Pension Benefit Guaranty Corporation

78-29

December 12, 1978

REFERENCE:
[*1] 4062(e). Liability of Employer in Single Employer Plans. Closing of Facility Affecting More Than 20% of Plan Participants

OPINION:

This is in response to your request for a written opinion from this office concerning the effect of Sections 4064, 4062 and 4062(e) of the Employee Retirement Income Security Act (the "Act") on a transaction involving an employer's sale of substantially all assets, and the concurrent transfer of its defined benefit pension plan, to a successor employer.

As I understand the pertinent facts, * * *, Inc. ("Seller") is a wholly owned subsidiary of the Company and is part of a controlled group of corporations (the "* * * Group") within the meaning of § 4001(b) of the Act. An unnamed buyer ("Buyer") is a corporation that has no affiliation with any member of the * * * Group. Buyer has agreed to acquire substantially all assets and liabilities of Seller including all liabilities and obligations as the employer under the * * * Salaried Employees' Pension Plan (the "Plan"). Buyer intends to continue Seller's business operations indefinitely at Seller's existing facilities and will offer to employ substantially all of Seller's present employees. You expect that 80% [*2] or more of Seller's employees will be employed by Buyer. Buyer also intends to continue operation of the Plan, which is covered by Title IV of the Act. In addition, neither Seller nor any other member of the * * * Group will contribute to the Plan nor act as plan administrator or a named fiduciary after the sale.

You have requested advice concerning the potential employer liability of Seller and of the other members of the Group to the PBGC in the event Buyer later terminates the Plan and assets are insufficient to pay the benefits guaranteed by the PBGC under Section 4022 of the Act. Specifically, you have referred to employer liability resulting from the operation of Sections 4064, 4062 and 4062(e) of the Act.

1. Sections 4064 and 4062

Based on the information contained in your letter, in the event Buyer later terminates the Plan, the PBGC would not, as a general rule, assert Section 4064 or 4062 employer liability against Seller or any other member of the Group, under either of following circumstances:

(1) If, as of the closing date of the sale, the Plan has sufficient assets to satisfy all PBGC guaranteed benefits; or

(2) If the Plan's assets are not sufficient [*3] to provide guaranteed benefits on the closing date, 30% of the net worth of the Buyer immediately after closing is greater than the amount by which the Plan is insufficient.

2. Section 4062(e)

You have presented two problems concerning employer liability under § 4062(e): (a) the effect of less than 80% of Seller's employees accepting employment with Buyer, and (b) the effect of Buyer's closure of one of Seller's former facilities, resulting in a reduction of more than 20% of Plan participants.

As you state in your letter, the application of Section 4062(e) is conditioned upon an employer's cessation of operations at a facility and a resulting separation from employment of more than 20% of all plan participants. Assuming that all of Seller's facilities continue in operation by the buyer after the sale, Section 4062(e) would not apply to the members of the * * * Group.

If, however, Buyer closes an acquired facility and more than 20% of Plan participants are separated from employment as a result, employer liability resulting from the application of Section 4062(e) would not be asserted by the PBGC against the * * * Group if either of the conditions are fulfilled as are described [*4] above in the analysis of Sections 4064 and 4062.

I trust that this response will be of help to you.

Henry Rose
General Counsel