

**U.S. Department of Labor**

Office of Pension and Welfare Benefit Programs  
Washington, D.C. 20210



OPINION NO. 84-29A  
Sec. 3(1), 3(5), 3(40)

JUN 26 1984

Mr. Lawrence R. Siegel  
Pickett, Lyle, Siegel, Drescher & Croshaw  
101 North Lynnhaven Road  
Virginia Beach, Virginia 23452

Dear Mr. Siegel:

This is in reply to your letters of August 16, September 22, and October 21, 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 Health Care Association Group Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Trust was established by the Florida Health Care Association (FHCA) to provide "health insurance, health care services, health care benefits, life insurance, death benefits, disability insurance, disability benefits, indemnity for legal services, legal care and services, and/or other benefits" for members and associate members of FHCA that are licensed health care providers doing business in the State of Florida and their employees and their dependents. The Trust is limited to "Participating Employers" and the term "Participating Employer" is defined in Article II, section 2.01(h) of the Trust Agreement, as amended, as:

(h) "Participating Employer" - Any employer, whether a corporation, partnership or sole proprietorship, which is a licensed health care provider doing business in the State of Florida and a current member or associate member of the Association, and agrees to be bound by the terms and conditions of the Trust and which satisfies the requirements for participation as same may be established from time to time by the Benefit Committee as described and more particularly set forth in this Trust Agreement or in the Plan Document established pursuant to one or more of the Benefit Plans provided hereunder; and said employer shall agree to be bound by the terms and conditions of this Trust Agreement as the same may from time to time be amended and modified.

The FHCA Bylaws as amended August 23, 1978, provide in Article IV, section 1.c. that:

c. Any nursing home currently licensed by the State of Florida, with an administrator currently licensed by the State of Florida Board of Examiners of Nursing Home Administrators, shall be eligible to make application for active membership in this Association.

Article IV, section 2.d. and 2.e. of the Bylaws provides that:

d. Any firm, corporation or organization, except a licensed nursing home, interested in the advancement of the objectives of the FHCA, shall be eligible to make application for an institutional associate membership in the Association.

e. Any person, other than the owner, the administrator or an employee of a nursing home licensed by the State of Florida which is not an active member of the FHCA, shall be eligible to make application for a personal associate membership in the Association.

The Trust is under the control of a Benefit Committee whose members serve staggered terms. Although the original members of the Benefit Committee were the seven individuals who initially executed the Trust Agreement, subsequent members are elected for 3-year terms at each annual FHCA convention by the Participating Employers present and voting. In the event of a vacancy, the other members of the Benefit Committee may appoint a successor to fill the unexpired term of that vacancy.

Section 3(1) of title I 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 Trust was established for the purpose of providing benefits among those identified in section 3(1) of ERISA, in order to be an employee welfare benefit plan, the Trust must, among other criteria, be established or maintained by an employer, an employee organization or both. Since there is no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved in the Trust, this letter will only examine the issue of whether the Trust was established or is maintained by an employer.

The term "employer" is defined in section 3(5) of ERISA to include, "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 cognizable, bona fide 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. On the other hand, where several unrelated employers merely execute identically worded "trust agreements" or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between these employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a purported group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In the Department of Labor's (the Department) view, the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

Based on the information you submitted, it is the position of the Department that FHCA is not an employer within the meaning of section 3(5) of ERISA in relation to the Trust. FHCA has no control over the Trust or the Benefit Committee. FHCA's only connection with the Trust appears to be limited to the fact that all Participating Employers must be members (although not necessarily voting members) of FHCA.

However, in examining your letters and the documents submitted with them, we have identified some circumstances that tend to support a conclusion that the Trust was established and is maintained by a bona fide employer group or association. Among these circumstances is the fact that the Participating Employers, by virtue of their authority to elect the Benefit Committee appear to exercise control and direct the activities and operations of the benefit program. However, the question of whether the Trust is subject, not only in form, but also in substance, to the control of its employer members, 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 employers that participate in the 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 also note that the trust appears to be a multiple employer welfare arrangement (MEWA) within the meaning of 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, since the Trust appears to be a MEWA, state insurance law would apply to it in the manner summarized above, even if the Trust is an employee welfare benefit plan or a trust established under such a plan within the meaning of section 514(b)(2) of title I 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,

Morton Klevan  
Deputy Administrator