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PENSION ANALYST
COMPLIANCE BULLETIN

Prudential
Bring Your Challenges

New legislation impacts single-employer defined benefit plans

On December 16, 2014, President Obama signed into law the Consolidated and Further Continuing Appropriations Act, 2015 (the "Act"). The new law provides funding for most of the federal government through September 2015. In addition, the new law includes several provisions which impact single-employer and multiple employer defined benefit plans.

Cessation of operations

Background

ERISA section 4062(e) provides that if a company ceases operations at a facility through a shutdown or sale and 20% or more of participants in the pension plan lose their jobs, the Pension Benefit Guaranty Corporation (PBGC) can force the company to increase a plan's funding. If a section 4062(e) event occurs, employers are generally required to make plan contributions or obtain a bond or escrow account based on the plan's unfunded termination liability. In the last few years, PBGC has taken an aggressive approach in its enforcement of this provision.
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On July 8, 2014, the PBGC announced it was imposing a moratorium from July 8 to December 31, 2014 on the enforcement of ERISA section 4062(e) cases. The purpose of the moratorium was to allow the PBGC to work with the business community, labor, and other stakeholders to ensure that the agency's enforcement efforts were targeted to cases where pensions are genuinely at risk.

Revisions made by the Act

The Act amends ERISA section 4062(e) to define a "substantial cessation of operations" as a permanent cessation of operations at a facility, which results in a workforce reduction of eligible employees at the facility equal to more than 15 percent of the number of all eligible employees of the employer, determined immediately before the earlier of:

- The date the employer decides to implement the cessation; or
- In the case of a workforce reduction which includes one or more eligible employees, the earliest date on which any eligible employee was separated from employment.

The Act defines a "workforce reduction" as the number of eligible employees at a facility who separated from employment due to permanent cessation of the employer's operation at the facility. In determining a "workforce reduction" the new law provides for a three-year lookback period that aggregates terminations of employment that are related to the permanent cessation of operations.

An "eligible employee" is an employee who is eligible to participate in a employee pension benefit plan, including a 401(k) plan established and maintained by the employer.

The new law clarifies that:

- An employee who separated from employment at a facility is not taken into account when determining a workforce reduction, if within a reasonable period of time, the employee is replaced at the same or another facility located in the United States, by an employee who is a citizen or resident of the United States; or
- A workforce reduction does not occur if an employer sells its assets or stock and another employer continues operation at the facility and assumes a portion of the plan assets and liabilities of the original employer's plan attributable to the employees that transferred. However, if there is a sale of assets and the original employer retains the plan, a workforce reduction has occurred and is subject to the provisions of ERISA section 4062(e).

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The new law provides for an exemption from section 4062(e) for plans that have:

- Fewer than 100 participants with accrued benefits under the plan as of the plan's valuation date; or
- A funding percentage of 90% or greater.

The funding percentage:

- Uses the market value of plan assets compared to plan liability used for determining PBGC variable premiums; and
- Is determined for the plan year prior to the year that the section 4062(e) event occurs.

Additional contributions

Plan sponsors that experience a substantial cessation of operations may elect to satisfy their liability by making additional contributions to the plan for each plan year in seven equal annual installments beginning with the plan year in which the cessation occurred. These additional contributions are in addition to the minimum required contributions. However, the Act provides that an employer's obligation to make additional contributions ceases when the funding percentage of the plan is 90 percent or greater.

An employer electing to make the additional contribution must notify the PBGC no later than 30 days after the earlier of the date the:

- Employer notifies the PBGC of the substantial cessation of operations; or
- PBGC determines a substantial cessation of operations has occurred.

Transition rule

An employer who had a cessation of operations before December 16, 2014, but did not enter into an arrangement with PBGC to make additional contributions, is permitted to make an election as if the cessation occurred on that date. The employer must make the election no later than 30 days after the PBGC issues, on or after December 16, 2014, a final administrative determination that a substantial cessation of operations has occurred.

Effective date

These provisions apply to cessation of operations that occur on or after December 16, 2014. These provisions also apply to prior cessations, except where a settlement agreement was entered into before June 1, 2014.

PBGC ends moratorium

With the enactment of the new law, PBGC has decided there is no need to continue its enforcement moratorium. Employers that had or have a cessation of operations on or after December 16, 2014, that is not exempt and that meets the 15% reduction trigger described above should report the event to PBGC. Employers that had a cessation before that date should report it to PBGC, if they have not already done so. PBGC may be contacting employers that previously reported a cessation for additional information to determine whether and how the new rules apply to that event.

Employers that have questions about these changes to section 4062(e), may contact PBGC at 4062e@pbgc.gov.

Normal retirement age

Background

For vesting and benefit accrual purposes, the Internal Revenue Code (IRC) defines normal retirement age as the earlier of the:

- Time a participant reaches normal retirement age under the plan, or

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- Later of:
  - The time a plan participant reaches age 65, or
  - The fifth anniversary of the time a participant began participation in the plan.

In 2007, the IRS issued final rules on how low a plan's normal retirement age may be and established age 62 as a safe harbor normal retirement age. Under these final rules, a plan's normal retirement age may not be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. However, a normal retirement age of age 62 or later is acceptable.

If a plan sets the normal retirement age between age 55 and age 62, the employer must apply a good faith analysis to determine if that age is reasonable under the specific facts and circumstances. In general, a normal retirement age that is lower than age 55 is presumed to be unreasonable, unless the employer can demonstrate otherwise.

The IRS clarified that plans may not provide a normal retirement age that is conditioned (directly or indirectly) on the completion of a stated number of years. The IRS believes that a normal retirement age that changes to an earlier date upon completion of a stated number of years of service will not satisfy the vesting or accrual rules.

Clarification of normal retirement age

The new law clarifies the definition of normal retirement age. Under the new law, a defined benefit plan which on or before December 8, 2014, provides for a normal retirement age which is the earlier of an attained age permitted in the IRC or completion of a number of years of benefit accrual service as defined in the plan (not less than 30) may continue to apply this definition only to an individual who:

- Is a participant in the plan on or before January 1, 2017; or
- Is an employee at any time on or before January 1, 2017, of an employer maintaining the plan and who later becomes a participant in the plan.

Next steps

Plan sponsors should review the guidance discussed in this *Compliance Bulletin.* Sponsors should also review their plan documents to determine if their plan's definition of normal retirement age complies with the new law. If there are questions regarding cessation of operations, please contact the plan's enrolled actuary or legal counsel.

Compliance Bulletin by Prudential Retirement
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