

Re: RIN 1212-AB20

Via e-mail to regcomments@pbgc.gov

These are comments on Regulation Identifier Number 1212-AB20. They are made by Tom Schryer A.S.A. They do not necessarily reflect the opinions of his employer, Findley Davies, Inc.

“The employer would have a week in which to resume activity”

This is not generally practical. Please consider “The employer would have a week in which to begin taking the necessary steps (including planning) to resume activity but undue hesitation in actually resuming activities will result in a cessation being triggered at the point of undue hesitation.”

“Reasonably certain” and “Hope or Expectation”

These two concepts are several paragraphs apart but should be connected. See –

“any hope or expectation the employer may have that the discontinued work will be resumed would be irrelevant to whether the discontinuance is a cessation” and

“unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work within 30 days—for example, after a two-week holiday shutdown. This standard would allow a plan administrator to decide immediately whether a separation occurred when an employee discontinued active work. If, however, the 30 days pass without the employee’s having returned, the employee would be considered to have separated from employment when active work stopped.”

Participation

See “the rehired or replacement employee was a participant in the plan.” Most plans have service requirements before “covered employees” become participants. Please change this to “the rehired or replacement employee was in employment that is – or would have been if the plan had not been frozen to new participants - covered by the plan and the employee has a reasonably customary likelihood of remaining in such employment until meeting the plan’s age and service requirements for participation.”

The first presumption (applicable to a voluntary cessation)

The first presumption relates to an *involuntary* cessation so a correction is needed. This then affects the second since it should not include the word “also” after this change.

Cessation Process

“For a voluntary cessation, carried out pursuant to an employer decision, that decision marks the beginning of the cessation process, and the active participant base would be measured immediately before that decision.” Think about the classic business transition: Buggy Whip Company of Detroit has just announced that – even though sales remain steady and prospects are decent – they will begin making steering wheel covers and

upholstery for cars. The company's termination rate ticks up 10% (from 4% annually to 4.4% annually) as some employees leave to join Henry Ford's crew. That appears to start the process according to the proposed rules. Eight years go by before they decide to give up the factory making buggy whips. I suggest a new phrase: "For a voluntary cessation, carried out pursuant to an employer decision, that decision (or, if later, when a downsizing rate of what appears to be at least 20% per year begins) marks the beginning of the cessation process, and the active participant base would be measured immediately before such time."

Penalties

If true, the rules should at least allude to the fact that some penalty rates are *per participant* (or whatever).

Liability

Two issues about how the liability (determined by the PBGC apparently) is calculated came to mind and should be clarified. The proposed rules say "should not take account of changes in assets or liabilities after the cessation date." The "cessation date" seems pretty clearly to be after the primary attrition at the facility but would be before the secondary attrition at other locations that pushes the attrition percentage over 20%. Since often terminated employees who are entitled to immediate early retirement pensions in such circumstances defer such pensions while unemployment benefits run out it would be good to clarify how the liabilities for those are valued.

Misleading section title

We suggest changing -

"(c) Follow-on operations disregarded." to

"(c) Follow-on operations disregarded (except for determining the percentage decrease in the active participant count)"

A new, financially sound employer continues

The PBGC wants to provide clear rules for the defined benefit plan community and make them well reasoned enough to have courts give deference to the PBGC's policies. One section lacked such clarity. We propose changing –

"Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the new employer, the proposed regulation would enable PBGC to consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation)" to

"Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the

new employer, the proposed regulation would provide that the PBGC will customarily consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation) unless the PBGC's investigations indicate that the plan's future financial prospects have been downgraded materially."

PBGC needs this information

The reference to unions seems a bit tangential to that purpose. Press releases might be related to the PBGC's duties.

Size

We have experience with these events and the assertion "should make compliance relatively easy" is, in our experience, not remotely accurate and have sent such a commentary to OMB in accordance with the procedures when rules are open for public comments. We estimate an expense of \$25,000 per case. That is truly burdensome for a smaller case. Having driven through a lot of the country recently while on vacation noting the freshly shuttered small businesses the assertion that "this rule will not have a significant economic impact on a substantial number of small entities" should either be changed or the quantitative analysis that the PBGC used should be presented (a link to a separate web page would suffice, if it provides enough detail). The assertion "4062(e) is generally not relevant for small employers" also seems strained since a manufacturing facility within a small business might well be shut down for a period of years while the business continues on using existing inventory and outside production facilities. **Section 604(b) of the Regulatory Flexibility Act** should almost undoubtedly be directly and fully addressed in the final rule including "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes" as so required.

Compliance with all laws, meeting the reasonable objectives outlined in the proposed rules, avoiding putting smaller enterprises who offer defined benefit pension plans at an economic disadvantage versus their counterparts who do not provide such benefits, avoiding undue damage to the economy (especially during the current phase), managing your own workload, and focus of resources can be improved if you include -

"If the actuary for a plan with fewer than 1,000 active participants certifies that the gross liability for accrued plan benefits has not increased by more than 10% as a result of the event, only simplified initial reporting will be required. Such initial reporting should include that signed statement and a brief description of the plan, the event, the number of affected employees, and the employer's near-, mid-, and long-term viability. The PBGC will then review its records to decide the extent to which it should pursue these matters while acknowledging the objectives of the Regulatory Flexibility Act."

Conclusion

Thank you for your attention and the real progress you have already made in this regard.

If you have any questions or comments please contact Tom Schryer, A.S.A. at 216/875-1917 or at tschryer@findleydavies.com.

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