U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-7A
3(1), 406

JAN 12 1981

Mr. Dean A. Mixon
Weinfeld & Mixon
Suite 203
601 North Parkcenter Drive
Santa Ana, California 92705

Dear Mr. Mixon:

This is in response to your letters of July 16, 1979, and October 12, 1979, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Consolidated Labor Union Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of ERISA, and whether an employee welfare benefit plan within the definition of section 3(1) can be maintained by more than one local.

You advise that the Trust was established April 2, 1979, by the Office and Professional Employees International Union, AFL-CIO Local 227 (Local 227) and Executive Insurance Advisors, Inc., to provide primarily medical benefits to union members through collectively bargained agreements with employers. The Trust permits any labor union affiliated with the AFL-CIO to become a party to the Trust to provide benefits agreed to in a collectively bargained agreement with employers. The Benefit Committee is composed of an equal number of representatives of those employers which are parties to the Trust and Local 227. Currently the Benefit Committee is composed of two representatives of Local 227, a principal of Executive Insurance Advisors, Inc., and the president of another employer. In addition, employees of Executive Insurance Advisors, Inc., were organized by Local 227 and Executive Insurance Advisors, Inc., and entered into a collectively bargained agreement with Local 227 on June 1, 1979.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> … 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).

From the information you submitted, the Trust does provide benefits among those enumerated in section 3(1) of ERISA. Further, the Trust was established or is maintained by an employer, by an employee organization, or by both, for the purpose of providing these benefits to participants or their beneficiaries. Therefore, it is the position of the Department of Labor that the Consolidated Labor Union Trust is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

In your letter of October 12, 1979, you also inquire whether an employee welfare benefit plan within the meaning of section 3(1) of ERISA[1] can be maintained by more than one local union. In this connection you indicate that at some future time other local unions affiliated with the AFL-CIO might be "admitted" to the Trust. We assume that this means that eligibility for benefits under the Trust would be extended to members of such locals.

In general, ERISA does not prohibit a welfare plan from providing benefits to members of more than one local union, provided that governing plan documents extend eligibility for benefits to all individuals who receive benefits. In view of the circumstances described in your letter, however, you should be aware of the Department's position that an organization that functions as a vehicle for insurance entrepreneurs to market insurance products or services, not as a bona fide program to provide benefits to employees, is not an employee benefit plan within the meaning of ERISA. In this regard, see Activity Report of the Committee on Education and Labor, H. Rep. No. 94-1785 (1976), at 48. See also, Bell v. Employee Security Benefit Association, 437 F. Supp. 382 (D. Kan. 1977).

As indicated above, we believe that as presently constituted the Trust is an employee welfare benefit plan. Your letters, however, mention a number of circumstances that suggest that the extension of benefits under the Trust to members of local unions other than Local 227 might be better analyzed as part of a program by which the contract administrator would market insurance products or services. Specifically, your letters indicate that one of the two employer representatives on the Trust's Benefit Committee is a principal of the contract administrator.[2] According to your October 12, 1979 letter, moreover, although the contract administrator has signed a collective bargaining agreement with Local 227 covering the administrator's employees,

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[1] Your letter refers to "an employee welfare benefit plan … under Section 3(2) of ERISA." Section 3(2) of ERISA contains a definition of the term "employee pension benefit plan," while the definition of "employee welfare benefit plan" is in section 3(1).

[2] You state that originally both of the two employer representatives on the Benefit Committee were principals of the contract administrator.

and although the contract administrator is obligated under the collective bargaining agreement to make contributions to the Trust on behalf of these employees, the collective bargaining agreement was not signed until June 1979, while the Trust was established on April 2 of that year. The instrument under which the Trust was established appears to have been signed April 2, 1979, by at least one individual who is described in your letter as a principal of the contract administrator and that individual appears to have signed the instrument in the capacity of a trustor. Thus, it appears that the creation of the Trust, and the contract administrator's involvement with it, actually preceded the involvement of any contributing employer.

While we do not think that these facts are necessarily determinative of the character of the Trust, they raise questions concerning the possibility that the contract administrator is in control of the Trust and might use it as a vehicle for marketing insurance products or services to other local unions. If that were the case, then the Trust, in our view, would not be an employee benefit plan.[3] In view of the inherently factual nature of the questions raised by your submissions in this regard, the Department, in accordance with section 5.01 of ERISA Procedure 76-1, relating to advisory opinions (41 FR 36281, August 27, 1976, copy enclosed), will not render an advisory opinion on those questions.

In addition, you should be aware that if any members of the Trust's "Benefit Committee" who are principals of the contract administrator participated in the decision of the Benefit Committee to retain the contract administrator on behalf of the Trust, their participation may have been in contravention of section 406(b)(1) of ERISA, which prohibits a fiduciary[4] with respect to a plan from dealing with the assets of the plan in his own interest or for his own account. Their participation may also have contravened section 406(b)(2), which prohibits a fiduciary with respect to a plan from acting, in his individual capacity or in any other capacity, in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

In your letters you raised an additional question as to whether the lack of actuarial soundness is a necessary characteristic of an employee benefit plan. You indicate that the opinion in Bell v. Employee Security Benefit Association, 437 F. Supp. 382 (D. Kan. 1977), might be read as standing for the proposition that lack of actuarial soundness is one of the characteristics of an employee benefit plan. Without expressing any views regarding the correct interpretation of

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[3] The fact that the Trust would not be an employee benefit plan under these circumstances does not necessarily mean that benefit programs offered to members of one or more individual local unions through the Trust would not be employee benefit plans if they met the statutory definition in section 3(3) of ERISA.

[4] Section 3(21) of ERISA provides that a person is a fiduciary with respect to a plan to the extent that, among other things, he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, or has any discretionary authority or responsibility in the administration of such plan.

Bell, the Department does not think that a program which otherwise meets the definition of "employee benefit plan" in section 3(3) of ERISA would fail to meet that definition merely because the plan sponsor or sponsors attempted to achieve actuarial soundness in funding the program. In this regard, it is significant that in part 3 of title I of ERISA, Congress imposed minimum funding standards on certain employee pension benefit plans. If Congress had considered actuarial soundness to be inconsistent with the definition of "employee benefit plan" in section 3(3), it would not have required these employee pension benefit plans, which are employee benefit plans within the meaning of section 3(3), to be funded on an actuarially sound basis. While employee welfare benefit plans and certain employee pension benefit plans are exempt under section 301 from the minimum funding standards in part 3 of title I of ERISA, there is nothing in ERISA that would prevent plan sponsors of these types of plans from attempting to achieve actuarial soundness.

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.

The opinions expressed in this letter relate solely to the legal consequences of the facts described herein under title I of ERISA. In particular, we express no opinion regarding the legal consequences of those facts under section 302 of the Labor Management Relations Act, 1947.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

Enclosure