

Joint Committee on Employee Benefits
Questions and Answers for the Department of Labor
based on meeting with staff
May 10, 2000

The following questions and answers are based on informal discussions between private sector representatives of the JCEB and Department of Labor officials. The questions were submitted by ABA members and the responses were given at a meeting of JCEB and government representatives. The responses reflect the unofficial, individual views of the government participants as of the time of the discussions, and do not necessarily represent agency policy. This report on the discussions was prepared by designated JCEB representatives, based on the notes and recollections of the JCEB representatives at the meeting, and has been reviewed by Labor Department staff who were present at the meeting. The questions were submitted in advance to the agency, and it was understood that this report would be made available to the public.

QUESTION 1. Will the PWBA issue additional soft-dollar disclosure guidance for plan sponsors and service providers in 2000?

PROPOSED/SUGGESTED ANSWER 1.

Yes, guidance will be issued by sometime in 2000.

DEPARTMENT OF LABOR ANSWER 1.

The Department of Labor Semiannual Regulatory Agenda states that guidance is scheduled to be issued before the end of July 2000.

QUESTION 2. Some plans offer participants the option of investing in either (1) anything permissible under ERISA through an individually directed account ("IDA"), or (2) selected mutual funds that a plan fiduciary has decided to offer under the plan ("Mutual Fund Account"). Some service providers and mutual fund companies that administer these arrangements tell us that the earnings they generate from the Mutual Fund Account (e.g., 12b-1 fees, management fees) is where they make their money. The fees charged to administer the IDAs do not cover the costs of administering those accounts. In other words, the fees charged to the Mutual Fund Accounts subsidize the IDAs. This arrangement could be viewed as unfair because lower paid employees typically do not take advantage of IDAs as much as do higher paid employees. Nonetheless, would this type of an arrangement seem acceptable to the Department of Labor if IDAs were available to all participants? Would any special disclosure of these facts need to be made to participants?

PROPOSED/SUGGESTED ANSWER 2.

Yes, this type of an arrangement is acceptable to the Department, as long as IDAs are

available to all participants. No additional disclosure of these facts need to be made to participants.

DEPARTMENT OF LABOR ANSWER 2.

The Department is examining these issues at this time, and the staff is not currently prepared to answer this question.

QUESTION 3. Evaluation of Insurance Company Separate Accounts: Plan fiduciaries must take the steps needed to properly evaluate and monitor the investment funds offered to participants under a plan designed to comply with ERISA § 1104(c). There are services available to help fiduciaries evaluate mutual funds to be offered. If a fiduciary wants to offer separate accounts under a group annuity contract to participants, wouldn't the fiduciary have to do (or hire someone to do) quite a bit more work to properly evaluate and monitor those separate accounts? Is the Department of Labor aware of anyone that evaluates separate accounts offered under annuity contracts?

PROPOSED/SUGGESTED ANSWER 3.

Yes, when a fiduciary selects the investments to be offered to participants under a 404(c) plan, the fiduciary must make the selection(s) in accordance with the fiduciary responsibilities under ERISA. Similarly, the fiduciary has an obligation to monitor the appropriateness of those investment offerings over time. The fiduciary is shielded with respect to the participant's exercise of control by directing the investment; there is no such shield with respect to the selection of investments to be offered to the participants.

DEPARTMENT OF LABOR ANSWER 3.

The staff agrees with the proposed/suggested answer.

QUESTION 4. In general, under 29 U.S.C. § 2550.408b-1(a) if a plan permits participants to borrow from the plan, loans must be made available to all participants who are parties in interest.

If a qualified pension plan covers both union (in accordance with the terms of a collective bargaining agreement) and non-union employees, and if the plan permits employees to borrow from the plan, must the plan permit all employees (who are parties in interest) to borrow, or may the plan have separate rules for union and non-union employees? If the plan covers employees covered by two or more collective bargaining agreements, what happens if one agreement requires that loans be made available and one does not permit loans?

PROPOSED/SUGGESTED ANSWER 4.

Under ERISA, the union employees must be treated in accordance with the applicable collective bargaining agreement, even if that produces a different result regarding plan

loans than for the non-union employees or for a different group of union employees. However, the disparate treatment may constitute illegal discrimination under NLRA §§ 8(a)(3) and (b)(2), if the non-union employees are in the bargaining unit of the union employees.

DEPARTMENT OF LABOR ANSWER 4.

The staff expressed no view as to the NLRA, as the Department does not administer the NLRA. The staff disagrees with the ERISA portion of the proposed/suggested answer, stating that the Department has expressed its views in Advisory Opinion 95-19 (August 9, 1995). In the circumstances presented in that Advisory Opinion, the employer represented that it would be unable to allow plan loans to any participants covered by a collective bargaining agreement until the representatives of those participants agreed to a loan feature. The bargaining agreements for the various bargaining units were to expire at different times. The employer and the union were to negotiate the plan loan feature as each contract would come up for renegotiation. In responding to the request for the Advisory Opinion, the Department assumed that outstanding loans to participants and beneficiaries would not be affected by the expiration of the governing collective bargaining agreement "and that all non-represented employees will be eligible for loans without regard to the collective bargaining process." The Department concluded in its Advisory Opinion "that making the loan program available to participants only as their collective bargaining agreements are renegotiated would not necessarily cause the loans to fail to be provided on a reasonably equivalent basis [within the meaning of 29 C.F.R. 2550.408b-1] if, within a reasonable period of time, all bargaining units approve the loan feature." The staff suggested that persons involved in a situation such as that described in the question read that advisory opinion.

QUESTION 5. The Title I definition of "church plan" (29 U.S.C. § 1002(33)) incorporates the same language as found in the Code definition at Sec. 414(e). Where a plan has obtained a church plan ruling from the IRS, can the sponsor take the position that the plan also satisfies 29 U.S.C. § 1002(33)? Is it necessary to obtain an Advisory Opinion from the DOL in order to ensure exemption from ERISA?. If so, does the DOL apply any standards that the IRS does not (does the DOL perform an independent inquiry, or do they rely entirely on the IRS ruling)?

PROPOSED/SUGGESTED ANSWER 5.

The DOL defers to the IRS on church plan determinations. If a sponsor has received a letter ruling from the Service, the DOL will use that as the basis for issuing an advisory opinion under Title I. As a result, it is not necessary for a sponsor to obtain an opinion from the DOL if they already have a letter ruling from the IRS. Conversely, if the sponsor has not already obtained a letter ruling, the DOL will not issue an advisory opinion.

DEPARTMENT OF LABOR ANSWER 5.

The staff stated that the proposed/suggested answer is essentially correct. Generally, the Department does not issue advisory opinions on whether a plan is a church plan, unless

the plan has already obtained a favorable determination of church plan status from the IRS. Nonetheless, the Department reserves the right to review the underlying IRS determination to be certain that the Department agrees with the IRS's determination. In addition, the Department is willing to consider issuing an advisory opinion on church plan status, where the IRS does not issue determinations. For example, the IRS does not issue church plan determinations with respect to plans in Puerto Rico. In such a case, the Department would not refuse to issue an advisory opinion solely based on the plan's failure to obtain an IRS determination.

QUESTION 6. Is family and bereavement leave subject to ERISA, assuming that the payroll practice rules do *not* apply?

PROPOSED/SUGGESTED ANSWER 6.

Yes. See Air Transport Association v. San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998).

DEPARTMENT OF LABOR ANSWER 6.

The staff questions whether bereavement leave is subject to ERISA. With respect to family leave, the Department filed an amicus brief in the appeal to the Wisconsin Supreme Court of the case of Aurora Medical Group v. Department of Workforce Department, 230 Wis.2d 399; 602 N.W.2d 111; 23 E.B.C. 2395 (Wis. Ct. Appl. 1999). The appeals court held that the Wisconsin statute, which would allow plaintiff to substitute 96.9 hours of paid sick leave for unpaid statutory leave, was not preempted by ERISA. In its brief to the Wisconsin Supreme Court, the Department argued that the arrangement at issue was not a plan covered by ERISA. In the alternative, the Department argued that, if it were an ERISA plan, then Wisconsin law would relate to that plan. The DOL argued that, because ERISA does not preempt federal laws, the FMLA would not be preempted. The FMLA, in turn, explicitly saves from preemption any state family leave laws that are more generous to workers than the FMLA. According to the Department's argument, these more generous state laws should not be preempted because they are part of an integrated federal/state scheme fostered under the FMLA. The Department's approach is reminiscent of its arguments in earlier cases that ERISA does not preempt state laws enacted in conjunction with the Fitzgerald Act (a federal law designed to regulate apprenticeship and training programs that authorizes the states to adopt programs to train and license apprentices). The courts were split on the issue until the Supreme Court decided California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997), holding that these state laws are not preempted.

QUESTION 7. Can a plan provide a shorter period during which disability benefits are available for mental illness than for physical illness?

PROPOSED/SUGGESTED ANSWER 7.

No, that violates the Mental Health Parity Act.

DEPARTMENT OF LABOR ANSWER 7.

The staff made reference to the several cases brought under the Americans with Disabilities Act that address this issue, but the staff had no comment on these cases. The staff did state that if the plan in question is a disability income plan, then ERISA § 733(c)(1) makes the plan exempt from the Mental Health Parity Act. However, if the plan in question is a group health plan, then the Mental Health Parity Act does apply, and the plan must assess whether there are dollar limits in place that are lower for mental health benefits than for medical/surgical benefits. If there are dollar limits in place (including constructive dollar limits) that are lower for mental health benefits, the answer is correct and the plan is in violation of the Mental Health Parity Act. However, if there are only visit limits in place (without additional dollar limitations), then the plan is not in violation of the Mental Health Parity Act. The Department is considering the issuance of guidance on this one issue.

QUESTION 8. Can a retirement plan charge participants' accounts (directly) the cost of issuing a check to the participant?

PROPOSED/SUGGESTED ANSWER 8.

Yes. To hold otherwise (where the plan bears the administrative costs) would produce untoward and unjust results, particularly in the case of a dwindling plan population. Basically, to hold otherwise benefits those who quit early, as opposed to those who stay, as illustrated in the following example, where there are five participants, with one of them leaving at a time, where the administrative cost of issuing the check to the departing participant is \$72.

Participant	Actual Cost	Number of Participants	Cost borne by Participant 5 (\$72/number of participants)
1	\$72	5	\$14.40
2	\$72	4	\$18
3	\$72	3	\$24
4	\$72	2	\$36
5	\$72	1	\$72
Total Amount Borne by Participant 5			\$169.40

Thus, if the costs must be borne by the plan, participant 5 ends up paying a total of \$169.40, yet participant 1 only paid \$14.40. This unequal allocation of the costs serves no rational purpose.

DEPARTMENT OF LABOR ANSWER 8.

This issue (direct assessment of charges that relate to a particular participant's account) is under examination. The Department hopes to have an answer in the form of published guidance in the not too distant future.

QUESTION 9. Can a tax-qualified retirement plan maintained by an S Corporation make a loan to a participant who is a shareholder-employee if the loan is not secured by the participant's account balance?

PROPOSED/SUGGESTED ANSWER 9.

No, it is a prohibited transaction to make a loan to a shareholder-employee. The fact that the loan is not secured by the shareholder-employee's account balance does not matter.

DEPARTMENT OF LABOR ANSWER 9.

The staff agrees with the proposed/suggested answer, citing ERISA §§ 408(b)(1) and 408(d).

QUESTION 10. Assume that a bank acts as custodian for a Section 401(k) plan sponsored by an unrelated corporation. Assume further that the Section 401(k) plan provides for individually directed accounts, but that all uninvested funds will automatically be transferred into a "sweep fund" sponsored by the bank. Assume that the bank has disclosed that the amount of fees it charges for sponsoring the sweep funds will, in many cases, equal the amount of the interest earned on the amounts in the sweep fund. Is this a prohibited transaction?

PROPOSED/SUGGESTED ANSWER 10.

Assuming that the bank has full discretion regarding what amounts are placed in the sweep fund (as opposed to being immediately invested in another investment vehicle), that is a prohibited transaction, because the bank can use its discretion to increase its income (by allocating more amounts to the sweep fund).

DEPARTMENT OF LABOR ANSWER 10.

The staff agrees with the proposed/suggested answer. The bank has discretion over which monies are swept in and how long those monies stay in the sweep fund (even if the sweep is automatic). Accordingly, the bank exercises discretion which can affect its own compensation, and there is a prohibited transaction. On the other hand, if the bank does not have that discretion, there would not be a prohibited transaction in the circumstances

presented. The Department issued a letter to this effect to the Comptroller of the Currency (the so-called "Plotkin letter.")

QUESTION 11. Many multiemployer plans provide participants with the option of taking their benefit in the form of a lump sum distribution. Participants have exercised this option and subsequently returned to employment prohibited by 29 U.S.C. 1053. Therefore, the Suspension of Benefit rules which would normally apply to these participants are circumvented when they take a lump sum distribution of their benefits. Multiemployer plans cannot control their continued prohibited employment by withholding benefits. The lump sum option cannot be eliminated by these plans because this would violate Code Section 411(d)(6).

Does 29 U.S.C. § 2530.203-3(d)(2)(i) authorize a multiemployer plan to amend its plan to provide that participants who take a lump sum distribution and thereafter return to work in prohibited employment become obligated to repay the plan the amount which would have been due during the month or months such work is performed had their benefit been paid in the form of a single life annuity?

PROPOSED/SUGGESTED ANSWER 11.

In light of the fact that Code Section 411(d)(6) prevents a plan from eliminating an optional form of benefit such as a lump sum option, and the fact that participants who exercise this option could circumvent the Suspension of Benefit rules by subsequently returning to work in prohibited employment, it appears that 29 U.S.C. § 2530.203-3(d)(2)(i) authorizes multiemployer plans to provide that participants who take a lump sum distribution and who subsequently return to work in prohibited employment must repay the amount which would have been payable by the Plan during the term of such employment if the participants' benefit were paid in the form of a single life annuity.

DEPARTMENT OF LABOR ANSWER 11.

The staff disagrees with the proposed/suggested answer. The staff concluded that the circumstances do not constitute a suspension of benefits. Nothing in the regulation supports compelling repayment to the plan of a portion of a lump sum payment under these circumstances. The staff cited the preamble to the regulation to the effect that moneys paid in a lump sum distribution could not be compelled to be repaid.

QUESTION 12. Is an employee benefit plan a "fiduciary" within the meaning of 29 U.S.C. § 1002(21) with standing to sue under 29 U.S.C. § 1132(a) or (b)?

PROPOSED/SUGGESTED ANSWER 12.

No. An employee benefit plan is not a "person" as defined under 29 U.S.C. § 1002(9), and only a person can be fiduciary. See also Pettit v. Bay Area Pipe Trades Pension Trust Fund, U.S., No. 99-962, cert. denied 2/22/00

DEPARTMENT OF LABOR ANSWER 12.

The staff agrees with the proposed/suggested answer. However, the trustee(s) of a plan can sue to recover asset on behalf of the plan or to otherwise assert the plan's rights.

QUESTION 13. Does ERISA preempt the District of Columbia's marital property law with respect to a divorced wife's ability to waive her potential property interest in her husband's pension by a validly executed prenuptial agreement?

PROPOSED/SUGGESTED ANSWER 13.

No. See ruling of District of Columbia Court of Appeals, Critchell v. Critchell, D.C. Ct. App., No. 98-FM-1304, 2/10/00).

DEPARTMENT OF LABOR ANSWER 13.

The Department has not addressed this particular issue, but the staff questions the reasoning of the court's ruling, and the staff is not sure that the decision is correct.

QUESTION 14. Can a plan participant waive his/her right to ready access to the courts under ERISA in favor of arbitration?

PROPOSED/SUGGESTED ANSWER 14.

Yes. See ruling of Tenth Circuit in Williams v. Imhoff, 10th Cir., No. 98-1448, 2/14/00).

DEPARTMENT OF LABOR ANSWER 14.

