

U.S. Department of Labor

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



Reply to the Attention of:

OPINION NO. 83-54A
Sec. 3(32), 4(b)(1)

OCT 21 1983

Mr. David Butler
Holland & Hart
Suite 2900
555 Seventeenth Street
Denver, Colorado 80201

Dear Mr. Butler:

This is in reply to correspondence by you and Mr. Thomas A. Gebow on behalf of the Western Interstate Commission for Higher Education (WICHE) concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Your most recent correspondence is dated January 31, 1983. Specifically, you request an advisory opinion that benefit plans for employees of WICHE are governmental plans within the meaning of section 3(32) of ERISA and, thus, that section 4(b)(1) of ERISA excludes the WICHE plans for its employees from coverage under title I of ERISA.

Correspondence and materials submitted on behalf of WICHE contain the following facts and representations. Federal law (Act of August 8, 1953, Public Law 83-226) enables any five or more named Western States to enter into the Western Regional Education Compact (the Compact). Article III of Public Law 83-226 terms the entity created by states choosing to participate in the Compact as a "body corporate of each compacting state and territory and an agency thereof." The Governors and State legislatures of thirteen Western States have ratified the Compact. In a ruling on August 10, 1954 on WICHE's tax exempt status, the Internal Revenue Service determined that WICHE was an "instrumentality of each compacting state". WICHE headquarters are in Boulder, Colorado.

Each Governor of a participating state names three representatives to the WICHE governing board and WICHE is subject to the joint control of the sponsoring states. Voting is by state, and a majority of states is necessary for a quorum. WICHE submits yearly activity reports to the Governor of each participating state and submits a budget to the Governor of each compacting state whenever and for whatever period of time required. Operating costs of WICHE are apportioned equally among the compacting states. A majority of voting states may, through WICHE, suspend rights, privileges, and benefits conferred by Compact when any participating state defaults in performance of its obligations assumed or imposed by the Compact.

Employee benefit plans for WICHE employees include an annuity program, group health insurance, group life insurance, and group disability insurance. The plans are funded either by the employer or by the employer and employee, together.

Currently, WICHE employees and employees of a separate non-profit organization with no claim to governmental status are grouped together for insurance purposes. You state that, if necessary for issuance of a favorable advisory opinion, the Department of Labor (the Department) should

assume WICHE will amend arrangements for its employees to provide that only WICHE employees are covered.

ERISA section 4(b)(1) excludes governmental plans from coverage. ERISA section 3(32) defines the term "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.... " Based on the factual situation you describe, the Department views WICHE as an "agency or instrumentality" of each state entering the Compact for purposes of section 3(32) of ERISA. Accordingly, based on the assumption that WICHE will modify its plans to include only WICHE employees, it is the position of the Department that plans "established and maintained" by WICHE for its employees are governmental plans. Thus, section 4(b)(1) of ERISA excludes the WICHE plans from coverage under title I of ERISA.

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,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs