



AMERICAN BENEFITS COUNCIL

October 6, 2014

SUMMARY & TALKING POINTS: BIPARTISAN SENATE-PASSED 4062(E) REFORMS

On September 16, the Senate approved, by unanimous consent, **S. 2511**, a bill that would significantly reform ERISA Section 4062(e). These reforms would in a very helpful way address a growing problem attributable to the Pension Benefit Guaranty Corporation's (PBGC) aggressive enforcement actions under Section 4062(e). We urge the House to pass this bipartisan legislation before the end of this year.

PBGC's enforcement of Section 4062(e) has become a very significant problem. Basically, Section 4062(e) requires companies to post security with the PBGC in the event that the company shuts down a major facility and, as a result, lays off a substantial portion of its workforce. PBGC has in recent years started interpreting this rule in a new way that interferes in routine minor business transactions, such as the sale of small business units where no employee loses his or her job. The new rules also impose massive liabilities on employers that are disproportionate to the size of the transaction. This is causing significant problems, driving more companies out of the pension system and preventing companies from entering into beneficial transactions that can improve their business. Very briefly, the bill would return Section 4062(e) to its original purpose by (1) only imposing liability where there has been a major downsizing, and (2) making the liability imposed on employers reasonable.

BACKGROUND

Under the current 4062(e) statutory provision, liability to the PBGC can be triggered if "an employer ceases operations at a facility in any location." Where Section 4062(e) is triggered, employers are required to post security with the PBGC at least equal to the liability amount (described below), in case the plan terminates in an underfunded status. The purpose of the rule was to identify companies spiraling downward and require them to post security with the PBGC in case the spiral continues and the plan terminates.

The statute was clearly intended to apply to situations where operations at a facility are actually shut down, and for many years, that was how PBGC enforced the law. More recently, PBGC has taken the position that liability can be triggered where *no* operations are shut down, but rather operations are, for example, (1) sold to another employer, (2) moved to another location, or (3) temporarily suspended for a few weeks to repair or improve a facility. In these cases, there is no evidence of the downward spiral contemplated by Congress.

As noted, the statute requires employers subject to Section 4062(e) to post security with the PBGC. But to our knowledge, such security is rarely provided. Instead, PBGC generally negotiates with employers to increase funding of the pension plan by the amounts that would otherwise be required as security, thus diverting excessive assets away from business recovery and jobs.

Moreover, under the PBGC's current approach, the increased funding amount imposed on employers can be vastly out of proportion to the transactions that give rise to the liability. The liability amount is determined based on the product of (1) the percentage of employees who are participants in a plan and who separate from employment by reason of the cessation of operations, multiplied by (2) the plan's unfunded "termination liability" as calculated by PBGC, which is far greater than the funding liability established by Congress in the Pension Protection Act of 2006 (the "PPA").

For employers that have a plan that has been closed to new entrants for many years, the number of employees who are participants in a plan can be a very small percentage of the total workforce. If more than 20 percent of that small number of employees happens to be involved in a minor business transaction, such as the sale of a small business unit, the liability can be enormous. For example, a *de minimis* routine business transaction affecting far less than 1 percent of an employer's employees could trigger hundreds of millions of dollars of liability, even in situations where a plan poses no meaningful risk to the PBGC.

Under PBGC's enforcement approach, "creditworthy" companies (as determined by the PBGC) and small plans are exempted. These exemptions do not address companies' concerns, regardless of whether the companies may be currently creditworthy. For example, no company, even a company that is strong today, wants to face a future where if the company confronts financial challenges, it may suddenly have a large PBGC liability for a previous business transaction, or be severely limited in its ability to engage in helpful future business transactions. And ironically, for companies that fail to satisfy PBGC's creditworthiness test, the application of Section 4062(e) and the resulting new liabilities can severely harm jobs and the company's recovery, which is in no one's interest, including the PBGC.

SENATE BILL

The Senate-passed bill would return the law to Congress' original intent by ensuring that Section 4062(e) is not triggered unless there is a major business event with a substantial reduction in employment. Under the bill, an event would not trigger Section 4062(e) unless:

- The event is a permanent shutdown of a facility, not just a temporary shutdown for repairs, for example;
- Generally, the event causes a workforce reduction of approximately 15 percent of the employer's workforce, thus qualifying as a major downsizing;
- Generally, the employees at the facility being shut down are not replaced by the employer or employed by another employer; where employees are replaced or are employed by a successor, there is not a real shutdown;
- The plan has 100 or more participants, exempting small employers that pose little risk to the PBGC; and
- The plan is less than 90 percent funded, exempting well-funded plans.

As noted, the bill also rationalizes the liability imposed on employers where Section 4062(e) applies. Generally, where Section 4062(e) applies, the bill allows an employer to elect to apply a different liability amount than applies under current law. Under this option, an employer must for seven years make a contribution in addition to the amounts due under the PPA funding rules. The additional contribution each year is equal to the plan's total unfunded benefits multiplied by 1/7 and multiplied further by the proportion of plan participants who lost their job as a result of the shutdown. In this way, the contribution obligation is based on the size of the shutdown and the amount of the plan's underfunding. The obligation to contribute additional amounts ceases if the plan becomes 90 percent funded.

Generally, the new rules apply to shutdowns that occur on or after the date of enactment. However, PBGC is prohibited from taking any enforcement or other action under Section 4062(e) that is inconsistent with the new rules, without regard to whether the shutdown occurred before, on, or after the date of enactment. (The only exception to this is for settlement agreements in place before June 1, 2014.) This provision ensures that the onerous rules being enforced by PBGC cease to be effective immediately upon enactment.

PBGC is prohibited from initiating a new enforcement action that is inconsistent with its enforcement policy in effect on June 1, 2014. This means, for example, that the PBGC cannot pursue employers that satisfy PBGC's creditworthiness test.

Finally, employers that had a shutdown prior to the date of enactment that is a 4062(e) event under the new rules may generally elect the optional liability amount described above. This ensures that such employers are not trapped into complying with the excessive liability rules currently in place.