U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

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August 18, 1967

Name*

This is in reply to your letter concerning benefit plans under section 7(e)(4) (formerly 7(d)(4)) of the Fair Labor Standards Act.

The following paragraphs are numbered to correspond with the questions presented in your letter.

1. A deferred plan which is treated as a profit sharing plan for IRS purposes may qualify as a benefit plan under 7(e)(4) even through its provides for less than full vesting of the interest of the participants, provided it qualifies as a bona fide benefit plan within the meaning of section 7(e)(4) and meets the tests prescribed in 29 CFR 778.215. Where such a plan or trust has been approved by the Bureau of Internal Revenue Code, the plan or trust will be considered to meet the conditions specified in subparagraphs (1), (4), and (5) of 29 CFR 778.215(a), in the absence of evidence to the contrary.
2. The word "and," as used in 29 CFR 778.215(a)(2) is not to be construed as meaning that the provision of all the types of benefits referred to must be included in the purpose of the plan. It would be sufficient if the plan provided for distribution to participate upon the happening of one of the contingencies listed therein. In other words, one may have a plan providing benefits only in the event of death.

3. A plan providing for payments to the participants only in case of death, disability, or retirement would be considered for that primary purpose and the employer's contribution to it would be excludable from the regular rate provided all requirements of 29 CFR 778.215 are met.

It would be sufficient if the contributions to the plan are paid only out of current profits. In such a case, if no profit was realized to a particular year, no contributions would be made for that year. There must, however, be a firm obligation to make a contribution conformably to the prescribed formula if there is a profit. Whether a cost-savings plan such as you describe would be considered to have as its primary purpose the provision of retirement, death or disability benefits, so as to meet the condition in section 778.215(a)(2) may be a closer question. We would need to have full information as to the history, terms, and application in practice of the plan before expressing a fire opinion.

4. Benefits which are specified are those mentioned or named in a specific or explicit manner, or stated precisely or in details. A benefit is specified within the meaning of 778.215(a)(3)(1) if it provides for a fixed sum in dollars or cents or is provided by a firm formula, such as a specified per cent of a known sum or a fixed amount times a readily ascertainable figure e.g. the number of years or service, as in your example.

As material basis, " as you may, implies a calculation which takes into account life experiences based on age, sex and other factors. It is concerned with the use of mortality tables or actuarial tables. A plan which provides for a fixed per-hour rate of contribution, with benefits to be in such amount as are actuarially determined to be available on the basis of the amount of contribution would appear to be on as actuarial basis.

A "definite formula" is more exact than "formula." The word definite as it appears in the Regulation is used in its ordinary sense. A "definite formula" refers to a fixed and precisely expressed method for arriving at the determined amount.

The third subdivision of section 778.215(a)(3) is a "catch-all" type provision which recognizes as appropriate some formulas not meeting the requirements of subdivision (i), or (ii). It is not a mere repetition of the provisions of subparagraph (a)(2), but allows consideration of all factors entering into determination of benefit amounts, in their relation to the statutory purposes and the types of benefits which it is the purpose of the plan to provide.

The formula requirements for contributions under both (ii) and (iii) may be met by a formula meeting the tests of (iv). This clause would permit acceptance of a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits, provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. This test may or may not be met by a provision in a profit sharing plan to the effect that the annual contribution of the employer shall be 10 per cent of net profits, provided, however, that in no event shall the contribution in any year exceed the amount deductible for income tax purposes for that year. Where the minimum and maximum contributions are derived from different basis, as in your example, the Department would not be able to judge the reasonableness of the relationship except on the showing of the actual experience of the company or hypothetical application of the formula to the firm's operation over a reasonable number of preceding years.

We trust that the forgoing is responsive to your inquiry.

Sincerely yours,

Frederick J. Glasgow
Administrator

*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).