U.S. Department of Labor Pension and Welfare Benefits Administration
Washington DC 20210

January 27, 1992

Mr. Chuck Huff
Georgia Insurance Department
Seventh Floor, West Tower
Floyd Building
2 Martin Luther King, Jr.,
Drive
Atlanta, Georgia 30334

92-05A
ERISA SECTION
3(40),
514(b)(6)

Dear Mr. Huff:

This is in response to your request regarding the status of a self-funded health benefit program sponsored by Action Staffing, Inc. (Action) under title I of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested an opinion as to whether the Action health benefit program is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA, and whether the Action health benefit program is a multiple employer welfare arrangement (MEWA), within the meaning of ERISA section 3(40) and, therefore, subject to applicable state insurance laws at least to the extent permitted under section 514(b)(6)(A) of title I of ERISA.

According to your letter, Action identifies its operations as those of a "staff leasing" company. Action markets its services and issues proposals to potential client employers in a variety of trades and businesses. If a client employer agrees to the terms of the proposal, an Agreement for Services is executed with Action. Under the terms of the Agreement for Services, a specimen copy of which accompanied your request, Action agrees to lease personnel to the client employer, subject to the payment of certain fees being paid by the client employer. Pursuant to the "Services" section of the Agreement for Services, it is provided that:

> Action shall ... provide the following services with regard to the leased employees: The recruitment, hiring, directing and controlling of employees in their day-to-day assignments; the disciplining, replacing, termination and the designation of the date of separation from employment; the promotion, reward, evaluation and from time to time the redetermination of the wages, hours and other terms and conditions of employment of

Action maintains a self-funded health program for leased employees.

With regard to its health benefit program, Action represents that the program is an ERISA-covered employee welfare benefit plan maintained by a single employer, i.e., Action.

Information submitted with your request, however, indicates that, in at least one instance, an Action client, with employees participating in the Action health benefit program, hired Action to enable employees to participate in the Action health benefit program. According to the information provided, the client, rather than Action, retains the right to control, evaluate, direct, hire and fire all employees.

ERISA section 3(40)(A) defines the term "multiple employer welfare arrangement" to mean:

> . . . 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 arrangement does not include any plan or 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,
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> (ii) by a rural electric cooperative, or
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> (iii) by a rural telephone cooperative association.

Inasmuch as there is no indication that the Action health benefit program is established or maintained under or pursuant to one or more collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association, the only issue relating to the health program's status as a MEWA appears to be whether the program provides benefits, as described in ERISA section 3(1), "to the employees of two or more employers." The resolution of this issue is dependent on whether, for purposes of ERISA section 3(40), the employees covered by the Action health benefit program are employees of a single employer (i.e., Action) or more than one employer (i.e., Action's clients).

ERISA section 3(5) defines the term "employer" to mean:

> . . . 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.

As reflected above, the term "employer", for purposes of title I of ERISA, encompasses not only persons with respect to whom there exists an employer-employee relationship between the employer and individuals covered by the plan (i.e., persons acting directly as an employer), but also certain persons, groups and associations, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered under an employee benefit plan. Therefore, merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.

The term "employee" is defined in ERISA section 3(6) to mean "any individual employed by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles and taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given 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, among other considerations.

While the Action Agreement for Services submitted with your request purports, with respect to the leased employees, to establish in Action the authority and control associated with a common law employer-employee relationship, your submission indicates that in at least one instance the client employer, rather than Action, actually retained and exercised such authority and control`

In this regard, it should be noted that a contract purporting to create an employer-employee relationship will not control where common law factors (as applied to the facts and circumstances) establish that the relationship does not exist.

It should also be noted that it is the view of the Department that where the employees participating in the plan of an employee leasing organization include "employees" of two or more client (or "recipient") 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.

On the basis of the information provided, the Action health benefit program covered at least one client's employees with respect to whom Action did not have an employer-employee relationship and, accordingly, were not "employees" of Action within the meaning of ERISA section 3(6). Therefore, in the absence of any indication that Action and its client employers constitute a "control group" within the meaning of ERISA section 3(40)(B)(i), it is the view of the Department that the Action health benefit program provides benefits to the employees of two or more employers and is, therefore, a multiple employer welfare arrangement within the meaning section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the Action health benefit program to the extent provided in ERISA section 514(b)(6)(A). In this regard, we are enclosing, for your information, a copy of Opinion 90-18A (dated July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to section 514(b)(6)(A) of ERISA.

Because your request for an opinion was concerned primarily with the issue of whether or not the Action health benefit program is subject to the applicable regulatory authority of the State of Georgia's insurance laws or is saved from such authority under the general preemption provision of section 514(a) of title I of ERISA, and because of the opinion above, we have determined it is not necessary at this time to render an opinion as to whether the Action health benefit program is an employee welfare benefit plan within the meaning of section 3(1) of that title.

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

Enclosure

*Although we conclude in this situation that some of the individuals participating as"employees" in the health benefit program are "employees" of the client employers, the Department notes that Action may also considered an "employer" within the meaning of ERISA section 3(5).