

ERISA OPINION

OPINION NO. 81-86A

Sec. 4(a), 4(b), 3(5), 3(4), 3(11),
3(12), 3(1), 3(8), 3(7)

NOV 13 1981

Martha P. Rogers
Special Assistant U.S. Attorney
U.S. Department of Justice
Criminal Division
77 South East 5th Street
Suite 401
Miami, Florida 33131

Dear Ms. Rogers:

This is in reply to your request for an opinion concerning the coverage of six employee benefit plans under both Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and the predecessor law, the Welfare and Pension Plans Disclosure Act, as Amended (WPPDA).

These plans are; (1) the Health and Welfare Department of Construction and General Laborers District Council of Chicago and Vicinity Trust Fund - affiliated with Laborers Locals 1, 2, 4, 5, 6, 25, 75, 76, 96, 118, 152, 225, 260, 269, 288, 681, 1001, 1006, 1092; (2) Southeast Florida Laborers District Council Dental, Vision and Preventive Care Trust Fund - affiliated with Laborers Locals 478, 938, 767 and 635; (3) Laborers Health and Welfare Fund of Dade County, Florida - affiliated with Laborers Locals 478 and 635; (4) Laborers Local 938 Health and Welfare Fund of Broward County, Florida; (5) Laborers Local 666 Health and Welfare Trust Fund of Dade County; and (6) Laborers Local 767 Health and Welfare Trust Fund (hereinafter referred to as the "Plans").

We have examined for each of the respective Plans filings made for the plans with the Department under ERISA, identified respectively by the Nos. WP-005465, WP-275253, WP-204446, WP-210022, WP-267013, WP-213519 and under the WPPDA, identified by the same numbers. The documents on file with the Department indicate that all the Plans were established and/or maintained jointly by the respective Local unions and by employers contributing thereto pursuant to collective bargaining agreements, for the benefit of members and their families, of the affiliated local union employed by the contributing employers.

ERISA Title I, section 4(a) specifies that ERISA Title I applies to any employee benefit plan if it is established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organizations representing employees

engaged in commerce or in any industry or activity affecting commerce, or (3) by both, except for plans specifically exempt under section 4(b).

The term "employee benefit plan" is defined in ERISA Title I, section 3(3): as "... an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." The term "employee welfare benefit plan" is defined in ERISA Title I, section 3(1) 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 or retirement or death, and insurance to provide such pensions)."

Coverage of employee welfare benefit plans under the WPPDA was the same as under ERISA for many plans. There are three areas of exception. The WPPDA provided more exemptions from coverage under WPPDA section 4(b) than does ERISA section 4(b). These exemptions relate to plans administered by organizations which are exempt from taxation under the provisions of section 501(a) of the Internal Revenue Code and plans consisting of 25 participants or less. In addition there were fewer benefits covered under the WPPDA definition of the term "employee welfare benefit plan." The benefits not contained in the definitional section of the WPPDA which are included under ERISA are vacation benefits, apprenticeships, or other training programs, day care centers, scholarship funds or prepaid legal services. Further the WPPDA definition of the term "employee pension benefit plan" is more limited than the ERISA definition in that the definition contained in ERISA embraces other methods of income deferral up to and beyond termination of the covered employment regardless of the method utilized to distribute such benefits.

Thus, the elements of coverage under both the WPPDA and ERISA are:

- (1) the plan must be established or maintained by an employer or employee organization, as those terms are defined, or by both;
- (2) jurisdiction under the commerce clause;
- (3) the plan provides benefits to participants and beneficiaries as defined;
- (4) the plan provides benefits specified in the definition of "employee welfare benefit plan" or "employee pension benefit plan";

- (5) under the WPPDA only, the plan must have been communicated or its benefits described in writing to employees; and
- (6) the plan is not exempt under section 4(b).

The following is a discussion of each of these points with respect to all the plans. Distinctions will be made only where the differences in plans warrant such distinctions.

1. Establishment or Maintenance by Employer and/or Employee Organization.

All six plans were established and/or maintained jointly by employers and an employee organization through collective bargaining.

ERISA section 3(5) defines the term "employer" as "... any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan and includes a group or association of employers acting for an employer in such capacity." WPPDA section 3(4) has a virtually identical definition.

The employers of the employees of the above referenced Plans which contribute to the Fund as a result of the various collective bargaining agreements with the union locals clearly fall within this definition.

ERISA section 3(4) defines the term "employee organization" as "... any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." The WPPDA definition of "employee organization" in section 3(3) is identical to the ERISA definition except for the use of the term "employee welfare or pension plan" rather than "employee benefit plan."

The local unions affiliated with the six subject plans all meet the definition of "employee organization" in both laws. The Locals are all labor organizations in which employees participate and a purpose for which they exist is dealing with employers on matters incidental to employment relationships, including matters affecting employee benefit plans. Articles I and II of the Uniform Local Union Constitution of the Laborers' International Union of North America, as amended by the 17th Convention, September 13-17, 1976, filed with the Department under the Labor-Management Reporting and Disclosure Act, indicate the nature of the organization (employee organization) and its objectives. Article I, Section I states, "Each affiliated Local Union ... is created ... to accomplish the goal of gathering under one banner all those that work at the craft and calling of said International Union" Article II, Section I list among the objectives

of the union "(a) To establish proper wages, conditions and hours of employment through the process of collective bargaining with employers and to fulfill and require observance thereof."

2. Commerce Clause.

With respect to the commerce clause, ERISA section 4(a) and WPPDA section 4(a) provide that ERISA Title I and the WPPDA apply to employee benefit plans established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce, or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both, except for plans specifically exempt under section 4 (b).

ERISA section 3(11) defines the term "commerce" as "... trade, traffic, commerce, transportation, or communication between any State and any place outside thereof." WPPDA section 3(10) defined commerce as "... trade, commerce, transportation, or communication among the several States or between any foreign country and any State, or between any State and any place outside thereof." The term "industry or activity affecting commerce" is defined in ERISA section 3(12) as "... any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry affecting commerce within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act." The definition in the WPPDA is virtually identical.¹

The term "industry or activity affecting commerce" has been given a liberal interpretation by the courts. The Supreme Court has held that the jurisdiction of the National Labor Relations Board under the Labor Management Relations Act definition is as broad as the jurisdiction of Congress over interstate commerce. See NLRB v. Fainblatt, 366 U.S. 601, 607, and cases cited therein (1939). Therefore, court decisions under the Labor Management Relations Act are useful in determining the applications of section 3(11) and (12) of ERISA and sections 3(10) and (11) of the WPPDA. In the case of NLRB v. Bank of America, 130 F.2d 624 (9th Cir. 1942), cert. denied 318 U.S. 791 (1943), the court pointed out that such normal business activities as correspondence with other banks and business institutions, use of telegraph or telephone facilities involved the use of channels of interstate communications so that the bank was "engaged in interstate activities not describable otherwise than as commerce."

¹ Section 3(11) of the WPPDA defined the term "industry or activity affecting commerce" as "... any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Relations Act of 1947, as amended, or the Railway Labor Act, as amended."

Therefore, we conclude that the employers and the various locals affiliated with these Plans engaged in commerce or in an industry affecting commerce within the meaning of ERISA and the WPPDA.

3. Provision of Benefits Specified in Law.

Under both laws, in order to be covered, a plan must provide benefits specified in the law's definition of "employee welfare benefit plan" or "employee pension benefit plan" as set forth above.

According to the annual reports (Forms 5500 and EBS-1) filed by these six plans with the Department, all provide some of the various combinations of the benefits listed. Thus, the plans provide benefits specified in ERISA section 3(1) as well as WPPDA section 3(1).

4. Provision of Benefits to Participants or Beneficiaries.

ERISA Title I and the WPPDA cover only employee benefit plans, i.e., plans arising out of the employment context. Thus, in order to be covered, a plan must cover participants who are employees and/or former employees (including members of employee organizations) who are or may become eligible to receive benefits or whose beneficiaries may be eligible to receive benefits.

ERISA section 3(6) and WPPDA section 3(5) define the term "employee" as "... any individual employed by an employer."

ERISA section 3(7) defines the term "participant" as "... any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." WPPDA section 3(6) defines the term "participant" as "... any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan, or whose beneficiaries may be eligible to receive any such benefit."

ERISA section 3(8) and WPPDA section 3(7) define a beneficiary as a person designated by a participant or by the terms of an employee benefit plan (employee welfare or pension benefit plan in WPPDA) who is or may become entitled to a benefit thereunder.

All of the subject plans provide benefits to employees of employers who have established and/or maintained the Plans and who are participants and beneficiaries as defined in both the ERISA and the WPPDA definitions.

5. Communicated in Writing (WPPDA Only).

Finally, the WPPDA covers only those plans which were communicated or their benefits described in writing to the employees. Examples of notification which satisfy the "in writing" requirement are insurance contracts and literature, mention in a collective bargaining agreement, description in a booklet, etc. The Form D-1s filed under the WPPDA for the Welfare Funds here in question indicate that all were mentioned in collective bargaining agreements or were described in booklets for members, etc., and thus were communicated in writing to employees.

6. Not Exempt Under Section 4(b).

ERISA section 4(b) and WPPDA section 4(b) exempt certain employee benefit plans from coverage such as governmental and church plans. None of the subject Welfare Plans fall under any of the section 4(b) exemptions.

Conclusion

Based upon our review of the reports filed with the Department and referred to above and for the reasons noted it is the opinion of the Department of Labor that all of the above-referenced employee benefit plans are covered by Title I of ERISA and were covered by the WPPDA.

Sincerely,

Morton Klevan
Deputy Assistant Administrator