

Calendar No. 552

113TH CONGRESS
2D SESSION**S. 2511**

To amend the Employee Retirement Income Security Act of 1974 to clarify the definition of substantial cessation of operations.

IN THE SENATE OF THE UNITED STATES

JUNE 19, 2014

Mr. HARKIN (for himself and Mr. ALEXANDER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

SEPTEMBER 8, 2014

Reported by Mr. HARKIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Employee Retirement Income Security Act of 1974 to clarify the definition of substantial cessation of operations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SUBSTANTIAL CESSATION OF OPERATIONS.**

4 (a) ~~IN GENERAL.~~—Subsection (e) of section 4062 of
5 the Employee Retirement Income Security Act of 1974
6 (29 U.S.C. 1362) is amended—

1 (1) by striking “OPERATIONS.—If an employer”
 2 and inserting “OPERATIONS.—

3 “(1) IN GENERAL.—If an employer”; and

4 (2) by adding at the end the following:

5 “(2) SUBSTANTIAL CESSATION OF OPER-
 6 ATIONS.—An employer shall not be treated as hav-
 7 ing a cessation described in paragraph (1) unless—

8 “(A) all operations at a facility in a loca-
 9 tion are ceased, and—

10 “(i) such cessation is reasonably ex-
 11 pected to be permanent;

12 “(ii) no portion of such operations is
 13 moved to another facility at a different lo-
 14 cation;

15 “(iii) no portion of such operations is
 16 assumed by or otherwise transferred to an-
 17 other employer; and

18 “(iv) no other operations are reason-
 19 ably expected to be maintained at such fa-
 20 cility; and

21 “(B) as a result of the cessation described
 22 in subparagraph (A), more than 20 percent of
 23 the employees of the employer have a termi-
 24 nation of employment that is reasonably ex-
 25 pected to be permanent.

1 For purposes of subparagraph (B), all employees
 2 treated as employed by a single employer under sec-
 3 tions 210 (c) and (d) shall be treated as employees
 4 of the employer.”.

5 (b) DIRECTION TO THE CORPORATION.—The Pen-
 6 sion Benefit Guaranty Corporation shall not take any en-
 7 forcement, administrative, or other action pursuant to sec-
 8 tion 4062(e) of the Employee Retirement Income Security
 9 Act of 1974 that is inconsistent with subparagraph (A)
 10 of section 4062(e)(2) of such Act, as added by subsection
 11 (a), without regard to whether the action relates to a ces-
 12 sation or other event that occurs before or after the date
 13 of enactment of this Act, unless such action is in connec-
 14 tion with a settlement agreement in place before June 1,
 15 2014.

16 **SECTION 1. SUBSTANTIAL CESSATION OF OPERATIONS.**

17 (a) IN GENERAL.—Subsection (e) of section 4062 of
 18 the Employee Retirement Income Security Act of 1974 (29
 19 U.S.C. 1362) is amended to read as follows:

20 “(e) TREATMENT OF SUBSTANTIAL CESSATION OF OP-
 21 ERATIONS.—

22 “(1) GENERAL RULE.—Except as provided in
 23 paragraphs (3) and (4), if there is a substantial ces-
 24 sation of operations at a facility in any location, the
 25 employer shall be treated with respect to any single

1 *employer plan established and maintained by the em-*
 2 *ployer covering participants at such facility as if the*
 3 *employer were a substantial employer under a plan*
 4 *under which more than one employer makes contribu-*
 5 *tions and the provisions of sections 4063, 4064, and*
 6 *4065 shall apply.*

7 “(2) *SUBSTANTIAL CESSATION OF OPER-*
 8 *ATIONS.—For purposes of this subsection:*

9 “(A) *IN GENERAL.—The term ‘substantial*
 10 *cessation of operations’ means a permanent ces-*
 11 *sation of operations at a facility which results in*
 12 *a workforce reduction of a number of eligible em-*
 13 *ployees at the facility equivalent to more than 15*
 14 *percent of the number of all eligible employees of*
 15 *the employer, determined immediately before the*
 16 *earlier of—*

17 “(i) *the date of the employer’s decision*
 18 *to implement such cessation, or*

19 “(ii) *in the case of a workforce reduc-*
 20 *tion which includes 1 or more eligible em-*
 21 *ployees described in paragraph (6)(B), the*
 22 *earliest date on which any such eligible em-*
 23 *ployee was separated from employment.*

24 “(B) *WORKFORCE REDUCTION.—Subject to*
 25 *subparagraphs (C) and (D), the term ‘workforce*

1 *reduction’ means the number of eligible employ-*
2 *ees at a facility who are separated from employ-*
3 *ment by reason of the permanent cessation of op-*
4 *erations of the employer at the facility.*

5 *“(C) RELOCATION OF WORKFORCE.—An eli-*
6 *gible employee separated from employment at a*
7 *facility shall not be taken into account in com-*
8 *puting a workforce reduction if, within a reason-*
9 *able period of time, the employee is replaced by*
10 *the employer, at the same or another facility lo-*
11 *cated in the United States, by an employee who*
12 *is a citizen or resident of the United States.*

13 *“(D) DISPOSITIONS.—If, whether by reason*
14 *of a sale or other disposition of the assets or*
15 *stock of a contributing sponsor (or any member*
16 *of the same controlled group as such a sponsor)*
17 *of the plan relating to operations at a facility or*
18 *otherwise, an employer (the ‘transferee em-*
19 *ployer’) other than the employer which experi-*
20 *ences the substantial cessation of operations (the*
21 *‘transferor employer’) conducts any portion of*
22 *such operations, then—*

23 *“(i) an eligible employee separated*
24 *from employment with the transferor em-*
25 *ployer at the facility shall not be taken into*

1 *account in computing a workforce reduction*
2 *if—*

3 “(I) *within a reasonable period of*
4 *time, the employee is replaced by the*
5 *transferee employer by an employee*
6 *who is a citizen or resident of the*
7 *United States; and*

8 “(II) *in the case of an eligible em-*
9 *ployee who is a participant in a single*
10 *employer plan maintained by the*
11 *transferor employer, the transferee em-*
12 *ployer, within a reasonable period of*
13 *time, maintains a single employer*
14 *plan which includes the assets and li-*
15 *abilities attributable to the accrued*
16 *benefit of the eligible employee at the*
17 *time of separation from employment*
18 *with the transferor employer; and*

19 “(ii) *an eligible employee who con-*
20 *tinues to be employed at the facility by the*
21 *transferee employer shall not be taken into*
22 *account in computing a workforce reduction*
23 *if—*

24 “(I) *the eligible employee is not a*
25 *participant in a single employer plan*

1 *maintained by the transferor employer,*
 2 *or*

3 “(II) *in any other case, the trans-*
 4 *feree employer, within a reasonable pe-*
 5 *riod of time, maintains a single em-*
 6 *ployer plan which includes the assets*
 7 *and liabilities attributable to the ac-*
 8 *crued benefit of the eligible employee at*
 9 *the time of separation from employ-*
 10 *ment with the transferor employer.*

11 “(3) *EXEMPTION FOR PLANS WITH LIMITED*
 12 *UNDERFUNDING.—Paragraph (1) shall not apply*
 13 *with respect to a single employer plan if, for the plan*
 14 *year preceding the plan year in which the cessation*
 15 *occurred—*

16 “(A) *there were fewer than 100 participants*
 17 *with accrued benefits under the plan as of the*
 18 *valuation date of the plan for the plan year (as*
 19 *determined under section 303(g)(2)); or*

20 “(B) *the ratio of the market value of the as-*
 21 *sets of the plan to the funding target of the plan*
 22 *for the plan year was 90 percent or greater.*

23 “(4) *ELECTION TO MAKE ADDITIONAL CONTRIBU-*
 24 *TIONS TO SATISFY LIABILITY.—*

“(A) *IN GENERAL.*—An employer may elect to satisfy the employer’s liability with respect to a plan by reason of paragraph (1) by making additional contributions to the plan in the amount determined under subparagraph (B) for each plan year in the 7-plan-year period beginning with the plan year in which the cessation occurred. Any such additional contribution for a plan year shall be in addition to any minimum required contribution under section 303 for such plan year and shall be paid not later than the earlier of—

“(i) the due date for the minimum required contribution for such year under section 303(j); or

“(ii) in the case of the first such contribution, the date that is 1 year after the date on which the employer notifies the Corporation of the substantial cessation of operations or the date the Corporation determines a substantial cessation of operations has occurred, and in the case of subsequent contributions, the same date in each succeeding year.

“(B) *AMOUNT DETERMINED.*—

1 “(i) *IN GENERAL.*—*Except as provided*
 2 *in clause (iii), the amount determined*
 3 *under this subparagraph with respect to*
 4 *each plan year in the 7-plan-year period is*
 5 *the product of—*

6 “(I) $\frac{1}{7}$ *of the unfunded vested*
 7 *benefits determined under section*
 8 *4006(a)(3)(E) as of the valuation date*
 9 *of the plan (as determined under sec-*
 10 *tion 303(g)(2)) for the plan year pre-*
 11 *ceding the plan year in which the ces-*
 12 *sation occurred; and*

13 “(II) *the reduction fraction.*

14 “(ii) *REDUCTION FRACTION.*—*For pur-*
 15 *poses of clause (i), the reduction fraction of*
 16 *a single employer plan is equal to—*

