

U.S. Department of Labor

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



October 7, 1996

96-22A
ERISA SEC. 3(32)

Mr. John M. Griggs
Executive Director
Kentucky Association of Counties
380 King's Daughters Drive
Frankfort, KY 40601

Dear Mr. Griggs:

This is in response to your correspondence concerning the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed participation of the employees of the Kentucky Association of Counties (KACo) in the County Employees' Retirement System (CERS), which is administered by the Kentucky Retirement Systems (KRS). Specifically, you request an advisory opinion that the status of CERS as a "governmental plan" within the meaning of section 3(32) and section 4(b)(1) of Title I of ERISA would not be adversely affected if employees of KACo were permitted to participate in CERS. Pursuant to your request, we are assuming without ruling on this issue that CERS, as currently operated, is a governmental plan under ERISA.¹

Section 4(b)(1) excludes from coverage under Title I of ERISA any plan that is a "governmental plan," and section 3(32) defines the term "governmental plan," in pertinent part, as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

You represent that KACo is a nonprofit corporation organized in 1974 pursuant to Kentucky law for the purpose of providing technical, informational, and other services to counties in Kentucky; fostering harmony of action among counties; fostering good public relations on a nonpartisan basis; promoting legislation relating to county government in order to improve county services to citizens; providing a medium for the exchange of information; and providing training in public administration and record keeping for county officials. See KACo Articles of Incorporation, Article II. You advise that KACo is exempt from federal income tax under section 501(c)(3) and (6) of the Internal Revenue Code and pays no state or city taxes except property taxes on buildings owned by KACo. See KACo Financial Statement of February 29, 1996. Employees of KACo are subject to federal tax withholding for FICA but not FUTA.

KACo offers voting membership to all Kentucky counties that pay assessed dues and all elected county officials of such dues-paying counties. Non-voting membership is also available for a \$200 fee to individuals or public and private agencies who wish to obtain a subscription to KACo's monthly newsletter, which provides information about county government. See Article IV of By-laws and KACo FY 95 annual report ("annual report") at 19. Other non-

¹ You advise that CERS was created pursuant to Kentucky Revised Statutes § 78.510 et seq. as a retirement system for county employees, that all counties in the state currently participate in CERS (for a total of about 12,824 employees); that these employees contribute 5% of their salary to CERS; and that each employer contributes 8.94% of an employee's salary, a figure which is adjusted annually by CERS. CERS is administered by the Kentucky Retirement Systems, which was established pursuant to state law for state employees. KACo employs twelve full-time employees, who would all participate in CERS if KACo joined CERS.

voting membership categories include honorary memberships (former members with distinguished service to the association) and adjunct memberships (non-voting groups of non-elected county and special district employees). (Article IV of By-laws).

KACo is governed by a board of directors (the board), comprised of (1) the presidents of all Kentucky associations of county officials sitting ex officio, (2) representatives elected through mail ballot by the elected county officials from each of Kentucky's Area Development Districts (ADDs),² and (3) the officers of KACo. Except for the executive director, who is an officer of KACo and is appointed by the board, the directors must all be elected county officials. See Article V of By-laws and annual report at 6. The board meets at least quarterly. Currently, 10 sitting board members represent local state organizations of county officials, and 18 board members represent Area Development Districts. See annual report at 6.

The positions that constitute the officers of KACo are the president, the president-elect, two vice-presidents and a secretary-treasurer. The officers act collectively as the board's executive committee and as KACo's operations committee. The immediate past president of KACo also serves on the executive committee. The office of secretary-treasurer is filled through the board's appointment of an executive director, who also serves as the association's secretary-treasurer and holds a non-voting position on the board of directors. Only one officer, the second vice president, is elected annually by the membership of KACo at KACo's annual conference. For such election, each county has a number of votes that varies depending on the amount of its dues paid to KACo.³ The other offices of KACo are filled by a rotation, through which in each succeeding year the second vice president previously elected succeeds to the office of first vice president, the prior year's first vice president becomes the president-elect, and the president-elect becomes president. See Article V, By-laws.

KACo works almost exclusively on behalf of county governments and county elected officials by providing services and information to counties. KACo undertakes legislative initiatives on behalf of counties and county officials, and it answers questions from counties on a regular basis. For example, in response to state legislation, KACo researched, drafted and promulgated a model investment policy for county governments and co-sponsored a series of forums statewide on its use. After legislation was passed requiring each local government to enact a code of ethics, KACo also researched, drafted and promulgated a model code and co-sponsored training sessions across the state. Annual report at 5.

² ADDs are the 15 regional planning organizations whose geographic boundaries are established by Kentucky Revised Statutes § 147A.050. Each ADD consists of between 4 and 17 counties. Although the ADDs have no official relationship with KACo, the KACo By-laws utilize the ADD boundaries to establish balloting regions for the voting of directors by elected county officials to assure representation on the KACo board from each geographic region.

³ County membership dues vary in accordance with a county's population as follows:

Population	Dues
0 - 13,999	\$500
14,000 - 28,999	600
29,000 - 49,999	900
50,000 - 79,999	1,500
80,000 - 139,999	2,100
140,000 - 299,999	3,500
300,000 - 599,999	5,000
600,000 +	9,000

Kentucky counties may associate under the Kentucky Interlocal Cooperation Act to self-insure, pursuant to Attorney General Opinion 87-20, and KACo facilitates such interlocal agreements through establishing and maintaining the KACo Workers Compensation Fund, the KACo Unemployment Insurance Fund, the KACo All Lines Fund (KALF), the KACo Leasing Trust (COLT), and the KACo Advanced Revenue Program (KARP).⁴

You represent that KACo is treated as a political agency for various state purposes, including the open records law, the workers compensation act, and the exemption from state sales tax. Similarly, self-insurance funds sponsored by KACo are subject to open records act requirements pursuant to attorney general opinions. Furthermore, KACo falls within a general category of entities that state law has defined as "counties" for purposes of eligibility for the retirement system. Kentucky Revised Statutes section 78.510(3) (defining a county to include a nonprofit organization created and governed by a county, counties or elected county officers).⁵ KACo's role as a representative of counties is recognized in various state statutes, such as the laws creating the jail construction authority, the enterprise zone authority, the Kentucky transportation center advisory board, and also in a legislative resolution on consolidating counties.⁶ You have advised that, although the Kentucky attorney general has never had

⁴ The workers compensation fund, which is regulated by the Kentucky Workers Compensation Board under the Labor Cabinet, permits counties to join together to self-insure. Annual report at 13. The KACo Unemployment Insurance Fund, which is regulated by the Cabinet for Human Resources, provides administrative and other services for counties to meet their obligations for unemployment coverage. Annual report at 14; bylaws of UI Self-Insurance Fund. The KACo All Lines Fund (KALF), which is regulated by the Department of Insurance, is a property and casualty liability self-insurance fund that covers negligence and property claims and provides training to county officials with respect to claims arising in law enforcement, the Americans with Disabilities Act, loss prevention, and employment discrimination training. Annual report at 15. The KACo Leasing Trust (COLT), which was established under federal statutes and was qualified under state statutes, offers counties an efficient method of financing long term capital projects and equipment purchases through use of lease instruments between itself and participating local government units. Annual report at 16. The KACo Advanced Revenue Program (KARP) assists counties with short-term borrowing financed by the pooling of county tax or revenue anticipation notes and assists county governments in preparing and evaluating their annual budgets. Annual report at 17.

⁵ Kentucky Revised Statutes § 78.510(3) provides as follows: "'County' means any county, or nonprofit organization created and governed by a county, counties, or elected county officers, sheriff and his employees, county clerk and his employees, or political subdivision or instrumentality, including school boards, charter county government, or urban-county government participating in the system by order appropriate to its governmental structure, as provided in KRS 78.530, and if the board is willing to accept the agency, organization, or corporation, the board being hereby granted the authority to determine the eligibility of the agency to participate[.]" (The "system" refers to CERS and the "board" means the CERS board of trustees.

⁶ Examples of state laws or resolutions recognizing KACo's role on behalf of counties are as follows: (a) Kentucky Revised Statutes § 441.615 created the Jail Construction Authority consisting of 10 members, one of whom is designated by KACo; (b) Kentucky Revised Statutes § 154.45-060 established the Enterprise Zone Authority consisting of 11 members, one of whom is appointed by the governor from a list of three persons nominated by KACo; (c) Kentucky Revised Statutes § 177.375 created a Kentucky Transportation Center Advisory Board consisting of nine members, one of whom is appointed from a list of three persons submitted by the executive board of KACo; and (d) the legislature, in a 1988 concurrent resolution, directed the Legislative Research Commission to create a special commission to study the feasibility of consolidating the counties in Kentucky and designated the executive director of KACo as one of the 23 members of such commission.

occasion to rule on whether the state open meetings law applies to KACo, in fact members of the media attend meetings of KACo's board of directors from time to time. Moreover, KACo's books and records are subject to examination by the state attorney general and the state legislature on account of KACo's role on behalf of counties and its funding, directly or indirectly by tax dollars, and KACo has modified its activities in accordance with such examination.⁷

Approximately 79% of KACo's funds are dues paid by counties directly for county membership, for the membership of elected officials, and for county membership in programs or funds administered by KACo. You represent that such use of county revenues has been approved by the Kentucky Attorney General.⁸ You further represent that county membership dues paid to KACo constitute a specific approved line item in each county's budget. The remaining funds that KACo raises from private sources are derived in connection with activities on behalf of the counties, such as corporate sponsorship of the annual conference, at which elections are held. Annual report at 20.

In view of the foregoing representations, it is the view of the Department of Labor that KACo is a governmental agency or instrumentality within the meaning of section 3(32) of ERISA and that inclusion of the KACo employees in CERS would not of itself adversely affect CERS' status as a "governmental plan" under title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA and is not determinative of any particular tax treatment under the Internal Revenue Code.

Sincerely yours,

Susan G. Lahne
Chief, Division of Coverage
Office of Regulations and Interpretations

⁷ KACo responded to state examination by dissolving a reinsurance trust it had established after the attorney general indicated a lack of certainty about the nature of such trust and by ending its involvement with a medical fund that it had organized for counties after a new attorney general questioned the fund's activities.

⁸ See Attorney General Opinion 74-434 (holding that any county may pay the dues of its county officials to KACo because meetings of KACo are official and involve a public benefit and purpose).