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United States | Human Capital | 20 October 2023

Rewards Policy Insider
2023-21

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PBGC Announces One-time Waiver of 4010 Filing Requirement

Due to atypical market conditions in 2022 and 2023, the Pension Benefit Guaranty Corporation ("PBGC") has

announced a one-time waiver of the ERISA section 4010 reporting requirement in certain circumstances. If a sponsor wishes to use this waiver, it must notify the PBGC no later than 15 days before the applicable 4010 filing due date. Generally, a 4010 filing is due on or before the 105th date after the close of the filer's information year.

Background

ERISA Section 4010 requires sponsors of underfunded single-employer defined benefit plans and members of the sponsor's controlled group to report certain information to the PBGC, including records needed to determine the plan's assets and liabilities, copies of the plan's audited financial statements, and other financial and actuarial information. Reporting under section 4010 is generally required if the plan's funding target attainment percentage ("FTAP") at the end of the previous plan year is less than 80%.

PBGC regulations provide some standard exceptions to this reporting requirement, such as if the aggregate funding shortfall for all plans maintained by the sponsor's controlled group does not exceed $15 million, or if the aggregate number of participants in all plans maintained by the sponsor's controlled group is less than 500. The regulations also give the PBGC discretion to determine that a waiver is necessary in other circumstances.

4010 Filing Waiver

PBGC exercised this discretion by issuing Technical Update 23-1, which provides a one-time 4010 filing waiver for filers that meet certain criteria. To qualify for the one-time waiver, the filer must meet all of the following criteria:

- The 4010 filing requirement did not apply for the five consecutive information years immediately preceding the year for which the one-time waiver is being claimed.
- Either:
    - None of the "includable plans" (i.e., plans that are maintained by the members of the contributing sponsor's controlled group as of the last day of the year for which a 4010 filing would be required if not for the new waiver) have a "market-based 4010 FTAP" below 85%; or
    - The market-based aggregate 4010 funding shortfall does not exceed $15 million.
- Every includable plan with a 4010 FTAP below 80% has a valuation date on or after October 1, 2022 and on or before March 1, 2023.

The Technical Update defines the terms "market-based 4010 FTAP" and "market-based aggregate 4010 funding shortfall" as being the same as "4010 FTAP" and "aggregate 4010 funding shortfall," except that:

- Asset smoothing is disregarded; and
- Liabilities are determined using the spot segment rates (as described in section 417(e)(3)(C) of the Code) for the month preceding the month in which the plan year begins (i.e., the interest assumption that would be used to determine the standard premium funding target for same plan year).

Note that, as is the case with the 4010 FTAP calculation, the market value of assets must be reduced by any prefunding or funding standard carryover balances for purposes of the "market-based 4010 FTAP" determination.

According to the Technical Update, the PBGC is providing this one-time waiver in recognition of atypical market conditions in late 2022 and early 2023, which may have impacted a plan's assets and liabilities (which are key components of measuring the FTAP). Because of this "almost unprecedented interaction of market conditions" in 2022 and 2023, and not due to any failure to properly fund the plan, the PBGC expects that many plans with valuation dates during that time will – potentially for the first time in a long time, or perhaps ever – have a 4010 FTAP well below 80%.

How to Claim the Waiver

As noted, in order to claim the waiver an eligible plan must notify PBGC no later than 15 days before the 4010 filing otherwise would be due. In order to provide notice, send an email to ERISA.4010@pbgc.gov with the subject line "Technical Update 23-1 Waiver." In the body of the email, include the name of the ultimate parent and the date the applicable information year ends.

Agencies Will No Longer Defer Enforcement of Requirement to Post Machine Readable Prescription Drug File

The Departments of Labor, Treasury, and Health and Human Services ("Agencies") have ended their deferred enforcement policy with respect to the requirement for group health plans to post machine readable files with certain information relating to their prescription drug benefits to a public website. Also ending is the enforcement safe harbor for reporting under certain "percentage of billed charges" contracts.

Prescription Drug Machine Readable Files

For plan years beginning on or after January 1, 2022, the Transparency in Coverage (TiC) regulations require non-grandfathered group health plans to post the following 3 separate machine-readable files to a public website:

- An in-network rate file;
- An out-of-network allowed amount file; and
- A prescription drug file

In a set of FAQs issued in August 2021, the Agencies delayed the implementation deadline until July 1, 2022, and also established a deferred enforcement policy with respect to the prescription drug file. The Agencies explained that the Consolidated Appropriations Act ("CAA"), 2021 established a new prescription drug reporting requirement, and that in light of that it needed

additional time to determine if the prescription drug machine-readable file requirement was still appropriate.

