

October 1, 1976

Dear :

In your letter of March 24, 1975 to the Department of Labor, you requested advice whether the [Union] Welfare and Insurance Fund (the Fund) may utilize the cash on hand when the employers discontinue contributing to the Fund to purchase dental benefits for members until such cash is depleted. I understand that of this office has discussed your questions with you by telephone.

You explain that for a number of years the Fund collected moneys from various employers and provided benefits for employees within the bargaining unit either through self insurance or by purchasing benefits from insuring companies. You advise that the union has negotiated for the direct purchase of benefits by the employers, that within a year no new moneys will be collected by the Fund, and that the trustees intend to purchase dental benefits for members with the balance of the Fund's assets (about \$90,000 at that time).

Without information regarding the distribution provisions of the plan under which the Fund is maintained and the status of the participants' accrued benefits under the plan at the time dental benefits are to be purchased, we cannot state specifically whether using the remaining assets of the Fund to provide dental benefits would satisfy the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). However, we believe the following general information may be helpful to you.

Section 402(a)(1) and (b)(3) & (4) requires every employee benefit plan to be established and maintained pursuant to a written instrument, to provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan, and to specify the basis on which payments are made to and from the plan. Section 403(d)(2) provides that the assets of a welfare plan which terminated shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

Although no regulations have been issued under section 403(d) (2), Conference Report No. 93-1280, 93rd Congress, 2d Session, states on page 303 that it is intended that the Secretary of Labor would allow the terms of the plan (or in the case of a plan subject to collective bargaining, the collective bargaining agreement) to govern such distribution or transfer of assets except to the extent that implementation of the terms of the plan or agreement would unduly impair the accrued benefits of the plan participants or would not be in the best interests of the plan participants. The Conference Report also states that where such distribution or transfer is incidental to the merger of one multiemployer plan with another, it is expected that the Secretary of Labor would disallow the distribution or transfer only where the merger would reasonably be expected to jeopardize the ability of the plan to meet its obligations or would otherwise not be in the best interests of the plan participants.

If the plan or collective bargaining agreement in question does not specifically provide for purchasing dental benefits for participants, such purchase would violate the above requirements of ERISA. However, such provisions may be added by amending the plan or collective bargaining agreement, in accordance with the requirements of section 402(b) (3) and (4). In order to meet the requirements of section 403 (d) (2), the amendment should also provide that dental benefits will be purchased for participants when employer contributions are discontinued only if such purchase would not unduly impair the accrued benefits of the plan participants and only if such purchase is in the best interests of plan participants. Of course, in order to meet the requirements of section 403(d) (2), the actual purchase of dental benefits must then follow the provisions of the amended plan and in actual operation (as well as in the form of the amendment) the purchase must not unduly impair the accrued benefits of the plan participants and must be in their best interests.

We sincerely regret the delay in replying to your letter. If we may be of any further assistance, please contact us.

Sincerely,