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PBGC Issues Proposed Regulation for Multiemployer Plan Withdrawal Liability Assumptions

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On October 14, 2022 the Pension Benefit Guaranty Corporation ("PBGC") published a proposed regulation regarding the interest rates that multiemployer pension plan actuaries use when calculating the present value of plans' liabilities for the purpose of assessing withdrawal liability.

Under the proposed regulation, actuaries would be permitted to select a withdrawal liability interest rate that is equal to (a) the interest rate used for minimum funding purposes, (b) the interest rate prescribed by PBGC for valuing terminated pension plans, or (c) any interest rate that falls between these rates.

The proposed regulation would apply to withdrawals that occur on or after the effective date of the final rule. The deadline for submitting comments on the proposed regulation is November 14, 2022.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Michael Kreps
mkreps@groom.com
(202) 861-5415

Samuel Levin
slevin@groom.com
(202) 861-6648

Michael Prame
mprame@groom.com
(202) 861-6633

Joshua Shapiro
jshapiro@groom.com
(202) 861-2613

Brigen Winters
bwinters@groom.com
(202) 861-6618

Background

When an employer ceases contributing to a multiemployer pension fund, the fund generally assesses withdrawal liability. An employer's withdrawal liability represents its share of the gap between the assets held by the plan, and the present value of the pension benefits that the plan owes to participants. The actuarial assumptions that the plan actuary uses to calculate the present value of those benefits can have a significant impact on the amount of an employer's withdrawal liability, with the interest rate often being the most impactful assumption.

Section 4213(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") governs the selection of actuarial assumptions for withdrawal liability purposes. Specifically, actuaries must calculate the present value of plan benefits using:

"(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."

Prior to the proposed regulation, PBGC has not issued any regulations under paragraph (2) of this section, though it did express the opinion that the withdrawal liability and funding assumptions do not need to be identical.[1] As a result, all withdrawal liability assumptions have historically been selected pursuant to paragraph (1).

In practice, many actuaries have chosen withdrawal liability interest rates that are different from the interest rates used for minimum funding purposes, which they have generally attributed to the different purposes of those measurements. Withdrawing employers, however, have often noted that paragraph (1) above is substantially identical to the provision governing the selection of actuarial assumptions for minimum funding calculations, and have challenged their withdrawal liability assessments on the theory that the withdrawal liability and minimum funding interest rates need to be the same. This issue has been the subject of many disputes, and arbitrators and courts have reached a wide range of conclusions.

Summary of the Proposed Regulation

The proposed regulation would exercise PBGC's authority under ERISA section 4213(a)(2) for the first time. It provides that under this provision, the withdrawal liability interest rate may be equal to either of two specified interest rates, *or equal to any interest rate that falls between these two rates*.

- The first interest rate specified in the proposed regulation is the rate that is used for minimum funding purposes for the plan year containing the date as of which the withdrawal liability was determined. In general, this will be the plan year preceding the plan year in which the withdrawal occurred. This rate typically represents the actuary's best estimate of the long-term rate of investment return that the assets of the plan will earn.
- The second interest rate specified in the regulation is the rate published by PBGC for valuing terminated pension plans under section 4044 of ERISA for the date as of which the withdrawal liability was determined.[2] Typically this rate is lower than the rate used for minimum funding purposes, resulting in higher withdrawal liability assessments. A pension liability measured using this assumption represents the estimated cost of settling the pension plan through the purchase of annuities. This is also the rate that multiemployer pension plans are required to use when they experience a mass withdrawal.

The proposed regulation only affects the interest rate assumption. Actuaries must continue to select all other assumptions based on the reasonable and best estimate standards of section 4213(a)(1) of ERISA.

Analysis

Under the proposed regulation, multiemployer pension actuaries would be able to select a withdrawal liability interest rate that satisfies either section 4213(a)(1) or 4213(a)(2) of ERISA. In order for the interest rate to comply with paragraph (1), it must satisfy the reasonable and best estimate requirements of that provision. Alternatively, to comply with paragraph (2), the interest rate need only fall within the range specified by the proposed regulation.

Current practice among multiemployer pension actuaries includes a wide range of withdrawal liability interest rates. It would, however, be unusual for an actuary to select an interest rate that is either higher than the minimum funding interest rate, or lower than the ERISA section 4044 interest rate. As such, it is likely that the range of interest rates specified in the proposed regulation will encompass substantially all interest rates that multiemployer pension actuaries currently use.

The preamble to the proposed regulation discusses the uncertainties that currently exist with respect to the permissibility of withdrawal liability interest rates that differ from the minimum funding interest rates. The proposed regulation is intended to eliminate this uncertainty by making it clear that it is acceptable for actuaries to use an interest rate anywhere in the specified range. The preamble explains the anticipated impact of the proposed regulation as follows — "Because PBGC expects the proposed rule will reduce the litigation risk for plans associated with selection of the interest assumption, PBGC believes that more plans will use 4044 rates, which would tend to increase withdrawal liability and a plan's collection of withdrawal liability assessments."

For more information on the impact of the proposed regulation, please contact the authors or any of our Groom attorneys.