**U.S. Department of Labor** Pension and Welfare Benefits Administration
Washington DC 20210

January 27, 1992

Ms. Sandra Milburn
Investigator
Texas State Board of Insurance
1110 San Jacinto
Austin, Texas 78701

92-04A
ERISA SECTION
3(40),
514(b)(6)

Dear Ms. Milburn:

This is in response to your request regarding the status of a self-funded health benefit program (the Program) sponsored by Advantage Corporate Services, Inc. (Advantage) under title I of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested an opinion as to whether the Program is a multiple employer welfare arrangement (MEWA), within the meaning of ERISA section 3(40) and, if so, whether the application of the Texas insurance laws would be inconsistent with the provisions of ERISA.

According to your letter, Advantage identifies its operations as those of an "employee leasing" company. Advantage markets its services and issues proposals to potential client employers in a variety of trades and businesses. If a client employer agrees to the terms of the proposal, a Personnel Lease Agreement (the Agreement) is executed with Advantage. Under the terms of the Agreement, copies of which accompanied your request, Advantage agrees to lease personnel to the client employer subject to the payment of certain fees by the client employer. Pursuant to the "Personnel Administration and Supervision" sections of the Agree- ments, the parties agree that Advantage is an independent con- tractor and that all individuals leased to the client employer are employees of Advantage. Under the same section, it is also provided that "Advantage shall be responsible for recruiting, hiring, training, supervising, evaluation, disciplining, discharge and replacing of those persons leased to the Client, although the Client will be consulted on such matters ...."

Advantage maintains the Program for leased employees, who contribute to the Program through payroll deductions. Advantage represents that the Program is an ERISA-covered employee welfare benefit plan maintained by a single employer, i.e., Advantage.

Information submitted with your request, however, indicates that, in at least one instance, an Advantage client, with employees participating in the Program, hired Advantage to provide payroll services and to enable employees to participate in the Advantage health benefit program. According to the information provided, the client, rather than Advantage, retains the right to control, evaluate, define, hire and fire all employees.

ERISA section 3(40)(A) defines the term "multiple employer welfare arrangement" 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 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 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,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

Inasmuch as there is no indication that the Program is established or maintained under or pursuant to one or more collective bargaining agreements, by a rural electric cooperative, or a rural telephone cooperative association, the only issue relating to the Program's status as a MEWA appears to be whether the Program provides benefits, as described in ERISA section 3(1), "to the employees of two or more employers." The resolution of this issue is dependent on whether, for purposes of ERISA section 3(40), the employees covered by the Program are employees of a single employer (i.e., Advantage) or more than one employer (i.e., Advantage's clients).

ERISA section 3(5) defines the term "employer" mean:

. . . 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.

As reflected above, the term "employer", for purposes of title I of ERISA, encompasses not only persons with respect to whom there exists an employer-employee relationship between the employer and individuals covered by the plan (i.e., persons acting directly as an employer), but also certain persons, groups and associations, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered by an employee benefit plan.

Therefore, merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.

The term "employee" is defined in ERISA section 3(6) to mean "any individual employed by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. Whether an employer-employee relationship exists will be determined by applying common law principles and taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished; whether the person for whom services are being performed has the right to discharge the individual performing the services; and whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, among other considerations.

While the Agreements submitted with your request purport, with respect to the leased employees, to establish in Advantage the authority and control associated with a common law employer-employee relationship, your submission indicates that in at least one instance the client employer, rather than Advantage, actually retained and exercised such authority and control.* It is the view of the Department that where the employees participating in the plan of an employee leasing organization include "employees" of two or more client (or "recipient") employers, or employees of the leasing organization and at least one client employer, the plan of the leasing organization would, by definition, constitute a MEWA because the plan would be providing benefits to the employees of two or more employers.

On the basis of the information provided, the Program covered at least one client's employees with respect to whom Advantage did not have an employer-employee relationship and, accordingly, were not "employees" of Advantage within the meaning of ERISA section 3(6). Therefore, in the absence of any indication that Advantage and its client employers constitute a "control group" within the meaning of ERISA section 3(40)(B)(i), it is the view of the Department that the Program provides benefits to the employees of two or more employers and is, therefore, a "multiple employer welfare arrangement" within the meaning of ERISA section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the Program to the extent provided in ERISA section 514(b)(6)(A).

In this regard, we are enclosing, for your information, a copy of Opinion 90-18A (dated July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to ERISA section 514(b)(6)(A).

Lastly, it should be noted that, while the foregoing views are based on your submission, a contractual arrangement will not be determinative of an employer-employee relationship when the facts and circumstances of the situation contradict the terms and conditions of the contract.

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

Enclosure

* Although we conclude in this situation that some of the individuals participating as "employees" in the Program are "employees" of the client employers, the Department notes that Advantage may also be considered an "employer" within the meaning of ERISA section 3(5).