

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



Nov 7 1977

Mr. James F. Precht
International Vice President
International Brotherhood of Boilermakers,
Iron Ship Builders, Blacksmiths, Forgers & Helpers
P. O. Box 7115
3625A Atlantic Avenue
Long Beach, California 90807

OPINION 77-84 A

412

Dear Mr. Precht:

This is in response to your inquiry regarding the insurance requirements for a collectively bargained multi-state vacation plan (Plan) of the Boilermakers-Blacksmiths under the Employee Retirement Income Security Act of 1974 (ERISA).

You state that the collective bargaining agreement under which the Plan operates, provides that contributions are based on . . . "fifty cents (50c) per hour for all hours worked by all employees covered by this agreement. . . . The monies specified above are delayed hourly wages with taxes withheld at time of earning." You indicate that monies are transmitted directly to the Wells Fargo Bank (Bank) at which time they are broken down and credited to each individual. These passbook accounts are insured and are currently receiving 5% interest. You further state that when the Plan was initially established the passbook interest was withheld for the first two years and these monies were set aside for the administrative, trustee and legal expenses. Additional monies are created for the operating expenses from the dead accounts of over five years. You further indicate that the Board of Trustees meets not less than once a year at which time they instruct the Bank to disburse monies from the individual passbook accounts, and that last year distributions from these accounts were approximately \$2,600,000. It is your view that since no one except the Bank handled the membership monies, only a nominal amount of insurance is necessary.

Such a vacation plan arrangement falls within the definition of an employee welfare benefit plan in section 3(1) of ERISA, and therefore, it is subject to all applicable provisions of Title I including the fiduciary responsibility provisions of Part 4.

With regard to your concern about the types of insurance which could be needed by the Plan, the bonding requirement of section 412 will be discussed below, and no other form of insurance is required under the provisions of ERISA. However, your attention is directed to section 410(b) which provides that

- 2 -

plans may purchase fiduciary insurance to protect against any losses to plan funds by the acts of that plan's fiduciaries. This section also permits plan fiduciaries to purchase insurance to protect them from any liability they may incur.

In your initial letter to this Office you indicated an intention to assume the role of administrator in addition to serving as a trustee of the vacation fund. Subsequent discussions and a letter from Mr. Hine indicate that it is now your intention to designate your secretary as the plan administrator.

As a general matter, a trustee of an employee benefit plan is a party in interest with respect to the plan by reason of being a fiduciary with respect to the plan (section 3(14)(A) of ERISA) and by reason of being a person providing services to the plan (section 3(14)(B) of ERISA). Section 3(14)(H) includes within the definition of the term "party in interest" an employee of a person who provides services to a plan. Accordingly, an employee of a plan trustee would be a party in interest with respect to the plan.

Section 406(a)(1)(C) of ERISA generally prohibits the provision of services to a plan by a party in interest. In the situation described in your letter, the secretary of a plan trustee is a party in interest with respect to the Plan under section 3(14)(H) of ERISA and would be prohibited from providing services to the Plan (e.g., serving as plan administrator) under section 406(a)(1)(C).

However, section 408(b)(2) of ERISA provides an exemption from the prohibited transaction provisions for the provision of services to plans by parties in interest if certain conditions are met. The Department of Labor has issued final regulations interpreting section 408(b)(2) (29 CFR 2550.408b-2, 42 FR 32389, June 24, 1977). Under the regulations, a party in interest is permitted to provide services to a plan if such services are necessary for the establishment or operation of the plan, such services are furnished under a contract or arrangement which is reasonable, and no more than reasonable compensation is paid for the services. A copy of the regulations is enclosed for your convenience.

In addition to the above, the appointment of your secretary as plan administrator also raises questions with respect to possible violations of section 406(b)(1) of ERISA, which prohibits plan fiduciaries (e.g., trustees) from dealing with plan assets in their own interest or for their own accounts. For example, if the compensation paid by the Plan for administrative services in fact serves to compensate your secretary for time spent in the performance of her secretarial duties for you, a violation of section 406(b)(1) might occur.

- 3 -

With respect to the bonding requirements of section 412 of ERISA, the Secretary has issued a temporary regulation (29 CFR 2550.412-1) which, pending issuance of a permanent bonding regulation implementing section 412, incorporates by reference most of the bonding regulations issued under the Welfare and Pension Plans Disclosure Act (WPPDA) and makes them applicable to plan officials under ERISA.

Pending the issuance of permanent regulations with respect to section 412, a plan official is not required to be bonded unless he handles funds or other property of an employee benefit plan. "Handling" occurs whenever the duties or activities of a plan official are such that there is a risk that such funds or other property could be lost in the event of fraud or dishonesty on the part of such person, acting either alone or in collusion with others. The authorization of disbursements may constitute "handling", depending upon the facts in a particular case. The factors which are considered include the closeness and continuity of supervision, who is in fact charged with or actually exercises final responsibility for determining whether specific disbursements or benefit claims are bona fide, regular and made in accordance with the applicable trust instrument or other documents and who has the final responsibility for determining the propriety of any specific expenditure. (See section 464.7 of the regulations under the WPPDA.)

Section 2.04 of the Agreement and Declaration of Trust establishing the Eight Western States Field Construction Boilermakers-Blacksmiths Vacation Trust (Trust) provides:

The entire right, title and interest to the Fund is vested in the Board of Trustees, subject to the right of the Employees to receive Vacation Benefits pursuant to Section 12 herein.

Section 6.01 of the Agreement and Declaration of Trust provides, in pertinent part, that the Board of Trustees shall have the power to:

(b) Verify claims for the payment of . . . Vacation Benefits and determine whether the conditions for the payment of Benefits . . . have been fulfilled. . . .

(d) Decide all questions within its sole discretion relating to eligibility, amount and kind of benefits.

Section 3.05 of the Administrative Agreement between the Trust and the Bank provides, in part, as follows:

- 4 -

Bank shall open a master savings account in the name of the Eight Western States Field Construction Boilermakers-Blacksmiths Vacation Trust. Under this account Bank will open separate savings accounts or an equivalent procedure for each Employee on whose behalf Contractor Contributions are received. Upon receipt of the Contractor Contributions, each Employee will be credited with the amount of said Contractor Contributions made on his behalf.

Section 3.08 of the Administrative Agreement provides, in part:

Bank shall establish an account entitled ". . . Administration Account." Pursuant to Order of the Board, Bank shall disburse such amounts as may be required by the Board for administration of the Vacation Trust.

Section 3.09 of the Administrative Agreement provides, in part:

Shortly before May 1, . . ., Bank shall receive written instructions from the Board that each Employee upon whose behalf Contractor Contributions have been received and for whom there exists an individual savings account is to be paid the balance in his account as of December 31, . . . Upon receipt of said instructions, Bank will prepare a cashier's check for each Employee and mail same to the Employee's address which has been supplied to Bank for this purpose. The next year, on May 1, . . ., Bank will receive instructions to prepare and mail to each Employee a cashier's check in the amount credited to said Employee's account as of December 31, . . .

In view of the Board of Trustees' responsibility with respect to disbursements by the Bank, if there is a risk of loss in the event of fraud or dishonesty as a result of the Board's exercise of that responsibility, the Board would be handling plan assets and bonding would be required.

With respect to the Administration Account, inasmuch as the Board of Trustees, pursuant to paragraph 3.08 of the Administrative Agreement, can order the Bank to disburse funds from that account, the Board would be handling the funds in the account and bonding would be required.

- 5 -

The amount of bond required is ten percent of the amount of funds handled during the prior reporting year of the plan. The bond shall be in at least the amount of \$1,000 but is not required to exceed \$500,000. (See Subpart C of the regulations under the WPPDA.)

This letter, with regard to ERISA section 412, constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exception

Enclosures