

Client Alert

Latham & Watkins
Tax Department

PBGC Reportable Event Notices and Facility Shutdown Liability

Sponsors and plan administrators of tax-qualified defined benefit pension plans in the US have certain reporting obligations to the Pension Benefit Guaranty Corporation (PBGC) upon the occurrence of certain "reportable events." Given the current economic situation and the impact that it is having on many companies, their affiliated companies and their pension plans, we thought it might be useful to remind our clients of these reporting obligations and the events that require reporting to the PBGC. Also, our clients should be aware that certain facility shutdowns or sales may result in unexpected pension plan liability.

Reportable Events

Failure to timely file a notice of a reportable event with the PBGC can result in fines of up to \$1,100 per day for each day of delinquency. In addition and potentially more significant, the occurrence of a reportable event often triggers notice obligations to lenders and can even trigger a default under credit and other agreements that the sponsor or members of its controlled group (controlled group member) may have with lenders and other parties.

The following events generally must be reported to the PBGC (subject to various notice waiver rules):

- **Missed Contributions.** Failure to make a required minimum funding contribution, regardless of amount. Notice is waived if the contribution is made within 30 days of its due date.
- **Bankruptcy.** Bankruptcy or similar proceedings by a sponsor or a controlled group member, including an assignment for the benefit of creditors or any other non-judicial settlement with substantially all creditors. Notice is waived if the controlled group member involved is a foreign entity, other than a foreign parent.
- **Liquidation.** Liquidation of the sponsor or any controlled group member, unless the controlled group member liquidating comprises a *de minimis* 10 percent segment of the controlled group for the most recent fiscal year and each plan that was maintained by the liquidating entity is maintained by another controlled group member after the liquidation. Notice is also waived if the liquidating controlled group member is a foreign entity other than a foreign parent.
- **Loan Default.** The sponsor or controlled group member defaults on a loan with an outstanding balance of \$10 million or more. Notice is waived if the default is cured within 30 days, or if later, the end of the cure period provided by the loan. Notice is also

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waived if the debtor is a foreign entity other than a foreign parent.

- **Decrease in Participation.** Decrease in the plan's active participants to fewer than 80 percent of those participating at the beginning of the plan year or to fewer than 75 percent at the beginning of the previous plan year. Notice is waived if (i) the plan has less than 100 participants at the beginning of the plan year, (ii) no variable rate premium is due for the plan year or (iii) the plan meets certain funding requirements.
- **Minimum Funding Waiver.** A sponsor applies for a minimum funding waiver.
- **Inability to Pay Benefits.** Current or projected inability of the plan to pay participants their benefits when due. Notice is waived if the plan has more than 100 participants.
- **Change in Controlled Group.** Change in the plan's sponsor or in discontinuance of members in a controlled group. Notice is waived if (i) the sponsor is a public company and the plan's funded vested benefit percentage is 80 percent or more, (ii) the change represents a *de minimis* 10 percent segment of the controlled group, (iii) no variable rate premium is payable to the PBGC for the plan year, or (iv) the plan meets certain funding requirements. In addition, the notice is waived if the controlled group member leaving the group is a foreign entity other than a foreign parent.
- **Extraordinary dividends and stock redemptions.** The sponsor or a controlled group member declares a dividend or distributions which exceeds certain limits, or redeems stock. Notice is waived if the controlled group member represents a *de minimis* 5 percent segment of the controlled group, or if the plan meets certain funding requirements. Notice is also waived if the distribution is made by a foreign entity, other than

a foreign parent, unless the foreign parent is making the distribution solely to other controlled group members.

- **Transfer of Plan Liabilities.** The plan transfers 3 percent or more of its liabilities to a plan or plans maintained outside of the controlled group. Notice is waived if (i) there is a transfer of all of the plan's assets and liabilities, (ii) the transfer complies with Section 414(l) of the Internal Revenue Code, but using the actuarial assumptions specified by the PBGC, or (iii) both the plans are fully funded after the transfer, using PBGC actuarial assumptions.
- **Distribution to Substantial Owner.** The plan distributes more than a certain amount to a substantial owner of the sponsor and after such distribution the plan has unfunded vested benefits. Notice is waived if the distribution is upon death and the plan meets certain funding requirements.

Generally notice must be given to the PBGC within 30 days after the reportable event occurs. However, certain private companies with substantially underfunded plans are required to report certain reportable events at least 30 days in advance. For this purpose a private company will have plans that are substantially underfunded if the plans have at least \$50 million in unfunded vested benefits at the end of the preceding year, and the aggregate funded vested benefit percentage is less than 90 percent.

Facility Shutdown Liability

Facility shutdowns and sales can also cause unexpected funding obligations for a sponsor and its controlled group. In particular, if a facility is shutdown or sold, and more than 20 percent of the employees who are participants in the pension plan are terminated, the portion of the plan related to the terminated

employees will be treated as terminated and the plan administrator must notify the PBGC of such event within 60 days. The sponsor and its controlled group members will be liable to the plan for the portion of the plan's unfunded benefit liability (determined on a termination basis) attributable to the shut down or sold facility. Because the unfunded benefit liability is determined using PBGC termination basis actuarial assumptions, this funding obligation can be much greater than expected. Also, the occurrence of this liability may trigger a notice obligation and a default under loan agreements. These additional liabilities should be considered when companies contemplate facility closings or sales as they can be significant.

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