

U.S. Department of Labor

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



August 25, 1995

95-22A
ERISA SECTION 3(40)(A)

Mr. Dale Robison
Physical Distribution Services, Inc.
55 West 78th Street
Bloomington, Minnesota 55420

Dear Mr. Robison:

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 Physical Distribution Services, Inc. (PDS), Larson Transfer and Storage Co. (Larson), Midwest Driver Corporation (Midwest), Labor Service Company (LSC), and Allstate Delivery Service (Allstate) constitute a single employer for the purposes of section 3(40)(B) of ERISA and whether the Physical Distribution Services, Inc. Group Health Plan (the PDS Plan) is a "multiple employer welfare arrangement" (MEWA) within the meaning of section 3(40)(A) of ERISA.

You advise that you own 100% of the stock of PDS and that PDS owns all the outstanding stock of Larson, Midwest, LSC, and Allstate. All employees of PDS and LSC and the management employees of Larson and Midwest are covered by the PDS Plan. You further advise that Allstate has no employees.

PDS as the parent company manages the other four companies, carries all insurance coverage required for the other companies, and solicits sales on behalf of all five companies. You advise that PDS screens, hires, qualifies, pays, disciplines, and terminates employees for all five companies and is responsible for day-to-day control over them. Larson is a licensed interstate and intrastate motor carrier. The drivers employed by Larson are provided health coverage under a union contract, but its other employees are covered under the PDS Plan. Midwest is an employee leasing company that provides drivers to other carriers.¹ Like Larson, the drivers employed by Midwest are provided health coverage under a union contract, but its other employees are covered under the PDS Plan. LSC is another employee leasing company and leases drivers, dockmen, mechanics, and supervisors to other carriers.² Allstate is a licensed interstate and intrastate carrier. Allstate leases all of its "employees," and a majority are leased from LSC.

Section 3(40) of Title I of ERISA defines the term "multiple employer welfare arrangement" (MEWA) to generally include, with certain specific exceptions, any arrangement that provides employee welfare benefit plan benefits to the employees of two or more employers. Section 3(40)(B) provides that any two or more trades or businesses in the same "control group" shall be deemed to be a single employer for the purposes of section 3(40).

Based on the information you submitted, it is the position of the Department of Labor that PDS, Larson, Midwest, LSC, and Allstate are all members of a single control group. PDS is the sole owner of Larson, Midwest, LSC, and Allstate. Accordingly, if PDS establishes and maintains a program to provide employee welfare benefits solely to its

¹ You advise that the National Labor Relations Board has previously determined that Midwest is the sole employer of the drivers leased by Midwest to other carriers.

² You indicate that the National Labor Relations Board has also previously determined that LSC is the employer of the employees leased to other carriers.

employees and the employees of Larson, Midwest, LSC, and/or Allstate, such program would be considered to be a welfare benefit plan established and maintained by a single employer for the purposes of section 3(40) and would not constitute a MEWA within the meaning of that section.

However, the Department takes no position herein whether the "employees" leased by Midwest and LSC to carriers other than Allstate are employees of the other carriers or the employees of Midwest or LSC, and the Department therefore takes no position as to whether the PDS Plan is a MEWA within the meaning of section 3(40).

The term "employee" is defined in section 3(6) of ERISA to mean "any individual employed by an employer." An individual is "employed" by an employer, for the purposes of section 3(6), when an employer-employee relationship exists. For purposes of section 3(6), whether an employer-employee relationship exists must be determined by applying common-law principles. In making such determinations, therefore, consideration must be given, among other matters, to whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is to be accomplished; whether the person for whom services are being performed has the right to discharge the individual performing the services; and whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services.

We note that you provided sample leasing agreements used by LSC and Midwest that purport, with regard to the leased employees, to establish in LSC or Midwest the authority and control associated with a common-law employer-employee relationship. In this regard, it should be noted that the terms set forth in a contract purporting to create an employer-employee relationship are not determinative of the nature of the actual relationship, but must be considered in light of the actual facts and circumstances of the relationships. The issue of whether LSC or Midwest, in fact, has a common-law employer-employee relationship with all the leased employees is, as a result, an inherently factual matter. Although there is no indication in the information you submitted that such an employer-employee relationship does not exist, the Department cannot provide an opinion that such a relationship does exist.

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