

# Compensation and Benefits Insights



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## PBGC v. Findlay Industries, Inc.: Sixth Circuit Expands Controlled Group and Successor Liability

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In *Pension Benefit Guaranty Corporation v. Findlay Industries, Inc. et al.*, the Sixth Circuit ruled that a family trust which leased land to a commonly-controlled plan sponsor was a “trade or business,” and therefore jointly and severally liable for the controlled group’s pension plan termination liability. The court further held that the buyer who purchased the plan sponsor’s assets was a successor employer and therefore liable for the plan sponsor’s pension plan termination liability. In so doing, the court adopted the position taken by several other circuit courts in cases involving multi-employer plans, and extended its application to single-employer plans.

### Facts of the Case

Findlay Industries, Inc. (“Findlay”) sponsored a single-employer defined benefit pension plan until it went out of business in 2009. At the end of 1986, Findlay transferred two pieces of property to its founder and owner, Philip D. Gardner (“Philip”). Less than a month later, Phillip transferred the property to an irrevocable trust (“Trust”). The Trust was to provide for Philip’s sisters for their lives, at which point the Trust was to be distributed to Philip’s two sons, Philip J. (“Phillip J.”) and Michael (“Michael”). Phillip J. was the trustee of the Trust, and Michael was the successor trustee. Michael was Findlay’s CEO and a director until March 2009 and owned almost 45% of Findlay’s stock.

From at least 1993 until 2009 when Findlay failed, the Trust leased the two plots of land back to Findlay. After Findlay failed, Michael formed F I Asset Acquisition LLC (“F I”) which purchased the equipment, inventory and receivables from two of Findlay’s plants for \$2.2 million in cash and \$1.2 million in assumed debt. Those assets were eventually transferred to

### Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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two companies owned and controlled by Michael, which then rehired most of Findlay's employees, and started selling to Findlay's largest customer.

Because Findlay could not pay its pension obligations, and FI did not assume Findlay's underfunded pension plan, the PBGC sued Findlay and its controlled group in 2015 for the plan's termination liability of \$30 million.

## Legal Background

ERISA provides that employees of a "trade or business" which is under common control with another entity are treated as if they are employed by a single employer. Accordingly, where a single-employer pension plan is terminated, all trades or businesses in the controlled group are jointly and severally liable for the plan's termination liability. Similarly, when an employer withdraws from a multi-employer pension plan, all members of the employer's controlled group are jointly and severally liable for the employer's withdrawal liability. The law regarding whether certain entities, such as trusts or investment funds, are considered to be "trades or businesses," and therefore subject to controlled group liability, has been evolving.

In addition to controlled-group liability, several circuits have adopted federal common law that imposes successor liability on a buyer in an asset deal where the buyer had notice of the pension plan liabilities prior to the sale and the buyer continues the operations of the seller. The circuit court cases have all involved actions by multi-employer pension plans to collect withdrawal liability from unrelated third parties who purchased assets of failed employers. But before *Findlay*, no circuit court had applied the successor liability doctrine in the single-employer plan context.

## District Court Case

The PBGC sued Findlay, the Trust, Michael, and the two companies controlled by Michael for the pension plan's termination liability. The PBGC alleged that the Trust was a "trade or business" under common control with Findlay. The PBGC argued that Findlay and the Trust were under common control because they shared a "substantial economic nexus" as a result of the lease; therefore, the Trust was jointly and severally liable for Findlay's plan termination liability. The PBGC further alleged that Michael and his two controlled companies were liable under the federal common law of successor liability because they had notice of the pension plan liabilities and substantially continued Findlay's operations.

To determine whether the Trust could be held liable as a "trade or business" under common control with Findlay, the district court applied the *Groetzing* test. The *Groetzing* test comes from a U.S. Supreme Court tax case and examines whether an entity regularly engages in an activity primarily for profit or income. The district court concluded that because the primary purpose of the Trust was to provide for Philip's sisters, the Trust was not a "trade or business" and could not be subject to controlled group liability. The district court also determined that it was not appropriate to create federal common law under ERISA to impose successor liability in the context of a single-employer plan.

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## Sixth Circuit Reverses

The Sixth Circuit rejected the district court's use of the *Groetzinger* test, noting that the Supreme Court's test was limited to specific sections of the Internal Revenue Code. Instead, the court joined the 7<sup>th</sup> and 8<sup>th</sup> circuits in adopting the "categorical test" to determine whether the Trust was a trade or business under Findlay's control. Under the categorical test, any entity that leases property to a commonly controlled entity is a "trade or business" under ERISA. Since the Trust was a trade or business under the categorical test, the court held that it was jointly and severally liable for Findlay's pension termination liability.

The Sixth Circuit also reversed the district court on the issue of successor liability. The court argued that applying successor liability would promote ERISA's fundamental policy of enforcing employers' promises to their employees by guaranteeing that substance matters over form. "Refusing to apply successor liability would allow employers to fail to uphold promises made to employees and then engage in clever financial transactions to leave PBGC paying out millions in pension liabilities. Holding the employers responsible, on the other hand, is a commonsense answer that fulfills ERISA's goals."

## Takeaways from *Findlay*

To the extent there are unfunded pension liabilities, the PBGC and multi-employer plans are certain to assert "trade or business" controlled group claims whenever there are leases or business connections between the plan sponsor and other related entities. In evaluating potential exposure to unfunded pension liability, remember that the *Findlay* court elevated substance over form. Likewise, buyers in asset deals need to be aware that the successor liability doctrine could be used in both the single-employer pension plan and multi-employer plan context to recover pension termination and withdrawal liabilities. To reduce the risk of being saddled with a seller's liability, buyers should consider one or more of the following actions when negotiating an asset purchase agreement:

- A purchase price reduction based on the anticipated pension liability.
- An escrow to cover the potential pension liability.
- Indemnity provisions that address any pension liability imposed on the buyer.
- Where available, consider pursuing the asset purchase in bankruptcy; Bankruptcy Code Section 363 may provide some protection against successor liability claims since debtors can sell property "free and clear" of certain claims, subject to court approval.

King & Spalding is available to assist you with your purchase or sale transactions and the resolution of any pension plan liability issues that arise in connection with such transactions.

## IRS Updates EPCRS to Require Electronic VCP Filings in 2019

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In September 2018, the IRS issued Revenue Procedure 2018-52 (the “Procedure”) updating its Employee Plans Compliance Resolutions System (“EPCRS”). The Procedure is a limited update intended primarily to set forth new electronic submission procedures for the Voluntary Correction Program (“VCP”) component of EPCRS.

### Background

EPCRS is the IRS’s program for retirement plan sponsors to use to correct plan qualification errors and preserve the tax-qualified status of the plan. In addition to the VCP component, EPCRS also includes the Self-Correction Program (“SCP”) and Audit Closing Agreement Program. The Procedure supersedes Revenue Procedure 2016-51, which was the most recent prior consolidation of the EPCRS correction programs.

### Changes to the VCP Submission Procedures

Beginning April 1, 2019, the Procedure provides that retirement plan sponsors must use the [www.pay.gov](http://www.pay.gov) website when filing a VCP submission and paying applicable user fees. During a transition period from January 1, 2019 through March 31, 2019, retirement plan sponsors may file VCP submissions with the IRS either by using [www.pay.gov](http://www.pay.gov) in accordance with the Procedure or by filing paper VCP submissions in accordance with Revenue Procedure 2016-51. The IRS will not accept paper VCP submissions postmarked on or after April 1, 2019.

An electronic VCP submission filed using the [www.pay.gov](http://www.pay.gov) website must include many of the same documents as a VCP submission filed on paper pursuant to Revenue Procedure 2016-51, but there are several procedural differences, such as:

1. First, an applicant must use the [www.pay.gov](http://www.pay.gov) website to create a pay.gov account, which must be used when filing the VCP submission and paying applicable user fees.
2. Second, after the applicant has established the pay.gov account, the applicant must complete Form 8950, Application for Voluntary Correction Program (VCP) Submission Under the Employee Plans Compliance Resolution System (“Form 8950”), using the [www.pay.gov](http://www.pay.gov) website. Beginning April 1, 2019, applicants will no longer be permitted to submit a paper version of Form 8950.
3. Third, documents relating to the VCP submission, including the description of failures, Form 14568 (Model VCP Compliance Statement), Schedules 1 through 9 of Form 14568, and any other applicable items for a VCP submission generally must be converted into a single PDF document and then uploaded onto the [www.pay.gov](http://www.pay.gov) website. However, there is a 15 MB size limitation for uploading a PDF document onto the [www.pay.gov](http://www.pay.gov) website; thus special instructions are provided for PDF files that exceed that limitation.

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4. Fourth, there are new procedures relating to the payment of user fees using the [www.pay.gov](http://www.pay.gov) website, including the generation of a payment confirmation. For submissions made using the [www.pay.gov](http://www.pay.gov) website, the IRS will no longer mail an acknowledgment letter to the applicant. Receipt of a submission will be acknowledged through the generation of a unique pay.gov tracking ID on the payment confirmation after the VCP submission is filed and the user fee is paid.

The Procedure clarifies that although the retirement plan sponsor is responsible for filing the VCP submission and paying the user fee using the [www.pay.gov](http://www.pay.gov) website, the plan sponsor may designate an authorized representative to file the VCP submission using the [www.pay.gov](http://www.pay.gov) website. The Procedure sets forth specific instructions on how to designate an authorized representative using the Form 2848, Power of Attorney and Declaration of Representation.

## Other Changes

Other substantive changes to Revenue Procedure 2016-51 contained in the Procedure include modifications to reflect recent changes in the IRS pre-approved plan program for qualified plans and the pre-approved 403(b) plan program and the elimination of the IRS letter forwarding program.

## Future Changes

The Procedure notes that the IRS expects to continue to update EPCRS and invites further comments on how to improve EPCRS. In particular, the Procedure states that the IRS received, and is reviewing, comments requested in Revenue Procedure 2015-27 on potential changes to EPCRS relating to the recoupment of overpayments, and that the IRS is in the process of developing further changes to modify the EPCRS rules on the correction of overpayments. In addition, the Procedure states that the IRS has received, and is reviewing, comments relating to expanding SCP and is considering changes to the program based on those comments.

King & Spalding would be happy to assist you with any retirement plan correction issues you face or with any questions you have about the changes to EPCRS.

## November and December 2018 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is

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usually delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
November 1 (by the first day of open enrollment)	Summary of Benefits and Coverage for Health Plans that Require Reapplication	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if written application materials are required for renewal.	Group Health Plans and Health Insurance Issuers
November 14 (within 45 days after the close of the third quarter)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the third quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the third quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	

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Deadline	Item	Action	Affected Plans
November 15  (the 15th day of the 11th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a second 3-month extension by filing a Form 8868.	Qualified Retirement Plans  Voluntary Employee Beneficiary Associations
December 1  (at least 30 but no more than 90 days before the beginning of the plan year)	Safe Harbor Notice	Deadline for plan administrator to distribute a notice of intent to use a safe harbor formula to participants and beneficiaries. This notice must be provided within a reasonable period of time before the beginning of the plan year. The regulations provide a safe harbor of not less than 30 days but not more than 90 days before the beginning of the plan year.	401(k) and 401(m) Plans
	Contingent Safe Harbor Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries specifying that the plan may be amended during the following plan year to include a 3% employer non-elective safe harbor contribution.	401(k) and 401(m) Plans
	Auto-Enrollment Notice	Deadline for plan administrator to provide annual auto-enrollment notice for plans with qualified automatic contribution arrangements (QACA) or eligible automatic contribution arrangements (EACA). This notice must be provided sufficiently early so that the employee has a reasonable period of time after receipt to make QACA or EACA elections. The preamble to the regulations notes that this timing requirement is deemed to be satisfied if the notice is given at least 30 days but not more than 90 days before the beginning of each plan year.	401(k) Plans with QACA or EACA

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Deadline	Item	Action	Affected Plans
December 1 (at least 30 days before the end of the plan year)	Qualified Default Investment Alternative (QDIA) Annual Notice	Deadline for plan administrator to provide annual QDIA notice to participants or beneficiaries.	Defined Contribution Plans with participant-directed investments
	Safe Harbor Follow-Up Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries informing them that the 3% employer non-elective safe harbor contribution will be made for the current plan year. This notice may be combined with the Contingent Safe Harbor Notice for the following plan year.	401(k) and 401(m) Plans
December 1 (at least 30 days prior to the first day of the new plan or policy year)	Summary of Benefits and Coverage for Health Plans that Automatically Renew Coverage	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if coverage automatically renews each year.	Group Health Plans and Health Insurance Issuers
December 1 (no later than 30 days before participant becomes eligible to diversify employer stock)	Diversification Notice	Deadline for plan administrator to provide diversification notice to participants who will first be eligible to divest employer securities on January 1.	Defined Contribution Plans with participant-directed investments in employer stock



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Deadline	Item	Action	Affected Plans
December 15  (2 months after the extension for filing Form 5500)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute SAR for prior year to participants and beneficiaries, if the IRS granted a 2-month extension for Form 5500 on or before the original Form 5500 deadline.	Defined Contribution Plans
December 31  (last day of plan year following plan year for which contributions were made)	Correction of Excess Contributions & Excess Aggregate Contributions	Deadline for plan administrator to make corrective employer contributions or distribute excess contributions (ADP test failure) and excess aggregate contributions (ACP test failure) for the prior year.	401(k) and 401(m) Plans
December 31  (last day of plan year)	Discretionary Amendments	Deadline for plan sponsor to adopt discretionary plan amendments for calendar-year plans.	Qualified Retirement Plans
	Adjusted Funding Target Attainment Percentage (AFTAP) Certification	Deadline for actuary to certify a specific AFTAP if a range certification was previously issued.	Defined Benefit Plans

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Deadline	Item	Action	Affected Plans
December 31 (at least annually)	ERISA §404(c) Disclosures	Deadline for plan administrator to distribute notices to participants and beneficiaries if the employer wants to limit fiduciary liability for participant-directed investment decisions.	Defined Contribution Plans with participant-directed investments
	Annual Fee Disclosure to Participants	Deadline for plan administrator to make annual disclosure of certain fees for participant directed individual account plans to be provided to participants and beneficiaries.	
	Pension Benefit Statements	Deadline for plan administrator of a defined benefit plan using alternative notice for pension benefit statements to notify participants of availability of a pension benefit statement and instructions on how to obtain it.	Defined Benefit Plans
December 31 (at least annually as a part of any yearly informational packet)	WHCRA Notice	Deadline for group health plans to distribute Women's Health and Cancer Rights Act (WHCRA) notice for new plan year to all participants and beneficiaries advising them of available mastectomy benefits under WHCRA and any deductibles and co-insurance limits applicable to such benefits.	Health and Welfare Plans