



February 17, 2023

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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW, Suite N-5655
Washington, D.C. 20210

Re: Puget Sound Pilots Association Multiple Employer Defined Benefit Pension Plan

Dear Reader:

Pursuant to ERISA Procedure 76-1, this is a request made on behalf of the Puget Sound Pilots Association for an advisory opinion concerning: (i) whether the Puget Sound Pilots Association may be considered to be an “employer group or association” so that it constitutes an “employer” within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), for purposes of establishing and maintaining a tax-qualified multiple employer defined benefit pension plan under 29 C.F.R. section 2510.3-55(b), 84 Fed. Reg. 37508 (published on July 3, 2019, effective September 30, 2019); and (ii) whether a Puget Sound Pilot, a self-employed individual who forms a limited liability company (“LLC”), treated as a partnership, that receives earned income for services performed as a pilot, may be considered to be a “working owner” as defined in section 2510.3-55(d) and an “owner-employee” under section 401(c) of the Internal Revenue Code of 1986, as amended (the “Code”) and qualify as both an employer and an employee of the trade or business for purposes of the requirements in section 2510.3-55(b).

A. Bona fide group or association of employers

Section 2510.3-55(b) provides that a bona fide group or association of employers capable of establishing a multiple employer plan (“MEP”) shall include a group or association of employers that meets the following requirements:

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- (i) the primary purpose of the group or association may be to offer and provide MEP coverage to its employer members and their employees; however, the group or association also must have at least one substantial business purpose unrelated to offering and providing MEP coverage or other employee benefits to its employer members and their employees; as a safe harbor, a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan, such as promoting common business interests of its members or the common economic interests in a trade or employer community and is not required to be a for-profit activity;
- (ii) each employer member of the group or association participating in the plan is a person acting directly as an employer of at least one employee who is a participant covered under the plan;
- (iii) the group or association has a formal organizational structure with a governing body and has by-laws or other similar indications of formality;
- (iv) the functions and activities of the group or association are controlled by its employer members, and the group's or association's employer members that participate in the plan control the plan, requiring control to be present both in form and in substance;
- (v) the employer members have a commonality of interest;
- (vi) the group or association does not make plan participation through the association available other than to employees and former employees of employer members, and their beneficiaries; and
- (vii) the group or association is not a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm, or owned or controlled by such an entity.

The term "commonality of interest" means that either the employers are in the same trade, industry, line of business or profession, or each employer has a principal place of business in the same region that does not exceed the boundaries of a single State or a metropolitan area.

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Section 2510.3-55(d) provides that a working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business for purposes of the requirements in section 2510.3-55(b). The term “working owner” means any person who a responsible plan fiduciary reasonably determines is an individual:

- (i) who has an ownership right of any nature in a trade or business, whether incorporated or unincorporated, including a partner or other self-employed individual;
- (ii) who is earning wages or self-employment income from the trade or business for providing personal services to the trade or business; and
- (iii) who either: (A) works on average at least 20 hours per week or at least 80 hours per month providing personal services to the working owner’s trade or business, or (B) has wages or self-employment income from such trade or business that at least equals the working owner’s cost of coverage for participation by the working owner and any covered beneficiaries in any group health plan sponsored by the group or association in which the individual is participating or is eligible to participate.

The determination under section 2510.3-55(d) must be made when the working owner first becomes eligible for participation in the MEP and continued eligibility must be periodically confirmed pursuant to reasonable monitoring procedures.

The Puget Sound Pilots are not employees of the Puget Sound Pilots Association, they are self-employed individuals affiliated by their profession as pilots who board oil tankers, cargo vessels, and cruise ships and guide them through the Puget Sound ports in the State of Washington. The Puget Sound Pilots Association is comprised of all of the working pilots and was formed by the pilots as a formal organization with a Federal Employer Identification Number, managed by the pilots with by-laws and a governing body made up of pilots. The Puget Sound Pilots Association schedules the assignments of the pilots for the vessels, negotiates the tariffs used for paying the compensation to the pilots, and sponsors an unfunded, pay-as-you-go or farebox defined benefit pension plan (the “Plan”).

The Plan is neither subject to the requirements of ERISA nor a tax-qualified plan described in section 401(a) of the Code. The Plan provides that a retired pilot is entitled to receive a benefit equal to 1.5% of the retired pilot’s retirement base

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multiplied by the number of that pilot's years of service. All of the pilots participate in the Plan and only the pilots are eligible to participate in the Plan.

The proposed Puget Sound Pilots Association multiple employer defined benefit pension plan would be a tax-qualified plan described in section 401(a) of the Code established and maintained by the Puget Sound Pilots Association. The benefit payable under the plan would be substantially similar to the current benefit payable under the Plan determined by the product of 1.864% of the retired pilot's retirement base, limited by section 401(a)(17) of the Code, and the number of that pilot's years of service.

Each self-employed Puget Sound Pilot would form an LLC which would be treated as a partnership receiving earned income from the services performed by the pilot serving as a pilot of the oil tankers, cargo vessels, and cruise ships in the Puget Sound. The LLC formed by each pilot would participate in the proposed multiple employer defined benefit pension plan and only the pilots would be eligible to participate in the Plan.

Consequently, the Puget Sound Pilots Association should be considered to be an employer under section 3(5) of ERISA pursuant to section 2510.55(b) capable of establishing and maintaining a multiple employer defined pension plan and each pilot as both an employer and an employee of a trade or business should be considered to be a working owner under section 2510.55(d) for purposes of participating in the plan.

If you need any additional information or if you have any questions with respect to this request for an advisory opinion, please let me know.

Respectfully submitted,

LEECH TISHMAN FUSCALDO & LAMPL, LLC

Bruce J. McNeil