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Withdrawal Liability Interest Rate Assumptions: The Battle Continues

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Since the 2018 decision in the *New York Times* case,[1] several employers have pursued court challenges to the actuarially assumed interest rate for calculating withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The interest rate determines the value of vested benefits, so this issue can have a major effect on the amount of a withdrawn employer's liability.

Recent appellate decisions favor employers, but a Pension Benefit Guaranty Corporation (PBGC) proposed rule would restore plan actuaries' prerogatives. The question is what balance to strike between protecting plans from opportunistic withdrawals and protecting employers from unfair withdrawal liability assessments. Litigation over that issue may continue even after the regulation is finalized.

BACKGROUND

A multiemployer defined benefit pension plan pools employer contributions, assets, and benefit obligations to provide economies of scale and portability of benefits for unionized employees. Employer withdrawals shift the funding burden to remaining employers, which destabilizes the plan and can eventually lead to plan insolvency and benefit reductions. MPPAA imposed withdrawal liability to neutralize incentives to withdraw and to shore up the plan's finances so it can continue to pay benefits of former employees including those of the withdrawn employer.

Withdrawal liability represents the withdrawn employer's allocable share of the plan's unfunded vested benefits the present value of vested benefits under the plan less the value of plan assets determined as of the end of the plan year before the employer withdraws. In determining present value, the plan may discount future benefits using the same interest rate as it does for minimum funding purposes for remaining employers.

In valuing benefits under terminated plans, PBGC uses a more conservative rate, based on the cost of closeout annuities. Multiemployer plan trustees, in valuing vested benefits for withdrawal liability purposes, often use a blend of the plan's funding rate and the closeout rate and sometimes use a pure closeout rate.

A lower interest rate produces a higher present value. For example, if plan assets are $100 million and vested benefits are $120 million using a 7.5% funding rate and $156 million using a 4.5% blended rate, unfunded vested benefits would increase from $20 million to $56 million at the lower rate, for a 180% increase.

The *New York Times* case was settled on appeal. But in the *Sofco*, *Energy West*, and *MNG* cases,[2] the U.S. Courts of Appeals for the Sixth, Ninth, and Dis-

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[1] *The New York Times Co. v. Newspaper and Mail Deliverers'-Publishers' Pension Fund*, 303 F. Supp. 3d 336 (S.D.N.Y. 2018), *appeals voluntarily dismissed*, Nos. 18-1140, 18-1408 (2d Cir. Oct. 16, 2019). The author was on the *amicus curiae* brief for the PBGC in the appeal in that case. Views expressed in this article are solely those of the author.

[2] *Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021), *UMWA 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730 (D.C. Cir. 2022), *pet. for cert. filed* (Feb. 3, 2023), and *GCIU-Employer Retirement*

trict of Columbia Circuits have held that an interest rate lower than the funding rate is not ''reasonable'' or cannot be considered the actuary's ''best estimate'' as required by MPPAA. The UMWA plan has asked the Supreme Court to review the D.C. Circuit's *Energy West* decision, which invalidated use of the PBGC closeout rate, and the GCIU plan may ask the Court to review the Ninth Circuit's *MNG* decision.

In response to these decisions, the PBGC has issued a proposed rule that would allow plans to use the funding rate, the PBGC closeout rate, or any rate in between, without regard to whether the rate is either reasonable or represents the actuary's best estimate.[3] PBGC is reviewing comments in support of and in opposition to the proposed rule.[4]

Meanwhile, in the *M&K* and *Ohio Magnetics* cases,[5] district judges in the District of Columbia have allowed a plan to lower the withdrawal liability interest rate for employers withdrawing in the year of the change while reserving on whether that rate may differ from the funding rate. The *M&K* decision is on appeal.[6]

RECENT APPELLATE DECISIONS

In the *Sofco*, *Energy West*, and *MNG* appeals, the plan actuary had assumed an interest rate that was lower than the plan's funding rate, either a blend of the plan's funding rate and PBGC closeout rates or pure PBGC closeout rates. PBGC closeout rates are based on annuity pricing surveys. Those rates are currently close to 5%, but they rarely topped 3% between 2015 and 2022.

Each plan's approach, according to testimony of the plan actuary and supporting actuarial experts, was reasonable, because withdrawal liability, like a plan termination, is a ''settlement'' as regards the departing employer. That is, the employer will not share in future experience, whether good or bad, and the plan will not have another chance to collect from the employer. Therefore, consistent with actual standards of practice, liabilities should be valued at a rate that reflects the cost of settling pension liabilities through the purchase of a group annuity.

But the courts were not persuaded, as each plan had a diversified portfolio and did not invest in annuities. *Sofco* held that a blended rate was unreasonable and rendered the assumptions (mainly interest and mortality) unreasonable ''in the aggregate,'' a criterion under both ERISA §4213(a)(1), which governs valuations, and ERISA §4221(a)(3)(B), which governs challenges to withdrawal liability valuations in mandatory arbitration.[7]

Energy West held that even if the closeout rate was reasonable, it could not represent the actuary's ''best estimate of anticipated experience under the plan,'' another §4213(a)(1) criterion, if it did not reflect expected earnings on the plan's actual investment mix. *MNG* reached the same conclusion, largely following the D.C. Circuit decision in *Energy West*.

Until *Energy West*, some considered ''best estimate'' a procedural rule only, based on the Supreme Court's decision in the *Concrete Pipe* case.[8] Addressing funding assumptions, the Court said that ERISA's legislative history ''suggests that the actuarial assumptions must be 'independently determined by an actuary,' and that it is 'inappropriate for an employer to substitute his judgment . . . for that of a qualified actuary' with respect to these assumptions.'' And the use of identical ''reasonable/best estimate'' language in the funding and withdrawal liability provisions ''tends to check the actuary's discretion,'' as using different assumptions ''could very well be attacked as presumptively unreasonable.''[9]

Some also read *Concrete Pipe* to mean that the rates must be identical. But *Energy West* holds only that they must be similar.[10]

PBGC'S PROPOSED RULE WOULD AUTHORIZE USE OF BLENDED OR CLOSEOUT RATES

In July 2021, PBGC issued an interim final rule on special financial assistance (SFA) to deeply troubled multiemployer defined benefit plans under the American Rescue Plan Act of 2021, including a requirement to use closeout assumptions for withdrawal liability purposes. In the preamble to the interim final rule, the

Fund v. MNG Enters., Inc., 51 F.4th 1092 (9th Cir. 2022), *reh'g denied* 2022 U.S. App. LEXIS (Dec. 6, 2022), *ext. of time for petition for cert. granted* (Feb. 14, 2023).

[3] *Actuarial Assumptions for Determining an Employer's Withdrawal Liability*, 87 Fed. Reg. 62,316 (Oct. 14, 2022).

[4] The public comments are available at https://www.pbgc.gov/prac/pg/other/guidance/pending-proposed-rules.

[5] *IAM Natl Pension Fund v. M&K Employee Solutions, LLC*, 2022 U.S. Dist. Lexis 176415 (D.D.C. Sept. 28, 2022), *appeal docketed*, No. 22-7157 (D.C. Cir. Nov. 18, 2022);*IAM Nat'l Pension Fund v. Ohio Magnetics*, 2023 U.S. Dist. LEXIS 19594 (D.D.C. Feb. 6, 2023) (consolidating three employer challenges), *appeal docketed*, No. 23-7028 (D.C. Cir. Mar. 9, 2023).

[6] *Id.*

[7] 29 U.S.C. §1393(a)(1), §1401(a)(3)(B).

[8] *Concrete Pipe & Prods. of Cal. Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993).

[9] 508 U.S. 602 at 633 and n.19.

[10] 39 F.4th 730 at 742–43. Congress amended the minimum funding requirements for multiemployer plans in 2006 to require that the assumptions be individually reasonable, while retaining the aggregate reasonableness standard for withdrawal liability purposes. *See id.*

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agency signaled that it was considering a proposed rule on withdrawal liability assumptions for non-SFA plans.[11]

In October 2022, PBGC issued that proposed rule, referencing in the preamble the challenges to withdrawal liability assumptions, including the *Sofco* and *Energy West* decisions.[12]

ERISA §4213(a)(2) authorizes such rules, as the *Sofco*, *Energy West* and *MNG* decisions noted.[13] Section 4213(a) provides:

Withdrawal liability under this part shall be determined by each plan on the basis of —

> (1) actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or
>
> (2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.[14]

PBGC's proposed rule would authorize use of the funding rate, closeout rates as in *Energy West* or *MNG*, or a blended rate as in *Sofco*, as long as other assumptions are individually reasonable and represent the actuary's best estimate of anticipated experience under the plan. Thus, for plans relying on paragraph (2) of §4213(a), and not paragraph (1), the interest assumption would not be subject to the reasonableness or best estimate requirements.[15]

In the preamble to the proposed rule, PBGC stated:

> Withdrawing employers will not be making future plan contributions, and ERISA accounts for this by requiring an employer to settle its share of the plan's unfunded liabilities. In the event of worse than expected investment performance or other actuarial experience following an employer's withdrawal, the plan cannot seek additional funds from that employer. Thus, a withdrawing employer shifts its share of investment risk and other risks to the plan and its remaining employers.[16]

The preamble continues:

> If a party promising a pension, as an employer participating in a multiemployer plan indirectly does, were to shift all investment risk, mortality risk, and other asset and liability risks to an annuity provider, that party must pay the premium amount necessary to fund the promised pension liability. Accordingly, it is reasonable to base the amount needed to settle the employer's share of the liability on the market price of settling pension liabilities by purchasing annuities from private insurers.[17]

The comment period closed December 13, 2022, with comments filed by the AFL-CIO, the American Academy of Actuaries, the ERISA Industry Council, the National Coordinating Committee for Multiemployer Plans, the U.S. Chamber of Commerce, several actuarial firms, and several multiemployer plans, among others. The unions, plans, and actuarial firms generally support the proposed rule, while the business groups do not.

DISTRICT COURTS APPROVE INTEREST RATE REDUCTION FOR EMPLOYERS WITHDRAWING IN YEAR OF ADOPTION

Two recent district court decisions in the District of Columbia, *M&K* and *Ohio Magnetics*, dealt with a related issue: when withdrawal liability assumptions must be adopted.[18]

The actuary for the IAM plan in both cases recommended, and the trustees approved, reducing the interest rate from 7.5% to 6.5% and adding an administrative expense load of up to 4% of vested benefits for withdrawal liability purposes. As noted, a lower interest assumption results in a higher value of liabilities; an administrative expense load further increases that value and, thus, withdrawal liability.

As is customary, the valuation was done as of the close of a plan year but was not completed until later. In January 2018, the trustees set the 6.5% interest assumption and authorized an expense load up to 4% to

[11] 86 Fed. Reg. 36,598, 36,611, n.18 (July 12, 2021). This provision was carried forward in the final rule. 87 Fed. Reg. 40,968, 41,021, *codified as* 29 C.F.R. §4262.16(g)(1).

[12] 87 Fed. Reg. 62,316, 62,317 n.3 (Oct. 14, 2022).

[13] 15 F.4th 407 at 422 n.2 (''We presume that the PBGC may displace §1393(a)(1)'s requirements by regulation.''); 39 F.4th 730 at 740 n.9 (''Under the MPPAA, the only alternative to the Best Estimate Requirement for calculating withdrawal liability is a PBGC regulation prescribing actuarial assumptions and methods. 29 U.S.C. §1393(a)(2).''); 51 F.4th 1092 at 1098 n.2 (''Section 1393(a)(2) permits the actuary to use ''actuarial assumptions and methods set forth in the corporation's regulations . . . . GCIU must justify its actuary's assumptions under subsection (a)(1) which, as indicated by the disjunctive 'or' in that provision, is a separate path with separate requirements. The PBGC's proposed regulation, therefore, has no bearing on the question presented here; nor do we express any view on the validity of the proposed regulation.'').

[14] 29 U.S.C. §1393(a).

[15] Proposed 29 C.F.R. §4213.11(c), 87 Fed. Reg. 62,322.

[16] 87 Fed. Reg. 62,316 at 62,317–18.

[17] *Id.* at 62,318.

[18] *See* n.5.

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value vested benefits as of December 31, 2017, to be applied to 2018 withdrawals. The actuary's report was not issued until April 2019, at which time the expense load was set at 3.5%. Each employer withdrew between April and December 2018. The IAM plan applied the new assumptions to those withdrawals, which the employers claimed was impermissibly ''retroactive.''

In each case, that threshold issue was submitted to arbitration, reserving the question whether withdrawal liability assumptions may differ from funding assumptions. In each case, the arbitrator held for the employer, but the district court reversed.

The employers asserted that actuarial assumptions must roll over from one year to the next (in this case, from 2016 to 2017) unless they are changed before the end of the plan year (in this case, December 31, 2017). The IAM plan asserted that assumptions not only may be set after the plan year-end but may take account of facts that exist at the time the valuation is completed.

In each case, the district court rejected both positions, holding that a valuation may, and as a practical matter must, be completed after the plan year-end, but may take into account only facts in existence ''as of'' that measurement date.

Judge Lamberth in *M&K* and Judge Moss in *Ohio Magnetics* reasoned that ERISA §4201 defines withdrawal liability as the allocable share of unfunded vested benefits determined under §4211; §4211(c) requires allocation of unfunded vested benefits ''as of'' the last day of the plan year before withdrawal; and §4213(a)(1) requires that actuarial assumptions be reasonable in the aggregate, taking into account the plan's experience, and represent the actuary's best estimate of anticipated experience under the plan.[19] They explained that ''as of'' connotes a ''snapshot,'' citing the D.C. Circuit's decision in the *Classic Coal* case, and agreed with the Second Circuit's decision in the *Metz* case that the last day of the preceding plan year (in this case, December 18, 2017) is the measurement date.[20]

The judges disagreed with the Second Circuit, however, on when the valuation must be done. The Second Circuit held that valuation assumptions roll over from year to year unless they are changed before year-end, and that any change cannot be applied to an employer that withdraws before the change is adopted.

The judges noted that rolled-over assumptions would not take into account plan experience as of the measurement date, and would not represent the actuary's best estimate of anticipated experience as of that date. That might, as the *Ohio Magnetics* court said, include a shock to the economy as occurred in 1929. So, as a practical matter, the actuary must wait until the year ends for all relevant facts to be known, and she must then take some time to analyze them and apply her professional judgment.

Finally, the judges held that a valuation done after the valuation date is not ''retroactive'' in any objectionable sense, rejecting the Second Circuit's reliance on ERISA §4214(a), which prohibits retroactive application of plan rules and amendments.[21] They reasoned that Congress presumably knew the difference between plan rules and actuarial assumptions, so the failure to preclude retroactive application of the latter presumably was intentional. In any event, the employers withdrew after the decision on plan year 2018 assumptions was made.

To be sure, Judge Moss noted in *Ohio Magnetics*, Congress was concerned about unfair withdrawal liability assessments. But the aggregate ''reasonable[ness]'' and ''best estimate'' criteria are the main protections. As the Supreme Court recognized in *Concrete Pipe*, actuaries are ''apparently unbiased professionals'' whose legal and professional obligations moderate any supposed inclination to ''come down hard'' on withdrawn employers.[22] And the ''best estimate'' criterion, as construed by the D.C. Circuit in *Energy West*, protects against both trustee interference and actuarial manipulation.

LEGAL CHALLENGES LIKELY TO CONTINUE

Whether or not the PBGC rule is finalized as proposed, employers will likely continue to challenge withdrawal liability interest assumptions that depart from funding assumptions. For example, some have suggested that the rule does not address the arbitral review standard of §4221(a)(3), which includes a ''plan experience'' component.[23] If employers succeed, lower withdrawal liability assessments could create a rush for the door, which MPPAA was meant to prevent. In any case, because of the leveraging effect of a lower interest rate, a legal challenge may be worth the expense.

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[19] 29 U.S.C. §1381, §1391(c), §1393(a)(1).

[20] *Combs v. Classic Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991); *Nat'l Retirement Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 136 (2d Cir. 2020).

[21] 29 U.S.C. §1394(a).

[22] 508 U.S. 602 at 632, 635.

[23] *See* Petition for Writ of Certiorari at 25, *UMWA 1974 Pension Plan v. Energy West Mining Co.*, No. 22-742 (Feb. 3, 2023) (explaining why proposed rule does not moot the issue).

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Congress's express grant of rulemaking authority may be enough for a court to uphold the PBGC rule under the *Chevron* doctrine.[24]

And though support for *Chevron* is waning,[25] the Administrative Procedure Act (APA) requires a court to uphold a rule if it is not arbitrary and capricious (5 U.S.C. §706(2)(a)). The Supreme Court has said: "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."[26] On this basis, the PBGC rule may be upheld at least in a facial challenge.[27]

[24] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)

[25] See, e.g., *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. ___, 140 S. Ct. 1462, 1482 (2020) (Thomas and Gorsuch, JJ., dissenting).

[26] *FCC v. Prometheus Radio Project*, 592 U.S. ___, 141 S. Ct. 1150, 1158 (2021).

[27] Given the express rulemaking delegation, this does not involve a "major question" reserved for Congress under *West Virginia v. EPA*, 597 U.S. __ (2022).

It may be more difficult for a plan with a diversified portfolio than a plan that invests largely in fixed-income securities to justify the use of closeout rates. On the other hand, a court would be less able to disregard expert actuarial opinion in favor of the "settlement" approach if it were grounded in a rule with the force of law and not just in actuarial standards of practice.

As a policy matter, a lower rate may be needed to preserve disincentives to withdraw. But a lower rate may also be seen as punitive. Given Congress's express delegation of rulemaking authority, striking that balance is for PBGC in the first instance, and the APA does not authorize judicial review of agencies' policy judgments.

WHAT TO WATCH

Practitioners should keep an eye on the PBGC proposed withdrawal liability valuation rule, the *certiorari* petition in *Energy West,* a possible *certiorari* petition in *MNG*, the appeals in *M&K* and *Ohio Magnetics*. But unless the Supreme Court grants *certiorari* and reverses in *Energy West* or *MNG*, legal challenges will continue and withdrawal liability valuations will remain vulnerable.

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