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

The Honorable Catherine Cortez Masto
Attorney General
Nevada Department of Justice
555 East Washington Avenue
Las Vegas, Nevada 89101-1088

2007-05A
ERISA SEC.
3(40) & 514(b)(6)

Dear Attorney General Masto:

This responds to your request for an advisory opinion from the Department of Labor (Department) regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to an employee benefit arrangement sponsored by Payroll Solutions Group Limited (Payroll Solutions). Specifically, you asked whether the arrangement constitutes a "multiple employer welfare arrangement" within the meaning of section 3(40) of ERISA subject to regulation under the insurance laws of the State of Nevada pursuant to section 514(b)(6) of ERISA.

Your inquiry arises from an order issued by the Division of Insurance of the Nevada Department of Business and Industry directing Payroll Solutions, a professional employer organization doing business in Nevada, to cease and desist offering unlicensed insurance through a multiple employer welfare arrangement (MEWA), the PSG Employee Medical Plan (Plan), to its client employers in the State of Nevada. Payroll Solutions has resisted the order, claiming that the Plan is a single employer plan, not a MEWA, and that section 514(a) of ERISA preempts the application of Nevada state insurance regulation.

Your office previously asked the Department to address Payroll Solutions' contention that the Plan cannot be a MEWA because Nevada state law provided 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). The Department issued a letter in May 2006 to Attorney General George J. Chanos, Nevada Department of Justice (copy enclosed), in which we confirmed, based on the information set forth in the letter, that even if the PSG Employee Medical Plan were found to be an employee benefit plan within the meaning of ERISA section 3(1), it would be a multiple employer plan, not a single employer plan, and it would be a MEWA subject to state insurance regulation at least to the extent permitted under section 514(b)(6)(A) of ERISA.[1] We also confirmed the Department's

[1] This letter should not be read as expressing the view that the PSG Employee Medical Plan is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA. If a MEWA is not itself an ERISA covered plan, which is often the case, ERISA's preemption provisions do not prohibit States from regulating the MEWA in accordance with applicable state insurance law. In such cases, the Department would view each employer using the MEWA to provide welfare benefits to its employees as having established a separate welfare benefit plan subject to ERISA. The Department has concurrent jurisdiction

view that whether any given welfare benefit 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, we explained that a state statute addressing a leasing company's relationship to leased employees would not govern the determination of whether a welfare benefit arrangement sponsored by the leasing company is a MEWA by reason of providing benefits to the "employees of two or more employers" within the meaning of ERISA section 3(40).

You provided us with a recent amendment to Nev. Rev. Stat. § 616B.691(2) which states, in pertinent part, 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, including, without limitation, for the purposes of the Employee Retirement Income Security Act of 1974." You indicated that Payroll Solutions is citing this amendment in a Request for Judicial Notice (Relating to Petition for Judicial Review) filed in the Nevada state court proceeding where it is challenging Nevada's cease and desist order to bolster its claim that the PSG Employee Medical Plan is not a MEWA, and that the Company "is the only employer insofar as ERISA health benefits are concerned."

The amendment to Nev. Rev. Stat. § 616B.691(2) does not alter the Department's view that whether an arrangement is a MEWA within the meaning of section 3(40) of ERISA is a question of federal law. Thus, the Department continues to believe that a state statute addressing an employee leasing company's relationship to leased employees would not govern the determination of whether any particular benefit arrangement sponsored by the employee leasing company is a MEWA for purposes of ERISA. Whether the Plan is a single employer plan for purposes of ERISA is also a question of federal law. To the extent that Nevada state law purports to govern the determination of whether a particular arrangement is a MEWA for purposes of ERISA, it is preempted by section 514 of ERISA.

Although section 514(b)(6) of ERISA allows state insurance regulation of employee benefit plans that are MEWAs, subject to certain limits, it does not require states to do so. A state may decide not to regulate MEWAs to the full extent permitted under

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with the States to regulate persons who operate such MEWAs to the extent those persons have responsibility for, or control over, the assets of ERISA plans that participate in the MEWA.

ERISA. Therefore, the Department expresses no opinion regarding the effect of this state law on the authority of the state to regulate the arrangement at issue within the scope allowed by ERISA.

This letter constitutes an advisory opinion under ERISA procedure 76-1. Accordingly, this letter is issued subject to the provisions of such procedure including section 10 relating to the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA and should not be read as an interpretation of Nev. Rev. Stat. § 616B.691(2) or any other federal or state law.

Sincerely,

Lisa M. Alexander
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

Enclosure