

certain substantial cessations of operations by employers that maintain single-employer plans. PBGC proposes to amend its current regulation on Liability for Termination of Single-Employer Plans to provide guidance on the applicability and enforcement of ERISA section 4062(e).

**DATES:** Comments must be submitted on or before October 12, 2010.

**ADDRESSES:** Comments, identified by Regulation Identifier Number (RIN) 1212-AB20, may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the Web site instructions for submitting comments.
- *E-mail:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov).
- *Fax:* 202-326-4224.
- *Mail or Hand Delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212-AB20). Comments received, including personal information provided, will be posted to <http://www.pbgc.gov>. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4040.)

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Manager, or Deborah C. Murphy, Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005-4026; 202-326-4024. (TTY/TDD users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4024.)

**SUPPLEMENTARY INFORMATION:**

**Introduction**

Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under ERISA section 4002(b)(3), PBGC has authority to adopt, amend, and repeal regulations to carry out the purposes of title IV.

*Background of Proposed Rule*

ERISA section 4062(e) provides that “[i]f an employer ceases operations at a

facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of [ERISA sections] 4063, 4064, and 4065 shall apply.”

ERISA section 4063(a) requires the plan administrator of a multiple employer plan (that is, a single-employer plan with at least two contributing sponsors that are not under common control) to notify PBGC within 60 days after a substantial employer withdraws from the plan, and section 4063(b) and (c) makes the withdrawn employer liable to provide a bond or escrow in a specified amount for five years from the date of withdrawal, to be applied—if the plan terminates within that period—against the plan’s underfunding. Section 4063(e) allows PBGC to waive this liability if there is an appropriate indemnity agreement among contributing sponsors of the plan, and ERISA section 4067 authorizes PBGC to make alternative arrangements for satisfaction of liability under sections 4062 and 4063. (ERISA sections 4064 and 4065 deal with plan termination liability and annual reports by plan administrators.)

The method described in section 4063(b) for computing the amount of liability focuses on relative amounts of contributions by more than one employer and is thus impracticable for calculating liability triggered by an event involving a plan of a single employer under section 4062(e). However, section 4063(b) provides that PBGC “may also determine the liability on any other equitable basis prescribed by [PBGC] in regulations.” Pursuant to that authority, on June 16, 2006 (at 71 FR 34819), PBGC published a final rule providing a formula for computing liability under section 4063(b) when there is an event described in section 4062(e). The formula provided by the 2006 rule apportions to an employer affected by an event under section 4062(e) a fraction of plan termination liability based on the number of participants affected by the event. Over the next three-and-a-half years, PBGC resolved 37 cases under section 4062(e) through negotiated settlements valued at nearly \$600 million, providing protection to over 65,000 participants.

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**PENSION BENEFIT GUARANTY CORPORATION**

**29 CFR Parts 4062 and 4063**

**RIN 1212-AB20**

**Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** ERISA section 4062(e) provides for reporting of and liability for

### Overview of Proposed Regulation

The proposed rule would create a new subpart B of PBGC's regulation on Liability for Termination of Single-Employer Plans (29 CFR part 4062) that would focus on section 4062(e). The liability computation rules that were added to part 4062 by PBGC's 2006 final rule (now in § 4062.8) would be moved to this new subpart B. The purpose and scope section of part 4062 and the cross-references section of part 4063 (Withdrawal Liability; Plans Under Multiple Controlled Groups) would be revised to reflect the proposed regulation, and the references to the applicability date of part 4062 (now over 20 years in the past) would be removed.

Proposed subpart B addresses two general topics: The applicability and enforcement of section 4062(e). The provisions on applicability provide guidance on the kinds of events section 4062(e) applies to (*i.e.*, on what a "section 4062(e) event" is). The enforcement provisions describe PBGC's section 4062(e) investigatory program, provide rules for notifying PBGC of section 4062(e) events, explain how section 4062(e) liability is calculated and how it is to be satisfied, and require the preservation of records about events that may be section 4062(e) events. Subpart B would also provide for waivers in appropriate circumstances.

Adoption of the regulatory provisions in this proposed rule will reduce uncertainty about PBGC's interpretation of the statute, thereby permitting more rapid resolution of cases. Clearer rules, together with specific, detailed reporting provisions, should encourage self-reporting of events that PBGC now learns of only through its own investigations and may enable PBGC to process section 4062(e) cases more quickly, thereby protecting more participants.

Further clarification of section 4062(e) is also warranted by requests from the public. Although PBGC's 2006 rule on section 4062(e) was limited to the issue of the liability formula, several commenters asked for additional guidance to clarify the meaning of statutory terms used to describe when an event covered by section 4062(e) occurs. PBGC also regularly receives requests from pension professionals for interpretive guidance on section 4062(e). This proposed rule provides such guidance.

### Applicability of Section 4062(e)

PBGC proposes to provide guidance on whether and when a "section 4062(e) event" occurs by explaining each of the

key terms that appear in the statute and in the proposed regulation: "operation," "facility," "cease," "separate," and "result." The term "active participant base" would be introduced to describe the baseline number of active participants against which the statutorily required decline in active participants would be measured and to serve as the denominator of the apportionment fraction used in calculating liability for a section 4062(e) event. Discussions of the subpart B explanations of these terms follow.

#### "Section 4062(e) Event"

New subpart B would use the term "section 4062(e) event" to refer to an event to which section 4062(e) applies.

The proposed regulation would apply only to events involving single-employer plans that are not multiple employer plans. ERISA section 4062(e) provides that if a section 4062(e) event occurs, the affected employer "shall be treated with respect to [the affected] plan as if he were a substantial employer under a plan under which more than one employer makes contributions." The phrase "as if" implies that section 4062(e) does not itself apply to events involving plans under which more than one employer makes contributions. From the context and language of section 4062(e), therefore, PBGC concludes that the term "plan" in section 4062(e) means a single-employer plan that is not a multiple employer plan. Furthermore, the liability formula adopted by PBGC in 2006 would produce anomalous results if applied to an event involving a multiple employer plan.

The proposed regulation would require only that a plan be maintained by an employer—not both established and maintained—to come within the provisions of section 4062(e). In *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910 (2d Cir. 1987), the Second Circuit reasoned that a plan whose sponsorship has changed may be considered "established" (or "re-established") by the new sponsor, notwithstanding that it has not first been formally "terminated." In addition, in PBGC Opinion Letter 90-6, PBGC noted that it had "declined to interpret the conjunction of the terms 'established and maintained' strictly in the context of the exemption from Title IV coverage for governmental plans [under] ERISA section 4021(b)(2) \* \* \* because doing so would frustrate the intent of Congress in providing the exemption." The opinion letter quoted from the *Rose* case, sanctioning that approach on the basis that "the status of the entity which currently maintains a particular pension plan bears more

relation to Congress' goals in enacting ERISA and its various exemptions than does the status of the entity which established the plan."<sup>1</sup> The opinion letter applied the same principle to the exemption for substantial owner plans under ERISA section 4021(b)(9).

PBGC believes that similar reasoning applies to ERISA section 4062(e), which also uses the phrase "established and maintained." PBGC believes the textual analysis in the *Rose* case would be appropriate in interpreting this phrase in ERISA section 4062(e). In addition, Congress's goal in enacting section 4062(e) would appear to be frustrated, rather than promoted, by excluding from the ambit of that provision any case involving a plan established by a different employer from the employer maintaining the plan when the event occurred. Indeed, such an interpretation would seem to open a formalistic loophole that could be exploited where, by chance or foresight, a plan's sponsorship changed.

The proposed regulation would provide explicitly that evaluation of risk is not an element in deciding whether a section 4062(e) event has occurred. Sections 4062(e) and 4063 call for self-reporting by plan administrators. Each section describes a class of events that is to be reported. Neither section provides or even suggests that a plan administrator is to make a risk assessment and report an event to PBGC only if it creates risk for the plan or its participants or for PBGC. PBGC believes that section 4062(e) reflects a judgment that as a class, events described therein are indicative of increased risk of underfunded plan termination within five years—whether or not any particular risk factors appear to be present in particular cases. PBGC's experience bears out this view. For example, in a recent section 4062(e) case, an employer opposed the assessment of liability under section 4062(e) on the ground that its financial resources eliminated any risk to the termination insurance program. But shortly after reaching accord with PBGC, the employer entered bankruptcy with its plan underfunded because of an economic downturn in the industry.

Thus PBGC believes that risk is not relevant in deciding whether a section 4062(e) event has occurred, and the proposed regulation would provide that such decisions be made without regard to whether there might in a particular

<sup>1</sup> A contrary case is *Hightower v. Texas Hospital Association*, 65 F.3d 443 (5th Cir. 1995). The *Hightower* case does not discuss the actions an employer assuming sponsorship of an existing plan might take to be treated as having "established" (or "re-established") the plan.

case be (or appear to be) no risk to the plan, participants, or PBGC. However, as discussed below under *Liability for section 4062(e) events*, in making arrangements for the satisfaction of liability arising from section 4062(e) events, PBGC may take account of such circumstances as employer financial strength.

The proposed regulation would also note that if an employer has two or more plans, section 4062(e) is applied separately to each plan, not on an aggregate basis. This principle is clear from section 4062(e)'s references to "a plan" and "that plan."

#### "Operation"

The proposed regulation uses the term "operation" (singular rather than plural) to refer to a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. PBGC proposes that section 4062(e) apply to cessation of an operation in this sense. This approach is consistent with PBGC's practice and experience in its current enforcement activities under section 4062(e). The regulation would also suggest some criteria that might be considered in identifying a set of activities as an operation, such as whether it is so treated by the employer or its employees or customers, by the public, or within the relevant industry.

#### "Facility"

Section 4062(e) applies to cessation of an operation "at a facility in any location." PBGC thinks that section 4062(e) should be read as applying to an employer's cessation of an operation at a "facility in any location," even if the employer continues or resumes the operation at another "facility in any location." Accordingly, under the proposed rule, the facility (or facility in any location) associated with an operation would simply be the place or places where the operation is performed. This would typically be a building or buildings, but could be or include any one or more enclosed or open areas or structures where one or more employees were engaged in the performance of the operation.

PBGC's view of "operation" and "facility" means that a facility (a building, for example) may be the site of more than one operation. Under the proposed regulation, therefore, section 4062(e) might apply where some but not all activity at a facility ceased, if the activity that ceased constituted an

operation distinct from other activities in the facility.<sup>2</sup>

#### "Cessation"

PBGC proposes that where an employer discontinues activity that constitutes an operation at a facility, deciding whether a cessation has occurred for purposes of section 4062(e) should involve assessment of whether the discontinuance represents a mere cutback or contraction, or is so thorough that the employer's conduct of the operation at the facility can no longer be considered on-going. The proposed regulation would address this issue for both voluntary and involuntary discontinuances.

PBGC believes that whether an employer's conduct of an operation at a facility ceases or remains on-going (though perhaps curtailed) depends on the degree to which the purpose of the operation continues to be fulfilled by the employer's activity at the facility. PBGC thus proposes that an employer's cessation of an operation at a facility be considered to occur only if the employer discontinues all significant activity at the facility in furtherance of the purpose of the operation.

Thus, an employer might cease an operation at a facility even though insignificant activity at the facility in furtherance of the purpose of the operation continued. For example, while continued processing of materials on hand would typically constitute significant activity in furtherance of the purpose of an operation, desultory sales of left-over inventory would typically not. Continuing activity that does not further an operation's purpose would be disregarded. For example, although maintenance and security activities may be important to a manufacturing operation, they do not further the purpose of the operation. Thus, a cessation of such an operation could occur even though there was a continuance of maintenance and guard services.

While this approach is apt for "voluntary" discontinuances pursuant to employer decision,<sup>3</sup> it is less suitable for

<sup>2</sup> For example, an employer might conduct a manufacturing operation under the same roof with shipping and administrative functions—or with another, distinct manufacturing operation. If the employer ceased the manufacturing operation (or one of the two manufacturing operations) at the facility, the cessation might come within the scope of section 4062(e), even though the employer continued its other activity at the facility.

<sup>3</sup> "Voluntary" as used here does not connote something desirable or preferable, but merely refers to a discontinuance of activity that is not involuntary as described below. Thus, for example, a discontinuance of activity in response to an economic downturn is considered "voluntary"

"involuntary" discontinuances caused by events outside the employer's control. Where a discontinuance of activity is thrust upon an employer, rather than stemming from the employer's will, PBGC believes that the employer should have an opportunity to react—to resume or to decide not to resume the activity—before the discontinuance is characterized as a cessation under section 4062(e).

PBGC proposes to provide two rules for involuntary discontinuances. In each situation, cessation would occur not when all significant activity stopped, but at a later date—unless the employer in the meantime resumed the operation at the facility (in which case there would be no cessation) or decided not to resume it (in which case the cessation would occur when the decision was made). One situation would be where the discontinuance of activity was caused by employee action, such as a strike or sickout. In this case, the cessation date would be put off until the employee action ended (and the employer would have a week in which to resume activity). The other situation would be where the discontinuance was caused by a sudden and unanticipated event (other than an employee action) such as a natural disaster. In this case, the cessation date would be deferred for 30 days—time enough to resume work if the event causing the discontinuance left the operation viable.

As indicated in the discussion of "facility" above, PBGC believes that section 4062(e) may apply to an employer's cessation of an operation at one facility even if the employer continues or resumes the operation at another facility. For example, where an employer has been performing manufacturing, shipping, and administrative functions under a single roof, section 4062(e) could apply where the employer moves the manufacturing operation outside the United States and has manufactured goods shipped in bulk to the original U.S. facility for distribution using the employer's own existing shipping operation.

Similarly, PBGC believes that section 4062(e) applies to an employer's cessation of an operation at a facility even if the operation is continued or resumed by another employer at the same or another facility. One example of this would be the not uncommon situation where one employer sells the assets used in an operation to another employer that continues or resumes the operation.

because it does not fall within the description of an involuntary discontinuance.

The proposed regulation would thus provide that continuance or resumption of an operation at another facility or by another employer is to be disregarded in deciding whether a cessation has occurred.

The proposed regulation would also reflect PBGC's view that it is irrelevant whether an employer begins a new operation contemporaneously with its discontinuance of an existing operation, either at the same or another facility. A section 4062(e) event concerns itself with the cessation of one operation and the effect of that cessation on the employment of participants in the affected plan. Undertaking a second operation does not nullify the discontinuance of the first or the impact of that discontinuance on those participants. Of course, if enough of those participants were retained by the employer in connection with the new operation to avoid a drop of more than 20 percent in the active participant-count, there would be no section 4062(e) event.

Under the proposed regulation, any hope or expectation the employer may have that the discontinued work will be resumed would be irrelevant to whether the discontinuance is a cessation. A cessation does not ripen into a section 4062(e) event unless it results in a decline of more than 20 percent in the number of active participants in the affected plan. Where such a decline occurs because an employer discontinues activities constituting an operation at a facility, PBGC believes that the event should not fail to be covered by section 4062(e) because the activity may resume.

The proposed regulation would use the term "cessation date" for the date when a cessation occurs as discussed above. Since an employer's cessation of an operation at a facility is only part of what constitutes a section 4062(e) event (the other part being a resultant drop of more than 20 percent in the active participant-count), the date of a section 4062(e) event might be later than the associated cessation date.<sup>4</sup>

#### "Separation"

The fact that an employer ceases an operation at a facility does not in itself constitute a section 4062(e) event.

<sup>4</sup> For example, assume that the workers in an operation represent 21 percent of active participants in a plan and that when all activity in furtherance of the purpose of the operation stops, 19 percent (out of the 21 percent) lose their jobs but the remaining 2 percent keep working until the machinery used in the operation has been crated for disposal. A section 4062(e) event would not occur on the cessation date, but only when the over-20-percent active participant reduction requirement was satisfied.

Under section 4062(e), it must also be true that "as a result of such cessation of operations, more than 20 percent of the total number of [the employer's] employees who are participants under [the affected plan] are separated from employment." PBGC believes that "separation" as used here logically and naturally refers to separation from employment with the employer, rather than separation from employment in the operation.

Thus, PBGC believes that the requirement of separation is not satisfied if an employee is merely transferred within the employer's organization—for example, from work in the ceasing operation to work outside it—even if the transfer takes the employee out of the category of employees covered by the plan.<sup>5</sup> By the same token, PBGC believes that if an employer ceases an operation, but the operation is continued or resumed by a new employer, the fact that a person previously employed by the original employer continues to work in the operation as an employee of the new employer does not mean that the person has not separated from employment (with the original employer). Accordingly, the proposed regulation's discussion of separation would be couched in terms of the employment relationship between the employer and the employee.

The 60-day period within which notice of a section 4062(e) event must be given does not begin to run until a section 4062(e) event has occurred—that is, until there has been both a cessation by an employer of an operation at a facility and a separation from employment of more than 20 percent of the active participants in the affected plan. To know the reporting deadline, therefore, it is as important for the plan administrator to fix promptly the dates when participants separate from employment as it is to fix the cessation date promptly. In some cases (e.g., discharges and quits), fixing the separation date is relatively straightforward. Other cases (e.g., layoffs) may raise doubt about whether or when a separation has occurred. It is important to avoid having doubt of this kind delay decisions about whether the 20-percent threshold has been exceeded and a section 4062(e) event has thus occurred.

The proposed regulation would provide that an employee separates from employment when the employee

<sup>5</sup> In general, such a transfer would not terminate the transferred employee's participation in the plan, although it would typically mean that the employee would accrue no further benefits under the plan.

discontinues the active performance, pursuant to the employee's employment relationship with the employer, of activities in furtherance of any of the employer's operations, unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work within 30 days—for example, after a two-week holiday shutdown. This standard would allow a plan administrator to decide immediately whether a separation occurred when an employee discontinued active work. If, however, the 30 days pass without the employee's having returned, the employee would be considered to have separated from employment when active work stopped. The focus on active performance of activities pursuant to the employment relationship would mean that continued provision of benefits to an employee, such as the continued granting of credited service for pension purposes, would be disregarded in deciding whether a separation from employment occurred.

The proposed regulation would also include a special rule under which an employee's separation before a cessation was complete would be ignored if, by the cessation date, (1) the employee was rehired or a replacement was hired, and (2) the rehired or replacement employee was a participant in the plan.

#### "Result"

The proposed regulation would provide that a separation from employment results from the cessation of an operation if the separation would not have occurred when it did had the cessation not occurred. Thus, for example, if an employee had been planning to retire in a year or two but chose to retire sooner upon learning of a shutdown that would eliminate her job, the separation would be the result of the shutdown; whereas if (before learning of the shutdown) she had been planning to retire immediately and retired as planned after she learned of the shutdown, the separation would not be a result of the shutdown.

The proposed regulation would provide that whether a separation occurs before, on, or after the cessation date is not considered decisive of whether the separation is the result of the cessation. An operation may not cease instantaneously, and some employees may leave before the cessation date because the operation in which they are employed is in the process of shutting down, although significant activity in furtherance of the purpose of the operation is still ongoing. Yet other employees may continue to work after the cessation date—for

example, disassembling machinery and guarding the premises until the plant and equipment can be sold—before they finally leave.

The proposed regulation would also provide that an employee's separation may result from the cessation of an operation at a facility even if the employee's employment has been in another operation or even at another facility. Ceasing one operation can have an impact on other operations, whether or not they also cease. For example, an employer might have one operation to assemble widgets from pre-fabricated parts, and another operation to fabricate widget parts for use in the employer's own widget manufactory or for sale to other widget manufacturers. If the employer shut down the widget assembly operation, there would be reduced demand for widget parts, the fabrication operation would cut back, and some fabrication employees would lose their jobs—as a result of the shutdown of the widget assembly operation. And if there was reduced demand for widget parts in the industry generally, the shutdown of the employer's widget assembly operation might even cause the shutdown of its fabrication operation, and thus all of the fabrication employees might be separated as a result of the shutdown of the assembly operation.

To supplement the general rule on when separation from employment results from an employer's cessation of an operation at a facility, PBGC is proposing four presumptions based on the relationship between the timing of a separation and the timing of events involved in a cessation.

The first presumption (applicable to a voluntary cessation) would be that if an employee is employed in an operation at a facility and involuntarily separates from employment on or after the date when the employer decides to cease the operation at the facility, the employee has separated from employment as a result of the cessation.

The second presumption (also applicable to a voluntary cessation) would be that if an employee in an operation at a facility voluntarily separates from employment after the employer decision to cease the operation at the facility becomes known (to the employee, to employees generally, or to the public), the separation results from the cessation.

The third presumption would be that if a cessation is involuntary, and an employee in the operation voluntarily or involuntarily separates from employment on or after the date of the event that caused the cessation, the separation results from the cessation.

The fourth presumption would be that if an employee employed in an operation becomes employed by a new employer that continues or resumes the operation, the employee has separated from employment with the original employer as a result of the cessation.

PBGC believes that these four presumptions reflect reasonable inferences and will simplify application of the proposed regulation; nonetheless, any of the presumptions could be rebutted by appropriate evidence.

#### *“Active Participant Base”*

A section 4062(e) event occurs only if “as a result of [a] cessation of operations, more than 20 percent of the total number of [the employer's] employees who are participants under [the affected plan] are separated from employment.” To apply the 20-percent test, one must know the base number against which the 20 percent is measured. The statute provides that this base number is “the total number of [the employer's] employees who are participants under [the affected plan],” but it does not say as of what point in time the number is to be fixed, although one may infer that it is to be a pre-cessation number.

The formula for calculating liability for a section 4062(e) event that PBGC added to the termination liability regulation in 2006 also refers to a base number—the denominator of a fraction that is applied to total termination liability to find the liability for a section 4062(e) event. Section 4062.8(a)(2) of the current regulation describes this base number as “the total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan.” This description is consistent with the description of a base number in section 4062(e), and administrative convenience is clearly served by using the same number for the statutory 20-percent threshold test and for the apportionment fraction in the regulatory formula for liability.

However, the existing regulatory language—“immediately before the cessation”—does not provide as much specificity about timing as PBGC thinks desirable. PBGC thus proposes to prescribe rules that are consistent with, but more specific than, the existing statutory and regulatory language, describing when to count active participants for purposes of fixing a single base number for both the 20-percent test and the liability formula. PBGC proposes to call this number the “active participant base.”

The key to PBGC's proposal is to identify when a cessation begins, and

employment starts to be affected by the cessation process, so that active participants can be counted just before then. For a voluntary cessation, carried out pursuant to an employer decision, that decision marks the beginning of the cessation process, and the active participant base would be measured immediately before that decision. For an involuntary cessation, the active participant base would be measured immediately before the event that causes the cessation (strike, natural disaster, etc.).

In counting active participants, the proposed regulation would use the same formulation for describing active employment as in the provision on separation from employment: Active performance, pursuant to the employment relationship with the employer, of activities in furtherance of the employer's operations (or reasonable certainty of resuming such active work within 30 days, with a “reality check” if 30 days have passed). Thus, the active participant base would be measured on a basis consistent with the rules about measuring the number of participants who separate from employment.

In response to a public comment, PBGC's 2006 final rule prescribing the section 4062(e) liability computation formula clarified that, in calculating the denominator of the fraction in the formula (the number of employee participants immediately before the cessation), only current employees are included. The proposed formulation of the active participant base would make this point more clearly.

The proposal would also clarify that an employee need not be accruing benefits under a plan to be a participant in the plan.<sup>6</sup> Freezing a plan should not make the employer immune from section 4062(e).

#### **Enforcement of Section 4062(e)**

Proposed subpart B would describe two processes for PBGC to learn about section 4062(e) events: PBGC investigations and reports to PBGC by plan administrators. It would also describe the liability that arises when a section 4062(e) event occurs and how the liability is satisfied and would prescribe recordkeeping requirements. Provision would also be made for waivers in appropriate circumstances.

#### *PBGC Investigations*

Under ERISA section 4003(a), PBGC has authority to make such investigations as it deems necessary to

<sup>6</sup> See the definition of “active participant” in § 4043.23 of PBGC's regulation on Reportable Events and Certain Other Notification Requirements (29 CFR part 4043).

enforce title IV and regulations thereunder (such as the regulation under section 4062(e) that PBGC is here proposing). PBGC's section 4062(e) enforcement has been strongly supported by investigations, and PBGC expects its section 4062(e) investigatory activity to continue, notwithstanding the inclusion in the proposed regulation of detailed reporting requirements.

The investigation provision in proposed subpart B would include a deadline for responding to PBGC information requests, and failure to respond by the deadline could result in the assessment of penalties under ERISA section 4071 (*see Late filing penalties* below). There would also be a requirement to correct or update information submitted to PBGC that was or became materially wrong or outdated.

#### Notice Requirement

Under ERISA section 4063(a), the plan administrator of a multiple employer plan must report the withdrawal of a substantial employer from the plan to PBGC within 60 days after the withdrawal. Since section 4062(e) refers to section 4063 for the procedures to be followed for section 4062(e) events, the proposed rule would provide, consistent with the statute, that notice of a section 4062(e) event must be filed with PBGC by the plan administrator of the affected plan within 60 days. The 60 days would run from the later of the cessation date or the date when the number of active participant separations resulting from the cessation exceeds 20 percent of the active participant base.

Filing forms and instructions, including filing methods, filing addresses, required data, etc., would be posted on PBGC's Web site.<sup>7</sup> The proposed regulation would also provide cross-references to filing rules in PBGC's regulation on Filing, Issuance, Computation of Time, and Record Retention (29 CFR part 4000). PBGC could require submission of supplementary information, ordinarily with a 45-day response period, which could be shortened if necessary to avoid prejudice to PBGC, the plan, or participants. The affected employer would be required to furnish necessary information to the plan administrator of the affected plan. Any filed information

<sup>7</sup> The absence heretofore of a section 4062(e) event reporting form made it possible to combine a section 4062(e) event notice with a reportable event notice under § 4043.23 of PBGC's reportable events regulation. PBGC's proposal to require the use of prescribed forms to file notice of section 4062(e) events would make this unworkable. However, information already submitted to PBGC in a reportable event notice would not need to be resubmitted in a section 4062(e) event notice.

that a filer discovered to be materially wrong or outdated would have to be promptly corrected. Thus, for example, if more employees separated from employment as a result of a cessation after the cessation had been reported to PBGC, and the number of additional separations would materially affect liability, the additional separations would have to be reported to PBGC.

To simplify section 4062(e) reporting, PBGC proposes to permit a plan administrator to disregard affected participants who were not employed at the facility where the affected operation was carried out. PBGC's experience suggests that effective and efficient enforcement of section 4062(e) is not usually best served by focusing the administrative resources of PBGC and plan administrators on tracing the effects of a cessation on employment at facilities beyond the one associated with the ceased operation. Accordingly, the proposed regulation would permit a plan administrator to ignore separations at other facilities in deciding whether a section 4062(e) event had occurred, when to file notice of an event, and how many affected participants to report in the notice. Only if PBGC specifically requested information about separations at other facilities would they need to be reported. In that case, however, or if identified in a PBGC investigation, separations at other facilities that were caused by a cessation would be counted in both the 20-percent threshold test and the liability calculation for the cessation.

Information submitted to PBGC under the proposed regulation would be protected from disclosure to the extent provided in the Freedom of Information Act and 18 U.S.C. 1905 (dealing with commercial and financial information).

#### Late Filing Penalties

ERISA section 4071 authorizes PBGC to assess a penalty against any person that fails to timely provide any notice or other material information required under section 4062(e) or 4063 or regulations thereunder (which would include the proposed regulation).<sup>8</sup> Under section 4071 and the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the maximum penalty is currently \$1,100 per day. *See* PBGC's regulation on Penalties for Failure To Provide Certain Notices or Other Material Information (29 CFR part 4071).

On July 18, 1995 (at 60 FR 36837), PBGC issued a statement of policy on

<sup>8</sup> Section 4071 penalties are not the only applicable enforcement mechanism.

penalties for failure to provide required information in a timely manner. The statement said that PBGC would—

consider the facts and circumstances of each case to assure that the penalty fits the violation. Among the factors the PBGC will consider are the importance and time-sensitivity of the required information, the extent of the omission of information, the willfulness of the failure to provide the required information, the length of delay in providing the information, and the size of the plan.

In general, the policy statement said that PBGC would assess penalties much lower than \$1,100 per day—\$25 per day for the first 90 days of delinquency and \$50 per day thereafter, with limitations based on plan size. However, it also said that PBGC may assess larger penalties if circumstances warrant, such as “if the harm to participants or the PBGC resulting from a failure to timely provide material information is substantial.” Such “larger penalties” would of course be subject to the \$1,100-per-day limitation. (The policy statement noted in particular that penalties for violations under subparts C and D of PBGC's reportable events regulation would generally be at the \$1,100-per-day level.) PBGC believes similarly that violations of the notice requirement under sections 4062(e) and 4063 may well result in substantial harm to participants and PBGC, especially because of the five-year limitation on maintaining a bond or escrow under ERISA section 4063(c)(2). Thus, such violations may well warrant section 4071 penalties larger than the “general” (\$25/\$50-per-day) penalty, subject to the \$1,100-per-day limitation.

#### Liability for Section 4062(e) Events

The liability formula for section 4062(e) events that PBGC added to the termination liability regulation in 2006 would be preserved under this proposed rule,<sup>9</sup> with clarification about how the calculation is done and some editorial changes (including rewording for consistency with terminology used in the rest of subpart B).

The proposed clarification relates to the provision (in both the existing and proposed regulation) that liability for a section 4062(e) event is based on a computation of termination liability performed as if the plan had been terminated by PBGC immediately after the cessation date. PBGC believes that termination liability for this purpose should be fixed and determinable as of

<sup>9</sup> In particular, no change would be made to the requirement to measure termination liability (on which section 4062(e) liability is based) as of the cessation date rather than as of the section 4062(e) event date.

the cessation date and should not take account of changes in assets or liabilities after the cessation date, such as from the receipt of contributions or the accrual of additional benefits. Ignoring post-cessation-date changes will promote simplicity and avoid the possibility that the liability calculation might differ depending on how long after the cessation date it was actually performed. This provision reflects PBGC's current practice.

PBGC proposes to remove the example in the current regulation that illustrates the computation of the fraction that is applied to termination liability to arrive at the liability that arises from a section 4062(e) event. The example was intended to make clear that the number of pre-event active participants does not include participants who are not currently working for the employer when the pre-event participant-count is measured. PBGC believes that its proposed formulation of the active participant base makes this point clear without the need for an example.

In general, PBGC proposes that it would prescribe one of the statutory methods (described in ERISA section 4063(b) and (c)(1)) for satisfying liability arising from a section 4062(e) event. However, the proposed regulation would permit the continuation of PBGC's practice, as authorized by ERISA section 4067, of negotiating with affected employers in appropriate cases on the manner in which the liability is to be satisfied, with a view to accommodating employer interests to the extent consistent with protecting the plan, participants, and PBGC as contemplated by the statute. For example, in some cases section 4062(e) liability might be satisfied through additional plan funding contributions that would not be added to the plan's prefunding balance. Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the new employer, the proposed regulation would enable PBGC to consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation).

#### *Recordkeeping and Waivers*

PBGC proposes to require that employers and plan administrators preserve records about potential section 4062(e) events that tend to show whether a section 4062(e) event in fact occurred and if so how much the resultant liability is. The recordkeeping

provision would also permit PBGC to proceed on the basis of reasonable assumptions if employer or plan records were insufficient. The proposed record retention period would be five years, which matches the period for which the security provided by an employer with respect to a section 4062(e) event can be held—and thus PBGC's window for enforcing section 4062(e).

New subpart B would also include a provision explicitly authorizing PBGC to grant waivers where warranted by the circumstances. PBGC's experience with section 4062(e) enforcement suggests that PBGC may encounter situations it does not now foresee, and this waiver provision is meant to provide a measure of flexibility in interpreting and applying the law.

#### **Provisions Not in the Rule**

The proposal does not include an exemption for small plans. Such an exemption was suggested by a commenter on PBGC's 2006 rulemaking that codified the section 4062(e) liability formula. PBGC believes that the protection afforded by section 4062(e) is appropriate for small plans (and their participants) as well as for large plans. Furthermore, to the extent that small plans present less underfunding potential than large plans (and thus less potential exposure for the pension insurance system), the liability under section 4062(e) will also be less, and thus the burden of satisfying it should not be disproportionate. Finally, PBGC believes that the guidance in this proposed rule should make compliance relatively easy for small and large plans alike. These considerations militate against an exemption for small plans.

The proposal also includes no exemption for well-funded plans. As noted above for small plans, the better a plan is funded, the lower (other things being equal) would be its liability for a section 4062(e) event under the formula provided in the regulation. If a plan were so well funded that it had no termination liability under ERISA section 4062, its liability for a section 4062(e) event would be zero. But termination liability computations are complex, and PBGC would not expect plans to make such computations simply to claim exemption from the section 4062(e) event reporting requirement.

The fact that a plan is undergoing a standard termination would likewise be ignored under the proposed rule. Until distributions pursuant to a standard termination are complete, there is the possibility that plan assets will be found insufficient to complete the standard termination process and that the plan

will remain ongoing. However, PBGC might forbear to pursue section 4062(e) liability where a standard termination was in process. And if distributions under a standard termination are complete by the deadline for giving notice of a section 4062(e) event, PBGC generally would not enforce the notice requirement.

#### **Effect on Prior Opinions**

PBGC has in the past issued a number of opinion letters dealing with ERISA section 4062(e).<sup>10</sup> While this proposed regulation does not explicitly address all details relating to section 4062(e), PBGC's intent in issuing the regulation is to set forth all of its current section 4062(e) guidance, supported by the discussion in this preamble.

Accordingly, the regulation would displace and supersede all of PBGC's prior opinion letter pronouncements addressing section 4062(e).

#### **Applicability**

PBGC proposes that the amendments made by this rule apply to section 4062(e) events with cessation dates on or after the effective date of the amendments.

#### **Compliance With Rulemaking Guidelines**

##### *E.O. 12866*

The PBGC has determined, in consultation with the Office of Management and Budget, that this proposed rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed this proposed rule under E.O. 12866.

##### *Regulatory Flexibility Act*

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply. This certification is based on the fact that the proposed regulatory amendments require only the filing of notices and that the economic impact of filing is not significant. Furthermore, section 4062(e) is generally not relevant for small employers. Small employers tend not to have multiple operations. For a small employer with a defined benefit pension plan, the cessation of an operation almost always would be

<sup>10</sup> See for example PBGC Opinion Letters 76-8, 76-52, 77-123, 77-134, 77-147, 78-29, 82-29, 85-8, and 86-13.



accompanied by plan termination. Section 4062(e) protection is only relevant when the plan is ongoing after the cessation of operations. Since publication of PBGC's 2006 final rule on calculation of liability under section 4062(e), only a handful of the potential section 4062(e) cases reviewed by PBGC involved plans with 100 or fewer participants.

#### *Paperwork Reduction Act*

PBGC is submitting the information requirements under this proposed rule to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202-326-4040. The proposed information collection will also be available on PBGC's Web site.

PBGC is proposing to require that notices of section 4062(e) events be filed using a PBGC form and include the following information:

- Identifying and contact information for the affected plan, the plan administrator, other plans covering affected participants, the contributing sponsor, and members of the contributing sponsor's controlled group.
- A description of current and proposed plan provisions dealing with lump sum options, shutdowns, and early retirement benefits.
- A description of any current or proposed plan termination proceedings, plan mergers, or changes in contributing sponsor or controlled group.
- A description of the affected operation and associated facility.
- A general description of the section 4062(e) event, including whether the affected operation is to be continued or resumed by the affected employer or a new employer at the same or another facility.
- The date used to calculate the active participant base, the date of any employer decision to cease the affected operation, the date (and nature) of any event that caused the cessation (other than an employer decision), the cessation date, and the date when the number of affected participants exceeded 20 percent of the active participant base.
- A copy of any press release or other announcement of the employer's cessation decision (including any notice issued pursuant to the Worker Adjustment and Retraining Notification (WARN) Act) and the date when it was issued.

- A description of any severance or retirement incentives offered since the date one year before the date of the employer decision to cease the operation.
    - The active participant base.
    - The number of affected participants as of the date when the filing was prepared.
    - The number of participants in the affected plan who have not separated from employment as of the date when the filing was prepared but who the employer believes will separate from employment as a result of the section 4062(e) event.
    - The number of active participants in the affected plan who had separated from employment as of the date when the filing was prepared but who were not counted as affected participants.
    - The name and address of each union representing affected participants.
    - A copy of each collective bargaining agreement covering affected participants.
    - The affected plan's most recent adjusted funding target attainment percentage (AFTAP) certification and most recent actuarial valuation report, including or supplemented by all of the information described in § 4010.8(a)(11) of PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010).
    - A summary of plan amendments, significant changes in plan population, changes in plan assumptions, and amounts and dates of lump sums paid that are not reflected in the most recent actuarial valuation report.
    - The market value of plan assets as of, or as close as possible to, the cessation date.
- PBGC needs this information to calculate the liability arising from a section 4062(e) event and decide how that liability should be satisfied. PBGC estimates that it will receive filings from about 200 respondents each year and that the total annual burden of the collection of information will be about 1,000 hours and \$350,000.
- Comments on the paperwork provisions under this proposed rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at [OIRA\\_DOCKET@omb.eop.gov](mailto:OIRA_DOCKET@omb.eop.gov) or by fax to (202) 395-6974. Although comments may be submitted through October 12, 2010, the Office of Management and Budget requests that comments be received on or before September 9, 2010 to ensure their consideration. Comments may address (among other things)—

- Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;
  - The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
  - Enhancement of the quality, utility, and clarity of the information to be collected; and
  - Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### **List of Subjects**

##### *29 CFR Part 4062*

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

##### *29 CFR Part 4063*

Employee benefit plans, Pension insurance.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4062 and 4063 as follows.

#### **PART 4062—LIABILITY FOR TERMINATION OF SINGLE-EMPLOYER PLANS**

1. The authority citation for part 4062 is revised to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3), 1303(a), 1362-1364, 1367, 1368.

2. Section 4062.1 is revised to read as follows:

##### **§ 4062.1 Purpose and scope.**

Subpart A of this part sets forth rules for calculation and payment of the liability incurred, under section 4062(b) of ERISA, upon termination of any single-employer plan and, to the extent appropriate, calculation of the liability incurred with respect to multiple employer plans under sections 4063 and 4064 of ERISA. Subpart B of this part sets forth rules under section 4062(e) of ERISA, including rules for reporting section 4062(e) events and for calculating and satisfying liability arising from such events.

##### **§ 4062.3 [Amended]**

3. In § 4062.3, paragraph (b) is amended by removing the reference “§ 4062.9(c)” and adding in its place the reference “§ 4062.8(c)”; and by removing the reference “§ 4062.9(b)” and adding in its place the reference “§ 4062.8(b)”.



**§ 4062.7 [Amended]**

4. In § 4062.7, paragraph (a) is amended by removing the reference “§ 4062.9” and adding in its place the reference “§ 4062.8”.

**§ 4062.8 [Removed]**

5. Section 4062.8 is removed.

**§§ 4062.9, 4062.10, and 4062.11 [Redesignated as §§ 4062.8, 4062.9, and 4062.10]**

6. Sections 4062.9, 4062.10, and 4062.11 are redesignated as §§ 4062.8, 4062.9, and 4062.10 respectively.

**§ 4062.1 through § 4062.10 [Designated]**

7. Newly redesignated §§ 4062.1 through 4062.10 are designated as subpart A with the heading “Subpart A—General Termination Liability Rules”.

8. A new subpart B is added to read as follows:

**Subpart B—Treatment of Substantial Cessation of Operations**

Sec.

- 4062.21 Purpose and scope.
- 4062.22 Definitions.
- 4062.23 “Section 4062(e) event.”
- 4062.24 “Operation.”
- 4062.25 “Facility” or “facility in any location.”
- 4062.26 “Cease” and “cessation.”
- 4062.27 “Separate” and “separation.”
- 4062.28 “Result.”
- 4062.29 “Active participant base.”
- 4062.30 PBGC investigations.
- 4062.31 Reporting requirement.
- 4062.32 Amount of liability.
- 4062.33 Manner of satisfying liability.
- 4062.34 Recordkeeping.
- 4062.35 Waivers.

**Subpart B—Treatment of Substantial Cessation of Operations****§ 4062.21 Purpose and scope.**

This subpart B provides guidance about the applicability and enforcement of ERISA section 4062(e).

**§ 4062.22 Definitions.**

For purposes of this subpart B:

*Active participant base* has the meaning described in § 4062.29.

*Affected employer* means an employer that ceases an operation at a facility.

*Affected operation* means the operation that an affected employer ceases.

*Affected participant* means an employee of an affected employer who is a participant in an affected plan and who separates from employment with the affected employer as a result of the affected employer’s ceasing the affected operation.

*Affected plan* means a single-employer plan that is maintained by an

affected employer, that is not a multiple employer plan, and that includes as participants employees of the affected employer who separate from employment as a result of the affected employer’s ceasing the affected operation.

*Cease and cessation* have the meaning described in § 4062.26.

*Cessation date* means the date when an employer ceases an operation at a facility as described in § 4062.26.

*Employer* has the meaning described in § 4001.2 of this chapter.

*Facility and facility in any location* have the meaning described in § 4062.25.

*Operation* has the meaning described in § 4062.24.

*Result* has the meaning described in § 4062.28.

*Section 4062(e) event* has the meaning described in § 4062.23.

*Separate and separation* have the meaning described in § 4062.27.

**§ 4062.23 “Section 4062(e) event.”**

(a) *In general.* A section 4062(e) event occurs if—

(1) An employer maintains a single-employer plan that is not a multiple employer plan;

(2) The employer ceases an operation at a facility in any location;

(3) As a result of the cessation, one or more persons who are employees of the employer and participants in the plan are separated from employment; and

(4) The number of such persons who are so separated is more than 20 percent of the active participant base associated with the cessation.

(b) *Risk disregarded.* Whether a section 4062(e) event has occurred is decided without regard to the existence or non-existence, when the event occurs or when the decision is made, of risk or apparent risk to a plan, its participants, or PBGC. However, PBGC may assess risk in making arrangements for satisfaction of liability for a section 4062(e) event.

(c) *Plan-by-plan application.* This subpart B applies separately to each plan of an affected employer.

**§ 4062.24 “Operation.”**

An operation is a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. Whether a set of activities is an operation may depend on whether it is (or similar sets of activities are) so considered or treated in the relevant industry, in the employer’s organizational structure or accounts, in relevant collective bargaining agreements, by the employer’s employees or customers, or by the public.

**§ 4062.25 “Facility” or “facility in any location.”**

The facility (or facility in any location) associated with an operation is the place or places where the operation is performed. A facility is typically a building or buildings. However, a facility may be or include any one or more enclosed or open areas or structures. The same facility may be associated with more than one operation.

**§ 4062.26 “Cease” and “cessation.”**

(a) *Voluntary cessation.* Unless paragraph (b) of this section applies, an employer is considered to cease an operation at a facility when the employer discontinues all significant activity at the facility in furtherance of the purpose of the operation.

(b) *Involuntary cessation.*

(1) *Cessation caused by employee action.* If a discontinuance of activity described in paragraph (a) of this section is caused by employee action such as a strike or sickout, then the employer is considered to cease the operation at the facility on the earlier of—

(i) The date when the employee action ends, unless within one week after that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation, or

(ii) The date when the employer decides not to resume significant activity at the facility in furtherance of the purpose of the operation.

(2) *Other involuntary cessation.* If a discontinuance of activity described in paragraph (a) of this section is caused by a sudden and unanticipated event (other than an employee action) such as a natural disaster, then the employer is considered to cease the operation at the facility on the earlier of—

(i) The date that is 30 days after the discontinuance, unless on that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation, or

(ii) The date when the employer decides not to resume significant activity at the facility in furtherance of the purpose of the operation.

(c) *Follow-on operations disregarded.* Whether an employer ceases an operation at a facility is decided without regard to whether—

(1) The operation is continued or resumed—

(i) At another facility, or

(ii) By another employer; or

(2) When the operation is discontinued, a different operation is undertaken.

**§ 4062.27 “Separate” and “separation.”**

(a) *In general.* An employee of an employer separates from employment when the employee discontinues the active performance, pursuant to the employee’s employment relationship with the employer, of activities in furtherance of any of the employer’s operations, unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work for the employer within 30 days. However, if the 30-day period passes and the employee has not resumed active work for the employer, the employee will be considered to have separated from employment when the discontinuance occurred.

(b) *Employees rehired or replaced.* If an employer ceases an operation at a facility, the separation from employment of an employee who is a participant in the affected plan is disregarded in computing the number of affected participants if the separation is before the cessation date and, as of the cessation date, either—

- (1) The employee has been rehired and is an employee of the employer and a participant in the affected plan, or
- (2) The employee has been replaced and the replacement is an employee of the employer and a participant in the affected plan.

**§ 4062.28 “Result.”**

(a) *In general.* An employee separates from employment as a result of an employer’s cessation of an operation at a facility if—

- (1) The employee separates from employment with the employer, and
- (2) The separation would not have occurred when it did if the employer’s cessation of the operation at the facility had not occurred.

(b) *Circumstances not decisive.* An employee’s separation from employment may result from an employer’s cessation of an operation at a facility—

- (1) Whether separation occurs before, on, or after the cessation date,
- (2) Whether or not the employee is employed in the operation that ceases, and
- (3) Whether or not the employee is employed at the facility associated with the operation that ceases.

(c) *Presumption; voluntary cessation; involuntary separation.* An employee’s separation from employment with an employer is presumed to be a result of the employer’s cessation of an operation at a facility if—

- (1) The employee is employed by the employer in the operation,
- (2) The cessation is described in § 4062.26(a) and not in § 4062.26(b), and

(3) The employee involuntarily separates from employment with the employer on or after the date of the employer decision pursuant to which the cessation occurred.

(d) *Presumption; voluntary cessation; voluntary separation.* An employee’s separation from employment with an employer is presumed to be a result of the employer’s cessation of an operation at a facility if—

- (1) The employee is employed by the employer in the operation,
- (2) The cessation is described in § 4062.26(a) and not in § 4062.26(b), and

(3) The employee voluntarily separates from employment with the employer on or after the earliest date when the employer decision pursuant to which the cessation occurred becomes known to the employee, to employees generally, or to the public.

(e) *Presumption; involuntary cessation.* An employee’s separation from employment with an employer is presumed to be a result of the employer’s cessation of an operation at a facility if—

- (1) The employee is employed by the employer in the operation,
- (2) The cessation is described in § 4062.26(b), and

(3) The employee voluntarily or involuntarily separates from employment with the employer on or after the date of the event that causes the cessation.

(f) *Presumption; employment by new employer.* An employee’s separation from employment with an employer is presumed to be a result of the employer’s cessation of an operation at a facility if—

- (1) The employee is employed by the employer in the operation,
- (2) Another employer (the “new employer”) continues or resumes the operation at the same or another facility, and
- (3) The employee becomes employed by the new employer.

**§ 4062.29 “Active participant base.”**

(a) *In general.* The active participant base associated with a cessation is the total number of persons who, immediately before the applicable date in paragraph (b) of this section, were—

- (1) Participants in the affected plan, and
- (2) Employees of the affected employer either—
  - (i) Engaged in the active performance, pursuant to their employment relationship with the employer, of activities in furtherance of the employer’s operations, or
  - (ii) Reasonably certain to resume such active work for the employer within 30

days, but a person is not counted in the active participant base under this paragraph (a)(2)(ii) if the 30-day period passes and the employee has not resumed active work for the employer.

(b) *Applicable date.* For purposes of paragraph (a) of this section, the applicable date is—

- (1) For a cessation described in § 4062.26(a) and not in § 4062.26(b), the date of the employer decision pursuant to which the cessation occurred, and
- (2) For a cessation described in § 4062.26(b), the date of the event that caused the cessation.

(c) *“Participant.”* For purposes of this subpart B, whether an individual is a participant in a plan at a particular time is decided without regard to whether the individual is accruing benefits under the plan at that time.

**§ 4062.30 PBGC investigations.**

(a) *In general.* PBGC may make such investigations as it considers necessary to enforce section 4062(e) and this subpart B and in particular to discover whether section 4062(e) events have occurred and whether notices required under § 4062.31 have been timely filed.

(b) *PBGC information requests.* If PBGC requests from any person information about any event that may be a section 4062(e) event, the person must file the requested information within 45 days after PBGC’s request or within a different time specified in the request. PBGC may specify a shorter time where it finds that the interests of PBGC, participants, or the pension insurance system may be prejudiced by a delay in the receipt of the information (for example, where timely enforcement of section 4062(e) of ERISA may be jeopardized).

(c) *Duty to update or correct.* If a person that has filed information with PBGC pursuant to a request under paragraph (b) of this section discovers that any information so filed (including the number of affected participants) is materially erroneous or has become materially outdated, the person must promptly file with PBGC the correct or updated information.

(d) *PBGC determinations.* On the basis of information gleaned from an investigation or otherwise obtained, PBGC may determine that a section 4062(e) event has occurred and determine the amount of liability arising from the event.

**§ 4062.31 Reporting requirement.**

(a) *Notice required; who must file.* If a section 4062(e) event occurs, the plan administrator of the affected plan must file a notice of the event with PBGC. The filing of the notice constitutes a

request that PBGC determine the liability with respect to the event.

(b) *When to file.*

(1) *In general.* Notice of a section 4062(e) event must be filed with PBGC within 60 days after the later of—

(i) The cessation date, or

(ii) The date when the number of affected participants is more than 20 percent of the active participant base.

(2) *Filing date; computation of time.*

See subparts C and D of part 4000 of this chapter for information on ascertaining filing dates and computing periods of time.

(c) *How to file.* See §§ 4000.3 and 4000.4 of this chapter for information on how and where to file. Notice of a section 4062(e) event must be filed in accordance with PBGC's instructions for filing section 4062(e) event notices, posted on PBGC's Web site (<http://www.pbgc.gov>).

(d) *Additional information.* If PBGC requests additional information from the plan administrator of an affected plan about a section 4062(e) event of which the plan administrator has given notice, the plan administrator must file the requested information within 45 days after PBGC's request or within a different time specified in the request. PBGC may specify a shorter time where it finds that the interests of PBGC, participants, or the pension insurance system may be prejudiced by a delay in the receipt of the information (for example, where timely enforcement of section 4062(e) of ERISA may be jeopardized).

(e) *Requirement for employer to provide information.* An employer that may be an affected employer must timely provide to the plan administrator of any plan that may be an affected plan any information that the plan administrator needs—

(1) To decide whether and when a section 4062(e) event has occurred, and

(2) To file under this section.

(f) *Duty to update or correct.* If the plan administrator of an affected plan discovers or is notified by the affected employer that any information filed with PBGC under this section (including the number of affected participants) is materially erroneous or has become materially outdated, the plan administrator must promptly file with PBGC the correct or updated information.

(g) *Disregarding certain affected participants for notice purposes.* In deciding whether notice of a section 4062(e) event is required, the due date of the notice, and the number of affected participants to be reported in the notice (and any update or correction of the notice under paragraph (f) of this

section), a plan administrator may disregard affected participants who were not employed at the facility associated with the affected operation.

This provision does not apply to—

(1) PBGC investigations under § 4062.30, or

(2) A request under paragraph (d) of this section for information about affected participants who were not employed at the facility associated with the affected operation (or any update or correction under paragraph (f) of this section of information provided in response to such a request).

#### § 4062.32 Amount of liability.

(a) *Determination of liability.* PBGC will determine the amount of liability with respect to a section 4062(e) event in accordance with this section.

(b) *Amount of liability.* The amount of liability for a section 4062(e) event is the amount that PBGC determines to be the amount described in section 4062 of ERISA for the entire affected plan, computed as if the plan had been terminated by PBGC immediately after the cessation date, multiplied by a fraction—

(1) The numerator of which is the number of affected participants, and

(2) The denominator of which is the active participant base.

(c) *Post-cessation changes disregarded.* For purposes of paragraph (b) of this section, the amount described in section 4062 of ERISA for the entire affected plan is calculated without regard to any change in the affected plan's assets or benefit liabilities after the cessation date, such as an increase in assets due to receipt of contributions after the cessation date or an increase in liabilities due to accruals after that date.

#### § 4062.33 Manner of satisfying liability.

(a) *In general.* PBGC will decide in accordance with ERISA how the liability for a section 4062(e) event is to be satisfied. In general, PBGC will require that liability for a section 4062(e) event be satisfied either—

(1) By paying the amount of the liability to PBGC to be held in escrow under section 4063(b) of ERISA, or

(2) By furnishing a bond in an amount not exceeding 150 percent of the amount of the liability under section 4063(c)(1) of ERISA.

(b) *Other arrangements.* PBGC may make arrangements for satisfaction of liability for a section 4062(e) event other than those in paragraph (a) of this section. For example, in appropriate cases:

(1) PBGC may permit liability for a section 4062(e) event to be satisfied through one or more additional plan

funding contributions that would not be added to the plan's prefunding balance.

(2) If an affected operation is continued or resumed by another employer (the "new employer"), and the new employer employs in the operation persons who were employed by the affected employer in the operation, PBGC may permit the liability for the section 4062(e) event to be satisfied by the new employer's adoption or maintenance of the affected plan or of a plan that holds substantially all of the liabilities and assets of the affected plan attributable to employees employed in the affected operation.

#### § 4062.34 Recordkeeping.

(a) Each employer that maintains a single-employer plan that is not a multiple employer plan, and the plan administrator of each such plan, must keep for five years, with respect to any discontinuance of all significant activity in furtherance of the purpose of an operation of the employer at a facility, all records that bear on whether there was a section 4062(e) event and on the calculation of liability with respect to the event.

(b) If PBGC finds that an employer or plan administrator referred to in paragraph (a) of this section has failed to keep records sufficient to determine whether a section 4062(e) event has occurred or the amount of liability arising from such an event, PBGC may make such determination on the basis of reasonable assumptions not inconsistent with information that PBGC knows of and considers reliable.

#### § 4062.35 Waivers.

PBGC may waive any provision of this subpart B to accommodate the facts and circumstances of particular cases and promote the equitable and rational interpretation and application of title IV.

### PART 4063—WITHDRAWAL LIABILITY; PLANS UNDER MULTIPLE CONTROLLED GROUPS

9. The authority citation for part 4063 continues to read as follows:

**Authority:** 29 U.S.C. 1302(b)(3).

10. In section 4063.1, paragraph (a) is amended by revising the second sentence to read as follows:

#### § 4063.1 Cross references.

(a) \* \* \* Part 4062 also sets forth rules under section 4062(e) of ERISA, including rules for reporting section 4062(e) events and for calculating and satisfying liability arising from such events.

\* \* \* \* \*

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**Joshua Gotbaum,**

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Corporation.*

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