

**U.S. Department of Labor**

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



OPINION 80-42A

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3(5)

JUL 11. 1980

Mr. Philip R. Hinderberger  
Counsel, Department of Insurance  
State of California  
100 Van Ness Avenue  
San Francisco, California 94102

Dear Mr. Hinderberger:

This is in response to your letter of July 31, 1978, requesting an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA). We regret our delay in responding to your inquiry.

In your letter you ask whether a certain trust known as the "RETA" Trust and the benefit plan established in connection with it (RETA Plan) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA and, if so, whether the Department has promulgated regulations regarding the definition of church plan under section 3(33) of ERISA. In your letter you enclosed certain correspondence between you and John R. Maloney, attorney for the RETA Trust, including Mr. Maloney's letter to you of March 9, 1978, in which he enclosed answers to interrogatories about the RETA Trust, your letter to him of March 15, 1978, and his letter to you of April 19, 1978.

The following is a summary of the facts and representations contained in the materials enclosed with your letter. The RETA Trust was established on January 1, 1976, by a group of entities affiliated with the Roman Catholic Church to provide health care benefits to clergy, religious, and lay employees. The original trustors were nonprofit religious corporations operated under the auspices of the Roman Catholic Church or approved for listing in The Official Catholic Directory, published by P.J. Kenedy & Sons. The original trustors are principally located in the states of California, Nevada, Oregon, and Washington. The RETA Trust by-laws provide that any religious organization operated under the auspices of the Roman Catholic Church, in good standing thereof, and currently listed, or approved for listing, in The Official Catholic Directory may be trustors upon approval of the Board of Directors of the RETA Trust. Any organization listed in The Official Catholic Directory is approved by the U.S. Catholic Conference as a member of that conference. Under a group ruling by the Internal Revenue Service, all organizations included in the Directory are exempt from Federal income taxes under section 501(c)(3) of the Internal Revenue Code of 1954 (the Code).

The RETA Trust provides hospital and medical benefits to clergy, religious, and lay employees of the trustors. The trust agreement provides for meeting of the trustors at least annually at the request of either the Board of Trustees, the plan administrator, or at least two trustors. Voting power is generally allocated among the trustors on the basis of the number of participants and their dependents under age 65 attributable to each trustor who are covered by the trust agreement. Trustors may vote directly or by proxy. Trustees are elected by the trustors for 3-year staggered terms and hold office until election and qualification of a successor or until the trustee dies, is removed, or resigns.

The trust agreement under which the RETA Trust was established and the accompanying RETA plan document (which were attached as Exhibit A to the answers to your interrogatories enclosed by Mr. Maloney with his letter to you of March 9, 1978) indicate that a plan administrator will have the authority and responsibility to control and manage the operation and administration of the RETA Plan. The trust

agreement and plan document themselves name the firm of Heffernan, Keiler & Doble, Inc. as the plan administrator, but apparently give the trustees the authority to select a different administrator.

The answers to the interrogatories submitted with Mr. Maloney's letter to you of March 9, 1978, represent that the RETA Trust has at no time sought, by any form of advertising, letter, brochure, or other means, to induce anyone to become a trustor, and that the plan administrator does not publish brochures or advertisements for the trust, but will prepare a proposal describing the anticipated costs of participation in the RETA Trust when requested to do so by a potential trustor. Mr. Maloney's letter asserts that the plan administrator did not form the trust and none of its officers, directors, or employees are trustees. The plan administrator is paid a fee per participant and beneficiary.

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....

The RETA Trust provides benefits among those enumerated in section 3(1)(A). A benefit program is not an employee welfare benefit plan, however, unless it is established or maintained by an employer, an employee organization, or both. From the submitted materials, it does not appear that any employee organization is connected with the establishment or maintenance of the RETA Trust. The trust, therefore, is not an employee welfare benefit plan unless it is established or maintained by an employer.

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 to include "a group or association of employers acting for an employer in such capacity." A body of employers, such as the employers who are trustors of the RETA Trust, is not an employer within the meaning of section 3(5) unless it is a bona fide employer group or association and it is acting in the interest of an employer in relation to an employee benefit plan.

The Department has taken the view, on the basis of the definitional provisions of ERISA, as well as the overall statutory scheme, that there must be some organizational relationship among employers in forming a group or association and establishing the plan. In contrast, where several unrelated employers merely execute identically worded "trust agreements" or similar documents offered by an independent third party as a means to fund benefits, no employer association, and, consequently, no employee benefit plan within the meaning of section 3(3) of ERISA, can be recognized.<sup>1</sup>

A determination whether a purported group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: 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.

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<sup>1</sup> In this connection, see the Activity Report of the House Committee on Education and Labor, H. Rep. No. 94-1785 (1977), where the committee expressed its view that "plans" established and maintained by insurance entrepreneurs for the purpose of marketing insurance products to employers and employees at large are not ERISA plans.

In examining your letter and the documents submitted with it, we have identified some circumstances that tend to support a conclusion that the RETA Trust was established and is maintained by a bona fide employer group or association. The by-laws of the trust provide that a participating employer may exercise voting rights regarding operation of the trust generally in proportion to the number of employee participants of the employer and their beneficiaries who are covered under the trust's program of benefits. These circumstances tend to indicate that the trustor employers retain control, at least formally, over the activities and operations of the RETA Trust. Your letter does not, however, indicate whether employer trustors exercise control in substance, as well as in form, over the RETA Trust. In the Department's view, a bona fide group or association of employers must be subject to the control of its employer members both in form and in substance.

Affiliation with the Roman Catholic Church is required for membership in the RETA Trust. Thus, there appears to have been a pre-existing relationship among the employer trustors before the establishment of the RETA Trust.

Mr. Maloney's letter of March 9, 1978, represents that the trust does not solicit employers to participate in it, and that the plan administrator did not form the trust. These circumstances tend to indicate that the RETA Trust was not established and is not operating as a vehicle for marketing insurance products to employers. In your letter of July 31, 1978, on the other hand, you characterize the RETA Trust as "a self funded multiple employer trust whose primary market is Roman Catholic Church related organizations in California and Nevada." This characterization tends to suggest that the RETA Trust might, in fact, be a vehicle for marketing insurance products and might, in fact, be controlled by the contract administrators, not the employers, although your letter does not indicate the circumstances that led you to describe the RETA Trust in these terms.

In light of the above, we are unable to reach a conclusion regarding the character of the RETA Trust on the basis of the materials that we have reviewed. However, we hope that the foregoing discussion will be of assistance to you in your consideration of this matter.

You also inquire whether the Department has promulgated regulations regarding the term "church plan" as defined under section 3(33) of ERISA. The Department of Labor has not yet promulgated regulations under section 3(33) regarding the term "church plan."

It should be noted, however, that the Department of the Treasury for purposes of section 414(e) of the Code recently issued regulations (26 CFR 1.414 (e)-1; 45 FR 20796) regarding the definition of the term "church plan." Section 414(e) contains a definition of the term "church plan" that is similar to the definition in section 3(33) of ERISA, but that generally applies only to retirement plans which are qualified for favorable tax treatment under section 401(a) of the Code.

Sincerely,

Ian D. Lanoff  
Administrator  
Pension and Welfare Benefit Programs