

TYPES NOT MAPPED YET October 21, 2024 | TTR not mapped yet | Michael T. Graham, Michael W. Duffee

## Challenge to PBGC Pension Bailout Liability Rules Denied by U.S. Bankruptcy Court

A multiemployer pension plan is a collectively bargained plan maintained by more than one employer, usually within the same or related industries, and a labor union. *See* ERISA Sections 3(37) and 4001(a)(3). In 2022, the Pension Benefit Guaranty Corporation (“PBGC”) estimated that there were about 1,400 multiemployer pension plans nationwide that covered about 10 million participants. When an employer seeks to leave a multiemployer pension plan, the plan’s fiduciaries typically issue a withdrawal liability determination to the departing employer. An employer’s withdrawal liability is based on its allocated share of the plan’s unfunded vested benefits. In the past decade, many large multiemployer plans had maintained large amounts of unfunded benefits, potentially risking that participants could be left without future pension benefits if a plan went bankrupt. In fact, the PBGC’s multiemployer pension insurance program was itself projected to become insolvent in 2026.

To address these solvency concerns, in March 2021, Congress passed the American Rescue Plan Act (the “Rescue Act”). The Rescue Act authorized the PBGC to provide billions of dollars in “special financial assistance” to troubled multiemployer pension plans. Congress specifically addressed the use of these federal funds and specified that the plans may only use the funds to make benefit payments and pay plan expenses. A question that has arisen through the Rescue Act is whether the special financial assistance funds should count as plan assets when paid for purposes of calculating the plan’s unfunded vested benefits, as doing so would reduce the withdrawal liability amount that a departing employer must pay to the plan.

A recent decision from the U.S. Bankruptcy Court for the District of Delaware was the first to address this question. In *In re Yellow Corp.*, 2024 BL 322122 (Bankr. D. Del. Sept. 13, 2024), Yellow Corporation, which once operated one of the nation’s largest trucking companies, shut down its businesses in the summer of 2023. As a result of shutting down, Yellow Corporation withdrew from 11 multiemployer pension plans to which it had contributed. Through the special financial assistance program, the PBGC approved more than \$40 billion in taxpayer funds for these multiemployer plans.

On cross motions for summary judgment, the Court addressed this principal question of whether the bailout funds constituted plan assets for purposes of calculating the plans’ unfunded vested benefits and for determining Yellow Corporation’s withdrawal liability from these plans. After the passage of the Rescue Act, the PBGC issued two regulations designed to ensure that a plan’s receipt of special financial assistance monies would not operate to let a withdrawing employer off the hook for withdrawal liability it would have otherwise owed. One regulation, referred to as the “No-Receipts Regulation,” provides that the Rescue Act funds that have been awarded but not yet paid to the plan do not count as plan assets. The second regulation, referred to as the “Phase-In Regulation,” provides that, for purposes of calculating plan assets, the special financial assistance funds the PBGC awards a plan should be treated as if the funds were received over time even though the monies were paid in a lump sum. Yellow Corporation argued that these two PBGC regulations related to the special financial assistance funds exceeded its statutory authority and violated ERISA.

The Bankruptcy Court rejected this argument, finding that the Rescue Act gave the PBGC express authority to “impose, by regulation or other guidance, reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to ... withdrawal liability.” Further, ERISA gives the PBGC general authority to adopt regulations that may be necessary to carry out the purposes of Title IV of ERISA, which includes provisions related to withdrawal liability. The Court determined that the regulations implement Congress’ specific directive in the Rescue Act that the plans should only use the special financial assistance funds to pay plan benefits and costs, and that the regulations prevent the funds from being used to reduce employers’ expected withdrawal liability. In so ruling, however, the Court declined to draw an inference from Congress’ failure to adopt statutory language that would have precluded special financial assistance from being considered as a plan asset for 15 years, as indicating that the PBGC rules were an unauthorized attempt by the agency to accomplish by regulation something that Congress did not allow. Further, the Court found that the regulations satisfied the recent Supreme Court decision



in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), finding that *Loper Bright* reaffirmed that in resolving statutory ambiguities, courts should give “due respect” to the executive branch.

Yellow Corporation also argued that the PBGC’s regulations could not be properly regarded as reasonable conditions on an eligible multiemployer plan that receives special financial assistance relating to withdrawal liability because the conditions impact the employer’s withdrawal liability, and the employer is not the entity receiving the federal funds. The company also argued that the Phase-In Regulation is contrary to an ERISA provision that describes the special financial assistance funds, once paid to the plan, as a plan asset. However, the Court disagreed, holding that the passing use of the term “asset” cannot prevail over the Rescue Act’s express prohibition that the special financial assistance funds be used for any purpose other than paying plan benefits and plan expenses. As a result, the Court determined that regulations were not arbitrary and capricious and were supported by the administrative record.

The *In re Yellow Corporation* decision is the first word on the PBGC’s rule-making authority with respect to whether the special financial assistance awards should constitute plan assets when paid. Given the large amounts that some withdrawing employers must pay when leaving a multiemployer plan, it is likely to be argued by other employers challenging their withdrawal liability determinations.

We will continue to monitor cases challenging the PBGC’s regulations under the American Rescue Plan Act to see if any other employers can gain some traction on this issue. In the meantime, please contact anyone in our Labor & Employment practice group or our Employee Benefits practice group with questions.

### authorsTest

michael

Michael T. Graham

michael

Michael W. Duffee