

ARTICLE XI

EMPLOYER WITHDRAWAL LIABILITY RULES & PROCEDURES

11.1 GENERAL

The Pension Fund is a multiemployer defined benefit pension plan regulated by the Employee Retirement Income Security Act (“ERISA”). ERISA, as amended by the Multiemployer Pension Plans Amendments Act of 1980 (“MPPAA”), generally requires every multiemployer defined benefit pension plan that has unfunded vested benefits to provide for the assessment of withdrawal liability on contributing employers that withdraw, completely or partially, from the plan. This ERISA-imposed liability is referred to as “employer withdrawal liability” (“EWL”).

The Congressional intent in enacting MPPAA was to require employers that withdraw from a plan with unfunded vested benefit liabilities to continue making payments for a period of time to help complete the plan’s funding of vested benefits. EWL is imposed only if the employer withdraws from the plan and the plan has unfunded vested benefit liabilities. The Pension Fund, as a building and construction industry plan, applies special EWL rules that exempt contributing employers from EWL unless they withdraw while the Pension Fund has unfunded vested benefit liabilities and the employer thereafter competes against the Pension Fund’s contribution base.

The intent of this Article is to describe in detail how the Pension Fund implements the EWL provisions of ERISA, reserving for the Pension Fund the full rights and protections afforded to it by ERISA.

An Employer’s obligations under this Article shall survive the Employer’s withdrawal from the Pension Fund.

11.2 DEFINITION OF WITHDRAWAL

(a) Generally

There are two types of withdrawal that can trigger EWL: a “Complete Withdrawal” and a “Partial Withdrawal”. Each type of withdrawal is defined in this Section.

(b) Special Building & Construction Industry Rules Apply

The Pension Fund is a plan that primarily covers employees in the building and construction industry. Accordingly, ERISA’s special definitions of withdrawal for the building and construction industry apply to contributing Employers to the extent that “substantially all” of the employees with respect to whom the employer has an obligation to contribute to the Pension Fund work in the building and construction industry. “Substantially all” means at least 85%.

If an Employer does not meet this requirement for application of the special building and construction industry withdrawal rules, the generally applicable ERISA definitions of Complete Withdrawal and Partial Withdrawal shall apply to the Employer rather than the definitions set forth herein.

(c) Complete Withdrawal

A Complete Withdrawal by a contributing employer occurs:

- (1) when the employer ceases to have an obligation to contribute to the Pension Fund; and
- (2) either:
 - (a) the employer continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
 - (b) the employer resumes such work within five (5) years after the date on which its obligation to contribute to the Pension Fund ceases, and the employer fails to renew its obligation to contribute to the Pension Fund at the time it resumes the work.

An Employer's obligation to contribute ceases when the Employer is no longer required by a collective bargaining agreement, other agreement accepted by the Pension Fund, by the National Labor Relations Act, or by any other applicable law to contribute to the Pension Fund. The mere fact that an Employer is delinquent in making contributions for a period when it did have a contractual or statutory obligation to contribute will not prevent a withdrawal from occurring, even though the Employer remains liable for the delinquent contributions.

The date of a Complete Withdrawal is the date of cessation of the Employer's obligation to contribute to the Pension Fund.

(d) Partial Withdrawal

A Partial Withdrawal by a contributing Employer occurs if the Employer's obligation to contribute to the Pension Fund is continued for no more than an "insubstantial portion" of its work in the craft and area jurisdiction of the collective bargaining agreement or other agreement of the type for which contributions are required. An "insubstantial portion" means 30%.

To determine whether a Partial Withdrawal has occurred, the Pension Fund will compare for each calendar year:

- (1) the amount of work for which the Employer was obligated to contribute to the Pension Fund for the year, with
- (2) the total amount of the Employer's work in the same craft and area jurisdiction for the year.

An Employer does not incur a Partial Withdrawal merely because its reported contribution hours have declined by 70% or more. For example: if the Employer is contributing to the Pension Fund for all of its work in the craft and area jurisdiction, but the amount of available work declines by 70% or more, the Employer will not have incurred a Partial Withdrawal.

However, if an Employer's reportable hours of contributions for a calendar year are 30% or less than the Employer's contribution hours for any of the three preceding calendar years, the Pension Fund may assert a rebuttable presumption that there has been a Partial Withdrawal. The Employer may be required by the Pension Fund to produce conclusive evidence that it has not incurred a Partial Withdrawal.

The date of a Partial Withdrawal is the last day of the calendar year during which the conditions of a Partial Withdrawal were met.

(e) Exception: "Free Look"

An Employer that would otherwise incur a Complete Withdrawal or a Partial Withdrawal will not be deemed to have withdrawn, despite the cessation of its obligation to contribute to the Pension Fund, if the following conditions are met:

- (1) the Employer first had an obligation to contribute to the Pension Fund on or after January 1, 2007; and
- (2) the Employer had an obligation to contribute to the Pension Fund for no more than five (5) years; and
- (3) the Employer was obligated to make contributions to the Pension Fund for each calendar year in an amount that was less than two percent (2%) of the sum of all employer contributions made to the Pension Fund for each of such years; and
- (4) the Employer has never before avoided EWL from the Pension Fund under this "free look" provision; and
- (5) any past service credit otherwise grantable to participants (other than current pensioners) for employment with the Employer is cancelled; and
- (6) the ratio of the Pension Fund's assets (for the calendar year preceding the first calendar year in which the employer was obligated to contribute to the Pension Fund) to benefit payments made during that calendar year was at least 8-to-1.

(f) Additional Exceptions

An Employer will not be deemed to have incurred a Complete Withdrawal or Partial Withdrawal under any of the following circumstances:

- (1) The Employer ceases to exist by reason of a change in corporate structure described in ERISA Section 4069(b) or a change to an unincorporated form of business enterprise, if the change causes no interruption in Employer contributions or obligations to contribute

to the Pension Fund. A successor or parent corporation or other entity resulting from any such change shall be considered the original Employer.

- (2) The Employer suspends contributions to the Pension Fund during a labor dispute involving its employees, within the meaning of ERISA Section 4218(2). However, if the Employer does not resume its contribution obligation to the Pension Fund as of the end of the labor dispute, the Employer may incur a Complete Withdrawal or Partial Withdrawal and the date thereof may relate back to when the contribution obligation ceased or other triggering event occurred.

(g) Transactions to Evade or Avoid EWL

If the principal purpose of any transaction is to evade or avoid EWL, these rules and ERISA's provisions shall be applied, and EWL determined, assessed and collected, without regard to such transaction, as provided in ERISA Section 4212(c).

11.3 CALCULATION OF EWL

- (a) In the event that an Employer incurs a Complete Withdrawal or Partial Withdrawal and the Pension Fund has unfunded vested benefits liability ("UVBL"), the Pension Fund's actuary will calculate the Employer's EWL, if any, using the rules set forth in this Section and ERISA.
- (b) An Employer's EWL is a proportionate share of the amount of the UVBL. UVBL refers to the present value of vested benefits ("PVVB") less the value of Pension Fund's assets. In determining PVVB, the interest assumption used will be based on the blended rate methodology developed by the Pension Fund's actuary (the "Segal method"). Under the Segal method, the PVVB is determined using a blend of interest rates. PBGC interest rates for terminated single employer plans are used to the extent the vested benefit liability is matched by the market value of plan assets and the interest assumption for plan funding is used to the extent that vested benefit liability is not matched by plan assets.

The date for determining the value of the Pension Fund's assets for this purpose will be the December 31st preceding the date of the withdrawal.

- (c) The "presumptive method" (ERISA Section 4211(b)) will be used to allocate a share of the UVBL to the Employer.
- (d) The share of the UVBL allocated to the Employer will be reduced by the *de minimis* deductible provided by ERISA Section 4209. Generally, the *de minimis* deductible is the lesser of (1) \$50,000 and (2) 0.75% of the UVBL. If the share of the UVBL allocated to the Employer is less than the *de minimis* deductible, no EWL is assessed.

The *de minimis* deductible is applied on a diminishing basis to the extent that the share of the UVBL allocated to the Employer is more than \$100,000. For every dollar that the Employer's share of the UVBL exceeds \$100,000, the deductible is reduced by a dollar. If the Employer's share of the UVBL is less than \$100,000, the full amount of the applicable deductible is applied to reduce the amount assessed as EWL. If the Employer's share of the UVBL exceeds \$150,000, the deductible is zero and does not reduce the amount assessed as EWL.

- (e) The share of the UVBL allocated to the Employer will be further reduced by application of the limitations on EWL set forth in ERISA Section 4225 if, and to the extent that, the employer demonstrates to the Pension Fund's satisfaction that it qualifies for any of the limitations.
- (f) In the event that an employer incurs a Partial Withdrawal, its EWL will be a pro-rata share of the Complete Withdrawal EWL calculated under subsections (b)-(e) .

11.4 INSTALLMENT PAYMENT SCHEDULE

- (a) EWL is payable by the Employer on an installment payment schedule determined by the Pension Fund's actuary in accordance with ERISA Section 4219(c). The installment payments will include interest.
- (b) The first installment will be payable within sixty (60) days following the Employer's receipt of the notice of assessment from the Pension Fund, and the subsequent installments shall be payable in accordance with the schedule.
- (c) An employer may pre-pay all or any part of its EWL and accrued interest without penalty.
- (d) The Pension Fund may require the Employer to post a bond or other acceptable security for the payment of its EWL, initially or at any time before the EWL is fully paid, if:
 - (1) the Employer's payment schedule extends more than eighteen (18) months; or
 - (2) the Employer is the subject of a bankruptcy petition or similar proceedings; or
 - (3) substantially all of the Employer's assets are sold, distributed or transferred out of the jurisdiction of the U.S. courts.
- (e) The Pension Fund may require immediate payment of the full amount of EWL under certain circumstances described in Section 11.8, below.

11.5 NOTICE TO EMPLOYER OF EWL ASSESSMENT & PAYMENT DEMAND

- (a) As soon as practicable after an Employer's Complete Withdrawal or Partial Withdrawal and the Pension Fund's determination that the Employer owes EWL, the Pension Fund shall send to the Employer a written notice of the assessment of EWL and demand for payment in accordance with the installment payment schedule. The notice shall include the installment payment schedule, a description of the EWL calculation, and a statement of the Employer's right to request review of the assessment by the Board of Trustees.
- (b) The Employer shall be presumed to have received the notice five (5) business days following the date on which the Pension Fund places the notice in the U.S. Mail. The Employer's address shall be presumed to be the address from which the Pension Fund received the Employer's most recent contributions unless the Pension Fund has received notice from the

Employer to use a different address. If the Employer claims that it did not receive the notice until a later date, it shall have the burden of proving this fact.

11.6 REQUEST FOR REVIEW OF ASSESSMENT BY BOARD OF TRUSTEES

- (a) An Employer that has been assessed EWL is entitled to request a review of the assessment by the Board of Trustees. If an Employer wishes to request review, it must submit a written request to the Pension Fund no later than ninety (90) days following its receipt of the notice of assessment. Review may be requested as to any specific matter relating to the EWL assessment and payment schedule, including any claim based on fact or law that the Employer is not subject to EWL. The Employer's request shall describe the specific issue(s) to be reviewed and Employer's position on such issue(s), and should include any documents or other information that it considers supportive of its position.
- (b) The Board of Trustees, or a designated committee thereof, will review any such request for review. The Board or committee may request that the Employer provide additional documentation or other information regarding its review request if such information is necessary or helpful to the review. The Employer will be notified in writing of Board or committee's decision and the basis for therefore, including an explanation of any changes in the EWL assessment or payment schedule under the decision.
- (c) The Employer shall be presumed to have received the notice five (5) business days following the date on which the Pension Fund places the notice in the U.S. Mail, and the other notice rules described in Section 11.5(b) shall apply.
- (d) An Employer shall not be entitled to initiate arbitration proceedings under this Article nor commence any lawsuit concerning the EWL assessment unless it has submitted a timely request for review to the Board of Trustees under this Article.

11.7 MANDATORY ARBITRATION

- (a) An Employer that has been assessed EWL may initiate arbitration proceedings regarding the issues for which it requested review by the Board of Trustees under Section 11.6. The arbitration shall be initiated and conducted in accordance with this Section, with ERISA Section 4221, and with PBGC regulations. No legal action may be commenced by an Employer regarding the EWL assessment unless it has timely initiated and exhausted the arbitration procedure.
- (b) As provided under ERISA Section 4221, if the Employer wishes to arbitrate any such issue, it must initiate arbitration within sixty (60) days after the earlier of:
 - (1) the date of which the Employer receives notice of the Board of Trustees' or committee's decision on its request for review; or
 - (2) one hundred twenty (120) days after the date on which the Employer's request for review was received by the Pension Fund.

The Pension Fund may itself initiate arbitration under this Section within the time limit set forth

- in this subsection (b), but shall not be required to do so.
- (c) Arbitration shall be initiated and conducted in accordance with the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes administered by the American Arbitration Association (AAA), except as otherwise provided in this Section and ERISA Section 4221.
- (1) The initial AAA filing fee shall be paid by the initiating party.
 - (2) All arbitrations shall be conducted in Dallas, Texas, unless the Employer and the Pension Fund agree otherwise.
 - (3) The Employer shall file with the AAA and serve upon the Pension Fund at least 21 days in advance of the arbitration hearing a preliminary statement describing: (i) the factual and legal contentions with respect to each issue to be arbitrated; (ii) a list identifying the name, address and occupation of each witness to be called at the hearing and a description of the matters upon which each witness will testify; (iii) a description of each exhibit that will be offered in evidence at the hearing; and (iv) a description of the relief that is being sought from the arbitrator.
 - (4) The Pension Fund shall file with the AAA and serve upon the Employer at least 7 days in advance of the arbitration hearing a preliminary statement containing the same information as required of the Employer in subsection 11.7(c)(4), above.
 - (5) The arbitrator shall apply all presumptions applicable under ERISA, including ERISA Section 4221(a)(3).
- (d) Any legal action to enforce, vacate or modify any arbitration award shall be filed in accordance with ERISA Sections 4221(b) and 1451 within 30 days after issuance of the award. In any such action, the presumptions of ERISA Section 4221(c) shall be applicable.
- (e) If the Employer does not initiate arbitration in accordance with this Section, the Employer will be deemed to have waived any right to contest the EWL assessment and the assessment may be collected by the Pension Fund in accordance with ERISA Section 4221(b).
- (f) In accordance with ERISA Section 4221(d), notwithstanding an Employer's request for review or initiation of arbitration, the Employer is required to pay its EWL assessment in accordance with the payment schedule set by the Pension Fund. If the EWL assessment is reduced or rescinded as a result of the Board of Trustees' review, arbitration or other proceedings, an appropriate adjustment in future payments or refund will be made. If the Employer has paid more EWL than it is determined to owe, the excess will be refunded with appropriate interest.

11.8 DEFAULT & COLLECTION

- (a) An Employer will be in default on its EWL payment obligations to the Pension Fund if:
- (1) any installment payment is not received by the Pension Fund when due;
 - (2) the Pension Fund has notified the Employer of its failure to pay the installment when due; and

- (3) the Employer has failed to make the installment payment within 60 days after receipt of the notice of non-payment from the Pension Fund. The presumptions of Section 11.5 regarding receipt of notices shall apply.

The default date will be the 60th day after the Employer's receipt of the notice of non-payment, unless payment is received by the Pension Fund by then.

- (b) In the event of default, the Employer shall be liable to the Pension Fund for:
 - (1) the amount of the overdue installment payment;
 - (2) interest at the Fund's interest rate for delinquent contributions (1.5% per month, compounded, from due date to payment date), but no greater or less than the maximum rate allowable under ERISA and applicable PBGC regulations;
 - (3) additional interest or liquidated damages in accordance with ERISA Sections 502(g)(2), 4301(b); and
 - (4) attorneys fees and costs incurred by the Pension Fund to collect the overdue EWL and/or related charges, including a civil action under ERISA Section 4301.
- (c) In the event of default, the Pension Fund may require the Employer to make immediate payment of the full amount of the EWL plus accrued interest on that full amount from the due date of the defaulted payment.
- (d) In the event that the Pension Fund determines that there is a substantial likelihood that an Employer will be unable to pay its EWL when due, the Pension Fund may declare the Employer in default and require the Employer to pay immediately pay the full amount of EWL plus accrued interest. Occurrences that the Board of Trustees, in its discretion, may deem to create such a substantial likelihood of non-payment include, but are not limited to:
 - (1) the Employer's insolvency, any assignment by the Employer for the benefit of creditors, the Employer's calling of a creditors meeting, the Employer's appointment of a creditors committee or liquidating agent, or the Employer's offer of a compromise or extension to creditors;
 - (2) the Employer's failure to pay debts as they become due;
 - (3) the commencement of any bankruptcy, insolvency, liquidation, receivership, reorganization, or like proceeding;
 - (4) the revocation, suspension, surrender or similar action relating to the Employer's license, charter, registration, or other governmental authorization required for the conduct of the Employer's business; or
 - (5) any other event or circumstance that, in the Board's judgment, materially impairs the Employer's credit worthiness or ability to pay liabilities when due.

- (e) The Pension Fund may commence a civil action under ERISA Section 4301 to collect any and all amounts owed by the Employer, including interest, liquidated damages, attorneys fees and costs under ERISA Section 502(g)(2).

11.9 DEFINITION OF EMPLOYER INCLUDES CONTROL GROUP

- (a) For purposes of this Article, an Employer includes all trades and business (whether or not incorporated) under common control with the withdrawn Employer as if a single employer, as provided under ERISA Section 4001(b). All members of a control group are liable for the EWL assessed to any member of the group.
- (b) The receipt of a notice of assessment under Section 11.5, or of a notice of default under Section 11.8, by the Employer shall be deemed receipt of the notice by each other member of the Employer's control group, and no additional notice shall be required.

11.10 EMPLOYER COOPERATION

- (a) An Employer is required, within 30 days of receipt of a written request from the Pension Fund, to furnish such information as the Pension Fund reasonably needs, in the Board of Trustees' judgment, to determine whether the Employer has incurred a Complete Withdrawal or Partial Withdrawal, to determine the amount of any EWL, to collect any assessed EWL, or to otherwise administer this Article and ERISA's employer withdrawal liability provisions, as provided in ERISA Section 4219(a).
- (b) If an Employer fails to comply with such a request for information, the Pension Fund shall be entitled to draw reasonable inferences and make reasonable assumptions that are adverse to the Employer, and such inferences and assumptions shall be binding unless the Employer disproves them by clear and convincing evidence. The Pension Fund may also bring a lawsuit under ERISA Section 502(a) to enforce this obligation.

11.11 EWL ESTIMATES

- (a) The Pension Fund will provide to an Employer a written estimate of that employer's potential EWL:
 - (1) if the Employer submits a written request to the Pension Fund; and
 - (2) the Employer pays the Pension Fund's reasonable charge for providing the estimate or the unique information; and
 - (3) the Employer provides the Pension Fund with such information that is needed or helpful for responding to the Employer's request.
- (b) The Board of Trustees shall set, and may change from time-to-time, the amount to be charged by the Pension Fund to cover its actuarial and other professional costs of preparing the estimate. The Pension Fund may require payment of this charge in advance of preparing the estimate and providing it to the Employer.

- (c) An employer may request an EWL estimate only once in any 12-month period.
- (d) If an employer requesting an EWL estimate satisfies the conditions of subsection (b), the estimate will be provided within 180 days absent unusual circumstances.
- (e) An EWL estimate provided to an Employer will include an explanation of how such estimated EWL was determined, the actuarial assumptions and methods used to determine the value of the plan liabilities and assets, the data regarding Employer contributions, unfunded vested benefits, annual changes in unfunded vested benefits, and the application of any relevant limitations on the estimated EWL.

11.12 ADMINISTRATIVE AUTHORITY

- (a) The Board of Trustees has delegated to the Fund Administrator the authority and responsibility to administer these rules and regulations on a day-to-day basis, including authority to make withdrawal determinations, to obtain calculations from the Fund's actuary, to send notifications of EWL assessments, and to collect assessed EWL, subject to the right of appeal to the Board.
- (b) The Board of Trustees has full discretionary authority:
 - (1) to interpret and apply this Article, as with all other rules and procedures of the Pension Fund;
 - (2) to decide all questions of fact and law concerning this Article, and to decide the application of all rules, procedures, laws, and regulations to particular situations and circumstances.

11.13 ADJUSTMENT OF EWL FOR RENEWED PARTICIPATION AND SUCCESSIVE WITHDRAWALS

- (a) In the event that an employer that has incurred a Complete Withdrawal later renews its obligation to contribute to the Pension Fund, the Employer's not-yet-due EWL installment payments may be reduced or waived by the Pension Fund in accordance with the EWL abatement regulations of the PBGC (29 CFR Part 4207).
- (b) In the event that an Employer that incurred a Partial Withdrawal and was assessed EWL later increases its contribution hours so that it is contributing to the Pension Fund for more than an insubstantial portion of its work in the craft and area jurisdiction, the employer's not-yet-due EWL installment payments may be reduced or waived by the Pension Fund in accordance with the EWL abatement regulations of the PBGC.
- (c) If an Employer that has incurred a Partial Withdrawal and was assessed EWL subsequently incurs a Complete Withdrawal, the EWL for the Complete Withdrawal will be adjusted to the extent appropriate under PBGC regulations.

11.14 MASS WITHDRAWAL

Notwithstanding any other provision of this Article, if all or substantially all contributing Employers withdraw from the Pension Fund, the EWL of each Employer will be determined in accordance with the mass withdrawal provisions of ERISA Sections 4041A and 4203 and applicable PBGC regulations.