U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-30A
404(a)(1)(D), 406(b)(2), 404(a)(1), 403(c)(2)(A)

MAR 16, 1981

Fred S. Hunt, III, Esq.
Jennings, Beddow, Marley and Burgess
P.O. Box 145
Chesterfield Courthouse, VA 23832

Re: Identification Number F-1880A

Dear Mr. Hunt:

Your letter of April 23, 1979, addressed to the Washington Area Office of the Labor-Management Services Administration, has been forwarded to this office for a response under the Employee Retirement Income Security Act of 1974 (ERISA). We regret our delay in responding to your inquiry.

In your letter, you raised several questions relating to, among other things, the lawfulness of certain payments of contributions by employers to the Ironworkers Local No. 28 Health and Welfare Plan and the Ironworkers Pension Fund of Local 28, Richmond, Virginia (the Plans). You indicate that the payments in question were made on behalf of individuals who are independent contractors in the iron work industry and who, in some cases, may be employers contributing to the plans, but who also continue to work from time to time in the capacity of employees for other employers in that industry and have retained their union membership. In one instance cited in your letter, an individual who has been appointed a trustee of the Plans by the labor union that has participated with contributing employers in establishing and maintaining the Plans controls a substantial portion of the shares in a corporation that is engaged in iron work, while continuing to be employed by other employers and while continuing to be a union member.

In general, the Department of Labor (the Department) is responsible for the administration of Title I of ERISA.[1] It appears that your questions might involve issues arising under section 401

[1] Under Reorganization Plan No. 4 of 1978 (43 FR 47713; October 17, 1978), moreover, the Department's authority to issue interpretations and opinions under Part 2 (relating to minimum participation, vesting and benefit accrual standards for pension plans) and Part 3 (relating to minimum funding standards for pension plans) of Title I has been transferred to the Department of the Treasury.

of the Internal Revenue Code of 1954 (the Code) and section 302 of the Labor Management Relations Act, 1947 (the LMRA). The Department, because it does not administer those statutes, does not ordinarily issue advisory opinions interpreting them. The Internal Revenue Service is responsible for the administration of the Code, while section 302 of the LMRA involves criminal sanctions and the Justice Department is responsible for its enforcement.

As discussed below, however, the questions posed in your letter also raise issues under Part 4 of Title I or ERISA, relating to fiduciary responsibility. Your first three questions concern the lawfulness of the contributions in question and of the payment of benefits under the circumstances described in your letter. First, you inquire whether an employee may continue to have contributions made and to be entitled to pension benefits, assuming he works as an employee for the required period of time, and at the same time serve as an employer on jobs not connected with those where he remains an employee. Second, you inquire whether, under these circumstances, the form of business organization of such an employee's business (i.e., corporation or unincorporated organization such as a sole proprietorship or partnership) would affect the legality of the contributions made on his behalf. Third, you inquire whether contributions would be proper if an employee's business was working on a job where he was employed by another employer.

With regard to the lawfulness under Part 4 of Title I or ERISA of contributions made "on behalf" of an individual who is both serving as an employee and an independent contractor, in the sense that the amount of the contributions is determined with reference to that individual's service, the fiduciary responsibility provisions of ERISA do not impose restrictions on the manner in which employer contributions to a multiemployer plan are determined.

Accordingly, contributions determined with reference to service performed by an employee who is also an independent contractor on some jobs would not contravene the fiduciary responsibility provisions. This would be true regardless whether such an employee's business is incorporated and regardless whether the employee's business were working on a job where he was employed by another employer.

With regard to the lawfulness under the fiduciary responsibility provisions of benefit payments by a plan to an individual who has served both as an employee of one or more contributing employers and as an independent contractor, or to an individual who has both served as an employee of an employer contributing to the plan and, in his capacity as an independent contractor, made contributions to the plan for service performed by his own employees, we are of the opinion that the fiduciary responsibility provisions would not prevent payment of benefits to such an individual, provided the individual is entitled to benefits under the terms of the plan. In general, Part 4 of Title I of ERISA does not impose restrictions on the class of individuals who may become eligible to receive benefits under an employee benefit plan. Again, we offer no view as to the applicability of any other law to this issue. You should be aware, however, that section 404(a)(2)(D), provides that a fiduciary must discharge his duties with respect to a plan in

accordance with the documents and instruments governing the plan in so far as such documents and instruments are consistent with Title I.

Thus, payment of benefits to an individual who is not entitled to them would contravene the duty imposed on plan fiduciaries under section 404(a)(1)(D) to discharge their duties in accordance with governing plan documents and instruments.[2]

In your letter you also inquired whether the Plans are entitled to keep contributions, assuming such contributions have been improperly made, or whether they must be returned to the employers who made them. Under section 403(c)(1) of ERISA, the assets of a plan must never inure to the benefit of any employer. Section 403(c)(2)(A), as amended by section 410(a) of the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. 96-364) recognizes an exception from the foregoing rule in the case of certain employer contributions. In relevant part, section 403(c)(2)(A), as amended, provides as follows:

> In the case of a contribution ... (ii) made by an employer to a multiemployer plan by mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of the ... Code ... or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code), paragraph (1) shall not prohibit the return of such contribution ... to the employer within 6 months after the plan administrator determines that the contribution was made by such mistake.

Your final question is whether the individual described in your letter may continue to sit as an employee trustee under the circumstances or whether his position as an independent contractor in the ironwork industry creates a conflict of interest. It appears that this question relates primarily to section 302(c)(5) of the LMRA, under which, in general, employers and employees must be equally represented in the administration of a fund to which that section applies. As noted above,

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[2] A specific provision with respect to which questions might be raised concerning the legality of benefit payments under the circumstances described in your letter is section 406 of ERISA. Section 406(a) of ERISA prohibits fiduciaries of an employee benefit plan from causing the plan to engage in certain types of transactions with persons who are parties in interest with respect to the plan, including a transfer to, or use by, or for the benefit of, a party in interest of any of the assets of a plan. The individual described in your letter is a trustee of the Plans and, therefore, under section 3(14)(A), is a party in interest with respect to the Plans. In the Department's view, however, section 406(a)(1)(D) does not prevent the payment of benefits in accordance with the terms of an employee benefit plan to a party in interest who is entitled to them. Similarly, while section 406(b) prohibits certain acts of self-dealing on the part of employee benefit plan fiduciaries (including trustees), section 408(c)(1) makes it clear that nothing in section 406 shall be construed to prohibit any fiduciary from receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries. Thus, it appears that payments of benefits in accordance with the terms of the Plans to the individual in question would not contravene section 406 of ERISA.

however, the Department does not issue advisory opinions dealing with issues arising under section 302 of the LMRA.

Nevertheless, several provisions of Part 4 of Title I of ERISA may also be relevant to your question. Section 408(c)(3) of ERISA provides that nothing in section 406, relating to prohibited transactions, shall be construed to prohibit any fiduciary from serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest. Thus, section 408(c)(3) makes it clear that a person is not disqualified from being a trustee or other fiduciary solely by virtue of being associated with a party in interest, such as an employer whose employees are covered under the plan.

Under section 406(b)(2), however, a fiduciary with respect to a plan must not, in his individual or in any other capacity, act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. Under section 404(a)(1), moreover, with certain exceptions not here relevant, a fiduciary must discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. Thus, while an individual serving as a trustee of an employee benefit plan may be affiliated with a party in interest, that association must in no respect affect such trustee's discharge of his fiduciary duties with respect to the plan.

You should also be aware of section 408(c)(2), which provides, among other things, that no person serving as a fiduciary with respect to a plan 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.

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

Sincerely,

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