U.S. Department of Labor

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

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ERISA OPINION 90-19A
Sec. 3(1), 3(4), 3(5), 3(40)

R. Terry Butler, Esq.
Office of Legal Services
Department of Insurance and Treasurer
State of Florida
413-B Larson Building
Tallahassee, Florida 32399-0300

Dear Mr. Butler:

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 the Alarm Association of Florida Health and Welfare Benefit Plan (the Plan) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the preemption provisions of section 514 of that title preempt state regulation of the Plan.

You advise that the Plan was established by the Alarm Association of Florida, Inc. (the Association). On November 1, 1985, the Association entered into an Administrator Agreement with Dealers Association Plan (DAP) for DAP to administer the Plan. Article I, section 1.1 of that Administrator Agreement provides that the Association's trust to provide Plan benefits was established "to obtain and provide for its Members, medical, surgical, or hospital care, or benefits, or benefits in the event of sickness, accident, disability, death or prepaid legal services, or any benefit described in section 302(c) of the Labor Management Relations Act of l974 [sic]." The summary plan description of the Plan which you submitted indicates that only firms who are paid members in good standing of the Association are eligible to adopt the Plan and that all permanent, full-time employees who work a minimum of 30 hours per week for a participating employer and their dependents are eligible to participate.

Under the Articles of Incorporation executed July 2, 1976, for the Association, there are two classes of membership. Article III provides, in pertinent part:

> A. There shall be two classes of membership for the Association:
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> (a) Regular Membership.
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> Regular membership in the Association shall be open to any individual, partnership, firm or corporation engaged in the business of installing and providing alarm service or maintenance under contract in the electrical protection field for a period of at least one year preceding the date of application for membership.
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> (b) Association Membership.
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> An Associate Membership shall be open to any individual, partnership, firm, or corporation who is not engaged directly in the business of installing and providing contract alarm services in the electrical protection industry, but who may supply any services, equipment, or otherwise to the regular members.

No constitution or by-laws for the Association were included in the materials you submitted.

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).

Although the Plan provides health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or by 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.
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> (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 submission that the Association, which established and maintains the Plan, is an employee organization within the meaning of section 3(4) of ERISA. The Association does not exist ". . . for the purpose, in whole or in part, of dealing employers. . . ." Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One of those criteria is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in the Association is not conditioned upon one's status as an employee, but rather is open to both employers and employees without regard to employment status. Thus, the Plan is not established or maintained by an employee organization within the meaning of section 3(4) of ERISA.

With regard to the issue os whether the Association is an "employer" within the meaning of section 3(5) of ERISA, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a 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.

The Department has taken the position that where the membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association or employers within the meaning of section 3(5) of ERISA. Membership in the Association is open to anyone engaged in a particular industry and is not conditioned on one's status as an employer. Thus, it would appear that the Association is not a bona fide association of employer with respect to its total membership.

Additionally, we note that from the limited information you submitted the Department cannot determine which class or classes of membership having voting rights and thus cannot determine who has control of the Association. In this regard, the Department believes that the concept of an association acting for an employer with respect to an employee benefit plan embodies a requirement, at a minimum, that such employer have a voice in the management of the association. For that reason, if the Plan is making benefits available to employees of non-voting employer members of the Association, the Association would not be acting (in relation to the Plan) for such members within the meaning of section 3(5) of ERISA, and, therefore, the Plan would not be a title I plan with respect to such members and their employees. However, any employer that establishes and maintains a welfare benefit program for its employees through the Plan, may have established a separate, single-employer, welfare benefit plan covered by title I of ERISA. This letter does not, however, address any of the issues surrounding the ERISA duties or obligations of the Plan or any of its agents with respect to such an ERISA plan.

Finally, we note that section 3(40)(A) of title I of ERISA defines the term "multiple employer welfare arrangements" (MEWA), to include:

> (40)(A) The term "multiple employer welfare arrangement" means 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 (l) 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 --
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> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
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> (ii) by a rural electric cooperative.

On the basis of the information provided, the Plan was established and is maintained for the purpose of providing benefits described in ERISA section 3(1) to the employees of two or more employers. Further, because the Plan is not established or maintained (i) under or pursuant to one or more collective bargaining agreements or (ii) by a rural electric cooperative, the exceptions to the definition of "multiple employer welfare arrangement" would not apply to the Plan. Therefore, it is the view of the Department that the Plan, regardless of whether it is an employee welfare benefit plan covered by title I of ERISA, constitutes a "multiple employer welfare arrangement" within the meaning of ERISA section 3(40).

Section 514(a) of title I of ERISA generally preempts any state law which relates to an employee benefit plan covered by that title. However, section 514(b)(6) provides, with regard to MEWAs:

> (6)(A) Notwithstanding any other provision of this section--
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> (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--
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> (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and
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> (II) provisions to enforce such standards, and
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> (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

Thus, the general preemption provision of section 514(a) of ERISA applies only to state laws relating to employee benefit plans covered by title I of ERISA. Therefore, the application of state law to the Plan is not preempted whether or not the Plan is covered by title I of ERISA since the Plan is a MEWA and the exception provided by section 514(b)(6) permitting state regulation of MEWAs would apply. Finally, the Department has previously stated it is not providing MEWAs exemptions from state regulation under section 514(b)(6)(B). That position has not changed at this time.

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