

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



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85-07A

Sec. 3(2), 3(5), 3(22), 514

Mr. Joseph R. Simone
Patterson, Belknap, Webb & Tyler
30 Rockefeller Plaza
New York, New York 10112

Dear Mr. Simone:

This is in reply to your correspondence with the Department of Labor (the Department) requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask for an advisory opinion that The Cultural Institutions Pension Plan (the Plan) is covered by title I of ERISA and that the provisions of section 200 of the New York Insurance Law (NY Section 200) are preempted with respect to the Plan.

You advise that the Cultural Institutions Retirement System (the System) was formed in 1962 and organized under NY Section 200. The System's purpose is to provide retirement benefits and insurance benefits for employees of member employers. The System consists of the Plan and the Cultural Institutions Group Life Insurance Plan. The System's members are private nonprofit charitable, cultural, or educational institutions, including certain child care centers, receiving partial financial support from the City of New York. The Plan is maintained pursuant to collective bargaining and also covers non-union employees. The Plan is a qualified defined benefit plan under section 401(a) of the Internal Revenue Code and has received a determination letter from the Internal Revenue Service to this effect.¹ The Plan is described as a multiemployer pension plan on the Form 5500.

Section 4(a) of title I of ERISA generally provides that any employee benefit plan established or maintained by an employer, an employee organization, or both is covered under title I of ERISA unless it is excluded under section 4(b) of ERISA.

¹ While you state (p. 17 of your letter of February 7, 1984) that the Plan does not "generally guarantee benefits," it appears that the Plan does undertake to provide promised benefits to participants regardless of the continued participation of contributing employers (with the exception of unfunded benefits attributable to service prior to the effective date applicable to a particular employer). See, §17(5) of the Cultural Institutions Pension Plan By-Laws.

In order to be an employee benefit plan covered by title I, in addition to providing benefits specified in section 3(1) or 3(2) of title I, an entity must be established or maintained by the appropriate party or parties, i.e., an employer as defined in section 3(5) of ERISA or an employee organization as defined in section 3(4) of ERISA, or both. The Plan is maintained pursuant to collective bargaining between the employers and District Councils 37 and 1707 of the American Federation of State, County and Municipal Employees, AFL-CIO. The Plan is administered by a 9-person committee, five of whom are elected by the employers, two appointed by the Mayor of the City of New York, and two appointed by the above named employee organizations representing the employees. Any amendments to the Plan must be approved by a majority of the employers, the Mayor, and the Superintendent of Insurance.

Based on your representations, it appears that employers control the Plan. Accordingly, the definition of "employer" in section 3(5) is particularly relevant. As defined in that section, the term "employer" includes a "group or association of employers acting for an employer in such capacity." In this respect, the Department has looked to several factors in order to determine whether an organization establishing or maintaining a plan is a bona fide employer organization within the meaning of section 3(5). These factors include: the presence of a pre-existing relationship among the members, the rights and privileges of employer members which exist by virtue of their employer status, and the manner in which control of the organization is exercised. See, ERISA Advisory Opinion No. 82-59A.

Based on your representations, it appears that the employers participating in the Plan control the Plan, and that these employers have pre-existing common interests. Thus, although whether the employers are acting as a bona fide employer organization is an inherently factual question with respect to which the Department will not ordinarily render an opinion, there is nothing in your letter which suggests that the employers are not acting as such an organization. Thus, since you also represent that the Plan provides retirement benefits to employees of the participating employers, it appears that the Plan is a single employee pension benefit plan that is subject to title I of ERISA.

The Department does not view the Plan as a governmental plan exempt from title I pursuant to section 4(b)(1) notwithstanding the fact that the City of New York makes contributions to the Plan and designates two of the nine members of the committee administering the Plan. Section 3(32) of title I of ERISA defines the term "governmental plan" to include a plan established for its employees by any state or subdivision of a state or any agency or instrumentality of such a state or subdivision. Based on the information you submitted, the Department does not view the employers participating in the Plan as governmental entities described in section 3(32) of title I of ERISA and thus the Plan is not excluded from title I coverage under section 4(b)(1).

NY Section 200(1) provides:

1. The employees, officers, and agents of any person, firm or corporation or of one or more corporations having business interests in common, hereinafter referred to as "employees," or such person, firm, corporation or corporations, or any organization of such employer, persons, firms or corporations, hereinafter referred to as the "employer," or such employees and employer jointly, may form or create a non-profit corporation or trust hereinafter referred to as the "retirement system," for the purpose of providing benefits on account of members retiring by reason of age or length of service or both, by filing in the office of the superintendent a declaration of their intention so to do, in a form approved by the superintendent, subscribed and affirmed as true under the penalties of perjury by two provisional trustees or officers of such system, accompanied by a duly authenticated copy of the constitution, by-laws or declaration of trust adopted to regulate the affairs of the system. Upon the filing of such declaration and duly authenticated copy, the superintendent may, if satisfied that the rates of contribution are adequate and that the plan of operation is sound and equitable, issue a license, subject to the provisions of section forty, authorizing the retirement system to do the business described therein.

Under section 514(b)(2)(B) of ERISA, to the extent that an organization is an employee pension benefit plan covered by title I of ERISA, it may not be deemed to be an insurance company or other insurer. As applied to such an organization, therefore, state insurance law is not preserved under section 514(b)(2)(A) from the preemptive effect of section 514(a).

In advisory opinions dealing with section 200 of the New York Insurance Law, the Department has indicated that that law relates to employee pension benefit plans for purposes of section 514(a) of ERISA and that some organizations originally established under section 200 are employee pension benefit plans, while other such organizations are insurance companies or other insurers for purposes of section 514.

In this case, the Plan appears to be a single employee pension benefit plan under ERISA section 3(2). Thus, ERISA section 514(b)(2)(B) would preclude regulation of the Plan as an insurance company and NY section 200, to the extent it would regulate the Plan, is not saved from preemption under ERISA section 514(b)(2)(A). Accordingly, section 200 would be preempted under the general preemption provision in section 514(a) of ERISA as it applies to The Cultural Institutions Pension Plan.

Finally, we call your attention to section 403(a) of title I of ERISA which provides that, with certain exceptions, all assets of an employee benefit plan shall be held in trust by one or more trustees.

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,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations

Enclosure