Labor & Employment Alert

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Sixth Circuit Weighs in on Multiemployer Plan Withdrawal Liability Assumptions

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On September 28, 2021, in *Sofco Erectors v. Trustees of the Ohio Operating Engineers Pension Fund*, No. 20-3639/3671, 2021 BL 367718 (6th Cir. Sept. 28, 2021), the 6th Circuit Court of Appeals issued the first major appeals court ruling on the selection of withdrawal liability assumptions, specifically an actuary's use of the Segal Blend interest rate to calculate a multiemployer pension plan's (MEP) unfunded vested benefits (UVBs) and a participating employer's withdrawal liability. Until now, there has not been clarity at the circuit court level, as arbitrators and district courts have been split on whether a MEP's actuary had to use assumptions that lead to their best estimate of the plan's anticipated experience for purposes of calculating withdrawal liability.

Withdrawal liability is based on a MEP's UVBs, which represent the value of vested benefits minus the value of plan assets. 29 U.S.C. §§ 1391 & 1393(c). The Employee Retirement Income Security Act (ERISA) requires the vested benefits and assets to be calculated using 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." 29 U.S.C § 1393(a)(1). Plan funding assumptions are also subject to a reasonableness standard and best estimate test, and MEPs generally base plan funding assumptions on the anticipated experience of a MEP's investment portfolio and expected earnings.

For purposes of calculating withdrawal liability, the Segal Blend provides actuaries a method to value UVBs using a weighted average of annuity rates issued by the Pension Benefit Guaranty Corporation (PBGC) and a MEP's minimum funding interest rate. The lower the interest rate, the higher the present value of liability, so the Segal Blend provides a middle ground compared to MEPs that use the PBGC rate, which is a rate used in instances of mass withdrawal in the multiemployer plan context and plan termination in the single-employer plan context.

In *Sofco*, the 6th Circuit agreed with the district court that use of the Segal Blend "violates the statute because the resulting interest rate is not 'the actuary's best estimate of anticipated experience under the plan.'" Rather, as the court concluded, the Segal Blend "dilutes the actuary's best estimate with rates on investments that the

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plan is not required to and might never buy, based on a set formula that is not tailored to 'the unique characteristics of the plan.'" Focusing on ERISA's requirement that the actuary's "best estimate" of anticipated experience requires the actuary to analyze the MEP's actual investment portfolio, the court explained that the Segal Blend violates ERISA because it incorrectly considers hypothetical assets that the MEP does not hold.

Many MEPs currently use the Segal Blend in calculating their withdrawn employer's withdrawal liability. Requiring these MEPs to use an interest rate that complies with ERISA and represents their actuary's best estimate of anticipated experience, instead of the Segal Blend, will dramatically reduce employers' withdrawal liability in today's low interest rate environment.

And although the issue was not specifically before the 6th Circuit, the court's decision also casts serious doubt on the validity of MEPs that use the PBGC rate to calculate withdrawal liability. According to the 6th Circuit, a withdrawal liability interest rate that does not take into account the anticipated experience of the MEP's actual investment portfolio violates ERISA's mandate that the interest rate be based on the anticipated experience under the plan. It is virtually impossible to argue that the PBGC rate takes into account a MEP's investment portfolio or anticipated experience given that the PBGC rate is based on interest rates currently used in pricing annuity contracts, with no consideration of the experience or anticipated experience of any MEP.

Although the 6th Circuit's decision provides much needed clarity, given the wide range of withdrawal liability assumptions and methods used by MEPs, both employers and plans should consider expert legal advice to navigate withdrawal liability disputes. Additionally, in the context of an acquisition or an asset sale, contributing employers should engage expert legal advice to ensure potential withdrawal liability exposure is evaluated in a manner consistent with the 6th Circuit's decision.

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