



For your information

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PBGC announces targeted enforcement policy for cessation-of-operations rule

PBGC issued a [press release](#) and [Frequently Asked Questions](#) about its modified enforcement policy for enhancing plan benefit security when plan sponsors experience changes in operations that result in separation from service of more than 20 percent of the employees participating in a plan covered by PBGC. Under this new “pilot program”, PBGC will only require additional security or plan contributions if the plan sponsor is a poor credit risk and the plan covers more than 100 lives. However, all plans will still face a notification requirement. The announcement comes in response to a 2011 executive order from President Obama asking agencies to review existing and proposed regulations and affirms previous informal indications from PBGC.

Background

Section 4062(e) of ERISA is one of PBGC’s tools for ensuring that plan sponsors are held financially responsible for benefit promises and do not escape liability when business operations change. Under ERISA Section 4062(e), plan sponsors have reporting obligations and may have financial obligations when operations are stopped at a facility and more than 20 percent of the employees participating in an employer-sponsored pension plan are terminated. In these situations the employer is treated as a withdrawing employer from a multiple employer plan.

The employer must notify PBGC within 60 days after the event and must provide a bond or escrow in a specified amount for five years to be applied--if the plan terminates within that period--against the plan's underfunding. PBGC may waive this requirement or make alternative arrangements.

In 2010, PBGC proposed [regulations](#) about the Section 4062(e) requirements. Plan sponsors and industry organizations reacted to the proposal as overreaching, in terms of both the imposition of financial obligations on employers in strong financial condition and the breadth of situations PBGC deemed covered by the rule.

In 2011, in response to Executive Order 13563, PBGC began a review of existing regulations with a [request for comments](#) released in the April 1, 2011 Federal Register. [Respondents](#) argued for changes in the ERISA 4062(e) filing requirements along with changes for Reportable Events and other filing

requirements. PBGC's preliminary plan for addressing the executive order stated that the proposed rules would be reconsidered. In statements at industry conferences and in [testimony](#) to the Health, Employment, Labor and Pensions Subcommittee of the House Education and the Workforce Committee in February 2012, PBGC affirmed an intent to make changes with an emphasis on being more responsive to employers and plans. Earlier this spring, informal reports noted that PBGC had softened its approach to enforcement and was differentiating remedies on the basis of the financial strength of the employer.

PBGC announces more rational approach for financial obligations

PBGC's November 2 announcement says it agrees with comments from the business community and that its enforcement approach to Section 4062(e) will be revised. Financial guarantees will no longer be required of companies with fewer than 100 participants or of those that meet standard tests of financial soundness. PBGC will use "common financial measures of financial soundness such as credit ratings, credit scores, indebtedness, liquidity, and profitability. If a company is creditworthy and there are no other indicators of financial weakness or other risks, PBGC will take no action."

Buck Comment: PBGC says creditworthy companies still have to report Section 4062(e) events. PBGC's announcement does not expressly state that small employers need not report.

Uncertainty remains about covered events

PBGC's announcement does not discuss contemplated changes to its proposed regulations defining the types of transactions that must be reported to the agency as Section 4062(e) events. Under the statute, liability is triggered if "an employer ceases operations at a facility in any location". Instead of limiting applicability to situations in which operations at a facility are shut down, under the proposed regulations, liability can be triggered where no operations are shut down, but rather are, for example, (1) transferred to another stable employer, (2) moved to another location, or (3) temporarily suspended for a few weeks to repair or improve a facility.

How to file

PBGC's latest releases do not provide specific information about filing. Its website, however, provides this instruction about what and where to file:

"Under sections 4062(e) and 4063(a) of ERISA, the administrator of a single-employer plan must notify PBGC if an employer who is a contributing sponsor ceases operations at a facility with a resulting separation from employment of more than 20% of the participants in the plan. Notice is also required under section 4063 if a substantial employer withdraws from a multiple employer plan. The notice under section 4063 is in addition to any Reportable Event notice that may be required under section 4043.

PBGC expects to make a form available for this purpose at a future date. For now no special format is required, but the notice should identify the affected plan and employer, and include a

statement that there has been a cessation of operations under ERISA section 4062(e) or a withdrawal by a substantial employer from a multiple employer plan, and a request that PBGC determine the resulting liability.

The notice must be filed with the PBGC's Corporate Finance & Restructuring Department (CFRD) within 60 days of the cessation or withdrawal. It may be mailed to CFRD at 1200 K Street, NW, Washington, DC 20005-4026, faxed to 202-842-2643, or emailed to 4063.report@pbgc.gov.”

In closing

This official confirmation from PBGC of its current enforcement policy is welcome news on some fronts. However, it does not revise guidance on the types of situations that are considered to fall within the definition of a covered event. PBGC's proposed regulation is widely viewed as overreaching on that score, and yet PBGC continues to use it for enforcement.

Buck Comment: Plan sponsors need to consider the impact of potential Section 4062(e) liability on business decisions such as transfers of operations and asset sales to avoid triggering inadvertent obligations for their underfunded plans.