

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 80-10A
3(1)

FEB 11 1980

Mr. George T. Boggs
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Dear Mr. Boggs:

This is in response to your letter of November 4, 1977, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether Totalcare Health Plan (THP) constitutes an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

The following is a summary of the facts and representations contained in your letter and the documents submitted therewith. You advise that Totalcare Systems of America, Inc., a District of Columbia corporation, (the Corporation) has created THP as a proposed prototype health and welfare plan. You assert that the THP is intended to be used by individual employers or employee organizations that desire to adopt a health and welfare plan for their employees or members, respectively. You advise that each entity will adopt a separate plan and trust having its own participants, funding, and administration, and only employers and employee organizations that meet the requirements respectively set forth in section 3(5) and 3(4) of ERISA will be permitted to adopt the THP. Each entity which adopts the THP will be permitted to exercise certain individual selections regarding program features. The THP prototype program is designed to provide a range of health services and, although the THP provides a specific list of benefits, that list is not necessarily exclusive. Most services and benefits available through THP will be provided by specified service providers which will include various medical personnel, and hospital and laboratory facilities. The prototype professional service agreement, which is part of the THP, indicates that each individual service provider will enter into a separate contract with each entity adopting the THP, so that specifically agreed upon medical services will be provided for that particular entity's participating members.

You advise that the THP adopted by each separate entity will be funded through monthly contributions by that adopting entity or its employees. The required monthly contribution will be calculated by the Corporation so that there will be a sufficient amount to pay both monthly retainer fees for the service providers and any necessary insurance coverage. The program will be administered by the Corporation through agreement with each entity in accordance with the proposed prototype Administration Contract, which is part of the entire THP package.

ERISA section 3(1) defines, in pertinent part, 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 . . ."

Although the benefits provided through the THP are among those enumerated in section 3(1), in order for the THP to be an employee welfare benefit plan, it must also be established or maintained by an employer, by an employee organization, or by both. However, even assuming that the entities which adopt prototype THPs are in fact bona fide employers or employee organizations (a fact as to which we offer no opinion), the prototype THP would not itself be considered an employee welfare benefit plan. Rather, each employer or employee organization which adopts the THP will have established its own separate employee welfare benefit plan covered by title I of ERISA, unless exempt or otherwise excluded from such coverage.

Our above consideration of the prototype THP does not relate to any provisions of ERISA not specifically discussed in this letter. Thus, for example, we are not rendering any opinion as to whether the THP and related documents are consistent with the general fiduciary responsibility provisions of title I of ERISA.

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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs