

Publications

PBGC Update – New Director Takes Helm/Flurry of New Forms

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Changes are a-comin' at the Pension Benefit Guaranty Corporation ("PBGC"), the most significant of which is its new Director, Gordon Hartogensis, who took the helm at the Agency on May 15, 2019. Mr. Hartogensis was first nominated by President Trump in 2017 and confirmed by the Senate on April 30, 2019. He replaces Thomas Reeder, who served as PBGC's Director since 2015.

Notably, the replacement of Mr. Reeder by Mr. Hartogensis could bring a shift in the Agency's approach in key areas. Mr. Reeder is an attorney and former partner in the employee benefits practice group of a major law firm. Before becoming PBGC's 15th Director, Mr. Reeder worked on employee benefits issues in various government positions, including at the Department of Treasury, the Senate Finance Committee, and the Internal Revenue Service. By contrast, Mr. Hartogensis comes from a business background, having founded and run a software company from 2004 to 2011 and managed the Hartogensis Family Trust since 2011.

With such a different career from Mr. Reeder's, we can expect Mr. Hartogensis to bring a different perspective; indeed, during a Senate Finance Committee hearing, Mr. Hartogensis offered that his background would lend a pair of "fresh eyes" to the issues facing PBGC. It remains to be seen how the new Director will impact plan sponsor interactions with the Agency, but it provides an opportunity for the Agency to address various issues.

In addition to the change in leadership, PBGC recently issued new final or proposed forms relating to reportable events, facility shutdown reporting under ERISA section 4062(e), and coverage determinations. We note these developments below.

Updated Reportable Event and Large Unpaid Contribution Forms

PBGC announced on May 8 that the Office of Management and Budget ("OMB") approved changes to PBGC's Forms 10, 10-Advance, and 200, which are submitted in connection with "post-event" or "advance reportable event" notices, and with a notice of a failure to make minimum funding contributions that, in the aggregate, exceed \$1

million. While most changes were minor, more significant changes include a requirement that controlled group, company financial, and plan actuarial information be submitted with every Form 10 filing, regardless of the event being reported. Also, PBGC's e-filing

portal has expanded to now offer sponsors or administrators the ability to submit Forms 10, 10-Advance, or 200 information through the portal.

Proposed Form and Instructions – New Process for 4062(e) Reporting

On May 15, PBGC published a notice (84 Fed. Reg. 21840) announcing its intention to request that OMB approve a collection of information necessary for a sponsor to fulfill reporting obligations under ERISA section 4063(a) relating to a cessation of operations at a facility under ERISA section 4062(e). An employer and plan administrator are required to provide notice to PBGC when there is a “substantial cessation of operations at a facility,” generally meaning a permanent cessation of operations at a facility that results in a greater than 15 percent reduction of “eligible employees” (*i.e.*, employees eligible to participate in any pension plan, including a defined contribution plan).

In the event of a substantial cessation of operations, liability of the plan sponsor arises under ERISA section 4062(e); this liability can be satisfied by an election to make additional annual contributions to the plan over seven years. A sponsor that makes this election must notify PBGC of such election, as well as each annual payment made (or failed to be made) pursuant to the election. The sponsor also must notify PBGC if its obligation to make the additional contributions ceases due to the receipt of a funding waiver from the IRS or the plan becoming at least 90 percent funded.

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 documents and information required to be submitted depend on the form/event being reported, but generally would include controlled group financial information and/or plan actuarial information.

The due date for filing these forms would be between 10 and 60 days after the event occurred, depending on the event being reported (*e.g.*, reporting required 10 days after an additional annual contribution is made, and 60 days after the occurrence of a substantial cessation of operations).

Comments are due to PBGC by July 15.

Proposed Form and Instructions – Coverage Determination Requests

As described in our [client alert](#) last December, PBGC announced its intention late last year to seek OMB approval of a proposed 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 ERISA. PBGC has now requested OMB approval of a [proposed form](#) and [instructions](#) relating to requests for coverage determination. 84 Fed. Reg. 20168. The proposed form contains lists of information PBGC requires to be submitted in connection with requests for coverage determinations.

As with the prior proposed form, the new proposed form does not specifically address all types of coverage exemptions (*e.g.*, governmental plans); instead, it specifically addresses only the substantial owner, professional service employer, church plan, and Puerto Rico plan exemptions, with a general box to check for any “other” exemption under section 4021(b) of ERISA. We understand that PBGC’s reasoning for specifically addressing only the four aforementioned exemptions is that those exemptions are the most common exemptions invoked in requests for coverage determinations.

There is one significant change in the new proposed form and instructions. In response to a prior comment, PBGC announced the creation of a pilot program under which a plan sponsor could request that PBGC provide an opinion letter of coverage with respect to a plan that is not yet in existence under the “substantial owner” or “professional service employer” exemptions. While PBGC will not

issue a coverage determination for a plan that has not yet been established, this process allows prospective plan sponsors to be reasonably assured of coverage (or non-coverage, as the case may be) prior to establishing a pension plan.

Comments are due to the Office of Information and Regulatory Affairs at OMB by June 7.