

U.S. Department of Labor

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



APR 11 1990

ERISA OPINION 90-08A
Sec. 3(1), 3(5)

Mr. Alan P. Ridsen
Manager, Corporate Financial Service
Blue Cross/Blue Shield of West Virginia
200 Kanawha Boulevard, E.
P.O. Box 1353
Charleston, West Virginia 25325

Dear Mr. Ridsen:

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 your Plan No. 506, Employee Accident and Sickness Program (Plan 506), which Blue Cross/Blue Shield of West Virginia (Blue Cross) offers to employees whose employers will make it available through payroll deductions, is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise Plan 506 is a program underwritten by Fort Dearborn Life Insurance Company (Fort Dearborn) under which employees of a company are offered an opportunity to have supplemental short-term disability coverage through payroll deductions. Participation is completely voluntary and no contributions are made by an employer. Employers receive no consideration in connection with the program. Employers collect the premiums through payroll deduction and remit them to Fort Dearborn. You further advise that employers do not endorse the program and that there is no organizational or other relationships between employers whose employees participate in the program. The program is solely under the control of Fort Dearborn.

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 matter 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 Plan 506. Therefore, this letter will examine only whether an employer within the meaning of section 3(5) established or maintains Plan 506.

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 have submitted, it appears that Plan 506 is not established or maintained by an employer within the meaning of section 3(1) of ERISA because the employers involved are not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. Except for the participation of their employees in the program, the employers are totally unrelated. They appear to have no organizational relationship or commonality of interest such as that which would exist with employers in the same industry. Further, it does not appear that Plan 506 is under the control, in either form or substance, of all the employers whose employees participate in Plan 506. Instead, control over Plan 506 rests with Fort Dearborn, the insurer. Accordingly, it is the Department's position that Plan 506 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 offered by an insurer or other entity 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.

In regulation section 29 C.F.R. 2510.3-1, the Department identified certain practices which would not be considered to be employee welfare benefit plans within the meaning of section 3(1) of title I of ERISA. Specifically, regulation subsection 2510.3-1(j) provides:

(j) Certain group or group-type insurance programs. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

- (1) no contributions are made by an employer or employee organization;
- (2) participation in the program is completely voluntary for employees or members;
- (3) the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
- (4) the employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

A determination of whether an insurance program, such as Plan 506, offered through payroll deductions to the employees of an employer is a group or group-type insurance program within the criteria set forth in regulation subsection 2510.3-1(j) would be one made with respect to each individual employer whose employees participate in the program. Under the facts as presented, it appears that Plan 506 may generally meet the criteria of subsections 2510.3-1(j)(1), (2), and (4), because no contributions are made by or consideration received by any employer, and employee participation is voluntary. However, Plan 506 could still be considered an employee welfare benefit plan to the extent that it is endorsed within the meaning of subsection 2510.3-1(j)(3) by any employer whose employees participate in the program. The Department has taken the position that the issue of whether an employer has endorsed a program offered to the employees may be inherently factual in nature. In ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed), the Department stated that when an issue is inherently factual in nature an advisory opinion will generally not be issued.

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 for Regulations and Interpretations