U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 82-32A
Sec. 403(c)(1), 404(a)(1), 406(a)(1)(C) & (D), 406(b)(2)

JUL 20 1982

Mr. Robert A. Georgine
National Coordinating Committee for Multiemployer Plans
Suite 603
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Dear Mr. Georgine:

This letter responds to the request of the National Coordinating Committee for Multiemployer Plans ("Committee") for advisory opinions or a class exemption, under the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), concerning several issues related to federal tax requirements regarding sick pay and other disability benefits. The submission contains representations and opinion requests as described below.

<u>Sick pay reporting related to voluntary income tax withholding</u>

Section 6051(f) of the Internal Revenue Code of 1954 ("Code")[1] requires any person who makes a payment to an employee of "third-party sick pay," as defined in that section, to furnish a written statement shortly after the end of the year to the employer "in respect of whom such payment was made." The statement is to show the identity of the employee who received the third-party sick pay, the total amount paid to the employee during the year, and the total amount, if any, of federal income tax withheld. The employer is required to include this information in or with the employee's Form W-2 and in the filings the employer makes with the Internal Revenue Service ("the Service").

According to the submission, the reporting process required under section 6051(f) of the Code is unworkable for many multiemployer plans. A distinctive feature of multiemployer plans is that participants accrue eligibility for benefits, such as sick pay, on the basis of aggregate service with the employers contributing to the plan. The largest multiemployer plans have tens of thousands of contributing employers, and an individual employee may work for a variety of employers in a given year. It is often impossible to attribute payments of sick pay under a multiemployer plan to a single employer, and thus to determine the employer "in respect of whom such payment was made," as required by the Code provision.

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[1] Section 6051(f) was added to the Code by Public Law 96-601. It applies to sick pay payments made on or after May 1, 1981.

As a solution to the problem of reporting under section 6051(f) of the Code, the Committee suggested in a comment filed regarding a proposed regulation issued by the Service that, where a multiemployer plan (or its insurance carrier) is the payor of sick pay, the payor be permitted to mail the required employer statements directly to the employee and to the Service. The Committee asserted that such direct reporting would enable multiemployer plans to comply with section 6051(f) at minimum costs for the plan and that it would be the only feasible method for some multiemployer plans to comply with that section. A final regulation under Code section 6051(f) was adopted on March 8, 1982 (26 CFR 31.6051-3, 47 FR 11275, 11277, March 16, 1982). This regulation includes an optional rule which provides for direct reporting by multiemployer plans and other third-party payors.

Since direct reporting would have the incidental effect of relieving employers of their reporting obligations under section 6051(f), the Committee is concerned that direct reporting might constitute a prohibited use of plan assets for the benefit of a party in interest under ERISA section 406(a)(1)(D). In addition, since one-half of the trustees of a multiemployer plan are chosen by employers, the Committee is concerned that participation by those trustees in implementing direct reporting might violate ERISA section 406(b)(2), relating to a plan fiduciary acting on behalf of or representing an adverse party.

FICA taxes on sick pay

Section 3(b)(1) of Public Law 97-123 ("Act") amended Code section 3121, which defines wages for purposes of the Federal Insurance Contributions Act ("FICA") provisions of the Code, to impose FICA taxes on payments for sickness or accident disability (hereafter, "sick pay") made to an employee under a plan or system established by the employer.[2] FICA taxes fall on both the employer and the employee. The Act provides that the third-party payor of sick pay, which includes a multiemployer plan, is to be treated as the employer for purposes of withholding the employee's tax and paying the employer's tax, unless regulations are adopted to provide otherwise. Section 3(d)(1) of the Act states that such regulations are to provide that the liability for the employer's portion of the taxes will shift to the employer if the third-party payor promptly withholds and deposits the employee's portion of the taxes and notifies the employer of the amount of sick pay paid to the employee. In this regard, section 3(d)(2) of the Act defines the term "employer" to mean "the employer for whom services are normally rendered (by the employee]."

According to the submission, the definition of "employer" in section 3(d)(2) of the Act is inadequate in the context of multiemployer plans, because plan participants may accrue benefits on the basis of service with a number of participating employers. For some plans, there would be

[2] The Act was enacted December 29, 1981, and generally applies to sick pay payments made after December 31, 1981. By virtue of section 3121(a)(4) of the Code, which was not amended by the Act, the new FICA taxes apply only to sick pay payments made within six months after the employee stopped working. Differences in the definition of sick pay under Code section 6051(f) and under the Act are immaterial for purposes of this letter.

extreme difficulties and administrative costs in identifying the "employer" for each sick pay recipient and providing periodic notification. Some plans may find it cheaper and easier simply to pay the employer portion of the taxes. Other plans may follow procedures for notification and transferring liability for the time being, but may wish to pay the employer portion directly, in the future, if collective bargaining produces an increase in contributions for that purpose.

