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U.S. Department of Labor Letter Opinions on "Bona-Fide" Associations under ERISA (11/9/2012)

Introduction

The Employee Retirement Income Security Act [ERISA - 29 U.S.C. §1001 et seq.] governs most employee benefit programs. ERISA applies when three elements exist – (a) an *employee*, (b) a *welfare benefit plan*, and (c) an *employer* or an *employee organization* as defined by ERISA. United States Department of Labor (DOL) regulations and rulings explain these definitions by identifying individuals who are not employees and arrangements that do not satisfy the "employer" test under ERISA. Counterintuitively, the ERISA definition of *employer* includes "a group or association of employers acting for an employer in such capacity" [29 U.S.C. §1002(5)]. Thus, an "association health plan" covering multiple employers can be consider an "employer" in the singular.

If a plan is offered to employees of two or more unrelated employers, the arrangement also constitutes a multiple employer welfare arrangement (MEWA) defined under ERISA as:

> …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 [welfare plan benefits] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries… [29 U.S.C. §1002(40)]

ERISA treats an association plan as a MEWA; but, the plan may also be offered by an "employer" in the singular if that plan is also considered "a group or association of employers acting for an employer" as DOL has interpreted the law. Litigation and DOL letter rulings have resulted in an interpretation of the ERISA "association of employers" to mean only "bona-fide" associations. As the court noted in an early case,

> The interpretations and opinions of an agency charged with administering a statute "constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance," … and accordingly, situations exist where it is prudent to consult the expert opinion of the Department of Labor in construing the statutory meaning of an "employee benefit plan." [Citations omitted, Wisconsin Educ. Assoc. Ins. Trust v. Iowa State Bd., 804 F.2d 1059, 1063 (8th Cir. 1986)]

The court established the core requirement of a bona-fide association that "[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are *tied by a common economic or representation interest, unrelated to the provision of benefits*" [id]. Throughout the years since the case was decided,

DOL has issued many opinions regarding the meaning of "bona-fide association" for ERISA purposes. These letter opinions are set forth in the table below according to the critical elements of DOL review which DOL describes as follows:

> In order for a group or association to constitute an "employer" within the meaning of Section 3(5), there must be a bona fide group or association of employers acting in the interest of its employer-members to provide benefits for their employees. In this regard, the Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of Section 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of Section 3(5).
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> The following factors are considered in determining whether a bona fide group or association of employers exists for purposes of ERISA:
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> - 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 pre-existing relationships of its
> - members; the powers, rights and privileges of employer-members; and
> - who actually controls and directs the activities and operations of the benefit program.
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> In addition, employer-members of the group or association that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the benefit program. *It should be noted that whether employer-members of a particular group or association exercise control in substance over a benefit program is an inherently factual issue on which the Department generally will not rule.* [Parenthetically, if DOL will not rule on this last point, the OIC should not rule on this matter either.]

None of these factors in isolation are determinative. DOL makes no mention of SIC codes or expresses an opinion as to what types of employers may share a "common interest." All of the standards go to answer the fundamental question raised by the court in 1986, "are the employers tied by a common economic or representation interest, unrelated to the provision of benefits." However, DOL has consistently maintained that the participation in a health plan alone does not create that common interest. The association plan must be an employer controlled effort distinguishable from other traditional insurance marketing methods.

The table below summarizes relevant opinions by DOL concerning association plans and multiple employer plans.

Opinion#/Date	Membership	Control	Important Point	Ruling	Notes
77-59 8/26/77	Employees	Insurance agents	One of DOL's first opinions in which they note that the "common interest" test predates ERISA.	No	
82-10A 2/1/1982	Ministers	Third party administrator	One of the first opinions articulating common interest plus control by employers. Employers must initiate and act in their own interests to create a plan.	No	Nowhere in the opinion does DOL establish or define a test of the type of common interest required.
82-50A 9/22/82	Realtors including 22,000 "independent contractors w/o employees	National Assoc. of Realtors appointed Trustees.	Since independent contractors are not employers, cannot be an association of employers.	No	Control must be vested solely in employer members.
83-14A 3/14/83	Wisconsin bankers	Active employer members	Inactive members did not have a voice in control and therefore, the association was not bona-fide.	No	DOL found common interest but could not conclude based upon the documents presented that all employers had control.
83-22A 5/9/83	Legal service corporation non-profits	Legal service projects funded by the national legal services corporation	A bona fide association is still a MEWA. Employees can be "members" so long as they exercise no control and coverage is to employers.	Yes	DOL gave provisionary approval noting that employer control had to be real.
83-48A 9/14/83	Banks and their service corporations in Illinois	Three member classes. Employers elect six of nine trustees.	Employers appeared to control Trust but it depended upon a finding that selection of board members who selected some managers was real	No opinion	If DOL can't determine on the surface that a fact like "control" exists, DOL won't issue an opinion.

			control.		
83-53A 10/14/83	Florida Builders Assoc. – employers. Assoc. had six member classes	Trustees elected by participating employers.	Since some member levels included those who were not employers, the mix defeated consideration as employer plan.	No	Cannot include non-employers.
94-07A 3/14/94	United Service Association for Health Care (USA) consolidating seven trusts into one trust for small employers	Board of Directors elected by employers and self-employed members of USA	- membership not limited to employers - board of directors self-perpetuating - members have no meaningful method of amending the trust - no apparent commonality of interest	No	Surprisingly, DOL did not reject commonality of interest in small employers across the country; rather, DOL found a lack of evidence.
94-37A 11/10/94	Union Pacific Employees	Trustees appointed by five unions	You can make changes to meet legal requirements. First told by DOL not bona fide for control issues. Amended control documents and DOL said the change fixed things.	Yes	DOL doesn't care how control is exercised by beneficiaries, just that they do.
95-29A 12/7/95	Employee leasing company providing HR management and staffing	The leasing company	DOL could not determine from the various arrangements the status of various "employers" and "employees"	No	The labels used by the organization will not control the outcome
01-04A 3/22/01	Auto dealers – regular members	Trustees selected by covered employers	DOL found a bona fide association because the Trust agreement was being amended to give greater control to plan subscribers.	Yes	A Trust moving toward compliance, DOL will not automatically reject bona fide status.
03-13A 9/30/03	Association of Independent Commercial	Board of Trustees elected by participating	"The mere presence of non-employer members will not, in and of itself, vitiate the	No	Association would have to remove employees from

	Producers – TV production industry	employers	status of a group or association as an "employer" within the meaning of ERISA section 3(5) if such … members have no voting rights… and no control over it."		control since they had voting rights in order to qualify.
03-17A 12/12/03	Hanford Employee Welfare Trust for contractors and subcontractors of Hanford clean up	Fluor Hanford, Inc. managing contractor with DOE and board of Trustees for Trust	Common interest as contractors working on Hanford, controlled by employers	Yes	The employers did not belong to an organization so much as they all had a common interest as contractors on the same project.
05-12A 5/16/05	Wings for Christ – employers and employees accepting the tenets and mission of WFC	No information provided by WFC. No idea who would be in charge other than the organizers	This association failed on many grounds – non-employers, control issues, commonality of interest.	No	WFC argued a "co-employee" model that DOL rejected since common law of employment governs
05-18A 8/1/05	DOL opinion requested by Wash. OIC on *federal preemption of Washington State premium tax* assessments upon self-funded MEWAs	Washington self-funded MEWAs subject to state licensing.	"If the MEWA is "fully insured," then any state law that regulates insurance may apply to the MEWA to the extent the law provides standards, or provisions to enforce those standards, requiring the maintenance ...reserves and contributions in order to ... pay benefits."	The tax on self—funded MEWAs was not preempted	Washington OIC attorney Charles Brown requested this DOL opinion [L&I also requested a preemption opinion in another matter relating to state family medical leave] Busy, busy.
05-20A 8/31/05	Dunkin' Donuts franchisees	Franchisees own the company that runs the plan	The company facilitates access to the raw materials, supplies and services that facilitate Dunkin' Donuts franchise business operations and therefore provides common interest	Yes	DOL will give an opinion on a structure to be created – in this case, the company had not purchased a health plan but DOL saw they would

