

Publications

PBGC Rulemaking Roundup

ATTORNEYS & PROFESSIONALS

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The Pension Benefit Guaranty Corporation (“PBGC”) has become increasingly active with respect to rulemaking, issuing several final and proposed rules covering a wide variety of topics—from PBGC reporting to administrative review to coverage determinations. It is unclear whether the increased activity reflects the relatively new leadership of Executive Director Hartogenesis, but it is clear that PBGC has gone to great lengths to update and revise longstanding rules. Below is an overview of rulemaking and other guidance from PBGC relating to single-employer defined benefit pension plans.

Proposed Rules or Requests

1. Reportable Events

PBGC recently published a notice in the *Federal Register* of its intention to request authorization to amend its Form 10 and Form 200, which are used to notify PBGC of “reportable events” and missed minimum required contributions in excess of \$1 million, respectively. 84 Fed. Reg. 59660 (Nov. 5, 2019). Specifically, with respect to the Form 10, PBGC proposes that when a sponsor makes a payment to satisfy a missed contribution, the sponsor must provide PBGC documentation of the payment (e.g., a cancelled check or a wire transfer notice). When reporting missed contributions in excess of \$1 million, PBGC proposes to require a sponsor to report the contribution amount that triggered the notification requirement.

PBGC also proposes to require sponsors to use PBGC’s e-filing portal for reporting, eliminating the email option.

Comments to PBGC’s proposals are due January 6, 2020.

2. PBGC Premiums Reflecting Risk Transfers

On October 30, PBGC published notice of submission to Office of Management and Budget modifying the 2020 premium filing form and instructions. Among other

things, the modifications would require premium filers to separately report the number of participants *in pay status* who were offered and elected a lump sum. The proposed form and instructions also change the reporting period for risk transfer activity (*i.e.*, lump sums or annuity purchases) to the prior premium payment year, as opposed to 60 days before the prior premium filing to 60 days prior to the current premium filing. Finally, the modified instructions would provide that if a plan submits a final premium filing because the plan is no longer covered by PBGC, the plan should request a coverage determination from PBGC.

Comments are due by November 29, 2019.

3. 4010 Reporting

ERISA requires that sponsors of certain underfunded plans report financial and actuarial information to PBGC. This requirement also extends to each member of a sponsor's controlled group, which has previously required the sponsor to submit separate financial information for each controlled group member. In some cases, particularly for large controlled groups, this reporting requirement is cumbersome and time-consuming.

On October 16, PBGC issued a technical update waiving the requirement to report certain controlled-group member-specific financial information. PBGC has determined that such information is not necessary to assess the risk a plan may pose to PBGC. This waiver means that, for controlled group members with a U.S. ultimate parent, a sponsor does not need to submit separate financial information for controlled group members that are included in consolidated financial statements submitted to PBGC. For controlled group members with a foreign ultimate parent, the requirement is waived if the U.S. members are included in consolidated financial statements submitted to PBGC.

Notwithstanding the waiver of the requirement to provide separate financial information, plan sponsors must manually input the revenues, operating income, and net assets for each controlled group member in the 4010 module.

This technical update was issued pending PBGC's proposed rule on June 27, 2019, eliminating the requirement to report separate controlled-group member financial information.

4. Administrative Review of Agency Decisions

On October 4, PBGC issued a notice of proposed changes to its rules regarding review of agency initial determinations. PBGC has a two-tier administrative review structure, which provides for an administrative review process that depends on the type of initial determination being challenged. Initial determinations on issues regarding coverage of a plan by PBGC, PBGC premiums, whether the criteria for a voluntary or distress termination have been met, and assessment of penalties for failing to timely provide information to PBGC are reviewed under the "reconsideration" process. Review by reconsideration is conducted by a higher-level official within the same department as issued the initial determination. By contrast, review of other agency determinations, such as *noncoverage* of a plan, benefit decisions, and termination liability assessments are reviewed not by the same department that issued the initial decision, but rather by PBGC's Appeals Board.

PBGC proposes to reorganize the administrative review rules to accomplish several objectives, including:

- Subjecting all coverage determinations (whether the determination is that a plan is covered or is not covered by PBGC) to the Appeals Board, rather than only determination of noncoverage.
- Subjecting PBGC's determination regarding the allocation of a trustee plan's assets to review by the Appeals Board, reasoning that the issue is necessarily implicated in PBGC's benefit determinations.
- Clarifying that when PBGC issues a decision that is effective as of the determination date, the aggrieved party has no appeal rights. Thus, the only remedy would be for the party to go to court to overturn the decision. Notably, this "jeopardy" determination cannot apply to a determination regarding a participant's benefit or qualification of a domestic relations order.

The proposed rules would be effective for initial determinations made after December 3, 2019. Comments on the proposal are due on December 3, 2019.

Final Forms Approved

1. Shutdown Liability Reporting

As we previously noted, on May 15, 2019, PBGC published a notice in the *Federal Register* announcing that it intended to seek from OMB authority to require reporting relating to ERISA section 4062(e), which imposes liability on a plan sponsor and controlled group relating to a cessation of operations at a facility and a resulting reduction of the workforce. This liability can be satisfied by an election to make additional annual contributions to the plan over seven years.

The proposed forms would be used by an employer or plan administrator to notify PBGC of:

- the occurrence of a substantial cessation of operations (Form 4062(e)-01 Notice of Section 4062(e) Event);
- the election to make additional plan contributions to satisfy the sponsor's liability under ERISA section 4062(e) (Form 4062(e)-02 Notice of Election Under ERISA 4062(e));
- the payment of an additional contribution, the receipt of a funding waiver from the IRS, or the cessation of the obligation to make additional contributions due to sufficient plan funding (Form 4062(e)-03 Notice of Additional Contributions Under ERISA 4062(e)(4)); and
- the failure to make an additional contribution as required under ERISA section 4062(e) (Form 4062(e)-4 Notice of Failure to Make Additional Contributions Under ERISA 4062(e)(4)).

The forms were approved by OMB in September and can be found on PBGC's website. Note that the forms are due between 10 and 60 days after an event, depending on the event being reported (*e.g.*, the Form 4062(e)-01 is due 60 days after the event occurred; the Form 4062(e)-03 is due 10 days after the contribution was made). Submission of financial and/or actuarial information along with the forms would generally be required. At this time, the forms are submitted via email, U.S. mail or commercial delivery.

2. Coverage Determinations

PBGC's form for coverage determinations, proposed earlier this year, was approved in July. The coverage determination form contains lists of information PBGC requires to be submitted in connection with requests for coverage determinations. The form does not specifically address all types of coverage exemptions (*e.g.*, governmental plans); instead, it specifically addresses only the most common exemptions invoked in requests for coverage determinations – the substantial owner, professional service employer, church plan, and Puerto Rico plan exemptions. The form, however, does include a general box to check for any “other” exemption under section 4021(b) of ERISA.

The new form also provides would-be plan sponsors with an opportunity to seek a coverage opinion letter with respect to a plan that has not yet been created. This opinion letter option falls under a one-year pilot program and applies only to potential “substantial owner” or “professional service employer” exemptions.