

U.S. Department of Labor

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



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86-08A
Sec.

Mr. Joseph J. Jankowski
Hutt, Berkow & Jankowski
Park Professional Building
459 Amboy Avenue
P.O. Box 648
Woodbridge, New Jersey 07095

Dear Mr. Jankowski:

This is in reply to your letter requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you requested an opinion as to whether the Insurance Trust of the New Jersey Builders Association (the Trust) is an "employee welfare benefit plan" within the meaning of section 3(1) of title I of ERISA.

Your letter and accompanying submission contain the following facts and representations. The Trust was created by the employer members of the New Jersey Builders Association (the NJBA). The Trust is maintained in accordance with the "Amended and Revised Declaration of Insurance Trust of the New Jersey Builder Association", (the Declaration of Trust). The Trust is currently a self-funded health benefit program with reinsurance. The Trust is administered by nine Trustees. Initially, the Trustees were appointed by the president of the NJBA, however, all subsequent Trustee appointments will be made by the Trustees in accordance with Article VI of the Declaration of Trust. Each Trustee must be actively engaged in the building industry in the State of New Jersey, be a member of the NJBA, and be a participating Employer in the Trust or an active officer or director of such an Employer.

Any eligible Employer may participate in the Trust to provide health benefits for its employees and their beneficiaries. Section 1.04 of the Declaration of Trust defines the term "Employer" to mean the NJBA, its local associations, its affiliated or related organizations, and "any person including, but not limited to, a sole proprietorship, partnership, firm, or corporation" certified by the NJBA as a member in good standing. You advise that the actual participating employers are the NJBA, two affiliates owned by the NJBA (Home Owners Warranty Corporation of New Jersey and the New Jersey Council of the Multi-Housing Industry), the Trust, nine local homebuilder associations qualified as affiliates of the NJBA, and employer-members of the NJBA.

Article VI of the NJBA Constitution and By-Laws provides for five classes of membership:

1. Builder Membership - for an individual who is or has for two years been engaged principally in the business of building or rebuilding homes, apartments, schools, commercial, industrial or other structures related to community or land development or who is employed by a firm or corporation so engaged for two years.
2. Conditional Builder Membership - for an applicant seeking future status as a builder or any individual who is employed by a firm or corporation that has been principally engaged for less than two years in the activities described for Builder Membership.
3. Associate Membership - for any individual principally engaged in providing goods or services to the residential, commercial, or industrial building industry in the State of New Jersey, or is employed by a firm or corporation so engaged.
4. Honorary Membership - for any person so designated by the Board of Directors for distinguished and unique service to the building industry.
5. Life Membership - for all past presidents of NJBA.

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, also be established or maintained by an employer, an employee organization or both.

The terms "employee organization" and "employer" are defined in sections 3(4) and 3(5) respectively of ERISA 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.

Based on the information you submitted, it is the view of the Department that the NJBA is not an employee organization within the meaning of section 3(4) of ERISA because membership in the NJBA is not based on employment status, but is open to both employees and employers. Further, for the reasons discussed below, it is the Department's view that the NJBA is not an employer within the meaning of section 3(5) of ERISA.

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 for their employees. On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of any genuine organizational relationship between the employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a 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 addition, it is the Department's view that 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.

According to the NJBA's constitution and bylaws (Article VI), membership in the NJBA is limited to "individuals" who are engaged, to varying degrees, in residential, commercial and industrial construction, without regard to whether such individuals are employers within the

meaning of title I of ERISA. As noted above, Article VI expressly provides that, with respect to three of the five "classes", membership may include an "individual ... who is employed by a firm or corporation ..." that is primarily engaged in the construction industry, and permits membership in the remaining classes 4 and 5 to include "[a]ny persons designated by the Board of Directors ..." and "[a]ll past presidents of the Association," respectively. Because membership in the NJBA is not limited to employers within the meaning of section 3(5) of ERISA, the Department is unable to find that the NJBA constitutes a bona fide group or association of employers for the purposes of title I. In addition, because it appears from the Declaration of Trust, pursuant to which the Trust is operated, that beyond the appointment of the initial Trustees by the president of the NJBA, the members of the NJBA do not, either directly or indirectly, exercise any control over the Trust, the Department is unable to find that the NJBA acts as a bona fide group or association of employers with respect to the Trust. Finally, we are unable to ascertain that the Trust has been established or maintained by any other cognizable, bona fide group or association of employers within the meaning of section 3(5).

Therefore, because the Trust 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, it is the view of the Department that the program of benefits offered by the Trust is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA. However, if the Trust is adopted by an employer within the meaning of section 3(5) of ERISA to provide health benefits to its employees, such an employer would be considered to have established or maintained a separate, single-employer employee welfare benefit plan within the meaning of section 3(1) of ERISA. In this regard, the Department wishes to note that it is not expressing an opinion with respect to the issue of whether the NJBA Trust, though not itself an employee welfare benefit plan, may, nevertheless, be considered a fiduciary within the meaning of section 3(21) of ERISA with respect to the plans whose assets are held by the Trust.

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,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations