



December 7, 1994

Mr. D. J. Simonetti
Berkowitz, Lefkowitz, Isom & Kushner
1600 Southtrust Tower
420 North 20th Street
Birmingham, Alabama 35203-2678

94-40A
ERISA SECTION
3(1)

Dear Mr. Simonetti:

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 the Hourly Sick Leave Policy of Parisian, Inc. (the Policy) is an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA or a payroll practice described in Department of Labor regulation section 29 C.F.R. 2510.3-1(b)(2).

You advise that Parisian, Inc. (the Employer) has established the Policy to provide sick leave pay to employees it designates "Type 2, Type 3 or Type 5 associates" who are scheduled to work 35 hours or more a week, after completion of six months of service. If an eligible employee has earned less than two years of service, the employee may receive 50% of pay for up to four weeks of sick leave per year. If the employee has earned at least two years of service, the employee may receive 60% of pay for up to six weeks of sick leave per year. You further advise that all benefits are paid out of the general assets of the Employer.

Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan" 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 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 (other than pensions on retirement or death, and insurance to provide such pensions).

In regulation § 2510.3-1, the Department of Labor (the Department) clarified the definition of an employee welfare benefit plan by identifying certain programs that do not constitute an employee welfare benefit plan within the meaning of section 3(1). Specifically, § 2510.3-1(b) provides, in pertinent part:

(b) Payroll practices. For purposes of Title I of [ERISA] and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--

(2) Payment of an 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)....

Based on your representations, it is the position of the Department that, although the Policy provides benefits identified in section 3(1)(A) - i.e., benefits in the event of sickness - the Policy is a payroll practice described in regulation § 2510.3-1(b)(2) and, therefore, does not constitute an employee welfare benefit plan within the meaning of section 3(1). It is the Department's position that an employer's practice of paying no more than an employee's normal compensation during periods of absence due to illness, out of the general assets of the employer, falls within the exception to coverage carved out in the regulation. See, e.g., Opinion 93-27A (issued October 12, 1993), 93-20A (issued July 16, 1993), and 93-02A (issued January 12, 1993).

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 advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations