U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-62A
SECTION 514, 403(a), 403(c), 404(a)

JUL 21 1981

Mr. L. Gerald Roach
Deputy Commissioner
Financial Condition Division
Bureau of Insurance
State Corporation Commission
Box 1157
Richmond, Virginia 23209

Dear Mr. Roach:

This is in reply to your letter of January 11, 1980, and related correspondence with the Department concerning the applicability of the Employee Retirement Income Security Act of 1974 (ERISA). Your letter relates in part to an advisory opinion request submitted by Mr. Ira Michael Shepard concerning a group legal services program sponsored by the N&W Employees Credit Union (Credit Union) for its participating members. The questions posed in Mr. Shepard's advisory opinion request where whether the Credit Union is an employee organization within the meaning of section 3(4) of ERISA, and whether the group legal services program is an employee welfare benefit plan within the meaning of section 3(1) of ERISA. We are enclosing with this letter a copy of our response to Mr. Shepard. In that letter we concluded that the Credit Union is an employee organization and the group legal services program is a welfare plan, but that Fortement Association, Inc. (Fortement), itself is not a welfare plan. We also stated that 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.

You enclosed with your letter to us a letter dated March 13, 1979, to the Chairman of the Board of Fortement. In that letter you expressed generally the view, and in your correspondence to us you indicated that you continue to be of the view, that "legal service plans that are employee benefit plans under ERISA are exempt from the provisions of Chapter 22 of the Code of Virginia." The questions you presented for our consideration assumed that proposition.

We concur generally in your expressed view on the effect of ERISA in relieving covered employee benefit plans of State regulation. As you know, section 514 of ERISA provides, in relevant part, as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of [title I] … shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b) [i.e., any employee benefit plan subject to title I
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> (b)(2)(A) Except as provided in subparagraph (B), nothing in [title I] shall be construed to exempt any person from any law of any State which regulates insurance, banking or securities.
> (B) Neither an employee benefit plan [subject to title I] …, nor any trust established under such plan, shall be deemed to be an insurance company or other insurer, … or to be engaged in the business of insurance … for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts …

Under section 514(a) of ERISA, a State law is preempted to the extent that it relates to an employee benefit plan, unless it is specifically excepted from preemption under section 514(b)(2)(A). To the extent, therefore, that the activities of an organization providing services to an employee benefit plan, including an organization serving as plan administrator, involve insurance, State laws regulating such activities are excepted under section 514(b)(2)(A) from Federal preemption. The question of what constitutes "insurance" for purposes of section 514(a)(2)(A) is to be determined under Federal law.

Several of the questions you presented for our consideration seem to involve, generally, the suggestion that if ERISA preempts State law relating to employee benefit plans, then it may, to a greater or lesser extent, preempt State law relating to employee benefit plan service providers, such as plan administrators. Thus, you inquire, for example, whether the administrator, or other servicing organization, of an employee benefit plan subject to title I of ERISA would generally be covered under section 514 of ERISA.

We do not think that the mere fact that an organization provides services to one or more employee benefit plans covered by ERISA is dispositive of the question whether the provisions of State law which would otherwise be applicable to the entity are preempted. Under ERISA the appropriate question, in our view, would be whether the State law in question "relates to" a covered employee benefit plan; if so, the further question, as here pertinent, would be whether the particular law is one which regulates insurance. These considerations should guide you in assessing the extent to which the authority of the Bureau of Insurance to regulate the activities of Fortement is affected by section 514 of ERISA.

You also inquire whether, if Fortement is the administrator and trustee of more than one plan subject to title I of ERISA, that situation is the equivalent of a "multiple employer trust" and thus not subject to Federal preemption of State laws under section 514 of ERISA.

The preemption provisions set forth in section 514 of ERISA apply to an employee benefit plan which is subject to title I regardless whether the administrator or trustee of the plan serves as administrator or trustee of other employee benefit plans.

Your question, however, seems to be premised on the assumption that so-called "multiple employer trusts" are not subject to preemption under section 514 of ERISA. The term "multiple employer trust" is not a term used in ERISA. It is a term that is generally applied in a non-technical sense to a situation where a number of employers make contributions to a trust out of which benefits are paid to these employers' employees under circumstances in which the trust itself does not amount to an employee benefit plan within the meaning of section 3(3) of ERISA.[1] While such a trust may not be an employee benefit plan, the benefit program sponsored by each individual employer contributing to the trust on behalf of that employer's employees may be an employee benefit plan and, therefore, subject to preemption of State laws under section 514(a).

Further, to the extent that the assets held in the trust are assets of one or more employee benefit plans, section 514 applies to State laws purporting to regulate the management of disposition of such assets. Each situation involving a trust characterized as a "multiple employer trust" must be individually analyzed in light of the provisions of section 514, including the "insurance" exception from preemption set forth in section 514(b)(2)(A).

Finally, you inquire whether, since Fortement executes a separate trust agreement for each plan it administers, there is a requirement under ERISA that the funds held under such trust agreements be segregated, or whether they may be commingled.

Section 403(a) of ERISA requires that all assets of an employee benefit plan be held in trust, but nothing in title I of ERISA prohibits the assets of more than one employee benefit plan from being held in a single trust. Section 403(c)(1), however, provides in relevant part, and with certain exceptions not here relevant, that the assets of a plan must be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying

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1 A welfare or pension plan that is an employee benefit plan within the meaning of section 3(3) is, by definition, established or maintained by an employer, an employee organization, or by both. The term "employer" is defined in section 3(5) of ERISA to include a group or association of employers acting for an employer in relation to an employee benefit plan. A trust to which more than one employer contributes might not be an employee benefit plan if the employers contributing to it have not formed a bona fide group or association of employers that amounts to an "employer" as defined in section 3(5).

reasonable expenses of administering the plan. Similarly, section 404(a)(1)(A) provides that a fiduciary must discharge his duties with respect to a plan for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. It is our view that if assets of more than one employee benefit plan are held in a common vehicle, a separate accounting of the interest of each plan in such vehicle must be maintained in order to avoid using the assets of one such plan to pay benefits to participants or beneficiaries of another such plan in contravention of sections 403(c)(1) and 404(a)(1)(A).

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