

# Ninth Circuit Agrees with Third Circuit that “Highest Contribution Rate” for Withdrawal Liability Payment Calculations Excludes PPA Surcharges

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On January 31, 2022, the Ninth Circuit affirmed the lower court’s finding that surcharges imposed by the Pension Protection Act (“PPA”) are excluded from the determination of an employer’s “highest contribution rate” for withdrawal liability payment calculations. While the Multiemployer Pension Reform Act (“MPRA”) explicitly excluded surcharges that accrued after 2014 from such calculations, this case concerned surcharges that accrued before 2015 – which remains relevant even today because the highest contribution rate is determined using a ten-year lookback period.

Withdrawal liability represents an employer’s allocable share of a multiemployer pension fund’s underfunding. However, a withdrawn employer is generally permitted to pay its withdrawal liability in installments that are determined using a different formula where the employer’s annual payment amount is the product of: (1) the highest consecutive three-year average of its contribution base units during the ten plan years prior to the employer’s withdrawal and (2) the employer’s highest contribution rate during the ten plan years ending with the year of the employer’s withdrawal.

The PPA imposes a 5-10% surcharge on contributions for employers that contribute to a multiemployer pension fund in “critical” status until the employer adopts a collective bargaining agreement that incorporates the rate increases required by the pension fund’s rehabilitation plan.

In this case, an employer had withdrawn from a pension fund in “critical” status to which it previously paid the PPA surcharge for a number of years. In calculating the employer’s withdrawal liability installment payment, the pension fund included the surcharge in the determination of the employer’s highest contribution rate. The arbitrator and the lower court agreed that the PPA surcharge was not part of the highest contribution rate for purposes of calculating withdrawal liability.

In affirming the lower court’s findings, the Ninth Circuit looked to the statutory language and determined that the surcharge was not a “contribution rate” because the PPA surcharge is calculated and paid *after* the total amount of contributions have been calculated. In doing so, the court agreed with a similar opinion from the Third Circuit from 2015 (*Bd. of Trs. of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*) that the PPA surcharge “is not the ‘highest contribution rate’ because it is not a ‘contribution rate’ at all.”

The case is *Bd. of Trs. of the W. States Office & Prof’l Employees Pension Fund v. Welfare & Pension Admin. Serv., Inc.*, No. 20-35545 (9th Cir. Jan. 31, 2022).

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