

**U.S. Department of Labor**

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



January 21, 1992

92-03A  
ERISA SECTION 3(2)

Mr. Barry S. Slevin  
Slevin & Hart, P.C.  
1625 Massachusetts Avenue, N.W.  
Suite 600  
Washington, D.C. 20036

Dear Mr. Slevin:

This is in response 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 Food Employers Labor Relations Association and Retail Store Employees Union Severance Plan (the Severance Plan) would be a severance pay plan described in Department of Labor (the Department) regulation section 29 C.F.R. 2510.3-2(b) if certain described acts occur.

You state that the Severance Plan was established and is maintained pursuant to collectively bargained agreements between three locals of the United Food and Commercial Workers Union and employers belonging to the Baltimore Food Employers Labor Relations Association and the D.C. Food Employers Labor Relations Association. The Severance Plan is funded entirely by contributions from participating employers and is tax exempt under Section 501(c)(9) of the Internal Revenue Code, and provides for the payment of severance benefits to eligible employees who terminate service with participating employers for any reason. The Severance Plan provides a three part severance benefit based on years of service (up to ten), and amount of employer contributions made on behalf of the participant. The Severance Plan also establishes a schedule that defines "payable severance benefit" as a percentage of the earned benefit that increases each year to 100% at year ten.

A participant under the Severance Plan whose period of severance at the time of a reemployment is less than the period of service credited as of the initial severance receives credit under the Severance Plan for both periods of employment. Also, a period of severance less than 12 months is counted as service, but no period of time is counted if it was included in a computation for which benefits were previously paid under the Severance Plan.

The Severance Plan also provides that where the period of severance becomes equal to or greater than the service credited, the service credited is canceled, and the individual, if rehired by an employer in employment covered by the plan, shall be treated as a newly hired employee. The total amount of a benefit does not exceed twice the employee's annual compensation during the year preceding the severance of employment. The Severance Plan provides that all payments to any participant under the Severance Plan shall be completed within 24 months after his severance from service date. Under the Severance Plan, the trustees may pay out a benefit, even to a participant who fails to apply, or, if he cannot be located, to a family member.

You further state that the Severance Plan now questions whether it would be a severance pay plan described in regulation section 2510.3-2(b) if it pays severance benefits under the following circumstances. A participant in the Severance Plan terminates employment with a participating employer after ten years of covered employment, but fails to file a claim for severance benefits within 2 years of the date of severance from employment from such service, and the administrator of the Severance Plan is unable to locate the plan participant. Five years after the date

of severance from employment, the individual is reemployed by the participating employer and later terminates employment. The plan participant now files a claim for severance benefits for both periods of employment covered under the Severance Plan. It is your view that the payment of severance benefits based on the total period of covered employment is permissible if it occurs within 24 months of the last termination date.

An "employee pension benefit plan" is defined in section 3(2) of ERISA to mean:

(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension 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 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.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which --

(i) severance pay arrangements, . . .

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment, a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

Regulation section 29 C.F.R. 2510.3-2 describes certain arrangements which will not be considered to constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA. With respect to severance benefits, regulation section 2510.3-2(b) specifically provides:

(b) Severance pay plans. (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

(2) For purposes of this paragraph (b),

(i) "Annual compensation" means the total of all compensation, including wages, salary, and any other benefit of monetary value, whether paid in the form of cash or otherwise, which was paid as consideration for the employee's service during the year, or which would have been so paid at the employee's usual rate of compensation if the employee had worked a full year.

(ii) "Limited program of terminations" means a program of terminations:

(A) Which, when begun, was scheduled to be completed upon a date certain or upon the occurrence of one or more specified events;

(B) Under which the number, percentage or class or classes of employees whose services are to be terminated is specified in advance; and

(C) Which is described in a written document which is available to the Secretary upon request, and which contains information sufficient to demonstrate that the conditions set forth in subclauses (A) and (B) of this clause (ii) have been met.

Because your letter does not indicate that the benefits payable under the Severance Plan are restricted to covered employees whose service is terminated in connection with a limited program of terminations, this letter will not consider whether the circumstances you describe fall within the criteria of regulation section 2510.3-2(b)(1)(iii)(A).

With regard to the criteria set forth in regulation section 2510.3-2(b)(1)(iii)(B), it is the Department's position that the benefits must be paid within 24 months of the event causing the employee to have a right to a benefit. Accordingly, a severance benefit payable due to a termination of service should be paid within 24 months of that termination of service. Payment of benefits due to a termination of service must be completed within 24 months of that termination of service and, unless constituting a limited program of termination, may not be deferred.

The preamble to regulation section 2510.3-2 recognizes that the regulation provides guidance by setting forth conditions under which a severance pay program will not be deemed to be a pension plan, without excluding the possibility that, in appropriate circumstances, a severance pay program not meeting those conditions might also be deemed not to be an employee pension benefit plan. However, the Department will generally not give an opinion where a particular program does not fall within the "safe harbor" provided by regulation section 2510.3-2(b). Therefore, we are unable to assure you that the Severance Plan will not be deemed to constitute an employee pension benefit plan within the meaning of section 3(2) of title I of ERISA.

Finally, we note that Article 4, Sections 4.4 to 4.6 of the Severance Plan, effective January 1, 1980, provide specific rules for the time period within which a severance benefit must be paid and to whom the benefits will be paid if a participant cannot be located. Although the Department does not provide advisory opinions interpreting specific plan provisions, it does not appear that those sections will permit any deferral of benefit payments beyond 24 months of the participant's termination of service.

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

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations