U.S. Department of Labor

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

April 18, 1997

97-12A
ERISA SEC. 3(1)

Ms. Barbara Clark
Pacific Telesis Legal Group
Pacific Telesis Center
130 Kearny Street, Suite 3629
San Francisco, California 94108

Dear Ms. Clark:

This responds to your correspondence concerning applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Pacific Telesis Group (PTG) outplacement assistance program (hereinafter, the Program). Specifically, you requested the Department's views on whether the Program is an "employee welfare benefit plan" as defined in ERISA section 3(1).

You state that the Program is an informal arrangement operated by PTG to assist selected management employees who, for any reason, terminate their employment with PTG or with one of its subsidiaries. Specifically, the Program is intended to help terminating managerial employees to secure new employment. You state that the Program offers varied services, including résumé preparation, identification of marketable skills, refinement of interviewing and negotiating techniques, and development of systems for making "contacts" in appropriate job markets.

You represent that PTG or one of its subsidiaries pays all costs of the Program. Further, PTG or a subsidiary pays an outside firm, presumably from the general assets of PTG or the subsidiary, to provide services to the selected, terminating managers.

You state that PTG and its subsidiaries exercise complete discretion over selecting the managers to whom "outplacement" services will be offered and over the type of services to be offered. Further, you indicate that a manager who is selected to participate in the Program may decide whether to avail him or herself of the proffered services and that the manager's decision does not affect his or her eligibility for any income continuation benefits that PTG or its subsidiary may offer on termination.

You argue first that the Program does not rise to the level of a "plan, fund, or program" within the meaning of ERISA because the Program's benefits are not specified in advance, are provided only occasionally, and are provided to individuals none of whom may be identified in advance. In this regard, it is our view that, in order to be a plan covered by Title I of ERISA, a benefit arrangement need not be described in a written document, completely disclosed, or specify in advance either precisely who may be selected as participants or the specific benefits to which they may be entitled.[1] Neither is a benefit arrangement under which benefits are only infrequently offered

[1] Insofar as a benefit arrangement is an "employee benefit plan" in ERISA § 3(3), the arrangement must comply with ERISA Title I's requirement of a written document. See ERISA § 402(a)(1). Further, in accordance with ERISA requirements, an employee benefit plan must specify, among other matters, the basis on which payments are made under the plan. See ERISA § 402(b)(4).

necessarily excluded from ERISA coverage. Finally, the fact that only very few employees are selected to participate in benefits does not alone provide sufficient grounds to exclude a program from ERISA coverage.[2]

You also indicate that you believe the types of services that the Program offers, although not completely described in the materials you submitted, are not benefits described in the definition of an "employee welfare benefit plan."

> ERISA section 3(1)(A) defines an "employee welfare benefit plan," in pertinent part, as any plan, fund, or program . . . established or maintained by an employer . . . 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, . . . unemployment, . . . or . . . training programs.

Further, ERISA section 3(1)(B) incorporates by reference the benefits enumerated in § 302(c) of the Labor Management Relations Act (LMRA) (29 U.S.C. § 186(c)), which include, among other benefits, severance benefits and benefits that are similar to severance benefits. The Department construes the terms "severance benefits" as provided in LMRA § 302(c) and "benefits in the event of . . . unemployment" as provided in ERISA § 3(1)(A) to be coextensive terms.

We first consider whether outplacement services that are not income replacement benefits, but instead aid a terminating employee's efforts to become re-employed, may constitute a type of "unemployment" or "severance" benefits within the meaning of ERISA section 3(1). Section 3(1), in identifying "benefits in the event of . . . unemployment" as an ERISA-covered welfare-type benefit, is ordinarily understood to refer to an employer's provision of interim income to a terminated employee for a limited period of unemployment.[3] Although generally intended to aid in a transition to new employment, these time-limited income continuation payments, whether or not the individual becomes re-employed by a different employer, constitute severance benefits, even if not so identified.

Outplacement services like those described here, which are unrelated to the provision of interim income, are, by definition, useful only to those individuals who are, or are about to become, unemployed and who wish to become re-employed. However, provided that eligibility for such outplacement services is not related to entitlement to income continuation benefits,[4] such outplacement services are, in our view, distinguishable from the severance or

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[2] This program is different from the cash payment programs in Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), and Wells v. General Motors Corp., 881 F.2d 166 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990). The provision of services involved here appears to require significant administration, even if it is provided by a third party service provider rather than the employer.

[3] The preamble to coverage regulations issued by the Department of Labor on August 15, 1975 (40 Fed. Reg. 34,526), which included a "safe harbor" regulation at § 2510.3-2(b) that distinguished between severance benefits that would constitute a mere welfare plan and those that would be considered pension benefits, expresses the Department's view that welfare benefits in the event of severance are benefits that provide a former employee with "a temporary 'cushion' against loss of income from employment . . . ." When regulation § 2510.3-2(b) was issued in final form on March 2, 1979 (44 Fed. Reg. 11,761), the Department indicated that the limitations therein placed on welfare-type severance benefits are meant to ensure that such benefits are "distinguishable from retirement income" (44 Fed. Reg. 11,763).

[4] It is the Department's view that a plan that provides periodic severance payments beyond termination of employment for only those employees who accept, in connection with those payments, all employment interviews or suitable employment that their employer arranges for them is an ERISA-covered plan. See ERISA Opinions 82-60A, 82-43A, and 82-35A.

unemployment benefits that are within the meaning of ERISA § 3(1). The sole purpose of these outplacement services is to aid an employee's efforts to become re-employed, rather than to replace income that the employee loses due to termination of employment. In our view, the terms "severance" or "unemployment" benefits refer only to benefits that provide a temporary source of income replacement. Thus, in analyzing whether "outplacement" services constitute an "employee welfare benefit plan," you need consider only the extent to which such services constitute an enumerated ERISA-covered benefit apart from "severance" or "unemployment" benefits.

As mentioned above, an additional benefit that is clearly among the benefits described in section 3(1) of ERISA is "training." However, the Department's regulations provide that payment of compensation out of the employer's general assets on account of periods of time during which an employee performs little or no productive work while engaging in training is not an ERISA-covered benefit. See 29 C.F.R. § 2510.3-1(b)(3)(iv). Similarly, classroom training programs that are provided by an employer for its own employees, either directly or through an educational institution, are not "welfare plans," when their cost is paid exclusively from the employer's general assets. See C.F.R. § 2510.3-1(k) and ERISA Opinion 83-32A.

Accordingly, to the extent that the Program provides to employees, or former employees, of PTG or its subsidiaries "training" benefits covered by ERISA, the Program is an "employee welfare benefit plan" that must comply with all applicable Title I requirements. The phrase "to the extent" indicates that a program may be an ERISA-covered "employee welfare benefit plan" with respect to any welfare benefits that are covered by ERISA, even if the program also offers benefits that are not described in the "employee welfare benefit plan" definition, provided that other elements of that definition are met.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Susan G. Lahne
Division of Coverage, Reporting and Disclosure