

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



MAR 14 1979

Mr. P. H. McCarthy, Jr.
McCarthy, Johnson, Miller & Shepard
605 Market Street, Suite 1300
San Francisco, California 94105

OPINION 79-18 A

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3 (2)

Dear Mr. McCarthy:

This is in reply to your letter concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Operating Engineers Local Union No. 3 collectively bargained Vacation and Holiday Pay Plan (the Plan). Specifically, your inquiry concerns whether the Plan is an employee welfare benefit plan within the meaning of ERISA section 3(1). We regret the delay in responding to your inquiry due to the volume of correspondence concerning ERISA.

You represent that the Plan consists of a fund to which employers who are parties to collective bargaining agreements contribute on behalf of individual employees in lieu of the employees' actually taking a vacation. You represent that the funds are accumulated on behalf of individual employees and are payable to the individual employee every 6 months (or in the case of one collective bargaining agreement -- yearly) on the application of the individual employee in accordance with the terms of the applicable collective bargaining agreement, unless the funds have been distributed previously to the employee due to emergency conditions. You also represent that if the amount in the individual employee's account is less than \$60.00 at the time accumulated funds become regularly payable to the employee, such sums are automatically paid out to the employee without the need for any application for the funds on the part of the employee. In addition, in certain of the collective bargaining agreements, a provision allows the employees to arrange to have payments made on their behalf automatically transferred from the Plan to a credit union. Funds contributed on behalf of employees are administered by a fund manager until they are distributed to the employee or transferred from the fund in accordance with the employee's directions.

As you know, both vacation and holiday or similar benefits are included in the definition of employee welfare benefit plan in ERISA section 3(1). The term "employee welfare benefit plan" is defined in section 3(1) in relevant part as " . . . any plan, fund, or program . . . 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

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maintained for the purpose of providing for its participants or beneficiaries, through the purchase of insurance or otherwise . . . vacation benefits . . . or 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)."

Regulations issued by the Department August 15, 1975, further clarify the definition of employee welfare benefit plan (copy enclosed). 29 C.F.R. 2510.3-1(a)(3) provides: "The benefits described in section 302(c)(6) of the LMRA [Labor Management Relations Act, 1947] but not in section 3(1)(A) of the Act [ERISA] are ' . . . holiday, severance or similar benefits.' Thus, the effect of section 3(1)(B) of the Act is to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits and benefits which are similar"

In your letter you suggest that the Plan is not a "welfare benefit plan" because it is a "system of payroll deductions by an employer for deposit in savings accounts owned by its employees" which is excluded from the definition of "welfare benefit plan" under 29 C.F.R. 2510.3-1(a)(2). The regulation indicates that such a system of payroll deductions is excluded from the definition of "welfare benefit plan" because it does not provide benefits described in section 3(1) of ERISA. The Plan, however, provides for employer contributions to a fund manager which are made "in lieu of an employee's actually taking a vacation." Vacation benefits are among the benefits described in section 3(1)(A) of ERISA and "vacation, holiday . . . or similar benefits" are benefits contemplated by section 3(1)(B) of ERISA because they are described in section 302(c)(6) of the LMRA. Accordingly, it appears that the Plan provides benefits described in section 3(1) of ERISA and the exclusion in 29 C.F.R. 2510.3-1(a)(2) does not apply.

Because the Plan is a fund established and maintained by an employer and an employee organization for the purpose of providing vacation and holiday or similar benefits, which are among the benefits described in ERISA section 3(1), the Plan is an employee welfare benefit plan within the meaning of ERISA section 3(1) and must comply with all applicable ERISA title I requirements.

No information you have submitted indicates that the Plan provides retirement income to employees or results in a deferral of income by employees to termination of covered employment or beyond. Therefore, we conclude that the definition of employee pension benefit plan in ERISA section 3(2) does not include the Plan.

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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