

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



JUN 27 1978

Mr. Theron E. Fry
Liddell, Sapp, Zivley & Brown
500 Gulf Building
Houston, Texas 77002

OPINION 78-13 A

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Dear Mr. Fry:

This is in response to your letter of March 17, 1978, regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the proposed supplemental payments of the Houston Chronicle Publishing Company (the Chronicle) with respect to certain retired employees would constitute an employee benefit plan within the meaning of ERISA.

You advise that the Chronicle maintains a defined benefit pension plan for its employees, and that it proposes to grant supplemental payments to certain employees (or their surviving spouses) who terminated service prior to January 1, 1976, and are receiving (or whose surviving spouses are receiving) benefits under the pension plan. You state that the Chronicle proposes to pay these supplemental payments from its general assets. The payments will be authorized only for the year 1978 according to the proposed resolution of the Board of Directors of the Chronicle which you submitted with your letter. You also submitted a proposed letter, to be sent to each retiree who will be given a payment, which indicates that the payment is for the year 1978, is voluntary and gratuitous, and does not constitute a pension plan. The letter also notes the Chronicle's discretion to make such payments in future years.

In regulation 29 CFR §2510.3-2(e), issued on August 15, 1975, the Department of Labor (the Department) indicated that certain types of arrangements would not be regarded as employee pension benefit plans within the meaning of title I of ERISA. Specifically, that regulation provides that for purposes of title I of ERISA the terms "employee pension benefit plan" and "pension plan" shall not include voluntary, gratuitous payments by an employer to former employees who separated from the service of the employer if:

- (1) payments are made out of the general assets of the employer,
- (2) former employees separated from the service of the employer prior to September 2, 1974,
- (3) payments made to such employees commenced prior to September 2, 1974, and
- (4) each former employee receiving such payments is notified annually that the payments are gratuitous and do not constitute a pension plan.

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The Department has indicated that supplemental payments to retirees which do not fully conform with the regulation may nevertheless not be part of an employee pension benefit plan. Subsequent to the issuance of this regulation, the Department expressed the view, for example, that payments outside a pension plan for persons who retire prior to the end of 1976 do not constitute an employee pension benefit plan so long as certain criteria are met. See news release USDL 76-707, April 26, 1976.

In view of these considerations, and based on your representations, the draft letter to retirees, and the draft resolution of the Board of Directors of the Chronicle, it is the position of the Department of Labor that the proposed supplemental payments by the Chronicle do not constitute an employee pension benefit plan within the meaning of ERISA.

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

Sincerely,

Fred W. Stuckwisch
 Director
 Office of Regulatory Standards
 and Exceptions