

U.S. Department of Labor

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



September 10, 1997

97-21A
ERISA SEC. 4(b)(3)

Ms. Robin S. Lazarow
Witman, Stadtmauer & Michaels, P.A.
26 Columbia Turnpike
Florham Park, New Jersey 07932-2246

Dear Ms. Lazarow:

This responds to your request for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether ERISA § 4(b)(3), which excludes from ERISA plans that are maintained solely to comply with state-mandated disability benefits, would apply to a disability benefits program (hereinafter, the Program) offered by the Association of Independent Colleges and Universities in New Jersey (hereinafter, AICUNJ) to its members for their employees.

The facts and representations in your correspondence and accompanying materials include the following. AICUNJ's members are private schools and universities in New Jersey (hereinafter, collectively, the Schools). According to AICUNJ's bylaws, any eligible, tax-exempt private institution of higher education in New Jersey, excepting institutions primarily for religious training, may join AICUNJ. The Schools are under no common control or ownership, but several Schools may be church-controlled, either directly or through a religious order.

AICUNJ's Program is insured through Hartford Life Insurance Company. AICUNJ subscribes to the Program on behalf of its own employees, and twelve Schools that are members of AICUNJ also subscribe to the Program.¹ Each School and AICUNJ set the terms and conditions under which its own employees will receive disability benefits. You represent that AICUNJ's program of disability benefits for its own employees provides that payments begin at the time that New Jersey law requires, which is the eighth day of an employee's disability. See N.J.S.A. 43:21-32 et seq. However, each School's program of disability benefits for its employees provides that payments begin on the eighth day of disability due to sickness but begin on the first day of any disability that arises out of an accident.

AICUNJ and each School has received its own separate "certificate of approval" from New Jersey's Disability Insurance Service. Each School's certificate evidences that the School provides its employees with at least the minimum disability income insurance required by New Jersey statute and that the state's standards are otherwise met, and AICUNJ's certificate evidences the same level of state law compliance as to its own employees: thus, "certification," is apparently issued without regard to whether an employer's disability benefits for its employees exceed the minimum statutory requirements for state-mandated disability insurance.

You ask that we address the status of AICUNJ's Program under the coverage provisions of Title I of ERISA. There is no indication in your submission that the Program was established or is maintained by an employee organization within the meaning of ERISA § 3(4). Further, based on your description of AICUNJ, of its members, and of the

¹ You do not specify whether AICUNJ requires any School to participate in the Program as a condition of membership or whether, on joining AICUNJ, a School may decline participation in the Program. The opinions expressed in this letter would apply to the Program and to the plans of AICUNJ and of each of the Schools regardless of that distinction.

Program, including the fact that each School controls its own disability benefits, it does not appear that the Program was established or maintained by AICUNJ as employer within the meaning of ERISA § 3(5) with respect to all participating employees.² Accordingly, the Program itself does not appear to constitute a single "employee welfare benefit plan," within the meaning of ERISA § 3(1).³ Instead, each School, insofar as it provides its employees with any ERISA-covered welfare benefit through the Program, has established and maintains a separate, single-employer "employee welfare benefit plan,"⁴ unless the School's plan is excepted from ERISA Title I coverage.⁵

ERISA § 4(b)(3) excepts from ERISA Title I coverage a plan "[that] is maintained solely for the purpose of complying with . . . disability insurance laws." Based on your representations, each School's plan for its own employees provides both state-mandated disability income benefits and additional disability benefits to cover the first seven days of disability due to accident, which are benefits that no School is required to provide its employees in order to comply with New Jersey law. Because a School's plan provides benefits that are not required for

² It is recognized, under the relevant definitional provisions of ERISA Title I, that a single employee welfare benefit plan may be established or maintained by a cognizable, bona fide group or association of employers, within the meaning of ERISA § 3(5), acting in the interests of its employer members to provide benefits for their employees. On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of any genuine organizational relationship among the employers, the Department recognizes no employer association, and, consequently, no employee welfare benefit plan. A determination whether a group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate, and who actually participates, in the association; the process by which the association was formed; the purposes for which it was formed; and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In addition, it is the Department's view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the benefit program. See, e.g., ERISA Opinions 96-25A and 96-07A

³ We note that activities of AICUNJ in establishing and operating the Program, although not in themselves constituting the establishment and maintenance of a single, ERISA-covered "employee welfare benefit plan," may involve handling plan assets for, or otherwise acting as a fiduciary in relation to, each School's ERISA-covered employee welfare benefit plan for its own employees. Based on AICUNJ's or the Program's activities or other fiduciary relationship as to any ERISA-covered welfare plan, AICUNJ may be subject to fiduciary requirements of ERISA.

⁴ Because AICUNJ's Program is not a "plan," it is not necessary to determine whether the term "multiple employer welfare arrangement" (MEWA), as defined in ERISA § 3(40), applies to the Program. Because the Program is not itself a "plan," ERISA § 514 does not preempt state law applicable to the Program, without regard to whether the Program is a MEWA and without regard to whether the MEWA exception to preemption in ERISA in § 514(b)(6) would apply.

⁵ We note that, if the "church plan" definition in ERISA § 3(33) applies to a School's welfare plan, it is excluded from ERISA Title I coverage by ERISA § 4(b)(2). See, e.g., ERISA Opinions 90-13A, 91-43A, 94-18A, and 95-10A. Moreover, because, as you represent, AICUNJ provides its own employees with only disability income insurance at the minimum statutory level required under New Jersey law, AICUNJ's program of disability benefits for its own employees is excluded from ERISA Title I coverage by ERISA § 4(b)(3) and does not constitute an ERISA-covered "employee welfare benefit plan."

compliance with the New Jersey disability insurance law, that plan is not "maintained solely for the purpose of complying with" such law.⁶ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107 (1983).

Each School's welfare plan is subject to all applicable provisions of ERISA Title I, including § 514. Pursuant to ERISA § 514, ERISA Title I supersedes state law that "relates to" employee benefit plans, subject only to specific statutory exceptions. Section 514, however, does not preempt state law that permits an employer to provide its employees with state-mandated disability income benefits through an employee benefit plan, as an alternative to participating in a state program of disability insurance. ERISA also does not preempt New Jersey's enforcement of its requirements as to minimum levels of state-mandated disability benefits, even if a School chooses to satisfy those state requirements through an ERISA-covered plan for its employees, as is apparently permissible under New Jersey law. See *id.* at 108; ERISA Opinion 92-26A (state-mandated workers' compensation benefits). If a state permits an employer to meet the state's statutorily-required minimum levels of disability benefits through its ERISA-covered plan, the state may ascertain whether its requirements are met and may require continuing compliance with state law.

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,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

cc: David Snook, Chief
Bureau of Private Plan Disability Insurance
Division of Unemployment and Disability Insurance
New Jersey Department of Labor

⁶ If a School were to exceed New Jersey statutory minimums for disability income only insofar as it paid employees, solely from its general assets, their normal compensation for "periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons," the School's payments in excess of New Jersey statutory minimums would constitute a "payroll practice" excluded from ERISA Title I coverage. See 29 CFR § 2510.3-1(b)(2). However, because according to your representations, all Schools provide insured disability benefits that exceed state statutory minimums, the "payroll practice" exception from ERISA has no applicability.