NCCMP Lawyers and Administrators Meeting

Significant Cases for Multiemployer Pension Plans

By

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The Supreme Court

- *M & K Employee Solutions, LLC v. Trustees of the IAM National Pension Fund,* 146 S.Ct. 1224, 224 L.Ed. 2d 764 (2026).
  - 2 ½ weeks after the close of the Plan year, the Plan actuary met with the Trustees and decided to change the discount rate for measuring the Plan's unfunded liabilities for withdrawals occurring that year.
  - Relying upon the 2nd Circuit decision in *Metz,*[*] four employers that withdrew that year (all after the change in the discount rate) contested the assessment on the ground that actuarial assumptions must be selected by the measurement date (*i.e.*, the last day of the Plan year preceding the withdrawal) and prevailed in arbitration.
  - The district court vacated the arbitration award, the DC Circuit affirmed, and the employers sought Supreme Court review. Following the recommendation of the Solicitor of Labor, the Supreme Court framed the issue as:
    - "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."

- *The National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2nd Cir. 2020), *cert. denied*, 592 U.S. 917 (2020).
- [**] *Trs. of IAM Nat'l Pension Fund v. M & K Emp. Sols., LLC*, 92 F.4th 316 (D.C. Cir. 2024).

The Supreme Court

- *M & K Employee Solutions*
  - Relying on the Actuarial Standards of Practice and dictionary definitions of "as of", the Court rejected the argument that actuarial assumptions are frozen in time and roll-over continuously until changed.
  - Rather, the:

    "'as of" requirement sets the reference point for the factual inputs into the UVB calculation. It has no bearing on when actuaries must select the tools, including assumptions, they use to calculate a plan's UVBs.

    * * *

    "Under petitioners' view, actuaries must value a plan's UVBs based on hard data as it stood on the measurement date while at the same time applying assumptions selected based on an older set of facts. The statute does not mandate this mismatch. Instead, actuaries may select their assumptions after the measurement date in order to value the UVBs as of the measurement date."
  - The Court explicitly did not resolve whether the data relied upon by the actuary must be in existence as of the measurement date.
  - In addition to filing an *amicus* brief in support of the Plan, the Solicitor General used 10 minutes of the Plan's 30 minutes to argue.

The Supreme Court – Epilogue

- *Cunningham v. Cornell Univ.*, 604 U.S. 693 (2025).
  - Using standard rules of pleading, the Court determined that plaintiffs alleging prohibited transactions do not have to plead sufficient facts to disprove the exitance of exemptions, since those are affirmative defenses.
    - The Court did suggest that district courts could address this problem and weed-out non-meritorious suits by requiring plaintiffs to file Replies to the affirmative defenses, as permitted by the Federal Rules.
    - In at least two cases, the district courts have required such replies.

The Supreme Court

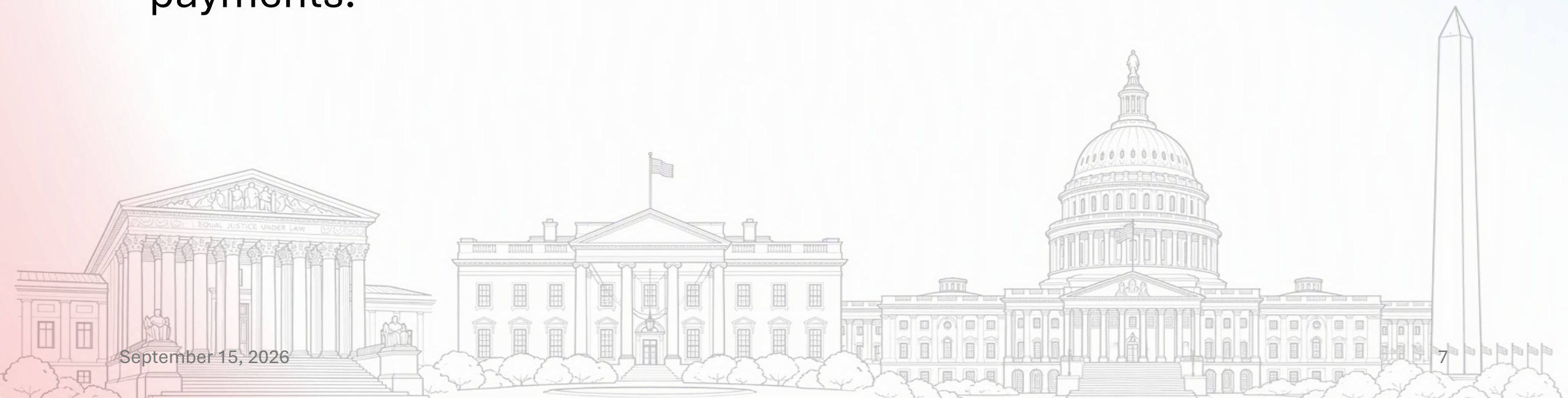
- *Anderson v. Intel Corporation Investment Policy Committee*, No. 25-498, *cert. granted* Jan. 16, 2026.
  - The question presented is:
    - Whether, for claims predicated on fund underperformance, pleading that an ERISA fiduciary failed to use the requisite "care, skill, prudence, or diligence" under the circumstances and thus breached ERISA's duty of prudence when investing plan assets requires alleging a "meaningful benchmark."
  - The Court of Appeals for the 9th Circuit had affirmed the district court's dismissal of the suit because the complaint neither directly alleged a flawed process (*i.e.*, lack of procedural prudence) nor a meaningful benchmark from which the Court could "infer from what is alleged that the process was flawed."
  - Oral Argument is set for October 6, 2026, and, in addition to the *amicus* brief it has already filed, the Solicitor General will use ten minutes of Intel's 30 minutes to argue the case.

The Government's Role

- Notably, the Solicitor General, EBSA, and PBGC have been more active than they've been in a while, generally supporting Plans on some key issues.
- The DOL has filed *amicus* briefs on multiple topics, including:
  - In support of procedural prudence as the prudence standard;
  - Supporting using a multi-factor approach for the selection of annuities to de-risking (*i.e.*, the purchase of annuities to close out defined benefit pension plans), rather than always requiring the use of the safest option.
  - The use of fiduciary discretion to apply DC plan forfeitures to reducing employer expenses rather than either offsetting participant expenses or increasing participant benefits.
  - The role of "equitable surcharge" as a make whole remedy, which is therefore permitted under ERISA as an "equitable remedy".
  - That participants do not have to exhaust administrative remedies in order to pursue statutory claims.
  - In pursuing fiduciary breach claims, the burden is on the participants to prove damages – there is no burden-shifting.

The Government's Role

- PBGC has formally announced revival of its *amicus* program (along with its opinion letter program).
- It has also filed a brief on how to apply credits against liability for a complete withdrawal for prior partial withdrawal liability payments.



The Supreme Court and More – Special Financial Assistance

- Following the 2nd Circuit's decision in *Bakery Drivers Local 550,*[*] granting eligibility for SFA to a plan that had terminated by mass withdrawal prior to its 2020 plan year, the government sought Supreme Court review, which the Court declined to do (over Justice Kavanaugh's dissent).
- On remand, the parties settled, with payment due by Sept. 29.
- The only remaining issue is the amount of the "reasonable and necessary" attorneys' fees incurred by the Plan, which PBGC has agreed to pay.
- The PBGC reached out to the 29 plans in the in the 2nd Circuit that would be covered by the *Local 550* decision and requested that they file applications by email.
- On September 2, 2026, 23 of the estimated 63 non-2nd Circuit plans potentially covered by the *Local 550* decision sued in the U.S. D.C. for DC, seeking to require the PBGC to permit them to file applications and, ultimately, to grant those applications if otherwise eligible.

- Bd. of Trs. of the Bakery Drivers Loc. 550 & Indus. Pension Fund v. PBGC, 136 F.4th 26 (2d Cir. 2025), *cert denied,* 224 L. Ed. 2d 844 (2026).
- Bd of Trs., Sports Arena Employees Local No. 137 Retirement Plan et al v. PBGC, Docket No. 1:26-cv-03073 (D.D.C. Sep 02, 2026).

Courts of Appeal – Actuarial Equivalence

- Cases involving allegedly outdated assumptions in determining "actuarial equivalence" for survivors' benefits.
  - *Reichert v. Kellogg Co.*, 170 F.4th 473 (6th Cir. 2026):

    ERISA Section 205(d)'s "actuarial equivalence requirement prohibits the use of unreasonably outdated mortality tables or other unreasonable, inappropriate actuarial assumptions."

    * * *

    "An employer would not violate [section 205] were it to use actuarial assumptions that are "within the scope of professional acceptability" in the field of actuarial science, i.e., reasonable. "
  - *Drummond v. S. Co. Servs., Inc.*, 177 F.4th 1076 (11th Cir. 2026):

    "We agree with Odom's reading. ERISA's definition of "present value," our past engagement with the same concept, and professional norms in the actuarial industry point in the same direction. Each source shows that actuarial equivalence connotes a degree of connection to empirical grounding and realistic expectations about the future. For this reason, the meaning of 'actuarial equivalent' can't support Defendants' proffered 'anything goes (as long as you wrote it down)' interpretation of Section [205(d)]."

Courts of Appeal – Withdrawal Liability

- *Gen. Elec. Co. v. Boilermaker-Blacksmith Nat'l Pension Tr.*, 176 F.4th 1059, 1065. (8th Cir. 2026)
  - The case involved an assessment of partial withdrawal liability against an employer that owned three subsidiaries that contributed to the Plan, each under contract with a different union local. Two subsidiaries were in the Building and Construction Industry ("BCI") and one was a factory. Determining that the employer was not in the BCI, the Plan assessed two partial withdrawals, one for a 70% decline in CBUs and one for shutting down the factory and moving the work to China and Mexico.
  - The question was whether "substantially all" of the employers' employees were in the BCI so that the employer would get the benefit of the BCI partial exemption from withdrawal liability.

GE – Withdrawal Liability

- The parties agreed that:
  - If GE were in the BCI, it would not have suffered the two assessed partial withdrawals;
  - "Substantially all" means 85%;
  - The "measurement period" was the 8 years, which was the length of time needed to determine a 70% decline in CBUs;
  - The appropriate measure is individual employees rather than CBUs;
  - The factory employees were not in the BCI; and
  - The field employees were in the BCI.
- The parties disagreed on how to count the employees:
  - GE wanted to count the employees in the aggregate over the measurement period, so that an employee who worked one hour would count the same towards the 85% threshold as an employee who worked the entire 8 years.
  - The Plan wanted to use a monthly counting period to see whether the GE met the 85% threshold in at least half of the 96 months.

GE – Withdrawal Liability

- The Court concluded that, of the two tests, GE's best met the statutory purpose. The Court's decision was fact-based, and it explicitly stated that different facts could well mean a different result.
- The Court also stated:
  - "We also see no obstacle to a fund and an employer contractually agreeing on what method to use to determine whether 'substantially all' employees worked in the building and construction industry."

Withdrawal Liability – What is the Building and Construction Industry?

- *Walker Specialty Constr., Inc. v. Bd. of Trs. of the Constr. Indus. & Laborers Joint Pension Tr. for S. Nevada*, 163 F.4th 1218 (9th Cir. 2026).
  - An employer that performed asbestos abatement work shut down and ceased contributions to a Plan in the Building and Construction Industry ("BCI").
  - The Plan assessed withdrawal liability of $2.8 million, the employer demanded arbitration, and prevailed. The Plan unsuccessfully sought to vacate the award in district court and appealed.

Walker Specialty Const. – What is the BCI?

- The Court characterized the employer's work as follows:
  - The Court joined the 2nd and 8th Circuits in concluding that Congress intended to incorporate the NLRB definition of the BCI into the MPPAA amendments to ERISA, stating:
    - "The NLRB settled the meaning of the "building and construction industry" through a series of administrative decisions interpreting Taft-Hartley in the 1960s. In *Indio Paint*,* the NLRB surveyed contemporaneous sources—including technical publications and manuals, common dictionaries, and state codes and decisions—to determine that the "building and construction industry" includes "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure." Moreover, "[c]onstruction covers the erection, maintenance and repair . . . of immobile structures and utilities . . . which become integral parts of structures and are essential to their use for any general purpose." The NLRB similarly noted that "construction" includes "new work, additions, alterations, and repairs." . . . The NLRB reaffirmed that the "building and construction industry" includes the alteration and demolition of buildings in Zidell Explorations, Inc.**"
  - In characterizing the employer's work, the Court stated:
    - "Asbestos abatement involves the remediation of building materials containing asbestos, such as insulation, roofing, flooring, walls, cement piping, and fireproofing materials. Remediation requires removing asbestos-containing materials or covering them with an impermeable coating like polyethylene to prevent the release of asbestos fibers. To remove materials with asbestos, Walker's employees scrape or grind them off, break them down using chemical solvents, or demolish them. Removal of asbestos-containing materials, especially demolition, can facilitate the refurbishment and renovation of existing buildings and the construction of new buildings."
  - The Court concluded that the extensiveness of the repairs in this case placed them within the BCI.

Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint & Rug Ctr.), 156 N.L.R.B. 951 (1966).

** 175 N.L.R.B. 887 (1969).

Withdrawal Liability and Bankruptcy Claims – When is a "Claim" an "Assessment"?

- *Int'l Painters & Allied Trades Indus. Pension Fund v. Fla. Glass of Tampa Bay, Inc.*, 165 F.4th 846 (4th Cir. 2026)
  - The Painters Plan filed a $1.6 million contingent proof of claim for withdrawal liability in the bankruptcy of a contributing employer that ultimately liquidated, for which it received a $50,000 distribution.
  - 6 years later, the Plan discovered that non-union controlled group members continued to operate and assessed withdrawal liability.
  - After blowing the deadline to arbitrate, the employer defended against the Plan's collection suit by claiming that the proof of claim constituted both an assessment and notice of default and acceleration, so that Florida's 6-year statute of limitations barred the action.

Florida Glass – When is a Claim an Assessment?

- The Court determined that, while a Proof of Claim *may* constitute and assessment and even a notice of default and acceleration, it depends on what is in the claim.
- As stated by the Court:

  “A proof of claim that clearly satisfies the provisions of the MPPAA should be given operative effect under that statute. In this case, however, the answer is "no." Because the 2016 proof of claim submitted by International Painters in Florida Glass's bankruptcy did not clearly satisfy the MPPAA's notice, demand, and acceleration provisions, the district court correctly held that it was nothing more than a proof of claim.”

Withdrawal Liability – Work in the "Entertainment Industry"

- *Nev. Resort Ass'n Theatrical Stage Employees Local 720 Pension Tr. Fund v. JB Viva Vegas, LP*, 163 F.4th 1240 (9th Cir. 2026).
  - ERISA provides a limited exemption from withdrawal liability for withdrawals from plans that "primarily cover[] employees in the entertainment industry . . . ."
  - A Plan that previously met this definition determined that "while the majority of plan employees earned some of their wages through entertainment work, only 35 percent earned more than half of their wages through entertainment work," and that the trend towards convention and trade show work and away from entertainment work was increasing.
  - The Plan then notified its contributing employers that it was no longer covered by the partial exemption.
  - The production company that produced "Jersey Boys" ceased contributing after the show's 8-year run ended, and the Plan assessed withdrawal liability.
  - The employer argued that it was entitled to the exemption. Although the parties agreed that "primarily" means at least half, they disagreed on what it means to be an "employee[] in the entertainment industry."
    - The employer argued that any work was sufficient, while the Plan contended that at least half an employee's work must be in the industry.

Jersey Boys – That's Entertainment

- Following the vacation of the first arbitration award on slightly different grounds, the arbitrator determined that the law was ambiguous as to what "employees in the entertainment industry" means, and upheld the assessment, which the district court enforced The employer appealed.
- The Court of Appeals noted that, although the word "primarily" is used to qualify what proportion of covered employees work in the entertainment industry, there is no such qualification on the amount of work the employee must perform.
- Therefore, it concluded, the statute was unambiguous and mandated that any amount of work was sufficient.
- Even if the statute were ambiguous, reasoned the Court, imposing any minimum threshold on the amount of work would "arbitrarily constrict" the exemption.
- Notably, Congress used the same formulation for the building and construction industry exemption.

QUESTIONS!