Legal Update Article

The End of Chevron Deference and the Anticipated Impact on Withdrawal Liability

By Robert R. Perry & David M. Pixley

July 12, 2024

Meet the Authors

Robert R. Perry
Principal
212-545-4000
Robert.Perry@jacksonlewis.com

David M. Pixley
Principal
216-750-0404
David.Pixley@jacksonlewis.com

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The U.S. Supreme Court recently overturned the decades-old Chevron doctrine of judicial deference to a federal agency's interpretation of an ambiguous statute. (See "Go Fish! U.S. Supreme Court Overturns 'Chevron Deference' to Federal Agencies: What It Means for Employers") Following the decision in *Loper Bright Enterprises v. Raimondo*, courts must exercise independent judgment in reviewing the agency's interpretation of the statute. Courts may apply the standard set forth in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), in which a court can uphold a regulation if it finds the agency's interpretation of the statute persuasive.

The *Loper Bright* decision could prove to have an immediate impact on the actions of the Pension Benefit Guaranty Corporation (PBGC). The PBGC is a federal agency with regulatory authority over the withdrawal liability provisions in Title IV of ERISA. Two recent actions taken by the PBGC that are under current scrutiny figure to be challenged under *Loper Bright:* the Special Financial Assistance (SFA) plan asset phase-in and withdrawal liability interest rate assumption regulations.

Conditions for MEPPs Receiving Special Financial Assistance (SFA)

The American Rescue Plan Act of 2021 (ARPA) provided for SFA for troubled multiemployer pension plans (MEPPs). The SFA program will provide between $74 and $91 billion in assistance to eligible MEPPs. Pursuant to ARPA, Congress delegated authority to the PBGC to issue "reasonable conditions" for SFA applications and for withdrawal liability calculated by SFA recipients. On July 8, 2022, the PBGC published a final rule detailing the eligibility criteria, application process, and restrictions and conditions associated with a MEPPs' use of SFA funds.

As previously discussed in "More Bad News for Employers in the PBGC Final Rule," the final rule expresses PBGC's opinion that "payment of an SFA was not intended to reduce withdrawal liability or to make it easier for employers to withdraw." Consistent with these concerns, the PBGC's final rule mandated that recipient MEPPs "phase-in" the SFA as a plan asset over a 10-year period. This interpretation will significantly (and arguably artificially) increase the amount of many employers' withdrawal liability. It is anticipated that the final rule will be challenged in the near future.

Withdrawal Liability Interest Rate Assumption

The interest rate assumptions used by an MEPP to calculate withdrawal liability can have a massive impact on the amount of an employer's liability. In 1980, when amending Title IV of ERISA by enacting the Multiemployer Pension Plan Amendments Act (MPPAA), Congress delegated authority to the PBGC to issue regulations relating to these critical interest rates assumptions. To date, PBGC has not done so.

In response to several recent court rulings (See "[Segal Blend' Withdrawal Liability Calculation Violates ERISA, Court Holds in Milestone Decision]" and "[Withdrawal Liability Interest Rate Must Reflect Projected Investment Return, D.C. Circuit Holds]"), the PBGC issued a proposed regulation to allegedly "make clear that use of 4044 rates [the settlement interest rate], either as a standalone assumption or combined with funding interest assumptions represents a valid approach to selecting an interest rate assumption to determine withdrawal liability in all circumstances." Even more problematic, the proposed rule states that a "plan's actuary would be permitted to determine withdrawal liability under the proposed rule without regard to section 4213(a)(1) [including foregoing the reasonableness and actuarial best estimate requirements]." The proposed rule directly contradicts recent judicial interpretations of the referenced statute that was enacted as part of MPPAA over 44 years ago.

Further, the PBGC's proposed rule ignored the critical issue of whether the selection of an interest rate that ignores the statutory reasonableness and best estimate requirements satisfies other provisions of ERISA, such as Section 4221(a)(3)(B)(i). In this regard, and consistent with *Loper Bright*, several Circuit Courts of Appeal have already exercised their independent judgment to interpret the statutory "best estimate of anticipated experience under the plan" language as referring to the "unique characteristics of the plan" such as the plan's investment asset mix and the expected rate of return on such assets. These recent Circuit Court decisions therefore directly contradict the PBGC's proposed regulations. Any final regulation promulgated by PBGC that follows the proposed regulations would inevitably be challenged and resolved under the less-deferential standard established under *Loper Bright*.

Final Thoughts

The exact impact of *Loper Bright* on agency actions in general and the PBGC actions discussed above remains to be seen. Since *Skidmore* is still good law, a court that is sympathetic to an agency's position could still opt to defer to that interpretation. Courts will no doubt be busy with a plethora of suits challenging administrative actions. The two current hot-button topics discussed above seem destined to be challenged and resolved by judges in a post-*Chevron* world. The resolution of these issues will have massive implications for employers with significant potential withdrawal liability exposure.

We will continue to monitor these issues for the benefit of our clients. Please contact the authors with any questions.