Re: RIN 1212–AB20

Via e-mail to regcomments@pbgc.gov

These are comments on Regulation Identifier Number 1212-AB20. They are made by Tom Schryer A.S.A. They do not necessarily reflect the opinions of his employer, Findley Davies, Inc.

“The employer would have a week in which to resume activity”

This is not generally practical. Please consider “The employer would have a week in which to begin taking the necessary steps (including planning) to resume activity but undue hesitation in actually resuming activities will result in a cessation being triggered at the point of undue hesitation.”

“Reasonably certain” and “Hope or Expectation”

These two concepts are several paragraphs apart but should be connected. See –

> “any hope or expectation the employer may have that the discontinued work will be resumed would be irrelevant to whether the discontinuance is a cessation” and
>
> “unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work within 30 days—for example, after a two-week holiday shutdown. This standard would allow a plan administrator to decide immediately whether a separation occurred when an employee discontinued active work. If, however, the 30 days pass without the employee’s having returned, the employee would be considered to have separated from employment when active work stopped.”

Participation

See “the rehired or replacement employee was a participant in the plan.” Most plans have service requirements before “covered employees” become participants. Please change this to “the rehired or replacement employee was in employment that is – or would have been if the plan had not been frozen to new participants - covered by the plan and the employee has a reasonably customary likelihood of remaining in such employment until meeting the plan’s age and service requirements for participation.”

The first presumption (applicable to a voluntary cessation)

The first presumption relates to an ***involuntary*** cessation so a correction is needed. This then affects the second since it should not include the word “also” after this change.

Cessation Process

“For a voluntary cessation, carried out pursuant to an employer decision, that decision marks the beginning of the cessation process, and the active participant base would be measured immediately before that decision.” Think about the classic business transition: Buggy Whip Company of Detroit has just announced that – even though sales remain steady and prospects are decent – they will begin making steering wheel covers and upholstery for cars. The company's termination rate ticks up 10% (from 4% annually to 4.4% annually) as some employees leave to join Henry Ford's crew. That appears to start the process according to the proposed rules. Eight years go by before they decide to give up the factory making buggy whips. I suggest a new phrase: "For a voluntary cessation, carried out pursuant to an employer decision, that decision (or, if later, when a downsizing rate of what appears to be at least 20% per year begins) marks the beginning of the cessation process, and the active participant base would be measured immediately before such time."

Penalties

If true, the rules should at least allude to the fact that some penalty rates are ***per participant*** (or whatever).

Liability

Two issues about how the liability (determined by the PBGC apparently) is calculated came to mind and should be clarified. The proposed rules say "should not take account of changes in assets or liabilities after the cessation date." The "cessation date" seems pretty clearly to be after the primary attrition at the facility but would be before the secondary attrition at other locations that pushes the attrition percentage over 20%. Since often terminated employees who are entitled to immediate early retirement pensions in such circumstances defer such pensions while unemployment benefits run out it would be good to clarify how the liabilities for those are valued.

Misleading section title

We suggest changing -

> "(c) *Follow-on operations disregarded." to*

> "(c) *Follow-on operations disregarded (except for determining the percentage decrease in the active participant count)"*

A new, financially sound employer continues

The PBGC wants to provide clear rules for the defined benefit plan community and make them well reasoned enough to have courts give deference to the PBGC's policies. One section lacked such clarity. We propose changing **–**

> "Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the new employer, the proposed regulation would enable PBGC to consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation)" to

> "Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the

> new employer, the proposed regulation would provide that the PBGC will customarily consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation) unless the PBGC's investigations indicate that the plan's future financial prospects have been downgraded materially."

<u>PBGC needs this information</u>

The reference to unions seems a bit tangential to that purpose. Press releases might be related to the PBGC's duties.

<u>Size</u>

We have experience with these events and the assertion "should make compliance relatively easy" is, in our experience, not remotely accurate and have sent such a commentary to OMB in accordance with the procedures when rules are open for public comments. We estimate an expense of $25,000 per case. That is truly burdensome for a smaller case. Having driven through a lot of the country recently while on vacation noting the freshly shuttered small businesses the assertion that "this rule will not have a significant economic impact on a substantial number of small entities" should either be changed or the quantitative analysis that the PBGC used should be presented (a link to a separate web page would suffice, if it provides enough detail). The assertion "4062(e) is generally not relevant for small employers" also seems strained since a manufacturing facility within a small business might well be shut down for a period of years while the business continues on using existing inventory and outside production facilities. **<u>Section 604(b) of the Regulatory Flexibility Act</u>** should almost undoubtedly be directly and fully addressed in the final rule including "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes" as so required.

Compliance with all laws, meeting the reasonable objectives outlined in the proposed rules, avoiding putting smaller enterprises who offer defined benefit pension plans at an economic disadvantage versus their counterparts who do not provide such benefits, avoiding undue damage to the economy (especially during the current phase), managing your own workload, and focus of resources can be improved if you include -

> "If the actuary for a plan with fewer than 1,000 active participants certifies that the gross liability for accrued plan benefits has not increased by more than 10% as a result of the event, only simplified initial reporting will be required. Such initial reporting should include that signed statement and a brief description of the plan, the event, the number of affected employees, and the employer's near-, mid-, and long-term viability. The PBGC will then review its records to decide the extent to which it should pursue these matters while acknowledging the objectives of the Regulatory Flexibility Act."

<u>Conclusion</u>

Thank you for your attention and the real progress you have already made in this regard.

If you have any questions or comments please contact Tom Schryer, A.S.A. at 216/875-1917 or at tschryer@findleydavies.com.

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Dear Sir or Madam:

Regulation Identifier Number (RIN) 1212-AB20

This letter is the response of Towers Watson to proposed changes to PBGC's regulation regarding ERISA section 4062(e) as published on August 10, 2010 in the Federal Register.

Towers Watson is a leading global professional services company specializing in employee benefits, human capital strategies, and technology solutions. Towers Watson was established on January 1, 2010 as a combination of the former Watson Wyatt and Towers Perrin, and employs approximately 14,000 associates on a worldwide basis. Our more than 600 Enrolled Actuaries under ERISA provide actuarial and consulting services to more than 1,500 defined benefit plans in the U.S. The undersigned have prepared our firm's response with input from others in the firm.

We support the effort PBGC is making to better define the rules regarding events that trigger reporting under ERISA section 4062(e). Further, given the fact that 4062(e) events may, in some cases, be indicative of a sponsor's poor health, we understand PBGC's desire to cast a wide net in the application of 4062(e), and to obtain information in a timely fashion to protect participants and the pension insurance system. However, PBGC's desire to apply 4062(e) in a broad range of situations, and resulting need for information, must be constrained by its statutory authority and balanced against the increased administrative and financial burden placed on defined benefit plan sponsors. In particular, we believe the PBGC's proposed definition of a 4062(e) event inappropriately expands the range of transactions potentially subject to reporting and, through negotiation with PBGC, significantly accelerated funding requirements not otherwise required under current pension funding law. In addition to modifying the definition of a 4062(e) event, we believe that certain waivers for reporting and liability imposition should be provided to cover the many situations in which there is no substantial increase in risk to the PBGC.

Specifically, we believe that the proposed regulation strikes the wrong balance in a number of respects and, if implemented as proposed, could contribute to the trend away from defined benefit plans. In particular:

1. **Scope.** The expansive interpretation of a section 4062(e) event taken by the PBGC in the proposed regulations (which we believe is inconsistent with the language in the statute and prior PBGC guidance) could sweep in many routine business transactions, such as changing product lines, moving to another facility (even a nearby facility which is simply more efficient or better suited to the plan sponsor's needs), or selling a business, even if the transaction poses no additional risk (or actually reduces the risk) to the PBGC and participants. The statute refers to "cessation of operations at a facility", not "cessation of an operation". We believe the expansion of the scope of 4062(e) beyond what the statute provides is beyond the PBGC's authority, destructive to the voluntary pension system, and will have unintended and detrimental effects on businesses which sponsor pension plans.

2. **Lack of specificity.** The proposed regulations are vague in many areas, likely leading to inconsistent interpretation of the regulation among different plan sponsors and between plan sponsors and PBGC. This situation exposes plan sponsors to potentially onerous penalties for not filing in situations in which they have reasonably determined that a 4062(e) event has not occurred. Given the requirement to preserve records for five years about potential section 4062(e) events, it also creates a burdensome need to maintain data in situations in which the plan sponsor has determined in a reasonable manner that a 4062(e) event has not occurred, including the potentially very significant data needed to calculate plan termination liabilities in case the PBGC should subsequently determine that a 4062(e) event did in fact occur. And most importantly, it puts plan sponsors in the untenable position of not being able to make routine business decisions with certainty about whether such actions will trigger a significant acceleration of funding under the plan or some other financial arrangement to be negotiated with PBGC.
3. **Compliance issues.** The regulations create practical compliance problems for sponsors (e.g., requiring sponsors to "get into the minds" of employees to determine if their voluntary departures were the result of an impending 4062(e) event).
4. **Automatic waivers.** The proposed regulation does not include automatic waivers for well-funded plans, small plans, or other situations which pose relatively little risk, or no additional risk stemming from the 4062(e) event, to the PBGC and participants.

We discuss each of these in more detail below. We also address interpretations in the proposed regulations that are inconsistent with the statute and note where additional clarification would be helpful.

<u>Scope of the proposed regulation</u>

- ***"An operation" vs. "operations."*** The most significant and troubling aspect of the proposed regulation is the re-defining of a 4062(e) event. The proposed regulation requires merely "cessation of an operation", rather than "cessation of operations" as provided by the statute, greatly expanding the number of events which will trigger 4062(e). Under the proposed regulation, if a facility has multiple operations, a cessation of one of those operations may result in a section 4062(e) event. However, the statute literally would require all operations at a facility to cease before a 4062(e) event can occur. We request that PBGC observe the clear wording of ERISA in this regard.

- ***Effect on routine business decisions.*** Under the proposed regulation, a number of routine business transactions (e.g., selling a business, moving to a more modern, efficient facility, or changing product lines), could result in a "cessation of an operation" (and, if a sufficient number of active participants are separated as a result, trigger section 4062(e)) even if the event poses no risk – or reduces the risk – to the PBGC and participants.

  <u>Asset sales</u> - Under the proposed regulation, a sale of assets would be treated as a cessation of an operation at a facility even if the purchaser continues the operation at the same facility with the same employees and, if 20 percent of the employees participating in a plan are transferred in the sale, section 4062(e) would be triggered. We disagree with this interpretation. Under these facts, there has been no "cessation of operations" and no employees have been "separated from employment," as contemplated by the statute. Although the legislative intent of this provision is unclear, we believe that a literal reading of ERISA indicates that a cessation of operations occurs when an employer actually shuts down a facility and operations actually cease. This makes sense since such circumstances may be a sign of current or impending financial trouble and a bond or escrow protects the PBGC against a potential distress termination. PBGC has also successfully used its Early Warning Program to monitor such situations and provide additional protection to PBGC where warranted.

  At the very least, PBGC should not apply section 4062(e) in situations involving arms-length transactions where the new employer continues the operations at the facility, the original employer's workers are employed by the new employer, and the new employer adopts the original employer's plan (or assets and liabilities related to such employees are transferred to a plan of the new employer). This is a reasonable interpretation of the statute that PBGC has agreed with in the past. For example, see PBGC Opinion Letters 76-52, 77-147, 78-29, 82-29, 85-8 and 86-13.

In addition, we believe PBGC's interests are adequately served through the Early Warning Program and current reportable event requirements, even where the new employer does not adopt the original employer's plan or accept a transfer of assets and liabilities (e.g., active participant reduction (4043.23), reporting of a change in contributing sponsor or controlled group (4043.29), plan merger, consolidation or transfer (4043.28), or transfer of benefit liabilities (4043.32)) We do not believe that PBGC, plan sponsors or plan participants are well served by piling on multiple reporting requirements for the same event.

We note that the proposed regulation would enable PBGC to consider the original employer's liability satisfied if a new, financially sound employer continues or resumes the operation, employs the same employees, and adopts the original employer's plan, or if assets and liabilities of affected employees are transferred to a plan sponsored by the new employer. However, burdensome reporting would still be unfairly imposed and there would be no certainty that PBGC would actually take such a position in any given case. As mentioned previously, the potential for a 4062(e) event and associated liability may unnecessarily inhibit companies from taking normal business actions in many situations where such actions would pose no increase in risk to the PBGC. We suggest that the regulation contain waivers for these situations so that companies can act with certainty rather than rely on the discretion of PBGC.

<u>Stock sales and spin-offs</u> - The proposed regulation does not specifically address stock sales or spin-offs. Because the employer does not change at the moment of the transaction under either of these situations, the regulation should specifically provide that such event does not result in "separations from employment" and thus 4062(e) does not apply.

<u>Moving an operation or undertaking a new operation</u> - Under the proposed regulation, moving an operation from one facility to another (e.g., moving/updating from an out-of-date facility to a new state-of the-art facility) or changing operations at a facility (e.g., in response to changing customer demands or seasonal changes in consumer buying patterns) would result in a cessation of operations (and trigger 4062(e) if there is a 20 percent drop in the active participant-count).

In these situations, we do not believe there has been a "cessation" of operations as contemplated by the statute. Moreover, it is difficult to see what interest the PBGC would have in these routine business operations. There is no reason to think that a sponsor is in financial distress simply because an operation has been moved to another facility or operations at the facility have changed. PBGC should not apply section 4062(e) to routine operations such as these entered into by companies for legitimate business reasons since to do so is inconsistent with the statute and the increased burden on sponsors is not justified by an increased risk to PBGC or participants. The increased funding of the pension plan and/or posting of security with PBGC potentially caused by such routine company actions could be a disincentive to engage in them, making the company financially weaker.

We note that the proposed regulation indicates that PBGC may assess risk in making arrangements for purposes of satisfying the 4062(e) liability. However, burdensome reporting would still be required and there would be no certainty that PBGC would exercise this authority in any given case. The uncertainty will greatly complicate employer business decisions and could lead employers to forgo actions which absent 4062(e) are clearly in the company's, employees', and PBGC's best interests.

Lack of specificity

There are also numerous interpretive issues related to these provisions.

- ***Geographic proximity.*** Can geographically dispersed buildings constitute one “facility” such that moving operations from one building to another would not result in a cessation of an operation under the rule described above?

  The proposed regulation defines the term “facility” or “facility in any location” associated with an operation as “the place or places where the operation is performed” and indicates that a facility may include multiple buildings. Although the proposed regulation does not discuss whether geographically dispersed buildings may constitute a “facility,” the use of the phrase “place or places” suggests this is possible. Assuming this is correct, how far apart may the buildings be?

  We recommend that PBGC confirm that, for purposes of determining whether there has been a cessation of operations at a facility, significantly geographically dispersed operations are not considered to be a single facility. For example, if a plan sponsor operates 200 retail stores nationwide, and closes ½ of them, the regulation should make clear that this would be treated as 100 facility closings, none of which would be likely to result in a reduction of 20% of the active employees participating in the plan. Of course, to the extent employees of these stores constitute a significant part of a plan’s active participant population, this event would be reportable to PBGC as an active participant reduction reportable event (4043.23).

  By contrast, buildings that are in a reasonable proximity to one another should be able to be treated as a single facility. For example, a plan sponsor should be able to move operations into a new, more efficient facility within the same geographic region without triggering 4062(e) liability, despite the fact that some employees whose commutes are adversely affected may decide to terminate employment as a result. We propose that a new facility which continues the operations of the original facility and is within a prescribed distance of the original facility be considered part of the original facility. Without such a provision, companies will be in an untenable position in which outgrowing a facility, losing a lease, or simply desiring a more efficient facility can result in triggering significant 4062(e) liability.

- ***Operation.*** As discussed above, we believe PBGC should employ the statutory definition, requiring “cessation of operations”. However, if PBGC defines a 4062(e) event as potentially occurring whenever there is a “cessation of an operation”, in order for sponsors to determine whether a new operation has begun and an existing operation has been discontinued, it is necessary to further clarify the term “operation.” For example, does a relatively routine change in product lines produced by a factory in response to changing customer demands constitute a “cessation of an operation”?

  The proposed regulation defines the term “operation” as a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. The proposed regulation also indicates that whether a set of activities is an operation depends on how it is 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.

  This definition is highly subjective and will mean different things to different individuals. PBGC should clarify the term “operation” in the final regulations. We note that the preamble includes an example that treats manufacturing and shipping as separate operations. Other examples would also be helpful.

However, beyond simply providing examples, we recommend that PBGC not use the public's or customers' views of product lines as being separate to determine whether separate operations exist. For example, if a manufacturing plant produces different products seasonally (e.g., winter holiday decorations and patio furniture), the regulations should be revised to be clear that the seasonal changes in product lines do not result in "cessation of an operation", and any reasonable down-time needed to switch between product lines does not constitute a cessation of an operation either. PBGC should also provide examples that confirm that manufacture of related items or items requiring similar components (e.g., cars vs. trucks, different types of paper products, lawnmowers and motorcycles) do not constitute separate operations. Without such clarification, plants which produce different products at different times may be treated as having a cessation of operations (particularly if there is some down-time needed to switch the product lines). There is no justification under the statute for having such business decisions influenced by the likelihood of triggering a 4062(e) event, particularly since the statute refers to "cessation of operations, not "cessation of an operation".

- ***"Significant" activity.*** Under the proposed regulation, an employer is considered to cease an operation at a facility when the employer "discontinues all significant activity at the facility in furtherance of the purpose of the operation."

  The regulation does not define "significant." However, according to the preamble, continued processing of materials on hand would typically constitute significant activity in furtherance of the purpose of an operation. On the other hand, sales of left-over inventory would typically not. Also, continuing activity that does not further an operation's purpose (e.g., maintenance and security activities) would be disregarded.

  Further guidance on the meaning of "significant" is needed. For example, if production is scaled back by 80 percent due to decreased demand, has there been a cessation? What about 90 percent? Given the potentially significant 4062(e) liability, penalties for failure to file and the requirement to maintain a significant amount of data in any case where a 4062(e) event may have occurred, undefined terms like "significant" are troublesome.

- ***Aggregation of unrelated events.*** If the "cessation of an operation" approach is adopted, we recommend that the regulations clarify that headcount reductions from unrelated cessations of unrelated operations at a single facility are not aggregated for purposes of meeting the 20% threshold.

In summary, plan sponsors need guidelines that are specific enough that they can be comfortable that if they reasonably apply the guidelines to determine each of their individual "operations", then that determination will not be second guessed or overruled, resulting in potential penalties and significant unanticipated consequences of an employer action.

Compliance issues

Given the expansive scope of the proposed regulation, virtually every defined benefit plan sponsor, even if they are financially healthy and their plan is fully funded, will need to watch for transactions that might constitute a cessation of operations. Once it is determined that there has been a cessation of an operation at a facility, the sponsor would then need to track separations and make a determination as to whether the separation "resulted" from the cessation.

Under the proposed regulation, a separation is considered to "result" from the cessation if the separation would not have occurred when it did if the employer's cessation of the operation at the facility had not occurred. This standard is particularly troublesome with respect to employees who voluntarily separate from employment. For example, under the proposed regulation, if an employee had been planning to retire in a year or two but chose to retire sooner upon learning of a shutdown, the separation would be the result of the shutdown. On the other hand, if (before learning of the shutdown) the employee had been planning to retire immediately and retired as planned after learning of the shutdown, the separation would not be a result of the shutdown. Clearly an employer would have a difficult time making determinations under such a standard (which relies on knowing the state of mind of an employee and how or whether his or her decision was influenced by an event). Further, it would be administratively burdensome for an employer to set up a system to routinely elicit such information (e.g., through exit interviews). PBGC's idea of establishing rebuttable presumptions is helpful. However, the presumptions that apply under the proposed regulations (i.e., treating all separations occurring on or after the earliest date the employer decision to cease operations becomes known, and all involuntary cessations occurring after the employer has made the decision resulting in the 4062(e) event, as having resulted from the cessation) does not seem appropriate since, in practice, it will result in all turnover after the decision becomes known being classified as resulting from the cessation and all involuntary termination after an earlier date also being so treated (even if managers making termination decisions are not aware of the decision). As is the case with the definition of a cessation of operations, we believe this is too expansive a view of the terminations resulting from a cessation.

As an alternative, we would suggest a presumption that treats an individual who voluntarily separates at an age when subsidized early retirement benefits are available or at or after normal retirement age as not having separated as a result of the cessation. In addition, plan sponsors should be able to carve out an estimate of the "normal level of turnover", based on recent historical patterns. Consider a plan sponsor who announces that a facility is closing in 12 months, during which time period the employer does not expect to replace voluntarily terminated employees. If the employer's turnover has recently averaged 10% per year, voluntarily terminating employees up to 10% of the number of employees at the time of the announcement should be able to be considered "normal attrition" and there should be a rebuttable presumption that such terminations are not as a result of the 4062(e) event.

Automatic waivers

The proposed regulation includes a provision explicitly authorizing PBGC to grant waivers where warranted by the circumstances. However, it does not include automatic waivers for well-funded plans or small plans (e.g., fewer than 500 participants), despite the fact that the potential exposure to the pension insurance system with respect to such plans is likely to be relatively small and does not justify the administrative burden and cost of compliance.

In the preamble, PBGC notes that the better a plan is funded, the lower (other things being equal) would be its liability for a section 4062(e) event, and if a plan were so well funded that it had no termination liability under ERISA section 4062(e), its liability for a section 4062(e) event would be zero. PBGC also notes that, to the extent small plans present less underfunding potential than large plans, the liability under section 4062(e) will also be less. However, sponsors and administrators of such plans would still incur the expense of monitoring for 4062(e) events and, on the occurrence of a 4062(e) event, compiling a significant amount of information and documentation and preparing Form 4062-E. Sponsors and administrators would also be required to preserve records about potential 4062(e) events for five years. In addition, such sponsors may be required to perform complex and expensive calculations to determine the plan's funded status on a plan termination basis. Perhaps most importantly, such sponsors may find that concern over these issues interferes with the normal course of running their businesses and inhibits them from taking routine actions that are in the best interest of their business.

We believe that the additional burdens placed on these plan sponsors are not warranted, given the relatively small risk to the system. Also, as we have repeatedly seen with respect to ERISA 4010 reporting, waivers for well-funded plans provide an incentive for sponsors to keep their plans well-funded so as to avoid the burdens and costs of reporting and, in the case of 4062(e), the much more significant potential 4062(e) liability. We believe that plan sponsors, participants and the pension insurance system are all better served by having such automatic waivers.

We believe that PBGC should also consider providing exemptions in situations in which the event itself poses no increased risk to PBGC and the existence of the event is not indicative of an increase in PBGC's risk. The classic example of this is a largely inactive plan which has only a handful of active employees participating. The risk such a plan poses to PBGC is completely independent of the number of such active employees (since the funding for that plan is clearly not being supported by the operations in which such employees are engaged), and it defies logic that a 20% reduction in that handful of employees (e.g., from 5 to 4) should trigger potentially very large 4062(e) liability.

Other Comments

- ***Plan status.*** The final regulations should explicitly provide that the applicability of a section 4062(e) event is based solely on the plan as it is constituted on the cessation date, and not involve any look-back to the plan's status at any earlier point in time.

- ***Timeframe for separations.*** The proposed regulation provides that a separation occurring before, on, or after the cessation date may be as a result of the cessation. According to the proposed regulations, an operation may not cease instantaneously, and some employees may leave before the cessation date because the operation in which they are employed is in the process of shutting down, although significant activity in furtherance of the purpose of the operation is still ongoing. However, the proposed regulation does not provide a timeframe for making this determination. For example, is it possible for a separation that occurs five years after the cessation date to "result" from the cessation? PBGC should set a reasonable period of time surrounding the cessation date as a boundary.

- ***Involuntary cessations.*** Under the proposed regulations, two situations are considered to be "involuntary" cessations and special rules apply. In each situation, a cessation would occur not when all significant activity stopped, but at a later date – unless the employer in the meantime resumed the operation (in which case there would be no cessation) or decided not to resume it (in which case the cessation would occur when such decision was made).

  The first special rule applies if the discontinuance of activity is caused by employee action such as a strike or sickout. In that case, the cessation date is the date when the employee action ends, unless within one week after that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation. The second special rule applies if the discontinuance of activity is caused by a sudden and unanticipated event such as a natural disaster. In that case, the cessation date is considered to be 30 days after the discontinuance.

In both of these situations, the timeframes for resuming significant activity appear unnecessarily short. For example, after a major storm or flood, it may take some time for damaged buildings to be repaired and reopened. This adds another issue and another potentially major expense for such an employer to deal with at a time when the employer is already trying to handle a difficult situation. Rather, PBGC could require that operations resume within a reasonable period of time based on a facts and circumstances determination taking into account the level of disruption caused by the event, with a rebuttable presumption after one year in either of these types of situations that operations have ceased. Alternately, there could be no set time limit - cessation is based only on an affirmative action (for example, sale of the damaged property) or a decision not to resume operations.

- ***Seasonal operations.*** Under the proposed regulations, employers engaged in seasonal operations could face 4062(e) liability every year. Consider a plan sponsor which operates amusement parks, or baseball stadiums. The proposed regulation requires that the "expectation of resumed operations" be disregarded. The regulations should accommodate seasonal businesses, such that the typical seasonal variations in employment levels do not trigger 4062(e). In addition, seasonal shifts in product lines (i.e., a factory producing tee shirts in the summer and sweaters in the winter) should be accommodated in the event that the previously discussed broader issues regarding the definition of a cessation are not addressed.

- ***Late filing penalties.*** PBGC indicated that failure to timely report a 4062(e) event may result in substantial harm to participants and PBGC and may warrant penalties larger than the "general" ($25/$50-per-day) penalty under the PBGC penalty policy. Given that the key terms in the proposed regulation for determining whether a section 4062(e) event has occurred are defined in a subjective fashion (i.e., there is no bright line test for determining whether a 4062(e) event has occurred), this seems extraordinarily unfair. PBGC should not apply penalties larger than the general penalties in these situations in the absence of evidence of willful disregard of the requirements of 4062(e). Also, PBGC should exempt an employer from penalties altogether if the employer made a determination, based on a reasonable, good faith interpretation of the rules, that such an event had not occurred.

In summary, PBGC should consider its statutory authority and the implications of the proposed rule on defined benefit plan sponsorship, and avoid unnecessarily burdensome requirements that might further accelerate the decline in defined benefit plans.

Thank you for the opportunity to comment on the proposed regulation. If your staff has any questions concerning our comments, please contact either of the undersigned directly.

Sincerely,

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