P/OPINION 75-137

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May 13, 1975

Dear :

This is in response to your letter of March 19, 1975, in which you inquire whether it would constitute a breach of a fiduciary duty or a prohibited transaction under the Employee Retirement Income Security Act of 1974 (the Act) for the trustees of an employee benefit plan covered by the Act to permit a close relative of one of the trustees to work for the fund as a claims representative. Your letter points out that the remuneration paid to the claims representative is reasonable and the claims representative is reasonably qualified.

Under section 406(a)(1)(C) of the Act, it is a prohibited transaction for a plan fiduciary -- such as a trustee -- to cause the plan to engage in a transaction if he or she knows or should know that the transaction constitutes a direct or indirect furnishing of services between the plan and a party in interest. Under section 3(14)(F) of the Act, a relative (as defined in section 3(15) of the Act) of a fiduciary is a party in interest. Therefore, it is a prohibited transaction for a plan fiduciary to cause the plan to engage in a transaction which he or she knows to be a furnishing of services between the plan and a relative of a plan fiduciary. If the person is not a "relative" to the fiduciary within the meaning of section 3(15) of the Act, there is no prohibited transaction.

You should note, however, that if the situation described in your letter meets the requirements of section 414(c) (4) of the Act, section 406 may not apply until June 30, 1977. A copy of ERISA IB 75-1 issued by the Department of Labor on December 31, 1974, to clarify the scope of section 414(c)(4) is enclosed. Additionally, if a plan fiduciary believes that the transaction described in your letter meets the criteria set forth for administrative exemption in section 408(a) of the Act, the fiduciary may apply for such an exemption.

Other fiduciary duties are set forth in section 404 of the Act. In particular, section 404(a)(B) requires that a fiduciary discharge his or her duties with respect to a plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aim. Whether the arrangement proposed in your letter would violate this standard is a question which can only be determined in the light of all the surrounding facts and circumstances.

It should be further noted that, if the plan is a qualified plan under section 401 of the Internal Revenue Code, the plan would be subject to analogous prohibited transaction provisions contained in section 4975(c)(1) of the Internal Revenue Code.

Sincerely,