

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



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Sec. 3(4), 3(5), 3(40)

Ms. Julia L. Jenness
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, 10th Floor
Sacramento, California 95814-4686

Dear Ms. Jenness:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the California Pharmaceutical Association Insurance Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the Trust is a multiple employer welfare arrangement within the meaning of section 3(40) of title I of ERISA.

You advise that the Trust was established pursuant to a trust agreement dated December 24, 1971 (and restated on January 1, 1978), by the California Pharmaceutical Association which subsequently became the California Pharmacists Association (the Association). The restated Trust Agreement provides that the Association provide, through the restated Trust Agreement, group insurance protection for members and their employees. The Trust subsequently contracted with Blue Cross of California (Blue Cross) for group health benefits.

The Trustees for the Trust are appointed by the Board of Trustees of the Association and may be removed by that Board (Sections 4 and 5 of the restated Trust Agreement). The Board of Trustees of the Association is, under Chapter II, Article III of the Association's Bylaws, comprised of one Trustee elected from each of the twelve membership districts, six elected officers of the Association and the immediate past president of the Association. Under Chapter I of the Bylaws, there are four classes of members:

1. Active Members - Any pharmacist, meaning a person licensed to practice pharmacy in the United States or any person who has an earned degree in pharmacy qualifying him or her to obtain such a license. This is the only class of membership eligible to hold office or vote in the Association.
2. Honorary Members - Professional and scientific persons who have given outstanding service to the profession and/or the delivery of health care and who are approved by the Board of Trustees.

3. Student Members - Any undergraduate or graduate student regularly enrolled in any accredited College of Pharmacy and who is a student member of the American Pharmaceutical Association.

4. Sustaining Members - Any reputable individual not eligible for Active Membership but who is interested in advancing the interests of pharmacy and is willing to assume the obligations of membership.

The term "employee welfare benefit plan" is defined in section 3(1) of title I of ERISA 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 service, 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 health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the 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 respectively by ERISA section 3(4) and 3(5) 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.

There is no indication in your submission that the Association, which established and maintains the Trust, is an employee organization within the meaning of section 3(4) of ERISA. The Association does not exist "... for the purpose, in whole or in part, of dealing with employers...." Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One of those criteria is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in the Association is not conditioned upon one's employment status but rather is open to both employers and employees.

With regard to the issue of whether the Association is 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 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 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. Membership in the Association is open to anyone engaged in a particular industry and is not conditioned on one's status as an employer, and control of the Association is not vested solely in the employer members. Thus, it would appear that the Association is not a bona fide association of employers.

The program of benefits offered by the Trust, 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 the Trust, however, may have established a separate, single-employer, welfare benefit plan covered by title I of ERISA. This letter does not, however, address any of the issues surrounding the ERISA duties or obligations of the Trust or any of its agents with respect to such an ERISA plan.

Further, because the Trust is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA, state regulation thereof is not preempted by section 514(a) of title I of ERISA. The general preemption provision of section 514(a) of ERISA applies only to state laws relating to employee benefit plans covered by title I of ERISA. Accordingly, it is not necessary to determine whether the Trust is a multiple employer welfare arrangement (MEWA) within the

meaning of section 3(40) of ERISA. Application of state law to the trust is not preempted by title I of ERISA regardless of whether the Trust is a MEWA and regardless of whether the exception provided by section 514(b)(6) permitting state regulation of MEWAs would apply.

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,

Elliot I. Daniel
Associate Director for Regulations and Interpretations