

## COVID-19 Temporary Furloughs' Impact on Multiemployer Plan Withdrawal Liability

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### Key Points:

- Furloughs in response to the current economic situation or local and state government closure orders due to COVID-19 should not result in complete withdrawal or partial withdrawal liability from a MEP.
- It may be good practice for employers to communicate to MEPs the temporary nature of the furlough and that contributions will resume once the COVID-19 restrictions are lifted and operations recommence.

As employers face difficult decisions amid the outbreak of COVID-19 and related government recommendations and orders impacting their operations, employers contributing to multiemployer pension plans (MEPs) may worry whether furloughs could result in withdrawal liability under the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendments Act. The initial determination of whether an employer's contribution cessation is permanent or temporary is made by the plan sponsor (the board of trustees of the MEP) and is generally upheld unless shown by the preponderance of the evidence to be clearly erroneous. ERISA §4221(a)(3). ERISA requires that an employer challenging the plan sponsor's determination must do so by initiating arbitration. ERISA §4221(a). However, based on current guidance, a MEP does not have a solid legal basis to assess complete or partial withdrawal liability against an employer for a cessation of contributions as a result of a furlough in connection with COVID-19.

### Triggering a Withdrawal

A temporary furlough of an employer's bargaining unit employees should not cause a complete or partial withdrawal from any MEP. A withdrawal only occurs when there is a permanent cessation of the employer's contributions to the MEP or a 70 percent or more decline in contribution hours that last for at least a three-plan-year period. Whether a cessation is permanent is a facts-and-circumstances determination. Here, all expectations are that contributions will resume once the current COVID-19 restrictions are lifted, supporting the conclusion that the cessation is temporary and not permanent. Though contributions will decline during the furlough, unless the decline lasts three years, there will not be a partial withdrawal.

### Contact Information

If you have any questions related to this alert, or any questions related to withdrawal liability that are outside the scope of this alert, please contact:

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Although ERISA does not define “permanent,” the statute does provide some guidance on the question of permanence. Section 4218(b) of ERISA provides that “an employer shall not be considered to have withdrawn from a plan solely because...an employer suspends contributions under the plan during a labor dispute.” Accordingly, short-term cessations in the contribution obligation that have foreseeable end dates, or are at least anticipated to be temporary in nature, do not amount to a permanent cessation of contributions. If circumstances change, MEPs could assess employers for a withdrawal that relates back to the date the furlough commenced. However, unless the furlough is known at this point to be permanent, there is no basis for a MEP to conclude that a permanent contribution cessation has occurred.

## Conclusion

The reasonable interpretation is that furloughs in connection with COVID-19 are temporary and the resumption of contributions in the relatively near future is expected. MEPs have the ability to assess for withdrawals in the future that relate back to the furlough date, should circumstances change.

Notwithstanding this analysis, it would be a good practice for employers to remain in communication with MEPs and make clear that the furloughs are temporary and that contributions will resume once economic conditions permit and/or the COVID-19 restrictions are lifted.

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