

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 80-4A

3(1), 3(2), 3(3), 3(4), 3(5), 3(6), 3(7), 3(8), 4(a)

JAN 25 1980

Mr. V. Grady O'Malley
Special Attorney
U.S. Department of Justice
Room 635 Federal Building
970 Broad Street
Newark, New Jersey 07102

Dear Mr. O'Malley:

This is in reply to your request for an opinion concerning the coverage of the Local 734 Pension Fund, Laborers' International Union of North America (the Pension Fund) and the Local 734 Welfare Fund, Laborers' International Union of North America (the Welfare Fund) under both title I of the Employee Retirement Income Security Act of 1974 (ERISA) and the predecessor law, the Welfare and Pension Plans Disclosure Act, as Amended (WPPDA).

Filings made for the Pension Fund with the Department under ERISA, identified as File No. 226174132-002, and under the WPPDA, identified as File No. 178598, and filings made for the Welfare Fund with the Department under ERISA, identified as File No. 221829587-502, and under the WPPDA, identified as File No. 070863, were examined, as well as filings made for Local 734 with the Department under the Labor-Management Reporting and Disclosure Act, identified as File Nos. 023958 and 000131.

The document on file with the Department indicate that both the Pension Fund and the Welfare Fund were established and/or maintained jointly by employers contributing thereto and Local 734, pursuant to collective bargaining, for the benefit of members of the union employed by the employers as well as their families.

ERISA title I, section 4(a) specifies that ERISA title I applies to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or (3) by both, except for plans specifically exempt under section 4(b).

The term "employee benefit plan" is defined in ERISA title I, section 3(3) as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." The term "employee welfare benefit plan" is defined in ERISA title I, section 3(1) as "... 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947

(other than pensions on retirement or death, and insurance to provide such pensions)." The term "employee pension benefit plan" is defined in ERISA title I, section 3(2) as "... 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."

Coverage under the WPPDA was the same as under ERISA for many plans. There are three areas of exception. The WPPDA provided more exemptions from coverage under WPPDA section 4(b) than does ERISA section 4(b), there were fewer benefits covered under the WPPDA definition of the term "employee welfare benefit plan," and the WPPDA definition of the term "employee pension benefit plan" is more limited than the ERISA definition. WPPDA section 4(a), like ERISA section 4(a), specifies that the WPPDA applied to "... any employee welfare or pension benefit plan if it is established or maintained by any employer or employers engaged in commerce or in any industry or activity affecting commerce or by an employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce or by both ..." except those plans exempt under WPPDA section 4(b). The term "employee welfare benefit plan" was defined in WPPDA section 3(1) as "... any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment." The term "employee pension benefit plan" was defined in WPPDA section 3(2) as "... any plan, fund, or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose of providing for its participants or their beneficiaries, by the purchase of insurance or annuity contracts or otherwise, retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement."

The elements of coverage under both the WPPDA and ERISA are:

- (1) the plan must be established or maintained by an employer or employee organization, as those terms are defined, or by both;
- (2) jurisdiction under the commerce clause;
- (3) the plan provides benefits to participants and beneficiaries as defined;
- (4) the plan provides benefits specified in the definition of "employee welfare benefit plan" or "employee pension benefit plan";
- (5) under the WPPDA only, the plan must have been communicated or its benefits described in writing to employees; and
- (6) the plan is not exempt under section 4(b).

The following is a discussion of each of these points with respect to both plans.

1. Establishment or Maintenance by Employer and/or Employee Organization.

Both the Pension Fund and the Welfare Fund were established and/or maintained jointly by employers and an employee organization (Local 734) through collective bargaining.

ERISA section 3(5) defines the term "employer" as "... any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or

association of employers acting for an employer in such capacity." WPPDA section 3(4) has a virtually identical definition, defining the term "employer" as "... any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee welfare or pension benefit plan, and includes a group or association of employers acting for an employer in such capacity."

The employers of the employees of Local 734 which contribute to the Fund as a result of collective bargaining with Local 734 clearly meet these definitions.

ERISA section 3(4) defines the term "employee organization" as "... any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." The WPPDA definition of "employee organization" in section 3(3) is identical to the ERISA definition except for the use of the term "employee welfare or pension plan" rather than "employee benefit plan".

Local 734 meets the definition of "employee organization" in both laws. Local 734 is a local labor union in which employees participate and a purpose for which it exists is dealing with employers on matters incidental to employment relationships, including concerning employee benefit plans. Articles I and II of the Uniform Local Union Constitution of the Laborers' International Union of North America, as amended by the 17th Convention, September 13-17, 1976, filed with the Department under the Labor-Management Reporting and Disclosure Act, indicate the nature of the organization (employee organization) and its objects. Article I, Section I states, "Each affiliated Local Union ... is created ... to accomplish the goal of gathering under one banner all those that work at the craft and calling of said International Union" Article II, Section I states among the objects "(a) To establish proper wages, conditions and hours of employment through the process of collective bargaining with employers and to fulfill and require observance thereof."

2. Commerce Clause.

With respect to the commerce clause, ERISA section 4(a) and WPPDA section 4(a) provide that ERISA title I and the WPPDA apply to employee benefit plans established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both, except for plans specifically exempt under section 4(b).

ERISA section 3(11) defines the term "commerce" as "... trade, traffic, commerce, transportation, or communication between any State and any place outside thereof." WPPDA section 3(10) defined commerce as "... trade, commerce, transportation, or communication among the several States or between any foreign country and any State, or between any State and any place outside thereof." The term "industry or activity affecting commerce" is defined in ERISA section 3(12) as "... any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry affecting commerce within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act." The definition in the WPPDA is virtually identical.¹

¹ Section 3(11) of the WPPDA defined the term "industry or activity affecting commerce" as "... any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended."

The term "industry or activity affecting commerce" has been given a liberal interpretation by the courts. The Supreme Court has held that the jurisdiction of the National Labor Relations Board under the Labor Management Relations Act definition is as broad as the jurisdiction of Congress over interstate commerce. See NLRB v. Fainblatt, 306 U.S. 601, 607, and cases cited therein (1939). Therefore, court decisions under the Labor Management Relations Act are useful in determining the application of sections 3(11) and (12) of ERISA and sections 3(10) and (11) of the WPPDA. In the case of NLRB v. Bank of America, 130 F. 2d 624 (9th Cir. 1942), cert. denied 318 U.S. 791 (1943), the court pointed out that such normal business activities as correspondence with other banks and business institutions, use of telegraph or telephone facilities involved the use of channels of interstate communications so that the bank was "engaged in interstate activities not describable otherwise than as commerce."

Therefore, the employers and Local 734 are included within the commerce clause of the WPPDA and ERISA.

3. Provision of Benefits Specified in Law.

Under both laws, in order to be covered, a plan must provide benefits specified in the law's definition of "employee welfare benefit plan" or "employee pension benefit plan".

A. The Welfare Fund

The ERISA section 3(1) definition of "employee welfare benefit plan" includes "... any plan, fund, or program ... established or ... maintained for the purpose of providing ... through the purchase of insurance or otherwise (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." (The effect of section 3(1)(B) is to include within the definition those plans which provide holiday and severance benefits, and benefits which are similar.)

According to the EBS-1 and the annual reports (Form 5500) filed with the Department, the Welfare Fund provides such benefits as health insurance, life insurance, dental and vision care. Thus, the Welfare Fund provides benefits specified in ERISA section 3(1).

The WPPDA section 3(1) definition of "employee welfare benefit plan" includes "... any plan, fund, or program ... established ... for the purpose of providing ..., through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment."

The Welfare Fund, according to the Form D-1 filed with the Department under the WPPDA, provides life insurance, accidental death and dismemberment, accident sickness, hospital, and surgical benefits and thus provides benefits specified in WPPDA section 3(1).

Thus, the Welfare Fund provides benefits specified in ERISA section 3(1) and WPPDA section 3(1).

B. The Pension Fund

The ERISA section 3(2) definition of "employee pension benefit plan" includes "... any plan, fund, or program ... 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."

According to the EBS-1 filed with the Department, the Pension Fund provides to participants at age 65 with at least 5 years of service a monthly retirement benefit equal to \$10 per year of service. Benefits are also payable at early retirement, death, and disability. Thus, the Pension Fund provides benefits described in ERISA section 3(2).

The WPPDA section 3(2) definition of "employee pension benefit plan" includes "... any plan, fund, or program ... established ... for the purpose of providing ... by the purchase of insurance or annuity contracts or otherwise, retirement benefits, and includes any profit-sharing plan which provides benefits at or after retirement."

The Form D-1 filed with the Department under the WPPDA indicates that the Pension Fund provides monthly pension and disability retirement benefits upon satisfaction of specified age and/or service requirements.

Thus, the Pension Fund provides benefits specified in ERISA section 3(2) and WPPDA section 3(2).

4. Provision of Benefits to Participants or Beneficiaries.

ERISA title I and the WPPDA cover only employee benefit plans, i.e., plans arising out of the employment context. Thus, in order to be covered, a plan must cover participants who are employees and/or former employees (including members of employee organizations) who are or may become eligible to receive benefits or whose beneficiaries may be eligible to receive benefits.

ERISA section 3(6) and WPPDA section 3(5) define the term "employee" as "... any individual employed by an employer."

ERISA section 3(7) defines the term "participant" as "... any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." WPPDA section 3(6) defines the term "participant" as "... any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan, or whose beneficiaries may be eligible to receive any such benefit."

ERISA section 3(8) and WPPDA section 3(7) define a beneficiary as a person designated by a participant or by the terms of an employee benefit plan (employee welfare or pension benefit plan in the WPPDA) who is or may become entitled to a benefit thereunder.

Both the Welfare Fund and the Pension Fund provide benefits to employees of employers with which the Funds were collectively bargained who are represented by Local 734 and their beneficiaries. Thus, both of the Local 734 Funds provide benefits to participants and beneficiaries as defined in both ERISA and the WPPDA definitions.

5. Communicated in Writing (WPPDA Only).

Finally, the WPPDA covers only those plans which were communicated or their benefits described in writing to the employees. Examples of notification which satisfy the "in writing" requirement are insurance contracts and literature, mention in a collective bargaining agreement, description in a booklet, etc. The Form D-1s filed under the WPPDA for both the Pension Fund and the Welfare Fund indicate that both were mentioned in collective bargaining agreements, were described in booklets for members, etc., and thus were communicated in writing to employees.

6. Not Exempt Under Section 4(b).

ERISA section 4(b) and WPPDA section 4(b) exempt certain employee benefit plans from coverage. Neither the Welfare Fund nor the Pension Fund fall under any of the section 4(b) exemptions.

Conclusion

Therefore, both the Local 734 Pension Fund and the Local 734 Welfare Fund, Laborers' International Union of North America, are covered by title I of ERISA and were covered by the WPPDA.

Sincerely,

Helene A. Benson
Chief
Division of Coverage
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