

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 81-23A

414(c)(4)

FEB 25 1981

Matthew T. Kissane, Esquire  
Strauss, Kissane, Davis & Hargrove  
3737 Camino Del Rio South, Suite 204  
San Diego, California 92108

Identification Number: F-1768A

Dear Mr. Kissane:

This is in reply to your letter of December 16, 1980, in which you requested an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA) on behalf of the San Diego County Teamsters Health & Welfare Trust Fund (the Trust). Specifically, you are concerned with the applicability of the fiduciary responsibility and prohibited transactions provisions of ERISA to the receipt of deferred compensation after June 30, 1977, for services rendered to the Trust prior to that date.

You represent that the trust was organized and is maintained under section 302(c)(5) of the Labor Management Relations Act and is an employee welfare benefit plan as defined in section 3(1) of ERISA. Its trustees consist of eight individuals of whom four represent participating employers and four represent participating labor organizations. These trustees administer the Trust in a fiduciary capacity as defined in section 3(21)(A) of ERISA.

You further stated that from 1973 until June 30, 1977, these trustees earned deferred compensation under the terms of the Trust and under a program formally adopted by the trustees. This deferred compensation was the accrual of rights to future payments of premiums from the assets of the Trust to an insurance carrier for the same health and welfare benefits provided participants and beneficiaries of the Trust. Trustees were eligible for this future coverage after completing six years of service as a trustee, and then, for each year of service (including the first six years) were entitled to a year of coverage. Benefits were provided only after resignation or termination as a trustee. As of June 30, 1977, further accrual of rights to future payments of premiums for this coverage terminated for all trustees.

You request an advisory opinion from the Department of Labor to the effect that the Trust may provide these delayed payments of premiums for health and welfare coverage when rights to the

coverage accrued prior to June 30, 1977, and former trustees have resigned or otherwise terminated their positions as trustee and either (1) do continue to receive full-time pay from a participating employer, employer association, or labor organization, or (2) do not continue to receive full-time pay from a participating employer, employer association, or labor organization.

Section 408(c)(2) of ERISA provides that nothing in section 406 (relating to prohibited transactions) shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer, or an association of employers whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred.

Regulations under section 408(c)(2) of ERISA, 29 CFR 2550.408c-2(b)(2), provide that under sections 408(b)(2) and 408(c)(2) of ERISA, the term "reasonable compensation" does not include any compensation to a fiduciary who is already receiving full-time pay from an employer or association of employers (any of whose employees are participants in the plan) or from an employee organization (any of whose members are participants in the plan), except for the reimbursement of direct expenses properly and actually incurred and not otherwise reimbursed.

However, section 414(c)(4) of ERISA provides that sections 406 and 407(a) of ERISA shall not apply until June 30, 1977, to the provision of services between a plan and a party in interest under a binding contract in effect on July 1, 1974, or if the party in interest ordinarily and customarily furnished such services on June 30, 1974, if such provision of services remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if such provision of services was not, at the time of such provision, a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code of 1954. 29 CFR 2550.414c-4(a) states that if the three requirements of section 414(c)(4) of ERISA are met, a person serving as a fiduciary to a plan who already receives full-time pay from a participating employer or an association of employers or from an employee organization may continue to receive reasonable compensation from the plan for services rendered to the plan before June 30, 1977.

It is the conclusion of the Department of Labor as to both issues raised by you that the limitations contained in section 408(c)(2) of ERISA will not preclude the receipt after June 30, 1977, of deferred compensation earned for services rendered prior to that date, if the conditions of section 414(c)(4) of ERISA are met.

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

Sincerely,

Alan D. Lebowitz  
Assistant Administrator for Office of Fiduciary Standards  
Pension and Welfare Benefit Programs