U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-22A
Sec. 3(1), 3(4), 3(5), 3(40), 514

MAY 9 1983

Ms. Barbara B. Creed
Pillsbury, Madison & Sutro
Post Office Box 7880
San Francisco, California 94120

Dear Ms. Creed:

This is in reply to your letter of July 7, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether certain benefit programs sponsored by the Legal Services Nationwide Employee Benefits Organization, Inc. (NEBO), are employee welfare benefit plans within the meaning of section 3(1) of ERISA.

You advise that NEBO was incorporated in April 1981 for the purpose of providing employee/members and their dependents with medical, dental, long-term disability, short-term disability, and life insurance benefits. NEBO has two classes of membership. Class A consists of the individual, regular employees of the Class B members. Class B consists of legal service projects (the Projects) funded by the Legal Services Corporation (LSC) and LSC itself. NEBO has applied to the Internal Revenue Service for qualification as a voluntary employees' beneficiary association under section 501(c)(9) of the Internal Revenue Code of 1954 (the Code).

You further advise that LSC is a private, nonmembership, nonprofit corporation created by the Legal Services Corporation Act of 1974 for the purpose of providing financial support for legal assistance in noncriminal matters to persons of low and moderate income. All of the Projects are separately incorporated, nonprofit corporations which are tax-exempt under section 501(c)(3) of the Code and each employs attorneys who provide legal assistance to persons of low income.

Class B members of NEBO must be designated as eligible by the NEBO Board of Directors and elect to participate in the benefit programs offered by NEBO. Membership of Class B members terminates upon the dissolution of the Project, when the Project ceases to be funded by LSC, or when the Project elects to terminate its membership. Membership of Class A members terminates upon the member's death, when the Class B membership of the Project employing the member terminates, or when the member's qualifying

employment ceases. Only Class B members have voting rights and elect the directors who manage the affairs of NEBO or vote on matters submitted for a vote of the members.

The by-laws provide that NEBO can charge no dues but can charge appropriate fees or assessments to defray the costs of maintaining the benefit programs offered. Each Class B member determines the portion of the fees and assessments to be borne by it and the portion to be borne by its Class A members.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" in relevant part as:

> … 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 its 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 [or] death….

The benefit programs offered by NEBO provide benefits enumerated in this list. However, for a program to be an employee welfare benefit plan, in addition to providing a benefit enumerated in section 3(1), it must, among other criteria, be established or maintained by an employer, by an employee organization, or by both.

Section 3(4) of ERISA defines the term "employee organization" to mean "… 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."

NEBO does not constitute an employee organization within the first part of the definition contained in section 3(4), as it does not exist "for the purpose … of dealing with employers on behalf of employees concerning an employee benefit plan, or other matters incidental to employment relationships." Nor is NEBO an employees' beneficiary association under the second part of the definition in section 3(4), since employers, not employees, control NEBO's affairs.[1]

Section 3(5) of ERISA defines the term "employer" to mean "… 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 Department of Labor (the Department) has taken the position that, in order for any group or association to satisfy this definition, it must be a bona fide

[1] We note that our conclusion that NEBO is not an employees' beneficiary association under section 3(4) does not affect its status under section 501(c)(9) of the Code.

association of employers, subject, in both form and substance, to the control of its employer members.

The employer members of NEBO are all nonprofit legal service projects funded by LSC, and, according to the documents, these employer members elect NEBO's directors and vote on all matters submitted for vote of the members. However, the question of whether a group or association is subject, not only in form, but also in substance, to the control of its employer members is a factual question. Section 5.01 of ERISA Procedure 76-1 provides that the Department ordinarily will not issue an advisory opinion when the nature of the question is inherently factual. Accordingly, the Department will not issue an advisory opinion at this time with regard to whether NEBO is or is not a group or association of employers within the meaning of section 3(5) of ERISA.

However, if NEBO is, both in form and in substance, controlled by its employer members, we do not think its status as an "employer" for purposes of section 3(5) of ERISA would be vitiated solely because NEBO includes as a separate class of "members," the employees of participating employers, if, as appears to be the case, these employee "members" have no voting rights in NEBO and no control over its operation, and are members only in the sense that they (1) will be eligible to receive benefits under the programs adopted by NEBO, and (2) can, if their employer so elects, be assessed for contributions to help pay the costs of maintaining those programs.

Therefore, it is the view of the Department that if NEBO should prove to be, in fact as well as in form, controlled by its employer members, NEBO would be an "employer" within the meaning of section 3(5) of ERISA and, accordingly, each benefit program sponsored by NEBO would be an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

You should be aware, however, that even if the benefit programs sponsored by NEBO are employee welfare benefit plans within the meaning of section 3(1) of ERISA, the NEBO programs may still be subject to state insurance regulation. Congress has amended ERISA by adding new section 3(40), which defines the term "multiple employer welfare arrangement" (MEWA). (Act of January 14, 1983, Pub. L. 97- 473, §302(a).) New section 3(40)(A) states that a MEWA is:

> … an 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 --
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> (1) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
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> (2) by a rural electric cooperative.

Although ERISA section 514(a) generally preempts any state law relating to an employee benefit plan covered by title I of ERISA, section 514(b) (6) provides:

> (6)(A) Notwithstanding any other provisions of this section --
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> (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides --
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> (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and
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> (II) provisions to enforce such standards, and
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> (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.
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> (B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.
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> (C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.
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> (D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

The Department has decided that, at the present time, it will not issue regulations providing for an exemption procedure under ERISA section 514(b)(6)(B) and, therefore, no exemptions will be issued.

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,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs