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Plan Termination

PBGC Rules for Standard Terminations Leave Questions for Future Guidance, Speaker Says

The Pension Benefit Guaranty Corporation takes a dim view of employers that purchase annuities at a favorable price before initiating a standard termination process to end their pension plan, an employee benefits attorney said Oct. 10 at an American Law Institute-American Bar Association Conference.

''PBGC tends not to like the idea of purchasing irrevocable commitments and then doing a standard termination as an afterthought,'' said attorney Harold Ashner, former assistant general counsel for legislation and regulations at PBGC and now a partner at Keightley & Ashner, a Washington, D.C., law firm that specializes in PBGC matters.

Ashner said he is hopeful that future guidance concerning that practice will clarify the circumstances, if any, in which an employer can lock in annuity prices ahead of the distribution phase in a standard termination. In the absence of that general guidance, Ashner added, ''You certainly can ask PBGC if they would be willing to give you any case-specific guidance on this issue.''

The rules for a standard termination require employers to give participants the name of the insurer or insurers from which the employer intends to purchase annuities. Ashner said he recommends to clients that they include that information in a Notice of Intent to Terminate, which the employer must send to participants as part of the standard termination process. The notice does not need to identify the insurer, Ashner said. ''You just have to give a list of those insurers from whom you reasonably intend to solicit bids. As long as you pick from that list you're fine,'' he said.

PBGC regards the insurer names as necessary information for participants to have in making their decision about whether to receive lump sums or annuities, Ashner said.

Occasionally, an employer doing a standard termination has an employee who elects an annuity but whose benefit amount is greater than de minimis but too small for most insurers to write an annuity contract, Ashner said. ''No insurer wants to write out an annuity contract for $6,000,'' he said. But the standard termination rules provide no good answer for employers in that situation, he added. ''You have no choice but to find an insurer at whatever cost the insurer will charge to purchase that $6,000 annuity,'' he said.

Similarly, the standard termination rules offer no relief for employers who might have a recalcitrant employee who refuses to elect either a lump sum or an annuity, Ashner said. But a call to PBGC is unlikely to help the employer dealing with that situation, he said.

Lump Sums OK. Concerning the effect of benefit restriction rules on standard terminations, Ashner said that practitioners have lacked a clear answer to whether a plan subject to benefit restrictions under the Pension Protection Act of 2006 (Pub. L. No. 109-280) could make distributions if the sponsor decided to terminate the plan, and it was too late in the plan year to make additional contributions to the plan to avoid PPA's benefit restrictions. ''That was kind of an open question,'' Ashner said.

However, final funding rules that the Internal Revenue Service and Treasury Department released Oct. 7 provided the answer, Ashner said (193 PBD, 10/8/09; 36 BPR 2321, 10/13/09). ''If it is a termination distribution, don't worry about those lump-sum restrictions,'' he said.

Ashner offered other PPA-related advice concerning which rules affecting lump-sum assumptions apply in a standard termination. If the termination and distribution dates straddle the beginning of the 2008 plan year, when PPA's lump-sum rules first went into effect, then it is the termination date that controls, not the distribution date, Ashner said. That would mean that the PPA

lump-sum rules would be disregarded even if they were already in the plan on the pre-PPA termination date, he said.

But if the termination dates and distribution dates straddle the beginning of a 2009 or later plan year, then it is the distribution date that controls, not the termination date, Ashner said. That would mean, for example, that if a plan had a termination date in 2008 and a distribution date in 2009, the plan administrator would determine lump-sum amounts for a standard termination using 2009 PPA rules, which call for a 40 percent phase-in of the interest rates and use of 2009 mortality tables, instead of 2008 PPA rules, which call for a 20 percent phase-in of the interest rates and use of 2008 mortality tables, he said.

Distress Termination Rules. Moving from the topic of standard terminations to distress terminations, Ashner said PBGC is concerned about employers terminating their plans during bankruptcy reorganization because no lender is willing to finance the reorganization unless PBGC takes over the pension plans. ''That's a hot-button issue with PBGC,'' Ashner said. However, the employer rather than PBGC might have the upper hand in those cases, he said, adding that ''if the lender is being reasonable, and you can't find anyone to finance the reorganization that is willing to do so with the plans ongoing, then there's a very good chance you're going to prevail on that issue.''

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