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

When a multiemployer pension fund assesses a withdrawing employer with withdrawal liability, that employer is permitted to pay its assessment in installment payments. To calculate the annual payment amount for these installment payments, funds use a formula that combines:

- (1) the highest consecutive three-year average of the withdrawing employer’s contribution base units during the ten years before 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.

Federal regulations require that funds adjust the “highest contribution rate” for this calculation. While the most common adjustments occur for contribution rate increases that were required by Rehabilitation Plans or Funding Improvement Plans (for funds in “Critical” or “Endangered” Statuses, respectively), there has been an open question whether surcharges imposed by the Pension Protection Act (“PPA”) must also be excluded when calculating the “highest contribution rate.” For employers contributing to a fund in “Critical” status, PPA imposes a 5-10% surcharge on contributions until the contributing employer adopts a collective bargaining agreement that includes the provisions of the fund’s Rehabilitation Plan.

Recently, the Ninth Circuit Court of Appeals (which has jurisdiction in most Western states, including California) ruled that PPA surcharges should be excluded from the “highest contribution rate” when calculating the annual amount for purposes of a withdrawal liability payment schedule.

In the case of *Board of Trustees of the Western States Office & Professional Employees Pension Fund v. Welfare & Pension Administration Service, Inc.*<sup>1</sup>, an employer withdrew from the fund after it had previously paid PPA surcharges for several years. When the fund calculated the employer’s payment schedule, it included the PPA surcharges as part of the employer’s “highest contribution rate.” The arbitrator and lower court agreed with the withdrawing employer that the PPA surcharges should be excluded when calculating the highest contribution rate for purposes of the payment schedule. On January 31, 2022, the Ninth Circuit affirmed the lower court’s ruling.

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. The Ninth Circuit reasoned that the surcharge was not a “contribution rate” because the PPA surcharge is calculated and paid after the total amount of contributions has been calculated. This reasoning was consistent with an opinion from the Third Circuit from 2015 that the PPA surcharge is not part of the highest contribution rate “because it is not a contribution rate at all.”<sup>2</sup>

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<sup>1</sup> No. 20-35545 (9<sup>th</sup> Cir. Jan. 31, 2022)

<sup>2</sup> *Board of Trustees of IBT Local 863 Pension Fund v. C & S Wholesale Grocers, Inc.*, Nos. 14-1956 and 14-1957 (3<sup>rd</sup> Cir. Sep. 16, 2015)

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Contact your Bolton Consultant or [marketing@boltonusa.com](mailto:marketing@boltonusa.com) with any questions about how this ruling may inform future withdrawal liability payment calculations for your plan.