

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION 80-15A  
3(1), 3(4), 3(5), 4(b)(1), 3(32)

MAR 14 1980

Ms. Barbara B. Creed  
Pillsbury, Madison & Sutro  
P.O. Box 7880  
San Francisco, California 94120

Dear Ms. Creed:

This is in reply to your letters of November 21, 1978, and May 11, 1979, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). You ask whether the Legal Services Region VIII Employee Benefits Organization Life Insurance Plan, the Legal Services Region VIII Employee Benefits Organization Medical Plan, and the Legal Services Region VIII Employee Benefits Organization Dental Plan (the Programs) are employee welfare benefit plans within the meaning of section 3(1) of ERISA.

You advise that the Legal Services Corporation is a private, nonmembership, nonprofit corporation created by the Legal Services Corporation Act of 1974 for the purpose of providing financial support for legal assistance in noncriminal matters to persons of low and moderate income. Region VIII of the Legal Services Corporation funds 36 legal services projects, in California and Nevada, that employ a total of approximately 1300 persons. Each of the 36 funded projects is a separately incorporated public interest legal services organization which is exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954 (the Code). Region VIII retained you to formulate welfare benefit plans for the employees of those 36 legal services projects.

You advise that an organization called the Legal Services Region VIII Employee Benefits Organization (hereinafter referred to as the "Organization") was incorporated on November 13, 1978, and is seeking qualification as a voluntary employees' beneficiary association under section 501(c)(9) of the Code. You state that the purpose of the Organization is to provide a program of life insurance, accidental death and dismemberment, and medical benefits to employees and certain retired employees of any legal services project that: (1) is funded by the Legal Services Corporation; (2) has one or more offices in Region VIII; (3) is designated by the Organization as eligible; and (4) elects to participate in the Organization.

The by-laws of the Organization provide for two classes of membership. Class A members consist of any legal services project that meets the four criteria enumerated above; Class B members consist solely of regular employees of such projects. The membership of Class A members terminates upon the dissolution of the project, when the project ceases to be funded by the Legal Services Corporation and to have at least one office located in Region VIII of such Corporation, or when the project elects to terminate its membership. The membership of Class B members terminates upon the member's death, when the Class A membership of the project employing the member terminates, or when the member's qualifying employment ceases. Class A members elect the directors who manage the affairs of the Organization, and Class A members have the sole power to vote on matters submitted for a vote of the members.

The by-laws provide that the Organization can charge no dues, but can charge appropriate fees or assessments to defray the costs of maintaining the benefit programs offered by the Organization. Each Class A member shall determine the portion of the fees and assessments to be borne by the Class A member and the portion to be borne by its Class B employee members. Benefits may be provided by the purchase of group insurance contracts, by direct payments from a trust fund maintained by the Organization, or by any combination of insurance and direct payments. You have submitted copies of the documents governing the life insurance, medical, and dental programs that the Organization intends to adopt. The documents designate the Organization as the "plan sponsor," "plan administrator," and "named fiduciary." They designate Galbraith and Green, Inc., as the claims administrator. They designate Crocker National Bank as trustee of some of the assets, and Phoenix Mutual Life Insurance Company as the insurer. The documents all provide that they can be amended at any time by the board of directors of the Organization.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" in relevant part 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 ....

The Programs provide benefits enumerated in this list. However, for a program to be an employee welfare benefit plan, in addition to providing a benefit enumerated in section 3(1), it must, among other criteria, be established or maintained by an employer, by an employee organization, or by both.

Section 3(4) of ERISA defines the term "employee organization" to mean "... 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 Organization does not constitute an employee organization within the first part of the definition contained in section 3(4), as it does not exist "for the purpose ... of dealing with employers on behalf of employees concerning an employee benefit plan, or other matters incidental to employment relationships." Nor is the Organization an employees' beneficiary association under the second part of the definition in section 3(4), since employers, not employees, control the Organization's affairs.<sup>1</sup>

Section 3(5) of ERISA defines the term "employer" to mean "... 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 Department has taken the position that, in order for any group or association to satisfy this definition, it must be a bona fide association of employers, subject, in both form and substance, to the control of its employer members.

The employer members of the Organization are all nonprofit legal service projects funded by Region VIII, and, according to the documents, these employer members elect the Organization's directors and vote on all matters submitted for vote of the members. However, the question of whether a group or association is subject, not only in form, but also in substance, to the control of its employer members is a factual question. Section 5.01 of ERISA Procedure 76-1 provides that the Department ordinarily will not issue an advisory opinion when the nature of the question is inherently factual. Accordingly, the Department will not issue an advisory opinion at this time with regard to whether the Organization is or is not a group or association of employers within the meaning of section 3(5) of ERISA.

However, if the Organization is, both in form and in substance, controlled by its employer members, we do not think its status as an "employer" for purposes of section 3(5) of ERISA would be vitiated solely because the Organization includes as a separate class of "members," the employees of participating employers, if, as appears to be the case, these employee "members" have no voting rights in the Organization and no control over its operation, and are members only in the sense that they (1) will be eligible to receive benefits under the programs adopted by the Organization, and (2) can, if their employer so elects, be assessed for contributions to help pay the costs of maintaining those programs.

You inquire whether our analysis would be affected in any way if the Organization were to include legal services projects that are not funded by the Legal Services Corporation. In order to answer your question, we would need to know: (1) whether these employers and employees

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<sup>1</sup> We note that our conclusion that the Organization is not an employees' beneficiary association under section 3(4) does not affect its status under section 501(c)(9) of the Code.

would be admitted to membership and participate in the Organization on the same basis as Region VIII employers and employees; (2) how the Organization sought, or would seek, the additional members;<sup>2</sup> and (3) if the additional members were not sought, how they became interested in joining the Organization.

We have also considered the question whether a plan established by the Organization would be a governmental plan within the meaning of section 4(b)(1) of ERISA. Section 1005(e)(1) of the Legal Services Corporation Act of 1974 states that, except for limited purposes not applicable here, the Legal Services Corporation "shall not be considered a department, agency or instrumentality of the federal government." Section 514(d) of ERISA provides that, with certain exceptions not applicable here, ERISA shall not "be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States ..." In view of section 1005(e)(1) of the Legal Services Act and section 514(d) of ERISA, we do not believe that a plan established and maintained by the Organization would be exempt as a governmental plan under section 4(b)(1) solely because the employer members of the Organization are funded by the Legal Services Corporation.

In conclusion, the Department is of the opinion that if the Organization should prove to be, in fact as well as in form, controlled by its employer members, the Organization would be an "employer" within the meaning of section 3(5) of ERISA and, accordingly, each of the three programs adopted by the Organization would be an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

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 of Pension and Welfare Benefit Programs

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<sup>2</sup> The materials you submitted to the Department indicate that the Organization was founded by Region VIII employers and employees for the purpose of providing welfare benefits for employees of Region VIII employers. The solicitation of additional non-Region VIII members does not appear to come within the scope of this purpose. If the Organization has some purpose other than the purpose stated, the status of the Organization under section 3(5) of ERISA might be affected. In this regard, we call your attention to the Activity Report of the Committee on Education and Labor of the United States House of Representatives, House Report No. 94-1785 (1976), and the court's discussion in Bell v. ESBA, 437 F. Supp. 382 (1977), both indicating that a plan would not be a welfare plan within the meaning of ERISA if the plan were established or maintained by an entrepreneurial venture engaged in the marketing of insurance products or services to others.