

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

[L-548, L-582]

COLLECTIVELY BARGAINED MULTIPLE
EMPLOYER APPRENTICESHIP AND
TRAINING PLANS

Proposed Class Exemption

AGENCY: Department of Labor.

ACTION: Proposed Class Exemption.

SUMMARY: This proposed class exemption would exempt from the prohibited transaction provisions of section 406(a) (1) (A) through (D) of the Employee Retirement Income Security Act of 1974 (the Act) certain transactions between collectively bargained multiple employer apprenticeship plans and employers making contributions to these plans if certain conditions are met. The exemption affects all employers contributing to apprenticeship plans, all employees of such contributing employers, all unions who are signatories to collective bargaining agreements which govern such plans, and all persons enrolled in such plans.

DATES: Proposed effective date: January 1, 1975. Comments must be received on or before September 16, 1977.

ADDRESSES: All written comments (at least six copies) should be addressed to Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20216, Attention: Application L-548. The applications for exemption referred to herein and all comments relating thereto will be available for public inspection at the Public Documents Room of Pension and Welfare Benefit Programs, Room N-4677, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20216.

FOR FURTHER INFORMATION CONTACT:

Forrest Foss, Room C-4508, Plan Benefits Security Division, Office of the Solicitor, Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, 202-523-6856. (Not a toll free number.)

SUPPLEMENTARY INFORMATION:

Notice is hereby given of the pendency before the Department of Labor (the Department) of an application for a class exemption from the restrictions of sections 406(a) (1) (A) through (D) of the Employee Retirement Income Security Act of 1974 (the Act). The proposed class exemption would exempt from the prohibited transaction provisions of section 406(a) (1) (A) through (D) of the Act: (1) The purchase of personal property by a collectively bargained multiple employer employee welfare benefit plan maintained for the purpose of providing apprenticeship or other training programs (hereinafter referred to as an apprenticeship plan) from an employer

who contributes to such plan (hereinafter referred to as a contributing employer) or a wholly-owned subsidiary of such an employer; and (2) the leasing of real property (excluding office space) or personal property by an apprenticeship plan from a contributing employer or a wholly-owned subsidiary of such an employer.

The International Union of Operating Engineers (IUOE), on behalf of 45 local affiliated apprenticeship and/or training plans, and the Laborers' Training and Retraining Trust Fund for Northern California have filed applications for class exemptions based upon representations which are summarized below.¹ In addition, several applications which are pending for individual exemptions contain common representations with regard to the transactions described in the proposed class exemption. If the proposed class exemption is granted, all transactions referred to in individual and class exemption applications which are similar to transactions described in the proposed class exemption will be exempt from the prohibitions of sections 406(a) (1) (A) through (D) of the Act if they satisfy the terms and conditions of the proposed class exemption.² Interested persons are referred to the applications for class exemption on file with the Department for the complete representations of the applicants. The applications were filed pursuant to section 408(a) of the Act and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

DISCUSSION

The applicants represent that apprenticeship and training programs maintained by apprenticeship and other

¹ Several applications for individual exemptions granted by the Department relate to transactions of the type described in this proposed exemption. The Department has granted exemptions for transactions between apprenticeship plans and contributing employers with respect to the use by a plan, as a training and storage site, of a portion of real property owned by a contributing employer (Dicco, Inc., 41 FR 26291, June 25, 1976), the purchase by a plan of heavy machinery from a contributing employer (R.E. Coulter Gradall Rental, Inc., 41 FR 29502, July 16, 1976) and the lease by a plan of equipment on a short term basis from a contributing employer (Teamsters-Rock Products and Ready Mixed Concrete Industries Training and Upgrading Fund, 42 FR 23217, May 6, 1977).

² Under the provisions of section 3.04 of ERISA Proc. 75-1, an application for individual exemption will not ordinarily be considered separately if a class exemption which would encompass the transaction described in the application for an individual exemption is under consideration by the Department. Accordingly, the Department is notifying directly each applicant for an individual exemption of the fact that such applicant's application is not being considered separately from this class exemption and that, following the disposition of this proposed class exemption, such application would ordinarily be closed and, therefore, such applicant's comments with respect to this class exemption are sought by the Department.

training plans are an essential element in providing trained workers in the industries in which they operate. The proper functioning of these plans requires that, from time-to-time, they purchase goods and lease equipment or other property for use in the training programs which they maintain. It has been customary for these plans, which are jointly sponsored by unions and employers, to obtain such goods and rentals from employers who are contributors to the plans. All such employers are signatories to collective bargaining agreements with the sponsoring unions.

An employer who makes contributions to a plan is a party in interest with respect to such plan by reason of section 3(14) of the Act. As a result, the sale or lease of property between a plan and such an employer is a prohibited transaction under section 406(a) of the Act. Accordingly, without the relief which would be provided by this proposed class exemption, many apprenticeship plans would be forced to obtain the necessary goods and rentals from non-contributing, non-union employers to the exclusion of union employers, thereby requiring apprenticeship plans which were created as a result of collective bargaining to discriminate against union employers. Such a result would be completely contrary to the philosophy of collectively bargained apprenticeship plans.

The proposed class exemption is available only for multiple employer apprenticeship plans. For purposes of this exemption, a multiple employer welfare benefit plan is a welfare plan which is a multiemployer plan within the meaning of section 3(37) of the Act or a welfare plan which meets the requirements of at least subsections 3(37) (A) (i), (ii) and (v) of the Act.

The proposed class exemption is limited to transactions between apprenticeship plans and contributing employers (or wholly-owned subsidiaries of such employers) where neither such persons nor their affiliates are fiduciaries of the plan at the time of the transaction and have not been fiduciaries of the plan for a period extending through two years prior to such transaction. By its exclusion of certain parties in interest in this manner, the exemption is limited to situations in which there is less of a possibility that the party in interest can influence the plan's actions to the plan's detriment. Finally, the proposed class exemption would require that the exempted transaction be at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and that the transaction be appropriate and helpful in carrying out the purposes for which the plan is established or maintained.³

³ The purchasing of goods and the leasing of equipment or other property frequently is accomplished after the solicitation of competitive bids based upon specifications published by the plan. The Department considered imposing such a competitive bidding procedure as an additional condition for exemption. However, because objective standards for the imposition of such a requirement would be difficult to draft and admin-

In their applications, the class applicants requested an exemption from the prohibitions of section 406(a)(1)(A) through (D) of the Act for the provision of services and the lease of property between a contributing employer and an apprenticeship plan. The proposed exemption would not provide relief for the provision of services, including construction or repair services, to an apprenticeship plan by a contributing employer or the leasing of office space by an apprenticeship plan from a contributing employer because these transactions are already covered by the statutory exemption under section 408(b)(2) of the Act and the final regulations issued thereunder (29 CFR 408b-2, 42 FR 32389, June 24, 1977).⁴ Under the exemption provided by section 408(b)(2), a party in interest (e.g., a contributing employer) may provide services (e.g., the construction of a training facility) or office space to a plan (including an apprenticeship plan) if certain conditions are met. Accordingly, the class applicants are referred to section 408(b)(2) and the regulations issued thereunder for relief for such transactions.

The proposed exemption, if granted, would be effective retroactively to January 1, 1975.

GENERAL INFORMATION

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act does not relieve a fiduciary or other party in interest with respect to a plan to which the exemption is applicable from certain other provisions of the Act. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act.

ister on a class basis, because competitive bidding would not be appropriate for all plans in all situations and, more importantly, because a fiduciary with respect to a plan must discharge his duties with respect to such plan solely in the interest of its participants and beneficiaries and in a prudent manner pursuant to section 404(a)(1) of the Act, this requirement was not considered necessary or appropriate in this context. Rather, the proposal permits plan administrators to determine, consistent with their duties under the Act, when and how to solicit bids or otherwise effect the transactions covered by this class exemption.

⁴ As noted above, this proposed exemption would cover the lease of real and personal property, other than office space, by the apprenticeship plan from a contributing employer, because such property is not covered by the statutory exemption afforded by section 408(b)(2) and the regulations adopted thereunder.

(2) The pending exemption, if granted, will not extend to transactions prohibited under section 406(a)(1)(E), 406(a)(2) or 406(b) of the Act.

(3) Before an exemption may be granted under section 408(a) of the Act, the Department must find that the exemption is administratively feasible, in the interest of the plan or plans and of their participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan or plans.

(4) The pending exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is in fact a prohibited transaction.

(5) If granted, the pending class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption.

(6) All interested persons are invited to submit written comments on this pending class exemption to the address and within the time period set forth above. All such comments will be made part of the record. The comments and the applications for exemption will be available for public inspection at the address set forth above.

PROPOSED EXEMPTION

Based on the applications referred to and summarized above, the Department has under consideration the granting of the following exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975): Effective January 1, 1975, the restrictions of section 408(a)(1)(A) through (D) of the Act do not apply to the transactions described in section I of this exemption, provided that the conditions set forth in section II of this exemption are met.

Section I.—Transactions. (a) The purchase of personal property by a multiple employer welfare benefit plan maintained for the purpose of providing apprenticeship or other training programs (hereinafter referred to as an apprenticeship plan) from an employer who makes contributions to such plan (hereinafter referred to as a contributing employer) or from a wholly-owned subsidiary of such an employer.

(b) The leasing of personal property by an apprenticeship plan from a contributing employer or from a wholly-owned subsidiary of such an employer.

(c) The leasing of real property (other than office space within the contemplation of section 408(b)(2) of the Act) by an apprenticeship plan from a contributing employer or from a wholly-owned subsidiary of such an employer.

Section II.—Conditions. (a) With respect to any transaction between a contributing employer or a wholly-owned

subsidiary of such an employer and an apprenticeship plan referred to in section I above:

(1) Neither the contributing employer, the wholly-owned subsidiary of the employer nor any affiliate of such employer or subsidiary is a fiduciary with respect to the apprenticeship plan on the date of the transaction or has been a fiduciary respecting the apprenticeship plan at any time during the two years preceding the date of the transaction;

(2) The transaction is on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be; and

(3) The transaction is appropriate and helpful in carrying out the purposes for which the plan is established or maintained.

(b) The apprenticeship plan which enters into any of the transactions described in section I above maintains or causes to be maintained for a period of six years from the termination of any such transaction such records as are necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that:

(1) This paragraph (b) and paragraph (c) below will not apply to transactions effected prior to (60 days subsequent to the date of grant of the exemption), and

(2) A prohibited transaction will not be deemed to have occurred, if due to circumstances beyond the control of the fiduciaries of such apprenticeship plan, such records are lost or destroyed prior to the end of the six year period.

(c) Notwithstanding anything to the contrary in subsections (a)(2) and (b) section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by (1) the Department of Labor, (2) employees on whose behalf contributions are made to the apprenticeship plan involved in the transaction, (3) a contributing employer to the plan, (4) the employee organization any of whose members have contributions made on their behalf to the apprenticeship plan involved in the transaction, and (5) any duly authorized employees or representatives of a person described in (1) through (4) of this paragraph.

Section III.—Definitions. For purposes of this exemption: (a) The term "multiple employer welfare benefit plan" means a welfare plan which is a multiemployer plan within the meaning of section 3(37) of the Act, or a welfare plan which meets the requirements of at least subsection 3(37)(A)(i), (ii) and (v) of the Act.

(b) The term "affiliate" of a person includes:

(1) Any person directly or indirectly controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee or relative of such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act or a brother, a sister or a spouse of a brother or a sister.

Signed at Washington, D.C., this 20th day of July, 1977.

IAN D. LANOFF,
*Administrator of Pension and
Welfare Benefit Programs,
Labor-Management Services
Administration, Department
of Labor.*

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