EFFECTIVE JANUARY 24, 2022

The Entire Keightley & Ashner Team Has Joined

THE WAGNER LAW GROUP

Click to visit our website

You can view this PDF by advancing to the next page.

Bloomberg BNA

Pension & Benefits Daily ™

Reproduced with permission from Pension & Benefits Daily, 144 PBD, 7/28/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Withdrawal Liability

ERISA Section 4062(e) Bill Approved By Senate Panel Would Change Liability Test

A manager's amendment to a bill to clarify what constitutes a ''substantial cessation of operations'' under the Employee Retirement Income Security Act significantly changed the legislation from its original form before it was approved by the Senate Health, Employment, Labor, and Pensions Committee.

The original bill (S. 2511), introduced June 19, proposed to amend ERISA by defining the conditions that constitute a substantial cessation of operations. The amended legislation, which expanded the original one-page bill to 14 pages, was advanced by unanimous voice vote July 23 (142 PBD, 7/24/14). It provides more detail ensuring ''that there is no 4062(e) event unless there is a substantial shutdown of operations at a facility relative to the size of the entire employer,'' according to a memo prepared by the American Benefits Council outlining the possible modifications to Section 4062(e).

The committee's approval clears the way for possible consideration of the bill on the Senate floor. The office of Senate Majority Leader Harry Reid (D-Nev.) didn't return requests for information on whether and when the bill would be taken up on the floor.

The subject of the Pension Benefit Guaranty Corporation's enforcement of Section 4062(e) has been fraught with controversy in the past, with the business community accusing the agency of overstepping its authority and improperly relying on proposed rules interpreting the statute (246 PBD, 12/23/11; 39 BPR 6, 1/3/12). The agency was set to re-propose a rule on Section 4062(e), but has since abandoned that plan (132 PBD, 7/10/14; 41 BPR 1445, 7/15/14).

According to the amendment approved by the committee, ''The term 'substantial cessation of operations' means a permanent cessation of operations at a facility which results in a workforce reduction of a number of eligible employees at the facility equivalent to more than 15 percent of the number of all eligible employees at all facilities of the employer, determined immediately before the date of the employer's decision to implement such cessation.''

A spokesman for ABC told Bloomberg BNA on July 24 that technical changes may be made before the modified bill, which has not officially been reported out, is publicly available. The spokesman said the new legislative text may not be available until September.

Harold J. Ashner, former PBGC assistant general counsel for legislation and regulations and a partner in Keightley & Ashner LLP in Washington, told Bloomberg BNA on July 25 that the new language ''is a huge step forward in rationalizing how downsizing liability works.''

The new language includes a ''very different test for determining whether a liability has been triggered and an alternative structure for satisfying the liability that is very different from the current structure,'' he said.

Other Possible Provisions. 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 version of the bill passed by the committee includes a provision that says only employees separated from employment at the facility that is permanently shut down will be taken into account to calculate whether a Section 4062(e) liability has been triggered. In addition, it includes a provision that says employees who are relocated to a different facility or the same facility ''within a reasonable period of time'' won't be taken into account when calculating the possibility of a Section 4062(e) event.

When finalized, the bill also may include a three-year look-back provision that states that ''for purposes of determining whether there has been a 15% workforce reduction, there would be taken into account the separation from employment of any employee who (a) was eligible to participate in any defined contribution or defined benefit plan of the employer, and (b) separated from employment at the facility during the three-year period preceding the cessation,'' according to the ABC memo, which noted that section of the rule may need modifications.

The chairman's mark includes an exemption for employers that had fewer than ''100 participants with accrued benefits under the plan as of the valuation date for the plan,'' or whose plan's funded status is at least 90 percent in the plan year before the plan year in which the shutdown occurred.

The current bill language ''retains the current-law liability rules that apply when an employer has a 4062(e) event, but also gives an employer an option to satisfy such liability in a different way,'' ABC's memo said.

''If an employer elects such option, the employer must contribute, for each year for seven years, an amount equal to the product of (a) 1/7 of the plan's un-

funded vested benefits (determined under the variable rate premium rules) for the plan year preceding the plan year in which the cessation occurred, multiplied by (b) the reduction fraction. The seven-year period begins with the plan year in which the cessation occurs,'' the ABC memo said.

Lynn D. Dudley, senior vice president of global retirement and compensation policy at ABC, told Bloomberg BNA on July 24, ''This is a situation where there was something that needed to be done. It's important that they're moving forward.''

The bill would let ''companies go ahead with business transactions they've been holding back on,'' she said.

By Kristen Ricaurte Knebel

To contact the reporter on this story: Kristen Ricaurte Knebel in Washington at kknebel@bna.com

To contact the editor responsible for this story: Phil Kushin at pkushin@bna.com

The draft text of the amended S. 2511 is at http://op.bna.com/pen.nsf/r?Open=krkl-9mcsd6.

 COPYRIGHT © 2014 BY THE BUREAU OF NATIONAL AFFAIRS, INC.