U.S. Department of Labor

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

NOV 21 1990

90-43A

Mr. Robert A. Williams
Florida Rural Legal Services, Inc.
110 South Second Street
P.O. Box 1109
Immokalee, Florida 33934

Dear Mr. Williams:

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 two programs operated by the West Indies Central Labour Organization (WICLO) for certain non-resident aliens of the United States who work in the United States under an H-2A program constitute employee benefit plans covered by title I of ERISA.

You advise that each year over 9,000 workers from various West Indian states are admitted to the United States under an H-2A program to harvest sugar cane for six employers - Okeelanta Corporation, Atlantic Sugar Association, Sugar Cane Growers Cooperative, United States Sugar Corporation, and Osceola Farms (the Employers). The workers are non-resident aliens of the United States and are authorized to work from October to March in the U.S.The H-2A program, established by the Wagner-Peyser Act, 29 U.S.C. §49, et seq., permits foreign nationals to be temporarily admitted to the United States to perform seasonal agricultural labor at the request of a specific employer when domestic workers are unavailable. The employer is required to follow the regulations at 20 C.F.R. Part 655. Each of the workers signs a standard contract with one of the Employers and the contract is also signed by a representative of WICLO.

You further advise that the countries whose nationals work under the H-2A program, i.e., Jamaica, Barbados, Dominica, Grenada, St. Lucia, and St. Vincent, are represented by the Caribbean Regional Labor Board (the Board) which, in turn, establishes policies which WICLO executes, thereby providing the operational staff for the Board. Both the Board and WICLO are composed of labor representatives of the member governments. According to the material you have submitted, the Board is the policy-making body, operates the H-2A program in the Caribbean, and participates in contract negotiations with prospective employers. WICLO merely carries out the policies of the Board, primarily from its organizational headquarters in Washington, D.C. WICLO also recruits the workers, negotiates the standard contract, and maintains officers in the U.S. to monitor employment conditions of the workers and resolve grievances.

The standard contract provides for the employers to withhold 3 percent of the worker's wages or a lesser sum set forth by WICLO to be transmitted to WICLO to pay for health insurance. Such insurance covers non-job-related illness and accidents and is provided through a policy with the United States Life Insurance Company. The insurance claims are processed through WICLO's office in Washington, D.C.

The standard contract also provides for 23 percent of the worker's wages to be withheld and sent to WICLO to be placed in a savings account in the worker's home nation as arranged between the worker and his or her government. However, although not stated in the standard contract, the sample side agreements and the H-2A workers handbook that you have provided indicate that the savings account withholding may be waived or the funds in an account may

be made available to persons designated by the worker during the worker's period of covered employment in the United States. The savings account is generally not available to the worker until after the worker's employment in the U.S. is complete and the worker has returned to his or her home nation. Although the standard contract provides that the savings account shall be interest-bearing, you state that the workers do not receive interest on their accounts.

Section 1 of Article XXI of the standard contract provides that the amount of the deduction available for health insurance may be reduced by any expenses incurred by WICLO on behalf of the workers. On November 5, 1969, WICLO was informed by the Department of Labor that the health insurance deduction was permissible under the H-2A program regulations but that the administrative expense deduction was not. Although the contract provision has not been changed, currently each H-2A worker agrees that 2 percent of his or her gross earnings will be deducted from the savings account deduction and retained by WICLO to cover WICLO'S administrative expenses. Although originally underwritten by the governments of the United States and various Caribbean nations, it appears that today WICLO is entirely funded by the 2 percent administrative expense deduction.

Title I of ERISA covers both employee welfare benefit plans and employee pension benefit plans. The terms "employee welfare benefit plan" and "employee pension benefit plan" are defined in sections 3(1) and 3(2)(A) respectively of title I of ERISA as follows:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean 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).
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> (2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean 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 by its express terms or as a result of surrounding circumstances such plan, fund, or program--
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> (i) provides retirement income to employees, or
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> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method calculating the benefits under the plan or the method of distributing benefits from the plan.

The health insurance program established by the standard contract for the H-2A workers provides the type of benefits described in section 3(1) of ERISA, and will therefore be considered an employee welfare benefit program within the meaning of that section if the program is established or maintained by an employee or an employee organization, or both. The payroll deduction savings provision of the standard contract is not an employee welfare benefit plan because it does not provide a benefit described in section 3(1) of ERISA. The savings plan is also not an employee pension benefit plan as provided in section 3(2)(A)(i) of ERISA because it does not expressly provide retirement income to employees or defer income until termination of employment or beyond. However, under section 3(2)(A)(ii) of ERISA, a savings plan such as provided here would be considered an employee pension benefit plan if it were established or maintained by an employer or employee organization, or both, and if, under the surrounding facts and circumstances, it systematically, in operation, defers income until termination of employment or beyond. The facts you have presented are not sufficient to make such a determination.

In order for the health insurance program to be an employee welfare benefit plan within the meaning of section 3(1) of ERISA it must, among other criteria, 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 title I 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.
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> (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 the information gathered by the Department that the workers are members of or "participate" in WICLO. Therefore, WICLO would not be an employee organization within the meaning of the first part of the definition contained in section 3(4), i.e., before the semi-colon. However, as reflected above, the term "employee organization" also includes, i.e., after the semi-colon, any employees' beneficiary association organized for the purpose, in whole or in part, of establishing an employee benefit plan.

While the term "employees' beneficiary association" is not further defined in title I of ERISA, the Department applies the criteria it developed for the same term under the Welfare and Pension Plans Disclosure Act (WPPDA) in determining whether a particular association or organization is an "employees' beneficiary association," within the meaning of ERISA section 3(4). Therefore, in order to conclude that an association or organization is an "employees' beneficiary association" within the meaning of ERISA section 3(4), the Department must find that:

1) membership in the association is conditioned on employment status -- for example, membership is limited to employees of a certain employer or union;

2) the association has a formal organization, with officers, by-laws or other indications of formality;

3) the association is organized for the purpose, in whole or in part, of establishing a welfare or pension plan, and

4) the association generally does not deal with employers.

WICLO does not appear to meet the criteria of an "employees' beneficiary association" because the employees are not members of WICLO.

'I'he definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, acting in the interest of its employer members to provide benefits to their employees. On the other hand, where several unrelated employers execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of a defined and identifiable organizational relationship between the employers, no employer association 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 power, 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, in the Department's 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 upon the information you submitted, it is the Department's position that the WICLO health insurance plan 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 employer within the meaning of section 3(5) of ERISA. Except for their participation in the WICLO program through individual contracts with WICLO and their employees, the employers involved are totally unrelated and have no independent organizational relationship.In addition, the employers appear to have no control over the operation of the health insurance program. Accordingly, WICLO is not a bona fide employer group or association within the meaning of section 3(5) of ERISA. However, to the extent that an "employer" within the meaning of section 3(5) utilizes the program to provide employee welfare benefits for its employees, each such employer would be considered to be maintaining a separate, single-employer, employee welfare benefit plan for purposes of title I of ERISA. Moreover, because each participating employer would be viewed as maintaining a separate employee welfare benefit plan for its own employees, the relationship of the WICLO program to each plan and transactions involving the plans are governed by Part 4 of title I of ERISA.

Finally, because we have concluded that the WICLO program is not an employee welfare benefit plan covered by title I, it is not necessary for the Department to address the issue of whether the program is a MEWA within the meaning of section 3(40) of title I of ERISA. Regardless of whether the program is a MEWA, because it is not an employee benefit plan for purposes of title I, ERISA section 514(b)(6) will not operate to limit the application of state law.

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,

Robert J. Doyle
Director of Regulations and Interpretations