U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 81-88A
Sec. 3(3)

JUL 9 1981

David Margolis
Chief, Organized Crime and Racketeering Section
Criminal Division
Department of Justice
Washington, D.C. 20530

Attention: Joseph M. Dooley
Attorney, Labor Unit

Re: Chicago Metropolitan Vendors Association
(DM:JMD:saa 156-017-23)

Dear Mr. Margolis:

This is in response to your letter of May 20, 1980, addressed to Donald Myers of the Plan Benefits Security Division, Office of the Solicitor of Labor, regarding the Chicago Metropolitan Vendors Association. With your letter you enclosed a copy of a letter, dated February 28, 1980, from Albert L. Grasso of Much, Schelist, Freed, Denenberg, Ament & Eiger, P.C., which was addressed to Mr. Martin Schneid, Assistant Regional Director, National Labor Relations Board, but which was referred to the United States Attorney's office for the Northern District of Illinois and then to your office.

In his letter, Mr. Grasso poses several questions regarding a non-qualified pension plan (the plan) maintained for milk vendors in the Chicago metropolitan area. These vendors are represented for purposes of collective bargaining with Chicago area milk suppliers by Teamsters Union Local 753, but, according to Mr. Grasso are independent contractors with respect to such suppliers, rather than employees.[1] Although until recently the milk vendors participating in the plan have conducted operations in an unincorporated manner, a recent amendment to the plan

[1] In addition, in a letter to Donald Myers, dated July 1, 1980, (a copy of which is enclosed) Mr. Grasso states that the Internal Revenue Service has determined that the milk vendors are not employees of the milk suppliers. However, Mr. Grasso did not discuss the nature of this determination.

permits vendors who are incorporated to participate in the plan. However, it appears that only vendors who are sole-owners of their businesses would be covered by the plan.[2]

The plan is administered by a joint board of trustees half of whom are selected by the union and half of whom are selected by the milk suppliers.

In the course of an investigation unrelated to your request, the Office of Enforcement of the Department's Pension and Welfare Benefit Programs has obtained a copy of an amended and restated trust agreement of Milk Wagon Drivers' Union, Local 753, I.B. of T., C., W. and H. of A., and Milk Dealers' Vendor Pension Trust, a copy of which is enclosed. Although Mr. Grasso does not specifically identify the instrument under which the plan described in his letter is maintained, we believe that the enclosed trust agreement may relate to that plan because, among other things, it establishes the pension benefit rights of certain "Vendor Members" who are defined in Article Two of the trust agreement as "members [of Local 753] who purchase dairy products from a Milk Dealer for resale on a personally run route."

As you know, this Department does not have interpretive responsibility with respect to matters arising under the Labor Management Relations Act, 1947 (the Taft-Hartley Act) and, accordingly, we have not responded to the specific questions raised by Mr. Grasso. However, the following information regarding the status of the plan under Title I of ERISA may be helpful to you.[3]

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[2] As discussed in more detail below, Mr. Grasso states that the plan will continue to be a plan without employees described in 29 CFR §2510.3-3(c), notwithstanding the incorporation of some of the participating milk vendors, and that the plan will, therefore, continue to be excluded from the coverage of ERISA. The provisions of 29 CFR §2510.3-3(c) apply, in the case of a corporation, only where a trade or business is wholly owned by an individual or by an individual and his spouse. Accordingly, we conclude that only vendors who are the sole-owners of their businesses participate in the plan.

[3] Section 302(c)(5) of the Taft-Hartley Act provides, in part, an exception to the general prohibition in section 302(a) of payments by an employer to an employee representative with respect to contributions to a pension plan only if such plan is, among other things, for the sole and exclusive benefit of employees of an employer and their families and dependents (or of such employees, families, and dependents, jointly with the employees of other employers making similar payments and their families and dependents). Because the term "employee pension benefit plan" is defined in section 3(2) of ERISA in terms of the providing of benefits to employees, a determination of the plan's status under Title I of ERISA may be relevant to a determination whether the plan is a plan of the kind described in section 302(c)(5) of the Taft-Hartley Act. We think it would not be appropriate for us to express an opinion on the question whether an individual who is an "employee" for purposes of Title I of ERISA must necessarily also be an "employee" for purposes of determining whether a plan is maintained "for the sole and exclusive benefit of employees" under section 302(c)(5) of the Taft-Hartley Act, or whether a

Mr. Grasso states that the plan is not covered by ERISA because it is a "plan without employees" described in 29 CFR §2510.3-3(c). That regulation provides that, for purposes of Title I of ERISA, the term "employee benefit plan" does not include any plan, fund or program (other than an apprenticeship or other training program) under which no employees are participants, and, therefore such a plan would not be subject to the provisions of Title I (see section 4(a) of ERISA). The regulation also provides that an individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual and his or her spouse, and that a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

It seems to us, on the basis of the statements made by Mr. Grasso, that the milk vendors who participate in the plan would not be considered to be employees with respect to the businesses which they own for purposes of Title I of ERISA. However, since the regulation cited by Mr. Grasso only establishes rules for determining whether an individual (and his or her spouse) is an employee with respect to a trade or business which is wholly owned by such individual (and his or her spouse), or in which he is a partner, the regulation would not exclude a plan from the coverage of Title I of ERISA if it is maintained for the purpose of providing benefits to individuals who, while owners of a trade or business, also would be considered to be "employees" of another entity. Thus, in this case, if the relationship between the milk suppliers and the milk vendors were characterized as that of employer and employee, 29 CFR §2510.3-3(c) would not apply to the plan.

The Department has not specifically addressed the question whether an individual who owns a trade or business may nonetheless be considered to be an "employee" of another entity with respect to that trade or business.[4] The material that was submitted by Mr. Grasso does not

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payment by an employer is a prohibited payment to an "employee representative" under Section 302(a) of that act if made to a representative of such an individual.

[4] Section 3(6) of ERISA defines the term "employee" to mean any individual employed by an employer, but the Department has not issued regulations further interpreting that definition. However, the Department has issued two advisory opinions (copies of which are attached) that discuss the circumstances in which persons who are technically independent contractors may nevertheless be considered to be "employees" for purposes of Title I of ERISA. In Department of Labor Advisory Opinion 75-40, (April 17, 1975), the Department stated that a plan that provides benefits to independent contractors and not to employees would not be covered by Title I of ERISA, and that a determination whether an individual is an independent contractor or an employee depends on the facts and circumstances of the particular case. In Department of Labor Advisory Opinion 77-75A (September 21, 1977), the Department stated that it intends to interpret the provisions of ERISA liberally to protect the rights of plan participants and beneficiaries and concluded that insurance agents whose business activity is predominantly with

indicate that the relationship between the milk suppliers and the milk vendors has any of the characteristics generally found in the relationships of employers and employees other than the fact that contributions are made by the suppliers to the plan on behalf of the vendors. Therefore, on the basis of that material alone, it does not appear that the plan is maintained for the purpose of providing benefits to employees, and, accordingly the plan does not appear to be subject to Title I of ERISA.[5] However, Mr. Grasso did not submit all the material which would be relevant to such a decision, and we cannot assure you that, if all the material were submitted, our decision would remain the same. Although, as indicated in Department of Labor Advisory Opinion 77-75A, the Department may, in appropriate cases refer to provisions of other laws (such as the Internal Revenue Code) as an aid in determining whether an individual is an "employee" for purposes of ERISA, the question whether a plan is maintained for employees under ERISA is dependent on the particular facts and circumstances of each case. In this respect, we enclose a copy of a summary of a recent decision which, in applying a common law test in

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one life insurance company are "employees" of that life insurance company within the definition set forth in section 3(6) of ERISA. In arriving at its conclusion that insurance agents are employees, the Department referred to sections 7701(a)(20) and 3121(d) of the Internal Revenue Code which provide that the term "employee" shall, for specified purposes, include certain insurance agents. In this respect, we note that section 3121(d)(3)(A) of the Internal Revenue Code (relating to FICA taxes) specifically includes within the definition of "employee" agent-drivers and commission-drivers engaged in, among other things, the distribution of beverages, but excludes such drivers from this specific definition if they engage in the distribution of milk. However, notwithstanding this exclusion, the Internal Revenue Service applied common law rules under section 3121(d)(1) of the Code (a general definition of "employee") in concluding that, in the circumstances described in the ruling, individuals engaged under contract in the distribution of milk for a dairy company are "employees" of the company. Rev. Rul. 70-472, 1970-2 C.B. 29.

[5] The enclosed trust agreement indicates that, under the terms of the plan described in that document, certain service by an individual as an "Employee Member" within the meaning of the "Milk Wagon Drivers' Union Local 753, I.B. of T., C., W. and H. of A. and Milk Dealers' Pension Trust Employee's Trust" may be taken into account in determining the individuals's eligibility for a pension benefit (see Article Nine, Part B, of the enclosed trust agreement). Further, the amount of that benefit is determined with reference to years of union membership rather than years of activity as a vendor member, and such periods of union membership may include service as an employee. Therefore, the argument might be advanced that, under these provisions, the plan provides a benefit to "employees" (because the amount of an individual participant's benefit may be affected by his service as an employee). Accordingly, at least to the extent the Plan provides such benefits, it might be considered a pension plan covered by Title I of ERISA. However, the Department has not adopted this position.

determining whether an individual was an employee or an independent contractor, discusses some of the factors which may be relevant to such a determination.

If you should have any further questions regarding this matter, please call Donald J. Myers of the Office of Solicitor at (202) 523-8644.

Sincerely,

Ian D. Lanoff
Administrator

Enclosures