

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 82-59A

Sec. 3(1), 3(5)

NOV 10 1982

Mr. James D. Hutchinson
Steptoe & Johnson
1250 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Hutchinson:

This is in reply to the letter of September 12, 1980, from you and Mr. Paul J. Ondrasik, Jr., regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask for an advisory opinion stating that the Chiropractic Health Plan Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

You advise that the Trust was created August 1, 1977, by the North Carolina Chiropractic Association to provide health and welfare benefits, disability benefits, and other benefits to chiropractic physicians and their employees. Although the North Carolina Chiropractic Association was the initial association to establish the Trust, it was at all times contemplated that other state chiropractic associations could adopt the Trust for the benefit of their members and their members' employees. As of your request, 20 additional state associations have adopted the Trust. The Trust instrument limits participation in the program of benefits to chiropractic physicians who are members of the chiropractic associations which participate in the Trust, employees of such members, and employees of the participating chiropractic associations. We note that although membership in some of the participating chiropractic associations is provided to students enrolled in chiropractic colleges, only licensed chiropractic physicians are entitled to vote in each state association. Pursuant to the Trust agreement, each state association appoints one member to the Board of Directors which directs and controls the Trust. Only members or employees of a participating state association are entitled to serve on the Board. The Trust document empowers the Board, among other things, to determine the benefits provided by the Trust; arrange for insurance underwriting; remove the trustee and appoint a successor; interpret and construe the program documents; determine the compensation to be paid for services rendered to the Trust; and direct the trustee concerning program payments. The Trust has entered into agreements with Benefits Services, Incorporated and its subsidiary, Tamarack Management Corporation, to provide administrative services to the Trust. The Trust currently provides a program of medical and disability benefits, life insurance, and accidental death and dismemberment benefits to its participants. Based on the foregoing, you represent that the Trust,

as established and maintained by the state chiropractic associations, is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA.

Section 3(1) of ERISA defines an "employee welfare benefit plan" as:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean 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, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (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).

The Trust provides benefits among those identified in ERISA section 3(1) to its participants. However, to be an employee welfare benefit plan within the meaning of section 3(1), the Trust, among other criteria, must be established or maintained by an employer, an employee organization, or both. Since, in your letter, you represent that the status of the Trust as an employee welfare benefit plan turns on the issue of whether the Trust has been established by an employer (and the Department of Labor (the Department) sees no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved with the Trust), we shall address only that issue.

Section 3(5) of ERISA defines the term "employer" as 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.

A group or association such as the one described in your application must be a bona fide group or association of employers in order to meet the definition in section 3(5) of the Act. A determination of the existence of a bona fide employer group or association must be made on the basis of all relevant facts and circumstances. The following are among the factors which should be considered in making such a decision: the manner in which association members are solicited; identification of persons eligible to participate (and who actually participate) in the association; the presence of a pre-existing relationship among the members; the process by which and the purpose for which the organization was formed; the powers, rights, and privileges of employer members that exist by reason of their employer status; and the identification of the parties who actually control and direct the activities and operations of the association and its benefit program.

Your application indicates that control of the Trust is vested in the participating state chiropractic associations. The state associations are composed of members who have in common their affiliation with the chiropractic profession, and only licensed chiropractors are entitled to voting

membership in the associations. It appears that members who are also employers enjoy no special powers, rights or privileges because of their employer status. Similarly, control of the state associations is determined on the basis of the member's status within the chiropractic profession rather than the member's status as an employer. It is the Department's position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of the Act. See Opinions 80-68A (dated December 1, 1980, copy enclosed), and 81-51A (dated June 9, 1981, copy enclosed).¹

Accordingly, it is the Department's position that the state chiropractic associations would not be "employers" within the meaning of section 3(5) of ERISA in relation to a program of benefits which are among those identified in section 3(1) of ERISA and which is offered to the members of these chiropractic associations. Further, the Chiropractic Health Plan Trust, therefore, would not constitute an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

However, if an employer within the meaning of section 3(5) of ERISA adopts the Trust for the purpose of providing health benefits for its employees, that employer would have established an employee welfare benefit plan with regard to such employees.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosures

¹ It should be 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" if such other members have no voting rights in the association and no control over it. See Opinion 80-15A (dated March 14, 1980, copy enclosed).