

U.S. Department of Labor

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



AUG 18 1989

ERISA OPINION 89-19A
Sec. 3(40)

Mr. Roy M. Larson
Tacoma Industrial Trust
808 No. 2nd
Tacoma, Washington 98403

Dear Mr. Larson:

This is in response 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 the Tacoma Industrial Trust (the Trust) is an employee welfare benefit plan covered by title I of ERISA.

You advised that the Trust was established pursuant to a trust agreement dated February 24, 1978, by the trustees. The trust agreement states that it was established to provide life and accident, dental, vision care, drugs, pharmaceutical supplies, health benefits and prepaid legal benefits for employees of participating employers. From the information you submitted, it appears the Trust currently offers accidental death and dismemberment, short term disability, dental, and health benefits.

Trustees of the Trust are designated by the trustees then serving and serve for a term designated at the time of their selection by the Chairman of the Trust. The trustees are empowered to establish and administer a plan or plans to provide benefits to employees of participating employers. Participation in the Trust is open to any employer who agrees in writing to participate. The trust agreement defines "employer" as any association, individual, partnership or corporation. You further advise that there is no group or association of the participating employers that deals with the Trust.

The term "employee welfare benefit plan" is defined in section 3(1) of title I of ERISA to include:

... any plan, fund, or program which was heretofore 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 service, 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).

Although the Trust provides health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined respectively by ERISA sections 3(4) and 3(5) as:

(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 your letter that there is any employee organization in any way involved in the establishment or maintenance of the Trust. Accordingly, this letter will only address whether the Trust was established or maintained by an employer within the meaning of section 3(5) of title I of ERISA.

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 to their employees. On the other hand, where several unrelated employers merely execute identically worded "trust agreements" or similar documents as a means to fund benefits, in the absence of any genuine organizational relationship between these employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a purported 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 the Department of Labor's (the Department) view, 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 is the position of the Department that the Trust was not established and is not maintained by a cognizable, bona fide group or association of employers. Rather, the Trust was formed solely by the trustees and the participating employers do not seem to have any control over the activities or operations of the Trust or the trustees. Moreover, the Trust appears to be open to any employer who wishes to participate without regard to the employer's trade or industry or the presence or lack of any preexisting relationships between the participating employers.

Accordingly, it is the position of the Department that the Trust is not an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and is not covered by that title. However, it is our view that each employer within the meaning of section 3(5) of ERISA which has elected to provide benefits described in section 3(1) to its employees through the Trust has established its own separate employee benefit plan subject to title I of ERISA.

Part 1 of title I of ERISA generally requires the administrator of every employee welfare benefit plan or employee pension benefit plan covered by that title to meet certain reporting and disclosure requirements. In accordance with the foregoing, although the Trust itself would not be an employee benefit plan covered by title I and no reports or disclosure would have to be made on its behalf, an administrator of each of the separate employee welfare benefit plans which utilize the Trust to provide welfare benefits would have to comply with the applicable reporting and disclosure requirements of Part 1. However, we note that regulation sections 29 C.F.R. 2520.103 and 2520.104 do provide limited exceptions depending on whether an employee welfare benefit plan meets the criteria set forth therein.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it 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