

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



JAN 31 1979

Mr. Robert M. Steed
Vice President-Personnel Director
Time Incorporated
Time & Life Building
Rockefeller Center
New York, N.Y. 10020

OPINION 79-9 A

3(2)

Dear Mr. Steed:

This is in response to your letter of September 27, 1978, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an opinion that the Time, Incorporated Optional Retirement Program is not an employee pension benefit plan within the meaning of section 3(2) of ERISA.

You represent that Time, Incorporated (Time) has an Optional Retirement Program (Program) which it has maintained in some form since July 1, 1965, and which it is currently in the process of changing. Time also maintains a qualified profit-sharing plan and a qualified pension plan. The current version of the Program permits all employees, regardless of position, who are 57, 58, or 59 years of age with 20 years of continuous service, or who are 60 or 62 years of age with 10 years of continuous service, to elect to leave Time and receive 30% of their final salary, plus 30% of the average of the last three years' bonuses, each year from the date of their termination until they reach age 65. At age 65 full benefits under the pension plan become payable without actuarial reduction, but no contributions to that plan or to the profit-sharing plan are made during the period of the employee's participation in the Program. Payments under the Program are made monthly, and life insurance and medical benefits continue during the period.

You indicate that Time is changing the Program. The revised Program will provide that any employee with at least 20 years of service, at least the last five years of which are continuous, can elect to leave Time and receive payments under the revised Program commencing at age 55, 56, 57, 58 or 59. Money will be set aside each year to make these payments. Payments under the revised Program will be at the same 30% level as under the current Program, and life insurance and medical coverage continue as before. The payments will continue until the individual reaches age 60, when he will become eligible to receive full benefits, without actuarial reduction, from the pension plan. The pension plan is being amended to provide for receipt of benefits at this earlier age.

In connection with your request that the Department of Labor (Department) conclude that the Program is not an employee pension benefit plan within the meaning of section 3(2) of ERISA, you suggest that the Program is either a severance pay plan within the meaning of paragraph (b) of the Department's regulation 29 CFR 2510.3-2, or that it is a supplemental payment program within the meaning of paragraph (e) of that regulation. However, the Program, both in its current form and with the revisions you describe, fails to meet the conditions of either paragraph (b) or paragraph (e) of the regulation, and the Department is unable to issue the opinion you request.

Section 3(2) of ERISA defines an employee pension benefit plan as:

any plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms 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.

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The Department's regulation 29 CFR §2510.3-2 identifies certain arrangements which do not constitute employee pension benefit plans for purpose of Title I of ERISA. Section 2510.3-2(b) of that regulation deals with severance pay plans, and section 2510.3-2(e) deals with supplemental payments to certain retirees.

Section 2510.3-2(b) provides, in part, that:

- (1) [T]he terms "employee pension benefit plan" and "pension plan" shall not include a plan, fund or program under which payments are made on account of an employee's separation from the service of an employer other than on account of retirement if -
 - (i) All such payments made to any participant are completed within one year after the participant's separation from service, and
 - (ii) The total of all payments made within such year to any participant cannot exceed the participant's annual compensation level, as determined under paragraph (b) (2) of this section.

It is apparent from the information you have supplied that payments under the Program are not made on account of separation "other than on account of retirement." Furthermore, neither of the conditions numbered (i) and (ii) above would be met by the Program. Accordingly, the Program does not appear to constitute a severance pay plan within the meaning of the regulation. You note in your letter that the Department has proposed to amend the regulation 1/ to provide, among other things, that payments under a severance pay plan may continue for up to two years following the termination of employment, and may equal up to twice the employee's annual rate of compensation. However, even if this amendment is adopted, the Program will not meet the conditions of the regulation inasmuch as the payments will not result from separation other than on account of retirement, and they might continue for more than two years.

1/ 43 FR 10579, March 14, 1978.

With respect to your suggestion that the Program might constitute a supplemental payment program, regulation section 2510.3-2(e) 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.

On April 26, 1976, in news release USDL 76-707, the Department described certain other types of payments which, while not meeting the condition of section 2510.3-2(e), would nonetheless constitute a supplemental payment program which is not a pension plan. Specifically, the Department indicated that it would regard as a supplemental payment program payments outside a pension plan for persons who retired prior to the end of 1976, provided, in part, such payments come from the employer's general assets, are not part of an employee benefit plan, and were not communicated to the employees prior to their retirement. In addition, the Department stated that such payments may not be granted for more than a year at a time, the employer must be under no legal obligation to make these payments, and the recipients must be fully informed in writing of these conditions.

It is the position of the Department that neither Time's current Program nor its revised Program meets the conditions of regulation section 2510.3-2(e), nor does either version of the Program constitute a supplemental payment program under the principles enunciated in the news release. Specifically, there is no

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indication that Time is not legally obligated to make payments during the period of an employee's participation in the Program, and it appears that payments will be made to persons who retired after 1976. Nor is there any indication that the notification procedures described in either the regulation or the news release will be followed, or that the payments will be made out of Time's general assets.

Accordingly, it does not appear that the Program constitutes either a severance pay plan or a supplemental payment program, and there appears to be no basis for concluding that the Program is not a pension plan for purposes of Title I 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, relating to the effect of such opinions.

Sincerely,

Ian D. Lanoff
Administrator