CONTEMPORARY COMPLIANCE

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TOPICS:

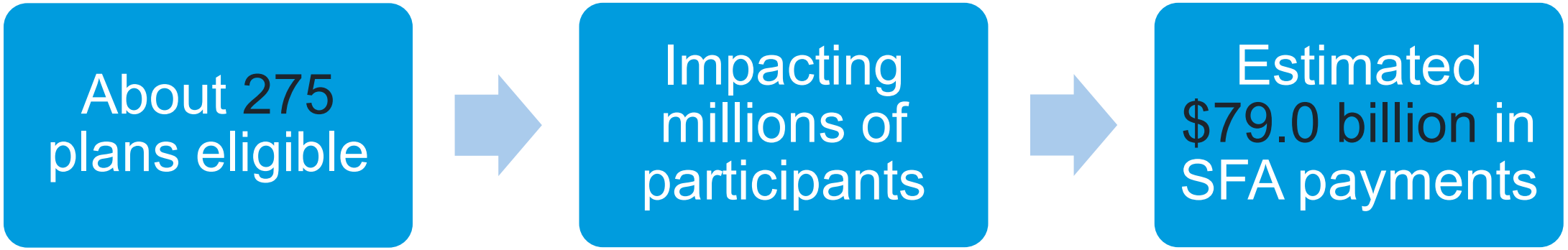
- Special Financial Assistance
- Withdrawal Liability
- Fiduciary Breach Litigation
- Healthcare Reform
- Mental Health Parity
- PBM Preemption

SFA Update

Proskauer

SFA Overview

The SFA Program, authorized under the American Rescue Plan Act, provides financial assistance to distressed multiemployer defined benefit pension plans through a one-time grant equal to the amount that, together with an eligible plan's non-SFA assets, is projected to allow it to maintain solvency through 2051.



SFA Applications – Current Status
(as of March 13, 2026)

	Approved	Under Review	Withdrawn (not yet resubmitted)	Plans on Waiting List
Number of Applications	193	15	20	81
Number of Plans	158	15	20	N/A
Aggregate $ SFA (approved or requested)	$75.3 billion	$2.5 billion	$1.2 billion	N/A
Aggregate Participant Count	1,685,283	159,382	77,114	

Bd. of Trs. of the Bakery Drivers Loc. 550 Pension Fund v. Pension Benefit Guaranty Corporation

- The Bakery Drivers Local 550 Pension Fund terminated by mass withdrawal in 2016. In 2022, a former contributing employer agreed to rejoin the Fund and resume contributions; the Fund applied for SFA.
- The PBGC denied the Fund's application because it had no zone status since 2016.
- The Fund sued the PBGC in E.D.N.Y. and the E.D.N.Y. granted summary judgment to the PBGC.
- The Second Circuit reversed holding that a MEP is *per se* eligible for SFA if it satisfied the criteria for "critical and declining status" during the 2020-2022 time period, even if it had previously terminated, because ERISA § 4262(b)(1)(A) references only ERISA § 305(b)(6) – not ERISA § 301(c), which provides that § 305 ceases to apply after "the last day of the plan year in which the plan terminates."
- The Second Circuit denied rehearing *en banc* on July 17, 2025.
- On December 12, 2025, the PBGC filed a petition for writ of certiorari to the Supreme Court – arguing in part that the Second Circuit's decision "will likely result in the payment of hundreds of millions of dollars in taxpayer funds to terminated pension plans that Congress intentionally excluded."
- On March 25, 2026, the Fund opposed the petition, arguing there is no basis for the granting of certiorari, as there is no circuit split, no broadly important issue of federal law and no other multiemployer pension fund in the exact same position as the Fund.

Post-SFA PBGC Audits

- PBGC has begun conducting post-SFA reviews focused on whether plans are complying with the conditions attached to Special Financial Assistance.

- Audit activity may include requests for documents relating to:
  - SFA account segregation and investment activity
  - use of SFA assets and administrative expense allocations
  - governance, internal controls, and service-provider oversight
  - calculation support and records underlying annual compliance filings

- Areas likely to draw attention include:
  - whether SFA assets were maintained and invested consistent with PBGC restrictions
  - whether required records can substantiate plan decisions and transactions
  - whether annual filings and certifications are complete and consistent with plan operations

- Plans that received SFA are treating PBGC audit readiness as an ongoing compliance function, not a one-time exercise at the point of application for SFA.

Withdrawal Liability Discount Rate Litigation

Types of Discount Rates

- Funding rate
- Risk-free rate
  - Most common is the PBGC rate for Section 4044 annuities
  - PBGC rate must be used to calculate withdrawal liability for mass withdrawals and plans that have accepted SFA
- Blended rate
  - Most common is the Segal Blend, which blends the funding rate and the PBGC rate
- Funding rate, less anticipated future administrative expenses
- Plan's anticipated return using different assumptions
  - More conservative estimate than used for funding purposes
  - Shorter time period

Types of Discount Rate Challenges

Where actuaries use a lower discount rate for withdrawal liability purposes than for funding, employers have asserted that the lower rate is improper for the following reasons:

1. Its adoption was untimely
2. It was the result of undue influence by the plan's trustees
3. Rates must be the same as a matter of law
4. Rate does not reflect the plan's actual or anticipated experience

Discount Rate Litigation

- The Sixth, D.C., and Ninth Circuits have held that the rate must still reflect the plan's actual or anticipated experience.
  - *United Mine Workers of Am. 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730 (D.C. Cir. 2022)
  - *Sofco Erectors, Inc. v. Trustees of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407 (6th Cir. 2021)
  - *GCIU-Emp. Ret. Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 2022)

	Energy West	*MNG*	*Sofco Erectors*
Minimum Funding Rate	7.5%	8%	7.25%
Withdrawal Liability Rate	PBGC rates of 2.71% and 2.78%	PBGC rate of ~4%	Segal Blend using PBGC rates of 2-3%
Holding	PBGC rate is a risk-free rate and has no relation to plan's investments or their anticipated return		PBGC rate "dilutes" the plan's anticipated return

- *Ace-Saginaw Paving Co. v. Operating Eng'rs Local 324 Pension Fund*, 150 F.4th 502 (6th Cir. 2025): Rejected use of PBGC rates on same grounds as in *Sofco Erectors*
- More decisions are expected at the Circuit level:
  - *City of Tacoma v. Western Metal Industry Pension Fund*, No. 25-4055 (9th Cir. 2025): Plan seeks review of Ninth Circuit's decision in *MNG Enterprises* that use of PBGC rates is unreasonable.
  - *Central States v. Allied Aviation Fueling Co. of St. Louis, LLC*, No. 25-02755 (7th Cir. 2025): Seventh Circuit will consider whether to uphold arbitrator and district court decisions holding use of Segal Blend reasonable.

PBGC's Proposed Rule

- By statute, PBGC can prescribe a discount rate.
- PBGC has prescribed the PBGC rate for mass withdrawals and withdrawals from plans receiving SFA.
- In 2022, PBGC proposed a rule permitting any discount rate between the PBGC and minimum funding rates.
  - 28 comments received
  - If adopted, would apply prospectively as a safe harbor
  - May be cited as persuasive authority

*Justice Kavanaugh inquired with the Solicitor General as to whether there was a status update on the PBGC proposed rule during the M&K Supreme Court oral argument.

Other Recent Withdrawal Liability Litigation

Trs. of the IAM National Pension Fund v. M & K Employee Solutions, LLC

- On January 20, 2026, the Supreme Court heard oral argument to resolve a Circuit split on whether there is a deadline by which actuaries must adopt their assumptions and methods.
  - *National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020): Actuary must adopt withdrawal liability assumptions by end of the prior plan year.
  - *Trs. of the IAM National Pension Fund v. M & K Employee Solutions, LLC*, 92 F.4th 316 (D.C. Cir. 2024): There is no deadline.

- Withdrawal liability generally is calculated "**as of** the end of the plan year preceding the plan year in which the employer withdraws."

- Question Presented - Whether 29 U. S. C. § 1391's instruction to compute withdrawal liability "as of the end of the plan year" requires the plan to base the computation on the actuarial assumptions **most recently adopted before the end of the year**, or allows the plan to use different **actuarial assumptions that were adopted after, but based on information available as of, the end of the year**.

Trs. of the IAM National Pension Fund v. M & K Employee Solutions, LLC

- Withdrawing Employer's Contentions
  - Adopting assumptions after the Measurement Date violates the "as of" language in § 1391.
  - § 1391 effectively freezes the unfunded vested benefits on the Measurement Date, which requires freezing the actuarial assumptions.
  - Plans should not be able to retroactively change assumptions to increase liability for withdrawing employers.
  - § 1394's anti-retroactivity provision for plan rules and amendments supports no retroactive adoption of actuarial assumptions.
- Plan & United States Contentions
  - Respondents: "as of" isn't part of § 1391(b), which is one of the withdrawal calculation methods.
  - Regardless, "as of" doesn't mean "on"; rather, it indicates a retrospective determination.
  - Common actuarial practice to make retrospective valuation.
  - Assumptions must be "reasonable (taking into account the experience of the plan and reasonable expectations)" and "in combination, offer the actuary's best estimate of anticipated experience under the plan." [29 U.S.C. § 1393(a)(1)]
  - Because § 1394 doesn't apply to actuarial assumptions, it undercuts petitioners' argument.

Ninth Circuit Clarifies Industry Exemptions for Withdrawal Liability

- Walker Specialty Const., Inc. v. Bd. of Trs. of the Constr. Indus. & Laborers Joint Pension Tr. for S. Nev. No., 24-1560, 2026 WL 21743 (9th Cir. Jan. 5, 2026).
  - Ninth Circuit held that "building and construction industry" means work involving the erection, maintenance, repair, and alteration of buildings.
  - Asbestos abatement work qualifies as work in the "building and construction industry."
  - As a result, the employer was eligible for the building-and-construction exemption and did not withdraw absent post-cessation non-contributory work in the same jurisdiction.
- Nevada Resort Ass'n–Int'l All. of Theatrical Stage Emps. & Moving Picture Mach. Operators of the U.S. and Can., Local 720 Pension Tr. v. JB Viva Vegas, LP, Nos. 24-3047 & 24-2791, 2026 WL 32577 (9th Cir. Jan. 6, 2026).
  - Ninth Circuit held that a plan "primarily covers employees in the entertainment industry" if a majority of covered employees perform some entertainment-industry work.
  - The Court rejected a stricter test that would have required a threshold amount of entertainment work.

FIDUCIARY BREACH LITIGATION

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ANDERSON V. INTEL

January 16, 2026: Supreme Court granted certiorari (Docketed 25-498)

- Question: Are allegations of fund underperformance, *without a meaningful benchmark*, sufficient to state a claim that an ERISA fiduciary breached the duty of prudence?
- Plaintiffs claim: 401(k) Plans' fiduciaries acted imprudently by allocating significant portions of assets to hedge funds, private equity, and other alternative investments, which had higher fees and lower returns compared to other investment options.
- District Court dismissed, stating a failure to plead that comparator investment was "a meaningful benchmark against which to compare."

ANDERSON V. INTEL

- What is a "meaningful benchmark"?
  - A comparator fund with sufficiently similar aims, risks, and objectives and taking into consideration the plan's overall investment strategies.
- Ninth Circuit: Pleading a meaningful benchmark is required; affirmed dismissal of complaint for failure to identify an appropriate comparator.
  - "The need for a relevant comparator with similar objectives—not just a better-performing plan or investment—is implicit in ERISA's text."
  - Standard of care is a "hypothetical prudent person 'acting in a like capacity . . . *and with like aims* . . .'"
  - "Statute makes clear that the goals of the plan matter."

PHARMACY BENEFIT MANAGER FEES

- *Lewandowski v. Johnson & Johnson et al.*
  - February 2024: Plaintiffs alleged fiduciary breach for selection of PBM, leading to inflated premiums and out-of-pocket costs.
  - Case dismissed with leave to amend in District Court in January 2025 and again on November 26, 2025 after complaint was amended and new plaintiff was added to address "harm" standard. Both times, District Court held that plaintiffs failed to plead concrete, non-speculative harm.
  - January 16, 2026: Plaintiffs filed notice of appeal to Third Circuit.

PHARMACY BENEFIT MANAGER FEES

- *Stern vs. JPMorgan Chase & Co.*
  - March 2025: Plaintiffs alleged fiduciary breach and prohibited transaction resulting in inflated out-of-pocket costs for generic drugs, causing some employees to pay more than uninsured patients.
    - One drug, the multiple sclerosis medication, teriflunomide, was marked up more than 38,000% to $6,229.23 from $16.20 for a 30-unit prescription.
  - On March 9, 2026, District Court dismissed fiduciary breach claim stating that this is a "settlor function" and not a fiduciary function, but allowed the prohibited transaction claim to proceed.
    - The court held that JPMorgan could contest the issue of the *correct benchmark* for determining the markup of a drug, which "is a question for the merits and not a ground for dismissal based on lack of standing."

ERISA LITIGATION REFORM ACT

March 17, 2026 – House Committee on Education and the Workforce advanced ERISA Litigation Reform Act (H. R. 6084) to House of Representatives, intended to raise pleading standard for participants to bring suits against plan fiduciaries.

- Positives: Balanced approach by raising pleading standard to prevent predatory lawsuits is beneficial, while recognizing that participants still need a mechanism to sue when they have genuinely been harmed.
- Concerns: Seeks to amend Section 502 of ERISA; 29. U.S.C. § 1132 - civil enforcement, which provides risks to additional changes to long established standards (i.e. equitable relief).
- Future horizon – expecting a bill to come out of the Senate, which will likely be different.

HEALTHCARE REFORM

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2026 CONSOLIDATED APPROPRIATIONS ACT

- February 3, 2026: Congress enacted an omnibus funding bill that, among other provisions, requires PBMs to remit all rebates and other remuneration to plan clients, requires flat-dollar, fair market value payment for services; and requires additional transparency for group health plans.
- Positives: Increased transparency and pass-through rebates.
- Concerns: Enforced as prohibited transaction – Trustees will be held responsible (rather than PBMs) for signing a contract that does not provide for pass-through.

"IMPROVING TRANSPARENCY INTO PHARMACY BENEFIT MANAGER FEE DISCLOSURE" PROPOSED RULE

January 30, 2026: DOL published a Proposed Rule which would mandate PBM transparency, including disclosure of detailed financial information, such as manufacturer rebates, spread pricing, pharmacy claw-backs, and compensation received by affiliates, agents, and subcontractors.

- The required disclosures are intended to enable plan sponsors to better compare PBM offerings, to better assess the reasonableness of compensation, and to identify conflicts of interest.
- As DOL describes it, "[t]his proposed rule would give plan fiduciaries an invaluable tool to address rising drug costs for American workers and businesses."
- Comments are due by April 15, 2026.

PATIENTS DESERVE PRICE TAGS ACT

- Act introduced in the Senate in July 2025 which seeks to increase transparency on healthcare costs.
- Includes various requirements for providers and Plans, including that Plans would be required to offer a real-time estimate of costs and – most problematic – a "hold harmless" clause such that participants cannot be held responsible for anything above the amount provided by this tool.
- Has obtained bipartisan support (ex. Senators Sanders and Cassidy).

MENTAL HEALTH PARITY

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(PARTIAL) STATEMENT OF NONENFORCEMENT

May 2025: DOL, HHS and Treasury published statement of nonenforcement of 2024 Final Rule to Mental Health Parity and Addiction Equity Act (MHPAEA)

- September 9, 2024, Departments issued "Requirements Related to the Mental Health Parity and Addiction Equity Act" (2024 Final Rule) implementing, among other things, additional requirements to non-quantitative treatment limitation ("NQTL") analysis.
- On January 17, 2025, the ERISA Industry Committee (ERIC) filed suit in the U.S. District Court for the District of Columbia challenging certain provisions of the 2024 Final Rule.
- May 2025, Statement of Nonenforcement: The Departments will not enforce the 2024 Final Rule prior to a final decision in the [ERIC] litigation, plus an additional 18 months. The Departments note that MHPAEA's statutory obligations [otherwise] continue to have effect.

KAISER SETTLEMENT

February 2026: Settlement reached with Kaiser Foundation Health Plan after EBSA alleged a failure to provide "timely and appropriate access to mental health and substance use disorder services."

Allegations:

- Kaiser did not maintain adequate provider networks for mental health and substance use disorder care
- Used patient responses to questionnaires to improperly prevent patients from receiving care.
- As a result, many members were forced to seek care outside Kaiser's network, often at higher out-of-pocket costs.

KAISER SETTLEMENT

Settlement:

- Over $28 million to participants, $2.8 million to government
- Kaiser agreed to reform company policies and practices to improve access to mental health and substance use disorder care, including:
  - steps to reduce appointment wait times;
  - improving care review processes to ensure members receive medically necessary care;
  - monitoring network adequacy to ensure members have access to appropriate mental health and substance use disorder providers and facilities.

PBM PREEMPTION

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PCMA V. MULREADY

Question: Was Oklahoma's Patient's Right to Pharmacy Choice Act, which sought to limit PBM's ability to restrict in-network pharmacies, preempted by ERISA?

- In 2023, 10th Circuit held that the Act which sought to regulate PBM limitations of pharmacy networks was preempted by ERISA because its provisions "govern[] a central matter of plan administration" and would "interfere[] with nationally uniform plan administration." (quoting *Rutledge v. PCMA*).
  - "*Rutledge* was a win for States and a loss for PBMs, but it does not shield the Act from preemption."
- In February 2024, Oklahoma filed a petition for a writ of certiorari requesting that the U.S. Supreme Court review the 10th Circuit decision.
- On May 27, 2025, the U.S. Solicitor General filed a brief arguing that the petition should be denied.
- On June 30, 2025, the Supreme Court denied Oklahoma's petition for review, thus ending any review of the decision and allowing the 10th Circuit decision to stand.

QUESTIONS?