

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



OPINION 80-6A
3(1), 3(2)

JAN 30 1980

Mr. Harvey Katz
Paul A. Tanker & Associates
1521 Locust Street
Philadelphia, Pennsylvania 19102

Dear Mr. Katz:

This is in reply to your letter of July 19, 1979, concerning the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion that the Wilmington Finishing Company Incentive Payment Program (the Program) is not an employee benefit plan as defined in section 3(3) of ERISA.

According to Article I of the Program, the purpose of the Program is to enable employees of Wilmington Finishing Company (the Company) to share in a portion of the Company's profits each year. Pursuant to Article IV of the Program, the Company distributes annually (on or about October 15) to the employees of the Company an amount equal to 20 percent of the "operating profit" in any "plan year" provided such profit exceeds the applicable "profit margin." Operating profit is defined as the entire taxable income for Federal Income Tax purposes, and before the deduction for any Employee Stock Ownership Plan contribution, but excluding nonrecurring extraordinary income. Plan year is defined as the fiscal year of the Company. Profit margin is defined as \$250,000 for the first plan year to be increased annually in direct proportion to increases in the cost of living as determined by the U.S. Department of Labor, Bureau of Labor Statistics, using 1979 as the base year. The amount of each individual distribution will be determined by dividing the total amount to be distributed by the total number of Program participants.

Section 3(3) of ERISA defines the term "employee benefit plan" to include an employee welfare benefit plan or an employee pension benefit plan or a plan which is both a welfare and a pension benefit plan. Section 4(a) indicates that such plans are subject to the provisions of title I of ERISA.

An "employee welfare benefit plan" is defined in section 3(1) of ERISA as:

... any plan, fund, or program which was heretofore or is hereafter 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 maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) 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).

Because the Program is maintained solely to provide employees with annual incentive payments for work performed, which is not among the purposes listed in ERISA section 3(1), the Program is not an employee welfare benefit plan within the meaning of ERISA section 3(1).

The term “employee pension benefit plan” is defined in section 3(2) as:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or 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.

Since the Program distributes benefits annually and neither provides retirement income to employees nor defers income to termination of employment or beyond, the Program is not an employee pension benefit plan within the meaning of section 3(2).

Since the Program is neither an employee welfare benefit plan nor an employee pension benefit plan, it is not an employee benefit plan subject to 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 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
 Administrator of Pension and Welfare Benefit Programs