U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-5A
Sec. 3(37)

JAN 19 1983

Mr. Gerald M. Feder
Feder and Gordon
1527 18th Street, N.W.
Washington, D.C. 20036

Dear Mr. Feder:

This is in reply to your letter of September 1, 1982 on behalf of the Retail Employees' Union Local 919 (UFCW) and Contributing Employers' Food Pension Trust Fund (Local 919 Trust) requesting an opinion that the Local 919 Trust is a multiemployer plan under the Employee Retirement Income Security Act of 1974 (ERISA) and under 29 CFR §2510.3-37 issued by the Department of Labor thereunder.

You state that the Local 919 Trust was created by collective bargaining to receive contributions from at least three employers and that the Local 919 Trust is negotiating an agreement to spin off assets and liabilities to it from the New England UFCW and Employers' Pension Trust (New England Trust). Pursuant to the Agreement of Asset and Liability Transfer by and between the New England Trust and Local 919 Trust, which was attached to your letter, this transfer will not be completed unless and until the Department of Labor rules that the Local 919 Trust is in fact a multiemployer plan or refuses to rule on the issue (§3.2).

Section 3(37) of ERISA as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) provides for a three-part test of multiemployer plan. To constitute a multiemployer plan a plan must be one to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

Based on your representations and the documents you submitted we find that the plan is one to which more than one employer is required to contribute and is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

Regarding the remainder of the test of what constitutes a multiemployer plan, viz., that the plan "satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation" (§3(37)(A)(iii), as amended by the MPPAA), under that comparable provision of ERISA before the MPPAA, section 3(37)(A)(v) thereof, the Department of Labor issued a regulation providing that a plan which was not in existence on the effective date of ERISA must, in order to be a multi-employer plan, have been established for a substantial business purpose (§2510.3-37 (c), 40 Federal Register 52008 (November 7, 1975)).

The enactment of the MPPAA did not negate the applicability of that regulation, the purpose of which was to preclude the establishment of a plan merely to obtain the advantages of multiemployer plan status. (See preamble to proposed regulation, 39 Federal Register 42234 (December 4, 1974)).[1]

The regulation provides:

> A substantial business purpose includes the interest of a labor organization in securing an employee benefit plan for its members. The following factors are relevant in determining whether a substantial business purpose existed for the establishment of a plan; any single factor may be sufficient to constitute a substantial business purpose:
>
> (1) the extent to which the plan is maintained by a substantial number of unaffiliated contributing employers and covers a substantial portion of the trade, craft or industry in terms of employees or a substantial number of the employees in the trade, craft or industry in a locality or geographic area;
>
> (2) the extent to which the plan provides benefits more closely related to years of service within the trade, craft or industry rather than with an employer, reflecting the fact that an employee's relationship with an employer maintaining the plan is generally short-term although service in the trade, craft, or industry is generally long-term;
>
> (3) the extent to which collective bargaining takes place on matters other than employee benefit plans between the employee organization and the employers maintaining the plan; and
>
> (4) the extent to which the administrative burden and expense of providing benefits through single employer plans would be greater than through a multiemployer plan.

In support of your request you stated that the Local 919 Trust was created for a substantial business purpose in accordance with Department of Labor regulations 29 CFR §2510.3-37, in that:

(1) the plan provides credit for years of service with any of the contributing employers all of whom are in the food industry;

(2) collective bargaining between Local 919 and the contributing employers covers not only participation in the Local 919 Trust but also a variety of other non-pension matters related to employment with said employers;

(3) the administrative burden and expenses related to the Local 919 Trust are far less than

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[1] This accorded with the Conference Committee's Report, which stated, at III Legislative History of the Employee Retirement Income Security Act, p. 4532, that "a plan is not to be classified as a multiemployer plan where there is no substantial business purpose in having a multiemployer plan (except to obtain the advantages of multiemployer plan status under this bill)."

could otherwise be achieved through administration of separate plans for each employer. This is so because each employer would have to retain and pay attorneys, actuaries, accountants, administrators, and investment advisors. Moreover, investment opportunities are often better for a large pool of assets than for separate funds.

In determining whether the plan meets any of the factors listed in the regulations, we note first that the plan is not maintained by a substantial number of unaffiliated employers. The Pension Plan document (Exhibit B) lists only two employers in addition to the union and the plan as participating employers as of January 1, 1983 (Article II, section 2.1), which would be the effective date of the plan, while the Agreement of Asset and Liability Transfer (Exhibit A, §1.2) and your letter state that there are three. Moreover, there is no allegation as to whether the plan would cover a substantial number of the employees in the trade, craft, or industry in the locality or geographic area, or a substantial portion of the employees in the trade, craft, or industry. However, the plan provides for the acceptance by the trustees of new employers (Article II, §2.2), provided, inter alia, that they are engaged primarily in the sale of food or food products or, if not so engaged primarily, participation will be limited to their retail food operations (Article I, §1.1(d) 2, 4). A further condition for acceptance of an employer is that it have a "collective bargaining or other written agreement with the Union or with the Trustees requiring periodic contributions to be made to the Plan" (Article I, §1.1(d)2(A)).

While the plan calculates benefits based on service with employers maintaining the plan (Article V, §5.2, and Article VII, §7.2), which group, aside from the union and the plan, is limited, as noted above, to employers in the retail food industry, you do not allege that the employees' relationships with a particular employer are short-term and that service in the trade, craft, or industry is generally long-term, as provided in the second factor relevant to determining a substantial business purpose. Therefore, we are not rendering a determination that the plan was created for a substantial business purpose on the basis, either in whole or in part, of the second factor enumerated in the regulation.

Additionally, while you allege that the administrative burden and expenses related to the Local 919 Trust are far less than could otherwise be achieved through administration of separate plans for each employer, you have not provided us with any supporting data in this regard. Accordingly, we cannot take into account this fourth relevant factor in determining a substantial business purpose.

However, as to the third factor relevant to determining a substantial business purpose, since you represent that "collective bargaining between Local 919 and the contributing employers covers not only participation in the Local 919 Trust but also a variety of other non-pension matters related to employment with said employers" the plan would be considered to be created for a substantial business purpose and, the other tests of multiemployer plan being met, as discussed above, to be a multiemployer plan.

It should be noted also that section 4231, ERISA, as amended by the MPPAA, which section is administered by the Pension Benefit Guaranty Corporation (PBGC), sets forth conditions under which a multiemployer plan may transfer assets and liabilities to and from another multiemployer plan. The PBGC has issued a proposed regulation under that section, which proposal, if adopted, would "prescribe a procedure under which plan sponsors must notify the PBGC of any … transfer between multiemployer plans" (46 Federal Register 62087 (December 22, 1981)).

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosure

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