

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 80-11A  
3(2)

FEB 29 1980

Mr. A.D. Fields  
Chief, Employee Plans  
Technical Branch E:EP:T:1  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

Dear Mr. Fields:

This is in reply to your request of November 5, 1979, concerning the applicability of title I of ERISA to a proposed tax deferred annuity plan (the TDA Plan) for the employees of St. Luke's Hospital Medical Center (the Employer).

The Employer desires to establish the TDA Plan pursuant to the terms of which tax-deferred annuity contracts would be purchased and premiums paid thereon by the Employer for selected employees. The documents accompanying the request indicate that certain eligibility prerequisites or conditions must be satisfied prior to employee participation in the TDA Plan, including the requirement that an employee must establish a "charitable remainder unitrust" which will ultimately benefit the Employer.

Section 3(2) of title I of ERISA defines the term "employee pension benefit plan" to include:

. . . 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 --

- (A) provides retirement income to employees, or
- (B) 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.

Department of Labor regulation §2510.3-2(f) provides a "safe harbor" so that under certain circumstances a tax deferred annuity program, pursuant to salary reduction agreements or agreements to forego an increase in salary, may not be considered to have been "established or maintained" by the employer as that phrase is used in the definition of the term "employee pension benefit plan" in section 3(2) of ERISA. On the basis of the information you have

provided, the Department has determined that the TDA Plan will not fall within the scope of regulation §2510.3-2(f) because it does not involve salary reduction agreements or agreements to forego an increase in salary. Moreover, although the preamble to §2510.3-2(f) noted that the regulation does not preclude the possibility that section 403(b) programs which do not fully conform with its provisions may nevertheless not be "established or maintained" by an employer for purposes of title I, it appears that the involvement of the Employer in the TDA Plan would be such that we would consider this plan to be "established or maintained" by the Employer and, in our view, the TDA Plan would constitute an employee benefit plan subject to title I.

It should be noted that we did not examine the TDA Plan for compliance with the various provisions of title I. Therefore, this letter should not be construed as indicative of whether the TDA Plan is in compliance with all of the provisions of title I of ERISA.

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs

cc: Mr. David C. Alexander