

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-61A
SECTION 3(1), 3(4)

JUL 21 1981

Mr. Ira Michael Shepard
Schmeltzer, Aptaker & Sheppard, P.C.
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Shepard:

This is in reply to your advisory opinion request dated December 28, 1979, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) and to materials supplementing your request for an advisory opinion which were received by the Department on February 8, 1981. Specifically, your request concerns whether the N&W Employees Credit Union (the Credit Union) is an employee organization within the meaning of section 3(4) of ERISA and whether a prepaid legal services program sponsored by the Credit Union for its members is an employee welfare benefit plan covered by ERISA title I.

The following is a summary of the material facts and representations in your request. The Credit Union is a Federal credit union. Criteria for membership in the Credit Union appear in section 5 of the Credit Union's charter. Section 5 of the charter provides as follows:

The field of membership shall be limited to those having the following common bond: Employees of the Norfolk and Western Railway Company who work in or have headquarters in or are paid from Roanoke, Virginia; employees of Virginia Holding Corporation, a subsidiary of Norfolk and Western Railway Company; unremarried spouses of persons who died while within the field of membership of this credit union; employees of this credit union; persons retired as pensioners or annuitants from the above employment; members of their immediate families; and organizations of such persons: Provided, however, that this field of membership shall not include any employees in groups of 500 or more employees who work in or are assigned to any city or town work location not specifically named above, but the employees in any group disqualified by this exclusion may be considered within this field of membership for not more than one year after the group is so disqualified.

You state that the purchase of prepaid legal services benefits offered by Fortement Association, Inc. (Fortement), is available on a voluntary basis to all members of the Credit Union within the

above described field of membership. You submitted a trust agreement signed by both Fortement and an officer of the Credit Union which describes the duties and powers of Fortement as trustee and in which the Credit Union is named as "trustor-plan sponsor." You also submitted a document entitled the N&W Roanoke Employees Federal Credit Union-Group Legal Services Plan signed by an officer of the Credit Union and by Fortement as plan administrator which describes benefits to be provided by Fortement. The latter document may be terminated or amended only by joint action of Fortement and the Credit Union and the Credit Union's right to amend or terminate the trust agreement is subject to its provisions. Additionally, materials you have submitted characterize the trust agreement as meeting the requirements of Internal Revenue Code section 501(c)(9) which provides a tax exemption for "voluntary employees' beneficiary associations."

To be an employee welfare benefit plan within the meaning of ERISA section 3(1), a plan, fund, or program, in addition to providing benefits specified in that section, must also be established or maintained by either an employer within the meaning of ERISA section 3(5) or an employee organization within the meaning of ERISA section 3(4), or both. Because it is clear that the situation you describe involves the provision of legal services or benefits in return for advance payment of premiums, because prepaid legal services are among the benefits included in ERISA section 3(1), and because no employer appears to have established and maintained the program of benefits you describe,¹ this opinion is limited in scope to whether the Credit Union is an employee organization within the meaning of ERISA section 3(4) which has established or maintained an employee welfare benefit plan within the meaning of ERISA title I.

Section 3(4) of ERISA defines the term "employee organization" to include an employees' beneficiary association organized for the purpose, in whole or in part, of establishing an employee benefit plan.

The term "employees' beneficiary association" as used in section 3(4) is not further defined in ERISA. However, in interpreting the definition of the term "employee organization" in section 3(3) of the Welfare Pension Plans Disclosure Act (the WPPDA), the Department developed certain criteria defining the characteristics of an "employees' beneficiary association." Those criteria, which are set forth in section 315.100 of the WPPDA Interpretive Manual (1965), 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;
- (2) An employees' beneficiary association has a formal organization, with officers, by-laws or other indications of formality; and

¹ Employees of the Credit Union participate in and purchase prepaid legal services solely on the basis of their membership in the Credit Union and apart from their status as employees of the Credit Union.

- (3) 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 or pension plan.²

The Credit Union is an employee credit union, which limits membership to employees of several related employers and which includes in its field of membership only those persons whose commonality of interest in the employment relationship on which membership is based is not disputed. The Credit Union is a Federal credit union and, therefore, has a charter and bylaws. Furthermore, it is clear that ownership and control of a Federal credit union, such as the Credit Union, by its members is central to the regulatory scheme for Federal credit unions administered by the National Credit Union Administration. Because making legal services benefits available to members for their purchase is authorized under 12 C.F.R. section 721.2 promulgated by the National Credit Union Administration and guidelines issued pursuant thereto, it appears that the provision of legal services benefits for members is among the purposes for which a credit union may, at least in part, choose to operate. Furthermore, the Credit Union does not appear to deal with employers on behalf of its members with respect to employee benefits or other employment-related matters.

For the above reasons, the Credit Union is an employees' beneficiary association within the meaning of ERISA section 3(4). Thus, the Credit Union is an employee organization within the meaning of ERISA section 3(4). Furthermore, because a plan has been established and maintained by the Credit Union whereby prepaid legal services are provided for its members, we are of the opinion that the Credit Union has established and maintained an employee welfare benefit plan within the meaning of ERISA section 3(1).

You should be aware, however, that our conclusion that the prepaid legal services plan sponsored by the Credit Union is an employee welfare benefit plan within the meaning of section 3(1) of ERISA does not necessarily entail the conclusion that all prepaid legal services programs in connection with which Fortement provides services or benefits are welfare plans for purposes of section 3(1). As noted above, a prepaid legal services program is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA unless it is established or maintained by an employer within the meaning of section 3(5) of ERISA, by an employee organization as defined in section 3(4) of ERISA, or by both. Fortement itself is not a welfare plan, and, in situations where Fortement contracts to provide services or benefits in connection with a prepaid legal services program, it is the character of the entity that sponsors the program, not the fact that Fortement may be involved in the administration of the program as a provider of services or benefits, that determines whether the program is a welfare plan.

² In addition, section 315.100 indicates that an employees' beneficiary association generally does not deal with employers. This criterion distinguishes an employees' beneficiary association from an organization such as a labor union that represents employees in dealing with employers concerning an employee benefit plan. Such an organization is also an "employee organization" as defined in section 3(4).

You should also note that it is the Department's position that the term "employees' beneficiary association" used in ERISA section 3(4) and "voluntary employees' beneficiary association" used in Internal Revenue Code section 501(c)(9) are not coextensive.

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

cc: Mr. Michael A. Brown