

Fiduciary Considerations in Actuarial Assumptions: Insights from Recent ERISA Litigation

By Chuck Campbell, Alyca Garrison and Laurel Malone

Fiduciaries of public pension plans regularly make decisions on behalf of the plan. Some decisions may be fiduciary in nature, while others may be purely administrative. In evaluating the application of fiduciary duties and potential liability to a particular set of circumstances, the first step in the analysis is relatively straightforward: What act or failure to act is at issue and did it involve the exercise of discretion by a potential fiduciary? If those boxes are checked, further analysis as to whether the fiduciary acted in accordance with applicable fiduciary duties and accompanying liability is required. Importantly, the subject matter of the action is not a factor in this step of the analysis. However, a potential concern for public pension plans is that the nature or subject matter of the action may cloud the analysis as to whether an action is fiduciary in nature.

The determination of actuarial assumptions to be used for plan purposes is certainly a fiduciary action. The fiduciary nature of selecting actuarial assumptions for an annual valuation is unlikely to be a surprise to trustees or to other plan fiduciaries. But what about actuarial assumptions used for other plan purposes that are more administrative in nature? The selection of these assumptions is a discretionary act as well. Recent cases under the Employee Retirement Income Security Act of 1974 (ERISA) highlight the potential risks and liabilities associated with these selections. While governmental plans are not subject to ERISA, these cases still provide valuable insight into potential risks for plan fiduciaries.

Outdated Assumptions

A recent line of cases brought under ERISA focuses on the reasonableness of actuarial assumptions used in determining the actuarial equivalence of different forms of benefit.¹ Specifically, plaintiffs in these cases challenge whether actuarial assumptions are reasonable in determining actuarial equivalent benefits if the assumptions used in converting benefits to different forms are outdated and have not been regularly updated by the plan. The claims often center around the actuarial equivalence of a qualified joint and survivor annuity (QJSA) as compared to a single life annuity.

Under ERISA, the default form of benefit for married participants in defined benefit plans must be a QJSA that is paid over the life of the participant with a survivor annuity for the life of the spouse.² Notably, the QJSA is required to be the “actuarial equivalent” of the single

life annuity for the life of the participant.³ Although ERISA does not define the term “actuarial equivalent,” the Department of Treasury has interpreted this term to mean that actuarial equivalence for QJSA is to be determined “on the basis of consistently applied *reasonable* factors.”⁴

In these recent cases, plaintiffs claim that a failure to use reasonable actuarial assumptions in an actuarial equivalent benefit conversion violates the applicable provisions of ERISA. This constitutes a forfeiture of accrued



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benefits when the conversion results in a reduced benefit and also forms the basis of a breach of fiduciary duty. Surprisingly, multiple courts have recently held that the specific terms of ERISA *do not* require the use of reasonable actuarial factors in determining the amount of a QJSA.⁵ However, the Department of Labor is questioning this odd result in a current case.

In *Drummond v. S. Co. Servs., Inc.*, No. 2:22-CV-00174-SCJ, 2024 U.S. Dist. LEXIS 157315 (N.D. Ga. 2024), the claimants asserted that a pension plan's use of outdated mortality tables in determining the value of a QJSA was unreasonable and resulted in plan participants receiving lower benefit payments than they would have received if the plan had used an updated mortality assumption. The pension plan utilized a mortality table from 1951, which was based on the life expectancy of persons who were at or near retirement age between 1946 and 1950 (and were born in the late 1800s).⁶ Relying on Congress' omission of the word "reasonable" in the statute, the court was unpersuaded that "the plain, established meaning of 'actuarial equivalent' requires that the benefits calculations be conducted using reasonable actuarial assumptions."⁷ Although the district court ruled in favor of the plan, the case is now on appeal to the Eleventh Circuit with oral arguments heard on September 17, 2025. Significantly, the Department of Labor filed an amicus brief in support of the plaintiff's position on appeal that points out how the district court's holding contravenes the purpose of ERISA.⁸

Although public pension plans are not subject to the specific QJSA rules under ERISA, plans often allow participants to elect alternate forms of benefits, and the amount of these benefits is intended to be the actuarial equivalent of the plan's normal form of benefit. Thus, the same fact pattern that exists in these ERISA cases could exist under a public pension plan. If either applicable state law or the terms of a public pension

plan document specifically require the use of reasonable actuarial assumptions, a plan fiduciary could be found to have failed to follow applicable state law or the terms of the plan. Additionally, if the use of outdated actuarial assumptions is found unreasonable, it could provide the basis for a fiduciary claim that a public pension plan was imprudent in monitoring its decisions around actuarial assumptions.

Timing of Assumptions

Periodic experience studies to determine the appropriateness of actuarial assumptions used by a plan is a common and prudent practice. These experience studies are performed by a public pension plan's actuary, often in connection with an annual valuation. Any changes to assumptions made due to these studies often take effect for the actuarial valuation for the *prior* year. (For example, assumption changes in connection with an experience study held in the spring of 2026 might apply to a valuation for the year ending December 31, 2025.) Another recent ERISA case considers the issues that might arise when assumption changes apply retroactively for certain purposes.



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Under ERISA, when an employer withdraws from a multiemployer pension plan, it must pay its share of the plan's unfunded vested benefits. That amount is calculated as of the last day of the year preceding the withdrawal (the "measurement date"). In *Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC*, 464 U.S. App. D.C. 215 (2024), plaintiffs brought a claim based on the change to key actuarial assumptions, including the plan's discount rate, in determining withdrawal liability under the multiemployer plan. In November 2017, the plan's actuary determined the plan's unfunded liability as of December 31, 2016 (*i.e.*, the measurement date for 2017) based on a discount rate of 7.5% for purposes of calculating withdrawal liability for any employers that

elected to withdraw from the plan in 2017.⁹ In January 2018, the plan adopted a new discount rate of 6.5% for determining withdrawal liability in 2018 based on the measurement date of December 31, 2017.¹⁰

In this case, the plaintiffs claimed that the use of the new discount rate established in 2018 when determining withdrawal liability as of December 31, 2017, was a violation of ERISA. Specifically, the plaintiffs cited a Second Circuit decision in *Nat'l Ret. Fund v. Metz Culinary Mgmt.*, 946 F.3d 146 (2d Cir. 2020), which held that, absent a change to the plan's actuarial assumptions made *prior* to a given measurement date, the assumptions in place for the plan year ending on the measurement date, including the discount rate, should be applied in determining withdrawal liability as of such date.

However, the D.C. Circuit declined to follow *Metz* and held that in determining withdrawal liability, an actuary should utilize assumptions that are based on information that is available "as of" the measurement date, but should not necessarily use or rely on the assumptions that were in effect on the measurement date.¹¹ In denying the plaintiffs' claim and upholding the plan's retroactive application of an assumption change, the court believed that its ruling balanced the directives from Congress that unfunded vested benefits be determined "as of" the measurement date and that the assumptions be generated "taking into account the experience of the plan and reasonable expectations" such that they offer the "actuary's best estimate of anticipated experience."¹² The Supreme Court has accepted certiorari in this case, but as of now, oral arguments have not been scheduled.¹³

Similar to the QJSA requirements, the withdrawal liability requirements for multiemployer plans under ERISA are inapplicable to governmental pension plans,

although governmental multiple employer plans may have a form of withdrawal liability for employers who cease participation in the plan. That said, this case highlights potential concerns with having retroactive application of changes in actuarial assumptions, particularly when neither applicable law, nor plan terms or procedures, are explicit on how assumption changes should be applied or when they should take effect.

Inconsistent Application of Assumptions

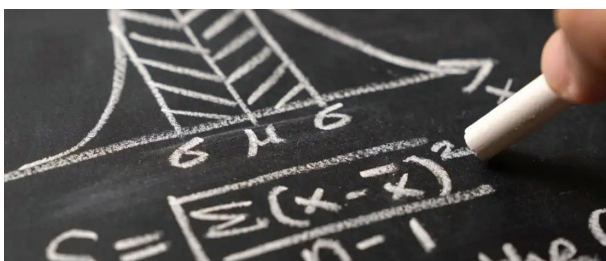
Actuarial assumptions can be used for a variety of purposes under a public pension plan. Assumptions are used for determining benefits or potential employer liability if withdrawing from a plan as demonstrated in the cases above. However, assumptions are also

used in annual plan valuations and determining annual employer contributions. When a plan uses inconsistent actuarial assumptions for different purposes, it begs the question whether one of the assumptions being used is inaccurate and thus unreasonable. A recent ERISA case highlights this potential problem.

In *Cruz v. Raytheon Co.*, 435 F. Supp. 3d 350 (D. Mass. 2020), a pension plan used fixed "conversion factors" to

convert a participant's single life annuity into a QJSA, but the plan did not disclose the mortality or interest rate it used to produce the conversion factors. However, in its 2014 10-K disclosure reporting pension liabilities to the SEC, the employer used a 5.06% interest rate and a 2014 mortality table to calculate the present value of its obligations under its plan.¹⁴

Participants claimed that if the assumptions used in the SEC filing had been utilized as conversion factors, the resulting benefit would have been a larger monthly payment than what the participants were currently receiving. Participants claimed that this divergence of



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benefit amounts produced by inconsistent application of actuarial assumptions by the plan was unreasonable.¹⁵ The court found the participants' argument to be persuasive and subsequently denied the plan's motion to dismiss, emphasizing that even under a "range of reasonableness" of actuarial assumptions, using inconsistent assumptions for different purposes may fall outside of that reasonable range.¹⁶ Ultimately, the employer ended up settling after the court denied its motion to dismiss.

Conclusions

The specific applicability of these cases to public pension plans will, as always, be driven by state law, plan terms, and the fiduciary law of a particular jurisdiction and if and how such terms and law align with the pertinent facts and ERISA. However, the cases discussed above do highlight potential fiduciary risks with actuarial assumptions that are administrative in nature. Implementing common best practices for fiduciaries can help to mitigate these risks.

- **Establish a Process:** Consider creating a specific process or procedure for the determination and periodic review of actuarial assumptions. The process should incorporate the involvement of the plan's actuary and be sensitive to administrative application of any changes to assumptions by providing the timeline for the review and the proposed effective date of any change.
- **Monitor Prior Decisions:** The frequency of reviewing actuarial assumptions should be built into the process described above to avoid outdated assumptions and ensure that stated assumptions are in line with actual experience and plan liabilities.
- **Be Consistent:** Ensure that consistent assumptions are used for all purposes under the plan or be able to justify the use of different assumptions for varying purposes.

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Endnotes

¹ See e.g., *Belknap v. Partners Healthcare Sys., Inc.*, 588 F. Supp. 3d 161 (D. Mass. 2022); *Drummond v. S. Co. Servs., Inc.* No. 2:22-CV-00174-SCJ, 2024 U.S. Dist. LEXIS 157315 (N.D. Ga. 2024). But see e.g., *Masten v. Metro. Life Ins. Co.*, 2021 U.S. Dist. LEXIS 110963, 543 F. Supp. 3d 25 (S.D.N.Y. 2021); *Scott v. AT&T Inc.*, No. 20-cv-07094-JD, 2025 U.S. Dist. LEXIS 130661 (N.D. Cal. 2025).

² 29 U.S.C. § 1055(a)(1).

³ *Id.* § 1055(d)(1).

⁴ 26 C.F.R. § 1.401(a)-11(b) (2) (emphasis added).

⁵ Some cases that made it beyond the motion to dismiss stage ultimately settled. See e.g., *Holloway v. Kohler Co. & Kohler Co. Pension Plan*, No. 23-CV-1242-JPS, 2024 U.S. Dist. LEXIS 224886 (E.D. Wis. 2024); *Urlaub v. CITGO Petro. Corp.*, No. 21-CV-4133, 2022 U.S. Dist. LEXIS 30616 (N.D. Ill. Feb 22, 2022).

⁶ Brief for the Acting U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 5, *Drummond v. S. Co. Servs., Inc.*, No. 2:22-CV-00174-SCJ (N.D. Ga. 2024) (DOL Brief).

⁷ *Drummond*, 2024 U.S. Dist. LEXIS 157315 at 17.

⁸ See generally DOL Brief.

⁹ *Id.* at 219.

¹⁰ *Id.*

¹¹ *Id.* at 221.

¹² *Id.*

¹³ *M&K Emp. Sols., LLC v. Trs. of the IAM Nat'l Pension Fund*, 145 S. Ct. 2841 (2025).

¹⁴ *Cruz*, 435 F. Supp. 3d at 351.

¹⁵ *Id.* at 353.

¹⁶ *Id.* at 352-53.

