

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 84-15A
Sec. 3(2)

MAR 20 1984

Mr. David W. Tucker
Cooper, White & Cooper
101 California Street
Sixteenth Floor
San Francisco, California 94111

Dear Mr. Tucker:

This is in reply to your letter of June 27, 1983, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the proposed Transfer Employee Severance Pay Plan of the San Francisco Newspaper Agency (the Transfer Plan) is an employee pension benefit plan within the meaning of section 3(2)(A) of title I of ERISA.

You advise that on September 12, 1965, The Chronicle Publishing Company (Chronicle) and Hearst Publishing Company, Inc. (Hearst) entered into a joint operating agreement under which all non-editorial functions of the "San Francisco Chronicle" and the "San Francisco Examiner" were consolidated in the San Francisco Newspaper Agency (the Agency). Certain employees of Chronicle and Hearst (including certain former employees of related or predecessor companies, namely The Hearst Corporation, Apex Publishing Corporation, and Daily News Company, Ltd.), became employees of the Agency. The Agency now proposes to provide severance pay by the adoption of the Transfer Plan covering present non-union employees who were non-union employees of Chronicle or Hearst prior to September 12, 1965, and who switched over to the Agency promptly thereafter. Agency employees previously paid severance pay or amounts in lieu thereof would not be covered by the Transfer Plan.

The Transfer Plan provides for benefits equal to 2 weeks pay for each year of service with Chronicle or Hearst prior to September 12, 1965, and with the Agency prior to April 30, 1976, up to a maximum benefit equal to 60 weeks pay. The maximum benefit is also limited to no more than twice the employee's annual compensation during the year immediately preceding termination of employment. The benefits are payable upon severance of employment for any reason except death or dishonesty and are payable in a lump sum 30 days after severance or in quarterly annual installments for a period not to exceed 18 months after severance. All benefits would be paid out of the general assets of the Agency. Every employee covered by the Transfer Plan is also covered by a separate tax-qualified pension plan maintained by the Agency.

Section 3(2) of ERISA defines the term "employee pension benefit plan" as:

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean 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 --

(i) provides retirement income to employees, or
(ii) 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.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which --

(i) severance pay arrangements, and
(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

In regulation 29 C.F.R. §2510.3-2 the Department of Labor (the Department) described certain programs which would not be considered to be employee pension benefit plans within the meaning of ERISA section 3(2). Specifically with regard to severance pay programs, regulation section 2510.3-2(b) provides:

(b) Severance pay plans. (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means the total of all compensation, including wages, salary, and any other benefit of monetary value, whether paid in the form of cash or otherwise, which was paid as consideration for the employee's service during the year, or which would have been so paid at the employee's usual rate of compensation if the employee had worked a full year.

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in sub-clauses (A) and (B) of this clause (ii) have been met.

Based on the information you submitted with your request, it appears the payments under the Transfer Plan would constitute a welfare plan, unless they are contingent, directly or indirectly, upon the employee's retiring. We note that, because of the nature of the Transfer Plan, the only employees who would be eligible to receive payments would have 18 years or more of service with the Agency and its predecessor companies. It is therefore possible that the eligible employees may constitute a group at or near retirement age, and therefore the severance benefits, as a factual matter, may be contingent upon the employees retiring. Accordingly, we are unable to assure you, at this time, that the Transfer Plan would not constitute an employee pension benefit plan within the meaning of section 3(2)(A) of title I of ERISA.

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

Sincerely,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs