

THE JOINT POLICY COMMITTEE, LLC

**WITHDRAWAL FROM MULTIEMPLOYER COLLECTIVE
BARGAINING FOR COMMERCIALS CONTRACTS AND
ASSOCIATED WITHDRAWAL LIABILITY**

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September 2026

I. INTRODUCTION

This memorandum discusses the issues and potential liability if and when a signatory to a collective bargaining agreement (“CBA”) with the Screen Actors Guild and the American Federation of Television and Radio Artists (“SAG-AFTRA”), including the SAG-AFTRA Commercials Contract and the Radio Recorded Commercials Contract (collectively, the “Contract”), decides to withdraw authorization from the Joint Policy Committee, LLC (the “JPC”) for collective bargaining and no longer continue its signatory relationship with SAG-AFTRA. First, this memorandum provides an overview of the withdrawal liability provisions contained in federal law. Next, it discusses how a withdrawing signatory may withdraw from the SAG-Producers Pension Plan (the “Plan”) or disassociate from the JPC’s multiemployer bargaining unit responsible for negotiating with SAG-AFTRA. As detailed below, an entity’s withdrawal of authorization from the JPC does not automatically trigger a withdrawal from the Plan. Rather, a company’s obligations under the Contract and its associated commitments to the Plan endures until the withdrawn employer fulfills or is relieved of its collective bargaining obligations imposed by federal labor law.

The memorandum then analyzes the liabilities non-signatories to the Contract and/or the Plan may incur as joint employers with signatories. These liabilities include the obligation to contribute to the Plan for work performed on behalf of the non-signatory pursuant to the Contract and any withdrawal liability incurred under federal law when the signatory employer ceases participation with the Contract or Plan. Finally, the memorandum discusses the definition of “joint employer” under Section 2(2) of the National Labor Relations Act of 1935 (“NLRA”) and whether entities incur contractual pension liability because of their joint employer status. In summary, a current authorizer may incur various liabilities by withdrawing authorization from the JPC and seeking to terminate its status as a signatory under the Contract.

II. WITHDRAWAL LIABILITY OVERVIEW

The Employee Retirement Income Security Act of 1974 (“ERISA”)¹ is a U.S. federal tax and labor law that establishes minimum standards for employee benefit plans, including

¹ Pub. L. 93-406, 29 U.S.C. § 1001 *et seq.*, as subsequently amended and regulated.

multiemployer defined benefit pension plans like the Plan.² Under ERISA, employers that are “obligated to make contributions to a multiemployer plan under...the terms of a collectively bargained agreement” are not only required to make such contributions contractually, but also pursuant to federal law. If an employer completely or partially withdraws from an underfunded multiemployer plan, ERISA (as amended by the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”))³ imposes proportionate financial liability on the withdrawing employer in an amount determined under the MPPAA.⁴ This ensures that a withdrawing employer provides adequate funds to pay its fair share of unfunded liabilities that would otherwise fall on the remaining contributing employers.⁵ The threshold questions for any withdrawal liability analysis include determining (a) whether a withdrawal has occurred, (b) whether the Plan is sufficiently underfunded to trigger a withdrawal liability assessment, and (c) whether any statutory provisions or exemptions operate to reduce or eliminate the withdrawal liability assessment.

A. Complete or Partial Withdrawal

A complete withdrawal from a multiemployer plan occurs when an employer either (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan.⁶ The obligation to contribute is defined broadly as an obligation arising under one or more CBAs or applicable labor-management relations law.⁷ Thus, when a CBA expires and the employer neither signs a new agreement nor continues covered operations, a complete withdrawal is triggered. However, a temporary cessation does not trigger complete withdrawal liability.

The Ninth Circuit reviews *de novo* whether a withdrawal has occurred, treating it as a mixed question of law and fact.⁸ In *Ass'n Services of Washington, Inc. v. Western Metal Industry Pension Fund*, the district court held that a qualifying agreement laying out an employer's obligation to contribute but spread throughout CBAs and the collective bargaining process was

² A “multiemployer plan,” as defined in ERISA, is one to which more than one employer is required to contribute, maintained pursuant to one or more CBAs between one or more employee organizations and more than one employer. See 29 U.S.C. § 1301(a)(3).

³ Pub. L. 96-364.

⁴ 29 U.S.C. § 1381(a).

⁵ See *Oregon-Washington Carpenters-Emps. Pension Tr. Fund v. BQC Const., Inc. Hardware Serv.*, 485 F. Supp. 2d 1206 (D. Or. 2007).

⁶ 29 U.S.C. § 1383.

⁷ 29 U.S.C. § 1392(a).

⁸ *Walker Specialty Constr., Inc. v. Bd. of Trs. of Constr. Indus. & Laborers Joint Pension Tr. For S. Nevada*, 163 F.4th 1218 (9th Cir. 2026).

related to a CBA, and thus the employer incurred withdrawal liability when it terminated its contributions.⁹ The Ninth Circuit has also held that withdrawal liability applies even when the withdrawal is involuntary. In *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, the court upheld the MPPAA's constitutionality as applied to an employer whose withdrawal was caused by the union's unilateral disclaimer of representation, reasoning that Congress could rationally defer a decision on whether to adopt special liability rules for involuntary withdrawals while the employer had obtained benefits from offering pension coverage and bore responsibility for meeting employees' legitimate expectations.¹⁰

By contrast, a partial withdrawal from a multiemployer plan occurs on the last day of a plan year if there is either (1) a 70% contribution decline, or (2) a partial cessation of the employer's contribution obligation.¹¹ Under the first scenario, a 70% contribution decline exists when, during each plan year in a three-year testing period, the employer's contribution base units do not exceed 30% percent of the employer's contribution base units for the high base year (i.e., the average for the two highest years within the five plan years preceding the testing period). For the second scenario, a partial cessation of the contribution obligation occurs when the employer permanently ceases to have an obligation to contribute under one or more (but not all) CBAs, while continuing to perform work in the jurisdiction of the type for which contributions were previously required, or when the employer permanently ceases to have an obligation to contribute with respect to work at one or more (but fewer than all) of its facilities while continuing to perform covered work.

B. Calculation of Withdrawal Liability

An employer's withdrawal liability equals the allocable amount of "unfunded vested benefits" or "UVBs" — the difference between the present value of benefits owed to employees and the current value of the plan's assets as of the last day of the plan year preceding the year of withdrawal, with specific statutory adjustments.¹² Per Schedule MB Line E(4)(a) from the Plan's most recent Form 5500 (P/Y/E December 31, 2024), the Plan had 80.1% funding percentage and

⁹ 563 F. Supp. 3d 1140 (W.D. Wash. 2021).

¹⁰ 749 F.2d 1396 (9th Cir. 1984).

¹¹ 29 U.S.C. § 1385.

¹² 29 U.S.C. § 1381(b). These adjustments include the *de minimis* reduction under 29 U.S.C. § 1389, the reduction under 29 U.S.C. § 1386 for partial withdrawals, the 20-year payment cap under 29 U.S.C. § 1399(c)(1)(B), and finally, the adjustment under 29 U.S.C. § 1405 for arms-length asset purchase sales.

therefore has UVBs and associated withdrawal liability for any withdrawing employers. Historical *Annual Funding Notices* indicate that funding is improving slightly each year.¹³

The funding percentage of a multiemployer plan is generally calculated by its actuary, using actuarial assumptions and methods that, in the aggregate, are reasonable and, in combination, offer the actuary's best estimate of anticipated experience under the plan.¹⁴ However, these actuarial assumptions are fluid, and can change between measurement and calculation. The Supreme Court recently ruled in *M&K Employee Solutions, LLC v. Trustees of IAM National Pension Fund* that plans may adopt actuarial assumptions after the measurement date, because such assumptions are predictive judgments rather than observable facts.¹⁵

A plan's actuary can calculate withdrawal liability assessments at withdrawal, as well as provide withdrawal liability estimates in advance of a contemplated withdrawal on request.¹⁶ Annual payments are calculated based on the product of the average annual contribution base units for the three highest consecutive plan years within the ten plan years preceding withdrawal, multiplied by the highest contribution rate during that period, and with the total payment calculation capped at 20 annual installments.¹⁷

C. Exceptions and Limitations

In addition to the statutory adjustments applied by the actuary at calculation (as described above), there are several exemptions or limitations in the statutes that can reduce or eliminate withdrawal liability. One potentially applicable exemption applies to employer sales; a seller of assets does not incur withdrawal liability if (1) the sale is a bona fide, arm's-length transaction to an unrelated party, (2) the purchaser assumes an obligation to contribute to the plan for substantially the same number of contribution base units for which the seller had an obligation; (3) the purchaser provides a bond or establishes an escrow account for a period of five plan years commencing after the sale, in an amount equal to the greater of the average annual contribution for the three preceding plan years or the last year's annual contribution; and (4) the contract of sale provides that the seller is secondarily liable for any withdrawal liability incurred by the

¹³ The Funding Notice is available [here](#); it notes that the funding percentage in 2023 was 79.06%, and in 2022 was 78.95.

¹⁴ 29 U.S.C. § 1393.

¹⁵ 608 U.S. 264, 146 S. Ct. 1224, 224 L. Ed. 2d 764 (2026).

¹⁶ The Plan charges a \$1,500 flat fee for providing such estimates. See "Withdrawal Liability" [here](#).

¹⁷ 29 U.S.C. § 1399.

purchaser during the first five years after the sale.¹⁸ There is also a statute of limitations for enforcement of withdrawal liability: an action may not be brought after the later of six (6) years after the date on which the cause of action arose, or three (3) years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action.¹⁹ The U.S. Supreme Court has ruled that this six-year clock begins *not* on the date the employer withdraws from the plan, but when the employer fails to make a scheduled withdrawal liability payment, with each missed payment creating a separate cause of action with its own six-year limitations period.²⁰

D. Contesting Withdrawal Liability and Interim Payment

The MPPAA establishes a pay now, dispute later collection system.²¹ As soon as practicable after a withdrawal, the plan sponsor must demand payment and set an installment schedule, and the employer must begin making payments no later than 60 days after the date of the demand. The employer may request review by the plan sponsor, but even if the withdrawal liability assessment is disputed; the MPPAA requires the employer to continue paying according to the trustees' schedule in the interim.²²

Either party may initiate arbitration within a 60-day period after the earlier of the date of notification to the employer following the review, or 120 days after the employer's request for review. The parties may also jointly initiate arbitration within 180 days after the plan sponsor's initial demand.²³ The Ninth Circuit confirmed in *Board of Trustees of the Construction Laborers' Pension Trust v. M.M. Sundt Construction Co.* that disputes arising under 29 U.S.C. §§ 1381–1399 must be resolved through arbitration, and that the arbitration requirement functions as an administrative exhaustion requirement that employers must satisfy before seeking judicial review — with courts dismissing disputes that have not been exhausted through arbitration.²⁴ Failing to timely initiate arbitration can result in severe consequences; in *Teamsters Pension Trust Fund-Board of Trustees of Western Conference v. Allyn Transport Co.*, the Ninth Circuit

¹⁸ 29 U.S.C. § 1384.

¹⁹ 29 U.S.C. § 1451(f).

²⁰ *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997).

²¹ *Marine Carpenters Pension Fund v. Puglia Marine, LLC*, 382 F. Supp. 3d 1134 (W.D. Wash. 2019).

²² 29 U.S.C. § 1399; *see also Bay Area Laundry*, 522 U.S. 192.

²³ 29 U.S.C. § 1401.

²⁴ 37 F.3d 1419 (9th Cir. 1994).

held that an employer's failure to initiate arbitration within the statutory period results in the assessed withdrawal liability becoming due and owing on the plan's schedule, with no further right to contest the amount or existence of the liability.²⁵

III. WITHDRAWAL FROM MULTIEMPLOYER BARGAINING UNIT

A. Withdrawing JPC Authorization Prior to Negotiations for a Successor Contract

Multiemployer bargaining is voluntary and neither the NLRB nor the courts may force employers to participate in such a framework.²⁶ An employer may therefore withdraw authorization from the multiemployer bargaining unit at-will, provided that it submits adequate written notice prior to the date set for renegotiation of the existing contract or the date on which negotiations commence.²⁷ But once negotiations have commenced, an employer may not withdraw authorization without mutual consent or absent unusual circumstances, which are found when an employer is subject to extreme financial pressures, imminent bankruptcy, or unit fragmentation.²⁸ Impasse is not an unusual circumstance.²⁹ As the NLRB has explained:

While mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit.³⁰

To withdraw from the bargaining unit, the Ninth Circuit has held that (1) withdrawal must be timely (before negotiations begin) with adequate written notice to the union; (2) withdrawal must be unequivocal; and (3) withdrawal must be carried out as specified in the agreement creating the unit. The Ninth Circuit has construed these rules strictly and narrowly.

The Contract was last negotiated fully in 2016 and subsequently modified by several Memorandums of Agreement (“MOAs”) dated 2019, 2022, and 2025.³¹ No date has been set for commencement of renegotiation of the Contract as of the writing of this memo, so JPC

²⁵ 832 F.2d 502 (9th Cir. 1987).

²⁶ *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958); *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (“Bonanno”).

²⁷ *Retail Associates, Inc.*, 120 N.L.R.B. at 388.

²⁸ *Bonanno*, 454 U.S. at 411; *see also Hawaii Carpenters Tr. Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987); *N.L.R.B. v. Hartman*, 774 F.2d 1376 (9th Cir. 1985).

²⁹ *Bonanno*, 454 U.S. 404; *Seattle Auto Glass*, 669 F.2d 1332

³⁰ *Retail Associates, Inc.*, 120 N.L.R.B. at 393.

³¹ The 2016 Commercial Contract is available [here](#) (PDF), with other agreements (including MOUs) hosted [here](#). The 2016 Audio Commercial Contract is available [here](#) (PDF), with other agreements (including MOUs) hosted [here](#).

authorizers wishing to withdraw from the multiemployer bargaining unit may do so at any time.

B. Withdrawing JPC Authorization Does Not Terminating the Contract or Withdraw from the Plan.

An employer may withdraw authorization from the multiemployer collective bargaining unit but cannot withdraw from a validly adopted CBA unless the CBA permits such withdrawal.³² Even after the labor agreement expires, withdrawal from multiemployer bargaining does not relieve the withdrawn employer of its obligations to collectively bargain with the union to negotiate a new CBA. In the Ninth Circuit, where an employer validly withdraws from a multiemployer bargaining association, its duty to bargain with the union continues nonetheless because withdrawal from a multiemployer unit does not destroy the rebuttable presumption that the union continues to enjoy majority support among the employer's employees.³³ To rebut the presumption and lawfully refuse to bargain, the employer must present clear, cogent, and convincing evidence either that the union was actually in the minority or that the employer had a good faith reasonable doubt of majority support based on objective considerations at the time of the refusal.³⁴

Withdrawal from multiemployer bargaining also does not relieve the withdrawn employer of its obligations to maintain the status quo that existed immediately prior to the withdrawal. Under the NLRA, an employer is obligated to maintain the terms and conditions of a CBA, even after the contract expires.³⁵ This statutory obligation continues until certain events occur, such as the execution of a successor agreement or the union's unequivocal disclaimer of interest in representing the bargaining unit.³⁶ Therefore, while there is no continuing contractual obligation to adhere to the labor agreement, there is a continuing, virtually identical statutory obligation to maintain the status quo.

The courts and the NLRB have held that freezing the status quo ante after a CBA has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to negotiating a new contract. Thus, an employer's failure to abide by the terms and conditions of

³² *Conditioned Air Systems, Inc.*, 360 N.L.R.B. No. 97, n.3 (2014).

³³ *See N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978); *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980); *Hawaii Carpenters Tr. Funds*, 823 F.2d 289.

³⁴ *Tahoe Nugget, Inc.*, 584 F.2d 293; *Silver Spur Casino*, 623 F.2d 571. Evidence of employee discontent, high turnover, low union membership, financial difficulties of the union, and bargaining history, individually or cumulatively, may be insufficient if the inferences are equivocal and not unequivocally referable to a decline in union support.

³⁵ *Laborers Health & Welfare Tr. Fnd. for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544–46 (1988).

³⁶ *See, e.g., Dycus v. NLRB*, 615 F.2d 820, 824 (9th Cir. 1980).

an expired labor agreement pending negotiations on a new contract constitutes bad faith bargaining in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the NLRA. Consequently, any unilateral change by an employer—including in the pension and welfare fund arrangements—in employee rights, provided by an expired agreement constitutes an unfair labor practice.³⁷

Typically, an employer is relieved from abiding by the status quo ante only after it has negotiated a successor labor agreement with the union or implemented its last best offer after reaching impasse during contract negotiations.³⁸ Mandatory subjects of bargaining include contributions to multiemployer benefit plans. With respect to pension obligations, this may involve an agreement for the employer to withdraw from the current pension fund and provide alternate retirement benefits, if any.³⁹ Prior to any such agreement, the employer remains obligated to contribute to the existing fund pursuant to the terms of the expired contract.⁴⁰ Following the execution of a successor agreement and the employer's withdrawal from the fund, the employer's withdrawal liability to the fund attaches,⁴¹ and is calculated and assessed as described above. Consequently, employers that withdraw from multiemployer bargaining relationships often remain obligated to contribute to the associated pension fund for a significant period while negotiating as a single employer.⁴²

On rare occasions, employers are relieved from their statutory obligation to maintain the status quo ante after the union has disclaimed interest in representing the bargaining unit, since a bargaining representative may disclaim interest in further representing a unit of employees provided the disclaimer is clear, unequivocal and made in good faith.⁴³ Contractual and statutory obligations to maintain the status quo ante persist until the union provides such a disclaimer. This

³⁷ See, e.g., *Great S. Fire Prot., Inc.*, 325 N.L.R.B. 9, 14 (1997) (finding that the employer violated Section 8(a)(5) and (1) of the NLRA by its failure to timely pay welfare and pension premiums following contract expiration); *Silver Spur Casino*, 623 F.2d 571 (finding that an employer who had withdrawn from a multiemployer unit committed an unfair labor practice under Sections 8(a)(5) and 8(a)(1) by unilaterally implementing a new grievance procedure).

³⁸ *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) (“During the interim between agreements...the parties must honor the terms and conditions of the expired contract that involve mandatory subjects of bargaining, at least until the parties reach a good faith impasse”) (citations omitted).

³⁹ See *Advanced Lightweight Concrete Co.*, 484 U.S. at 544 n. 6 (“[A]n employer’s failure to honor the terms and conditions of an expired CBA pending negotiations on a new agreement constitutes bad faith bargaining...Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice”); see also *Peerless Roofing Co. v. N.L.R.B.*, 641 F.2d 734, 735 (9th Cir. 1981) (“[W]hile fringe benefits including trust fund contributions were among the subjects of negotiation, [Employer] never proposed the substitution of cash wages for trust fund payments”).

⁴⁰ *Advanced Lightweight Concrete Co.*, 484 U.S. at 544.

⁴¹ *N.J. Carpenters Pension Fund v. Hous. Auth.*, 68 F. Supp.3d 545, 553 (D. N.J. 2014) (“[A]n employer [is] liable for a withdrawal penalty in the event of a qualifying withdrawal from a multiemployer pension plan”).

⁴² *Advanced Lightweight Concrete Co.*, 484 U.S. at 544.

⁴³ *Prod. and Maint. Union, Local 101*, 329 N.L.R.B. 247 (1999); *Am. Sunroof*, 243 N.L.R.B. 1128 (1979).

is unlikely to occur here; while SAG-AFTRA has not historically demanded individualized bargaining, it has also indicated that it will not disclaim interest in representing any signatory who is under contract and instead will aggressively increase pressure on non-signatory digital advertising agencies to adhere to SAG-AFTRA standards and stop from undermining the Contract. More likely is that employees vote to end SAG-AFTRA's representation, as has already happened at least twice this year.⁴⁴

IV. JOINT EMPLOYERS AND WITHDRAWAL LIABILITY

As described in Part II above, an employer that is obligated to make contributions to a multiemployer pension plan but which withdraws from such plan may be subject to withdrawal liability. However, ERISA does not define the term “employer,”⁴⁵ and under 29 U.S.C. § 1301(b)(1), all trades or businesses under common control with the withdrawing employer are treated as a “single employer.”⁴⁶ Courts have held that all commonly controlled entities are jointly and severally liable for withdrawal liability, so a non-signatory to a CBA can nevertheless still be liable to the pension plan by virtue of its status as a “joint employer.”

A. Federal Courts Largely Reject Joint Employer Withdrawal Liability as a Freestanding Doctrine

Ninth Circuit. In the Ninth Circuit, imposing ERISA withdrawal liability on a non-signatory entity using a “joint employer” theory is legally complex and subject to important limitations. Absent a pre-existing contractual or statutory obligation to contribute,⁴⁷ the Ninth Circuit has largely rejected a freestanding or independent “joint employer” doctrine – i.e., holding that a non-signatory entity exercised sufficient control over employees to be deemed a co-employer – as an independent basis for ERISA contribution liability or withdrawal liability

⁴⁴ See Yahoo! Finance, “*Sinclair Statement On KOMO Employee Vote Regarding SAG-AFTRA Union Representation*” (August 24, 2026), available [here](#), and Insider Radio, “*Texas Public Radio Employees Vote To Remove SAG-AFTRA*” (August 7, 2026), available [here](#).

⁴⁵ *Div. 1181 Amalgamated Transit Union v. New York City Dept. of Educ.*, Case No. 13-cv-9112 (PKC), 2014 WL 4370724, at *3 (S.D.N.Y. Aug. 27, 2014) (quoting *Korea Shipping Corp. v. N.Y. Shipping Ass’n – Int’l Longshoremen’s Ass’n Pension Transit Fund*, 880 F.2d 1531, 1536 (2d Cir. 1989)).

⁴⁶ See *Auto. Indus. Pension Tr. Fund v. Tractor Equip. Sales, Inc.*, 73 F. Supp. 3d 1173 (N.D. Cal. 2014); *Allyn Transp. Co.*, 832 F.2d at 502.

⁴⁷ The preexisting duty requirement is critical, and the Ninth Circuit has declined to apply alter ego analysis when no original duty existed. See *CMSH Co. v. Carpenters Tr. Fund for N. California*, 963 F.2d 238 (9th Cir. 1992).

under the MPPAA.⁴⁸ It has also rejected a “reverse alter ego” doctrine (where a non-union employer creates a union company) because the non-union employer has no collective bargaining obligations to avoid.⁴⁹

Instead, Ninth Circuit courts reach non-signatory entities through three principal mechanisms: (1) the statutory controlled group rules under the IRS Code, which generally require 80% common ownership;⁵⁰ (2) the equitable alter ego doctrine, which requires a showing that the two entities constitute a single employer and that the non-signatory was used in a sham to avoid collective bargaining or withdrawal liability obligations; and (3) the statutory anti-evasion provision.⁵¹ In addition, PBGC guidance confirms that if a non-signatory entity is found to be a joint employer under the NLRA and thereby has an obligation to contribute under applicable labor-management relations law, it may be subject to withdrawal liability.⁵² This is because the Ninth Circuit treats delinquent contribution liability under ERISA Section 1145 and withdrawal liability under ERISA Section 1451(b) as analogous.⁵³

The Ninth Circuit directly addressed whether a non-signatory entity can be held liable for ERISA contribution obligations under a pure “joint employer” theory in *Trs. of Screen Actors Guild-Producers Pension & Health Plans v. NYCA, Inc.*, decided in 2009. In that case, an advertising agency (NYCA) was a signatory to a CBA requiring contributions to employee benefit plans, while its client (TaylorMade) was not. The plan trustees argued that TaylorMade was a “joint employer” of the performers and therefore obligated to contribute based on the total compensation paid to the performer. The Ninth Circuit rejected this theory, holding that ERISA Section 515⁵⁴ imposes no independent obligation on employers; it merely provides a federal cause of action to enforce pre-existing obligations created by CBAs.⁵⁵ Since a company only has a pre-existing obligation to contribute to the pension fund by executing the operative CBA, the Trustees were unable to subject a non-signatory employer to ERISA-imposed withdrawal liability under a joint employer theory.

⁴⁸ *Trustees of the Screen Actors Guild-Producers Pension and Health Plans v. NYCA, Inc.*, 572 F.3d 771, 776 (9th Cir. 2009) (“NYCA”).

⁴⁹ *S. California Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*, 558 F.3d 1028 (9th Cir. 2009).

⁵⁰ See *CMSH Co.*, 963 F.2d 238.

⁵¹ 29 U.S.C. § 1392(c).

⁵² See 29 U.S.C. §§ 1383 and 1392(a)(2); see also PBGC Opinion Letter 85-14 (1985 WL 32711) and PBGC Opinion Letter 86-10 (1986 WL 38789).

⁵³ *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079 (9th Cir. 2015).

⁵⁴ 29 U.S.C. § 1145.

⁵⁵ *NYCA*, 572 F.3d at 776.

Nevertheless, a non-signatory employer is not automatically shielded from liability and may still be subject to withdrawal liability if it is “one and the same” with the signatory employer as an “alter ego” of the signing company. The Ninth Circuit identified four theories under which a non-signatory may be held liable: (1) piercing the corporate veil, (2) the alter ego doctrine (where the non-signatory is really the same entity as the signatory), (3) the single employer doctrine, and (4) the theory that the interests of the non-signatory and signatory parties are materially inseparable. As explained by the Ninth Circuit, “[i]f the non-signatory company is really the same as the signatory company, then it is fair to say that the purported non-signatory is actually a signatory, and therefore an ‘employer who is obligated to make contributions.’”⁵⁶

The Ninth Circuit applies a two-part “alter ego” test to impose withdrawal liability on a non-signatory entity.⁵⁷ The first element of the test is a threshold showing that the two firms constitute a “single employer,” “by measuring the degree of common ownership, management, operations, and labor relations.”⁵⁸ The criteria for this determination are: (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. Not all criteria need be present, and no single factor controls, but centralized control of labor relations is the most important factor.⁵⁹ This can be demonstrated either by showing common control of day-to-day labor matters or by showing that the person in charge of the union company's labor relations made the decision that the second company would be non-union.⁶⁰

The second element requires proof that the non-union firm was used in a sham effort to avoid collective bargaining obligations, rather than for the pursuit of legitimate business objectives untainted by union animus. The Ninth Circuit has consistently held that an element of fraud or misrepresentation must exist in all alter ego determinations. Importantly, the alter ego doctrine as developed in labor law is analytically different from the traditional veil-piercing doctrine as developed in corporate law.⁶¹ Federal substantive law, not state law, governs the alter ego determination in an ERISA dispute, although courts may look to state law for guidance.⁶²

⁵⁶ *Id.*

⁵⁷ *UA Local 343 United Ass’n of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. of the United States and Canada, AFL-CIO v. Nor-Cal Plumbing Inc.*, 48 F.3d 1465, 1469-70 (9th Cir. 1994); see also *A. Dariano & Sons, Inc. v. Dist. Council of Painters No. 33*, 869 F.2d 514 (9th Cir. 1989).

⁵⁸ *UA Local 343*, 48 F.3d at 1469-70.

⁵⁹ *UA Local 343*, 48 F.3d 1465.

⁶⁰ *Id.*

⁶¹ *Id.*; *A. Dariano & Sons*, 869 F.2d 514.

⁶² *Bd. of Trs. of Mill Cabinet Pension Tr. Fund for N. California v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769 (9th Cir.

Finally, a non-signatory employer can be liable for the signatory's ERISA contractual obligations where "the interests of the non-signatory and signatory parties are materially inseparable."⁶³ While the Ninth Circuit has not established an official "test" to determine whether two entities' interests are "materially inseparable," as explained in *NYCA*, the interests must align so as to make the two entities "one and the same."⁶⁴ Thus, where the challenging party can prove (a) the two entities are alter egos, (b) where the corporate veil can be pierced, or (c) where the two entities are considered to be a "single employer," material inseparability of interests necessarily follows.⁶⁵ Under the "single employer" theory, a non-signatory employer will only be subject to liability on NLRB precedent.⁶⁶

Second Circuit. The Second Circuit – potentially a proper venue for the Plan to initiate an action – has also directly rejected the joint employer theory as an independent basis for ERISA withdrawal liability.⁶⁷ The Second Circuit defines "employer" as a person obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants, and only an "employer" is subject to withdrawal liability under 29 U.S.C. § 1381(a).⁶⁸ The Second Circuit acknowledged that the joint employer doctrine – which imposes liability for violations of labor or employment laws on entities that handle certain aspects of the employer-employee relationship jointly – is well-established in other employment law contexts such as Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938 ("FLSA"), but is "untethered to any particular statute beside the MPPAA" and does not independently create a "duty" to contribute under 29 U.S.C. § 1392(a)(2).⁶⁹

B. The NLRB Has Previously Extended Contractually Mandated Withdrawal Liability to Non-Signatory Joint Employers.

While courts have declined to extend ERISA obligations to a joint employer that is not party to the applicable CBA, the NLRB has occasionally imposed liability pursuant to the NLRA. The NLRB's determination of joint employer status serves as the predicate for

1989).

⁶³ See *Hotel Emp. and Rest. Emp. Intern. Welfare Union Fund v. Genter*, 50 F.3d 719, 722 (9th Cir. 1995).

⁶⁴ *NYCA*, 572 F.3d at 776

⁶⁵ See *id.* at 722.

⁶⁶ *UA Local 343*, 48 F.3d at 1470.

⁶⁷ *Div. 1181 A.T.U.-New York Emps. Pension Fund v. City of New York Dep't of Educ.*, 910 F.3d 608 (2d Cir. 2018); accord *Refined Sugars, Inc. v. Loc. 807 Lab.-Mgmt. Pension Fund*, 632 F. Supp. 630 (S.D.N.Y. 1986).

⁶⁸ See *Korea Shipping Corp.*, 880 F.2d 1531.

⁶⁹ *Div. 1181*, 910 F.3d 608.

withdrawal liability; as described above, if a joint employer has an obligation to contribute to a multiemployer pension plan arising from its status under labor-management relations law, a permanent cessation of that obligation triggers ERISA withdrawal liability.

The NLRB has long recognized that two entities may be joint employers if they share or codetermine the essential terms and conditions of employment of a single workforce.⁷⁰ However, the standard for making this joint employer determination has shifted significantly over the past decade and has been the subject of contradictory NLRB rulemaking, flip-flopping with each administration change since President Obama's second term. The joint employer determination uncertainty was created by changes in the Board's composition and developments in two cases – *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015) (“Browning-Ferris I”) and *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017) (“Hy-Brand”), and the issuance of contradictory NLRB rulemaking in 2020, 2023, and now 2026.