According to new FAQs the Agencies issued on September 27, 2023, it is now clear that there is no conflict between the statutory prescription drug reporting requirement and the machine-readable prescription drug file requirement. As a result, they are now ending the temporary deferred enforcement policy with respect to the prescription drug file, and will begin addressing enforcement decisions on a "case-by-case" basis.

However, this change in enforcement policy does not appear to mean that group health plans must post a prescription drug machine-readable file immediately. The Agencies acknowledged that plans may have relied on the prior guidance to put off any efforts to develop or post such a file. As such, the Agencies "intend to develop technical requirements and an implementation timeline in future guidance that sufficiently account for any reliance interests that plans and issuers may have developed."

Percentage of Billed Charges Contracts

For the in-network file, all applicable rates must be shown in dollar amounts for each covered item or service furnished by an in-network provider. In many cases this will be negotiated rates or some underlying fee schedule rates. But in some cases, a plan agrees to pay a provider a specific percentage of billed charges, and it isn't possible for the plan to know what the actual dollar amount of its reimbursement will be until it actually receives a bill from the provider.

The Agencies issued FAQs in April 2022 to establish an enforcement safe harbor for this situation. Specifically, the FAQs provided that if the plan cannot determine a dollar amount in advance under a percentage of billed charges contract, then it can simply provide the agreed upon percentage. For example, if the plan agrees to pay a network provider 70% of the billed charge for a specific service, the plan can simply report 70% instead of a dollar amount.

In these new FAQs, the Agencies are rescinding this enforcement safe harbor. According to the FAQ:

> The Departments now clarify that whether a plan or issuer is able to comply with the requirement to disclose certain rates as dollar amounts is a fact-specific determination; therefore, the Departments intend to exercise enforcement discretion with respect to this requirement on a case-by-case basis, without any categorical "safe harbor." The Departments note that in exercising their enforcement discretion, the Departments are unlikely to pursue enforcement action if a plan or issuer can demonstrate that compliance with the relevant provisions of the TiC Final Rules would have been extremely difficult or impossible, including, but not limited to, for the reasons stated in FAQs Part 53.

In other words, plans may be able to continue reporting just the percentage in these circumstances, but they will need to be able to demonstrate that it would have been "extremely difficult or impossible" to report an actual dollar amount.

ACA Affordability Threshold Shrinks to 8.39% for 2024

Large employers may need to review their required employee premium contributions for self-only coverage in order to avoid potential ACA employer shared responsibility penalties in 2024. The ACA affordability threshold, currently at 9.12% for 2023, will be reduced to 8.39% for 2024 according to IRS Rev. Proc. 2023-29.

Why Does This Matter?

In very general terms, there are 2 ways "applicable large employers" (i.e., those with at least 50 full-time employees) can be subject to ACA shared responsibility penalties:

- "A" Penalty: If the applicable large employer fails to offer Minimum Essential Coverage (MEC) to at least 95% of its "full-time employees" (in general, those employees who typically work at least 30 hours per week), and at least one such employee qualifies for an ACA premium tax credit, the employer may be assessed a penalty equal to $2,880 (2023) times the number of full-time employees.
- "B" Penalty: With respect to each full-time employee who is offered MEC that is either not "affordable" or fails to provide "minimum value," the employer may be assessed a penalty equal to $4,320 (2023). (Note that, unlike the A penalty, the B penalty is assessed only for each full-time employee who is offered coverage that is not "affordable" and/or does not provide "minimum value.")

In order for MEC to be affordable to a full-time employee, the employee's required premium contribution cannot exceed a set percentage of household income (i.e., the Required Contribution Percentage). The initial Required Contribution Percentage was 9.5%, but the Code requires the IRS to adjust it annually according to a prescribed methodology that is based on the rates of premium growth relative to the rates of income growth.

The reduction of the Required Contribution Percentage from 9.12% in 2023 to 8.39% for 2024 means applicable large employers should review their required premium contributions for self-only coverage in order to avoid potentially greater exposure to the B Penalty, described above.

For example, if an employer relies on the Federal poverty line safe harbor to determine if coverage is affordable in 2024, then its required employee contribution for its lowest cost self-only coverage option should not exceed 8.39% of $14,580 per year – or $101.93 per month.

For More Information

The full text of Rev. Proc. 2023-29 is available here.

If you have questions about how the change to the Required Contribution Percentage might affect your plan, please contact a Deloitte professional.

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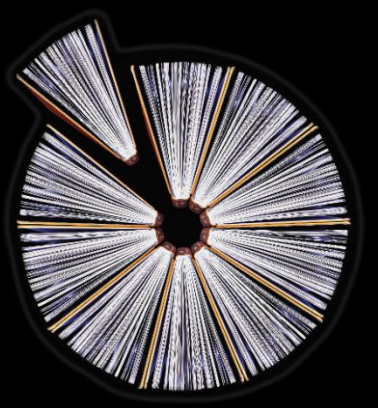

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