

U.S. Department of Labor

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



OPINION NO. 80-74A
Sec. 3(1)

OCT 8 1980

Wesley J. Kinder
Insurance Commissioner
State of California
100 Van Ness Avenue
San Francisco, CA 94102

Attention: Raul V. Aguilar
Senior Counsel

Dear Mr. Kinder:

You have requested the opinion of the Department of Labor as to whether the program of benefits offered by the Common Market Employee Benefit Association ("CMEBA"), during the time this entity was in operation, constituted an employee welfare benefit plan within the meaning of ERISA §3(1), 29 U.S.C. §1002(1).

We have reviewed the documents pertaining to CMEBA which you have forwarded to us, including its Articles of Association, Bylaws, brochures and marketing materials, and minutes of meetings. We have also reviewed transcripts of the depositions of CMEBA administrator Frank Barry conducted on March 21, 1977 and February 3, 1978, and that of CMEBA trustee Mark E. Killebrew, also conducted on March 21, 1977. Based on these materials, and for the reasons set forth below, we are of the view that the benefit program offered by CMEBA, from the time it was established in December 1975 until CMEBA was placed in conservatorship in October 1977, did not constitute an ERISA-covered plan.

The records referred to above indicate that CMEBA and its health program were formulated by two licensed insurance agents, Frank Barry and Mark E. Killebrew, in December 1975. Barry and Killebrew named themselves administrator and trustee, respectively, and together developed the terms and rate structure for the benefit program. They began business by soliciting employers to whom they had previously sold insurance, then hired CMEBA employees to sell the program, and in April 1976 entered into a contract with Al Haney to direct a national sales force of insurance agents and brokers. Haney, and the agents and brokers with whom he contracted, received as commission a total of 22% of contributions, plus a \$10 CMEBA membership fee paid by each applicant for coverage. Barry's final salary from CMEBA was \$500 per week, plus 2% of contributions received as an "incentive."

Although CMEBA was directly marketed to both employers and to individual employees, its Articles of Association specified that CMEBA was an organization of employees. However, there was virtually no involvement by these employee "members" in CMEBA's organizational activities. The application form for CMEBA membership and coverage by the health program included a proxy allowing Frank Barry to vote at all meetings for which the member was not present. During the CMEBA annual meeting on May 11, 1977, only two of nearly eight thousand members (other than CMEBA employees and management) were in attendance. Although CMEBA had a board of managers for a period of time, its members were associates or relatives of Barry or Killebrew, and were not seriously involved in CMEBA's operations.

Section 3(3) 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).

The benefits provided under the CMEBA program constitute the type of benefits enumerated in ERISA §3(1). However, to be an employee welfare benefit plan within §3(1), the program, among other elements, must be established or maintained by an employer, an employee organization, or both. Since the documents submitted to us, including the depositions of the principals, represent only that CMEBA was an employee organization, we shall only address that issue.

Section 3(4) of ERISA 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 employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

There is no evidence that CMEBA in any way represented employees in their dealings with employers, so as to constitute a labor union or similar entity within the first part of the definition. As to whether CMEBA constituted an "employees' beneficiary association" under the second part of the definition, the Department has interpreted that term, under both ERISA and the Welfare and Pension Plans Disclosure Act, to mean an organization in which employees participate, and in which the members share a commonality of interest with respect to the employment relationship, e.g., employees of a single employer or members of one union. The requirement of employment participation means that the functions and activities of the organization are in fact controlled by its members, either directly, or through the regular election of directors, officers, etc.

In this case, neither of the essential criteria of an employees' beneficiary association, i.e., commonality of interest and participation, is present. The requirement of commonality is not satisfied by the mere status of CMEBA members as unrelated employees.¹ As stated above, the notion of commonality embodies a much closer tie among members, such as the employees of a single employer.

Member participation is also lacking here. It is apparent that CMEBA was organized and operated by Barry and Killebrew, with no meaningful involvement or control by the members. The CMEBA health program was instead marketed, on a commission basis, through traditional means of insurance solicitation, with member dues paid to the sales force rather than the Association.

Because CMEBA was not an employee organization within the meaning of ERISA §3(4), we have concluded that its benefit program did not constitute an employee welfare benefit plan because that program was not established or maintained "by an employer or by an employee organization or by both" so as to satisfy the definition found in ERISA §3(1).

This letter constitutes an advisory opinion under ERISA procedure 76-1.

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs

¹ In fact, it appears that the membership of CMEBA included employers, sole proprietors, partners, and other non-employees.