The Committee is concerned that payment by a multiemployer plan of the employer's portion of the FICA taxes on sick pay might constitute prohibited transactions under ERISA sections 406(a)(1)(D) and 406(b)(2).

According to the submission, the employee's portion of the FICA taxes normally is withheld from the benefits paid to the employee. However, the tax may be paid by the plan in some instances, such as where the collective bargaining agreement has a maintenance of benefit provision which requires that a certain level of benefit be maintained regardless of contingencies. In such cases, a plan can pay the employee's portion of the taxes either directly, by paying the tax for the employee, or indirectly. The indirect method is done by increasing the plan's benefit level so that, after withholding the FICA tax, the net payment to the employee is the same as if the FICA taxes were not imposed.

Opinion requests

The Committee requests advisory opinions to the effect that section 406 of ERISA does not prohibit the following acts or transactions:

1. Direct reporting by a multiemployer plan, or by an insurance company or other party making payments on behalf of the plan, to comply with section 6051(f) of the Code.
2. Payment by a multiemployer plan, or by an insurance company or other party making payments on behalf of the plan, of the employer's portion of the FICA taxes on sick pay.
3. Participation by the employer-appointed trustees in implementing either of the above.
4. Payment by a multiemployer plan of the employee's portion of the FICA taxes on sick pay, through either the direct or the indirect method as described above.

We believe it is appropriate in this case to address sections 403(c)(1) and 404(a)(1) of ERISA as well as the prohibited transaction rules of section 406. Section 403(c)(1) provides that, subject to certain exceptions not here relevant, the assets of a plan shall not inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1) similarly requires that plan fiduciaries discharge their plan duties solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan. In addition, this section requires that fiduciaries act in a prudent fashion and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA's provisions. See section 404(a)(1)(D).

Among the prohibitions of section 406 of ERISA, section 406(a)(1)(D) prohibits a plan fiduciary from causing the plan to engage in a transaction which the fiduciary knows or should know

constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. The term "party in interest" is defined by section 3(14) of ERISA to include an employer of employees covered by the plan (section 3(14)(C)) and an employee of such an employer (section 3(14)(H)). Under section 406(b)(2), a plan fiduciary may not act in a transaction involving the plan on behalf of a party, or represent a party, whose interests are adverse to the interests of the plan or its participants or beneficiaries.

As represented in the submission, section 6051(f) of the Code imposes certain reporting obligations on a multiemployer plan making sick pay payments and on employers participating in the plan; however, a regulation under that section provides an optional method of compliance by which reporting would be done only by the plan. Similarly, a multiemployer plan has an obligation to pay the employer's portion of the FICA taxes, unless the plan implements procedures which, under regulations anticipated by the Act, would cause that obligation to pass to a participating employer.[3] Thus, in each of these two situations, multiemployer plans are or may be in a position to comply with federal tax law requirements by using a method which would result in employers not incurring certain burdens, but which, it is represented, the trustees of some multiemployer plans may want to implement as being the less costly and burdensome method of compliance for the plan or the only feasible method for the plan. In our view, the use of such a method of compliance for both the sick pay reporting and the "employer portion" of the FICA tax requirements by a multiemployer plan would not necessarily contravene sections 403(c)(1), 404(a)(1) and 406(a)(1)(D) of ERISA. We are of the opinion that the fiduciary responsibility provisions of ERISA require plan trustees to follow that procedure which, of the available alternatives, would be the least burdensome and least costly for the plan. This determination involves questions of an inherently factual nature which the trustees must decide on a case by case basis.[4] However, because experience will be gained and facts and circumstances may change over time, the manner in which the plan complies with the tax requirements should be reviewed by the trustees at reasonable intervals in order to prevent a violation of one or more of those ERISA provisions from occurring in the future.

The submission mentions that direct reporting by a plan to comply with Code section 6051(f) might constitute a furnishing of services between the plan and a party in interest employer under section 406(a)(1)(C) of ERISA. It is our view that a furnishing of services by a multiemployer plan to a participating employer would not occur merely because the plan undertakes activities to satisfy the plan's obligations under that Code section or under the Act. We note, however, that the submission indicates some multiemployer plans might transfer the liability for the employer's

[3] See, Temporary Regulations at 26 CFR 32.l, 47 FR 29224, July 6, 1982.

[4] The trustee's deliberations should, at the least, include consideration of whether one method of complying with Code section 6051(f) and/or the Act should be used with respect to one or more particular employers and the other method with respect to the remaining group of employers. For example, if a multiemployer plan has a large participating employer whose employees normally work only for that employer, it might be less costly for the plan to report sick pay and pass the liability for FICA taxes to that employer for sick pay payments made to that employer's employees, while the plan does otherwise for payments made to employees of the other participating employers.

FICA tax for some time and then pay the tax directly if collective bargaining produces an increase in contributions for that purpose. In this latter regard, we assume that it is the plan's intention to provide a service to the contributing employers by remitting to the Internal Revenue Service the employers' portion of the FICA taxes. In the event that a plan's payment of the tax constitutes a provision of services by the plan to the employers, or if a plan otherwise enters into an arrangement, agreement or understanding to provide services to one or more participating employers, or to a participating employer association, for purposes of satisfying the tax requirements, the provision of services will be exempt from the prohibitions of ERISA section 406(a) if the terms and conditions of the class exemption provided under Part C of Prohibited Transaction Exemption 76-1 are met.[5] In any event, however, since you have not described the proposed concept for implementing the arrangement with any particularity, the Department can offer no opinion regarding the application of ERISA sections 403(c)(1) and 404(a)(1).

Regarding section 406(b)(2) of ERISA, we wish to note that in Opinion 77-91, the Department of Labor addressed this prohibition in the context of decision-making by the trustees of a jointly administered, multiemployer plan concerning the collection of delinquent employer contributions. Consistent with the views expressed in that letter, it is our view that a trustee of such a plan, who participates in the decision-making process by which the plan's method of complying with Code section 6051(f) and with the Act is determined, would not be deemed to be acting on behalf of a party whose interests are adverse to the plan solely by reason of the fact that the trustee serves on the plan's board of trustees as a representative of one or more participating employers. This is so even if the trustee is an affiliate of a participating employer or association of such employers. However, if the trustee participates in decision-making specifically with regard to an employer with whom the trustee is affiliated, and the decision relates to whether the plan should transfer its obligation for payment of FICA taxes to that employer, the trustee would be deemed to be acting on behalf of or representing a party whose interests are adverse to the plan and such participation would result in a violation of section 406(b)(2).

The required employee portion of FICA taxes is imposed on the recipient of sick pay benefits and not on the third-party payor, such as a multiemployer plan. This obligation is generally satisfied through a system of withholding from the amounts of sick pay payable to an employee pursuant to a plan's provisions. However, it is the view of the Department that the fiduciary requirements of sections 403(c)(1), 404(a)(1) and 406(a)(1)(D) would be violated if a multiemployer plan were to assume and pay an employee's liability for FICA taxes, unless such payments were provided for as benefits under the plan. We believe that such additional distributions from plan assets for the benefit of an employee can be justified only as benefits

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[5] In addition, Prohibited Transaction Exemption 77-10 provides a conditional class exemption from the prohibition of ERISA section 406(b)(2) for, among other things, the provision of administrative services by a multiemployer plan to a participating employer or to a participating employer association. The conditions of each of these class exemptions include requirements that the plan receive reasonable compensation for its provision of services and that the arrangement allow the plan to terminate the services on reasonably short notice.

specified in a plan provision and not as reasonable administrative expenses of the plan generally. Of course, as an alternative, a plan's basic benefit level could be properly increased and amounts comprising an employee's FICA tax liability withheld from sick pay distributions without violating the above-referenced fiduciary standards. The Department of Labor considers that the advisory opinion procedure normally is not a suitable process for the resolution of questions involving interpretation of plan documents, including a plan's benefit provisions. The Department views the interpretation of plan documents as a function to be performed primarily by appropriate plan fiduciaries acting in a prudent manner.

We note that the submission refers to situations in which a party, such as an insurance company, makes sick pay payments on behalf of a multiemployer plan. In such a case, the other party and not the plan may have the status and obligations of a third-party payor under Code section 6051(f) and under the Act. Nevertheless, the trustees of the plan normally would be in a position to control or influence the manner in which the other party satisfies those obligations, or to disengage the plan from its relationship with that party and make other arrangements for paying the sick pay benefits. We believe that the nature of the trustees' decision-making in this context is, with respect to ERISA's fiduciary responsibility provisions, essentially the same as when the plan itself is the third-party payor under the tax provisions. Therefore, our views in the above paragraphs apply also in this context.

Since it appears to us that the prohibited transaction provisions of ERISA do not place any undue restrictions on the manner in which multiemployer plans may satisfy their obligations under Code section 6051(f) and under the Act, we consider that it is not necessary to propose a class exemption.

We wish to note that the views we express in this letter relate only to the provisions of ERISA addressed above and not to any other law. In particular, we do not rule on the interpretation or application of Code section 6051(f) or of the Act. Also, we make no comments concerning section 302(c) of the Labor Management Relations Act, 1947, since the Department of Justice rather than the Department of Labor has jurisdiction regarding that provision.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of that procedure explains the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

cc: Mr. P. Joseph Walshe