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Plan Termination

Corporate Transactions Can Trigger Liability Under PBGC Regulations, Practitioner Says

NEW YORK—There are traps for the unwary in the Pension Benefit Guaranty Corporation's increasingly active role in corporate transactions, attorney Harold J. Ashner said June 9 during an American Bar Association meeting.

If a client has a PBGC-covered defined benefit plan, practitioners should know that the agency "may insist on protection for itself or the pension plan as the price for allowing the transaction to go forward," Ashner said.

Practitioners should also be aware that in a downsizing situation, the agency may find the downsizing has triggered liability and pursue a demand against the employer equal to a portion—or all—of the pension plan's underfunding, determined on a plan termination basis, Ashner said. "That could lead to a very scary number," even though the plan remains ongoing, he added.

Ashner, a partner with Keightley & Ashner LLP, Washington, D.C., spoke at a session on PBGC reporting, monitoring, and enforcement that was part of the ABA Joint Committee on Employee Benefits' program on benefits issues in mergers and acquisitions.

Reportable Events. In reviewing the PBGC reportable events rules, Ashner said the requirements could lead to unexpected penalties for failure to report events to the agency. In addition, the agency "may" find the reportable event indicative of plan termination, with the emphasis on "may," Ashner said, since reportable events "most of the time do not lead to termination."

Reporting obligations are "event driven" and therefore it may be difficult to know if an event has occurred, he said. The event may involve the plan directly, or it may involve a plan in the employer's controlled group, Ashner said.

Controlled Group Liability. The controlled group concept is important, Ashner said, as it includes each sponsor of the plan and each member of the plan's controlled group, both domestic and foreign.

Questioned during the session as to the impact of the controlled group rules in a private equity situation, Ashner said an 80 percent or greater interest will probably establish a controlled group link for PBGC purposes. The employer may not know what is going on in its controlled group in relation to reporting a reportable event, but the agency's answer is that "you need a structure in place," regardless of how the entity is organized, he said. "Develop a central point of contact" within a controlled group to know when these events occur, Ashner said.

Ashner discussed proposed rules, since withdrawn, that would have called for more reporting by more sponsors.

The original rule was designed to eliminate most of the automatic waivers and filing extensions now permitted under existing reportable events regulations and guidance. Ashner said PBGC plans to re-propose the rules. The agency announced its intention to do so in a preliminary plan for regulatory review, which was posted May 26 on the White House website (103 PBD, 5/27/11; 38 BPR 1035, 6/7/11).

Early Warning Program. The agency's early warning program (175 PBD, 9/13/10; 37 BPR 2044, 9/14/10) focuses on corporate transactions that might increase PBGC's risk, Ashner said. In determining whether to step in, among other concerns, PBGC will look at the effect of a corporate transaction on the employer's pension plan, the effect on the credit quality of the controlled group, both pre- and post-transaction, and whether the controlled group will be able to keep the plan alive post-transaction, Ashner said.

The agency's early warning program "is very much a team approach," generally led by a financial analyst, and includes an actuary and an attorney. In many cases, the agency learns of a transaction simply by "read[ing] the newspapers.'' It also look at rating agency reports, Securities and Exchange Commission filings, and reportable events filings, Ashner said.

Ashner also covered penalties, PBGC's subpoena authority, and settlement negotiations in his review of PBGC's role in the context of mergers and acquisitions.

BY MARY HUGHES

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