U.S. Department of Labor

Employee Benefits Security Administration
Washington, D.C. 20210

July 8, 2019

Alden J. Bianchi
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One Financial Center
Boston, MA 02111

2019-01A
ERISA SEC.
3(5)
3(40)

Dear Mr. Bianchi:

This is in response to your request on behalf of the Ace Hardware Corporation (Ace) for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to the Ace Hardware Corporation Cooperative Group Health Plan (Plan). Specifically, you ask whether the Plan would be an association health plan (AHP) that is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA maintained by a "bona fide group or association of employers" for purposes of section 3(5) of ERISA.[1] You also ask whether the Plan is a "multiple employer welfare arrangement" within the meaning of section 3(40) of ERISA, that is "fully insured" within the meaning of section 514(b)(6)(A) of ERISA.

You provided the following facts and representations in support of your request. Ace is a hardware retailer cooperative and is the largest cooperative, by sales, in the hardware industry. Most of the Ace retail owners are small, closely-held businesses that market and sell consumer and commercial hardware products and services. Ace retail owners purchase hardware products, paint and other merchandise from Ace, as well as receive services such as advertising, market research, merchandising assistance, promotion assistance with site location, store format design, retail training services, insurance, and store technology services. Ace facilitates access to materials, supplies and services, as well as engages in activities that support Ace retail owners' operation of their retail hardware businesses. Ace currently serves approximately 2,700 retail owners who operate approximately 4,400 Ace stores in the U.S. In addition, approximately 120 corporate stores are owned and operated as wholly-owned subsidiaries of Ace.

[1] The Department published a final rule on June 21, 2018, that established alternative criteria from those in the Department's pre-rule sub-regulatory guidance under ERISA section 3(5) for "bona fide group or association of employers" capable of establishing AHPs (Pathway 2). On March 28, 2019, in State of New York v. United States Department of Labor, the United States District Court for the District of Columbia vacated portions of the Department's final rule. The U.S. Department of Justice filed an appeal on April 26, 2019. The District Court's decision did not address the Department's pre-rule sub-regulatory guidance (Pathway 1). Employer groups and associations can still rely on that guidance for purposes of sponsoring an ERISA-covered AHP. See the Department's Q&A guidance issued on May 13, 2019 (available at www.dol.gov/ebsa) relating to the final rule and the U.S. District Court's ruling in State of New York v. United States Department of Labor. You requested an opinion under the Department's Pathway 1 pre-rule sub-regulatory guidance. This letter does not address, and should not be read as addressing, the status of the Plan under the provisions in the final rule.

Each Ace retail owner has entered into an Ace Membership Agreement and is a "Member" of Ace. Every Member owns one share of Class A (voting) stock of Ace, irrespective of the number of Ace stores the Member operates. This allows single-store Members to have the same voice in the governance of Ace as Members that operate multiple stores. The Members also accumulate shares of Class C (non-voting) stock as part of annual patronage distributions based on the volume of merchandise they purchase from Ace. The patronage distribution is paid in cash, Class C stock, and patronage certificates.

Ace's bylaws set forth the rights and obligations of Ace and its Members. Under the bylaws, Ace's business and affairs are governed by its Board of Directors which is comprised of between nine and twelve individuals, the number of which may vary by Board resolution. Ace's bylaws require that at least eight of the directors be Member Directors and that no more than twenty-five percent (25%) of the directors may be non-Member Directors. Member Directors must be "eligible persons." The bylaws define "eligible persons" as Members, a stockholder or other equity owner of a Member that is a legal entity, or a manager, executive officer, general partner, or other affiliate of a Member that is a legal entity. The Ace directors are divided into three classes and each class of directors serves a three-year term. During the annual meeting of the Members, the term of one class of directors shall expire and a new class of directors shall be elected by the Members who are entitled to vote as stockholders. Potential directors are recommended by the Board's Nominating and Governance Committee and endorsed by the full Board. Members may also nominate other "eligible persons" for election to the Board. Such a nominee would, in effect, run against the Board-endorsed candidate(s). Any director may be removed, with or without cause, by an affirmative vote of two-thirds of the Members.

Ace currently maintains a group health plan covering approximately 4,000 employees of Ace (and their beneficiaries) and certain wholly-owned Ace subsidiaries. Ace proposes to amend this plan and restate it as the Ace Hardware Corporation Cooperative Group Health Plan to provide group health benefits to the Members and their employees in addition to employees of Ace and U.S.-based employees of Ace's wholly-owned subsidiaries. There are approximately 80,000 full and part time employees of Members. Ace, its subsidiaries, and Members who employ at least one common law employee may participate in the Plan (collectively Ace Plan Employers). Members without any common law employees cannot participate in the Plan.

The powers, rights and privileges of the Ace Plan Employers are set out in the Plan's bylaws, which will be adopted by a vote of all the Ace Plan Employers. The bylaws provide for the establishment of an administrative committee (Plan Administrative Committee) to oversee the day-to-day operations of the Plan. The Plan Administrative Committee will have sole authority to control and manage the property, operations, and administration of the Plan, such as establishing contribution requirements, making eligibility determinations, paying claims and interpreting the terms of the Plan. In addition, the Plan Administrative Committee is empowered to allocate fiduciary responsibilities and designate persons to carry out fiduciary responsibilities in accordance with ERISA section 405(c)(1) and hire service providers. The Plan Administrative Committee will make decisions by majority vote.

The members of the Plan Administrative Committee shall consist of the Officers of the Plan plus two additional individuals, all of whom must be nominated by an Ace Plan Employer and selected by plurality vote of the Ace Plan Employers. Members of the Plan Administrative Committee serve a term of not less than one year or more than three years as determined by vote of the Ace Plan Employers. Each member of the Plan Administrative Committee must be an officer or director of an Ace Plan Employer. Each Ace Plan Employer will have one vote for every ten employees who participate in the Plan. The Ace Plan Employers may remove any member of the Plan Administrative Committee, with or without cause, by a plurality vote at any membership meeting called for that purpose. Any vacancy during the term of a member of the Plan Administrative Committee is filled by a majority vote of the remaining Plan Administrative Committee members. In addition, the Ace Plan Employers may dissolve the Plan by a majority vote and amend the Plan's bylaws by a plurality vote.

The Plan will be funded by contributions from Ace Plan Employers and covered employees, which will be held in the Plan's trust. Plan benefits will be guaranteed through an insurance contract. The trust under the Plan will wholly-own an insurer licensed to do business in the State of Vermont as an association captive insurance company (Insurer). The Insurer will issue an insurance contract to the Plan. The Plan will pay insurance premiums to the Insurer from contributions from Ace Plan Employers and covered employees in the Plan's trust. Under the insurance contract, the Insurer will be unconditionally liable while the contract is in effect to pay Plan participants and beneficiaries, directly or through its agents, all of the benefits under the Plan. The Insurer's obligation will be backed by its general assets and will not be conditioned on whether the Insurer receives reimbursements for benefit payments from the Plan or the Plan's participants. The Plan participants and beneficiaries will have direct contractual rights against the Insurer for benefit claims.

The term "employee welfare benefit plan" is defined in section 3(1) of ERISA to include, among other things, "any plan, fund, or program … 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 … medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment …." In addition to providing the types of benefits described in section 3(1) of ERISA, the Plan must also, among other criteria, be established or maintained by an employer, an employee organization, or both if it is to be treated as an "employee welfare benefit plan" within the meaning of ERISA. There is no indication that an employee organization within the meaning of section 3(4) of ERISA is in any way involved in the Plan.[2] Therefore, this letter will focus on whether Ace Plan Employers

[2] Section 3(4) of ERISA defines the term "employee organization" as "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

may act as a bona fide employer group or association for the purpose of establishing the Plan within the meaning of section 3(5) of ERISA.

The term "employer" is defined in section 3(5) of ERISA 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 an employer in such capacity." The definitional provisions of ERISA thus recognize that a single employee welfare benefit plan might be established or maintained by a bona fide group or association of employers, acting in the interest of its employer members to provide benefits for their employees.

To determine whether an arrangement is a bona fide employer group or association under prior sub-regulatory guidance (*i.e.*, Pathway 1), one must consider all the relevant facts and circumstances, including: how members are solicited; who is entitled to participate and who actually participates in the group or association; the process by which the group or 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. 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. *See, e.g.*, Advisory Opinion 2017-02AC; Advisory Opinion 2005-20A.

An important consideration under Pathway 1 is whether the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representational interest and genuine organizational relationship unrelated to the provision of benefits.[3] *See, e.g.*, Advisory Opinion 2008-07A; Advisory Opinion 96-25A.

In this case, Ace Plan Employers have a commonality of economic interest and a genuine organizational relationship unrelated to the provision of benefits under the Plan. Ace Plan Employers are engaged in the same industry—the hardware retail business. In addition, the Members and subsidiaries that participate in the Plan share ownership interests with Ace as evidenced by the Ace common stock that is owned by the Members and Ace's 100% ownership interest in the subsidiaries. Ace Plan Employers will establish and maintain the Plan, and appear, based on your representations, to be a group consisting solely of employers of common law employees who will be covered by the Plan. Further, the Ace Plan Employers, and, therefore, only employers of common law employees covered by the Plan, have the power to control the Plan through their authority to nominate, elect and remove the Plan Administrative Committee.

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[3] As indicated in footnote 1 above, this Advisory Opinion is based solely on the criteria set forth in the Department's prior sub-regulatory guidance interpreting ERISA section 3(5). It neither addresses the application of the criteria set forth in the Department's final rule published on June 21, 2018, nor purports to set forth the outer boundaries of the statutory definition. Based on the representations and conditions set forth in this Advisory Opinion, the arrangement meets the terms of that prior sub-regulatory guidance, irrespective of whether it also falls within the scope of the statutory definition under other grounds as well.

Thus, under the Department's Pathway 1 sub-regulatory guidance, and assuming that the Plan is adopted and operated as described in this letter, the Ace Plan Employers would, at least in form, constitute a bona fide employer group or association in relation to the Plan for purposes of ERISA section 3(5), and the Plan would, at least in form, constitute an AHP that is an employee welfare benefit plan for purposes of Title I of ERISA. Whether the Ace Plan Employers exercise control in substance over the benefit program, as required for treatment as a bona fide employer group or association, is an inherently factual issue on which the Department generally will not rule in an advisory opinion.

It is also the Department's view, based on your representations and information provided, that the Plan would be a MEWA within the meaning of section 3(40) of ERISA. Section 3(40)(A) of ERISA defines the term "MEWA," in pertinent part, to include:

> [A]n 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) [section 3(1) of ERISA] 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, (ii) by a rural electric cooperative, or (iii) by a rural telephone cooperative association.

The Plan would be an arrangement established and maintained for the purpose of providing welfare benefits to employees of two or more employers and it does not fall within any of the exceptions listed in section 3(40).

With respect to whether the Plan would be a fully-insured MEWA for purposes of the ERISA preemption provisions set forth in section 514(b)(6), section 514(b)(6)(D) provides that a plan-MEWA:

> shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary [of Labor] determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

Deciding whether a particular plan-MEWA is "fully insured" within the meaning of ERISA section 514(b)(6)(D) requires an examination of the insurance contract. *See* Advisory Opinion 94-07A. In light of the prospective nature of the Plan, Ace does not have an insurance contract in place. Accordingly, the Department is unable to conclude that the Plan would be fully insured within the meaning of ERISA section 514(b)(6)(D). There is nothing in your submission, however, that would lead us to conclude that the Plan would not be fully insured if an insurance policy consistent with your representations is secured to guarantee all the benefits under the Plan. *See* Advisory Opinion 93-11A; Advisory Opinion 2005-20A.

You also raise a number of issues in your submission concerning application of the fiduciary responsibility provisions of Part 4 of Title I of ERISA to the proposed transaction between the

Plan and the Insurer. For your information, prohibited transaction issues similar to those you raised are addressed in, and we would refer you to, Advisory Opinion 97-23A, which is available on the Employee Benefits Security Administration's website at www.dol.gov/agencies/ebsa. We also note that the general standards of fiduciary conduct contained in ERISA sections 403 and 404 would apply to the Plan's fiduciaries. Accordingly, the respective fiduciaries of the Plan must act prudently and solely in the interests of the participants and beneficiaries of the Plan and must carry out their ongoing fiduciary responsibilities under ERISA in connection with the Plan, including monitoring plan investments. Whether the actions of the Plan fiduciaries satisfy these requirements is an inherently factual question, and the Department generally will not issue an advisory opinion on such questions. The appropriate plan fiduciaries must make such determinations based on all the facts and circumstances of the individual situation.

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. This opinion relates solely to the application of the provisions of Title I of ERISA addressed in the letter. It is not determinative of any particular tax treatment under the Internal Revenue Code and does not address any other issues arising under ERISA or any other federal or state laws.

Sincerely,

Suzanne Adelman
Acting Chief Division of Coverage Reporting and Disclosure
Office of Regulations and Interpretations