



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

4.71.23

OCTOBER 24, 2024

EFFECTIVE DATE

(10-24-2024)

PURPOSE

- (1) This transmits revised IRM 4.71.23, Employee Plans Examination of Returns, Bankruptcy Procedures.

MATERIAL CHANGES

- (1) Made editorial changes, including changes for Plain Language (the Plain Writing Act of 2010), throughout the document.

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 4.71.23 dated December 20, 2023.

AUDIENCE

Tax Exempt and Government Entities
Employee Plans

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4.71.23
Bankruptcy Procedures

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4.71.23.1
(10-29-2019)
Program Scope and Objectives

- (1) **Purpose:** IRM 4.71.23, Employee Plans Examination of Returns, Bankruptcy Procedures, provides guidance for Employee Plans (EP) examiners to use to properly identify and work situations where the plan sponsor, or other applicable entity, is in bankruptcy, or a distinct possibility exists that they will file for bankruptcy protection in the near future.
- (2) **Audience:** This IRM provides procedures for examiners, their group managers and support staff in EP Examinations.
- (3) **Program Owner:** Director, EP Examinations.
- (4) **Program Authority:** EP Examinations derives its authority to conduct examinations, resolve issues and determine tax liability from Title 26, Internal Revenue Code, Subtitle F – Procedure and Administration, which includes but is not limited to:
 - a. IRC section 7602 - Examination of books and witnesses, which falls under Chapter 78 - Discovery of Liability and Enforcement of Title.
Note: IRC 7602 provides examiners with the authority to:
 - Examine any books, papers, records or other data necessary to complete an examination.
 - Take testimony under oath to secure additional information needed.
 - Issue summons for information necessary to complete an examination.
 - Ask about any offense connected to the administering or enforcing of the Internal Revenue laws.
 - b. IRC section 6201- Assessment authority, which falls under Chapter 63 - Assessment.**Note:** EP Examinations' authority to resolve issues is derived from its authority to make determinations of tax liability under IRC 6201.

4.71.23.1.1
(10-29-2019)
Background

- (1) To protect the Government and plan participants from loss when a plan sponsor or other entity is in bankruptcy, or when there are significant financial difficulties that could result in the filing of bankruptcy, EP examiners, their managers and support staff must consider the Employee Retirement Income Security Act of 1974 (ERISA) Titles I and IV, and the bankruptcy laws.
- (2) Policy Statement 4-119 (IRM 1.2.1.5.36, Selection and Examination of Returns) provides the primary objective of the Employee Plans examination program is regulatory, with emphasis on continued qualification of employee benefit plans. The purpose of selecting and examining returns is to promote the highest degree of voluntary compliance with the tax laws governing plan qualification. Such purpose is also to determine the extent of compliance and the causes of noncompliance with the tax laws by qualified plans. Plans will also be examined to determine whether such plans meet the applicable qualification requirements in operation.
- (3) In accordance with Policy Statement 4-117, Examination Authority to Resolve Issues, EP examiners and managers:
 - a. Have been given broad authority to consider and weigh conflicting information, data, and opinions.

- b. Will use professional judgement in accordance with examination standards to make findings of fact and apply the Service’s position on issues of law to determine the correct tax liability.
 - c. Will exercise this authority to obtain the greatest number of agreements to tax determinations without sacrificing the quality or integrity of those determinations. Also, this authority will be used to dispose of tax differences at the lowest level.
- (4) All examinations will be done in accordance with Policy Statement 1-236 (IRM 1.2.1.2.36, Fairness and Integrity in Enforcement Selection.)

4.71.23.1.2
(10-24-2024)
Program Controls

- (1) Within EP Examinations, Mandatory Review ensures examiners conduct examinations per technical, procedural and administrative requirements, see IRM 4.70.14, Resolving the Examination.
- (2) The following EP examination cases are no longer subject to Mandatory Review:
 - a. The 30-Day Letter package for proposed revocation/non-qualification issues.
 - b. Unagreed discrepancy adjustments (Form 1040 or Form 1120) related to an unagreed plan qualification.
 - c. In all instances where there is an unagreed issue, the Examinations group issues the relevant 30-Day Letter package for all controlled returns. You must obtain supervisory review and **written** supervisory approval **before** issuing any 30-Day Letter package.
- (3) When a taxpayer responds with a protest to Appeals, follow the steps outlined in the affected IRM sections to determine the validity of the protest request, and to process the case to Appeals when warranted.
- (4) When a taxpayer fails to respond, transfer cases to Mandatory Review for issuance of the 90-day letters and Statutory Notices.
- (5) All examinations will be done in accordance with the Taxpayer Bill of Rights as listed in IRC 7803(a)(3).

Note: Find additional information at: *Taxpayer Bill of Rights*.

- (6) The IRS is fully committed to protecting the privacy rights of taxpayers and employees. Privacy laws are included in the IRC, the Privacy Act of 1974, the Freedom of Information Act, and IRS policies and practices. For more information about these laws, visit the *IRS Freedom of Information / Internal Revenue Service*. For questions concerning privacy, send an email to **Privacy*. For question concerning disclosure, send an email to **Disclosure*.

4.71.23.1.3
(12-03-2018)
Acronyms,
Abbreviations and
Forms

- (1) This manual uses the following acronyms and references the following forms.

Acronyms and Abbreviations

Acronym/ Abbreviations	Definition
DOL	Department of Labor
EP	Employee Plans

Acronym/ Abbreviations	Definition
EPFC	EP Examinations Fraud Coordinator
ERISA	Employee Retirement Income Security Act of 1974
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
PBGC	Pension Benefit Guaranty Corporation
SME	Subject Matter Expert
TEQMS	Tax Exempt Quality Measurement System

Forms and Schedules

Form	Name
Form 56	Notice Concerning Fiduciary Relationship
Form 872-H	Consent to Extend the Time to Assess Tax on a Trust
Form 990-T	Exempt Organization Business Income Tax Return
Form 1041	U.S. Income Tax Return for Estates and Trusts
Form 5330	Return of Excise Taxes Related to Employee Benefit Plans
Form 5500	Annual Return/Report of Employee Benefit Plan
Form 6212-B	(DOL) Examination Referral Checksheet B

4.71.23.2
(12-03-2018)
**Overview of EP
Examinations
Bankruptcy Procedures**

- (1) Examining the qualified plan of a plan sponsor who is insolvent or has filed for federal bankruptcy protection imposes unique challenges on EP examiners.
- (2) This IRM discusses some of the issues and examination procedures that may be applicable when the sponsor of a qualified plan has filed, or appears to be poised to file, for federal bankruptcy protection.
- (3) Identifying and collecting tax and other liabilities from a plan sponsor that has filed for bankruptcy requires an understanding of tax, ERISA Titles I and IV, and bankruptcy laws.
- (4) Coordination between different divisions and functions within the IRS is required.
- (5) As a result, the examiner must use special examination procedures when a plan sponsor is bankrupt.

4.71.23.3
(12-20-2023)

**Procedure When Initially
Contacting Taxpayer for
an Examination**

- (1) Include and mail the following documents to the taxpayer with your initial contact letter:
 - a. Publication 1, Your Rights as a Taxpayer.
 - b. Notice 609, Privacy Act Notice.
 - c. Publication 5146, Employment Tax Returns: Examinations and Appeal Rights (for employment tax examinations only).
 - d. Initial Form 4564, Information Document Request.

Note: Do not send a copy of the publications or notice to any representatives.

- (2) Take the following actions during an examination initial telephonic contact or interview:
 - a. Verify the taxpayer's receipt of Publication 1 and Notice 609. If conducting an employment tax examination, verify the taxpayer's receipt of Publication 5146.
 - b. Briefly describe the rights discussed in Publication 1 and Notice 609 and respond to any questions.
 - c. Briefly describe the examination process and inform the taxpayer and/or representative of the resolution options available for unagreed cases (e.g., managerial conference, Fast Track Settlement, formal appeal, right to petition the United States Tax Court, etc.)
 - d. Document the confirmation of receipt of Publication 1, Notice 609, and Publication 5146 if applicable, and the discussion held with the taxpayer and/or representative on your case chronology record.
 - e. Discuss the items that will be examined, the types of documents to be received, how the taxpayer is to provide the documents; confirm any appointment scheduling.

Note: You may also document the confirmation and discussion in any initial interview workpapers.

4.71.23.4
(12-03-2018)
Definitions

- (1) **Automatic Stay:** When a debtor files a petition for bankruptcy protection with the bankruptcy court, it results in an Automatic Stay of any creditor from pursuing activity to collect from the debtor. For example, the Automatic Stay generally prevents a creditor from demanding payment, initiating or continuing a lawsuit, including a proceeding before the U.S. Tax Court, or perfecting a lien.
- (2) **Bankruptcy Estate:** When a debtor begins bankruptcy action, the debtor's property generally becomes the property of a new taxable entity, the Bankruptcy Estate.
- (3) **Bankruptcy Trustee:** The Bankruptcy Trustee or the debtor-in-possession manages the Bankruptcy Estate under the supervision of the bankruptcy court, and is generally responsible for preparing and filing the Bankruptcy Estate's tax returns.
- (4) **Bar Date:** The Bar Date is the date fixed by the court or by statute and is the date by which a creditor must file a Proof of Claim. If the IRS asserts tax liabilities after the Bar Date in a federal bankruptcy case, they are deemed to be untimely, and any tax assessments must be abated. The amount of the tax liability asserted in a Proof of Claim may be adjusted or modified, even after

the Bar Date, provided the Proof of Claim has been timely filed with the bankruptcy court. The Bar Date is generally the later of -

- a. 180 days after the petition date, or
- b. 90 days after the first meeting of the creditors.

(5) **Chapter 7 Proceedings:** A proceeding filed under Chapter 7 of the Bankruptcy Code is where the debtor's available assets are liquidated with the proceeds distributed to creditors.

- a. In a Chapter 7 case, the Bankruptcy Trustee collects the debtor's nonexempt property and converts the property to cash.
- b. The trustee then distributes the cash to the creditors.
- c. The ultimate goal of the debtor is to receive a discharge from pre-bankruptcy debts.

(6) **Chapter 11 Proceedings:** In a Chapter 11 case, the debtor develops a reorganization plan to pay its pre-bankruptcy creditors over time.

- a. The creditors must vote for the debtor's reorganization plan.
- b. If the debtor's plan is not passed, the creditors will propose their own plan.
- c. If neither the debtor nor the creditors achieve the necessary votes to pass a plan, the debtor liquidates.
- d. A Chapter 11 case may be filed by an individual, sole proprietor, corporation, partnership, or a Limited Liability Company (LLC).

(7) **Chapter 13 Proceedings:** In a Chapter 13 case, like a Chapter 11, the individual debtor develops a payment plan to pay its pre-bankruptcy creditors over time.

- a. The debtor's payment plan is largely based on their monthly income.
- b. A reorganization plan must be approved by the court and may be approved for up to 60 months.

(8) **Chapter 15 Proceedings:** A Chapter 15 case provides U.S. creditors with a coordinated forum for foreign bankruptcy proceedings.

(9) **Governmental Unit:** The term Governmental Unit is defined in Bankruptcy Code section 101(27), and includes the United States government.

(10) **Proof of Claim:** A Proof of Claim is an official bankruptcy form a creditor files with the bankruptcy court stating the amount a debtor owes to him or her.

Note: In a bankruptcy case, the debtor is required to identify creditors. The creditors are then permitted to file a Proof of Claim form substantiating the debt. A Proof of Claim form will contain details regarding the debt and supporting evidence, such as relevant documentation.

(11) **Reportable Event:** Both publicly traded and privately held companies must notify the PBGC of Reportable Events. The Reportable Events that arise most often include:

- Bankruptcy
- A change in contributing sponsor or controlled group
- Failure to make required minimum payments
- Inability to pay benefits when due

- Active participant reductions.
- Loan default
- Liquidation of the contributing sponsor or a controlled group member

4.71.23.5
(12-03-2018)

General Bankruptcy Principles

- (1) While an EP examiner does not necessarily participate in bankruptcy court procedures, it's very helpful for you (the examiner) to understand these procedures in cases where the plan sponsor is bankrupt.
- (2) Every debtor is required to attend the first meeting of creditors (often called the 341 meeting).
 - a. The meeting is conducted by a court appointed trustee.
 - b. Creditors and the trustee question the debtors under oath about financial affairs, debts and assets.
- (3) The assets of a plan qualified under IRC 401(a) are generally excluded from the Bankruptcy Estate, and as such, the plan assets are not subject to the claims of the debtor's creditors.
- (4) The Bankruptcy Estate also specifically excludes any amount the employer withheld from employee wages or received from employees for payment as contributions to:
 - Plans under IRC 401(a)
 - Plans under IRC 408, including SEP IRAs, SIMPLE IRAs, or SARSEP IRAs
 - Governmental plans (within the meaning of IRC 414(d))
 - Deferred compensation plans under IRC 457
 - IRC 403(b) plans
- (5) Under the Bankruptcy Code, certain claims are given priority over others (i.e., certain claims are paid before others).
 - a. In a situation where the Bankruptcy Estate is limited, and insufficient to satisfy all of the outstanding liabilities, having a priority claim is very important.
 - b. In the case of compensation, benefits and pension contribution obligations, whether a claim is entitled to a priority may depend on if the liability arose pre-petition or post-petition.
- (6) Claims in bankruptcy court are generally divided into pre-petition and post-petition.
 - a. Pre-petition means the claim arose before filing the bankruptcy petition.
 - b. Post-petition means the claim arose after the bankruptcy petition was filed.
- (7) Creditors' claims generally fall into one or more of the following:
 - a. **Secured.** A secured claim has a lien, security interest, or other encumbrance which has been properly perfected as required by law with respect to property owned by the debtor. A secured claim entitles a creditor to a higher priority of payment from the debtor's assets.
 - b. **Unsecured priority.** An unsecured priority claim has priority over other unsecured claims. Section 507 of the Bankruptcy Code lists categories of priority claims in order of priority. Unsecured priority creditors have their own hierarchy of payment under section 507 of the Bankruptcy Code. If a

creditor falls within one of the numbered paragraphs of section 507 of the Bankruptcy Code, that paragraph will indicate the priority of payment – first, second, third, fourth, etc.

- c. **Unsecured.** An unsecured claim is not entitled to either secured or priority status. An unsecured creditor is generally paid after a secured creditor.

- (8) Administrative claims are the actual, necessary expenses that arise from the ordinary business operations of the Bankruptcy Estate.

- a. The administrative claims are unsecured, but are given priority status as ordinary and necessary business expenses of the Bankruptcy Estate.
- b. Tax liabilities incurred by the Bankruptcy Estate constitute administrative claims.

4.71.23.6
(12-20-2023)

Common Issues

Surrounding Bankruptcy

- (1) The examiner should pay special attention to the actions of the employer when examining the plan.

- (2) As an employer's financial situation worsens, the chance that it will take pension-related actions to reduce its insolvency increase. Those actions include:

- Eliminating or suspending employer profit sharing and/or matching contributions
- Freezing benefit accruals under defined benefit plans
- Terminating pension plans
- Seeking financing through an ESOP
- Reducing employee pay or work hours, or terminating employees
- File for federal bankruptcy protection
- Entering into a state law assignment for the benefit of creditors

- (3) Additionally, due to the employer's actions to reduce its insolvency, employees will also commonly take pension-related actions, including:

- Taking more plan loans, hardship or other in-service distributions under defined contribution plans
- Requesting distributions based on retirement, early retirement or termination of employment under defined benefit or defined contribution plans

- (4) The bankruptcy of the plan sponsor may (or may not) affect the tax liabilities of the trust, participants and beneficiaries, disqualified persons and fiduciaries. The plan's trust, its participants and beneficiaries, and disqualified persons other than the employer, are separate entities from the plan sponsor. Therefore, the examiner may continue to pursue the trust's and participant's income tax liabilities or the disqualified person's excise tax liabilities, even if the plan sponsor is in bankruptcy. For example:

- a. If the trust has engaged in an unrelated business activity, the trust would still be liable for unrelated business income tax (Form 990-T).
- b. If the plan is disqualified, the trust would be liable for tax on realized earnings of the trust (Form 1041).
- c. If the plan is disqualified, participants would be liable for income taxes on plan contributions to a defined contribution plan to the extent those contributions are vested (Forms 1040).

- d. Per IRC 402(b)(4), if the plan is disqualified for failure to meet IRC 401(a)(26) or IRC 410(b) (coverage failure), each Highly Compensated Employee must include in income an amount equal to the employee's entire vested accrued benefit (or account balance) not yet included in income (Forms 1040).
 - e. If a disqualified person (other than the plan sponsor) engages in a prohibited transaction, they would still be liable for excise tax under IRC 4975 (Form 5330). Even if there is a prohibited transaction between the plan and the plan sponsor, the examiner could still pursue a prohibited transaction against the fiduciary.
- (5) When a bankruptcy involves a member of a controlled group or affiliated service group, the examiner should determine which members filed for bankruptcy and who has the obligation to pay benefits.
- a. In some instances the legal entity that employs certain workers, and the entity that is obligated to provide benefits, are not the same.
 - b. For example, the common law employees of a subsidiary may receive benefits from that entity's parent.
 - c. All the related entities may not have filed for bankruptcy protection.
 - d. Therefore, it is essential to identify all members of the bankrupt entity's controlled group (or affiliated service group), and determine if any tax or other liabilities apply to those members. This may include foreign entities.
- (6) A employer's attempt to contribute debentures to a plan in lieu of cash contributions, or to provide less benefits than participants are entitled to, would create a minimum funding issue in a pension plan and may constitute a disqualifying defect with respect to the plan. For example, if plan terms don't permit contributions 'in kind' (meaning only cash can go in and not property) or if plan terms say the employer will contribute the minimum contribution necessary in the current year and doesn't allow deferral to a later year.
- (7) It may be that the plan sponsor is bankrupt, but the company's defined benefit pension plan is overfunded. In this case, the employer may seek to access the surplus assets without paying the full IRC 4980 excise tax on reversions. The examiner should determine if the plan sponsor or trustee has taken any of these actions:
- a. Terminated the plan and distributed or transferred excess assets directly to the plan sponsor.
 - b. Completed a transaction intended to directly or indirectly sell the excess assets to another entity.
 - c. Merged an overfunded plan with another entity's plan or with another plan of the plan sponsor.
 - d. Transferred assets of an overfunded plan into the plan of another entity or into another plan of the plan sponsor.
 - e. Transferred excess assets to an ESOP in accordance with IRC 4980(c)(3).
 - f. Established a qualified replacement plan under IRC 4980(d).
 - g. Increased benefits under the plan.

Note: Under IRC 4980(d)(6), the 20% reversion excise tax would apply to an employer who, as of the termination date of the plan, is undergoing a bankruptcy liquidation under Chapter 7 or Chapter 11, even if there is no qualified replacement plan.

- (8) If an employer sponsors a plan that has excess assets, the sponsor may only reclaim those extra assets if the plan has satisfied all the employees' earned benefit obligations. Before the plan sponsor can recover the excess assets, it must fully vest participants and purchase annuity contracts to pay all earned benefits.
- (9) When the plan sponsor terminates the plan, and receives a reversion, the sponsor incurs taxes. These taxes include:
- Corporate income tax on the amount of the reversion
 - Nondeductible 20% excise tax on the amount of the reversion
 - 50% excise tax (instead of 20%) if a successor plan is not established
- (10) An employer with insolvency issues will tend to shrink or curtail operations over time, which may result in a partial plan termination.
- a. Treasury Regulations, 26 CFR 1.411(d)-2(b), provide that whether a partial termination occurs is based on the relevant facts and circumstances.
 - b. Under IRC 411(d)(3), upon a partial termination, the rights of all affected employees accrued to the date of the partial termination, to the extent funded on that date, or the amounts credited to their accounts, must become fully vested.
- (11) A contributing employer must notify the plan administrator of a defined benefit pension plan of a bankruptcy filing.
- a. The plan administrator must then notify participants and beneficiaries of the bankruptcy filing and the limitations of the PBGC's guarantee in the event of a plan termination.
 - b. The DOL may impose a penalty of \$110 per day for each individual that is not given this notice.
 - c. The examiner should make sure proper notification has been made.
- (12) IRC 401(a)(33)(A) provides that an employer engaged in a Chapter 11 bankruptcy proceeding may not, subject to certain exceptions (discussed below), adopt an amendment to a qualified defined benefit pension plan that is effective prior to the employer's plan of reorganization, if the amendment increases plan liabilities by reason of any:
- Increasing benefits
 - Changing the accrual of benefits
 - Changing the rate at which benefits become nonforfeitable under the plan
- (13) IRC 401(a)(33) states that an employer in a Chapter 11 bankruptcy proceeding may adopt a plan amendment to a defined benefit pension plan that is effective before the effective date of the employer's plan of reorganization if:
- a. The plan would have a funding target attainment percentage of 100% or more after the amendment takes effect; or
 - b. The IRS determines that the amendment is reasonable and increases the liabilities of the plan by not more than a de minimis amount; or
 - c. The amendment only repeals an extraordinary amendment described in IRC 412(d)(2); or
 - d. The amendment is required to maintain the plan's tax-qualified status.

- (14) Other potential issues to look for when examining plans of bankrupt employers include:
- a. Employers filing bankruptcy are also more likely to improperly pull money out of the plan and fail to pay deferrals or contributions to the trust timely (if at all).
 - b. Employers filing bankruptcy may attempt to identify assets as exempt when the funds actually belong to the debtor and should be available for the creditors. This leads to improper commingling of funds within the trust.
 - c. In an attempt to satisfy creditors, the trust may improperly attempt to repay loans on behalf of the plan sponsor or make loans to the plan sponsor or other disqualified person. This improper use of plan assets would violate IRC 4975.

4.71.23.7
(12-03-2018)
Funding Issues

- (1) In general, employers who sponsor single employer defined benefit plans are required to contribute the present value of all benefits earned under a plan.
 - a. Each year, the sponsor must re-determine the present value of all benefits earned under the plan as of the end of the previous tax year.
 - b. To the extent the future value of the current plan assets falls short of the total earned benefits, the sponsor must make an actuarially adjusted contribution equal to the present value of this deficiency.
- (2) IRC 401(a)(29) requires that a single employer defined benefit plan satisfy the requirements of IRC 436 in order to constitute a qualified plan.
- (3) IRC 436 imposes a number of restrictions on plan amendments, benefits, and forms of benefit payment of plans that are not sufficiently funded to satisfy benefit liabilities.
- (4) IRC 412 provides that certain qualified plans must satisfy a minimum funding obligation. A plan is treated as meeting this minimum funding obligation if:
 - a. In the case of a defined benefit plan that is not a multiemployer plan, the employer makes contributions required under IRC 430.
 - b. In the case of a money purchase plan that is not a multiemployer plan, the employer makes contributions as required under the terms of the plan.
 - c. In the case of a multiemployer plan, the employers make sufficient contributions so that the plan does not have an accumulated funding deficiency under IRC 431.
- (5) Generally, in a single employer plan, the plan sponsor is responsible for making the required contributions under a plan.
- (6) Per IRC 412(b)(2), if the plan sponsor is a member of a controlled group, each member of the controlled group is jointly and severally liable for paying the contributions.
- (7) If an employer fails to satisfy its minimum funding obligation under IRC 412 at any time during any taxable year with respect to a single employer plan:
 - a. The employer is subject to an excise tax under IRC 4971(a)(1) for the taxable year equal to 10% of the aggregate unpaid minimum required

contributions for all plan years remaining unpaid as of the end of any plan year ending with or within the taxable year.

- b. If the IRS imposes the tax under IRC 4971(a) and the employer fails to correct the aggregate unpaid minimum required contributions or the accumulated funding deficiency, the IRS will impose an excise tax equal to 100% of the unpaid minimum required contribution or accumulated funding deficiency.

(8) For multiemployer plans:

- a. Participating employers that fail to make required minimum contributions during any taxable year are subject to an excise tax equal to 5% of the accumulated funding deficiency determined under IRC 431 as of the end of any plan year ending with or within the taxable year.
- b. If the IRS imposes the 5% excise tax under IRC 4971, and the participating employers fail to correct the accumulated funding deficiency, the IRS will impose an excise tax equal to 100% of the unpaid minimum required contribution or accumulated funding deficiency.

(9) If an employer fails to timely make minimum required contributions under IRC 412 with respect to a single employer defined benefit plan, and the unpaid contributions (including interest) exceeds \$1,000,000, a lien is automatically created in favor of the plan on the employer's assets.

- a. This lien extends to all members of the controlled group.
- b. The amount of the lien is equal to the aggregate unpaid balance of the required contributions.
- c. This unpaid aggregate amount is treated as unpaid federal taxes.
- d. An employer that becomes subject to a lien must notify the PBGC of its failure to make the required minimum contribution within 10 days of the due date for the payment.

