

Dealing with PBGC Issues: A Practical Guide

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The Employee Benefits Law Firm with a PBGC Focus

Overview

- Premium Filings and Related Audits
- Standard Terminations and Related Audits
- PBGC Reporting Requirements
- Missed Contributions and Related Liens
- ERISA Section 4062(e) Downsizing Liability
- PBGC-Related Issues in M&A Context
- Early Warning Program Negotiations
- Distress and Involuntary Terminations
- PBGC Guaranteed Benefits
- Bankruptcy Claims and Disputes
- Researching PBGC Issues

PBGC Premiums and Related Audits

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PBGC Premiums: Practical Pointers

- Flat-rate premium
 - Don't just copy Form 5500 participant count (broader definition than for premiums)
 - Watch out for timing of deemed and real cashouts
 - Focus on annuity starting date, not just payment date, for real cashouts and consensual lump sums
 - Drop "unlocatables" based on "reasonable belief" of no living participant/beneficiary entitled to benefits
 - Don't pay twice for same participant
 - Move accrued benefit when participant moves to another plan
 - If plan has benefit liabilities with respect to participant, count only participant (not alternate payees or other beneficiaries)

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PBGC Premiums: Practical Pointers (Cont.)

- Variable-rate premium
 - Consider reducing UVBs by designating first two quarterlies to last year (election, “cash-in-plan” issues)
 - Year-end standard termination: select proposed termination date of 12/31 (not 1/1 or later), to ensure VRP exemption
 - Drop non-vested benefits (pre- and post-PPA guidance)
 - De-risking may result in VRP reduction based on effect of headcount-driven VRP cap
 - Electing Alternative vs. Standard Premium Funding Target: consider *not* changing for small reduction (5-year lock)
 - Estimated VRP filings: be careful to rely on *exact* assets
 - Duplicate and gap premiums in mid-year mergers: choose date and surviving plan carefully

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PBGC Premiums: Practical Pointers (Cont.)

- When evaluating contribution choices, consider PBGC reporting and ERISA Section 4062(e) consequences tied to UVBs
- Premium audits
 - Tie flat-rate premium to particular participants
 - Keep “static” e-record for each year
- Premium penalties
 - Self-correct (lower penalties apply)
 - Maintain good compliance record (lower penalties may apply to later underpayment not self-corrected if corrected promptly after PBGC notice)
 - Review “reasonable cause” waiver policy (Appendix to 29 CFR Part 4007)
- Premium bills: read them carefully before paying
- Premium refunds: watch out for 6-year statute

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Standard Terminations and Related Audits

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Planning a Standard Termination

- Moving from insufficiency to sufficiency: three options
 - Sufficiency commitment from employer
 - Majority owner “alternative treatment”
 - “Freeze and wait” approach
- Planning for plan amendments: remember that IRS and PBGC post-termination amendment rules differ
- Develop schedule and assign tasks with deadlines
- Be careful regarding pre-standard termination irrevocable commitment purchases

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Notices to Participants

- Notice of Intent to Terminate
 - Need to anticipate who *will be* an “affected party” as of *future* “proposed termination date”
 - Be careful regarding “freeze” information
 - Generally best to use PBGC’s “model” NOIT
 - Take advantage of ability to provide “additional information”
 - Generally best to include notice of annuity information w/NOIT
 - After first NOIT, restriction on lump sums and purchase of irrevocable commitments applies through end of PBGC 60-day review period (subject to “ordinary course” exception)
- Notice of Plan Benefits
 - Consider including election material with NOPB
 - If NOPB error discovered later, correct by election notice deadline to preserve possible “correction of errors” relief

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Form 500 Filing and PBGC Review

- If more time is needed for Form 500 filing (*e.g.*, to complete NOPB issuance or to address sufficiency):
 - Move the proposed termination date (subject to 90-day limit regarding *earliest* NOIT)
 - Request an extension
 - Start over (“61-day expedited” process)
- If no acknowledgment letter from PBGC within month or so, call to make sure filing received
- Termination distributions prohibited until *61* days after date PBGC *received* Form 500 filing

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Notice of Annuity Information

- Often included with NOIT or NOPB, but required at least 45 days before distribution
- Must identify insurers from whom (or from among whom) you intend to purchase irrevocable commitments
 - OK to include list of insurers from whom you reasonably expect to solicit bids
 - But new 45-day notice is required if new insurer is to be used
- Remember to give notice to all participants and beneficiaries except de minimis cashouts

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Distribution

- If extension needed (*e.g.*, because of illiquid assets, benefit dispute, election or data issues)
 - File request at least 15 days before deadline (but not fatal if 15-day deadline missed)
 - PBGC will focus on length of delay and exercise of ordinary business care and prudence
- Watch out for timing of lump sum distributions
 - Key issue: “annuity starting date” vis-à-vis stability period (and resulting “lookback” month) changes
 - PBGC regulations presume distribution date is ASD in “absence of evidence establishing” another ASD
 - But presumption may be overcome by use of “immediate” ASD pursuant to Treas. Reg. § 1.417(e)-1(b)(1)
 - Note that delays in payment beyond reasonable administrative delay may result in new/late ASD

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Post-Distribution Certification

- Form 501 (Post-Distribution Certification) due *30 days* after distribution is *completed*
- Penalty-free zone until *90 days* after distribution *deadline*
- Mark "Day 90" on your calendar early on
- But may want to file Form 501 sooner, not later
 - Likelihood of audit essentially same whenever you file Form 501
 - Earlier filing puts you in earlier audit pool, so that any audit takes place before memories/records harder to reconstruct
 - But remember that early Form 501 filing may accelerate premium filing deadline (see next slide)

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Remember Final Steps

- Provision of annuity contract: where participant will receive distribution through irrevocable commitment
 - Plan administrator or insurer must provide participant annuity contract or certificate within 30 days after it is available
 - If contract/certificate unavailable by 90th day after distribution *deadline*, plan administrator must issue notice providing:
 - Identifying information relating to insurer
 - Statement re future receipt of contract or certificate
- Final PBGC premium payment
 - Early Form 501 filing may accelerate premium deadline (earlier of normal due date and Form 501 filing date)
 - Pay timely to avoid penalties

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Standard Termination Audits

- Odds of audit are high (100% if more than 300 lives)
- Remember that IRS favorable determination letter won't count with PBGC
- Most common error: lump sums too low
 - Wrong determination date for interest rate or for current age
 - Wrong retirement age assumption
 - Failure to use "greater of" plan assumptions
 - Adoption of post-termination amendment
 - Remedy: employer pays balance due plus reasonable interest

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Standard Termination Audits (Cont.)

- Common errors re irrevocable commitments
 - Failure to include all benefit options
 - Failure to interpret/apply benefit formula correctly
 - Use of erroneous participant data
 - Failure to preserve "future" lump sum basis
 - Remedy: correct irrevocable commitments
- Other common errors
 - Failure to obtain appropriate elections and spousal consent
 - Alternative treatment (waiver) of benefits by non-majority owners
 - Failure to send the total value of Missing P's benefits to PBGC
 - Deduction of processing fees from participants' benefits
 - Rollover of missing participants' benefits with lump sum values between \$1,000 and \$5,000 into an IRA

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PBGC Reporting Requirements

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PBGC Reporting Requirements: Avoiding Delinquencies

- Reportable events: watch out for multiple events/plans
 - One set of facts may give rise to two events
 - One event may occur “for” two or more plans
 - Determine waivers, extensions, and required information separately for each event and each plan
- “Active participant reduction” reportable event
 - “Single-cause” event may occur any day of plan year
 - May have two “single-cause” events (based on same or different causes) in same plan year (two different thresholds)
 - Spinoff may trigger event, even if within same controlled group
 - ERISA Section 4062(e) events: “disregard” rule applies to reductions timely reported under ERISA Section 4063(a)
 - But no waivers/extensions for ERISA Section 4063(a) notice

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PBGC Reporting Requirements: Avoiding Delinquencies (Cont.)

- “Change in controlled group” reportable event
 - Timing keyed to legally binding agreement, not closing
 - “Legally binding” determined without regard to conditions
 - Intra-controlled group merger no longer covered under this event, but liquidation into another controlled group member is liquidation event
- “Loan default” reportable event
 - Captures *any* default under \$10M+ loan agreement (even if just “technical” default—no need for acceleration or notice of default)
 - Also captures *non-defaults* (where lender waives or agrees to amendment of covenant if effect is to cure or avoid breach that *would* trigger default)

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PBGC Reporting Requirements: Avoiding Delinquencies (Cont.)

- Form 200 filings (\$1M+ missed contributions triggering lien)
 - Unique PBGC calculation methodology (see Appendix to Form 200 instructions at www.pbgc.gov/documents/Form-200-Instructions.pdf)
 - Form 200 must be *received* by PBGC within 10 days (not *sent to* PBGC within 30 days as for reportable events)
- ERISA Section 4010 reporting: note requirement to report that you no longer need to report

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PBGC Reporting Requirements: Reporting Effectively

- For reportable events, must use prescribed PBGC forms and must file electronically
 - Forms are available at www.pbgc.gov/prac/reporting-and-disclosure/reportable-events.html
 - Consider using e-filing portal (efilingportal.pbgc.gov/e4010) (includes forms, error checks, etc.)
- Explain (where applicable) why event should not be of concern to PBGC (may obviate follow-up need)
- Multiple events can be combined in one filing
- In general, expect follow-up inquiry from PBGC for more information re event and re plan
- Note: statutory confidentiality applies (ERISA Section 4043(f))

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PBGC Reporting Requirements: Dealing with Penalties

- Late reporting penalties
 - Not mechanical/automatic (considerable discretion)
 - Maximum daily penalty = \$2,194; lower guideline penalties per policy statement at [60 Fed. Reg. 36837 \(July 18, 1995\)](#)
- If reporting late:
 - Explain reason for delinquency
 - State steps taken to help ensure future compliance
 - Note (where applicable) that late filing resulted in no harm or potential harm to PBGC or participants
- If penalty is assessed:
 - Review proposed waiver guidance issued at [66 Fed. Reg. 2856 \(Jan. 12, 2001\)](#) (reasonably current, per PBGC Blue Book/JCEB guidance)
 - PBGC won't accept "it's the consultant's fault"

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Missed Contributions and Related Liens

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PBGC Missed Contributions Lien

- IRC Section 430(k) lien arises when total of missed contributions (with interest) exceeds \$1M
 - Lien is on all controlled group assets
 - If in bankruptcy, automatic stay blocks lien for filed entities
 - Otherwise, lien can (subject to exceptions) “prime” (get ahead of) existing secured lenders where security is after-acquired property (e.g., receivables, inventory)
 - PBGC may perfect/enforce lien
- Consider approaching PBGC to negotiate subordination agreement
 - May be necessary for employer to survive (e.g., to meet payroll)
 - May also be in best interest of PBGC
 - Can help preserve possibility of plan remaining ongoing
 - Can maximize PBGC’s recovery prospects if plan terminates

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ERISA Section 4062(e) Downsizing Liability

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PBGC Downsizing Liability

- Remember that, with 15% liability trigger tied to all “eligible employees,” liability may arise for plan with small reduction
- In “transfer of operations” context, transferor’s ERISA Section 4062(e) liability may depend on actions taken by transferee
 - Negotiate what transferee can and cannot do
 - Negotiate obligation for transferee to share information

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PBGC Downsizing Liability (Cont.)

- Consider keeping plan(s) at/above 90% variable-rate premium (“VRP”) funding threshold to ensure ERISA Section 4062(e) exemption
- If not at 90% VRP threshold and 7-year alternative is elected, consider reaching 90% with excess contribution for Year 1
 - Results in payment for 0 of 7 years
 - Prefunding balance can be used to offset future contributions, dollar-for-dollar, if “80% of last year” test is met
- Watch out for deadlines relating to electing and satisfying 7-year payment option

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PBGC-Related Issues in M&A Context

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Deal Issues and Pitfalls

- Analyze whether to merge plans, maintain separate plans, freeze plans, or terminate plans
 - Amend plans to create uniformity if keeping separate
 - Amend plans to freeze (soft vs. hard)
 - Review/amend plans to ensure no duplicative benefit coverage
- Watch out for partial termination and full vesting, and consider seeking seller's agreement to fund
- If existing Collective Bargaining Agreement
 - Review for contractual obligations regarding future benefit increases
 - Consider impact on funding status and benefit restrictions

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Deal Issues and Pitfalls (Cont.)

- Watch out for joint and several controlled group liability, including for:
 - Minimum funding obligations and related excise taxes
 - Multiemployer plan withdrawal liability
 - Single-employer plan termination liability
 - PBGC premiums
- Request communications from and to governmental entities

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Deal Issues and Pitfalls (Cont.)

- Duplicate premiums in all mid-year spinoffs
- Duplicate premiums in some mid-year mergers
 - Example: Plan B (with October 1 plan year) merges into calendar year Plan A on December 1
- Gaps in premiums in some mid-year mergers
 - Example: Calendar year Plan A merges into Plan B (with October 1 plan year) on December 1
- Choose the date and the survivor carefully
- Watch out for rules governing proration for change in plan year
 - Prorated premium refund (or credit) for change in plan year duplication
 - Change in plan year disregarded if plan merges/consolidates or otherwise ceases independent existence either during short year or at beginning of full year following short year

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Deal Documents

- Condition deal on PBGC not initiating involuntary termination?
- Watch out for ERISA Section 4062(e) exposure
- Due diligence to ensure no carry-over PBGC exposure (e.g., reporting delinquencies, premiums)
- Ensure clear allocation of PBGC-related responsibilities and liabilities
- Consider indemnities and escrows for PBGC liabilities
- Watch out for representations, warranties, covenants, defaults, etc., that are tied to PBGC reporting requirements

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Early Warning Program Negotiations

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Early Warning Program: Introduction

- PBGC monitors corporate transactions/events that could pose risk to pension plan(s) and/or to PBGC
- Early warning program cases may entail significant investigative efforts and intensive negotiations
- Whether transaction/event occurs may depend on results of negotiations
- Most early warning program cases are not litigated, but rather are resolved through:
 - PBGC reaching comfort without added protection, or
 - Settlement providing added protection

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Early Warning Program: PBGC Focus

- PBGC focus: increased risk to pension plan(s) and/or to PBGC resulting from corporate transaction
 - Effect on credit quality of controlled group
 - Changes in capital structure and effect on PBGC's/pension plan's position in structure
- Joint and several controlled group liability is key
- PBGC's "long-run loss"/legal analysis: likelihood of future termination, current vs. future PBGC loss
- PBGC's financial/practical analysis: is transaction good or bad for plan, participants, PBGC premium payers?

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Early Warning Program: Monitoring Criteria and Transactions of Concern

- Criteria for PBGC monitoring
 - Aggregate controlled group underfunding = at least \$50M
 - Aggregate CG participant count = at least 5,000
 - "Other reasons as appropriate" (e.g., credit rating)
- Transactions of concern
 - Breakup of controlled group
 - Transfer of plan to weaker controlled group
 - Major divestiture by employer with retention of significantly underfunded pension liabilities
 - Highly leveraged transaction
 - Substitution of substantial secured for unsecured debt
 - Payment of very large dividend to shareholders

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Early Warning Program: Providing Information to PBGC

- Consider contacting PBGC first
 - Where contact is inevitable, sooner may be better
 - Avoid last-minute complications
- PBGC information requests
 - Timing flexibility *if* transaction not imminent
 - Protect confidentiality (confidentiality agreement and/or ERISA Section 4043(f) coverage as reportable event follow-up)
 - Generally best to comply (subpoena authority)
 - Request will cover transaction, plan(s), and financial status of pre- and post-transaction controlled group
 - Demonstrate viability of post-transaction controlled group

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Early Warning Program: PBGC Analysis

- Contribution/financial projections may be key factors in Early Warning Program analysis
- Contribution projections
 - Incorporate cost of making up missed contributions (if any)
 - Reflect funding relief (if any)
 - Illustrate range of results, considering future interest rate and investment experience scenarios
 - PBGC may ask for revised contribution projections with different scenarios
 - PBGC may have questions (often leading to productive discussions between PBGC actuaries and plan actuaries)

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Early Warning Program: PBGC Analysis (Cont.)

- Financial projections
 - Provide 5-year cash flow projections indicating pension funding is affordable
 - Provide 5-year forecast for income statement & balance sheet
 - PBGC may have questions (discussions between PBGC financial analysts and employer financial experts)
 - Key assumptions made in preparing forecasts need to be provided
 - Expect PBGC to critically analyze the assumptions
 - PBGC may hire industry consultant and/or investment banker to assist it
 - PBGC may develop its own assumptions and forecast

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Early Warning Program: PBGC Analysis (Cont.)

- PBGC recovery analysis may also be a key factor in Early Warning Program analysis
 - Likely PBGC recovery if plan terminates pre-transaction
 - Likelihood of future plan termination *and* likely PBGC recovery if transaction occurs with future plan termination
 - Many variables (e.g., fire-sale pricing, claims of other creditors) can affect and complicate analysis

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Early Warning Program: PBGC Leverage

- PBGC “clearance”
 - No legal requirement to get PBGC “clearance” of transaction
 - But PBGC concerns, as practical matter, can result in parties being unwilling to proceed with transaction
- Primary PBGC leverage: threat of “involuntary termination” (pre-transaction)
- Involuntary termination:
 - Requires court approval or plan administrator agreement
 - Would increase/accelerate liability, add termination premium, and likely lead to bankruptcy, job losses
- Initiation of involuntary termination (or even mere threat thereof) would likely trigger various defaults

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Early Warning Program: PBGC Leverage (Cont.)

- PBGC can quickly set termination date
 - PBGC publishes notice
 - “Locks in” termination date, related liability
 - But subject to later court approval or agreement
- Potential ERISA Section 4069 or fraudulent conveyance action (post-transaction)
- PBGC’s pre-transaction remedy may be too extreme and its post-transaction remedy may be too uncertain

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Early Warning Program: Settlement Options

- PBGC has broad settlement authority
- Settlement possibilities include:
 - Additional contributions to plan
 - May have other reasons to pay above minimum
 - Agreement will prohibit using excess as prefunding balance
 - But effect will be to reduce future minimum contributions
 - Retention of plan by strong seller
 - Guarantee by seller if future plan termination
 - Grant to plan or PBGC of security interest
- Direct actuary-to-actuary, lawyer-to-lawyer, business-to-business discussions can work well

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Distress and Involuntary Terminations

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Distress and Involuntary Terminations

- If plan is underfunded, only way to terminate voluntarily is through “distress termination”
- CBA can block distress termination – 11 U.S.C. § 1113 motion possible
- *Each* controlled group member must meet at least 1 test:
 - Distress Test 1: Liquidation in bankruptcy/insolvency
 - Distress Test 2: Reorganization in bankruptcy
 - Distress Test 3: Inability to continue in business
 - Distress Test 4: Unreasonably burdensome pension costs
- Each CG member may meet different test
- Distress terminations usually arise in bankruptcy setting (liquidation/reorganization)

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Distress and Involuntary Terminations (Cont.)

- Liquidation distress test (Test 1): automatic
- Reorganization distress test (Test 2): often contested
 - Show “meaningful sacrifices” in all areas
 - Show plan unaffordable even w/freeze & waiver
 - If lender/investor insists on plan termination, show:
 - Lender/investor has sound financial basis
 - Inability to find lender/investor not insisting on termination
 - Multiple plans: PBGC argues for plan-by-plan analysis
 - Watch out for any *non-debtor* controlled group members (each one must also meet distress)
 - Watch out for “follow-on” replacement plans (major PBGC concerns)

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Distress and Involuntary Terminations (Cont.)

- Distress permitted outside bankruptcy under Tests 3/4
 - Can be useful for small to mid-size employer where bankruptcy not otherwise needed, too costly, etc.
 - Business continuation test (Test 3) analogous to reorganization test (Test 2)
 - Determination made by PBGC, not by bankruptcy judge
 - Filing should include convincing argument/evidence re austerity measures, consideration of alternatives, etc.
 - Highlight any “sharing of the pain” (distress termination is a “last resort”)
 - Explain why bankruptcy is not a good solution

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Distress and Involuntary Terminations (Cont.)

- Distress permitted outside bankruptcy under Tests 3/4 (cont.)
 - Contribution and financial projections drive Test 3 affordability analysis
 - PBGC follow-up questions likely during review
 - Test 4 very rarely used to date (some overlap w/Test 3)
 - Termination liabilities settled outside of bankruptcy
 - PBGC resists “selling” a termination
 - But settlement negotiations possible pre-termination (will be contingent on PBGC approval of termination)
 - PBGC and employer goal in Test 3 cases: settlement that allows for business continuation

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Distress and Involuntary Terminations (Cont.)

- Contribution/financial projections will be needed to support Test 3 and may be needed to support Test 4
- Contribution projections
 - Incorporate cost of making up missed contributions (if any)
 - Reflect funding relief
 - Reflect results with and without funding waivers
 - Consider illustrating range of results (e.g., baseline, optimistic, and pessimistic) based on:
 - Future interest rate scenarios
 - Future investment experience scenarios
 - PBGC may have questions (often leading to productive discussions between PBGC actuaries and plan actuaries)

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Distress and Involuntary Terminations (Cont.)

- Financial projections
 - Focus is on cash flow
 - Provide 5-year cash flow projections indicating pension funding is not affordable
 - Provide 5-year forecast for Income Statement & Balance Sheet
 - PBGC may have questions (often leading to productive discussions between PBGC financial analysts and employer financial experts)
 - Key assumptions made in preparing forecasts need to be provided
 - Expect PBGC to critically analyze the assumptions
 - PBGC may hire industry consultant to assist it
 - PBGC may develop its own assumptions and forecast

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Distress and Involuntary Terminations (Cont.)

- Distress procedures
 - Various notices and filings (tracks standard termination process, but with significant differences)
 - Notice of intent to terminate (“NOIT”) must be issued/filed at least 60 days and (except with PBGC approval) no more than 90 days before proposed termination date
 - NOIT to “affected parties” other than PBGC
 - Must go to participants, beneficiaries, alternate payees, any current union, and (if no current union) any prior union (5-year look-back)
 - Best to use model NOIT in PBGC instruction booklet
 - Allowed to give additional information if not misleading (helpful to provide memo, FAQs, to reassure participants where appropriate)

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Distress and Involuntary Terminations (Cont.)

- Distress procedures (cont.)
 - NOIT to PBGC is filed on Form 600 (after all other NOITs issued)
 - Includes much “off-the-shelf” information (e.g., plan documents, latest actuarial valuation report, 5500s)
 - Requires identification of all controlled group members
 - Requires identification of applicable distress test(s) and supporting evidence/argument
 - PBGC regulatory benefit restrictions (which apply in addition to any IRC Section 436 restrictions) are effective as of date *first* NOIT is issued
 - Can’t make loans to participants
 - Can’t pay benefits attributable to employer contributions, other than death benefits, in any form other than annuity (prohibits all lump sums, even de minimis lump sums)
 - Can’t purchase irrevocable commitments

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Distress and Involuntary Terminations (Cont.)

- Distress procedures (cont.)
 - Must implement cutbacks of benefits to estimated Title IV levels as of proposed termination date
 - Estimated cutback rules can lead to reductions that are much larger than necessary
 - Consider asking PBGC for modification (29 CFR § 4022.61(e))
 - PBGC issues “tentative finding of compliance” following review of Form 600
 - Distress Termination Notice (Form 601) must be filed with PBGC by 120th day after proposed termination date

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Distress and Involuntary Terminations (Cont.)

- Distress procedures (cont.)
 - Process can take months or even years (particularly if application is not complete or financial statements not adequately supported)
 - No specific deadline for PBGC to decide distress
 - Alert PBGC if fast action is needed to save employer, jobs
 - Don't forget “net worth” notice and submission (29 CFR § 4062.6)
 - If distress termination is approved:
 - PBGC and plan administrator sign termination/trusteeship agreement; or
 - In rare case where plan is sufficient for guaranteed benefits, PBGC issues notice authorizing private-sector closeout

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Distress and Involuntary Terminations (Cont.)

- Schedule EA-D attestation
 - Sufficiency level relative to guaranteed benefits and benefit liabilities at proposed termination date using 4044 assumptions
 - Take into account total value of plan's assets (including value of contributions receivable)
 - Take into account *nonguaranteed* PC 3 benefits

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Distress and Involuntary Terminations (Cont.)

- Other issues
 - Large plans may have a high number of benefit reductions to process and large amounts of data to turn over to PBGC
 - All funding, filing, and plan administration requirements continue at least until the PBGC approves termination
 - Payments from plan assets
 - May not pay PBGC premiums (or related penalties or interest) from plan assets once first NOIT is issued
 - PBGC must approve payment of expenses after date of trusteeship

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Distress and Involuntary Terminations (Cont.)

- Involuntary (PBGC-initiated) terminations
 - Often used for abandoned plans, distress “shortcut”
 - Often done by agreement with plan administrator (“consensual involuntary termination”—oxymoronic but real)
 - May be used/threatened to block corporate transaction
 - May be used to cut off PBGC guarantee exposure
 - Possible “triggers” include reportable event notices and transactions reviewed under “Early Warning Program”
 - Don’t forget “net worth” notice and submission (29 CFR § 4062.6)
 - No premium (or related interest or penalty) payments from plan assets once PBGC initiates involuntary termination

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Distress and Involuntary Terminations (Cont.)

- Criteria for involuntary terminations
 - Minimum funding standard not met (missed annual “catch-up,” not missed quarterlies)
 - Plan “will be unable” to pay benefits when due (*mandatory* termination if *currently* unable)
 - Substantial owner distribution (rare)
 - “Long-run loss”: “the possible long run loss of the [PBGC] with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated”
- “Long-run” loss analysis
 - Likelihood of future termination if PBGC does not act now
 - Expected increase in PBGC loss

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Distress and Involuntary Terminations (Cont.)

- Termination date
 - May be retroactive
 - But not before participant expectations extinguished
 - PBGC may seek later date for financial reasons
- CBA *cannot* block PBGC-initiated termination
- Significant consequences of distress or involuntary terminations include:
 - Large UBL claim
 - Large termination premium claim (exceptions may apply)
 - Joint & several liability for each controlled group member
 - Possibly significant benefit cutbacks (and loss of lump sum option) for participants

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PBGC Guaranteed Benefits

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PBGC Benefit Payments: Three Levels of Payments

- PBGC will pay:
 - Guaranteed benefit regardless of plan funding level
 - “Title IV Benefit” (ERISA Section 4044 allocation) depending on plan funding level: greater of guaranteed benefit or benefit funded by plan assets
 - “Termination Benefit” (based on ERISA Section 4022(c)) depending on employer liability recoveries
 - Includes Title IV Benefit
 - Plan-specific if “unfunded nonguaranteed benefits” > \$20M
 - Otherwise based on “small plan average recovery ratio”
 - ERISA Section 4022(c) payment to plan follows 4044 priority order but skips benefits that are either guaranteed or funded (or both)

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PBGC Benefit Payments (Cont.): Guaranteed Benefits

- Key acronym: **P-E-N-A-M-P**
- Guaranteeable benefit (**P-E-N**)
 - **P**ension benefit
 - **E**ntitlement
 - **N**onforfeitable
- Limits on guaranteeable benefit (**A-M-P**)
 - **A**ccrued at normal limit
 - **M**aximum guaranteed benefit limit
 - **P**hase-in limit
- Guaranteed benefit determined as of termination date or (if termination during bankruptcy) bankruptcy petition date
- Therefore, post-petition accruals are often entirely lost

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PBGC Benefit Payments (Cont.): Earliest PBGC Retirement date

- Earliest PBGC retirement date
 - No earlier than earliest annuity date under plan
 - No earlier than age 55 unless facts/circumstances support earlier date
 - Drives when PBGC will put participant in pay status
 - Drives PC 3 determinations

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PBGC Benefit Payments (Cont.): Optional PBGC Benefit Forms

- PBGC benefit forms
 - Straight-life annuity
 - 5-year, 10-year, or 15-year C&C
 - 50%, 75%, or 100% J&S
 - 50% "Pop-up" J&S
 - Plan's automatic form
- If married, spousal consent required for any form other than plan's automatic form for married participant
- May designate non-spouse beneficiary (subject to spousal consent if married)
- Conversion based on GAM-83 (blended 50% male and 50% female) and 6% interest (29 CFR § 4022.8(c)(7))

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Bankruptcy Claims and Disputes

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Bankruptcy Claims and Disputes (Cont.)

- Key PBGC concerns
 - Adequate information in disclosure statement
 - Funding of plan during bankruptcy
 - Future of plan
 - Ongoing
 - Standard termination
 - Distress or PBGC-initiated termination
 - Treatment of PBGC claims
- PBGC bankruptcy claims
 - Many priority arguments raised by PBGC
 - Most arguments rejected by courts
 - Usually resolved with “global” PBGC settlement

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Bankruptcy Claims and Disputes (Cont.)

- Potential PBGC “post-bankruptcy” liability
 - “Exit fee” (“termination premium”) for PBGC-initiated terminations and non-liquidation distress terminations
 - \$1,250 per participant, per year, for 3 years
 - For employers in bankruptcy reorganization, 3-year period starts post-confirmation
 - *Oneida* decision
 - Holding: termination premium liability is not discharged, and survives reorganization intact
 - Consequence: interferes with feasibility of reorganization and creates incentive for asset sale followed by liquidation

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Bankruptcy Claims and Disputes (Cont.)

- PBGC claims on its own (guarantor) behalf
 - Unpaid premiums
 - General unsecured if plan year starts pre-petition
 - Check PBGC calculation methodology
 - “Unfunded Benefit Liabilities”
 - Contingent on plan termination
 - Often filed as unliquidated claim
 - Disputes re amount: based on PBGC valuation regulation assumptions (controversial)
 - Disputes re priority: PBGC claims tax status (30% of aggregate positive controlled group net worth), but courts reject

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Bankruptcy Claims and Disputes (Cont.)

- PBGC claims on behalf of plan
 - Unpaid contributions
 - PBGC claim generally contingent on plan termination and PBGC trusteeship
 - May be secured per perfected IRC Section 430(k) lien
 - Tax status arguments (\$1M+) rejected by courts
 - Post-petition “administrative” priority
 - ✓ Limited (at most) to normal cost
 - ✓ Reduce for decline in employment levels
 - Limited priority for 180-day pre-petition period
 - Rest is general unsecured
 - Shortfall amortization claim (ERISA Section 4062(c)) (treated by PBGC as claim for due and unpaid employer contributions)
 - Fiduciary breach (not common)

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Bankruptcy Claims and Disputes (Cont.)

- Resolving claims with PBGC
 - Settlement common
 - Actuary to actuary (plan/PBGC): agree on numbers
 - Attorney to attorney (debtor/PBGC): resolve priority and (for UBL claim) amount disputes
 - End result:
 - May be single sum
 - If good “test case” for PBGC, settlement may not occur

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Researching PBGC Issues

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Researching PBGC Issues

- Get “real time” regulations and FR notices at www.pbgc.gov/prac/laws-and-regulations
- Check “What’s New for Practitioners” at www.pbgc.gov/prac/whatsnew.html
- Sign up for email updates (same link)
- Most guidance at www.pbgc.gov/prac
- Check “[Staff Responses to Practitioner Questions](#),” [JCEB/PBGC Meeting Summaries](#), [Blue Books](#), [Opinion Letters](#), [Technical Updates](#), [FAQs](#)



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