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Withdrawal Liability

Senate Passes Legislation on ERISA 4062(e); Bill May See Action in Lame Duck Session

A bill unanimously passed by the Senate that would clarify what constitutes a “substantial cessation of operations” under ERISA Section 4062(e) may see action in the House during Congress’s lame duck session.

Under S. 2511, passed by senators Sept. 16, a substantial cessation of operations would be clarified to mean a “permanent cessation of operations at a facility which results in a workforce reduction of a number of eligible employees at the facility equivalent to more than 15 percent of the number of all eligible employees of the employer.”

Under Section 4062(e) of the Employee Retirement Income Security Act, plan sponsors are liable for underfunding of their defined benefit plans if the employer stops operations of a facility and, as a result, more than 20 percent of the total number of employees who are participants in the plan are separated from employment.

The clarifications in S. 2511 change the liability trigger from 20 percent of plan participants to 15 percent of all employees of the employer. They also specify that a cessation of operations must be “permanent.” These clarifications are supported by the business community, which say the regulations proposed to implement this law have been too broad, too expensive and make business planning difficult.

Kent A. Mason, a partner at Davis & Harman LLP in Washington, told Bloomberg BNA on Sept. 17, “Our understanding is that the House will consider this issue during the lame duck session, but certainly no decisions have been made.” The lame duck session starts in November.

The bill was introduced June 19 by Sen. Tom Harkin, chairman of the Senate Health, Employment, Labor, and Pensions Committee, and approved by the panel on July 23 (142 PBD, 7/24/14; 41 BPR 1539, 7/29/14).

On the issue of who may take up the bill in the House, Mason said that “there have been active discussions with committee staff on the House side, and they’re looking for more information and input as they prepare for the lame duck session.”

Controversial Interpretation. The subject of the Pension Benefit Guaranty Corporation’s enforcement of ERISA Section 4062(e) has been fraught with controversy in the past, with the business community accusing the agency of overstepping its authority and improperly relying on proposed rules interpreting the statute (246 PBD, 12/23/11; 39 BPR 6, 1/3/12). The agency was set to re-propose a rule on Section 4062(e), but has since abandoned that plan (132 PBD, 7/10/14; 41 BPR 1445, 7/15/14).

Harold J. Ashner, former PBGC assistant general counsel for legislation and regulations and a partner at Keightley & Ashner LLP in Washington, told Bloomberg BNA on Sept. 17, “The fact that the Senate has passed this as quickly as they have is a very positive development. The legislation, if ultimately enacted, would go a long way toward rationalizing how 4062(e) liability works.”

In a news release on the bill’s passage, Kathryn A. Ricard, senior vice president for retirement policy at the ERISA Industry Committee in Washington, said that “S. 2511 helps clarify that regular workforce and operational decisions made by companies that are far less consequential than ceasing operations at a facility in any location will not get swept up into the enforcement actions of the PBGC.”

“ERIC now calls on the House to approve this important legislation, as we continue to work with the PBGC to implement workable rules that enable the agency to protect itself against the cost of terminating underfunded plans without imposing unnecessary burdens on employers,” she said.

A spokesman from the American Benefits Council also praised the bill’s passage, telling Bloomberg BNA on Sept. 17 that ABC is concerned about the PBGC’s “current enforcement strategy” on Section 4062(e), as it “represents a misinterpretation of the ERISA statute. We support S. 2511 as a means of establishing a more appropriate enforcement approach.”

The PBGC declined to comment on the bill’s passage.

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The Senate engrossed version of the bill is at <http://op.bna.com/pen.nsf/r?Open=krkl-9p2jc2>.