EFFECTIVE JANUARY 24, 2022

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Regulations

Benefit Practitioners Suggest Candidates For President's Regulatory Review Initiative

Benefit practitioners told BNA they have singled out several regulations for the Obama administration to consider reviewing as part of a regulatory reform initiative that President Obama announced Jan. 18.

The president directed federal agencies to consider how they might go about reviewing rules that may be ''outmoded, ineffective, insufficient, or excessively burdensome,'' and asked them to develop preliminary plans for periodically reviewing all significant rules. Those plans are due within 120 days of the president's Jan. 18 executive order (12 PBD, 1/19/11).

The executive order directs federal agencies, consistent with the law, to consider ''costs and benefits and choose the least burdensome alternative'' when crafting federal regulations.

In interviews with BNA, several practitioners presented a short list of proposed or existing regulations that they said should be reviewed. In most cases, they have already expressed their views on those rules in comment letters to the Internal Revenue Service, Labor Department, and Pension Benefit Guaranty Corporation.

Downsizing Liability Tops Short List. A regulation that ranked high on a short list mentioned by benefit practitioners is a PBGC proposed regulation (RIN 1212-AB20) under Section 4062(e) of the Employee Retirement Income Security Act. The proposal would increase pension plan liabilities and reporting requirements for single-employer defined benefit plan sponsors that downsize their business operations for various reasons, causing job losses affecting more than 20 percent of active participants in the employer's qualified plan (152 PBD, 8/10/10; 37 BPR 1809, 8/17/10).

''PBGC is taking an expansive position on the circumstances in which downsizing liability can be triggered,'' Harold J. Ashner, a former assistant general counsel at the agency who is now a partner at Keightley & Ashner, a Washington, D.C., law firm that focuses on PBGC-related matters, told BNA Jan. 24.

Jim Keightley, a partner at Keightley & Ashner and PBGC's former general counsel, said Jan. 24 that liability under the proposed regulation could be triggered by routine business transactions, such as selling an ongoing business unit to a new owner, even when operations and employment continue under the new owner.

Ashner, along with other benefit attorneys who said they would like PBGC to further review the proposed regulation under Section 4062(e), said that an employer's liability under Section 4062(e) is determined using a formula that can result in a liability that approaches or equals a pension plan's full termination liability, even though the plan remains ongoing. Under that formula, pension plan underfunding is based on PBGC's conservative assumptions, which generally result in a larger payment than is necessary for regular plan funding and other purposes, Ashner said.

A Welcome Review. Separately, an attorney at the American Benefits Council said that several proposed and existing regulations might warrant an internal review. ''Of course, we're pleased that they are doing this review,'' Jan Jacobson, senior counsel for retirement policy at ABC, told BNA Jan. 19.

Jacobson said that PBGC's proposed regulation under Section 4062(e) would unnecessarily increase costs for employers that sponsor pension plans, Jacobson said. ''You could have a plan that is 100 percent funded under normal funding rules, but suddenly [it becomes] subject to the termination funding rules,'' she said. Under those rules, the employer would be obligated to make a substantial additional contribution to the plan, she said.

Because many companies have frozen their pension plans and are involved in mergers and spin-offs, the

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number of pension plan sponsors that would be subject to additional pension plan liabilities and payments under Section 4062(e) almost certainly would increase if the regulation is finalized as written, Jacobson said.

Reportable Events Proposed Rule. Another candidate is a regulation, proposed by PBGC in November 2009, that would eliminate most automatic waivers and filing extensions now permitted under the agency's reportable events regulations and guidance, Ashner said.

The wholesale elimination of waivers could trigger defaults or have other significant implications under loan and other corporate agreements that reference the reportable events rules, Ashner told BNA. Section 4043 of ERISA requires a plan administrator or plan sponsor to report to PBGC certain specific events that could jeopardize the funded status of a defined benefit plan or the financial status of the plan termination insurance program (223 PBD, 11/23/09; 36 BPR 2674, 11/24/09).

Compliance with the proposed changes to reportable events requirements, which PBGC has scheduled for issuance in March as a final regulation, would also be an administrative burden for employers that operate as part of a global controlled group, Keightley said. ″Just knowing whether a reportable event has occurred can be a challenge,″ he said.

The proposal, as written, would also require significantly more reporting by smaller plans, Ashner said.

Electronic Communications. Most retirement plan regulations do not rise to the level of hindering economic growth, job creation, or competitiveness, but the executive order for a review of regulations is not limited by those criteria, said Ed Ferrigno, vice president of Washington affairs at the Profit Sharing/401(k) Council of America. But some regulations could be improved through a process of updating and consolidating, Ferrigno told BNA Jan. 19.

''The first thing that comes to mind is the area of required communications to participants in ERISA-covered benefit plans that are also subject to IRS requirements,'' Ferrigno said. ''We need to examine opportunities to further combine these communications when possible and also to examine the area of electronic communications,'' he said.

To their credit, Ferrigno said, the Employee Benefits Security Administration and Treasury ''have made strides in this area, but there are still opportunities'' for improvements. Ferrigno said that one such opportunity would be to combine EBSA's proposed notices on qualified default investment alternatives with notices required under the agency's participant-level disclosure regulation, as PSCA and other employer groups recommended in recent comments filed with EBSA (13 PBD, 1/20/11).

PSCA is pleased that EBSA has announced a pending examination of its electronic communications regulation, Ferrigno said.

Jacobson at ABC said that an updated electronic disclosure regulation would be helpful, especially for employers that have a large, extended workforce in locations throughout the United States.

''There is a lot of disclosure required with both health and retirement plans,'' Jacobson said. EBSA's current electronic disclosure regulation is unworkable because it generally requires that participants consent to receiving electronic notices or that participants receiving the notices have access to a computer and the internet as an integral part of their job, she said.

For that reason, most employers still send out paper notices, Jacobson said.

Hybrid Plans Rules. Asked about regulations that might merit a review under the president's executive order, Mark Ugoretz, president and chief executive officer at the ERISA Industry Committee, directed BNA to ERIC's recent comments submitted to IRS on a proposed regulation (REG-132554-08) and final regulation (T.D. 9505) on hybrid plans (10 PBD, 1/14/11; 38 BPR 101, 1/18/11).

In a strongly worded comment letter, Ugoretz was critical of various provisions in the proposed regulation, which would affect hybrid defined benefit plans such as cash balance and pension equity plans. ''The regulatory obstacles in the proposed regulations, combined with other statements from Treasury and the IRS indicating that hybrid plans might have difficulty satisfying the tax qualification rules, send a strong message to employers that there is substantial uncertainty about these plans—and that it is therefore not worthwhile to dedicate hundreds of millions or even billions of dollars to provide benefits to their employees under hybrid plans,'' Ugoretz said in the letter.

The letter urged Treasury and IRS to adopt a final regulation that is ''fully consistent with Congress's intent to foster the creation and continued maintenance of hybrid plans.''

By Florence Olsen