



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 32 –
Multiemployer Pension Plans: Mitigating Risk in
the Context of a Business Transaction**

By [Andrew Graw](#), [Taryn Cannataro](#), [Jessica Kriegsfeld](#)

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- Kevin Iredell:** Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at lowenstein.com/podcasts, or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, SoundCloud, or YouTube. Now let's take a listen.
- Jessica Kriegsfeld:** Welcome to the latest episode of Just Compensation. My name is Jessica Kriegsfeld and I'm an associate in Lowenstein Sandler's Employee Benefits and Executive Compensation Practice Group. I'll turn it over to Andy and Taryn to introduce themselves.
- Andrew Graw:** Hi, I'm Andrew Graw. I'm chair Lowenstein Sandler's Employee Benefits and Executive Compensation Practice Group.
- Taryn Cannataro:** And I'm Taryn Cannataro, counsel in the Employee Benefits and Executive Compensation Group.
- Jessica Kriegsfeld:** Today's episode will be a high-level discussion of some considerations related to multi-employer pension plans in the context of a business transaction. This episode will give an overview of considerations with respect to multi-employer plans in the context of a business transaction, areas of potential liability and approaches to mitigating these issues. As always, this is not intended to be an exhaustive discussion, so we encourage you to consult with your legal counsel if you are considering a business transaction that involves multi-employer plans to discuss how these considerations could apply to you. Andy, what's a multi-employer plan and how do they differ from single employer defined benefit plans?
- Andrew Graw:** Well, first, a defined benefit plan in general is a plan that provides retirement benefits based on a formula. For example, typical defined benefit plan will determine benefits based on factors such as final average compensation and years of service. In contrast to a defined contribution plan, like a 401k plan, is one where benefits are based on account balances, contributions are made into the account each year, they earn investment returns and then ultimately the total value of that account is payable out at retirement, termination of service or upon earlier events like a hardship.
- A multi-employer plan differs from a single employer plan in that as the names suggest, a single employer plan is maintained by a single employer. A multi-employer plan is maintained in an industry in which various unrelated employers in the industry

will make contributions to the plan on behalf of their workforce, which is a unionized workforce.

Jessica Kriegsfeld: What are some areas of potential liability for multi-employer plans in a business transaction?

Taryn Cannataro: One source of significant liability for a multi-employer plan is withdrawal liability and withdrawal Liability occurs when a contributing employer in a multi-employer plan stops contributing or significantly reduces the contributions. There are two ways withdrawal can occur. You can have a complete withdrawal, which is when the employer permanently ceases contributing or permanently ceases all cover operations under the multi-employer plan. Or you can have a partial withdrawal, which is when the employer reduces contributions to the plan by 70% or more.

If a withdrawal occurs, the employer is liable for their allocable portion of the plan's unfunded vested liabilities, which is determined under a statutory formula taking into account the value of the plan's assets and the value of the non-forfeitable benefits under the plan and payable over a number of years.

You usually need an actuary to calculate this statutory formula. There are a few potential exceptions for withdrawal liability under ERISA such as a special industry exception for certain industries like construction, trucking, entertainment and retail food industries. A di minimis exception for certain small employers with a minimal withdrawal liability and an asset sale exception, which we'll discuss momentarily.

Andrew Graw: Another source of liability is the obligation to make contributions to the multi-employer pension plan itself. These are contributions required pursuant to a collective bargaining agreement, and if there's a failure to make those contributions, then the delinquent employer can be assessed liquidated damages as well as attorney's fees of the fund for not having timely paid the contributions over to the fund.

In addition, there is a risk that contributions to the fund could be increased over time, either through negotiation of the collective bargaining agreement or where the fund becomes in a significantly underfunded position called at-risk status. In an at-risk status situation, the fund could demand that employers pay additional surcharge contributions to the fund.

Jessica Kriegsfeld: Which party bears the liability for multi-employer plans in a business transaction?

Taryn Cannataro: Depends on the type of business transaction. In a stock deal or merger, the acquirer will assume the obligation for making contributions to a multi-employer plan, and if they discontinue making those contributions, they would be subject to potential withdrawal liability calculated to the extent applicable based on the target's contribution history.

Andrew Graw: In an asset deal, unless a seller continues to have an obligation to contribute to the multi-employer pension plan, it will incur a withdrawal as a result of the sale. That is true even if the acquirer enters into a new collective bargaining agreement providing for contributions to the fund.

However, there is an exception. It's called the sale of assets exemption, and it allows the seller to avoid withdrawal liability if certain conditions are met. Conditions are that the acquirer must assume the obligation of the seller to contribute to the multi-employer plan or substantially the same amounts that the seller had an obligation to contribute for.

Two, the purchaser must post a bond or escrow for a period of five years with the fund in an amount equal to the average annual contributions of the seller for the preceding three-year period.

And third, the seller must agree to remain secondarily liable for any withdrawal liability that may occur if the acquirer withdraws from the plan during the first five years after the closing. Even when the purchaser does not expressly assume seller's obligation to contribute to the multi-employer pension plan, the purchaser should still be concerned about possible successor liability.

Consider if the buyer could have some liability if after the transaction the seller shuts down and there's not enough assets to cover plan liabilities. Concern is that the multi-employer pension plan would seek liability from the buyer for the seller's withdrawal liability.

Jessica Kriegsfeld: What should an acquirer do in a business transaction where a multi-employer plan is involved to help mitigate these risks?

Taryn Cannataro: Well, first, I would recommend engaging in due diligence to make sure you're reviewing the multi-employer plan and that you're not walking into any issues. For example, you'll want to inquire about the funding status of the plan. Another thing that you want to do is to consider the impact of changes in the workforce post-closing. If an acquirer assumes responsibility to make contributions to a multi-employer plan but are also thinking they may reduce the workforce post-closing, then they could be faced with a future partial withdrawal. Or if they're going to try to not hire union employees in the future or perhaps negotiate for different retirement benefits that don't include the multi-employer plan, there could also be a withdrawal.

Finally, you should address potential withdrawal liability in the purchase agreement, and one way to do this would be to consider reducing the deal price or adding indemnification covenants to protect you from any liability.

Jessica Kriegsfeld: What consideration should a seller keep in mind if they have a multi-employer plan and are looking to sell?

Andrew Graw: It's important for a seller to get in front of the issue early on. They can do that by asking the fund for an estimate of their withdrawal liability. A lot of companies are reluctant to do that, but it's a normal thing to do. Any fund is statutorily required to provide an estimate of the withdrawal liability. Some plans will charge for that estimate, but it's well worth getting an understanding of what the estimated withdrawal liability would be, and then a seller should also consider what exceptions to withdrawal liability exist. Are they in an industry that would afford them the ability to avoid withdrawal liability or are there other things that they can do to try to reduce their future withdrawal liability without incurring a partial withdrawal from the fund?

Jessica Kriegsfeld: It's important to understand when a multi-employer plan is involved in a transaction early on so you can approach the deal strategically and assess potential liability early on. Being aware of these nuances and potential issues can help you avoid costly liabilities and help the deal progress faster.

Thanks for joining us for today's discussion. We hope you found it informative and provided you with some food for thought when engaging in transactions. Tune into our other episodes to hear about considerations with respect to single employer defined benefit plans and defined contribution plans in the context of a business transaction.

This episode is intended to be a high-level overview but is by no means an exhaustive discussion. Thanks for joining us today. We look forward to having you back for our next episode of Just Compensation.

Kevin Iredell:

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