

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-63A
Sec. 3(32), 4(b)(1)

DEC 9 1982

Mr. Joseph T. Auwers
Executive Director
Detroit/Wayne County Port Authority
Suite 1370, Tower 100
Renaissance Center
Detroit, Michigan 48243

Dear Mr. Auwers:

This is in reply to your letter of January 5, 1982, and your previous correspondence of December 21, 1981, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to employee benefits the Detroit/Wayne County Port Authority (the Authority) proposes to offer its employees.

In your letters you make the following representations. The Authority is an incorporated entity formed as a result of City of Detroit and County of Wayne representatives' resolutions as authorized by state law. Its purpose is the exercise of lawful authority under its enabling act including over the Detroit River and other commercially navigable water within Wayne County. Its board of directors consists of five unpaid members. The mayor of Detroit appoints two members; the chairman of the Wayne County Board of Commissioners appoints two; and the governor of Michigan appoints one. Detroit and Wayne County each contribute 25 percent of the Authority's funds, and Michigan matches the combined appropriation. At this time, three government bodies are the only sources of the Authority's income; however, other income-producing activities (such as ownership of facilities) are authorized by legislation. At the end of each fiscal year, the Authority returns to its contributing governmental bodies any appropriated funds which remain unspent.

Accompanying your letters are several determination letters. A letter dated November 27, 1981, from the Internal Revenue Service (IRS) exempts the Authority from Federal income taxes under section 501(c)(4) of the Internal Revenue Code (the Code). The IRS letter does not, however, state whether the Authority is viewed under the Code as an instrumentality of a State or political subdivision. Also, a letter dated August 26, 1981, from the Administrator of the Sales, Use, and Withholding Tax Division of the Michigan Department of Treasury states that the Authority is an

instrumentality of local government for the purposes of the Authority's purchase of tangible personal property for its own use and consumption.

The Authority's proposal for employee benefits contemplates provisions of a "cafeteria" plan of employee benefits allowing employees to choose benefits they prefer. The benefits provided are among those described in sections 3(1) and 3(2)(A) of ERISA. Only Authority employees will be covered under its proposal, but the Authority may arrange that under certain options its employees are included in a larger group in order to obtain favorable group insurance rates.

Section 4(b)(1) of title I of ERISA exempts from title I plans which are governmental plans as defined in section 3(32) of title I. The definition of a governmental plan in section 3(32) of ERISA includes a plan established or maintained for its employees by an agency or instrumentality of a state or political subdivision of a state.

The Authority serves a public function, derives its income from public funds, operates under a board of directors appointed by public officials, and was formed with resolutions by the City of Detroit and the County of Wayne, as authorized by law enacted by the State of Michigan. The Articles of Incorporation are executed by authorized officers of the City of Detroit and the Board of Commissioners of Wayne County pursuant to Act 639 of the Michigan Public Acts of 1978. For these reasons, the Department views the Authority as an agency or instrumentality of government for purposes of section 3(32) and section 4(b)(1) of title I of ERISA. The Authority's employee benefit plans thus constitute one or more governmental plans within the meaning of section 3(32) of ERISA which under the terms of section 4(b)(1), are not covered by title I of ERISA. However, in the view of the Department, governmental plan status does not necessarily extend to those groups formed in part by Authority employees merely for the purpose of obtaining group insurance.

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