

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-37A
3(1), 3(2)

MAR 31 1981

Mr. Ray W. Frederick
Suite 1717
69 West Washington Street
Chicago, Illinois 60602

Dear Mr. Frederick:

This is in reply to your letter of October 17, 1980, regarding the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed Max Factor & Co. – ILWU Local 26 Severance Pay Plan (the Severance Pay Plan). Specifically, you ask whether the Severance Pay Plan is an employee pension benefit plan, as defined under section 3(2) of ERISA, or an employee welfare benefit plan, as defined under section 3(1) of ERISA.

You represent that recently Max Factor & Co. entered into a collective bargaining agreement with the Warehouse, Processing & Distribution Workers' Union, Local 26, affiliated with the International Longshoremen's and Warehousemen's Union (the Local) which provided for the Severance Pay Plan. The proposed Severance Pay Plan is being established to provide benefits based upon length of service for involuntary separation from employment with Max Factor & Co. (the Company) which would result directly from the closing of the entire Company's operation or because the Company's operation is relocated outside the jurisdiction of the Local. The severance benefits will be provided to defray adjustment expenses by supplementing, and not replacing, state unemployment compensation and to help compensate for the loss of job security, vacation, and sick leave accrual and insurance benefit coverage. The Severance Pay Plan will be funded by scheduled Company contributions from general assets to the Severance Pay Plan Trust (the Trust) as of July 1, 1980.

The Company is to contribute 10 cents per hour for each straight time hour worked for each regular full-time employee covered by the collective bargaining agreement but not more than \$4.00 per week per employee. Regular full-time employees with 5 full years of seniority with the Company actively working on the date that the Company informs the Local that it will terminate or transfer operations, will be eligible for payment of severance benefits provided that the employee remains regularly at work until the date specified by the Company for his termination, is not discharged for just cause, does not take another job with the Company, and does not retire or die.

Upon termination of eligible employees, the Trust will distribute the severance benefits in accordance with a formula described in the plan. Under the benefit formula, an eligible employee is entitled to benefits generally equal to his credited service multiplied by the quotient of the net value of the Trust Fund divided by the aggregate of all service credited to all eligible employees, but not to exceed the equivalent of twice the employee's annual compensation.

The Company, in addition to the Severance Pay Plan, maintains a pension plan to which it contributes and which includes the employees who will be eligible to participate in the Severance Pay Plan.

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA 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)." Inasmuch as the Severance Pay Plan provides eligible employees severance benefits upon certain specified conditions of separation from employment with the Company and severance benefits are among the benefits listed in section 3(1)(B) of ERISA, the Severance Pay Plan is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

The term "employee pension benefit plan" is defined in section 3(2) of ERISA as "(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."

Department of Labor regulation 29 C.F.R. §2510.3-2 identified certain programs that would not be considered to constitute employee pension benefit plans within the meaning of section 3(2)(A) of ERISA. Specifically, regulation section 2510.3-2(b)(1) provides that:

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.

Accordingly, since the Severance Pay Plan meets the criteria of regulation section 2510.3-2(b)(1), it is the opinion of the Department that the Severance Pay Plan is not an employee pension benefit plan within the meaning of section 3(2) 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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs