U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

May 16, 2005

2005-12A
ERISA SEC.
3(1)

Jacob M. Barsottini
General Manager & Chief Operating Officer
Employshare
P.O. Box 350
Beaver Falls, PA 15010

Dear Mr. Barsottini:

This is in reply to your request, on behalf of Wings For Christ, Inc. (WFC), regarding the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a program of benefits WFC is interested in offering to its members (WFC Program) would be an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA. You also ask whether the WFC Program would be subject to state insurance regulation as a "multiple employer welfare arrangement" (MEWA) within the meaning of ERISA section 3(40).

Your correspondence and the materials supplied in support of your inquiry contain the following facts and representations. WFC is a Pennsylvania not-for-profit corporation that provides missionary support, medical aid and disaster relief throughout the United States and Central America. You represent that the mission of WFC is religiously based, but that WFC is not a church, nor is it controlled by or associated with any particular church, convention or association of churches.

You state that WFC is comprised of both "employer" and "employee" members located in a number of different states. The employer members of WFC include Christian churches, church schools, church hospitals, nursing homes and rehabilitation centers. As a condition of membership in WFC, each of the employer members sign an agreement with WFC supporting the tenets and mission of WFC. In addition, you represent that WFC "co-employs" approximately 2,000 employees of the member employers. Although you represent that the employee members are "volunteers" who are compensated by their separate employers and not by WFC, you note that the employee members sign an "employment agreement" to "participate in the mission of WFC" so that WFC may terminate the WFC membership of any employee member who fails to adhere to the tenets and mission of WFC. Nothing in your submission suggests, however, that WFC has the authority to terminate the employment relationship between the employer member and the employee member, or that WFC would exercise any other significant employer functions with respect to the "co-employees."

According to your request, WFC plans to establish a program to provide welfare benefits, including group health care, dental, vision and life insurance, to its employee members. Your submission did not include information on WFC's corporate structure,

the persons or entities that exercise control over or direct the activities of WFC or the WFC Program, the structure of the WFC Program, or the source of contributions for the benefits the WFC Program would provide.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I of ERISA to include, in relevant part, "any plan, fund, or program . . . 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, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." The WFC Program would appear to provide benefits described in section 3(1). However, in order to be a plan covered by ERISA, the WFC Program would also, among other criteria, have to be established or maintained by an employer, employee organization, or both. There is no indication in the information you submitted that an employee organization within the meaning of section 3(4) of ERISA would in any way be involved in the establishment or maintenance of the WFC Program.[1] Therefore, this letter will examine only whether an "employer" within the meaning of section 3(5) would establish or maintain the WFC Program.

The term "employer" is defined in section 3(5) of ERISA to include "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." The definitional provisions of ERISA thus recognize that a "multiple employer" welfare plan may exist where a cognizable bona fide group or association of employers establishes a benefit program for the employees of member employers. 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, preexisting relationships exist among 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. *See* Advisory Opinion 80-02A. In addition, the Department takes the

[1] The term "employee organization" is defined in section 3(4) to include either organizations such as a labor union in which employees participate and that deals with an employer regarding the conditions of employment or an employees' beneficiary association that is organized, in whole or in part, for the purpose of establishing a plan. Based on the information you submitted, the Department would not view the WFC as dealing with employers on behalf of employees. Further, the Department has previously indicated the criteria it uses to identify employees' beneficiary associations for purposes of Title I of ERISA. S*ee* Advisory Opinion 92-19A; Advisory Opinion 80-68A. WFC does not meet the criteria of an employees' beneficiary association.

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 program. *See* Advisory Opinion 89-13A.

In previous opinions involving associations whose membership was not restricted to employers in a particular trade or occupation, the Department has taken the position that the subject associations were not groups or associations of employers within the meaning of section 3(5) of Title I of ERISA. *See* Advisory Opinion 2003-13A. We have also noted that the mere presence of non-employer members will not, in and of itself, vitiate the status of a group or association as an "employer" within the meaning of ERISA section 3(5) if such other members have no voting rights in the association and no control over it. *See* Advisory Opinion 80-15A. In the case of WFC, eligibility for membership is not limited to "employers" but is open to "co-employees." Further, you did not provide us with any information that would support a conclusion that only employer members of the WFC who participate in the WFC Program exercise control over or direct the activities of WFC or the WFC Program. Therefore, for this reason alone, the Department would not find WFC to be a bona fide group or association of employers within the meaning of section 3(5) of ERISA.

In the alternative, you maintain that WFC is an "employer" as contemplated by ERISA section 3(5) because it is the "co-employer" of the employee members covered under the Program. You provided a letter from your legal counsel concluding that "persons who become associated with WFC" would be considered "employees" of WFC for purposes of the "church plan" definition in section 414 of the Internal Revenue Code and section 3(33) of ERISA. We note that you do not contend that the WFC Program is a "church plan" under ERISA section 3(33), and further that you represented as part of your request for guidance that WFC is not a church, nor is it controlled by or associated with any particular church or convention or association of churches.[2] Without expressing any view on the church plan definition in section 3(33) of ERISA, the Department does not view becoming "associated with" an organization as the controlling standard for determining whether there is an employer-employee relationship within the meaning of section 3(6) of ERISA. Rather, whether an individual is an "employee" for purposes section 3(6) of Title I of ERISA generally must be determined by applying common law principles. *See Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992); *Yates v. Hendon*, 541 U.S 1 (2004).[3] A contract

[2] Church plans as defined in section 3(33) of ERISA are exempted from Title I coverage by section 4(b)(2) of ERISA, and, therefore, the preemption provisions of section 514 of ERISA do not preclude state regulation of such arrangements. *See also* Clarification of Church Welfare Plan Status Under State Insurance Law Act, 29 U.S.C. § 1144a.

[3] While common law of agency factors typically have been applied in determining whether a person is an employee or independent contractor, common law principles are equally applicable to determine by whom an individual is employed. *See Professional & Executive Leasing Inc. v. Commissioner*, 89 TC No. 19 (1987).

purporting to create an employer-employee relationship will not control where common law factors (as applied to the particular facts and circumstances of a situation) establish that the relationship does not exist.

Accordingly, because we cannot conclude that WFC is an employer as defined in ERISA section 3(5), we are unable to conclude that the WFC Program is an employee welfare benefit plan within the meaning of section 3(1) of ERISA. However, if an employer adopts for its employees a program of benefits sponsored by a group or association that does not itself constitute an "employer" within the meaning of ERISA section 3(5), such an employer may have established a separate employee benefit plan covered by Title I of ERISA. *See Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Thus, while the WFC Program is not an employee welfare benefit plan, WFC's employer members may be establishing their own employee welfare benefit plans subject to ERISA if they were to participate in the WFC Program to provide welfare benefits for their employees.

Even if the WFC Program were an employee welfare benefit plan within the meaning of section 3(1) of ERISA, based on your representations, it would be a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of ERISA. Section 3(40)(A) defines the term "MEWA," in relevant part, to include:

> [A]n 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, (ii) by a rural electric cooperative, or (iii) by a rural telephone cooperative association.

On the basis of your representations and the information submitted, the WFC Program would not be limited to persons who have a common-law employer-employee relationship with WFC and would include persons who have such a relationship with one or more unrelated employers. The Department would view the WFC Program as providing health and other welfare benefits described in section 3(1) of ERISA to the employees of two or more employers within the meaning of section 3(40) of ERISA. Nothing in the materials submitted suggested that the WFC Program would meet any of the exceptions set out in the MEWA definition. Although section 514(a) of Title I of ERISA generally preempts any state law which relates to an employee benefit plan covered by Title I of ERISA, section 514(b)(6) provides an exception which permits certain state insurance regulation of employee welfare benefit plans which are MEWAs. Accordingly, even if the WFC Program were an employee benefit plan within the meaning of section 3(1) of ERISA, the preemption provisions of ERISA would not

preclude state insurance regulation of the WFC Program, at least to the extent provided in ERISA section 514(b)(6)(A).

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