



SEP 3, 1993

Ms. Mary B. Hevener
Lee, Toomey & Kent
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

93-25A
ERISA SEC.
3(1)

Dear Ms. Hevener:

This is in response to your correspondence requesting an advisory opinion concerning applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Armstrong Dependent Care Reimbursement Account (the Program). Specifically, you represent that Armstrong World Industries, Inc. (the Employer) adopted the Program January 1, 1989, to provide all its regular full-time and part-time employees with dependent care assistance as described below, and you request an advisory opinion from the Department of Labor (the Department) concluding that the Employer has not thereby established an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

According to your representations, by filing an annual election to participate in the Program, each participating employee authorizes the Employer to reduce that employee's pre-tax salary in any amount specified by the employee up to a maximum amount. The Employer maintains a record of the amounts by which each employee's salary is reduced; that record is termed a "dependent care account." Participation in the Program entitles the employee to reimbursement from the employee's own dependent care account for amounts the employee expends on eligible dependent care services up to the extent of that employee's salary reduction. Reimbursement is provided for three types of dependents: (1) a participant's child under age 13, including a stepchild; (2) a dependent, as that term is defined in the Program, who is physically or mentally incapable of caring for himself and who regularly spends at least eight hours a day in the participant's home, and (3) any other dependent under age thirteen who meets income requirements specified in the Program.

You represent that eligible expenses reimbursed under the terms of the Program include payments for specified dependent care services enabling a participant and spouse, if any, to remain gainfully employed. Covered services include dependent care performed inside or outside the participant's home, as well as payments to licensed day care centers. The Employer has no day care center for its employees and, under the Program, employees may choose the day care arrangements they prefer.

You further represent that the Employer intends the Program to meet the requirements of section 129 of the Internal Revenue Code.¹ Accordingly, you describe participants as forfeiting any amounts by which their salaries are reduced in connection with the Program if these amounts are not used for dependent care reimbursement during the year.

As you describe the Program, the Employer establishes no trust fund in connection with its administration.² If amounts forfeited by participants are not sufficient to cover administrative expenses of the Program, the Employer pays any additional administrative costs from its general assets. The Employer also appoints a committee of three or more employees to administer the Program and to determine whether claims are reimbursable. Only the Employer may amend or terminate the Program.

As indicated above, the issue you raise involves interpretation by the Department of section 3(1) of Title I of ERISA. Section 3(1) of ERISA defines the term "employee welfare benefit plan" as follows:

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) 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 ... (emphasis supplied).

Section 302(c) of the Labor Management Relations Act, 1947, as here relevant, refers to "a pooled or individual trust fund established ... for the purpose of... child care centers for preschool and school age dependents of employees. ..."

Inasmuch as the Program benefits you have described are limited to reimbursement of dependent care services freely chosen by each participating employee, rather than the employer's provision of any specific day care center, the benefits provided by the Program are not of the type described in ERISA section 3(1). Thus, in the Department's view, the Program does not constitute an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, 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

¹ The Department expresses no opinion concerning the status of the Program pursuant to section 129 of the Code.

² In view of the conclusion reached in this advisory opinion, the Department expresses no opinion concerning the proper application of ERISA fiduciary provisions to the treatment of participant contributions in programs covered by Title I of ERISA. With respect to such programs, see regulations of the Department at 29 CFR §2510.3-102; DOL Technical Release 92-1 (57 Fed. Reg. 23272, June 2, 1992).