Pension Benefit Guaranty Corporation

94-3

August 2, 1994

REFERENCE:
[*1] >4203(b)(1)>
4204(a)(3) Sale of Assets. Bond Requirement on Liquidation of Seller
4209(c) De Minimis Rule. Exceptions to De Minimis Rule
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal
4221 Resolution of Disputes
>29 CFR 2648>
>29 CFR 2648.3>
>29 CFR 2648.9>

OPINION:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the "* * *" Pension Plan (the "Plan"). PBGC has also received letters from several employers who have written to express their views on the factual and legal issues raised by your request.

The Trustees of the Plan have concluded that a mass withdrawal occurred in 1988 and have issued mass withdrawal liability assessments in accordance with sections 4209(c) and 4219(c)(1)(D) of the Employee Retirement Income Security Act of 1974 ("ERISA"),as amended. A number of employers have challenged the Trustees' conclusion. You request PBGC's opinion whether the Plan experienced a mass withdrawal by substantially all employers in 1988 and whether the circumstances support the conclusion that some of these employers withdrew pursuant to an "agreement or arrangement" [*2] to withdraw.

You advise that ten out of twelve employers withdrew from the Plan in the three-year period from 1986 through 1988. You represent that two employers withdrew in 1986, one in 1987, and seven of the nine remaining employers in 1988. Of the seven employers that withdrew in 1988, five belonged to the same employer association. Historically, each of these five employers had adopted collective bargaining agreements with the same terms and conditions. Under the agreements ratified for the three-year period beginning in 1988, the five employers ceased having an obligation to contribute to the Plan.

On July 1, 1989, the Plan terminated by amendment, pursuant to ERISA § 4041A(a)(1). At this point, two employers remained. In 1990, the Trustees determined that a mass withdrawal by substantially all employers had occurred in 1988. Mass withdrawal liability assessments were issued to each of the employers that withdrew between 1986 and 1988, in accordance with ERISA § § 4209(c) and 4219(c)(1)(D) and part 2648 of the PBGC's regulations.

As you are aware, section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal [*3] liability are to be resolved first through arbitration, and if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions or disputes. We will, however, continue our practice of answering questions of general interpretation under Title IV of ERISA.

Generally, a mass withdrawal occurs on the withdrawal of every employer from a plan or by the withdrawal of substantially all employers from a plan pursuant to an agreement or arrangement to withdraw. ERISA provides special rules for calculating withdrawal liability following a mass withdrawal. Employers may lose the benefit of any applicable de minimis reduction under ERISA § 4209(c) and of any reduction due to the 20-year cap limitation under ERISA § 4219(c)(1)(D)(i). In addition, section 4219(c)(1)(D)(ii) requires that all unfunded vested benefits be allocated among the withdrawing employers, rather than limiting an individual employer's assessment to its allocable share of the unfunded vested benefits, as adjusted, as determined in accordance with ERISA § § 4201 and 4211. PBGC has issued a final regulation, 29 [*4] C.F.R. Part 2648, that establishes rules for the redetermination and reallocation of withdrawal liability following a mass withdrawal.

When a mass withdrawal occurs by the withdrawal of substantially all employers from a plan pursuant to an agreement or arrangement to withdraw, only those employers withdrawing pursuant to the agreement or arrangement to withdraw lose the benefit of any reduction due to the 20-year cap limitation and are subject to the full allocation (or reallocation) of the plan's unfunded vested benefits. ERISA § 4219(c)(1)(D); 29 C.F.R. § 2648.3(b)(2) and (c). However, every employer that withdraws in a plan year in which substantially all employers withdraw pursuant to an agreement or arrangement loses the benefit of the de minimis reduction, regardless of whether the employer withdraws pursuant to the agreement or arrangement. ERISA § 4209(c)(1); 29 C.F.R. § 2648.9.

When a mass withdrawal occurs by the withdrawal of every employer from a plan, slightly different rules apply. All employers withdrawing from a plan that terminates by the withdrawal of every employer lose the benefit of any reduction due to the 20-year cap limitation, regardless of when [*5] the employer withdraws from the plan. ERISA § 4219(c)(1)(D); 29 C.F.R. § 2648.3(b)(1). Under ERISA § 4219(c)(1)(D)(ii) and 29 C.F.R. § 2648.3(c), an employer is subject to the full allocation of the plan's unfunded vested benefits only if the employer withdraws from the plan after the beginning of the second full plan year preceding the date the plan terminates by the withdrawal of the last employer. Finally, because a year in which a plan terminates by the withdrawal of every employer is, by definition, a plan year in which substantially all employers withdraw from the plan, every employer that withdraws from a plan in that plan year is liable for any de minimis amounts. ERISA § 4209(c)(1); 29 C.F.R. § 2648.3(a)(1).

Thus, employers withdrawing in a mass withdrawal may pay greater amounts of withdrawal liability because the special rules negate the relief given to ordinary withdrawing employers under the de minimis rule and the 20 year payment cap. The full allocation of unfunded vested benefits also may increase a withdrawing employer's liability to a plan. As PBGC noted in the preamble to its proposed and final mass withdrawal liability regulations, the increase in [*6] withdrawal liability payable to a plan following a mass withdrawal is intended to encourage plan continuation by reducing the potential future liabilities of the remaining employers. 49 Fed. Reg. 45018, 45019 (1984); 51 Fed. Reg. 10314 (1986).

With this background, we turn to your questions. The first question you raise is whether "substantially all" employers withdrew from the Plan. The term "substantially all" is not defined by the statute or addressed by its legislative history in the context of ERISA § § 4209(c) or 4219(c)(1)(D). However, the term is used in a number of other provisions of subtitle E of Title IV of ERISA, including provisions that (1) provide special withdrawal rules for employers if substantially all covered employees work in a certain industry or if substantially all contributions to a plan are made by employers in certain industries, ERISA § 4203(b)(1)(A), (d)(2); (2) limit the amount of certain employers' withdrawal liability in the case of a bona fide sale of all or substantially all of their assets, ERISA § 4225(a)(1); and, (3) impose special bonding requirements on an employer seeking to avert a withdrawal if all or substantially all of the employer's [*7] assets are distributed, ERISA § 4204(a)(3).

A number of court decisions interpreting "substantially all" in the context of these other provisions have concluded the term means 85% or more. We disagree. If Congress had intended a strict numerical test, it could easily have included a percentage test in the statute. In determining whether a partial withdrawal has occurred, for example, Congress opted for a test based on a 70% decline in contribution base units in each of three consecutive plan years measured against a base year. ERISA § 4205(a)(1), (b)(1). Thus, Congress clearly knew how to fashion a strict numerical test. In the mass withdrawal context, however, and in other provisions of ERISA employing similar language, it chose to leave the determination to the plan sponsor, subject to arbitration and review by the courts.

The second issue you raise concerns what is meant by an "agreement or arrangement" to withdraw from a plan. Again, these terms are not defined by the statute. Plainly, however, an agreement or arrangement to withdraw need not be in writing or otherwise formalized. It can be inferred from the facts and circumstance surrounding the withdrawal.

For example, [*8] and "agreement or arrangement" is likely where nine out of ten employers withdraw from one plan over a three-year period to start another. On the other hand, if three employers liquidate in Chapter 7 bankruptcy proceedings, three employers sell their assets to buyers who do not have an obligation to contribute to the plan, and three withdraw to start their own plan, there probably is no "agreement or arrangement" to withdraw.

Often, a plan will not have access to information to determine whether substantially all employers withdrew pursuant to an agreement or arrangement. Accordingly, Congress specified, in ERISA § 4219(c)(1)(D), that an agreement or arrangement to withdraw from a plan is presumed whenever substantially all employers withdraw from a plan over a three-year period. This provision provides in pertinent part:

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

See also ERISA [*9] § 4209(d). Such evidence should, of course, include the reasons for the employer's withdrawal from the Plan and why its withdrawal was not a part of an agreement or arrangement to withdraw.

I hope this has been of assistance to you. If you have any further questions, please call D. Bruce Campbell of my staff at (202) 326-4125.

Carol Connor Flowe
General Counsel