U.S. Department of Labor

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

Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 80-20A
3(1), 3(5)

APR 16 1980

Mr. Gary J. Torre
Lillick McHose & Charles
Two Embarcadero Center
San Francisco, CA 94111

Dear Mr. Torre:

This is in reply to your letter of August 14, 1979, supplementing information presented in your original requests for advisory opinions. In your letter you urge that the Department reconsider its advisory opinion of January 15, 1979 that holiday and vacation payments made to employees by the Pacific Maritime Association (PMA) pursuant to a collective bargaining agreement with the International Longshoremen's and Warehousemen's Unions (ILWU) constituted employee welfare benefit plans within the meaning of ERISA title I. You also urge that the Department determine that a pay guarantee plan, also the result of collective bargaining between PMA and ILWU and the subject of an information letter issued by the Department January 18, 1979, should not be considered an employee welfare benefit plan within the meaning of ERISA title I.

You argue that the above plans constitute payroll practices within the meaning of regulation section 2510.3-1(b)(3). You also content that ERISA section 403(a) requirements should not be applicable to the plans and, in this regard, you request an exemption from the requirements of ERISA title I pursuant to ERISA section 403(b)(4).

You have clarified the role of PMA with regard to its employer members. You state that, rather than regarding PMA as an "agent for payroll purposes," as described in your earlier letters, the Department should regard PMA as an "employer bargaining agent." You also have clarified the requirements of the collective bargaining agreements you submitted with regard to funding arrangements for holiday, vacation, and pay guarantee benefits required thereby. You state that the collective bargaining agreements do not require employers to utilize any particular method of financing or of collecting monies to meet the benefit requirements specified therein. Rather, you state that the collective bargaining agreements merely require payments to be made at specified times and in specified amounts by PMA. It appears that employer members of PMA have elected to assure payments are made on schedule by regularly assessing themselves in order to contribute

adequate funds to PMA. PMA then pays benefits to employees in order to discharge benefit obligations as warranted in accordance with applicable collective bargaining agreements.

With regard to your contention that the above plans are payroll practices within the meaning of regulation section 2510.3-1(b)(3), issued by the Department on August 15, 1975, which refers to 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 … performs no duties; for example (i) Payment of compensation while an employee is on vacation or absent on holiday …," the Department takes the position that the intent of the regulation is to exclude from ERISA title I coverage a type of arrangement not exhibited in the factual situation you describe.

Paragraphs (b)(2) and (b)(3) of regulation section 2510.3-1 are designed to deal with payment of compensation out of general assets of the employer during periods of employee absences. Such payment could be construed as an employee benefit when an employee is absent for one of the reasons for which benefits described in sections 3(1) of ERISA and 302(c) of the Labor Management Relations Act are provided. Taken together, paragraphs (b)(2) and (b)(3) illustrate the point that payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare plan. Thus, it is clear that under the regulation, payments must be made from the general assets of an employer maintaining the plan. PMA may be an "employer" within the meaning of section 3(5) of ERISA because PMA is a group or association of employers acting indirectly in the interest of employers in relation to an employee benefit plan. However, because PMA is a separate entity to which member employers pay dues and assessments, and from which benefit payments are made to eligible employees of member employers, in the Department's view, payments from PMA to employees do not constitute payment of compensation out of the employer's general assets within the meaning of regulation section 2510.3-1(b)(3).

Therefore, the Department affirms its earlier determination that the vacation and holiday benefits paid by PMA in accordance with collective bargaining agreements with ILWU constitute employee welfare benefit plans subject to ERISA title I requirements and are not merely payroll practices within the meaning of regulation section 2510.3-1(b)(3). In addition, it is the position of the Department of Labor that pay guarantee benefits made by PMA are benefits in the event of unemployment within the meaning of ERISA section 3(1), are a plan, fund or program established and maintained by an employer within the meaning of ERISA section 3(5), and thus, are an employee welfare benefit plan within the meaning of ERISA section 3(1). Because the PMA pay guarantee plan is not excluded from ERISA title I coverage by regulation section 2510.3-1(b)(3) or other regulation, or otherwise excluded therefrom, compliance with all applicable ERISA title I requirements is mandatory.

With regard to your interest in an exemption from ERISA title I trust requirements, the following information may be helpful to you.

Section 403(a) of ERISA requires that, in general, assets of employee benefit plans be held in trust by one or more trustees. Certain exceptions to this requirement are set forth in ERISA section 403(b). The Department has recently issued proposed regulations regarding the requirement that plan assets be held in trust. A copy of the proposed regulations, including proposed exemptions from the trust requirements, issued on August 28, 1979, is enclosed. Because the comment period on the proposed regulations ended March 27, 1980, the Department cannot assure you that any views you submit at this time will be included in the Department's considerations concerning the final regulations. However, the Department welcomes public interest in its regulations and procedures at all times and will respond accordingly. In view of the pendency of these regulations and proposed exemptions, the Department is not considering at this time individual requests for relief from the trust requirements.

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