PITTA LLP
Labor, Employment & Employee Benefits Law Firm
EMPLOYEE BENEFITS
IN FOCUS
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NEW YORK DISTRICT COURT REJECTS WITHDRAWAL LIABILITY CALCULATION BASED ON PLAN'S HYPOTHETICAL FUTURE UNDERPERFORMANCE

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), an employer that withdraws from a multiemployer pension plan must pay its proportionate share of the plan's unfunded vested benefits, or its "withdrawal liability." Withdrawal liability calculations require actuarial assumptions to account for the expected experience of the plan over time, taking into consideration such items as the likelihood that employees' benefits will vest as well as covered employees' mortality. Further, a calculation must consider future interest rates based on an estimate of how the plan's investments will grow over time. Thus, the higher the interest rate used to calculate the present value of a pension plan's future benefit liabilities, the lower the present value of those liabilities and, therefore, the lower an employer's withdrawal liability. Due to the dramatic impact that interest rates can have on the amount of an employer's withdrawal liability assessed by a plan, chosen interest rates are often at the center of withdrawal liability disputes.

Such was the case in a recent decision out of the United States District Court for the Southern District of New York. *See The Nat'l Ret. Fund v. Domestic Linen Control Grp.*, 23-cv-5955 (AS) (S.D.N.Y. Jul. 31, 2024). Domestic Linen was an employer who participated in the National Retirement Fund ("Plan"). In 2017, Domestic Linen partially withdrew from the Plan, and in 2019, the employer withdrew from the Plan completely. When the Plan's actuary calculated withdrawal liability for Domestic Linen, it applied a 1.98% interest rate to the partial withdrawal and a 2.84% interest rate to the complete withdrawal, instead of the 7.3% interest rate the actuary used to calculate how much current participating employers are required to contribute to the Plan — otherwise known as the "minimum funding requirements." The lower interest rates utilized by the Plan in the calculation resulted in a much higher total withdrawal liability. The Plan's actuary justified its application of the lower interest rates by claiming there was "a chance the Plan could underperform in the future."

Domestic Linen challenged these interest rate assumptions in arbitration. Under MPPAA, determinations made by plan sponsors regarding withdrawal liability are presumed correct unless the party challenging the determination can show "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." The calculation at issue is presumed correct unless the actuarial assumptions "were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)" or a significant error was made. Agreeing with Domestic Linen that the actuary used unreasonable assumptions, in that the interest rate neither was based on investment return projections nor was it similar to the minimum funding interest rate, the arbitrator vacated the withdrawal liability assessment and ordered the Fund to recalculate using the 7.3% minimum funding interest rate. The Plan asked the district

court to vacate the arbitrator's decision, and the parties cross-moved for summary judgment.

District Judge Arun Subramanian agreed with the arbitrator that the withdrawal liability assessed by the Plan was flawed, rejecting the Plan's argument that its actuary has broad discretion to fashion an interest rate. Citing case law from other circuits, Judge Subramanian held that, while the text of MPPAA does not explicitly require that actual projected investment returns be used to determine interest rates, the requirement nonetheless "flows unmistakably" from the statute because determination of unfunded vested benefits, on which withdrawal liability is based, requires accounting for the "time value of money." Here, the Plan's actuary used lower interest rates based on certain "risk-free annuities, benefits, and assets that the Plan does not own and does not plan to buy" to place risk of the Plan's hypothetical future underperformance on the withdrawing employer. "That justification," wrote Judge Subramanian, "clashes with the MPPAA, which requires that the interest rate reflect 'the actuary's best estimate of anticipated experience under the plan' — not the risk that the actuary's best estimate is wrong."

Although the Court agreed with the arbitrator that the withdrawal liability calculation was unreasonable, it disagreed that the withdrawal liability calculation must be recalculated utilizing the 7.3% minimum funding interest rate. Under relevant precedent, the interest rate used to calculate withdrawal liability must be similar to that used to calculate minimum funding but need not be identical. The Court remanded the issue of proper rate to the arbitrator because, although the Court generally agreed that the 7.3% interest rate likely was proper, the arbitrator failed to explain his basis for requiring use of the 7.3% rate.

