

**U.S. Department of Labor**

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



Reply to the Attention of:  
Pension and Welfare Benefit Programs

OPINION 81-56  
SECTION 3(1), 3(4), 3(32)

JUN 29 1981

Ms. Jane B. Stranch  
Branstetter, Kilgore & Stranch  
200 Church Street, Fourth Floor  
Nashville, Tennessee 37201

Dear Ms. Stranch:

This is in reply to your request of October 10, 1980, for an advisory opinion concerning coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether a group insurance program funded by the individual contributions of the members of an association composed of government employees constitutes an employee benefit plan within the meaning of ERISA title I.

The following is a summary of the material representations in your letter. The Metropolitan Fire Fighters Association of Nashville and Davidson County Local 763 (the Association) is an association whose membership is limited to individuals employed by the Metropolitan Government, a governmental entity which encompasses the county in which Nashville, Tennessee, is located. The Association is a formalized organization that has entered into a Memorandum of Understanding on behalf of its members with the Metropolitan Government. You indicate that in 1970 members of the Association expressed a need for group insurance coverage. Based on this expressed need, Vulcan Life and Accident Insurance Company (Vulcan) of Birmingham, Alabama, presented a group life insurance program at an Association meeting. It should be noted that the agreement to provide coverage to the Association was signed on March 1, 1970, by Mr. Doug Horn, then and present president of the Association. In addition to his role as an officer of the Association, Mr. Horn acted as an agent of Vulcan. Mr. Horn continues in the dual roles as of the date of your request. Further, Mr. Horn also performs administrative tasks and provides information to Association members for which he continues to receive a commission from Vulcan.

An "employee benefit plan" is defined in section 3(3) of ERISA to include both employee welfare benefit plans and employee pension benefit plans.

An "employee welfare benefit plan" is defined in section 3(1) of ERISA, in relevant part, 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, ... benefits in the event of ... death ....

Under section 4(a) of ERISA, title I generally applies, except as provided in section 4(b), and with certain other exceptions not here relevant, to any employee benefit plan if it is established or maintained by, among other entities, an employee organization representing employees engaged in commerce or in any industry or activity affecting commerce. The phrase "industry or activity affecting commerce" is broadly defined in section 3(12) of ERISA. Of the exceptions from title I coverage listed in section 4(b), only section 4(b)(1) appears to be of potential relevance in this matter. Section 4(b)(1) provides that title I of ERISA does not apply to a plan which is a governmental plan, as defined in section 3(32).

In your letter you specifically raise a question as to whether title I of ERISA applies to the Association, or to a benefit program which it may sponsor, in view of the "governmental plan" exclusion from coverage under title I in section 4(b)(1). The term "governmental plan" is defined in section 3(32) to mean, in relevant part, "... a plan established or maintained for its employees by ... the government of any State or political subdivision thereof ...." While the Metropolitan Government appears to be the government of a political subdivision of the State of Tennessee, the group life insurance program at issue is not established or maintained by the Metropolitan Government, as you recognize in your letter, since the Metropolitan Government does not fund the program and is not otherwise involved with it. Thus, the group life insurance program is not a governmental plan within the meaning of section 3(32) of ERISA and, assuming it is an employee benefit plan within the meaning of section 3(3) of ERISA, would not be exempt under section 4(b)(1) from coverage under title I of ERISA.

You suggest that the Association is not a labor union, and, therefore, not an employee organization within the meaning of section 3(4) of ERISA, on the ground that the Metropolitan Government is not an "employer," and the members of the Association are not "employees," as those terms are defined in section 2(2) and (3) of the National Labor Relations Act (NLRA), respectively, and in section 501(3) of the Labor Management Relations Act, 1947 (LMRA), because state and local governments and their employees are specifically excluded under those definitions.<sup>1</sup> In addition, you indicate that there is no collective bargaining agreement between

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<sup>1</sup> Under section 3(1) of ERISA, a benefit program is not a welfare plan within the meaning of section 3(1) unless, among other conditions, it is established or maintained by an employer, an employee organization, or by both. The group life insurance program is not established or maintained by the employer of the individuals covered under the program, i.e., the Metropolitan Government. Therefore, if the Association is not an employee organization, the group life

the Association and the Metropolitan Government. You also indicate, however, that a Memorandum of Understanding exists between these parties, although the Tennessee State Attorney General's Office has held that the memorandum has no legal effect.

While section 4(b)(1) of ERISA excludes governmental plans from coverage under title 1 of ERISA, the definitions of the terms "employer" and "employee" in section 3(5) and (6), respectively, do not specifically exclude governmental entities and their employees. In the absence of language specifically excluding governmental entities and their employees from these definitions, we believe that these terms, as used in title I of ERISA, unlike their counterparts in the NLRA and the LMRA, include governmental entities and their employees. Thus, we do not think that the fact that the members of the Association are employees of a governmental entity necessarily implies that the Association is not a labor union.

From the representations in your letter and the material you have submitted, moreover, it appears that the Association is, in fact, a labor union, or a similar type of association, in which employees participate and which exists for the purpose of dealing with their employer concerning matters incidental to the employment relationship.

The Association is formally organized under its constitution and by-laws and is comprised solely of employees of the Metropolitan Government. The objectives of the Association listed in its constitution and by-laws include the "improvement of the ... economic conditions of its members and fellow workers, ... by promoting proper remunerations commensurate with duty performed ...." You indicate, moreover, that the Association has entered into a Memorandum of Understanding with the Metropolitan Government. The Memorandum of Understanding, although it may have no legal effect, appears to be the result of dealings between the Association and the Metropolitan Government concerning matters incidental to employment relationships.

Even if the Association is not a labor union, it would appear to be an "employees' beneficiary organization" within the meaning of ERISA. The term "employees' beneficiary association" is not defined in ERISA. Substantially identical language, however, was used in the definition of the term "employee organization" in section 3(3) of the Welfare and Pension Plans Disclosure Act (WPPDA). In interpreting section 3(3) of the WPPDA, the Department developed certain criteria to be used in construing the term "employees' beneficiary association," for which the WPPDA, like ERISA, provided no definition. Those criteria are:

- (1) Membership in an employees' beneficiary association is conditioned on employment status -- for example, if membership is limited to employees of a certain employer;

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insurance program would not be established or maintained either by an employee or by an employee organization, and would therefore not be a welfare plan.

- (2) An employees' beneficiary association has a formal organization, with officers, by-laws or other indications of formality;
- (3) An employees' beneficiary association generally does not deal with employers; and
- (4) An employees' beneficiary association which is an "employee organization" within the meaning of the statute is organized for the purpose, in whole or in part, of establishing a welfare pension plan.

Based on your representations it appears that even if the Association is not a labor union, it would be an "employees' beneficiary association." Accordingly, we think that the Association is an "employee organization" within the meaning of ERISA section 3(4).

In your letter, you also raise a question as to whether the group insurance program in question is a group program described in 29 C.F.R. §2510.3-1(j) which is not deemed to be a welfare plan for purposes of title I of ERISA. Regulation section 2510.3-1(j) clarifies the definition of the term "employee welfare benefit plan" for purposes of title I of ERISA by indicating that the term "employee welfare benefit plan" will not include certain group or group-type insurance programs offered by an insurer to employees or members of an employee organization if specified criteria are satisfied. These criteria are that the arrangement must be one in which (1) no contributions are made by an employer or employee organization, (2) participation is voluntary, (3) the sole function of the employer or employee organization with respect to the program is, without endorsing the program, to permit the insurer to publicize the program and to collect and remit premiums to the insurer, and (4) the employer or employee organization receives no consideration in connection with the program other than reasonable compensation for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

While you represent that Mr. Horn receives a commission for services performed for members who elect to participate in the group insurance program, the Association itself does not appear to receive consideration directly or indirectly from Vulcan. Therefore, it is the Department's opinion that the group insurance program provided through the Association meets the condition set forth in regulation section 2510.3-1(j)(4). Additionally, the criteria set forth in regulation section 2510.3-1(j)(1) and (2) also seem to be met.

Under regulation section 2510.3-1(j)(3), however, a group or group-type insurance program offered to members of an employee organization to provide benefits described in the "welfare plan" definition in section 3(1) of ERISA would amount to an employee welfare benefit plan if the employee organization endorses the program. The question whether the group insurance program at issue has been endorsed by the Association is an inherently factual issue. The Department will not render an advisory opinion on that question, particularly in view of the continuing role of Mr. Horn as president of the Association and as the Vulcan insurance agent. See section 5.01 of ERISA Procedure 76-1. If such endorsement of the group life insurance

program by the Association has occurred, however, you should be aware that the Department would consider the program to be established and maintained by the Association and, therefore, to be an employee welfare benefit plan, since it provides death benefits, which are among the benefits described in section 3(1) of ERISA.

Finally, you also suggest in your letter that a voluntary insurance program like the group life insurance program at issue here is not an employee benefit plan. In the Department's view, which is embodied in regulation section 2510.3-1(j)(3), where such a program is offered by an insurer to employees of an employer or to members of an employee organization, the program is established and maintained by the employer or employee organization if, in addition to permitting the insurer to publicize the program to employees and members, and possibly collecting premiums through payroll deductions or dues checkoffs and remitting them to the insurer, the employer or employee organization endorses the program. In this regard, section 3(1) of ERISA explicitly defines the term "welfare plan" to include plans, funds, or programs that provide benefits listed in that section through the purchase of insurance. Moreover, you should also be aware, in connection with Mr. Horn's activities, that Prohibited Transaction Exemption 77-9 (as amended in 44 FR 1479, January 5, 1979) specifies conditions under which insurance agents who are fiduciaries of employee benefit plans may receive commissions for the sale of insurance to such plans.

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  
Pension and Welfare Benefit Programs