

PBGC ISSUES

Surprise—You Just Missed a PBGC Reporting Deadline!

PBGC reporting requirements can catch you off guard. This article highlights several “traps for the unwary” so that you won’t fall into one of them.

BY HAROLD J. ASHNER

Harold J. Ashner is a partner at Keightley & Ashner LLP, a boutique law firm focusing on PBGC matters. He served as the PBGC’s Assistant General Counsel for Legislation and Regulations until early 2005, when he established Keightley & Ashner LLP with James J. Keightley, the PBGC’s General Counsel, and William G. Beyer, the PBGC’s Deputy General Counsel. Mr. Ashner is a frequent author and lecturer, is often quoted in the media, is active in the ABA, is a Fellow of the *American College of Employee Benefits Counsel*, and is routinely retained by major law firms and employers to deal with PBGC-related issues.

Complying with PBGC reporting requirements can be tricky. The real challenge is to know whether and when to report; knowing *what* to report usually is easy. Unfortunately, missing a PBGC reporting deadline can be costly, given the exposure to penalties that could be as high as \$1,100 per day for as long as the delinquency continues.

Reportable Events

The rules governing PBGC reportable events provide several opportunities for you to overlook a reporting requirement. Consider the following examples:

- *Active participant reduction.* Reporting is required if a plan’s active participant count is reduced to less than 80 percent of the count at the beginning of the current plan year or 75 percent of the count at the beginning of the previous plan year. You must perform this count, at least in theory, on a daily basis, not just at the beginning or end of a plan year; it is only the *baseline* count that is tied to the beginning of a plan year. It does not matter that the reporting threshold is crossed without the occurrence of any discrete “event,” such as a facility closing; normal attrition suffices. And it is possible to trigger the reporting requirement without any immediately preceding reduction in the active participant count—indeed, there may have been an immediately preceding *increase*—where

the count at the beginning of a plan year is less than 75 percent of what it was at the beginning of the previous plan year. In such circumstances, reporting is required even if essentially the same active participant reduction (resulting from, *e.g.*, a facility closing during the previous plan year) has already been reported. The PBGC staff interpretation of the regulation is that each plan year starts a new reporting cycle, and that the first day of that plan year on which the active participant count is less than 80 percent of the count at the beginning of the plan year or is less than 75 percent of the count at the beginning of the previous plan year is the date on which an active participant reduction reportable event occurs. Fortunately, there are several reporting waivers and extensions available for the active participant reduction reportable event, although some apply only in circumstances where an ERISA Section 4062(e) event (generally involving facility closings, as discussed later in this article) is unlikely to have occurred.

- *Extraordinary dividend.* There is a statutory reportable event tied to the declaration of an extraordinary dividend based on the definition in the Internal Revenue Code. The PBGC by regulation has waived reporting of this statutory reportable event and, in its place, has created by regulation an “extraordinary dividend” reportable event with its own PBGC-specific definition. What is important to keep in mind, and is easy to miss, is that a transfer of value to any other member of the controlled group maintaining the plan could be reportable. This is because the regulatory event captures certain significant transfers of value to “shareholders,” and a transfer to anyone in the controlled group—up, down, or sideways—is treated as a transfer to a shareholder.
- *Change in sponsor or controlled group.* One key reportable event—often thought of by practitioners as the “controlled-group breakup” reportable event, and of great importance to the PBGC because of

its various potential claims against *each* controlled-group member *on a joint and several basis*—calls for reporting when there is a transaction that results, or will result, in one or more persons ceasing to be members of the controlled group maintaining the plan. This reportable event captures not only changes in the makeup of the controlled group, such as when a parent that sponsors a plan sells a non-sponsor subsidiary to another controlled group, but also transactions where a plan is transferred (*e.g.*, in connection with the sale of a division) to another controlled group and the makeup of each controlled group remains absolutely intact; from the standpoint of the plan, every “person” that was a member of the plan’s pre-transaction controlled group will cease to be a member of the plan’s controlled group as a result of the transaction. This event also captures the merger of one member of the plan’s controlled group into another member, even though all corporate assets and liabilities remain within the controlled group, since one of the merging entities will necessarily cease to exist as a separate entity. (Such an intra-controlled-group merger can significantly dilute the values of the PBGC’s potential joint and several claims.)

It is important to keep in mind that you may not be able to wait until after the transaction has become effective to file the required report, since the event is triggered by the existence of a legally binding agreement that *will* result in the change in sponsor or controlled group. Oddly, where there is a lengthy period between the date of a legally binding agreement and a later closing date on which the transaction becomes effective, post-event reporting may be due *before* advance reporting is due! This is possible because post-event reporting is due 30 days after the date of actual or constructive knowledge that the reportable event has *occurred*, whereas advance reporting—which applies only to a very small group of privately held controlled groups with significantly underfunded plans—is due 30 days before the *effective date* of the reportable event.

- **Plan spinoffs.** Another reportable event captures certain non-*de minimis* transfers of benefit liabilities to a plan maintained by another controlled group. The regulation contains a generous waiver under which no reporting of this event is required so long as the transfer complies with the Internal Revenue Code Section 414(l) rules using PBGC “safe harbor” actuarial assumptions, regardless

of how much underfunding is transferred from one controlled group to another and regardless of the relative financial positions of the two controlled groups. However, the transfer might still be reportable, not based on this reportable event, but rather based on the corresponding active participant reduction reportable event, which has no corresponding waiver tied to the use of PBGC “safe harbor” assumptions. PBGC staff takes the position that a spinoff can constitute an active participant reduction for the transferor plan, even though all of the transferred active participants involved continue to be active participants (in the transferee plan). The lesson here is to run each set of facts through all potentially applicable reportable events before concluding that no reporting is required based on a waiver that applies only to a particular event.

Notice of Missed Contributions (Form 200)

When there is a failure to make one or more quarterly or other contributions required under the minimum funding rules, and the total of the unpaid balances (including interest) exceeds \$1 million, there are significant financial and reporting consequences. A statutory lien in favor of the plan arises on all controlled-group property, and within 10 days after the contribution due date, a Form 200 must be filed with the PBGC.

What you might not be aware of is that the PBGC has its own special methodology for calculating total missed contributions for this purpose—a methodology that can involve significant double-counting. Instead of using the plan’s current accumulated funding deficiency or funding shortfall, the PBGC will simply bring each missed contribution forward with interest and then add them all together, even though the missed contributions for one plan year may already be reflected, at least in part, in the missed contributions for the next plan year. What this means is that there may be a Form 200 reporting obligation and, more important, a statutory lien on all controlled-group property, even though the plan’s accumulated funding deficiency or funding shortfall is well below the \$1 million threshold.

Notice of ERISA Section 4062(e) Event

An ERISA Section 4062(e) event occurs when an employer “ceases operations at a facility in any location” and, as a result, more than 20 percent of the active participants in a PBGC-covered plan established

and maintained by the employer are separated from employment. The occurrence of such an event triggers a contingent liability (tied to plan underfunding and enforceable by the PBGC) to protect the plan in case it undergoes an underfunded termination in the next five years, as well as a reporting obligation to the PBGC under ERISA Section 4063(a).

Notice of the event is due to the PBGC under ERISA Section 4063(a) within a 60-day period. Ensuring that the required notice is timely filed can be difficult, not only because of a lack of guidance on when the 60-day period begins (*e.g.*, the date of the cessation, the date on which the 20 percent threshold is crossed, or the later of those two dates), but also because of the many unresolved interpretive issues regarding whether and when an ERISA Section 4062(e) event has occurred—issues such as whether an asset or stock sale could constitute a Section 4062(e) event, what is meant by “a facility in any location,” how complete a cessation must be, when a cessation that occurs in stages or over an extended period is deemed to have occurred, and how to determine whether an active participant at the same or a different facility is treated as having been separated as a result of the cessation.

In addition, there is a potential trap here in that you might reason that, if reporting is waived or extended for the generally corresponding active participant reduction reportable event, reporting of the Section 4062(e) event is similarly waived or extended. You would be wrong; there are no waivers or extensions that apply to the requirement to report an ERISA Section 4062(e) event under ERISA Section 4063(a). Plan administrators of even the smallest and most well-funded plans—plans that would qualify for multiple waivers under the active participant reduction reportable event and that would face not even a *potential* contingent liability under ERISA Section 4062(e)—are required to report the occurrence of an ERISA Section 4062(e) event under ERISA Section 4063(a), with penalty exposure if they fail to do so in a timely manner.

ERISA Section 4010 Annual Reports

Under ERISA Section 4010 and the PBGC’s implementing regulations, certain controlled groups are required to file annual reports with the PBGC containing specified financial and actuarial information. The most common trigger for reporting before PPA was that the plans maintained by the controlled group had aggregate underfunding on a PBGC premium basis in excess of \$50 million. PPA repealed that

trigger and, in its place, requires reporting if any plan maintained by the controlled group is less than 80 percent funded under the new PPA funding rules. The PBGC issued a proposed rule that would waive reporting based on the new PPA reporting trigger where the controlled group’s aggregate underfunding does not exceed \$15 million.

There are two other reporting triggers, however, that PPA did not change the substance of and that have no such \$15 million controlled-group waiver: (1) where the conditions for imposing the statutory lien for missed contributions exceeding \$1 million (discussed earlier in this article) have been met for any plan maintained by the controlled group; and (2) where any plan maintained by the controlled group has been granted minimum funding waivers exceeding \$1 million and any portion is still outstanding. The \$1 million statutory lien trigger in particular can be overlooked because of the PBGC’s double-counting methodology (discussed earlier in this article) for determining whether and when the lien arises. What is important to keep in mind is that, once the statutory lien has arisen, in addition to the requirement to file a Form 200 with the PBGC within 10 days after the contribution due date, the members of the controlled group maintaining the plan will automatically become ERISA Section 4010 filers for the “information year” (generally the controlled-group-wide fiscal year) in which the lien arose. (PBGC regulations waive ERISA Section 4010 reporting, but not Form 200 reporting, if the contribution is paid within 10 days of the due date.)

Once you become subject—based on any of the reporting triggers—to ERISA Section 4010 reporting for a particular information year, it is important to mark your calendar so that you will remember to report for the next information year *even if you are not otherwise required to report for that next information year*. Why is that? Because PBGC regulations require that, if you had to report for last year (because a reporting trigger applied) and do not have to report for this year (because no reporting trigger applies), you still have to report for this year for the sole purpose of notifying the PBGC that you do *not* have to report for this year. (The purpose of the requirement is to help ensure that filers do not overlook their filing obligations.) It would be most unfortunate to face a penalty for failing to report that you need not report!

Conclusion

For many PBGC-covered plans and the controlled groups maintaining them, reporting to the

PBGC goes well beyond routine annual premium filings. A wide variety of events and circumstances, some directly involving the plan and others only the sponsor or perhaps some distant controlled-group member, can trigger a filing obligation. A solid familiarity with the PBGC's reporting rules will help to minimize the likelihood of a reporting failure.

Note: A more detailed discussion of PBGC reportable event requirements is available at http://www.keightleyashner.com/publications/Events_JPPCwinter07.pdf. If the reader is interested in a more detailed discussion of ERISA Section 4062(e) events, see the spring 2008 issue of the Journal of Pension Benefits or <http://www.keightleyashner.com/publications/PBGC-DownsizingSpring08.pdf>. ■