

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



March 14, 1997

97-08A
ERISA SEC. 3(1)

Mr. Harold G. Korbee
Wood & Lamping
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202-2409

Dear Mr. Korbee:

This responds to your request on behalf of the Board of Trustees of the Pipe Fitters Union Local No. 392 Drug Free Workplace Trust Fund (the Fund) for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Fund, which pays for annual drug testing of union members, is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

The Fund was established in 1993 as a jointly-administered, employer-financed trust fund as a result of collective bargaining between the Pipe Fitters Union Local No. 392 (the Union) and the Mechanical Contractors Association of Cincinnati (the Association).¹ The Fund trustees (Trustees) established the Pipe Fitters Union Local No. 392 Drug Free Workplace Plan (the Plan) to describe the standards and procedures for implementing the Fund. The Fund and the Plan specifically cover annual drug testing only for employees of covered employers and the Union, and not Union members in general. However, the Fund's trust document and the Plan both also refer to pre-employment drug testing, and you have represented that the Fund is also intended to provide a low-cost, uniform system of pre-employment drug testing to assure that Union members who are referred by the Union for jobs are "drug free", that is, that they do not use illegal drugs.

You represent that before the establishment of the Fund, various project owners and employers who employed Union members required such members to undergo drug tests as a condition of eligibility for employment at their job sites. The lack of uniformity in testing procedures, requirements, costs, and acceptance of results caused difficulties and delays for both employers and employees in filling jobs where certification of drug-free workers was required. To remedy this problem, the Union and the Association consulted with various project owners and medical providers to develop a program that would provide accurate, effective and prompt drug testing at reasonable cost and yield test results that would be acceptable to nearly all employers and the project owners for whom they work. The bargaining agreement entered into as a result of this process specifically provides for the creation of the Fund, which is financed through collectively-bargained employer contributions, and requires that members of the Union undergo an annual drug test and receive a favorable result in order to be eligible for continued employment or for referral by the Union to employment with any signatory employer.

According to your representations, Union members may elect to have the required annual drug test paid for by the Fund. In order to obtain this benefit, the Union member must first obtain a referral form from the Union hiring hall

¹ The Mechanical Contractors Association of Cincinnati is an employer association comprised of individuals, partnerships and corporations engaged in the pipe fitting industry in Cincinnati, Ohio, and surrounding areas.

and present it to a testing facility specified by the Trustees.² Union members may schedule and take the test at a time of their own choosing. Those who receive a negative (passing) result are issued a Drug Free Certification Card that is recognized by signatory employers and the Union for one year from the date of issuance. Union members who receive a positive (failing) result have the right to have the original sample retested by a qualified laboratory of the Union member's choice. The cost of a second test is not covered by the Fund.³

You further represent that the Fund does not provide or pay for any treatment or care for substance abuse or any other kind of medical services related to the drug testing. A qualified health professional, employed by the testing facility, is available at each certified facility to discuss with the Union member any medical conditions or current medications that may produce false results. In addition, the testing facility provides a medical review officer to verify the laboratory results, notify the Trustees of all negative (passing) results, review the Union member's medical record, and notify the Union member of a positive (failing) result. You state that the Fund does not provide or pay for medical care or treatment for Union members. Medical benefits are provided through a completely separate group health plan.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" as

any plan, fund, or program . . . 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 vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, 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).⁴

Based on your representations, it appears that the Fund pays only the cost of the annual drug testing required by the collective-bargaining agreement, in order to meet a condition of eligibility for covered employment. The Fund does not provide Union members with any counseling or care in connection with the drug screening. It is our view that payment for drug testing in these circumstances does not provide any Union member with benefits that are in the

² The Fund requires that the drug tests be obtained from laboratories certified under National Institute of Drug Abuse guidelines and operated in compliance with the U.S. Department of Health and Human Services Scientific and Technical Guidelines dated April 11, 1988. The screening must test urine samples for ten categories of drugs specified by the Fund and no other tests are to be performed on the samples. The Fund also specifies the cut-off limits used to determine who passes or fails the screening.

³ The Plan also sets forth certain circumstances in which an employed Union member may be required to submit to an additional drug test during a year, such as when the member has been involved in a workplace accident or has been observed using illegal drugs, or is employed in a job classification for which the employer is required by law to conduct random drug testing. However, you represented in a telephone conversation that all of the drug tests conducted under the Fund's provisions have been pursuant to only the annual test requirement.

⁴ It is the Department's view that section 3(1)(B) of ERISA incorporates within section 3(1) only benefits described in section 302(c) of the Labor Management Relations Act that are provided through employee benefit plans. Furthermore, only certain of those benefits, e.g., "holiday, severance or similar benefits", are not described in section 3(1)(A) of ERISA. See 29 C.F.R. 2510.3-1(a) and ERISA Advisory Opinion 94-29A.

nature of medical benefits or benefits in the event of sickness. Further, the payments for drug testing are not conditioned on or otherwise related to the actual status of unemployment in such a manner as to constitute a benefit in the event of unemployment. The program provided by the Fund is merely a method of making it easier for Union members to satisfy the eligibility requirement for employment. Because the Fund does not provide any benefit specified in section 3(1) of ERISA, we conclude that the Fund is not an employee welfare benefit plan within the meaning of that section.

We note that we are expressing no opinion with respect to the applicability of other laws to the Fund, particularly section 302(c) of the Labor Management Relations Act.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of advisory opinions.

Sincerely,

Susan G. Lahne
Chief, Division of Coverage
Office of Regulations and Interpretations