

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 84-11A
Sec. 3(1), 3(4), 3(5), 3(40)

FEB 22 1984

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Dear Mr. Hightower:

This is in reply to your letters of August 23, September 7, and September 14, 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 Keep Well Trust for Employer Aided Benefits (the Keep Well Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

According to the Plan of Agreement and Declaration of Trust dated July 18, 1983, the Keep Well Trust was created by the Gulf Coast Builders Exchange (GCBE). Also according to the trust agreement, only "Employers" may join the Keep Well Trust.¹ The term "Employer" is defined therein as "...any person, partnership, joint venture, corporation or unincorporated organization who has a common interest in employee safety and the conduct of workers' compensation coverage, who is engaged in a construction-related business, who is a member in good standing of GCBE, and who agrees to participate in and be bound by the terms of this Agreement."

The Keep Well Trust is under the control of its Board of Trustees. Section 4.3 of the Agreement provides that, "Section 4.3. Eligibility. Each Trustee must be personally and actively engaged in the contracting, home building, or construction or construction-related industry within the State of Florida; must be (or his Employer must be) a member in good standing of the Gulf Coast Builders Exchange, Inc., or must be a participating Employer of GCBE or an officer, director or Employee of a participating Employer."

Although the initial Trustees were selected by GCBE on staggered terms, successor Trustees will be elected for a term of 5 years by a plurality vote of "participating Employers". Article VII of the Keep Well Trust Bylaws dated September 1, 1983, provides that there will be an annual meeting of "participating Employers" to elect Trustees to

¹ Section 5.1 of the Agreement provides, in part, "...The Trustees shall not secure coverage for the Employees of any person or entity unless such person or entity shall have applied for participation, met the underwriting standards of the Trust, and have been accepted as a participating Employer by the Trustees."

succeed Trustees whose terms expire in that year.

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 the benefit programs to be established under the Keep Well Trust may provide benefits among those identified in section 3(1) of ERISA, to be an employee welfare benefit plan, the Keep Well Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined in ERISA sections 3(4) and 3(5) respectively as follows:

(4) The term "employee organization" means any labor union or any 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.

(5) The term "employer" means 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 Keep Well Trust neither was established nor is maintained by an employee organization within the meaning of section 3(4) of ERISA. There is no indication that employees participate in the Keep Well Trust in any manner other than to be eligible to receive benefits as employees of participating Employers. The initial Trustees were selected by GCBE which is not an employee organization since membership in GCBE is not conditioned upon one's status as an employee but is open to both employers and employees. Further, the successor Trustees of the Keep Well Trust are elected solely by participating Employers.

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 (the Department) 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 GCBE is not a bona fide association of employers. Membership in GCBE is open to anyone engaged in a particular trade and is not conditioned on one's status as an employer and all members of GCBE appear to be eligible to vote.

Further, it is the Department's position that GCBE does not maintain the Keep Well Trust. Although GCBE selected the initial Trustees and participating Employers are limited to members of GCBE, GCBE has no further control over the Trustees and no voice in their selection other than the initial Trustees. Instead control over the Keep Well Trust is vested, according to the documents you submitted, with the participating Employers.

In examining your letters and the documents submitted with them, we have identified some circumstances that tend to support a conclusion that the Keep Well Trust is maintained by a bona fide employer group or association - i.e., the participating Employers.

Among these circumstances is the fact that each participating Employer is involved in the building industry in Sarasota or Manatee Counties, Florida. In addition, the participating Employers, by virtue of their authority to elect Trustees of the Keep Well Trust, appear to exercise control and direct the activities and operations of the benefit programs. However, the question of whether the Keep Well trust is subject, not only in form, but also in substance, to the control of its participating Employers as well as the ultimate determination whether the participating Employers are acting as a bona fide group or association of employers in maintaining a benefit program, are factual. Section 5.01 of ERISA Procedure 76-1 provides that the Department ordinarily will not issue an advisory opinion when the nature of the question is inherently factual. Accordingly, the Department is unable to issue an advisory opinion with regard to whether the participating Employers in the Keep Well Trust are acting as a group or association of employers within the meaning of section 3(5) of ERISA with regard to its members.

We would point out, moreover, that the Keep Well Trust may 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 the Keep Well Trust is 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 if the Keep Well Trust is 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