Current rule. The current operative NLRB joint employer standard, codified at 29 C.F.R. § 103.40 (effective February 27, 2026), requires that an entity possess and exercise substantial *direct and immediate control over essential terms and conditions of employment* such that it meaningfully affects matters relating to the employment relationship.⁷¹ The regulation defines essential terms and conditions of employment as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.⁷²

Substantial direct and immediate control means control that has a regular or continuous consequential effect, not merely sporadic, isolated, or *de minimis* control. The regulation further specifies that an entity does not exercise direct and immediate control over hours of work merely by establishing an enterprise's operating hours or by setting schedules for completion of a project, and does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform or where and when to perform it, rather than how to perform it. Indirect control, contractually reserved but unexercised authority, and control over matters other than essential terms are probative only to the extent they supplement and reinforce evidence of direct and immediate control.

⁷⁰ *Dunkin' Donuts Mid-Atl. Distribution Ctr., Inc. v. N.L.R.B.*, 363 F.3d 437 (D.C. Cir. 2004).

⁷¹ This regulation was issued on February 27, 2026, and withdrew the vacated 2023 joint-employer rule and amended its regulations to replace the vacated 2023 regulatory text with the text of the 2020 joint-employer rule, which has been the operative standard given a Texas district court's vacatur of the 2023 rule. *See* NLRB, Final Rule, *Withdrawal of 2023 Standard for Determining Joint Employer Status*, 91 Fed. Reg. 9707 (Feb. 27, 2026.)

⁷² 29 C.F.R. § 103.40.

Prior rules. A summary of the differences in those prior rules is useful given that a change in administrations going forward may include a return to the Obama and Biden-era changes. In *Browning Ferris I*, the NLRB held that it would consider whether (but not require that) a purported joint employer exercise direct and immediate control over employment terms and conditions in more than a limited and routine manner. It overruled the prior (and now current) joint employer standard⁷³ finding that it would be material whether the purported joint employer had reserved authority to control employment terms and conditions and exercised indirect control (such as use of an intermediary) over employment terms and conditions. Later rulemaking and decisions, including decisions on appeal, clarified that evidence of direct, indirect, or reserved control is relevant only where it bears on employees' essential terms and conditions of employment, and not on routine features of ordinary business-to-business contracting (e.g., contract terms that merely set objectives, basic ground rules, or monitor end results).

The prior rules did not require direct and immediate control over the terms and conditions of employment to create a joint employer relationship. Under those rules, the mere right to indirectly control terms and conditions of employment, even if never exercised, created a joint employer relationship. Possessing the regular or continuous power (regardless of whether this power is exercised) to hire, fire and discipline employees, supervise and direct the work/hours of employees, set the wages, hours, schedules, seniority and overtime; or assign work and determine the manner and method of work performance constitutes control by the joint employer.⁷⁴ Under this standard, advertisers and agencies arguably satisfied the definition of joint employer, as well as any third-party signatories that non-signatory advertisers or agencies used to produce commercials under the Contract.

Though this expanded “joint employer” definition is no longer in effect, SAG-AFTRA expressed their intentions to apply the expansive definition of “joint employer” to non-signatories when the rule was in effect. How the courts will enforce such claims is unclear, as the prior rule was contested in multiple venues and jurisdictions. But a return to the prior rules would, at a minimum, create uncertainty and potentially subject “countless entities to unprecedented new joint-bargaining obligations that most do not even know they have” and

⁷³ Overruling, for example, *TLI, Inc.*, 271 N.L.R.B. 798 (1984); *Laerco Transp.*, 269 N.L.R.B. 324 (1984); *Airborne Express*, 338 N.L.R.B. 597 (2002); *Flagstaff Med. Ctr.*, 357 N.L.R.B. No. 65, slip op at 9, n.23 (Aug. 26, 2011); *Goodyear Tire & Rubber Co.*, 312 N.L.R.B. 674, 677-78, 687-90 (1993); *AM Property Holding Corp.*, 350 N.L.R.B. 998 (2007).

⁷⁴ *DOL Final Rule on Joint Employer Status Under the FLSA* Effective April 27, 2020 (2020 NLRB Rule), at 29 C.F.R. § 103.40.

require joint employers to adhere to CBAs and/or the status quo ante post-contract expiration to which they are not signatories.

V. CONCLUSION

Withdrawing from multiemployer bargaining will not provide employers with immediate relief from pension fund or other costs associated with the Contracts. Rather, financial savings are typically best accomplished through the collective bargaining process itself. Moreover, when seeking givebacks or other economic relief, multiemployer bargaining committees, especially those that enjoy “most favored nation” contractual protections like the JPC does in the Contract, are generally better positioned to extract such concessions from unions than an outlier single employer engaged in its own negotiations with the union.