Pension Benefit Guaranty Corporation

85-22

September 11, 1985

REFERENCE:
[*1] 4243 Reorganization Funding

OPINION:

This is in response to your request for an opinion of the Pension Benefit Guaranty Corporation (the "PBGC") as to whether the * * * Reciprocal Agreement * * * operates so as to impose on certain employers and defined contribution pension plans the minimum contribution requirements of Section 4243 of the Employee Retirement Income Security Act of 1974 ("ERISA") or the withdrawal liability provisions of Section 4201 of ERISA.

As we understand the facts, the Reciprocity Agreement is entered into by the union and employer trustees of pension plans, both defined benefit and defined contribution, whose participanats are represented by the * * *. The Reciprocity Agreement provides for the transfer to the "home plan" of an employee of contributions made on behalf of that employee by his employer when he is employed outside the jurisdiction of the * * * local union to which he belongs. The transfer must be pursuant to a written authorization by the employee. Under the Reciprocity Agreement, the plan under which work is performed is liable to the "home plan" only to the extent of contributions made and collected.

Your inquiry deals with the situation in which [*2] contributions are made by an employer to a defined contribution plan and are in turn transferred from the defined contribution plan to a defined benefit plan. The employers contributing to the defined contribution plan are not parties to the Reciprocity Agreement. The applicable collective bargaining agreement, entered into by the * * * local and a local chapter of the * * *, does not make reference to the Reciprocity Agreement, nor does the pension plan document.

You specifically asked whether, in view of the Reciprocity Agreement, if the defined benefit plan is in reorganization, the minimum contribution requirement or other requirements of ERISA impose any obligation on the defined contribution plan (other than the transfer of contributions) or on its contributing employers (beyond that of making contractually required contributions to the defined contribution plan). You also asked whether, in view of the Reciprocity Agreement, if the defined benefit plan is terminated at a time when it is underfunded, and all participating employers withdraw subject to withdrawal liability, the employers contributing to the defined contribution plan are subject to withdrawal liability and [*3] whether the defined contribution plan is subject to withdrawal liability or other liability under ERISA.

As * * * of my staff indicated in his * * *, letter to you, it is the general position of the PBGC that it is the plan sponsor's responsibility in the first instance to determine whether a withdrawal has occurred and to determine the identity of the liable employer. Disputes arising over such withdrawal liability determinations must be resolved under the dispute resolution procedures of Sections 4219 and 4221 of ERISA.

With this caveat, we can provide some general guidance. With respect to employers, we note that Section 4203 of ERISA defines a withdrawal by an employer, inter alia, as a permanent cessation "of an obligation to contribute under the plan." Section 4212(a) of ERISA defines "obligation to contribute" as

an obligation to contribute arising --

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labormanagement relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

The legislative history of ERISA indicates that [*4] an employer has an "obligation to contribute" to a plan if the employer has agreed to make contributions to the plan on behalf of workers for work performed. In the words of Senator Williams:

The committees intend that the term obligation to contribute under a collective bargaining, or related, agreement apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan. This includes cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement.

126 Cong. Rec. 11672 (1980).

Thus, it appears that withdrawal liability was intended to apply only to employers, as employers are the entities that generate contributions to multiemployer plans.

While Title IV does not define "employer" (other than in Section 4001(b)) we think it clear that a multiemployer pension plan is not an "employer" within the meaning of Title IV with respect to its participants who are employees of its contributing employers (while such a plan presumably would be the "employer" of its own employees, [*5] this situation is clearly distinguishable from that posited by you). Accordingly, defined contribution plans would not be liable for withdrawal liability for a transfer of assets from a multiemployer plan to another plan under the facts presented in your letter. Section 4234 of ERISA pertains to such transfers and notes that transfers may occur pursuant to written reciprocity agreements. Thus, with respect to defined contribution plans the existence of a reciprocity agreement would not impose any minimum contribution requirement under the facts presented in your letter.

Section 4243 of ERISA does not by its own operation impose any obligation to contribute to a plan on any person. While its application by a plan in reorganization may affect the specific amount owed by a contributing employer to such a plan, that employer's responsibility to contribute to that plan is determined by the pertinent collective bargaining agreements and by applicable law generally, including such regulations as may be promulgated by the Secretary of Labor and by the Secretary of the Treasury under Sections 418B and 418C of the Internal Revenue Code. You may therefore wish to contact the Assistant [*6] Secretary of Labor for Pension and Welfare Benefit Programs and the Assistant Internal Revenue Commissioner for Employee Plans and Exempt Organizations for additional guidance.

I hope I have been of assistance. If you have any questions please contact the attorney assigned to this matter, * * *, at (202) 254-4895.

Edward R. Mackiewicz
General Counsel