

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216



SEP 20 1977

OPINION 77-73 A

Mr. Scott L. Grzybowski
210 Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

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301 (a) (7)

Dear Mr. Grzybowski:

This is in reply to your letter concerning the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence has resulted in a delay in responding.

You state that the M.R.&R. Trucking Company (the Company) is considering the adoption of two bonus programs for the benefit of its employees. One Bonus Program (Bonus Plan) would allow the payment of an annual cash bonus to all eligible employees. The amount of the bonus award would depend on performance, earnings, and total years of service. Under the Supplemental Bonus Plan (Supplemental Plan), an individual participant would be entitled to a supplemental bonus determined by applying the ratio of (1) the cash deposits he or she makes to an individual retirement account (IRA) between January 1, and a cutoff date of the following calendar year to, (2) the total of such deposits made by all participants, times (3) the supplemental bonus declared by the Company, but limited to the lesser of total deposits of cash to the employee's IRA; seven and one-half per cent of paid compensation; or \$750.00. You question whether either the Bonus Plan or the Supplemental Plan would be deemed a pension plan within the meaning of ERISA. You also question whether an employer may make checks payable to financial institutions in the amount of an employee's bonus without violating section 2510.3-2(d)(i) of regulations issued by the Department on August 15, 1975, and whether the employer may negotiate financial institution fees related to IRAs without violating section 2510.3-2(d)(iii).

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The Department of Labor has adopted an advisory opinion procedure (ERISA Procedure 76-1, copy enclosed) which describes the general procedures for issuing information letters and advisory opinions under ERISA. Pursuant to ERISA Procedure 76-1, this letter is to have the effect of an advisory opinion.

Section 3(2) of ERISA defines the term "pension plan" to include any program maintained by an employer to the extent that it results in retirement income or a deferral of income to periods extending to the termination of covered employment or beyond. Section 4(a) indicates that such plans are subject to the requirements of Title I of ERISA.

Section 2510.3-2 of regulations issued by the Department on August 15, 1975 clarifies the definition of the term "pension plan" for purposes of Title I and identifies certain programs which do not constitute plans within the meaning of section 3(2) of ERISA. Subsection (c) of that section indicates that the term "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed unless such payments are systematically deferred to the termination of covered employment or beyond or so as to provide retirement income to employees. Therefore, the Bonus Plan which awards employees cash payments for work performed would not be deemed a pension plan within the meaning of ERISA.

Section 2510.3-2(d) of these regulations indicates that the term pension plan will not include certain IRAs meeting the qualifications specified therein. Among these qualifications are the requirements that the sole involvement of the employer is without endorsement to permit the sponsor to publicize the program to employees or members, and to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor. The employer may not make any contributions to the IRA. In addition, participation must be completely voluntary for all employees.

The Supplemental Plan conditions payment of bonuses on the establishment and maintenance of an IRA by the employee and provides for payments in amounts limited to the lesser of the total deposits of cash to the employee's IRA, 7½ per cent of paid compensation, or \$750. These payments in effect are refunds by the employer to the employee of amounts up to the whole of the amounts contributed by the employee to the IRA and thus constitute contributions made by the employer to the

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IRA. The fact that the payments are made after any deposits to the IRA and that they are paid to the employee rather than directly into the IRA does not change the nature of these payments as employer contributions. As a result, the Supplemental Plan would not satisfy at least one of the several necessary requirements of section 2510.3-2(d) in order to be excluded from Title I coverage as a pension plan.

As indicated above, section 4(a) of ERISA provides that pension plans are subject to the requirements of Title I of ERISA. Sections 201(b) and 301(a)(7) exempt IRAs from coverage under Parts 2 and 3 of Title I which contain the participation, vesting, and funding provisions. Therefore, the Supplemental Plan would be subject to Parts 1, 4, and 5 of Title I which contain the reporting and disclosure, fiduciary responsibility and enforcement provisions of ERISA. However, if the Supplemental Bonus Plan is a plan which permits the participant or beneficiary to exercise control over assets in his account within the meaning of section 404(c) of ERISA, it would have available to it the provisions of section 404(c), which limit the applicability of the fiduciary responsibility provisions of Part 4.

In response to your additional questions, the Company may make payments of cash bonuses in the form of checks made payable to designated financial institutions at the option of a participant and pursuant to his written instructions without violating section 2510.3-2(d)(i). As long as a participant may receive the bonus in cash, this practice would merely constitute a permissible method of forwarding employee contributions to an IRA.

The Company may not, however, negotiate initial and annual fees charged participants by financial institutions without violating section 2510.3-2(d)(iii). Such action would make the employer's involvement in the program more extensive than that permitted under section 2510.3-2(d)(iii).

Sincerely,

Fred W. Stuckwisch
 Director
 Office of Regulatory
 Standards and Exceptions

Enclosure