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September 24, 2014 www.groom.com

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Senate Unanimously Passes Bill on ERISA 4062(e) Overhaul

Given the legislative gridlock in Washington these days, no one expects Congress – especially the Senate, where the threat of filibuster looms – to pass any legislation. Consequently, it is big news when the Senate passes legislation on ERISA by unanimous consent.

On September 16, 2014, the Senate unanimously passed S. 2511, a bill that clarifies the circumstances that give rise to liability for employers that sponsor underfunded pension plans under the heavily-criticized ERISA section 4062(e). Currently under ERISA section 4062(e), when an employer with a pension plan ceases operations at a facility and, as a result of the cessation, 20 percent of employees are separated from employment, the employer may be required to provide PBGC short-term financial guarantees in the form of a bond or escrow in an amount based on the pension plan's unfunded termination liability. Although this provision went largely unenforced for years, PBGC more recently adopted an expansive enforcement policy, asserting liability where, for example, facility operations were continued by another employer or where operations moved to another location. Moreover, PBGC has required onerous terms from employers to settle the liability, at times threatening the financial condition of the company. PBGC's enforcement of ERISA section 4062(e) drew such heavy criticism from the business community that, on July 8, 2014, PBGC issued a moratorium on enforcement of 4062(e) through the end of the year.

The bill passed by the Senate addresses many of the business community's concerns. The bill provides that section 4062(e) liability arises when a "substantial cessation of operations" occurs, meaning that operations at a facility permanently cease, resulting in a workforce reduction of more than 15% of eligible employees. Significantly, the bill does not include in the workforce reduction calculation employees who are separated from employment but are replaced by another employee at another location, so a company that relocates a facility's operations to another facility within a reasonable period of time may not liable under section 4062(e). Similarly, the bill does not count employees who are separated from employment after the employer sells its assets to another employer as long as the new employer either keeps or replaces the separated employee and maintains a pension plan that provides for the separated employee's accrued benefit.

The bill provides support for PBGC's position regarding a "rolling shutdown" by including in the workforce reduction calculation employees separated from employment up to three years prior to the date the facility permanently closes.

When an event under section 4062(e) occurs, an amount is determined under section 4063. This amount is the fraction of the unfunded benefit liabilities as of the event date, determined using PBGC's conservative assumptions, corresponding to the fraction of participants who separated from service. This amount must be escrowed with PBGC. A

bond also may be posted in an amount up to 150 percent of the fractional amount. If the plan does not terminate during the five years, the escrowed amount is returned without interest or the bond is cancelled. The bill provides an option for employers to elect to satisfy the liability by making additional contributions to the plan over the 7 year period following the facility shutdown. The amount of the contributions relates to the pension plan's unfunded vested benefits under ERISA 4006(a)(3)(E) and cannot be greater than the excess of 25% of the plan's underfunding for the preceding plan year over the minimum required contribution for the plan year. These contributions are in addition to the minimum required contributions under ERISA section 303 and cannot serve to create a prefunding balance under IRC section 430.

If an employer elects to satisfy its liability through additional contributions, the requirement to make additional contributions ceases when the plan becomes at least 90% funded, even if the plan's funding later worsens later, or if the employer receives a funding waiver from the IRS.

Under the bill, ERISA section 4062(e) does not apply to employers that sponsor plans with fewer than 100 participants or that are at least 90% funded as determined under ERISA section 4006(a)(3)(E).

Several concerns remain. For example, section 4068 provides that a lien arises upon failure to pay liability arising under sections 4062, 4063, or 4064. The lien, which applies to the property of the liable contributing sponsor and its controlled group members, is in the amount of the liability, but limited to 30% of the net worth of the contributing sponsor's controlled group. This provision typically has been applied to liability that arises under section 4062 of ERISA upon termination of an underfunded pension plan. The Senate's bill does not address the concern that PBGC could use this lien provision in connection with section 4062(e). In addition, the bill's requirement that an employer act "within a reasonable period of time" exposes employers to uncertainty regarding PBGC's interpretation of that language in any given case. The bill nevertheless represents a significant step in addressing the business community's concerns regarding ERISA section 4062(e).

The House of Representatives will consider the legislation next, although likely not until the members return from recess after the November elections for Congress's lame duck session.

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