

Pension Benefit Guaranty Corporation

85-16

June 3, 1985

REFERENCE:

[*1] 4203(e) Complete Withdrawal. Date of Complete Withdrawal
4205 Partial Withdrawals
4205(a) Partial Withdrawals. Definition of Partial Withdrawal

OPINION:

In your recent letter you describe a situation in which a union enters into a concessions agreement with an employer that has previously made contributions to a multiemployer pension plan. You stated in your telephone conversation with my staff that one aspect of the agreement is that for an eighteen month period the employer will not make pension contributions to the plan for participants at the smaller of its two facilities. At the end of the eighteen-month period, if the employer is still in business, contributions will become due retroactively. All contributions have been paid in full for past years.

You ask specifically whether entry into the agreement would effect a partial withdrawal under Section 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "Multiemployer Act").

Section 4205(a) of ERISA states that a partial withdrawal by an employer occurs when:

- (1) there is a 70 percent contribution decline (in the employer's contributions to [*2] the plan), or
- (2) there is a partial cessation of the employer's contribution obligation.

It is our understanding that the 70 percent test is not implicated in the factual situation you have presented. Nevertheless, a partial cessation of the contribution obligation may occur when the employer permanently ceases to have an obligation to contribute under the plan, either under one of several collective bargaining agreements or with respect to work performed at one of several facilities. Section 4205(b)(2)(A).

The Multiemployer Act places the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan and for determining the amount of any liability resulting therefrom on the plan sponsor, and the PBGC does not interject itself into this process by issuing an opinion on the application of the law to a particular transaction. If a plan sponsor makes any such determination respecting a withdrawal, and the employer objects in any way, ERISA provides in § § 4219 and 4221 a procedure for resolving the dispute.

Thus, the plan sponsor, consistent with his or her fiduciary responsibilities, would be initially responsible for [*3] determining such questions as what is considered "permanent" under Section 4205. The determination is, however, generally based on all the facts and circumstances of a particular case. Relevant considerations in the instant case include the duration of the cessation of contributions and the likelihood of a resumption of contributions.

We note also that the Multiemployer Act does not specify a period within which a multiemployer plan may determine that a withdrawal has occurred. Consequently, if the plan determines that a withdrawal has occurred, it is not precluded from finding at a later date that a withdrawal occurred at some earlier point. See Section 4203(e) of ERISA.

This opinion is not intended to serve as an interpretation of the terms of the plan described in this case or as a statement on the possible applicability of Title I of ERISA or of any other statute. We also express no view concerning the rights under the plan of employees working under the concessions agreement.

I hope this has been of assistance. If you have any further questions please contact * * * at the above address or at (202) 254-4895.

Edward R. Mackiewicz
General Counsel

