



APRIL 27, 2012

The Honorable Dannel P. Malloy
Governor of Connecticut
State Capitol
210 Capitol Avenue
Hartford, CT 06106

2012-01A
ERISA SEC.
3(32) & 4(b)(1)

Dear Governor Malloy:

This is in response to your request for an advisory opinion under the Employee Retirement Income Security Act (ERISA), concerning the governmental plan status of a group health plan established by the State of Connecticut for state employees, retirees, and their families (hereafter State Plan). You request the Department's view as to whether participation in the State Plan by certain private, nonprofit employers under the "Connecticut Healthcare Partnership" provisions in Connecticut Public Act 11-58 (Public Act) would adversely affect the status of the State Plan as a "governmental plan" under section 3(32) of Title I of ERISA. You have enclosed for our consideration the relevant portions of the Public Act and a Fiscal Analysis of the impact of the provisions on the State Plan.

The State Plan is a self-insured group health care benefits plan established under subsection (m) of Section 5-259 of the Connecticut General Statutes. Public Act 11-58 requires the State to offer coverage under the State Plan to employees and retirees of nonstate public employers, beginning on January 1, 2012, and certain nonprofit employers on January 1, 2013. Section 1 (3)(A) of the Public Act defines the term "nonprofit employer" as:

(A) a nonprofit corporation, organized under 26 USC 501, as amended from time to time, that (i) has a purchase of service contract, as defined in section 4-70b of the general statutes,¹ or (ii) receives fifty per cent or more of its gross annual revenue from grants or funding from the state, the federal government or a municipality or any combination thereof . . .²

Under Section 2(g)(1) of the Public Act, the Comptroller has the authority to cancel coverage to any nonprofit employer, and to discontinue accepting applications for

¹ Connecticut General Statutes Section 4-70b (1) defines a "purchase of service contract" as a "contract between a state agency and a private provider organization for the purpose of obtaining direct health and human services for agency clients."

² Under Section 1(3)(B) of the Public Act, the definition of "nonprofit employer" includes tax-exempt organizations under Internal Revenue Code section 501(c)(5) (labor, agricultural, or horticultural organizations). You have not requested an opinion as to whether these employers could be considered governmental agencies or instrumentalities for purposes of section 3(32) of ERISA.

coverage from nonprofit employers if the coverage would adversely affect the State Plan's status as a governmental plan under section 3(32) of ERISA.

Section 4(b)(1) of ERISA provides that Title I of ERISA does not apply to an employee benefit plan that is a "governmental plan" as defined in ERISA section 3(32). Section 3(32) of ERISA defines the term "governmental plan," in pertinent part, as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

We assume for purposes of this opinion that the State Plan, as currently constituted, is a governmental plan within the meaning of ERISA section 3(32). You request an advisory opinion as to whether participation in the State Plan by nonprofit employers described in Section 1(3)(A) of the Public Act would adversely affect the governmental plan status of the State Plan.³ Specifically, you asked whether the nonprofit employers described in Section 1(3)(A) of the Public Act could be considered governmental "agencies or instrumentalities" within the meaning of ERISA section 3(32) because Section 1(3)(A) of the Public Act defines "nonprofit employer" as an employer with a "purchase service agreement" with a State entity, or an employer which receives 50% or more of its revenue from local, state, or federal funding or grants. You also inquire as to the application of the Department's position that a plan may retain its status as a governmental plan under ERISA section 3(32) even if a *de minimis* number of private employees are permitted to participate. Although you are not able to estimate the total number of employees of private nonprofit employers that would ultimately enroll in the State Plan, your letter states that approximately 175,000 employees would be eligible to enroll. The estimated number of State employees and retirees currently in the State Plan is approximately 100,000.

Although your request relates to a group health plan, the issues presented by your request implicate not only the provisions of Title I of ERISA, but also the parallel "governmental plan" definitions in section 414(d) of the Internal Revenue Code (Code) and section 4021(b)(2) of Title IV of ERISA. The Department, accordingly, coordinates its "governmental plan" determinations with the Internal Revenue Service (IRS) of the Department of the Treasury and the Pension Benefit Guaranty Corporation (PBGC). On November 8, 2011, the IRS published two advance notices of proposed rulemaking (ANPRMs) concerning the definition of the term "governmental plan" under Code

³ Although not the subject of your request, we note that Section 2 of the Public Act also provides eligibility in the State Plan for "nonstate public employers," beginning on January 1, 2012. Section 1(5) defines a nonstate public employer as a "municipality or other political subdivision of the state, including a board of education, quasi-public agency or public library." This letter does not address whether all the employers described in this section would necessarily be governmental agencies or instrumentalities under section 3(32) of ERISA.

section 414(d). In light of the pending IRS project in this area, nothing herein should be construed to apply under section 414(d) of the Code.

A governmental plan within the meaning of ERISA section 3(32) must be established or maintained for its employees by a governmental entity. In that regard, the Department has previously concluded that private sector contractors, including nonprofit or tax-exempt organizations, are not governmental agencies or instrumentalities for purposes of section 3(32) of ERISA merely because they perform public service functions under governmental direction and control pursuant to contracts with governmental entities. *See* Advisory Opinion 97-05A (nonprofit organization that provides social services under contract to county agencies is not a governmental agency or instrumentality). *See also* Advisory Opinion 95-27A (ambulance service whose sole connection to government is the receipt of governmental operating subsidy is not governmental agency or instrumentality). Thus, under our existing advisory opinion guidance, the Department would not treat the private nonprofit employers described in Section 1(3)(A) of the Public Act as governmental agencies or instrumentalities within the meaning of section 3(32) of ERISA solely because they operate under a contract with a state agency for the purpose of providing direct health and human services to the public, or receive 50% or more of their gross annual revenue from federal, state or local grants or funding.

With respect to your request regarding participation by a *de minimis* number of private sector employees in a governmental plan, the Department addresses this issue based on our existing advisory opinion guidance.⁴ In 2005, the Department issued Advisory Opinion 2005-07A, which assumed that nonprofit organizations that contract with federal, state and local governments to provide health services to the public are not themselves governmental agencies or instrumentalities and concluded that a *de minimis* number of the organizations' employees could participate in a State Health Plan without affecting that plan's status as governmental under ERISA section 3(32). The Department did not establish a specific number of employees or percentage threshold that would constitute more than a *de minimis* number for this purpose. None of our advisory opinions, however, have suggested that the substantial level of private sector participation described in your letter would be permissible in a plan claiming the governmental plan status exemption from ERISA. *See, e.g.,* Advisory Opinion 99-07A (participation by approximately 300 private sector employees in the "Employees' Retirement System of the City of Milwaukee" that covered approximately 25,221 public employee participants is *de minimis*). Rather, and again based on existing guidance, the Department would view the participation of private nonprofit employers in the Connecticut State Plan described in your letter as more than *de minimis*, and, therefore,

⁴ In the ANPRM relating to the general definition of the term "governmental plan" under section 414(d) of the Code, the Department of Treasury and IRS request comments on "existing practices under which a small number of private employees participate in a plan that would otherwise constitute a governmental plan under section 414(d)." Comments on the ANPRM will be forwarded to the Department and the PBGC.

such participation would adversely affect the status of the State Plan as governmental under ERISA section 3(32).

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. This letter relates solely to the application of section 3(32) of Title I of ERISA, and should not be read as expressing any opinion as to the applicability of other laws to the above described arrangement, including any provision of Title IV of ERISA or of the Internal Revenue Code.

Sincerely,

Susan Elizabeth Rees
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

cc: Andrew McDonald, General Counsel to the Governor