

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



JAN 30 1979

Mr. Robert W. Gilbert
Suite 305
400 South Beverly Drive
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OPINION 79-8 A

403(c)(1)
3(7)
3(6)

Mr. Joseph M. McLaughlin
McLaughlin and Irvin
Suite 300
800 West Sixth Street
Los Angeles, California 90017

Gentlemen:

This is in reply to your letter of November 9, 1978, requesting an advisory opinion concerning the eligibility of Mrs. Joan Adams for participation in the Southern California Retail Clerk Unions and Food Employers Council Joint Pension Trust Fund (the Fund). Specifically, you ask whether Mrs. Adams must be automatically precluded from participating in the Fund by section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Fund is a multiemployer fund jointly managed by employer and employee representatives and is subject to title I of ERISA. You also represent that Mrs. Adams, who participated in the Fund from September, 1971, until May, 1977, is the wife of the owner of a 12½ percent partnership interest in Vicente Foods, where Mrs. Adams is employed and which contributes to the Fund on her behalf. You assert that Mr. Adams owns his partnership interest as separate property, not as community property.

The Department of Labor is of the opinion that Mrs. Adams is not precluded from participating in the Fund by section 403(c)(1). Section 403(c)(1) of ERISA provides generally that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The term "participant," as it is used in ERISA section 403(c)(1), is defined in ERISA section 3(7) to include "any employee . . . of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." ERISA section 3(6) defines the term "employee" as "any individual employed by an employer." Regulation section 2510.3-3, which

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interprets section 3(3) of ERISA for purposes of title I thereof, provides, in part, that "[f]or purposes of this [regulation,] . . . a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." However, that regulation is not intended to construe "employee" as that term is used in section 3(6) of ERISA. Rather, the regulation defines "employee" only for the limited purpose of determining whether a plan has any employees, in connection with determining whether a plan exists within the meaning of title I of ERISA. Since the Fund appears to cover a number of employees and its status as a plan under title I does not appear to be in doubt, the definition of "employee" in regulation section 2510.3-3 has no relevance to the question of Mrs. Adams' status under the plan. Thus, Mrs. Adams, the wife of a partner in the firm employing her, is a participant in the Fund for purposes of section 403(c)(1) if she is employed by a contributing employer and is otherwise eligible to participate under the terms of the Fund as properly administered according to all applicable laws and plan documents.

This letter is not intended to interpret or express any opinion concerning the Labor Management Relations Act to which you referred in your inquiry or concerning any other statute (other than ERISA title I and regulations pursuant thereto).

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,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

cc: Mr. Joseph M. McLaughlin