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

October 12, 1993

Ms. Deborah Holland Tudor
Greenebaum Doll & McDonald
333 West Vine Street, Suite 1400
Lexington, Kentucky 40507

93-27A
ERISA SECTION
3(1)

Dear Ms. Tudor:

This is in reply to your correspondence on behalf of Toyota Motor Manufacturing, U.S.A., Inc. (hereinafter, the Employer) concerning applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion concluding that the Employer's Short Term Disability Plan (hereinafter, Program A) and its Salary Continuation Plan (hereinafter, Program B) are payroll practices within the meaning of regulations of the Department of Labor (hereinafter, the Department) at 29 C.F.R. §2510.3-1(b) and therefore are not "employee welfare benefit plans" within the meaning of section 3(1) of Title I of ERISA.

You advise that Programs A and B (hereinafter, collectively, the Programs) provide employees with payments from the Employer's general assets during certain absences for medical reasons. The Employer set up Program A to cover all its regular, full-time active employees who are subject to the provisions of the Fair Labor Standards Act (hereinafter, FLSA). Program A pays eligible employees who are absent from work due to a "disability" 65 percent of their average biweekly compensation up to a maximum of $1,400 biweekly for no more than 26 weeks of absence.[1] A similar program, Program B, covers all the Employer's regular, full-time active employees who are FLSA-exempt and pays them up to 26 weeks at 100 percent of their rate of compensation at the time their covered absence due to a "disability" began.

Both Programs define "disability" as "a physical or mental condition of a Participant arising after the Effective Date which renders him incapable of performing any of his usual duties with the Company." The Programs further provide that "disability" does not include "injury or sickness due to employment with any other employer or self-employment, any injury which is self-inflicted or self-induced, or any injury due to employment with the Company which is covered by workers' compensation insurance."[2] Pursuant to an amendment effective April 2, 1990, Program A begins payments immediately for an eligible employee with a covered "disability" caused by accidental injury or due to outpatient surgery covered under the Employer's group health plan. However, payments pursuant to the Programs for any other "disability" within the meaning of the Programs begin only after an employee is absent 7 days.[3]

The Employer's manager of personnel, as administrator of the Programs, determines who receives payments from the Programs and, pursuant to the terms of the Programs, bases his decision whether or not to make payments on "competent medical authority." In order to receive payments pursuant to its Programs, the Employer requires an employee to submit an application form that includes a medical authorization and release of information, required certification by the employee's attending physician, required certification by the Employer's industrial health services physician, and an agreement to reimburse any amounts received therefrom if recovery is also obtained from "a third party or his personal representative by judgment settlement or otherwise on account of the same bodily injuries or sickness." [4] Proposed amendments to the Programs provide that termination of employment with the Employer for any reason terminates an employee's rights to participate in, and to receive benefits from, the Programs. You also state that the proposed amendments are consistent with the Employer's intent and practice since the Programs' inception.

Your request for an advisory opinion involves interpretation of the term "employee welfare benefit plan," as defined in section 3(1) of Title I of ERISA. That section of ERISA defines the term "employee welfare benefit plan," in pertinent part, as

...any plan, fund, or program which was ... or is ... established or maintained by an employer ... 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,...benefits in the event of sickness, accident, [or] disability....

To clarify the scope of the "employee welfare benefit plan" definition, the Department identified in regulations at 29 CFR §2510.3-1(b) certain employer practices that would not be included within that definition. Regulation section 2510.3-1(b)(2) describes the following employer practice as excluded from the "employee welfare benefit plan" definition:

...[p]ayment 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)....

In its previous advisory opinions, the Department has also taken the position that payment of less than normal compensation from an employer's general assets during periods in which an employee is absent for medical reasons may, under certain circumstances, also constitute an employer "payroll practice" which is not an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA. See, for example, ERISA Advisory Opinion 80-44A.

Based on your representations that payments pursuant to the Programs are made from the general assets of the Employer for absence due to certain medical reasons and that such payments either equal, or represent a significant portion of, an employee's normal compensation, but in no event exceed an employee's normal compensation, the Department concludes that the Programs constitute one or more employer "payroll practices" within the meaning of regulation section 2510.3-1(b)(2) and thus are not employee welfare benefit plans 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 the procedure, including section 10 thereof relating to the effect of an advisory opinion.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

[1] Calculation of 65 percent of salary is based on compensation for the period of seven consecutive biweekly pay periods immediately prior to commencement of disability, minus any Social Security or Railroad Retirement benefits to which the employee is entitled during that period.

[2] Employees applying for payments from the Programs agree to refund any overpayments they receive from the Programs if also filing for worker's compensation, Railroad Retirement, Social Security, or other similar benefits.

[3] The Employer also has a "personal illness reimbursement days" policy which reimburses those employees with more than six months' service at the rate of 65 percent of compensation for three days of absence due to "disability" in each twelve month period, beginning on October 1. Employees may use their three reimbursement days during the seven day waiting period under the Programs.

[4] Because of the conclusion we reach in this advisory opinion, ERISA's preemption provision in section 514, among other provisions, does not apply to the Programs. Thus, ERISA does not preclude applicability of state law (e.g., state law allowing an accident victim's receipt of compensation for the same accident or injury both from an employer and from a third party insurer). See FMC Corp. v. Holliday, 498 U.S. 52 (1990).