U.S. Department of Labor

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

MAY 28 1993

93-18A
Section 403(d)(2); 406(b)(2)

Melvin H. Pizer
The 500 Building, Suite 1100
500 South Salina Street
Syracuse, NY 13202

Dear Mr. Pizer:

This is in response to your request for an advisory opinion concerning the application of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the termination and proposed transfer of the excess funds of one employee welfare benefit plan to another employee welfare benefit plan.

You represent that the Local 317 Truckdrivers and Helpers Legal Service Plan and Trust (the Legal Plan) and the Local 317 Truckdrivers and Helpers Welfare Plan and Trust (the Welfare Plan) are jointly-administered, labor management trust funds established under collective bargaining agreements between the Local 317 Truckdrivers and Helpers Union and various employers pursuant to section 302(c) of the Labor Management Relations Act.

The Legal Plan was established on January 1, 1984, and provides tax-free legal benefits to employees and members of the Local 317 Truckdrivers and Helpers Union. The Welfare Plan was established on December 22, 1964, and provides various health and welfare benefits for employees and members of the Local 317 Truckdrivers and Helpers Union and their dependents.

According to your representations the majority of individuals who comprise the Board of Trustees (the Trustees) of the Legal Plan are the same individuals who comprise the Board of Trustees of the Welfare Plan. Neither plan has been a service provider to the other.

You further represent that on July 8, 1986, the Trustees of the Legal Plan voted to terminate the Legal Plan, and consequently, all employer contributions to the Legal Plan have ceased.[1] As of September 30, 1986, no new claims for legal benefits could be filed by participants, and as of July 1, 1988 all cases were completed. The Legal Plan has continued to file its annual 5500 reports during this process. Additionally, you state that the decision by the Trustees to terminate the Legal Plan was conditioned upon securing all necessary governmental approvals and amending the Legal Plan to carry out the transfer before the termination would be effected.

In addition, you propose that the Legal Plan condition the transfer on an indemnification agreement whereby the Welfare Plan would agree to pay any claims for benefits, liabilities, costs or damages which may arise against the Legal Plan as a result of the termination and transfer of assets.

You have requested an advisory opinion with respect to the following questions:

[1] We note that your request refers solely to employer contributions, and accordingly, we assume for purposes of this opinion that no assets of the Legal Plan were derived from participant contributions, whether after-tax contributions or pre-tax salary reductions.

1. Are the Legal Plan, the Welfare Plan or the Trustees of either, parties in interest as defined in section 3(14) of ERISA with respect to each other and the other Plan?

2. Is the contemplated transfer of assets from the Legal Plan to the Welfare Plan, a transaction prohibited under section 406(a) of ERISA?

3. Will the involvement of the Trustees of the Legal Plan and Welfare Plan in the contemplated transfer of assets result in actions which are prohibited under section 406(b)(2) of ERISA?

4. Is the proposed indemnification agreement an exculpatory provision proscribed by section 410(a) of ERISA?

Section 5.04 of ERISA Procedure 76-1 (41 Fed. Reg. 36281, 36282, August 27, 1976) provides that the Department of Labor (the Department) ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund or program or a particular provision or provisions thereof subject to Title I of ERISA. Accordingly, the Department makes the following determinations based on the assumptions that the Legal Plan will be properly terminated and all claims paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Plan.

With regard to your first question, the Department has addressed the issue of whether related plans are parties in interest with respect to one another in Prohibited Transaction Exemption 76-1 (41 Fed. Reg. 12740, 12744, March 26, 1976). As explained in the preamble to that exemption, two or more plans are not parties in interest with respect to each other merely because they are maintained by the same plan sponsors or have trustees or fiduciaries who are common to the plans. A plan may be a party in interest with respect to another plan, however, if it has a relationship to the plan as defined in section 3(14) of ERISA. For example, a plan may be a party in interest with respect to another plan under section 3(14)(B) of ERISA if it provides services to such plan.[2]

Based on your representations that neither Plan has been a service provider to the other, and assuming that there is no other relationship between the Plans to cause them to be parties in interest to each other, we have determined that neither the Legal Plan nor the Welfare Plan is a party in interest with respect to the other. However, individuals who serve as trustees for both Funds are parties in interest with respect to both Plans (see Section 3(14) of ERISA).

Concerning your second question, section 406(a) of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he or she knows or should know that the transaction constitutes a direct or indirect (1) lending of money or other extension of credit between the plan and a party in interest, or (2) a transfer to, or use by or for the benefit of, a party in interest, of any asset of the plan. As the transaction between the Legal Plan and the Welfare Plan is not a transaction between an employee benefit plan and a party in interest with respect thereto, it is the Department's view, based upon your representations, that the transaction is not prohibited by section 406(a) of ERISA.

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[2] A plan may also be a party in interest to another plan:

(a) Under section 3(14)(H) of ERISA if it holds directly or indirectly 10 percent or more of the shares of a person described, with respect to the other plan, in subparagraph (B), (C), (D), (E) or (G) of section 3(14) of ERISA, or

(b) Under section 3(14)(I) of ERISA, if it was a 10 percent or more (in capital or profits) partner or joint venturer of a person described, with respect to the other plan, in subparagraph (B), (C), (D), (E) or (G) of section 3(14) of ERISA.

With respect to your third question, section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. If the Legal Plan has been properly terminated and all claims have either been paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Plan the contemplated transfer of assets to the Welfare Plan would not violate section 406(b)(2) because, at that time, the Legal Plan will no longer exist, and therefore, no transaction will be occurring on behalf of that Plan. If neither further claims nor participants or beneficiaries of the Legal Plan exist, the trustees of the Welfare Plan would not be representing interests adverse to that Plan and, thereby, violating section 406(b)(2) by receiving the transferred monies.

In response to your fourth question, section 410(a) of ERISA provides generally that any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under Part 4 of Title I of ERISA shall be void as against public policy. Section 410(a) has been augmented by an interpretive bulletin, ERISA IB 75-4, 29 CFR 2509.75-4, which provides, in pertinent part, that the Department interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under Part 4 of Title I of ERISA. If the indemnification agreement contemplated in this case purports to reimburse the Legal Plan for any sums which it may have to pay as a result of this transaction, but does not relieve the trustees of any liability for their breach of fiduciary responsibility, we are of the opinion that such agreement is not prohibited by section 410(a) of ERISA.

Although you have limited your inquiry to sections 406 and 410 of ERISA, we note that the proposed transfer of assets also raises issues under sections 403 and 404 of ERISA. Section 403(c)(1) of ERISA provides, in part, that except as provided in section 403(d), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. Similarly, section 404(a)(1) of ERISA provides, in part, that subject to sections 403(c) and 403(d), a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. Sections 404(a)(1)(B) and (D) of ERISA require plan fiduciaries to act prudently, and in accordance with the documents, and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.

Section 403(d)(2) provides that the assets of a welfare plan which terminates shall be distributed in accordance with the plan documents, except as otherwise provided in regulations of the Secretary. To date, the Department has not issued regulations under section 403(d)(2). Accordingly, a transfer other than a distribution in accordance with the terms of the Legal Plan documents, as contemplated under section 403(d)(2), may contravene sections 403(c)(1) and 404(a) of ERISA.

This letter is an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Section 10 of the Procedure describes the effect of an advisory opinion.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations