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Working with the PBGC—A Practical Business Guide for Consultants

2008 Annual Meeting
Conference of Consulting Actuaries
October 28, 2008 • Bonita Springs, Florida

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Overview

- Researching PBGC Issues: The Basics and Beyond
- PBGC Premiums: Practical Pointers
- Standard Terminations: Doing it Right
- Reporting Requirements: “Traps for the Unwary”
- Penalties and Subpoenas

Overview (Cont.)

- "Downsizing Liability" (ERISA Section 4062(e))
 - "Early Warning Program" Negotiations
 - Distress Terminations
 - PBGC-Initiated Terminations
 - Bankruptcy Claims and Disputes
-

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Researching PBGC Issues: The Basics and Beyond

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Key PBGC Issues

- 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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Key PBGC Issues (Cont.)

- 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))
- PBGC-initiated terminations (ERISA § 4042)
- Controlled group determinations/liabilities (ERISA §§ 4001, 4062–4064, 4068)

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Key PBGC Issues (Cont.)

- ❑ 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)
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PBGC Legislative/Regulatory Framework

- ❑ 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: www.gpoaccess.gov/index.html
 - ❑ Thomas: 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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PBGC Legislative/Regulatory Framework (Cont.)

- 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
 - Check Fed. Reg. preambles/notices (significant guidance!)
 - 7/1/96 forward: pbgc.gov/practitioners/law-regulations-informal-guidance/content/page13189.html
 - 1994 forward: www.gpoaccess.gov/fr/index.html
 - Earlier: subscription services

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PBGC Case Law

- 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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PBGC Guidance—Beyond the Regulations and Case Law

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

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

- ❑ Forms and instructions
 - Significant additional guidance!
 - Available at 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
 - Generally not binding on public, but often wise to follow!

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

- PBGC Opinion Letters
 - Over 600 issued
 - Significant body of guidance
 - Most issued in early years
 - None since 2002
 - Available at 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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PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

- PBGC Appeals Board decisions
 - Recent (post-9/30/02) full Board decisions available at 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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PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

- ❑ PBGC Annual Reports:
<http://pbgc.gov/about/annreports.html>
 - ❑ PBGC Data Books:
<http://pbgc.gov/practitioners/plan-trends-and-statistics/content/page13270.html>
 - ❑ PBGC Research Reports:
<http://pbgc.gov/media/key-resources-for-the-press/content/page13695.html>
 - ❑ PBGC Fact Sheets:
<http://pbgc.gov/media/key-resources-for-the-press/content/page13538.html>
 - ❑ Various other PBGC publications:
<http://pbgc.gov/media/key-resources-for-the-press/content/page14802.html>
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PBGC Guidance—Beyond the Regulations and Case Law (Cont.)

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

- 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 <http://www.abanet.org/jceb/qanda.html>

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

- 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
 - Informal guidance on premiums, reporting, standard terminations, guaranteed benefits, other areas
 - Most content useful not only to actuaries, but also to others with interest in PBGC issues (*e.g.*, attorneys)
 - 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

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Other Sources

- Internet sources, including:
 - abanet.org
 - actuary.org
 - americanbenefitscouncil.org
 - asppa.org
 - benefitslink.com
 - ccactuaries.org
 - coffi.org
 - ebri.org
 - eric.org
 - freerisa.com
 - ifebp.org
 - soa.org
 - Websites of actuarial, accounting, law firms
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Other Sources (Cont.)

- Reporting/subscription services (*e.g.*, BNA, CCH, RIA, Lexis, Westlaw, Colliers, Norton)
 - *Employee Benefits Law*, 2nd Ed. & 2007 Cum. Supp., Ch. 9 (ABA Labor & Employment Law Section (BNA))
 - *ERISA Fiduciary Answer Book*, 5th Ed. & 2008 Supp., Ch. 10 (Aspen)
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Other Sources (Cont.)

- *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
- *Multiemployer Plans—Special Rules* by Kushner (BNA Tax Management Portfolio)

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Contacting PBGC

- Detailed practitioner contact information:
 - pbgc.gov/practitioners/contact.html
- General legal questions related to PBGC:
 - Office of General Counsel
 - (202) 326-4400 or 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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Contacting PBGC (Cont.)

- 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
- 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

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PBGC Premiums: Practical Pointers

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Flat-Rate Premium

- Unique PBGC definition of “participant”
 - Count *only* if plan has benefit liabilities (“earning” alone is not enough)
 - Drop after one-year break in service under plan rules
 - Drop based on “irrevocable commitment” once liability transfers to insurer (*before* certificate is issued)
- So always distinguish between plan “participant” and PBGC premium “participant”!

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Flat-Rate Premium (Cont.)

- Don't just use Form 5500 participant count, which may include:
 - Participants with no benefit liabilities (*e.g.*, permanent part-timers)
 - Participants beyond plan break-in service period (up to 5 consecutive 1-year breaks)
 - Participants with irrevocable commitments but no certificates
 - Participants counted as of date other than flat-rate participant count date

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Flat-Rate Premium (Cont.)

- Use “deemed cashouts” of terminated non-vested participants to reduce participant count
 - Watch out for timing of deemed cashouts near EOY
 - Watch out for timing of “real” cashouts to avoid PBGC challenge to timing of “deemed” cashouts
 - Amend plan to make clear that employment termination date is cashout date

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Flat-Rate Premium (Cont.)

- For “real” cashouts and consensual lump sums:
 - May be able to drop even if payment is *after* participant count date, provided that
 - Annuity starting date on/before participant count date
 - Only “reasonable administrative delay” in payment
 - Encourage prompt payment to avoid annuity starting date arguments

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Flat-Rate Premium (Cont.)

- ❑ Consider carve-outs of certain participant groups through irrevocable commitments (cost factors)
- ❑ Drop “unlocatable” participant if “reasonable belief” of no living participant/beneficiary entitled to benefits
- ❑ Avoid paying flat-rate premium for small part of benefit
 - *Problem:* plan purchases irrevocable commitment for retiree benefits but grants ad hoc COLA payable from plan assets
 - *Solution:* purchase irrevocable commitment for COLA before participant count date

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Flat-Rate Premium (Cont.)

- ❑ Don't pay twice for the same participant!
 - If employee transfers from Plan A to Plan B, consider putting *entire* benefit in Plan B
 - Be sure to pay once for deceased participant, even if multiple beneficiaries are entitled to benefits
 - Ditto re participant and alternate payee — pay once!

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Flat-Rate Premium (Cont.)

- Note new flat-rate “termination premium”
 - Added by DRA
 - PPA made permanent
- Amount: \$1,250 per participant per year (3 years)!
- Applies (generally) for post-2005 termination dates in PBGC-initiated or non-liquidation distress termination
- Being challenged in bankruptcy reorganization
- May lead to more asset sales, fewer reorganizations

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Variable-Rate Premium

- Key PPA changes (all plans):
 - FFL exemption repealed (effective 2008)
 - UVB determination rules coordinated with new PPA funding rules (effective 2008)
- Key PPA change (small plans):
 - New PPA small employer VRP cap (effective 2007)
 - If eligible for and paying at cap, no need to determine/report UVBs (effective 2008)

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Variable-Rate Premium (Cont.)

- Eligibility for small employer VRP cap:
 - 25 or fewer *employees* (not *participants*)
 - Controlled group aggregation applies
 - “Employee”: use minimum coverage definition
 - Count on first day of premium payment year

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Variable-Rate Premium (Cont.)

- Small-employer VRP cap amount
 - Per-participant cap: \$5 x *participant count* (in *plan*)
 - Plan-wide cap: \$5 x *square of participant count*
 - Example: 20-participant plan cap = \$2,000 (*not* \$100!)
 - Count participants as of flat-rate participant count date (generally last day of prior plan year)
- Note: eligibility tied to employees but cap tied to participants
 - 30-participant plan might be eligible
 - 20-participant plan might be ineligible

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Variable-Rate Premium (Cont.)

- Consider designating 8½ month “grace-period” contributions to prior year
 - Goal: reduce UVBs and therefore VRP
 - Watch out for missed quarterlies
 - Need “cash-in-the-plan” credit balance!
 - Note IRS proposal requiring election by quarterly due date to use credit balance for quarterlies!

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Variable-Rate Premium (Cont.)

- If considering standard termination near UVB valuation date
 - VRP may still apply based on premium underfunding
 - Conditional VRP exemption available *if* proposed termination date is on or before UVB valuation date
 - Consider VRP exemption in setting proposed termination date

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Variable-Rate Premium (Cont.)

- Disregard any non-vested benefits
 - Focus on whether entitlement met as of UVB valuation date
 - For example:
 - “30 & out” benefits don’t count until 30 is reached
 - Disability benefits don’t count until the individual is disabled
 - Pre-retirement lump sum death benefits don’t count until individual is deceased

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Variable-Rate Premium (Cont.)

- Caution: PBGC will *not* treat benefit as nonvested merely because:
 - Benefit not 411(d)(6)-protected and thus can be amended out of plan
 - Participant still alive where benefit is payable upon death as:
 - QPSA
 - Post-retirement survivor annuity
 - Return of mandatory employee contributions

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Variable-Rate Premium (Cont.)

- Disregard benefit attributable to “unlocatable” participant/beneficiary based on:
 - “Reasonable belief” of no living participant/beneficiary entitled to benefits, *or*
 - Forfeiture provision (even if participant counts for flat-rate!)
- Consider reflecting irrevocable commitments in funding (and therefore UVB) calculations

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Variable-Rate Premium (Cont.)

- Determining UVBs under post-PPA rules
 - Old choices are gone
 - Alternative calculation method
 - General rule “roll-forward” (1/1 of prior year)
 - General rule “roll-back” (1/1 of current year)
 - Key new choice:
 - Standard premium funding target, or
 - Alternative premium funding target

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Variable-Rate Premium (Cont.)

- Alternative differs from standard target in that:
 - 24-month averaging of interest rates applies
 - Full yield curve applies (if elected for funding)
 - “Applicable month” (vs. month before premium payment year begins) is used to select interest rate
 - 2008/2009 transition rule applies (except for new plans or where election not to use rule for funding)

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Variable-Rate Premium (Cont.)

- Election/revocation is irrevocable for 5 years (but only *after* first “alternative” election is made)
 - If “alternative” used in 2008, cannot change in 2009
 - If “standard” used in 2008, can keep/change in 2009
 - Deadline to elect/revoke: VRP deadline for plan year

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Variable-Rate Premium (Cont.)

- Caution re estimated VRP filings (100+ lives!)
 - VRP estimate due "10/15" of current plan year
 - True-up due "4/30" of following plan year
 - Estimate must be based on *final* assets or penalty relief may be lost (even if assets *understated*)!
 - Estimate must be based on *final* determination of "alternative" vs. "standard" premium funding target
 - Estimate is subject to PBGC audit

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Mergers and Spinoffs

- Duplicate and gap premiums
 - Duplicate premiums in all mid-year spinoffs
 - Duplicate/gap premiums in some mid-year mergers
 - Duplicate example: Plan B (with October 1 plan year) merges into calendar year Plan A on December 1
 - Gap example: Calendar year Plan A merges into Plan B (with October 1 plan year) on December 1
 - Choose date and surviving plan carefully!

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Mergers and Spinoffs (Cont.)

- Duplicate and gap premiums (cont.)
 - Refunds available for change in plan year duplication
 - But if change in plan year coincides with merger, PBGC will deny refund

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Premium Consequences: Reporting

- Premium determination can affect:
 - \$50M *pre-PPA* gateway test under ERISA § 4010
 - Various waivers and extensions under ERISA § 4043(a) (post-event reporting of reportable events)
 - \$50M and 90% triggers under ERISA § 4043(b) (advance reporting of reportable events)
- Advise client of premium-related reporting consequences resulting from contribution choice

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Premium Audits

- Keep those records for 6 years!
 - Tie flat-rate count to particular participants
 - Document VRP determinations (*e.g.*, asset valuations, actuarial worksheets)
 - Document reasons for:
 - Significant year-to-year changes
 - Significant differences from AVR, Form 5500
 - Keep “static” e-record for each year!
 - Note “clarified/strengthened” recordkeeping rules
- On “gray” areas, be prepared to challenge, request reconsideration, let courts decide

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Premium Penalties

- Take advantage of 1%/5% penalty policy
 - Try to correct potential underpayments ASAP, *before* PBGC issues written notice, to get 1% rate
 - But if payment is mailed same day PBGC issues (*e.g.*, electronic or fax) notice, you still get 1% rate
- Penalty waiver requests:
 - No need to include penalty waiver request with late payment
 - Consult PBGC policy (appendix to Part 4007) for waiver standards

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Premium Interest

- Interest on underpayments vs. overpayments
 - PBGC charges interest on underpayments
 - Pre-PPA: PBGC position was no authority to pay interest on overpayments
 - PPA authorizes PBGC to pay interest on overpayments (awaiting rulemaking)

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Premium Billings and Collections

- Read those bills carefully
 - Multiple plan year bills may have multiple errors
 - Focus on penalty calculations and movement of charges and credits from one plan year to another
 - Prepare your own calculation based on review of premium filings and payments, then compare!

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Premium Refund Claims

- Be sure to provide required “explanation”
- Watch out for 6-year statute of limitations!
 - PBGC generally treats request as timely if *filed with PBGC* before statute runs
 - But if PBGC ultimately disagrees that refund is owed, statute of limitations is available to PBGC as defense
 - PBGC tolling agreements may be unenforceable
 - Bottom line: make request *well before* statute runs, and be prepared to file suit *before* statute runs

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Standard Terminations: Doing it Right

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Standard Terminations: Planning

- Why is termination necessary/appropriate?
- Is plan projected to have sufficient assets to pay all benefit liabilities?
 - Consider sufficiency commitment from employer
 - Consider majority owner "alternative treatment"
 - Consider "freeze and wait" approach (until 2012 when PPA lump sum changes are fully phased in?)
- Any replacement plan(s)?

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Standard Terminations: Planning (Cont.)

- Develop participant communication strategy
- Any CBA bar to termination?
- Determine who has "settlor" authority for decision, then document (*e.g.*, board resolution)
- Determine who has authority to act as plan administrator to implement termination

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Standard Terminations: Planning (Cont.)

- Develop "schedule" for termination
 - Earliest/latest NOIT dates
 - Proposed termination date
 - Notice of plan benefits and election notices for participants & beneficiaries
 - IRS determination letter request and related notices
 - Form 500 filing with PBGC
 - Annuity bids
 - Earliest/latest distribution dates
- Assign tasks (with deadlines!) among actuary, attorney, plan administrator, etc.

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Standard Terminations: Planning (Cont.)

- Determine which costs may/should be paid from plan assets
- Decide "end game" investment strategy (probably very conservative)
- Review/address any illiquid assets
- Consider how to deal with potential reversion

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Standard Terminations: Planning (Cont.)

- Determine need for plan amendments
 - Top priority: retain qualified status!
 - Add termination lump sum provision?
 - Eliminate ancillary benefits or other non-411(d)(6)-protected benefits?
 - Freeze benefit accruals as “fail-safe” in case termination not successfully completed?
 - Address formula for allocating any residual assets among participants?
 - Fix variable indices for cash balance plan!
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Standard Terminations: Planning (Cont.)

- Watch out for PBGC’s rules on “post-termination amendments”!
 - PPA lump sum assumption amendments
 - May be adopted after termination date for *qualification* purposes (at least until end of 2009 PY)
 - But PBGC rules require adoption on/before termination date unless amendment preserves pre-PPA lump sum basis
 - Similar concerns re residual asset allocation formula, other non-411(d)(6)-protected benefits
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Standard Terminations: Planning (Cont.)

- Watch out for “transitional” PPA lump sum issues
 - Example:
 - Plan is amended *on/before* pre-2008 termination date to shift to PPA assumptions for post-2007 distributions
 - Distributions (annuity starting dates) are in 2008
 - PBGC Technical Update: use pre-PPA assumptions!
 - Open issue re 2008–2011 termination dates
 - Example: 2008 termination date and 2009 distributions
 - Use 20% or 40% phase-in?
 - Use 2008 or 2009 mortality?
 - Awaiting PBGC/IRS guidance

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Standard Terminations: Planning (Cont.)

- Evaluate availability of data and time needed to determine all “benefit liabilities”
- Develop/update mailing list for all participants/beneficiaries
- Identify potential “missing participants” and start “diligent search” efforts

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Standard Terminations: Planning (Cont.)

- Consider starting to research options for selection of annuity provider
- Be careful re pre-standard termination irrevocable commitment purchases
 - PBGC audit initiative in effect since late 2006
 - Consider approaching PBGC in advance for case specific guidance

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Standard Terminations: Notice of Intent to Terminate

- Count carefully re 60-90 day period from proposed termination date back to NOIT issuance date
 - Exclude proposed termination date ("day zero")
 - Include NOIT issuance date
 - If 60/90-day date falls within weekend/holiday period, may issue NOIT on day before/after weekend/holiday period
 - Remember to test for earliest *and* latest NOIT!

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Standard Terminations: Notice of Intent to Terminate (Cont.)

- ❑ Need to *anticipate* who *will be* "affected party" as of *future* "proposed termination date"
 - Err on side of over-inclusion
 - But if you miss someone, PBGC's "after-discovered affected parties" rules can save you
- ❑ Be careful re NOIT "freeze" information
 - PBGC less likely to nullify for defect if benefits were frozen irrespective of plan termination
 - Make clear if freeze is independent of termination

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Standard Terminations: Notice of Intent to Terminate (Cont.)

- ❑ No special required format, but best to use PBGC's "model" in Form 500 package
- ❑ Additional information permitted
 - Must not be "misleading"
 - Helps implement communications strategy (reason for termination, process/timing, replacement plan, etc.)
- ❑ Remember that once *first* NOIT issued, plan subject to lump sum/irrevocable commitments limitations

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Standard Terminations: Notice of Plan Benefits

- ❑ Must *complete* issuance of NOPBs *before* filing Form 500 with PBGC
- ❑ Consider including election notices with NOPBs
 - May depend on expected timing of distributions
 - Note PPA 180-day notice/consent period gives more flexibility

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Standard Terminations: Notice of Plan Benefits (Cont.)

- ❑ Determination of category (pay status, valid election or de minimis benefits, others not in pay status) may be unclear
 - Example: de minimis hinges on interest rate not yet known
 - May want to provide NOPB information for multiple categories
- ❑ If NOPB error discovered later, correct by election notice deadline to preserve possible "correction of errors" relief

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Standard Terminations: IRS Determination Letter Request

- ❑ Not required, but usually advisable
 - May not be feasible if goal is to distribute shortly after PBGC review period
 - But no disqualification “protection” without DL and greater likelihood of IRS audit
 - Note: PBGC will *not* treat DL as determinative of whether all benefit liabilities have been properly paid for Title I and Title IV purposes

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Standard Terminations: IRS DL Request (Cont.)

- ❑ File DL request *before* filing Form 500 with PBGC (allows later distribution deadline)
- ❑ DL timing leads to potential loss of control over distribution timing (risk of new stability period)
- ❑ May need substantial updating given IRS’s DL “cycle” system (suddenly all amendments needed!)
- ❑ Remember that IRS and PBGC post-termination amendment rules differ!

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Standard Terminations: Form 500 Filing

- Watch out for deadline
 - *No later than* 180th day after proposed termination date (exception for DL requests)
 - *No earlier than* completion of NOPB issuance
- May need documentation of sufficiency measures to certify to projected sufficiency
 - "Sufficiency commitment"
 - Majority owner "alternative treatment"

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Standard Terminations: Form 500 Filing (Cont.)

- If more time is needed (*e.g.*, to complete NOPB issuance or to address sufficiency):
 - Move the proposed termination date (subject to 90-day limit re *earliest* NOIT)
 - Request an extension
 - Start over ("61-day expedited" process)

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Standard Terminations: PBGC Review

- PBGC likely to respond to Form 500 filing within 2-3 weeks
 - Acknowledgment letter (good news!)
 - Notice of incomplete filing (can still correct)
 - Notice of noncompliance (bad news!)
- If no word from PBGC within month or so, call to make sure filing was received!
- Termination distributions prohibited until 61 days after date PBGC *received* Form 500 filing

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Standard Terminations: Notice of Annuity Information

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

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Standard Terminations: Notice of Annuity Information (Cont.)

- Remember to give notice to all participants and beneficiaries except de minimis cashouts
 - This includes participants expected to elect, or who have elected, consensual lump sum
 - One purpose of notice is to help participants decide whether to elect lump sum
 - Even a participant who has elected a lump sum can change election (subject to limitations)

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Standard Terminations: Distribution

- Must complete distribution by later of:
 - 180th day after end of PBGC review period for Form 500, or
 - 120th day after receipt of favorable DL (if valid DL request submitted by time Form 500 filed)
- May need extension (*e.g.*, because of illiquid assets, benefit dispute, data issues)
 - File request at least 15 days before deadline
 - PBGC will focus on length of delay and exercise of ordinary business care and prudence

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Standard Terminations: Distribution (Cont.)

- Note deductibility issues re contribution to “top up” for standard termination distribution
 - Can deduct in year of termination amount necessary to be sufficient for all benefit liabilities
 - PPA '06 rules generally allow larger deductions (so may be no need to wait until year of termination)

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Standard Terminations: Distribution (Cont.)

- Distribution must meet ERISA/IRC requirements
- Concerns re difficulty/cost re purchase of irrevocable commitment for (*e.g.*) \$6K benefit
- If participant with (*e.g.*) \$100K benefit neglects or refuses to return election forms (or cannot get spousal consent), *must* annuitize
- Applicability of PPA lump sum benefit restrictions?

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Standard Terminations: Distribution (Cont.)

- Watch out for timing of lump sum distributions!
 - Key issue: “annuity starting date” vis-à-vis stability period (and resulting “lookback” month) changes!
 - PBGC regulations presume distribution date is ASD in “absence of evidence establishing” another ASD
 - But presumption may be overcome by use of “immediate” ASD pursuant to Treas. Reg. § 1.417(e)-1(b)(1)
 - Note that delays in payment beyond reasonable administrative delay may result in new/late ASD
 - Retroactive annuity starting dates: special concerns
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Standard Terminations: Post-Distribution Certification

- PDC statutorily due within *30* days after distribution is *completed*
 - PBGC provides penalty relief until *90* days after distribution *deadline*
 - Mark that 90th day on your calendar as soon as you know distribution deadline!
 - But may want to file PDC sooner, not later
 - Likelihood of audit essentially same whenever you file PDC
 - But earlier PDC filing puts you in earlier audit pool, so that any audit takes place before memories/records harder to reconstruct
-

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Standard Terminations: Audits

- Selection of plans for audits
 - 100% audit rate for standard terminations with more than 300 participants
 - Random sampling of smaller terminations
 - PBGC may select plan for other reason (*e.g.*, complaint from participant)
 - “Clean” audit for a practitioner *does not* ensure no future audits for that practitioner

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Standard Terminations: Audits (Cont.)

- Timing of plan selection
 - PBGC selects from PDCs filed each quarter
 - To make cutoff, file PDC few days early
 - If PDC filed late, any audit will be late!
- Initial audit letter generally issued within 30 days after end of quarter

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Standard Terminations: Audits (Cont.)

- Initial audit letter requests information in 30 days:
 - Summary participant data (name, address, and distribution form, amount, and date)
 - Reconciliation (from termination to distribution date) of participant counts and assets
 - Plan and trust documents
 - Annuity contracts
 - CBA
 - Last actuarial report
 - IRS determination letter
 - Other information, including EA worksheet
-

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Standard Terminations: Audits (Cont.)

- PBGC sampling
 - PBGC selects sample participants from listing
 - PBGC requests detailed information on sample
 - PBGC sends confirmation letters to sample participants
 - PBGC reviews sample (follows up with PA, EA, etc.)
 - Initial determination by auditor
 - Final decision by higher level at PBGC
 - PBGC enforcement of audit findings (will file suit if necessary)
-

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Standard Terminations: Audits (Cont.)

- Focus of audit is on benefit determination and distribution, not on procedures
 - Most common error: lump sums too low
 - Wrong determination date for interest rate or for current age
 - Wrong retirement age assumption
 - Failure to use plan assumptions that require greater than minimum lump sums
 - Adoption of post-termination amendments re lump sum assumptions
 - Remedy: employer pays balance due plus reasonable interest
-

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Standard Terminations: Audits (Cont.)

- Errors re irrevocable commitments
 - Failure to include all benefit options
 - Failure to interpret/apply benefit formula correctly
 - Use of erroneous participant data
 - Failure to preserve "future" lump sum basis
 - Remedy: correct irrevocable commitments
-

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Standard Terminations: Audits (Cont.)

- Effect of favorable determination letter
 - DL (per PBGC) is *not* determinative of validity of termination
 - DL is *prima facie* evidence of Title I compliance
 - Notwithstanding favorable DL, PBGC will enforce its own findings re Title I requirements

85

PBGC Reporting Requirements: “Traps for the Unwary”

86

PBGC Reporting Requirements: Reportable Events—In General

- Post-event reporting: the challenges
 - Required sporadically, not periodically
 - May relate to distant controlled group member
 - Rules not always “intuitive”
 - Multiple plans in controlled group—watch out!
 - Particular reportable event may occur “for” two or more plans in controlled group
 - Determine waivers, extensions, and required information separately for each plan!
-

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PBGC Reporting Requirements: Reportable Events—In General (Cont.)

- Multiple events—watch out!
 - Two or more events may arise at about same time out of same or related facts
 - Determine waivers, extensions, and required information separately for each event!
 - Use “optional” Form 10 (significantly reduced initial information submission)
-

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PBGC Reporting Requirements: Selected Reportable Events

- "Change in controlled group"
 - Covers plan transfer with no CG makeup change
 - Covers merger of two entities within CG
 - Timing keyed to binding agreement, not closing
- "Active participant reduction"
 - May occur any day (not annual snapshot)
 - Need not occur based on discrete "event"
 - May need to report twice in same plan year
 - Event may occur on "1/1" without any reduction

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PBGC Reporting Requirements: Selected Reportable Events (Cont.)

- Transfers of benefit liabilities
 - Generous waiver (use PBGC "safe-harbor" assumptions)
 - But may still be reportable (per informal PBGC guidance) as active participant reduction!
- "Extraordinary dividend" reportable event
 - Does not match IRC definition
 - Captures significant value transfer to any CG member

90

PBGC Reporting Requirements: 4062(e) Events

- Trigger: cessation of “operations at a facility in any location” that results in > 20% active participant reduction
- Many unresolved interpretive issues as to whether and when 4062(e) event occurs

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PBGC Reporting Requirements: 4062(e) Events (Cont.)

- Reporting required (4063(a)) within 60 days
 - Unclear when 60-day period starts (*e.g.*, date of cessation, date 20% threshold crossed)
 - No exemptions based on size, funding, etc.
- 60-day 4063(a) requirement independent of 30-day reportable event requirement
 - Any reportable event waiver/extension is inapplicable to 4063(a)
 - Reportable event notice may be due before or after 4063(a) notice is due

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PBGC Reporting Requirements: Form 200

- ❑ Statutory lien and Form 200 triggered when missed contributions (with interest) > \$1M
 - ❑ Note PBGC's calculation methodology (see PBGC Opinion Letter 2001-1)!
 - Add up all missed/unpaid contributions (each w/interest to current missed contribution date)
 - Total may significantly exceed pre-PPA deficiency or PPA shortfall under funding rules!
 - Smaller plans/employers may hit \$1M before they know it!
-

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PBGC Reporting Requirements: Form 200 (Cont.)

- ❑ Significant financial consequences
 - Statutory lien, loan defaults, etc.
 - Maximum penalty (\$1,100 per day) likely for late Form 200
 - PBGC/creditor workout or bankruptcy
-

94

PBGC Reporting Requirements: Section 4010 Annual Reports

- Pre-PPA thresholds
 - \$50M aggregate UVBs test (most common trigger) affects larger plans/employers
 - But some smaller plans/employers may hit:
 - \$1M outstanding waiver threshold
 - \$1M lien threshold (note PBGC methodology!)

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PBGC Reporting Requirements: Section 4010 Annual Reports (Cont.)

- Post-PPA threshold
 - \$50M aggregate UVBs test replaced by one-plan FTAP < 80% test
 - Absent PBGC relief, could affect even smallest plans/employers!
 - PBGC proposed rule: exempt if aggregate plan underfunding not above \$15M
 - But proposed exemption inapplicable to other two thresholds (re waivers & missed contributions)
 - Note: PBGC regulations require you to report that you no longer need to report!

96

Penalties and Subpoenas

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Penalties and Subpoenas

- Penalty exposure up to \$1,100 *per day* for *each* person required to report or disclose
- "Guideline" penalties generally much lower
 - \$25 per day for first 90 days
 - \$50 per day thereafter
 - Reduced for plans with < 100 participants (*e.g.*, 60 participants: 60% x total) with \$5 daily floor
 - Overall cap of \$100 x participant count

98

Penalties and Subpoenas (Cont.)

- PBGC may assess penalty above or below “guideline” amount where warranted
- Larger penalty may be warranted where:
 - Willful failure
 - Pattern or practice
 - Substantial harm to participants or PBGC
- PBGC normally assesses maximum penalty for Form 200 and *advance* reporting failures

99

Penalties and Subpoenas (Cont.)

- PBGC has discretion re whether/how much to assess/waive
- “Reasonable cause” waiver guidance in *proposed* policy statement issued in 2001
 - 2001 Blue Book guidance (Q&A 18): proposal “largely reflective of PBGC’s current practices” (still applicable?)
 - Note: *no* relief based on claim that outside advisor was responsible for failure (unless *advisor* has reasonable cause)

100

Penalties and Subpoenas (Cont.)

- ❑ Penalty authority applies only where time limit in certain statutory/regulatory provisions
- ❑ PBGC may subpoena information, whether or not it is subject to penalty authority
- ❑ Comply with PBGC information requests!

101

“Downsizing Liability” (ERISA Section 4062(e))

102

4062(e)—Statutory Language

One sentence, many questions:

“If an employer 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 by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 4063, 4064, and 4065 shall apply.”

103

4062(e)—Statutory Problem

- ❑ Cross-reference to multiple-employer plan withdrawal liability rules is unworkable
- ❑ Statutory liability
 - Employer liability (full plan) x withdrawing employer's share of past contributions
 - 4062(e) context: only one employer
 - 100% liability for 21% reduction?
 - Bottom line: 4062(e) essentially unenforceable without regulatory solution

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4062(e)—Regulatory Solution

- PBGC final rule (mid-2006)
- Regulatory liability formula
 - Employer liability (full plan) x percentage reduction in active participants
 - May overstate or understate theoretically “correct” amount
 - Sets stage for enhanced PBGC enforcement

105

4062(e)—The Basics

- Trigger
 - Must have “cessation”
 - Cessation must be of “operations”
 - Operations must be at “a facility”
 - Facility must be “in any location”
 - “Result” of cessation must be > 20% of active participants “separated from employment”

106

4062(e)—The Basics (Cont.)

- Liability amount
 - Step 1: calculate employer liability (full plan)
 - Use conservative PBGC assumptions
 - Determine immediately *after* cessation (include shutdown benefits)
 - Step 2: multiply by active participant percentage reduction
 - Example
 - Employer liability (full plan) = \$200M
 - Active participant percentage reduction = 40%
 - 4062(e) liability amount = \$80M

107

4062(e)—The Basics (Cont.)

- Form of satisfaction of liability
 - Escrow liability amount with PBGC (default option)
 - PBGC may instead require posting of bond for up to 150% of liability amount
 - If plan terminates (distress/PBGC-initiated) within 5 years:
 - Escrowed amount added to plan assets, or
 - Amount realized on bond added to plan assets
 - If plan remains ongoing at end of 5-year period
 - Escrow (without interest!) returned to employer, or
 - Bond canceled

108

Reporting and PBGC Monitoring

- ❑ 60-day ERISA Section 4063(a) notice
- ❑ 30-day reportable event notice
- ❑ PBGC may assess penalties (up to \$1,100 per day) for late notice
- ❑ PBGC likely to learn of event sooner through “Early Warning” Program

109

Unresolved Interpretive Issues

- ❑ Little/no PBGC guidance on interpretation of ERISA Section 4062(e)
 - Open issues re whether event occurs
 - Open issues re amount of liability
 - No case law guidance because essentially unenforceable before regulatory fix
 - Note: 4062(e) liability has 5-year “shelf life”
 - ❑ Ambiguity leads to more leverage for employer in negotiations with PBGC
 - ❑ Simple “open & shut” cases maximize PBGC leverage

110

Unresolved Interpretive Issues (Cont.)

- Applicability to “going concern” asset sales
 - Operations “cease” *with seller*
 - Employees “separated from employment” *with seller*
 - Old PBGC Opinion Letters: no 4062(e) liability
 - But PBGC may still claim 4062(e) liability arises, at least where pension liabilities remain with seller
- Applicability to stock sales
 - “Employer” definition in Title IV of ERISA: entire controlled group
 - Operations “cease” *with entire controlled group*
 - Employees “separated from employment” *with entire controlled group*
 - More aggressive position for PBGC than re asset sale

111

Unresolved Interpretive Issues (Cont.)

- “Facility in any location”
 - Two or more buildings across street or across town?
 - Geographically dispersed buildings conducting integrated “operations”?
 - Two or more “facilities” in a single building?
- “Operations”
 - Cessation of one set of “operations” with other “operations” at same “facility” continuing?
 - What constitutes discrete set of “operations”?
- “Cessation”
 - How complete?
 - Work in progress?

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Unresolved Interpretive Issues (Cont.)

- Timing
 - “Cessations” that occur in stages?
 - “Cessations” that occur gradually over period of time?
- “Result of”
 - Can “cessation” at Facility A “result in” separation of employee at Facility B?
 - Employees who voluntarily quit or retire in anticipation of cessation?
 - Normal attrition?
- “Separated from employment”
 - Layoffs?
 - Recall rights?

113

PBGC Enforcement/Negotiations

- Statutory liability is *not* self-executing
 - PBGC must first decide whether to pursue
 - Absent voluntary compliance, PBGC very likely would have to initiate court action
- Statutory liability serves primarily as starting point for PBGC negotiations

114

PBGC Enforcement/Negotiations (Cont.)

- PBGC negotiating “team”
 - Financial analysts
 - Attorneys
 - Actuaries
 - Accountants
- Director involvement: significant deals
- Board of Directors involvement: very rare

115

PBGC Enforcement/Negotiations (Cont.)

- Key focus
 - Exposure
 - Current underfunding (PBGC basis)
 - Projected 5-year underfunding (PBGC basis)
 - Risk
 - Controlled group financial distress
 - Historical and projected financial statements
 - EBITDA, free cash flow, projected contribution requirements
 - Joint and several controlled group liability (including foreign members)

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PBGC Enforcement/Negotiations (Cont.)

- Negotiating leverage for PBGC
 - Ability to file suit to enforce 4062(e) liability
 - Effect lawsuit would have on lenders/investors
- Negotiating leverage for employer
 - Plan will not terminate during 5-year window
 - Downsizing will make employer stronger
 - 4062(e) liability would increase failure risk
 - Preserve jobs
 - Political considerations
 - Unresolved interpretive issues

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PBGC Enforcement/Negotiations (Cont.)

- PBGC can be very creative in developing negotiated alternative
 - Unlike “typical” Federal agency
 - More like private corporation vis-à-vis flexibility to structure “deals”
 - “Early Warning Program” deals are analogous (same goal: protect plan in case it terminates)

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PBGC Enforcement/Negotiations (Cont.)

- Possible settlement may include
 - Additional contributions
 - Waiver of existing credit balance
 - Grant of security interest
 - Letter of credit
 - Escrow with interest
 - Guarantee from foreign CG member
 - Guarantee from non-CG member

119

“Early Warning Program” Negotiations

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“Early Warning Program” Negotiations

- “Early Warning Program”
 - Also called “Risk Mitigation Program”
 - Focus: increased risk resulting from corporate transactions
- PBGC staffing:
 - Financial Analysts
 - Actuaries
 - Accountants
 - Attorneys

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“Early Warning Program” Negotiations (Cont.)

- Controlled group liability is key
- Determining controlled group status
 - Parent-sub group: 80% ownership of sub by parent
 - Brother-sister group: 5 or fewer individuals, estates or trusts own 80% of 2 or more businesses
 - Combined group: group with both brother-sister and parent-sub components
 - Extensive rules re attributed ownership and excluded interests

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“Early Warning Program” Negotiations (Cont.)

- ❑ Joint and several controlled group liability
 - *Each* member liable for full amount (with total recovery capped at full amount)
 - Applies to:
 - ❑ Unpaid contributions and related excise taxes
 - ❑ Ongoing/termination premiums (and penalties/interest)
 - ❑ Plan termination liability (unfunded benefit liabilities)
 - ❑ Certain information penalties under ERISA Section 4071
 - PBGC liens (\$1M+ missed contributions, unpaid termination liability) can reach all CG property
- ❑ All CG members considered in distress/PBGC-initiated terminations

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“Early Warning Program” Negotiations (Cont.)

- ❑ PBGC Technical Update 00-3 limits program based on plan funding & employer credit rating
 - PBGC contact allowed only if current liability >\$25M *and*:
 - ❑ Junk bond rating, *or*
 - ❑ *Unfunded* current liability >\$5M
 - PPA-based threshold(s): awaiting guidance
 - NOTE: 4010 reporting or reportable event filing might also be basis for PBGC contact
- ❑ Consider contacting PBGC first (where contact is inevitable, the earlier the better)

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“Early Warning Program” Negotiations (Cont.)

- PBGC concerns
 - Breakup of controlled group
 - Transfer of plan to weaker controlled group
 - Movement of value between/among CG members
 - Highly leveraged transactions

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“Early Warning Program” Negotiations (Cont.)

- PBGC leverage
 - PBGC-initiated termination (the “nuclear” option)
 - Full underfunding becomes immediately due
 - Accruals cease
 - Benefits may be reduced
 - “Evade or avoid” lawsuit, but
 - Years of litigation
 - Uncertain outcome
- Your leverage
 - Save jobs (political/public relations leverage)
 - Plan *will* continue (financial leverage)

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"Early Warning Program" Negotiations (Cont.)

- ❑ ERISA Section 4069 (pension evasion)
"comfort letters"
- ❑ What PBGC may be looking for
 - Additional contribution to plan (with credit balance waiver or restriction)
 - Retention of plan by strong seller
 - Guarantee by seller if future plan termination
 - Transfer to plan of security interest

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Distress Terminations

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Distress Terminations

- ❑ If plan is underfunded, only way to terminate voluntarily is through “distress termination”
- ❑ *Each* controlled group member must meet at least one distress test:
 - Test One: Liquidation in bankruptcy/insolvency
 - Test Two: Reorganization in bankruptcy
 - Test Three: Inability to continue in business
 - Test Four: Unreasonably burdensome pension costs

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Distress Terminations (Cont.)

- ❑ Each CG member may meet different test
- ❑ Distress terminations usually arise in bankruptcy setting (liquidation/reorganization)
- ❑ Remember CBA can block distress termination (subject to 1113 motion to reject CBA)

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Distress Terminations (Cont.)

- Liquidation distress test: automatic (for liquidating member(s) of controlled group)
- Reorganization distress test: often contested
 - Show “meaningful sacrifices” in all areas
 - Show plan unaffordable even w/freeze & waiver
 - If lender/investor insists on plan termination, show:
 - Lender/investor has sound financial basis
 - Inability to find lender/investor not insisting on termination

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Distress Terminations (Cont.)

- Reorganization distress test: often contested (cont.)
 - Multiple plans: PBGC argues for plan-by-plan determination of distress
 - Watch out for any *non-debtor* controlled group members (each one must also meet distress!)
 - Watch out for “follow-on” plans (major PBGC concerns!)

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Distress Terminations (Cont.)

- Distress also permitted outside of bankruptcy under Tests 3 and 4
 - PBGC makes determination
 - Business continuation test (Test 3) analogous to reorganization test (Test 2)
 - Test 4 very rarely used to date

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Distress Terminations (Cont.)

- Procedures
 - NOIT to participants, beneficiaries, and union
 - Similar to standard termination version
 - Must issue at least 60 and (except with PBGC approval) no more than 90 days before proposed termination date
 - First NOIT triggers restrictions on paying lump sums or purchasing irrevocable commitments
 - Possible restrictions even before NOIT (based on "anticipation of termination" rules)

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Distress Terminations (Cont.)

- Procedures (cont.)
 - Form 600 (NOIT to PBGC) requires
 - All information re controlled group makeup
 - Detailed information supporting distress test for each CG member (by 60th day after filing)
 - Proposed termination date triggers cutbacks
 - Form 601 due 120 days after proposed termination date
 - Include EA certification re sufficiency level
 - May need to update distress test information
 - No specific deadline for PBGC to decide distress

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Distress Terminations (Cont.)

- In (common) bankruptcy reorganization context, PBGC will
 - Appear in court
 - Submit brief stating its view of Test 2, and
 - Support, oppose, or take no position on distress motion
- Note PPA's "deemed" termination date (for guarantee, PC 3): bankruptcy petition date

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PBGC-Initiated Terminations

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PBGC-Initiated Terminations

- PBGC-initiated termination
 - May be used/threatened to block corporate transaction:
 - Sale of "crown jewel" subsidiary
 - Transfer of plan to weaker controlled group
 - Movement of value between/among CG members
 - Highly leveraged transaction

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PBGC-Initiated Terminations (Cont.)

- PBGC-initiated termination (cont.)
 - May be used (in some circumstances) to cut off increased PBGC exposure (guaranteed benefits)
 - Impending shutdown benefits (less likely in light of PPA change to phase-in rules)
 - Increase in maximum guarantee or phase-in

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PBGC-Initiated Terminations (Cont.)

- PBGC-initiated termination (cont.)
 - Possible "triggers" include reportable event notices and "Early Warning Program" monitoring
 - Less controversial uses:
 - "Abandoned" plans
 - "Shortcut" in lieu of distress process
 - May be (and often is) done by agreement with plan administrator

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PBGC-Initiated Terminations (Cont.)

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

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PBGC-Initiated Terminations (Cont.)

- “Long-run” loss analysis
 - Likelihood of future termination if PBGC does not act now
 - Expected increase in PBGC loss (current v. future termination)
- PBGC can act quickly to set termination date by publishing notice
 - “Locks in” immediate termination date and related liability
 - But subject to later court approval or agreement with plan administrator

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PBGC-Initiated Terminations (Cont.)

- Termination date
 - May be retroactive
 - No earlier than when participant expectations extinguished
 - PBGC may seek later date for financial reasons
 - Subject to PPA's "deemed" termination date (for guarantee, PC 3) of bankruptcy petition date
- Remember CBA *cannot* block PBGC-initiated termination

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Bankruptcy Claims/Disputes

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Bankruptcy Claims/Disputes

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

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Bankruptcy Claims/Disputes (Cont.)

- Potential PBGC “post-bankruptcy” liability
 - New “exit fee” for PBGC-initiated terminations and non-liquidation distress terminations
 - \$1,250 per participant, per year, for 3 years
 - For employers in bankruptcy reorganization, 3-year period starts post-confirmation
 - Challenged in court (non-dischargeable debt vs. dischargeable general unsecured claim?)
 - If upheld, may lead to more asset sales followed by liquidations

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Bankruptcy Claims/Disputes (Cont.)

- Guarantor claims
 - Unpaid premiums
 - General unsecured if plan year starts pre-petition
 - Check PBGC calculation methodology!
 - “Unfunded Benefit Liabilities”
 - Contingent on plan termination
 - Often filed as unliquidated
 - Disputes re amount: based on PBGC valuation regulation assumptions (controversial)
 - Disputes re priority: PBGC claims tax status up to 30% of aggregate positive net worth in CG, but courts have rejected

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Bankruptcy Claims/Disputes (Cont.)

- Successor trustee claims
 - Unpaid contributions
 - Contingent on plan termination and PBGC trusteeship
 - Tax status arguments (\$1M+) rejected by courts
 - Post-petition “administrative” priority
 - Limited (at most) to normal cost
 - Reduce for decline in employment levels
 - Limited priority for 180-day pre-petition period
 - Rest is general unsecured
 - Fiduciary breach (not common)

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Bankruptcy Claims/Disputes (Cont.)

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

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Questions?

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