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Wagner Law Group Pushes Back on Proposed PBGC Penalty Rule

According to the law group, employers in defined benefit plans would be unfairly paying for outside adviser errors.

Reported by VALENTINA BAEZ

In a letter last week, the Wagner Law Group urged the Pension Benefit Guaranty Corporation to change and clarify its proposed penalty guidance for pension plans that do not provide adequate plan information, including participant reductions and distribution changes.

The proposal released on July 21, RIN 1212-AB50: Penalties for Failure to Provide Certain Notices or Other Material Information, would replace longstanding PBGC penalty guidance implementing Sections 4071 and 4302 of the Employee Retirement Income Security Act.

Under Section 4071, the PBGC is authorized to assess civil penalties for certain reporting and disclosure violations, with a maximum penalty of $2,739 per day of delinquency. Section 4302 authorizes penalties of up to $365 per day for certain multiple-employer-plan notice failures.

According to the PBGC, its proposal largely codifies existing agency practices. The rule would establish a “per diem, opposed to a flat rate penalty” for filing failures, according to the proposed rule. The proposal includes general penalties from its 1995 policy of $25 per day for the first 90 days of delinquency and $50 per day thereafter for many notice and reporting violations. More time-sensitive filings could face penalties of $100 per day or $1,000 per day, depending on the nature of the violation.

In a 20-page comment letter, Wagner Law Group generally supported the PBGC’s effort to replace decades-old penalty guidance with a formal regulation. However, the letter petitioned for greater clarification and reconsiderations, with one of the primary recommendations concerning errors made by outside advisers.

While employers remain legally responsible for required filings, Wagner argued that the PBGC should distinguish between sponsors that exercised appropriate oversight and those that failed to adequately supervise service providers. The firm argued that employers should not automatically receive penalty relief when outside advisers make mistakes, saying the agency should consider whether a sponsor exercised “ordinary business care and prudence” in hiring and overseeing advisers before assessing penalties.

Wagner Law Group Partners Harold Ashner and Israel Goldowitz, who helped develop the PBGC’s earlier policies on penalties, stated in the letter that the guidance should place greater emphasis on whether violations caused “actual harm.”

“Imputing the adviser’s conduct answers who remains legally responsible,” stated Ashner in an email to PLANADVISER. “It does not answer the separate question of what penalty is fair when a careful filer encounters an isolated professional error.”

The letter recommended that first-time inadvertent violations that create no material harm and are promptly corrected should generally result in written warnings rather than monetary penalties.

Affecting the DB Plan Market

The proposal arrives as the defined benefit market continues to contract, with PBGC data showing the number of covered single-employer plans declined about 25% from 2005 to 2025. The letter noted that disproportionate penalties for inadvertent or harmless errors could create additional costs for employers already weighing whether to continue sponsoring traditional pension plans.

“A penalty system works best when it encourages people to find problems, report them, and fix them,” wrote Ashner. “If every technical mistake can continue accruing indefinitely, even where no material harm occurred, the incentive can shift away from voluntary compliance.”

The letter also argued that excessive compliance costs and disproportionate penalties could add to pressures facing employers that continue to sponsor pension plans, potentially discouraging some from maintaining those arrangements.

“The policies PBGC has used since 1995 were designed to make the penalty fit the violation,” Ashner wrote. “As PBGC replaces those policies with a regulation, it should retain that practical discipline by distinguishing related or harmless errors from deliberate or genuinely consequential noncompliance.”

The firm also called for limits on penalty accrual periods, arguing that the seriousness of a violation does not necessarily increase in direct proportion to the number of days a filing remains delinquent.

“PBGC proposes to continue its ‘notice and cure’ approach to penalties for multiemployer plan filings, not assessing a penalty until the filer is given a second chance, and relies on that approach as a justification for generally assessing the statutory maximum penalty,” Goldowitz wrote in an email to PLANADVISER. “PBGC should codify that approach in the final rule.”

The PBGC declined to comment in response to the Wagner letter.

The 60-day comment period for the rule ended on September 21. A final rule publication date has not yet been announced.

Tags DB plan, ERISA, PBGC,