

Pension Benefit Guaranty Corporation

88-9

December 6, 1988

REFERENCE:

[*1] 4021 Plans Covered

4021(a) Plans Covered. Requirements of Coverage

4021(b)(13) Plans Covered. Professional Service Employer Plans

OPINION:

We write in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the application of the coverage provisions of Section 4021 of the Employee Retirement Security Act of 1974, as amended ("ERISA"), to a transaction you describe.

In the situation you posit, a professional service employer maintains a single-employer plan that is covered by Title IV of ERISA. The employer proposes to divide this plan into two plans. One plan will contain 20 professionals and the other plan will cover the remaining 150-200 non-professional employees. You ask whether the successor plan provisions of ERISA Section 4021(a), apply to this transaction, or whether Section 4021(b)(13), which provides that a plan maintained by a professional service employer is not subject to Title IV if the plan does not at any time after ERISA's enactment have more than 25 active participants, exempts the smaller plan from Title IV coverage.

ERISA Section 4021(a) states in pertinent part:

For purposes of [Title IV], a successor plan is [*2] considered to be a continuation of a predecessor plan. For this purpose, . . . a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided.

Because the two plans that will result from the division of the original plan include all of the participants and liabilities that were included in the original plan, they must be considered successor plans and treated as continuations of the original plan. Consequently, although one of the successor plans will now have fewer than 25 active participants, it will not qualify for the professional employer exemption of ERISA Section 4021(b)(13) because, as a continuation of the larger, original plan, at some time after the date of ERISA's enactment (September 2, 1974), it had more than 25 active participants in the plan.

The conclusions set forth in this letter are limited to Title IV of ERISA. Any opinions relating to Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

I hope this information is of assistance [*3] to you. If you have further questions, please contact the attorney handling this matter, John Foster, at (202) 778-8850.

Gary M. Ford
General Counsel