17 “(I) *the number of participants*
 18 *with accrued benefits in the plan who*
 19 *were included in computing the work-*
 20 *force reduction under paragraph*
 21 *(2)(B) as a result of the cessation of*
 22 *operations at the facility; divided by*

23 “(II) *the number of eligible em-*
 24 *ployees of the employer who are par-*
 25 *ticipants with accrued benefits in the*

1 *plan, determined as of the same date*
2 *the determination under paragraph*
3 *(2)(A) is made.*

4 “(iii) *LIMITATION.—The additional*
5 *contribution under this subparagraph for*
6 *any plan year shall not exceed the excess, if*
7 *any, of—*

8 “(I) *25 percent of the difference*
9 *between the market value of the assets*
10 *of the plan and the funding target of*
11 *the plan for the preceding plan year;*
12 *over*

13 “(II) *the minimum required con-*
14 *tribution under section 303 for the*
15 *plan year.*

16 “(C) *PERMITTED CESSATION OF ANNUAL IN-*
17 *STALLMENTS WHEN PLAN BECOMES SUFFI-*
18 *CIENTLY FUNDED.—An employer’s obligation to*
19 *make additional contributions under this para-*
20 *graph shall not apply to—*

21 “(i) *the first plan year (beginning on*
22 *or after the first day of the plan year in*
23 *which the cessation occurs) for which the*
24 *ratio of the market value of the assets of the*

1 *plan to the funding target of the plan for*
 2 *the plan year is 90 percent or greater, or*

3 “(ii) *any plan year following such first*
 4 *plan year.*

5 “(D) *COORDINATION WITH FUNDING WAIV-*
 6 *ERS.—*

7 “(i) *IN GENERAL.—If the Secretary of*
 8 *the Treasury issues a funding waiver under*
 9 *section 302(c) with respect to the plan for*
 10 *a plan year in the 7-plan-year period under*
 11 *subparagraph (A), the additional contribu-*
 12 *tion with respect to such plan year shall be*
 13 *permanently waived.*

14 “(ii) *NOTICE.—An employer maintain-*
 15 *ing a plan with respect to which such a*
 16 *funding waiver has been issued or a request*
 17 *for such a funding waiver is pending shall*
 18 *provide notice to the Secretary of the Treas-*
 19 *ury, in such form and at such time as the*
 20 *Secretary of the Treasury shall provide, of*
 21 *a cessation of operations to which para-*
 22 *graph (1) applies.*

23 “(E) *ENFORCEMENT.—*

24 “(i) *NOTICE.—An employer making*
 25 *the election under this paragraph shall pro-*

1 *vide notice to the Corporation, in accord-*
2 *ance with rules prescribed by the Corpora-*
3 *tion, of—*

4 “(I) *such election, not later than*
5 *30 days after the earlier of the date the*
6 *employer notifies the Corporation of*
7 *the substantial cessation of operations*
8 *or the date the Corporation determines*
9 *a substantial cessation of operations*
10 *has occurred;*

11 “(II) *the payment of each addi-*
12 *tional contribution, not later than 10*
13 *days after such payment;*

14 “(III) *any failure to pay the ad-*
15 *ditional contribution in the full*
16 *amount for any year in the 7-plan-*
17 *year period, not later than 10 days*
18 *after the due date for such payment;*

19 “(IV) *the waiver under subpara-*
20 *graph (D)(i) of the obligation to make*
21 *an additional contribution for any*
22 *year, not later than 30 days after the*
23 *funding waiver described in such sub-*
24 *paragraph is granted; and*

1 “(V) *the cessation of any obliga-*
2 *tion to make additional contributions*
3 *under subparagraph (C), not later*
4 *than 10 days after the due date for*
5 *payment of the additional contribution*
6 *for the first plan year to which such*
7 *cessation applies.*

8 “(ii) *ACCELERATION OF LIABILITY TO*
9 *THE PLAN FOR FAILURE TO PAY.—If an em-*
10 *ployer fails to pay the additional contribu-*
11 *tion in the full amount for any year in the*
12 *7-plan-year period by the due date for such*
13 *payment, the employer shall, as of such*
14 *date, be liable to the plan in an amount*
15 *equal to the balance which remains unpaid*
16 *as of such date of the aggregate amount of*
17 *additional contributions required to be paid*
18 *by the employer during such 7-year-plan*
19 *period. The Corporation may waive or settle*
20 *the liability described in the preceding sen-*
21 *tence, at the discretion of the Corporation.*

22 “(iii) *CIVIL ACTION.—The Corporation*
23 *may bring a civil action in the district*
24 *courts of the United States in accordance*
25 *with section 4003(e) to compel an employer*

1 *making such election to pay the additional*
 2 *contributions required under this para-*
 3 *graph.*

4 “(5) *DEFINITIONS.*—*For purposes of this sub-*
 5 *section:*

6 “(A) *ELIGIBLE EMPLOYEE.*—*The term ‘eli-*
 7 *gible employee’ means an employee who is eligi-*
 8 *ble to participate in an employee pension benefit*
 9 *plan (as defined in section 3(2)) established and*
 10 *maintained by the employer.*

11 “(B) *FUNDING TARGET.*—*The term ‘funding*
 12 *target’ means, with respect to any plan year, the*
 13 *funding target as determined under section*
 14 *4006(a)(3)(E)(iii)(I) for purposes of determining*
 15 *the premium paid to the Corporation under sec-*
 16 *tion 4007 for the plan year.*

17 “(C) *MARKET VALUE.*—*The market value of*
 18 *the assets of a plan shall be determined in the*
 19 *same manner as for purposes of section*
 20 *4006(a)(3)(E).*

21 “(6) *SPECIAL RULES.*—

22 “(A) *CHANGE IN OPERATION OF CERTAIN*
 23 *FACILITIES AND PROPERTY.*—*For purposes of*
 24 *paragraphs (1) and (2), an employer shall not be*
 25 *treated as ceasing operations at a qualified lodg-*

ing facility (as defined in section 856(d)(9)(D) of the Internal Revenue Code of 1986) if such operations are continued by an eligible independent contractor (as defined in section 856(d)(9)(A) of such Code) pursuant to an agreement with the employer.

“(B) *AGGREGATION OF PRIOR SEPARATIONS.*—The workforce reduction under paragraph (2) with respect to any cessation of operations shall be determined by taking into account any separation from employment of any eligible employee at the facility (other than a separation which is not taken into account as workforce reduction by reason of subparagraph (C) or (D) of paragraph (2)) which—

“(i) is related to the permanent cessation of operations of the employer at the facility, and

“(ii) occurs during the 3-year period preceding such cessation.

“(C) *NO ADDITION TO PREFUNDING BALANCE.*—For purposes of section 303(f)(6)(B) and section 430(f)(6)(B) of the Internal Revenue Code of 1986, any additional contribution made under paragraph (4) shall be treated in the same

1 *manner as a contribution an employer is re-*
 2 *quired to make in order to avoid a benefit reduc-*
 3 *tion under paragraph (1), (2), or (4) of section*
 4 *206(g) or subsection (b), (c), or (e) of section 436*
 5 *of the Internal Revenue Code of 1986 for the*
 6 *plan year.”.*

7 *(b) EFFECTIVE DATE.—*

8 *(1) IN GENERAL.—The amendment made by this*
 9 *section shall apply to a cessation of operations or*
 10 *other event at a facility occurring on or after the date*
 11 *of enactment of this Act.*

12 *(2) TRANSITION RULE.—An employer that had a*
 13 *cessation of operations before the date of enactment of*
 14 *this Act (as determined under subsection 4062(e) of*
 15 *the Employee Retirement Income Security Act of*
 16 *1974 as in effect before the amendment made by this*
 17 *section), but did not enter into an arrangement with*
 18 *the Pension Benefit Guaranty Corporation to satisfy*
 19 *the requirements of such subsection (as so in effect)*
 20 *before such date of enactment, shall be permitted to*
 21 *make the election under section 4062(e)(4) of such Act*
 22 *(as in effect after the amendment made by this sec-*
 23 *tion) as if such cessation had occurred on such date*
 24 *of enactment. Such election shall be made not later*
 25 *than 30 days after such Corporation issues, on or*

1 *after such date of the enactment, a final administra-*
2 *tive determination that a substantial cessation of op-*
3 *erations has occurred.*

4 *(c) DIRECTION TO THE CORPORATION.—The Pension*
5 *Benefit Guaranty Corporation shall not take any enforce-*
6 *ment, administrative, or other action pursuant to section*
7 *4062(e) of the Employee Retirement Income Security Act*
8 *of 1974, or in connection with an agreement settling liabil-*
9 *ity arising under such section, that is inconsistent with the*
10 *amendment made by this section, without regard to whether*
11 *the action relates to a cessation or other event that occurs*
12 *before, on, or after the date of the enactment of this Act,*
13 *unless such action is in connection with a settlement agree-*
14 *ment that is in place before June 1, 2014. The Pension Ben-*
15 *efit Guaranty Corporation shall not initiate a new enforce-*
16 *ment action with respect to section 4062(e) of such Act that*
17 *is inconsistent with its enforcement policy in effect on June*
18 *1, 2014.*

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A BILL

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