

Reproduced with permission from Pension & Benefits Daily, PBD, 3/30/2012. Copyright © 2012 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Plan Termination

PBGC Enforcing Facility Closure Rule Despite Promise to Revise It, Speakers Say

The Pension Benefit Guaranty Corporation is stepping up its enforcement efforts on violations of Section 4062(e) of the Employee Retirement Income Security Act, speakers said during an actuarial conference March 28.

ERISA Section 4062(e) requires that if a company ceases operations at a facility that results in 20 percent of employees who are plan participants losing their jobs, the company is treated as though it is subject to withdrawal liability on the termination of single-employer plans under multiple controlled groups (ERISA Sections 4063 and 4064). Also, the plan administrator must report this liability to PBGC under Section 4065.

Laura Rosenberg, senior vice president of finance, Fiduciary Counselors, Washington D.C., said there was a long period of time when PBGC did not enforce Section 4062(e) because there was a problem with the way the Section 4062(e) liability was calculated. This problem made it difficult for PBGC to go to employers and say they owed the agency money, because the regulation did not make sense, said Rosenberg, who formerly worked in PBGC's Corporate Finance & Negotiations Department.

"So while we did a few 4062(e)'s, they were few and far between, because when you don't have the law on your side, you just don't have the law on your side, and you've gotta move on," she said during a session of the Enrolled Actuaries Meeting.

In order to trigger a Section 4062(e) violation, an employer "has to cease operations at a facility in any location," resulting in a 20 percent reduction "in the active head count in one PBGC covered plan," said attorney Harold Ashner, with Keightley & Ashner, Washington, D.C., who formerly served as PBGC assistant general counsel for legislation and regulations.

The problems with the law have now been corrected, opening the door for PBGC to pursue Section 4062(e) violations more readily, Rosenberg said. Because of this, Rosenberg and Ashner think the pension community will be seeing a lot more 4062(e) cases.

"They are incredibly aggressive with this tool now," Rosenberg said, adding that the way the current law reads, PBGC is applying it to companies of all sizes and standing.

"They are applying to the healthiest, strongest, most stable companies, to the weakest one step out of bankruptcy companies. They are going after everybody," she said.

ERISA Section 4062(e) Re-Proposal. PBGC proposed a rule under Section 4062(e) in August 2010 (152 PBD, 8/10/10; 37 BPR 1809, 8/17/10). The proposed rule was met with tremendous push back and calls for the agency to withdraw the rule (198 PBD, 10/15/10; 37 BPR 2263, 10/19/10).

In October 2011, PBGC Director Joshua Gotbaum said PBGC would re-propose its rule on the application and enforcement of employer liabilities and reporting requirements under Section 4062(e) (165 PBD, 8/25/11; 38 BPR 1575, 8/30/11). The agency also said in its final plan for regulatory review in August that it planned to re-examine the proposed rule.

Letter to PBGC. In a letter dated Dec. 16, 2011, several groups from the pension industry expressed concern to Gotbaum that agents of PBGC were enforcing the controversial proposed rule (246 PBD, 12/23/11; 39 BPR 6, 1/3/12).

"The PBGC is actively enforcing very controversial proposed regulations that are being reconsidered pursuant to Executive Order 13563 on Improving Regulation and Regulatory review," the letter said.

Under Section 4062(e), "liability is triggered if 'an employer ceases operations at a facility in any location,'" the letter said. The letter said the statute was "clearly intended" to apply to situations in which facilities are completely shut down.

Re-Proposal Out in June. Ashner said while PBGC's regulatory agenda indicates the 4062(e) re-proposal will be out in June, he told the audience he "wouldn't take that to the bank."

However, Rosenberg said PBGC knows there is great interest in a re-proposal, so it will not drop off of the agency's radar screen.

"They know that people are anxious to see the rule, so it's not that they're going to forget about it," she said.

BY KRISTEN RICAURTE KNEBEL