

employee benefits lawflash

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PBGC Changes Enforcement Policy Under ERISA Section 4062(e)

No action will be taken against creditworthy companies or small pension plans; no financial guarantees will be required for approximately 92% of applicable employer-plan sponsors.

On November 2, the Pension Benefit Guaranty Corporation (PBGC) announced that, going forward, it will generally take no action to enforce Section 4062(e) of ERISA against “creditworthy” companies or small pension plans with 100 participants or less.¹ Instead, PBGC will concentrate its Section 4062(e) enforcement efforts on those companies where the risk of defaulting on their pension plan obligations still remains substantial. Companies that are “financially sound” by existing measures will not be required to provide financial assurance of any kind. As a result, PBGC expects that 92% of companies that sponsor defined benefit pension plans will not face enforcement. PBGC previously enforced all Section 4062(e) cases without regard to the size of the plan or the financial health of the company sponsor.

Background

Section 4062(e) requires companies with defined benefit pension plans to report to PBGC when they cease operations at a facility and more than 20% of the employees who are plan participants are separated from employment in connection with the facility shutdown. In such a case, Section 4062(e) generally requires the company to provide financial security to protect the pension plan, such as making additional contributions or providing a financial guarantee.

In August 2010, PBGC published proposed regulations under Section 4062(e) that, among other things, (i) provided guidance on whether and when a “Section 4062(e) event” occurs, (ii) described the liability that arises and how the liability is satisfied, (iii) prescribed recordkeeping requirements, and (iv) provided for waivers in appropriate circumstances. The issuance of these proposed regulations drew an immediate and heated response from the business community on virtually all aspects of the proposed regulations. Among these comments, the business community pointed out that Section 4062(e) was sometimes applied when there was little or no risk of default either to pension plans or to PBGC because the plan was small or the company involved had the financial strength to stand behind its pension obligations.

In light of the overwhelming public comments, PBGC announced that it would issue new proposed regulations interpreting Section 4062(e), and, in March 2012, PBGC announced that it would soften Section 4062(e) enforcement for employers in strong or moderately strong financial condition. The approach categorized plan sponsors into three classes based upon their financial strength. After determining that a Section 4062(e) event had occurred, PBGC would classify the employer-plan sponsor as a “strong company,” a “moderately strong company,” or a “weak company.” The company’s status would determine the extent of its funding liability. This approach has since given way to PBGC’s most recent announcement that it will only take action to enforce Section 4062(e) against companies where the risk of default remains substantial.

1. Press Release, Pension Benefit Guar. Corp., PBGC Targets Enforcement Efforts to Preserve Pensions (Nov. 2, 2012), [available at http://www.pbgc.gov/news/press/releases/pr12-32.html](http://www.pbgc.gov/news/press/releases/pr12-32.html).

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Implications

Under the new PBGC enforcement policy, the agency will take no action to enforce Section 4062(e) against “creditworthy” companies or small pension plans with 100 participants or less. PBGC is using this enforcement policy as a pilot program that may be modified based on experience and to help the agency decide what changes may be required to the proposed regulations. However, PBGC indicated that its announcement does not change its current position as to the applicability of Section 4062(e) (e.g., the meaning of key terms and in what circumstances Section 4062(e) is triggered) or the liability that is created when Section 4062(e) is triggered.

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