Pension Benefit Guaranty Corporation

89-4

Withdrawn on February 12, 2026

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July 26, 1989

REFERENCE:
[*1] 4044 Allocation of Assets
4044(d) Allocation of Assets. Distribution of Residual Assets. Distribution of Residual Assets
29 CFR 2617 Determination of Plan Sufficiency & Termination of Sufficient Plans.
>29 CFR 2617.4>

OPINION:

We have reviewed the Trustee's Motion to Compromise Claim and the appended Mutual Release and Settlement Agreement filed June 20, 1989, in the bankruptcy of ***, concerning the *** Salaried and Hourly Pension Plans (hereinafter the "Plans"). In response and in lieu of filing a formal objection, we suggest several modifications to the Motion to reflect the following concerns.

The Plans must satisfy all liabilities to participants and beneficiaries under the terms of the Plans.

Section 4044(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1344(a), requires that, upon termination of a single employer plan, the plan administrator must allocate plan assets in accordance with a six-tier allocation scheme. See Mead Corp. v. Tilley, No. 87-1868, slip op. at 2 (U.S. June 5, 1989). Section 4044(d) provides, inter alia: [*2]

Any residual assets of a single employer plan may be distributed to the employer if . . . all liabilities of the plan to participants and their beneficiaries have been satisfied . . .

*** received Notices of Sufficiency regarding the Plans on November 20, 1985, and was thereby directed to distribute plan assets in accordance with the section 4044 allocation scheme. Therefore, the Motion should clarify that the Plans must satisfy all liabilities to participants and beneficiaries under the terms of the Plans, not just guaranteed benefits. Satisfaction of anything less denies *** the right to a reversion of residual assets.

To satisfy the liability to a missing participant or beneficiary, the plan administrator must purchase an annuity or, in the case of a de minimis benefit, place the benefit in a separate account in the participant's name.

The PBGC recognizes that frequently all participants cannot be located at the time of distribution of plan assets upon plan termination. Two opinion letters address the issue of distributing plan assets to "lost" participants. PBGC Opinion Letter No. 83-24, issued October 17, 1983, concludes that a plan administrator has a fiduciary duty [*3] to take reasonable steps to locate all participants. When a participant cannot be found, his entitlement must be satisfied through the purchase of an annuity unless an exception described in 29 C.F.R. § 2617.4 applies. If the participant's monthly benefit is less than the smallest monthly benefit amount normally provided by an insurer, or the present value of the benefit, determined under applicable PBGC regulations, is $ 1,750 or less, the benefits of those participants may be deposited into a special bank account. Thus, Opinion Letter No. 83-24 indicates that all such benefits may be placed in one pooled account. Id., citing 29 C.F.R. § 2617.4.

Subsequently, the Department of Labor issued an opinion letter on August 25, 1986, which arrives at a conclusion similar to that of the PBGC above. The Opinion also states:

We note, however, that a [fiduciary] violation . . . would not occur merely because the trustees of a plan, after following the appropriate plan procedures for locating "lost" participants and otherwise fulfilling their responsibilities as outlined in section 404(a)(1) of ERISA, distribute the benefits to which a "lost" participant is entitled into an interest-bearing [*4] federally-insured bank account opened in the participant's name if such manner of distribution is permitted under the terms of the plan and if the participant has an unconditional right to withdraw funds from the account.

DOL Opinion Letter No. 11-86 (emphasis added).

The PBGC agrees that it is the better view for the de minimis unclaimed benefit to be placed in a separate bank

account opened in the missing participant's name. A separate account in the individual's name is preferred to a pooled account because of the possibility that the Internal Revenue Service procedures will result in a "lost" participant's learning of the existence of his account. At present, the IRS attempts to match each Form 1099 filed by a financial institution showing interest earned by a specific account to the account-holder's income tax return. An imbalance automatically generates a letter that is sent to the filer. Thus, a missing participant who filed an income tax return would receive such a letter and thereby learn of the account containing his benefit.

Therefore, to ensure that the Plans' liability to each participant is satisfied, we believe that, rather than pooling all de minimis [*5] lump sum benefits in one account, each unclaimed benefit entitlement, other than those required to be distributed in annuity form, should be distributed through placement in a separate account in the participant's name.

If you have any questions, please contact the staff attorney assigned to this matter, Susan Decker, at (202) 778-8886.

Carol Connor Flowe, General Counsel

You have asked whether the administrator of a terminated pension plan, pursuant to a distribution of the plan's assets, may create a special bank account to hold the benefit entitlements of those participants whom it is unable to contact. We have concluded that, subject to the conditions below and the requirements of other applicable law, the creation of such an account and the payment of lump sum entitlements into it may be consisted with a distribution of assets under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

The Pension Benefit Guaranty Corporation (the "PBGC") has published a Regulation Determination of Plan Sufficiency and Termination of Sufficient Plans, 29 C.F.R. Part 2617 (the "Regulation"), which covers the procedure to be followed by a plan administrator that distributes [*6] the assets of a terminated sufficient plan.

Section 2617.21 of the Regulation provides that

"[w]ithin 90 days after the date of the Notice of Sufficiency, the plan administrator shall allocate and distribute plan assets in accordance with [the PBGC's Regulation Allocation of Assets in Non-Multiemployer Plans, 29 C.F.R. Part 2618] by -

(a) Purchasing from an insurer contracts to provide benefits required by § 2617.4(a) [of the Regulation] to be provided in annuity form;

(b) . . ., and

(c) Providing all benefits that are not required by § 2617.4 to be provided in annuity form.

Section 2617.4 of the Regulation requires that participant entitlements under a terminated plan must be paid in annuity form unless either 1) the monthly benefit is less than the smallest monthly benefit amount normally provided by an insurer; 2) the present value of the benefit, determined under applicable PBGC regulations, is $ 1,750 or less; or 3) the plan provides for an alternative form of distribution, and the plan administrator submits a written statement to the PBGC certifying that, inter alia, the participant elected, in writing, the alternative form of distribution. In a situation such as [*7] the one you describe, where the plan administrator is unable to contact a participant to obtain such an election, the third exception does not apply, and thus the participant's entitlement may be paid in a form other than an annuity only if it is small enough so that one of the first two exceptions is applicable.

You have stated that you have been unable to contact approximately * * * participants for the purpose of making appropriate distributions to them. You have asked whether, in these circumstances, the creation of a special bank account and the payment into it of all benefits payable as lump sums would comply with § 2617.21(c) of the Regulation. We have concluded that § 2617.21(c) does not prohibit distribution in such a manner. Our conclusion is based in part on our understanding that all reasonable efforts to notify participants and beneficiaries of their rights to lump sum payments have been made, that the plan administrator will cooperate with the efforts of any participant or beneficiary who seeks to recover an entitlement after distribution into the special account, that the account will remain in existence for at least the period required by law for trust accounts [*8] containing amounts due beneficiaries who cannot be located, and that the expenses and earnings of the special account are to be allocated in a manner consistent with applicable law.

Accordingly, when all lump sum payments to the special account have been made and all other assets of the plan have been distributed in accordance with the Regulation, the plan administrator may submit the appropriate distribution information to the PBGC in accordance with § 2617.23 of the Regulation. Furthermore, the continued existence of the special account will not by itself necessitate the continued payment of premiums to the PBGC under 29 U.S.C. § 1307.

I trust this responds to your inquiry. Please direct any further questions you may have to * * * of my staff at (202) 254-3010.

Henry Rose, General Counsel

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Re: Seafood Workers Pension Trust Identification No. F-2870A

This is in response to your request for an advisory opinion concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to the disposition of unclaimed moneys payable to participants of the Seafood [*9] Workers Pension Trust (the "Trust") who cannot be located.

You represent that the Trust is a multiemployer pension plan which is in the process of being terminated by its trustees (the "Trustees") in accordance with the provisions of ERISA. Notices have been sent out to the approximately 770 individuals who were found to be eligible for payment out of the trust corpus of approximately $ 2,270,000. As of December 24, 1985, 22 individuals, representing estimated payments of $ 10,000, have not responded to the mailed notices which were sent to them. The Trustees plan to take additional steps to try and locate the missing participants, including the use of newspaper advertisements and mailings to the last known addresses supplied by the Social Security Administration.

You ask the following questions:

1. Whether the Trustees must take additional steps to contact participants beyond advertisement and a mailing to the last known address supplied by the Social Security Administration.

2. Whether the Trustees must hold in trust remaining assets of unaccounted-for participants for a period of time, and if so for what period of time, and what would be the applicable reporting requirements. [*10]

3. Whether, if the answer to #2 is negative, there is a procedure for transferring unclaimed sums to the Pension Benefit Guaranty Corporation (PBGC) to hold for the benefit of the unaccounted-for individuals, thereby permitting the Trust to make a final termination.

4. Whether the Trustees should be guided by state law on the termination of trusts and/or unclaimed property where there is no applicable Federal law.

Section 5 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) provides that advisory opinions ordinarily will not be issued regarding problems of an inherently factual nature or on the form or effect in operation of a plan or particular provisions thereof. Therefore, the following discussion is intended to provide general guidance with respect to various legal issues raised by your questions and should not be construed as an endorsement by the Department of any particular procedure for locating "lost" plan participants or disposing of unclaimed moneys.

Section 404(a)(1)(A) of ERISA provides, in relevant part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose [*11] of providing benefits to participants and their beneficiaries. In addition, section 404(a)(1)(B) of ERISA requires that a fiduciary discharge his duties with the care, skill, prudence and diligence that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims. Section 404(a)(1)(D) of ERISA provides that fiduciaries must discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents or instruments are consistent with the provisions of Titles I and IV of ERISA. In this connection, section 402(b)(4) provides, among other things, that every employee benefit plan shall specify the basis on which payments are made to and from the plan. In the case of terminating plans, plan fiduciaries must also ensure that procedures regarding "lost" participants are consistent with the applicable allocation provisions referred to in section 403(d) of ERISA.

Section 403(a) of ERISA provides that, subject to certain exceptions established in section 403(b), all assets of an employee benefit plan shall be held in trust by one or more trustees.

Issue 1 [*12]

The fiduciary responsibility provisions of Title I of ERISA do not specifically address the question of what steps fiduciaries of a plan must take in order to locate "lost" participants. In the Department's view, this question is inherently factual in nature and must be resolved by the appropriate plan fiduciaries, applying ERISA's general fiduciary responsibility provisions to each plan's particular facts and circumstances. Accordingly, the Trustees must themselves determine whether the procedure you describe for locating "lost" participants would satisfy their fiduciary obligations under Title I of ERISA. However, in the Department's view, such a determination would generally not satisfy ERISA's fiduciary responsibility provisions where a plan's "lost" participant procedures did not include, among other things, a requirement for utilizing the services of the Social Security Administration to attempt to ascertain the current mailing address of "lost" participants.

Issue 2

Neither sections 403(a) and (b) nor the regulations issued thereunder (29 CFR 2550.403a-1 and 2550.403b-1) contain an exemption from ERISA's trust requirements with respect to pension plan funds held for [*13] participants who cannot be located. We note, however, that a violation of section 403(a) would not occur merely because the trustees of a plan, after following the appropriate plan procedures for locating "lost" participants and otherwise fulfilling their responsibilities as outlined in section 404(a)(1) of ERISA, distribute the benefits to which a "lost" participant is entitled into an interest-bearing federally-insured bank account opened in the participant's name if such manner of distribution is permitted under the terms of the plan and if the participant has an unconditional right to withdraw funds from the account. To the extent that the transfer into a bank account constitutes a distribution of the benefits to which the participant is entitled, the assets of the bank account would not be subject to the trust requirements in section 403(a) of ERISA.

Issue 3

The Department is unaware of any procedures for transferring unclaimed sums to the PBGC in connection with a plan termination. To the extent this question raises issues under Title IV of ERISA, you may wish to direct your inquiry to the PBGC, which has jurisdiction for issuing rulings and interpretations under Title [*14] IV.

Issue 4

In view of our response to the issues you raised in your second question, it is unnecessary to further respond to your question concerning the applicability of State law. However, for your general information, we are enclosing a copy of Opinion 79-30A, dated May 14, 1979, in which the Department of Labor addressed the issue of whether the State of California's Unclaimed Property Law is preempted under section 514 of ERISA.

We trust that this information will be helpful to you.

Elliot I. Daniel, Assistant Administrator for Regulations and Interpretations