National FCA 2010 Annual Council
Leadership Council
Steve Burton – National FCA Legal Counsel
June 19, 2010 – New York City

Pension Plan Issues

35 percent contribution increase is decided upon by the trustees. The funding improvement plan indicated that the 35 percent is to remain as long as necessary. I believe the trustees would have to affirmatively vote to undue that 35 percent at some point before the required increase would be eliminated.

Non-construction industry employer: Partial withdrawal can occur if there is a decline of more than 70 percent in contribution base unit over a five year period. However, there is a special provision concerning partial withdrawal for the construction industry that, in effect, means that it may not actually be imposed.

Once we reach green zone, there is a level where unfunded liability may go away. However, there are plans in the green zone that still have withdrawal liability.

The Pension Protection Act gave trustees greater latitude to have overfunded pension plans. Under the previous law, the traditional response to an overfunded plan is one of the issues that caused plans to get into financial difficulty.

Patient Protection and Affordable Care Act (PPACA)

Because the administrative agencies charged with rulemaking authority under PPACA took the position that time was of the essence in the rulemaking phase, the PPACA regulations went straight to the final regulations stage, bypassing the proposed rulemaking and comments stage.

As union contractors, you had two global objectives: drive costs down, and level the playing field. Neither of the two objectives was met with the PPACA. Employers of 50 or less people do not have to provide health care. In terms of cost increases, it is estimated that the elimination of lifetime maximums alone may increase the cost of stop-loss coverage for self insured plans by 7 to 8 percent.

Non-Grandfathered Plans are plans established on or after March 24, 2010, and the plans must phase in their compliance over a six month period with a variety of requirements, including:

- Rules on deductible maximums and out of pocket maximums.
- Coverage of preventative services with no cost sharing between participant and fund.
- The establishment of an internal and external appeals process between the claimant and the fund.
- Provide for the same payment for emergency room services in and out of network.
- No requirement of prior authorization on obstetric and gynecological procedures.
- The plan must provide coverage for clinical trials for certain diseases.

The sole fact that your plan is collectively bargained provides very limited relief from the requirements of PPAC.

1. **Each time the carrier is changed, is the health care plan considered a new plan under the regulations?**

   Yes.

"Grandfathered Plans" are those in existence as of March 23, 2010. Grandfathered plans are insulated from some requirements of PPAC, but must make some changes in plan years beginning on or after October 1, 2010.

Health Care

For example, an annual maximum is something that says we will pay for X number of visits per year and nothing more after that. That limitation will be impacted for plan years after 1-1-2011. These will eventually be phased out. Initially, annual maximums may only be established for non-essential services.

In the regulations, Health and Human Services says the following issues may result in loss of grandfathered status:

- Even if you get identical coverage from a different insurance company, the regulations state that ends your grandfathered status. If your carrier issues a new certificate of insurance, it removes the plan of grandfathered status.
- They are soliciting comments as to whether no not a change in network should end grandfather status.

You can modify your plan in some respects without loss of grandfathered status. For example, the regs state that increases in fixed amount cost sharing (for example, deductible) will not cost the plan grandfathered status if the increase does not exceed the cost of medical inflation plus 15 percent. In terms of the cost of coverage, if the employer changes its relative contribution to premium cost by more than five percent, (expressed as a percentage) grandfathered status is gone. If you provide changes in benefits, grandfathered status may also be eliminated.

Over the long haul, it may be virtually impossible for most plans to maintain grandfathered status, because of the restrictive manner that grandfathered status is treated by the regs.

Plans that provide early retiree health care benefits, in order to be eligible for a special reimbursement, must contain costs by adopting provisions that the plan may not presently include. Once the reimbursement funds are exhausted, elimination of those cost containment strategies would likely result in the loss of grandfathered status.

2. How does 90-day waiting period affect multiemployer plans?

For plan years on or after January 1, 2014, an individual in a classification eligible for health coverage may no longer have a waiting period in excess of ninety days.

Merkley Amendment would have lowered the threshold and force most non-union companies to provide benefits, but the amendment failed.

Bottom line – costs will increase. There is not much you can do about this right now in the world of bargaining. Have an actuary make an assessment to see if a grandfathered status is important to maintain, in comparison to the traditional cost savings strategies that may result in loss of grandfathered status.

National FCA 2010 Annual Council
Leadership Council
Steve Burton – National FCA Legal Counsel
June 19, 2010 – New York City

Financial Accounting Standards Board (FASB) Rule

Withdrawal liability – normal industrial employer vs. construction industry employer rules
In the non-construction industry setting, the moment that a company goes out of business and no longer has an obligation to contribute, withdrawal liability immediately goes into effect.

In the construction industry, there are different rules. Because work in the construction industry is transient, withdrawal generally occurs only if you no longer have an obligation to contribute to the plan, and if you continue to perform the same work in the same geographic area covered by the collective bargaining agreement, within five years. If you simply shut your door and walk away you generally do not have withdrawal liability. This is the main difference between the normal industrial employer's liabilities compared to the construction industry liability.

However, in order to avail itself of this rule, the employer must actually be in the construction industry, and be contributing to the construction industry plan. Some employers do not, for example, because they have a high percentage of employees involved in shop fabrication, as compared to field erection or installation.

With respect to the disclosure rules contemplated by FASB, this presents an issue of unintended consequences. FASB wants complete transparency. FASB may require employers to disclose information that many people will have no idea as to its meaning or implications. It may seriously jeopardize a contractor's ability to obtain financing or bonding.

If FASB's proposal is eventually implemented, an assessment of anyone's potential withdrawal liability would likely include whether the employer is or is not in the construction industry, i.e. if you are part of the conduction industry and contributing to a construction industry plan. Accountants may be unwilling to express an opinion on that issue.

3. **Does lockout or strike affect withdrawal liability?**

   In most cases a strike or lockout does not result in withdrawal liability.

FASB Standards (continued)

The development of standards is generally favored by the law because they often serve public policy objectives. Because of that general favor that the law grants to the development of standards, successful challengers to standards have been few and far in between.

The National Labor Relations Act defines the construction industry to include employers primarily in the construction industry, performing work at the construction site, involving the construction, alteration, painting, and repair of a building. Upgrades or renovation is considered construction industry. Replacing components may not be considered work in the construction industry.

Davis-Bacon

PW is determined by a survey. DOL will regard survey responses as significant if they are 25 percent or more of the forms they send out. In calculating what rate [prevails, if a majority of these surveys reflect that 50 percent or more of the employers pay the same rate to the penny, that rate prevails. Submit those surveys every chance you possibly can, include the CBA agreement. Don't be bashful abut challenging surveys. There is an appeals process. Don't be bashful about flooding them with information because it is in your best interest to do so.

Allocation

In regards to pension funds, if your fund is anything less than green, preferably, you should not leave the contributions to the fund up to the allocations process. If you are subject to an alternate schedule that requires contribution increases, ideally, you should negotiate the amount of the pension contribution into the CBA, along with language that in the event needs any more money to that for the specific schedule that the union allocate that amount to bring the funding level up.

You can have withdrawal liability if you no longer have an obligation to contribute, and continue to perform work in the same geographic region. Therefore, the union could theoretically choose to allocate nothing to the plan and withdrawal liability therefore goes into effect.

4. **How can a prevailing rate differ from the union rate?**

   This occurs because prevailing wage is based on surveys, based on the weighted average of wages paid to employees. Furthermore, the prevailing wage rate does not take into consideration any industry or promotional funds.