U.S. Department of Labor Pension and Welfare Benefits Administration
Washington DC 20210

January 12, 1993

Mr. Daniel T. King
Unit Manager - Health & Disability
AAA Michigan
1 Auto Club Drive
Dearborn, Michigan 48126

93-02A
ERISA SECTION
3(1)

Dear Mr. King:

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 an income replacement program (the Program) that AAA Michigan offers its full-time employees who become disabled as a result of non-occupational illness or injuries is a payroll practice within the meaning of Department of Labor (the Department) regulation section 29 C.F.R. 2510.3-1(b) and, therefore, would not constitute an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

You advise that any employee who has completed 6 months of continuous service is eligible for the Program. After a covered employee has been absent for the greater of seven consecutive work days or the employee's accumulated sick leave, he or she will receive benefits that may continue for a maximum of 180 consecutive days or until the employee is no longer disabled, ceases to be an eligible employee, or dies. The Program's benefits are equal to 60 percent of salary for salaried employees, 60 percent of the previous year's W-2 earnings up to a maximum of $1,500 per month for commissioned employees, and 60 percent of the prior calendar year's W-2 earnings less overtime or shift premiums for travel agents. The Program was previously administered within AAA Michigan and paid from the employer's general assets. Effective July 1, 1990, the Program began to be administered by an independent administrator, Aetna Life Insurance Company, pursuant to an administrative services contract. AAA Michigan has established a special checking account from which all claims and fees due under the Program are paid. You have represented, and we assume for purposes of this advisory opinion, that this checking account is part of AAA Michigan's general assets. [1]

The term "employee welfare benefit plan" is defined in section 3(1) 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchases of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, 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).

In regulation section 29 C.F.R. 2510.3-1, the Department identified certain programs that would not constitute employee welfare benefit plans within the meaning of section 3(1). Specifically, regulation section 2510.3-1(b) provides, in pertinent part:

(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 -

(2) Payment of the employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties; or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); ...

It is the position of the Department that an employer's payment of less than normal compensation from the employer's general assets during periods in which an employee is absent for medical reasons may constitute a payroll practice that is not an employee welfare benefit plan. On the basis of your representations that the Program's benefits are paid exclusively from the general assets of the employer, notwithstanding the change in the administration of the Program, it is the position of the Department that the Program is not an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA, but instead constitutes a payroll practice within the meaning of regulation section 2510.3-1(b).

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

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

[I] You have not inquired, and the Department expresses no view regarding, whether the assets in the checking account are plan assets. See, e.g., Advisory Opinion 92-24 (Nov. 6, 1992).

As the Department explained in that opinion, an employer sponsor of a welfare plan may maintain such a plan without identifiable plan assets by paying plan benefits exclusively from the general assets of the employer. This would be true even if the employer set aside some of its general assets in a segregated employer account for the purpose of providing benefits under the plan. However, if the employer took steps that caused the plan to gain a beneficial ownership interest in particular assets, there would be, under ordinary notions of property rights, identifiable plan assets. For example, a welfare plan generally will have a beneficial interest in particular assets if the employer establishes a trust on behalf of the plan, sets up a separate account with a bank or other third party in the name of the plan, or specifically indicated in the plan documents or instruments that separately maintained funds belong to the plan.