

U.S. Department of Labor

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



JAN 15 1991

Mr. Gerald Grimes
Oklahoma Insurance Commissioner
1901 N. Walnut
P.O. Box 53808
Oklahoma City, Oklahoma 73158-3408

91-06A
ERISA SEC.
3(40), 514(b)(6),
3(1), 514(a)

Dear Commissioner Grimes:

This is in response to the joint request of the Insurance Commissioners of the states of Oklahoma, Texas and California as to whether state regulation of the Diversified Industrial Group (DIG) is preempted under section 514(a) of the Employee Retirement Income Security Act of 1974(ERISA).

According to the information provided, DIG is a self-insured or partially self-insured trust that provides health care and other benefits to members of the International Union of Petroleum and Industrial Workers (IUPIW). The membership of the IUPIW consists of "Members", who are individuals working in bargaining units represented by the IUPIW in collective bargaining, and "Associate Members", who are not currently part of an organized bargaining unit and with respect to whom the IUPIW has no obligation to collectively bargain. According to an IUPIW "Resolution"(undated), accompanying the request, "Associate" membership is open to any person who is interested in advancing the cause of organized labor but who is not eligible for membership as a member of a bargaining unit represented by the IUPIW for collective bargaining. Also, according to the "Resolution", "Associate Members" are entitled to hold office and to be elected a delegate and are allowed a voice and vote in the internal Union affairs of the IUPIW, in the same manner as all other members, under the Constitution. "Associate Members" are also entitled, among other things, to participate in the DIG health benefits program. We understand that the number of "Associate Members" may equal or exceed the current number of "Members" participating in the IUPIW and DIG.

According to the provided information, DIG was established and is maintained pursuant to various collective bargaining agreements between the IUPIW and various employers, including the Western Labor Exchange, Inc. According to the Agreement and Declaration of Trust creating DIG, which accompanied the request, DIG is to be administered by a board of four trustees, two of whom are appointed by the IUPIW and two of whom are to be appointed by employers.

Section 514(a) of ERISA generally provides that any state law which relates to an employee benefit plan covered by title I of ERISA is preempted, except to the extent otherwise provided in section 514(b). The only exception in section 514(b) which appears to be relevant to your request is the exception set forth in section 514(b)(6), which excepts from ERISA preemption the application and enforcement of state insurance laws with respect to "multiple employer welfare arrangements." The term "multiple employer welfare arrangement"(MEWA) is defined in ERISA section 3(40)(A) to mean:

... 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 providing any benefit described in paragraph(1) [section 3(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 bargain- ing agreements.

* * *

(Emphasis supplied)

On the basis of the information provided, it appears that DIG is maintained pursuant to one or more collective bargaining agreements between the IUPIW and various employers, albeit all participants covered by the DIG plan are not represented in collective bargaining by the IUPIW. Therefore, assuming that the agreements pursuant to which DIG is maintained are bona fide collective bargaining agreements,¹ it is the view of the Department that DIG does not constitute a MEWA within the meaning of section 3(40)(A). Accordingly, state regulation of DIG is preempted under section 514(a) to the extent that DIG constitutes an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

¹ In the absence of any facts or representations concerning the extent to which the agreements, pursuant to which DIG is maintained, constitute bona fide collective bargaining agreements for purposes of section 3(40)(A)(i), the Department, without making any findings, is assuming, for purposes of this ruling, that the agreements are agreements which the Department would find to be collective bargaining agreements.

Section 3(1) defines the term "employee welfare benefit plan" 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 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).

While DIG appears to provide benefits described in section 3(1), i.e., medical benefits, in order to constitute an "employee welfare benefit plan" covered by title I, DIG must also be established or maintained by an employer, an employee organization, or by both. The term "employee organization" is defined in ERISA section 3(4) to mean:

...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.

(Emphasis supplied)

On the basis of the information provided, it appears that the "Members" and "Associate Members" of the IUPIW have the right to hold office and vote in the internal affairs of the IUPIW and, therefore, appear to "participate" in the IUPIW. Further, it appears that, as the collective bargaining representative of its "Members", the IUPIW exists, at least "in part", for the purpose of dealing with employers.

Accordingly, it is the view of the Department that the IUPIW is an "employee organization" within the meaning of ERISA section 3(4) with respect to its members. Inasmuch as DIG was established and is maintained by the IUPIW, an "employee organization" within the

meaning of section 3(4), in addition to employers with respect to which the IUPIW has collective bargaining agreements, it is the view of the Department that DIG is an "employee welfare benefit plan" within the meaning of ERISA section 3(1). Thus, as an employee benefit plan covered by ERISA, which also meets the exception of section 3(40)(A)(i) from the definition of "multiple employer welfare arrangement", the application and enforcement of any state laws which "relate to" DIG would be preempted by ERISA section 514(a).

The Department notes, however, that although state law is preempted by section 514(a) of ERISA, the application of other federal laws to ERISA-covered plans is preserved by section 514(d) of ERISA. The legality of employer contributions to DIG is dependent upon compliance with section 302(c)(5) of the Labor- Management Relations Act of 1947 (LMRA)(29 U.S.C. §186(c)(5)), which establishes an exception from a general proscription against payments by an employer to, among others, " ...any representative of his employees who are employed in an industry affecting commerce, or any labor organization, or any officer or employee thereof, which represents or seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce..." The exception in 302(c)(5) of the LMRA applies only -

with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents(or of such employees, families, and dependents jointly with employees of other employers making similar payments, and their families and dependents)

29 U.S.C. §186(c)(5)

Moreover, the relevant definition of "employee", found in section 152(3), does not include --

any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. (Emphasis Added)

29 U.S.C. §152(3)

The documents submitted with your request indicate that independent contractors may be included as "Associate Members" of the IUPIW. In addition, it appears that employers who have not signed a collective bargaining agreement with IUPIW are making payments on behalf of their employees into the jointly-trusted DIG, or that employees of such non-signatory employers are making payments on their own behalf into DIG. Accordingly, the Department is referring the material submitted by you to the Department of Justice which has responsibility for the enforcement of section 302 of the LMRA, to determine what, if any, action may be appropriate with respect to the operation of DIG.

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations