

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-84A
Sec. 3(1), 3(5)

DEC 9 1981

Mr. Vic Turvey
Financial Analyst
State of Illinois
Department of Insurance
Springfield, Illinois 62767

Dear Mr. Turvey:

As you know, the Department of Labor, pursuant to its responsibilities for administration and enforcement of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1001 *et seq.*, has conducted an investigation in order to determine whether the program of health and life insurance benefits offered by the Illinois Health Care Association (IHCA Health Program) is an employee benefit plan subject to the coverage of ERISA. After reviewing the facts involved, we are of the opinion, for the reasons set forth below, that the IHCA Health Program does not constitute an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

In order to satisfy the definition of an "employee welfare benefit plan" or "welfare plan" set forth in section 3(1) of ERISA, 29 U.S.C. section 1002(1), a plan must, among other criteria, provide welfare benefits, including the type provided by the IHCA Health Program and be "established or maintained by an employer or by an employee organization, or by both." The IHCA Health Program does not claim to be connected to an employee organization and there is no evidence of any such connection. Therefore, in determining whether the IHCA Health Program is an "employee welfare benefit plan," we have found it necessary only to consider whether it is established or maintained by an "employer."

Section 3(5) of ERISA, provides:

The term "employer" means any person acting directly as an employer, or indirectly in the interest of any employer in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

In interpreting this statutory term, the Department has relied on its experience in administering ERISA and other statutes regulating aspects of the employer-employee relationship. Because the

Illinois Health Care Association (IHCA) is not itself the employer of the persons who receive benefits under the IHCA Health Program, the only way in which IHCA could meet the definition of an employer is if it is the type of "group or association of employers" described in section 3(5). The definitional provisions of ERISA recognize that a single welfare plan might be established by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members in providing benefits to their employees. On the other hand, where several unrelated employers merely execute identically worded "trust agreements" or similar documents offered by an independent third party as a means to fund benefits, in the absence of any indication that such employers have formed a group or association to act in their interest in providing benefits, a single employee benefit plan within the meaning of section 3(3) of ERISA cannot be recognized. Instead, each benefit program provides by an individual employer for his employees, to the extent that it meets the "welfare plan" definition in section 3(1) of ERISA, will be considered a separate employee benefit plan. Among the key factors in determining whether an organization providing health and welfare benefits to employees of more than one employer is a welfare plan established and maintained by a group or association of employers acting in the interest of its employer members are the process by which the group or association of employers was formed and who actually controls and directs the activities and operations of the organization.

IHCA has a stated purpose of providing a trade association for nursing homes, homes for the aged and sheltered care homes to work on matters of mutual concern. Membership in the association consists of any person, persons, partnership or corporation approved for membership pursuant to the bylaws. IHCA provides its members with educational services, lobbying activities before legislative bodies and other services normally attributed to associations. IHCA is a group of more than 200 nursing homes throughout the state of Illinois.

The IHCA Health Program is a self-funded, re-insured multiple employer plan. The IHCA Health Program is financed through contributions from the employers and employees. Eligibility of individual participants is determined by the individual nursing homes in the IHCA. Individual homes participate in the IHCA Health Program by signing a joinder agreement and starting to make contributions to the IHCA Health Program's administrator, Benefit Center, Ltd. (BCL).

It is evident that the IHCA Health Program had from its inception been closely connected with BCL. BCL is wholly owned by Morris Shlofrock and Jacob Farkas. As the IHCA Health Program's administrator, BCL handled all billings, collections and claims payments. All contributions were mailed directly to BCL and BCL did not give any financial reports to the trustees of the IHCA Health Program. In an interview on December 5, 1980, Morris Shlofrock stated that not all the participating employers were members of the IHCA and that the only requirement was that a participating employer had to be a licensed health care facility.

Participation in the IHCA Health Program is left to the discretion of the Benefit Committee. The trust agreement provided that the members of the Benefit Committee were to continue to serve until death, incapacity, resignation, or removal. New members to the Benefit Committee were to

be named by the IHCA and removal could be with or without cause by that association. The members of the Benefit Committee stated that they were either unaware of their responsibilities as trustees or were unable to obtain information from BCL.

After considering all of the facts and circumstances involved with the IHCA Health Program, we do not believe that it represents a situation in which employers have come together in a group or association to establish or maintain a benefit program for their employees. It is the Department's view, based on the definitional provisions of ERISA as well as the overall statutory scheme, that a multiple employer trust must not only be established or maintained by a bona fide employer association but also that the association must do more than merely lend its endorsement to a benefit program offered by an essentially independent third party who controls such benefit program. Based on the facts uncovered during our investigation, we conclude that the IHCA Health Program was not under the control of the IHCA.

BCL and its principals controlled the operation of the IHCA Health Program. It appears that the participating employers, in establishing benefit programs for their employees, without any concerted "sponsor" or "settlor" activity, merely executed identically worded joinder agreements offered by BCL as a means to fund benefits. Therefore, no multiple employer plan can be recognized.

For these reasons, we have determined that the IHCA Health Program is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA. This conclusion does not, of course, mean that individual employer members of IHCA have not established their own single-employer plans or that persons who act in fiduciary capacities with respect to those plans are not subject to the fiduciary obligations set forth in Part 4 of Title I of ERISA, 29, U.S.C. section 1101 et seq.

Sincerely,

Jeffrey N. Clayton
Acting Administrator
Pension and Welfare Benefit Programs