

Pension Benefit Guaranty Corporation

75-96

September 10, 1975

REFERENCE:

[*1] 4001(a)(2) Definitions. Substantial Employer
4063(a) Liability of Substantial Employer for Withdrawal. Notice of Withdrawal of Substantial Employer
4063(b) Liability of Substantial Employer for Withdrawal. Amount of Employer Liability

OPINION:

This is in response to your letter addressed to the Office of Employee Benefits Security, Labor-Management Services Administration. You inquired whether the withdrawal from a "multiemployer" plan of a number of participating employers that resulted in the removal of approximately 10% of the participants from the plan constitutes either (a) the withdrawal of an "employer," or (b) a "significant reduction in the amount of contributions made to the plan" and thus requires the departing employers to post security under the Employee Retirement Income Security Act of 1974 ("ERISA") (88 Stat. 829 et seq.).

Section 4063 of ERISA provides for posting of security in the event that a "substantial employer" withdraws from a multiemployer plan. An employer who makes contributions to a plan maintained by more than one employer which for either the two immediately preceding plan years, or the second and third preceding plan years, equal or [*2] exceed 10% of all employer contributions to the plan is a "substantial * * * employer." ERISA, Section 4001(a)(2). A reduction in plan participants on account of withdrawal has no direct bearing upon whether the withdrawing employer or employers constitute a "substantial employer." Compare Act, Section 4043(b)(4).

Nor may the withdrawing employers' contributions be aggregated in order to compel them to post security. Rather, Act, Section 4001(a)(2) provides that employers who are members of the same affiliated group within the meaning of Section 1563(a) of the Internal Revenue Code of 1954 ("Code") shall be treated as one employer, implying that others may not ordinarily be. But cf. Act, Section 3(5) defining "employer" as including an association or a group of employers "acting for an employer in such capacity," i.e. in relation to an employee benefit plan. The information provided in your letter indicates that some of the employers who intend to withdraw are members of multiemployer association which negotiate on their behalf, and that the employers employ a substantial percentage of participants. These facts alone would not require them to post security under [*3] Section 4063, but if the association's members withdraw as a group and their aggregate contributions meet the "substantial employer" test, the employers might be required to post security.

You also ask whether the withdrawal of the employer would result in a significant reduction in the amount of contributions made to the plan and therefore require the posting of security. Section 4063(d) of ERISA is the only subsection in Section 4063 which contains a reference to a * * * "significant reduction in the aggregate contributions to or under the plan by employers." That subsection, however, does not refer to the posting of security. Hence, assuming arguendo that the employers' withdrawal would substantially reduce contributions, the employers would not be required to post security for that reason alone.

I trust this answers your inquiries.

Henry Rose
General Counsel