U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

December 7, 1995

95-29A
ERISA SECTION 3(1), 3(40)

Mr. Kevin W. Ahern
McLaughlin & Ahern, P.C.
202 Cherry Street
Milford, Connecticut 06460

Dear Mr. Ahern:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Act of 1974 (ERISA). Specifically, you ask whether the Employee Staffing of America, Inc.'s Employee Benefit Plan (the ESA Program) is an employee welfare benefit plan maintained by a single employer within the meaning of section 3(1) of Title I of ERISA.

You represent that Employee Staffing of America, Inc. (ESA) is in the business of "employee leasing." An employer retains ESA to provide human resource management, administration and staffing services by executing an "Employee Staffing Agreement" (the Agreement), a copy of which was enclosed with your submission. Section 2(a) of the Agreement provides that all persons listed on "Schedule A" of the Agreement are "deemed" to be employees of ESA.[1] Sections 2(b) and 3 provide that ESA is responsible for all administrative functions of the employer including the payment of all payroll taxes and workers compensation insurance, and for determining personnel policies, procedures, and administration, including hiring, termination, vacations, and wage administration. Sections 6 and 7 delineate certain financial responsibilities of the employer to ESA with respect to the employees leased from ESA. Your cover letter indicates that the relationship between ESA and an employer who executes the Agreement is that of "co-employers" and that such an employer is a "co-employer client of ESA (also referred to herein as a "client employer").

Section 3 of the Agreement also provides that ESA and the client employer shall be considered an "affiliated service group." You assert that ESA and its client employers are "a trade or business under common control and thus the ESA Program is a single-employer plan.

You represent that, in addition to providing the services to client employers as outlined in the Agreement, ESA established the ESA Program, effective June 1, 1989, as a self-insured stop-loss benefit plan, to provide, at the client employer's option, health insurance for employees that ESA leases to the client employer. The Agreement itself does not refer to the ESA Program. Although you indicate that it client employers who contribute financially to the ESA Program and whose contributions are held in a separate trust for payment of benefits under the ESA Program. The client employer, apparently, may determine the level at which employees must contribute, and the maximum level of the employee's contribution is set at $500 per employee. Under the ESA Program, ESA pays the first $20,000 of any benefits due to an employee under the program directly out of its trust fund. All medical expenses in excess of $20,000 per employer are covered under a stop-loss insurance policy issued by the Safeco Life Insurance Company.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I of ERISA to include:

[1] We are unable to determine from your submission whether the persons listed on Schedule A of the Agreement and "deemed" to be employees of ESA are persons who have a common-law employer-employee relationship with ESA or with the client employer.

> 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, an entity must not only provide benefits among those described in section 3(1) but also, among other criteria, be established or maintained by an employer, an employee organization, or both. There is no indication in your request that an employee organization is in any way involved in the ESA Program. Accordingly, this letter examines only whether the ESA Program was established or is maintained by an employer.

The term "employer" is defined in section 3(5) of ERISA to include "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." The term "employer," for purposes of Title I of ERISA, thus encompasses not only persons with respect to whom there exists an employer-employee relationship with the individuals covered under the plan (i.e., persons acting directly as an employer), but also certain persons, group and associations that, 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 the plan. Therefore, merely because a person, group or association may be determined to act as an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered under the plan with respect to which the person, group or association acts an "employer" are "employees" of that employer. From the information submitted with your request, it appears that the ESA Program was created, and is maintained, by ESA for "employees," including those individuals for whom it is a "co-employer," and with respect to whom, under the Agreement, ESA performs tasks that the common-law employer of the "employees" would perform. There is no indication that any entity other than ESA has control over the ESA Program, although day-to-day operations of the ESA Program are supervised by Robert S. Weiss & Company. Accordingly, based on your representations, it is the position of the Department of Labor (the Department) that ESA is acting either directly or indirectly in the interest of an "employer" in establishing and maintaining the ESA Program, which therefore is one or more employee welfare benefit plans within the meaning of section 3(1) of Title I of ERISA.

You are specifically interested in whether the ESA Program is a single-employer welfare plan or a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of Title I of ERISA. Thus, the issue is whether the ESA Program covers employees of a single employer or two or more employers for which it provides benefits as described in ERISA section 3(1). Section 3(40)(A) defines the term "MEWA" to include:

> 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 --
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> > (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

Section 3(40)(B) provides, in pertinent part:

For purposes of this paragraph --

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,
(ii) the term "control group" means a group of trades or businesses under common control,
(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether the employees of two or trades or business are treated as employed by a single employer under section 4001(b), except that, for the purposes of this paragraph, common control shall not be based on an interest of less than 25 percent . . .

Section 4001(b) of ERISA provides that determinations of whether employees of trades or business that are under common control shall be treated as employees of a single employer shall be made in a manner consistent with regulations issued under section 414(c) of the Internal Revenue Code (the Code).

Although the Agreement states that the client employers and ESA shall be considered an affiliated service group, there is nothing in your submission to support that claim. Nor have you submitted any evidence that ESA and any of its client employers share ownership interests in such a way as to be within the same control group as provided in section 3(40)(B)(ii). Accordingly, the Department is unable to conclude that ESA and any of its client employers represent a control group within the meaning of section 3(40)(B) of Title I of ERISA.

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 the purposes of section 3(6), when an employer-employee relationship exists between the two parties. For purposes of section 3(6), whether an employer-employee relationship exists must be determined by applying common law principles. In making such determinations, therefore, careful 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 the 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.

We are unable to determine with any degree of certainty based on the Agreement and your representations, the relationship of the individuals covered by the Agreement or by the ESA Program, or both, to ESA and its client employers. It is not clear from your submission whether the ESA Program is limited solely to persons who have a common-law relationship with ESA or whether it also includes persons who have such a relationship with one or more client employers. Although the Agreement outlines ESA's responsibilities with respect to persons listed on Schedule A that are "deemed" under section 2(a) to be employees of ESA, it is silent as to the client employer's responsibilities other than the responsibility to maintain a safe workplace. You represent that the client employer has the power to elect whether to provide coverage under the ESA Program to the employees "leased" to it and to determine the amount of employee contributions. Accordingly, it is the view of the Department that the documents and your representations do not provide a basis for determining whether the client employers or ESA, or both, in fact have an employer-employee relationship with the "leased employees" and whether ESA or the client employers are

the employers of the individuals covered by the ESA Program. Moreover, the Department does not consider the Agreement's characterization of the parties' relationship to be dispositive as to the actual nature of the relations between them, which must be determined in light of the actual facts and circumstances of that relationship.

Further, there is no indication in the information you submitted that the ESA Program was established or is maintained pursuant to any collective bargaining agreement or by a rural electric cooperative or a rural telephone cooperative association. Accordingly, inasmuch as we cannot conclude that ESA and the client employers constitute a "control group" within the meaning of section 3(40)(B) of Title I of ERISA or that the covered employees are common law employees of ESA, it is the view of the Department that the ESA Program is an arrangement providing benefits to the employees of two or more employers and is, therefore, a MEWA within the meaning of section 3(40)(A) of Title I of ERISA.[2]

Although section 514(a) of ERISA provides that any state law or regulation that relates to an employee benefit plan covered by Title I of ERISA is generally preempted, section 514(b) provides:

> (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.
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> (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.

Based on the assumptions outlined above, the preemption provisions of ERISA would not preclude state regulation of the ESA Program, to the extent provided in ERISA section 514(b)(6)(A), because the ESA Program constitutes a MEWA. However, if further facts demonstrated that ESA and its client employers actually constituted a "control group," or if all the individuals covered by the ESA Program were, in fact, shown to be exclusively the common-law

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[2] It is the Department's position 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.

employees of ESA, the preemption provisions of ERISA would preclude state regulation of the ESA Program because it would constitute an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA established and maintained by a single employer and not a MEWA within the meaning of section 3(40)(A). We emphasize, however, that the Agreement itself and the representations set forth herein provide no basis for reaching such conclusions.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations