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PBGC Announces 4062(e) Enforcement Pilot Program: Who Will Qualify for Relief?

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On Nov. 2, 2012, the Pension Benefit Guaranty Corporation announced that it was implementing a pilot program regarding enforcement of downsizing liability under Section 4062(e) of the Employee Retirement Income Security Act (213 PBD, 11/5/12; 39 BPR 2080, 11/6/12). In brief, under this program, PBGC "generally" will not enforce the liability against "financially sound" or "creditworthy" companies, or in small plan situations based on a 100-participant threshold.[1]

This announcement could be viewed as reflecting a softening of PBGC's general approach to Section 4062(e) enforcement (in that it provides relief in many situations) or as a hardening of its approach (in that it allows PBGC to focus its resources intensively on other situations). And it raises a question (discussed below) as to whether the initiation of this pilot program might signal some openness on the part of PBGC to change some of the expansive 4062(e) interpretations that have attracted significant opposition from the employer community.

Background

Under Section 4062(e)[2] and PBGC's implementing regulations,[3] a liability arises if "an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment." PBGC regulations provide that the liability equals the amount of the plan's underfunding (using PBGC plan termination assumptions) multiplied by the percentage of the plan's active participants who are separated from employment as a result of the cessation of operations.

Although the statutory provisions[4] call for the liability to be satisfied through an escrow payment or purchase of a bond to provide protection in case the plan is terminated in a distress or involuntary termination within the next five years, PBGC generally attempts to negotiate alternative ways of satisfying the liability, most often with an employer commitment to make additional contributions to the plan, over a period of years, that total the 4062(e) liability.

In a proposed rule issued in 2010,[5] PBGC adopted an expansive view as to the circumstances in which 4062(e) liability can arise. For example, the proposal took the position that the liability can be triggered based on a going-concern asset sale, in which operations and employment are discontinued with the seller but continue seamlessly with the buyer; the cessation of only one of multiple operations at a facility with all

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[1] The announcement consists of a press release, available at *http://www.pbgc.gov/news/press/releases/pr12-32.html*, and a set of frequently-asked questions and answers, available at *http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html*.

[2] 29 U.S.C. § 1362(e).

[3] 29 C.F.R. § 4062.8.

[4] ERISA sections 4062(e) and 4063, 29 U.S.C. §§ 1362(e), 1363.

[5] The 2010 proposed rule, published at 75 Fed. Reg. 48,283 (Aug. 10, 2010), is available at *http://www.pbgc.gov/Documents/2010-19627.pdf*. (For a summary and analysis of this proposed rule, see "Stealth Liability Lurks for Employers with Ongoing Pension Plans who Downsize or Sell Businesses" by Harold J. Ashner, "BNA Pension & Benefits Daily" and "BNA Pension & Benefits Reporter," 175 PBD, 9/13/10; 37 BPR 2044, 9/14/10.)

other operations continuing at full strength; or the transfer of an operation from one facility to another facility of the same employer with no reduction in the overall level of operations.

Public comments strongly objected to these and other interpretations,[6] and PBGC thereafter announced that it would reconsider and re-propose the proposed rule. Several trade groups (American Benefits Council, ASPPA College of Pension Actuaries, Committee on Investment of Employee Benefit Assets, the ERISA Industry Committee, Financial Services Roundtable, National Association of Manufacturers, and the U.S. Chamber of Commerce) sent a letter to PBGC on Dec. 16, 2011,[7] taking the position that certain aspects of the 2010 proposed rule ''are not consistent with the statute, nor are they consistent with published PBGC guidance and many years of historical enforcement practices''; stating that they were ''very concerned to learn from numerous companies that PBGC personnel, in communications with plan sponsors, are referring to the proposed regulations as current law, and enforcing them as such''; arguing that it is ''inconsistent with the President's Executive Order to announce a reconsideration of troublesome proposed regulations, while at the same time actively enforcing them as current law''; and asking PBGC ''to address this situation by suspending all enforcement actions based on the proposed regulations and by voiding all agreements entered into based on the proposed regulations.''

The liability that arises in connection with a 4062(e) event can be surprisingly large. Consider, for example, a legacy plan with 50 active participants, all working at one location, but with thousands of retirees and deferred vested participants. Assume that the plan is well funded or even overfunded on an ongoing funding basis, but underfunded by $250 million (based primarily on liabilities for inactive participants) on a PBGC plan termination basis, and that the employer, with a workforce of 50,000 employees on a controlled-group-wide basis, sells the business at that one location in a going-concern asset sale. Under PBGC's interpretative approach, the resulting liability would presumably be $250 million, or $5 million for each of the 50 affected active participants. Clearly, employers will be interested in knowing whether they will qualify for relief under PBGC's recent announcement.

Relief for 'Financially Sound' or 'Creditworthy' Companies

If a company is ''financially sound'' or ''creditworthy,'' PBGC will take no action to enforce 4062(e) liability, provided that there are no ''other indicators of financial weakness'' or ''other risks.'' The announcement stated that PBGC's ''decision to take no action will be based on PBGC's analysis of a company's financial strength and the circumstances of the case,'' and that ''PBGC will use the standards already used by businesses throughout the world: common financial measures of financial soundness such as credit ratings, credit scores, indebtedness, liquidity, and profitability.''

However, PBGC cautioned that ''[i]f the company is no longer creditworthy during the five-year enforcement period, PBGC will enforce the 4062(e) liability,'' and noted that it ''may periodically request additional information from the company to confirm its continued qualification as creditworthy.''

Creditworthiness is, of course, a relative concept, with varying degrees of creditworthiness being viewed as adequate for different purposes. The announcement provided no specifics regarding the level of creditworthiness that will be needed to qualify for this relief. In evaluating creditworthiness, will there be a general credit rating standard, such as having an investment grade credit rating rather than a below investment grade credit rating?

Since PBGC is considering factors other than the credit rating, presumably a company with a credit rating above any general credit rating standard might not qualify as creditworthy, and one below that standard might nonetheless qualify. Under what circumstances would these other factors lead to such results? And for companies without a credit rating, what metrics, and at what levels, will drive PBGC's determination?

Assuming that a company qualifies as ''financially sound'' or ''creditworthy'' under PBGC's multifactor approach, it nonetheless might *not* qualify for the relief where there are, as noted above, ''other indicators of financial weakness'' or ''other risks.'' There is no guidance in the announcement as to what criteria would be used to make these determinations, including how significant any such ''other indicators'' or ''other risks'' must be to override a determination of financial soundness or creditworthiness.

The announcement focuses on the creditworthiness or financial strength of ''a company.'' However, PBGC generally is very focused on the joint-and-several liability that each member of a controlled group has with respect to a plan, and it is therefore likely that PBGC will take into account all members of the controlled group (perhaps with varying levels of creditworthiness) in making its determinations.

Relief in 'Small Plan' Situations

The announcement refers to PBGC not enforcing the 4062(e) liability ''against'' small plans; of course, any enforcement would be against the employer rather than against the plan. As for the threshold for relief in small plan situations, it is expressed in a few different ways—alternatively using thresholds of 100 or fewer and of fewer than 100 participants. More importantly, it sometimes refers to whether a particular *plan* is small but elsewhere states that the relief applies where ''*companies* . . . have [fewer] than 100 participants,'' thus raising the question of whether PBGC may be aggregating all plans maintained by the company (or perhaps by the entire controlled group).

Of course, a large company (or controlled group) may have a small plan (perhaps along with one or more other larger plans), and a small company (or controlled group) may have a large plan (*e.g.*, in cases in which a company or controlled group that downsized over the years has a plan with a large number of retirees and terminated vested participants). It is also unclear what definition of ''participant'' will be used (there are sev-

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[6] The public comments on the 2010 proposed rule are available at *http://subscript.bna.com/UTILS/lk.nsf/r/pkun8zu5th?opendocument.*

[7] The Dec. 16, 2011, letter to PBGC is available at *http://www.uschamber.com/issues/letters/2011/comment-letter-pension-benefit-guaranty-corporations-pbgc-enforcement-actions* (see 246 PBD, 12/23/11; 39 BPR 6, 1/3/12).

eral[8]) or as of what date(s) the participant count(s) will be determined. Hopefully, there will be further guidance that provides clarity on how the small plan threshold will be determined.

Effect on PBGC Reporting Requirements

The announcement makes clear that the mere fact that a company qualifies for this relief based on creditworthiness does not eliminate the requirement to report a 4062(e) event. In this connection, PBGC stated that ''the law requires companies to report,'' but went on to state that it ''will not act on reports from creditworthy companies.'' There is no discussion of whether reporting will be waived in situations that qualify for the small plan relief being provided, but absent any further guidance, there appears to be no such waiver. (There is an existing waiver from reporting an active participant reduction reportable event for a plan with fewer than 100 participants at the beginning of either the current or the previous plan year,[9] but that waiver does not apply to the separate requirement to report a 4062(e) event in accordance with ERISA Section 4063(a).[10])

Effect on PBGC's 4062(e) Interpretations

The announcement does not state any intention for PBGC to change any of the specific 4062(e) interpretations that it has expressed in its 2010 proposed rule and that it has been relying on in its past and pending negotiations. However, PBGC did state that it is ''using this pilot program to help [it] decide what changes to make in [its] proposed regulation.'' So one can hope that PBGC—both in its pending and future negotiations and in its planned re-proposed regulation—will pull back from at least some of its expansive interpretations as to the circumstances in which 4062(e) liability can arise.

Effect on Pending Cases

The announcement does not address whether and to what extent the pilot program will apply to pending cases. That said, there is nothing in the announcement suggesting that the program will apply only to 4062(e) events that have not yet occurred, so one would think that pending cases will be covered, and a PBGC spokesperson has confirmed that this is the case (213 PBD, 11/5/12; 39 BPR 2080, 11/6/12).

Conclusion

Although many employers will qualify for relief under PBGC's pilot program, there will be cases in which it is unclear whether a particular employer qualifies. An employer facing potential 4062(e) liability—including cases in which a possible future downsizing event (such as, according to PBGC, a going-concern asset sale) is being contemplated by the employer, or in which a downsizing event has already occurred but may not constitute a 4062(e) event—might want to approach PBGC to attempt to obtain certainty, and this might require the submission of evidence and arguments to PBGC. A careful review of the recent announcement and of the relevant facts and circumstances will help guide the employer in deciding whether to approach PBGC to request that it take no action and, if so, how best to do so.

[8] *See, e.g.*, ERISA Section 3(7), 29 U.S.C. § 1002(7) (Title I definition of ''participant''); 29 C.F.R. § 2510.3-3(d) (Department of Labor definition of ''participant covered under a plan''); 29 C.F.R. § 4006.6 (PBGC definition of ''participant'' under PBGC premium regulations); 29 C.F.R. § 4041.2 (PBGC definition of ''participant'' under PBGC standard and distress termination regulations); 2011 Form 5500 instructions at p. 17 (definition of ''participant'' for certain Form 5500 reporting purposes).

[9] 29 C.F.R. § 4043.23(c)(1).

[10] 29 U.S.C. § 1363(a).