

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



JUL 20 1989

ERISA OPINION 89-13A
Sec. 3(40), 3(5)

Mr. John N. Erlenborn
Seyfarth, Shaw, Fairweather & Geraldson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4004

Dear Mr. Erlenborn:

This is in reply to your letter requesting an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether either the Better Business Bureau Insurance Trust (the Trust) or the utilization of the Trust to provide health care and other benefits to the employees of Griffith's Five Day Tire Store (the Store) constitutes an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Trust (a/k/a the Better Business Bureau Insurance Trust No. 6 and the Transportation, Communication and Public Utilities Industry Trust) operates under a Trust Agreement dated June 1, 1977, between the Better Business Bureau of Rhode Island, Inc. as Settlor and the Rhode Island Hospital Trust National Bank as Trustee. You further advise that the Trust may be adopted by any member firm of any Better Business Bureau to provide health care benefits to the firm's employees. On April 1, 1982, the Store, a member of the Better Business Bureau of Palm Beach County, adopted the Trust to provide health care benefits to its employees and their beneficiaries. Under the terms of the Trust Agreement, the Trustee may be removed by the Settlor and successor Trustees will be designated by the Settlor. The Settlor also has the power to amend, alter or revoke the Trust Agreement.

Section 3(1) of title I 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).

Thus, to be an employee welfare benefit plan within the meaning of section 3(1), an entity must not only provide benefits among those described in that section but also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined in sections 3(4) and 3(5) of title I of ERISA respectively as follows:

(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.

There is no indication in the information you submitted that an employee organization within the meaning of section 3(4) is in any way involved in the establishment or maintenance of the Trust or the extension of benefits of the Trust to the employees of the Store. Therefore, this letter will examine only whether an employer within the meaning of section 3(5) established or maintains the Trust or extended the benefits of the Trust to the employees of the Store.

The definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits for their employees. On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of any genuine organizational relationship among the employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting

relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In addition, it is the Department of Labor's (the Department) view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

Based on the information you submitted, it does not appear that the Trust is under the control, in either form or substance, of all the employers which participate in the Trust. The power to change Trustees and to amend, alter or revoke the Trust is reserved under the Trust Agreement of June 1, 1977 to the Settlor -- i.e., the Better Business Bureau of Rhode Island, Inc. Participating employers who belong to Better Business Bureaus other than the Settlor have no control, directly or indirectly, over the Trust. Accordingly, it is the Department's position that the Trust does not constitute an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA. However, it has been the view of the Department that, if an employer (or an employee organization) adopts for its employees (or members) a program of benefits sponsored by a group or association that does not itself constitute an "employer" or an "employee organization," such an employer or employee organization may have established a separate, single-employer (or single employee organization) employee benefit plan covered by title I of ERISA. Therefore, it is the Department's position that the Store, an employer within the meaning of section 3(5), established a separate single-employer employee welfare benefit plan covered by title I of ERISA when it adopted the Trust to provide health care benefits to the employees of the Store and their beneficiaries.

We note that, even if the Trust were an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA, it would appear to be a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of that title. Section 3(40)(A) defines the term "MEWA" to include:

... 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--

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
- (ii) by a rural electric cooperative.

Although section 514(a) of title I of ERISA generally preempts any state law which relates to an employee benefit plan covered by title I of ERISA, section 514(b)(6) provides an exception which permits state regulation of employee welfare benefit plans which are MEWAs to the extent provided in subsection 514(b)(6)(A).

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,

Robert J. Doyle
Director of Regulations and Interpretations