

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



MARCH 1, 1979

Mr. Christopher C. Cornell
South Mississippi Home Health and
Rehabilitation Agency Inc.
P.O. Box 888
Hattiesburg, Mississippi 39401

OPINION 79-12 A

3(1)

Dear Mr. Cornell:

This is in response to your letter of December 14, 1977, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask the date upon which a certain employee pension benefit plan maintained by the South Mississippi Home Health and Rehabilitation Agency, Inc. (the Agency) came into existence. In this regard, you appear to request advice as to whether certain actions taken by the Agency in May, 1977, resulted in the termination of an existing plan and the establishment of a new one, or resulted instead in merely a modification of the then-existing plan.

You represent that on December 2, 1974, the Agency informed its employees of its intent to establish a retirement program. On December 11, 1974, the Agency's Board of Trustees approved a pension plan to begin January 1, 1975. On February 14, 1975, the Board of Trustees determined to have the pension plan funded in part through insurance contracts issued by Lamar Life Insurance Company (Lamar Life), and the remainder of the plan's assets managed by Lamar Life. Contributions were paid to Lamar Life until June, 1976, when, due to disagreement between the Agency and Lamar Life, the Agency began placing its contributions in escrow. On May 31, 1977, the Agency adopted plan documents which you represent contain provisions similar to those which were proposed to be implemented by Lamar Life. Subsequently the plan was submitted to the Internal Revenue Service (IRS) for qualification, and was approved. In addition, Lamar Life has agreed to return all contributions paid by the Agency plus interest.

Section 3(2) of ERISA defines an employee pension benefit plan as:

any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

- (A) provides retirement income to employees, or
- (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

With regard to Title I of ERISA, it appears from the information you have supplied that the Agency had established a plan for purposes of that Title as of January 1, 1975, the effective date of ERISA.

The foregoing portion of 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.

To the extent that it might be necessary for purposes of Title I to determine whether the events of May, 1977 resulted in a termination of the plan and the establishment of a new one, or merely a modification of the plan, such determination must be made on the basis of the relevant facts and circumstances. The Department ordinarily does not issue advisory opinions on such inherently factual issues. See, ERISA Procedure 76-1, Advisory Opinion Procedure, 41 FR 36281, August 27, 1976. However, with regard to the status of the plan under Title I, we note for your information that, based on the information you have supplied, we see no basis for disagreeing with your conclusion that the events of May, 1977 resulted in a modification rather than a termination of the plan.

We might also point out for your information that a determination that a plan exists or has terminated for purposes of Title I of ERISA is not necessarily dispositive of whether the plan exists or has terminated for purposes of Title II or Title IV of ERISA. Title II of ERISA is generally administered by the IRS, and Title IV is administered by the Pension Benefit Guaranty Corporation. You may wish to contact those agencies regarding the status of the plan under Titles II and IV.

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit
Programs
Labor-Management Services
Administration
Department of Labor