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Defined Benefit Plans

PBGC Changes 4062(e) Enforcement; Financially Sound Plans Exempt, Agency Says

The Pension Benefit Guaranty Corporation Nov. 2 announced changes in its enforcement practices regarding Section 4062(e) of the Employee Retirement Income Security Act, and issued frequently-asked-questions and answers on the changes.

ERISA Section 4062(e) requires that, if a company ceases operations at a facility that results in 20 percent of employees who are plan participants losing their jobs, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups (ERISA sections 4063 and 4064). Also, under Section 4065, the plan administrator must report this liability to PBGC.

Under the new enforcement effort, PBGC is starting a ''pilot program that focuses enforcement on companies where there is a higher risk of default. Companies that are financially sound by existing measures will not be required to provide financial assurance of any kind,'' the agency said in a news release.

''Instead of using a one-size-fits-all approach, we are focusing on the handful of companies that pose real risk,'' PBGC Director Joshua Gotbaum said in the release. ''For most companies, it will mean fewer requirements and less hassle—and it will let us use our resources where they're really needed,'' he said.

In 2010, PBGC proposed a rule on the application and enforcement of employer liabilities and reporting requirements under Section 4062(e) (152 PBD, 8/10/10; 37 BPR 1809, 8/17/10).

PBGC also released a set of FAQs regarding the new enforcement policy and the pilot program. The FAQs address several issues concerning the policy change, including the reasoning behind it, how the change affects small plans, and how the agency defines creditworthiness. An answer to one of the FAQs states that PBGC is using the pilot program to gauge how to modify the 2010 proposed regulation.

The agency said that, as a result of its new approach, 92 percent of companies sponsoring defined benefit pension plans will not face PBGC enforcement efforts, including plans with 100 or fewer participants, PBGC said. Agency spokesman Marc Hopkins told BNA Nov. 2 that the 92 percent was derived from a survey of the plans that PBGC insures.

Hopkins said the enforcement change will apply to pending cases under Section 4062(e). Additionally, when a Section 4062(e) event occurs, financially sound companies, both large and small, will still need to report the event to PBGC, but the agency will not take enforcement action, an answer to one of the FAQs states.

Reasoning Behind the Change. PBGC said the change in enforcement policy is a result of a 2011 executive order from President Obama, which requires federal agencies to review all of their existing and pending regulations for possible modification or elimination (12 PBD, 1/19/11; 38 BPR 151, 1/25/11).

''Companies sponsoring pension plans have long said that PBGC imposed requirements even when plans posed little or no risk of defaulting on their pension obligations. After the Presidentially-mandated review, PBGC agreed. The agency also concluded that, by targeting, it could both respond to industry concerns and preserve plans more effectively, too,'' PBGC said in the news release.

PBGC said it is applying its new approach to its financial assurance program under Section 4062(e), but the agency is not creating ''new financial soundness standards.'' In the accompanying FAQs, PBGC said the standards it will be using include ''common financial measures of financial soundness such as credit ratings, credit scores, indebtedness, liquidity, and profitability.''

Section 4062(e) Controversy. The 2010 proposed rule was met with a lot of push-back from employer groups, including the ERISA Industry Committee (220 PBD, 11/17/10; 37 BPR 2533, 11/23/10), the American Benefits Council (ABC), the U.S. Chamber of Commerce, and the American Society of Pension Professionals and Actuaries (ASPPA) (198 PBD, 10/15/10; 37 BPR 2263, 10/19/10).

PBGC's enforcement efforts surrounding Section 4062(e) sparked some controversy, with several employer groups writing a letter to PBGC in December 2011 asking that it cease all enforcement actions that are based on the Section 4062(e) proposed regulations (246 PBD, 12/23/11; 39 BPR 6, 1/3/12).

Harold J. Ashner, a partner with Keightley & Ashner, Washington, told BNA Nov. 2 that the 2010 proposal ''adopted an expansive view as to the circumstances in which [Section] 4062(e) liability can be triggered, including where there is a going-concern asset sale or operations simply transfer to another location.''

Ashner said that, while PBGC's announcement does not indicate the agency is changing its interpretation of Section 4062(e), he is ''hopeful that PBGC will reconsider many of the interpretations in the 2010 proposal as it gains further experience under the pilot program.''

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Reaction to Change. Kent A. Mason, a partner at Davis & Harman in Washington, told BNA Nov. 2 that Section 4062(e) states that, for its requirements to kick in, there be a cessation of operations at a facility and that employees lose their jobs, but that PBGC's reading of the statute is different and often includes situations in which operations do not cease and employees do not lose their jobs. Mason said PBGC is ''enforcing a version of 4062(e) that has really very little relationship to the statute.''

Mason also raised concerns as to how PBGC will judge the creditworthiness of companies.

''I have been always concerned about distinguishing in the pension world between companies that have good credit and companies with not-as-good credit. These concerns arise by virtue of the fact that, by applying the toughest, most onerous rules on the companies with less good credit, it's going to hinder economic recovery, which also hurts PBGC,'' he said.

''You could be putting hundreds of millions of dollars of liabilities on companies that are having challenges today, and that's not good for their economic recovery, and in the long term, is not good for the PBGC, which only inherits liabilities when companies go out of business. So I think this is counterproductive to the economic recovery, and I think it's counterproductive to the PBGC,'' Mason said.

Lynn D. Dudley, senior vice president of policy at ABC, echoed Mason's concerns, saying that allowing PBGC to assess a company's creditworthiness is ''a very risky proposition.''

''I can see how some companies that are creditworthy would benefit from not having it enforced, or a very small company would benefit from not having it enforced. The problem is that it's kind of all based on a faulty principle and that's that they're interpreting the statute very differently than we do,'' Dudley told BNA Nov. 2.

''We think the statute's fairly clear that it's talking about a shutdown, and [PBGC's] not talking about a shutdown, not exclusively. They're not talking about the statute. And so for us, that's a fundamental flaw, and it's hard to endorse something that's fundamentally flawed,'' she said.

Good for Small Businesses. Judy A. Miller, chief of actuarial issues at ASPPA, told BNA Oct. 31 that this is a ''smart move'' on PBGC's part and ASPPA is ''very pleased that they're going in that direction.''

In a 2010 comment letter, ASPPA proposed a small plan exception because ''4062(e) is generally not relevant for small employers because they tend not to have multiple operations and terminate the plan when operations cease. However, many small employers may be found to have multiple operations within the framework defined by these proposed rules.''

''For small plans, it doesn't make sense for a couple of reasons. Number one, the cost benefit of it, even if there were a situation where there was a partial shutdown, it isn't worth PBGC's effort, or the plan sponsor's. . . . There are situations where the [Section 4062(e) event's] impact to a small employer just isn't the situation that was contemplated in the law, where it's really a minor event, not a major event,'' Miller said.

Following the Nov. 2 announcement, Miller told BNA that the new enforcement policy ''certainly indicates an adjustment in approach that shows promise, and we'll have to see what the details are for plans'' with more than 100 plan participants.

'A Little Backwards.' Dudley said she respects the fact that PBGC is trying to do a good thing by making this enforcement change but that she does not think the agency is going about it in the right way.

''They're looking for a good solution, but this is not it,'' she said. ''Why not take the proposed reg that they said they were withdrawing and going to redo and not make up some enforcement procedure and actually fix the regulation?''

Regarding the statement that the pilot program will help inform PBGC's revision of its 2010 proposed regulation, Dudley said that approach is ''a little backwards.''

''The law should exist [first], and their job is to implement the law, and this is sort of a tortured way of getting to the law,'' she said.

By Kristen Ricaurte Knebel

The FAQs are at http://www.pbgc.gov/about/faq/pg/frequently-asked-questions-4062.html.

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