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Plan Termination

PBGC Developing Proposed Regulation On Downsizing Liability Section of ERISA

The Pension Benefit Guaranty Corporation is developing a proposed regulation that will address interpretive issues under a statutory provision subjecting certain downsizing employers to liability, PBGC said in a statement issued to BNA May 14.

The guidance being considered is to Section 4062(e) of the Employee Retirement Income Security Act, which gives PBGC the authority to assess liability on sponsors of single-employer defined benefit plans that cease operations at a facility resulting in the separation from service of at least 20 percent of the plan's participants.

Under the provision, PBGC may require employers undergoing such a cessation to place into escrow an amount equal to the plan's underfunded liability multiplied by the percentage reduction in active participants, or, alternatively, to post a bond equal to 150 percent of the underfunded liability to protect the plan if it experiences a distress or involuntary termination within the next five years.

PBGC said the regulation being developed is "expected to provide guidance on what is a [Section] 4062(e) event, reporting requirements, and other issues. It is premature at this point to provide more details because a number of basic policy issues are still under consideration."

PBGC said it "hopes to issue a proposed regulation in 2009, but that may change."

Agency Stepping Up Enforcement. Attorney Harold J. Ashner, former PBGC assistant general counsel for legislation and regulations, has been warning for some time that PBGC has been stepping up its enforcement of Section 4062(e) and that employers should be considering that as a possible cost when considering a cessation of a facility and the reduction of its workforce (91 PBD, 5/12/08; 35 BPR 1065, 5/13/08).

Ashner told attendees of an American Bar Association Section of Taxation meeting in Washington, D.C., May 8 that PBGC is monitoring more than 1,100 companies and has about 50 active cases ongoing under this provision.

Ashner, now a partner at Keightley & Ashner, Washington, D.C., explained to BNA May 14 why PBGC has increased enforcement of this provision: "PBGC sees itself as an involuntary lender that, unlike other lenders, typically has little if any ability to control its risk or exposure. As a result, in many cases, PBGC ends up with a significant liability and an insignificant recovery when an employer enters bankruptcy after having secured most or all of its assets for the benefit of other lenders. PBGC has recently started pursuing this downsizing liability aggressively to try to get some protection before an employer enters bankruptcy."

Ashner said he hoped any forthcoming guidance from PBGC would address a number of unresolved interpretive issues, such as the full meaning of the statutory terms "facility in any location," "operation," "timing," "cessation," and "separation from employment."

By DAVID B. BRANDOLPH