

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-73A
Sec. 3(1), 3(5)

SEP 24 1981

Mr. Bruce M. Hollowick
Suite 404
Champion Forest Regency Plaza
13231 Champion Forest Drive
Houston, Texas 77069

Dear Mr. Hollowick:

This is in response to your letter of February 6, 1981, regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether the Merchants Discount Service Association Trust (the MDSA Trust) is an employee benefit plan within the meaning of ERISA section 3(3).

You represent that Merchants Service Association, Inc., is owned and managed by Ronald A. Borger and Selene R. Gorel, the officers, directors, and sole shareholders of the corporation, and is incorporated in Texas as a for-profit corporation. Although the name of the corporation is Merchants Service Association, Inc., it operates under the name of Merchants Discount Service Association (MDSA). MDSA membership consists predominantly of merchants engaged in wholesale and retail selling of merchandise. A small minority of the MDSA membership consists of suppliers of services and self-employed businessmen. MDSA solicits members who pay a fee of \$120 per year. This fee entitles the members to participate in the programs offered by MDSA. Membership in MDSA entitles participating members to join in programs which either offer unique business services or which offer standard business services at greatly reduced rates. In 1979, MDSA established the MDSA Trust, under the terms of which group life, accident, and health insurance were made available to employees of participating MDSA members and their dependents. The trust agreement gave substantially complete control and discretion over the operation and management of those programs to Insurance Markets of America, Inc. (IMA), an independent third party.

In November 1980, MDSA was notified by the State of Tennessee that the MDSA Trust was an uninsured, noncollectively bargained multiple employer plan and consequently subject to the insurance regulation of that state. Further, at that time, MDSA began to receive complaints from participating employers that IMA was not properly paying benefit claims. You also state that, because of the concerns over whether the MDSA Trust was in compliance with ERISA, whether

the MDSA Trust was financially sound, whether the MDSA Trust had been properly administered by IMA, and whether the claims outstanding were in reasonable condition, the trustees of the MDSA Trust filed suit against IMA and others.

Section 3(3) of ERISA defines employee benefit plans to include both employee pension benefit and employee welfare benefit plans. Since there is no indication that MDSA Trust is an employee pension benefit plan, this opinion will only address the issue of whether MDSA Trust is an employee welfare benefit plan subject to title I of ERISA.

Section 3(1) of ERISA provides:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean 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 or 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).

Although the MDSA Trust offers the type of benefits enumerated in ERISA section 3(1), to be an employee welfare benefit plan, the MDSA Trust must among other criteria, also be established or maintained by an employer, an employee organization, or by both. Since there is no indication that any employee organization is in any way involved with the MDSA Trust, this letter will only address whether the MDSA Trust was established or maintained by an employer within the meaning of ERISA section 3(5).

Section 3(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." The Department has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, an employee welfare benefit plan exists where a cognizable, bona fide group or association of employers established a benefit program for the employees of member employers and exercises "settlor" functions on behalf of these members with respect to a trust established under the program. In contrast, no employee welfare benefit plan is recognized where several unrelated employers, in establishing benefit programs for their unrelated employees, merely execute identical documents offered by a third party to fund benefits. In such situations, each employer is viewed as having established its own single employee plan.

The Department also has taken the view that an essential characteristic of a bona fide employer association, for purposes of section 3(5) of ERISA, is that the association be subject to the control of its members, both in form and substance. The Department assumes, on the basis of the information which you have provided, that MDSA members neither vote nor otherwise exercise any control over the management and operation of MDSA.

In view of the foregoing, it appears to the Department that MDSA is not the type of "association" of its sustaining employer members which satisfies the definition of an "employer" within the meaning of section 3(5) of ERISA. Therefore, the Department concludes, on the basis of the information you have supplied, that the MDSA Trust is not an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA. This conclusion does not mean that individual employers who are members of MDSA have not established their own individual employee welfare benefit plans subject to ERISA or that the trustees of the MDSA Trust, as well as other persons who are fiduciaries with respect to any such individual employee welfare benefit plans, are not subject to the fiduciary responsibility provisions 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
Pension and Welfare Benefit Programs