



September 26, 2008

Tim Casey
Executive Director
Bend Chamber of Commerce
777 NW Wall Street, Suite 200
Bend, Oregon 97701

2008-07A
ERISA SEC.
3(40) & 514(b)(6)(A)

Dear Mr. Casey:

This is in response to a letter from the Bend Chamber of Commerce concerning the application of the Employee Retirement Income Security Act of 1974 (ERISA) to an arrangement the Chamber of Commerce in Bend, Oregon (Bend Chamber) proposes to establish and offer to its employer members.

The Bend Chamber's correspondence and the materials supplied in support of its inquiry contain the following facts and representations. The Bend Chamber is a non-profit corporation that was founded in 1926. The mission statement of the Bend Chamber is "To Enhance the Economic Vitality of Bend." The Bend Chamber Bylaws state that "any person, firm, business, association, corporation, partnership, or estate, which acts as an employer and supports the Chamber's Mission Statement, shall be eligible to apply for membership." The Bylaws stipulate that control of the Bend Chamber is vested with the Board of Directors consisting of a maximum of twelve members (who are elected by the Bend Chamber members). The proposed arrangement would offer fully insured benefits to the employees of the member employers of the Bend Chamber. These benefits would include medical and dental coverage, wellness programs, third party administration, legal aid services, life insurance, disability insurance and business travel accident insurance.

The Bend Chamber's request focuses on provisions added to ERISA in 1983 that modified the scope of ERISA's preemption of state law to permit state insurance regulation of employee welfare benefit plans that are multiple employer welfare arrangements (MEWA).

Section 514(a) of ERISA, subject to certain exceptions, generally preempts state laws to the extent that they "relate to" employee benefit plans subject to Title I of ERISA. Section 514(b)(2)(A), referred to as the "savings clause," provides in pertinent part that "nothing in this title [Title I of ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance" This savings clause reflects the fact that Congress did not intend to deprive states of the right to regulate insurance contracts and policies merely because the purchaser is an employee benefit plan. While section 514(b)(2)(A) saves from ERISA preemption state laws regulating

insurance, section 514(b)(2)(B) of ERISA, referred to as the “deemer clause,” provides that a state law “purporting to regulate insurance” generally cannot deem an employee benefit plan to be an insurance company (or in the business of insurance) for the purpose of regulating such a plan as an insurance company. An additional piece of analysis, however, is needed if the ERISA welfare plan is a MEWA as defined in section 3(40) of ERISA. Specifically, ERISA section 514(b)(6)(A) creates a partial exception to the deemer clause for employee welfare benefit plans that are also MEWAs. If the employee benefit plan MEWA is “fully insured,” then, under section 514(b)(6)(A)(i), any state law that regulates insurance may apply to the MEWA directly to the extent the law provides standards, or provisions to enforce those standards, requiring the maintenance of specified levels of reserves and contributions in order to be considered able to pay benefits. If the employee benefit plan MEWA is not “fully insured,” then, under section 514(b)(6)(A)(ii), the MEWA may be directly regulated under “any law of any State which regulates insurance” as long as the law is “not inconsistent with” the provisions of ERISA.

It is the view of the Department, based on the information we reviewed, that the Bend Chamber’s proposed health insurance arrangement is a MEWA within the meaning of section 3(40) of ERISA. Section 3(40)(A) of ERISA defines the term “MEWA,” in pertinent part, 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) [ERISA section 3(1)] 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.” The Bend Chamber’s proposed arrangement would be established and maintained for the purpose of offering and providing welfare benefits to employees of two or more separate employers and does not fall within any of the exceptions listed in section 3(40).

As noted above, the limitations set forth in section 514(b)(6)(A) of ERISA on state insurance regulation of MEWAs only apply to MEWAs that are also employee welfare benefit plans as defined in section 3(1) of ERISA. If a MEWA is not itself an ERISA-covered plan, ERISA’s preemption provisions do not limit the ability of states to regulate the arrangement in accordance with any applicable state insurance law. Thus, unless the Bend Chamber arrangement is itself an ERISA-covered employee benefit plan, ERISA would impose no limit on the application of state insurance law to the arrangement.

The term “employee welfare benefit plan” is defined in section 3(1) of ERISA to include, among others, “any plan, fund, or program . . . established or maintained by an

employer or by an employee organization, or by both, to the extent 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 . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment”

Although it appears that the Bend Chamber arrangement provides benefits described in section 3(1) of ERISA, to be an employee welfare benefit plan, the plan, fund or program must also, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization. There is no indication in the Bend Chamber’s submission that an employee organization within the meaning of section 3(4) of ERISA would be involved in sponsoring the arrangement. Therefore, this letter will only address whether the arrangement would be established or maintained by an “employer” within the meaning of section 3(5) of ERISA.

The term employer is defined in section 3(5) of ERISA as 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 has taken the view, on the basis of the definitional provisions of ERISA as well as the overall statutory scheme, that, in the absence of the involvement of an employee organization, a multiple employer plan (i.e., a plan to which more than one employer contributes) may, nevertheless, exist where a cognizable, bona fide group or association of employers establishes a benefit program for the employees of member employers and exercises control of the amendment process, plan termination, and other similar functions on behalf of these members with respect to a trust established under the program.

A determination whether there is a bona fide employer group or association for this ERISA purpose must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

The definition of “employee welfare benefit plan” in ERISA is grounded on the premise that the person or group that maintains the plan is tied to the employers and employees that participate in the plan by some common economic or representation interest or genuine organizational relationship unrelated to the provision of benefits. *See, e.g.,*

Advisory Opinion 94-07A; Advisory Opinion 2001-04A. Courts have also held that there must be some cohesive relationship between the provider of benefits and the recipient of benefits under the plan so “that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits.” *Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059, 1064 (8th Cir. 1986). Indeed, one court reasoned that “an overly broad interpretation of the term ‘employee welfare benefit plan’ ignores congressional intent to limit such plans to situations where the nexus between the plan's sponsor and all of its beneficiaries excludes it from the state-regulated entrepreneurial arena in which private insurance companies operate.” *Id.* The representational link between employees and an association of employers in the same industry who establish a trust for the benefit of those employees also supplies the requisite connection. See Advisory Opinion 2001-04A; Advisory Opinion 2003-13A; *National Business Ass'n Trust v. Morgan*, 770 F. Supp. 1169, 1174-75 (W.D.Ky. 1991); *MDPhysicians & Associates, Inc. v. State Bd. of Ins.*, 957 F.2d 178 (5th Cir. 1992), *cert. denied*, 506 U.S. 861 (1992). See also *Nat'l Business Conf. Employee Benefits Ass'n v. Anderson*, 451 F. Supp. 458, 461 (S.D.Iowa 1977) (employees must have common interest in employment relationship for ERISA plan). The Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, no employer group or association exists for purposes of ERISA section 3(5). See, e.g., Advisory Opinion 95-01A, and Advisory Opinion 88-07A.

The Bend Chamber notes that membership in the Bend Chamber represents a valid, cohesive employer association with mutual interests including but extending beyond the provision of health care benefits to employees. The Bend Chamber cites, in particular, the following: (1) the chamber's membership is limited solely to employers (with new membership limited to those being endorsed by existing members); (2) the chamber members must be located in the three Oregon counties covered by the Bend Chamber; (3) the chamber's purpose is to act as the “unified voice of private business in the Bend community” and its activities include business and associational purposes other than provision of insurance; (4) the chamber is a bona fide not-for-profit organization under section 501(c)(6) and section 501(c)(3) of the Internal Revenue Code with an independent Board of Directors that has been in existence for at least 10 years, with substantial physical office space, and with at least two full-time staff members; and (5) the chamber is financially solvent with a membership of approximately 500 dues-paying employer members, cash assets of \$100,000 or more, financial statements going back at least seven years, and its staff are bondable.

In the Department's view, however, the Bend Chamber's structure is not the type of connection between employer members that the Department requires for a group or association of employers to sponsor a single “multiple employer” plan. Rather, the Department would view the employers that use the Bend Chamber's arrangement as

each having established separate employee benefit plans for their employees. Although we do not question the Bend Chamber's status as a genuine regional chamber of commerce with legitimate business and associational purposes, the primary economic nexus between the member employers is a commitment to private business development in a common geographic area. This would appear to open membership in the Bend Chamber, and in turn participation in the proposed health insurance arrangement, to virtually any employer in the region. The other factors the Bend Chamber cites do not directly relate to a connection between the member employers, the association, and the covered employees; instead, such factors are characteristics that evidence the reliability of the Bend Chamber's operations (*e.g.*, cash assets of \$100,000 or more, physical office space, years in operation, etc.).

The Department's conclusion that the Bend Chamber's health insurance program is not itself an employee welfare benefit plan under ERISA does not, however, prohibit the Bend Chamber from establishing and maintaining its proposed arrangement. Rather, the principal consequence for the Bend Chamber of its arrangement not being an employee benefit plan is that ERISA would not limit Oregon's ability to regulate the Bend Chamber's program under state insurance law.¹ We note, in that regard, that many states have enacted laws specifically designed to regulate such association-based MEWAs as part of the general regulation of insurance. The Bend Chamber may want to consider communicating with the Oregon Department of Consumer and Business Services Insurance Division regarding the application of state insurance law to the Bend Chamber's proposed health insurance program.

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. This letter relates solely to the application of the provisions of Title I of ERISA.

Sincerely,

Lisa M. Alexander
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations

¹ See the Department's booklet entitled "Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act: A Guide to Federal and State Regulation" (available on EBSA's Web site at www.dol.gov/ebsa). The Department prepared the booklet to address many of the questions that have been raised concerning the effect of ERISA on federal and state regulation of MEWAs.