

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



APR 27 1978

OPINION 78-11 A

Mr. William F. Drew, Jr.
Kennedy, Covington, Lobdell and Hickman
3300 NCNB Plaza
Charlotte, North Carolina 28280

3(1)
3(2)

Dear Mr. Drew:

This is in reply to your letter requesting an advisory opinion concerning the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Employee Stock Purchase Plan of Lance, Inc. (the Plan). Specifically, you request an opinion regarding whether the Plan is an employee benefit plan within the meaning of ERISA section 3(3) and thereby covered under title I of ERISA.

You represent that the Plan is a nonqualified employee stock purchase plan offered to employees of Lance, Inc. Participation in the Plan is voluntary, providing for purchases by full-time, regular employees of common stock of the company at market price through North Carolina National Bank as agent. Purchases are funded only through employee contributions made through payroll deductions, except that certain brokerage fees and administrative expenses associated with the operation of the Plan are paid by Lance, Inc.

Stock purchased is ordinarily credited to the participant's account along with cash dividends and stock dividends with shares being held by the agent, or participants may request that stock certificates be issued directly to them. Participating employees may withdraw from the Plan at any time and receive either certificates for full shares of common stock purchased or the net proceeds from the sale of such shares, the value of fractional shares in the participant's account, and uninvested funds in the account. Notice of the retirement, death, or termination of employment of an employee constitutes notice of withdrawal from the Plan. Participants who withdraw from the Plan are ineligible to rejoin for a period of 24 weeks.

An "employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

An "employee welfare benefit plan" is defined in section 3(1) of ERISA as "... any plan, fund, or program, which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Because the Plan is maintained solely to provide employees a means of purchasing shares of stock in the company and providing means to purchase shares of stock is not a benefit described in ERISA section 3(1), the Plan is not an employee welfare benefit plan within the meaning of ERISA.

An "employee pension benefit plan" is defined in section 3(2) of ERISA as "... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express term or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

Because the Plan provides that a participant may withdraw from the Plan at any time and receive the contents of his or her account or the value thereof, and does not provide

any impediment to rejoining the plan within a reasonable period of time, the plan does not provide retirement income nor does it result in deferral of income as described in ERISA section 3(2). Thus, the Plan is not an employee pension benefit plan within the meaning of ERISA.

Because the plan is neither an employee welfare benefit plan nor an employee pension benefit plan, the plan does not constitute an employee benefit plan within the meaning of section 3(3) of ERISA.

This letter constitutes an advisory opinion as defined in ERISA Procedure 76-1, copy enclosed. Accordingly, this letter is issued subject to the provisions of such procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions

Enclosure