

U.S. Department of Labor

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



OPINION 80-40A

3(1)

3(5)

JUL 9, 1980

Mr. Donald A. Dowdell
Attorney, Legal Division
Insurance Commissioner
Office of Treasurer
Tallahassee, Florida 32304

Dear Mr. Dowdell:

This is in response to your letter of July 28, 1978, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the health benefits program of the Small Business Independent Trades Association (SBITA) is an employee benefit plan within the meaning of ERISA section 3(3).

You advise that SBITA was granted a certificate of incorporation on August 29, 1977, by the State of Missouri. One of the purposes for incorporation was to unite small businesses and independent tradesmen and, by virtue of their combined buying power, to secure accident and health benefit plans at lower cost. In pursuit of this purpose, SBITA sponsored the Association Master Trust (the Trust) on December 1, 1977, with Association Plan Administrators, Inc. (APA), Tampa, Florida, as administrator. Section 2.1(b) of the Trust provides that one of the purposes is to provide employers "... medical, surgical, or hospital care, or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, apprenticeship or other training programs, or day care centers, scholarship funds or prepaid legal services, or any benefit described in Section 302(c) of the [L]abor Management Relations Act of 1947."

SBITA has two classes of members -- founding and sustaining. Founding members consist of seven serving until voluntary resignation or upon request to resign by a majority of other founding members. Sustaining members, who have no right to vote or to participate in selecting the Board of Directors or corporate officers, consist of all other members.

The employer membership of SBITA is drawn from a variety of industries. Any employer-member of SBITA may participate in the Trust if the employer is acceptable to the administrator. The administrator also has the power to terminate any participating employer because of failure to contribute in a timely manner or by reason of adverse claims experience. Further, any good faith construction of the Trust agreement by the administrator is binding upon the participating employers.

The investment and management of the Trust assets is performed by a management committee. Members of this committee are selected by participating employers at an annual meeting. SBITA has the power unilaterally to remove members of the management committee at any time, as do participating employers with the consent of 51 percent of such employers. In either case, upon removal of a member of the management committee, SBITA appoints the successor. Termination of the Trust can be accomplished with the consent of two-thirds of the participating employers or unilaterally by SBITA upon 90 days notice to all participating employers. SBITA also has the power unilaterally to amend the Trust in certain circumstances.

Section 3(3) of ERISA defines employee benefit plans to include both employee pension benefit and employee welfare benefit plans. Since there is no indication that the Trust is an employee pension benefit plan and the literature of APA claims it is an employee welfare benefit plan, this opinion letter will address only that issue.

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, 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 the Trust provides benefits among those enumerated in section 3(1)(A), to be an employee welfare benefit plan, the Trust must, among other criteria, be established or maintained by an employer, an employee organization, or both, for the purpose of providing its participants with these benefits. Since participation in the Trust is limited to employers, and there is no indication that an employee organization is connected with the Trust in any manner, the Department concludes that the Trust was not established by an employee organization.

Section 3(5) of ERISA provides that the term “employer” means:

... 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 the absence of an employee organization, a multiple employer plan is formed where a cognizable, bona fide group or association of employers establishes a benefit program for the employees of member employers. In contrast, where several unrelated employers, in establishing benefit programs for their unrelated employees, merely execute identically worded “trust agreements,” “subscription agreements,” or similar documents offered by a third party as a means to fund benefits, no multiple employer plan can be recognized. In this situation, each employer establishes his own single-employer plan; the entity providing benefits is not itself an employee benefit plan but the provider of a funding vehicle to the various single-employer plans.

SBITA does not appear to possess many of the characteristics normally attributed to a bona fide association of employers. The Department takes the view that a significant characteristic of a bona fide employer association is that the association be subject to the control of its members, both in form and substance. The SBITA Articles of Incorporation indicate that control of SBITA rests solely with the seven founding members, who are self-perpetuating and independent of any control by the sustaining members. Furthermore, it appears that ultimate control over the Trust rests in SBITA and APA in its role as administrator. SBITA has the power to terminate the Trust unilaterally, amend the Trust agreement, and remove members of the Trust’s management committee. The administrator has the power to terminate participating employers at any time because of adverse claims experience or failure to contribute. Moreover, the administrator has the power to construe the provisions of the Trust agreement, such construction to be binding upon participating employers. Participating employers do have the power to remove members of the management committee, but SBITA appoints their successors.

In view of these facts, it is the position of the Department that SBITA is not the type of “association” of its sustaining employer members which satisfies the definition of an “employer” within the meaning of section 3(5) of ERISA.* Therefore, the Department concludes, on the basis of the information you have supplied, that the Trust is not an “employee welfare benefit plan” within the meaning of section 3(1) of ERISA. As noted above, this conclusion does not mean that individual employers who are members of SBITA have not established their own individual employee welfare benefit plans subject to ERISA, or that persons who act in fiduciary capacities with

* You also indicate that SBITA, through APA, has solicited Florida licensed insurance agents to market the Trust to Florida residents. The Department believes that the establishment or maintenance of a plan as an entrepreneurial venture engaged in the marketing of insurance products or services to others is a factor to be considered in determining whether the persons engaged in such venture are acting as a bona fide employer association.

respect to those plans are not subject to the fiduciary obligations imposed by part 4 of title I of ERISA, 29 U.S.C. §1001 et seq.

It should also be noted that if any of the seven founding members of SBITA participate in the Trust, it is possible that those founding members' arrangements would be deemed to be one plan rather than several plans. The Department expresses no opinion on this question.

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

cc: Small Business Independent Trades Association