

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



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89-06A
Sec. 3(1), 3(5)

Lisa Klinger, Esq.
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Dear Ms. Klinger:

This is in reply to your letter and subsequent correspondence from Mr. Wendell Gustafson, Associate Director of Personnel Services, Stouffer Hotels, requesting an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the proposed Stouffer Hotel Management Corporation Vacation Pay Plan for certain Hourly Employees (the Vacation Pay Plan) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Stouffer Hotel Management Corporation (the Corporation), a wholly-owned subsidiary of Stouffer Hotel Company (Stouffer), was hired to manage The Stouffer Concourse Hotel-Los Angeles (the Concourse), which is 50 percent owned, indirectly, by Stouffer. In 1986, it was agreed that all employees at the Concourse would become employees of the Corporation. On April 15, 1987, the management agreement with the Corporation was formally amended to provide that the general manager and all other employees at the Concourse will be employees of Stouffer or its affiliates.

You further advise that the Vacation Pay Plan as proposed would be effective as of January 1, 1987, and be funded through a trust exempt from Federal taxation under section 501(c)(9) of the Internal Revenue Code. The Corporation would contribute sufficient funds to the trust to pay current benefit liabilities. The vacation benefits would be for employees at the Concourse only and would be the same as those provided similarly situated employees at other Stouffer locations.

Section 3(1) of title I of ERISA defines the term "employee welfare benefit plan" to include:

- (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) ... vacation benefits ... or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Although the Vacation Pay Plan provides benefits described in section 3(1) of ERISA, to be an employee welfare benefit plan, the Vacation Pay Plan must, among other criteria, be established or maintained by an employer, an employee organization, or both. Because you do not state and there is no other indication that an employee organization is in anyway involved in the Vacation Pay Plan, this letter will only address whether the Vacation Pay Plan has been established or is maintained by an employer.

The term "employer" is defined in section 3(5) of ERISA to include:

... any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

The Department of Labor (the Department) would consider a member of a controlled group which establishes a benefit plan for its employees and/or the employees of other members of the controlled group to be an employer within the meaning of section 3(5) of ERISA. Accordingly, the Corporation would be an employer for the purposes of title I with regard to the Vacation Pay Plan.

We also note that in Department of Labor regulation section 29 CFR 2510.3-1, the Department described certain arrangements which would not be considered to be employee welfare benefit plans within the meaning of section 3(1) of ERISA. Specifically regarding vacation pay arrangements, regulation section 2510.3-1(b) provides:

- (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include-- ...
- (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example--
 - (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons,

However, based on your statements that the Corporation will make contributions to the Vacation Pay Plan's trust which will disburse the benefits to participating employees, it is the Department's position that the Vacation Pay Plan would not be a payroll practice described in regulation section 2510.3-1(b)(3)(i).

Accordingly, it is the Department's position that the Vacation Pay Plan would be an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and would be covered by title I.

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

cc: Mr. Wendell Gustafson
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