

## Withdrawal Liability in Mergers and Acquisitions

by Jeffrey D. Snavely

Most employers that contribute to a multi-employer pension plan are familiar with withdrawal liability — the liability they face for the unfunded obligations of union retirement plans. In recent years, most such employers have come to understand the potential crippling liability they face if they withdraw from these plans. And there are few instances where potential withdrawal liability has had a more chilling effect than with respect to mergers and acquisitions. Employers are hesitant to enter into transactions only to see the proceeds wiped out by withdrawal liability, while acquirers are hesitant to take on that liability, either explicitly or as a successor.

Potential withdrawal liability does not have to be a deal killer, however, and there are a number of options and strategies available to both a selling company and its acquirer to minimize or eliminate withdrawal liability. The following is an overview of the more common of those options and strategies.

- **Determine the Liability.** By law, multi-employer plans must provide, upon request, an estimate of the employer's withdrawal liability. While the estimate usually is not representative of the current year, it should give the employer some idea of the magnitude of the liability. As we have seen the magnitude of withdrawal liability on the decline in recent years, some employers have been pleasantly surprised to see their potential liability significantly reduced if not eliminated.
- **Determine if Exceptions to Liability Exist.** There are a number of exceptions to withdrawal liability that employers may or may not be able to use. While it is often dependent on the pension plan in question, employers in the coal, trucking, construction, entertainment, grocery and other industries may have exceptions to withdrawal liability. Often, if such an employer ceases operations completely, withdrawal liability is deemed inapplicable under the theory that when the employer ceases operations, another employer, who will be making contributions to the same or a similar plan, will by necessity absorb the business left by the terminating employer.
- **Free Look.** An employer who has not participated in a plan for an extended period of time may be able to avail themselves of the free look rule. In an effort to entice new employers to join multi-employer plans, some plans have adopted a free-look rule,



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which provides that an employer joining a plan may withdraw from the plan within a certain period of time without incurring withdrawal liability.

- **Net Worth Limits.** An employer may be able to lessen its liability under rules limiting withdrawal liability to a percentage of the employer's net assets. While the limitations will not eliminate withdrawal liability (depending on the net worth of the employer, the limit can be as high as 80% of net assets), this can be particularly useful for employers in financial distress that would not otherwise be able to effect a transaction.
- **Transfer of Liability.** Surprisingly, acquirers often will be willing to assume the withdrawal liability of the employer. Whether because of the structure of the transaction (a stock sale, for example, typically does not trigger withdrawal liability) or an explicit assumption (pension plans usually have a process by which an acquirer can specifically assume withdrawal liability), an acquirer can assume the liability of an employer under the plan in question. The fact is that the acquirer will not face liability unless and until it withdraws from the plan, and understanding that it may never face any liability at all, some acquirers will take over the obligation.
- **Negotiate.** When all else fails, the employer does have the ability to negotiate its withdrawal liability. Typical withdrawal liability is paid over a period of up to 20 years, and plans often are willing to negotiate a discount on withdrawal liability for faster payment.

The potential for withdrawal liability always will be a concern in mergers and acquisitions, and will generally affect, sometimes greatly, the due diligence process as well as the purchase price. However, it is not necessarily the deal killer that it is often perceived to be. With an understanding of the options available to an employer, some accommodation can almost always be reached.

*Should you have any questions concerning withdrawal liability in multi-employer plans, please contact [Jeffrey D. Snavely](#) or visit our web site [www.eastmansmith.com](http://www.eastmansmith.com).*

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