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

93-29A

Mr. Alfred W. Gross
Deputy Commissioner
Virginia Bureau of Insurance
Box 1157
Richmond, Virginia 23209

Dear Mr. Gross:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a health benefit program (the ERM Program) offered by Employers Resource Management Company, Inc. (ERM) is a multiple employer welfare arrangement (MEWA) within the meaning of ERISA section 3(40).

The following facts and representations are contained in materials submitted by your office. ERM is an employee leasing firm that markets certain services relating to employees of client companies. A client company (the Client) retains ERM by executing a "Service Agreement" that specifies the terms and conditions of the services to be provided and the fees payable for those services.

The "Services" section of the Service Agreement states that ERM is an independent contractor providing "management services to Client for certain of Client's employer responsibilities." It provides that ERM is responsible for "payment of employer federal, state and local taxes, those various employee benefits which may be specified, and all required federal, state and local employee payments or withholdings from wages." It also provides that ERM has sole discretion to establish and maintain an employee welfare benefit plan as defined in ERISA and that ERM agrees to hold harmless and indemnify the Client for any failure to pay any required benefit or other specified payment.

The "Administration" section of the Service Agreement generally provides that ERM may exercise the right to direct other aspects of management not designated to the Client. The management functions that may be exercised by ERM are described to include, but are not limited to, recruiting, determining qualifications, hiring, training, evaluation, supervision, discipline, replacement, and termination of employees.

The "Administration" section also imposes specific administrative duties on the Client. These duties include periodically reviewing and evaluating employee performance and wages; recommending adjustments to employee wages, titles and functions; verifying employee time submission; and assisting ERM with administering unemployment claims and labor complaints. The Client also agrees to indemnify and hold harmless ERM for claims arising out of specific conduct of employees who are made available to the Client by ERM.

The "Insurance" section of the Service Agreement gives ERM the option either to maintain workers compensation insurance covering the employees with respect to whom it provides services, or to provide occupational accident and disease benefits under the ERM Program.

The information you have submitted indicates the ERM offers the ERM Program as an optional part of its services. If a Client contracts for this service, the ERM Program provides health benefits to employees with respect to whom ERM provides management services.

ERM maintains that it acts as a "fiscal employer" or "co-employer" of employees with respect to whom it provides management services. All of the documents submitted indicate that employer responsibilities with respect to the employees covered by the ERM program are expected to be divided between ERM and the Client.

For example, section 5.04 of the summary plan description for the ERM Program and section 3.01(e) of the trust agreement for the ERM Program both define the term "Co-Employer" to mean "any client company of E.R.M.'s which enters into a Contract with E.R.M. whereby such client company and E.R.M. act as Employers of such client companies' [sic] Employees." These documents define "Employer" to mean "both E.R.M. and its Co-Employers." Further, marketing information disseminated by ERM (which you supplied to us) describes "co-employment" as

. . . a business arrangement between your company and [ERM] to share employer responsibilities. As the managing employer, you retain the responsibilities of hiring, firing, and supervising your employees. You're still the boss, just like in the past, and you continue to run your business, making all the management decisions. [ERM] becomes the administrative employer; handling the "paperwork" side of your business -- payroll, personnel and benefits administration.

The term "multiple employer welfare arrangement" is defined in ERISA section 3(40)(A) as:

. . . 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 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 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.

The only issue relating to the ERM Program's status as a MEWA presented by this case is whether the Program provides health benefits "to the employees of two or more employer." [1] This issue must be resolved by determining whether, for purposes of ERISA section 3(40)(A), the employees who participate in the ERM Program are exclusively employees of a single employer, or are, rather, employees of more than one employer.

Section 3(6) of ERISA defines "employee" as "any individual employed by an employer." Section 3(5) of ERISA defines "employer" as "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 any employer in such capacity."

In order for an individual covered by a plan to be considered an "employee" of an "employer" for purpose of section 3(6), an employer-employee relationship must exist between the employer and the individual. The Department has taken the position that, for purposes of section 3(6), such determinations must be made by applying common law of agency principles. [2] In applying common law principles, consideration must be given to, among other things, 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 service. In general, whether an employer-employee relationship exists is a question that must be determined on the basis of the facts and circumstances involved. In this regard, payment of wages; payment of federal, state, and local employment taxes; and the provision of health or pension benefits (or both) are not the sole determinants of an employee-employer relationship. Moreover, a contract purporting to create an employer-employee relationship surrounding the contract.

ERM maintains that the ERM Program is a single-employer plan exempt from state insurance regulation under ERISA because ERM is the "co-employer" of all of the employees covered under the ERM Program. However, the Service Agreement and the other documents concerning the ERM Program clearly contemplate that Clients of ERM will, in many instances, retain significant employer functions.

Specifically, the Service Agreement's characterization of ERM as an "independent contractor" providing "management services" to Clients who may exercise significant employer functions, and the acknowledgements in the summary plan description and the trust agreement of the employer status of Clients indicate that Clients are expected in specific contractual arrangements to retain and exercise employer authority and control. In addition, ERM's marketing information emphasizes that its services are intended to be largely administrative in nature.

Any Client that in fact exercises employer control and authority over employees covered under the ERM Program would be an "employer" with respect to such employees for purposes of ERISA section 3(6). Your submission indicates that in at least one instance a Client in fact retained just such powers.

Therefore, in the absence of any indication that ERM and its Clients constitute a "control group" within the meaning of section 3(40)(B)(i) of ERISA, it is the view of the Department that the ERM Program is an arrangement providing benefits to the employees of two or more employers and is, therefore, a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the ERM 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(a)(6)(A) of ERISA.

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 Interpretations
and Regulations

[1] There is no indication in the materials submitted that the ERM 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.

[2] While the principles of the common law of agency typically have been applied to determine whether a person is an employee or an independent contractor, such common law principles are equally applicable to determining by whom an individual is employed. See Professional & Executive Leasing, Inc. v. Commissioner, 89 T.C. 225 (1987), affd 862 F.2d 751 (9th Cir. U.S. 1344, 112 S. Ct. 1344 (1992).