EFFECTIVE JANUARY 24, 2022

The Entire Keightley & Ashner Team Has Joined

THE WAGNER LAW GROUP

Click to visit our website

You can view this PDF by advancing to the next page.

Bloomberg BNA

Pension & Benefits Daily ™

Reproduced with permission from Pension & Benefits Daily, 39 PBD, 02/27/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) http://www.bna.com

Section 4062(e) Liability Reformed: A Summary and Analysis of the New Law

BY HAROLD J. ASHNER AND DEBORAH WEST

In recent years, the Pension Benefit Guaranty Corporation's enforcement of Section 4062(e) of the Employee Retirement Income Security Actof 1974[1]—the so-called ''downsizing liability'' provision—has been an increasingly controversial centerpiece of PBGC's enforcement activity.[2] On Dec. 16, 2014, President Obama signed into law the Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83) (Public Law 113-235) (the ''Act''). The Act changes the definition of a 4062(e) event, creates exemptions from 4062(e) liability for small plans and well funded plans, and provides employers with the right to elect to satisfy the liability in a different way.[3] And, although the law is generally effective as of the date of enactment, special provisions give the law a retroactive reach in many pending cases.

A new 4062(e) era has now begun. For many employers, the new law will lead to far greater certainty, and far more favorable consequences, than existed under the old law. And for all employers, an understanding of the new law is essential in order to evaluate any 4062(e) implications of potential business transactions.[4]

Section 4062(e) Liability Under Prior Law: A Brief Recap

Before the reform legislation was enacted, the key statutory and regulatory provisions governing 4062(e) liability[5] provided as follows:

- **Liability Trigger.** Section 4062(e) liability arises ''[i]f an employer[6] 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[7] by him are separated from employment . . .''

[1] 29 U.S.C. § 1362(e).

[2] For a detailed summary and analysis of the history of Section 4062(e) and the events leading to the enactment of the new 4062(e) provisions, *see* ''Section 4062(e) Liability In Transition: Planning For An Uncertain Future'' by Harold J. Ashner and Deborah West, BNA Pension & Benefits Daily and BNA Pension & Benefits Reporter, 166 PBD, 8/27/14; 41 BPR 1803, 9/2/14; available at: http://www.keightleyashner.com/publications/082714-BNA.pdf. *See also*, First Annual Report of the Participant and Plan Sponsor Advocate, available at: http://www.pbgc.gov/Documents/pbgc_advocate_report_2014.pdf (discussion of PBGC's enforcement of Section 4062(e)).

Harold Ashner (haroldashner@keightleyashner.com) is a partner and Deborah West (deborahwest@keightleyashner.com) is of counsel with Keightley & Ashner LLP, a Washington, D.C. employee benefits law firm. Mr. Ashner previously served as Assistant General Counsel for Legislation and Regulations at PBGC, and Ms. West previously served as PBGC Senior Assistant General Counsel for ERISA/Bankruptcy Matters.

[3] The reforms to Section 4062(e) are set forth in Section 1 of Division P of the Act.

[4] This article uses the term ''transactions'' inclusively to encompass all significant business events, whether or not they involve an unrelated person. Thus, a ''transaction'' includes an employer's implementation of its decision to cease operations at a facility as well as a stock or asset sale to an unrelated person.

[5] For a detailed summary and analysis of Section 4062(e) under prior law, *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, available at: http://www.keightleyashner.com/publications/091410-BNA_Stealth.pdf.

[6] Under ERISA Section 4001(b)(1), 29 U.S.C. § 1301(b)(1), the plan's contributing sponsor and all members of its controlled group are treated together as a single ''employer.'' *See also* ERISA Section 4001(a)(13) and (a)(14), 29 U.S.C. § 1301(a)(13) and (a)(14) (definitions of ''contributing sponsor'' and ''controlled group'').

[7] PBGC issued proposed guidance interpreting the ''established and maintained'' language as ''requir[ing] only that a

COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN

■ **Statutory Notice Requirement.** Under Section 4063(a), there is a requirement that the plan administrator notify PBGC of a Section 4062(e) event within a 60-day period and request that PBGC determine the resulting liability.[8]

■ **Statutory Liability Formula.** The statutory liability formula, which is set forth in Section 4063(b) of ERISA, provides for rules applicable to a substantial employer's withdrawal from a multiple-employer plan.[9] As noted below, in the context of a 4062(e) event involving liability with respect to a single-employer plan that is not a multiple-employer plan,[10] PBGC has expressed the concern that the statutory liability formula is impracticable.

■ **PBGC Authority for Adopting Regulatory Liability Formula.** Section 4063(b) of ERISA provides PBGC with the authority to determine liability ''on any other equitable basis prescribed by the corporation in regulations.''

■ **PBGC Regulatory Liability Formula.** Under PBGC's 4062(e) liability formula rule,[11] 4062(e) liability with respect to a plan equals the amount of the plan's underfunding (measured on a conservative PBGC plan termination basis as if the plan had terminated immediately after the cessation of operations) multiplied by the percentage reduction in active plan participants.

■ **Escrow or Bond.** Under Sections 4062(e) and 4063, the liability is to be satisfied through an escrow payment (or, if PBGC so requires, the purchase of a bond in an amount not exceeding 150 percent of the liability) to provide protection in case the plan is terminated in a distress or involuntary termination within the next five years.

■ **Abatement of Liability After Five Years.** Section 4062(e) liability is abated if the plan is not terminated in a distress or involuntary termination within five years; any escrow is returned to the employer without interest and any bond is cancelled.[12]

Rather than seek the statutory remedy of a bond or escrow, however, PBGC generally attempts to negotiate alternative ways of satisfying the liability, most often with an employer commitment to make additional contributions to the plan that total the 4062(e) liability amount over a period of years.

One of the key concerns of employers prior to the legislative reform was that a transaction that was immaterial in the context of the employer's overall business operations could nonetheless trigger an extremely large 4062(e) liability. Consider, for example, an employer with a workforce of 50,000 employees on a controlled-group-wide basis. The employer shuts down a money-losing facility at which 200 employees work, including all 50 active participants in a legacy plan maintained by the employer. All of the employees at the shut down facility—who constitute far less than 1 percent of the employer's total workforce—are separated from employment. The legacy plan, which has thousands of retirees and deferred vested participants, is well funded or even overfunded on an ongoing funding basis. On a PBGC plan termination basis, however, it is underfunded by $250 million, based primarily on liabilities for inactive participants. Under prior law, 4062(e) liability would be triggered, and the liability amount would be $250 million—$5 million for each of the 50 affected active participants.

The Act's ''right-sizing'' of the liability trigger percentage is one of its most welcome reforms.

A Growing Controversy. Section 4062(e) has been law since ERISA's enactment on Sept. 4, 1974, but was essentially dormant for more than thirty years, largely because of a PBGC concern that the statutory liability formula was impracticable. After promulgating its 4062(e) regulatory liability formula rule in 2006, PBGC stepped up its 4062(e) enforcement efforts,[13] staking out in-

plan be maintained by an employer—not both established and maintained—to come within the provisions of section 4062(e).'' 75 Fed. Reg. 48283, 48284, 48291 and proposed § 4062.23(a)(1) (Aug. 10, 2010), available at http://www.pbgc.gov/Documents/2010-19627.pdf.

[8] 29 U.S.C. § 1363(a). Note that, under ERISA Section 4043 and PBGC's implementing regulations, there is a requirement that the plan administrator or contributing sponsor notify PBGC of a reportable event within a 30-day period (absent a waiver or extension). 29 U.S.C. § 1343, 29 C.F.R. Part 4043, Subparts A and B. Under 29 C.F.R. § 4043.23(a), an active participant reduction reportable event occurs when the number of active participants in a plan is reduced to less than 80 percent of the number of active participants at the beginning of the plan year, or to less than 75 percent of the number of active participants at the beginning of the previous plan year. A Section 4062(e) event—whether under prior law or (less likely) under the Act—may constitute an active participant reduction reportable event as well.

[9] 29 U.S.C. § 1363(b).

[10] A ''single-employer plan'' is a defined benefit plan that is not a multiemployer plan. 29 U.S.C. § 1301(a)(15). A ''multiple-employer plan'' is a single-employer plan maintained by two or more contributing sponsors that are not members of the same controlled group, under which all plan assets are available to pay benefits to all plan participants and beneficiaries. 29 C.F.R. § 4001.2. *See also* 29 U.S.C. §§ 1002(37), 1301(a)(3)(definition of ''multiemployer plan''). PBGC has issued proposed guidance limiting the scope of section 4062(e) to single-employer plans that are not multiple-employer plans. 75 Fed. Reg. 48283-48284, 48291 and proposed § 4062.23(a)(1) (Aug. 10, 2010), available at http://www.pbgc.gov/Documents/2010-19627.pdf.

[11] 29 CFR § 4062.8; *see also* 71 Fed. Reg. 34819 (final rule and preamble); 70 Fed. Reg. 9258, 9259 (Feb. 25, 2005) (proposed rule and preamble, including discussion of the difficulty of applying the 4063 liability formula in a 4062(e) context); for a summary and analysis of the final rule, *see* ''PBGC's Final Rule on Liability for Facility Shutdowns Affects Downsizing Employers'' by Harold J. Ashner, BNA Pension & Benefits Reporter, 33 BPR 1546, 6/27/06, available at: http://www.keightleyashner.com/publications/BNA_FinalRule062706.pdf; for a summary and analysis of the proposed rule, *see* ''PBGC Proposes Alternative Liability Calculation for Facility Shutdowns'' by Harold J. Ashner, BNA Pension & Benefits Reporter, 32 BPR 575, 3/8/05, available at: http://www.keightleyashner.com/publications/4062e_reg.pdf.

[12] ERISA Sections 4062(e), 4063(c)(2), 29 U.S.C. §§ 1362(e), 1363(c)(2).

[13] *See* First Annual Report of the Participant and Plan Sponsor Advocate, available at: http://www.pbgc.gov/Documents/pbgc_advocate_report_2014.pdf; ''Section 4062(e) Liability In Transition: Planning For An Uncertain Future'' by Harold J. Ashner and Deborah West, BNA Pension & Benefits

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

creasingly expansive interpretations, including some that appeared to be in conflict with earlier PBGC interpretations, in negotiations as to the circumstances in which 4062(e) liability could arise. In August 2010, PBGC published a proposed rule[14] that reflected these and other interpretations. Under the proposal, the liability could arise, for example, based on: a going-concern asset sale, where 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 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 number of employees or the overall level of operations. The 2010 proposal drew strong objections from stakeholders,[15] and PBGC subsequently decided that it would consider changes and develop a revised proposal.[16]

Section 4062(e) Enforcement Pilot Program. In November 2012, PBGC announced that it was implementing a pilot program regarding 4062(e) liability enforcement.[17] Under the enforcement pilot program, PBGC stated that it would generally not enforce 4062(e) liability against a company that was ''financially sound.'' PBGC also said that it would not enforce 4062(e) liability in small plan situations based on a 100-participant threshold.[18] As explained below, PBGC's enforcement policy continues to be relevant under the new law.

On April 11, 2013, PBGC made available to the public[19] the October 2012 enforcement guidelines[20] that PBGC uses in connection with the enforcement pilot program that it had announced in November 2012. The enforcement guidelines provide that, in general, an affected company will be considered ''financially sound'' if it meets certain criteria based on credit ratings (or based on credit scores and levels of secured debt). However, if, in PBGC's judgment, a company that otherwise meets the general criteria ''presents signs of financial weakness,'' the company will *not* be considered financially sound. Examples of signs of financial weakness given by PBGC include ''a lack of ongoing operations, existing or imminent changes in business fundamentals such as a large drop in demand, existing or imminent transactions that would result in a credit ratings downgrade, or an insignificant amount of assets or operations in the U.S.''

The enforcement guidelines provide that PBGC will forbear from enforcing 4062(e) liability only ''if and so long as'' an employer is, in PBGC's judgment, ''financially sound.'' In the FAQs accompanying its announcement of the pilot enforcement program, PBGC stated 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.''[21]

Many employers had concerns about the pilot program, particularly because: (1) PBGC reserved the right to pursue an employer that met its general criteria for financial soundness if PBGC concluded that there were risks associated with the employer; (2) an employer that PBGC initially deemed to be financially sound continued to be subject to a threat of 4062(e) liability enforcement based on changes in its financial status within the five-year enforcement period; and (3) an employer was still subject to various reporting obligations. Moreover, the pilot program did nothing to address the growing concern among the employer community regarding the PBGC's expansive and aggressive interpretations of the statute.

An employer PBGC deemed ''financially sound'' under the enforcement guidelines who was deciding whether to proceed with a transaction that could constitute a 4062(e) event might wish to obtain assurance, before consummating the transaction, that PBGC would permanently forbear from enforcement as a result of the transaction. However, even if the proposed transaction further strengthened the already ''financially sound'' employer, such assurance was unlikely to be provided, as PBGC staff stated that PBGC would not be willing even to *consider* providing certainty to the employer, in advance of a contemplated transaction, that it would never pursue 4062(e) liability based on that transaction.[22]

Daily and BNA Pension & Benefits Reporter, 166 PBD, 8/27/14; 41 BPR 1803, 9/2/14; available at: http://www.keightleyashner.com/publications/082714-BNA.pdf.

[14] The 2010 proposed rule, published at 75 Fed. Reg. 48283 (Aug. 10, 2010), is available at http://www.pbgc.gov/Documents/2010-19627.pdf. For a summary and analysis of the 2010 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, available at: http://www.keightleyashner.com/publications/091410-BNA_Stealth.pdf.

[15] The public comments on the 2010 proposed rule are available at http://www.pbgc.gov/docs/SubstantialCessationofOperationsComments(11).pdf.

[16] *See* http://www.pbgc.gov/news/testimony/page/tm020212.html (PBGC Director testimony stating that the agency planned to re-propose a 4062(e) regulation and would consider other changes in its 4062(e) enforcement program).

[17] http://www.pbgc.gov/news/press/releases/pr12-32.html; http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html.

[18] For a summary and analysis of the pilot program, *see* ''PBGC Announces 4062(e) Enforcement Pilot Program: Who Will Qualify for Relief?'' by Harold J. Ashner and Deborah G. West, BNA Pension & Benefits Daily and BNA Pension & Benefits Reporter, 217 PBD, 11/9/12, 39 BPR 2173, 11/13/12, available at http://www.keightleyashner.com/publications/110912-BNA-4062e.pdf. *See also* ''PBGC Changes 4062(e) Enforcement; Financially Sound Plans Exempt, Agency Says,'' BNA Pension & Benefits Daily and BNA Pension & Benefits Reporter, 213 PBD, 11/5/12, 39 BPR 2080, 11/6/12.

[19] An April 11, 2013, update to a Nov. 2, 2012, PBGC news release regarding its new enforcement policy added a link to the ''October 2012 Guidelines for Enforcement of ERISA section 4062(e).'' The Nov. 2, 2012, press release, as updated on April 11, 2013, is available at http://www.pbgc.gov/news/press/releases/pr12-32.html.

[20] http://www.pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf.

[21] http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html.

[22] http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_pbgc_qa.authcheckdam.pdf (*see* PBGC staff response to question 16).

Continuing Enforcement Efforts. Notwithstanding the pilot program, PBGC continued to vigorously pursue 4062(e) liability based upon its expansive interpretations, including, for example, the following:

- Section 4062(e) liability may arise with respect to a cessation of operations that is temporary;[23]

- Section 4062(e) liability may arise with respect to a relocation of operations, even if the employer's overall employment level is unchanged or increased as a result of the relocation;[24] and

- Section 4068 liens for 4062(e) liability may arise on all of an employer's property and PBGC may perfect those liens,[25] despite the fact that, by statute, 4068 liens arise only "on the date of termination of a plan"[26] and 4062(e) liability pertains to plans that are ongoing and have no plan termination date.[27]

Introduction of S. 2511 and PBGC Moratorium. On June 19, 2014, Sen. Tom Harkin (D-Iowa) introduced S. 2511[28] to address the 4062(e) controversy, which had begun soon after PBGC adopted its liability formula rule and intensified over the succeeding years; S. 2511, which was co-sponsored by Sen. Lamar Alexander (R-Tenn.), was the legislative vehicle for the reform bill that ultimately became law. Less than three weeks after the bill was introduced, on July 8, 2014, PBGC announced a moratorium on its enforcement of Section 4062(e).[29] The moratorium was immediately effective and continued until Dec. 31, 2014.[30] During the moratorium, employers were required to continue to comply with the statutory and regulatory reporting requirements that pertain to potential 4062(e) events.[31]

Although the moratorium provided employers with assurance that PBGC would not enforce 4062(e) cases for the balance of calendar year 2014, PBGC would be free to resume its pursuit of 4062(e) liability on Jan. 1, 2015. Thus, an event that occurred during the moratorium could form the basis for PBGC's post-moratorium pursuit of 4062(e) liability.

[23] *See* PBGC proposed 4062(e) rule, 75 Fed. Reg. at 48286.
[24] *See id.* at 48285, 48291 and proposed § 4062.26(c)(1)(i).
[25] *See* http://www.keightleyashner.com/alert052814.htm (discussing PBGC assertion that 4068 termination liens could arise with respect to 4062(e) liability).
[26] 29 U.S.C. § 1368(b).
[27] *See* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_pbgc_qa.authcheckdam.pdf (PBGC staff response to question 17, expressing the view that the cessation of operations date is "equivalent to the date of plan termination for purposes of ERISA section 4068").
[28] *See* https://beta.congress.gov/bill/113th-congress/senate-bill/2511.
[29] The announcement was made in a press release, available at http://www.pbgc.gov/news/press/releases/pr14-09.html.
[30] For a discussion of the moratorium, *see* "Section 4062(e) Liability In Transition: Planning For An Uncertain Future" by Harold J. Ashner and Deborah West, BNA Pension & Benefits Daily and BNA Pension & Benefits Reporter, 166 PBD, 8/27/14; 41 BPR 1803, 9/2/14; available at: http://www.keightleyashner.com/publications/082714-BNA.pdf.
[31] http://www.pbgc.gov/news/press/releases/pr14-09.html; *see* 29 U.S.C. § 1363(a), http://www.pbgc.gov/prac/reporting-and-disclosure/section-4063-notices.html.

Legislative Reform of Section 4062(e)

On July 23, 2014, the HELP Committee approved a modified version of S. 2511 by a bipartisan voice vote.[32] Clarifications of S. 2511 were made before the bill was reported out of committee on Sept. 8, 2014.[33] In stating that legislative reform was needed, Sen. Harkin referred to the "substantial evidence" provided to Congress by the pension community, which showed that ". . . the [PBGC's] enforcement efforts were out of line with Congressional intent to such an extent that section 4062(e) had become a major impediment to businesses' efforts to restructure."[34] The Senate unanimously approved the bill on Sept. 16, 2014.[35] The measure was subsequently folded into H.R. 83, the Consolidated and Further Continuing Appropriations Act, without any changes. The Act was approved by the House on December 11 and by the Senate on December 13, and signed into law by the President on Dec. 16, 2014.

On Jan. 5, 2015, PBGC announced that the 4062(e) moratorium was not going to be continued.[36] The announcement provided a high-level summary of the new law and a point of contact for questions, and stated that further guidance would be issued in the future. As for pending cases, the announcement noted that, under the Act, "PBGC must apply the new rules to prior cessations, except where a settlement agreement was entered into before June 1, 2014," and stated that "PBGC may be contacting employers that previously reported a cessation for additional information to determine whether and how the new rules apply to that event."

The Act, which is generally effective as of its Dec. 16, 2014, enactment date, makes the following key changes to prior law:

- **Liability Trigger.** Section 4062(e) liability now arises only with respect to a cessation of operations at a facility in any location that results in the separation from employment at the facility of more than 15 percent of all "eligible employees" of the employer (*i.e.*, employees who are eligible to participate in an employee pension benefit plan established and maintained by the employer).

- **Exemptions.** There is no 4062(e) liability with respect to a plan with fewer than 100 participants on an aggregated controlled group basis, or a plan that is at

[32] *See* https://beta.congress.gov/bill/113th-congress/senate-bill/2511/actions. For a detailed discussion of the version of S. 2511 that was approved by the HELP Committee on July 23, 2014, *see* "Section 4062(e) Liability In Transition: Planning For An Uncertain Future" by Harold J. Ashner and Deborah West, BNA Pension & Benefits Daily and BNA Pension & Benefits Reporter, 166 PBD, 8/27/14; 41 BPR 1803, 9/2/14; available at: http://www.keightleyashner.com/publications/082714-BNA.pdf. The July 23, 2014, version of the bill may be found at: http://op.bna.com/pen.nsf/id/krkl-9mcsd6/$File/S.2511Amend.pdf.
[33] *See* https://www.congress.gov/bill/113th-congress/senate-bill/2511/text/171795.
[34] 160 Cong. Rec. S5687-S5688 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin), available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm.
[35] *See* https://www.congress.gov/bill/113th-congress/senate-bill/2511/actions.
[36] "Important Changes to ERISA Section 4062(e)," available at: http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html.

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

least 90 percent funded on a PBGC-variable rate premium basis.

■ **Alternative Method for Satisfying Liability.** An employer may elect to satisfy 4062(e) liability by making contributions to the plan, in addition to minimum required contributions, for each plan year in the seven-plan year period beginning with the plan year in which the cessation at issue occurred, with each payment (subject to a cap) equal to 1/7 of the plan's underfunding on a variable-rate premium basis times a ''reduction fraction'' (discussed later in this article) that is based on the plan-specific portion of the workforce reduction.

■ **Restrictions on PBGC's Enforcement Authority.** The Act also imposes restrictions on PBGC's enforcement authority with respect to both pre-enactment and post-enactment cessations and other events.

—*Conformance with new rules.* Unless PBGC's action is in connection with a settlement agreement that was in place before June 1, 2014, PBGC is prohibited from taking any enforcement, administrative, or other action pursuant to Section 4062(e), or in connection with an agreement settling 4062(e) liability, that is inconsistent with the new statutory rules, whether the action relates to a cessation or other event that occurs before, on, or after the Dec. 16, 2014, enactment date of the Act; and

—*Continued relief under pre-enactment enforcement policy.* For both pre-enactment and post-enactment cases, PBGC is prohibited from initiating a new 4062(e) enforcement action that is inconsistent with its enforcement policy in effect on June 1, 2014.

The Act did not make any changes to Section 4063. Consequently, the plan administrator continues to have an obligation under Section 4063(a) to report to PBGC, within 60 days, a cessation of operations that (taking into account, among other things, the new exemptions) is subject to Section 4062(e).[37]

Although the Act did not change the provisions in Section 4063(b) regarding satisfaction of the liability through an escrow payment (or, if PBGC so requires, the purchase of a bond in an amount not exceeding 150 percent of the liability), these provisions were used infrequently in the past, and are likely to be used even less frequently in the future in light of the Act's new alternative method for satisfying 4062(e) liability (discussed in detail below).

Change in Definition of Section 4062(e) Event

Under both the new law and the prior law, 4062(e) liability is triggered when an employer ceases operations at a facility and, as a result, a specified percentage of employees is separated from employment. However, the new law changes several key aspects of the liability trigger.

[37] Other reporting obligations that may be triggered by a 4062(e) event also are unchanged; for example, the plan administrator and contributing sponsor continue to have an obligation to report (absent the availability of a waiver or extension), within 30 days, an active participant reduction reportable event. *See* footnote 8.

Under new Section 4062(e)(1) and (e)(2)(A), a 4062(e) event (referred to as a ''substantial cessation of operations'') occurs with respect to any PBGC-covered single-employer plan established and maintained[38] by an employer covering participants at ''a facility in any location'' if:

■ There is a permanent cessation of operations at the facility;[39] and

■ As a result, there is a workforce reduction of a number of eligible employees at the facility equivalent to more than 15 percent of the number of all eligible employees in the contributing sponsor's controlled group.

Under Section 4062(e)(2)(B), the term ''workforce reduction'' means the number of eligible employees at a facility who are separated from employment by reason of the permanent cessation of operations of the employer at the facility. Section 4062(e)(5)(A) defines ''eligible employee'' as an employee who is eligible to participate in any employee pension benefit plan as defined in ERISA Section 3(2) established and maintained[40] by the employer. An employee pension benefit plan under Section 3(2) includes both a defined benefit plan and a defined contribution plan.

As discussed in detail below, for purposes of determining the numerator of the 15 percent threshold test, the Act provides rules for: (1) excluding certain ''eligible employees'' if specified criteria are met; and (2) including certain ''eligible employees'' based on a three-year lookback rule.

It is important to be aware that the Act's provisions raise a myriad of issues, many—but by no means all—of which are either discussed or referenced below. At this early date, PBGC has provided no guidance beyond its brief summary of the new law.[41] In view of the significance of the changes made to 4062(e) by the Act and the complexity of the Act's provisions, it would be helpful for PBGC to provide guidance on key issues. And, in light of the concerns that led Congress to enact 4062(e) reform, it is to be hoped that PBGC guidance will not reflect the expansive and aggressive approach the agency took under prior law.

[38] This article assumes that PBGC will interpret the ''established and maintained'' language in Section 4062(e)(1) the same way it proposed to interpret that language in Section 4062(e) under prior law, *i.e.*, as meaning just ''maintained.'' *See* footnote 7.

[39] A special rule under Section 4062(e)(6)(A) provides that an employer shall not be treated as ceasing operations at a qualified lodging facility (as defined in Section 856(d)(9)(D) of the 1986 Internal Revenue Code) if such operations are continued by an eligible independent contractor (as defined in section 856(d)(9)(A) of the Internal Revenue Code) pursuant to an agreement with the employer.

[40] Although the phrase ''established and maintained'' is used in a different context here than under Section 4062(e)(1) of the Act and Section 4062(e) under prior law—both of which focus on the plan with respect to which the liability may arise—this article assumes that PBGC will interpret ''established and maintained'' in this context in the same way it proposed to interpret that language in Section 4062(e) under prior law, *i.e.*, as meaning just ''maintained.'' *See* footnotes 7 and 38.

[41] *See* ''Important Changes to ERISA Section 4062(e),'' available at: http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html.

Potential Effect on More Plans in Controlled Group. It is important to keep in mind that a ''substantial cessation of operations at a facility in any location'' may trigger 4062(e) liability with respect to more than one PBGC-covered plan maintained by the controlled group. Under the general rule set forth in Section 4062(e)(1), if there is a substantial cessation of operations at a facility in any location, a 4062(e) event occurs with respect to ''*any* single employer plan'' (emphasis added) established and maintained by the employer covering participants at the facility (subject to the exemptions discussed below for small plans and 90-percent-funded plans).

If a 4062(e) event occurred under the Act, it would not be surprising if liability arose with respect to a PBGC-covered plan, for example, in which 25 percent (or 16 percent) of active participants separated from employment. But the fact that liability could also arise with respect to a plan, in which, for example, only 5 percent of the plan's active participants separated from employment could well catch an employer by surprise. Indeed, if the 15 percent liability threshold trigger is crossed, there will be 4062(e) liability with respect to each non-exempt PBGC-covered plan with at least one active participant who is counted in the numerator of the liability trigger fraction; this is the case regardless of the size of the plan-specific active headcount reduction fraction. Under prior law, liability was not triggered with respect to a plan unless more than 20 percent of active participants in the plan were separated from employment as a result of the cessation.

Use of Larger Employment Base. As noted above, the requisite workforce reduction percentage triggering liability under prior law was more than 20 percent of the total number of employees who are participants in a PBGC-covered single-employer plan, whereas the requisite workforce reduction percentage under the Act is more than 15 percent of the total number of ''eligible employees'' of the employer on a controlled-group-wide basis. Thus, both the numerator and the denominator used to determine whether the liability trigger threshold has been crossed have a broader sweep than that under prior law, as each includes not only employees who are participants in a PBGC-covered plan, but also *all* employees of the Title IV employer (*i.e.*, the contributing sponsor and all members of its controlled group) who are eligible to participate in any employee pension benefit plan established and maintained by the employer—whether a defined benefit plan or a defined contribution plan. It is important to note that this definition includes employees who are *eligible* to participate in, for example, a 401(k) plan, whether or not they choose to do so.[42] For many employers, the ''eligible employee'' count will serve as a rough proxy for the employer's full-time domestic workforce on a controlled-group-wide basis.

Both the numerator and the denominator used to determine whether the liability trigger threshold has been crossed have a broader sweep than that under prior law.

As noted earlier, under prior law, it was possible for a transaction that affected a very small portion of the controlled group workforce to trigger a very large liability, particularly where the plan underfunding includes large legacy liabilities. The new liability trigger helps to ensure that any event triggering 4062(e) liability will be significant relative to the total number of employees in the contributing sponsor's controlled group. The Act's ''right-sizing'' of the liability trigger percentage is one of its most welcome reforms.

Employees throughout the controlled group were taken into account under the old law's liability trigger threshold, but only if they were participants in the affected PBGC-covered plan. In most cases the controlled group entities whose employees were plan participants was easily determinable based on a review of the plan document and/or related papers (*e.g.*, participation agreements by certain controlled group entities). By contrast, the Act takes into account ''eligible employees'' throughout the controlled group without regard to whether they are participants in any PBGC-covered plan, thus presenting a more challenging task for employers. Knowing which entities are in the controlled group can be difficult, *e.g.*, in certain complex ''brother-sister'' controlled group situations, or where a contributing sponsor's controlled group may include other U.S. entities linked to the contributing sponsor only through foreign ownership. And problems may arise in keeping track of changes in the composition of the controlled group where there are frequent acquisitions and divestitures. However, there are many important reasons for an employer at all times to know the make-up of its controlled group, and the 4062(e) provisions of the Act provide yet another such reason.

Facility in Any Location. There are questions that were unresolved under prior law that remain unresolved under the Act. Perhaps the most basic unresolved question is what constitutes a ''facility in any location.'' For example, can two or more buildings that are located near one another and at which the same or related ''operations'' are conducted constitute a single ''facility in any location''? How about two or more buildings that are across town or across the country from one another? Can there be two separate ''facilities in any location'' within a single building? And given the legislative history (discussed below) explaining that ''facility'' is to be interpreted according to its ''natural usage,'' how, if at all, would the term apply in the context of a white-collar office environment with perhaps one or more suites or entire floors of offices in one or more office buildings?[43]

[42] This article assumes that PBGC will interpret ''eligible employee'' within the meaning of Section 4062(e)(5)(A) as including an employee of the employer who is a participant only in a multiemployer plan, as defined under 29 U.S.C. §§ 1002(37), 1301(a)(3), with respect to which the employer is a contributing employer.

[43] In its 2010 proposed rule (75 Fed. Reg. at 48285, 48291, proposed § 4062.25), PBGC stated that the ''facility (or facility in any location)'' that is ''associated with an operation'' is ''the

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

Sen. Harkin, in a floor statement accompanying S. 2511 (the ''Harkin Floor Statement''),[44] noted that ''there may be questions as to how the terms 'facility' and 'location' should be interpreted,'' and explained that these terms ''are not explicitly defined in S.2511 because we intend for them to be interpreted according to their natural usage.'' The Harkin Floor Statement provided the following guidance:

> For example, if an employer maintains several buildings that are physically adjacent to each other, that would be a single facility at a single location. However, if the employer maintains a building in one part of a city and another building in another part of the city, those buildings would be separate facilities at separate locations.

It is worth noting that, depending on the context, an employer may prefer either a broader or narrower definition of ''facility in any location.'' A broad definition could make it less likely that there would be a ''permanent cessation of operations at a facility.'' On the other hand, a narrow definition could make it less likely that the 15 percent workforce reduction threshold would be crossed. In addition, if the threshold is crossed, a narrow definition generally would result in a smaller liability amount, at least under the alternative liability method (discussed below). These consequences could flow from a narrow definition because both of these determinations (*i.e.*, the threshold determination and the determination of the alternative liability amount) take into account only separations from employment *at the facility* that experienced the permanent cessation of operations.[45]

Consider an employer that maintains building A and building B, manufactures identical widgets at both buildings, and conducts no other operations at either building. If both buildings are considered together to constitute one ''facility in any location,'' then it would appear that there is no ''permanent cessation of operations at a facility'' in any location if widget manufacturing operations permanently cease at building A but continue at building B. On the other hand, if the example is modified so that widget manufacturing simultaneously and permanently ceases at both buildings A and B, the analysis can change significantly. Assume that the resulting separations at each building are 10 percent and 6 percent, respectively, of all ''eligible employees'' of the employer. If a broad definition of the term ''facility in any location'' is used, both buildings would be considered to constitute a single ''facility in any location,'' and the 15 percent liability trigger threshold would be crossed. If, however, a narrow definition of the term is used, each building would be considered to be a separate facility, and the 15 percent threshold would not be crossed.

Cessation of Operations. Another issue that was unresolved under prior law and that remains largely unresolved under the Act is how to determine whether and when a covered ''cessation of operations'' has occurred. This determination can have significant 4062(e) consequences. Most obviously, if no cessation has occurred, there can be no 4062(e) liability. But even where it is clear that a cessation has occurred, *when* it occurred may be much less clear. The date of the cessation has significant consequences under the Act, including with regard to the small plan exemption, the 90-percent-funded exemption, the three-year lookback provision, the determination of the liability amount under the alternative liability method, the determination of the seven plan years for which the alternative liability payments are to be made, and various notice requirements.

Issues abound as to whether and when a cessation should be treated as occurring. For example:

- Must all (or substantially all) operations at the facility cease in order for there to be a ''permanent cessation of operations at a facility in any location'' that is covered by 4062(e)? Or could a permanent cessation of one discrete ''operation'' at a facility be enough, even though other operations at the facility continue? If so, how does one determine what constitutes a sufficiently distinct ''operation'' to treat it independently for Section 4062(e) purposes?

- Must the ''cessation'' of the operations (or of all of the operations) at the facility be a complete cessation, without regard to the completion of any work in progress?

- What is the date of a ''cessation'' when it occurs in two or three stages, or gradually over an extended period of time?

- What is the date of a ''cessation'' where operations cease *before* the employer decides that the cessation will be permanent, as will often be the case where the cessation is the result of employee action such as a strike, or is the result of a fire, flood, or other disaster?

PBGC addressed several of these issues in its 2010 proposed rule,[46] but in light of the significant adverse

---

place or places where the operation is performed''; that a facility ''is typically a building or buildings''; that a facility ''may be or include any one or more enclosed or open areas or structures''; and that the same facility ''may be associated with more than one operation.'' What was not clear, particularly given the ''place *or places*'' (emphasis added) language in PBGC's proposed regulatory text, was the extent to which a single ''facility in any location'' might be viewed as encompassing ''places'' in different and geographically distant ''locations,'' notwithstanding the statutory limitation to a (singular) facility in ''a'' (singular) location.

[44] 160 Cong. Rec. at S5687, available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm. PBGC has not yet indicated whether or not it agrees with the various interpretations reflected in the Harkin Floor Statement.

[45] *See* Section 4062(e)(2)(A), 4062(e)(4)(B) and the discussion of the alternative liability method in the text of this article.

[46] In its 2010 proposed rule (75 Fed. Reg. at 48285, 48291, proposed § 4062.23(a)(2)), PBGC shifted from the plural ''operations'' used in the statute to the singular ''operation'' used in the proposed regulation. As a result, ceasing just one of two or more operations could trigger Section 4062(e) liability under the proposal, even though the facility remained open with significant ongoing (other) operations staying in place. The proposal provided that an ''operation'' would be defined as ''a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer,'' with weight being given to how a particular set of activities is (or similar sets of activities are) ''considered or treated in the relevant industry, in the employer's organizational structure or accounts, in relevant collective bargaining agreements, by the employer's employees or customers, or by the public.'' In the case of what PBGC described as a ''voluntary'' cessation, the proposal provided that the cessation would occur when ''the employer discontinues all significant activity in furtherance of the purpose of the operation''; for an ''involuntary cessation,'' the pro-

comment on its proposal,[47] and the subsequent legislative reform, it is unclear whether PBGC would proceed under the new law with guidance that tracks the 2010 proposal on these or other issues.

Employee Status. Both the prior law and the new law are silent on whether or when an employer-employee relationship is treated as severed. Whether such a relationship exists can, of course, have a major effect on the headcount determinations that drive 4062(e) liability.

Significant questions can arise in connection with determining whether and when an eligible employee should be treated as having separated. For example:

- What if the employee is laid off for a short or even a long period with some possibility or even a firm expectation of recall?
- What if the employee is reinstated after having been separated?
- What about employees on long-term disability? Does it matter how long they have been on disability? Does it matter what the expectations are regarding the employee's return to work?[48]

Separation ''by Reason of'' Cessation. Under prior law, there were challenging issues regarding whether a particular separation should be treated as being the ''result'' of a cessation.[49] These and similar issues will undoubtedly arise in connection with the new law provisions that call for an eligible employee at the facility to be counted in the numerator of the 15 percent threshold test if he or she was separated ''by reason of'' the cessation, or to be taken into account under the three-year lookback provision (discussed below) if the separation was ''related to'' the cessation. For example:

- What about an employee who voluntarily quits or retires in anticipation of the cessation, or does so at or about the time of the cessation having previously planned to quit or retire?
- Under what circumstances would an involuntarily separated employee be counted if the employer has a reason *other* than (or in addition to) the cessation (*e.g.*, misconduct) for separating the employee?
- How does normal attrition enter into the analysis, particularly where there is a long period of time between the date the employer decides to implement a cessation and the date the cessation occurs?[50]

Explicit Permanence Requirement. Under prior law, PBGC took the position that the liability could be triggered even if the cessation of operations was temporary.[51] That position is foreclosed by Section 4062(e)(2)(A) of the Act, which specifies that the ''[t]erm 'substantial cessation of operations' means a permanent cessation of operations at a facility. . . . '' However, although the statutory provision requiring that the cessation of operations be ''permanent'' in order to trigger liability is clear, it remains to be seen how PBGC will interpret that requirement in various factual contexts. For example, what if a cessation is expected to be temporary when implemented but later becomes permanent? Or, conversely, what if a cessation that is expected to be permanent when implemented ends up being only temporary, perhaps because of some positive development that occurs shortly after the cessation?

Asset Sales and Other Transfers of Operations to New Employer. Under prior law, PBGC took the position that 4062(e) liability could be triggered notwithstanding that operations and employment continue with another employer (*e.g.*, in a going-concern asset sale), since both operations and employment were discontinued with the original employer. Public comments generally opposed this position, arguing that such transfers of operations should not result in 4062(e) liability. Under the Act, in light of the new provisions (discussed below) relating to the exclusion of eligible employees in the context of transfers of operations, such transfers of operations may trigger 4062(e) liability, but the analysis must take into account such factors as the extent to which eligible employees continue in employment with or are replaced by the transferee employer and whether their pension liabilities are assumed in connection with the transfer.

Employment ''at'' the Facility. The numerator under the new law—for purposes of both the ''workforce reduction'' liability trigger and the plan-specific ''reduc-

---

posal provided a set of detailed rules for determining when the cessation would be treated as having occurred.

[47] The public comments on the 2010 proposed rule are available at http://www.pbgc.gov/Documents/SubstantialCessationofOperationsComments(11).pdf.

[48] PBGC's guidance in its 2010 proposed rule (75 Fed. Reg. at 48286, 48292, proposed § 4062.27) provided that an employee ''separates'' from employment ''when the employee discontinues the active performance, pursuant to the employee's employment relationship with the employer, of activities in furtherance of the employer's operations,'' subject to three exceptions: (1) a short-term layoff exception under which no separation would be deemed to occur if it is reasonably certain that the employee will resume active work for the employer within 30 days, unless resumption has not occurred during the 30-day period; (2) a reinstatement exception, under which a pre-cessation-date separation would not count if, as of the cessation date, the employee has been rehired and is both an employee and a participant in the affected plan; and (3) a replacement exception under which a pre-cessation-date separation would not count if, as of the cessation date, the employee has been replaced and the replacement employee is a participant in the affected plan.

[49] In its 2010 proposed rule (75 Fed. Reg. at 48286–87, 48292, proposed § 4062.28), PBGC addressed these issues with a general rule that called for a ''but for'' analysis: the ''result'' test would be met if the ''separation would not have occurred when it did if [the cessation] had not occurred.'' The proposal also provided for a number of rebuttable presumptions that this ''result'' test was met (*e.g.*, that the ''result'' test was presumed met if an involuntary separation occurs on or after the date the employer decides to cease operations in a voluntary cessation, or if a voluntary separation occurs on or after the date the employer cessation decision in a voluntary cessation becomes known).

[50] These same questions, insofar as they affect the 15 percent threshold test, may also have an effect on the plan-specific ''reduction fraction'' (discussed later in the text of this article) that is used in determining the liability amount under the alternative liability method, as the reduction fraction is derived from the determinations made for purposes of the 15 percent threshold test.

[51] *See, e.g.*, 75 Fed. Reg. at 48285, 48291, proposed 29 CFR § 4062.26(b)(2) (in the case of certain involuntary cessations, the employer is considered to have ceased an operation no later than the date that is 30 days after the discontinuance of activity, regardless of whether activities later resume).

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

tion fraction'' that affects the alternative liability amount—is narrower than that used under prior law (as interpreted by PBGC) in one respect: the eligible employee who is separated from employment in connection with the cessation must have been ''at'' the facility that experienced the cessation.[52] (Similarly, a 4062(e) event can occur with respect to a plan only if the plan covers participants ''at'' the facility in question.[53]) Prior law provided that, if an employer ceased 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 active plan participants are separated from employment, there was a 4062(e) event.[54] PBGC took the position that if the cessation of operations at a facility resulted in the separation from employment of plan participants at other facilities, those participants must be included in the numerator.[55] The Act's explicit language forecloses such an interpretation.

Questions will undoubtedly arise under the new law when determining whether a particular employee or plan participant is ''at'' a given facility. For example, what about an employee who is typically ''on the road'' but from time to time performs work ''at'' various different facilities? Or an employee who works from a remote location (*e.g.*, his or her home), but routinely coordinates via electronic means with other employees working from different remote locations and/or with employees who work together at some physical location that constitutes a ''facility in any location''? The answers to questions such as these can make the difference between having and not having 4062(e) liability and can also significantly affect the amount of any such liability.

Rules for Excluding Eligible Employees. The Act provides special rules for excluding eligible employees from the workforce reduction numerator in determining whether the 15 percent threshold has been crossed.[56]

Relocation of Workforce. Under Section 4062(e)(2)(C), an eligible employee separated from employment at a facility is not taken into account in computing a workforce reduction if, within a reasonable period of time, the employee is replaced by the employer, at the same or another facility in the United States, by an employee who is a citizen or resident of the United States.

Transfer of Operations. Section 4062(e)(2)(D) sets forth rules that come into play when there is a sale or other disposition of the assets or stock of a contributing sponsor of the plan (or any member of the same controlled group as such a sponsor) relating to operations at a facility, or otherwise. For purposes of these provisions, an employer that experiences the substantial cessation of operations is the ''transferor employer''; an employer that conducts any portion of such operations is the ''transferee employer.'' It is important to note that these provisions could apply not only to asset sales and stock stales, but also to other situations involving a transfer of operations, such as where there is a change in government contractors conducting operations at a facility.

Under these provisions:

- An eligible employee *who is separated from employment* with the transferor employer at the facility is not taken into account in computing a workforce reduction if, within a reasonable period of time:

  —the eligible employee is replaced by the transferee employer by an employee who is a citizen or resident of the United States; *and*

  —in the case of an eligible employee who is a participant in a single-employer plan maintained by the transferor employer, the transferee employer, within a reasonable period of time, maintains a single-employer plan which includes the assets and liabilities attributable to the accrued benefit of the eligible employee at the time of separation from employment with the transferor employer.

- An eligible employee *who continues to be employed at the facility by the transferee employer* is not taken into account in computing a workforce reduction if either:

  —the eligible employee is not a participant in a single-employer plan maintained by the transferor employer; *or*

  —in any other case, the transferee employer, within a reasonable period of time, maintains a single-employer plan which includes the assets and liabilities attributable to the accrued benefit of the eligible employee at the time of separation from employment with the transferor employer.

Among the many questions regarding these new provisions are the following:

- How similar must the duties, responsibilities, hours, compensation, etc., of the replacement employee be to those of the eligible employee who would not be counted in order for the rule to apply?

- How is it to be determined whether the possible replacement employee is to be treated as replacing Employee A (who was an eligible employee and who otherwise *would* be taken into account in determining the workforce reduction), or Employee B (who was not an eligible employee and who therefore in any event *would not* be taken into account in determining the workforce reduction), when both Employee A and Employee B were separated from employment at a facility?

- What constitutes a ''reasonable period of time'' within which an employer must hire a replacement employee in order for these rules to apply?

- What constitutes a ''reasonable period of time'' within which the transferee employer must maintain a PBGC-covered single-employer plan which includes the above-specified accrued benefits in order for these rules to apply?

- Is an eligible employee who is separated from employment with the transferor employer and immedi-

---

[52] *See* Section 4062(e)(2)(A), (B).

[53] *See* Section 4062(e)(1).

[54] 29 U.S.C. § 1362(e) (2012) (emphasis added to quoted language).

[55] *See* 75 Fed. Reg. at 48287, 48292, proposed 29 CFR § 4062.28(b)(3).

[56] These same rules may also affect the plan-specific ''reduction fraction'' (discussed later in the text of this article) that is used in determining the liability amount under the alternative liability method, as the reduction fraction is derived from the determinations made for purposes of the 15 percent threshold test.

ately (or within a reasonable time) hired by the transferee employer (as is common in asset sale situations) treated as one who ''continues'' to be employed at the facility by the transferee employer?

■ If an eligible employee at the facility is immediately hired by the transferee employer to work at a *different* facility of the transferee employer, perhaps a facility where some or all of the operations that were transferred will be performed, does the replacement rule apply, notwithstanding the language calling for the eligible employee to ''continue to be employed *at the facility*''[57] by the transferee employer in order for the replacement rule to apply?

Regardless of how these interpretive issues are resolved, consider the challenges that may be encountered by a transferor employer (who may face 4062(e) liability) and by the affected plan's plan administrator (who may face a 60-day reporting deadline under ERISA Section 4063(a)) in obtaining, in a timely manner—or at all—the information that will be needed to evaluate the applicability of these rules to particular ''eligible employees'' (*e.g.*, where an understanding of the transferee employer's post-transaction business operations is required to evaluate whether an employee hired by the transferee employer may properly be viewed as a ''replacement'' employee). And assuming (as is likely) that ''a reasonable period of time'' might, depending on the circumstances, significantly exceed 60 days, how can a plan administrator comply with the ERISA Section 4063(a) requirement to report a 4062(e) event to PBGC within a 60-day period—even if that period starts to run only on the *later* of the cessation date and the date the 15 percent threshold is crossed[58]—when, as of the end of that 60-day period, there is uncertainty as to whether a number of ''eligible employees'' may properly be disregarded under these rules and, as a result, it is not yet known whether a 4062(e) event has occurred?

Where the transfer of operations is the result of a transaction between the transferor employer and the transferee employer, rather than, *e.g.*, the government's replacement of a contractor, some of these challenges could be addressed, at least partially, through provisions in the transaction documents governing the transfer of operations. And where there is uncertainty as to whether a 4062(e) event has occurred when the statutory reporting deadline approaches, a timely precautionary filing may be made to guard against late filing penalties and other potential problems (*e.g.*, in connection with loan or other corporate agreements where compliance with reporting requirements may be relevant).

Three-Year Lookback. As noted above, there is a three-year lookback for purposes of determining whether the 15 percent workforce reduction threshold is crossed. Thus, under Section 4062(e)(6)(B), a workforce reduction with respect to a cessation of operations at a facility is determined by taking into account any separation from employment of any eligible employee at the facility (other than a separation that is not taken into account under the rules for excluding eligible employees discussed above) that:

■ is ''related to'' the permanent cessation of operations of the employer at the facility, *and*

■ occurs during the three-year period preceding the cessation.[59]

It is worth noting that the denominator used for the 15 percent threshold test is determined, using the rule described in the next section of this article, as of a single snapshot date. By contrast, the numerator may be comprised of eligible employees who separated from employment over a lengthy period of time, running from as far back as three years before the cessation date up to, and possibly even beyond, the cessation date.

It is not clear whether and, if so, how the ''related to'' the permanent cessation test under the three-year lookback provision differs from the ''by reason of'' the permanent cessation test under the ''workforce reduction'' definition. Moreover, under any interpretation of the ''related to'' test, there will undoubtedly be gray areas and disputes in the context of various factual patterns. In particular, given that the provision of the new law governing the ''as of'' date for determining the count in the denominator (as discussed in the next section of this article) arguably contemplates that there may be separations that are ''related to'' the permanent cessation even where a separation occurs *before* the employer has made a decision to implement a voluntary *future* cessation, it is not clear how one would determine the circumstances in which a separation should be treated as ''related to'' such a *possible* future cessation.

Among the many questions potentially raised under the three-year lookback rule are the following:

■ Might the ''related to'' test be met where an employee who separates voluntarily (*e.g.*, to accept a job with another employer) does so at a time when it is common knowledge among the employees that a permanent cessation is possible, likely, or virtually certain to occur in the near (or perhaps distant) future?

■ Is the test met, or is there a rebuttable presumption that it is met, where the employer implements involuntary separations at a time when no firm decision to implement a permanent cessation has been made, but there is a management belief that a permanent cessation is possible, likely, or virtually certain to occur?

■ What if management significantly reduces the workforce at a facility at a time when it is expected and intended that operations at the facility will continue indefinitely, but a year later, based on changed circumstances, a permanent cessation of operations occurs at the facility?

■ To what extent, if any, does the amount of time by which the separation precedes the permanent cessation

[57] Section 4062(e)(2)(D)(ii) (emphasis added).

[58] In its 2010 proposed rule (75 Fed. Reg. at 48288, 48293, proposed § 4062.31(b)(1)), PBGC stated that the 60-day period would run from the later of the cessation date or the date that the old-law 20-percent threshold was crossed.

[59] This three-year lookback rule is important in that it can affect not only the ''workforce reduction'' liability trigger, but also: (1) as discussed later in this article, the numerator of the plan-specific ''reduction fraction'' that is used to determine the liability amount under the alternative liability option; and (2) as also discussed later in this article, the ''as of'' date for determining the number of eligible employees in the denominator for purposes of both the ''workforce reduction'' liability trigger and the plan-specific ''reduction fraction'' that affects the alternative liability amount.

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

and/or the decision to implement it affect the analysis (*e.g.*, whether a separation that occurs two years before the cessation decision is made significantly less likely to be treated as ''related to'' the cessation than one that occurs only two weeks before the cessation decision date, solely or primarily because of the timing difference)?

Where the employer's workforce at a facility has declined significantly during the three-year period preceding the permanent cessation of operations at the facility, issues such as these may be front and center in the 4062(e) analysis associated with the cessation.

''As of'' Date for Denominator. Under Section 4062(e)(2)(A), the number of eligible employees to be counted in the denominator of the 15 percent ''workforce reduction'' liability trigger fraction is determined *immediately before* (*i.e.*, on the date that is one day before) the earlier of:

- The date of the employer's decision to implement the cessation; or

- In the case of a workforce reduction that includes one or more eligible employees covered by the three-year lookback rule (discussed in detail in the previous section of this article), the earliest date on which any such eligible employee was separated from employment.

This same ''as of'' date is used, under Section 4062(e)(4)(B)(ii)(II), when counting the number of eligible employees in the denominator of the plan-specific ''reduction fraction'' that affects the liability amount under the alternative liability option (discussed below).

The three-year lookback rule is most easily understood in the context of involuntary cessations. Certainly, one can understand that separations that are ''related to'' a cessation may occur at the pre-decision stage where the cessation is involuntary (*e.g.*, at least some employees at a facility are separated on or shortly after the date a fire or flood damages the facility, and the employer does not decide to close the facility permanently until after the cost of rebuilding the facility is determined). What is not clear is whether and, if so, under what circumstances, a separation of an eligible employee that occurs before the employer decides to cease operations could be brought in under the three-year lookback rule in the context of a voluntary cessation.

Many issues may arise when determining the ''date of the employer's decision'' to implement the cessation. For example:

- Is it the date on which management, or perhaps senior management, makes a cessation decision that is subject to Board of Directors approval, the date on which the Board of Directors meets and approves the decision, or some other date?

- Under what circumstances would an arguably tentative ''decision'' not ripen into a ''decision'' for this purpose until it is publicly announced, or until a concrete implementation step is taken?

- What is the decision date if there is a fire or flood that ultimately results in a permanent cessation? In such a case, does it matter whether and, if so, when efforts were made to resume operations?

- What if an important contract is not renewed and subsequent efforts to secure a replacement contract are unsuccessful? Is the decision date when the efforts completely cease?

The use of an ''as of'' date that *precedes* the cessation decision date based on the inclusion of one or more separations under the three-year lookback provision can have a significant impact on 4062(e) liability. For example, assume that: (1) there is a permanent cessation that would have resulted in crossing the 15 percent liability trigger threshold without regard to the three-year lookback provision; (2) there are relatively few separations that are brought in under the three-year lookback provisions (because they were ''related to'' the cessation) and at least one of them occurred long before the cessation; and (3) the denominator as of the day before the first such separation is significantly larger than it was the day before the cessation decision date (because there was a declining workforce during that period for reasons that are not ''related to'' the cessation at issue). The use of a significantly larger denominator (*e.g.*, 2,000 instead of 1,000), coupled with the use of a slightly larger numerator (*e.g.*, 200 instead of 160), might either shift the liability trigger percentage from at or even well above 15 percent to no more than 15 percent (so that there would be no 4062(e) liability), or significantly reduce the plan-specific ''reduction fraction'' (so that there would be a significantly lower alternative liability amount).

Possible Numerator-Denominator Mismatch. Particularly where the applicability of the three-year lookback rule leads to an ''as of'' date for the denominator that is long before the cessation date, a potentially significant question arises as to which of the eligible employees whose separations are ''by reason of'' or ''related to'' the cessation should be counted in the numerator. Consider a situation where, on the applicable ''as of'' date that falls two years before a permanent cessation of operations at a facility, there are 1,000 eligible employees, 100 of whom are the only active participants in a PBGC-covered plan and are all employed at the facility. Of these 1,000 eligible employees, 140 are the subject of separations that are ''by reason of'' or ''related to'' the cessation. And of these 100 active participants in the PBGC-covered plan, 50 are the subject of separations that are ''by reason of'' or ''related to'' the cessation.

One would think that there would thus be a ''workforce reduction'' of only 14 percent and, therefore, no 4062(e) liability with respect to that (or any other) PBGC-covered plan. But now assume that sometime *after* the ''as of'' date that was two years in the past and before the cessation (and presumably well before the cessation decision), the employer hired 60 eligible employees, all of whom worked at that same facility and became participants in the PBGC-covered plan, and all of whom were the subject of separations that were ''by reason of'' or ''related to'' the cessation. One can read the new law literally to produce a 20 percent (*i.e.*, 200/1,000) ''workforce reduction'' that would trigger liability, and also to produce a 110 percent (110/100) ''reduction fraction'' that would result in an alternative liability amount that *exceeds* the plan's underfunding on a variable-rate premium basis. Alternatively, one can interpret the new law in a more rational way that ensures that an individual cannot be counted in the numerator unless he or she was counted in the denominator. Hopefully, PBGC guidance will adopt this common-sense ap-

proach, as the other approach, which could easily lead to absurd results, was clearly not intended.

Effect of Excluding "Former" Employees. As discussed earlier in this article, there are significant questions as to whether and, if so, when an employer-employee relationship is to be treated as severed. Where there are individuals whose status as ''eligible employees'' may have ceased (because they arguably were no longer ''employees'') sometime before the ''as of'' date for determining the count in the denominator of the 15 percent threshold test, a determination as to their status may control whether or not a 4062(e) event has occurred. If it is determined that a number of ''eligible employees'' are to be disregarded entirely in determining whether the 15 percent threshold had been crossed, that determination may result in eliminating 4062(e) liability if they otherwise would have been taken into account as having been separated from employment at the facility, or in creating 4062(e) liability if they otherwise would not have been taken into account as having been so separated.

For example, consider a situation in which:

- there are 1,000 individuals who are arguably to be counted in the denominator of the 15 percent threshold test as ''eligible employees''; and

- of these 1,000 individuals, 100 had arguably ceased to be employees prior to the ''as of'' date (discussed earlier in this article) for measuring the denominator of the 15 percent threshold test, and thus arguably should not be counted in the denominator.

Excluding the individuals in this group of 100 from the denominator of the 15 percent threshold test can be helpful or harmful, as doing so can create 4062(e) liability or, conversely, can eliminate 4062(e) liability. The effect of excluding these individuals will depend on whether—had they been included in the *denominator* of the 15 percent threshold test—they would also have been counted in the *numerator* of that test (*i.e.*, as having been separated from employment at the facility in connection with the cessation and not disregarded under the Act's rules, discussed earlier in this article, for disregarding separations under specified circumstances). Consider what might happen if all of the individuals in the group of 100 were excluded as no longer being ''employees'' on the ''as of'' date for purposes of the denominator:

- *Exclusion eliminates liability*. Assume that, if all of the individuals in the group of 100 were included in the denominator of the 15 percent threshold test, they would also have been included in the numerator of the 15 percent threshold test, and that the resulting fraction would have been 160/1,000 (16 percent), thus crossing the 15 percent threshold and resulting in the occurrence of a 4062(e) event. If all of the individuals in the group of 100 were instead excluded from the denominator and (therefore) the numerator of the 15 percent threshold test, the resulting fraction would have been 60/900 (6.67 percent), thus falling short of the 15 percent threshold. In this example, their exclusion would serve to *eliminate* 4062(e) liability.

- *Exclusion creates liability*. Assume now that, if all of the individuals in the group of 100 were included in the denominator of the 15 percent threshold test, they would *not* have been included in the numerator of the 15 percent threshold test, and that the resulting fraction would have been 140/1,000 (14 percent), thus falling short of the 15 percent threshold and resulting in there not being a 4062(e) event. If all the individuals in the group of 100 were instead excluded from the denominator of the 15 percent threshold test, the denominator would of course be reduced, but there would be no reduction in the numerator (since these 100 individuals would not have been counted in the numerator even if they had been counted in the denominator), and the resulting fraction would have been 140/900 (15.56 percent), thus crossing the 15 percent threshold. In this example, their exclusion would serve to *create* 4062(e) liability.

Exemptions From Section 4062(e) Liability

Section 4062(e)(3) provides for an exemption from 4062(e) liability with respect to a PBGC-covered single employer plan if, for the plan year preceding the plan year in which the cessation occurred, either:

- there were fewer than 100 participants with accrued benefits under the plan as of the valuation date for the plan year (as determined under ERISA Section 303(g)(2)); *or*

- the ratio of the market value of the assets of the plan to the funding target of the plan for the plan year was 90 percent or greater.[60]

Exemption for Small Plans. Whether a plan is a small plan for exemption purposes depends upon the participant count as determined by reference to ERISA Section 303(g)(2), which provides rules for determining the valuation date of a plan for minimum funding purposes.[61] Under that provision, all single-employer defined benefit plans that are maintained by the same employer (*i.e.*, the contributing sponsor and each controlled group member) are treated as one plan, but only participants with respect to the employer are taken into account. Thus, where there are two or more single-employer plans maintained within a controlled group, the exemption might not apply with respect to any of these plans, even though one or more (or each) of these plans, on a stand-alone basis, has fewer than 100 participants.

Alternative Relief for Small Plans Under PBGC's Enforcement Policy. As explained in more detail below, the Act provides that PBGC may not initiate a new enforcement action with respect to Section 4062(e) ''that is inconsistent with its enforcement policy in effect on June 1, 2014.'' If a plan meets the small plan statutory exemption criterion, there is no 4062(e) liability with respect to that plan, and PBGC's enforcement policy is irrelevant. It is important to be aware, however, that a plan

[60] In addition to the two specified exemptions, a special rule under Section 4062(e)(6)(A) provides that an employer shall not be treated as ceasing operations at a qualified lodging facility in certain circumstances. *See* footnote 39.

[61] Under ERISA Section 303(g)(2), the valuation date of a plan for any plan year generally is the first day of the plan year. However, if, on each day during the preceding plan year, a plan had 100 or fewer participants (determined using the controlled group aggregation rule explained in the text above), the plan may designate any day during the plan year as its valuation date for the plan year and succeeding plan years.

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC. ISSN

that does *not* meet the statutory exemption criterion for small plans may nonetheless be a ''small plan'' for which relief applies under the enforcement policy, since the PBGC enforcement guidelines reference a different measurement date and a different set of rules for purposes of determining the relevant participant count than those embedded in the statutory exemption. Thus, the enforcement policy's small plan provisions will continue to have relevance, notwithstanding the new small plan exemption under the statute.

PBGC's October 2012 enforcement guidelines, which were made available to the public in April 2013,[62] provide:

> ***New small-plan cases.*** PBGC will not initiate enforcement of section 4062(e) liability if the affected plan's participant count for purposes of the flat-rate premium is less than 100 as of the most recent participant count date before the beginning of the cessation of operations giving rise to the section 4062(e) event.[63]

For purposes of the PBGC enforcement policy, whether the participant count is ''less than 100''[64] is determined by reference to the count used for purposes of the flat-rate premium, which is a plan-specific count with no aggregation of participant counts for all plans maintained by the employer.[65] There will thus be many cases in which, largely because of the application of the controlled group aggregation rule for purposes of the statutory exemption but not for purposes of the enforcement policy, an employer will be looking to the enforcement policy rather than to the statutory exemption for small plan relief.[66]

There are two areas of ambiguity regarding the appropriate ''as of'' date under the guidelines for the relevant participant count.

Ambiguity Regarding ''as of'' Date for Participant Count—Beginning of Cessation of Operations. PBGC's enforcement guidelines refer to ''the beginning of the cessation of operations giving rise to the section 4062(e) event.'' It is unclear when or under what standard the date the cessation of operations would be deemed to have begun. Nor is it clear whether any such standard used under PBGC's enforcement policy would be or should be modified or clarified in connection with cases under the Act. For example, might the ''beginning'' of the cessation of operations giving rise to the 4062(e) event under the Act be deemed to be the first date on which there was a separation from employment of any eligible employee who is included (taking into account the three-year lookback provisions) in the numerator of the ''workforce reduction'' fraction? Or might it instead be the first date on which the employer took a concrete step to implement a planned cessation (*e.g.*, by curtailing or discontinuing certain production activities), even if that is before the first date on which any separations have occurred? This is another area in which PBGC guidance would be welcome.

Ambiguity Regarding ''as of'' Date for Participant Count—Most Recent Participant Count. The October 2012 enforcement guidelines refer to the ''most recent participant count date before the beginning of the cessation of operations.'' However, some four months *after* the October 2012 enforcement guidelines were in place, but two months *before* those guidelines were made publicly available, PBGC staff stated that PBGC uses ''the participant count reported on the comprehensive premium filing most recently submitted prior to the date the cessation of operations giving rise to the 4062(e) event began.''[67] That date may be different than ''the most recent participant count before the beginning of the cessation of operations'' as referenced in the October 2012 guidelines.

Under PBGC rules: (1) the ''premium payment year'' means the plan year for which the premium is being paid;[68] (2) the ''participant count date'' of a plan is generally the last day of the plan year preceding the premium payment year;[69] and (3) the ''normal premium due date'' for comprehensive premium filings for plan years 2015 and later is the 15th day of the 10th full calendar month that begins on or after the first day of the premium payment year (*e.g.*, generally October 15th for a calendar year plan).[70]

Under these rules, if, for example, the beginning of the relevant cessation of operations is June 1, 2016 (and continuing with the example of a calendar-year plan), the ''most recent participant count date'' before the cessation began is likely to be Dec. 31, *2015*, which will generally be the participant count that will be used with

---

[62] *See* footnote 19.

[63] http://www.pbgc.gov/Documents/4062(e)-enforcement-of-guidelines.pdf.

[64] In its November 2012 announcement and associated FAQs relating to the 4062(e) Enforcement Pilot Program, PBGC expressed the threshold for relief in small plan situations in a few different ways, alternatively using thresholds of 100 or fewer and of fewer than 100 participants. However, PBGC staff stated in the response to Question 14(a) of the 2013 Enrolled Actuaries Meeting Blue Book (available at http://www.pbgc.gov/Documents/2013bluebook.pdf) that the relief does not apply where the participant count is 100.

[65] 29 U.S.C.§ 1306(a)(3)(A)(i); 29 C.F.R. §§ 4006.2, .6(a) (definition of ''participant'' under PBGC's Premium Rates rule for purposes of the flat-rate premium for a plan); *see also* http://www.pbgc.gov/Documents/2014-Premium-Payment-Instructions.pdf (instructions regarding ''How to Count Participants'').

[66] It is important to keep in mind that, if small plan relief applies under the statutory exemption, no 4062(e) event will occur with respect to the small plan, and the plan administrator of that plan therefore will not be subject to the reporting obligation under Section 4063(a). However, if small plan relief applies only under the enforcement policy, PBGC has stated that such reporting is still required. *See* http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html; *see also* http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_pbgc_qa.authcheckdam.pdf (PBGC staff response to question 16). And in either event, there may be a requirement to provide notice of a reportable event, as discussed at footnotes 8, 37, and 95.

[67] http://www.pbgc.gov/Documents/2013bluebook.pdf (summary of questions and answers discussed with PBGC staff on Feb. 14, 2013; *see* PBGC staff response to question 14(d)).

[68] 29 C.F.R. § 4006.2 (definition of ''premium payment year'').

[69] 29 C.F.R. §§ 4006.2, .5(c) (generally applicable definition of ''participant count date''); *see also* http://www.pbgc.gov/Documents/2014-Premium-Payment-Instructions.pdf (instructions regarding ''How to Count Participants,'' including ''Participant Count Date'').

[70] 29 C.F.R. § 4007.11(a)(1) (generally applicable rule regarding due date for flat-rate and variable-rate premium filing); *see also* http://www.pbgc.gov/Documents/2014-Premium-Payment-Instructions.pdf (instructions regarding ''When to File''). Under 29 C.F.R. §§ 4000.43(a) and 4007.6, if the last day counted is a weekend or Federal holiday, the deadline is extended to the next regular business day.

respect to the 2016 premium payment year.[71] However, the "comprehensive premium filing most recently submitted" prior to June 1, 2016, is likely to be the filing submitted on or shortly before the Oct. 15, 2015, deadline with respect to the 2015 premium payment year, which will generally report a participant count determined as of Dec. 31, *2014*. Of course, significant changes in the participant count can occur over the course of a full year.

Exemption for 90-Percent-Funded Plans. In order to meet the statutory exemption for a plan that is at least 90-percent-funded, for the plan year *preceding* the plan year in which the cessation occurred, "the ratio of the market value of the assets of the plan to the funding target of the plan" must be at least 90 percent. (The terms, "market value of the assets of a plan" and "funding target," are defined in a way that ties those values to PBGC variable-rate premium determinations for the plan year in question.[72]) Thus, where a plan meets this 90-percent-funded test for the plan year preceding the cessation plan year, a Section 4062(e) event cannot occur with respect to that plan. And, as discussed in detail below, even if a plan is not at least 90-percent-funded for the plan year *preceding* the plan year in which the substantial cessation of operations occurred, there will be no 4062(e) liability with respect to the plan if it meets the same 90-percent-funded standard with respect to the plan year *in which* the cessation occurred, provided that the employer elects the alternative method for satisfying liability (as the obligation would cease with respect to that first plan year of the seven-plan-year payment period and all succeeding plan years). Moreover, as also discussed below, if a plan subject to the alternative method reaches the 90-percent-funded level with respect to *any* plan year during the remaining six years of the seven-year funding period, the employer's obligation to make the alternative liability method installments ceases with respect to that plan year and all succeeding plan years.

The Act creates powerful incentives for employers to keep their plans funded at the 90-percent-funded level at all times, as doing so essentially provides insurance against 4062(e) liability.

The Act thus creates powerful incentives for employers to reach the 90-percent-funded level. It is important to consult with the plan actuary to determine whether the threshold is met and, if not, what additional contribution would have to be made to meet it and how that additional contribution would affect future minimum funding obligations.

In contrast to the rules governing the calculation of plan underfunding for purposes of determining minimum required contribution obligations—under which plan assets are generally determined *net of* any "prefunding balance" (essentially excess contributions that are retained as a possible credit to use to offset future contribution obligations)—*full* plan assets (*i.e.*, plan assets without any reduction by the amount of any prefunding balance) are taken into account for variable-rate premium purposes. Thus, reaching the 90-percent-funded level threshold for a particular plan year may be possible by making an "excess" contribution for the prior plan year, even if that excess contribution is used

[71] The comprehensive premium filing for the 2016 premium payment year is likely to be *submitted* to PBGC after the June 1, 2016, beginning of the cessation—*i.e.*, on or shortly before the Oct. 17, 2016, filing deadline pertaining to the 2016 premium payment year under 29 C.F.R. § 4007.11(a)(1).

[72] "The market value of the assets of a plan shall be determined *in the same manner* as for purposes of section 4006(a)(3)(E) [29 U.S.C. § 1306(a)(3)(E)]" (Section 4062(e)(5)(C) (emphasis added); "The term 'funding target' means, with respect to any plan year, the funding target as determined under section 4006(a)(3)(E)(iii)(I) *for purposes of determining the premium paid to the [PBGC]* under section 4007 for the plan year" (Section 4062(e)(5)(B) (emphasis added); *see also* 29 C.F.R. § 4006.4(c) (methodology for determining fair market value of assets); 29 C.F.R. § 4006.4(b) (definition of premium funding target and of standard premium funding target); 29 C.F.R. § 4006.5(g) (definition of alternative premium funding target). In light of these definitions, PBGC will likely interpret these terms—whether for purposes of the 90-percent-funded level exemption, the 90-percent-funded level test that ends the obligation to make further payments (as discussed later in this article) under the alternative liability method, or the determination of the amount of the annual cap (also discussed later in this article) on payments under the alternative liability method—in the same manner as these terms are to be interpreted (and applied) for purposes of the premium filing submitted to PBGC for the applicable plan year (the premium payment year). Thus, for example: (1) the funding target would be determined based on whichever of the "standard premium funding target" or "alternative premium funding target" was (permissibly) used for purposes of the premium filing for that premium payment year; and (2) the measurement date (*see* 29 CFR § 4006.2 (definitions of "UVB Valuation Year" and of "UVB Valuation Date")) for determining both the funding target and the market value of assets would be the same as was (permissibly) used for purposes of the premium filing for that premium payment year.

That measurement date, subject to a possible exception under a lookback rule (*see* 29 CFR § 4006.2 (definition of "UVB Valuation Year")) for small plans (as defined at 29 CFR § 4006.2), is the valuation date (under the minimum funding rules) for the premium payment year. Under the lookback rule, the measurement date is the valuation date for the plan year *preceding* the premium payment year, unless the plan opts out (with PBGC permission where required) of the lookback rule and thus uses, as a measurement date, the valuation date *for* the premium payment year. (Under the PBGC "small plan" definition used for this purpose, the lookback rule is potentially applicable to a plan that has a flat-rate participant count for the premium payment year of no more than 100 *or* has a valuation date (determined in accordance with ERISA Section 303(g)(2) (discussed earlier in this article)) for the premium payment year that is not the first day of the premium payment year.) Thus, if the lookback rule applies and has not been opted out of, the "market value" of the assets of a calendar-year plan and its "funding target" for (*e.g.*) the 2015 plan year would be determined as of the plan's valuation date for the 2014 plan year. In the interest of (relative) simplicity—and because there would not be any 4062(e) liability (*e.g.*, because of the small plan exemption or the small plan relief in PBGC's enforcement policy) in most, though certainly not all, situations in which the lookback rule applies—this article assumes that the plan at issue, for the plan year at issue, either is not eligible for use of the lookback rule or has opted out of its use, and thus disregards the possibility of the lookback rule applying when discussing the provisions of the Act.

COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

to create or to increase the plan's prefunding balance. And in cases where the plan meets an 80 percent funded test under the minimum funding rules for the prior plan year,[73] the employer may be able to rely on that same excess contribution to offset the minimum required contribution for the current plan year.

For many employers, it will make good business sense to keep their plan(s) funded at the 90-percent level at all times, as doing so essentially provides insurance against 4062(e) liability.[74]

New Option for Satisfying Liability

Under both prior law and the Act, the amount of 4062(e) liability is a portion (which may be 100 percent) of the plan's unfunded benefit liabilities, measured on a conservative PBGC plan termination basis.[75] As noted above, the liability may be satisfied via the provision of an escrow or (if PBGC so requires) a bond in an amount not exceeding 150 percent of the liability.[76] Section 4062(e)(4) of the Act provides that an employer may elect an alternative method of satisfying 4062(e) liability. The provision of an optional method for satisfying 4062(e) liability that an employer may unilaterally elect empowers an employer to resolve the liability in a way that in many cases will be more efficient, more predictable, and more manageable than under prior law. The Act's provision of the elective alternative method is one of its most welcome changes.

Plan-by-Plan Analysis. As noted above, a 4062(e) event may trigger liability with respect to more than one plan. Nothing in the Act requires an employer that has 4062(e) liability with respect to two or more plans to satisfy the liability for all plans in the same manner. It therefore appears that an employer may, for example, elect the alternative liability method with respect to Plan A but not with respect to Plan B. Consequently, if 4062(e) liability is triggered with respect to more than one plan, it will be necessary to separately analyze each plan to determine whether the alternative method for satisfying liability should be elected with respect to that plan.

Amount of Liability Under Alternative Method. Under Section 4062(e)(4)(B), an employer that elects the new alternative method would make additional contributions to the plan for seven plan years (in excess of the minimum required contribution under Section 430 of the Internal Revenue Code); under Section 4062(e)(6)(C), the extra contributions may not be used to create or to increase the plan's prefunding balance. The annual additional contribution amount for each affected plan is determined by multiplying:

- One-seventh of ''the unfunded vested benefits determined under section 4006(a)(3)(E) as of the valuation date of the plan (as determined under ERISA Section 303(g)(2)) for the plan year preceding the plan year in which the cessation occurred'';[77]

by

- A ''reduction fraction'' equal to the number of plan participants in the affected plan counted in the workforce reduction (using the same rules described above that are used to determine the numerator of the workforce reduction percentage) divided by the number of eligible employees of the employer who are participants with accrued benefits in the plan (as of the same date used to determine the denominator of the workforce reduction percentage).

Determination of Unfunded Vested Benefits. It is important to note that there are significant differences in the methodology and assumptions used to calculate unfunded vested benefits under the alternative liability option and unfunded benefit liabilities under PBGC's regulatory liability rule, with unfunded vested benefits in most cases being significantly smaller than unfunded benefit liabilities (largely due to the use of differing interest assumptions), but with the reverse also being possible. Among the key differences are the following:

- *Measurement Date.* The relevant unfunded vested benefits for purposes of the alternative method is determined as of the valuation date for (generally the first day of) the plan year *preceding* the plan year in which the cessation occurred. By contrast, under PBGC's regulatory liability rule, the amount of unfunded benefit liabilities for 4062(e) purposes is determined ''as if the plan had been terminated by the PBGC immediately after the date of the cessation of operations . . . .''[78] Thus, there could be a difference of up to two years between the two measurement dates. Clearly, a great deal could change (in either direction) over that period of time, both in terms of the value of plan assets (*e.g.*, due to investment experience or levels of contributions to the plan) and in the value of plan liabilities (*e.g.*, due to sig-

[73] *See* Section 430(f)(3)(C) of the Internal Revenue Code.

[74] An added benefit flowing from improving an underfunded plan's funding level for variable-rate premium purposes is a reduction in the variable-rate premium owed to PBGC, as that premium is based on a percentage of unfunded vested benefits. ERISA Section 4006(a)(8), 29 U.S.C. § 1306(a)(8); 29 C.F.R. § 4006.3(b).

[75] *See* 29 U.S.C. §§ 1301(a)(18), 1344, 1362(b); 29 C.F.R. Parts 4044, 4062.

[76] 29 U.S.C. § 1363(b), (c).

[77] The absence of a specific requirement in the statute that the amount of unfunded vested benefits for purposes of determining the alternative liability amount track how the amount of unfunded vested benefits for purposes of determining the variable-rate premium paid to PBGC for the applicable plan year—coupled with the specific reference in the statute to the valuation date ''for the plan year preceding the plan year in which the cessation occurred'' (*e.g.*, the 2015 plan year if the cessation occurs in the 2016 plan year)—may lead to the conclusion that the determination need not track what was done for premium payment purposes for that plan year. And it is possible that this conclusion would be reached even if the two terms that ordinarily make up the components of unfunded vested benefits—''market value'' and ''funding target''—are to be interpreted as tracking what was done for such premium payment purposes. See discussion at footnote 72.

Thus, for example, assume that the cessation occurs in the 2016 plan year, and that the plan year preceding the cessation plan year is therefore the 2015 plan year. It could be that the amount of the plan's unfunded vested benefits for the 2015 plan year is determined *for variable-rate premium payment purposes* based (under PBGC's regulatory lookback rule) on unfunded vested benefits as of the valuation date for the *2014* plan year, but that the amount of unfunded vested benefits *for purposes of the alternative liability method* would nonetheless be determined as of the valuation date for the *2015* plan year. However, as noted in footnote 72, in the interest of simplicity, this article disregards the possibility of the lookback rule applying when discussing the provisions of the Act.

[78] 29 C.F.R § 4062.8.

nificant changes in interest rates or in plan demographics).

■ *Value of Plan Assets*. For purposes of calculating unfunded vested benefits as of the measurement date, contributions that are made after that date will count as part of plan assets (subject to discounting rules), so long as they are designated under the minimum funding rules as being for the plan year ending before the measurement date (and thus must be made on or before the last day for doing so under the minimum funding rules,[79] which for a calendar-year plan is September 15 of the following year) and are received by the plan on or before the date the premium is filed (*e.g.*, in the case of a large calendar-year plan's 2015 variable rate premium filing that is made on Oct. 15, 2015, contributions received by the plan on Sept. 15, 2015, and that are designated as being for the 2014 plan year will count as part of plan assets when determining unfunded vested benefits as of Jan. 1, 2015). By contrast, in calculating unfunded benefit liabilities under its liability formula rule, PBGC takes the position that the value of plan assets does not include contribution receivables that were unpaid as of the measurement date.[80]

■ *Value of Plan Liabilities*. Very different methodologies and assumptions are used for the two purposes, with the key difference relating to interest assumptions—generally with significantly lower interest assumptions, and therefore significantly higher liabilities, for unfunded benefit liabilities purposes than for unfunded vested benefits purposes.

Because of the complexity of the rules and calculations, it is essential that an employer work closely with the plan actuary in evaluating whether to elect the alternative liability method. And as part of that evaluation, it will generally be important to determine the effect that the extra payments will have on projected minimum required contributions for future plan years. (The plan's funding shortfall, which is generally to be amortized over a seven-plan-year period under the minimum funding rules, will be reduced in connection with each alternative liability payment, thus resulting in a reduction in future funding obligations.)

The statute simply refers to annual payments of 1/7 of the amount of the applicable liability without any provision for an interest adjustment. It thus would appear that no interest adjustment is required, particularly where payments are made by the deadlines set forth in the Act (*i.e.*, by the date determined under Section 4062(e)(4)(A) (discussed below)). However, the legislative history suggests that an interest adjustment may be appropriate in limited circumstances.[81] PBGC has not issued any guidance regarding the issue, but might decide to take the position that interest is required, for example, on Section 4062(e)(4) contributions for a particular plan year that are made long after the date on which contributions are due for that plan year under the minimum funding rules. If so, it is unclear how and at what rate any such interest rate adjustment would be made.

Nor is it clear whether a Section 4062(e)(4) payment that is required to be made ''for'' a plan year in the seven-plan-year period can be prepaid, *i.e.*, whether a payment may still count for 4062(e)(4) purposes ''for'' a particular plan year even though it is designated as being ''for'' an earlier plan year under the Internal Revenue Code Section 430 funding rules—and, if so, whether a discount for early payment would be made. Such a prepayment might occur, for example, where an additional contribution (above and beyond the minimum required contribution) that is greater than the Section 4062(e)(4) payment that is due for a particular plan year is made for that plan year in order to avoid triggering benefit restrictions under Internal Revenue Code Section 436. Assuming that a Section 4062(e)(4) payment that is required to be made for a plan year in the seven-plan-year period can be prepaid, it is an open question as to how the rules governing the cap on the 4062(e)(4) amount (discussed below) for that plan year will apply to the earlier payment (see the discussion of the statutory cap on the amount of annual payments below). (Similar issues may arise where a Section 4062(e)(4) contribution for a particular plan year is made after the due date for contributions that may be designated as being ''for'' that plan year under the Internal Revenue Code Section 430 funding rules.)

Determination of Reduction Fraction. The ''reduction fraction'' that is used to determine the liability amount under the alternative liability option is essentially the plan-specific portion of the fraction used to determine whether the 15 percent ''workforce reduction'' threshold test is met. Thus, it is based on the same rules (*i.e.*, the relocation of workforce and transfer of operations provisions) under which certain eligible employees are not taken into account in computing the workforce reduction, and the same three-year lookback rules under which certain eligible employees are taken into account. As is the case with respect to the denominator of the 15 percent threshold test (and as discussed in some detail earlier in this article), there may be significant consequences flowing from the determination as to whether particular individuals whose status as ''eligible employees'' may have ceased (because they arguably were no longer ''employees'') sometime before the ''as of'' date for determining the count in the denominator of the plan-specific reduction fraction and who, if their ''eligible employee'' status had theretofore ceased, would therefore be disregarded entirely in determining that fraction.

For example, consider a situation in which a 4062(e) event has clearly occurred (*i.e.*, a ''substantial cessation of operations'' has occurred and no exemption applies with respect to the affected plan), and in which there are 10 individuals who had arguably ceased to be employees prior to the ''as of'' date for measuring the denominator of the plan-specific reduction fraction, and thus arguably should not be counted in the denominator of that fraction. Excluding all the individuals in this group of 10 can be helpful or harmful, as doing so can increase 4062(e) liability or, conversely, can decrease 4062(e) liability. The effect of excluding them will de-

---

[79] *See* Internal Revenue Code Section 430(j)(1), 26 U.S.C. § 430(j)(1); ERISA Section 303(j)(1); 29 U.SC. § 1083(j)(1).

[80] *See* http://www.pbgc.gov/documents/apbletter/Decision—Munksjo-Plan-2013-12-31.pdf at p. 14.

[81] *See* the discussion of the Act's acceleration provision in the text of this article. *See also* 160 Cong. Rec. S5687-S5688 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin), available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm (saying that, if either PBGC or a court finds that an employer had a reasonable basis to contest any material portion of a PBGC determination, ''then the acceleration provision shall not apply (but the employer would owe past due payments plus interest).'')

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

pend on whether—had they been included in the *denominator* of the reduction fraction —they would also have been counted in the *numerator* of that fraction (*i.e.*, as having been separated from employment at the facility in connection with the cessation and not disregarded under the Act's rules, discussed earlier in this article, for disregarding separations under specified circumstances). Consider what might happen if all of the individuals in the group of 10 were excluded as no longer being ''employees'' on the ''as of'' date for purposes of the denominator:

- *Exclusion decreases liability*. Assume that, if all of the individuals in the subgroup of 10 were included in the denominator of the plan-specific reduction fraction, they would also have been included in the numerator of that fraction, and that the resulting fraction would have been 20/50 (40 percent), leading to an alternative liability amount (payable over seven years) of 40 percent of the plan's underfunding on a variable-rate premium basis. If all the individuals in the subgroup of 10 were instead excluded from the denominator of the plan-specific reduction fraction, that fraction would instead be 10/40 (25 percent), leading to an alternative liability amount of only 25 percent of the plan's underfunding on a variable-rate premium basis. In this example, their exclusion would serve to *decrease* 4062(e) liability.

- *Exclusion increases liability*. Assume now that, if all of the individuals in the subgroup of 10 were included in the denominator of the plan-specific reduction fraction, they would *not* have been included in the numerator of that fraction, and that the resulting fraction would have been 20/50 (40 percent), leading to an alternative liability amount (payable over seven years) of 40 percent of the plan's underfunding on a variable-rate premium basis. If all the individuals in the subgroup of 10 were instead excluded from the denominator of the plan-specific reduction fraction, that fraction would instead be 20/40 (50 percent), leading to an alternative liability amount of 50 percent of the plan's underfunding on a variable-rate premium basis. In this example, their exclusion would serve to *increase* 4062(e) liability.

Time for Election of Alternative Liability Method. ERISA Section 4062(e)(4)(E)(i) provides that an employer must provide notice to PBGC of the election to use the alternative liability method (in accordance with rules prescribed by PBGC) not later than 30 days after the earlier of: (1) the date the employer notifies PBGC of the substantial cessation of operations; or (2) the date PBGC ''determines a substantial cessation of operations has occurred.'' Because the alternative liability method is likely to be the most favorable method of resolving 4062(e) liability, it is critical that the employer be aware of and comply with applicable deadlines for electing that method. Given the short (30-day) time period for making this election, and the adverse consequences that may flow from a failure to make a timely election, the employer should consider whether to make the election *as part of* any initial notice to PBGC that a substantial cessation of operations has occurred.

PBGC Determination. As discussed below, Section 4062(e)(4)(A)(ii), which sets forth the rules regarding *when* the annual payments under the alternative liability method must be paid, also refers to the date PBGC ''determines a substantial cessation of operations has occurred.'' By contrast, the transition rule pertaining to the availability of the alternative liability option with respect to certain pre-enactment cases provides that employers may, under certain circumstances (also discussed below), elect the alternative method not later than 30 days after PBGC issues, on or after the date of enactment, a ''final administrative determination'' that a substantial cessation of operations has occurred.

The Act does not explicitly state whether the references to the date that PBGC ''determines'' that a substantial cessation of operations has occurred refers to an initial PBGC determination that is subject to internal administrative review[82] or to a final PBGC determination that is subject to review by the appropriate U.S. district court. An argument could be made, based on the reference to a ''final administrative determination'' in the transition rule, that the absence of that language in the other two provisions supports an inference that the determinations need not be final in order to begin the running of the 30-day clock for purposes either of the election of the alternative method or of the one-year clock triggering when the annual payments must be made. On the other hand, there would be no reason for the election clock to start earlier with respect to a post-enactment case than with respect to a pre-enactment case.

Moreover, the legislative history supports the view that the PBGC determination referenced in Section 4062(e)(4)(E)(i) and (as discussed below) Section 4062(e)(4)(A)(ii) must be a final administrative determination. According to the Harkin Floor Statement, the election must be made not later than 30 days after the earlier of the date that the employer notifies PBGC of a substantial cessation of operations ''or the date that the [PBGC] makes a *final administrative determination* both that a substantial cessation of operations has occurred and of the amount of the alternative liability.''[83]

There may be cases in which the employer does not believe that (or does not yet know whether) a 4062(e) event has occurred, but makes a precautionary filing under Section 4063(a) (for example, to guard against the imposition of Section 4071[84] penalties). In such cases, according to the legislative history, the 30-day election period will not begin on the date of the precautionary filing:

> . . . . In order to ensure that any reporting requirement that may later be determined to apply is satisfied, an employer

[82] PBGC has not yet provided guidance regarding the applicability of its administrative review rule to various determinations under the Act. Under its existing administrative review rule, determinations by PBGC of ''the amount of liability under section 4062(b)(1), section 4063, or section 4064 of ERISA'' are subject to administrative appeal. 29 C.F.R § § 4003.1(a), .1(b)(9). Under old law, PBGC on a number of occasions had issued initial determinations that a 4062(e) event had occurred and had resulted in a specified ''amount of liability under . . . section 4063,'' and had treated those initial determinations as subject to appeal under its administrative review regulation. *See* http://www.pbgc.gov/Documents/apbletter/Decision--Bendix-Commercial-2011-08-08.pdf; http://www.pbgc.gov/documents/apbletter/Decision--Home-Meridian-Plan-2013-12-31.pdf; and http://www.pbgc.gov/documents/apbletter/Decision--Munksjo-Plan-2013-12-31.pdf.

[83] 160 Cong. Rec. S5687-S5688 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin) (emphasis added), available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm.

[84] 29 U.S.C. § 1371.

> may notify the [PBGC] of an event that the employer does not believe constitutes a substantial cessation of operations. If the employer informs the [PBGC] in writing, the notification will not trigger the 30-day period for making an election, and the 30-day period will begin when the employer agrees that the event constitutes a substantial cessation of operations or when the [PBGC] makes a final administrative determination to that effect and similarly determines the amount of the alternative liability.[85]

Whether PBGC will agree with the legislative history's discussion of these and other issues remains to be seen. Accordingly, with respect to these and the many other open issues relating to the Act, it is important to be alert to the issuance of PBGC guidance.

Conditional Elections And Related Issues. An employer may wish to make a *conditional* election of the alternative method for satisfying 4062(e) liability that may later be determined to have arisen (whether by PBGC or by the courts). The legislative history states that the Act is ''intended to allow employers to make conditional elections.''[86] According to the Harkin Floor Statement:

> . . . Of course, there may be instances in which it is uncertain as to whether [a substantial cessation of operations] has occurred or the amount of the alternative liability, if any, even after a final administrative determination has been made by the [PBGC]. In those cases, the employer would certainly not be required to make a binding election to pay amounts that may later be determined not to be due. Thus, in all cases, an election by the employer would become inapplicable to the extent that a court subsequently rules, or the [PBGC] later agrees, that a cessation has not occurred or that the alternative liability amount is lower than the amount determined by the [PBGC].[87]

The Harkin Floor Statement also indicates that, to the extent that a conditional election becomes inapplicable, the contributions previously made by the employer to satisfy the ''inapplicable liability amount'' should be treated as additional funding contributions that are not subject to the provisions of the Act; consequently, any such contributions could be treated as increasing the plan's prefunding balance.

An employer that meets PBGC's financial soundness standards under its 4062(e) enforcement policy for the first few years after the cessation of operations, may wish to make a conditional election of the alternative method in case it falls below the financial soundness standards before the end of the five-year period. According to the legislative history, in such a case, the annual amount due under the alternative liability method would be zero until PBGC makes a final administrative determination that its enforcement policy no longer applies to the employer.[88]

Time for Making Alternative Liability Payments. ERISA Section 4062(e)(4)(A) provides that the seven plan years for which the alternative liability payments are to be made begins with the plan year in which the cessation occurred; the annual contribution must be paid not later than the earlier of:

- the due date for the minimum required contribution for the plan year;

  or

- in the case of the first such contribution, the date that is one year after the date on which the employer notifies PBGC of the substantial cessation of operations or the date PBGC determines that a substantial cessation of operations has occurred, and in the case of subsequent contributions, the same date in each succeeding year.

As was the case with respect to the 30-day period for electing the alternative method (discussed above), a number of timing issues could prove to be problematic depending on how they are interpreted and applied by PBGC.

It makes sense for an employer to have appropriate notice of a PBGC determination that a cessation has occurred *prior* to the commencement of its obligation to make the first of the seven annual contributions. This reading is supported by the legislative history, which states that: ''[i]n all cases, the employer will have at least one year's advance notice of the need to make the first alternative liability payment.''[89] According to the Harkin Floor Statement:

> . . . S. 2511 is intended to prevent employers from being subject to retroactive liability and to other unreasonable payment deadlines. . . . . The intent is to ensure that, in all cases, the employer has at least one year's advance notice of the need to make the first contribution . . . . Thus, clause (2) controls where otherwise an employer could have less than a year's advance notice of the liability. That is especially important where there is uncertainty as to whether a substantial cessation has occurred or regarding the alternative liability amount because the [PBGC's] final determination might not even be made until after the due date for contributions for the year of the substantial cessation . . . . To prevent retroactive liability and other problems, clause (2) is controlling regarding the timing of the first contribution in all cases where the employer would otherwise have less than a year's advance notice of the liability. Where clause (2) is controlling, the seven annual payments would start with the first one required by clause (2).[90]

As is the case with respect to the 30-day period for electing the alternative method, the legislative history states that the one-year period for making the first additional alternative liability payment does not begin until PBGC issues a *final* determination: ''[a] PBGC determination that a substantial cessation has occurred must be a final administrative determination in order to trigger the start of the one-year period for making the first additional alternative liability payment.''[91]

The Act does not address: (1) how the seven-year payment obligation would apply with respect to an employer that makes an alternative liability election in a specified amount and it is later determined that the correct amount is higher; (2) how the seven-year payment obligation would apply with respect to an employer that meets PBGC's financial soundness standards under its 4062(e) enforcement policy for the first few years after the cessation of operations, but then falls below those

[85] 160 Cong. Rec. S5687-S5688 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin), available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm.

[86] *Id.*

[87] *Id.*

[88] *Id. See also* the discussion in the following section of this article regarding the time for making alternative liability payments, including footnote 93 and the accompanying text.

[89] *Id.*

[90] *Id.*

[91] *Id.*

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

standards before the end of the five-year period, triggering a PBGC decision to seek to enforce liability; or (3) whether an employer that seeks court review of a final PBGC determination must make the annual payments during the period the matter is being litigated.

Legislative history[92] sheds light on these issues, providing as follows:

- If the employer makes an alternative liability election in a specified amount and it is later determined that the correct amount is higher, the higher amount (presumably meaning the incremental amount) would become due pursuant to the timing rules and there would be separate seven-year periods, one for the originally elected amount and one for the higher amount (again, presumably meaning the incremental amount).

- If an employer initially qualifies for forbearance under PBGC's 4062(e) enforcement pilot program but PBGC later makes a final administrative determination that the forbearance no longer applies to the employer, the alternative liability payments are zero for any plan years in the seven-plan-year payment period until PBGC makes that final administrative determination. Including years during the seven-year period in which the payment amount is zero will ensure that a substantial cessation in one year cannot cause liabilities many years later.[93]

- PBGC and the courts have the power to stay, in whole or in part, an employer's obligation to make alternative liability payments until the court has determined whether there has been a substantial cessation and/or the alternative liability amount. If the stayed payments are later determined to be owed, the employer may owe interest on such payments.

Again, on these and other open issues relating to the Act, it is important to be alert to the issuance of PBGC guidance.

Cap on Annual Section 4062(e) Payments. For any plan year, the Section 4062(e)(4) payment to a plan under the alternative liability method cannot exceed the excess, if any, of:

(a) 25 percent of the underfunding of the plan (*determined on a variable-rate premium basis* for the *preceding* plan year, over

(b) the minimum required contribution for the plan *determined under the minimum funding rules* for the *current* plan year.

For example, assume that:

- the additional required contribution to a plan for each plan year in the seven-plan-year payment period is $5 million;

- the underfunding of the plan as determined on a variable-rate premium basis for the 2016 plan year is $24 million; and

- the minimum required contribution for the plan under the minimum funding rules for the 2017 plan year is $3.5 million.

The effect of the cap on the Section 4062(e)(4) payment for the 2017 plan year would be to reduce the payment from $5 million to $2.5 million—the excess of $6 million (*i.e.*, 25 percent of $24 million) over $3.5 million. By limiting the *total* required contribution for each plan year in the seven-plan-year payment period (*i.e.*, the minimum required contribution under the minimum funding rules for the plan year *plus* the Section 4062(e)(4) payment for that plan year) to 25 percent of the plan's underfunding on a variable-rate premium basis for the immediately preceding plan year, the Act helps to ensure that the alternative liability payments continue to bear some relationship to the plan's funding status as time goes on.

As discussed above, an open question, assuming that a Section 4062(e)(4) payment that is required to be made for a plan year in the seven-plan-year period (e.g., the 2018 plan year) can be prepaid (*e.g.*, designated, under the funding rules in Section 430 of the Internal Revenue Code, as being ''for'' the 2016 plan year), is how the rules governing the cap on the 4062(e)(4) amount for the later plan year apply to the earlier payment.

Cessation of Annual Installments When 90-Percent-Funded Level Is Reached. As discussed earlier, under the Act's exemption provisions, there is no 4062(e) liability in connection with a substantial cessation of operations with respect to a plan that is at the 90-percent-funded level under PBGC variable rate premium rules for the plan year preceding the plan year in which the cessation occurred.

Under Section 4062(e)(4)(C), if the alternative method for satisfying liability is elected with respect to a plan, an employer's obligation to make additional contributions does not apply to the first plan year in the seven-plan-year payment period (*i.e.*, the plan year during which the cessation occurs and the next six plan years) for which the plan is at the 90-percent-funded level under PBGC variable rate premium rules, or to any later plan year. Thus, whereas the 90-percent-funded exemption provision pertains to the plan year *preceding* the plan year in which the cessation occurred, the 90-percent-funded provision under the alternative liability method pertains to the plan year *during* which the cessation occurred, and to *each* of the following six plan years during the seven-plan-year payment period.

By way of illustration, an employer whose plan was not at the 90-percent funded level for the plan year *preceding* the plan year in which the cessation occurred (and thus does not qualify for the exemption), but *is* at the 90-percent-funded level for the plan year *during which* the cessation occurred, could elect the alternative method and be immediately released from the seven-year funding obligation (and from 4062(e) liability with respect to the plan)—without making *any* liability payments. An employer whose plan reached the 90-percent-funded level for the plan year after the plan year in which the event occurred (*i.e.*, plan year two of the seven-plan-year payment period) would be released from liability after making just one of the seven annual

[92] *Id.*

[93] Under this analysis, it would appear that, for example, in a case in which the employer was ''financially sound'' under the PBGC enforcement policy for only the first 4 years of the seven-plan-year alternative liability period, it would owe a total of three payments of one-seventh of the total liability amount (*i.e.*, a total of 3/7 of the total liability amount), subject to the Act's provisions: (1) setting forth a cap on the amount of the annual alternative liability payment to the plan; and (2) stating that no alternative liability payments are owed with respect to any plan year for which the 90-percent-funded test is met, nor for any plan year following such year.

additional contributions. An employer whose plan reached the 90-percent-funded level in year three of the seven-plan-year payment period would be released from liability after making two of the seven annual installments, and so forth. These rules provide additional incentives for an employer to achieve a 90-percent-funded level.

Coordination With Funding Waivers. Section 4062(e)(4)(D)(i) provides that the obligation to make the additional contribution is permanently waived with respect to any plan year for which the Secretary of the Treasury issued a funding waiver.

Section 4062(e)(4)(D)(ii) provides that an employer maintaining a plan with respect to which such a funding waiver has been issued or a request for such a funding waiver is pending must provide notice to the Secretary of the Treasury, ''in such form and at such time as the Secretary of the Treasury shall provide,'' of a substantial cessation of operations subject to Section 4062(e)(1) of the Act. Presumably the Secretary of the Treasury will issue guidance regarding these provisions, including with respect to the circumstances under which the notices must be provided,[94] the content of the notices, and the time frames within which they must be provided.

New Notice Requirements. Under Section 4062(e)(4)(E)(i),[95] if an employer has elected to use the alternative method with respect to any plan, the employer must notify PBGC of:

- the payment of each additional contribution (within 10 days of the payment);
- any failure to pay the additional contribution in the full amount for any year in the seven-plan-year period (within 10 days of the failure);
- any minimum funding waiver granted by IRS with respect to any plan year in the seven-plan-year period (within 30 days after the waiver is granted); and
- the cessation of any obligation to make additional contributions as a result of the plan reaching the requisite 90-percent-funded level (within 10 days of the due date for payment of the additional contribution for the first plan year to which such cessation applies).

Acceleration. Under Section 4062(e)(4)(E)(ii), if an employer fails to pay the additional contribution in the full amount for any year in the seven-year period by the due date for that payment, all unpaid additional contributions required to be paid by the employer to the plan for the entire seven-year period become due and payable as of the due date of the missed payment. That provision also states that PBGC may waive or settle the accelerated liability in its discretion. Legislative history[96] addresses key issues regarding the Act's acceleration provisions:

- Any acceleration of any unpaid balance should be stayed during the pendency of any administrative or judicial proceeding to determine whether there has been a substantial cessation and/or the amount of the alternative liability amount.
- If PBGC or a court finds that the employer had a reasonable basis to contest any material portion of PBGC's determination, the acceleration provision would not apply, but the employer would owe past due payments plus interest.[97]

Enforcement and Lien Issues. Section 4062(e)(4)(E)(iii) empowers PBGC to file an action in the appropriate United States district court to compel an employer making the election to pay the additional contributions.

The alternative payment contribution obligations exist only under Title IV of ERISA, and not under the Internal Revenue Code. Consequently, although an employer's failure to timely pay any portion of the required contributions could result in the acceleration of the payment obligation for all unpaid contributions for the entire seven-year period, the failure, in and of itself, would not trigger a lien under 26 U.S.C. § 430(k) or excise taxes under 26 U.S.C. § 4971.

Although, as discussed earlier, PBGC has asserted that a lien for 4062(e) liability may arise under Section 4068 of ERISA, that assertion is questionable, particularly in light of the fact that a 4068 lien arises only with respect to a terminated plan (as of the plan's termination date) and 4062(e) liability arises with respect to an ongoing plan.[98] Such an assertion would be even more untenable if made with respect to missed contributions under the alternative method for satisfying 4062(e) liability, because the liability is not owed to PBGC, it is owed to the plan. Section 4068 applies only with respect to certain liabilities owed ''to the corporation''[99]—*i.e.*, to PBGC.

Transition Rule. As discussed below, a transition rule provides that an employer that had a 4062(e) cessation of operations event before the date of enactment may elect to satisfy the liability via the alternative method under certain circumstances.

Liability if Alternative Method Is Not Elected: Amount of Liability. It is unclear how the amount of 4062(e) liability will be determined if the alternative liability option is not elected. Since 2006, the liability amount has been determined pursuant to PBGC's regulatory liability formula, 29 C.F.R § 4062.8. PBGC's regulatory liability formula is based on the prior statutory language, which

[94] For example, if a waiver request is pending or was granted with respect to the 2015 plan year, must the Section 4062(e)(4)(D)(ii) notice be filed with respect to a substantial cessation of operations that occurs in the 2016 plan year?

[95] As previously discussed, the plan administrator continues to have an obligation under 29 U.S.C. § 1363(a), within a 60-day period, to notify PBGC of a Section 4062(e) event and to request that PBGC determine the resulting liability. There also continues to be a requirement, under ERISA Section 4043 and PBGC's implementing regulations, that the plan administrator or contributing sponsor notify PBGC of a reportable event within a 30-day period (absent a waiver or extension). 29 U.S.C. § 1343, 29 C.F.R. Part 4043, Subparts A and B; *see, e.g.*, 29 C.F.R. § 4043.23(a) (active participant reduction reportable event). As discussed earlier in this article, the pre-Act reportable events requirements have not been changed.

[96] 160 Cong. Rec. S5687-S5688 (daily ed. Sept. 17, 2014) (statement of Sen. Harkin), available at http://www.gpo.gov/fdsys/pkg/CREC-2014-09-17/html/CREC-2014-09-17-pt1-PgS5687-2.htm.

[97] There is no discussion regarding what interest rate would be used under these circumstances.

[98] *See* footnote 25 and accompanying text.

[99] 29 U.S.C. § 1368(a).

COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

provided that the numerator used for the 4062(e) liability trigger is determined by reference to the total number of plan participants who are separated from employment "as a result of" the cessation of operations. As explained above, under the Act, it is clear that only those participants who work "at the facility" where operations ceased may be included in the numerator. Moreover, as discussed earlier, the Act's relocation of workforce and transfer of operations rules[100] provide that certain eligible employees shall not be taken into account in computing a workforce reduction.

Particularly given the provision of the Act (discussed in some detail below) that prohibits PBGC (absent a settlement in place before June 1, 2014) from taking "any enforcement, administrative, or other action pursuant to Section 4062(e) . . . that is inconsistent with" the new rules in the Act, it is questionable whether PBGC could (or would) seek to apply the current formula—which is based on statutory language that has been repealed and replaced—to cases subject to the Act. PBGC might decide to apply the current formula in a modified manner that would reduce the numerator of the liability fraction to conform to current law, or seek to change the current rule (presumably through a rulemaking action) in some manner. It is to be hoped that PBGC guidance regarding this issue will be forthcoming.

It is worth noting that it will be an unusual case in which it would be advantageous for an employer *not* to elect the alternative method for satisfying 4062(e) liability, largely because the measure of plan underfunding used under the alternative method, *i.e.*, unfunded vested benefits on a PBGC variable-rate premium basis, usually results in a significantly smaller underfunding amount than that used under PBGC's regulatory liability formula, *i.e.*, unfunded benefit liabilities on a plan termination basis. However, even in a case where the amount of liability under the regulatory liability formula is lower than the amount of liability under the alternative method, the alternative method has some significant advantages.

The alternative method does not require a negotiated agreement with PBGC, but instead specifies terms that are likely to be more favorable than the types of provisions PBGC has successfully sought under prior law. Thus, liability under the alternative method:

- is paid in installments over a seven-year period;
- is subject to an annual cap; and
- ceases with respect to any plan year in which the plan is 90-percent-funded and each year thereafter.

Moreover, a PBGC assertion that the lien provisions in Section 4068 are applicable in an alternative liability context would appear to be even more untenable than such an assertion would be in the standard liability context.

Liability if Alternative Method Is Not Elected: Manner of Satisfaction of Liability. As discussed above, the Act does not alter the statutory provisions governing the manner in which 4062(e) liability is to be satisfied (*i.e.*, through an escrow payment to PBGC of the liability amount or, if PBGC so requires, the purchase of a bond for up to 150 percent of the liability amount). However, it is likely that, in a case in which the alternative liability method is not elected, PBGC would continue the approach it took under prior law of seeking a negotiated resolution of 4062(e) liability calling for additional contributions to be made to the plan over a period of years, perhaps with a combination of other forms of protection (*e.g.*, the provision of security or a letter of credit).[101] It is possible that, under appropriate circumstances and with appropriate provisions in such an agreement, a negotiated resolution of the 4062(e) liability (rather that the resolution provided for by the alternative liability method) could best meet the employer's business needs. Special care should be taken, of course, to assure that the deadline for electing the alternative liability option is not overlooked during the course of attempting to reach a settlement.

Effective Date and Related Special Rules

The new provisions apply to cessations of operations or other events at a facility that occur on or after the Dec. 16, 2014, date of enactment, subject to a number of special rules.

PBGC Enforcement Restriction: Pre-Enactment Cases. PBGC is prohibited from taking "any enforcement, administrative, or other action" that is inconsistent with the new statutory rules with respect to pending cases, without regard to whether the cessation or other event occurred before, on, or after the date of enactment.[102] The only exception is with respect to cases in which a settlement agreement was in place before June 1, 2014.

Thus, as a practical matter, PBGC is prohibited from pursuing liability with respect to a pre-enactment cessation or other event with respect to a plan (absent a settlement agreement that is in place before June 1, 2014) if: (1) the cessation or other event would not constitute a "substantial cessation of operations" with respect to that plan under the new rules; (2) the plan qualifies for the small plan statutory exemption under the new rules; or (3) the plan qualifies for the 90-percent-funded statutory exemption under the new rules.

For example, assume that, a cessation of operations occurred on July 15, 2012, and resulted in the separation from employment of more than 20 percent of active plan participants, thus triggering 4062(e) liability under prior law. However, the employer's workforce reduction was 15 percent or less of all eligible employees (as determined under the Act). If no settlement agreement was in place before June 1, 2014, PBGC is prohibited from taking any "enforcement, administrative, or other action" with respect to the 4062(e) liability that arose under prior law.

A slightly different example would lead to the same result. Assume that the July 15, 2012, cessation of operations that triggered liability under prior law *would*

[100] Section 4062(e)(2)(C) and (D), respectively.

[101] Although PBGC has the authority under Section 4067 of ERISA, 29 U.S.C. § 1367, to settle liability under 29 U.S.C. §§ 1362, 1363, and 1364 for less the full amount of the asserted liability, it was generally PBGC's practice under prior law to insist that 4062(e) settlements be for the full amount of the asserted liability, whether through payment in full (generally over a period of years) of the asserted liability via extra contributions to the plan, or via a combination of payment and the provision of other forms of protection.

[102] Section 1(c) of Division P of the Act.

cross the Act's 15 percent workforce reduction liability threshold. If the plan at issue met the Act's 90-percent-funded exemption standard for the prior plan year (*e.g.*, the 2011 plan year for a calendar-year plan), there would be no 4062(e) liability with respect to that plan, and PBGC would be prohibited from taking any action with respect to the liability.

It is important to note that the Act does not *create* 4062(e) liability with respect to a pre-enactment cessation of operations at a facility in any location. For example, assume that a pre-enactment cessation resulted in the separation of only 10 percent of active participants in a PBGC-covered plan maintained by the employer, and that, consequently, the cessation did not trigger liability under prior law. Assume further that the cessation resulted in the separation from employment of eligible employees at the facility that constituted 16 percent of the total number of the employer's eligible employees (as determined under the Act). Even though the event would have resulted in liability under the Act if it had occurred on or after the Dec. 16, 2014, date of enactment, the Act does not create liability with respect to such a case.

As noted earlier, PBGC has stated that it ''may be contacting employers that previously reported a cessation for additional information to determine whether and how the new rules apply to that event.''[103] PBGC has not yet commented regarding how and when an employer would find out whether PBGC intends to take action in connection with a pending case. It is thus not known whether PBGC will issue no-action letters with respect to pending pre-enactment cases that are no longer subject to liability because of these provisions.

Availability of Alternative Option: Pre-Enactment Cases. Employers that had a cessation of operations before the Dec. 16, 2014, date of enactment (as determined under ERISA Section 4062(e) as in effect before that date), but did not enter into an arrangement with PBGC to satisfy the liability before that date, would be permitted to make the election to satisfy the liability by using the alternative method (described above) as if the cessation had occurred on the date of enactment. (This of course assumes that the restriction on PBGC enforcement of pre-enactment cases discussed above does not apply.) The election must be made not later than 30 days after PBGC issues, on or after the date of enactment, a final administrative determination that a substantial cessation of operations (as defined under the new statutory rules) has occurred.

If the employer elects the alternative liability method to satisfy the liability that arose under prior law, the liability amount would be determined as if the cessation of operations occurred on the date of enactment—Dec. 16, 2014. Thus, assuming a calendar-year plan and continuing with the example of a cessation that occurred on July 15, 2012:

- the liability amount would be based on the amount of the plan's unfunded vested benefits determined under variable rate premium rules for the 2013 plan year (*i.e.*, the plan year preceding the plan year in which the cessation is *deemed* to have occurred), regardless of what that amount would have been for the plan year preceding the plan year in which the pre-enactment cessation *actually* occurred (*i.e.*, in this example the 2011 plan year based on the cessation actually occurring in the 2012 plan year);[104] and
- if the plan meets the 90-percent-funded standard for the 2014 plan year, the employer would be immediately released from the obligation to make the seven annual contributions otherwise required under the alternative method—without making any of the contributions.

PBGC Enforcement Restriction: Enforcement Policy. PBGC is prohibited from initiating a new 4062(e) enforcement action that is inconsistent with its enforcement policy as in effect on June 1, 2014.[105] However, as discussed earlier, it is important to recognize that PBGC's enforcement guidelines provide that: (1) PBGC may conclude that a company that otherwise meets the general criteria for financial soundness presents signs of financial weakness and therefore is not financially sound, and (2) PBGC may take enforcement action against an employer it had deemed to be financially sound if PBGC concludes, later in the five-year liability period, that the employer no longer is financially sound.

That said, the Act's prohibition of new PBGC enforcement actions that are inconsistent with its existing enforcement policy is a meaningful—and welcome—restriction on PBGC's ability to adopt a more aggressive enforcement policy. Note that there is no restriction on PBGC's ability to adopt a less aggressive enforcement policy. Thus, for example, PBGC could change its current definition of ''small-plan'' cases (the plan's flat-rate premium participant count is under 100 as of the measurement date) so that it applies to any plan with a participant count of under 500; it could not, however, change the definition so that it applies, for example, only to a plan with a participant count of under 50.

The Act's prohibition of new PBGC enforcement actions that are inconsistent with its existing enforcement policy applies to both pre-enactment and post-enactment cases.

Planning Considerations

Understanding the new 4062(e) liability rules and properly evaluating their impact will be of critical importance to an employer that wants to be sure to avoid unpleasant surprises and also wants to minimize or eliminate exposure for this potential liability.

Pre-transaction Planning. It is worth emphasizing the need to thoroughly consider the 4062(e) implications of potential transactions *before* a transaction is implemented. By doing so, an employer may be able to structure its ongoing business operations, and a transaction, in a way that strengthens the business—and, thus, its

---

[103] The quoted language is from the PBGC announcement regarding the new 4062(e) provisions, available at: http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html.

[104] If the plan meets the 90-percent-funded standard for the plan year preceding the plan year in which the pre-enactment cessation *actually* occurred, the restriction on PBGC enforcement of pre-enactment cases would of course apply, assuming no settlement agreement was in place before June 1, 2014.

[105] PBGC's enforcement policy is discussed in the sections entitled ''Section 4062(e) Enforcement Pilot Program and Enforcement Guidelines'' and ''Exemption for Small Plans.''

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.

PBGC-covered pension plan(s)—without incurring unnecessary costs.

For example, an employer, where feasible, could make excess contributions to a plan so that it would meet the 90-percent-funded level as of the valuation date for either:

- the plan year preceding the plan year in which an anticipated cessation of operations is expected to occur, thus satisfying the statutory exemption provision; or

- the plan year in which the cessation of operations occurs, (with the employer electing the alternative liability method for satisfying 4062(e) liability), thus ensuring that the obligation to make seven annual installment payments would cease before even one installment payment is made.

Even if the 90-percent-funded level is out of reach for the plan year preceding the plan year of an anticipated cessation, the employer may nonetheless want to make excess contributions to increase the funded level as of the valuation date for that plan year, so that the alternative liability amount would be reduced. For example, if a cessation is anticipated to occur in early 2016, the employer may want to make an excess contribution to its calendar-year plan in early September of 2015 and designate that contribution to the 2014 plan year, thus reducing the plan's unfunded vested benefits for the 2015 plan year. As discussed earlier in this article, excess contributions for a plan year may, in certain circumstances, be used to offset minimum required contributions for the next plan year, and will also result (for an underfunded plan) in a reduction in the variable-rate premium owed to PBGC.

Another step an employer could take if feasible, of course, would be to limit the number of eligible employees who would be treated as having been separated from employment at the facility (taking into account the the Act's relocation of workforce and transfer of operations provisions) in connection with a cessation of operations. Doing so could mean the difference between a cessation that results in a workforce reduction that is greater than 15 percent—thus triggering a 4062(e) event—or one that is 15 percent or less. Thus an employer considering a significant cessation of operations that might constitute a 4062(e) event would be well-advised to consider the feasibility of various methods of preserving jobs (*e.g.*, transferring or replacing employees, or reducing hours rather than headcount).

Similarly, even if there is no feasible way to save enough jobs to avoid crossing the 15 percent threshold and thus triggering a 4062(e) event, saving at least some jobs may lead to a substantial liability reduction. Consider the situation of an employer that will experience an overall workforce reduction exceeding the 15 percent level (even if all jobs that could conceivably be saved were saved) as a result of the cessation of operations at a facility, and who maintains a legacy plan for which the amount of unfunded vested benefits to be used in determining the alternative liability amount is $150 million, has thousands of retirees and deferred vested participants, and has only 10 active plan participants—all of whom work at that facility. If all 10 participants separate (and are treated as having separated) from employment ''by reason of'' the cessation, the total 4062(e) alternative liability amount would be $150 million—$15 million for each of the 10 affected active participants. If it is feasible for the employer to take steps to save the jobs of some or all of the participants who would otherwise be counted in the numerator of the plan-specific reduction fraction, doing so would reduce the employer's total 4062(e) alternative liability amount by up to $15 million for each job saved.

There are numerous other potential options that may be worth considering in appropriate circumstances.

Post-Transaction Due Diligence and Analysis. Once it appears possible that—or PBGC asserts that—a 4062(e) event has occurred under the Act, it is essential that an employer accurately identify and count the number of eligible employees who are properly included in the ''workforce reduction'' under Section 4062(e)(2)(B) (the numerator used for the 15 percent liability trigger) and the number of all eligible employees who are properly included under Section 4062(e)(2)(A) (the denominator used for the 15 percent liability trigger). Errors in these counts may result in a conclusion that a 4062(e) event has occurred when it has not. It will be equally important that the plan-specific ''reduction fraction'' used under Section 4062(e)(4)(B) for calculating the amount of liability under the alternative liability method be accurately determined with respect to each plan with respect to which an event has occurred or may have occurred.

In order to accurately identify and count the relevant employees—both for purposes of the liability trigger and for purposes of the plan-specific reduction fraction—it is necessary to have a thorough understanding of the applicable provisions (including the rules regarding identifying, excluding, and including eligible employees), and to complete careful due diligence in reviewing relevant employment and pension plan records to identify each eligible employee who must be included (or excluded) for these purposes. It is also important to be aware of the many unresolved questions and to make informed judgments with respect to them.

Given the complexity of the statutory rules and the numerous unanswered interpretative questions (some but not all of which are discussed above), as well as the varied facts and circumstances each case will undoubtedly present, the necessary tasks will be challenging indeed.

Loan Agreements and Other Corporate Matters. It is important that an employer be on the lookout for the implications that an actual or potential 4062(e) event may have on other aspects of its business—for example, with respect to obligations under WARN or under corporate loan agreements. With respect to a loan agreement, for example, is a particular occurrence reportable to the lender under the agreement? Is it an event of default? These types of questions should be considered in advance; if they are not, unpleasant surprises may follow.

Continuing Applicability of PBGC Early Warning Program

Even if there is no 4062(e) liability in a particular factual context—whether it be, for example, because the PBGC-covered plan involved is exempt or because the workforce reduction percentage is 15 percent or less, or for any other reason—PBGC may nonetheless have concerns about the employer or its plan. PBGC continues to

have an active "Early Warning Program,"[106] under which it may seek protection from an employer under certain circumstances.

Even if there is no 4062(e) liability, PBGC may seek protection under its "Early Warning Program."

Section 4042(a) of ERISA[107] empowers PBGC to initiate involuntary termination proceedings regarding a PBGC-covered pension plan under specified circumstances.[108] In seeking protection from employers under the Early Warning Program, PBGC relies primarily on its statutory authority under Section 4042(a)(4)[109] to initiate termination proceedings if it determines that "the possible long-run loss of the [PBGC] may reasonably be expected to increase unreasonably if the plan is not terminated."

[106] *See* PBGC Technical Update 00-3 (July 24, 2000) (available at http://www.pbgc.gov/prac/other-guidance/tu/tu00-3.html) and "Early Warning Program Fact Sheet (available at http://www.pbgc.gov/about/factsheets/page/early-warning.html). Note that the Early Warning Program screening criteria discussed in PBGC Technical Update 00-3 and in the Early Warning Program Fact Sheet incorporate pre-Pension Protection Act funding concepts, and thus are no longer applicable. PBGC staff has stated in informal guidance that its Early Warning Program screening criteria call for monitoring of employers with pension plans that, in the aggregate (on a controlled-group-wide basis), have $50 million or more in underfunding or 5,000 or more participants, but that PBGC also monitors employers for other reasons as appropriate (http://www.pbgc.gov/Documents/2011bluebook.pdf (PBGC staff response to question 19); http://www.pbgc.gov/Documents/2013bluebook.pdf (PBGC staff response to question 22(a) and (c)); http://www.americanbar.org/content/dam/aba/events/employee_benefits/2014_pbgc_qa.authcheckdam.pdf (PBGC staff response to question 22). However, more recently, at an Oct. 20, 2014, session ("Conversations With PBGC") at the 2014 Conference of Consulting Actuaries Annual Meeting in Rancho Mirage, California, a senior PBGC official stated that the underfunding criterion has been changed to *$25 million* or more in underfunding (still determined on an aggregate controlled group basis and still subject to the caveat that PBGC may monitor other employers depending on the facts and circumstances).

[107] 29 U.S.C. § 1342(a).

[108] PBGC does not have the authority to unilaterally terminate a covered pension plan. Absent an agreement with the plan administrator, a termination decision is made by the appropriate United States district court under the provisions of 29 U.S.C. § 1342(c). The relevant standard under that provision is whether the plan "must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the [PBGC insurance] fund."

[109] 29 U.S.C. § 1342(a)(4).

If PBGC has concerns about the level of its exposure and/or risk with respect to a plan (whether in connection with a particular transaction or otherwise), it may contact the employer to request additional information. Depending on the particular matter, PBGC may seek protection that it believes desirable or necessary in order to reduce its exposure and/or risk. PBGC may implicitly or explicitly indicate that, absent such protection, it may consider, or will initiate, involuntary termination proceedings with respect to the plan, relying on its authority under Section 4042(a)(4). Such an action could create a cascade of negative consequences for an employer.

Thus—whether or not a particular transaction constitutes a 4062(e) event—evaluating the likely or possible level of PBGC concern regarding the transaction will continue to be necessary. If any potential PBGC concerns are anticipated in the planning process, it may be possible to address those concerns *before* they arise (or to be prepared to efficiently and effectively address them if they do arise).

Conclusion

The Act, which provides welcome relief as well as a potentially quite favorable new option for satisfying 4062(e) liability, reflects a recognition that—as employers have asserted for years—PBGC's expansive interpretations and aggressive enforcement of Section 4062(e) needed to be curtailed. Under the Act, 4062(e) liability will arise only in circumstances where there has been a major downsizing, and the liability will be both more predictable *and* more reasonable. For many employers, the Act will provide the certainty that was often unavailable under prior law.

But the Act also contains provisions that will require a great deal of careful thought on the part of the employer. Moreover, although the new rules are far more rational and will trigger 4062(e) liability in far fewer situations, in those cases where the new rules could potentially trigger 4062(e) liability, the task of evaluating the 4062(e) implications will in some respects be more challenging than under prior law. This is both because the Act—while providing welcome relief—is also complex, and because there are so many unanswered questions (both new and old) regarding various aspects of 4062(e) liability. These unanswered questions make it critical to be alert to new developments as the law is implemented, including the issuance of PBGC guidance in whatever form.

As was true under prior law, appropriate planning *before* a transaction is implemented may minimize, or even eliminate, potential 4062(e) liability with respect to one or more plans. Similarly, careful due diligence and analysis *after* a transaction is implemented is essential. To take full advantage of the long-sought reforms that are now in the law, it is important that an employer be well-advised so that appropriate due diligence regarding potential, planned, or completed transactions is grounded in a thorough understanding of the generally very helpful, but sometimes quite complex, statutory rules.

 COPYRIGHT © 2015 BY THE BUREAU OF NATIONAL AFFAIRS, INC.