

Pension Benefit Guaranty Corporation Proposes Regulations for Single Employer Pension Plan Liability Related to Substantial Cessation of Operations

Section 4062(e) of ERISA imposes liability on an employer that maintains a single employer pension plan - as distinguished from an employer that contributes to a multiemployer pension plan or a multiple employer pension plan - if the employer ceases an operation at a facility in any location and, as a result, more than 20% of the total number of the employer's employees who participate in the pension plan are separated from employment. In those circumstances section 4062(e) treats the employer like an employer that contributes to, and then withdraws from, a multiple employer pension plan. In the latter case, the withdrawing employer may be held responsible for its share of the multiple employer pension plan's underfunding or, in the alternative, be required to post a bond for up to 150% of that share of underfunding.

These rules for multiple employer pension plans, however, cannot readily be applied to a single employer pension plan when the plan's sponsor ceases substantial operations. Moreover, section 4062(e) is wholly dependent on a number of ambiguous terms, for which the Pension Benefit Guaranty Corporation (PBGC) has previously provided little, if any, guidance. The result is that section 4062(e) was largely ignored for many years by both plan sponsors and the PBGC.

That situation changed a few years ago. The PBGC began using the threat of liability assessments and enforcement litigation under section 4062(e) to secure financial concessions from plan sponsors that closed plants or otherwise terminated substantial operations. To provide some structure for these efforts, the PBGC finalized regulations in 2006 that provided a formula for computing section 4062(e) liability. The formula determines a plan sponsor's section 4062(e) liability as a fraction of the full plan termination liability, based on the number of participants separated from employment by the cessation of operations as a percentage of the total plan participant population.

But the 2006 regulations did nothing to clarify the ambiguous terms that remained the foundation of section 4062(e). Plan sponsors still did not know under what circumstances the PBGC might try to assert section 4062(e) liability. Would liability attach, for example, if a plant remained open but a product line was shut down, resulting in a 20% decrease in plan participant population? What about a cessation of a selling employer's operations due to a sale of assets or stock, where the buyer continued those operations without interruption?

The PBGC's proposed regulations answer these and other questions, extending the reach of section 4062(e) beyond many plan sponsors' expectations. Here are some of the highlights.

- A "cessation" of an "operation" occurs whenever - and for whatever reason - an employer discontinues all significant activity at a facility in furtherance of the purpose of an organizationally, operationally or functionally distinct unit of the employer.
- A "facility" may house a number of distinct "operations." Cessation of any one of those operations may result in section 4062(e) liability, even if the remainder of the facility continues to thrive. Continuation of ancillary functions relating to an operation, such as maintenance or security services, will not prevent the cessation of that operation.
- If an operation at a facility is discontinued, it is irrelevant whether the same operation is continued or resumed at another facility, or a new operation begins contemporaneously at the same or a different facility.
- Section 4062(e) liability may arise from cessation of an operation due to the sale of stock or assets to an unrelated employer, even if the buyer continues that operation uninterrupted. This remains true, as well, where the seller transfers pension assets and liabilities to the buyer. The proposed regulation notes, however, that the PBGC may consider the selling employer's liability satisfied by the buyer's adoption of the seller's pension plan or the portion of that plan covering the affected operation.
- Special rules apply if operations cease for reasons beyond the employer's control. If the cessation is caused by employee action, such as a strike, section 4062(e) liability will not arise unless the employer fails to resume the operation within a week after the employee action has ended. If the cessation is caused by a sudden and

unanticipated event, such as a natural disaster, section 4062(e) liability will arise only if the employer fails to resume the operation within 30 days after the event.

- Hopes or expectations that a discontinued operation will resume are generally disregarded.
- Evaluation of the risk to the pension plan, participants or the PBGC is not considered in deciding whether section 4062(e) applies. In making arrangements to satisfy section 4062(e) liability, however, the PBGC may take risk into account. A financially strong employer, for example, may obtain more favorable arrangements.
- In determining whether there has been a 20% reduction in the participant population as a result of the cessation of an operation, it is necessary to determine when to begin counting employee terminations. If the employer makes the decision to discontinue the operation, the date of that decision is the date to begin counting employee terminations. If the operation is discontinued because of an event beyond the employer's control (e.g., strike or natural disaster), on the other hand, employee terminations are counted beginning at the time of the event.
- The plan administrator for the affected pension plan generally must provide written notice to the PBGC, using forms prescribed by the PBGC, within 60 days after the later of (i) the date the operation was discontinued or (ii) the date when the number of active participant terminations resulting from the cessation exceeds 20% of the pre-cessation plan population. In order to simplify this reporting requirement, the plan administrator may disregard terminated participants who were not employed at the facility where the affected operation was discontinued - even if their terminations resulted from the discontinuation of the operation - in determining whether an event reportable under section 4062(e) has occurred, when to file the required notice, and how many affected participants to report in the notice.
- The PBGC can assess penalties up to \$1,100 per day for failure to file the required notice. It has exercised its discretion to assess much lower penalties for a number of other kinds of reporting failures, but the PBGC has indicated in the preamble to the proposed regulations that penalties at the higher end of the spectrum would likely be assessed for section 4062(e) notice failures.

If you have questions or would like additional information about liability to the PBGC for substantial cessation of operations by a sponsor of a single employer pension plan, please feel free to contact Brian Dougherty at (215) 587-5919 or bdougherty@postschell.com.

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