Pension Benefit Guaranty Corporation

86-20

September 29, 1986

REFERENCE:
[*1] 4207 Reduction or Waiver of Complete Withdrawal Liability
29 USC 1461 Action Taken Before Regulations Prescribed
29 CFR 2647 Reduction or Waiver of Withdrawal Liability

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the proper application of our regulation on Reduction or Waiver of Withdrawal Liability, which went into effect on April 24, 1986 (51 FR 10300, March 25, 1986).

Your first set of questions concerns the application of the regulation to employers that reentered the plan from which they withdrew prior to the effective date of the final rule. You note that § 2647.8(a) of the regulation provides that the rule applies to employers that completely withdrew after September 25, 1980, and were performing covered work under the plan on April 24, 1986. Upon the application of such an employer, the plan is required to determine whether the employer satisfies the requirements for abatement of its complete withdrawal liability under the regulation. That section also provides that the general applicability of the rule to those employers shall not negate reasonable actions taken by plans prior to the effective date of the rule pursuant [*2] to plan rules, validly adopted under section 405(a) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), implementing the statutory abatement provision.

You also observe that the preamble of the regulation explains that the purpose in making the rule retroactive was to provide additional relief to employers and not to interfere with reasonable actions taken by plans. As an example, we noted that if an employer reentered a plan and satisfied the regulation's requirements for abatement prior to the regulation's effective date, and the plan had not adopted an interim rule, the employer would get the benefit of the regulation.

You assert that an employer that reentered a plan (prior to the issuance of the regulation) that had adopted reasonable interim abatement rules is not eligible for waiver or reduction of withdrawal liability in the several fact situations you hypothesize.

Section 2647.8(a) applies only to employers that reentered (prior to the effective date of the regulation) a plan that had not adopted reasonable rules implementing section 4207(a). Accordingly, an employer that reentered a plan (prior to the effective date of the regulation) that had adopted [*3] reasonable abatement rules (pursuant to section 405(a)) is not eligible for reduction or waiver of its withdrawal liability pursuant to the regulation for that reentry. This is true whether or not the employer was granted, or even applied for, abatement under the plan's rules.

You also ask how the filing deadlines under the regulation apply to an employer that reentered the plan prior to the effective date of the regulation. You note that § 2647.2(a) provides the general rule that applications for abatement must be filed by the first scheduled withdrawal liability payment falling due after the employer resumes covered operations. Section 2647.8(a) provides that employers that reentered, before the effective date of the regulation, the plan from which they withdrew, shall be eligible for abatement under the regulation in accordance with the rules of § 2647.8(a). You observe that § 2647.8(a) provides no deadline for filing an abatement application. You ask when employers that reentered before the effective date of the regulation must apply for abatement.

The language of § 2647.8(a) makes the filing deadline of § 2647.2(a) inapplicable to employers that reentered before the effective [*4] date of the regulation. Since § 2647.8(a) provides no express filing deadline, we believe that an application under that section should be considered timely if the employer files it within a reasonable time after its reentry. A determination of what is a "reasonable" time should take into account the length of time it might take the average employer to learn of the regulation (and specifically § 2647.8) and the length of time necessary to put together and submit an application for abatement. This determination is made, in the first instance, by the plan sponsor. Any disputes arising therefrom are to be resolved first through arbitration and then, if necessary, in the courts.

Your final question concerns the obligation of an employer that is granted abatement to pay withdrawal liability for the period prior to its reentry into the plan. You note that ERISA and the regulation generally are clear that withdrawal liability must be paid in accordance with the schedule established by the plan, notwithstanding any dispute the employer may have as to the existence or extent of the liability. You suggest, however, that § 2647.6(c)(2) of the regulation might be read to postpone an employer's [*5] obligation to make pre-reentry withdrawal liability payments that are in arrears at the time of reentry until the employer incurs a subsequent withdrawal.

This is neither the intended meaning, nor, we believe, the better reading of § 2647.6(c)(2). That rule provides only that the unfunded vested benefits allocable to a withdrawing employer for its previous withdrawal should be reduced to reflect payments made against that prior liability. That rule is not authority for withholding payments due prior to reentry. We believe § 2647.2(c)(1) and (c)(4) make clear that abatement relieves the obligation to make withdrawal liability payments only with respect to payments due after reentry.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050.

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General Counsel