2015 Enrolled Actuaries Meeting

Questions to the PBGC

and Summary of Their Responses

Summary of Discussions between the Enrolled Actuaries Program Committee
and Staff of the Pension Benefit Guaranty Corporation
on February 2, 2015

The following pages set forth the questions posed to staff of the Pension Benefit Guaranty Corporation at discussions on February 2, 2015, with representatives of the Enrolled Actuaries Program Committee. Included also are summaries of the responses to those questions. The summary responses to the questions are intended to reflect as accurately as possible the statements made by the government representatives. However, those responses are merely the current views of the individuals and do not represent the positions of the Pension Benefit Guaranty Corporation or of any other governmental agency and cannot be relied upon by any person for any purpose. Moreover, PBGC has not in any way approved this booklet or reviewed it to determine whether the statements herein are accurate or complete.

The following representatives of the Enrolled Actuaries Program Committee took part in the discussions:

Harold J. Ashner, Keightley & Ashner LLP
Susan L. Breen-Held, The Principal Financial Group©
Bruce A. Cadenhead, Mercer
Scott A. Hittner, October Three LLC
James E. Holland Jr., Cheiron Inc.
Eric A. Keener, Aon Hewitt
Ellen L. Kleinstuber, The Savitz Organization
Jeffrey S. Litwin, Sibson Consulting, a Division of Segal
Marjorie R. Martin, Buck Consultants, A Xerox Company
John H. Moore, The Terry Group
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The following representatives of the Pension Benefit Guaranty Corporation took part in the discussions:

Kenneth Cooper, Assistant General Counsel, Office of the General Counsel
David Gustafson, Chief Policy Actuary, Policy, Research and Analysis Department
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The Program Committee would like to thank the practitioners who submitted questions for this booklet.

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QUESTION #1

Premiums: Statute of Limitations on Premium Refunds Based on Changes in PBGC Interpretation

In 2014 Blue Book Q&A 1, PBGC was asked about the reasons for its withdrawal of two long-standing opinion letters (Op. Ltrs. 77-172 and 85-19) on PBGC coverage of plans in Puerto Rico and Guam. In its response, PBGC stated that it will no longer determine that a plan is covered under Title IV of ERISA if its trust is created or organized outside the U.S. and no §1022(i)(2) election has been made, and further stated that it has refunded "up to six years of premiums."

Why is PBGC limiting its premium refunds to the past six years, given that the statute of limitations (§4003(f)(5)) allows actions to be brought against PBGC until the *later* of six years after the cause of action arose or three years (six years in the case of fraud or concealment) after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action?

RESPONSE

As a preliminary matter, it is important to note that only the requesting parties to a PBGC opinion letter or coverage determination are entitled to rely on the opinion letter/coverage determination. Furthermore, the existence of the now-withdrawn opinion letters did not preclude any plan from seeking a coverage determination or filing a legal action. In fact, many plans did request a coverage determination before opinion letters 77-172 and 86-19 were withdrawn on April 19, 2013. Thus, PBGC's decision to withdraw those opinion letters has no impact on the statute of limitations applicable to premium refund requests made by non-parties.

Consistent with section 4003(f)(5) of ERISA, PBGC will refund up to six years of premiums where appropriate. PBGC does, however, consider the statute of limitations to be tolled as of the date the request for a determination was made. For example, if a plan requested a determination in 2010 but PBGC did not make a determination until 2013, the six year statute of limitations would be measured from 2010 and PBGC would refund premiums dating back to 2004.

QUESTION #2

Premiums: Small Plan Opt-Out Rules

Under PBGC's premium rules and instructions for the 2014 premium payment year, the variable-rate premium for small plans is generally based on year-old data, subject to an opt-out rule under which the small plan can elect to base the variable-rate premium on current-year data. An election to opt out can be made without PBGC approval only if it is for the first premium payment year for which such an election can be made, and once such an election is made, it cannot be changed for a later premium payment year without PBGC approval. Please explain how these rules work in the context of mergers, spinoffs, and consolidations involving one or more plans that either did or did not make such an opt-out election for a prior premium payment year. In particular, under what circumstances is a plan treated as having the opt-out "history" of another plan (*e.g.*, where the plan is a "successor plan" to that "other" plan for purposes of Title IV)?

RESPONSE

A plan that is spun off from another plan is considered a new plan, so it has no history for premium payment purposes. In a merger context, if Plan A is being merged into Plan B, the relevant history for premium payment purposes will be that of Plan B. If Plan A and Plan B are consolidated, resulting in Plan C, Plan C is considered a new plan, and therefore has no history for premium payment purposes.

QUESTION #3

Premiums: Reporting of Participant Counts by Category

Starting with 2014, the participant count reported on the premium filing is broken down into three categories: (1) active participants (2) terminated vested participants, and (3) retirees and beneficiaries receiving payment. If a plan has benefit liabilities for an individual who is no longer working in a position that falls within the plan's coverage, but is employed in another position with a member of the contributing sponsor's controlled group (whether that other position falls within the coverage of another plan maintained by the same controlled group or does not fall within the coverage of any plan), is that individual to be treated as being in the active category or in the terminated vested category?

RESPONSE

The individual should be reported in the same category for which he is reported on Schedule SB of Form 5500.

QUESTION #4

PBGC Coverage: Church Plans

How is PBGC dealing with church plan Title IV coverage issues, and related PBGC premium issues, in light of recent court decisions (*e.g.*, *Rollins v. Dignity Health* and *Kaplan v. Saint Peter's Healthcare System*) finding that only a church can establish a church plan?

RESPONSE

PBGC is closely monitoring the ten lawsuits involving church plans. The district courts that have considered these issues have been divided, and there are appeals pending in several cases. It is too early to know how the issues will ultimately be resolved. For a plan that stops paying premiums and/or requests a refund of premiums on the basis that it is a church plan, PBGC's longstanding policy is that for such a plan to be determined to be a church plan under Title IV, the plan must first obtain a letter ruling from the IRS determining that the plan meets the definition of a church plan under the Internal Revenue Code. PBGC continues to follow this policy.

QUESTION #5

Standard Termination: Lump Sum Mortality Table for a Non-Calendar Year Plan

PBGC Technical Update 08-4 provides that "for a plan with a termination date on or after the first day of the first plan year beginning in 2008, a lump sum would be determined based on the applicable mortality table as specified by the Secretary of Treasury on the plan's termination date, taking into account projected mortality improvements under the table through the plan year containing the distribution date".

Rev. Rul. 2007-67, Notice 2008-85 and Notice 2013-49 provide that the applicable mortality table for a given calendar year applies to distributions with annuity starting dates that occur during stability periods that begin during that calendar year.

If the distribution date is within the same calendar year as the date of plan termination, the appropriate applicable mortality table to use is the applicable mortality table for the calendar year in which the stability period that includes the distribution date begins. However, when the distribution or payment date is in a later calendar year, the Technical Update seems to limit the projection of mortality improvements to the first day of the plan year containing the distribution date.

Assume that a plan year runs July 1 to June 30, the plan termination date is March 31, 2014 and the stability period is the calendar quarter.

a) The distribution date for the plan termination is March 1, 2015 (i.e., in the 2015 calendar year, but within the 2014 plan year). Which applicable mortality table (2014 or 2015) would be the appropriate table to use for lump sum payments on the distribution date?

b) A deferred annuity was purchased for participant A on March 31, 2015, the distribution date for plan termination benefits. The participant later elected to receive a lump sum payment of his deferred annuity benefit from the deferred annuity contract payable on February 1, 2016 (i.e., in the 2016 calendar year, but within what would have been the 2015 plan year had the plan not terminated). Which applicable mortality table (2015 or 2016) would be the appropriate table for the contract to use to determine the participant's lump sum payment on the payment date of February 1, 2016?

RESPONSE

The Technical Update was intended to provide guidance for a plan with a calendar year plan year and a plan year stability period. For situations where the plan year is not the calendar year or where a calendar year plan has a stability period other than the plan year, the principles outlined in the IRS guidance noted above should be followed. More specifically, the applicable mortality table is the one in effect on the first day of the stability period containing the date the distribution. Therefore, the answers to the questions posed above are:

a) The distribution date (March 1, 2015) occurs during the stability period beginning January 1, 2015. Therefore the applicable mortality table is the PPA 2015 applicable mortality table.

b) The distribution date (February 1, 2016) occurs in the stability period beginning January 1, 2016. Therefore the applicable mortality table is the PPA 2016 applicable mortality table.

QUESTION #6

Standard Terminations: Effect of Majority Owner Alternative Treatment Election on Sufficiency Commitment

Assume that, to facilitate the standard termination of a plan, the contributing sponsor of the plan properly executes a sufficiency commitment, and a majority owner properly elects an alternative treatment of his or her benefits. Under PBGC regulations (§4041.21(b)), a sufficiency commitment calls for the contributing sponsor to "contribute any additional sums necessary to enable the plan to satisfy plan benefits in accordance with §4041.28," and an alternative treatment election calls for the majority owner to "forgo receipt of his or her plan benefits to the extent necessary to enable the plan to satisfy all other plan benefits in accordance with §4041.28."

Does PBGC agree that the contributing sponsor would be required to contribute additional sums only as needed to enable to the plan to satisfy all plan benefits other than those of the majority owner who made the alternative treatment election, rather than all plan benefits, including those of that majority owner?

RESPONSE

Yes. Benefits for which a majority owner has elected alternative treatment in accordance with the regulation are not included in the benefits required to be satisfied pursuant to a sufficiency commitment.

QUESTION #7

Standard Terminations: Allocation of Shortfall Among Multiple Majority Owners Electing Alternative Treatment

Under the rules governing majority owner "alternative treatment" elections, it is possible for there to be two or more majority owners who may make such an election (since majority owner status is based on 50% or more ownership and also as a result of the controlled group attribution rules). Assume that there are two or more majority owners, that each of them makes such an election, and that plan assets are sufficient to satisfy some, but not all, of the benefit liabilities of all of these majority owners. Will PBGC, upon audit of the standard termination, review how the shortfall was allocated among the majority owners and, if so, what are PBGC's rules and guidelines in conducting such a review?

RESPONSE

Upon audit of the standard termination, PBGC will review how the shortfall (if any) was allocated among the majority owners. In conducting such a review, PBGC will follow the alternative benefit treatment election and plan language to determine how the shortfall should be allocated among the majority owners. To the extent that no amounts or order of alternative benefit treatment elections has been specified, and all majority owners have elected an alternative treatment of their benefit to the extent necessary to fund all other benefits, PBGC will review the allocation to ensure that the shortfall is allocated proportionate to each majority owner's benefit under the plan.

QUESTION #8

Standard Terminations: PBGC Review of Notice of Intent to Terminate and Notice of Plan Benefits

PBGC recently revised its standard termination forms and instructions to provide for submission of a sample of the Notice of Intent to Terminate and samples of the Notices of Plan Benefits as part of the Form 500 filing.

a) In the past, PBGC has not routinely received copies of these notices until the time of a PBGC audit. What does PBGC anticipate doing if it identifies that there are defects in one of these notices when it reviews them at the Form 500 review stage? In particular, under what circumstances does PBGC anticipate nullifying a termination or requiring the plan administrator to issue revised notices?

b) The revised instructions require submission of sample notices of plan benefits "issued to each category of participants (actives, retirees, separated vesteds, and separated non-vesteds)." PBGC regulations, however, do not provide separate rules governing the content of notices of plan benefits based on these four categories, but rather based on the following three categories: persons in pay status, persons not in pay status but with valid elections or de minimis benefits (whether actives, separated vested, or separated non-vesteds), and all other persons not in pay status (again, whether actives, separated vested, or separated non-vesteds). Should the submission made as part of the Form 500 follow the Form 500 instructions and provide a sample notice of plan benefits for each of the four categories noted in the instructions, without any need to provide a sample for each of the three categories noted in the regulations, or does PBGC intend that a sample be provided for each of the three regulatory categories?

RESPONSE

a) As noted, PBGC's forms have recently been revised to require submission of these documents. (Plan administrators must use the new forms for terminations initiated on or after June 1, 2014.) What actions PBGC will take upon finding defects will depend upon the types and severity of defects that are found. When determining whether a nullification is appropriate, PBGC will follow its regulations, which allow consideration of the plan participants' interests, as well as the correction of good faith errors.

b) Plan administrators must attach to the Form 500 a sample notice of plan benefits for each of the four categories of persons named in the revised instructions: actives, retirees, separated vesteds, and separated non-vesteds. (Notices of plan benefits must include the information for each of the three categories named in the regulations.)

QUESTION #9

Standard Terminations: Effect of Failure to Request Determination Letter on PBGC Audit Selection Determination

In the majority of cases, an employer will want to request and receive a favorable determination letter from IRS before assets are distributed as part of a standard termination. However, there are cases in which an employer decides, generally for timing reasons, either that it will not request a determination letter or that it will distribute assets before receiving the letter. Does PBGC take into account whether an IRS determination letter has been requested, or whether distribution occurred after (as opposed to before) receipt of the letter, in deciding which plans to select for a standard termination audit?

RESPONSE

No.

QUESTION #10

Standard Terminations: PBGC's Requirement for Submission of Plan Document and Proof of Distribution

PBGC recently revised its standard termination forms and instructions to provide for submission of the most recent plan document and proof of benefit distributions along with the post-distribution certification.

(a) May these new documents be submitted electronically?

(b) Will PBGC accept a distribution listing stating the participant name and distribution amount as proof of distribution?

RESPONSE

(a) Yes. With the exception of forms requiring original signatures, any materials required to be submitted may be submitted electronically.

(b) No, a listing of names and distribution amounts is not adequate proof of distribution. With any post-distribution certification filed on or after March 1, 2015, along with a copy of the most recent complete plan document and any amendments to it, the Plan Administrator must submit:

- For individuals who received a lump sum distribution, a copy of the cancelled check or bank statement with the individual's name and distribution amount; and

- For individuals for whom annuities were purchased (missing and non-missing participants), a copy of the annuity contract(s), certificates, and/or written notices to the participants, identifying the contact information for the annuity provider, group contract number, and a list of participants entitled to annuities from that provider.

QUESTION #11

Distress or Involuntary Terminations: Effect of Change in PBGC's Position on Coverage of Puerto Rico and Guam Plans

In 2014 Blue Book Q&A 1, PBGC was asked about the reasons for its withdrawal of two long-standing opinion letters (Op. Ltrs. 77-172 and 85-19) on PBGC coverage of plans in Puerto Rico and Guam. In its response, PBGC stated that it will no longer determine that a plan is covered under Title IV of ERISA if its trust is created or organized outside the U.S. and no §1022(i)(2) election has been made. Does this change in PBGC's position on plan coverage apply to plans that have already undergone distress or involuntary terminations and have been trusteed by PBGC? If so, what steps (if any) is PBGC taking either to recover benefits that have been paid based on a coverage determination or to refund amounts (for employer liability, DUEC, etc.) that PBGC has collected based on such a determination? If not, what are the rules governing the effective date of the change and the plans to which the change will be applicable (*e.g.*, plans for which a distress or involuntary termination had not been initiated, or perhaps completed, as of the effective date)?

RESPONSE

The decision to withdraw opinion letters 77-172 and 85-19 has no impact on coverage decisions made for any previously trusteed plan. Accordingly, PBGC will not seek to recoup benefits paid to participants nor will it stop paying benefits solely as a result of PBGC's decision to withdraw the opinion letters. In addition, PBGC will not refund any amounts collected for employer liability and similar claims, and will continue collection efforts for any pending claims. To the extent that there are any pending distress or involuntary terminations affected by this coverage issue, PBGC will make decisions based on all of the relevant facts and circumstances.

QUESTION #12

Reportable Events: Death of Owner; Reporting of Controlled Group Changes

An individual owns 100% of the stock of several companies. The companies are, therefore, treated as part of the same controlled group under IRC §414(c) and Title IV of ERISA. The individual dies. The stock continues to be held by his estate until it is sold by the estate or distributed to his beneficiaries under his will.

Is there a reportable event and, if so, when does it occur? (Assume that no waiver of a reportable event is available.)

RESPONSE

The death of the owner does not cause any of the companies to cease being controlled group members, and thus there is no reportable event at that point or for so long as the estate continues to own the stock. Whether the act of the estate selling or distributing the stock at a later date constitutes a controlled group break-up (and thus is reportable) depends on the facts and circumstances of the sale or distributions (e.g., to whom the stock is sold or distributed). Potential filers with questions about this type of situation are encouraged to contact PBGC.

QUESTION #13

Reportable Events: Legally Binding Agreement as Trigger for Reporting

Under §4043.29, the trigger for reporting a change in contributing sponsor or controlled group is a "transaction that results, or will result, in one or more persons ceasing to be members of the plan's controlled group", with a "transaction" defined as including "a legally binding agreement". The report is due within 30 days after the date of actual or constructive knowledge of such a "legally binding agreement" to transfer ownership even though the agreement may not become effective until much later.

PBGC proposed guidance on what constitutes a "legally binding agreement" in its April 3, 2013 Notice of Proposed Rulemaking on reportable events. The proposed guidance was that "[w]hether an agreement is legally binding is to be determined without regard to any conditions in the agreement."

Pending issuance of the final rule, what is PBGC's position on what constitutes a legally binding agreement for this purpose?

RESPONSE

What constitutes a legally binding agreement is determined based on the facts and circumstances. PBGC's long-standing position is that the determination is generally made without regard to any conditions in the agreement. Potential filers with questions as to whether an agreement is legally binding are encouraged to contact PBGC.

QUESTION #14

Reportable Events: Extraordinary Dividend "Adjusted Net Income" Test

Under § 4043.31 of the PBGC's reportable events regulation, an extraordinary dividend reportable event occurs if (among other things) any member of the "plan's controlled group" declares a cash dividend -- with a "dividend" defined as "a distribution to one or more shareholders" and with "[a] payment by a person to a member of its controlled group . . . treated as a distribution to its shareholder(s)" – and the resulting distribution:

> (1) when combined with any other cash distributions to shareholders previously made during the fiscal year, exceeds the adjusted net income of the person making the distribution for the preceding fiscal year; and
>
> (2) when combined with any other cash distributions to shareholders previously made during the fiscal year or during the three prior fiscal years, exceeds the adjusted net income of the person making the distribution for the four preceding fiscal years (the "adjusted net income test").

Assume that there is a controlled group consisting of Parent, which is a holding company with no (or very little) adjusted net income on a stand-alone basis, and Subsidiary, an operating company that is owned 100% by parent and that has substantial adjusted net income; that Subsidiary declares a cash dividend that goes to Parent; and that Parent then immediately dividends the same cash amount up to its shareholders. When determining whether the cash dividend from Parent to its shareholders is reportable under the above "adjusted net income" test, is the test based on the stand-alone adjusted net income of Parent or on its adjusted net income on a GAAP basis that consolidates its adjusted net income with that of Subsidiary?

RESPONSE

"Person" is defined in PBGC regulation § 4001.2 by reference to ERISA section 3(9) and does not include controlled groups. Further, construing "person" to include a controlled group member is inconsistent with the definition of "dividend" in § 4043.31(e)(3), which says that a payment by a person to a member of its controlled group is treated as a distribution to its shareholders. Thus, the adjusted net income of the person making a distribution under these circumstances should be the adjusted net income of the person alone.

If a sponsor believes an event may not be of concern to PBGC despite the requirement to file, the sponsor may request a waiver from reporting. A request for a waiver must be filed with PBGC in writing and must state the facts and circumstances on which the request is based.

QUESTION #15

Reportable Events: Effect of Technical Update 14-1 on Funding-Based Tests in Reportable Events Regulation

In Technical Update 14-1 ("Effect of HATFA on PBGC Premiums"), PBGC announced that, in the exercise of its enforcement discretion, it would not, in certain specified circumstances, require a plan to amend its premium filing for the 2014 premium payment year or to pay additional premiums or late payment charges for that premium payment year, provided that certain specified conditions are met.

Assume that the specified conditions are met for a plan, that, as a result, the plan does not amend its 2014 premium filing or pay additional premiums or late payment charges for 2014, and that, had the plan amended its 2014 premium filing, the plan's unfunded vested benefits for the 2014 plan year would have been $50,000 higher.

For purposes of determining whether funding-based waivers or extensions apply, and/or whether advance reporting is required, under PBGC's reportable events regulations (Part 4043) and PBGC's related guidance in PBGC Technical Update 13-1, may the plan administrator and contributing sponsor of the plan rely on the submitted premium filing for the 2014 plan year?

PROPOSED RESPONSE

If the plan was not required to amend its 2014 premium filing to reflect a lower asset value (resulting from discounting contributions receivable using a higher discount rate), the data reported on the 2014 premium filing may be used for the purposes described above.

QUESTION #16

ERISA Section 4062(e): Effect of 2014 Legislative Amendment on PBGC's Regulatory Liability Formula

PBGC's regulatory liability formula (at §4062.8) provides for a §4062(e) liability equal to the unfunded benefit liabilities of the affected plan, as if the plan had been terminated by the PBGC immediately after the date of the cessation of operations, multiplied by a fraction. The numerator of the fraction is the number of the employer's employees who are participants under the plan and are separated from employment as a result of the cessation of operations, and the denominator of the fraction is the total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan.

This fraction very closely tracks the (now repealed) test for determining whether §4062(e) liability had arisen. The Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83), signed by the President on December 16, 2014, repeals this old test for determining whether §4062(e) has arisen. It replaces it with a test related to whether more than 15% of all "eligible employees" of the employer have been separated from employment at the facility by reason of the cessation.

a) In a case in which a §4062(e) liability has arisen under the new test and the employer does not elect to satisfy its §4062(e) liability by making additional contributions to the plan pursuant to amended §4062(e)(4), would PBGC treat the §4062.8 formula as establishing the §4062(e) liability?

b) If not, how would PBGC determine §4062(e) liability in such circumstances?

RESPONSE

The language relating to liability under the Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83) is substantially similar to the language under the prior version of section 4062(e). Additionally, the "reduction fraction" provided for in calculating the alternative liability captures the formula expressed in §4062.8. Accordingly, unless it issues contrary guidance, PBGC will apply that formula to calculating liability when plan sponsors do not elect the alternative liability.

QUESTION #17

ERISA Section 4062(e): Effect of Technical Update 14-1 on §4062(e)(3)(B) Exemption Determinations and §4062(e)(4) Alternative Liability Determinations

In Technical Update 14-1 ("Effect of HATFA on PBGC Premiums"), PBGC announced that, in the exercise of its enforcement discretion, it would not in certain specified circumstances require a plan to amend its premium filing for the 2014 premium payment year or to pay additional premiums or late payment charges for that premium payment year, provided that certain specified conditions are met. Assume that the specified conditions are met for a plan; that, as a result, the plan does not amend its 2014 premium filing or pay additional premiums or late payment charges for 2014, and that, had the plan amended its 2014 premium filing, the plan's unfunded vested benefits for the 2014 plan year would have been $50,000 higher.

In such circumstances, may the employer rely on the submitted premium filing for the 2014 plan year for purposes of:

a) determinations under §4062(e)(3)(B) (relating to the exemption from §4062(e) liability for a plan that was at least 90 percent funded on a variable-rate premium basis for the plan year preceding the plan year in which the cessation at issue occurred), or

b) §4062(e)(4) (relating to the alternative liability that an employer may elect to satisfy its §4062(e) liability)?

RESPONSE

If the plan was not required to amend its 2014 premium filing to reflect a lower asset value (resulting from discounting contributions receivable using a higher discount rate), the data reported on the 2014 premium filing may be used for both purposes described above.

QUESTION #18

ERISA Section 4062(e): Recent changes

The Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83), signed by the President on December 16, 2014, included extensive amendments to ERISA section 4062(e). Among other things, as amended, section 4062(e):

- Refers to a "substantial cessation of operations at a facility in any location";
- Includes language describing the meaning of terms like "substantial cessation of operations" and "workforce reductions" and "eligible employee";
- Provides that an employer may make an election to satisfy its §4062(e) liability by making additional contributions, calculated under an alternative liability formula, to the plan and requires that plans an employer making such an election must:
  - Notify PBGC within a specified timeframe; and
  - Make those contributions within a specified timeframe.

What are the key differences between the requirements of §4062(e) prior to the enactment of the new law and today? How does PBGC's pre-existing and ongoing §4062(e) enforcement program impact PBGC's implementation of the new law?

RESPONSE

PBGC has updated its website with a simplified description of the law and its changes. The update can be found here: http://www.pbgc.gov/about/faq/pg/important-changes-to-erisa-section-4062(e).html. There are some ambiguities in the legislative language; PBGC will provide future guidance on questions of interpretation and implementation.

QUESTION #19

ERISA Section 4062(e): Reporting Requirement

If an employer experiences a "substantial cessation of operations," as defined under recently amended ERISA section 4062(e), but it appears there would be no liability, is notice to PBGC required?

RESPONSE

Yes. ERISA section 4062(e) provides that the notice and liability determination requirements of section 4063(a) apply when an employer experiences a substantial cessation of operations, unless the cessation is exempt under subsection (a)(3) (e.g., there are under 100 participants in the plan).

ERISA 4063(a) requires the plan administrator provide notice and request that PBGC determine the applicable liability. Accordingly, plan administrators should determine whether notice to PBGC is required without regard to the anticipated liability.

As was the case before section 4062(e) was amended, we encourage filers to include information that will assist PBGC with the liability determination.

QUESTION #20

ERISA Section 4062(e): PBGC Determinations on Cessations of Operations That Occurred Before December 16, 2014

Under Division P Section 1(c) of the Consolidated and Further Continuing Appropriations Act of 2015, PBGC was directed not to take any enforcement, administrative, or other action pursuant to §4062(e), or in connection with an agreement settling liability thereunder, that is inconsistent with the amendments to §4062(e) that were enacted on December 16, 2014, without regard to whether the action relates to a cessation or other event that occurs before, on, or after December 16, 2014, unless such action is in connection with a settlement agreement that is in place before June 1, 2014.

How and when can an employer find out whether PBGC intends to take action in connection with such a pending case that was not settled before June 1, 2014? In particular, will PBGC be issuing notices to employers if it decides *not* to take action and, if so, when can employers expect to hear from PBGC?

RESPONSE

PBGC needs additional information to assess the application of the Consolidated and Further Continuing Appropriations Act of 2015 to pending cases and will contact employers in the near term for that information. If PBGC decides that no action should be taken in a particular case, it will inform the employer of that decision.

QUESTION #21

Other: Use of Credit Default Swaps in Early Warning Program Settlements

Would PBGC consider accepting credit default swaps in connection with settlements in Early Warning Program cases?

RESPONSE

Yes. PBGC will consider credit default swaps in settlement of Early Warning Program concerns.

QUESTION #22

Other: Withdrawal Liability for Multiple Employer Plan

A multiple employer plan includes a "minimum withdrawal liability" provision that requires a contributing sponsor electing to voluntarily withdraw from the plan (as contrasted with spinning off to a separate plan) to pay an additional contribution to the plan equal to a defined amount (either a fixed dollar amount per participant or a calculated amount based upon an allocated share of plan liabilities), which may not be the same as the amount that would be assessed under §4063. The amount due under the plan-defined methodology may be offset by any amount assessed under §4063, or could be in addition to that amount (e.g., to cover administrative expenses expected to be incurred by the plan after withdrawal). Alternatively, pursuant to the PBGC's authority under §4063, PBGC may agree to permit the plan to treat any such payment as an offset to or a substitute for the §4063 amount.

Would such a provision in a plan be taken into account by PBGC when determining a withdrawal liability assessment? For example, if a withdrawing sponsor had already made a contribution to the plan under a plan-defined "minimum withdrawal liability" provision, might PBGC consider reducing the amount otherwise assessed by the payment already made?

RESPONSE

In a number of cases, PBGC has waived withdrawal liability under section 4063 when it has determined that a contribution to a multiple employer pension plan, either under that plan's "minimum withdrawal liability" provision or an agreement among contributing sponsors, constituted an "indemnity agreement" under section 4063(e) that was adequate to satisfy the purposes of sections 4063 and 4064, provided the other contributing sponsors concurred. That determination is made on a case-by-case basis.