

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



OPINION 80-2A
514, 3(1), 3(4), 3(5)

JAN 16 1980

Richard A. Block, Esq.
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Dear Mr. Block:

This is in response to your letter of June 5, 1978, and subsequent submissions, requesting an advisory opinion relating to the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an opinion that the Michigan Association of Timbermen Employee Benefit Plan Trust (MAT Trust) does not provide insurance, and that Michigan state laws applicable to it are preempted by section 514 of ERISA.

Section 514(b) of Title I of ERISA provides, in part, that neither an employee benefit plan described in section 4(a) of ERISA that is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company, or other insurer, or to be engaged in the business of insurance, for the purposes of any law of any state purporting to regulate insurance companies. We believe, therefore, that the more appropriate issue for the Department to consider is the status of the MAT Trust under Title I of ERISA, rather than the status of the MAT Trust under state insurance laws.

You advise that the Michigan Association of Timbermen (MAT) is a corporation having two classes of members -- "regular" and "associate". A regular member may be any person or company engaged in the growing, harvesting or processing of forest products or engaged in providing supplies or services in connection with the growing, harvesting or processing of forest products. An associate member may be any person or company not meeting the above requirements but who is interested in furthering the purposes for which MAT was formed. Your submission does not indicate what are those purposes.

MAT is managed by a Board of Directors elected at an annual meeting. Only regular members have voting power; associate members are not entitled to vote on any matter. However, associate members are otherwise entitled to all rights and privileges of regular members.

Members of MAT are eligible to participate in certain programs, described below, which provide benefits for the members' employees and which are funded from contributions made by those participating employers through the MAT Trust. A participating employer may, however, require that his employees make contributions to the Trust. It appears from the documents you have submitted that MAT offers the following programs to its members: "Plan 501", which offers health benefits; and "Plan 502", which offers

group life and accidental death and dismemberment benefits. For purposes of this letter we will assume that MAT offers only these two programs (collectively, "MAT Plan").

The MAT Trust, established on January 20, 1978, is managed by its trustees, whose powers include the power to purchase insurance. MAT, together with the administrator of the MAT Plan (currently, MAT itself), has the power to determine reserve and contribution requirements. MAT has the power to remove the trustees, with or without cause, through action by its Board of Directors, and to appoint new trustees. In addition, MAT can modify or revoke the MAT Trust.

Section 3(1) of ERISA defines an "employee welfare benefit plan" as:

...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 [or], death....

Although the benefits provided through the MAT Plan are among those described in section 3(1), that Plan, to be an employee welfare benefit plan as defined in that section, must also have been established (or be maintained) by an employer or by an employee organization, or by both.

ERISA section 3(4) defines an "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 employee's beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

Although you assert that the MAT Trust is a "voluntary employees' beneficiary association", within the meaning of section 501(c)(9) of the Internal Revenue Code of 1954, you do not assert, and, as discussed below, it does not appear, that MAT itself -- the entity that offers the MAT Plan -- is an "employees' beneficiary association", for purposes of section 3(4) of ERISA. In construing the term "employees' beneficiary association," as that term is used in section 3(4) of ERISA, the Department has taken the position that, in order for an entity to be such an association, it is necessary that membership in the entity be conditioned on one's employment status (for example, where membership is limited to employees of a certain employer or employers).¹

Since membership in MAT is available to all persons who are interested in furthering the purposes for which MAT was formed and, therefore, does not appear to be conditioned in any manner upon employment status, the Department is of the opinion that MAT is not an "employees' beneficiary association" as that term is used in section 3(4) of ERISA. Moreover, we have found no evidence in your submissions to indicate that MAT would otherwise fall within the definition of "employee organization".

¹ There are also other criteria for determining whether an organization is an "employees' beneficiary association" within the meaning of the act.

It appears that membership status in MAT as an employer (rather than employee) is necessary in order for the benefits provided by the MAT Plan to be available to the member's employees. In addition, it does not appear that MAT deals with its member employers on behalf of employees (other than by permitting its members and their employees to participate in the MAT Plan). Therefore, the Department concludes, on the basis of the information you have submitted, that the MAT Plan was not established and is not maintained by MAT as an "employee organization" within the meaning of section 3(4).

Section 3(5) of ERISA defines an "employer" 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 a capacity.

The Department has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a "multiple employer" plan (i.e., a plan to which more than one employer contributes) may, nevertheless, exist where a cognizable, bona fide group or association of employers establishes a benefit program for the employees of member employers and exercises "settlor" functions on behalf of these members with respect to a trust established under the program. We have included, for your information, a number of recent letters in this area issued by the Department.²

Whether a bona fide employer association exists is generally a factual question. Among the factors considered include: 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 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 association and the benefit program.

The Department ordinarily will not issue an advisory opinion when the nature of the question is factual in nature. See ERISA Procedure 76-1 (Advisory Opinion Procedure), section 5.01 (41 FR 36282, August 27, 1976).

Because of the limited information you have supplied concerning the nature, history, functions and purposes of MAT, we decline to express an opinion as to the status, under ERISA Title I, of the MAT Plan and the MAT Trust vis a vis regular members of MAT.

However, employer associate members of MAT, although their employees would appear to be eligible to participate in the MAT Plan, have no voting rights with respect to MAT matters. The Department believes that the concept of an association acting for an employer with respect to an employee benefit plan embodies a requirement, as a minimum, that such employer have a voice in the management of the association. For that reason, the Department concludes that, in making benefits under the MAT Plan available to employees of associate members of MAT by establishing the MAT Plan, MAT has not acted (in relation to the MAT Plan) for its associate member employers within the meaning of section 3(5) of

² Opinion Letters 79-49, 79-54; letter of July 19, 1979, to Richard E. Carllson regarding Mutual Assurance Trust; and letter of August 9, 1979, to Richard B. Sanford regarding Independent Businessman's Association.

ERISA. Accordingly, it is our view that the MAT Plan was not established by MAT acting as a group or association of its associate member employers; rather, each associate member employer of MAT who has elected to provide, for his employees, benefits through the MAT Plan may have established his own separate plan subject to Title I of ERISA, and the MAT Trust was not established pursuant to any such separate plan.

You may wish to consider the letters we have enclosed, which indicate the nature of the information the Department has considered significant in other cases. If you wish to furnish additional information that you believe is relevant to a determination whether the MAT Trust was established pursuant to a plan covered by Title I of ERISA, we will give the matter further consideration.

We have considered your request for a conference, in the event the Department contemplated rendering an unfavorable opinion, and have concluded that, to the extent the opinions we have expressed herein are unfavorable, a conference is not necessary for resolution of those matters.

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

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs

Enclosures