Bulletin

Multi-Employer Defined Contribution Plans – Are You Liable for Another Contractor's Delinquency?

Introduction

Most contractors are aware of the withdrawal liability issues surrounding multi-employer defined benefit pension plans. Withdrawal liability adds a layer of potential cost liability beyond the contribution rate set forth in the collective bargaining agreement (CBA). But, what about potential cost liability with multi-employer defined contribution plans (sometimes referred to as annuity plans)? This bulletin will address this potential liability.

Contractors have taken the position that their liability for benefit plans starts and ends with the specific contribution rate set forth in the CBA. This position was upended by statute related to defined benefit withdrawal liability many years ago. Many contractors do not realize, however, that there is also potential liability for uncollected contributions in a multi-employer defined contribution plan.

The Key—What Kind of Plan?

To understand how and why, it is important to first understand the type of multi-employer defined contribution plans that exist. Primarily there are two types, either a profit sharing plan or a money purchase plan.

Money Purchase Plan
The Internal Revenue Service (IRS) takes the position that a **money purchase plan** is a type of pension plan, defined contribution or defined benefit notwithstanding. The IRS states that a pension plan (including a money purchase pension plan) under which service credit or allocation of contributions is conditioned on an employer making required contributions violates the definitely determinable benefit rules for pension plans (Treas. Reg. 1.401-1(b)(1)(i)). Therefore, the Plan is required to credit service to a participant based on the Plan's contribution rate, regardless of whether the employer has, in fact, made the contributions.

Given this position, where does the Plan get the cash for the uncollected, delinquent contributions to credit the participant's account? In most cases, the only source of funding is the contractor, so it may be necessary to assess the uncollected delinquent contributions from one contractor to the remaining contractors in the multi-employer bargaining unit.

Profit Sharing Plan
In contrast, a profit sharing plan by law and plan design does not have to meet the definitely determinable benefit rules. This means that the contributions are not credited to a participant's account if not collected from the employer.

There are other differences between the two plan types, summarized in the comparison chart that follows.

Strategies to Minimize Potential Liability

1. Contractors and management trustees of a trust fund should know what kind of defined contribution plan is in place. In some instances, this may not even be addressed by the trust document (especially in some older plans), in which case reference to the annual 5500 filings could be helpful in identification.

2. It is possible if the trustees (or labor management) agree, to convert a money purchase plan to a profit sharing plan with minor plan amendments. This can be accomplished in consultation with the Plan's legal counsel. In most cases there will be little if any changes required in the Plan's operation other than to eliminate the requirement that the Plan credit a participant with service even though the employer does not make the required contribution on the participant's behalf.

3. Plan trustees should be diligent in collection activities. This includes assuring that bond protection is in place to provide adequate cash for the Plan in case of a delinquency.

The Management Methods Committee thanks the following individual for his assistance in the preparation of this Bulletin:

Anthony C. Ciriaco, Esq.
Vorys, Sater, Seymour & Pease, LLP
Columbus, OH

COMPARISON OF A MONEY PURCHASE PENSION PLAN AND A PROFIT SHARING PLAN

ITEM	**MONEY PURCHASE**	**PROFIT SHARING PLAN**
Plan Terms	Plan terms are required to specify the amount of contributions to be made by the employer and received by the participant.	Plan terms can either be written to: • Specify the amount of the contributions to be made by the employer and received by the participant; or • Permit employer contributions to be made at the discretion of the employer.
Crediting of Contributions	Contributions are required to be credited to the participant even if not collected from the employer.	Contributions may <u>not</u> be credited to the participant if not collected from the employer.
In-service Distributions	Limited to age 62 or older.	More flexible in-service distribution options can be offered. In-service distributions can be made to a participant: • After the contributions have been received by the plan for at least a two year period; • After the participant has at least five years of participation in the plan; or • On account of the participant's hardship. However, the amount of the contributions credited to a participant's account on the date the plan is converted to a profit sharing plan would be required to be

		grandfathered and subject to the money purchase pension rules.
Forms of Benefit	The plan must provide an annuity form of benefit to a participant or beneficiary as a normal form of benefit unless the participant and spouse, if any, consent to another form of benefit.	The plan may continue to offer annuity forms of benefits, but is not required to do so. The plan can just offer a lump sum form of benefit. However, it appears that the amounts credited to a participant's account prior to the date the plan is amended to be a profit sharing plan would be required to remain subject to the annuity requirements.
204(h) Notice	Plan amendments reducing future employer contributions will result in a notice, called a Section 204(h) notice, being provided to participants.	The conversion of a money purchase plan into a profit sharing plan will result in the Section 204(h) Notice being provided to affected participants. Thereafter, the Section 204(h) Notice would not be required to be provided in the case of a reduction in employer contributions to participants.