Pension Benefit Guaranty Corporation

75-98

November 30, 1975

REFERENCE:
[*1] 4062(a) Liability of Employer in Single Employer Plans. Applicability
4064(a) Liability of Employers in Multiple Employer & Multiemployer Plans. Applicability

OPINION:

Your letter of September 23, 1975 to * * * of the Oklahoma City Office of the Labor-Management Services Administration, has been forwarded to this Office for reply. Your inquiry centers on employer liability provisions for terminated pension plans under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

The pertinent facts, as I understand them, are as follows: Your Client, * * * ("Company") contributes to the * * * Pension Fund ("Plan") pursuant to collective bargaining agreements. You state that the company "has no right or ability to participate in the administration of the Plan," to which a multitude of employers contribute. You are concerned about the Company's potential liability under ERISA § 4064 should the Plan terminate. You suggest that it would not be liable under ERISA § 4064 for termination because the Plan is not "maintained" by one or more employers.

You correctly state that liability under ERISA § 4064 applies to employers who "maintained" a plan at the time such plan was terminated. [*2] Although at no time does ERISA specifically define "maintained," the Conference Report (H.R. Rep. No. 1280, 93d Cong. 2d Sess. (1974)) clearly indicates that an employer who contributes to a pension plan is in fact * * * "maintaining" such plan, under § 4064:

"[T]he employer liability on termination of a multiemployer plan was to be allocated among employers who had contributed to the plan during the five years before termination . . ." (Emphasis added) (Conference Report at 380).

Furthermore, statutory provisions governing plan management and administration indicate that such responsibilities are not to be confused with "maintenance." Thus, plan fiduciaries are specifically authorized to "control and manage the * * * operation and administration of the plan" (ERISA § 402(a) (1)). At no time does the Act require that these responsibilities be assumed by the employer or his representative as part of plan maintenance.

Hence, the plan is "maintained" or, in another sense, kept in operation by the very fact of employer contributions. Employer liability under ERISA is not predicted on participation in the plan beyond a financial obligation. The * * * statutory language referring [*3] to plan "mainetnance" should be interpreted accordingly.

In addition, you state that you are considering including in future collective bargaining agreements a provision that the Union warrants that the Plan be administered in compliance with ERISA, and further, that the Union hold the * * * Company harmless for plan termination liability.

Such a provision would not sav the Company from liability to the PBGC in the event that the Plan terminates and the Pension Benefit Guaranty Corporation asserts a claim. As you are aware, ERISA § 4064 is applicable "to all employers who maintain a plan under which more than one employer makes contributions at the time such plan is terminated . . . ."

Note, however, that this would not impair any of the Company's contractual and procedural remedies against the Union under a "hold harmless" provision.

I hope that this explanation will prove helpful to you. Should you wish further information, please direct inquiries to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. or call * * * of this office at (202) 254-4873.

Henry Rose
General Counsel