

# Advanced Withdrawal Liability Topics

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# Overview

- Using separate assumptions for funding and withdrawal liability calculations
- Complete/partial withdrawal liability
- Trustee options
- New proposed PBGC regulations under ERISA §4213 and §4262
- Court cases and legal issues
- Accounting and auditing issues for funds and contributing employers

# What Is Withdrawal Liability?

- Employer's share of Fund's **Unfunded Vested Benefits** ("UVBs")
  - triggered by complete, partial or mass withdrawal of Employers
- Continuing contributions for a "withdrawn" Employer for a period which is dependent upon Employer's allocated UVBs and the Employer's contribution history

## Determination and Collection of Withdrawal Liability (WL)—ERISA §4202

- When an Employer withdraws from a multiemployer defined benefit pension plan, the Trustees shall:
  - Determine the amount of the Employer's WL;
  - Notify the Employer of the amount, and
  - Collect the WL from the Employer.

# Complete Withdrawal

- Occurs when an employer:
  - Permanently ceases to have an obligation to contribute under the plan, or
  - Permanently ceases all covered operations under the plan.
- Exceptions
  - Building/construction industry: project-by-project
  - Entertainment industry: project-by-project
  - Long/short-haul trucking, household moving, warehousing industry if:
    - PBGC asserts substantial damage; or
    - Employer fails to post bond = 50% of its withdrawal liability.

# Partial Withdrawal

- 70% contribution decline, or
- Partial cessation of the employer's contribution obligation.

# Partial Withdrawal: 70% Decline

- Three-year testing period: The plan year and the immediately preceding two plan years
- During each plan year in the three-year testing period the employer's contribution base units ("CBUs") do not exceed 30% of the employer's CBUs for the high base year.
- CBU for high base year: Average CBU for the two plan years for which the employer's CBUs were the highest within the five plan years immediately preceding the beginning of the three-year testing period.
- EXCEPTION: Retail-food industry
  - The plan may be amended to trigger a partial withdrawal via 35% percent contribution decline (instead of a 70% percent contribution decline).
  - Provide rules for the equitable reduction of withdrawal liability in any case in which the number of the plan's CBUs, in the two plan years following the plan year of withdrawal of the employer, is higher than such number immediately after the withdrawal.

# Partial Withdrawal: 70% Decline

2014	5,133	Partial withdrawal in . . . ?							
2015	5,123						2021	2022	
2016	6,123	Highest 2 of past 5 yrs of CBUs 5,133 + 6,123 = 11,256							
2017	5,113								
2018	4,123	11,256 / 2 = 5,628							
2019	3,123	5,628 * .3 = <u>1,688</u>							
2020	1,523						1,688		
2021	1,123						NO	1,687	
2022	1,023						YES	YES	
2023	1,003						YES	YES	
							NO	YES	
								YES	



# Partial Withdrawal: Partial Cessation

- “CBA take-out”—Either:
  - Employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements (CBAs”) under which the employer has been obligated to contribute but continues to perform work in the jurisdiction of the CBA of the type for which contributions were previously required; or
  - Employer transfers such work to another location or to an entity or entities owned or controlled by the employer
- “Facility take-out”—An employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities but continues to perform work at the facility of the type for which the obligation to contribute ceased.

# Partial Withdrawal Liability Amount

- (1) x (2), where:
  - (1) is the amount of UVBs allocated under 4211, adjusted by 4209 de minimis, determined as if the employer had withdrawn from the plan in a complete withdrawal on the date of the partial withdrawal; or
  - In the case of a 70%/35%-decline partial withdrawal on the last day of the first plan year in the three-year testing period; and
  - (2) is 1 minus a fraction [partial-withdrawal fraction]:
- Numerator = Employer's CBUs for the plan year following the plan year in which the partial withdrawal occurs, and
- Denominator = Average CBUs for:
  - Five plan years immediately preceding plan year in which the partial withdrawal occurs, or
  - In the case of a 70%/35%-decline partial withdrawal, five plan years immediately preceding the beginning of the three-year testing period.

# Partial Withdrawal: Partial Cessation

Year	CBU 1	CBU 2
2015	100	10,000
2016	100	10,000
2017	100	10,000
2018	100	10,000
2019	100	10,000
2020	100	10,000
2021	0	10,000
2022	0	10,000
2023	0	10,000

Example 1: Facility take-out end of 2020  
Complete WDL – 10,000,000

Numerator – 10,000 [2021]  
Denominator – 10,100 [avg. 2015-2019]

Partial Fraction:  $1 - \frac{10,000}{10,100}$

0.00990099

Partial WDL: 99,010

# Partial Withdrawal: Partial Cessation

Year	CBU 1	CBU 2
2015	100	10,000
2016	100	10,000
2017	100	10,000
2018	100	10,000
2019	100	10,000
2020	100	10,000
2021	0	5,000
2022	0	10,000
2023	0	10,000

Example 2: CBA take-out end of 2020  
Complete WDL – 10,000,000

Numerator – 5,000 [2021]

Denominator – 10,100 [avg. 2015-2019]

Partial Fraction:  $1 - \frac{5,000}{10,100}$   
0.50495050

Partial WDL: 5,049,505

# Trustee Options, Via Amendment

- Building/construction exception
  - Amend that it applies
- Entertainment-industry exception
  - Amend that it doesn't apply
- *De minimis* rule: automatic \$50,000 deduction
  - Amend to \$100,000 deduction
- “Free look”: avoid withdrawal liability if small employer contributing for < five years

# Trustee Options, Via Amendment

- Allocation of employer's UVBs
  - Simulated via contribution ratios
    - 20 pools (presumptive, default); or
    - 1 pool
  - Very intensive assignment of employees' service, or employer's contributions or share of assets
    - Direct attribution
  - Other: individually designed and PBGC-approved
    - *e.g.*, Two-pool (legacy/new pool)

# Trustee Options, Various

- Partial withdrawal
  - Retail-food industry 35% decline, via amendment
- Payment schedule
  - Frequency of payments = Quarterly
    - May be amended to other intervals
      - *e.g.*, Monthly

# ERISA on Assumptions

- ERISA §4213(a) . . . 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 [PBGC's] regulations for purposes of determining an employer's withdrawal liability.



# ERISA on Challenges to Withdrawal Liability

- ERISA §4221(a)(3)(B) . . . The determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that:
  - 1) The actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
  - 2) The plan's actuary made a significant error in applying the actuarial assumptions or methods.

# Proposed ERISA §4213 Regulations

- Long-awaited proposed regulations from PBGC
  - Published in Federal Register on October 14, 2022
- Comment period
  - Originally 30 days
    - Through November 14, 2022
  - Extended another 30 days
    - Through December 13, 2022

# Proposed ERISA §4213 Regulations

- ERISA §4213.11 Section 4213(a)(2) assumptions
  - a) **In general.** Withdrawal liability may be determined using actuarial assumptions and methods that satisfy the requirements of this section. Such actuarial assumptions and methods need not satisfy any other requirement under title IV of ERISA.
  - b) **Interest assumption**
    - 1) General rule. To satisfy the requirements of this section, the single effective interest rate for the interest assumption used to determine the present value of the plan's liabilities must be the rate in paragraph (b)(2) of this section, the rate in paragraph (b)(3) of this section, or a rate between those two rates.

# Proposed ERISA §4213 Regulations

- 2) The rate in this paragraph (b)(2) is the single effective interest rate for the interest assumption prescribed in §4044.52 of this chapter for the date as of which withdrawal liability is determined.
- 3) The rate in this paragraph (b)(3) is the single effective interest rate for the interest assumption under section 304(b)(6) of ERISA for the plan year within which the date in paragraph (b)(2) of this section falls.

# Proposed ERISA §4213 Regulations

- c) Other Assumptions. The assumptions and methods (other than the interest assumption) satisfy the requirements of this section if:
  - 1) Each is reasonable (taking into account the experience of the plan and reasonable expectations), and
  - 2) In combination, they offer the actuary's best estimate of anticipated experience under the plan.

## §4213 Proposed Regs: Comments From the Multiemployer Community

- Who commented?
  - Actuarial firms (and actuaries)
  - Advocacy groups
  - Associations
  - Employers
  - Plans
  - Unions
  - Attorneys
  - Various individuals

# Proposed Reg Comments: Impact

- Regs “clarify” use of 4044 rates, long-term funding or anything in between
  - Creates huge UVB increase
- EXAMPLE for an employer whose fund intensity is 5%
- Assumed rate of return on long-term funding basis
  - Assets = \$664,370,000
  - Vested-Benefit Liability = \$703,110,000
  - Unfunded Vested Benefits = \$38,740,000
  - Withdrawal liability = \$1,937,000 [= 5% of \$38,740,000]
- Assumed rate of return on blended funding/PBGC basis
  - Assets = \$664,370,000
  - Vested-Benefit Liability = \$988,500,000 **41% higher**
  - Unfunded Vested Benefits = \$324,130,000 **737% higher!**
  - Withdrawal liability = \$16,206,500 [= 5% of \$324,130,000] **737% higher!**

# Determinations of Withdrawal Liability for Pension Funds Receiving Special Financial Assistance [SFA]

- PBGC published interim final rule [“IFR”] July 9, 2021
- PBGC published final rule July 8, 2022 setting forth:
  - Requirements for special financial assistance applications
  - And related restrictions and conditions pursuant to the American Rescue Plan Act of 2021
- Effective date for final rule is 30 days later = August 7, 2022
- 4262.16 = Conditions for special financial assistance
- 4262.16(g) = Withdrawal-liability determination



## Determinations of Withdrawal Liability for Pension Funds Receiving SFA

- Interest assumption
- Must use mass-withdrawal PBGC rates
  - Beginning with plan year in which plan first receives SFA;
  - Through the LATER OF:
    - a) End of 10th following plan year; OR
    - b) IF most recent SFA received was determined under IFR.
  - THEN plan year of projected SFA exhaustion under IFR interest
  - ELSE plan year of projected SFA exhaustion under final rule

## Determinations of Withdrawal Liability for Pension Funds Receiving SFA

- Phase-in of SFA
- [Note: SFA is to be ignored for all funding calculations]
- Applicable
  - To plans:
    - Receiving SFA or supplemented-application SFA under final rule.
  - When:
    - First measurement after first SFA payment year through
    - Exhaustion year.

# Withdrawal Liability: Large Settlements

- PBGC must approve during SFA coverage period
- IF both exceed \$50 million:
  - UVBs allocated; and
  - Present value of payment schedule.
- PBGC will approve if plan demonstrates that waiver best serves all stakeholders

# Recent Withdrawal Liability Cases

- *UMWA 1974 Pension Fund v. Energy West Mining Co.*, 39 F.4th 730 (DC Cir. 7/18/22)
  - D.C. Circuit Court of Appeals overturned District Court grant of summary judgment for Pension Fund that used a “risk-free” discount rate to determine withdrawal liability instead of Pension Fund’s actual performance.
    - The statutory language—*Not* the Actuarial Standards of Practice—is the law and controlling on the question of the assumptions required to be used in the withdrawal liability calculation.

# Recent Withdrawal Liability Cases

- *GCIU-Employers Retirement Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 10/28/22)
  - Following a withdrawal liability assessment for a partial and complete withdrawal, the Fund appealed the Arbitrator and District Court's decision to reject the Fund's use of the PBGC Interest Rate. The Court upheld the District Court, finding that:
    - The discount rate assumption cannot be divorced from the plan's anticipated investment returns, as assumptions must meet the statute's "best estimate" standard.

# Recent Withdrawal Liability Cases

- *Employees' Retirement Plan of the National Education Association et al v. Clark County Education Association*, No. 1:20-cv-03443 (D.D.C., 2/27/2023) affm'd after remand (D.D.C. 3/28/24)
  - Arbitrator found in favor of employer challenge to use of 5% interest rate rather than the 7.3% funding rate.
  - District Court rejected the Fund's use of 5% interest rate following ruling of *Energy West*, but remanded case to arbitrator to determine relief, finding that:

# Recent Withdrawal Liability Cases

- Although risk was a permissible consideration, Fund could **not** use 5%, because actuary based that rate only on the expected returns of 40% of the Fund's assets, and therefore, it was not the actuary's best estimated rate; must consider all of the Fund's investments;
- That ERISA §4221(a)(3)(B)(i) must be read in conjunction with ERISA §4213, and that "best estimate" is still required by ERISA §4221(a)(3)(B)(i) because it requires assumptions to be tied to experience and expectations of the Fund;
- But the *Energy West* decision does not prevent a Fund from using different rates for withdrawal liability and funding so long as the rates are similar, and both based on experience and expectations of the Fund.

# Recent Withdrawal Liability Cases

- *Dycom Industries v. Pension, Hospitalization & Benefit Plan of the Electrical Industry*, (S.D.N.Y. 3/24/23) affm'd 98 F.4th 397( 2nd Cir., 2024)
  - Under the Building and Construction Industry Exemption, an employer is deemed to have withdrawn from a plan only if it ceases to have an obligation to contribute to the plan but continues to perform work of the type for which contributions were required in the trade and geographic jurisdiction of the collective bargaining agreement pursuant to which contributions were made within the five-year period following the cessation of the obligation to contribute.



## Recent Withdrawal Liability Cases

- The term “building and construction industry” is not defined in MPPAA.
- Most courts have held that the term should be interpreted under MPPAA according to the case law under § 8(f) of the National Labor Relations Act.
- The National Labor Relations Board has generally defined the term as “subsum[ing] the provision of labor whereby materials and constituent parts may be combined on the building site to form, make[,] or build a structure.”

# Recent Withdrawal Liability Cases

- The Arbitrator sided with the Fund, relying heavily on the fact that:
  - The employer almost never worked on new construction projects; rather it provided installation where residences had been prewired
  - The employer never obtained building permits for the work performed
  - The employees did not have any qualifications or training to be a licensed/journeyman electrician
  - The employees were not paid the same rate as construction journeyman electricians.

# Recent Withdrawal Liability Cases

- *Trustees of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 22-7157 (D.C. Cir. Feb. 9, 2024)
  - IAM National Pension Fund assessed withdrawal liability against two employers for a 2018 withdrawal from the plan. As of December 31, 2017 (the measurement date), the plan was using an interest rate of 7.5% that had been selected in November 2017.
  - After a meeting in late January 2018, the actuary selected a new interest rate assumption of 6.5%—to be used retroactively. This change in the interest rate assumption caused the employers to be assessed a significantly higher withdrawal liability.

# Recent Withdrawal Liability Cases

- *Trustees of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, No. 22-7157 (D.C. Cir. Feb. 9, 2024)
  - The D.C. Circuit, affirming the District Court, found that the plan actuary's interest rate assumption may be changed retroactively after the measurement date, even if it is based on information received after the measurement date so long as the information is "as of" the measurement date.
  - Split from the Second Circuit, causing uncertainty in future withdrawal liability disputes by putting at issue how, why, and when a plan actuary changes such a crucial assumption, and whether information provided to a plan actuary after the year-end measurement date was influenced by knowledge available after the measurement date.

## Recent Withdrawal Liability Cases

- *Bulk Transport Corp. v. Teamsters Union 142 Pension Fund*, No.23-1563 (7th Cir. 3/22/24)
  - Bulk Transport and Teamsters had multiple CBA's over the years. Attached to the main CBA was an addendum, "Steel Mill Operation Work"
  - Bulk Transport obtained a new type of work and Teamsters verbally demanded that those workers be paid under the Addendum, although not within "Steel Mill Operations" description of work. Bulk Transport complied.

# Recent Withdrawal Liability Cases

- *Bulk Transport Corp. v. Teamsters Union 142 Pension Fund*, No.23-1563 (7th Cir. 3/22/24)
  - Bulk Transport lost the work and was then assessed \$2 million in withdrawal liability, arguing course of dealing bound Bulk Transport to the CBA
  - 7th Circuit Court of Appeals overturned U.S. District Court and held withdrawal liability could not be assessed because terms of pension contributions cannot be changed orally. The precise terms must be in writing, and having been reduced to writing, must be enforced without consideration of equitable arguments.

# Recent Withdrawal Liability Cases

- *Allied Painting & Decorating, Inc. v. Int'l Painters & Allied Trades Industry Pension Fund*, 107 F. 4th 10 (3rd Cir. 2024)
  - Pension Fund alleged that the Company effectuated a withdrawal in 2005, but did not make a withdrawal demand until 2017—12 years later
  - Third Circuit held that “the soon as practicable” requirement was an independent statutory requirement and it was not met, and the assessment was invalid.
  - Third Circuit rejected the applicability of an equitable laches defense, holding that the defendant had no duty to show that it has been prejudiced only that there was an unreasonable delay.

## Accounting and Auditing Issues for Pension Fund

- FASB ASC 960-310-25-3A states that the plan should record the receivable, net of any allowance for an amount deemed uncollectible when entitlement has been determined.
- The assessed withdrawal liability income is generally shown as a separate line item in the statement of changes in net assets available for benefits.



# Accounting and Auditing Issues for Pension Fund

- Notes to financial statements include:
  - A general description of the assessed withdrawal liability
  - The assessed amount
  - The general terms and conditions of payment
  - The allowance for doubtful accounts, even in the likelihood of collection is remote and when the assessed amount is formally written off
  - Additionally, the number of employers that were assessed a withdrawal liability during the current period and the number of employers with assessed withdrawal liabilities may be disclosed.

## Financial Accounting Standards Board Requirements for Contributing Employers

- FASB standards (adopted July 27, 2011) do NOT change old standards with respect to contingencies (Topic 450). Withdrawal liability reported on financial statement as:
  - “Probable”—Likely to occur in the next year—  
Shown on financial statement
  - “Reasonably probable”—Calculated amount shown only in footnote/below the line, or
  - “Remotely probable”—No disclosure.

# Financial Accounting Standards Board Requirements for Contributing Employers

- Contributing employers are required to disclose within Notes to Financial Statement the following information:
  - Name of Pension Fund
  - EIN/Pension Plan Number
  - Pension Protection Act Zone Status for Years Presented
  - FIP/RP Status Pending/Implemented
  - Employer Contributions for Years Presented
  - Surcharge Imposed?
  - Expiration Date of CBA and a description of the Employer's participation in multiemployer plans
  - A description of any changes affecting comparability
  - Additional information for foreign plans.

# Financial Accounting Standards Board Requirements for Contributing Employers

Pension Fund	EIN/Pension Plan Number	Pension Protection Act Zone Status		FIP/FP Status Pending/Implemented	Contributions of (Company Name Here)			Surcharge Imposed	Expiration Date of Collective Bargaining Agreement
		2010	2009		2010	2009	2008		
Plans for which plan financial information is not publicly available outside (Company Name Here) financial statements									
Other Funds									

Total Contributions: \$                 -   \$                 -   \$                 -

# Key Takeaways

- Proposed ERISA Section 4213 Regulations are a long-awaited piece on the calculation of Withdrawal Liability, but they have raised many issues with the multiemployer professional community.
- Pension funds that receive special financial assistance will need to comply with several new restrictions (and attest to doing so), including the phase-in of special financial assistance received over each of several subsequent plan years when determining a contributing employer's withdrawal liability.

# Key Takeaways

- Recent Federal cases, both predating and after the release of the Proposed Regulations, have still required the Fund's Actuary to satisfy a best estimate standard of anticipated experience of the Fund to set the discount rate for Withdrawal Liability. It is not clear how these opinions will change when Regulations become final.
- FASB Requirements have become a significant factor in the valuation and sale of signatory contractors as possible withdrawal liability and the threat of successor liability are brought to the forefront.

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