

U.S. Department of Labor

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



APR 27 1989

89-07A
Sec.

Mr. Craig Westbrook
Mitchell, Williams, Selig & Tucker
1000 Savers Federal Building
Capitol Avenue at Spring Street
Little Rock, Arkansas 72201

Dear Mr. Westbrook:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Union National Bank Incentive Bonus Plan (the Incentive Plan) is an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

You advise that Union National Bank (the Employer) currently has an incentive compensation plan in place based on the annual performance of different classes of employees. The Employer now wishes to alter that program to allocate a portion of that incentive compensation to the Incentive Plan. The percentage allocated annually would be discretionary as would the employees or classes of employees awarded bonuses under the Incentive Plan. If an employee awarded a bonus under the Incentive Plan is still employed by the Employer 5 years after the date the bonus is awarded, a lump sum payment would be due the employee. Otherwise the employee would forfeit the award. The Incentive Plan is not intended to be funded and participation would not be limited to a select group of management or highly compensated employees.

The term "employee pension benefit plan" is defined in section 3(2)(A) of title I of ERISA to include:

... 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 by its express terms or as a result of surrounding circumstances such plan, fund, or program--

- (i) provides retirement income to employees, or
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In Department of Labor (the Department) regulation 29 C.F.R. 2510.3-2, the Department described certain programs which would not be considered to constitute employee pension benefit plans within the meaning of section 3(2) of title I of ERISA. Specifically, regulation section 2510.3-2(c) provides:

(c) Bonus Program. For purposes of Title I of the Act and this chapter, the term "employee pension benefit plan" or "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

The reference to retirement income in the regulation cited above contemplates that a bonus program could be considered to be an employee pension benefit plan where payments under it are systematically deferred until such time as an employee terminates employment or so as to provide retirement income.

The description of the Incentive Plan that you supplied specifically provides that employees who terminate their employment for any reason, including retirement, during the five year "vesting" period will forfeit their right to any amount allocated to their individual account(s). Therefore, according to its express terms, the Incentive Plan does not appear to contemplate the deferral of income to the termination of covered employment or beyond, but rather it appears to provide payment for work performed as contemplated by the regulatory definition of a bonus program described in section 2510.3-2(c).

The clear intent of the "bonus program" definition at 29 CFR 2510.3-2(c) is that bonuses, which are not subject to the provisions of ERISA, shall not be used as alternative forms of retirement or post-termination payments. As previously stated, bonuses are intended to be payments for work performed only. In comparison, payments described within the definition of "employee pension benefit plan" in section 3(2)(A) of title I of ERISA are to provide retirement, deferred termination, or post-termination income.

Although the express terms of the Incentive Plan disallow payment upon termination, since the income from the bonus program is deferred under the terms of the plan, it is necessary to ensure, in the selection of the amounts of the awards, the employees to receive the award, and the timing of the payments of the award, that the plan in operation is not a vehicle for the provision of retirement income. A significant operative factor would be that an inordinate percentage of the bonus recipients were at or nearly at retirement age as defined in section 1.01 of the Incentive Plan.

Where it is clear that the bonus, under the surrounding facts and circumstances, does not constitute retirement income, it would not be considered an employee pension benefit within the meaning of section 3(2) of title I of ERISA.

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations