ABA Employee Benefits Committee
Midwinter Meeting February 2019
Nashville, TN

REPORT OF THE SUBCOMMITTEE ON REPORTING AND DISCLOSURE

Jamie Bowers, Cohen Milstein Sellers & Toll PLLC
Employee & Plaintiff Co-Chair, Washington, DC

Christopher D. Lopez-Loftis, Department of Labor
Public & Neutral Co-Chair, Dallas, Texas

Tzvi Mackson, Cohen, Weiss and Simon LLP
Union & Employee Co-Chair, New York, New York

Sean K. McMahan, Morgan, Lewis & Bockius LLP
Employer & Management Co-Chair, Washington, DC

Additional Contributors:

Harold J. Ashner, Keightley & Ashner LLP, Washington, DC

Abbey Glenn, Morgan, Lewis & Bockius LLP, Washington, DC

Michelle Lewis, Hunton & Williams LLP, Washington, DC


Chris Scheithauer, McDermott Will & Emery LLP, Los Angeles, CA
II. Principal Means of Disclosing Terms of the Plan

A. Disclosure of Plan Terms Absent a Request

1. Summary Plan Description

In *In re Derogatis*, 904 F.3d 174 (2d Cir. 2018), the Second Circuit considered two different SPDs. A participant in both a health plan and a pension plan fell ill. Believing that health benefits would cease immediately if he retired early, the participant deferred retirement and later died without having retired. The participant’s surviving spouse subsequently applied for survivor benefits but received a lower monthly benefit than she expected.

When ruling on the surviving spouse’s claim for higher monthly benefits, the court held that the pension plan SPD sufficiently apprised participants of the differences between benefits available to a surviving spouse of a retiree as opposed to the benefits available under a pre-retirement survivor annuity. The SPD explained that the pre-retirement annuity was the benefit provided to the surviving spouse of a participant who had a vested right to a pension but had not yet applied for retirement benefits before death and that participants had to be alive at the time they applied for retirement benefits.

The health plan, by contrast, did not clearly explain how retirement would affect the participant’s right to health coverage. The court noted that the health plan’s SPD, which was 156 pages long: had no index or table of contents; included substantive provisions in sections organized alphabetically, with both highly specific and general topics receiving equal weight; included contradictory language erroneously suggesting benefits would end immediately on retirement; and failed to address how early retirement would affect health benefits. Accordingly, the court affirmed judgment in favor of the pension plan and vacated the judgment in favor of the health plan and remanded for further proceedings.

In *Crawford v. Metropolitan Life Ins. Co.*, 2018 WL 6261877 (5th Cir. 2018), the Fifth Circuit interpreted language in the SPD to determine the terms of a life insurance plan. Noting that the Supreme Court had cautioned in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011) against making the language of a plan summary legally binding, the Fifth Circuit pointed out that “[a]lthough we discuss the summary plan description, we are ultimately interpreting the plan” because the plan document defined the plan to include the SPD and incorporated the SPD’s terms by reference.

In *Manuel v. Turner Industries Group, L.L.C.*, 905 F.3d 859 (5th Cir. 2018), the Fifth Circuit affirmed the district court’s dismissal of claims against an insurer for a deficient SPD, on the ground that the plan administrator, which was a separate entity, and not the insurer, had the duty under ERISA § 101 to provide the SPD.
In *Pearce v. Chrysler Group LLC Pension Plan*, 893 F.3d 339 (6th Cir. 2018), the Sixth Circuit set out the elements of a reformation claim in the context of an SPD that omitted required language. Relying on a pension plan SPD, the claimant rejected an insolvent employer’s buyout offer, believing that he would qualify for a pension supplement even if he were laid off. The employer terminated the claimant, who then applied for the subsidized pension. The plan rejected the claim, based on a plan provision that excluded terminated participants from the subsidy. Relying on *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), the claimant sought equitable relief in the form of reformation. In analyzing whether the claimant had met his burden of proving the fraud or inequitable conduct element of a reformation claim, the court noted that one factor—whether a legal or equitable duty to the claimant existed—could be established by the requirement, under ERISA § 102, to include the exclusion provision in the SPD, which duty had been breached.

In *Boyd v. ConAgra Foods, Inc.*, 879 F.3d. 314 (8th Cir. 2018), the Eighth Circuit addressed a breach of fiduciary duty claim based on an alleged misstatement in an SPD. The Court rejected the plaintiff’s argument that terms in a severance plan’s SPD were not sufficiently defined. The SPD included a definition of “Good Reason” for termination that included “material” adverse changes. While the SPD did not define “material,” the court reasoned that the average plan participant would be able to understand the common meaning of “material,” and so the SPD met ERISA § 102(a)’s requirement that the SPD be written in a manner calculated to be understood by the average plan participant, even though the SPD did not list specific events qualifying as “Good Reason.”

In *Abrams v. Life Insurance Co. of North America*, 725 F. App’x 553 (9th Cir. 2018), the Ninth Circuit rejected a claimant’s argument that a disability plan SPD failed to satisfy ERISA § 102(a)’s content and manner requirements. The claimant challenged a decision to offset his monthly benefits by wages he had earned. The court held that the SPD’s language describing the offset provision reasonably apprised the claimant of the circumstances resulting in the loss of benefits. The court rejected the argument that language guaranteeing a level of coverage under the plan also guaranteed a minimum level of benefits, where the SPD outlined “a litany of circumstances” under which benefits, as opposed to coverage, could be reduced. In addition, the court held that the claimant failed to show that the SPD violated the Department of Labor’s requirement that a SPD not minimize or render obscure the offset language, noting that the relevant benefit and offset provisions were described in the same style, typeface, and type size as the rest of the SPD and were located in close proximity. The court found nothing in ERISA supporting the claimant’s argument that the relevant provisions should have been given special emphasis or mentioned more than once in the SPD.

In *Moore v. Metropolitan Life Ins. Co.*, 299 F. Supp. 3d 849 (E.D. Ky. 2018), the court rejected a claimant’s contentions that an SPD should have included reductions in
benefits that were described in a prior SPD. The court noted that while a Summary of Material Modifications must describe modifications to benefits, a new SPD need not include such descriptions. The court also rejected the claimant’s argument that the new SPD was misleading because it retained a heading that appeared in the prior version, while omitting mention of discontinued benefits that had previously been described under the heading.

2. Summary of Benefits and Coverage

No update to report.

3. Summary of Material Modification

No update to report.

B. Requests for Plan Documents

1. Written Requests by Participants and Beneficiaries (ERISA Section 104(b)(4))

Who May Request Documents

Griffin v. TeamCare, 909 F.3d 842, 846-847 (7th Cir. 2018). The Seventh Circuit held that a health care provider to whom a plan participant assigned her right to benefits under an ERISA health care plan was a “beneficiary” able to sue for statutory penalties based on the plan administrator’s failure to furnish plan documents upon request under ERISA Section 104(b)(4).

W.A. Griffin, MD v. Aetna Health Inc., 740 F. App’x 169, 170 (11th Cir. 2018), cert. denied sub nom. Griffin v. Aetna Health Inc., No. 18-613, 2019 WL 113185 (U.S. Jan. 7, 2019). The Eleventh Circuit held that, regardless of a health care provider being “retroactively” assigned a patient’s rights to benefits under an ERISA health care plan, the plan administrator was not liable for failure to provide documents under ERISA Section 104(b)(4) because at the time of the request the health care provider was not entitled to such documents.

What Documents Must Be Produced

Cave v. Delta of California, No. 18-CV-01205-WHO, 2018 WL 5292059, at *5 (N.D. Cal. Oct. 23, 2018). The court rejected a plaintiff’s claim for penalties for failure to provide documents under ERISA Section 104(b)(4) because the documents sought were not relevant to the creation or operation of the plan under which plaintiff was insured; instead, plaintiff sought documents regarding the approval of benefit claim and a grievance investigation by the insurer.
Griffin v. TeamCare, 909 F.3d 842, 847 (7th Cir. 2018). The Seventh Circuit held that an administrator was required to produce fee schedules used to calculate payment to provider because they were part of basis of benefits determination, and administrator was required to provide copy of its contract with third-party claims administrator because the contract, which defined roles of plan and claims administrators, governed operation of plan.

Lauga v. Applied Cleveland Holdings, Inc., No. CV 16-14022, 2018 WL 3495860, at *7 (E.D. La. July 20, 2018). The court rejected plaintiff’s request for penalties because plaintiff’s request for “a copy of all documentation in [claimant’s husband]’s personal file pertaining to ‘any’ insurance coverage (including any correspondence, application, request for coverage, and confirmation of coverage) for the entire period of his employment with Applied Consultants” and for “a complete copy of all records showing when [claimant’s husband] was first offered the insurance coverage by MetLife at his job and all subsequent documentation thereafter” are not within the scope of documents specified in ERISA Section 104(b)(4).

Williamson v. Travelport, LP, 289 F. Supp. 3d 1305, 1315 (N.D. Ga. 2018). The court dismissed plaintiff’s claim for penalties for failure to produce documents because ERISA Section 104(b)(4) does not require a pension plan to provide historical, original documents underlying pension benefit calculations that the plan participant demanded.

Sullivan-Mestecky v. Verizon Commc’ns Inc., No. CV 14-1835 (SJF)(AYS), 2018 WL 2422678, at *17 (E.D.N.Y. Mar. 5, 2018), report and recommendation adopted, No. 14-CV-1835 (SJF)(AYS), 2018 WL 2229140 (E.D.N.Y. May 16, 2018). The court held that plaintiff’s claim for failure to provide certain documents under ERISA Section 104(b)(4) failed, in part, because (1) plaintiff was not entitled to plan documents under which the deceased employee was not a participant, and (2) plaintiff’s request for claim determination information is not required to be disclosed under Section 104(b)(4).

Manuel v. Turner Indus. Grp., L.L.C., 905 F.3d 859, 872 (5th Cir. 2018), reh’g denied (Nov. 2, 2018). The Fifth Circuit held that the district court wrongly concluded that the plaintiff did not have a claim under which a penalty could be assessed. Instead, the court noted that an amendment contained in the administrative record, but not provided in response to a request for documents under ERISA Section 104(b)(4), may constitute a formal legal document governing the plan if it was properly executed. As such, the Fifth Circuit remanded the case to the district court for consideration of whether the amendment was properly executed and therefore a component of the plan required to be produced under Section 104(b)(4).

provide documents because benefit calculations are not subject to disclosure under Section 104(b)(4).

Who May Be Held Liable for Failure to Produce Required Documents

Xie v. JPMorgan Chase Short-Term Disability Plan, No. 15 CIV. 4546 (LGS), 2018 WL 501605, at *3 (S.D.N.Y. Jan. 19, 2018). The court dismissed plaintiff’s claim under ERISA Section 104(b)(4) because (1) the plaintiff failed to make a written request for documents, and (2) the requests were directed to the claims administrator, not the plan administrator.

Figlioli v. Liberty Life Assurance Co. of Boston, No. 1:17CV171, 2018 WL 834616, at *1 (N.D. W. Va. Feb. 12, 2018). The court held that the plaintiff’s claims for failure to produce documents under ERISA Section 104(b)(4) fails because the insurer is not the plan administrator and the Fourth Circuit has not adopted the de facto plan administrator doctrine, which might otherwise treat the insurer as the plan administrator.

Dunivin v. Life Ins. Co. of N. Am., No. 4:17CV1530 HEA, 2018 WL 1455861, at *2 (E.D. Mo. Mar. 23, 2018). The court held that the plaintiff’s claim for penalties due to the alleged failure to produce documents under ERISA Section 104(b)(4) fails because the disability insurance provider is not the plan administrator.

Univ. Spine Ctr. v. Anthem Blue Cross Blue Shield, No. 2:17-CV-9108-KM-MAH, 2018 WL 3302996, at *6 (D.N.J. July 3, 2018). The court held that although plaintiff alleges that the insurer is “at a minimum, the Claims Administrator,” plaintiff’s claim under ERISA Section 104(b)(4) fails because plaintiff has not shown that insurer is the plan administrator obligated under ERISA to provide plaintiff with the requested documents.

Ojeda-Resto v. Blankenship, No. CV 17-1978 (GAG), 2018 WL 4657191, at *4 (D.P.R. Sept. 26, 2018). The court dismissed plaintiffs’ claim under ERISA Section 104(b)(4) holding that, while plaintiffs do have a right to access full annual financial reports if requested in writing under Section 104(b)(4), plaintiffs failed to present any facts to support their assertion that defendants refused to provide such documents.

Gaskill v. Life Ins. Co. of N. Am., No. 4:17CV1526 HEA, 2018 WL 1455863, at *3 (E.D. Mo. Mar. 23, 2018). The court dismissed plaintiff’s claim for statutory penalties for failure to provide documents under ERISA Section 104(b)(4) because the request for documents was directed to the claims administrator, not the designated plan administrator.

Bergamatto v. Bd. of Trustees of Nysa-IlaPension Tr. Fund, No. CV 16-5484 (KM), 2018 WL 3412990, at *10 (D.N.J. July 12, 2018). The court, addressing whether a party can be held liable under a de facto plan administrator theory for failure to produce documents under
ERISA Section 104(b)(4), held that the *de facto* administrator theory fails as a matter of law because the plain language of ERISA requires that such requests for documents be directed to the plan administrator.

*Plastic Surgery Ctr., P.A. v. Cigna Health & Life Ins. Co.*, No. 17-2055 (FLW) (DEA), 2018 WL 2441768, at *10-11 (D.N.J. May 31, 2018). The court dismissed plaintiff’s claim for penalties for failure to provide documents under ERISA Section 104(b)(4) because: (1) the plaintiff failed to allege that she made such requests in writing, (2) the requests were directed to the claims administrator not the plan administrator, and (3) the claims administrator could not be held liable for failure to provide documents under *de facto* plan administrator doctrine because the plain language of the statute places this duty on the plan administrator.

*Venable v. Schlumberger Tech. Corp.*, No. CV 16-01336, 2018 WL 1788640, at *4 (W.D. La. Apr. 13, 2018). The court dismissed claim for penalties for failure to provide documents under ERISA Section 104(b)(4) because the claim was directed to the claims administrator, not the plan administrator and the Fifth Circuit has rejected the *de facto* plan administrator doctrine that might otherwise hold the claims administrator liable.

*N. Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 483 (5th Cir. 2018). The Fifth Circuit rejected appellant’s argument that it is entitled to “information revealing Aetna’s methodology for calculating UCR reimbursement on out-of-network claims” under ERISA Section 104(b)(4) because the request is directed to the third-party administrator not the plan administrator and the Fifth Circuit does not recognize a *de facto* administrator doctrine in the context of an insurance company involved in claims handling.

**Award (or Declining to Award) Penalties**

*Moore v. Metro. Life Ins. Co.*, 299 F. Supp. 3d 849, 861-62 (E.D. Ky. 2018). The court held that a statutory penalty in the amount of $15 per day (resulting in a total penalty of $6,615 for a 441-day delay) was warranted as result of the plan administrator’s conduct in twice providing inapplicable insurance certificate in response to plan participant's attorney’s requests for plan documents, even though administrator’s conduct was not in bad faith, and participant was not prevented from making claim for benefits as result of administrator’s conduct.

*Keaton v. Sedgwick Claims Mgmt. Servs., Inc.*, No. SA-17-CV-223-XR, 2018 WL 2027747, at *11 (W.D. Tex. Apr. 30, 2018). The court held, despite the plan administrator’s alleged failure to provide documents under ERISA Section 104(b)(4), penalties were not warranted because there was no evidence that the failure to provide such documents prejudiced the participant and there was no indication of bad faith by the administrator.
Sepulveda-Rodriguez v. MetLife Grp., Inc., No. 8:16CV507, 2017 WL 6628116, at *16–17 (D. Neb. Dec. 28, 2017). The court held that an imposition of a penalty of $110 per day was warranted where the plan administrator failed to timely provide the SPD to the plaintiff for 19 days because the plan administrator provided no reasons for the delay other than inadvertence and the plaintiff was prejudiced by the delay in that she waited for years to collect life insurance rightly due to her and had to expend money in pursuit of her claims.

Sullivan-Mestecky v. Verizon Commc'ns Inc., No. CV14-1835 (SJM)(AYS), 2018 WL 2422678, at *18 (E.D.N.Y. Mar. 5, 2018), report and recommendation adopted, No. 14-CV-1835 (SJM)(AYS), 2018 WL 2229140 (E.D.N.Y. May 16, 2018). The court declined to impose penalties for failure to provide documents under ERISA Section 104(b)(4) where: (1) delinquent SPD was identical to a SPD timely provided in all material respects; (2) the failure to provide the current SPD and group insurance contract was not committed in bad faith; and, (3) the plaintiff was not prejudiced by the delay.

Requests by the DOL (ERISA Section 104(a)(6))
No update to report.

III. Reporting and Disclosure of Financial Information about the Plan

A. Annual Financial Reporting to the Government: Form 5500 (ERISA Section 103)

1. The Requirements

DOL implemented the following changes for 2018 Form 5500s:

Principal Business Activity Codes. Principal Business Codes have been updated to reflect certain updates to the North American Industry Classification System (NAICS);

Form 5500-Participant Count. The instructions for Lines 5 and 6 have been enhanced to make clearer that welfare plans complete only Line 5 and elements 6a(1), 6a(2), 6b, 6c, and 6d in Line 6;

List of Plan Characteristics Codes for Lines 8a and 8b (Lines 9a and 9b for SF filers). Plan characteristic code 3D, has been updated to reflect the IRS changes on the pre-approved plans as prescribed in Revenue Procedure 2017-41;

Schedule MB-Contributions. The instructions for Line 3 have been modified to require an attachment in situations where a reported contribution to a multiemployer plan includes a withdrawal liability payment;
Schedule MB-Plan in Critical Status or Critical and Declining Status. The instructions for Line 4f (where multiemployer plans expected to become insolvent or emerge from troubled status report the year in which such insolvency or emergence is expected to occur) have been modified to require an attachment providing additional information about how that year was determined. In addition, the instructions now include guidance about what to report if a troubled plan is neither projected to emerge from critical status nor become insolvent within 30 years;

Schedule SB-Mortality Tables. Line 23, where filers check a box to indicate which set of mortality tables is used, has been updated to provide additional options available under Treas. Reg. Section 1.430(h)(3). The instructions for Line 23 have been modified to reflect this change;

Schedule SB. Schedule SB has been updated to reflect the issuance of Revenue Procedure 2017-56 with respect to change in funding methods. Line 23 has been updated to reflect final regulations prescribing mortality tables to be used by most defined benefit (DB) plans. Line 27, Codes 5 and 8 are no longer applicable and should not be used. Lines 42 and 43 have been removed; pursuant to the Pension Relief Act of 2010, there are no installment acceleration amounts or installment acceleration amount carryovers after the 2017 plan year; and

Schedule R. Schedule R has been updated to reflect the issuance of Revenue Procedure 2017-56, 2017-44, with respect to the change in funding methods. Also, the Schedule R instructions under “Who Must File” have been updated to reflect the removal from Schedule R of certain IRS compliance questions.

2. Compliance
   a. Penalties

The instructions have been updated to reflect an increase to $2,140 per day in the maximum civil penalty amount assessable under ERISA Section 502(c)(2). The increased penalty is applicable for civil penalties assessed after January 2, 2018, whose associated violation(s) occurred after November 2, 2015;

   b. Voluntary Compliance Program for Delinquent Form 5500s

No update to report.

B. Financial Reporting to Others

1. Summary Annual Report (ERISA Section 104(b)(3))

No update to report.
2. **Annual Funding Notice for Defined Benefit Plans (ERISA Section 101(f))**

No update to report.

3. **Additional Financial Disclosure Required for Multiemployer Plans (ERISA Sections 104(d) and 101(k))**

No update to report.

**IV. Additional Disclosure to Participants Concerning Their Benefits and Rights**

**A. Pension Benefits Statement**

In *Browe v. CTC Corp.*, 331 F. Supp. 3d 263, 310 (D. Vt. 2018), the court held plan administrators personally liable for failing to provide pension benefit statements to plan participants in violation of ERISA’s reporting and disclosure requirements under 29 U.S.C. § 1025.

**B. Notice of Amendments Reducing the Rate of Benefit Accruals or Eliminating or Reducing Early Retirement Benefits and Retirement-Type Subsidies**

In *Teufel v. N. Trust Co.*, 887 F.3d 799 (7th Cir. 2018), the court rejected the plaintiffs’ argument that the plan administrator failed to communicate a plan amendment in a manner that would be understood by the average plan participant, as required by ERISA section 204(h)(2). The court found that the communication in question was clear in light of the complexities of pension formulas. Moreover, participants were provided an online tool showing “exactly what would happen to that worker’s pension, under a number of different assumptions about future wages and retirement dates, and under both the pre-2012 approach and the amended plan,” leading the court to conclude a “precise participant-specific summation is hard to beat for clarity.”

**C. Survivor Annuity Notice and Explanation of Distribution Options**

No update to report.

**D. Domestic Relations and Medical Child Support Order Notices**

No update to report.

**E. Benefits Statement for Terminated Employees**

No update to report.
F. Rollover Notice

No update to report.

G. Claims Denial Notice

On December 19, 2016, the Department of Labor published a final rule revising the claims procedure rules for ERISA-covered employee benefit plans that provide disability benefits. Applicability of the final rule was delayed several times but the rule, which makes numerous changes to claim denial notice requirements, became effective April 1, 2018.

H. Notice of Suspension of Benefits

No update to report.

I. Blackout Notice Required by Sarbanes-Oxley Act of 2002

No update to report.

J. Notice of Funding Issues

1. *Single-Employer Plans with Funding Issues (ERISA Section 101(j))*

No update to report.

2. *Multiemployer Plans in Endangered or Critical Status (ERISA Section 305(b)(3))*

No update to report.

K. Notice of Diversification Rights (ERISA Section 101(m))

No update to report.

L. Notice Regarding Qualified Default Investment Arrangement (ERISA Section 404(c))

No update to report.

M. Automatic Enrollment Notice

No update to report.
N. Notice of Rights of Military Personnel

No update to report.

O. Civil Penalties Under ERISA Section 502(c)(4) for PPA Notice Violations

No update to report.

P. Notice Requirements of Prohibited Transaction Exemption for Investment Advice

No update to report.

Q. Fee Disclosure Requirements

No update to report.

V. Other Notice and Reporting Requirements

A. Service Provider Fee Disclosures to Plan Fiduciaries

No update to report.

B. Notice of Application for Determination of Qualification of Retirement Plan

No update to report.

C. Notice of Prohibited Transaction Exemption Application

No update to report.

D. Notice of Request for Extension of Amortization Period

No update to report.

E. Reporting and Payment of Excise Taxes

IRS Form 5558 is used to request an extension of time to file a number of different plan-related forms, including Form 5330, Return of Excise Taxes Related to Employee Benefit Plans. The IRS’ September 2018 version of Form 5558, notes that a separate Form 5558 must be filed for each type of return for which an extension is being sought (as opposed to one Form 5558 to request several different return filing extensions) and that a signature is required when seeking an extension to file Form 5330.
F. Notice of Merger, Consolidation, Spinoff, or Transfer and Determination Application for Terminating Retirement Plan

No update to report.

G. Notice of Withdrawal Liability to Employers Contributing to Multiemployer Plans

No update to report.

H. Notice of Transfer of Excess Pension Assets to Retiree Health Benefit Account

No update to report.

I. Notice of Distributions (Forms 1099-R, 1099-LTC, and 1099-SA)

No update to report.

J. Notice of Withholding of Taxes

No update to report.

K. Contribution Reports for Certain Plans

No update to report.

VI. Reporting and Disclosure Relating to Termination Insurance

Issuance of 2018 Premium Filing Forms and Instructions

On January 8, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved its Comprehensive Premium Filing Instructions for 2018 Plan Years (including the illustrative form) and that those instructions are available on PBGC’s website. Of particular note is a new section alerting practitioners to the most common premium filing mistakes. In addition, PBGC expanded the section about short plan years to provide additional information for plans expecting to distribute assets during the 2018 plan year pursuant to a standard termination, and expanded the examples in the section about how to determine premiums in a year when a plan is involved with a spinoff, merger, or consolidation.
PBGC Final Rule on Adjustment of Civil Penalties

On January 12, 2018, PBGC issued a final rule (83 Fed. Reg. 1555) to amend its regulations, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and OMB memorandum M-18-03, to make an annual adjustment, as required by law, to the maximum penalty amounts provided for in sections 4071 and 4302 of ERISA. The new maximum amounts, applicable to penalties assessed after January 12, 2018, are $2,140 per day (up from $2,097 per day) for section 4071 penalties and $285 per day (up from $279 per day) for section 4302 penalties. When it announced this final rule on January 11, 2018, on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm), PBGC stated as follows:

> Although the maximum penalty is increasing, it's worth noting that it is uncommon for PBGC to assess information penalties. The agency's goal is to encourage compliance, not to penalize plans that inadvertently forget to file information. In most cases, when PBGC does assess an information penalty, it is for an amount significantly less than the maximum permitted.

Policy Statement on PBGC Review of Multiemployer Plan Proposals for Alternative Terms and Conditions to Satisfy Withdrawal Liability

On April 4, 2018, PBGC issued a policy statement (83 Fed. Reg. 14524) to provide insight to the public on the information PBGC finds helpful and factors PBGC considers in reviewing multiemployer plan proposals for alternative terms and conditions to satisfy withdrawal liability as provided under ERISA Section 4224. PBGC provided the following general statement of its policy goal:

> Generally, in evaluating a proposal to adopt alternative terms and conditions to satisfy withdrawal liability, PBGC looks to whether trustees have supported their conclusion that the proposed alternative terms and conditions would realistically maximize the collection of withdrawal liability and projected contributions, relative to the statutory rules. Ultimately, PBGC should see that the proposed alternative terms are in the interests of participants and beneficiaries and do not create an unreasonable risk of loss to the insurance program and are otherwise consistent with ERISA and PBGC's regulations. If PBGC finds that the proposed alternative terms and conditions may create an unreasonable risk of loss to plan participants and beneficiaries and to the multiemployer pension insurance program, PBGC engages with the plan trustees and their representatives to discuss possible modifications to mitigate that risk.
The policy statement also provided guidance on the information that PBGC would find helpful in evaluating a proposal to adopt alternative terms and conditions to satisfy withdrawal liability and on the factors PBGC considers in reviewing such proposals.

**Issuance of Revised Standard and Distress Termination Forms and Instructions**

On April 17, 2018, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved minor revisions to PBGC’s standard and distress termination forms and instructions, and that the revised instructions are available on PBGC’s website. Key changes include a new option for submitting these filings by email and the ability to request a pre-filing consultation to determine if a distress filing application is warranted. In addition, because the rules related to missing participants differ depending on whether the plan termination date is before January 1, 2018, the post-distribution certifications (i.e., Forms 501 and 602, for standard and distress terminations respectively), were modified slightly so that they could be used for both pre-2018 and post-2017 terminations.

**Notice of Changes to PBGC Disaster Relief**

On July 2, 2018, PBGC published a Notice (83 Fed. Reg. 30991) announcing changes to the way it provides disaster relief. PBGC’s previous practice was to post a separate disaster relief announcement on its website each time IRS posted a disaster relief news release that included filing extensions for the Form 5500, with the PBGC announcement copying the disaster, the disaster area, and the relief period from the IRS news release, but otherwise generally containing boilerplate language that was repeated in every announcement. Under the new approach, PBGC will provide disaster relief via a one-time Disaster Relief Announcement (available at www.pbgc.gov/prac/other-guidance/Disaster-Relief) that will apply whenever IRS announces that it is granting tax relief that includes filing extensions for the Form 5500. As with the previous practice, there are exceptions to the general “IRS-based” relief (which are listed in the Announcement) and filers would be able to request relief on a case-by-case basis for the excepted filings or other actions not covered by the general relief.

The one-time Disaster Relief Announcement incorporates various changes and clarifications in the scope and availability of PBGC disaster relief. In particular:

- Previously, a late premium payment eligible for disaster relief and paid by the end of the relief period was treated as timely for purposes of assessing the late payment penalty, but not the applicable interest charge. Under the new approach, the premium payment due date is extended so that no late payment penalty or interest charges will be assessed for the disaster relief period.
- Previously, premium filers had to submit the premium form and payment owed (“the premium filing”) by the end of the relief period for disaster relief to apply. Under the new approach, where a filer is unable to submit, or anticipates difficulty in submitting, a premium filing by the end of the relief period, the filer
would simply notify PBGC by the end of the period of the filer’s eligibility for disaster relief to apply, with late payment penalty and interest charges not beginning to accrue until after the end of the relief period. The same method of notification is available for filings other than premium filings covered by the general disaster relief.

- Previously, filers would need to apply for case-by-case disaster relief for late annual financial and actuarial information reporting under ERISA section 4010. Under the new approach, these filings fall under general relief.

- Previously, post-event notices of reportable events under ERISA section 4043 fell under general relief. Under the new approach, based on PBGC’s view that “certain of these filings involve time-sensitive information where there may be a high risk of substantial harm to participants or PBGC’s insurance program,” five categories of post-event filings (i.e., failure to make required contributions under $1 million, inability to pay benefits when due, liquidation, loan default, and insolvency or similar settlement) no longer fall under general relief, but may be appropriate for case-by-case relief.

- Formerly, where disaster relief was founded on problems getting information or assistance from a service provider, the provider’s operations must have been “directly affected” by the disaster. Under the new approach, PBGC stated that it is replacing “this vague standard” with “a clear standard that the service provider [must] be located in the disaster area,” and noted that this is “the same objective condition as for the person required to file.”

The changes are effective for disasters for which IRS issues a disaster relief notice on or after July 2, 2018.

Proposed Rule on Terminated and Insolvent Multiemployer Plans and Duties of Plan Sponsors

On July 16, 2018, PBGC issued a proposed rule (83 Fed. Reg. 32815) that would amend its multiemployer reporting, disclosure, and valuation regulations to reduce the number of actuarial valuations required for smaller plans terminated by mass withdrawal, add a valuation filing requirement and a withdrawal liability reporting requirement for certain terminated plans and insolvent plans, remove certain insolvency notice and update requirements, and reflect the repeal of the multiemployer plan reorganization rules. In particular, the proposed rule would:

- allow the plan sponsor of a multiemployer plan terminated by mass withdrawal to perform an actuarial valuation only every 5 years (rather than, as under the existing regulation, annually) if the present value of the plan's nonforfeitable benefits is $50 million or less;
- add a new requirement for plan sponsors of certain terminated or insolvent plans to file actuarial valuations with PBGC (with the same $50 million threshold to be
used for determining whether the requirement applies annually or only every 5 years);

- allow a plan receiving financial assistance from PBGC to comply with the actuarial valuation requirement by filing alternative information if the present value of the plan's nonforfeitable benefits is $50 million or less;

- require plan sponsors of certain terminated or insolvent plans to file with PBGC information about withdrawal liability payments and whether any employers have withdrawn but have not yet been assessed withdrawal liability;

- eliminate outdated information included in notices that are required to be sent by a multiemployer plan terminated by mass withdrawal that is insolvent or is expected to be insolvent for a plan year, or by a multiemployer plan that is certified by the plan's actuary to be in critical status and that is expected to become insolvent under section 4245 of ERISA;

- require a plan to provide notices of insolvency if the plan sponsor determines the plan is insolvent in the current plan year or is expected to be insolvent in the next plan year; and

- eliminate the requirement to provide most annual updates to notices of insolvency benefit level.

**Announcement of New PBGC Staff Guidance Q&A Web Page**

On July 25, 2018, PBGC announced on its What’s New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had developed a new “Staff Responses to Practitioner Questions” web page (available at www.pbgc.gov/prac/staff-responses-prac-questions) that compiles PBGC staff responses to questions received from practitioners about Title IV requirements that may be of interest to other practitioners. The new web page can be accessed via the Other Guidance page (www.pbgc.gov/prac/other-guidance) on the “Employers and Practitioner” menu of www.pbgc.gov.

The questions cover issues such as bankruptcy claims, liens arising from large missed contributions, premiums, guaranteed benefits, and reportable events. The new web page states that the interpretations “reflect the views of the staff of PBGC”; “are not rules, regulations, or statements of [PBGC]”; “do not necessarily contain a discussion of all material considerations necessary to reach the conclusions stated”; “are not binding due to their informal nature”; and “are intended as general guidance and should not be relied on as definitive.” The new web page also cautioned that “[t]here can be no assurance that the information presented in these interpretations is current, as the positions expressed may change without notice.”

PBGC stated that it intends to update this web page periodically as additional questions arise.
PBGC Modifications to 2018 Premium Filing Instructions (Impacting “Reverse Spinoffs”)

On September 4, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that it had modified the Comprehensive Premium Filing Instructions for 2018 Plan Years “to provide information about a recent change to the premium payment instructions and, in response to questions PBGC has received, to clarify the applicability of a variable-rate premium exemption for plans closing out during the year.”

- The change to the premium payment instructions (at p. 2 of the modified instructions) relates to where and how to send premium payments.
- The clarification of the applicability of that variable-rate premium exemption (at p. 35 of the modified instructions) states that the exemption from the variable-rate premium that applies to a plan that makes a final distribution of assets in a standard termination during the premium payment year requires that “by year end, benefits for participants covered by the plan on the UVB Valuation Date will be distributed in accordance with PBGC’s standard termination regulation (29 CFR Part 4041) and PBGC coverage of such benefits will cease.” This interpretation would result in the exemption not applying in the case of a “reverse spinoff,” which entails a plan, late in a plan year, spinning off most of its participants to a new plan that is virtually identical to the old plan, leaving only a small group of retirees in the old plan, with the (now small) old plan undergoing a fast-track standard termination and completing the resulting final distribution by the end of the plan year. This is because most participants who were covered by the plan on the UVB valuation date would have thereafter been spun off to the new plan, with their benefits not distributed as part of the standard termination of the old (now small) plan and with PBGC coverage of their benefits continuing under the new spun off plan.

Final Rule on Mergers and Transfers Between Multiemployer Plans

On September 14, 2018, PBGC issued a final rule (83 Fed. Reg. 46642) to implement statutory changes under the Multiemployer Pension Reform Act of 2014 (MPRA) affecting mergers of multiemployer plans under title IV of ERISA and to reorganize and update PBGC’s existing regulation on Mergers and Transfers Between Multiemployer Plans.

On June 6, 2016, PBGC had published a proposed rule (81 Fed. Reg. 36299) to amend this regulation to implement MPRA’s changes to section 4231 of ERISA and to reorganize and update provisions of the regulation to reflect other changes in the law. The final rule adopts the proposed changes implementing MPRA, with some modifications in response to public comments, and also adopts some of the proposed changes updating and reorganizing the existing regulation. However, “to allow more
consideration of the concerns raised by the public comments, PBGC is not adopting its proposed changes to provisions of the existing regulation related to plan solvency.”

This final rule makes one major and numerous minor changes to the PBGC regulation. The major change is the addition of procedures and information requirements for a voluntary request for a facilitated merger to implement MPRA’s changes to section 4231 of ERISA.

Posting of Enhanced 4062(e) Web Page

On October 11, 2018, PBGC expanded and modified the information on its website relating to the “downsizing” liability that may arise under ERISA Section 4062(e) (as amended by Public Law 113-235) when an employer ceases operations at a facility under ERISA section 4062(e). The revised web page (www.pbgc.gov/prac/reporting-and-disclosure/erisa-section-4062-e) provides basic information about 4062(e), answers to frequently asked questions, and information on reporting to PBGC.

Announcement of Proposed Increase in Reportable Events Information Requirements

On October 12, 2018, PBGC published a notice in the Federal Register (83 Fed. Reg. 51713) informing the public that it is requesting that OMB extend its approval, under the Paperwork Reduction Act, of the collection of information requirements under PBGC’s regulation on Reportable Events and Certain Other Notification Requirements (29 CFR Part 4043). As part of the request, PBGC proposes to require that all reportable event filings include controlled group information, company financial statements, and the plan’s actuarial valuation report. None of these three types of information was previously required for two reportable events categories (“active participant reduction” and “distribution to a substantial owner”); neither controlled group information nor the plan’s actuarial valuation report were previously required for one reportable events category (“extraordinary dividend or stock redemption”); and the plan’s actuarial valuation report was not previously required for two reportable events categories (“transfer of benefit liabilities” and “change in contributing sponsor or controlled group”).

Posting of Reportable Events Reference Sheet for Small Plans

On October 26, 2018, PBGC posted a newly-created reference tool to help practitioners when advising plan administrators and plan sponsors of small plans (those with 100 or fewer participants) about reportable events. The tool, which is in the form of a checklist and is available at www.pbgc.gov/sites/default/files/reportable-events-reference-sheet-small-business.pdf, refers the reader to guidance on PBGC’s website (www.pbgc.gov/prac/reporting-and-disclosure/reportable-events) on filing requirements, including due dates and whether a waiver from reporting is available.
On December 4, 2018, PBGC published a notice in the Federal Register (83 Fed. Reg. 62629) informing the public that it intends to request that OMB approve, under the Paperwork Reduction Act, a new forms and instructions package to be used by a plan administrator or plan sponsor to request a PBGC coverage determination. The proposed form would highlight the four plan types for which coverage determinations are most frequently requested:

- church plans as listed in ERISA section 4021(b)(3) of ERISA;
- plans that are established and maintained exclusively for the benefit of plan sponsors’ substantial owners as listed in ERISA section 4021(b)(9);
- plans covering, since September 2, 1974, no more than 25 active participants that are established and maintained by professional services employers as listed in ERISA section 4021(b)(13); and
- Puerto Rico-based plans within the meaning of ERISA section 1022(i)(1).


On December 13, 2018, PBGC announced on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm) that OMB had approved its Comprehensive Premium Filing Instructions for 2019 Plan Years (including the illustrative form) and that those instructions are available on PBGC’s website. Among the key changes (in addition to reflecting the new premium rates for 2019) are the inclusion of information about the process by which plan administrators may certify the filing manually instead of electronically, revised instructions to reflect PBGC’s streamlined disaster relief process (as discussed earlier in this report), and an expansion of PBGC’s list of common filing errors.

On December 28, 2018, PBGC issued a final rule (83 Fed. Reg. 67073) to amend its regulations, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and OMB memorandum M-19-04, to make an annual adjustment, as required by law, to the maximum penalty amounts provided for in sections 4071 and 4302 of ERISA. The new maximum amounts, applicable to penalties assessed
after December 28, 2018, are $2,194 per day (up from $2,140 per day) for section 4071 penalties and $292 per day (up from $285 per day) for section 4302 penalties. When it announced this final rule on December 28, 2018, on its What's New for Practitioners page (www.pbgc.gov/prac/whatsnew.htm), PBGC stated as follows:

Although the maximum penalty is increasing, it is uncommon for PBGC to assess this amount. The agency's goal is to encourage compliance. In most cases, when PBGC does assess an information penalty, it is for an amount significantly less than the maximum permitted.

VII. Additional Notices Required for Welfare Plans

A. Affordable Care Act Notices and Reporting

Reporting and Disclosure of Minimum Essential Coverage Under IRC 6055 – Extension of Time to Provide Responsible Individuals with Information for 2018 Reporting Year

Section 6055 of the IRC, as amended by the ACA, requires that health insurance issuers, self-insured employers, sponsors of self-insured group health plans, and others that provide minimum essential coverage ("MEC") (a) annually provide covered individuals with information about the type and period of MEC, and (b) file informational returns with the IRS. 79 Fed. Reg. 13220 (March 10, 2014). Individuals may use this information to determine whether, for each month of the calendar year, they may claim the premium tax credit on their individual income tax returns. The IRS has revised 2018 forms for Section 6055 reporting, which can be found at https://apps.irs.gov/app/picklist/list/formsPublications.html. Form 1095-B must be provided for each “responsible individual,” defined generally as any person who enrolls himself, herself, or others in an employer-sponsored plan. A health coverage provider must furnish the statement to the responsible individual on or before January 31 and must file the information return, along with the transmittal form, 1094-B, with the IRS on or before February 28 (March 31 if filed electronically) of the year following the calendar year in which it provided MEC to an individual.

For the 2018 reporting year, the deadlines for furnishing the forms to individuals have been extended such that the due date for furnishing the 2018 Forms 1095-B and 1095-C is March 4, 2019. The filing deadline for filing information returns with the IRS; however, is not extended and remains February 28, 2019 (April 1, 2019, if filed electronically) for the 2018 Forms 1094-B, 1095-B, 0194-C, and 1095-C.

B. Medicare Data Reporting

Nothing to report.
C. Additional Welfare Plan Notices and Reporting

**Updated CHIP Model Notice**

Under the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA), group health plans and group health insurance issuers must generally permit employees and dependents who are eligible for a group health plan to enroll in the plan upon (a) losing eligibility for coverage under a State Medicaid or CHIP program, or (b) becoming eligible for State premium assistance under Medicaid or CHIP. P.L. 111-3 (Feb. 4, 2009), 42 U.S.C. § 1396 et seq. Employers that maintain a group health plan in a State that provides premium assistance under Medicaid or CHIP must notify all employees at least once a year of potential opportunities for premium assistance in the State in which the employee resides. 29 U.S.C. § 1181(f)(3)(B)(i). A model notice, current as of July 31, 2018, is available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/laws/chipra/model-notice.pdf

VIII. General Issues Concerning Retention and Transmission of Documents

A. Retention of Records

As explained in the Main Volume, ERISA section 209(a)(1), 29 U.S.C. section 1059(a)(1) provides that an employer shall maintain records for all employees that are sufficient to determine the benefits due, or that may become due, to such employees. ERISA section 209(b) imposes a “civil penalty of $10 for each employee” to be paid to the Secretary of Labor for every year in which an employer fails to keep proper records.

In Buffalo Laborers Welfare Fund v. Di Pizio Construction, 318 F. Supp. 3d 591 (W.D.N.Y. 2018), a multi-employer trust fund brought an action for unpaid benefit contributions from an employer. The court found on a motion for summary judgment that the employer breached its obligations to provide benefit contributions. The court also addressed the employer’s lack of recordkeeping and how to measure damages. The employer admitted that it did not keep records for the jobs for which it failed to make fringe benefit contributions because it did not believe the work was covered by the CBA or that the employer otherwise had a requirement to retain records for the work in question. The district court noted that although the Second Circuit has not squarely addressed the issue of the standard that applies when a benefit fund contests the amount of contributions owed by an employer, other circuits and district courts within the Second Circuit have held that where the fund produces evidence “raising genuine questions concerning an employer’s failure to maintain adequate records,” the burden shifts to the employer to present “evidence of the precise number of hours worked or to negate the reasonableness of the inferences to be drawn from the plaintiff fund’s evidence.” “If the employer fails to provide such evidence, the court may award damages to the trustee[s] even if the damages are an approximate amount.” In this
case, the trust fund had conducted an audit that was entitled to create a presumption that the employer was unable to rebut.

B. Electronic Disclosure

Nothing to report.

IX. Reporting and Disclosure Requirements Under the Federal Securities Laws

A. Securities Act of 1933

No update to report.

1. Plan Interest and Assets as Securities
   a. Participation Interests as Securities
      No update to report.
   b. Employer Stock as Securities
      No update to report.

2. Transactions in Securities as Constituting the Offer or Sale of Securities
   a. Plan Distributions
      No update to report.
   b. Sales by Plan Participants
      No update to report.

3. Registration
   No update to report.
   a. Registration of Participant Interests
      No update to report.
   b. Registration of Employer Securities
      No update to report.

4. Exemptions
Under Rule 701, sales made within a 12-month period pursuant to Rule 701 may generally be made for the greater of $1 million, 15 percent of the issuer’s total assets, or 15 percent of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701. In 2018, Rule 701 was revised such that a company is subject to enhanced disclosure requirements only if aggregate sales of its securities in reliance on Rule 701 exceed $10 million in a 12-month period, increasing the prior $5 million threshold. Rule 701(e), 17 C.F.R. § 230.701(e). Companies that remain below the $10 million limit need only provide a copy of the benefit plan or compensatory contract under which the securities are granted, rather than enhanced disclosures such as detailed financial statements and risk disclosures.

5. **Penalties**

No update to report.

**B. Securities Exchange Act of 1934**

1. **Registration**

No update to report.

2. **Periodic Reporting**

No update to report.

3. **Specialized Reporting**

No update to report.

4. **Antifraud Provisions**

No update to report.

5. **Proxy Solicitation and Shareholder Proposals**

No update to report.

   a. **Proxy Solicitation**

No update to report.

   b. **Shareholder Proposals**

No update to report.

6. **Other Rules Relevant to Plans as Investors**
a. Soft Dollars
No update to report.

b. Proxy Voting Rules for Mutual Funds and Investment Advisers
No update to report.

c. Market Timing and Late Trading
No update to report.

7. Sarbanes-Oxley Act of 2002
No update to report.

a. Pension Fund Blackout Periods
No update to report.

b. Corporate Governance Provisions Including Prohibition of Executive Loans
No update to report.

X. Plan-Related Disclosures Under the LMRDA
No update to report.