

3(1)
104(a)(3)
408(c)2
410(b) ✓
414(c)

March 17, 1976

Dear:

This is in reply to your letter of January 28, 1976, to concerning the application of various provisions of the Employee Retirement Income Security Act of 1974 (the Act) to certain questions involving training and apprenticeship plans.

Your letter first inquires whether a plan may compensate a person who is a trustee or fiduciary with respect to the plan for the time spent by such person in attending an apprenticeship meeting in a distant city. Your letter indicates that such person is not paid his normal hourly wage by his employer when attending such meeting and, as a result of attending the meeting, he will miss work and suffer a diminution in pay.

Section 408(c)(2) of the Act provides, generally, that a fiduciary may receive reasonable compensation for services rendered, or reimbursement for expenses properly and actually incurred, in the performance of his duties with a plan. Section 408(c)(2) further provides, however, that a fiduciary who already receives full-time pay from an employer or association of employers, whose employees are covered by the plan, or from an employee organization whose members are participants in the plan, may not receive compensation for services rendered to the plan (although he may receive reimbursement for expenses properly and actually incurred in connection with his plan duties).

In the situation described in your first question, the trustee or fiduciary is paid by his employer (who we assume is an employer whose employees are participants in the plan) on an hourly basis and loses wages for time spent in connection with his plan duties. Thus, he would not be deemed to be receiving full-time pay from his employer during those periods of time that he is performing his duties as plan trustee or fiduciary, and he may, therefore, receive compensation from the plan for services rendered in the performance of his duties with the plan.

The second question raised in your letter relates to a situation similar to that described above, except that the plan trustee or fiduciary is a management representative who is required to be absent from his business for four hours in order to attend the apprenticeship meeting. You inquire whether this trustee may also be compensated by the plan for services rendered in the performance of his duties with the plan. As noted above, section 408(c)(2) of the Act does not permit a plan trustee or fiduciary to receive compensation from the plan if he is already receiving full-time pay from, among others, an employer whose employees are participants in the plan. From your letter, it appears that the management representative/trustee is the owner of a business which is an employer whose employees are participants in the plan. In such cases, it is unlikely that the trustee's regular full-time pay or compensation will be diminished by his time spent on plan duties. Accordingly, under section 408(c)(2) he may not ordinarily receive compensation from the plan for services rendered to the plan as trustee or fiduciary.

This provision does not however, preclude reimbursement for expenses properly and actually incurred by such person in the performance of his duties with the plan. In addition, section 414(c)(4) of the Act may provide a transitional exemption which would permit the payment of compensation to a person serving as a trustee or fiduciary for a plan. On December 31, 1974, the Department issued ERISA IB 75-1, (enclosed herewith), which clarifies the scope of section 414(c)(4). As indicated in ERISA IB 75-1, a plan trustee or fiduciary serving as such on June 30, 1974, whose services meet the requirements of section 414(c)(4) of the Act,

may continue to receive reasonable compensation from the plan for his services as plan trustee or fiduciary until June 30, 1977, notwithstanding the limitations of section 408(c)(2).

The third question raised in your letter is whether apprenticeship and training plans will be exempt from all of the provisions of the Act. Section 3(1) of the Act includes within the definition of "employee welfare benefit plan" any apprenticeship or other training programs. Pursuant to various provisions of the Act, employee welfare benefit plans are subject to Parts 1 and 4 of Title I of the Act relating to reporting and disclosure and fiduciary responsibilities; however, such plans are not subject to Parts 2 and 3 relating to participation, vesting and funding. In addition, pursuant to regulations under section 104(a)(3) of the Act, issued by the Department on August 15, 1975 (29 CFR §2520.104-22, 40 FR 34535), a limited exemption from the reporting and disclosure requirements of the Act has been provided for employee welfare benefit plans which provide solely apprenticeship and training benefits. I am enclosing a copy of this regulation for your information.

Finally, your letter requests advice regarding the purchase of fiduciary insurance, and, specifically, whether such insurance should contain a "discrimination clause". As you know, section 410(b) of the Act allows, but does not require, plans to purchase insurance for its fiduciaries, provided that such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by the fiduciary. However, the decision to purchase such insurance can only be made by the appropriate plan fiduciaries consistent with their responsibilities as fiduciaries set forth in section 404(a)(1) of the Act. Accordingly, the question of whether a plan should purchase fiduciary insurance, or what form it should take, is not a matter on which the Department is able to provide advice.

Sincerely,