



March 22, 1993

Mr. James D. Thomas
Spradling, Alpern, Friot, Gum &
Scoggins
101 Park Avenue, Suite 700
Oklahoma City, Oklahoma 73102-7283

93-09A
ERISA SECTION
3(1),3(4)

Dear Mr. Thomas:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Fleming Employees' Supplemental Disability Plan (the Fleming Plan) is an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

You have made the following representations. The Fleming Plan was established by a group of employees of Fleming Foods Companies, Inc. (Fleming) to provide disability benefits that would supplement disability benefits provided by Fleming to its employees through a disability insurance program. These employees adopted a formal plan document and trust agreement, establishing a trust funded through voluntary contributions made by Fleming employees. Only persons who are employed at the Fleming food warehouse facilities (and its satellites) located in Oklahoma City may participate in the Fleming Plan. The participants elect trustees for the trust, who must also be plan participants, by majority vote to serve 3-year terms. The Fleming Plan pays weekly payments (after a waiting period) of not more than \$400 (less any workers' compensation or disability payments received) for a maximum of 3 months to participants who are absent from work due to a disability. The participating employees have the right to amend or terminate the Fleming Plan by majority vote, and the assets of the trust, upon termination of the Fleming Plan, will be divided among the then-currently participating employees according to a specified formula based on each participant's months of participation.

You further represent that Fleming has had no involvement in the establishment or operation of the Fleming Plan, but has been asked to permit contributions to the Fleming Plan to be made through payroll deductions.

Section 3(1) of Title I 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... 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 (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 benefit provided by the Fleming Plan, disability payments to employees, is among those described in section 3(1). Therefore, the Fleming Plan is an "employee welfare benefit plan" if, among other criteria, it has been established or maintained by either an employer or an employee organization, or both.

The term "employer" is defined in section 3(5) 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.

On the basis of your representations, the Department concludes that Fleming, the employer, has not established or maintained the Fleming Plan)

It is the Department's view, however, that the Fleming Plan benefit program is maintained by an "employee organization," as defined in section 3(4) of ERISA. That section states:

The term "employee organization" means 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 does not appear to be an employee organization within the meaning of the first part of this definition (before the semi-colon) involved in any way with the Fleming Plan, i.e., there does not appear to be an entity connected with the Fleming Plan 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."

Section 3(4) of ERISA defines the term "employee organization," in the second part of the definition (the portion after the semi-colon), to also include any employees' beneficiary association organized for the purpose, in whole or in part, of establishing an employee benefit plan.

Although ERISA does not define the term "employees' beneficiary association," the Department has established criteria for determining whether an entity is an "employees' beneficiary association" within the meaning of ERISA section 3(4). See e.g. Adv. Op. No. 89-20, Aug. 18, 1989. Under those criteria, in order to conclude that an entity is an "employees' beneficiary association" within the meaning of ERISA section 3(4), the Department must find that:

- (1) membership is conditioned on employment status -- for example, membership is limited to employees of a certain employer or members of one union;
- (2) there is some degree of formal organization, such as officers, bylaws, or other indications of formality;
- (3) the association does not deal with an employer (as distinguished from organizations described in the first part of the "employee organization" definition); and
- (4) the association was organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

Based on the information provided, it is the Department's view that the Fleming Plan satisfies all of these criteria. The Fleming Plan is limited to employees of Fleming who are employed at a specific location. The duties and privileges of participation are governed by a formal plan document and trust agreement, providing for formally elected trustees serving limited terms of office. The Fleming Plan does not deal with an employer within the meaning of section 3(4). The Fleming Plan was organized for the purpose of providing supplemental disability benefits.

It is, therefore, the Department's view that the Fleming Plan constitutes an "employees' beneficiary association" and thus an "employee organization" described in ERISA section 3(4).²

Accordingly, the program of benefits provide by the Fleming Plan constitutes an "employee welfare benefit plan" within the meaning of section 3(1) of Title I of ERISA.

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,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

cc: Trustees of the Fleming Employees'
Supplemental Disability Plan
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'This result would not be altered if Fleming permitted employees to make contributions to the Fleming Plan through payroll deductions, provided that Fleming's involvement in the Fleming Plan were limited to withholding participant contributions and that Fleming did not endorse the plan.

² It should be noted that this conclusion is solely for the purposes of Title I of ERISA and is not intended to affect the status of the Fleming Plan under Section 501(c)(9) of the Internal Revenue Code.