Under the current DOL appeals regulation, arbitrations are deemed to constitute a reasonable claims procedure in certain circumstances in single-employer, collectively-bargained plans, which are not jointly trustee (that is, not subject to 29 U.S.C. § 186(c)(5)). 29 C.F.R. § 2560.503-1(b)(2). 63 Fed. Reg. 48390, 48397 (September 9, 1998). The issue of whether such arbitration could be final and not reviewable by the courts was not addressed in the regulation. The Department is currently examining the issue in the context of the claims regulation. In addition, the proposed claims procedure regulation would not allow a plan to require a claimant to submit to arbitration, but would (like the current regulation) allow a plan and a participant to agree voluntarily to submit to arbitration. 29 C.F.R. § 2560.503-1(b)(3) (proposed).

QUESTION 15. In the case of Jordan v Michigan Conference of Teamsters Welfare Fund, 6th Cir., No. 98-1885 (3/24/00), the Fund and the plaintiff participants had settled a class action. As part of the settlement, the Fund agreed to pay reasonable attorney fees incurred by the participants. The attorney fees had been advanced by the union, and the payment of fees by the Fund under the settlement agreement was to be used to reimburse

the union. The Fund objected, alleging the reimbursement to be a prohibited transaction. The district court agreed; the Circuit Court has just reversed.

Does the Department agree with the rulings of the Circuit Court that:

- A. ERISA is a fee shifting statute, so the reimbursement is outside the scope of ERISA § 406;
- B. There could be no prohibited transaction, because the Fund lacked subjective intent to benefit the party in interest union;
- C. ERISA § 406(a)(1)(D) does not limit a district court's authority to order fiduciaries to make payments to a party in interest;
- D. ERISA § 408(b)(2) permits the Fund's reimbursement to the union of the suing participants attorney fees.

PROPOSED/SUGGESTED ANSWER 15.

- A. Payment of attorney fees from plan assets to a successful party in interest litigant is authorized under ERISA § 502(g) and cannot violate ERISA § 406.
- B. Subjective intent is not relevant in determining whether there has been a prohibited transaction.
- C. A court order does not constitute protection against the commission of a prohibited transaction, unless the Department of Labor or the Internal Revenue Service are party to the litigation or unless there is a statutory or regulatory exemption otherwise available with respect to the prohibited transaction.
- D. ERISA § 408(b)(2) does not provide a basis for use of plan assets to reimburse the attorney fees of participants who have sued the plan and/or its fiduciaries.

DEPARTMENT OF LABOR ANSWER 15.

- A. The staff noted that payment of attorney fees from plan assets to a successful litigant is authorized under ERISA § 502(g), but declined to address whether such fees when paid to a party in interest would be a prohibited transaction.
- B. The staff agrees with the proposed/suggested answer. Subjective intent is not relevant to the decision whether a prohibited transaction has been committed. The Department referred us to Advisory Opinion 85-36 (October 23, 1985).
- C. The staff agrees with the proposed/suggested answer citing PTE 79-15.
- D. The staff wants additional time to consider this issue, but it believes that the proposed/suggested answer is correct.

QUESTION 16. Is a medical benefits plan provision, prohibiting lawsuits for benefits after 90 days from the date the plan fiduciary makes the final determination to deny benefits, enforceable?

PROPOSED/SUGGESTED ANSWER 16.

Yes. A United States Court of Appeals ruled that the 90-day limitation was reasonable and was consistent with other plan provisions that were designed to speed claims processing. The court was impressed with plan's internal appeals process, which ensured adequate opportunity to investigate the claim and provide a complete response to the participant. Northlake Regional Medical Center v. Wafflehouse System Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998).

DEPARTMENT OF LABOR ANSWER 16.

The staff disagrees with the proposed/suggested answer and disagrees with the decision of the court in Northlake Regional Medical Center v. Wafflehouse System Employee Benefit Plan, 160 F.3d 1301 (11th Cir. 1998).

QUESTION 17. Is the Department contemplating ongoing revisions to its Voluntary Fiduciary Correction program?

PROPOSED/SUGGESTED ANSWER 17.

Yes. Just as the Internal Revenue Service has made revisions to its voluntary programs (the Employee Plans Consolidated Resolution System) a priority, the Department intends to expand and revise its VFC program.

DEPARTMENT OF LABOR ANSWER 17.

After the VFC program has been in effect for a while, the Department will review it to see what changes, if any, are appropriate. Only to this extent can the Department be said to be considering expansion or revision of the VFC program.

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