

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



JUN 29 1979

OPINION 79-41 A

Mr. Thomas C. Blake
Western Employers Security Trust
6300 Wilshire Boulevard
Los Angeles, California 90048

3 (1)

3 (5)

Dear Mr. Blake:

This is in response to your letter of November 2, 1978, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether the Western Employers and Employees Security Trust (WEST) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA. Our response is based on the representations set forth in your request, and on information developed through an investigation conducted independently by this Department.

You advise that WEST was established pursuant to a trust agreement dated July 15, 1971 (amended and superseded on May 1, 1976). The original trust agreement stated that the purpose of WEST was to permit subscribing employers to establish a group insurance plan for their eligible employees. The amended trust agreement states that the purpose of WEST is to obtain and make available to small businesses a program to provide employee benefits through the aggregation of smaller businesses so as to permit them to qualify for medical, health, disability, accident and life benefits and to provide these benefits through self-funding or through insurance policies. You represent that only employers may subscribe to WEST for their eligible employees and all costs of participation are billed to the employer who pays the amount in gross. In this regard the term "participant" in the WEST Master Plan Document is defined as "any firm acceptable to the Trust Administrator and the Trustees who becomes a member of and contributor to the Trust."

The Amended Agreement and Declaration of Trust (the Agreement) names Thomas C. Blake as the Trustee and Interstate Group Administrators, Inc. (IGA) as the Administrator. No provision is made in the Agreement for the removal of either the Trustee or the Administrator, though both are given the right to resign. The Trustee has the power to name his own successor and to appoint a successor Administrator. The Administrator is given general administrative power over the fund and has the power to construe the provisions of the Agreement. Any construction adopted by the Administrator in good faith is binding upon the participating employers. The Administrator also has the power to terminate the participation of any individual participating employer for failure to make its contribution. The Trustee is given broad powers by the Agreement. Article IV, section 2 of the Agreement states:

Trustees may exercise all rights or privileges under the provisions of any employee benefit plan or policies of insurance provided hereunder, and may agree to alteration, modification or amendment of such plans or policies and may take any necessary action respecting such policies or plans which may be necessary or advisable.

The Trustee may terminate the Trust upon a two-thirds vote of the participating employers at a meeting which the Trustee is empowered to call for that purpose. Thirty days notice of the meeting must be given and the absence of any participating employer is deemed to be approval and consent to the action proposed by the Trustee. The Trustee, in conjunction with the original signatories to the Agreement, may amend the Agreement. These original signatories, who are the "Trustors", are Samuel Smith and James Willard. Investigation by the Department of Labor reveals that Samuel Smith is the owner of Jassco Printing, a company which is an employer participant in WEST. Jassco provides printing service to IGA, including the printing of WEST materials. Smith was named Trustor by Thomas C. Blake. He attends Trust meetings but has no voting authority and considers himself a figurehead. James Willard was also selected to be Trustor by Thomas C. Blake, though he is not a partici-

pant in WEST and never has been. He provided computer service to IGA until IGA obtained other computer services. Willard attends Trust meetings but indicated that he generally goes along with Blake's suggestions and merely attends to approve Trust changes.

Section 3 of ERISA provides in part:

For purpose 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, or 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).

Although WEST offers, for consideration, the type of benefits enumerated in section 3(1)(A), the mere fact that the benefits provided are of the type enumerated in the statute is not sufficient to render the provider of those benefits an employee welfare benefit plan. To be an employee welfare benefit plan, WEST must, among other criteria, be established or maintained by an employer, an employee organization, or both. WEST does not represent itself as being, and there is no evidence to suggest that WEST is, established either in part or wholly by an employee organization. Therefore, consideration need be given only to whether WEST is established or maintained by an employer within the meaning of ERISA section 3(5).

WEST contends that it constitutes, as an entity a multiple employer welfare plan subject to ERISA. It is the Department of Labor's view, based on the definitional provisions of ERISA as well as the overall statutory scheme, that multiple employer plans exist where a cognizable group or association of employers establishes a benefit program for the employees of member employers, or where several employers and one or more employee organizations jointly establish such a program, or where several employers contribute to a plan established by an employee organization. In each of these contexts there is some organizational relationship among the employers, or the employees, or both in coming together and establishing a single plan. But where several unrelated employers, in establishing benefit programs for their unrelated employees, without any concerted "sponsor" or "settlor" activity, merely execute identically worded "trust agreements," "subscription agreements," or similar documents offered by an independent third party as a means to fund benefits, no multiple employer plan can be recognized. This situation is better analyzed as one in which each employer establishes his own single-employer plan and in which the entity contracted with (such as WEST) to provide benefits in return for a fixed premium or subscription fee, is not itself an employee benefit plan, but the provider of a funding vehicle to the various single employer plans.

Therefore, it is the position of the Department of Labor that WEST is not an employee benefit plan because it is not a program of benefits established or maintained by an employer within the meaning of ERISA section 3(5).

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions. We have considered your request for a conference under section 8 of the procedure and have decided that a conference is not necessary in providing this advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure