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Plan Termination

Employer Groups Ask PBGC to Cease Enforcement of 4062(e) Proposed Rule

Agents of the Pension Benefit Guaranty Corporation are enforcing a controversial 2010 proposed rule under Section 4062(e) of the Employee Retirement Income Security Act that the agency has expressed interest in re-proposing, according to a Dec. 16 letter from several groups in the pension community to PBGC Director Joshua Gotbaum.

“The PBGC is actively enforcing very controversial proposed regulations that are being reconsidered pursuant to Executive Order 13563 on Improving Regulation and Regulatory review,” said the letter, from the American Benefits Council, the ASPPA College of Pension Actuaries, the Committee on Investment of Employee Benefit Assets, the ERISA Industry Committee, the Financial Services Roundtable, the National Association of Manufacturers, and the U.S. Chamber of Commerce.

The proposed rule under Section 4062(e), which PBGC unveiled in August 2010 (152 PBD, 8/10/10; 37 BPR 1809, 8/17/10), was met with strong criticism and calls for the agency to withdraw the rule (198 PBD, 10/15/10; 37 BPR 2263, 10/19/10).

In October, Gotbaum said PBGC intended to re-propose its rule on the application and enforcement of employer liabilities and reporting requirements under ERISA Section 4062(e) (207 PBD, 10/26/11; 38 BPR 1995, 11/1/11). The agency also said in its final plan for regulatory review in August that it planned to re-examine the proposed rule (165 PBD, 8/25/11; 38 BPR 1575, 8/30/11).

ERISA Section 4062(e). Under Section 4062(e), “liability is triggered if ‘an employer ceases operations at a facility in any location,’” the letter said. The letter said the statute was “clearly intended” to apply to situations in which facilities are completely shut down.

However, under the 2010 proposed regulations, an employer’s liability can be triggered when operations are temporarily shut down to repair a location, the letter said. Liabilities also can be triggered if operations are being “transferred to another stable employer,” or moved to a different location, the letter said.

Attorney Harold J. Ashner, a partner with Keightley & Ashner, Washington, D.C., and former PBGC assistant general counsel for legislation and regulations, told BNA Dec. 22 that the liabilities triggered can often surprise employers and be very costly.

“The liability often catches employers by surprise and can put a heavy price tag on a normal business transaction that would ultimately serve to strengthen the employer,” Ashner said.

The groups requested that PBGC suspend all enforcement actions that are based on the proposed regulations and void any agreements entered into based on the proposed regulations.

“We are very concerned to learn from numerous companies that PBGC personnel, in communications with plan sponsors, are referring to the proposed regulations as current law, and enforcing them as such,” the letter said. “It is inconsistent with the President’s Executive Order to announce a reconsideration of troublesome proposed regulations, while at the same time actively enforcing them as current law,” the letter continued, referring to Executive Order 13563 on regulatory review (12 PBD, 1/19/11; 38 BPR 151, 1/25/11).

PBGC told BNA Dec. 22 that some of the letter’s concerns “are addressed by the language of the statute.”

“We are in the process of considering other issues they’ve raised, which may lead to a change in how we direct our resources within the 4062(e) program. We recognize that it’s important for PBGC to use the tools we have to focus on the real threats to the retirement security of people in traditional pension plans,” PBGC said.

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Full text of the letter can be found at [http://
www.americanbenefitscouncil.org/documents/4062e_](http://www.americanbenefitscouncil.org/documents/4062e_)

group_letter1211.pdf.