



July 18, 2007

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2007-04A
ERISA SEC.
406

Dear Mr. Coogan:

This is in response to your request for an advisory opinion, on behalf of the National Elevator Industry Educational Program (the NEIEP), regarding whether the proposed reimbursements of certain monies by the NEIEP to affiliated local unions of the International Union of Elevator Constructors constitute prohibited transactions under section 406 of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

You make the following representations.

The NEIEP is a trust formed, under the Second Restated Agreement and Declaration of Trust dated January 10, 2003, between the National Elevator Industry Inc., and the International Union of Elevator Constructors (the IUEC) and all of its affiliated local unions (the Locals). The NEIEP was created for the exclusive purpose of initiating and operating an Apprenticeship and Mechanics Program (the Program) for the education and training of elevator constructor mechanics, registered apprentices, probationary apprentices and elevator constructor helpers in the basic, intermediate and advanced techniques required in their field, with the object of assuring the elevator industry of a constant supply of competent elevator constructor mechanics and apprentices.

You state that the Program is essential to ensure that there are sufficient numbers of elevator constructor mechanics and apprentices who are certified welders, but the NEIEP has neither the curriculum nor the ability to train and certify Local members as welders. As a result, members of the Locals, who are NEIEP participants, are forced to attend educational programs outside of the NEIEP in order to receive their welding certifications. The NEIEP has not developed and constructed its own welding school, because the costs to do so are prohibitive and would have a severe financial impact on the NEIEP's funds. As an alternative, the NEIEP has developed a cost efficient policy of reimbursing its plan participants, all of whom are Local members, who successfully complete welding education programs and receive their certifications.

However, you state that the welding education programs are expensive. Most individual Local members cannot afford to pay the tuition and then wait for the NEIEP to reimburse them directly upon their successful completion of the Program. Such

circumstances create a difficult situation for Local members, and for the elevator industry. The NEIEP is willing to reimburse Local members who successfully complete welding education programs, but most Local members cannot afford the tuition to enter the Program. You state that this situation is creating a lack of constructor mechanics and apprentices certified in welding.

You represent that there are two approaches to solve this problem.

First, under the current approach, the Locals are willing to pay the tuition for their members to attend a NEIEP-approved training program. When a member successfully completes the training program, the Local is reimbursed, without interest, by the NEIEP for the monies that the Local expended for paying the tuition of its member(s).

Under this reimbursement approach, the NEIEP and each Local will operate under a Shared Services Agreement (the SS Agreement), with the following procedures:

- A. Within thirty (30) days of the successful completion of a NEIEP-approved welding education program by a Local member, the tuition for which program was advanced by his or her Local, the member's Local will complete the NEIEP Reimbursement Voucher (the Voucher) and submit it to the NEIEP, together with a copy of the certificate of program completion (the Program Certificate) and the tuition payment check attached. The Local's Business Agent must sign the Voucher.
- B. Subject to review of the Voucher and attached documentation, the NEIEP will reimburse the Local, without interest, for monies the Local expended as tuition payments for the Local member's enrollment in the NEIEP-approved welding education program.
- C. All reimbursements due to a Local under the SS Agreement shall be due by the thirtieth (30th) day from the presentation of a signed Voucher, with proper documentation attached, by the Local to the NEIEP.

Second, under a proposed new approach, the NEIEP will pay each Local member who successfully completes a NEIEP-approved welding program, and presents appropriate documentation as described above (i.e., a Voucher, a Program Certificate and the tuition payment check), an amount equal to the full tuition for the program. The Local member would be paid this amount as a benefit to which he or she would be entitled to as a participant under the terms of the NEIEP. However, since most Local members cannot afford to pay the tuition that is due prior to their successful completion of the welding program, the member's Local would still advance monies to him or her to enable the tuition payment to be made. Under this approach, there would be an agreement between the NEIEP, each Local and the Local member(s) that the money such

member(s) would be eligible to receive from the NEIEP as a benefit, upon successful completion of the program, would be directed, pursuant to each member's written request, to the Local as reimbursement for the money that was advanced by the Local to them for their tuition payment(s).

Request for an Advisory Opinion

With respect to the first approach, you ask whether the reimbursements by the NEIEP to the Locals for advances of monies, as tuition payments, used solely for the education of members of the Locals in the NEIEP-approved welding education programs would constitute a violation of section 406 of ERISA.

With respect to the second approach, you ask whether the arrangement between the NEIEP, each Local, and Local member(s) for the payment of monies by the NEIEP to the Local member(s), as a benefit under the terms of the NEIEP, whereby such member(s) would have the right to make a written request that such monies be paid to the Local as reimbursement for tuition paid by the Local, would constitute a violation of section 406 of ERISA.

Relevant Provisions of ERISA and the Regulations

Section 406(a)(1) of ERISA prohibits, in pertinent part, a fiduciary with respect to a plan from causing a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect lending of money or other extension of credit between the plan and a party in interest (see section 406(a)(1)(B)); the furnishing of goods, services, or facilities between the plan and a party in interest (see section 406(a)(1)(C)); or a transfer to or use by or for the benefit of, a party in interest, of any assets of the plan (see section 406(a)(1)(D)).

Section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of a plan in his or her own interest or for his or her own account. Section 406(b)(3) of ERISA provides that a plan fiduciary shall not receive any consideration for his or her own personal account from any party dealing with the plan in connection with a transaction involving assets of the plan.

Section 3(14) of ERISA defines the term "party in interest" with respect to a plan to include, among others, a person providing services to such plan and an employee organization any of whose members are covered by such plan. Section 3(4) of ERISA defines the term "employee organization" to include, in pertinent part, any labor union which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships.

Section 408(b)(2) of ERISA provides, in pertinent part, a statutory exemption from the prohibitions of section 406(a) for contracting or making reasonable arrangements with a party in interest, including a fiduciary, for services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefore. Regulations issued by the Department clarify the terms “necessary service” (29 CFR § 2550.408b-2(b)), “reasonable contract or arrangement” (29 CFR § 2550.408b-2(c)), and “reasonable compensation” (29 CFR § 2550.408b-2(d) and § 2550.408c-2) as used in section 408(b)(2).

Accordingly, the provision of services to a plan would be exempt from the prohibitions of section 406(a) of ERISA if the conditions of section 408(b)(2) were met. Whether the conditions are met in each case involves questions that are inherently factual in nature. The Department generally will not issue opinions on such questions. Therefore, the appropriate plan fiduciaries must determine, based on all of the relevant facts and circumstances, whether the conditions of section 408(b)(2) are satisfied.

With respect to the prohibitions in section 406(b), the Department’s regulation § 2550.408b-2(a) states that section 408(b)(2) of ERISA does not contain an exemption for an act described in section 406(b) of ERISA, even if such act occurs in connection with a provision of services which is exempt under section 408(b)(2). As explained in 29 CFR § 2550.408b-2(e)(1), if a fiduciary uses the authority, control or responsibility that makes him or her a fiduciary to cause the plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary’s best judgment as a fiduciary), a transaction described in section 406(b) of ERISA would occur.

Section 402(b)(4) of ERISA requires every employee benefit plan to specify the basis on which payments are made to and from the plan. Section 403(c)(1) of ERISA generally requires the assets of an employee benefit plan to 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)(A) of ERISA requires that a fiduciary 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 such participants and beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(D) of ERISA requires the fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA.

Analysis of the First Approach

Under the first approach, you describe an arrangement between a Local and NEIEP

whereby the Local pays tuition for its members, who are NEIEP participants, at certain NEIEP-approved welding schools. The NEIEP exists to train its participants and allows for such participants to receive training at outside welding schools, provided tuition payments can be made. The NEIEP's obligation to reimburse such tuition payments, through the SS Agreement with a Local, only arises upon successful completion by a participant of their training. If the participant is unsuccessful, the Local has no recourse against the NEIEP for the participant's tuition.

Under this arrangement, the Local would be considered a party in interest to the NEIEP as a service-provider who facilitates training opportunities that allow the NEIEP to achieve its training goals. Thus, absent a statutory or administrative exemption, such services by the Local to the NEIEP would be a prohibited transaction under section 406(a) of ERISA. However, to the extent the conditions of section 408(b)(2) of ERISA are met, particularly that the Local's services are necessary for the administration of the NEIEP and the contract or arrangement for such services is reasonable, the provision of services by the Local to the NEIEP would be exempt from the provisions of section 406(a).

To the extent that the Local would receive reimbursement from the NEIEP, under the SS Agreement, where a member of that Local would also serve as a trustee of the NEIEP, a violation of ERISA section 406(b), not entitled to relief under section 408(b)(2) of ERISA, may arise. For example, if such a person used his or her authority, control or responsibility as a fiduciary to cause the NEIEP to pay the Local an additional fee or other compensation in connection with this arrangement, then a violation of ERISA section 406(b) may occur. However, it is the opinion of the Department that where there is a clear understanding or agreement, entered into at or before the time of the advance of money by the Local for tuition payments, that the NEIEP will reimburse the Local for such payments, with no interest or other compensation being charged to the NEIEP, no violation of section 406(b) of ERISA would occur. In our opinion, there must be clear evidence of such an agreement provided by either relevant plan language or otherwise which creates an obligation on the part of the NEIEP to reimburse such expenses.¹

Analysis of Second Approach

With respect to the circumstances described in the second approach, it is the view of the

¹ Under the agreement, monies owed by the NEIEP to a Local are due by the thirtieth (30th) day from the presentation of proper documentation by the Local to the NEIEP. The Department notes that once the NEIEP's obligation to reimburse a Local for such expenses arises, and the Local does not receive its reimbursement within the agreed upon time, then the monies outstanding would become an extension of credit by the Local to the NEIEP. In this regard, we do not opine here as to whether Prohibited Transaction Exemption 80-26 (45 Fed. Reg. 28545, April 29, 1980; amended at 71 Fed. Reg. 17917, April 7, 2006) would be available for any such loans or extensions of credit.

Department that the same analysis would apply and the same conclusions would be reached.

Additionally, the tuition paid to the participant is a benefit of the plan. Thus, if the NEIEP paid money to which a participant or beneficiary is entitled as a benefit, at the direction of the participant or beneficiary, to the Local as reimbursement for the payment of the tuition of the participant, then such payment would not be considered a prohibited transaction under section 406 of ERISA (see 29 CFR § 2509.78-1, Interpretative Bulletin relating to payments by certain employee welfare benefit plans).²

Fiduciary Concerns

The fiduciaries of the NEIEP must act prudently and solely in the interests of the NEIEP when causing the NEIEP to enter into the proposed arrangement. If the decisions by the fiduciaries to enter into the proposed arrangements, and to reimburse the Locals for services in accordance with the arrangements, are not prudent and solely in the interests of the NEIEP, the fiduciaries would be liable for any loss resulting from such breach of fiduciary responsibility, even though the arrangement may not constitute a prohibited transaction.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations

² No opinion is expressed herein as to the application of section 302 of the Labor Management Relations Act of 1947, or the Internal Revenue Code, regarding either arrangement.