U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

May 8, 2006

The Honorable George J. Chanos
Attorney General
Nevada Department of Justice
555 East Washington Avenue
Las Vegas, Nevada 89101-1088

Dear Attorney General Chanos:

This is in response to the request from your Office for guidance regarding the definition of "multiple employer welfare arrangement" (MEWA) in section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA). Your inquiry indicates that an issue has arisen in connection with an order issued by the Division of Insurance of the Nevada Department of Business and Industry directing Payroll Solutions Group Limited (Company), a professional employer organization doing business in Nevada, to cease and desist offering unlicensed insurance through a MEWA, the PSG Employee Medical Plan (Plan), to its client employers in the State of Nevada. The Company is resisting the order claiming the Plan is a single employer plan, not a MEWA, and that section 514(a) of ERISA preempts the application of state insurance regulation.

Section 514(a) of Title I of ERISA generally preempts state laws purporting to regulate an employee benefit plan covered under that title. There are, however, exceptions to this general preemption provision. The relevant exception for purposes of your inquiry is in subsection 514(b)(6)(A), which allows state insurance regulation of MEWAs without regard to whether they are employee benefit plans covered by Title I of ERISA. Section 3(40)(A) of ERISA defines the term MEWA, in relevant part, to mean: "[A]n 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 [section 3(1) of ERISA] 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 [of Labor] finds to be collective bargaining agreements, (ii) by a rural electric cooperative, or (iii) by a rural telephone cooperative association."

The Department has previously expressed the view that a plan that is maintained by a single employer for the exclusive purpose of providing benefits to that employer's employees, former employees, or their beneficiaries, would be a single employer plan

and not a MEWA within the meaning of ERISA section 3(40). *See* Employee Benefits Security Administration, U.S. Department of Labor, MEWAs - Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation 30 (2003). On the other hand, the Department has also previously expressed the view that where the employees participating in the plan of an employee leasing organization include employees of two or more client employers, or employees of the leasing organization and at least one client employer, the plan of the leasing organization would, by definition, constitute a MEWA because the plan would be providing benefits to the employees of two or more employers. Advisory Opinion 92-07A (Feb. 20, 1992). The Department believes the same analysis is applicable to plans of professional employer organizations covering the employees of their client companies. The relevant issue for purposes of your inquiry thus is whether the employees who participate in the Plan are exclusively employees of the Company, or are, rather, employees of more than one employer.

The term "employee" is defined in section 3(6) of ERISA to mean "any individual employed by an employer." Whether an individual is an "employee" for purposes section 3(6) of Title I of ERISA generally requires a determination of whether there is an employer-employee relationship applying common law principles. *See Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992); *Yates v. Hendon*, 541 U.S. 1 (2004). In making such determinations, therefore, consideration must be given, among other matters, to whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished; whether the person for whom services are being performed has the right to discharge the individual performing the services; and whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services. Advisory Opinion 95-29A (Dec. 7, 1995); Advisory Opinion 95-22A (Aug. 25, 1995). In this regard, the Department has taken the position that payment of wages; payment of federal, state, and local employment taxes; and the provision of health or pension benefits (or both) are not determinative of an employee-employer relationship. Advisory Opinion 93-29A (Oct. 22, 1993). Further, a contract purporting to create an employer-employee relationship also will not control where common law factors (as applied to the facts and circumstances) establish that the relationship does not exist. Advisory Opinion 2005-12A (May 16, 2005); *see also* Advisory Opinion 95-22A (Aug. 25, 1995).

Included in your submission was a copy of a letter, dated March 24, 2004, from the Department of Labor's Regional Office in San Francisco to Harold Winters, President of the Company, and Tim Menifield, Trustee of the Plan. In that letter, the Department described the Company as a professional employee organization that executes leasing agreements with client employers from various industries. Under the leasing arrangement, employees are "shared" by the Company and the respective client

employer, but the Company and the client employer have different obligations. In exchange for a fee, the Company performs certain administrative and support services including payroll, benefits, and worker's compensation. The payments collected by the Company from participating employers include health contribution payments or "premiums" that are to be used to pay medical claims under the Plan's self-funded arrangement. The Department's letter concluded that the client employers, in practice, retain the responsibility of supervising, training, hiring, and firing of its employees, and thus, the client employers and their employees have a common-law employer-employee relationship.

Under the circumstances set forth above, the participants in the Plan thus include employees of two or more employers, notwithstanding the fact that the Company may be a co-employer or joint employer for other purposes. A professional employer organization's responsibilities as employer, or co-employer, under laws other than ERISA is not determinative for purposes of identifying a single employer to the exclusion of others under ERISA section 3(40). For example, the employer responsible for purposes of withholding federal income taxes and Federal Insurance Contributions Act tax payments can be the trustee of an employer's bankruptcy estate, *Otte v. U.S.*, 119 U.S. 43 (1974), the regulations under the Fair Labor Standards Act of 1938 contemplate joint compliance responsibility among joint employers, 29 C.F.R. § 791.2(a), and under the Family Leave Medical Act of 1983 a leasing company that is an employer of employees is generally a joint employer and compliance requirements are divided among the leasing company, as primary employer, and its client employer as secondary employer. 29 C.F.R. § 825.1(b),(c). Similarly, although the Department expressed the view that a leasing company acting as co-employer was an employer under ERISA section 3(5) by acting directly or indirectly in the interest of an employer in establishing or maintaining an employee benefit plan within the meaning of ERISA section 3(1), the Department concluded that the same plan was a MEWA. Advisory Opinion 95-29A (Dec. 7, 1995).[1] Therefore, even if the Plan were found to be an employee benefit plan within the meaning of section 3(1), it would be a multiple employer plan, not a single employer plan, and would be a MEWA subject to state insurance regulation at least to the extent permitted under section 514(b)(6)(A) of ERISA.[2]

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[1] Further, although in connection with the proposed regulations governing Form M-1 reporting under ERISA section 101(g) representatives of professional employer organizations argued that their group health plans should not be considered MEWAs because the organizations act as co-employers, the Department was unable to conclude that such plans do not cover the employees of more than one employer. 68 FR 17497 (2003).

[2] If a MEWA is "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards (*See* section 514(b)(6)(A)(i)). If the MEWA is not fully insured, any law of any state which regulates insurance may apply to the extent not inconsistent with title I of ERISA (*See* 514(b)(6)(A)(ii)).

You also asked that we specifically address the Company's contention that the Plan cannot be a MEWA because Nevada state law provides that "an employee leasing company shall be deemed to be the employer of its leased employees for the purposes of sponsoring and maintaining any benefit plans." Nev. Rev. Stat. § 616B.691(2) (2005). It is the Department's view that whether an arrangement is a MEWA within the meaning of section 3(40) is a question of federal law. *See, e.g., Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, n. 5 (1992) (Court construed the term employee under ERISA to incorporate "the general common law of agency, rather than ... the law of any particular State."); *see also Serapion v. Martinez*, 119 F3d 982, 988 (1st Cir. 1997) (court rejected arguments regarding employee status of partners under Title VII of the Human Rights Act of 1964 based on Puerto Rico law; absent plain indication of contrary intent, "courts ought to presume that the interpretation of a federal statute is not dependent upon state law"). Thus, a state statute addressing the leasing company relationship to leased employees would not govern the determination of whether any particular arrangement is a MEWA by reason of providing benefits to the employees of two or more employers.

This letter should not be read as expressing the view that the Plan is itself an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA, or that the Company would be shielded from the consequences of employer or co-employer status under ERISA or any other law.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations