

U.S. Department of Labor

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



JAN 14, 1991

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

91-05A
ERISA SEC.
3(40), 514(b)(6)

Dear Ms. Phillips:

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 AGC Health Benefit Trust (the Trust) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of title I of ERISA and therefore subject to the applicable regulatory authority of the State of Oregon and whether the Trust is an employee welfare benefit plan within the meaning of section 3(1) of title I or ERISA or an employee pension benefit plan within the meaning of section 3(2) of that title.

The information you submitted indicated that the Trust was created pursuant to a trust agreement effective January 1, 1971, and amended and restated on January 1, 1986, between the Oregon-Columbia Chapter, The Associated General Contractors of America, Inc. (AGC) on behalf of itself and its employer members as Trustor and four individuals as Trustees. The restated trust agreement states that the purpose of the Trust is to provide health benefits to eligible employees of employers who qualify and elect to make contributions. The term "employer" is defined in Article I, Section 5 as follows:

Subject to approval by Trustees, Trustor, and any other employer who is a member of the Trustor, including an affiliate member who is required to make Contributions to the Fund, Trustees may adopt uniform rules and regulations for the inclusion of new employers in and the expulsion of current employers from Trust participation based on sound actuarial principles for the funding of Plan benefits. No employee shall be allowed to begin participation or to continue to participate in the Plan and Trust if such participation would cause the Trust to not constitute a voluntary employees' benefit association.

Trustees of the Trust serve at the pleasure of AGC. Article 2, Section 2.1 of the Bylaws of the AGC provides for the following classes of membership:

2.1.1 The classes of membership and affiliation in the Association are a) General Contractor Members (voting members); and b) Associates (non-voting affiliates).

2.1.2 General Contractor Member. General Contractor Members (Members) are the members of the association. A Member shall be an individual partnership, corporation, or other business entity that is capable of performing construction work as a contractor with overall responsibility for the satisfactory completion of a project using its own forces to perform or supervise part of the work and who is also in good standing with the Association.

2.1.3 Associate. An Associate shall be an individual, partnership, corporation, or other business entity that is in good standing with the Association and qualifies under any of the following categories:

2.1.3.1 Subcontractor Associate. One who performs construction work as subcontractor, and does not qualify or elect Member status;

2.1.3.2 Industry Associate. One who serves the construction industry in a trade, fiduciary or other relationship;

2.1.3.3 Professional Associate. One who provides professional service to the construction industry;

2.1.3.4 Construction Employee Associate. A current employee in the construction industry, or one who is actively seeking employment in the construction industry, who has a recent successful history of employment in the construction industry;

2.1.3.5 Public Employee Associate. A public employee involved in or responsible for public works construction for a federal, state, county, or municipal government or other political subdivision; or

2.1.3.6 Retiree Associate. One who has retired from the construction industry but while working was an owner or manager of a Member or Associate.

2.1.4 An individual, partnership, corporation, or other business entity which would otherwise qualify as an Associate but which performs over 25% of its volume as a general contractor must be a Member.

2.1.5 The Board of Directors is the sole judge of the qualifications and proper classification of a Member or Associate of prospective Member or Associate.

In a telephone conversation with a representative of this Office, you stated that, to your knowledge, the Trust is not maintained under or pursuant to any collective bargaining agreement, the participating employers in the Trust are not a "control group" within the meaning of section 3(40)(B) of title I of ERISA, and there is no rural electric cooperative in any way involved with the Trust.

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

. . . any 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:

For the 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 Trust is a MEWA within the meaning of section 3(40). The Trust 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 management subject to an exemption under subparagraph (B)), any such 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.

...

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

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 Trust 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).

Because your request for an opinion was concerned primarily with the issue of whether or not the Trust 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 Trust is an employee welfare benefit plan within the meaning of section 3(1) of that title.

We found no indications in the information you submitted that the Trust may be fully insured. The fact that the Trust may have obtained stop-loss insurance does not in itself indicate the Trust is fully insured within the meaning of section 514(b)(6)(D). Although the information you submitted did not include a copy of the stop-loss insurance contract, it is the Department's position that such a policy shall be considered to fully insure an arrangement only if the terms of the arrangement provide that the amount of all benefits are guaranteed under the insurance contract or policy. Many stop-loss policies only guarantee benefits above a threshold amount paid through another funding vehicle. Accordingly, based on the information provided, we are unable to conclude that the Trust is fully insured within the meaning of section 514(b)(6)(D) of title I of ERISA.

The proceeding 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

Enclosure