

Supreme Court Decision Creates Uncertainty in Determining Pension Exposure for Unionized Properties

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Real estate owners or buyers in the market to purchase a real estate property, or to provide mortgage financing for a real estate property that has a unionized workforce at the property, should heed the Supreme Court's recent decision in *M&K Employee Solutions, LLC v. Trustees of the IAM National Pension Fund*, 608 U.S. ___ (2026), and should identify pension exposure early in any transaction or operational change involving union labor. The case concerns "withdrawal liability," which is the amount an employer may owe to an underfunded multiemployer pension plan (Multiemployer Plan) covering union employees when the employer "withdraws" from the Multiemployer Plan. The Supreme Court's decision permits a Multiemployer Plan to change assumptions used in calculating withdrawal liability in a manner that can cause prior estimates of that liability to be understated.

Generally, a withdrawal occurs when an employer ceases to have an obligation to contribute to a Multiemployer Plan. Thus, in practical terms, this issue may arise when a hotel, office building or other property with a unionized labor force is sold, closed or redeveloped. But any cessation of the employer's obligation to contribute to a Multiemployer Plan can cause a withdrawal to occur.

The issue in this case involved the complex methodologies used by a Multiemployer Plan to calculate the amount of an employer's withdrawal liability (which is essentially an exit charge on the withdrawing employer). Withdrawal liability is generally based on the amount of funding that the Multiemployer Plan needs so that it can pay promised retirement benefits in the future. The withdrawal liability amount is calculated on a plan-wide basis in the first instance, and then that amount is allocated among all employers whose employees are or were participating in the plan. As required by the Employee Retirement Income Security Act of 1974 (ERISA), a Multiemployer Plan uses actuarial assumptions to estimate how much money the plan will need to pay those promised benefits.

One important actuarial assumption used in calculating employer withdrawal liability is the discount rate. This rate is used to convert estimated future employer contributions to a pension plan into a

present-day dollar amount. The discount rate has an inverse relationship to the amount of withdrawal liability: using a lower discount rate assumption will increase a plan's overall withdrawal liability, which will increase the amount charged to withdrawing employers. In contrast, using a higher discount rate assumption will decrease the overall withdrawal liability amount, and hence the amount charged to withdrawing employers. In this Supreme Court case, the pension plans' trustees changed the discount rate, which increased one employer's withdrawal liability from approximately \$1.8 million to approximately \$6.2 million.

Before this decision, there was uncertainty over which discount rate assumptions a pension plan could use to calculate withdrawal liability. Some employers argued that the plan had to use the actuarial assumptions that were already in place on the "measurement date," which is generally the last day of the plan year before the plan year in which the employer withdraws. That argument had support from the Second Circuit's decision in *National Retirement Fund v. Metz Culinary Mgmt., Inc.*, 946 F. 3d 146, 152 (2020), which required multiemployer pension plans to adopt their interest rate assumptions on or before the measurement date. The District of Columbia Circuit took the opposite approach in the current case, holding that the actuaries can change the discount rate after the measurement date. That decision created a split that the Supreme Court decided to resolve in *Trustees of the IAM National Pension Fund v. M&K Employee Solutions, LLC*, 92 F.4th 316, 322 (D.C. Cir. 2024).

In ***the current*** case, the Supreme Court, in a unanimous decision, held that ERISA does not require a pension plan's actuary to select the relevant actuarial assumptions on or before the measurement date. Moreover, the Supreme Court held that a Multiemployer Plan could, after the measurement date, choose a lower discount rate assumption than the one in effect on the measurement date.

The practical effect of the decision will be significant and will be felt by many stakeholders in the real estate industry. In numerous circumstances, an employer with a unionized workforce that contributes to a Multiemployer Plan will find it necessary to gauge actual or potential withdrawal liability. One example involves financing transactions, where the potential or actual withdrawal liability for a property will be important to both the lender and borrower. Another example involves an asset sale context for commercial real property where a Multiemployer Plan is in place. Sellers and buyers typically estimate exposure to withdrawal liability so they can allocate risk. However, as a result of the Supreme Court's decision, the parties' estimates of potential or actual withdrawal liability may not be accurate because the Multiemployer Plan is no longer required to use the discount rate in effect on the measurement date (the last day of the plan year before the year of the sale). Instead, the Multiemployer Plan can now change the discount rate after that measurement date, thereby increasing previously estimated withdrawal liability.

For real estate clients, the takeaway is that pension exposure should be quantified early in any transaction or operational change involving union labor, as mentioned above. Additionally, owners, buyers, sellers, lenders and borrowers should research whether an employer or a property manager contributes to a Multiemployer Plan related to the property, obtain withdrawal liability estimates from the trustees of the pension plans and consider purchase-price adjustments, recourse guarantees or other protections before closing on a transaction or in deciding whether to foreclose or accept a deed in lieu of foreclosure. Given that calculations of exposure may turn out later not to have been accurate, we recommend considering a range of exposure based on the possibility that a Multiemployer Plan can change its discount rate assumption. For example, if a Multiemployer Plan is using a 7.5 percent discount rate, parties to a transaction should consider how withdrawal liability estimates would change if the plan's actuary switches to a 6.5 percent discount rate later on to calculate that liability. Alternatively, the parties may wish to consider the impact each half-percent change to the discount rate might have on withdrawal liability estimates. Although using a range will not ensure certainty, doing so will provide an order of magnitude for potential changes, and knowing the magnitude can help assessments of liability risks in this area.

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