

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-58A
Sec. 3(32), 4(b)(1)

NOV 8 1982

Ms. Elizabeth Burns Koby
Weinberg and Green
100 South Charles Street
Baltimore, Maryland 21201

Dear Ms. Koby:

This is in reply to your letter of February 9, 1982, concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to one pension plan established and maintained by Blind Industries and Services of Maryland (BISM) only for its employees and one maintained both by BISM for its employees and by the Maryland Vending Facilities Program, Division of Vocational Rehabilitation (DVR), a division of the Maryland Department of Education, for former BISM employees now employed by DVR. Specifically, you request an advisory opinion that the BISM plans are governmental plans excluded from coverage by title I of ERISA.

You enclosed a determination letter issued to BISM from the Pension Benefit Guaranty Corporation (PBGC) and one from the Internal Revenue Service (IRS) based on facts BISM submitted in its June 30, 1977 correspondence requesting opinions from PBGC, IRS, and the Department of Labor (the Department). Both determination letters received by BISM take the position that BISM has agency or instrumentality of government status and that its retirement plans for its employees are governmental plans. On November 7, 1977, the Department declined to issue BISM an advisory opinion concerning governmental plan status in the absence of regulations further clarifying the definition of a governmental plan in section 3(32) of ERISA.

You state in your letter of February 9 that the facts surrounding the operation of the BISM pension plans differ in certain respects from their description in the June 30, 1977 correspondence mentioned above. BISM no longer exercises licensing powers such as are ordinarily reserved to Maryland or its subdivisions of government. Legislation consolidating licensing power over vending facilities with the DVR was effective July 1, 1980. DVR is also since that date the employer of vending managers formerly employed by BISM.

In other respects BISM meets the description in the June 30, 1977 correspondence. BISM operates under the 1908 Act of the Maryland General Assembly which created BISM. The Governor of Maryland appoints the BISM Board of Governors with the advice and consent of the Maryland Senate. Maryland may appropriate funds for BISM both annually and on an emergency basis. Sales are also used to provide BISM with revenues. Included is revenue from Federally-funded service programs. Additionally, you stated in a telephone conversation with a staff member on May 26, 1982, that, at the local level BISM receives rent-free stands in municipal buildings and waivers of local vending license fees and restrictions in addition to a county grant. BISM also accepts private donations for its endowment fund. DVR reviews a detailed BISM budget annually, and BISM participates in a Maryland pricing committee set up to control the prices of products and services purchased by Maryland.

You represent that the BISM pension plans cover only BISM employees, including those individuals considered employed by DVR for certain purposes. However, the BISM retirement plan for its salaried employees, hereafter termed "the BISM Pension Plan for salaried employees," does provide in Article XV, section 15.1, for its adoption by any employers executing a written agreement to participate. DVR adopted the BISM Pension Plan for salaried employees July 1, 1980. No other employers participate in the BISM Pension Plan for salaried employees at this time. The BISM pension plan for its hourly workers, "the Production Workers Pension Plan," continues to cover only BISM employees.

ERISA section 4(b)(1) excludes governmental plans from coverage. ERISA section 3(32) defines the term "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing" Based on the factual situation you have described, the Department concludes that BISM is an agency or instrumentality of the State of Maryland established for the purpose of providing blind persons in the state with services, training and employment. As a result, BISM is a governmental agency for the purposes of section 3(32) of ERISA, and the plans established and maintained by BISM are governmental plans within the meaning of section 3(32) and 4(b)(1) of ERISA. The fact that DVR adopted a BISM pension plan for certain employees formerly employed by BISM who are now, for some purposes, the employees of DVR does not affect the Department's position on the governmental plan status of the BISM pension plans since DVR is a division within an agency of Maryland government. However, we note that provisions of the BISM pension plan for salaried employees may allow additional employers to participate in the BISM plan at a later time. If additional employers are allowed to participate in these plans, you should resubmit an advisory opinion request describing the specific additional employers and their employees, specifying the form of control, if any, such employers have over the plan or plans, and describing the circumstances under which the employers executed agreements to participate in the plan or 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,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs