

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:  
Pension and Welfare Benefit Programs

OPINION 81-38A  
3(1), 3(4)

MAR 31 1981

Mr. Mark S. Geschwer  
Counsellor at Law  
442 Main Street  
Fort Lee, New Jersey 07024

RE: Your File #1550

Dear Mr. Geschwer:

This is in response to your letter of September 10, 1980, concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Garden State Dental Benefits Program, Inc. (Garden State).

You describe Garden State as a New Jersey corporation which, as part of its efforts to comply with New Jersey law, is applying for a certificate of authority from the New Jersey Commissioner of Insurance to operate as a dental plan organization. You state that Garden State intends to sign up enrollees for a program of dental benefits, using agents who are independent contractors working on a commission equal to 5 percent of the monthly gross premiums paid by the individuals each agent enrolls.

You further describe Garden State as desiring to arrange with certain Teamsters locals and other union locals for members' monthly payroll deductions to be forwarded to Garden State as payment for participation in Garden State's prepaid capitation dental program. Garden State, after deducting administrative expenses, would distribute the remainder of funds it collects to dentists who deliver services to members. Payments to a participating dentist would be calculated on a ratio of the number of union members and families treated by that dentist to the total enrollment of union members and families. Accordingly, each participating dentist is to receive a pro rata share of the fund, including dentists outside New Jersey. Garden State would determine the number and location of participating dentists, based on actuarial figures concerning the use of dental services and on the proximity of the dentist to a set number of families.

ERISA section 3(1) defines an "employee welfare benefit plan" as "... 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 and 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)."

It is apparent that Garden State intends to provide benefits among those listed in ERISA section 3(1). However, in order to be an employee welfare benefit plan, a program of benefits described in ERISA section 3(1) must, among other things, also be established or maintained by an employer within the meaning of ERISA section 3(5), by an employee organization within the meaning of ERISA section 3(4) or by both. There is no indication that Garden State is the employer of all enrollees who might receive benefits or that it is acting directly or indirectly on behalf of any employer. Therefore, it is the Department's position that Garden State is not an employer within the meaning of section 3(5) of ERISA.

Further, Garden State is not an employee organization within the meaning of section 3(4) of ERISA. Section 3(4) defines the term "employee organization" to include "... any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan in which employees participate and 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; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." Garden State does not appear to be an "employees' beneficiary association" within the meaning of section 3(4) because it does not appear that enrollee-employees would control, or even participate in any meaningful way in, the affairs of Garden State. Rather, employee organizations might contract with Garden State for provision of dental services in much the same manner as if Garden State were an insurance company. For these reasons, and because it does not appear that Garden State exists for the purpose of enabling employees to deal with employers, we conclude that Garden State is not an employee organization within the meaning of section 3(4).<sup>1</sup> Accordingly, Garden State itself

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<sup>1</sup> In this connection, see the Activity Report of the House Committee on Education and Labor, H. Rep. No. 94-1785(1977), where the Committee expressed its view that "plans" established and maintained by insurance entrepreneurs for the purpose of marketing insurance products to employers and employees at large are not ERISA plans. It appears that provisions of the applicable New Jersey statute (P.L. 1979 Ch. 478), inter alia, would require a certified dental plan organization to be financially responsible for its contractual obligations to enrollees, and contemplate the maintenance of general and contingent reserves by the organization. Accordingly, it would appear that the contracts which would be issued by Garden State could be viewed as insurance products in this context.

would not be an employee welfare benefit plan and would not be an entity subject to regulation under ERISA.

However, if a union, its local, or other employee organization or employer arranges with Garden State for the provision of dental benefits for its members or employees, such employee organization or employer may thereby establish or maintain an employee welfare benefit plan. Unless otherwise excepted from ERISA title I coverage, such an employee welfare benefit plan would have to meet all applicable ERISA title I requirements. For your information, we are enclosing a copy of ERISA Opinion 81-17A, which concerns in this regard an organization which appears to resemble Garden State.

Although you have requested a conference with respect to issuance of this advisory opinion, the Department does not deem such a conference advisable or necessary in view of its opinion as indicated in this letter. Should you have further general questions on ERISA coverage issues, you may wish to get in touch with the Division of Coverage, Office of Reporting and Plan Standards, Pension and Welfare Benefit Programs at (202) 523-7901 or at the address indicated above.

You have also requested an opinion as to Garden State's "ability to contract directly with a union local in New York State, Connecticut, and/or Pennsylvania." As suggested above, the question of Garden State's capacity to act is beyond the scope of the authority of this office, which authority is limited to interpretation and enforcement of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff  
Administrator of Pension and Welfare Benefit Programs

Enclosure