

Pension Benefit Guaranty Corporation

76-108

September 7, 1976

REFERENCE:

[\*1] 4004(f)(4) Temporary Authority. Waiver of Employer Liability  
4064 Liability of Employers in Multiple Employer & Multiemployer Plans  
4082(c). Effective Date; Special Rules. Applicability of Title IV to Multiemployer Plan Terminations

OPINION:

This is in response to your letter on behalf of \* \* \* wherein you discussed how employer liability under the Employee Retirement Income Security Act of 1974 (the "Act") might be imposed if the Pension Benefit Guaranty Corporation (the "PBGC") exercises its discretion under § 4082(c) of the Act to insure benefits provided under the \* \* \* (the "Fund").

In your letter, you state that since most of the remaining participating employers have established separate pension plans covering active employees and have given full past service credit, it would not be necessary for the PBGC to pay benefits to active employees with vested benefits under the Fund. You go on to propose that in this case, instead of asserting employer liability based on the formula contained in § 4064 of the Act, the PBGC should assess liability against each employer based on the amount of the Fund's insufficiency attributable to each employer's own retirees. You suggest that this could [\*2] be accomplished if the PBGC grants a waiver under § 4004(f) of the Act or exercises its authority under the last sentence of § 4064(b) of the Act to "determine the liability of each such employer on any other equitable basis prescribed by the [PBGC] in regulations."

As you know, in connection with the Fund's application the PBGC is seeking to clarify, among other things, how the establishment of now defined benefit plans by employers that contributed to the Fund would affect the payment terms for employer liability if the PBGC exercised its discretion under § 4082(c) of the Act. Generally, under §§ 4022 and 4061 of the Act, the PBGC insures the payment of those benefits that are guaranteed under Title IV.

Thus, although you state that it would not be necessary for the PBGC to pay benefits to active employees with vested benefits under the Fund, if the PBGC exercised its discretion under § 4082(c) of the Act, absent other arrangements or conditions it would appear that the PBGC would be undertaking to pay such benefits, assuming they are guaranteed. Thus, we think this area must be considered further, in consultation with the employers that have established new plans, to clarify [\*3] how a PBGC guarantee of benefits provided under the Fund would be implemented in view of the new plans.

With respect to your proposed alternative method of asserting liability, the PBGC understands and shares your concern about the affect imposition of employer liability will have on employers. We are willing to discuss methods for payment of such liability to avoid unnecessary hardship, including deferred payment terms as authorized by § 4067 of the Act.

Section 4004(f) of the Act, which grants the PBGC authority to waive or reduce employer liability if necessary to avoid unreasonable hardship, by its terms limits that authority to cases where a plan terminates within the first 270 days after enactment of the Act. Since the date of termination of the Fund has not yet been established under § 4068 of the Act, the PBGC has never foreclosed the possibility that a waiver under § 4004(f) of the Act could be granted. There continues to be uncertainty as to the date of the Fund's termination in view of the pending claim for contributions by the Receiver. However, from the facts that have been adduced as of this date, it does not appear that the Fund terminated within the statutory [\*4] 270 day period. If this proves to be the case, the PBGC would not have authority to waive imposition of employer liability under § 4004(f).

It would also be inconsistent with the language and intent of the Act if the PBGC asserted liability against the employers only for the amount of the PBGC's liability attributable to each employer's retirees. The legislative history of the Act clearly indicates that Congress recognized the effect employer liability could have on an employer. See, e.g., H.R. Rep. No. 93-533, 93d Cong. 1st Sess., 16 (1973); S. Rep. No. 93-383, 93d Cong. 1st Sess., 87 (1973). After

considering a number of methods to mitigate its possible burdensome effect, Congress decided to limit the liability to 30 percent of the net worth of the employer, as determined by the PBGC on whatever basis best reflects the current status of the employer's operations and prospects.

Subject to that limitation, § 4062 and 4064 of the Act provide for reimbursement to the PBGC of the amount of liability it incurs as of the date of a plan's termination. In the case of a multiemployer plan, liability based on the obligation to contribute reflects the fact that such plans continue [\*5] to have an obligation to retirees of withdrawn employers, and employers that agree to contribute to such a plan are obligating themselves to fund the benefits of other employers' retirees. There is no authority to waive all or a portion of the employer liability imposed by the Act. The fact that limited authority was specifically provided in § 4004(f) indicates that, in the absence of the application of that provision, the PBGC does not have the power to waive employer liability.

This is not to imply that the PBGC will not consider settlement proposals for payment of employer liability that do not result in the exact allocation of liability among the employers obtained from application of the formula in § 4064 of the Act. We will consider such proposals, which may incorporate suggestions regarding the integration of a PBGC guarantee with the benefits provided under the new plans, as referred to above.

As you know, representatives of the PBGC have discussed this matter with counsel for a number of employers that contributed to the Fund. In response to our request counsel for some employers have provided the PBGC with financial information with respect to their clients, which [\*6] is needed to evaluate the amount of the PBGC's claim. We understand more such information and a proposed arrangement for payment of employer liability is forthcoming. We hope that with continued cooperation this matter can be resolved in the near future.

Charles E. Skopic  
Acting Executive Director