

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-53A
Sec. 3(1), 3(4), 3(5), 3(40), 514(b)(6)

OCT 14 1983

Mr. Gerald T. Hart
Ausley, McMullen, McGehee, Carothers & Proctor
P.O. Box 391
Tallahassee, Florida 32302

Dear Mr. Hart:

This is in reply to your letters of March 25, April 5, and May 10, 1983, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Florida Home Builders Health Benefit Trust (FHBHBT) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

According to the trust agreement, only "Employers" may join FHBHBT. The agreement defines "Employer" as "any person, partnership, joint venture, corporation, company or unincorporated organization who is engaged in the Florida building industry and who is a member in good standing in the Florida Home Builders Association" "Employees", under the Agreement, are individuals employed by an Employer and include partners and sole proprietors. Employees of member Employers receive benefits through FHBHBT as members of a "participation unit", provided that 75 percent of all eligible Employees of a member Employer wish to subscribe for the purpose of receiving those benefits. The term "participation unit" is not defined in the trust agreement, but it appears to refer to a member Employer and all the Employees of that Employer who receive benefits through FHBHBT.

You advise that FHBHBT was formed in 1978 to provide self-funded, health, and accident benefits with stop-loss coverage to employees of member firms of the Florida Home Builders Association (FHBA). FHBHBT also offers insured life, accidental death and dismemberment coverages, and self-funded dental benefits. You further advise that FHBHBT is a successor to the Florida Home Builders Industry Insurance Fund formed in 1964.

FHBHBT is under the control of its Board of Trustees. The restated Declaration of Trust dated July 21, 1981, provides that each of the trustees must be a member in good standing of FHBA, be personally actively engaged in the home building industry, and be a participating employer (or an active officer or director of a participating employer) in FHBHBT. The trustees are elected for 5 year terms by the participating employers, with each "employer unit" entitled to one vote.

The FHBA Bylaws provide for the following six classes of membership:

(A) BUILDER MEMBERSHIP, which shall be open to any person, firm or corporation that is or has been in the business of building single or multifamily housing, non-residential buildings or engaged in land or community development, who subscribes to the Code of Ethics of this Association, and is of good character and business reputation and who either:

(1) has been accepted as a builder member in good standing of any affiliated local Association

or Chapter of this Association, or

- (2) applies as a direct builder member of this Association, is acceptable to the membership committee of this Association, and who operates in an area not within the jurisdiction of any affiliated local Association or Chapter.

(B) ASSOCIATE MEMBERSHIP, which shall be open to any person, firm or corporation engaged in a trade, industry or profession related to home building or construction and not inconsistent with the objectives of this association or any of its affiliated local Associations or Chapters; who subscribes to the Code of Ethics of this Association and who is of good character and business reputation; and who either:

- (1) has been accepted as an Associate Member of an affiliated local Association or Chapter, or
- (2) applies as a direct Associate Member of this Association, is acceptable to the membership committee of this Association, and who operates in an area not within the jurisdiction of any affiliated local Association or Chapter.

(C) STUDENT MEMBERSHIP, which shall be open to any student of construction in an accredited school during the current academic year who is acceptable to the membership committee of this Association.

(D) SUSTAINING MEMBERSHIP, for which any builder or Associate Member shall be eligible who pays the additional dues for sustaining membership under Article III, Section 1(C). A sustaining member shall not be entitled to any right or privilege of membership other than those enjoyed by virtue of his builder or associate membership.

(E) HONORARY MEMBERSHIP, for which persons shall be designated by the Board of Directors of this Association from time to time for distinguished and unique service to the home buying public. Honorary Members shall not be required to pay dues to this Association. All past presidents of the National Association of Home Builders who are members in good standing of an affiliated local association in Florida shall be designated an Honorary Member of this Association.

(F) LIFETIME MEMBERS, all Past Presidents of this Association are hereby designated lifetime members of this Association, and shall not be required to pay dues to this Association provided they are members in good standing of their local Association.

A Board of Directors, elected annually by the Builder and Associate members of the FHBA, governs the affairs of the Association, along with an Executive Committee composed of members of the Board. Nominees for election to the Board are made by affiliated local associations in proportion to their Builder membership, as specified in the FHBA Bylaws. The Board, in turn, elects the executive officers of the FHBA from among FHBA Builder members selected by a Nominating Committee. Those officers, who serve for 1 year, are the President, First Vice President, Second Vice President, Secretary, and Treasurer.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

... 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 FHBHBT provides benefits among those identified in section 3(1) of ERISA, to be an employee welfare benefit plan, FHBHBT must also, among other criteria, be established by an employer, an employee organization, or by both. Section 3(4) of ERISA defines "employee organization" as "... any labor union or organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." There is no indication that either FHBHBT or FHBA is an employee organization within the meaning of section 3(4) of ERISA.

Under the trust agreement, employees do not "participate" in FHBHBT as contemplated by the definition of "employee organization" in section 3(4). They merely receive benefits as employees of a member employer. Further, FHBHBT is not an "employees' beneficiary association" because employees do not control FHBHBT. Although each "participation unit" has a vote in electing trustees, there is no indication that employees play any part in deciding how the votes are cast. FHBA does not fit the definition of "employee organization" either since it does not exist "for the purpose, in whole or in part, of dealing with employers ...". Furthermore, FHBA is not an "employees' beneficiary association" because, as with FHBHBT, employees do not control FHBA.

Section 3(5) of ERISA defines the term "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." Thus, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits to their employees.

The Department of Labor has taken the position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. Thus, it would appear that FHBHBT is not a bona fide association of employers. Membership in FHBHBT is open to anyone engaged in a particular trade and is not conditioned on one's status as an employer, inasmuch as the trust agreement provides that any person engaged in the Florida building industry who is also a member of FHBA may become a member of FHBHBT. For the above reasons, it would appear that FHBA also is not a bona fide association of employers. Both Builder and Associate members of FHBA include all persons engaged in certain segments of the building industry, as specified in the FHBA Bylaws, without regard to their status as employers.

The program of benefits offered by FHBHBT, therefore, is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA because it is not established or maintained by an employee organization or an employer, as those terms are defined in sections 3(4) and 3(5) of ERISA, respectively. Any employer that establishes and maintains a welfare benefit program for its employees through FHBHBT, however, may have established an employee welfare benefit plan covered by title I of ERISA.

We would point out, moreover, that FHBHBT appears to be a multiple employer welfare arrangement (MEWA) under section 3(40) of ERISA, as amended by the Act of January 14, 1983 (Pub. L. 97-473). Section 514(b)(6) of ERISA, as amended, provides, in part, that in the case of a MEWA which is a fully

insured employee welfare benefit plan, and notwithstanding any other provision of section 514, state law which regulates insurance may apply to the extent that such law provides standards requiring the maintenance of specified levels of reserves and levels of contributions which any such plan, or any trust established under such a plan, must meet in order to pay benefits when due. Section 514(b)(6) further provides that in the case of any other employee welfare benefit plan which is a MEWA, state insurance law may apply to the extent not inconsistent with title I of ERISA.

Accordingly, even if FHBHBT were an employee welfare benefit plan, or a trust established under such a plan, within the meaning of title I of ERISA, state insurance law would apply to it in the manner summarized above because it appears that FHBHBT would be a MEWA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs