

ABA Joint Committee on Employee Benefits

Experts' Guide to Researching Employee Benefits Issues

Researching PBGC Issues:
The Basics and Beyond

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Overview

- Key PBGC Issues
 - PBGC Legislative/Regulatory Framework
 - PBGC Case Law
 - PBGC Guidance—Beyond the Regulations and Case Law
 - Other Sources
 - Contacting PBGC
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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))
- ❑ Involuntary (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: 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 wise to follow!

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

- PBGC Opinion Letters
 - 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:
pbgc.gov/about/annreports.html
- ❑ PBGC Data Books:
pbgc.gov/practitioners/plan-trends-and-statistics/content/page13270.html
- ❑ PBGC Research Reports:
pbgc.gov/media/key-resources-for-the-press/content/page13695.html
- ❑ PBGC Fact Sheets:
pbgc.gov/media/key-resources-for-the-press/content/page13538.html
- ❑ Various other PBGC publications:
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 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
- Significant guidance on premiums, reporting, standard terminations, guaranteed benefits, other areas
- Most content useful to attorneys (not just actuaries)
- 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:

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| ■ abanet.org | ■ ebri.org |
| ■ actuary.org | ■ eric.org |
| ■ americanbenefitscouncil.org | ■ freerisa.com |
| ■ asppa.org | ■ ifebp.org |
| ■ benefitslink.com | ■ ipebla.org |
| ■ ccactuaries.org | ■ soa.org |
| ■ coffi.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. & 2009 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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