			other than in benefits		eventually.
05-24A 12/30/05	Wisconsin Association of Independent Colleges and Universities	Board of directors elected by member colleges and universities	Members have a history of organized cooperation on educational and administrative matters unrelated to the provision of welfare benefits to member employees, such as performing research, developing public relations programs, developing marketing strategies, providing admissions support services and managing collaborative ventures among the members.	Yes	Met the basic bona fide formula: - Employers only, - Who control, and - Who have a common interest other than benefits Also limited to a particular subset of employers – higher education
05-25A 12/30/05	Tennessee Independent Colleges and Universities	Board of directors elected by members	"The employer members of the Consortium have a commonality of interest and genuine organizational relationship beyond participation in the Consortium as a means to provide welfare benefits to their employees."	Yes	Even though the association's plan was a single, large plan for ERISA purposes, DOL noted that the plan was also a MEWA because it covered more than one employer.
07-05A 8/15/08	Payroll Solutions Employee Leasing Company (PEO)	PEO arguing as a single employer of leased employees under Nevada law	However the state labels an employer plan or purports to regulate the employer plan, federal law governs and preempts state law. A PEO is not a single employer plan because of the "common law" employment relationship between the employee and client		"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

			employer. Although federal law permits limited regulation of MEWAs, state is not required to exercise that limited jurisdiction.		arrangement is a MEWA for purposes of ERISA, it is preempted by section 514 of ERISA."
08-07A 9/26/08	Bend Chamber of Commerce Members	Board of Directors elected by members.	DOL rejected Chamber argument that other activities of the Chamber created valid, cohesive employer association. DOL found the "structure is not the type of connection between employers" that creates a bona fide association.	No	There must be a "cohesive relationship between the provider of benefits and the recipient…tied by a common economic or representation interest, unrelated to the provision of benefits."
11-01A 2/1/11	Custom Rail Employer Welfare Trust ("CREW")	Trustees	DOL considered the issue of whether CREW was a fully insured or self-insured MEWA to determine the extent of state regulation finding CREW to be self-funded.	No	ERISA preemption of state regulation of fully insured MEWA except laws governing contribution and reserves.
11-02A 5/4/11	"Green Cross" program whereby every covered person were defined as "employees" participating in a health research project	TPA	DOL found that no employment relationship existed "as a matter of economic reality."	No	Fake employment relationships based upon documents will not be honored in a review of the status of a benefit plan.
12-03A 5/25/12	Pension plan for "orphan" employer plans	NRP Corporation - in the business of taking over abandoned by plan sponsors	This was one of two opinions where DOL extended bona fide association tests to pension plans.	No	Rather than acting in the interest of an employer, NRP appears to be … a service provider to the plan, much like a

					TPA or investment advisor.
12-04A 5/25/12	Pension plan for multiple unrelated employers adopting the participation agreements.	Investment Advisory Firm	DOL extended historic analysis of bona fide association to pension plans explaining that the association was not bona fide because no "cognizable" group of employers, acting in the interest of employers, controls the plan, amendment, termination and other similar functions.	No	"Common employment-based interests distinguish an employee benefit plan from other entities that underwrite benefits or provide administrative services."

In March, 2006 Insurance Commissioner Mike Kreidler requested an information letter regarding a PEO that had an option to purchase 80% ownership in client companies which Kreidler wanted to regulate as a MEWA.

DOL advised that the common control language of ERISA should not treat separate businesses as a single employer based on an artifice entered into… "as a shield against state insurance regulation of a health benefit program being marketed to those separate employers and their employees. The Department, therefore, is of the view that the PEO must be able to demonstrate that there is a "substantial business purpose" for the option agreements other than avoiding State insurance regulation of a health benefit program it offers to its client employers before the Department will give any weight to the option agreements in determining whether the PEO and its client employers should be treated as a single employer for purposes of section 3(40) of ERISA."