

# **Benefit Limitations Under PPA 2006 - Section 436**

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## **Introduction**

The Pension Protection Act of 2006 (PPA 2006), as amended by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) and the Pension Relief Act of 2010 (Pension Relief Act), added section 436, Funding-Based Limits on Benefits and Benefit Accruals under Single-Employer Plans, to the Internal Revenue Code (IRC). Section 436 sets forth several limitations on the accrual and payment of benefits under an underfunded plan. These benefit limitations apply when a plan's adjusted funding target attainment percentage (AFTAP) is less than the percentages prescribed in the statute. The §436 limitations are the:

- §436(b) limitation on unpredictable contingent event benefits (UCEB). A UCEB is not payable if the AFTAP is less than 60%, or would be less than 60% taking into account the UCEB.
- §436(c) limitation on plan amendments increasing liability for benefits. Certain plan amendments increasing plan liabilities may not take effect if the AFTAP is less than 80%, or would be less than 80% taking into account the amendment.
- §436(d) limitations on prohibited payments. A prohibited payment cannot be made or the payment is restricted if the AFTAP is less than 80%.
  - Under §436(d)(1), such payments cannot be made if the AFTAP is less than 60%.
  - Under §436(d)(2), such payments cannot be made if the plan sponsor is in bankruptcy and an AFTAP of 100% (or more) has not been certified for the current plan year.
  - Under §436(d)(3), if the AFTAP is 60% or more but less than 80%, such payments are restricted, meaning, prohibited payments can be paid only to the extent that the amount of the prohibited payment does not exceed the lesser of:
    1. 50% of the present value of the optional benefit form that is or includes a prohibited payment, or
    2. 100% of the present value of the PBGC maximum benefit guarantee amount.Benefit payments limited under §436(d)(3) may be split and paid in an unrestricted portion (i.e., 50% of the amount payable under the optional benefit form) and a restricted portion (the remaining benefit) payable in any optional benefit form under the plan that is not a prohibited payment.
- §436(e) limitation on benefit accruals. Benefit accruals cease under a plan if the AFTAP is less than 60%.

For most plans, section 436 applies to plan years beginning on or after January 1, 2008 (i.e., the 2008 plan year). The applicable Internal Revenue regulations, 26 CFR §1.436-1, are effective for plan years beginning on or after January 1, 2010 (i.e., the 2010 plan year).

- Before the regulations became effective, plans could comply with IRC §436 through a reasonable interpretation of the statute. Plans also could comply with section 436 by relying on the proposed regulations, 74 FR 53004 (August 31, 2007), provided such reliance was reasonable and consistent.
- For certain plans maintained pursuant to a collective bargaining agreement (CBA) ratified before January 1, 2008, application of the §436 limitations was deferred until the earlier of (1) the

beginning of the plan year following the expiration of the CBA, or (2) the beginning of the 2010 plan year.

Under 26 CFR §1.436-1(a)(3)(ii), any §436 limitation in effect immediately before the termination of a plan does not cease to apply after termination except for certain types of prohibited payments needed to carry out the termination.

The purpose of this internal guidance document is to describe how PBGC applies IRC §436 and 26 CFR §1.436-1 to its calculation, valuation, and payment of pension benefits in a PBGC-trusteed plan.

References to IRC §436, section 436, and §436 include 26 CFR §1.436-1, the applicable rules under WRERA and the Pension Relief Act, and guidance provided by the Internal Revenue Service unless otherwise specified.

## Guidance

PBGC applies any §436 limitation it concludes was in effect prior to DOPT in calculating, valuing, and paying benefits. Benefits that were limited under §436(b), §436(c), or §436(e) are not plan benefits, and therefore, are not payable by PBGC. In addition, PBGC does not pay a benefit in the form of a prohibited payment limited under §436(d) with some minor exceptions.

1. **Acceptance of Pre-DOTR Plan Administration.** PBGC generally will accept the plan administrator's application of IRC §436 in calculating and paying benefits, absent convincing evidence that the plan administrator failed to properly follow IRC §436.
  - a. **Corrections.** If PBGC concludes that a plan administrator failed to properly follow IRC §436, PBGC will re-calculate, value, and/or pay an affected participant's or other individual's benefit.
  - b. **Prohibited payments made by plan administrator.** If a plan administrator made a prohibited payment prior to trusteeship during a period in which a §436(d) limitation applied, PBGC generally will not change the benefit form or pursue repayment of the benefit solely because of the §436(d) limitation. However, PBGC may otherwise re-calculate, value and/or pay the benefit.
2. **PBGC Application of IRC §436.** PBGC follows IRC §436 and relies on available plan documents and relevant information in other plan records (§436-related documentation) as further described below to evaluate whether a §436 limitation was in effect as of DOPT, and if required, to correct benefits. For additional rules that may apply to plan years prior to the effective date of 26 CFR §1.436-1 (i.e., the 2008 and 2009 plan years), see section PBGC Application of IRC §436 Before the Effective Date of 26 CFR §1.436-1.
  - a. **Evidence suggests plan administrator did not correctly follow IRC §436.** If evidence suggests that the plan administrator did not correctly follow IRC §436, for instance, by not obtaining required AFTAP certifications and/or calculations, PBGC will evaluate the plan's available AFTAP certifications and calculations, if any, and other §436-related documentation to determine (1) whether a presumption of underfunding under §436(h) applied, (2) whether a §436 limitation was applicable, (3) the period of limitation, if any; and (4) the effect, if any, on benefits provided under the plan.
  - b. **AFTAP certifications and/or calculations.** Beginning with the 2010 plan year, AFTAP certifications and calculations generally must comply with the rules in §1.436-1(h)(4) or as otherwise provided in §1.436-1 to be acceptable to PBGC.
  - c. **PBGC unable to obtain a copy of an AFTAP certification or calculation.** If PBGC is unable to obtain a copy of an AFTAP certification or calculation (or for plan years 2008 and 2009, acceptable documentation of the AFTAP) that materially complies with the

requirements described in §1.436-1, PBGC will not calculate or certify a plan's AFTAP for any time period and will apply the presumption of underfunding rules provided under §436(h).

- d. **AFTAP certification after DOPT.** IRC §436 provides that under certain conditions benefits limited under §436(b), §436(c), or §436(e) earlier in a plan year must retroactively be paid or permitted to take effect if the limitation ends later in that plan year, for instance, because the plan's actuary certifies an AFTAP that ends the limitation or the plan sponsor makes a contribution to the plan to specifically terminate the limitation (an AFTAP generally must be certified or recertified at the time the contribution is made). When necessary, for purposes of evaluating whether benefits were limited under §436(b), §436(c), or §436(e), PBGC will use an AFTAP certified (or for plan years 2008 and 2009, acceptable documentation of the AFTAP) after DOPT, if available and otherwise acceptable to PBGC, in determining the effect of IRC §436 for periods prior to DOPT.

## PBGC Treatment of Certain §436 Limitations

Application of a §436(b), §436(c), or §436(e) limitation before DOPT primarily affects whether a benefit is payable and the calculation and valuation of a benefit. A §436(d) limitation in effect before DOPT may affect the form in which a benefit is paid after DOPT and, in some situations, the amount of the benefit payable by PBGC. PBGC treats the §436 limitations as described below in establishing whether a §436 limitation was in effect as of DOPT and, if required, in correcting benefits.

- 1. **Unpredictable Contingent Event Benefits.** Under §1.436-1(a), if a UCEB with respect to an event that occurred earlier in a plan year could not be paid due to a §436(b) limitation but becomes payable later in the plan year because the limitation no longer applies, the UCEB must be paid retroactively for the period that the UCEB was otherwise payable under the plan.
  - a. While the retroactive payment of a UCEB during the plan year, as required under §1.436-1(a), is not in itself an amendment subject to phase-in, PBGC will apply its phase-in rules to the UCEB, including treating it as a plan amendment adopted as of the date of the event (see ERISA §4022(b)(8), which is applicable to UCEBs that become payable after July 26, 2005).
  - b. Under §1.436-1(a), if the UCEB does not become payable during a plan year because of a §436(b) limitation, the plan is treated as if it did not provide for those benefits. The plan may amend to restore all or part of the UCEB that were limited, subject to the §436(c) limitation. Such an amendment is subject to phase-in.
- 2. **Amendments Increasing Benefit Liabilities.** Under §1.436-1(a), if an amendment could not take effect as of its effective date earlier in the plan year due to a §436(c) limitation, but is permitted to take effect later in that year because the §436(c) limitation no longer applies, the amendment must take effect as of the first day of the plan year or, if later, the original effective date.

While the retroactive implementation of an amendment during the plan year, as required under §1.436-1(a), is not in itself an amendment for PBGC purposes, PBGC will apply its normal phase-in rules to the amendment, with the phase-in period beginning on the later of its adoption or effective date.

### 3. Prohibited Payments

- a. PBGC will not honor an unpaid plan application for a prohibited payment if any of the §436(d) limitations were in effect as of DOPT, regardless of the application filing date or annuity starting date, unless PBGC has identified the prohibited payment as being

- necessary to carry out termination of the plan. Prohibited payments that PBGC has identified as necessary to carry out termination of the plan include, but are not limited to, a withdrawal of accumulated mandatory employee contributions as provided in PBGC Internal Guidance Document, Payment of Priority Category 2 Benefits; and non-de minimis lump sums payable to estates as provided in Internal Guidance Document, Payments to Beneficiaries.
- b. PBGC will not permit a payee who had an annuity starting date or benefit commencement date during a period in which a §436(d) limitation was in effect to make a new benefit form election because the limitation ended, even if the plan would have provided a new election or a new election was otherwise permissible under IRC §436.
  - c. Under the §436(d)(3) limitation (i.e., the AFTAP is equal to or greater than 60% but less than 80%), a prohibited payment may be paid in restricted and unrestricted portions ('bifurcated'). If a payee was paid the unrestricted portion of the benefit, for example, in a partial lump-sum, and the restricted portion of the benefit (i.e., the residual benefit) has not been paid, PBGC pays the residual benefit as of DOPT as follows:
    - i. If the lump-sum value of the residual benefit is *de minimis*, PBGC will pay the residual benefit in accordance with Internal Guidance Document, Lump Sums.
    - ii. If the lump-sum value of the residual benefit is non-de minimis, PBGC pays the residual benefit in accordance with Internal Guidance Documents, Annuity Starting Dates and Annuity Benefit Forms.
4. **Benefit accruals.** Under §1.436-1(a), benefit accruals that ceased under a §436(e) limitation automatically resume at the end of the cessation period unless the plan provides otherwise. In addition, accruals that were limited earlier in a plan year must, under certain conditions, be restored later in that plan year. Plans may provide for the restoration of accruals limited under §436(e), that are not required to be restored, by automatic restoration (i.e., a pre-existing plan provision) or amending to specifically restore the accruals.

*Resumption* of benefit accruals means that benefits begin to accrue again as of the date that the §436(e) limitation ends.

*Restoration* of benefit accruals means that benefits that were limited under a §436(e) limitation are treated as not having been limited and are reinstated.

- a. **Automatic resumption of accruals.** Automatic resumption of accruals as provided under §1.436-1(a) will not be treated as an amendment for phase-in purposes. Note that resumption of the accruals is not an amendment subject to the §436(c) limitation.
- b. **Resumption of accruals by amendment.** If a plan provided that the accruals would not resume after a §436(e) limitation ended, but later is amended to permit resumption of accruals, the amendment is subject to phase-in. Note that the amendment is also subject to the §436(c) limitation.
- c. **Required restoration of accruals.** Restoration during a plan year of benefit accruals that were limited under §436(e) earlier in that year, when required under IRC §436 (i.e., because the plan sponsor makes an additional contribution and the plan's enrolled actuary certifies that the plan's AFTAP for that plan year is 60% or more, taking account of the restored accruals), is not an amendment for PBGC purposes and is not subject to phase-in.
- d. **Automatic restoration of accruals.** If the plan provides for automatic restoration of limited accruals under a pre-existing plan provision and the cessation period was:

- i. Not more than 12 months, the restoration is not an amendment for PBGC purposes and is not subject to phase-in. Note that the restoration also is not an amendment subject to the §436(c) limitation.
- ii. More than 12 months, the restoration is an amendment for PBGC purposes, which is subject to phase-in. Note that the restoration also is an amendment subject to the §436(c) limitation.
- e. **Amendment to restore accruals.** If the plan did not provide for automatic restoration of accruals under a pre-existing plan provision and is amended to restore limited accruals, the amendment is subject to phase-in regardless of the length of the cessation period. Note that the amendment is also subject to the §436(c) limitation.

## PBGC Application of IRC §436 before the Effective Date of 26 CFR §1.436-1

For plan years 2008 and 2009, plans could comply with IRC §436 through a reasonable interpretation of the statute. Although not required, plans could also rely on the Internal Revenue proposed regulations, 74 FR 53004 (August 31, 2007), if that reliance was reasonable and consistent. The final regulations, 26 CFR §1.436-1, became effective as of the beginning of the plan's 2010 plan year.

1. **Evaluations Prior to the 2010 Plan Year.** For the 2008 and 2009 plan years, PBGC performs a facts-and-circumstances evaluation using available §436-related documentation to establish whether a §436 limitation was in effect as of DOPT and, if required, to correct benefits.
  - a. PBGC follows IRC §436, WRERA, the Pension Relief Act, and guidance received from the Internal Revenue Service in performing this evaluation.
  - b. In addition, PBGC applies the proposed regulations, 74 FR 53004 (August 31, 2007), in performing this evaluation if documentation clearly demonstrates that the plan consistently followed the proposed regulations.

Example: A plan terminated on July 15, 2011. The first day of the plan's 2008 plan year was May 1, 2008.

The statutory effective date of section 436 for this plan was May 1, 2008, and the plan had to follow the statute. Although not required, the plan could also follow the proposed regulations.

The effective date of the regulations for the plan was May 1, 2010, and the plan had to follow the regulations beginning May 1, 2010.

In evaluating whether a §436 limitation was in effect as of DOPT and, if required, in correcting benefits, PBGC applies this section and Section 2 of the Guidance above, if warranted, for the period May 1, 2008 through April 30, 2010 and May 1, 2010 through DOPT.

2. **Transition Rule for 2008 Plan Year.** Based on guidance from the Internal Revenue Service, PBGC will not apply the §436(b), §436(c), §436(d)(1) or §436(d)(3), and §436(e) limitations before the earlier of (1) the certification date of the 2007 or 2008 AFTAP or (2) the first day of the 10th month of the 2008 plan year.

- a. PBGC will apply the §436(d)(2) limitation during any period in the 2008 plan year that the plan sponsor was in bankruptcy and did not have a certified AFTAP for the 2008 plan year of 100% or greater.
- b. If an AFTAP for the 2008 plan year was not certified timely, PBGC applies the presumption of underfunding under IRC §436(h)(2).

Plans were not required to obtain or apply an AFTAP for the 2007 plan year, but could rely on a certification of the 2007 AFTAP until the earlier of the certification of the 2008 AFTAP or the first day of the 10th month of the 2008 plan year. However, an AFTAP for the 2007 plan year could not be relied upon for determining if the §436(d)(2) limitation applied.

An AFTAP certification for a plan year is timely if it is certified before the first day of the 10th month of that plan year.

3. **Documentation of AFTAP Prior to 2010 Plan Year.** Prior to the 2010 plan year, PBGC generally will accept any document that is signed and dated by an enrolled actuary which purports or otherwise appears to be a certification of an AFTAP unless the document specifically states that it is not a certification of the AFTAP. PBGC may accept other documentation in establishing an applicable AFTAP for the 2008 and 2009 plan years such as a plan's actuarial valuation report ('AVR') or Form 5500.
4. **Treatment at End of Limitation Period.** Unless there is evidence to the contrary, PBGC will assume that if a §436(b), §436(c), or §436(e) limitation ended, the plan would have:
  - a. Retroactively paid a UCEB.
  - b. Permitted an amendment to increase benefit liabilities to take effect as of the beginning of the applicable plan year, or if later during that year, its original effective date.
  - c. Resumed and restored benefit accruals.
5. **Restoration of UCEB.** For plan years 2008 and 2009, absent a plan amendment restoring a UCEB that was limited under a §436(b) limitation, PBGC will assume that a plan did not intend to restore a UCEB after the §436(b) limitation ended, and therefore, will not restore the UCEB.
6. **Restoration of Accruals After §436(e) Limitation Ends.** Unless there is evidence to the contrary, and provided the applicable AFTAP was equal to or more than 60%, PBGC will assume that a plan would have restored benefit accruals that were limited under §436(e) for plan years 2008 and/or 2009 after the §436(e) limitation ended as follows:
  - a. For the 2008 plan year, accruals will be restored based on a 2008 or 2009 AFTAP certification of 60% or more, whether timely or not.
  - b. For the 2009 plan year, accruals will be restored based on a 2009 AFTAP or 2008 AFTAP (e.g., the 2008 AFTAP was certified in 2009, and/or, under WRERA, the 2008 AFTAP is used to determine if a §436(e) limitation applied for 2009) certification of 60% or more, whether timely or not.

An AFTAP certification for a plan year is timely if it is certified before the first day of the 10th month of that plan year.