
PENSION BENEFIT GUARANTY CORPORATION**29 CFR Parts 4001 and 4022****RIN 1212-AB19****USERRA Benefits Under Title IV of ERISA****AGENCY:** Pension Benefit Guaranty Corporation.**ACTION:** Final rule.

SUMMARY: The Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) provides that an individual who leaves his or her job to serve in the uniformed services is generally entitled to reemployment by his or her previous employer and, upon reemployment, to receive credit for benefits, including employee pension plan benefits, that would have accrued but for the employee’s absence due to the military service. This final rule amends PBGC’s regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022) to address a narrow but important issue regarding PBGC’s guarantee of benefits for participants who are serving in the uniformed services at the time that their pension plan terminates. Under PBGC’s existing regulations, a benefit is guaranteed only if the participant satisfies the conditions for entitlement to the benefit on or before the plan’s termination date. PBGC is providing an exception to this rule in the unique circumstances of persons serving in the uniformed services as of the plan’s termination date, consistent with USERRA’s statutory mandate to treat such persons, upon reemployment, as if they had never left the employ of their

former employer. This final rule provides that so long as a service member is reemployed within the time limits set by USERRA, even if the reemployment occurs after the plan’s termination date, PBGC will treat the participant as having satisfied the reemployment condition as of the termination date. This will ensure that the pension benefits of reemployed service members, like those of other employees, would generally be guaranteed for periods up to the plan’s termination date.

DATES: Effective December 17, 2009. (See Applicability in **SUPPLEMENTARY INFORMATION.**)

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SUPPLEMENTARY INFORMATION:**Background**

Pension Benefit Guaranty Corporation (“PBGC”) administers the single-employer pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”). When a covered plan terminates in either a distress termination under section 4041(c) of ERISA, or an involuntary termination (one initiated by PBGC) under section 4042 of ERISA, PBGC typically becomes statutory trustee of the plan with responsibility for paying benefits in accordance with the provisions of Title IV.

The amount of benefits paid by PBGC under a terminated, trustee plan is generally determined as of the plan’s termination date.¹ Under section 4022(a) of ERISA, PBGC guarantees the payment of nonforfeitable benefits

¹ Section 404 of the Pension Protection Act of 2006 (“PPA 2006”), Public Law 109-280, added sections 4022(g) and 4044(e) of ERISA, which provide that, when an underfunded plan terminates during the bankruptcy of the plan sponsor, the date the sponsor’s bankruptcy petition was filed is treated as the termination date of the plan for purposes of determining the amount of benefits PBGC guarantees and the amount of benefits in priority category 3 in the section 4044 asset allocation. These changes apply to plan terminations that occur during the bankruptcy of the plan sponsor if the bankruptcy filing date is on or after September 16, 2006. See PBGC proposed rule on Bankruptcy Filing Date Treated as Plan Termination Date for Certain Purposes, 73 FR 37390 (Jul. 1, 2008). For convenience, this preamble generally will refer to the plan’s termination date, although in many cases this reference will instead apply to the bankruptcy filing date.

under the plan, subject to the limitations of section 4022(b), as of the date the plan terminates. Under § 4022.3 of PBGC's regulation on Benefits Payable in Terminated Single-Employer Plans, PBGC guarantees the amount, as of the termination date, of a benefit provided under the plan (subject to certain limitations) if "the benefit is, on the termination date, a nonforfeitable benefit." To be guaranteed, the benefit must also qualify as a pension benefit as defined in § 4022.2, and the participant must be entitled to the benefit under § 4022.4. The amount of any additional nonguaranteed benefits payable from the plan's assets under section 4044 or PBGC's recoveries under section 4022(c) of ERISA is also determined as of the termination date.

Section 4001(a)(8) of ERISA and § 4001.2 define a "nonforfeitable benefit" with respect to a plan as:

A benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this Act (other than the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this Act or the Internal Revenue Code of 1986.

Guaranteed benefits under Title IV of ERISA are benefits with respect to which a participant has satisfied the conditions for entitlement under the plan as of the termination date. Therefore, plan benefits such as an early retirement subsidy or disability retirement benefit with respect to which a participant has not satisfied the conditions for entitlement (e.g., a years-of-service requirement or the onset of disability) as of the termination date are not guaranteed.²

On July 29, 2009 (at 74 FR 37666), PBGC published in the **Federal Register** a proposed rule to address the interaction of Title IV's requirement that benefits be nonforfeitable on the termination date in order to be guaranteed with the rights of reemployed service members in their employee pension benefit plans under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Public Law 103-353 (October 13, 1994). PBGC received no

public comments on the proposed rule and the final regulation is unchanged from the proposed regulation.

Congress enacted USERRA to protect certain rights and benefits of employees who voluntarily or involuntarily leave civilian employment to serve in the uniformed services.³ Under USERRA, returning service members are generally entitled to reemployment in their pre-service positions, with the status, pay, and benefits to which they would have been entitled had they not served in the uniformed services. The stated purposes of USERRA are—

- To encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service,
- To minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service under honorable conditions, and
- To prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. 4301. The provisions of USERRA are generally effective with respect to reemployments initiated on or after December 12, 1994.

The Department of Labor ("DOL") issued a final rule on USERRA, 70 FR 75246 (Dec. 19, 2005). The preamble to that rule states that, in construing USERRA and its implementing regulations, DOL intends to "apply with full force and effect" the interpretive maxim of the Supreme Court in *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946), that legislation on reemployment rights for service members "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * *" 70 FR 75246.

DOL's final regulation on USERRA, codified at 20 CFR part 1002, covers various types of military training and service. Section 1002.6 provides:

USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel,

³ Terms used in this final rule, such as "service in the uniformed services," are intended to have the meaning provided under USERRA and the Department of Labor regulations implementing USERRA. For convenience, this preamble sometimes uses the term "military service" as shorthand for "service in the uniformed services."

USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

USERRA establishes specific rights for reemployed service members in their employee pension benefit plans. Each period of service performed by an individual in the uniformed services is deemed, upon reemployment, to constitute service with the employer(s) maintaining the plan for purposes of determining participation, vesting, and accrual of benefits under the plan. 38 U.S.C. 4318(a)(2)(A) and (B); 20 CFR 1002.259. As explained in the preamble to DOL's final rule implementing USERRA, the reemployed service member is treated for pension purposes under the plan as though he or she had remained continuously employed. 70 FR at 75280.⁴

Entitlement to pension credit arises only where the returning service member is reemployed by his or her pre-service employer.⁵ There is no entitlement to pension credit in cases in which an employee permanently and lawfully loses reemployment rights—for example, where an employee dies during the period of military service (however, see recent changes to the Internal Revenue Code⁶), where an employer is excused from its reemployment obligations based on a statutory defense or where an employee

⁴ Consistent with this principle of treating a reemployed service member as if his or her employment had not been interrupted by military service, DOL's final rule requires that any preparation time before entering military service or recuperation time (or period of hospitalization or convalescence) after completing service before reporting back to work, to the extent permitted by USERRA, be treated as continuous service with the employer upon reemployment for purposes of determining the employee's pension entitlement. 20 CFR 1002.259; see 70 FR at 75276.

⁵ A service member who meets five eligibility criteria is entitled to be reemployed: The employee is absent from employment by reason of service in the uniformed services; the employee gives advance notice of the service; the employee has five years or less of cumulative service in the uniformed services with respect to the employment relationship with the employer; the service member makes a timely return to, or application for reinstatement in, his or her employment after completing service; and the employee receives an honorable discharge from service. 38 U.S.C. 4312(a)-(c). There are three statutory defenses that an employer may assert against a claim for USERRA benefits; the employer bears the burden of proving these defenses. 38 U.S.C. 4312(d).

⁶ The Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART") amended the Internal Revenue Code with respect to the provision of certain benefits under an employee pension benefit plan for participants who die or become disabled while performing qualified military service. 26 U.S.C. 401(a)(37); 26 U.S.C. 414(u)(9). PBGC may provide additional guidance in the future regarding HEART provisions under Title IV.

² ERISA section 4022(e) provides that a qualified preretirement survivor annuity under a single-employer plan is not treated as forfeitable solely because the participant has not died as of the termination date.

elects not to seek reemployment within the specified time frame.⁷ 38 U.S.C. 4312(d)(1); see 70 FR at 75280. Plan termination, however, is not identified as a circumstance that results in a permanent and lawful loss of reemployment rights for purposes of computing an employee's pension entitlement.

In the case of a standard termination, under ERISA section 4041(b)(1)(D) and § 4041.28(a) of PBGC's regulation on Termination of Single-Employer Plans, plan assets must satisfy all plan benefits through priority category 6 under section 4044 of ERISA. Priority category 6 includes benefits that, as of the termination date, are conditioned on a future event. Accordingly, even without these regulatory changes, a plan terminating in a standard termination must provide benefits relating to periods of military service through the termination date for participants who become reemployed in accordance with USERRA provisions, even if such reemployment occurs after the plan's termination date.⁸

Section 4312(f) of USERRA describes the information that a service member must submit to an employer in order to establish that the individual meets the statutory requirement for reemployment, including information establishing that the individual's application for reemployment is timely; that he or she has not exceeded the five-year military service limitation; and that the type of separation from military service does not disqualify the individual from reemployment.

Regulatory Changes

Under USERRA, an individual who is reemployed following military service is entitled to the pension benefits that he or she would have earned if he or she had remained continuously employed. As noted above, Title IV of ERISA provides that, for a benefit to be nonforfeitable, the conditions for entitlement to the benefit must be satisfied on or before the plan's termination date. In order to harmonize the significant federal mandate to protect service members' rights and benefits under USERRA with Title IV's

rules on nonforfeitable benefits, PBGC is amending its regulation on Benefits Payable in Terminated Single-Employer Plans. This amendment provides that a participant will be deemed to have satisfied the reemployment condition for entitlement to the benefit as of the plan's termination date, for purposes of PBGC's guarantee, if PBGC determines, based on a demonstration by the participant or otherwise, that he or she became reemployed and entitled to the restoration of the pension benefit pursuant to USERRA, even if the reemployment occurred after the plan's termination date. Thus, for example, if a participant had 14 years of pension service at the time he or she entered military service, and had spent one year in the military as of the plan's termination date, the participant will be considered to have 15 years of service, for guarantee purposes, so long as he or she returns to his or her former employment within the bounds set by USERRA.

When a plan termination occurs during the bankruptcy of the plan sponsor, PBGC treats the bankruptcy filing date as the plan's termination date for certain purposes (see note 1). New § 4022.11 includes a provision that applies this concept to USERRA benefits. For example, if a participant is performing military service as of the bankruptcy filing date, any benefit relating to the period of military service that is accrued and vested through the bankruptcy filing date will be considered nonforfeitable if the participant becomes reemployed pursuant to USERRA after the bankruptcy filing date.

PBGC will provide guidance on how individuals can establish, for purposes of their Title IV benefit, their entitlement to benefits under USERRA. Persons with questions about these benefits should contact PBGC's Benefits Administration and Payment Department.

PBGC emphasizes that the regulatory changes are very narrow, applying only to the unique circumstances presented by federal statutes affording special protection to the men and women serving the nation in the uniformed services. Except as provided in this amendment, a benefit will be treated as nonforfeitable only if all conditions for entitlement to the benefit have been satisfied on or before the termination date. This includes benefits such as disability benefits, subsidized early retirement benefits (e.g., "30 and out" benefits), and benefits that may be similar in certain respects to the benefits covered by this amendment, such as a benefit conditioned on an employee's

being reemployed after a period of layoff.

Applicability

The amendments made by this final rule will apply to reemployments under USERRA initiated on or after December 12, 1994. Starting December 17, 2009, PBGC will begin adjusting final benefit determinations of affected participants and make back payments with interest.

Compliance With Rulemaking Guidelines

PBGC has determined, in consultation with the Office of Management and Budget, that this final rule is not a "significant regulatory action" under Executive Order 12866.

Regulatory Flexibility Act

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) that the amendments in this final rule will not have a significant economic impact on a substantial number of small entities. The amendments harmonize the requirements of USERRA with the nonforfeitable benefits requirements of Title IV of ERISA. Virtually all of the amendments affect only PBGC and persons who receive benefits from PBGC. Accordingly, as provided in section 605 of the Regulatory Flexibility Act, sections 603 and 604 do not apply.

List of Subjects

29 CFR Part 4001

Pensions.

29 CFR Part 4022

Pension insurance, Pensions.

■ For the reasons given above, PBGC is amending 29 CFR parts 4001 and 4022 as follows.

PART 4001—TERMINOLOGY

■ 1. The authority citation for part 4001 continues to read as follows:

Authority: 29 U.S.C. 1301, 1302(b)(3).

■ 2. In § 4001.2, add a new definition in alphabetical order to read as follows:

§ 4001.2 Definitions.

* * * * *

PPA 2006 bankruptcy termination means a plan termination to which section 404 of the Pension Protection Act of 2006 applies. Section 404 of the Pension Protection Act of 2006 applies to any plan termination in which the termination date occurs while bankruptcy proceedings are pending with respect to the contributing sponsor of the plan, if the bankruptcy proceedings were initiated on or after

⁷ USERRA contains a broad prohibition against waivers of statutory rights. The preamble to DOL's regulation on USERRA provides that an employee cannot waive USERRA's right to reemployment until that right has matured, i.e., until the period of service is completed. 70 FR at 75257.

⁸ Under the final regulation, as explained below, such benefits would be in priority category 4 (covering guaranteed benefits) if the reemployment occurs after the plan's termination date and if all other conditions are met. These benefits thus would continue to be part of benefit liabilities that would have to be provided in a standard termination.

September 16, 2006. Bankruptcy proceedings are pending, for this purpose, if a contributing sponsor has filed or has had filed against it a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan.

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PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 3. The authority citation for part 4022 continues to read as follows:

Authority: 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 4. In § 4022.2, amend the first paragraph by removing the words “plan year, proposed termination date, substantial owner” and adding in their place “plan year, PPA 2006 bankruptcy termination, proposed termination date, statutory hybrid plan, substantial owner.”

■ 5. Add new § 4022.11 to subpart A to read as follows:

§ 4022.11 Guarantee of benefits relating to uniformed service.

This section applies to a benefit of a participant who becomes reemployed after service in the uniformed services that is covered by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

(a) A benefit described in paragraph (b) of this section that would satisfy the requirements of § 4022.3(a) and (c) (together with any benefit earned for the period preceding military service) except for the fact that the participant was not reemployed on or before the termination date will be deemed to satisfy those requirements if PBGC determines, based upon a demonstration by the participant or otherwise, that he or she became reemployed after the termination date and entitled to the benefit under USERRA.

(b) A benefit described in this paragraph (b) is a benefit attributable to a period of service commencing before the termination date and ending on the termination date during which the participant was serving in the uniformed services as defined in 38 U.S.C. 4303(13) (or was in a subsequent reemployment eligibility period) and to which the participant is entitled under USERRA.

(c) Example: A plan’s vesting requirement is 5 years of service with the employer. A participant has

completed 4 years of service when he leaves employment for uniformed service. The plan terminates while the participant is in military service. As of the termination date, the participant would have had 5 years of service and 5 years of benefit accruals if he had remained continuously employed. Upon reemployment after the termination date but within the time limits set by USERRA, the participant would have had 6 years of service under the plan for vesting and benefit accrual purposes, if the plan had not terminated. PBGC would treat the participant as having a vested, nonforfeitable plan benefit with 5 years of vesting service and benefit accruals as of the termination date.

(d) In the case of a PPA 2006 bankruptcy termination, “bankruptcy filing date” is substituted for “termination date” each place that “termination date” appears in this section.

Issued in Washington, DC, this 10th day of November 2009.

Vincent K. Snowbarger,
Acting Director, Pension Benefit Guaranty Corporation.

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

Judith R. Starr,
Secretary, Board of Directors, Pension Benefit Guaranty Corporation.

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