

U.S. Department of Labor

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



Reply to the Attention of:
Ms. Patricia Nitchie
(202) 523-8521

OPINION NO. 82-37A
Sec. 3(2)(A)

JUL 30 1982

Mr. Karl Clifford
Smith, Baker, Field & Clifford, Inc.
2112 Indiana
Lubbock, Texas 79410

Dear Mr. Clifford:

This is in reply to your letters of April 14, 1981, and February 19, 1981, requesting an advisory opinion stating that title I of the Employee Retirement Income Security Act of 1974 (ERISA) does not apply to the Prather Sheet Metal Works, Inc. and Read-Co Mfg., Inc. Defined Benefit Plan (the Plan). Specifically, your question concerns whether Prather Sheet Metal Works, Inc. and Read-Co Mfg., Inc. (the Corporations), established or maintained the Plan for purposes of ERISA title I. Your inquiry also is addressed to the Internal Revenue Service (IRS) and to the Pension Benefit Guaranty Corporation. In this opinion the Department of Labor (the Department) will address only the issue under jurisdiction of the Department, namely, whether the Plan is covered by ERISA title I.

The representations contained in your letters and in the materials submitted with your request are as follows. On May 28, 1980, the following documents to which the Corporations president's verified signature was affixed along with the date October 4, 1979, were forwarded to the IRS as the Plan's request for an IRS determination letter: the Plan document, the Plan's trust agreement, a power of attorney, an application for qualification with attachments, and a Form EBS-1 plan description. Both the Plan's application for qualification and the Plan's Form EBS-1 specify the effective date of the Plan as April 1, 1979. The Plan's application for qualification stated that the Plan was also communicated to employees orally and in writing on April 1, 1979. You submitted a response from the IRS dated September 29, 1980, stating the Plan was qualified on the basis of the documents submitted and, in addition, you submitted the minutes of a special meeting of the Corporations' directors on September 4, 1980, at which the directors voted not to adopt or implement the Plan or, in the alternative, to terminate the Plan effective April 1, 1980. You also submitted affidavits by two officer-employees of the Corporations and by one shareholder-employee of the Corporations which recite, in pertinent part, that the affiants were never

informed of the existence of the Plan as employees and that they anticipated no benefits thereunder. The Corporations made no contributions to the Plan.

You argue that there was a condition precedent to the establishment of the Plan that the Plan sponsor receive an IRS determination of qualification status and the Plan sponsor determine, at that time, to implement the Plan. You also argue, in the alternative, that the Plan was not established because no benefits were accrued thereunder.

Section 3(2)(A) of ERISA, in relevant part, 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 ... 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,

There is no question that the Plan was meant to provide retirement income to employees of an employer and would be an "employee pension benefit plan" within the meaning of section 3(2)(A) of ERISA if it is considered to have been established or maintained by an employer. You argued that, although the Plan documents and all other documents submitted to the IRS do not contain any provisions conditioning the establishment of the Plan on the receipt of a favorable determination letter from the IRS and a subsequent decision by the Plan sponsor to implement the Plan, and even though duly qualified Plan officials filed documents with the Department indicating that a plan had been established, the Department should find, on the basis of affidavits which you submitted, that there was no intent on the part of the Plan sponsor to implement the Plan at the time a request for a favorable determination letter from the IRS was filed. The Department cannot accept this view. On the basis of the information submitted, it is the position of the Department that the Plan was established by the Corporations.

Further, the Department does not accept your view that the Plan was not established because no benefits were accrued under the Plan. In fact, your letters state that benefits were accrued under the Plan to four employees, one of whom terminated employment without vested benefits and three of whom subsequently waived their benefits. Because in the Department's view benefits have accrued under the Plan, the Department need not express a view as to whether a plan was "established" if no participants had accrued benefits.

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,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs