

U.S. Department of Labor

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



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 81-36A
3(1), 3(2)

MAR 26 1981

Mr. Robert J. Freda
Melrod, Redman & Gartlan
Suite 1100 K
1801 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Freda:

This is in reply to your letter dated August 12, 1980, regarding coverage under the Employee Retirement Income Security Act 1974 (ERISA) of a bonus incentive plan (the Program) to be established by Veda Incorporated (Veda) for its employees who do not take all of their authorized sick leave. You ask that the Department determine that the Program is neither an "employee welfare benefit plan" as defined in ERISA section 3(1) nor an "employee pension benefit plan" as defined in ERISA section 3(2) and therefore is not subject to the requirements of title I of ERISA.

The following is a summary of the representations in your letter. Veda proposes to establish the Program for the purpose of paying employees for accumulated but unused sick leave. The Program provides that all Veda employees will become participants in the Program on their first day of employment. The Program will be unfunded; participants under the Program will be general creditors of Veda. Veda will establish and maintain a sick leave account (SLA) for each employee. Veda will credit each employee's SLA with the number of hourly units of allowable leave earned less the number of hourly units of allowable sick leave used. Each participant will be entitled to an incentive payment of the amount of the accumulated sick leave when the sum of his age and years of service with Veda equals 75 (the Rule of 75), if he is employed at that time.

The initial incentive benefit will be equal to one-half of the net hourly units credited to the participant's SLA once the Rule of 75 is satisfied multiplied by the participant's current rate of compensation. This benefit is limited to 200 percent of the participant's compensation for the year during which the Rule of 75 is satisfied. You indicate that each year after the Rule of 75 is satisfied, the participant will be paid for one-half of the hours of sick leave earned during the year. The initial benefit will be paid in eight quarterly installments commencing 4 months after

the end of the year during which the participant satisfied the Rule of 75. The annual benefits thereafter will be paid in a lump sum each year within 4 months after the close of the plan year. The remaining one-half of the net hourly units credited to the participant who satisfies the Rule of 75 and who continues to be employed after the date of satisfying such rule is held in a "protected sick leave account" and may be used as sick leave by the participant in the future.

Section 4(a) of ERISA title I provides, in relevant part, that title I applies to "... any employee benefit plan if it is established or maintained ... by any employer engaged in commerce or in any industry or activity affecting commerce or ... by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce ... or ...by both." Section 3(3) defines the term "employee benefit plan" to mean an employee welfare benefit plan or an employee pension benefit plan or a plan which is both a welfare benefit plan and a pension benefit plan. Section 3(1) defines the term "employee welfare benefit plan" to 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 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)."

Because the Program is to be established and maintained to compensate employees for not using sick leave, not to provide a benefit listed in ERISA section 3(1), the Program is not an employee welfare benefit plan within the meaning of that section.

Section 3(2)(A) defines the term "employee pension benefit plan" to 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."

In your letter, you suggest that the Program is not a pension plan because it does not result in a deferral of income. We assume, although it is not entirely clear from your submissions, that an employee, before meeting the Rule of 75, may in any year use all previously accumulated but unused sick leave and would not be limited to using a specified amount of sick leave in any

particular year. If that assumption is correct, we do not think that the Program would result in a deferral of income.¹

Nevertheless, even if the Program were to result in a deferral of income by employees, it would not be an employee pension benefit plan unless it results in a deferral for periods extending to the termination of covered employment or beyond, or provides retirement income to employees. The Program does not, by its express terms, provide retirement income to employees or result in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

However, even if a plan, fund, or program does not, by its express terms provide retirement income to employees or result in a deferral of income by employees to the termination of covered employment or beyond, it is an "employee pension benefit plan" within the meaning of section 3(2)(A) of ERISA if it has these effects as a result of surrounding circumstances. The question whether a plan, fund, or program has these effects as a result of surrounding circumstances is an inherently factual question. Section 5.01 of ERISA Procedure 76-1, 41 FR 36281 (August 27, 1976), provides that the Department generally will not issue opinions on such questions.

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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

¹ If your arrangements for "sick leave" restrict an employee from using in subsequent years "sick leave" which had been accumulated in earlier years but permit the crediting of such "sick leave" for purposes of the Program, the conclusions in this letter would have to be re-evaluated.