

U.S. Department of Labor

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



OCT 25 1990

ERISA SEC. 90-34A
3(40), 514(b)

Mr. Michael J. Angelini
Investigator
New Jersey Department of Insurance
20 West State
Trenton, New Jersey 08625-0325

Dear Mr. Angelini:

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 New Jersey Licensed Beverage Association Employee Benefit Plan (the Plan) a/k/a the New Jersey Licensed Beverage Association Group Health Benefits Program is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA and whether the Plan is subject to the applicable regulatory authority of the State of New Jersey.

The information you submitted indicates that the Plan was created in conjunction with a trust agreement dated January 1, 1990, between five individuals as the Trustees and the New Jersey Licensed Beverage Association (the Association). The Trust agreement states that the Plan was adopted to provide medical benefits to members of the Association who are owner-employees and to employees and their dependents of members of the Association.

In a letter dated February 20, 1990, addressed to Mr. Thomas Smith of the New Jersey Department of Insurance, Mr. Henry M. Matri of Cole, Schotz, Bernstein, Meisel & Forman representing the Plan stated in reference to the Association, "This is an association of restaurant and tavern owners". In a telephone conversation with a representative of this Office you stated that, to your knowledge, the Plan is not maintained under or pursuant to any collective bargaining agreement, the members of the Association are not a "control group" within the meaning of section 3(40)(B), and there is no rural electric cooperative in any way involved with the Plan.

Section 3(40)(A) of title I of ERISA defines the term "MEWA" to include:

... an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained --

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
- (ii) by a rural electric cooperative.

Section 3(40)(B) provides in pertinent part:

For purposes of this paragraph --

- (i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,
- (ii) the term "control group" means a group of trades or businesses under common control,...

Based upon the information you submitted, it is the position of the Department of Labor (the Department) that the Plan is a MEWA within the meaning of section 3(40). The Plan covers the employees of two or more separate, independent employers; is not maintained by a rural electric cooperative; and is not maintained under or pursuant to any collective bargaining agreement.

Although section 514(a) of ERISA provides that any state law or regulation which relates to an employee benefit plan covered by ERISA is preempted, section 514(b) of title I of ERISA provides:

(6)(A) Notwithstanding any other provision of this section-- (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

Although section 514(b)(6)(B) provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has previously stated that it did not see the need to prescribe such regulations. The Department, at this time, has not changed its position. Accordingly, the Department is not exempting MEWAs from state regulation.

It is, therefore, the Department's position that the preemption provisions of ERISA do not preclude state regulation of the Plan at least to the extent provided in section 514(b)(6)(A), regardless of whether it is an employee benefit plan covered by title I of ERISA, because it is a MEWA within the meaning of section 3(40) of that title.

Enclosed for your information is a copy of Opinion 90-18A (issued July 2, 1990) which discusses the scope of the states' authority to regulate pursuant to section 514(b)(6)(A).

The preceding 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.

Because your request for an opinion was concerned primarily with the issue of whether or not the Plan is subject to the applicable regulatory authority of the State of New Jersey's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have

determined it is not necessary at this time to render an opinion as to whether the Plan is an employee welfare benefit plan within the meaning of section 3(1) of that title.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

Enclosure