

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



May 28, 1993

Mr. James P. Harrington, Jr.
California Department of Insurance
100 Van Ness Avenue
San Francisco, California 94102

93-19A
ERISA SECTION
3(40),
514(b)(6)

Dear Mr. Harrington:

This responds 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 Western Growers Assurance Trust (WGAT) is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of Title I of ERISA and therefore subject under section 514(b)(6) of that title to applicable state insurance regulation. You represent that WGAT has asserted that it should not be considered to be a MEWA because it has been established or maintained under or pursuant to one or more collective bargaining agreements.

According to the information provided, WGAT was established in 1957 pursuant to the terms of a trust agreement signed by two individuals as trustors and three individuals as trustees. It operates currently under an amended and restated trust agreement dated November 15, 1990, which was signed by eight individuals as trustees (the "1990 Trust Agreement").¹ WGAT provides life, health, and other welfare benefits to approximately 30,000 employees of several hundred employers through individual contracts (called "participation agreements"), each of which is executed by WGAT and an individual participating employer (called a "subscribing employer"). In order to be eligible to be a subscribing employer, an employer must be a member of Western Growers Association (WGA), a trade association that was first organized in 1926. Membership in WGA is open to growers, shippers, and packers of fresh produce and other organizations and individuals engaged in activities related to the fresh produce industry of California and Arizona. Currently, subscribing employers in WGAT include employers with unionized and non-unionized employees. Approximately 80 percent of WGA's total membership participates in WGAT as subscribing employers.

Section 3(40)(A) of Title I of ERISA defines the term "MEWA" as:

. . . an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) [of section 3 of ERISA] to the employees of two or more employers (including one or more self-employed individuals),

or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained --

- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,
- (ii) by a rural electric cooperative, or
- (iii) by a rural telephone cooperative association.

On the basis of the representations described above, WGAT would be a MEWA within the meaning of section 3(40), because it provides benefits that are described in section 3(1) of ERISA to the employees of two or more employers, unless it is determined that WGAT is established or maintained under or pursuant to one or more collective bargaining agreements within the meaning of section 3(40)(A).²

You have represented that WGAT relies on the following documents as demonstrating that it is established or maintained under or pursuant to one or more collective bargaining agreements: the 1957 trust agreement establishing WGAT and the 1990 Trust Agreement under which WGAT currently operates; the minutes of a May 3, 1957, meeting of the Board of Directors of WGA, which describe the original establishment of WGAT; and three collective bargaining agreements: two "Truck Drivers" agreements signed in 1956 and a "1989-1992 Packing Shed Agreement." In addition to these documents, counsel for WGAT has provided the Department of Labor (Department) with portions of certain currently effective bargaining agreements between subscribing employers and unions representing their employees, samples of participation agreements, and a letter dated December 11, 1992, from the President of WGAT (WGAT Letter), copy enclosed, which discusses aspects of WGAT's history and the significance of at least one clause in the participation agreements.³ It is the Department's view that these documents do not support a finding that WGAT is established or maintained under or pursuant to one or more collective bargaining agreements. Rather, it is the Department's opinion that these documents demonstrate that WGAT may have been established by employers, acting in concert, as a response to the unionization of the fresh produce industry, but that WGAT maintains an independence of all collective bargaining agreements that is incompatible with a finding that it is established or maintained under or pursuant to one or more collective bargaining agreements.

The two trust documents are substantially similar.⁴ Our analysis focuses on the 1990 Trust Agreement, under which WGAT currently operates. Under the terms of the 1990 Trust Agreement, the trustees of WGAT have the sole power to determine the benefits to be paid by WGAT. The 1990 Trust Agreement provides that each of the original signatory trustees will continue to serve until he reaches age 70, resigns, is removed, becomes incapacitated, or dies.

A trustee may be removed at any time by vote of a majority of either the then-sitting trustees or the then-subscribing employers. In the event of a trustee vacancy, the then-subscribing employers may choose a successor, or, if the employers fail to act within 30 days, the then-sitting trustees may by majority vote select a successor.

The 1990 Trust Agreement further provides that it may be amended by a majority of the subscribing employers and that a majority of the subscribing employers may direct the trustees to take any action permitted under the trust agreement. The 1957 trust agreement contained provisions substantially similar to the above.

The 1990 Trust Agreement does not require that the trustees provide specific benefits to any employer; nor does it contain any limitation on the amount of contributions that the trustees may require subscribing employers to pay for benefits that the trustees elect to provide through WGAT. Thus, under the 1990 Trust Agreement, the trustees have the power to refuse to contract with any specific employer, to determine independently what benefits will be paid through WGAT, and to set the contribution level required for any provided benefits. We conclude that the trustees of WGAT, who are directly or indirectly controlled by member-employers of WGA, independently control both the benefits that may be provided through the trust and the contributions that may be charged to employers.

The minutes of the May 30, 1957, meeting of the WGA Board of Directors do not demonstrate that the establishment of WGAT was "under or pursuant to" collective bargaining. Rather, they indicate at most that WGA, an employer-controlled group, developed the program that became WGAT in order to provide a vehicle through which employers could, if they wished, provide benefits to their employees, whether those benefits were promised under a collective bargaining agreement or not. The minutes do not indicate that only collectively bargained benefits could be provided through WGAT; nor do they indicate that any union participated in the organization of WGAT or in its control.

The Truck Drivers' and Packing Shed collective bargaining agreements, dating respectively from 1956 and 1992, do not provide any basis for concluding that WGAT was or is established or maintained pursuant to any collective bargaining agreement. Neither agreement refers specifically to WGAT; neither agreement requires WGAT to provide any specified benefits or accept any specified contributions; and neither agreement provides for union participation in the establishment or maintenance of WGAT. At most, these agreements can be read to require an employer to provide specified benefits either through WGAT or through an alternate provider, at the employer's option. The sample current bargaining agreements similarly merely require the employer to maintain a welfare plan that provides benefits equal to those provided under a specific WGAT contract, either through WGAT or through a comparable provider.

Finally, the WGAT letter reinforces our conclusion that WGAT is neither established nor maintained pursuant to one or more collective bargaining agreements. The WGAT letter states that WGAT was established in 1957 as a method of providing affordable health insurance for agricultural employees on an industry-wide basis. The letter explains that employers and unions worked closely with WGAT to establish a plan that met the particular needs of those employees, but states that WGAT has never participated in the direct negotiations between unions and employers. The letter states, rather, that "[t]he Assurance Trust never had control over the benefit package negotiated by parties to a collective bargaining agreement. On the other hand, the Assurance Trust staff actively participated in advising the parties what costs would be incurred as a result of certain benefits being selected." Benefits offered by WGAT initially were insured and limited to the options provided by the insurance carrier, but WGAT became self-funded in 1979, at which time collective bargaining agreements had begun to require many different health benefit packages. In the 1970's, WGAT began to offer specialized plans to satisfy different benefit requests growing out of bargaining units such as truck driver, packing shed and field employees. The WGAT letter states:

"Because of the fractionalization and independence shown by the various agricultural unions, it consistently appeared that no pre-packaged health plan was ever quite satisfactory to the parties for a particular bargaining unit. Thus, not long after the inception of the Trust in 1957, it became a common practice that the union and the employer would approach the Trust with an agreed upon health benefit package. The Assurance Trust would then price the cost of these benefits, and if the price was satisfactory, the union and employer would incorporate that particular plan into the collective bargaining agreement. The language of the collective bargaining agreement would merely refer, for example, to providing health benefits to union members as 'health coverage will be provided at no less than those benefits provided by the Western Growers Assurance Trust, Plan 24B.' Historically, the Assurance Trust has received a request for benefits by the union and the employer, and then notified the parties of the cost."

Based on these representations, it is the view of the Department that WGAT has maintained an independence from all collective bargaining agreements that permits it both to set independently the contributions that would be required to pay for benefits and to decline to provide any set of benefits promised under any individual collective bargaining agreement. The representation by WGAT that its power to decline to provide benefits has not been exercised in any case does not alter our view. Therefore, it is the position of the Department that WGAT is not established or maintained under or pursuant to one or more collective bargaining agreements and that WGAT is a MEWA within the meaning of section 3(40) of ERISA.⁵

Although section 514(a) of ERISA provides that any state law or regulation that relates to an employee benefit plan covered by ERISA is preempted, section 514(b)(6) of Title I of ERISA provides, in relevant part, that:

(A) Notwithstanding any other provision of this section -- (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any not inconsistent with the preceding sections of this title.

Accordingly, because WGAT is a MEWA within the meaning of section 3(40), it is the opinion of the Department that the preemption provisions of Title I of ERISA do not preclude state regulation of WGAT at least to the extent provided in section 514(b)(6)(A), regardless of whether WGAT is an employee benefit plan covered by Title I of ERISA.

Enclosed for your information is a copy of Opinion 90-18A (issued July 2, 1990) which discusses the scope of the States' authority to regulate pursuant to section 514(b)(6)(A).

Because your request for an advisory opinion was concerned primarily with the issue of whether or not WGAT is subject to the applicable regulatory authority of the State of California's insurance law or is saved from such authority under the general preemption provision of section 514(a) of Title I of ERISA, and because of the opinion above, we have determined that it is not necessary at this time to render an opinion as to whether WGAT is an employee welfare benefit plan within the meaning of section 3(1) of that title.

The preceding constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations
and Interpretations

Enclosures

¹ The copy of the 1990 Trust Agreement submitted with the opinion request contains the name of a ninth trustee whose signature line is unsigned.

² You have represented, and we assume for purposes of this advisory opinion, that WGAT is not established or maintained by a rural electric cooperative or by a rural telephone cooperative association.

³ According to the WGAT letter, participation agreements since late 1984 have contained language to the effect that any provision of the participation agreement that contravenes a collective bargaining agreement or insurance policy will not be implemented "provided [WGAT] has been furnished with a written copy of the bargaining agreement or insurance policy, and agrees to the modification." The WGAT letter explains that this language is intended to make clear that WGAT "would have to receive notice of the bargaining agreement before [WGAT] would agree that its provisions were inapplicable." This explanation further reinforces our conclusion that WGAT maintains its independence from any collective bargaining agreement.

⁴ The earlier trust agreement differed from the current trust agreement principally in that it apparently permitted employers who were not members of WGA to participate in WGAT and in that trustees were explicitly given control over contributions.

⁵ The Department expresses no view in this letter concerning whether any collective bargaining agreement referenced herein would constitute a bona fide collective bargaining agreement for purposes of section 3(40) of ERISA.