U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 80-18A
3(2)

APR 14 1980

Mr. Steven Bloom
Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz
P.O. Drawer 520337
Miami, Florida 33152

Dear Mr. Bloom:

This is in response to your letter of July 6, 1979, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask 1) whether the Miami Elevator Constructors Trust (the Trust) is an employee pension benefit plan within the meaning of section 3(2) of ERISA; 2) whether, upon termination of the Trust, plan assets must be allocated pursuant to section 403(d)(1) of ERISA; and 3) whether the Trust is subject to the vesting requirements set forth in part 2 of title I of ERISA.

You represent that the Trust was established in 1958 by the International Union of Elevator Constructors, Local #71 (the Union) to provide pension, disability, and death benefits for Union members. The Trust provided that it would terminate on September 1, 1978, unless revoked earlier and that all assets at that time would be distributed to the Union. Accordingly, the Trust has terminated payments effective September 1, 1978. The Union has contributed varying amounts of money from dues to the Trust from time to time. The only other source of income has been the return on investments. There have been no contributions by employers or individual Union members. In your letter you contend that the Trust is not an employee pension benefit plan, but that it is either 1) a gratuitous pay plan as identified in Department of Labor regulation 29 CFR 2510.3-2(e), or 2) a program that does not cover “employees.”

The term "employee pension benefit plan" is defined in ERISA 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 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.

In order to constitute an employee pension benefit plan, a program 1) must provide benefits identified in the definition, 2) must provide those benefits to "employees," and 3) must be established or maintained by an employer, an employee organization, or by both.

The Trust clearly provides benefits specified in the definition and is established and maintained by an "employee organization."[1]

With respect to the individuals covered, you suggest that because section 3(2) refers to "employees" when discussing the class of persons to whom retirement benefits are provided, in view of the absence of involvement by an "employer" in the Trust, and the fact that benefits under the Trust are calculated upon length of membership in the Union rather than length of service with an employer, the Trust might be considered not to provide benefits to "employees" and, therefore, might be considered not to be a "pension plan" within the meaning of section 3(2).[2] It is our view, however, that the term "pension plan" as used in title I of ERISA does not necessarily exclude plans established and maintained by employee organizations for their members, in light of the specific reference in sections 3(2) and 4(a)(2) to plans, funds or programs established or maintained by an employee organization without the involvement of an employer. We also believe it significant that section 201(4) of ERISA (which is discussed in your submission and addressed further below) specifically excludes certain plans established and maintained by labor organizations from coverage under part 2 of title I of ERISA; such an exclusion would have been unnecessary if such plans were not considered "pension plans."

Accordingly, it is the position of the Department that the Trust is an employee pension benefit plan within the meaning of section 3(2) and that the Trust is covered under title I of ERISA unless otherwise excluded from coverage.

The Trust is not a "gratuitous pay" plan as described in Department of Labor regulation 29 CFR 2510.3-2(e) because, among other things, payments are not made from the Union's general assets, and there is no limitation on the date by which a recipient must have retired to receive the benefits.

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[1] Section 3(4) of ERISA defines the term "employee organization" to include a labor union. Thus, the Union constitutes an employee organization with the meaning of Section 3(4).

[2] In this connection, section 3(e) of the revised Trust rules and regulations conditions entitlement to Trust benefits for persons who joined the Union after October 1, 1958 upon completion of "at least 10 years of continuous service as a full-time Elevator Constructor." It appears, therefore, that payment of benefits under the Trust is contingent to a significant extent on the existence of an employment relationship.

The foregoing 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.

We are unable to give an advisory opinion regarding whether or not the Trust would fall within the meaning of sections 201(3) or (4) since there is insufficient information in your submission to determine whether or not the Trust was established or maintained by an entity which is described in Internal Revenue Code (IRC) §501(c)(5), (8), or (9) or whether the Trust fails under IRC §501(c)(18). If it is a plan described in ERISA sections 201(3) or (4), the Trust would not be covered by the provisions of part 2.

You also ask for an advisory opinion that the return of the assets in question to the Union is not prohibited by section 403(d)(1) of ERISA.[3] In this regard you contend that, by reason of sections 4021(b)(4) and 4021(b)(5) of ERISA, the Trust is not a pension plan to which section 4021 applies, and that the Trust is a plan "to which no employer contributions have been made," within the meaning of section 403(d)(1).

Title IV of ERISA, including section 4021, is administered by the Pension Benefit Guaranty Corporation (PBGC). Accordingly, the Department will not determine whether the provisions of section 4021 of ERISA apply to a pension plan at the time it terminates, and we have concluded that it would not be appropriate for the Department to issue the requested advisory opinion. See section 5 of ERISA Procedure 76-1. For your general information, however, if the PBGC were to determine that section 4021 would not apply to the Trust, and if the Trust were a plan to which no employer contributions have been made, the Trust would not be prohibited from distributing its residual assets pursuant to its terms.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

[3] This section provides that upon termination of a pension plan to which section 4021 of ERISA does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 4044 of ERISA, except as otherwise provided in regulations of the Secretary of Labor.