

# EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

## INFORMATION MEMO

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### Withdrawal Liability Pitfalls for Construction Industry Employers

Employers in the construction industry often use union employees subject to collective bargaining agreements. With collective bargaining agreements, contributions to multiemployer pension funds are common, potentially exposing employers to withdrawal liability. There is an important exemption from withdrawal liability under section 4203(b) of ERISA (Employee Retirement Income Security Act of 1974) for certain construction industry employers that participate in a construction trade pension fund. This exemption does not always apply to a construction employer and below is a discussion of some recent litigation touching on that point. Before considering a transaction that might result in a withdrawal from a multiemployer plan, construction industry employers will want a firm grasp of the rules.

First, a little background on withdrawal liability. After the enactment of ERISA, many multiemployer pension funds were becoming underfunded, with not enough plan assets to pay all projected pension benefits. Employers contributing to these funds, not wanting to get stuck “holding the bag” for the unfunded liability, ran for the exits, causing even further underfunding. Congress’s solution was to start imposing withdrawal liability, requiring pension funds to charge an employer a share of the underfunding when it exits.

However, Congress included an exemption for construction industry employers in construction industry pension funds because when such an employer leaves a pension fund, another employer should take its place. Also, the construction industry had persuasive lobbyists at the time.

The construction industry exemption has several criteria, some of which are poorly defined even after 45 years. It often comes as an unpleasant surprise to construction employers that they are not eligible for the exemption (at least according to pension funds). Simply stated, an employer may be able to avoid withdrawal liability if:

1. The employer has an obligation to contribute for work performed in the building and construction industry (BCI),
2. “Substantially all” the employees for whom the employer is obligated to contribute “perform qualified work” in the BCI and
3. The pension fund “primarily covers employees” in the BCI (or has otherwise adopted the rule for BCI employers).

In *General Electric v. Boilermaker-Blacksmith National Pension Trust*, currently pending before the Eighth Circuit, a pension fund had assessed partial withdrawal liability against an employer, GE. The case involved a dispute over whether the exemption applied, and whether “substantially all” of the employer’s employees were performing construction work (the substantially all test in number two above). GE contributed both for union employees performing construction work and for others that did not.

The parties agreed on which employees performed work in the BCI. Further, they agreed that “substantially all” requires that at least 85% of the employer’s union employees perform work in the BCI over an 8-year period<sup>1</sup>. However, the parties believed that different methods should be used to determine the percentage of employees performing qualified construction work.

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<sup>1</sup> Note that an 8-year period was used because this dispute related to a certain type of partial withdrawal. The parties would have almost certainly used a different period if a complete withdrawal was at issue.

The pension fund argued for a monthly employee headcount, looking at whether “substantially all” of the relevant GE employees were in the BCI each month. The fund said this methodology best characterized GE’s work in the geographical area of the fund and avoided absurd results. The fund noted that GE’s preferred method (described below) could overcount BCI employees when there is high turnover among those employees. Notably, the fund asked the court to allow funds to use methods that make sense for particular employers or types of work and not set a bright-line rule.

In contrast, GE argued for an aggregate headcount, meaning that if “substantially all” of the relevant GE employees over those 8 years worked in the BCI, the test should be satisfied. GE argued that its method was a straightforward reading of ERISA and that the exemption was intended to accommodate the expected ebb and flow of construction industry work.

Which is the right method to determine whether “substantially all” of an employer’s employees are working in the BCI — monthly or cumulative headcount? The law is unsettled, but the answer may be “neither.” The reason lies with a careful reading of ERISA which establishes that withdrawals occur as of a specific point in time, here, “the last day of a plan year” in which “there is a 70% contribution decline.” It is also clear that, in ERISA’s use of the present tense, the BCI exemption operates on the date of withdrawal (for example, the exemption states that “substantially all the employees with respect to whom the employer *has an obligation* to contribute under the plan *perform work* in the building and construction industry”). The use of present tense and complete omission of a measurement period strongly suggest that the “substantially all” determination should be made on the date of withdrawal, not over a time period. This approach would give parties a bright-line rule, avoid the measurement methodology problem and remain faithful to the statute.

However, measuring “substantially all” on the date of withdrawal has policy concerns of its own. For example, employers that intuitively appear to be genuine construction employers might not qualify on that specific date for various reasons. Conversely, employers that appear to be mixed employers might qualify by virtue of last-minute changes in workforce. One could imagine an employer that exclusively contributed for BCI employees for years pivoting to other types of work shortly before incurring a withdrawal and thereby not qualifying for the exemption. One could also imagine an employer engineering its workforce before an expected withdrawal to qualify for the exemption. But those types of counterintuitive outcomes can happen with long measurement periods too. Pension funds have some protection from manipulation of workforces by employers under the “evade or avoid rule” which applies “[i]f a principal purpose of any transaction is to evade or avoid liability.” In other words, a fund could argue that if an employer engineers its workforce with a purpose of qualifying for the BCI exemption, withdrawal liability can be imposed without regard to those workforce changes.

This discussion only scratches the surface of one of the issues with applying the BCI exemption. Another important issue is whether an employer’s construction work is being actually performed on site. Most funds take the position that off-site work does not usually qualify. Note that withdrawal liability can be triggered by reductions in force, location closures, mergers and acquisitions, asset sales and other circumstances. It can be especially difficult to benefit from the BCI exemption when selling a business. Our firm can help you determine whether the BCI exemption could apply to your circumstances.

If you have questions about withdrawal liability or the construction industry exemption, contact [Gregory Katz](#), any attorney in our [employee benefits and executive compensation practice](#) or the attorney at Bond with whom you are regularly in contact.