EBSA TO GROUP HEALTH PLANS: THE CYBERSECURITY GUIDANCE APPLIES TO YOU TOO

In April 2021, the Employee Benefits Security Administration Division ("EBSA") of the Department of Labor ("DOL") issued best practices guidance and tips for how to protect retirement plans and benefits administered pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended from time to time*, against cyber threats and attacks ("2021 Cybersecurity Guidance"). The 2021 Cybersecurity Guidance was directed not only to plan sponsors and plan fiduciaries of ERISA-governed retirement plans, but also to the recordkeepers and other service providers of those plans, with the goal of providing information about how these entities could better protect themselves from, and mitigate risk of, cybersecurity threats and attacks. The 2021 Cybersecurity Guidance covered three areas: "*Tips for Hiring a Service Provider*," "*Cybersecurity Program Best Practices*" and "*Online Security Tips* (for plan participants)." However, the 2021 Cybersecurity Guidance left a glaring hole – it appeared not to be directly applicable to group health plans and their fiduciaries, plan sponsors, or service providers.

In the years since the release of EBSA's cybersecurity guidance, healthcare has experienced costly cyberattacks and threats to participant data. According to a 2023 report published by IBM Security, the average cost of a healthcare breach reached nearly $11 million dollars – an increase of 53% in costs since 2020 – and threat actors often

used participant medical records as leverage to force breached organizations to pay ransoms. With the prevalence of cyberattacks against the healthcare industry continuing to climb, the DOL's ERISA Advisory Council ("Council") examined and identified the impact that these cybersecurity issues and concerns have had, or may have, on ERISA-covered group health plans and their plan sponsors and fiduciaries in its published report titled "*Cybersecurity Issues Affecting Group Health Plans*."

In gathering information for the report, the Council generally found that because the 2021 Cybersecurity Guidance was silent as to its applicability to health and welfare plans and referred only to retirement plans, there was confusion among both the retirement and health and welfare plan community as to whether the Guidance generally applied to all employee benefit plans. The Council recommended that EBSA clarify its 2021 Cybersecurity Guidance to reflect that health and welfare plans are also governed by its cybersecurity requirements. The Council also noted in its report that cyberattacks and threats will continue to persist. The Council further recommended that EBSA should regularly update its guidance to employee benefit plans to reflect the evolving nature of cybercrime and continue to help employee benefit plans minimize the risks from such threats.

On September 6, 2024, EBSA published Compliance Assistance Release Notice 2024-01 (the "Notice") clarifying the reach of the 2021 Cybersecurity Guidance, and the fiduciary obligations related to cybersecurity of plan data, confirming that it generally applies to all employee benefit plans, including health and welfare plans. A copy of Notice 2024-21 can be accessed here. In the Notice, EBSA acknowledged that since the release of the 2021 Cybersecurity Guidance, group health plan service providers have informed fiduciaries and EBSA investigators that the guidance only applies to retirement plans. Further, EBSA recognized the work performed by the Council in 2022 in producing recommendations for clarifying the 2021 Cybersecurity Guidance to reflect that it also applied to group health plans.

Although with the publication of this Notice, the 2021 Cybersecurity Guidance is generally applicable to all employee benefit plans, the substance contained in the guidance initially produced in 2021 remains largely unchanged. With this Notice, all employee benefit plan sponsors and their service providers are now on alert that they must take reasonable and prudent steps to implement safeguards that will protect plan data and will be required to conduct periodic assessments of their policies and procedures to ensure that appropriate protections against cyberattacks and threats are in place.

REMINDER: DEADLINE FOR REQUIRED HIPAA PRIVACY RULE UPDATES RELATED TO REPRODUCTIVE HEALTH PHI IS FAST APPROACHING

As we previously reported in our June 2024 Employee Benefits in Focus edition provided here, in an article titled "HIPAA Privacy Rule Updates to Impact Use and Disclosure of Protected Health Information Related to Reproductive Health," we noted that, spurred by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), which overturned *Roe v. Wade*, a number of states

passed legislation to limit access to certain reproductive health services offered by plan sponsors of group health plans to their participants and/or beneficiaries. This legislative activity led the U.S. Department of Health and Human Services ("HHS") to publish a proposed rule modifying the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule") to include privacy protections for reproductive health information. The proposed rule became final on April 26, 2024, with an effective date of June 25, 2024 ("Effective Date").

Group health plan sponsors and their business associates have one hundred and eighty (180) days from the Effective Date, or until **December 23, 2024**, to update their protected health information ("PHI") policies and procedures to bring them into compliance with the Privacy Rule. Specifically, plan sponsors must implement measures to prevent use or disclosure of PHI when it is sought to investigate or impose liability on individuals, health care providers, or others who seek, obtain, provide or facilitate reproductive health care. As of the Effective Date, group health plans and their business associates will be required to obtain an attestation prior to the disclosure, or use, of PHI from the entity or person seeking the reproductive health PHI, affirming that the information will not be used to investigate the lawfulness of the reproductive health service(s) obtained by the covered individual. HHS has created a model attestation for use by plan sponsors of group health plans and their business associates when a request for PHI related to reproductive health services is received, which is provided here. Group health plan sponsors will also be required to amend their Notice of Privacy Practices to reflect these changes to the Privacy Rule by February 16, 2026.

A FEW REMINDERS

(Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

OCTOBER

ALL PLANS

- **Form 5500 Extended Deadline**
    - October 15, 2024 is the date by which the Form 5500 for the 2023 plan year is due if a Form 5558 extending the due date was filed.
- **Form 8955-SSA Extended Deadline**
    - October 15, 2024 is the due date for Form 8955-SSA and participant statements for the 2023 plan year if a Form 5558 extending the due date was filed.

HEALTH AND WELFARE PLANS

- **Creditable Coverage Notices**
    - October 15, 2024 is the due date by which plan sponsors of group health plans that provide prescription drug coverage to Medicare Part D-eligible

individuals must disclose whether the prescription drug coverage is creditable.

DEFINED BENEFIT PLANS

- **Third Quarter Contributions**
  - October 15, 2024 is the deadline for third quarter contributions.
- **Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination Failures**
  - October 15, 2024 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.
- **Pension Benefit Guaranty Corporation ("PBGC") Premium Filing and Payment**
  - October 15, 2024 is the deadline by which to file the prescribed premium information and pay the premium due in accordance with PBGC's Premium regulations and instructions.
- **PBGC Form 200**
  - October 25, 2024 is the last day by which to file the PBGC Form 200 if a single employer plan sponsor did not make the October 15, 2024 required contribution and the FTAP is less than 100% if the total amount in unpaid contributions (including interest) exceeds $1 million.

DEFINED CONTRIBUTION PLANS

- **Notice of Intent to Use Section 401(k) and Section 401(m) Safe-Harbor Formula (if plan is a "safe-harbor" 401(k) plan)**
  - October 3, 2024 is the earliest date by which to send safe harbor notices for 401(k)/401(m) nondiscrimination safe harbor plans and plans with eligible automatic contribution arrangements.
- **Retroactive Amendment to Correct Prior Year Coverage/Nondiscrimination Failures**
  - October 15, 2024 is the deadline by which to make a retroactive amendment to correct prior year coverage/nondiscrimination failures.

NOVEMBER

DEFINED BENEFIT PLANS

- **PBGC Form 10**
  - November 14, 2024 is the deadline by which to file the Form 10 if the defined benefit plan: 1) has more than 100 participants; 2) missed its October 15th required contribution and the contribution remains unpaid as of November 14th; 3) could not have satisfied the contribution by a Prefunding or Carryover Balance election; and 4) had not filed a PBGC Form 200 for the same incident.

DEFINED CONTRIBUTION PLANS

- **Periodic Pension Benefit Statement**
  - November 14, 2024 is the deadline by which a participant-directed plan must furnish the third calendar quarter's benefit/disclosure statement and statement of plan fees and expenses actually charged.

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