

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



SEP 21 1977

OPINION 77-75 A

3(6)

John K. Wright, Esquire
Protective Life Insurance Co.
Post Office Box 2606
Birmingham, Alabama 35202

Dear Mr. Wright:

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

In your letters you state that your firm maintains the Protective Life Agent's Pension Plan solely for full time insurance agents, some of whom represent Protective Life exclusively. The Pension Plan has never been filed or qualified with the Internal Revenue Service (IRS). Your firm withholds F.I.C.A. taxes for all the agents per instructions from IRS. It is your view that the insurance agents are independent contractors outside the definition of "employee" for purposes of ERISA, and hence the Pension Plan is a "plan without employees" and not subject to the provisions of ERISA. You have asked our office to make a determination as to whether or not your view with respect to this matter is correct.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). Accordingly, this letter is issued subject to the provisions of such procedures, including section 10 thereof, relating to the effect of advisory opinions.

Section 3(2) of ERISA defines in relevant part an "employee pension benefit plan as any plan, fund or program established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program provides retirement income to employees . . ." (emphasis added).

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Section 3(6) of ERISA defines the term "employee" to mean "any individual employed by an employer."

It is our view that the term "employee" as set forth in section 3(6) of ERISA should be interpreted not according to technical concepts derived from the common law of agency, but in the light of the protective purposes of ERISA. This rationale has already been reflected by the Department of Labor in regulations issued on August 15, 1975. Section 2510.3-3(b) of these regulations indicates that a plan under which no employees are participants covered under the plan is not an employee pension benefit plan for purposes of Title I of ERISA. Section 2510.3-3(c) provides in relevant part that for purposes of Section 2510.3-3 (which clarifies the definition of employee benefit plan for purposes of Title I) a spouse of a sole proprietor of a trade or business, or of a partner in a partnership, is not deemed to be an employee of such trade, business, or partnership. Under the common-law rule such a spouse would be treated as an employee of the trade, business, or partnership. Therefore, if section 3(6) were interpreted as embodying the common-law rule, a plan maintained in connection with a sole proprietorship, a corporation wholly owned by an individual, or a partnership covering at least one such spouse, would be deemed to be covered under Title I of ERISA. However, in the light of the protective purposes of ERISA, the reason given in the preamble to section 2510.3-3 for the exclusion from Title I coverage of a plan covering only individuals described in section 2510.3-3(c) is the absence of a likelihood that abuses will occur in connection with such a plan.

It is our interpretation that insurance agents whose business activity is predominately with one life insurance company are "employees" of that life insurance company within the definition set forth in section 3(6) of ERISA. Unlike spouses of a proprietor of a trade or business, or of a partner in a partnership, the absence of this likelihood for abuse in connection with a plan covering insurance agents is not present. Where there exists a potential for abuse under an employee benefit plan, the Department intends to interpret the provisions of ERISA liberally in favor of plan participants and their beneficiaries, in order to protect their rights and benefits under the plan. For this reason, the definition of "employee" as set forth in section 3(6) of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be "employees." Congress has expressed its intent for broad interpretation of the coverage of ERISA to protect the interests of participants and their beneficiaries. Evidence

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of this intent is reflected by section 4(a) of ERISA which extends the jurisdiction of Title I provisions to participants of all employee benefit plans except those handfults mentioned in section 4(b) (and those plans exempted from certain parts of Title I pursuant to sections 201, 301, and 401 of ERISA).

As you are probably aware, our view that certain insurance agents are "employees" has been expressed by Congress with respect to other Federal legislation. Specifically, section 7701(a)(20) of the Internal Revenue Code of 1954 (the Code), for purposes of applying the provisions of subtitle A of the Code with respect to contributions to or under a stock-bonus, pension, profit-sharing, or annuity plan, defines the term "employee" to include full-time life insurance salesmen who are considered employees for purposes of Chapter 21 of the Code (relating to FICA taxes). The term "employee," for purposes of FICA taxes in Chapter 21 of the Code, is defined in section 3121(d) of the Code to include full-time life insurance salesmen who meet specific test criteria for being considered "employees."

In your June 3, 1976 letter, you state that the IRS required your firm to withhold FICA taxes for the insurance agents. This appears to indicate that the IRS has deemed these insurance agents to be "employees" of your firm for FICA tax purposes. Otherwise, the insurance agents would have been subject to FICA taxes as "self-employed" individuals.

The Department is not obligated to define the term "employee" for purposes of ERISA as that term has been defined in other legislation. However, where a potential for abuse exists, it is the Department's opinion that the term "employee" for purposes of the newly enacted ERISA law should be interpreted at least as liberal as the term had been interpreted by other established legislation. Thus, your insurance agents that are considered employees for FICA tax purposes, even though they are not common-law employees, are also deemed to be "employees" under the protection from abuse of their pension rights concept under ERISA.

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In view of the foregoing reasons, it is the Department's determination that the Protective Life Agent's Pension Plan is a "plan with employees," and hence, is an employee pension benefit plan subject to all applicable provisions of Title I of ERISA.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulator
Standards and Exceptions

Enclosures

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