

Publications

PBGC Finalizes Streamlined Coverage Determination Process

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As reported in our client alerts in [December 2018](#) and [May 2019](#), the Pension Benefit Guaranty Corporation (“PBGC”) had been working on a form for plan sponsors or administrators to submit when requesting a determination from PBGC as to whether a plan is covered under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”). The form and instructions were finalized on July 10th and are now available on PBGC’s [website](#). The form lists information that a plan sponsor must submit when seeking a coverage determination with respect to substantial owner plans, small professional service employer plans, church plans, and Puerto Rico-based plans. The form also allows an employer to request, under a PBGC pilot program, a coverage opinion with respect to a professional service employer or substantial owner plan that has not yet been established.

I. Coverage Determinations Overview

Under section 4021 of ERISA, a defined benefit pension plan that meets the qualification requirements for such plans under section 401 of the Internal Revenue Code (“Code”), or has been determined by the IRS to be a qualified plan, generally is covered by Title IV of ERISA (*i.e.*, the PBGC insurance program). However, ERISA section 4021(b) identifies categories of plans that are not covered by PBGC notwithstanding their tax qualification. The most common of these exclusions includes:

- **Governmental plans**, or generally plans that are established and maintained by the federal government, or state government or political subdivision, or by any agency or instrumentality of any of the foregoing (ERISA section 4021(b)(2)),
- **Church plans**, or generally plans that are established and maintained by a church or by a tax-exempt organization controlled by or associated with a church (ERISA section 4021(b)(3)),
- **Substantial owner plans**, or plans established and maintained for a substantial

owner (ERISA section 4021(b)(9)),

- **Professional service employer plans**, or generally plans established and maintained by a professional service employer and that have never had more than 25 active participants (ERISA section 4021(b)(13)).

Furthermore, a plan with a trust that is not based in the United States, such as a Puerto Rico plan, will not qualify under the Code (though Puerto Rico-based plans can make an irrevocable election under ERISA section 1022(i)(2) to be tax qualified), and, therefore is not covered by PBGC.

If a pension plan is not covered by PBGC, the sponsor does not need to pay costly PBGC insurance premiums. Additionally, these plans are generally not subject to other ERISA requirements, such as funding, vesting, and reporting and disclosure requirements, as well as the fiduciary responsibility rules.

PBGC does not need to make a coverage determination in order for a Plan to be covered by PBGC's insurance program; rather, a plan is covered (or not covered) by operation of law, except in limited exceptions where a plan sponsor can elect plan coverage. However, a plan sponsor or administrator typically seeks a determination from PBGC that a plan is not covered to confirm the sponsor has no obligation to pay PBGC premiums or comply with other PBGC rules. Plan sponsors are often reluctant to not pay (or stop paying) PBGC premiums in the absence of a formal determination because, if PBGC concludes the plan is covered, PBGC will seek to recover unpaid premiums, interest, and penalties. On the other hand, some sponsors have, for various reasons, sought an affirmative determination from the PBGC that a plan is covered.

II. New Form Streamlines Determination Process

In the past, plan sponsors typically submitted a written request to PBGC for a coverage determination outlining the facts and the sponsor's reasoning for why the plan is not covered. PBGC would then request that the sponsor provide information PBGC deems necessary to make the coverage determination.

PBGC's new coverage determination form provides a streamlined process by listing the information initially required to be submitted by the sponsor (or would-be sponsor) in order for PBGC to make a coverage determination (or issue a coverage opinion for a yet-to-be established professional service employer or substantial owner plan, discussed below). The information PBGC requires depends on the type of plan at issue and includes participant information, sponsor owner and ownership information, corporate organizational documents, and information regarding corporate activities.

As we previously discussed, the inclusion of church plans on the form indicates that PBGC is breaking with past practice and is willing to issue coverage determinations with respect to church plans. Indeed, historically church plan coverage determinations were rare, perhaps due to the numerous lawsuits regarding the covered status of religiously-affiliated hospital-sponsored pension plans in which plaintiffs argued the plans did not qualify for the exemption because the plans were not established by churches. Although that litigation continues, the law became more settled when the Supreme Court [ruled](#) on June 5, 2017 that church plans need not be established by churches but can be maintained by certain tax-exempt organizations that are controlled by or associated with a church.

Perhaps due to the increased clarity of the legal landscape regarding church plans, PBGC appears to be willing to issue coverage determinations regarding purported church plans. PBGC clarified on its website that it defers to the IRS when determining whether a plan is a church plan, and therefore typically requires a plan to obtain an IRS private letter ruling indicating that it is a church plan.

Although the form lists information required to be submitted only with respect to substantial owner plans, small professional service employer plans, church plans, and Puerto Rico-based plans, the form can be used for any request for coverage determination. Other requests may relate to an individual account plan, a governmental plan, or an unfunded "top hat" plan established for the benefit of management or highly compensated employees. The instructions state that, in such cases, a sponsor must provide documentation and legal bases to support the sponsor's position on the plan's covered status.

III. Pilot Program

As noted above, PBGC instituted a year-long pilot program under which an employer can request a coverage opinion with respect to only a professional service employer or substantial owner plan that has yet to be established. The coverage opinions are not initial determinations with administrative appeal rights and are not binding on the agency. Rather, PBGC intends for these opinions to provide non-binding guidance only. This program is likely to be most useful for employers that wish to establish a pension plan but do not want to be subject to the provisions of Title IV of ERISA.

The pilot program is slated to end on June 30, 2020, meaning that any request for a coverage opinion must be submitted by that date.