

Department of Labor

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



Reply to the Attention of:

OPINION 80-37A  
3(2)

JUN 24 1980

Mr. Brian J. Lake  
Thornburg, McGill, Deahl, Harman, Carey & Murray  
Sixth Floor, First Bank Building  
South Bend, Indiana 46601

Dear Mr. Lake:

This is in response to your letters of September 13, 1979, and May 23, 1980, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You request an opinion that the Torrington Company Severance Pay Plan (the Severance Plan) constitutes an "employee welfare benefit plan" under section 3(1) of ERISA, and, further, that the Severance Plan is not an "employee pension benefit plan" under section 3(2) of ERISA.

You represent that the Torrington Company, Bearings Division, South Bend, Indiana (the Company), entered into a labor agreement with the International Union, United Automobile, Aero-Space, Agricultural Implement Workers of America, and its Local Union No. 590 (the Union). The labor agreement provided that the Company would contribute \$.05 per work hour to Supplemental Unemployment Benefit (S.U.B.) Plans No. 1 and No. 2 which were established to provide certain benefits to employees in the event of their layoff from or termination of employment with the Company. S.U.B. Plans No. 1 and No. 2 were amended effective May 1, 1978, and incorporated in a single plan document. Section 3 of Article XV of the labor agreement provided that "[s]ubject to the approval of the Treasury Department, the provisions of the S.U.B. Plan #2 be amended so as to provide a bonus payment from that fund for employees retiring after May 1, 1978 of \$50.00 for each full year of credited service."

After the labor negotiations were completed, the Company expressed concern that such an amendment to S.U.B. Plan No. 2 could jeopardize the tax exempt status of S.U.B. Plan No. 2 and possibly S.U.B. Plan No. 1. In light of this concern, the Company and the Union entered into post-contract negotiations in which a determination was made that a separate unfunded Severance Pay Plan would be adopted to provide benefits of \$50.00 per year of credited service to employees who are disabled, die, or terminate employment after a certain age. The Severance Plan would be funded out of the general assets of the Company without any trust fund. Further, you represent that adoption of the Severance Plan, along with the corresponding amendments to S.U.B. Plans No. 1 and No. 2, are contingent upon receiving Internal Revenue Service approval of various ruling requests as well as approval of the Department with respect to certain requests for advisory opinions.

The Severance Plan would provide benefits to certain employees terminating their employment on or after May 1, 1978. To be eligible to receive benefits under the Severance Plan the employee had to complete at least 10 years of credited service (as defined under the Torrington Company Bearings Division Hourly Rate Employees' Pension Plan (the Pension Plan)) and had to terminate employment (1) as a result of death or disability, or (2) after attainment of age 55. In a telephone conversation on May 19, 1980, you informed a representative of the Department that the Pension Plan provides an early retirement benefit at age 55.

You represent that the total liability of the Company for payments to the Severance Plan and for other purposes (as indicated below) is limited to \$.05 per hour of work. Further, you indicate that the amendments to the S.U.B. Agreement and Plan establish priorities with respect to the \$.05 per hour payment being made by the Company. The priorities provide that the first portion of \$.05 per hour contribution is to be paid to provide benefits under the Extended Hospital - Medical Coverage During Layoff Program (a program which is already in existence under S.U.B. Plan No. 1); to the extent that any portion of the \$.05 per hour payment remains, the second priority will be payments for the Severance Plan; and the third priority is for payments to S.U.B. Plans No. 1 and No. 2. To the extent that severance payments cannot be paid in one month they become

eligible for payment in following months. However, among the terms of the Severance Plan are provisos that benefit

payments (which are to be made either in a lump sum or in monthly installments) must be made no later than 24 months after termination of employment and benefit payments cannot exceed twice the employee's annual compensation.

ERISA section 3(2) defines the term "employee pension benefit plan" 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."

Regulation section 2510.3-2, issued by the Department on March 2, 1979, clarifies the limits of the defined terms "employee pension benefit plan" and "pension plan" for purposes of title I of ERISA. Specifically, section 2510.3-2(b) provides that if certain conditions are met, a plan which provides payments upon severance from employment will not be considered an employee pension benefit plan. Section 2510.3-2(b) provides that:

For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

- (i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;
- (ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and
- (iii) All such payments to any employee are completed,
  - (A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and
  - (B) In the case of all other employees, within 24 months after the termination of the employee's service.

Although benefits under the Severance Plan are not directly contingent on an employee's retiring, the Severance Plan provides that eligibility for benefits may be based upon the completion of 10 years of service and the attainment of age 55 or older. In view of this eligibility requirement and the fact that the Pension Plan provides for early retirement benefits at age 55, it is the Department's opinion that under these circumstances, benefits under the Severance Plan are indirectly contingent upon retirement. Accordingly, the Severance Plan would fail to meet the criteria of section 2510.3-2(b). While the preamble to the Federal Register notice adopting section 2510.3-2(b) indicated that under certain circumstances a severance pay plan which does not meet the conditions of section 2510.3-2(b) might nevertheless not be deemed to be a pension plan, we think that in light of the provisions regarding eligibility for benefits noted above, the terms of the Severance Plan contemplate that it is intended to provide retirement income to employees. Accordingly, it is the opinion of the Department that the Severance Plan is an employee pension benefit plan within the meaning of section 3(2) 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.

In addition to your request for an advisory opinion regarding the determination on the Severance Plan, you request a determination with regard to matters that are subject to the Fair Labor Standards Act. This Office cannot respond to this issue. Copies of your submissions in this regard have been forwarded to Mr. Harry T. White, Wage and Hour Division, Employment Standards Administration, Room S-3502, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20216, telephone (202) 523-8305. Any further inquiries on this matter should be directed to that Office.

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs