

June 12, 1979

Dear :

This is to supplement my oral response to a question that you raised at the recent conference of the International Foundation of Employee Benefit Plans in Washington. Specifically, you inquired whether under Part 2 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), a multiemployer pension plan must give credit to plan participants for purposes of vesting and benefit accrual for service with respect to which the participants' employer fails to make required contributions. 1/

It has been and is the Department's view that under sections 203 and 204 of ERISA, a multiemployer pension plan must give credit both for purposes of vesting and for purposes of benefit accrual, for service performed for an employer required to make contributions in respect of such services, if such service would otherwise be required to be credited under Part 2 of Title I of ERISA, regardless whether the employer makes or fails to make the required contributions.

With regard to vesting, section 203(b)(1) of ERISA provides that in determining the percentage of an employee's accrued benefit derived from employer contributions that must be nonforfeitable under section 203(b)(2), all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, with certain exceptions. Neither the exceptions set forth in that section, nor the requirements set forth in 29 CFR 2520.200b-2 and 200b-3, regarding the crediting of hours of service for purposes of determining an employee's years of service, permit a

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1/ This question should be distinguished from those related questions concerning the circumstances, if any, under which an employer required to make contributions to a multiemployer plan might be "expelled" from further sponsorship of the plan on account of failure to make required contributions, and the means of effecting and consequences of such an expulsion. These issues are not addressed in this letter.

multiemployer plan to disregard service with respect to which a participant's employer fails to make required contributions to the plan, if such service would otherwise be required to be credited under Part 2 of Title I of ERISA.

With regard to benefit accrual, section 204(b)(3)(A) permits a plan to provide for the determination of an employee's period of service, for purposes of calculating the employee's accrued benefit, on any reasonable and consistent basis permitted under regulations. If, however, a multiemployer plan, in determining an employee's accrued benefit, does not take into account periods of service with respect to which the employee's employer has failed to make contributions to the plan, the period used to determine the employee's accrued benefit would fail to measure accurately the employee's service. Under these circumstances, the period of service used for purposes of calculating the employee's accrued benefit would not be determined on a reasonable and consistent basis.

As you may be aware, effective December 31, 1978, section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) has generally transferred to the Secretary of the Treasury the authority of the Secretary of Labor to issue, among other documents, rulings and opinions under Parts 2 and 3 of Title I of ERISA. The views expressed in this letter reflect positions taken by the Department in opinion letters issued before the Reorganization. I am enclosing herewith copies of the earlier opinion letters and a letter which I sent to Steven J. Sacher, Special Counsel to the Senate Committee on Labor and Human Resources on the same issue. 2 / Because this letter does not apply to a

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2/ In ERISA Advisory Opinion 78-28 A, which is among the opinion letters enclosed herewith, the Department issued an opinion regarding a plan under which service credited for purpose of vesting was also used as a basis for determining an employee's accrued benefits. Thus, that opinion did not address the question whether a multiemployer plan that credits service for benefit accrual purposes on a different basis from that on which it credits service for vesting purposes may fail to give benefit accrual credit for service with respect to which an employer does not make required contributions. As I have indicated in the body of this letter, it is the Department's view that denial of benefit accrual credit under those circumstances would not be permitted under section 204 of ERISA.

specific factual situation, it is a general information letter, not an advisory opinion. (See section 3.01 of ERISA Procedure 76-1, relating to advisory opinions.) Further I have conferred with representatives of the Internal Revenue Service and they have authorized me to inform you that they concur in the views expressed herein.

Sincerely,

Enclosures