

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs
Washington, D.C. 20216



FEB 27 1978

OPINION 78-4 A

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Mr. Doak Foster
Chief Counsel
Arkansas Insurance Department
400 University Tower Building
Little Rock, Arkansas 72204

Dear Mr. Foster:

This is in response to your letter of January 26, 1978, regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the NEBA, Inc. Pre-paid Legal Service Plan (the Plan) is an employee welfare benefit plan within the meaning of §3(1) of ERISA, 29 U.S.C. §1002(1).

We have reviewed the documents pertaining to the Plan which you have forwarded to us. ^{1/} From these documents, it appears that the National Employee Benefit Association (the Association) is an incorporated association which manages and administers the Plan. According to the recitations in the agreement between the Association and NEBA, Inc., the Association serves as administrator of employee welfare benefit plans while NEBA, Inc. engages in the business of creating, promoting and selling employee welfare benefit plans.

^{1/} These include the Articles of Association of the National Employee Benefit Association, as amended, the Articles of Incorporation and By-laws of NEBA, Inc., the plan document, plan descriptions, trust agreement, participation agreement, membership application, EBS-1 forms, and the agreement between the Association and NEBA, Inc. Also reviewed were the pleadings filed in Woodyard v. NEBA, Inc. and National Employee Benefit Association, (Pulaski County, Arkansas, Chancery Court, 1st Div., No. 77-3607).

In order for the program of benefits promoted by NEBA, Inc. and administered by the Association to be subject to ERISA, it must in the first instance satisfy the definition of an employee welfare benefit plan found in ERISA §3(1), 29 U.S.C. 1002(1). That definition provides:

Sec. 3. For purposes of this title:
(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter 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, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Based on the information presented, we conclude that although the Association's program of benefits, i.e., prepaid legal services, is one of the types of benefits which may be offered by an employee welfare benefit plan, this program does not satisfy the statutory definition of a plan because it is not established or maintained by an employer or by an employee organization (or by both) as those terms are defined in ERISA.

It is not clear whether the Association presently asserts that it is an "employer" or an "employee organization." 2/

2/ We note that in earlier litigation, Monroe v. National Employee Benefit Association, (Pulaski County, Arkansas, Chancery Court, No. 75-4856), the Association asserted that it was an "employee organization" within the meaning of ERISA §3(4), 29 U.S.C. §1002(4). Respondent's Memo-randum Brief, page 8.

We conclude, however, that the Association satisfies neither definition of those terms under ERISA.

ERISA §3(5), 29 U.S.C. §1002(5), defines the term "employer" for purposes of ERISA:

(5) The term "employer" means 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 Association, as the facts are presented, is not the actual employer of the individuals (denominated as "members") who are entitled to receive benefits from the Plan. Moreover, the plan documents indicate that the Association is neither a group or association of employers, nor is it acting in the interest of employers. The Association is a non-profit corporation. It enters into so-called "Subscription Agreements" with not only employers, but unions, other groups and associations, and individuals. Insofar as the Association may be said to be "composed" of these various types of entities, it is clear that the Association is not a "group or association of employers" within the meaning of ERISA §3(5). Moreover, Article V.A of the Association's Articles of Association offers "Active Memberships" as follows:

Any person who is an employee of any person, corporation, association, partnership or other organization is eligible to become an active member of this Association with full privileges if qualified under such rules as the Membership Committee may provide.

Thus the primary class of membership in the Association consists of employees, not employers, further reinforcing the conclusion that the Association cannot satisfy the definition of employer under ERISA.

It is also our view that the Association does not constitute an "employee organization" within the meaning of ERISA §3(4), 29 U.S.C. §1002(4). That section defines an employee organization as follows:

(4) The term "employee organization" means 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.

The Association fails to satisfy the first part of the definition (preceding the semi-colon), because employees cannot be said to "participate" in the Association in any meaningful way, and the Association does not exist for the purpose of dealing with employers on behalf of employees concerning an employee benefit plan. In this regard, it is noted that Article V. (C) of the Articles of Association of the Association provides that: "Each Active member shall not be entitled to vote in the affairs of the Association. Associate and Honorary members shall not be entitled to vote." [Emphasis supplied.] ^{3/} There is also no evidence that the Association represents its members by dealing with their employers on any matter relating to employment relationships. Instead, the Association offers prepaid legal service benefits to

^{3/} Additionally, the Association's Answers to Interrogatories Nos. 19, 20 and 21 indicate that the members have no right to control the plan or replace fiduciaries or trustees, and that no members attended its annual meeting.

individuals (whether they are employees, labor organization members, or members of some other group) who are signed up for coverage as a result of the sales efforts of NEBA, Inc.

We also conclude that the Association is not an employees' beneficiary association within the meaning of ERISA §3(4). In the first instance, the Association fails to satisfy the definition because its membership is not conditioned on employment status, as indicated by Articles V.B and V.D of its Articles of Association offering "Associate Membership" to "any person in any way interested in the activities of the Association," and granting such persons "all privileges of membership." However, even if the Association were composed entirely of employees, not every group of persons who each happens to be employed constitutes an employees' beneficiary association. Rather, an organization is an employees' beneficiary association for purposes of the ERISA definitions relating to plans only where the members of the organization share some commonality of interest with respect to their employment relationships. The requirement of commonality preceded ERISA, as it had long been the view of the Department in the interpretation of identical language found in the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §302(a)(3), as evidenced by Department of Labor interpretation and opinions.

The concept of commonality means, in general, that membership in an association is conditioned not only on the fact of employment, but also employment in the same common working unit, e.g., employees of a single employer or members of one labor union.

The requirement of a commonality of interest among members applies to all of the types employee organizations described in ERISA §3(4). As the members of the Association share no commonality of interest with respect to an employment relationship, we conclude that the Association is not an employee organization within the meaning of ERISA §3(4).

Finally, insofar as it might be argued that NEBA, Inc. rather than the Association, has established or maintained the Association's program of benefits, it is clear from

the foregoing that NEBA, Inc. is neither an employer nor an employee organization. NEBA, Inc. is a for-profit, privately owned corporation which promotes and markets prepaid legal service plans, and receives 25% of all contributions paid to the Association as remuneration for such "marketing." NEBA, Inc. quite obviously does not satisfy the definitional criteria for the types of entities which may establish or maintain an ERISA-covered plan.

Therefore, it is the position of the Department of Labor that neither the Association nor NEBA, Inc. are employee organizations or employers within the meaning of ERISA §§3(4) and 3(5). Accordingly, the NEBA, Inc. Pre-paid Legal Service Plan offered by the Association and/or NEBA, Inc. does not constitute an employee benefit plan subject to ERISA because the requirement that such a plan be "established or maintained by an employer or by an employee organization, or by both" is not satisfied.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions