

PUBLICATION

Supreme Court Resolves Circuit Split on Timing for Selection of Actuarial Assumptions to Calculate Multiemployer Pension Withdrawal Liability

The United States Supreme Court recently held in *M&K Employee Solutions, LLC et al. v. Trustees of the IAM National Pension Fund* that the Employee Retirement Income Security Act of 1974 (“ERISA”) does not require that the actuarial assumptions used to calculate withdrawal liability be selected on or before the statutory measurement date. In doing so, the Court resolved a split between the Second and D.C. Circuits on when those assumptions may be selected.

What is withdrawal liability?

Withdrawal liability is the proportionate share of a multiemployer pension plan’s unfunded vested benefits owed by a contributing employer that partially or completely withdraws from the plan. A multiemployer pension plan is a plan to which more than one employer contributes and that is maintained pursuant to one or more collective bargaining agreements. ERISA requires employers that withdraw from an underfunded multiemployer pension plan to pay their share of the plan’s unfunded vested benefits to assist in ensuring that the plan remains able to pay benefits to retirees.

Withdrawal liability must be calculated “as of” the last day of the plan year preceding the withdrawal, also referred to as the “measurement date.” (ERISA §§ 1391(b)(3)(E)(i), (c)(2)(C)(i), (3)(A), (4)(A).) Plan actuaries use both hard data, such as the value of plan assets and the number of beneficiaries, and assumptions about future assets and obligations to determine the value of unfunded vested benefits. A key assumption is the “discount rate,” which is the interest rate used to discount future benefit payments to present value. A higher discount rate lowers the value of the plan’s unfunded vested benefits, which in turn lowers the withdrawal liability assessment for the withdrawing employer.

Withdrawal liability calculations are complex, and ERISA requires plans to provide the withdrawn employer with adequate notice of the amount owed and the basis for the assessment. ERISA also provides the withdrawn employer with a process to challenge the assessment, culminating in binding arbitration.

Case Background

The lawsuit was filed by four contributing employers that withdrew from the IAM National Pension Fund (the “Fund”) in 2018. The employers challenged the Fund’s withdrawal liability assessments based on the discount rate used by the Fund’s actuary, Cheiron, to calculate each employer’s obligation. In November 2017, Cheiron used a 7.5% discount rate for the Fund’s annual valuation for the 2016 plan year, resulting in unfunded vested

benefits of approximately \$500 million. Two months later, Cheiron met with the Fund's trustees to discuss the assumptions it would use to calculate the employers' withdrawal liability and determined that it would use a 6.5% discount rate. That one-percentage-point difference substantially increased the withdrawal liability assessments. For example, M & K Employee Solutions' assessment increased from \$1.8 million at a 7.5% discount rate to \$6.2 million at a 6.5% discount rate.

In each resulting arbitration, the arbitrator held that the assessments were improper because the Fund applied actuarial assumptions adopted after the measurement date of December 31, 2017. The Fund sought review of the arbitration decisions by the district court, which found that the arbitrators had erred in concluding that the Fund actuaries must use "assumptions and methods in effect" on the valuation date. The D.C. Circuit affirmed the district courts' reversal, reasoning that limiting actuaries to assumptions adopted before the close of business on the measurement date would conflict with ERISA's instruction to use the actuary's "best estimate" of the plan's anticipated experience as of that date. Therefore, actuaries may adopt assumptions after the measurement date so long as those assumptions are "based on the body of knowledge available up to the measurement date."

The D.C. Circuit's decision created a split with the Second Circuit Court of Appeals, which had held in another case that multiemployer plans must adopt interest rate assumptions for withdrawal liability purposes on or before the measurement date. The Supreme Court granted certiorari to resolve when actuarial assumptions may be selected for purposes of calculating withdrawal liability.

The Decision

In a unanimous decision authored by Justice Ketanji Brown Jackson, the Supreme Court agreed with the Fund, finding that there is no statutory requirement that actuaries use assumptions adopted prior to or on the measurement date.

Justice Jackson noted that ERISA imposes few substantive requirements on the selection of actuarial assumptions. It requires only that the actuary use "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." (ERISA § 1393(a)(1).)

The Court focused on the nature of actuarial assumptions as predictive judgments or tools that actuaries use to calculate a plan's unfunded vested benefits, rather than as "facts." The Court reasoned that assumptions are akin to the "methods" referenced in ERISA § 1393; they are selected and used to determine unfunded vested benefits, but they are not observable facts that are "in effect" on a particular date. Citing actuarial professional guidelines, the Court explained that actuaries identify the assumptions appropriate for a specific measurement when the need for an actuarial valuation arises. In short, assumptions are not "in effect" for a defined period, as the contributing employers argued. Because actuarial assumptions are tools rather than hard data, they cannot be "frozen" on the measurement date. ERISA's "as of" requirement sets the reference point for factual inputs into the unfunded vested benefits calculation, but it does not dictate when actuaries must select the assumptions used in that calculation.

The Court also relied on a fundamental canon of statutory construction: when Congress includes particular language in one section of a statute but omits it from another section of the same act, the omission is presumed intentional. Specifically, Congress included timing language elsewhere in the same statutory scheme, yet ERISA § 1393 contains no deadline for selecting actuarial assumptions. For example, ERISA

specifies that the amortization period for an employer's withdrawal liability payments must be determined based on "the assumptions used for the most recent actuarial valuation for the plan." (ERISA § 1393(c)(1)(A)(ii).) The Court therefore declined to read a timing limitation into the statute that does not appear in its text.

The Court also made a practical point: relevant information about a plan's performance or broader economic conditions as of the measurement date is often not available until after that date. Requiring actuaries to rely only on assumptions selected before the measurement date would prevent them from considering the most up-to-date information available, undermining ERISA's requirement that the assumptions reflect the actuary's best estimate under § 1393(a)(1).

The Court rejected the petitioners' arguments that ERISA's prohibition on retroactive plan amendments should apply to actuarial assumptions and that allowing assumptions to be selected after the measurement date would invite manipulation.

The Court's decision does not upend longstanding actuarial practice and provides a degree of certainty for multiemployer plans and withdrawing employers by confirming that withdrawal liability assumptions need not be selected on or before the measurement date. The decision should reduce timing-based challenges to withdrawal liability assessments while keeping the focus where ERISA places it; that is, on whether the assumptions, in the aggregate, are reasonable and represent the actuary's best estimate based on information available as of the measurement date.

Key Takeaways

- **No timing restriction on assumption selection:** Actuaries retain flexibility to select assumptions after the measurement date, provided those assumptions reflect the actuary's best estimate of anticipated plan experience based on information available as of that date. Employers can always challenge such assumptions through binding arbitration.
- **Actuarial assumptions are "tools," not "facts":** The Court emphasized that actuarial assumptions are predictive judgments used to estimate future experience—not fixed data points—and therefore are not subject to being "frozen" as of a specific date.
- **Practical takeaway for plans and employers:** Plans should ensure that withdrawal liability assessments clearly document the information considered and the actuarial rationale for the assumptions selected, while employers evaluating an assessment should focus challenges on the reasonableness of the assumptions and whether they reflect the actuary's best estimate, rather than on when the assumptions were adopted.