(10) ERISA section 302 provides minimum funding obligations with respect to single employer defined benefit plans similar to IRC 412. Under ERISA section 101(d), if an employer maintaining a single employer defined benefit plan fails to make a minimum required contribution payment under section 302 before the 60th day following the payment due date, the employer must notify each participant and beneficiary (including alternate payees) of the failure.

4.71.23.8
(12-03-2018)
**Role of the Pension
Benefit Guaranty
Corporation (PBGC)**

(1) When a plan sponsor terminates a defined benefit pension plan and the plan is not fully funded for the present value of all earned benefits, the PBGC may take over the plan. The PBGC acts as both an insurer of guaranteed benefits and a collector for non-guaranteed benefits.

(2) Plans not covered by the PBGC, among others, include:

- Individual account plans
- Governmental plans
- Plans established and maintained outside of the U.S. primarily for the benefit of individuals substantially all of whom are nonresident aliens
- Plans established and maintained exclusively for substantial owners
- A plan established and maintained by a professional service employer that has never had more than 25 active participants in the plan

(3) When an underfunded defined benefit plan covered by PBGC is terminated, the PBGC may step in and pay benefits.

- (4) If a plan sponsor wants to terminate its defined benefit pension plan, but cannot fund all earned benefits, it may voluntarily file for a distress termination with the PBGC.
- (5) A plan sponsor seeking a distress termination must send a notice of intent to terminate, and file required forms with PBGC similar to those in a standard termination as required by ERISA section 4041.
- (6) The PBGC may start proceedings for an involuntary defined benefit pension plan termination if they determine that the PBGC may be subject to a long term loss with respect to the plan if the plan is not terminated.

4.71.23.9
(10-24-2024)

Bankruptcy Procedures

- (1) During any plan examination, it is important to determine as soon as possible whether the plan sponsor is in bankruptcy or may soon file for bankruptcy. The examiner may determine that the sponsor has filed for bankruptcy through the following means:
 - a. On IDRS, research TXMODA or BMFOLT and look for TC 520 with a closing code: 60, 61, 62, 63, 64, 65, 66, 67, 81, 83, 84, 85, 86, 87, 88 or 89.
 - b. On IDRS, research AMDISA and look for an "X" or "U" freeze code depending on when the bankruptcy was filed. You may also just see the word "bankruptcy" on the AMDISA print.
 - c. Obtain a bankruptcy report through Accurant.
 - d. During the initial examination interview, ask the plan sponsor if they have any bankruptcy filings, or if they are planning to file for bankruptcy.
 - e. Notification from Classification.

Note: Classification may also notify the examiner of a bankruptcy filing.

- (2) If, upon examination of the plan, the examiner discovers that the plan sponsor has filed for federal bankruptcy protection, the following procedures should be taken:
 - a. Inform your manager that you have a taxpayer that is in bankruptcy.
 - b. Contact SB/SE Insolvency (Insolvency). Go to the *Insolvency Contacts* (sharepoint.com) to determine who the Insolvency contact is for your state.
 - c. Determine the Bar Date.

Note: The Insolvency specialist will assist in the determination of the Bar Date.

- (3) Consider all the facts and circumstances surrounding the case. If the examiner and group manager decide to survey the case, they must notify Insolvency of this decision.
- (4) If the case meets the criteria for significant bankruptcy case processing (refer to IRM 4.27.1.3.1, Significant Bankruptcy Case Issues, for criteria) immediately contact Area Counsel.
- (5) If the plan is a defined benefit plan covered by the PBGC, make a referral to the PBGC. Refer to IRM 4.70.11.15.6 , Referrals to Other Agencies.
- (6) If you need to secure a statute of limitations extension for a plan for which the plan sponsor has filed for bankruptcy and you have questions regarding who

the trustee is, contact Area Counsel to ensure that you have properly completed Form 872-H and Form 56 and they are signed by the appropriate person.

- (7) It is important to check the applicable Bar Date as soon as you determine that the taxpayer has filed for bankruptcy.
- (8) If you determine the plan sponsor is insolvent, but the Bar Date has not passed:
 - a. Determine if any excise tax or income tax is due.
 - b. Notify Insolvency of any potential assessment so that they can timely file a Proof of Claim with the bankruptcy court.
 - c. If you cannot make a final determination of tax, interest and penalties, estimate them to the best of your ability, based on all the facts.
 - d. Upon completing your examination, notify Insolvency of the correct final determination so they can file an amended claim.
 - e. Make sure that you add issues that may have possible tax liabilities as focused issues for your case (e.g., late deferrals for 401(k) plans, minimum funding for pension plans, nondeductible contributions and prohibited transactions for all plans).
- (9) Refer the case to the DOL if:
 - a. The plan is a defined benefit or money purchase pension plan that has not been funded properly.

Note: DOL has the ability to file a lawsuit on behalf of the participants to recover this money.
 - b. There have been any misuses of trust assets, so that the DOL may file a lawsuit on behalf of the plan to recover any lost assets.

Note: Also contact the EP Fraud Subject Matter Expert (EP Fraud SME) or the TEGE Fraud Specialist if plan assets have been misused. Find contact information for the EP Fraud SME and the TEGE Fraud Specialist at *My Job - Fraud (sharepoint.com)*.
- (10) After you have completed the examination of tax-related issues and submitted a Revenue Agent's Report or other justification for the tax due to the Insolvency specialist, continue the examination as a normal examination.
- (11) Any qualification issues discovered should be corrected using the Employee Plans Compliance Resolution System (EPCRS), or through a Delegation Order 8-3 closing agreement. See IRM 4.70.14, Resolving the Examination.
- (12) Carefully consider whether or not there has been, or is, any misuse of trust assets or exclusive benefit rule violations under IRC 401(a)(2).
 - a. If you suspect misappropriation or misuse of trust assets, contact the EP Fraud SME to assess the indications of potential fraud.
 - b. If the plan sponsor has been misusing the trust assets, contact Insolvency and/or Counsel to determine if assets can be recovered from the plan sponsor.
 - c. Consider pursuing prohibited transactions against other disqualified persons who are not in bankruptcy (e.g., the fiduciary).
 - d. Also, if there have been any large or unusual contributions to the plan, discuss it with the Insolvency examiner and/or Counsel.

- (13) If the plan sponsor is unwilling or unable to correct plan qualification issues, process the case as unagreed in accordance with IRM 4.70.14.2.4.2.1, EP – Unagreed Form 5500 Examination Procedures.
- (14) If the plan sponsor is unwilling or unable to correct excise tax issues (for example, prohibited transactions under IRC 4975 or minimum funding issues under IRC 4971), process the case in accordance with IRM 4.70.14.2.4.2.3, EP – Unagreed Forms 5330 and 990-T
- (15) If a plan sponsor successfully undergoes a bankruptcy reorganization, it will emerge from bankruptcy protection according to its reorganization plan.

Note: If the plan sponsor has emerged from bankruptcy, you should see a TC 521 posting on the BMFOL. This TC 521 is posted to reverse the TC 520 that posts when the taxpayer files for bankruptcy protection.

4.71.23.10
(12-03-2018)
**Bankruptcy Referrals
From Classification**

- (1) Classification is notified by Insolvency of all employers that maintain a pension plan that have filed for bankruptcy. See IRM 5.9.1.4, The Role of Insolvency, for a description of Insolvency Responsibilities.
- (2) When Classification is notified, the Bar Date is often near expiration which provides little or no time to do an examination and submit a claim before the expiration of the Bar Date.
- (3) Classification may assign bankruptcy referrals for pension plan issues after a Bar Date has passed or about to pass.
- (4) The EP examiner should make every effort to contact Insolvency before the expiration of the Bar Date so that Insolvency can timely file a Proof of Claim.
- (5) If the Bar Date has expired and the EP examiner determines excise tax is due, notify your Insolvency contact to determine if a Proof of Claim can still be filed. Refer to IRM 4.71.23.9 (2), Bankruptcy Procedures, on how to determine your Insolvency contact.
- (6) Issues concerning the pension plan should be resolved where excise tax is not involved.
- (7) Pension plan assets should not be used to resolve bankruptcy issues.
- (8) Classification may hold a bankruptcy referral for the subsequent year filing to determine if any new violations may have occurred.