

Pension Benefit Guaranty Corporation

88-2

March 22, 1988

REFERENCE:

[*1] 4203(a) -Definition of Complete Withdrawal
4203(b) - Building and Construction Industry Exemption
4225 - Limitation of Withdrawal Liability
4225(a) - Sale of Assets
4225(e) - Multiple Withdrawals

OPINION:

We are writing in response to your request for the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether section 4225 of the Employee Retirement Income Security Act, as amended ("ERISA"), applies to an employer subject to the definition of withdrawal set forth in section 4203(b) of ERISA ("a construction industry employer") that sells its assets following a withdrawal from a multiemployer pension plan.

Under section 4203(b), a complete withdrawal of a construction industry employer occurs if the employer both ceases to have an obligation to contribute to the plan, and

(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 the resumption.

ERISA § 4203(b)(2)(B). The quoted portion of this definition contrasts [*2] with the general definition of complete withdrawal, ERISA § 4203(a), which is triggered, inter alia, by a permanent cessation of operations covered under the plan, rather than by a continuation or resumption of work.

The amount of an employer's withdrawal liability is computed under section 4211 of ERISA, subject to certain adjustments enumerated in section 4201. Section 4225(a) of ERISA prescribes one of these adjustments. Section 4225(a) provides that "[i]n the case of [a] bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party," the unfunded vested benefits allocable to certain employers should not exceed a specified amount. While Congress did restrict the applicability of section 4225 in certain circumstances (see, for example, ERISA section 4211(d)(2)), no restriction was provided on the applicability of this provision to building and construction industry plans and employers. Therefore, we do not believe that ERISA provides a categorical exception from section 4225 for construction industry employers that withdraw from construction industry plans.

It is our view, however, that section 4225(a) applies [*3] only when the withdrawal is "attributable to" a sale of assets, and not when the sale and the withdrawal are merely coincidental. As noted above, the special sale rule in section 4225(a) only comes into play in calculating an employer's withdrawal liability. It is therefore reasonable to conclude that there must be a connection between the sale and the withdrawal. This interpretation is directly supported by section 4225(e), which deals with the application of section 4225 in the case of multiple withdrawals and by its terms applies only "[i]n the case of one or more withdrawals of an employer attributable to the same sale . . ." (emphasis added). The legislative history of section 4225 further supports this position. See Senate Committees on Finance and on Labor and Human Resources, "Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980," § 5d, reprinted in 126 Cong. Rec. 20,195 (1980). See also ERISA § 4204(a).

In the typical case, we would not expect a construction industry employer's complete withdrawal, which by definition must involve a continuation or resumption of the employer's work, to be attributable to a sale of the employer's [*4] assets. A sale of the employer's assets would more likely cause work to cease, not continue or resume. Nonetheless, we believe there may be cases in which section 4225(a) would apply to a construction industry employer, n1 so the determination whether the section applies must be made on a case-by-case basis.

n1 For example, section 4225 could apply in the building and construction industry if an employer that had previously been performing both covered and non-covered work in an area sold all or substantially all of its assets to an unrelated party, thus ceasing the obligation to contribute to the plan, yet continued to perform non-covered work in the same area.

In the situation you posit, a construction industry employer ceased to be obligated to contribute under a construction plan but continued to perform covered work in the same area. Six months later it sold its assets to an unrelated party. While on the basis of these limited facts it does not appear that the employer's withdrawal was attributable to the sale of assets, this is not PBGC's decision to make. The question of whether a withdrawal was attributable to the sale of all or substantially all of an employer's [*5] assets is a matter to be determined by the plan sponsor based on all of the facts and circumstances. If an employer disputes the plan sponsor's decision, the employer may seek arbitration of the matter, with further review available in the appropriate court.

I hope this has been of assistance. If you have further questions, please contact the attorney handling this matter, John Foster, at (202) 778-8850.

Gary M. Ford
General Counsel