VOL. 37, NO. 3 AUTUMN 2024

BENEFITS LAW JOURNAL

Pension Plan Sponsors Targeted in Pension Risk Transfer Lawsuits

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In this article, the authors discuss the litigation risks that should be considered by pension plan sponsors contemplating pension risk transfer transactions.

Since March 2024, six plan sponsors and fiduciaries have been hit with class action lawsuits challenging the transfer of pension plan liabilities to Athene Holding Ltd. or related entities (Athene). The lawsuits focus heavily on Athene's private equity ownership and alleged "risky" investments. The transactions at issue ranged from approximately $1.4 billion to $9 billion and cover tens of thousands of participants.

These lawsuits come at a time when plan sponsors, due to a range of factors including the relatively favorable interest rate environment, have an increased interest in transferring pension risk to insurance companies and other de-risking activities. If your company sponsors a defined benefit pension plan, consider reviewing any current or contemplated de-risking activities in light of this litigation.

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BACKGROUND

Defined benefit pension plans promise guaranteed benefits to plan participants upon retirement, typically in a manner that is without material risk to the participants. The company that sponsors the plan assumes the risk as to whether the plan has enough money to pay promised benefits and is responsible for making contributions based on assumptions set annually about events that will occur in the future, including investment performance, interest rates, and how long participants will live. In addition to being volatile because those assumptions change and, like any prediction, generally are incorrect, the contributions might not be sufficient to pay promised benefits requiring potentially significant and unexpected future contributions. Oddly, contributing too much is also a concern because using a surplus in the future on anything other than increased pension benefits is extremely difficult.

These risks and other considerations, including significant increases in premiums required to be paid to the Pension Benefit Guaranty Corporation, the time and attention required of senior company employees to maintain pension plans, and in some cases the impact of pension plans on the plan sponsor's stock price, have led to a significant increase in de-risking activities during the past 15 years including:

- Plan asset investment adjustments (liability driven investments);

- Plan design changes including freezing to new entrants, ceasing future benefit accruals, and adding ongoing lump sum forms of payment; and

- Transferring risk to participants (lump sum offers/windows) or to one or more insurance companies through the purchase of group annuity contracts (pension risk transfer, or PRT, transactions, which may include terminating the entire plan or a portion of the plan).

The decision to do a PRT transaction is made by the plan sponsor in a non-fiduciary capacity and may be based on the plan sponsor's legitimate business interests. By contrast, the implementation of the sponsor's PRT decision, including selection of an annuity provider, is fiduciary and subject to strict standards under federal law including that the plan fiduciary (which may be a committee of company employees) act solely in the interest of the plan participants and beneficiaries. The Department of Labor (DOL) issued guidance in 1995 specifying how a plan fiduciary should comply with those strict standards. A 2022 law required the DOL to review that 1995 guidance to determine whether it should be modified in part due to concerns some have raised regarding private equity-owned insurance companies. In June 2024, the DOL concluded that the 1995 guidance was still appropriate and determined it would not propose any changes to the guidance.

PRT LITIGATION

The plaintiffs in each lawsuit, former plan participants whose benefits were transferred to Athene, generally allege that the plan fiduciaries could not possibly have complied with applicable strict fiduciary standards given that Athene, with its private-equity ownership and risky investments such as offshore captive reinsurance, was selected. They further allege that Athene was selected because it was less expensive than other annuity providers and therefore in each company's interest to ensure it was selected. They make this allegation even though in certain cases an independent fiduciary was engaged by the company to select the insurer.

Plaintiffs generally bring two types of claims in the lawsuits.

First, plaintiffs bring claims for breach of fiduciary duty (including co-fiduciary duty and breach of a duty to monitor in cases involving an independent fiduciary), alleging that the defendants breached their duties to plan participants by selecting Athene and, as a result of this breach, participants are allegedly at increased and substantial risk of not receiving their benefits, have lost significant protections under federal pension law, and have a decreased value of their pension benefit.

Second, plaintiffs claim the defendants engaged in prohibited transactions in the selection of Athene, also giving rise to alleged fiduciary liability, among other things. To remedy this alleged wrongdoing, plaintiffs seek, among other things, a company guarantee of the annuities, that the company be secondarily liable for the plaintiffs' pension benefits, and disgorgement of profits allegedly earned from the annuity purchase.

Motions to dismiss are expected to or have been filed in each case. At a high level, the defendants argue for dismissal on the grounds that the plaintiffs have not sufficiently alleged actual or imminent harm, but rather vaguely alleged a possibility of some unspecified and speculative increase in the risk that the participants will not receive their full benefit (which is belied by plaintiffs' own allegations). The defendants also argue, among other things, that the plaintiffs did not sufficiently allege that (or how) the plan fiduciary's process was inconsistent with the requirements of federal pension law and that the remedies sought are not available under such applicable law.

CONCLUSION

De-risking activities, including PRT transactions, are permissible under the law and frequently can be quite beneficial in mitigating certain of the risks associated with sponsoring a pension plan. That said, it is critical to undertake these activities with any potential additional risks, such as this litigation, in mind. If you sponsor a defined benefit pension plan, it is important to follow the progress of this litigation and understand how these cases may impact you and your plan, especially if you are considering a PRT transaction or any de-risking activities.