

Pension Benefit Guaranty Corporation

76-27

February 20, 1976

REFERENCE:

[*1] 4023(b) Contingent Liability Coverage. Premiums
4023(c) Contingent Liability Coverage. PBGC Optional Program with Private Insurers
4062(a) Liability of Employer in Single Employer Plans. Applicability

OPINION:

This is in response to your letter of January 20, 1976 regarding the liability of * * * to the Pension Benefit Guaranty Corporation ("PBGC" or "Corporation") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act") due to the termination of the * * * and

Pension Plan ("Plan").

It is our understanding of the prior state of the law, that your belief "that had ERISA not been adopted, the Company's obligations would have been at an end upon the payment into the Trust of the final contribution based upon hours worked," may be correct. However, the enactment of ERISA has, in many circumstances, superseded the previous rule that upon termination of a pension plan, participants are fully vested in their benefits, but only to the extent that those benefits have been funded.

In this case, it appears that a termination date has not been established. It also appears that a determination as to the sufficiency or insufficiency of the Plan has not been made. Now that [*2] PBGC's basic benefit regulation has been finalized, it is possible to obtain a precise determination of the amount of the insured benefits provided by the Plan and thus, a determination of whether the Plan has sufficient assets to provide those benefits. The PBGC requests that * * * supply the necessary data so that this determination can be made.

Should the Plan prove to be sufficient, * * * will be issued a sufficiency letter and will be requested to certify that the Plan assets will be distributed according to section 4044 of the Act. Upon such a distribution and a return of the certification to PBGC, the matter will be closed. If the Plan has insufficient assets to provide all guaranteed benefits, PBGC will insure those benefits and make the necessary provisions for their payment. Generally, when a plan proves insufficient, PBGC requests that a trustee be appointed pursuant to section 4042 of the Act.

There does not appear to be any difference of opinion that the Plan is a defined benefit plan which provides a monthly benefit of \$3.95 per year of credited service. Further, the Plan meets the coverage conditions set forth in section 4021 of the Act; thus, it is subject to [*3] the provisions of Title IV. As you know, section 4062(b) imposes a liability upon an employer whose plan proves to be insufficient, as to guaranteed benefits, at termination. Such liability is the amount of the insufficiency of the plan or 30% of the employer's net worth, whichever is the lesser amount. This liability applies to:

". . . any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated, but does not apply -

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 4006(a)(2)(B) for each of the 5 plan years immediately preceding the plan year during which the plan terminated . . ." (emphasis added) section 4062(a).

Thus, section 4062(a) specifically provides that the liability imposed by section 4062(b) must be imposed unless contingent liability insurance premiums have been paid for the five years prior to plan termination. As you may know, the benefit insurance provisions are retroactive in some circumstances; if Congress had wanted to avoid any alleged injustice to employers of plans terminated prior to the availability of contingent liability insurance, it could have [*4] so provided.

I should like to direct your attention to H.R. Rep. No. 1280, 93d Cong., 2d Sess. 371 (1974) which discusses the

contingent liability provisions as enacted in ERISA. The Conference Report States, inter alia, that:

". . . coverage of contingent employer liability is mandatory for single and multiemployer plans, but the corporation is instructed to attempt with private insurers to devise within a 36-month period a system under which risks are equitably distributed by the corporation and the private insurers The corporation may thereafter require all employers to obtain coverage from the private insurers, the corporation, or both, depending upon the system devised The corporation may not make any coverage payment with respect to contingent liability until the insurance has been in effect, and the premiums have been paid, for more than five years.

The corporation may set the premium levels and collect the premiums (in arrears) for this coverage during any time up to, but not later than, three years after the date of enactment. An employer may then pay premiums for the period since the date of enactment, and this period is [*5] to be counted toward completion of the five-year payment of premiums requirement. Once obtained, coverage is to be prospective only, not retroactive." (emphasis added)

As you can see from the material quoted above, Congress gave PBGC three years to develop a contingent liability program. Further, Congress contemplated prospective, not retroactive insurance coverage. Even if PBGC permits contingent insurance premiums to be paid from the date of ERISA's enactment, PBGC is precluded from making any coverage payments on a plan which terminates prior to September 2, 1979, at the earliest.

It is, of course, PBGC's opinion that ERISA, including section 4062, is constitutional. I hope that a complete evaluation of the Plan can be made in the near future and that this matter will then be able to be concluded.

I hope the above explanation will prove useful to you. If you have any further questions on this matter, please contact * * * the Staff Attorney assigned to this matter.

Henry Rose
General Counsel