Withdrawal Liability Actuarial Assumptions – Did New Proposed PBGC Regs Get it Wrong?

CHARLES C. SHULMAN, ESQ.[1]
Teaneck, NJ
201-357-0577
cshulman@ebeclaw.com

Actuarial interest rate assumptions for Employee Retirement Income Security Act (ERISA) withdrawal liability, which are relevant for purposes of determining an employer withdrawal liability for withdrawing from a multiemployer pension plan are to be made by the plan actuary using reasonable actuarial interest rate assumptions (which may sometimes be termination rate assumptions or ongoing plan assumptions or a combination depending on what is reasonable for the plan) under ERISA § 4213(a)(1). However, notwithstanding the above, once Pension Benefit Guaranty Corporation (PBGC) regulations under ERISA § 4213(a)(2) are issued; the plan actuary must instead comply with such regulations in determining the actuarial interest rate assumptions. Several recent federal courts have ruled that ongoing minimum funding rates should have been used in those cases by the plan actuary in determining withdrawal liability, under ERISA § 4213 (a) (1). However, PBGC regulations under § 4213(a)(2) have just been issued in proposed form, and once finalized, plan actuaries can use plan termination interest rate assumptions, which, according to the PBGC, will apparently be deemed to comply with the actuarial assumption requirements, thus shielding the plans from legal challenges regarding their

choice of the actuarial interest rate assumptions. But this is a difficult argument to make, since ERISA § 4213(a)(1) does require reasonable actuarial assumptions that can be challenged in court, and the newly proposed regulations under ERISA § 4213(a)(2) give the plan actuary a permitted range of assumptions, (i.e., plan termination assumptions or ongoing funding assumptions or anything in between) a court could logically read these regulations and § 4213(a)(2) to require that when an actuary chooses an interest rate in the permitted range, it must be a reasonable choice.

Under ERISA § 4201, withdrawal liability is imposed on an employer that withdraws from an underfunded multiemployer pension plan based on the withdrawing employer's allocated share of the plan's unfunded vested benefits (UVBs) which are the value of vested benefits minus the value of plan assets, as of the last day of the preceding plan year.

1. ACTUARIAL INTEREST RATE ASSUMPTIONS TO BE REASONABLE UNDER **ERISA § 4213(A)** *BASED ON (I) THE ACTUARY'S BEST ESTIMATE OF ANTICIPATED EXPERIENCE UNDER THE PLAN OR (II) ONCE PBGC REGULATIONS ARE FINALIZED FOLLOWING THE ACTUARIAL* **INTEREST RATE** *ASSUMPTIONS SET FORTH IN THE PBGC REGULATIONS*

ERISA § 4213(a) sets forth rules regarding the actuarial interest rate assumptions to be used in determining the UVBs of the multiemployer pension plan for purposes of determining withdrawal liability, as follows:

(i) If the PBGC has not yet issued regulations regarding the actuarial interest rate assumptions to be used in determining the plan's UVBs, then the plan actuary may use actuarial interest rate assumptions that are in the aggregate reasonable (based on the experience of the plan and reasonable expectations), and which offer the actuary's "best estimate" of anticipated experience under the plan.

(ii) If the PBGC has issued final regulations regarding the actuarial interest rate assumptions to be used in determining a plan's UVBs, the actuary must use the actuarial assumptions and methods set forth in such PBGC regulations.

Until recently, the PBGC had not issued any regulations regarding the actuarial interest rate assumptions to be used in determining withdrawal liability. This left open the issue in each case as to whether the multiemployer plan's actuary has used reasonable actuarial assumptions. However, on October 14, 2022, the PBGC issued proposed regulations that once finalized will determine the actuarial interest rate assumptions to be used in determining withdrawal liability.

2. METHODS USED BY ACTUARIES PRIOR TO PBGC REGULATIONS

In practice, prior to final PBGC regulations, actuaries have various ways of measuring unfunded vested benefits. For a withdrawal of a participating employer in an ongoing multiemployer pension plan, it may be reasonable to use the plan's ongoing "minimum funding" assumptions, which are typically determined at a higher interest rate, thus yielding a lower withdrawal liability, and being more favorable to withdrawing employers. (Of course, if a multiemployer plan is terminating in a mass termination, the PBGC termination rate assumptions are to be used.) On the other hand, actuaries sometimes use PBGC plan termination assumptions (or insurance company annuity close-out rates, which are substantially the same as plan termination assumptions), which uses a lower interest rate, thus yielding a higher withdrawal liability and being more favorable to the multiemployer pension fund. Use of the termination rate assumptions is apparently based on the theory that for the employer permanently withdrawing from the multiemployer plan its applicable share should be viewed in terms of a termination of the plan that is likely to occur in the future.

3. USING ONGOING PLAN ASSUMPTIONS LEADS TO BACKLOADING: LAST MAN STANDING PROBLEM

Although a multiemployer pension plan generally does not terminate when a withdrawal of a participating employer takes place, it can be argued that withdrawal liability is different than funding an ongoing plan because it does not represent an ongoing funding relationship but rather a one-time transfer of risk from the withdrawing employer to the continuing employers and participants in the multiemployer plan. Using ongoing funding rates would likely have the result of backloading liability, with withdrawal liability obligations to be largest for those who withdraw from the fund the latest (or for those participating employers who are still participating when the multiemployer plan terminates in a mass withdrawal).

This disproportionate liability on employers that remain in the multiemployer plan after most other employers have withdrawn (the last man standing) can cause disproportionate backloading of liabilities. This is further exacerbated when some of the participating employers have gone into bankruptcy.

4. RECENT CASE-LAW CHALLENGING THE PLAN ACTUARIES' ASSUMPTIONS REGARDING WITHDRAWAL LIABILITY

Several recent federal cases have sided with withdrawing employers in challenging the plan actuary's assumptions when the actuary did not use ongoing minimum funding assumptions.

D.C. Circuit Rules in a 2022 Case for the Withdrawing Employer that Ongoing Funding Obligations Should Have Been Used. In a 2022 case, the D.C. Circuit held that where the multiemployer fund actuary used plan termination interest assumption of 2.7–2.8 percent (yielding a very high withdrawal liability) even though the actuary was using a 7.5 percent assumption (the minimum funding), the plan termination assumptions must represent the actuary's best estimate of anticipated experience under the plan, and therefore the withdrawal liability calculations were not reasonable. *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Company*, 39 F.4th 730 (D.C. Cir. 2022). In that case, a multiemployer pension fund brought action under ERISA against a withdrawing employer seeking to enforce arbitrator's award upholding the pension fund actuary's calculation of withdrawal liability through use of a risk-free termination discount rate. The D.C. Circuit overturned the arbitrator's ruling since the termination assumption used by plan actuary and which was not chosen based on the plan's projected performance, was not reasonable and instead the actuary should have considered the pension funding discount rate assumptions taking into account anticipated projected investment returns as applicable for pension minimum funding.

Two Cases Challenging a Blended Rate and *Holding Ongoing Minimum Funding Rate was Appropriate*. Some actuaries use the blend of insurance company annuity close-out rates and plan funding assumptions. For example, the "Segal Blend" method determines a plan's unfunded vested benefits for withdrawal liability based on a blend of (i) the insurance company annuity purchase rates used by the PBGC for plan terminations; and (ii) the actuary's assumption of future investment returns used for determining the plan funding requirements. Although the multiemployer plan is generally not terminating in a withdrawal liability case, withdrawal liability is

different than funding an ongoing plan because it represented not an ongoing funding relationship but a one-time transfer of risk from the withdrawing employer to the continuing employers and participants.

In a 2021 case, *Sofco Erectors, Inc. v. Trustees of the Ohio Operating Engineers Pension Fund*, 15 F.4th 407 (6th Cir. 2021), the Fund's actuary used a 7.25 percent rate for minimum funding purposes, but for withdrawal-liability purposes used the Segal Blend taking the interest rate used for minimum-funding purposes and blending it with the PBGC's published interest rates on annuities (2–3 percent), even though the actuary conceded that the PBGC annuity close-out rates would be what is used in terminating a multiemployer plan. The court ruled that this blended formula violated ERISA in this case, as using the Segal Blend in an ongoing plan violated ERISA's mandate under ERISA § 4213(a)(1) that the interest rate for withdrawal liability calculations be based on the anticipated experience under the plan.

Likewise, a 2018 Southern District of New York case invalidated the use of the Segal Blend. *New York Times Company v. Newspaper and Mail Delivers' Publishers Pension Fund*, 303 F. Supp. 3d 236 (S.D.N.Y. 2018), holding that in a withdrawal from an ongoing plan where the minimum funding rate would be the actuary's best estimate, blending with a lower no-risk PBGC bond rates should not be accepted as the anticipated plan experience.

5. PROPOSED PBGC REGULATIONS THAT WHEN FINALIZED WILL PURPORTEDLY GIVE MULTIEMPLOYER PLANS INCREASED CERTAINTY IN USING PBGC TERMINATION RATE ASSUMPTION WITHOUT SECOND GUESSING FROM COURTS

On October 14, 2022, the PBGC issued proposed regulations that once finalized would, pursuant to ERISA § 4213(a)(2), set forth in the actuarial assumptions and methods that may be used by a plan actuary for the purpose of determining an employer's withdrawal liability. Proposed PBGC Reg. § 4213.11, 87 Fed. Reg. 62316 (Oct. 14, 2022). These proposed regulations were issued in part in response to the above unfavorable cases for multiemployer plan withdrawal liability, as lower withdrawal liability based on ongoing funding interest rate assumptions leaves multiemployer plans with greater underfunding, which could increase PBGC risk.

As stated in the Preamble, the proposed regulations in § 4213.11(b) make it clear that use of ERISA § 4044 rates (plan termination assumptions), either as a standalone assumption or combined with minimum funding interest assumptions represents a valid approach to

selecting an interest rate assumption to determine withdrawal liability in basically all circumstances.

Under Proposed PBGC Reg. § 4213.11(c), assumptions and methods other than the interest assumption would have to offer the actuary's best estimate of anticipated experience under the plan.

Proposed PBGC Reg. § 4213.11(b) would specifically permit the use of an interest rate in withdrawal liability assumptions to be ERISA § 4044 plan termination rates alone or minimum funding rates alone or anywhere in the middle, although as stated in the Preamble, the main import of the regulations is to allow plan actuaries to use of ERISA § 4044 plan termination assumptions even as a standalone assumption as a valid approach in to determining withdrawal liability.

It appears from the Preamble to the proposed regulations that the PBGC believes that any interest rate assumptions permitted by the PBGC regulations would generally be shielded from challenge in arbitration or litigation since the choice of termination interest rate assumptions is a proper assumption under the regulations. The Preamble states that this could save both the plan and employers on arbitration and litigation costs, which until now have ranged from $82,500 to $222,000 for a withdrawal liability arbitration dispute, and can run over $1 million for a lengthy litigation.

The Preamble also states that the PBGC estimates that, in the 20 years following the final rule's effective date, there will be an increase in aggregate withdrawal liability payments ranging between $804 million and $2.98 billion.

6. COMMENTS ON PROPOSED REGULATIONS

- There is likely to be some objections to the above proposed PBGC regulations. Employer withdrawal liability imposes a large and often unexpected burden on unionized companies that participate in multiemployer pension plans. For many employers the potential withdrawal liability may discourage interested buyers of the company or push the employer into bankruptcy. In addition, higher ERISA withdrawal liability amounts will further dissuade companies from using a unionized workforce with a multiemployer pension plan.

- Under the proposed PBGC regulations, multiemployer plan actuaries are much more likely to use plan termination assumptions in calculating withdrawal liability, relying on the

new regulations and the authority given under the regulations pursuant to ERISA § 4213(a)(2), which can greatly increase withdrawal liability and exacerbate the issues raised in the previous paragraph.

- The PBGC believes that, under the proposed regulations, any assumptions used by the plan actuary, including plan termination assumptions would generally be immune from judicial challenge, and thus, there would be little ability to challenge withdrawal liability calculations. However, this purported immunity is likely to be challenges in litigation, as the PBGC regulations give a range of permitted actuarial interest rate assumptions from plan termination assmptions to ongoing minimum funding assumptions or any combination. The PBGC believes that since ERISA § 4213(a)(2) and the proposed regulations do not state anything about reasonable assumptions, the courts will view the range permitted in the regulations as a non-reviewable standard by the plan actuary not subject to judicial review. However, this is a difficult argument to make, since ERISA § 4213(a)(1) does required reasonable assumptions, and the regulations under ERISA § 4213(a)(2) give a permitted range of assumptions, it would be a logical reading of ERISA that a choice under a range of assumptions by the plan actuary must be reasonable and could be challenged in court or arbitration.

- Also, since interest rates and plan performance over time tend to fluctuates, fixing the withdrawal liability interest at ERISA § 4044 termination liability rates may yield an overly high withdrawal liability, which may not be warranted in the long run when the plan performance increases.

- The proposed PBGC regulations would be effective with respect to employer withdrawals occurring on or after the final regulations are published (or some other date to be set in the final PBGC regulations), but presumably they would be effective for purposes of valuing unfunded vested benefits as of the end of the plan year prior to the year in which the employer withdrawal occurs even if the prior plan year ended prior to the issuance of final regulations.

If you have any questions, please contact me at number or email listed below.

NOTE

1. **Charles C. Shulman, Esq.** has over 30 years of experience in employee benefits and executive compensation law, including drafting, negotiating, and advising regarding qualified plans, nonqualified plans, equity-based plans, employment and severance agreements, health and fringe benefit plans, other ERISA issues and M&A-related issues. Charlie has lectured and written on a wide variety of topics, including the widely used chapter "Employee Benefits and Executive Compensation in Mergers & Acquisitions," he is co-author of "Qualified Retirement Plans" and Vol 8 of Federal Administrative Practice (West treatises), and is contributing editor to the *Journal of Deferred Compensation*. Charlie has a JD & LLM from NYU School of Law and is admitted to the NY & NJ Bars and the American College of Employee Benefits Counsel. If you have any questions, contact him at 201-357-0577, 212-380-3834 or cshulman@ebeclaw.com.