

**U.S. Department of Labor**

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



OPINION 80-72A

3(1)

3(2)

DEC 8 1980

Mr. Mario S. Belaval  
Vice-President  
Bacardi Corporation  
G.P.O. Box 3549  
San Juan, Puerto Rico 00936

Dear Mr. Belaval:

This is in response to your letter of June 23, 1980, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether a severance program (the Program) of Bacardi Corporation (the Employer) located in Catano, Puerto Rico, constitutes an "employee benefit plan" under section 3(3) of ERISA. Further, you ask if the Program is an "employee benefit plan" would it be an "employee welfare benefit plan" under section 3(1) of ERISA or an "employee pension benefit plan" under section 3(2) of ERISA.

You represent that the Employer has entered into a labor agreement with "Congreso de Uniones Industriales de Puerto Rico" (the Union) which represents approximately 215 of the Employer's 493 employees. The labor agreement provides that the Employer will continue to maintain the Program for members of the Union.

The Program provides that participants will receive a severance benefit when the participant discontinues his employment either (a) on or after the date he attains the age of 62 with at least 15 years of service with the Employer, or (b) because of total and permanent disability such that he is eligible for a Social Security Disability payment, or (c) on or after the date he attains the age of 65. The amount of severance benefit that the participant receives is calculated by multiplying the participant's final hourly rate of pay by 40 hours multiplied by his or her years of service with the Employer. Severance benefits under the Program are made in a lump sum.

In addition to the Program, the Employer maintains the Retirement Plan for General Employees of Bacardi Corporation (the Pension Plan) which covers both union and non-union employees. Under the terms of the Pension Plan, eligibility to receive pension benefits arises when the participant attains the age of 62 and his or her credited service equals or exceeds 15 years.

The term "employee benefit plan" is defined in section 3(3) of ERISA as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA 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) medical, surgical, or hospital care or benefits, or 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)."

Since the Program provides a benefit in the event of disability which is a benefit described in section 3(1)(A) of ERISA, the Program would be an employee welfare benefit plan within the meaning of section 3(1).

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA 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 -- (i) provides retirement income to employees, or (ii) 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 Department of Labor regulation section 29 C.F.R. 2510.3-2 (copy enclosed), the terms "employee pension benefit plan" and "pension plan" were clarified 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.

The Program provides that eligibility for benefits other than upon becoming disabled is based upon the attainment of either age 62 and completion of 15 years service or age 65. In view of this, it is the Department's opinion that benefits under the Program are contingent, directly or indirectly, upon retirement.

Accordingly, the Program would fail to meet the criteria of section 2510.3-2(b). Further, 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) may nevertheless not be deemed to be a pension plan, it is our position that in light of the provisions noted above, the Program provides retirement income to employees. As a result the Program is also, in the Department's view, a pension benefit plan within the meaning of section 3(2) of ERISA.

Therefore, the Program is an "employee benefit plan" that is both a welfare benefit plan and a pension benefit plan and is subject to the requirements of title I of ERISA. Specifically, the Program, unless otherwise exempt, must comply with part 1, relating to reporting and disclosure; part 2, relating to minimum standards in the areas of eligibility to participate, vesting, and benefit accrual; part 3, relating to funding; part 4, relating to fiduciary responsibilities; and part 5, relating to matters of administration and enforcement.

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