



OPINION NO. 84-43A
Sec. 3(1), 3(5), 3(4), 514(b)(6)

NOV 6 1984

Willis M. Coil, Administrator
Nevada Resort Association Health & Welfare Trust
940 E. Sahara
Las Vegas, Nevada 89104

Dear Mr. Coil:

This is in reply to your letters of August 16 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 Nevada Resort Association Health and Welfare Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and subject to the requirements of that title.

You advise that the Trust was created in 1972 by the Nevada Resort Association (the Association) for the purpose of providing benefits under one or more health and welfare plans to which Association members or other employers have become parties for the benefit of their employees. According to the Agreement and Declaration of Trust dated September 25, 1972, the Trust is administered by a Board of Trustees appointed by the Association. Article II, section 1 of the Association's bylaws provides that members shall be persons or corporations who are separately licensed by the State of Nevada to engage in the gaming business. Article II, section 8 of the Association's bylaws provides:

Section 8. Associate Members. The Board of Directors may, from time to time, provide for associate members, who can be either persons or corporations and need not necessarily be licensed by the State of Nevada to engage in the gaming business in such State. Such associate members shall have such privileges of membership as the Board of Directors may, from time to time, determine, with the exception of voting.

The term "Employer" is defined by Article 10(a) of the Agreement and Declaration of Trust as "... any person, firm, association, partnership or corporation, whether or not a member of the Association, which has become a party to a Collective Bargaining Agreement or other agreement which requires health and welfare contributions to the Fund created pursuant to this Trust Agreement."

The term "Participating Employer" is defined by Article I(C) of the Dental/Vision Care Program of the Trust as adopted effective September 1, 1977, to include only an employer who is a member in good standing of the Association and any third party administrator contracted to administer that program. You submitted no information which would indicate what employers are eligible to adopt the Salary Continuance Program as effective September 1, 1978.

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 provides benefits among those identified in section 3(1) of ERISA, to be an employee welfare benefit plan, the Trust must, among other criteria, also be established or maintained by an employer, an employee organization, or both. The issue, therefore, is whether the Association is an employer or an employee organization within the meaning of title I of ERISA in relation to the Trust.

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

(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.

It is the position of the Department of Labor (the Department) that the Association is not an employee organization within either part of the definition contained in section 3(4) of ERISA. The Association does not exist for the purpose, in whole or part, of dealing with employers. Nor do the employees "participating" in the Trust participate in any way other than receiving benefits under the Trust.¹

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 has taken the position that where membership in a

¹ The Department's position in this regard does not affect in any way the Trust's status, as a voluntary employees' beneficiary association under section 501(c)(9) of the Internal Revenue Code.

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 a group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. The terms of the Association's bylaws allow membership to include any persons and entities licensed by the State of Nevada to engage in the gaming business. Further, persons and entities which are not licensed to engage in the gaming business may become associate members of the Association (on such terms and conditions as the Directors may determine) but apparently may not exercise voting rights. It is not clear, however, whether these persons and entities must be employers or whether they would be permitted to participate in the Trust. Thus, we are unable to conclude that the Trust is controlled by employer members of the Association.

In addition, it does not appear that the Association, even if it in fact is controlled by its employer members, would be acting for all the employer participants in the Trust, as required by section 3(5), because employers who are not members of the Association may participate in the Trust. In our view, the Association would not be acting as an "employer" with respect to these non-member employers and therefore the Trust would not be a single plan to the extent it includes such employers.

We also note that the Trust may be a multiple employer welfare arrangement (MEWA) under section 3(40) of title I of ERISA, as amended by the Act of January 14, 1983 (Pub. L. 97-473).² 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 Trust 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 might still apply to it in the manner summarized if the Trust is a MEWA within the meaning of section 3(40) of title I of ERISA.

Finally, we note that this letter addresses only the issue of whether the Trust is an employee welfare benefit plan. It does not address issues arising under other provisions of ERISA, including the fiduciary responsibility provisions 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.

² However, there is an exclusion from the definition of MEWAs in section 3(40) for plans or arrangements established or maintained pursuant to one or more agreements the Secretary of Labor finds to be collective bargaining agreements. From the information you submitted, there is insufficient information for the Department to take a position on this issue regarding the Trust.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations