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Withdrawal Liability

PBGC to Issue Guidance on ERISA 4062(e), Has Decided Not to Re-Propose Regulation

The Pension Benefit Guaranty Corporation will be issuing guidance on enforcement of pension withdrawal liability cases under Section 4062(e) of the Employee Retirement Income Security Act, but had previously decided not to re-propose its regulation.

“We will not re-propose 4062(e). We plan to issue guidance in the near future,” Marc Hopkins, spokesman for the PBGC, told Bloomberg BNA on July 9.

On July 8, the agency announced that it was placing a moratorium on enforcement of pension withdrawal liability cases under Section 4062(e) until the end of the 2014 (131 PBD, 7/9/14). Hopkins said the agency will be “thinking through these issues during the moratorium.”

Under Section 4062(e), if a company ceases operations at a facility that results in 20 percent of employees who are plan participants losing their jobs, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups (ERISA sections 4063 and 4064). Business and retirement groups have complained that the PBGC’s interpretation of the shutdown provisions is inconsistent with ERISA because routine business transactions can trigger the 4062(e) liabilities.

The PBGC had said in its semiannual regulatory agenda issued in May that it expected to re-propose a rule (RIN 1212-AB20) on the withdrawal liability companies face under Section 4062(e) in July (104 PBD, 5/30/14; 41 BPR 1113, 6/3/14).

Kathryn A. Ricard, senior vice president for retirement policy at the ERISA Industry Committee in Washington, told Bloomberg BNA on July 9 that her group is “very supportive of the moratorium.”

She said her group had suggested to the PBGC that it include a “road map or FAQs on the hard-and-fast rules for 4062(e) reporting” because “there are some urban myths out there about what has happened in the past” with the PBGC’s enforcement on Section 4062(e).

Hopkins said existing FAQs are likely to be updated in the future. In November 2012, the PBGC issued a set of frequently-asked-questions and answers on changes in its enforcement practices of Section 4062(e) (213 PBD, 11/5/12; 39 BPR 2080, 11/6/12).

Harold J. Ashner, former PBGC assistant general counsel for legislation and regulations and a partner in Keightley & Ashner LLP in Washington, told Bloomberg on BNA July 9 that “there clearly is a need for new guidance. I hope PBGC will work closely with stakeholders in developing this guidance.”

Lynn D. Dudley, senior vice president of retirement and international benefits policy at the American Benefits Council in Washington, told Bloomberg BNA on July 9 that her group is pleased that the PBGC won’t re-propose the rule at this stage. “We want them to revisit the rules in a way that is workable for employers,” she said.

“We think this is a good signal. We want to keep talking with the PBGC and with Congress,” she said.

Dudley said ABC supports a bill (S. 2511) recently introduced by Sen. Tom Harkin (D-Iowa) that would amend ERISA to clarify the definition of “substantial cessation of operations” for purposes of Section 4062(e).

“We want to return to a rule that is based on actual cessation of operations,” she said.

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