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New Pension Paradigm for Substantial Cessation of Operations

Congress has redefined PBGC's ability to assert liability on pension plan sponsors when changing business operations that affect covered plan participants in a single-employer plan. Revisions to ERISA Section 4062(e) included in the Multiemployer Pension Reform Act of 2014 (within the Consolidated and Further Continuing Appropriations Act, 2015, a.k.a. "CRomnibus") change the definition of "substantial cessation of operations" to limit the situations that will trigger liability.

Background

ERISA Section 4062(e), prior to the current revision, imposed liability on plan sponsors when a cessation of operations at a facility produced a reduction in force of more than 20% of plan participants. Under this law, the PBGC could seek a bond or other collateral from a pension plan sponsor if there was such an event. PBGC enforcement guidelines (see our November 6, 2012 *For Your Information*) and proposed regulations in 2010 interpreted this in a manner many employers believed to overreach the rule intended by ERISA drafters. For example, PBGC found liability to be triggered when a plan was divided in two due to a change in corporate ownership, with plan participation continuing undisrupted under the resulting entities.

In response to complaints, PBGC announced a moratorium in 2014 as reported in our July 9, 2014 *For Your Information*. Under the moratorium, PBGC avowed to hold off on new enforcement efforts, though plan sponsor reporting of new ERISA Section 4062(e) events was still required. Heavy lobbying ensued as employers and trade organizations looked to Congress to obtain a narrower reading of the rule.

Congress Agrees on Redefinition

Tagging along with changes to the funding rules for multiemployer plans (see our January 12, 2015 *For Your Information*) attached to the CRomnibus Act, revisions to ERISA Section 4062(e) significantly change the PBGC's options for imposing liability when plan sponsors retool facilities, rearrange operations, or sell off segments of their business to other entities.

The revised law changes the definition of a substantial cessation of operations at a facility to mean a permanent cessation at a facility that results in a workforce reduction of more than **15%** of **eligible** employees. All employees of a sponsoring employer who are eligible to participate in any defined contribution or defined benefit pension plan subject to ERISA are considered eligible employees. The new law constrains the determination of whether there is a 15% reduction in a number of ways. For example:

Required Reporting

If a cessation occurs using the new 15% definition, the plan sponsor should report it to the PBGC within 60 days of the event.

- Separated employees are not taken into account if they are replaced within a reasonable time by other employees who are US citizens or residents and are working at a facility in the US.
- Such separated employees are not taken into account even if replaced at another US facility.
- Eligible employees are not taken into account in the case of an asset or stock sale of business operations if replaced (by other employees who are US citizens or residents) and the new employer provides ongoing coverage via a spun off plan, or if the eligible employee had not participated in the original employer's plan.

Exceptions and Funding Elections

For plans that do experience a cessation under the revised definition, new exceptions may allow a plan sponsor to avoid posting a bond or other collateral. Plans with fewer than 100 participants with accrued benefits and plans funded at 90% or more (using market value of plan assets and liabilities determined with PBGC premium assumptions) in the year prior to the cessation are excused. In addition, plan sponsors can elect to satisfy the liability for the cessation by making additional contributions to their plans over a 7-year period beginning with the plan year in which the cessation occurred. These contributions are in addition to any minimum required contribution under the usual funding rules.

The amount of the contribution is based on the value of unfunded vested benefits determined using premium liabilities and is adjusted to reflect the proportion of participants in the workforce reduction relative to the number of eligible employees with accrued benefits in the plan. The additional contributions are no longer required once the plan satisfies the 90% funding ratio.

Plan sponsors will need to inform the PBGC of their election to pay the additional contributions, the payment of each installment, any failure to make a payment, and the cessation of the contribution obligation upon achieving the 90% threshold.

Moratorium Ends

With new legislation in place, PBGC **announced** the end of its moratorium on enforcement of the cessation of operations rule. In keeping with the instruction from Congress, PBGC says it will continue to focus enforcement efforts on cases where there is a high risk of substantial plan failure. PBGC will not pursue ERISA Section 4062(e) liabilities for small plans or from creditworthy sponsors.

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Effective Date and Transition

The new definitions are effective as of the December 16, 2014 enactment date. Congress has directed the PBGC not to take any enforcement action under ERISA Section 4062(e) that is inconsistent with the enacted changes. In addition, Congress instructed PBGC to abide by its enforcement policy as in effect on June 1, 2014. Plan sponsors with a cessation of operations before the date of enactment that had not yet entered into an arrangement with PBGC are permitted to opt for the new plan contribution option in lieu of posting a bond or other collateral.

In Closing

Plan sponsors of PBGC- covered plans that are less than 90% funded should consider how the newly revised ERISA Section 4062(e) may impact corporate transactions or decisions about stopping operations at a facility. If a cessation occurs using the new 15% definition, the plan sponsor should report it to the PBGC within 60 days of the event.

Authors
Marjorie Martin, EA, FSPA, MAAA
Jay P. Rosenberg, EA, FSA, MAAA, FCA
Joanne Jacobson, JD, LLM

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