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Plan Termination

PBGC Softening Its Stance On 4062(e) Liability, Attorney Says

The Pension Benefit Guaranty Corporation has reportedly softened its stance behind the scenes on enforcement of Section 4062(e) of the Employee Retirement Income Security Act, but no official announcement has been made regarding a policy change.

PBGC has changed its stance on enforcement by applying criteria that distinguish among companies based on their level of financial strength when pursuing Section 4062(e) liabilities, Harold Ashner, a partner with Keightley & Ashner, Washington, said April 26 during a session of the program Pension, Profit-Sharing, Welfare, and Other Compensation Plans, sponsored by the American Law Institute-American Bar Association.

"PBGC is now distinguishing and not pursuing the employers that are financially strong, at least not pursuing them for any remedy right now," Ashner said.

"If you're moderately strong, there's some intermediate approach PBGC is pursuing, and if you are neither strong, nor moderately strong, then it's business as usual, and PBGC is pursuing it," he added.

Section 4062(e) requires that if a company ceases operations at a facility that results in 20 percent of em-

ployees who are plan participants losing their jobs, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups (ERISA sections 4063 and 4064). Also, under Section 4065, the plan administrator must report this liability to PBGC.

Ashner said he anticipates that when PBGC makes a formal announcement regarding the specific criteria it will be using in evaluating Section 4062(e) liabilities going forward, it could come in the form of a proposed regulation.

J. Jioni Palmer, senior adviser and director of communications and public affairs at PBGC, told BNA April 27, "Our review of 4062(e) enforcement is ongoing, and we expect it to be finalized and announced in the near future."

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

In December 2011, several employer groups sent a letter to PBGC asking that it cease all enforcement actions that are based on the Section 4062(e) proposed regulations (246 PBD, 12/23/11; 39 BPR 6, 1/3/12).

BY KRISTEN RICAURTE KNEBEL