U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 84-05A
Sec. 104(a)(3)

JAN 17 1984

Mr. Timothy R. Young
Dempsey, Magnusen, Williamson & Lampe
First Wisconsin National Bank Building
Oshkosh, Wisconsin 54902

Dear Mr. Young:

This is in response to your letter of September 9, 1983, and subsequent letter of September 20, 1983, concerning the application of the reporting and disclosure requirements of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the A.I. McDermott Co., Inc. Health and Welfare Trust (the Trust). Specifically, you have inquired whether the Trust qualifies for the limited exemption for certain small welfare plans prescribed in 29 C.F.R. §2520.104-20.

Your letters contain the following facts and representations. The Trust is a "voluntary employees' beneficiary association" organized pursuant to section 501(c)(9) of the Internal Revenue Code (the Code). The Trust is a welfare benefit plan with fewer than 100 participants. The benefits are provided exclusively through insurance contracts issued by an insurance company qualified to do business in the State of Wisconsin, the premiums for which are paid partly from the general assets of the Trust and partly from the contributions by employees for dependent coverage.

29 C.F.R. §2520.104-20, in relevant part, provides a limited exemption from certain reporting and disclosure requirements of ERISA for employee welfare benefit plans covering fewer than 100 participants. Benefits must be provided in one of the following ways: (1) from the general assets of the employer or employee organization maintaining the plan; (2) exclusively through insurance contracts or policies the premiums for which are paid directly by the employer or employee organization from its general assets or partly from employee or member contributions; or (3) both. Contributions by participants must be forwarded by the employer or employee organization within three months of receipt.

You suggest in your letters that, because the Trust qualifies as a "voluntary employees' beneficiary association" under section 501(c)(9) of the Code, the Trust constitutes an "employee organization" within the meaning of section 3(4) of ERISA and §2520.10420. We do not agree.

The term "employee organization" is defined in ERISA section 3(4) to mean:

> . . . 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 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.

It is the view of the Department that a trust which qualifies as a "voluntary employees' beneficiary association" under section 501(c)(9) of the Code and regulations issued thereunder does not, by virtue of that fact alone, constitute an "employees' beneficiary association" as that phrase is used in section 3(4) of ERISA and, therefore, is not necessarily an "employee organization" for purposes of section 3(4) and the limited exemption under §2520.104-20.

An examination of the A.I. McDermott Co., Inc. Health and Welfare Trust Agreement, enclosed with your letter of September 9, 1983, reveals the following characteristics of the Trust which are relevant to a determination as to whether the Trust is an "employee organization" within the meaning of ERISA section 3(4).

The Trust was established by the A.I. McDermott Co., Inc. (the Company) to fund the benefits provided for in health care and welfare plans adopted by the Company for the benefit of its employees. The Trust was created for the sole purpose of providing health care benefits for employees under the plan (Section 3). The Company's determination of the contributions under the Agreement "shall be final and conclusive upon all persons" (Section 5). The Trust and plan are administered by the Trustee (Valley Bank of Oshkosh) and the Company (Section 7). The Company reserves the right by action of its Board of Directors to amend the trust at any time without consent of the Trustee (Section 13). The Company has the right to terminate its contributions and terminate the Trust (Sections 14 and 15). Trustees are appointed and removed by resolution of the Board of Directors of the Company (Section 16). Finally, the Trust Agreement is executed by the Company and Trustee, but not by employee representatives.

Because it appears that the Company established, maintains and controls the Trust in those respects relevant to our consideration of this matter and that employees are neither parties to the Trust agreement nor participants in the affairs of the Trust, the Trust is not an employees' beneficiary association, as that phrase is used in section 3(4) of ERISA.[1] For these reasons and because the Trust does not exist for the purpose of enabling employees to "deal with employers" concerning an "employee benefit plan" we must conclude that the Trust is not an "employee organization" within the meaning of section 3(4) of ERISA. Consequently, we conclude that the Trust is not an "employee organization" for purposes of §2520.104-20 and, therefore, may not avail itself of the limited exemption prescribed therein.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

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[1] It should be noted that this consideration is solely for the purposes of title I of ERISA and is not intended to affect the status of the Trust under section 501(c)(9) of the Code.

Sincerely,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs