

**U.S. Department of Labor**

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



OPINION 80-66A  
3(2)

NOV 13 1980

Mr. A. Kimbrough Davis  
Kilpatrick & Cody  
3100 Equitable Building  
100 Peachtree Street  
Atlanta, Georgia 30303

Dear Mr. Davis:

This is in response to your letter of April 25, 1980, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to a program which you denominated as a "Gratuitous Pay Plan" proposed by the Fulton National Bank of Atlanta (Fulton). Specifically, you request an advisory opinion stating that the proposed plan is not an employee benefit plan within the meaning of ERISA section 3(3).

You state that Fulton maintains a defined benefit pension plan qualified under Internal Revenue Code section 401(a). Fulton revised the plan effective January 1, 1977, to provide benefit increases prospectively to persons employed by Fulton and qualified for participation in the plan as of that date. These increases are not the subject of your request; however, you state that as a consequence of the manner in which Fulton arranged such benefit increases, Fulton employees who retired prior to January 1, 1977, and were receiving benefits did not receive increases. Fulton now proposes to voluntarily and "from time to time" make payments in any amount Fulton determines to employees it selects from among those who retired prior to January 1, 1977. Fulton proposes to make such payments from its general assets and to notify recipients annually that payments are gratuitous and not a pension plan.

You state that Fulton's classification of eligible employees will be as broad as the Department of Labor permits and, specifically, you state that "if permitted" Fulton would extend the classification to any former employee without regard to when retirement occurred. This opinion, however, is limited to the Department's consideration of the status under ERISA title I of Fulton's proposed payments to persons who retired prior to the end of 1976. We do not express any opinion on the potential extension of such payments to retirees without regard to when retirement occurred.

ERISA section 3(3) provides that an employee benefit plan means an employee pension benefit plan or an employee welfare benefit plan, or both. Because in your submission to the Department you raise only arguments concerning the term "employee pension benefit plan," this opinion addresses only that issue. Nothing in your letter indicates, however, that the payments you propose to make meet the definition of an employee welfare benefit plan.

ERISA section 3(2) defines the term "employee pension benefit plan" to include programs established by an employer which by their express terms or as a result of surrounding circumstances provide retirement income to employees. In Department of Labor regulation section 2510.3-2(e) (issued August 15, 1975), the Department identified certain payments which do not constitute pension plans. Regulation section 2510.3-2(e) excludes from the definition of an "employee pension benefit plan" certain gratuitous payments to retirees if:

- (1) payments are made out of the general assets of the employer,
- (2) former employees separated from the service of the employer prior to September 2, 1974,

- (3) payments made to such employees commenced prior to September 2, 1974, and
- (4) each former employee receiving such payments is notified annually that the payments are gratuitous and do not constitute a pension plan.

Subsequently, the Department expressed the view in a news release (USDL 76-707, copy enclosed) that payments outside a pension plan for persons who retired prior to the end of 1976 do not constitute a pension plan if certain conditions are met.

It is the position of the Department of Labor that the proposed payments you describe, if made to employees who retired prior to January 1, 1977, do not constitute an employee pension benefit plan when authorized for no more than a year at a time.

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

Enclosures