

**U.S. Department of Labor**

Office of Pension and Welfare Benefit Programs  
Washington, D.C. 20210



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85-06A  
Sec. 3(1), 3(4), 3(5)

Mr. Steven C. Krueger  
Hoskins, King, McGannon, Hahn & Hurwitz  
Suite 1100 Commerce Bank Building  
922 Walnut Street  
Kansas City, Missouri 64106

Dear Mr. Krueger:

This is in reply to your request for an advisory opinion concerning whether title I of the Employee Retirement Income Security Act of 1974 (ERISA) is applicable to the proposed Money Back Health Protector Program (the Program) of the Missouri State Teachers Association (MSTA). Specifically, you request (on behalf of your client, Forrest T. Jones and Company) that the Department of Labor (the Department) issue an advisory opinion stating the Program is a governmental plan excluded from coverage under title I of ERISA.

If given effect, the proposed Program would be one of a number of programs offered to Missouri school districts for their employees by Forrest T. Jones and Company as agent for MSTA. Other programs currently in operation, included in a master insurance policy with New York Life Insurance Company, and briefly described in materials you forwarded to the Department appear to have certain factual differences from the proposed Program (for example, allowing for contributions by participants as well as by school districts). For that reason, and because only the proposed Program appears to be the subject of your request for an advisory opinion, this opinion affects only the status under title I of ERISA of the proposed Program and does not affect the status of other programs.

Participating employers under the proposed Program may be any school district in Missouri except those operating in Kansas City, St. Louis, or Springfield. Each school district will execute a separate agreement with Forrest T. Jones and Company as agent for MSTA under the master policy held by MSTA. Each school district's agreement will set the level of benefits and the classes of employees eligible for coverage. Only employees of the school district will be covered, but they need not be MSTA members. Each school district will pay all costs of the proposed Program for its own employees.

Under the proposed Program, the basic monthly charge payable by a school district will be divided into two components: (1) payment to New York Life Insurance Company for health

insurance benefits under the master insurance policy containing a proposed amendment/rider providing for payment of benefits only after a \$500 deductible is satisfied and (2) payment to Forrest T. Jones and Company of \$41.67 per month (\$500 divided by 12) to be held for payment of the first \$500 in benefits which would have been due under the present master policy offered to school districts which now contain no deductibility provision. Forrest T. Jones and Company will keep the funds it receives from the school districts in a separate "side fund" consisting of a deposit administration agreement with a separate account for each covered employee, and benefits paid by Forrest T. Jones from the account (up to the total of \$500 per year credited) will be subtracted therefrom.

No copy of the deposit administration agreement was submitted with your request. In addition, no explanation was provided with your request concerning whether an individual account in a side fund will merely be an accounting entry and whether or how funds will be pooled to pay claims presented prior to sufficient monthly contributions accumulating in an individual's account to cover the claims. Because of this lack of information, the Department expresses no opinion as to the extent to which the fiduciary provisions of ERISA apply to Forrest T. Jones and Company in its administration of the "side fund."

Each participating school district may elect to have a stated rate of interest on the side fund of its employees either (1) credited against its costs for the proposed Program or (2) credited to the individual employee's account within the side fund. It appears that an employee will be vested in any balance in the individual employee's account within the side fund after the first year for which contributions are made, and such amounts will be payable to the employee on termination of employment. Forrest T. Jones and Company will collect monthly payments and process claims in addition to holding the side fund for ultimate distribution to employees.

On the basis of the foregoing, you have requested the Department's opinion as to whether the proposed Program will be covered by ERISA. You specifically state your belief that the Program will be a "governmental plan" within the meaning of section 3(32) of ERISA, and therefore exempt from ERISA coverage under section 4(b)(1).

Pursuant to section 4, ERISA covers employee benefit plans unless otherwise exempted. Section 3(3) of ERISA defines the term "employee benefit plan" to include employee welfare benefit plans. 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, 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).

If the proposed Program will provide the types of benefits identified in section 3(1) and if, among other criteria, the Program is established or maintained by an employer, an employee organization, or by both, the Program will be an ERISA-covered plan unless exempted in section 4(b).

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.

Although it appears that many different employers will provide employee benefits through the Program, the Department has taken the position that a single employee benefit plan might be established or maintained by a bona fide group or association of employers within the meaning of section 3(5). However, the record does not indicate the existence of any such cognizable, bona fide employer group or association. As such, the Program will be deemed to be an employee welfare benefit plan within the meaning of section 3(1) only if it is established or maintained by an employee organization within the meaning of section 3(4) of ERISA.

The term "employee organization" is defined in section 3(4) of ERISA to include:

... 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.

It appears from the information submitted in support of this application that MSTA may be an employee organization within the meaning of the first part of the definition in section 3(4) since it acts on behalf of its employee members in dealing with employers concerning matters incidental to employment relationships. However, it appears that the program will cover participants who are neither represented nor employed by MSTA. As to these school district employees, MSTA is not an employee organization within the meaning of the first part of section 3(4) of ERISA. As a result, the Program will be viewed as a single employee welfare benefit

plan only if it is established or maintained by an employees' beneficiary association within the meaning of the second part of section 3(4) of ERISA.

Although the term "employees' beneficiary association" is not defined in title I of ERISA, the Department has previously indicated it will use criteria it developed for defining the same term under the Welfare and Pension Plans Disclosure Act (WPPDA). The WPPDA criteria are:

- (1) Membership in an employees' beneficiary association is conditioned on employment status--for example, if membership is limited to employees of a certain employer or members of one union;
- (2) An employees' beneficiary association has a formal organization, with officers, bylaws or other indications of formality;
- (3) An employees' beneficiary association generally does not deal with employers;
- (4) An employees' beneficiary association which is an "employee organization" within the meaning of the statute is organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

Applying these criteria to the situation described in the application, it is apparent that, although all the participants in the proposed Program will be employees of various school districts, there is no formally organized employees' beneficiary association. As a result, the Department does not believe that the proposed Program will be established or maintained by an employees' beneficiary association within the meaning of section 3(4) of ERISA.

In summary, the Program will not be established or maintained by an employer since the many contributing employers are not a bona fide employer group or association within the meaning of section 3(5). The Program will not be established or maintained by a labor union within the meaning of the first part of section 3(4) since not all participants are represented or employed by MSTA. There is also no employees' beneficiary association under the WPPDA criteria and the second part of section 3(4). As a result, it is the position of the Department that the proposed Program is not established or maintained by an employer, employee organization, or both, and is not therefore an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

Because the Program is not an employee welfare benefit plan within the meaning of section 3(1), the Program is not an employee benefit plan covered under section 4(a) of ERISA. In view of this determination, it is unnecessary to determine whether the Program is a governmental plan within the meaning of section 3(32) of ERISA.

It should be noted that, although the Program itself will not be an ERISA-covered plan, the individual benefit arrangements entered into by the various employers contributing to the Program may be employee welfare benefit plans within the meaning of section 3(1). These individual arrangements would be subject to ERISA regulation unless their amount and method of public funding, participant composition, and relationship to governmental entities cause them to be governmental plans within the meaning of section 3(32) and therefore exempt from ERISA coverage under section 4(b)(1). Such determinations are made on a case-by-case basis.

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,

Elliot I. Daniel

Acting Assistant Administrator for Regulations and Interpretations