Pension Benefit Guaranty Corporation

88-5

April 1, 1988

REFERENCE:
[*1] 29 CFR 2648 - Redetermination on Mass Withdrawal
29 CFR 2648.3 - Liability on Mass Withdrawal
29 CFR 2648.3(c) - Reallocation Liability 29 CFR 2648.6(b) - Amount of UVBs to be Reallocated
29 CFR 2648.6(c)(2) - Amount of Reallocation

OPINION:

This is in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") regarding the powers of trustees of a multiemployer pension plan under the Employee Retirement Income Security Act of 1974 ("ERISA") and the PBGC's regulation on Redetermination of Withdrawal Liability upon Mass Withdrawal (29 CFR Part 2648) (the "reallocation regulation").

The plan in question has been terminated by the withdrawal of all of its contributing employers. For such a plan, section 4209(c) of ERISA provides that certain withdrawn employers lose the benefit of the de minimis reduction that would otherwise apply to their withdrawal liabilities. Also, section 4219(c)(1)(D) of ERISA requires that the liabilities of withdrawn employers be determined without regard to the 20-year limitation on annual payments under section 4219(c)(1)(B) of ERISA and that the plan's total unfunded vested benefits be fully allocated among the withdrawn [*2] employers. The reallocation regulation implements these provisions.

Under the reallocation regulation, the withdrawal liability that is assessed without regard to the fact that there has been a mass withdrawal termination is called "initial withdrawal liability." The term for the additional withdrawal liability that arises from the fact that the de minimis reduction and the 20-year payment limitation do not apply is "redetermination liability." Finally, the liability arising from the requirement for full allocation is referred to in the reallocation regulation as "reallocation liability."

In general, the regulation contemplates that reallocation liability will be based on the plan's unfunded vested benefits as of the "mass withdrawal valuation date," which is the last day of the plan year in which the mass withdrawal termination occurs. The employers to be assessed reallocation liability are identified as of the "reallocation record date," set by the trustees, which may not be later than one year after the mass withdrawal valuation date. The deadline for determining reallocation liability is ordinarily one year after the reallocation record date but may be extended, as it [*3] has been for the plan in question. Demand for payment of reallocation liability is to be made within 30 days after the deadline for determining the amount of the liability. (The regulation permits plans to adopt different rules for determining reallocation liability, but your request makes no mention of such rules for the plan in question.)

You ask whether the trustees, in computing the reallocation liabilities of all withdrawing employers under the reallocation regulation, may consider certain events occurring after the plan's reallocation record date. The two types of events you mention are (1) a change in a withdrawing employer's financial condition (including the liquidation, dissolution or bankruptcy of the employer) and (2) an arbitration award with respect to a challenge to an employer's initial withdrawal or redetermination liability.

In considering these questions, it is important to distinguish between the time when an event or condition affecting reallocation liability occurs or exists and the time when the trustees, having learned of the event or condition, take it into account in computing the liability. In general, the trustees may make decisions about which withdrawing [*4] employers are to be assessed reallocation liability, and the amount of reallocation liability to be assessed to those employers, at any time before payment of the liability is demanded (whether or not the deadline for determining the liability has been extended); however, the trustees may not base those decisions on events that occur, or conditions that come into being, after the times specified in the reallocation regulation and ERISA.

An employer's financial condition may affect reallocation liability in various ways. For example, under § 2648.3(c)(1) and (c)(2) of the reallocation regulation, an employer is excluded from reallocation liability if, as of the

reallocation record date, the employer has been completely liquidated or dissolved or is involved in bankruptcy or insolvency proceedings. This is true even if the trustees do not learn of the liquidation, dissolution or bankruptcy until after the reallocation record date. Any liquidation, dissolution or bankruptcy of an employer after the reallocation record date may not be considered by the trustees in determining whether the employer is liable for reallocation liability under § 2648.3(c)(1) and (c)(2).

Under § 2648.6(c)(2), [*5] the trustees may determine that ERISA section 4225 limits the reallocation liability of an employer that has been involved in a sale, liquidation, or dissolution. In such a case, a portion of the reallocation liability that would otherwise be assessed to that employer may be reallocated among all other liable employers. The wording of ERISA section 4225(e) makes clear that section 4225(a) and (b) apply only where the employer's withdrawal is "attributable to" the sale, liquidation or dissolution in question. The determination of whether section 4225 applies must thus be based on whether the withdrawal that gives rise to the initial, redetermination, and reallocation liability was in connection with one of the events specified in section 4225. However, under § 2648.6(c)(2), as under § 2648.3(c)(1) and (c)(2), the trustees' determination itself may be made at any time before the demand for reallocation liability.

Section 2648.3(c)(3) is the only rule under which the time for making the trustees' determination ends before the time for demanding reallocation liability. Under § 2648.3(c)(3), an employer is excluded from reallocation liability if, as of the reallocation record date, [*6] the plan sponsor has determined that the employer's initial withdrawal liability or its redetermination liability is limited by section 4225 of ERISA. Section 2648.3(c)(3) provides specifically that the determination that section 4225 applies to the initial or redetermination liability must have been made on or before the reallocation record date. As with § 2648.6(c)(2), section 4225 must be applicable at the time of withdrawal.

The time when an arbitration award is made generally has no bearing on whether the trustees may consider it in determining reallocation liability (although an award obviously cannot be taken into account until it has been made). The significance of an arbitration award in this context is that it may represent a finding that an event or condition affecting reallocation liability occurred or existed at some (generally) earlier time. It is the timing of the events or conditions established by the award that is decisive as to whether the trustees may consider them.

You mention in particular arbitration awards with respect to challenges to an employer's initial withdrawal or redetermination liability. The outcome of such challenges, by determining the amount [*7] of withdrawal liability owed to the plan, can affect the amount of a plan's assets, and thus its unfunded vested benefits. Under § 2648.6(b), the amount of "unfunded vested benefits to be reallocated" for a plan, upon which the reallocation liability depends, is the amount of the plan's unfunded vested benefits, determined as of the mass withdrawal valuation date, with certain adjustments. Unless an arbitration award respecting an employer's initial withdrawal or redetermination liability is based on facts occurring or existing after the mass withdrawal valuation date (which would be unlikely), the trustees may consider it in determining the "amount of unfunded vested benefits to be reallocated" and thus the withdrawing employers' reallocation liability.

If you have any further questions about this matter, you may call Deborah C. Murphy at 202-778-8820.

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