

employers that maintain the Plan. PBGC approved the original rule in 1984 and an amended version in 1998. 49 FR 6043 (February 16, 1984); 63 FR 27774 (May 20, 1998). PBGC published a Notice of Pendency of the Request for Approval of a second amendment on June 13, 2003 (68 FR 35462) ("Notice of Pendency"). In accordance with the provisions of the Employee Retirement Income Security Act of 1974, PBGC is now advising the public that the agency has approved the requested amendment with certain modifications.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

As explained in the Notice of Pendency (see 68 FR 35463-65), the International Longshoremen's and Warehousemen's Union-Pacific Maritime Association Pension Plan ("Plan") has since 1984 operated under a special modification to the usual employer withdrawal liability rules of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, Public Law 96-364, 94 Stat. 1208-1311. Under section 4201 of ERISA, an employer who incurs either a complete or partial withdrawal from a defined benefit multiemployer pension plan becomes liable for a proportional share of the plan's unfunded vested benefits. The statute specifies that a "complete withdrawal" occurs whenever an employer either permanently (1) ceases to have an obligation to contribute to the plan, or (2) ceases all operations covered under the plan. See ERISA section 4203(a). Under the second test, therefore, an employer who closes or sells its operations will incur withdrawal liability. Under the first test, an employer who remains in business but who no longer has an obligation to contribute to the plan also suffers liability. The "partial withdrawal" provisions of sections 4205 and 4206 impose a lesser measure of liability upon employers who greatly reduce, but do not entirely eliminate, the operations that generate contributions to the plan.

The withdrawal liability provisions of ERISA are a critical factor in maintaining the solvency of these pension plans and reducing claims

made on the multiemployer plan guaranty fund maintained by PBGC, which is much less robustly funded than the comparable single employer fund.¹ In the absence of withdrawal liability rules, an employer who participates in an underfunded multiemployer plan would have a powerful economic incentive to reduce expenses by withdrawing from the plan at the first convenient opportunity.

Congress nevertheless allowed for the possibility that, in certain industries, the fact that particular employers go out of business (or cease operations in a specific geographic region) might not result in permanent damage to the pension plan's contribution base. In the case of the construction industry, for example, the work must necessarily take place at the construction site; if that work generates contributions to the pension plan, it does not much matter which employer performs the work. Put another way, if a construction employer goes out of business, or stops operations in a geographic area, pension plan contributions will not diminish if a second employer who contributes to the plan fills the void. The plan's contribution base is damaged, therefore, only if the employer stops contributing to the plan but continues to perform construction work in the jurisdiction of the collective bargaining agreement.

This reasoning led Congress to adopt a special definition of the term "withdrawal" for construction industry plans. Section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan, but the employer nevertheless performs previously covered work in the jurisdiction of the collective bargaining agreement at any time within five years after the employer ceased its contributions.² There is a parallel rule for partial withdrawals from construction plans. Under section 4208(d)(1) of ERISA, "[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial

portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required."

Section 4203(f) of ERISA provides that PBGC may prescribe regulations under which plans that are not in the construction industry may be amended to use special withdrawal liability rules similar to those that apply to construction plans. Under the statute, the regulations "shall permit the use of special withdrawal liability rules * * * only in industries" that PBGC determines share the characteristics of the construction industry. In addition, each plan application must demonstrate that the special rule "will not pose a significant risk to the [PBGC] insurance system." Section 4208(e)(3) of ERISA provides for parallel treatment of partial withdrawal liability rules.

The regulation on *Extension of Special Withdrawal Liability Rules* (29 CFR part 4203), prescribes the procedures a multiemployer plan must follow to request PBGC approval of a plan amendment that establishes special complete or partial withdrawal liability rules. Under 29 CFR 4203.3(a), a complete withdrawal rule must be similar to the statutory provision that applies to construction industry plans under section 4203(b) of ERISA. Any special rule for partial withdrawals must be consistent with the construction industry partial withdrawal provisions.

Each request for approval of a plan amendment establishing special withdrawal liability rules must provide PBGC with detailed financial and actuarial data about the plan. In addition, the applicant must provide PBGC with information about the effects of withdrawals on the plan's contribution base. As a practical matter, the plan must demonstrate that the characteristics of employment and labor relations in its industry are sufficiently similar to those in the construction industry that use of the construction rule would be appropriate. Relevant factors include the mobility of the employees, the intermittent nature of the employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed.

PBGC will approve a special withdrawal liability rule only if a review of the record shows that:

(1) The industry has characteristics that would make use of the special construction withdrawal rules appropriate; and

¹ The PBGC multiemployer guaranty fund receives only \$25 million in annual premiums. In contrast, the single employer funds received premiums of \$787 million in the 2002 fiscal year. PBGC Pension Insurance Data Book 2002 at 2.

² Section 4203(c)(1) of ERISA applies a similar definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement. No plan has ever requested PBGC to determine that it shares the characteristics of an entertainment plan.