

U.S. Department of Labor

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



February 13, 1995

95-01A
ERISA SECTION 3(1)

Mr. Kenneth R. Hoffman
Weinberg and Green
100 South Charles Street
Baltimore, Maryland 21201-2773

Dear Mr. Hoffman:

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 Pennsylvania Division, Horsemen's Benevolent & Protective Association Health Benefit Plan (the PHBPA Plan) is an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

Your submission makes the following representations. The Penn National Race Course (Penn National) is operated by the Mountainview Thoroughbred Racing Association and the Pennsylvania National Turf Club, Inc., which organizations in turn employ various individuals to conduct the actual business of running Penn National (i.e., maintaining the facility, accepting wagers, etc.). The owners of the thoroughbred horses that race at Penn National independently train and provide care for their horses. Such owners may perform these duties themselves or may contract with self-employed trainers (hereafter referred to as the trainers) to provide such care and training. The trainers may utilize the services of various additional persons, such as grooms, exercise boys, "hot walkers," etc., to assist them.

These additional people are generally referred to as "Backstretch Personnel." You state that the Backstretch Personnel may be self-employed or may be employees of the trainers.¹ Only Backstretch Personnel and trainers are eligible to become participants in the PHBPA Plan.

You advise that the PHBPA Plan was established in 1990 by the Pennsylvania Division, Horsemen's Benevolent & Protective Association, Inc. (the PHBPA) to provide certain benefits to individuals associated with thoroughbred horse racing at Penn National. Membership in the PHBPA is open to:

[a]ny owner or trainer of a thoroughbred racehorse who is currently licensed as such by the Pennsylvania State Horse Racing Commission who starts a thoroughbred racehorse in a qualifying race within the jurisdiction of [the PHBPA] . . . Persons who are a part of any partnership, corporation or other entity that is licensed as such by the Pennsylvania State Horse Racing Commission and which starts a thoroughbred racehorse in a qualifying race within the jurisdiction of [the PHBPA] shall likewise be eligible for membership.

Article V, Section 1 of the PHBPA's Constitution and Bylaws.

¹ The Department expresses no independent opinion herein regarding the employment status of the Backstretch Personnel or the trainers. Such status would depend on the particular facts and circumstances of the relationships, evaluated pursuant to the common-law tests for determining whether an employer-employee relationship exists.

Article V, Section 3 of the PHBPA's Constitution and Bylaws further provides that "[a]ny person who has performed some distinguished service to the sport of Thoroughbred [sic] racing and who is not already a member of [the PHBPA]" may be granted nonvoting honorary membership. For the purposes of this letter, we assume that any member who is not an honorary member is eligible to vote.

The PHBPA Plan is established pursuant to the terms of a trust agreement dated December 30, 1992, between the PHBPA and two individuals as Trustees, which provides, in pertinent part that:

Benefits that may be provided under the Trust shall be limited to health benefits (including the sponsorship of on-site clinics and cash reimbursements for the cost of medical, dental, and prescription drug services and supplies); benefits for burial expenses; benefits designed to safeguard or improve the health of Participants, their Dependents and Beneficiaries; benefits designed to assist Participants in emergency situations; and any other benefits that the Trustees determine in their sole discretion serve to foster the growth and general welfare of the industry.

The PHBPA Plan provides benefits to two eligible classes of participants: (1) "Trainers" and (2) "Assistants." See PHBPA Plan, Article III, Sections 3.1 and 3.2.

The term "Trainer" is defined in Article II, Section 2.1 of the PHBPA Plan as follows:

Trainer: A trainer whose primary place of business is in Pennsylvania, whose primary source of compensation for the performance of services is derived from the racing, training, and care of thoroughbred race horses at [Penn National], who is duly licensed by the Pennsylvania State Horse Racing Commission, who is in good standing with the Pennsylvania State Horse Racing Commission, and who satisfies the race and stabling requirements of the next two sentences. If the trainer owns or is responsible for at least nine horses, 2/3 of the race starts for his horses must occur at [Penn National]; if the trainer owns or is responsible for fewer than nine horses, 1/2 of the race starts must occur at [Penn National]. A trainer also must have his horses stabled on a full-time basis at [Penn National] or at another stabling area approved by the Trustees.

The term "Assistant" is defined in Article II, Section 2.1 of the PHBPA Plan to include:

Any individual who provides full time services to one or more Trainers at the Track (either as an employee or as an independent contractor), is duly licensed by the Pennsylvania State Horse Racing Commission, and is in good standing with the Pennsylvania State Horse Racing Commission. "Assistant" does not include, however, an exercise rider, a jockey, or a farrier.²

Section 3(1) of Title I of ERISA defines the term "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

² Although the material you submitted does not clearly equate the term "Assistants" used in the PHBPA Plan and the "Backstretch Personnel" described in your request, we assume for the purposes of this opinion that the two terms are coextensive.

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).

Although the PHBPA Plan provides benefits among those described in section 3(1), in order to be an employee welfare benefit plan, it must also, among other criteria, be established by an employer, an employee organization, or both. The terms "employee organization" and "employer" are defined in sections 3(4) and 3(5), respectively, as follows:

(4) 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 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.

(5) The term "employer" means 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.

The Department of Labor (the Department) has previously stated that membership in an employee organization within the meaning of section 3(4) of ERISA must be based upon status as an employee. There is no indication that membership in the PHBPA is based upon one's status as an employee. Accordingly, the PHBPA is not an employee organization within the meaning of section 3(4) of Title I of ERISA.

Based on the documents and representations presented, the Department cannot conclude that the PHBPA is a bona fide group or association of employers within the meaning of section 3(5) of ERISA. The voting membership of PHBPA includes self-employed owners and trainers who are not necessarily employers of common-law employees. Eligibility for membership in PHBPA therefore is not limited to "employers" but is open to anyone in the trade or profession of owner or trainer. In this regard, PHBPA is similar to many other associations open to individuals engaged in trades or businesses without regard to whether those individuals are employers. In previous opinions involving such associations, the Department has consistently taken the position that the subject associations were not groups or associations of employers within the meaning of section 3(5) of Title I of ERISA.³ Because we cannot conclude that PHBPA is an employer as defined in ERISA section 3(5), we are unable to conclude that the PHBPA Plan is an employee welfare benefit plan within the meaning of section 3(1) of ERISA.

This letter 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

³ See, for example, Opinion 88-07A (issued March 28, 1988) regarding professional golfers, Opinion 86-26A (issued December 5, 1986) regarding accountants, Opinion 83-15A (issued March 22, 1983) regarding dentists, and Opinion 79-49A (issued July 31, 1979) regarding osteopaths.