

U.S. Department of Labor

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



October 31, 1996

96-25A
ERISA SEC. 3(40)

Mr. Harvey A. Kurtz
Foley & Lardner
Firststar Center
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5367

Dear Mr. Kurtz:

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 for an advisory opinion that: (1) the Health Care Provider Benefit Plans, Inc. Fringe Benefit Welfare Plan (the HCPBP Plan) is established and maintained by a "group or association of employers" within the meaning of section 3(5) of ERISA and (2) the HCPBP Plan is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

You advise that the HCPBP Plan is a "Master Welfare Plan" sponsored by Health Care Provider Benefit Plans, Inc. (HCPBP) offering severance, death, and disability benefits to employees of employers in the home health care industry who adopt the HCPBP Plan. The HCPBP Plan is offered to employers that belong to the National Association for Home Care (NAHC), although membership in the NAHC is not a prerequisite for adoption of the HCPBP Plan and HCPBP is not affiliated with NAHC. Substantially all of the employers that are eligible to adopt the HCPBP Plan comply with Health Care Financing Administration (HCFA) rules qualifying them for reimbursement by Medicare. Employers in the HCPBP Plan are members of the Health Care Providers Benefit Plan Council (the Council), and HCPBP is a member-at-large of the Council with no voting rights. All members other than HCPBP have one vote on the Council, and Council membership ceases if an employer cancels its adoption of the HCPBP Plan.

Under an unexecuted HCPBP Plan document drafted March 7, 1995, which you represent describes the terms governing the HCPBP Plan, the HCPBP Plan may only be amended by HCPBP. Employers may execute adoption agreements with HCPBP to obtain benefits for their employees, and amend their adoption agreements only to select other available options offered by HCPBP. The HCPBP Plan has been determined by the Internal Revenue Service (IRS) to be a voluntary employees beneficiary association (VEBA) within the meaning of Section 501(c)(9) of the Internal Revenue Code (Code § 501(c)(9)).

Under a separate undated and unexecuted supervisory services agreement (which you also represent is in force), the HCPBP Plan appointed HCPBP as "Plan Supervisor."¹ HCPBP is listed as signatory in this unexecuted agreement on behalf of the HCPBP Plan. The supervisory services agreement expires only at the termination of the HCPBP Plan. The Plan Supervisor's duties include providing insurance brokerage, consulting, and administrative services,

¹ Each employer that adopts the HCPBP Plan pays a periodic service fee to the Plan Supervisor, stipulated in the adoption agreement. The Plan Supervisor is compensated out of the service fee or is paid by the trustee from plan assets.

such as distributing and collecting forms, statements, and information from employers; compensating the Plan Administrators, the trustee or trustees, and other HCPBP Plan advisors out of the service fees; and reimbursing the trustees' expenses. You also stated that there is no means of replacing the Plan Supervisor.

According to the documents you submitted, HCPBP has or will appoint a trustee or trustees to receive employer contributions and to hold and disburse plan assets at the direction of the Plan Administrator or the Plan Supervisor.² Further, under an undated and unexecuted administrative services agreement, the HCPBP Plan would appoint International Employee Benefit Plans, Inc. (IEBP) as the Named Fiduciary and Plan Administrator of the HCPBP Plan. HCPBP, as Plan Supervisor, would sign the agreement on behalf of the HCPBP Plan. This agreement indicates that, in the event of a vacancy, the Council may appoint a replacement as Plan Administrator. The Plan Administrator's duties as set out in this agreement include final resolution of disputed benefit claims, control and management of investment of plan assets, and selection of policies for providing certain insured benefits. The Plan Administrator also has the authority to fill a vacant trustee position or change a trustee and to determine trustee compensation.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I of ERISA to include, among others, any plan, fund, or program established or maintained by an employer, an employee organization, or both an employer and an employee organization that provides benefits in the event of sickness, accident, disability, death, or unemployment. Although it appears that the HCPBP Plan provides benefits described in section 3(1), to be an employee welfare benefit plan, the HCPBP Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization.

There is no indication in your submission that the HCPBP Plan was established or is maintained by an employee organization within the meaning of section 3(4) of ERISA. There is no indication that the HCPBP Plan was established or is maintained by an entity that exists "for the purpose, in whole or in part, of dealing with 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).³ 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 Council is not conditioned upon one's employment status but rather is open only to employers. Thus, the HCPBP Plan was not established or and is not maintained by an employee organization within the meaning of section 3(4) of ERISA.

With regard to the issue of whether the HCPBP Plan was established or is maintained by 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 cognizable, bona fide group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits for their employees.

² You submitted a trust agreement drafted on March 7, 1995, that indicates HCPBP will appoint an unnamed bank corporation as trustee but it does not appear that this trust agreement, or any other trust agreement, has actually been signed. Under the draft document, the trustee would be a trustee for the VEBA for the purpose of receiving employer contributions and making payments as directed by the Plan Administrator or Plan Supervisor.

³ The Department has previously stated that whether an entity has or has not been recognized by the IRS as a VEBA for the purposes of Code § 501(c)(9) is not indicative of whether the entity is an employees' beneficiary association for the purposes of section 3(4) of Title I of ERISA. We note that the IRS reiterated this position in the preface to its regulations regarding Code § 501(c)(9).

On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of any genuine organizational relationship among the employers, no employer association, and consequently no employee welfare benefit plan, can be recognized.

A determination whether a group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In addition, it is the Department's view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

Based on the information you submitted, it does not appear that the HCPBP Plan is established or maintained by a group or association of employers within the meaning of section 3(5) of ERISA. Although the employers who adopt the HCPBP Plan may have some commonality of interest, based on being in the same industry, there does not appear to be any genuine organizational relationship between them or any history of organized cooperation. Each employer's membership in the Council begins and ends with the period of its adoption of the HCPBP Plan. Further, although you indicate that some or all of these employers are members of NAHC, you have specified that NAHC has no involvement in the establishment or maintenance of the HCPBP Plan and therefore cannot be considered to be sponsoring the HCPBP Plan.

It also does not appear that the HCPBP Plan is under the control, in either form or substance, of the employers that adopt the program of benefits. These employers, through the Council, have no authority to direct, replace, or supervise the Plan Supervisor or to amend the HCPBP Plan. Instead, it would appear that the HCPBP Plan is under the ultimate control of HCPBP. In the Department's view, the Council's apparent authority under the unexecuted administrative services agreement to name or change the Plan Administrator is not sufficient control over the benefit program because neither the Plan Administrator nor the Council has the authority to cancel or revise the services contract under which the Plan Supervisor acts to control the HCPBP Plan and receives compensation for a wide range of services to the HCPBP Plan. Accordingly, it is the Department's position that the HCPBP Plan was not established and is not maintained by a bona fide employer group or association and, therefore, is not a single employee welfare benefit plan.

It has also been the view of the Department that, if an employer adopts for its employees a program of benefits sponsored by a group or association that does not itself constitute an "employer" or an "employee organization," such an employer or employee organization may have established a separate, single-employer (or single employee organization) employee benefit plan covered by Title I of ERISA. Therefore, it is the position of the Department that each employer that adopts the HCPBP Plan to provide benefits to its employees would thereby establish a separate, single-employer welfare benefit plan, and such plans and the relationship of HCPBP to each plan and the transactions involving the plans would be governed by the fiduciary standards of Part 4 of Title I 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,

Susan G. Lahne
Chief
Division of Coverage