Employee Benefits
In Focus
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For Clients and Friends
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PBGC PROPOSES RULE SUPERCEDING FEDERAL COURTS BY PRESCRIBING INTEREST RATE ASSUMPTIONS FOR CALCULATING WITHDRAWAL LIABILITY

On October 14, 2022, the Pension Benefit Guaranty Corporation ("PBGC") published a proposed rule expressly permitting three different methods for actuaries to calculate withdrawal liability by employers who withdraw from multi-employer pension plans under the Multi-Employer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1001 *et seq.* ("MPPAA"). Once finalized, the Proposed Rule will offer actuaries and plans a broad safe harbor within which to assess and collect withdrawal liability.

Under MPPAA, an employer who withdraws from a multi-employer pension plan must pay its proportional share of the plan's unfunded vested benefits ("UVBs") as an exit fee. The UVB is the negative difference between the amount of money the plan has readily available and the amount of vested benefits the plan would have to pay if all participant employees claimed their benefits. Because benefits are paid out over time, frequently 20 years, MPPAA requires that plan actuaries use an interest rate to determine the present value of those benefits. Section 4213 of the Employee Retirement Income Security Act of 1974 ("ERISA") provides that the PBGC may prescribe a rate(s) or, in absence of PBGC rule, the plan and its actuary may choose a rate that is reasonable in the aggregate and is the actuary's best estimate of the plan's future earnings. Between 1980 and 2018, in the absence of a PBGC rule, actuaries used one of three interest methods: (1) the "funding" rate which is the rate used by plans to estimate plan investment returns from the market, typically high yielding equities, that determine under ERISA how much money employers must contribute to the plan to meet its obligations; (2) the "4044" rate prescribed by the PBGC for termination of single employer plans, which consists of an average annuity interest rate; or (3) a combination or "blend" of both other rates. In this way, MPPAA seeks to encourage employers to remain in the plan, require that employers who leave pay their "fair share" of liabilities related to their employees, and ensure that the plan maintains solvency.

This approach worked as long as the funding rate and annuity rates did not diverge too far. However, with the bull stock market and low interest rates, the disparity boomed. Withdrawal liability using the funding method required far less payments over 20 years since the plan assumed annual asset returns of about 7%. Withdrawing employers began to vigorously challenge use of the 4044 annuity rate, which, at return of 2%, yielded much higher liability payments. Over time, the majority of federal district courts deciding the issue and the Courts of Appeals for the Sixth and D.C. Circuits ruled against any rate other than the funding rate. These courts reasoned that since both ERISA and MPPAA require a rate that is the actuary's best estimate of anticipated earning experience for the plan, and the plans annually certify that the funding method is the plan's best estimate under ERISA, then the funding method must also be the best estimate of anticipated plan experience under MPPAA as well.

In response, plans using the popular “Blend” or annuity rates petitioned PBGC to restore the status quo ante by using its dormant power to prescribe rate(s) for computing withdrawal liability. Marty Walsh heading the Biden Administration PBGC responded with the Proposed Rule. Under Section 4213.11 of the Proposed Rule, PBGC makes clear that for the purposes of computing liability, a plan may use either the 4044-annuity rate <u>or</u> the 304(b)(6) funding rate, <u>or</u> a rate that falls between the two, i.e. “the Blend”. While the other assumptions in computing withdrawal liability must still meet the “reasonable” and “best estimate” criteria, the Proposed Rule makes clear that any of the three methods are per se reasonable and best.

PBGC justified its revitalization of rulemaking authority for the Proposed Rule on several grounds. First, PBGC noted that where a plan does not collect full withdrawal liability, the burden of the departing employer’s UVBs shifts to remaining employers and the plan, threatening financial viability of both, including benefits. “This proposed rule is needed to clarify that a plan actuary’s use of 4044 rates represents a valid approach to selecting an interest rate to determine withdrawal liability <u>in all circumstances</u>” (emphasis added), and “thereby reduce or eliminate the cost-shifting effect of impediments to actuaries’ use of 4044 rates.’” Second, PBGC estimates a “nominal increase in cumulative withdrawal liability payments ranging between $804 million and $2.98 billion,” which furthers MPPAA’s intent of guaranteeing benefits to retirees. Third, given the “safe harbor” certainty of rates under the Proposed Rule, plans and employers will experience less arbitration and litigation costs. Finally, PBGC clearly favors use of the annuity rate, alone or in Blend, since the withdrawing employer is settling its past and future liabilities with the plan, and “it is reasonable to base the amount needed to settle the employer’s share of the liability on the market price of settling pension liabilities by purchasing annuities from private insurers.”

The Proposed Rule would apply to the determination of withdrawal liability for employer withdrawals that occur on or after the effective date of the final rule. PBGC will receive comments from the public for 30 days from October 14. In particular, PBGC is interested in whether it should consider rules for other assumptions such as demographics and mortality, and whether “the top rate of permitted interest rates” should be lower than the funding rate.

This article presents a summary of the PBGC Proposed Rule, the effects of which will unfold over short, medium and long runs. If you have any questions, please feel free to contact the Pitta LLP attorney with whom you work.

<u>RHODE ISLAND RETIREMENT PLAN IS NOT A CHURCH PLAN</u>

On September 13, 2022, a Rhode Island District Court judge held that a defined benefit pension plan, the St. Joseph Health Services of Rhode Island Retirement Plan (the "Plan"), covering more than 2,700 nurses and other employees of St. Joseph Health Services of Rhode Island ("SJHSRI"), was not a church plan, based on the "Principal Purpose Organization" ("PPO") analysis set forth by the Supreme Court in *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017). *See Del Sesto v. Prospect CharterCare LLC*, No. 1:18-cv-00328 (D.R.I. Sept. 13, 2022).

Background

Since 1892, SJHSRI has operated Catholic hospitals in Rhode Island under various names. SJHSRI was also the Plan Administrator and Employer of the Plan which was created in 1995 and periodically amended and at the center of the litigation. Following several corporate restructurings, in 2017, the Plan became insolvent and was placed into a receivership. In 2018, the Receiver and Administrator of the Plan and numerous beneficiaries filed a complaint against an array of Defendants, which had been partly or fully responsible for the corporate restructurings. While a number of the Defendants settled, the remaining Defendants include the Diocesan Administration Corporation, the Diocesan Service Corporation, and the Roman Catholic Bishop of Providence. Plaintiffs alleged that the various corporate defendants "fraudulently concealed that the Plan was grossly underfunded, then executed a complicated hospital sale and reorganization designed to leave the Plan and its obligations dangling from a corporate entity" that had no assets. *Id*. By doing so, Plaintiffs alleged, Defendants violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), "committed fraud, breached their contractual obligations, violated their duty of good faith and fair dealing, and/or otherwise acted wrongfully.'" *Id*. (Quoting First Amended Complaint).

Discussion

The District Court opined that the central issue of when the plan stopped being a church plan, and thus subject to ERISA, was essential to narrowing the issues before the Court. Adding that because of ERISA's state law preemption provision, should ERISA apply, some or all of Plaintiffs' state-law claims may be preempted; however, claims based on ERISA's enforcement provisions may become applicable. Conversely, if the Plan was a church plan, then the ERISA claims would be inadequate, but the state-law claims may survive.

Ultimately, the District Court held that to qualify as a church plan under ERISA, a Plan must be maintained by a PPO, which must be affiliated with or controlled by a church, and whose main job is "to fund or manage a benefit plan for the employees of churches or . . . church affiliates.'" *Id.* (Citations omitted). Plaintiffs originally conceded that as of April 29, 2013, SJHSRI did not maintain the Plan as its main job, and therefore it did not qualify as a PPO. Accordingly, the District Court held it was unquestionable that the Plan did not qualify as a church plan as of that date.

DOL SUES ARCHITECTURE FIRM FOR LOSING MILLIONS IN PLAN ASSETS

On August 30, 2022, the U.S. Department of Labor ("DOL") filed a lawsuit against Defendants InterArch, Inc., Shirley Hill and Vernon Hill (collectively, "Defendants") alleging, in part, that Defendants InterArch, Inc., Shirley Hill, and Vernon Hill breached their duties of loyalty and prudence and duty to diversify and engaged in prohibited transactions. *See Walsh v. InterArch, Inc*., No. 1:22-cv-05289 (D.N.J., complaint filed 8/30/22). It is worth noting that InterArch, Inc. Profit Sharing Plan (the "Plan") was joined as a defendant in the lawsuit to ensure that complete relief benefitting the Plan was granted. It is also worth noting that this lawsuit follows a related case, *McCann v. Hill, et al.,* No. 1:20-cv-06453 (NLH) (JS) (D.N.J) -- a class action brought by participants and beneficiaries of the Plan against Defendants for fiduciary breaches and other violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The DOL complaint alleges that Shirley Hill and Vernon Hill, wife and husband, were fiduciaries of the Plan and breached their fiduciary duties of loyalty, prudence and diversification by mismanaging the Plan's assets from at least August 30, 2016 through the Plan's termination date of June 30, 2020 (the "relevant time-period"). Defendant Shirley Hill was InterArch's President, Chief Executive Officer, and sole owner. Defendant Vernon Hill was Chairman of Metro Bank, a London-based bank and a senior leader of Republic Bank ("Republic Bank"), a Philadelphia-based bank. During the relevant time-period, Defendants invested 70% of the Plan's assets in Metro Bank, PLC's ("Metro Bank's") stock and 13% of the Plan's assets in Republic First Bancorp, Inc.'s dba Republic Bank's stock.

According to the complaint, despite Metro Bank's share price plummeting from $57.13 to $4.47 between March 14, 2018 and July 31, 2019, Defendants bought 166,374 additional Metro Bank shares for the Plan in 2018 and 2019. Further, it was not until June 8, 2020 when Defendants sold the Plan's Metro Bank shares over the course of two days at a tremendous loss of 96% as compared to the shares' peak value. Similarly, between June 16, 2017 and the end of June 2020, the Republic Bank's share price plummeted from $9.75 to $2.05. Despite this major decrease, Defendants took no actions with respect to the Plan's Republic Bank shares between 2017 and 2020. In fact, it was only on August 6, 2020 when Defendants transferred the Republic Bank's shares out of the Plan at a 74% loss compared to the shares' peak value.

Relief Requested

The DOL requested the following relief: (1) mandate that Defendants jointly and severally "restore all losses, plus interest and/or lost opportunity earnings, incurred by the Plan as a result of their violations of ERISA;" (2) permanently enjoin "Shirley Hill and Vernon Hill from serving as fiduciaries or service providers to any ERISA-covered plan;" (3) grant "appropriate injunctive and other equitable relief to redress the ERISA violations, to enforce ERISA, and to prevent future ERISA violations;" and (4) grant "such other relief as may be equitable, just, and proper."

Consent Order and Judgment

On September 23, 2022, the parties agreed to resolve all issues in the action through the entry of a Consent Order and Judgment (the "Order") in lieu of an answer to the complaint. Under the Order, Defendants agreed not to contest the allegations in the complaint that they violated certain ERISA provisions in a way that caused financial losses to the Plan. In addition, Defendants agreed to pay $1,836,853.42 to Plan Participants as well as an anticipated additional $1,185,339.13 in the *McCann v. Hill, et al*, related case. The Order also provided that should the settlement amount in the related case equate to less than the anticipated $1,185,339.13 then Defendants and the Secretary will further agree by Consent Order to provide the Plan Participants with the difference between the anticipated settlement amount and the actual settlement amount. Defendants were also penalized under ERISA § 502(l) in the combined amount of $183,685.34. Furthermore, the Order barred Defendants from ever "serving or acting as fiduciaries or service providers to any employee benefit plan subject to Title I of ERISA."

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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