U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-55A
SECTION 3(2)

JUN 26 1981

Mr. Jay A. Herbst
Cross, Wrock, Miller & Vieson
Suite 1900
400 Renaissance Center
Detroit Michigan 48243

Dear Mr. Herbst:

This is in reply to your letter of March 18, 1981, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the American Motors Corporation (the Corporation) proposed vacation benefits program for salaried employees (the Plan). Specifically, your request for an opinion concerns whether the portion of the Plan which provides deferred vacation benefits (the deferral arrangement) will be regarded by the Department as solely an employee welfare benefit plan or will be deemed an employee pension benefit plan.

The following summary of the relevant provisions of the Plan is based on the representations contained in your letter and the proposed plan document you enclosed.

The Plan provides that certain full-time non-represented salaried employees of the Corporation are entitled to receive compensation for a specified number of weeks during which they may take vacations according to a schedule based on compensation status, hiring date, and years of service. The deferral arrangement provides that, not later than November 30 of any year, an employee may irrevocably agree in writing not to take a portion of the vacation time to which the employee would otherwise be entitled in the following year. The election to defer may be made only with respect to the number of weeks which the Corporation has designated as eligible for deferral up to a career maximum of 104 vacation weeks. An employee receives one vacation credit for each week of vacation not taken. Vacation credits result in an employee obtaining a deferred vacation benefit payment on ceasing employment with the Corporation for any reason. In addition, employees may, at the sole discretion of the Corporation, obtain cash payments while continuing in employment with the Corporation in return for cancellation of vacation credits in case of proven emergency financial need by the employee. Employees with vacation credits at the time of their retirement, death, permanent and total disability, long term disability, voluntary termination, or discharge are eligible for payments from the Corporation. Payments for vacation

credits are equal to the amount of credits attributable to the employee multiplied by the employee's base weekly salary as of the date of termination except that employees who terminate employment for reasons other than retirement within 5 years of the adoption of the Plan, death, permanent and total disability, or long term disability and who have not elected to receive one or more vacation credits in at least 5 separate years receive a minimum benefit payment for each vacation credit they hold at termination of employment. The minimum benefit payment consists of each vacation credit held multiplied by the highest base weekly salary, including applicable shift premium, of the employee for the year following the November 30 on which the employee agreed to defer that specific vacation credit.

The Corporation may terminate the Plan, including the deferral arrangement, at any time. Upon such termination the Corporation may either make immediate cash payments to all employees in cancellation of the employees' vacation credits, with the amount of such payment to be the number of credits times the base weekly salary, including applicable shift premium, of the employee at termination of the Plan or, alternatively, provide benefits with respect to the existing vacation credits of an employee in the manner provided under the Plan. Employees designate the form of payment for a vacation credit at the time of election of the credit. The forms of payment are either (1) a lump sum or (2) two equal annual installments over no more than 24 months after termination of employment with the Corporation. Interest is paid on the second annual installment at the rate then in effect as set by the Corporation each November 30. Employees file at the time they receive a vacation credit a written designation of beneficiary form for payment of benefits in the event of death. The Corporation will suspend installment payments of an employee who returns to work until that employee again ceases employment. The Plan prohibits and declares null and void the pledging of Plan benefits or rights as collateral and their conveyance, transfer, or assignment by employees or beneficiaries. It also precludes claims of creditors, employees, or beneficiaries for Plan benefits or rights through legal process or otherwise. The Plan provides for a claims procedure and a method for review of claim denial. All payments for vacation credits are made from the general assets of the Corporation.

The issue you raise in your request and about which you provide argumentation concerns whether the deferral arrangement will be deemed by the Department to be an employee pension benefit plan, as defined in ERISA section 3(2). You base your arguments that the Department should not deem the deferral arrangement to be an employee pension benefit plan on ERISA section 3(2)(B) and on regulation 29 C.F.R. §2510-3-2(b). ERISA section 3(2)(B) authorizes the Secretary to promulgate regulations specifying categories of severance and supplemental pay arrangements which will be treated as welfare plans rather than pension plans for the purposes of title I of ERISA. Regulation section 2510.3-2(b) (copy enclosed), which you cited in your request, sets standards under which the Department excludes from the definition of an employee pension benefit plan certain arrangements providing payments to employees on termination of employment. Arrangements which meet the standards provided in regulation section 2510.3-2(b) are not subject to parts 2 and 3 of ERISA title 1 which contain requirements applicable to employee pension benefit plans rather than employee welfare benefit plans. To the extent that

such arrangements constitute welfare plans, however, they are subject to parts 1, 4, and 5 of title I.

Regulation section 2510.3-2(b) provides, in pertinent part, as follows:

> (1) 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,
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> * * *
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> (B) … within 24 months after the termination of the employee's service.

The deferral arrangement provides benefits to participants when termination of employment occurs for any reason and, thus, the payments made thereunder are not directly or indirectly contingent on retirement. Each participant is limited to deferral of 104 weeks of salary (i.e., 104 vacation credits) over the employee's entire career. Assuming that the interest paid on the second installment of principal is at a reasonable rate, the amount to be paid at termination of employment does not appear to exceed the limit on the amount of payments to be provided specified in regulation section 2510.3-2(b)(1)(ii). Because all payments are completed within 24 months of termination of service by the employee, the Plan also appears to meet the standard for the time over which payments may be made specified in regulation section 2510.3-2(b)(1)(iii)(B).

Although the deferral arrangement appears to meet the conditions of regulation section 2510.3-2(b) and, thus, is not considered by the Department to constitute an employee pension benefit plan within the meaning of ERISA title I, it does provide a benefit (severance pay) described in section 302(c) of the Labor Management Relations Act of 1947 and, for that reason, it constitutes an "employee welfare benefit plan" as that term is defined in ERISA section 3(1) consequently, the deferral arrangement must comply with all applicable requirements of parts l, 4, and 5 of ERISA title I.

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
Pension and Welfare Benefit Programs

Enclosures