

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



MAR 2 1979

OPINION 79-14 A

Mr. Neil S. Kurlander
Niles, Barton & Wilmer
929 N. Howard Street
Baltimore, Maryland 21201

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Dear Mr. Kurlander:

This is in response to your letter of August 29, 1978, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether the vacation benefit account established pursuant to a collective bargaining agreement between the International Longshoreman's Association, AFL-CIO (the ILA) and the Steamship Trade Association of Baltimore, Inc. (the STA) is an employee welfare benefit plan within the meaning of and thereby covered by title I of ERISA.

You advise that, pursuant to the collective bargaining agreement between the ILA and the STA, employees covered by the agreement are granted vacation pay based upon the employee's credited hours of service during a fiscal year of October 1 to September 30. Each contributing employer makes a payment to the STA based upon the number of hours credited to that employer's employees covered by the agreement. The STA deposits these contributions in the vacation benefit account and, pursuant to the agreement, distributes the vacation pay to the covered employees. Employees may receive a vacation benefit payment regardless of whether they actually take vacations.

You suggest that, since the payments are made whether or not the employee takes a vacation and also since the amount of benefit increases as the amount of work performed increases, the vacation benefit account represents a payroll practice excluded by Department of Labor regulation §2510.3-1(b) from those programs which constitute employee welfare benefit plans within the meaning of ERISA section 3(1).

The definition of "employee welfare benefit plan" contained in section 3(1) includes any plan, fund, or program established or maintained by an employer, an employee organization, or both and which provides vacation benefits. In regulation §2510.3-1 (issued August 15, 1975, copy enclosed) the Department of Labor identified certain practices which would not constitute an employee welfare benefit plan.

Subsection 2510.3-1(b) (1) provides as follows:

(b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include -

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- (1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as -
- (i) Overtime pay,
 - (ii) Shift premiums,
 - (iii) Holiday premiums,
 - (iv) Weekend premiums. . . .

All fringe benefits, including pension and welfare benefits, are part of an employee's total compensation paid for work performed. We do not think the fact that vacation pay is provided whether or not the employee takes a vacation makes such payments into a payroll practice within the meaning of regulation §2510.3-1(b)(1). The general purpose of that section was to exclude as a payroll practice extra earnings for extra work performed. Since the vacation benefit account does not fall in this category, the vacation benefit account does not meet the criteria of §2510.3-1(b)(1).

Additionally, because the vacation benefits are not paid from the general assets of the employer, they are not a payroll practice within the meaning of §2510.3-1(b)(3)(i), which reads as follows:

- (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example -
- (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons. . . .

Therefore, it is the position of the Department of Labor that the vacation benefit account established pursuant to the collective bargaining agreement between the ILA and the STA is an employee welfare benefit plan within the meaning of ERISA section 3(1).

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

Enclosure