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## ABA Joint Committee on Employee Benefits

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### **Experts' Guide to Researching Employee Benefits Issues**

Researching PBGC Issues:  
The Basics and Beyond

July 22, 2010

## Presented by

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## Overview

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- Key PBGC Issues
  - PBGC Legislative/Regulatory Framework
  - PBGC Case Law
  - PBGC Guidance—Beyond the Regulations and Case Law
  - Other Sources
  - Contacting PBGC
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3

## Key PBGC Issues

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- Coverage (ERISA § 4021)
  - Premiums and related audits and penalties (ERISA §§ 4006–4007)
  - Annual employer reporting (ERISA § 4010)
  - Reportable events (ERISA § 4043)
  - Information penalty assessments/waivers (ERISA § 4071)
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4

## Key PBGC Issues (Cont.)

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- ❑ Facility shutdown liability (ERISA § 4062(e))
- ❑ \$1M+ missed contribution liens (ERISA § 303(k); IRC § 430(k))
- ❑ “Early Warning”/“Risk Mitigation” program
- ❑ Standard terminations and related audits (ERISA §§ 4003(a), 4041(b))
- ❑ Distress terminations (ERISA § 4041(c))
- ❑ Involuntary (PBGC-initiated) terminations (ERISA § 4042)
- ❑ Controlled group determinations/liabilities (ERISA §§ 4001, 4062–4064, 4068)

5

## Key PBGC Issues (Cont.)

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- ❑ Employer liability and unpaid contributions (ERISA § 4062(a)–(c))
- ❑ Multiple-employer plan liability (ERISA §§ 4063–4064)
- ❑ Bankruptcies and workouts (ERISA §§ 4041, 4042, 4062, 4068)
- ❑ Benefit determinations and appeals (ERISA §§ 4003, 4022, 4044)
- ❑ Multiemployer plan matters (ERISA §§ 4022A, 4022B, 4041A, 4201–4402)

6

## PBGC Legislative/Regulatory Framework

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### Legislative

- Most provisions in ERISA Title IV
  - ERISA §§ 4001–4402
  - 29 U.S.C. §§ 1301–1461
- Some non-Title IV provisions (*e.g.*, \$1M+ missed contribution liens in ERISA § 303(k); IRC § 430(k))
- Check legislative history
  - GPO: [gpoaccess.gov/index.html](http://gpoaccess.gov/index.html)
  - Thomas: [thomas.loc.gov](http://thomas.loc.gov)
  - Key committee websites (Joint Tax, Senate Finance, Senate HELP, House Ways/Means, House Ed./Labor)
  - Subscription services (*e.g.*, BNA, CCH, RIA, Lexis, Westlaw)

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7

## PBGC Legislative/Regulatory Framework (Cont.)

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### Regulatory

- All in 29 CFR Parts 4000–4907
- CFR “Part” numbers track ERISA Title IV § numbers
- Current (“real time”) CFR available at [pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13188.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13188.html)
- Check Fed. Reg. preambles/notices (significant guidance!)
  - 7/1/96 forward: [pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13189.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13189.html)
  - 1994 forward: [www.gpoaccess.gov/fr/index.html](http://www.gpoaccess.gov/fr/index.html)
  - Earlier: subscription services

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8

## PBGC Case Law

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- Significant body of case law
  - PBGC is active litigant!
    - Has independent litigating authority
    - Particularly active in bankruptcy cases
  - Much case law on plan termination and related liabilities
  - Little case law on ongoing compliance (*e.g.*, premiums, reporting, penalties)
- Reporting/subscription services (*e.g.*, BNA, CCH, RIA, Lexis, Westlaw, Colliers, Norton)

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9

## PBGC Guidance—Beyond the Regulations and Case Law

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- Start with PBGC website: [pbgc.gov](http://pbgc.gov)
  - Helpful “search”/“advanced search” capability
  - Most guidance under “Practitioners” page: [pbgc.gov/practitioners/index.html](http://pbgc.gov/practitioners/index.html)
  - Keeping up to date:
    - Check practitioners’ “What’s New” page: [pbgc.gov/practitioners/whatsnew.html](http://pbgc.gov/practitioners/whatsnew.html)
    - Sign up for email notifications (same page)
    - Check news releases: [pbgc.gov/media](http://pbgc.gov/media)

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10

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- Forms and instructions
  - Significant additional guidance!
  - Available at [pbgc.gov/practitioners/index.html](http://pbgc.gov/practitioners/index.html)
  - Use *current* version (updated periodically)
- PBGC “Technical Updates”
  - Explanations, interpretations, reporting relief
  - Available at [pbgc.gov/practitioners/law-regulations-informal-guidance/content/index.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/index.html)
  - Generally not binding on public, but wise to follow!

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11

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- PBGC Opinion Letters
  - Most issued in early years (none since 2002)
  - Available at [pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13191.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13191.html)
  - Not designed to dispose of particular controversies
  - Not binding
  - May be entitled to deference (per Op. Ltr. 87-7)

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12

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- ❑ PBGC Appeals Board decisions
  - Recent (post-9/30/02) full Board decisions available at [pbgc.gov/practitioners/law-regulations-informal-guidance/content/page15626.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/page15626.html)
  - Primarily involve benefit claims
  - Other issues too (*e.g.*, coverage, employer liability)
  - Not binding on other parties, but helpful guidance
- ❑ FAQs
  - Wide variety of PBGC areas
  - Available at PBGC website under particular topics

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13

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- ❑ PBGC Annual Reports:  
[pbgc.gov/about/annreports.html](http://pbgc.gov/about/annreports.html)
- ❑ PBGC Data Books:  
[pbgc.gov/practitioners/plan-trends-and-statistics/content/page13270.html](http://pbgc.gov/practitioners/plan-trends-and-statistics/content/page13270.html)
- ❑ PBGC Research Reports:  
[pbgc.gov/media/key-resources-for-the-press/content/page13695.html](http://pbgc.gov/media/key-resources-for-the-press/content/page13695.html)
- ❑ PBGC Fact Sheets:  
[pbgc.gov/media/key-resources-for-the-press/content/page13538.html](http://pbgc.gov/media/key-resources-for-the-press/content/page13538.html)
- ❑ Various other PBGC publications:  
[pbgc.gov/media/key-resources-for-the-press/content/page14802.html](http://pbgc.gov/media/key-resources-for-the-press/content/page14802.html)

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14



## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- PBGC litigation briefs may contain useful guidance
  - Example: briefs with PBGC position on proof needed for “reorganization” distress test (“road map” for debtor)
  - Obtain through PACER, FOIA, counsel in other case
- PBGC settlements may provide some “practice” guidance (generally available through FOIA)
- PBGC staff instructions, guidelines, etc. (generally available through FOIA)

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15

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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- ABA JCEB Qs/As with PBGC
  - Summary: Qs/As at annual JCEB/PBGC meeting
  - Strong disclaimer, but helpful guidance (various areas)
  - Available (1994 to date) at [abanet.org/jceb/qanda.html](http://abanet.org/jceb/qanda.html)

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16

## PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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### □ PBGC “Blue Books”

- Summary: Qs/As at annual “Enrolled Actuaries Meeting”
  - Analogous to older IRS “Gray Book” and newer DOL “Green Book”
  - Prepared in 1998 and each year from 2000 forward
- Significant guidance on premiums, reporting, standard terminations, guaranteed benefits, other areas
- Most content useful to attorneys (not just actuaries)
- Strong disclaimer, but on PBGC website as “informal guidance” and PBGC staff discusses at EA Meeting
- Available at [pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html](http://pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13190.html)

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17

## Other Sources

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### □ Internet sources, including:

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| ■ <a href="http://abanet.org">abanet.org</a>                                   | ■ <a href="http://ebri.org">ebri.org</a>         |
| ■ <a href="http://actuary.org">actuary.org</a>                                 | ■ <a href="http://eric.org">eric.org</a>         |
| ■ <a href="http://americanbenefitscouncil.org">americanbenefitscouncil.org</a> | ■ <a href="http://freerisa.com">freerisa.com</a> |
| ■ <a href="http://asppa.org">asppa.org</a>                                     | ■ <a href="http://ifebp.org">ifebp.org</a>       |
| ■ <a href="http://benefitslink.com">benefitslink.com</a>                       | ■ <a href="http://ipebla.org">ipebla.org</a>     |
| ■ <a href="http://ccactuaries.org">ccactuaries.org</a>                         | ■ <a href="http://soa.org">soa.org</a>           |
| ■ <a href="http://coffi.org">coffi.org</a>                                     | ■ Websites of actuarial, accounting, law firms   |

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18

## Other Sources (Cont.)

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- Reporting/subscription services (*e.g.*, BNA, CCH, RIA, Lexis, Westlaw, Colliers, Norton)
- *Employee Benefits Law*, 2<sup>nd</sup> Ed. & 2009 Cum. Supp., Ch. 9 (ABA Labor & Employment Law Section (BNA))
- *ERISA Fiduciary Answer Book*, 5<sup>th</sup> Ed. & 2008 Supp., Ch. 10 (Aspen)

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19

## Other Sources (Cont.)

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- *ABI's Pension Manual: A Practical Guide to Pension Issues* (American Bankruptcy Institute)
- *Pension Plan Terminations* by Veal & Mackiewicz
  - Last published in 1998 (BNA)
  - Updated thru 3/26/07 at [stromata.tripod.com/id373.htm](http://stromata.tripod.com/id373.htm)
- *Multiemployer Plans—Special Rules* by Kushner (BNA Tax Management Portfolio)

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20

## Contacting PBGC

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- ❑ Detailed practitioner contact information:
  - [pbgc.gov/practitioners/contact.html](http://pbgc.gov/practitioners/contact.html)
- ❑ General legal questions related to PBGC:
  - Office of General Counsel
  - (202) 326-4400 or [askogc@pbgc.gov](mailto:askogc@pbgc.gov)
- ❑ ERISA/bankruptcy legal questions:
  - Office of Chief Counsel
  - Ask for (rotating) "general inquiry attorney"
  - (202) 326-4020
- ❑ Legislative/regulatory questions:
  - Legislative and Regulatory Department
  - (202) 326-4024

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21

## Contacting PBGC (Cont.)

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- ❑ General practitioner phone number:
  - (800) 736-2444
- ❑ Unresolved practitioner problems:
  - Diane Morstein
  - Problem Resolution Officer for Practitioners
  - (800) 736-2444, ext. 4136, or [practitioner.pro@pbgc.gov](mailto:practitioner.pro@pbgc.gov)
- ❑ General participant phone number:
  - (800) 400-PBGC (7242)
- ❑ Unresolved participant problems:
  - Problem Resolution Officer for Participants
  - (800) 400-PBGC (7242) or [participant.pro@pbgc.gov](mailto:participant.pro@pbgc.gov)



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22