



JAN 14 1991

Christine Phillips
Investigator
Insurance Division
Department of Insurance and Finance
Room 440-2, 21 Labor and Industries Building
Salem, Oregon 97310

91-03A
ERISA Sec. 3(40), 514(b)

Dear Ms. Phillips:

This is in response to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act (ERISA). Specifically, you ask whether the Health Services Association Health Plan (HSA Plan) is a multiple employer welfare arrangement (MEWA) within the meaning of Section 3(40) of title I of ERISA. You also ask whether the Department has received any documents or filings or made any determination as to whether the HSA Plan is an employee benefit plan within the meaning of title I of ERISA.

The information submitted indicates that the HSA Plan was created to provide health care coverage for railway employees and their families. The constitution for the Health Services Association states that its purpose is to "aid its members in the preservation and restoration of their physical and mental health. This purpose may be accomplished by means of prepaid comprehensive health care plans or by any other lawful means." The effective date of the constitution is March 1, 1972, with subsequent amendments in January and May of 1977 and May of 1978.

According to the constitution, membership in the Health Services Association includes the following persons or groups, subject to the approval of the Board of Directors of HSA:

1. All employees and former employees of Burlington Northern Inc., its predecessor companies and any of its subsidiaries;
2. All employees and former employees of Health Services Association, Health Services, Inc., and any predecessor association or corporation;
3. All spouses, including widows and widowers, and dependents of such employees and former employees;
4. Active and retired employees of Class 1 and 2 railroads;
5. Any person or group of persons.

The constitution also provides that the business, property and other affairs of the Health Services Association shall be managed by a Board of Directors, consisting of at least nine directors elected by the members and not more than seven additional directors appointed by the elected directors. The by-laws of the Health Services Association, included in the materials you submitted, provide that the Board of Directors may appoint an Executive Committee of board members to exercise the powers of the full board when it is not in session. The Executive Committee must at all times contain a majority of elected board members.

In a telephone conversation with a representative of this office you stated that, to your knowledge, the HSA Plan is not maintained under or pursuant to any collective bargaining agreement, the members of the HSA 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 HSA 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) a rural electric cooperative.

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

- (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 on the information you submitted, it is the position of the Department of Labor (the Department) that the HSA Plan is a MEWA within the meaning of section 3(40). The HSA 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 related 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 an arrangement to the extent that the 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

(iii) 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 arrangements or class of arrangements 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 MEWA's from state regulation under section 514(b)(6)(A)(ii), the Department has previously states 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 MEWA's from state regulation.

Therefore, the preemption provisions of ERISA would not preclude state regulation of the HSA 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 or ERISA, because it would be 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 20, 1990) which discusses the scope of the states' authority to regulate pursuant to section 514(b)(6)(A).

Because your request for an opinion was concerned primarily with the issue of whether or not the HSA Plan is subject to the applicable regulatory authority of the State of Oregon'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 HSA Plan is an employee welfare benefit plan within the meaning of section 3(1) of that title.

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.

With respect to your question concerning whether or not the Department has received any documents or filings from HSA relevant to a determination of its status as an employee welfare benefit plan, a search of our records did not reveal any information of this kind.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

Enclosure