

Issued in Renton, Washington, on June 7, 2006.

Kevin M. Mullin,

*Acting Manager, Transport Airplane
Directorate, Aircraft Certification Service.*

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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4062 and 4063

RIN 1212-AB03

Liability Pursuant to Section 4062(e) of ERISA

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule provides a formula for computing liability under section 4063(b) of the Employee Retirement Income Security Act of 1974 (“ERISA”) when there is a substantial cessation of operations by an employer as described by section 4062(e) of ERISA. That section provides, among other things, that when a section 4062(e) event occurs, liability arises under section 4063 of ERISA. However, the method described in section 4063 for determining liability is impracticable when applied to a section 4062(e) event. This rule, which is narrow in scope, provides a practicable and transparent formula for calculating employer liability when a section 4062(e) event occurs. This rulemaking is part of the PBGC’s ongoing effort to streamline regulation and improve administration of the pension insurance program.

EFFECTIVE DATE: July 17, 2006. For a discussion of applicability of these amendments, see the Applicability section in **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: John H. Hanley, Director, Legislative and Regulatory Department, or James L. Beller, Jr., Attorney, Legislative and Regulatory Department, PBGC, 1200 K Street, NW., Washington, DC 20005-4026; 202-326-4024. (TTY/TDD users should call the Federal relay service by dialing 711 and ask for 202-326-4024.)

SUPPLEMENTARY INFORMATION: On February 25, 2005, (at 70 FR 9258), the Pension Benefit Guaranty Corporation (PBGC) published a proposed rule modifying 29 CFR parts 4062 (Liability for Termination of Single-employer Plans) and 4063 (Withdrawal Liability; Plans under Multiple Controlled Groups). Six comment letters were received on the proposed rule and are addressed below. The regulation is

being issued substantially as proposed with one clarification.

Section 4062(e) of ERISA provides special rules that apply when “an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment” (a “section 4062(e) event”). In the case of a section 4062(e) event, the employer “shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of §§ 4063, 4064, and 4065 shall apply.”¹

Thus, if a section 4062(e) event occurs, the provisions of ERISA section 4063 (among other provisions) apply to the employer. Section 4063(b) imposes liability upon a substantial employer that withdraws from a multiple employer plan. This section 4063(b) liability represents the withdrawing employer’s share of the liability to the PBGC under section 4062(b) that would arise if the plan were to terminate without enough assets to pay all benefit liabilities. The section 4063(b) liability payment made by the employer is held in escrow by the PBGC for the benefit of the plan. If the plan terminates within five years, the section 4063(b) liability payment is treated as part of the plan’s assets. If the plan does not terminate within five years, the liability payment is returned to the employer. The statute also provides that, in lieu of the liability payment, the contributing sponsor may be required to furnish a bond to the PBGC in an amount not exceeding 150% of the section 4063(b) liability.

The statute also specifies a method of computing the amount of the section 4063(b) liability. Section 4063(b) provides that “[t]he amount of liability shall be computed on the basis of an amount determined by the [PBGC] to be the amount described in section 4062 for the entire plan, as if the plan had been terminated by the [PBGC] on the date of the withdrawal, multiplied by a fraction (1) the numerator of which is the total amount required to be contributed to the plan by such contributing sponsor for the last 5 years ending prior to the withdrawal, and (2) the denominator of which is the total

amount required to be contributed to the plan by all contributing sponsors for such last 5 years.”

In sum, section 4063(b) imposes liability and provides a method for determining the amount of that liability—*i.e.*, for determining the withdrawing employer’s portion of the liability to the PBGC under section 4062(b) that would arise if the plan terminated.

Section 4062(e) provides that, when a section 4062(e) event occurs, the employer is treated as a substantial employer under a multiple employer plan. Thus, section 4062(e) creates liability that is analogous to the section 4063(b) liability arising when a substantial employer withdraws from a multiple employer plan. Section 4062(e) does not, however, provide any details as to how this analogy is to be implemented—*i.e.*, how the liability is to be apportioned with respect to the cessation of operations.

As explained above, when a substantial employer withdraws from a multiple employer plan, section 4063(b) allocates liability to that withdrawing employer based upon the ratio of the employer’s required contributions to all required contributions for the five years preceding the withdrawal. The PBGC has found, in general, that application of this statutory allocation formula is relatively straightforward when determining the liability of a withdrawing substantial employer from a multiple employer plan because it is generally easy to verify what contributions were required to be made by the withdrawing employer and what contributions were required to be made by all of the contributing employers.²

In contrast, when there is a section 4062(e) event, there is by definition only one employer that contributes to the plan. When there is only one employer, the numerator and denominator used to determine the liability under section 4063(b) would always be equal. Thus, the literal application of the allocation method described in section 4063(b) to determine the liability arising upon a section 4062(e) event is impracticable. Instead, the PBGC has been using the method prescribed in this rule to determine that liability on a case-by-case basis.

Section 4063(b) of ERISA provides that “in addition to and in lieu of” the manner of computing the liability

¹ A section 4062(e) event is similar to an active participant reduction reportable under part 4043. Often (but not always), a facility closing that results in a section 4062(e) event also results in a reportable event described in 29 CFR 4043.21 (active participant reduction). The reporting requirements for these two types of events are separate.

² When there have been no required contributions for the plan for the past five years, the contribution method results in an undefined fraction of zero divided by zero. This presents a problem for determining liability under the contribution method of section 4063 in the context of a section 4062(e) event.

prescribed in that provision, the PBGC “may also determine the liability on any other equitable basis prescribed by the [PBGC] in regulations.” Pursuant to that authority, the PBGC is prescribing in this rule a simple, practicable, and equitable method for determining the liability for a section 4062(e) event. Specifically, under this rule, the section 4062(e) liability equals the liability under section 4062(b) multiplied by a fraction (1) the numerator of which is the number of the employer’s employees who are participants under the plan and are separated from employment as a result of the cessation of operations, and (2) the denominator of which is the total number of the employer’s current employees, as determined immediately before the cessation of operations, who are participants under the plan. The liability under section 4062(b) is determined as if the plan had been terminated by the PBGC immediately after the cessation of operations rather than “on the date of the withdrawal” (as specified in section 4063(b)), which does not literally apply in the case of a section 4062(e) event.

By providing a simple and transparent method for determining the amount of this liability, this rule will allow plan sponsors who experience a section 4062(e) event (or believe they may experience a section 4062(e) event) to more readily determine their liability (or expected liability). Although this final rule specifies a method for determining the amount of the liability imposed by statute, it does not affect the imposition of liability. Moreover, because this method has generally been followed on a case-by-case basis, the final rule will have little or no effect on the amount of liability.

Nothing in this final rule affects the computation of liability incurred when there is a withdrawal of a substantial employer from a multiple employer plan under ERISA section 4063.

Comments

Six comment letters on the proposed rule were received: two from associations of employee benefits professionals, two from employee benefits consulting firms, one from a large domestic corporation, and one from an individual. Two commenters commended the PBGC for proposing a method for calculating the liability for a section 4062(e) event. Commenters made four major recommendations, asking for:

Clarification on how to determine the denominator of the fraction set forth in the proposed rule for determining employer liability pursuant to ERISA section 4062(e);

Additional guidance on a variety of interpretive issues relating to ERISA section 4062(e);

A regulatory exemption from ERISA section 4062(e) liability for small plans (generally, those with fewer than 500 participants); and

A cap on liability in the formula for calculating the ERISA section 4062(e) liability because the proposed formula could lead to unreasonable results.

Clarification of Liability Calculation

The final rule clarifies that the denominator used for determining the employer liability pursuant to section 4062(e) equals the total number of the employer’s current employees, as determined immediately before the cessation of operations, who are participants under the plan. The denominator does not include all participants in the plan, such as retirees and other former employees who separated from employment before the cessation of operations. In addition, the regulation includes an example for further clarification.

Additional Guidance

Several commenters asked for additional guidance on a number of issues relating to section 4062(e) that were not addressed in the proposed regulations. For instance, commenters asked for guidance on what constitutes a “cessation of operations,” whether a sale of assets constitutes a cessation of operations, what is meant by a “facility in any location,” which employees are treated as separated as a result of the cessation, how to provide notice, and other issues. One commenter opposed the imposition of 4062(e) liability pending further guidance.

The PBGC agrees that additional guidance in this area is warranted. However, this rule is narrow in scope and is intended to address one overarching aspect of ERISA § 4062(e)—the formula for calculating employer liability. As commenters point out, there are other interpretive issues that may arise under ERISA § 4062(e), but these issues remain outside of the scope of this rulemaking. The PBGC plans to issue additional guidance as appropriate, recognizing that such guidance would provide valuable assistance to plan administrators, employers, and participants, especially in determining whether and when a section 4062(e) event has occurred. When formulating guidance related to ERISA § 4062(e), the PBGC will take these commenters’ concerns into consideration. In the interim, these issues will continue to be resolved on a case-by-case basis.

Small Plan Exemption

One commenter asked for a regulatory exemption from ERISA section 4062(e) liability for small plans (generally, those with fewer than 500 participants). This request also is beyond the scope of this rulemaking. As discussed above, this rule addresses only the formula for calculating the section 4062(e) liability. The PBGC will consider this request as it formulates additional guidance in this area.

Cap on Liability

Two commenters expressed concern that the proposed formula for determining the section 4062(e) liability could result in an “unreasonable” outcome. Both commenters noted that the liabilities of separated participants might represent a small percentage of all liabilities, yet the section 4062(e) liability imposed by the rule could be substantially larger. For instance, if the facility that closed had recently been opened with all newly hired employees, the benefit liabilities associated with those separated employees could be quite small. If those separated employees represented 25% of the employer’s employees participating in the plan, the liability determined using the fraction prescribed in the proposed rule would be 25% of the plan underfunding. Both commenters asked that the final rule provide that the section 4062(e) liability be limited to a fraction of the unfunded liability based upon benefit liabilities attributable to participants who separated as a result of the cessation of operations.

The PBGC considered a number of approaches, including ones based on the liabilities associated with the separated participants. It rejected a liabilities-based approach primarily because it found that employers had great difficulty separating liabilities by employee group—thus, this sort of liabilities-based approach would not provide a simple, predictable formula for determining section 4062(e) liability. Moreover, the liabilities-based approach would not necessarily provide a result more in line with statutory intent than would the headcount approach prescribed in this rule.

These comments assume that there is in fact a theoretically exact amount of section 4062(e) liability that should arise in each case and from which a large deviation would be “unreasonable.” One comment also seems to assume that the section 4062(e) liability amount should never include amounts that are not directly attributable to unfunded benefit liabilities of the participants who

separated from service as a result of the cessation of operations. This is contrary to what Congress prescribed for determining liability for a substantial employer under ERISA section 4063, the section under which section 4062(e) liability is to be determined.

The method prescribed by Congress for calculating liability for a substantial employer that withdraws from a multiple employer plan establishes the underfunded liability for which the withdrawing employer is responsible. It is not an exact calculation of the unfunded benefit liabilities for all of the employer's employees or former employees that participated in the plan. As explained before in the proposed rule and above, the substantial employer's liability under section 4063 is based on the employer's required contributions for the last five years. Obviously, this 5-year contribution method only approximates the unfunded liabilities attributable to all of the substantial employer's participants. Moreover, in a multiple employer plan, there may be unfunded benefit liabilities not attributable to the withdrawing substantial employer's participants for which the substantial employer is nevertheless partially responsible. The substantial employer's liability is a portion of the plan's total unfunded liability. This total unfunded liability, for instance, may include unfunded liabilities attributable to employees of employers who have withdrawn from the plan but owed no section 4063(b) liability because they were not substantial employers.

The headcount method in this rule provides a simple, practicable, and equitable method for determining employer liability under section 4062(e). The headcount method attributes to the employer responsibility for an appropriate amount of plan underfunding upon the cessation of operations in much the same way that ERISA section 4063 attributes to a substantial employer responsibility for a portion of plan underfunding upon withdrawal. Moreover, the liability amount (whether pursuant to a section 4062(e) event or withdrawal of a substantial employer) goes to the plan if the plan terminates within 5 years; otherwise the liability amount is returned to the employer.

Other Comments

One commenter expressed concern about the hardship on employers arising from the imposition of section 4062(e) liability, noting that "the PBGC's proposal to calculate and assess pension liability when a facility shuts down may have the unintended consequence of

making defined benefit plans more difficult and costlier to maintain or continue." Another commenter opposed the proposed rule on similar grounds, noting that it could unnecessarily restrict business decisions. That commenter also suggested that the PBGC should study what impact the rule would have had if it had been implemented several decades ago.

This final rule will have little effect on either the imposition or amount of section 4062(e) liability. As stated in the preamble to the proposed rule (70 FR at 9259), this rule simply provides a method of calculating the section 4062(e) liability and does not affect the imposition of such liability, which is statutorily imposed. Moreover, because historically 4062(e) cases have generally been resolved on a case-by-case basis using the method set forth in this rule, the rule will have little or no effect on the amount of liability.

One commenter asked the PBGC to communicate its current practice with respect to the many substantive and interpretative questions related to ERISA section 4062(e) before changing that practice. The PBGC has no generally applicable practice with respect to section 4062(e). As stated above, the PBGC currently handles ERISA section 4062(e) liability on a case-by-case basis. However, in these cases, it has generally imposed liability based on headcount, often as part of a negotiated settlement.

One commenter said that the proposal would "exacerbate incongruity between congressional intent, legislation, and regulation," since it would apply one form of liability calculation in the multiple employer context and another form of liability calculation (*i.e.*, ERISA § 4062(e) liability under this rule) to plans with one employer. As explained above and in the proposed rule, it is impracticable to use the allocation method described in section 4063(b) (which applies to a withdrawal from a multiple employer plan) to determine the liability arising upon a section 4062(e) event. Moreover, while withdrawal from a multiple employer plan and a section 4062(e) event are analogous events, they are not equivalent. As explained, the headcount method provides a simple, practicable, and equitable method for determining ERISA § 4062(e) liability, which is analogous to the method used for determining liability for a substantial employer that withdraws from a multiple employer plan.

One commenter asked for clarification of the effective date of the regulation and, in particular, clarification that it does not apply retroactively. The

preamble to this rule contains a section on applicability.

Applicability

This rule applies to section 4062(e) events occurring on or after July 17, 2006. However, as noted in the proposed rule (and above), the rule will have little or no effect on the imposition or amount of liability—the liability is statutorily imposed and the amount of liability is generally determined on a case-by-case basis using the method prescribed in this rule.

Compliance With Rulemaking Guidelines

The PBGC has determined, in consultation with the Office of Management and Budget, that this final rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget, therefore, has reviewed this notice under Executive Order 12866.

The PBGC certifies under section 605(b) of the Regulatory Flexibility Act that this final rule would not have a significant economic impact on a substantial number of small entities. A section 4062(e) event is generally not relevant for small employers. Most small employers sponsoring defined benefit plans tend not to have multiple operations. For these small employers, the shutdown of operations almost always would be accompanied by plan termination. Section 4062(e) protection is only relevant when the plan is ongoing after the cessation of operations. Thus, the change will not have a significant economic impact on a substantial number of small entities. Accordingly, sections 603 and 604 of the Regulatory Flexibility Act do not apply.

List of subjects

29 CFR Part 4062

Employee Benefit Plans, Pension insurance, Reporting and recordkeeping requirements

29 CFR Part 4063

Employee Benefit Plans, Pension insurance, Reporting and recordkeeping requirements

■ For the reasons set forth above, the PBGC amends parts 4062 and 4063 of 29 CFR chapter LX as follows:

PART 4062—LIABILITY FOR TERMINATION OF SINGLE-EMPLOYER PLANS

■ 1. The authority citation for Part 4062 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1362–1364, 1367, 1368.

§ 4062.1 [Amended]

■ 2. Amend § 4062.1 by adding the following sentence after the first sentence of the paragraph:

§ 4062.1 Purpose and Scope

* * * This part also sets forth rules for determining the amount of liability incurred under section 4063 of ERISA pursuant to the occurrence of a cessation of operations as described by section 4062(e) of ERISA. * * *

§ 4062.3 [Amended]

■ 3. In paragraph (b) of § 4062.3, remove the references to “§ 4062.8(c)” and “4062.8(b)” and add the references to “§ 4062.9(c)” and “§ 4062.9(b)” in their places, respectively.

§ 4062.7 [Amended]

■ 4. In paragraph (a) of § 4062.7, remove the reference to “§ 4062.8” and add in its place the reference to “§ 4062.9”.

§ 4062.8 through § 4062.10 [Redesignated]

■ 5. Redesignate §§ 4062.8, 4062.9, and 4062.10 as §§ 4062.9, 4062.10, and 4062.11, respectively.

■ 6. Add new § 4062.8 to read as follows:

§ 4062.8 Liability pursuant to section 4062(e).

(a) *Liability amount.* If, pursuant to section 4062(e) of ERISA, an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20% of the total number of the employer's employees who are participants under a plan established and maintained by the employer are separated from employment, the PBGC will determine the amount of liability under section 4063(b) of ERISA to be the amount described in section 4062 of ERISA for the entire plan, as if the plan had been terminated by the PBGC immediately after the date of the cessation of operations, multiplied by a fraction—

(1) The numerator of which is the number of the employer's employees who are participants under the plan and are separated from employment as a result of the cessation of operations; and

(2) The denominator of which is the total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan.

(b) *Example.* Company X sponsors a pension plan with 50,000 participants of which 20,000 are current employees and 30,000 are retirees or deferred vested participants. On a PBGC termination basis, the plan is underfunded by \$80 million. Company X ceases operations at a facility resulting in the separation

from employment of 5,000 employees, all of whom are participants in the pension plan. A section 4062(e) event has occurred, and the PBGC will determine the amount of employer liability under section 4063(b) of ERISA. The numerator described in paragraph (a)(1) of this section is 5,000 and the denominator described in paragraph (a)(2) of this section is 20,000. Therefore, the amount of liability under section 4063(b) of ERISA pursuant to section 4062(e) is \$20 million (5,000/20,000 × \$80 million).

PART 4063—LIABILITY OF SUBSTANTIAL EMPLOYER FOR WITHDRAWAL FROM SINGLE-EMPLOYER PLANS UNDER MULTIPLE CONTROLLED GROUPS AND OF EMPLOYER EXPERIENCING A CESSATION OF OPERATION

■ 7. The authority citation for part 4063 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3).

■ 8. Revise paragraph (a) of § 4063.1 to read as follows:

§ 4063.1 Cross-references

(a) Part 4062 of this chapter sets forth rules for determination and payment of the liability incurred, under section 4062(b) of ERISA, upon termination of any single-employer plan and, to the extent appropriate, determination of the liability incurred with respect to multiple employer plans under sections 4063 and 4064 of ERISA. Part 4062 also sets forth rules for determining the amount of liability incurred under section 4063 of ERISA pursuant to the occurrence of a cessation of operations as described by section 4062(e) of ERISA.

* * * * *

Issued in Washington, DC, this 13th day of June, 2006.

Elaine L. Chao,

Chairman, Board of Directors, Pension Benefit Guaranty Corporation.

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

Judith R. Starr,

Secretary, Board of Directors, Pension Benefit Guaranty Corporation.

[FR Doc. E6-9503 Filed 6-15-06; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05-06-052]

RIN 1625-AA87

Security Zone; Severn River and College Creek, Annapolis, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule; correction.

SUMMARY: The Coast Guard published a document in the **Federal Register** on June 1, 2006 (71 FR 31088), correcting the coordinates described in the security zone. However, that correction contained an incorrect section number. This document corrects that section number.

DATES: The correction to this rule is effective May 25, 2006. The rule itself is effective May 26, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD05-06-052 and are available for inspection or copying at Commander, Coast Guard Sector Baltimore, 2401 Hawkins Point Road, Baltimore, Maryland 21226-1791, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ronald L. Houck, Waterways Management Division, U.S. Coast Guard Sector Baltimore, telephone 410-576-2674, Fax 410-576-2553.

SUPPLEMENTARY INFORMATION: In FR Doc. E6-8428 appearing on page 31088 in the **Federal Register** of June 1, 2006, the following correction to the section number is made:

§ 165.35-T05-052 [Corrected]

■ 1. On page 31088, in the third column, correct the bold heading four lines below the **SUPPLEMENTARY INFORMATION** heading to read “§ 165.T05-052 [Corrected]”.

■ 2. On page 31088, in the third column, in the second and third lines of instruction 1., correct the section number and heading to read “§ 165.T05-052 Severn River and College Creek, Annapolis, MD”.

Dated: June 9, 2006.

Stefan G. Vencus,

Chief, Office of Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E6-9411 Filed 6-15-06; 8:45 am]

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