

**U.S. Department of Labor**

Labor-Management Services Administration  
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 82-57A  
Sec. 3(1), 3(4), 3(5), 514(a)

NOV 2 1982

Mr. Francis X. Roche  
Coopers & Lybrand  
One Post Office Square  
Boston, Massachusetts 02109

Dear Mr. Roche:

This is in reply to your letters of June 14 and June 21, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an opinion that the Eastern Small Business Federation Group Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA and is covered by title I of ERISA and that section 514 of ERISA preempts the provisions of Chapter 676 of the Connecticut General Laws (Conn. Chap. 676) from applying to the Trust.

You advise that in 1977 the Internal Revenue Service determined the Trust to be tax-exempt under section 501(c)(9) of the Internal Revenue Code (the Code). The trust declaration dated February 28, 1977, and amended February 4, 1980, states that the Trust was created to provide "life, sick, accident and other benefits" to employees (and their dependents) of members of the Eastern Small Business Federation (ESBF). ESBF (originally incorporated in 1975 as the Connecticut Small Business Federation) is a non-stock corporation among whose purposes, as amended on April 22, 1980, are to promote and protect the interests of small business and the professions, to provide group benefits to members, and to engage in other behavior "consistent with its tax-exempt status under section 501(c)(6) of the Internal Revenue Code." Under the ESBF By-Laws, as amended April 21, 1980, there are two classes of members. Regular members may be any entity operating a small business or professional enterprise. Associate members may be any entity not qualifying as a Regular member. Only Regular members may vote or hold office. All members are entitled to participate in group benefits offered by ESBF.

The Trust is governed by the Board of Directors of ESBF. Under Article IV of the ESBF By-laws, the initial Board of Directors consisted of seven directors elected by a majority vote of the original incorporators of ESBF. Subsequent directors are elected by majority vote of the Board of Directors. The Board is also empowered to elect ESBF's officers and to alter, amend or repeal the ESBF By-laws.

Section 3(1) of ERISA 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, ... (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).

Although the Trust provides benefits among those identified in section 3(1), to be an employee welfare benefit plan, the Trust, among other criteria, must also be established or maintained by an employer, an employee organization, or both. The issue, therefore, revolves around whether ESBF is an employer or an employee organization with respect to the Trust.

ERISA sections 3(4) and 3(5) define the terms "employee organization" and "employer" respectively as:

(4) The term "employee organization" means 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.

(5) The term "employer" means 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.

ESBF is not an employee organization within the meaning of the first part of the definition in section 3(4) - before the semi-colon - since there is no indication that employees participate in ESBF and ESBF does not "deal" with employers concerning an employee benefit plan or other matters incidental to employment relationships. Nor is ESBF an employee organization within the meaning of the second part of the definition in section 3(4) - an employees' beneficiary association.<sup>1</sup> The term "employees' beneficiary association" as used in section 3(4) is not defined in ERISA. Substantially identical language, however, was used in the definition of the term "employee organization" in section 3(3) of the Welfare and Pension Plans Disclosure Act (the WPPDA), Pub. L. No. 85-836, 72 Stat. 997 (1958). (The WPPDA was repealed by ERISA section 111(a)(1).) In interpreting section 3(3) of the WPPDA, the Department of Labor (the Department) developed certain criteria to be used in construing the term "employees' beneficiary association." One of those criteria, which are set forth in §315.100 of the WPPDA Interpretive Manual (1965), is that membership in an employees' beneficiary association is conditioned on employment status. Membership in ESBF, however, is not conditioned on employment status.

It is the Department's view, based on the definitional provisions of ERISA as well as the overall statutory scheme, that in the absence of the involvement of an employee organization a multiple employer plan exists where a cognizable group or association of employers establishes a benefit program for the employees of member employers. (We also note that a multiple employer plan exists where several employers and one or more employee organizations jointly establish such a program, or where several employers contribute to a plan established by an employee organization.) In each of these contexts there is some organizational relationship among the employers, or the employees, or both, in coming together and establishing a single plan. But where several unrelated employers, in establishing benefit programs for their unrelated employees, without any concerted "sponsor" or "settlor" activity, merely execute identically worded "trust agreements," "subscription agreements," or similar documents offered by an independent third party as a means to fund benefits, no multiple employer plan can be recognized. In such a situation, each employer (or each bona fide employer association) establishes its own plan, and the entity contracted with to provide benefits is not itself an employee benefit plan, but in most cases the provider of a funding vehicle to the various plans.

We believe that this latter description fits the Trust. As noted above, the Trust is not under the control of the employer/members of ESBF. It is controlled by the Board of Directors of ESBF. The employer/members of

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<sup>1</sup> We note that our conclusion that ESBF is not an employees' beneficiary association under section 3(4) does not affect the status of it or the Trust under section 501(c)(9) of the Code.

ESBF may only vote on those issues which are submitted to them by the Board of Directors for a vote. Accordingly, we conclude that the Trust, as an entity, is not a multiple employer plan subject to ERISA. This, of course, does not mean that individual employers have not established individual employee welfare benefit plans subject to the coverage of ERISA or that persons who act in fiduciary capacities with respect to those plans are not subject to the fiduciary obligations imposed by part 4 of title I of ERISA, 29 U.S.C. §1101 et seq.

Section 514(a) of ERISA provides:

SEC. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

Section 514 thus preempts only those state laws which relate to employee benefit plans covered by title I of ERISA. Since the Trust is not an employee benefit plan covered by title I of ERISA, the State of Connecticut is not preempted from exerting its applicable authority over the Trust.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton  
Administrator  
Pension and Welfare Benefit Programs