

Pension Benefit Guaranty Corporation

83-21

September 8, 1983

REFERENCE:

[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption
4203(f) Complete Withdrawal. Special Withdrawal Liability Rules

OPINION:

This responds to your letter concerning the applicability and scope of Section 4203(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA").

Section 4203(b)(1) provides:

Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if -

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan -

(i) primarily covers employees in the building and construction industry, or

(ii) is amendment to provide that this subsection applies to employers described in this paragraph.

In your letter you indicated that employees of your clients manufacture concrete blocks, carry blocks to a storage yard or to a loading area, transport blocks to [*2] construction sites, and unload blocks at the contribution site. You also indicated that the multiemployer plan, to which your clients contribute, has adopted a specific "construction industry exemption" and has represented that this exemption covers the employees of your clients.

ERISA does not specifically define those activities that are included within the term "building and construction industry". The Senate report in Section 4203(b) does indicate that PBGC and plan sponsors should refer to labor-management relations law in defining the term "building and construction industry". Summary & Analysis of S. 1076 (Senate Labor Comm.), p. 14 (April 1980). PBGC is currently in the process of developing a regulation on Section 4203(b), which will define that activities that are included within the building and construction industry, as well as the terms "primarily" and "substantially all", which are critical to the implementation of Section 4203(b). A copy of PBGC's advance notice of rulemaking on this issue is enclosed (Enclosure A).

Our understanding of the cases under the labor-management relations law is that the term "building and construction industry" includes, but is [*3] not necessarily limited to, work performed at the site of a building or other structure in connection with the erection, alteration of the building or other structure. cf. Carpet, Linoleum & Soft Tile Local Union 1247, et al., 156 NLRB 951 (1966).

In a case where an employer does perform work in the building and construction industry and substantially all the employees with respect to whom such employer has an obligation to contribute under the plan perform work in such industry, ERISA § 4203(b)(1)(B)(ii) permits a plan amendment which will subject such employer to withdrawal liability only if the provisions of § 4203(b)(2) apply. n1

n1 § 4203(b)(2) provides:

A withdrawal occurs under this paragraph if -

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer -

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of resumption.

You should be aware that under limited [*4] circumstances rules similar to those for the construction and entertainment industries may apply to plans in other industries. Section 4203(f) of ERISA provides:

(1) The corporation [PBGC] may prescribe regulations under which plans in industries other than the construction or entertainment industry may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules -

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

The PBGC has adopted procedural rules (Enclosure B) under which a plan may request approval of a plan amendment providing for special withdrawal liability rules similar to those applicable to the construction and entertainment industries. The PBGC has also issued an advance notice [*5] of proposed rulemaking (Enclosure C) relating to possible PBGC regulatory standards for approval of plan amendments providing for special withdrawal liability rules.

Henry Rose
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