

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-44A

Sec. 3(1)

AUG 27 1982

Mr. Frank Albino
Parker, Milliken, Clark & O'Hara
27th Floor, Security Pacific Plaza
333 South Hope Street
Los Angeles, California 90071

Dear Mr. Albino:

This is in reply to your letter of February 19, 1982, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to a leave of absence policy (the Policy) for associates in the firm of Parker, Milliken, Clark & O'Hara (the Firm). Specifically, your inquiry concerns whether the Policy is a payroll practice within the meaning of regulation 29 C.F.R. §2510.3-1(b)(2) and thus excluded from title I of ERISA.

Your correspondence and the enclosed leave of absence policy contain the following facts and representations. The Firm, a partnership engaged in the practice of law, adopted the Policy November 14, 1981. The Policy is a statement of Firm rules concerning personal leave of absence and salary continuation payments during specified periods of medical leave of absence granted to associates. Associates are common law employees of the Firm. Periods of medical leave of absence are those requested by an associate in writing and granted by the Firm's Associates Committee. The function of the Associates Committee is to plan, provide for, and supervise the assignment, training, evaluation, compensation, and other activities related to the appropriate development and welfare of the Firm's associates. An application for medical leave is based on the inability of the associate to perform normal work for a period in excess of 10 working days due to a non-industrial injury, illness, or disability. Upon satisfactory verification that the associate is unable to perform his or her normal work because of such injury, illness, or disability, medical leave of absence will be granted for up to 30 days, commencing from the first day of injury, illness, or disability. The Associates Committee may grant extensions in additional 30 day increments of medical leave of absence up to a maximum of 6 months upon satisfactory verification of the continuing inability of the associate to perform his or her normal work because of such injury, illness, or disability. Salary continuance for full-time associates with at least 1 year of service will be paid at full salary rate for the first 30 days of medical leave and at 50 percent of salary for each of the next two 30-day periods of medical leave granted. After three 30-day periods of medical leave, any medical leave granted is without pay. Payments to

associates on a medical leave of absence are made from the general assets of the Firm and are not funded or insured.

The Policy also provides for personal leave of absence to be granted at the sole discretion of the Associates Committee and to be taken by the associate without pay. Additionally, you stated in a phone conversation with a member of my staff that the Firm also continues to pay normal salary during associates' absences from or inability to perform normal work due to medical reasons if such absences do not exceed 10 days; however, the Firm's Policy does not include statements about absences for medical reasons not exceeding 10 days.

Section 3(1) of ERISA provides that the term "employee welfare benefit plan" includes, "... 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)."

The Department has, by regulation, identified certain practices that are not considered employee welfare benefit plans within the meaning of section 3(1) of ERISA. In particular, section 2510.3-1(b)(2) of the regulations provides that the term "employee welfare benefit plan" does not include the following:

Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment).

It is the Department's position that because the Policy provides for payments from the Firm's general assets of not more than associates' normal compensation during periods of 30 days to 6 months during which the associates apply for permission to be, and are, absent for medical reasons, the Policy appears to meet the requirements for exclusion as a payroll practice described in regulation section 2510.3-1(b)(2). In addition, the Firm will have met the requirements of regulation section 2510.3-1(b)(2) regarding payments for associates whose absences for medical reasons do not exceed 10 days so long as the Firm's payments for continuation of their salaries are from the Firm's general assets. The remainder of the Policy, which deals with the Associates Committee's approval of leave without pay for personal reasons, is not a plan or program for the purpose of providing any benefits enumerated in section 3(1) of ERISA. Accordingly, the Policy is excluded from coverage under title I of ERISA and need not meet title I requirements applicable to employee welfare benefit plans.

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