



Workforce Reduction May Constitute Partial Plan Termination

Over the past few months, layoffs and furloughs have become a part of everyday life. While many human resources professionals, in-house counsel and business managers realize that it is essential to consult with a labor and employment lawyer regarding layoffs, many are not aware that a large layoff may be considered a partial plan termination under ERISA. Companies that sponsor qualified retirement plans should be aware that certain requirements may be triggered under those plans when there are significant reductions in participants and/or closures of entire plants or facilities.

PARTIAL PLAN TERMINATION

In general, company-initiated terminations that affect 20 percent or more of eligible participants in a qualified retirement plan may result in a partial plan termination requiring full and immediate vesting of the affected participants' retirement plan benefits/account balances.

However, the guidance regarding partial terminations is limited and leaves many uncertainties as to how to appropriately analyze whether a partial termination did or will occur. A plan sponsor that is aware of the issue and performs a thoughtful analysis of the facts and circumstances will be much better positioned than one who discovers the partial termination only after the Internal Revenue Service has audited the plan or after a plan participant brings a claim for benefits based on an alleged partial termination of the plan.

Following are some points to keep in mind in determining whether a partial termination has occurred:

- Partial plan terminations can be triggered not only by company-initiated terminations, but also by company-initiated plan amendments excluding a group of employees from participation in the plan.
- Voluntary severances (*e.g.*, death, disability, retirement or quits) may be ignored in calculating the percentage decrease, but constructive terminations and/or terminations that occur "in anticipation of an involuntary termination" may have to be included. Note that it can be difficult to determine whether a "quit" occurred in anticipation of severance. In addition, it is not clear under current guidance whether terminations for cause are required to be counted in calculating the 20 percent threshold.
- There is some authority suggesting that the terminations must occur in connection with a significant corporate event. However, some courts have made partial termination



determinations where terminations occurred over an extended period of time due to a general downturn in the business.

- The period over which the percentage reduction is measured is also unclear. It is generally the plan year, but it could extend over a longer period if there are a series of related severances. For example, reductions that occur over two or three successive years as part of a series of cost-cutting measures put in place by a company during difficult economic times may result in a partial termination if the participant reduction reaches 20 percent when the years are aggregated.
- If a partial termination is found to have occurred over an extended period of time, the plan will be required to restore any non-vested benefits that were forfeited during that time. Unallocated forfeitures may be available to make such restorals (if permitted by the terms of the plan). If forfeitures are not available, the company may have to contribute the amount necessary to restore benefits to the plan.

A careful analysis of all the facts and circumstances is necessary to determine whether a partial plan termination did or will occur. Now more than ever, companies need to diligently monitor for partial terminations of their benefit plans.

PBGC REPORTABLE EVENT

In addition to creating a partial plan termination, companies should be mindful that facility shut-downs could result in a reportable event for a defined benefit pension plan. A reportable event occurs when a company ceases operations at a facility and, as a result, more than 20 percent of the participants in its pension plan are terminated.

Similar to partial terminations, there are several aspects of this reportable event rule that are open to interpretation and require careful analysis. If the circumstances are determined to constitute a reportable event, notification to the Pension Benefit Guarantee Corporation (PBGC) will be required in most cases. This notification will likely trigger a request from the PBGC that the company provide an escrow or post a bond in an amount equal to the plan's underfunded dollar amount multiplied by the percentage reduction in plan participants.

The PBGC is aggressively monitoring compliance with this rule and taking steps to identify downsizing companies that may be subject to this reporting requirement. Therefore, companies should take into account the potential cost of complying with the PBGC's demands as part of, and at the time of, the decision to close a plant or facility.



FOR MORE INFORMATION

Our Employee Benefits & Executive Compensation practice group can assist you in determining whether a partial termination or PBGC reportable event did or will occur and in complying with the associated requirements. If you need assistance, please contact your primary Thompson Hine Employee Benefits & Executive Compensation lawyer or email us at AskUs@ThompsonHine.com. For a list of our Employee Benefits & Executive Compensation lawyers, go to www.ThompsonHine.com/practices/Employee_Benefits_Executive_Compensation/lawyers/.

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