



SEP -5 1980

OPINION 80-53A

Mr. S. Howard Kline
Drinker Biddle & Reath
1100 Philadelphia National
Bank Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania .19107

3(1)

Dear Mr. Kline:

This is in response to your letter of February 12, 1980, requesting advisory opinions regarding the applicability of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request a determination by the Department that certain medical make-up payments made by ESB, Incorporated (the Company) as supplemental compensation pursuant to a collectively bargained agreement do not constitute an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

Your letter contains the following facts and representations: Pursuant to the collectively bargained agreement with the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (the Union), the Company agreed to make supplemental medical make-up payments to employees provided the inability of the employee to perform his regular job was due to certain specifically delineated medical reasons. The payments would be one of three types: supplemental payments following a return to work after disability where the employee returns to a different lower-paying job classification; supplemental workers' compensation payments; and job transfer supplemental payments to employees who are transferred to a lower-paying job classification for medical reasons. You give no indication in your letter whether or not the supplemental payments would be made from the general assets of the employer. The payments are designed to increase an employee's rate of pay to a level equal to the rate he was receiving prior to the disability.

An "employee welfare benefit plan" is defined in section 3(1) of ERISA, in relevant part, 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) ...benefits in the event of sickness, accident, disability, death or unemployment..., 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)."

The Department's regulation section 29 CFR 2510.3-1 identifies certain arrangements that will not constitute employee welfare benefit plans for the purposes of title I of ERISA. Section 2510.3-1(b) provides in relevant part:

(b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include --...

(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties or is otherwise absent for medical reasons...

It is the Department's view, on the basis of your representations, that (a) supplemental payments following return to work after disability, (b) job transfer supplemental payments, and (c) payments which when coupled with workers' compensation equal the employee's normal compensation and which are made for a period of time during which the employee is absent due to physical or mental incapacities would all constitute payroll practices within the purview of ERISA regulation section 2510.3-1(b) (2), provided that such payments are made from the general assets of the Company and the total compensation received by the employee does not exceed the normal compensation received by the employee for his duties prior to his disability.

Accordingly, it is the opinion of the Department that the ESB, Incorporated medical make-up payments for supplemental payments following return to work after disability and job transfer supplemental payments do not constitute employee welfare benefit plans within the meaning of section 3(1) of ERISA. Further, it is the opinion of the Department that the ESB, Incorporated supplemental workers' compensation payments, if made from the general assets of the Company, do not constitute an employee welfare benefit plan as defined in section 3(1) 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