

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries 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 withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

(Pub. L. 93-406, title IV, §4203, as added Pub. L. 96-364, title I, §104(2), Sept. 26, 1980, 94 Stat. 1218.)

§ 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the “seller”) under this section does not occur solely because, as a result of a bona fide, arm’s-length sale of assets to an unrelated party (hereinafter in this section referred to as the “purchaser”), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if—

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of—

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer’s assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser—

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3)(A) If all, or substantially all, of the seller’s assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1)(C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller’s assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) Liability of purchaser

(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a)(1)(B) of this section.

(c) Variances or exemptions from continuation of liability of seller; procedures applicable

The corporation may by regulation vary the standards in subparagraphs (B) and (C) of subsection (a)(1) of this section if the variance would more effectively or equitably carry out the purposes of this subchapter. Before it promulgates such regulations, the corporation may grant individual or class variances or exemptions from the requirements of such subparagraphs if the particular case warrants it. Before granting such an individual or class variance or exemption, the corporation—

(1) shall publish notice in the Federal Register of the pendency of the variance or exemption,

(2) shall require that adequate notice be given to interested persons, and

(3) shall afford interested persons an opportunity to present their views.

(d) “Unrelated party” defined

For purposes of this section, the term “unrelated party” means a purchaser or seller who

does not bear a relationship to the seller or purchaser, as the case may be, that is described in section 267(b) of title 26, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

(Pub. L. 93-406, title IV, §4204, as added Pub. L. 96-364, title I, §104(2), Sept. 26, 1980, 94 Stat. 1220; amended Pub. L. 101-239, title VII, §7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

AMENDMENTS

1989—Subsec. (d). Pub. L. 101-239 substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”, which for purposes of codification was translated as “title 26” thus requiring no change in text.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 7891(f) of Pub. L. 101-239, set out as a note under section 1002 of this title.

§ 1385. Partial withdrawals

(a) Determinative factors

Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—

- (1) there is a 70-percent contribution decline, or
- (2) there is a partial cessation of the employer's contribution obligation.

(b) Criteria applicable

For purposes of subsection (a) of this section—

(1)(A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)—

(i) The term “3-year testing period” means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location or to an entity or entities owned or controlled by the employer, or

(ii) an employer permanently ceases to have an obligation to contribute under the

plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

(B) For purposes of subparagraph (A), a cessation of obligations under a collective bargaining agreement shall not be considered to have occurred solely because, with respect to the same plan, one agreement that requires contributions to the plan has been substituted for another agreement.

(c) Retail food industry

(1) In the case of a plan in which a majority of the covered employees are employed in the retail food industry, the plan may be amended to provide that this section shall be applied with respect to such plan—

(A) by substituting “35 percent” for “70 percent” in subsections (a) and (b) of this section, and

(B) by substituting “65 percent” for “30 percent” in subsection (b) of this section.

(2) Any amendment adopted under paragraph (1) shall provide rules for the equitable reduction of withdrawal liability in any case in which the number of the plan's contribution base units, in the 2 plan years following the plan year of withdrawal of the employer, is higher than such number immediately after the withdrawal.

(3) Section 1388 of this title shall not apply to a plan which has been amended under paragraph (1).

(d) Continuation of liability of employer for partial withdrawal under amended plan

In the case of a plan described in section 404(c) of title 26, or a continuation thereof, the plan may be amended to provide rules setting forth other conditions consistent with the purposes of this chapter under which an employer has liability for partial withdrawal.

(Pub. L. 93-406, title IV, §4205, as added Pub. L. 96-364, title I, §104(2), Sept. 26, 1980, 94 Stat. 1221; amended Pub. L. 101-239, title VII, §7891(a)(1), Dec. 19, 1989, 103 Stat. 2445; Pub. L. 109-280, title II, §204(b)(1), Aug. 17, 2006, 120 Stat. 887.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (d), was in the original “this Act”, meaning Pub. L. 93-406, known as the Employee Retirement Income Security Act of 1974. Titles I, III, and IV of such Act are classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

AMENDMENTS

2006—Subsec. (b)(2)(A)(i). Pub. L. 109-280 inserted “or to an entity or entities owned or controlled by the employer” after “to another location”.

1989—Subsec. (d). Pub. L. 101-239 substituted “Internal Revenue Code of 1986” for “Internal Revenue Code of 1954”, which for purposes of codification was translated as “title 26” thus requiring no change in text.

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-280, title II, §204(b)(2), Aug. 17, 2006, 120 Stat. 887, provided that: “The amendment made by this subsection [amending this section] shall apply with respect to work transferred on or after the date of the enactment of this Act [Aug. 17, 2006].”