requirements by using qualifiers like "substantially" or "primarily." Although the statute requires that the plan "primarily cover[] employees in the entertainment industry," it does not further require that an individual's work must be primarily in the industry to qualify as an employee in such industry. Because there was no limiting language for "employees in the entertainment industry," JB had to show only that at least 50% of the employees covered by the plan performed some amount of entertainment industry work. It was undisputed that the majority of employees covered by the plan perform some entertainment work, so the Court held that the plan primarily covered "employees in the entertainment industry" and remanded the case to the district court for further proceedings.

Proskauer's Perspective

The Ninth Circuit's recent decisions provide clarification for how employers may qualify for the building and construction industry and entertainment industry exemptions and thereby avoid triggering withdrawal liability. In *Walker Specialty*, the Court clarified the expansive nature of the type of work that can qualify for the exemption, and in *JB*, the Court explained that there is no minimum amount of work an employee needs to perform in order to qualify as an industry employee.

Employers and plan sponsors operating in these industries should carefully evaluate how withdrawal liability rules and industry-specific exemptions apply to their operations and plan participation decisions, to mitigate unexpected liability down the road.

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