

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 83-21A  
Sec. 3(2), 3(5), 103(a)

MAY 9 1983

Mr. Paul P. Truncali  
Pension Plan Sponsor  
United Way Comptroller  
United Way of Greater New Haven  
One State Street  
New Haven, Connecticut 06511

Dear Mr. Truncali:

This is in reply to your letter of January 29, 1981, requesting an advisory opinion regarding the application of the Employee Retirement Income Security Act of 1974 (ERISA) to the Employee Benefit Plan of the United Way of Greater New Haven, Inc., and Affiliated Agencies (the EBP). Specifically, you ask whether an audited financial statement is required for the EBP under Department of Labor regulations.

You represent that the EBP is a program providing retirement, life insurance, and other benefits, to the employees of the United Way of Greater New Haven, Inc. (United Way), and certain "affiliated" agencies. There are over 100 participants in the EBP although each participating agency employs fewer than 100 individuals participating in the program. United Way is the agent for, and has assumed the liability for all contributions payable by each participating agency with respect to the EBP. The EBP provides that United Way and such agencies will be treated as a single employer for the purposes of the EBP so long as an employee is employed in either covered service or contiguous non-covered service and all such service is counted for the purposes of eligibility and vesting. The EBP further provides that United Way shall be the Plan Administrator, and the United Way's principal officer shall be the "named fiduciary" for the Plan (unless he or she appoints another person to so serve). In a telephone conversation on July 7, 1981, with members of the staff of this Office, you indicated that United Way does not control in any way the operations of any of the participating agencies and none of the participating agencies controls in any way the operations of United Way. Rather, United Way and the other agencies are affiliated only in that they make a common public appeal for contributions and for purposes of general coordination to prevent duplication of services.

In order to address the issue you raise, we first must establish whether the EBP itself constitutes an employee pension benefit plan within the meaning of section 3(2) of ERISA or whether each participating agency has established separate employee pension benefit plans providing benefits through EBP.

Section 3(2)(A) of ERISA defines the term "employee pension benefit plan" 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 by its express terms or as a result of surrounding circumstances such plan, fund, or program—

- (i) provides retirement income to employees, or
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Although the EBP provides benefits described in section 3(2)(A), in order to be an employee pension benefit plan, it must, among other criteria, also be established or maintained by an employer, an employee organization, or both. Since there is no indication that an employee organization is in any way connected with the EBP, this letter shall only consider whether or not the EBP was established or is maintained by an employer.

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." Since it appears that there is no formal group or association of employers involved in this matter, the Department of Labor (the Department) believes that the issue is whether United Way acts "indirectly in the interest of" each participating agency, for purposes of section 3(5), in relation to the EBP. With respect to this issue, the Department believes that a greater organizational nexus than is demonstrated by your submission must exist among the agencies (including United Way) in order that the EBP should be considered a single employee benefit plan for purposes of title I of ERISA.

Therefore, it is the Department's position that the United Way and each of the affiliated agencies have established separate employee pension benefit plans for their employees.

The requirement for audited financial statements by an independent qualified public accountant is contained in section 103(a)(3)(A) of ERISA which provides, in relevant part, that:

... the administrator of an employee benefit plan shall engage ... an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report... are presented fairly in conformity with generally accepted accounting principles... Such examination shall be conducted in accordance with generally accepted auditing standards....

The requirement for audited financial statements is generally waived by the Department's regulation 29 C.F.R. §2520.104-46 if the plan covers fewer than 100 participants at the beginning of the plan year.

Based upon the above and provided that each plan covers fewer than 100 participants, we believe each of the individual plans would meet the requirements for the waiver specified in regulation section 2520.104-46. Therefore, it is not necessary to obtain audited financial statements for the individual 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 of Pension and Welfare Benefit Programs