



January 24, 2020

Alexander T. Renfro, JD, LLM
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2020-01A
ERISA SEC.
3(1)
29 CFR 2510.3-3

Dear Mr. Renfro:

This is in response to your request on behalf of LP Management Services, LLC (LP Management), for the Department's views on the regulatory status under the Employee Retirement Income Security Act of 1974 (ERISA) of health benefit programs that the LP Management limited partnerships may choose to offer to their "limited partners." In particular, you ask whether the Department would consider LP Management's limited partnership programs to be employee welfare benefit plans within the meaning of section 3(1) of ERISA, and, if so, whether the arrangements constitute single-employer group health plans sponsored by the limited partnerships as an "employer."

After submitting your request, you filed a complaint for declaratory and injunctive relief against the Department in *Data Marketing Partnership, LP v. United States Department of Labor*, Civil Case No.4:19-cv-00800-O United States District Court for Northern District of Texas (filed October 4, 2019). The complaint included allegations regarding a currently operating limited partnership program. The summary of facts and representations in this letter is based on the materials you submitted in support of your request as well as the information alleged in the complaint.¹

As discussed in more detail below, ERISA does not sweep so broadly as to regulate the commercial sale of insurance in the manner proposed by LP Management. ERISA regulates the provision of *employee* benefits by employers and employee organizations, not the commercial sale of insurance outside the context of employment-based relationships. Based on your representations, in the Department's view, the limited partners as described in your request are not employees or bona fide partners of the limited partnerships; they do not work for or through the partnership; and they do not receive income for performing services for or as partners of the partnership. In sum, you have provided no facts that would support a conclusion that the limited

¹ The summary does not include representations you provided about the financial and reinsurance safeguards adopted by the limited partnership, e.g., use of a licensed and bonded third party administrator, reinsurance supported by retrocessionary coverage, and a trust to hold plan assets, because those representations and allegations were not relevant to the Department's decision on the foundational question you posed about the status of the limited partnership health coverage program under the definition of "employee welfare benefit plan" in section 3(1) of ERISA.

partners are meaningfully employed by the partnership or perform any services on its behalf. The purported and sole “service” that the limited partners would appear to perform for or through the partnership would be to install specific software on their personal electronic devices that capture data as they browse the Internet or use those devices for their own purposes. If LP Management’s arguments were accepted, marketers could sell any health insurance package as a single ERISA-covered plan, as long as their buyers had smartphones, the contract papers included “limited partnership” provisions, and the customers assented to the installation of tracking software (much as numerous firms, such as internet browsers and social media companies, already track consumers’ activities on the Internet without claiming that the tracked consumers work for them). Accordingly, in the Department’s view the limited partners are not participants in a single-employer group health plan or in an ERISA plan at all.²

According to the information you submitted and the representations you made in support of your request, LP Management proposes to serve as general partner of various limited partnerships and manage the day-to-day affairs of these partnerships. The limited partnerships’ business would be to capture, segregate, aggregate, and sell to third-party marketing firms, electronic data generated by individuals who become limited partners and install on their personal electronic devices specific software which, among other things, captures the data tracking of other companies as the individual partners use their devices and surf the Internet. LP Management represents that individuals would obtain a limited partnership interest by executing a joinder agreement with LP Management, which would serve as the general partner. You assert that limited partners would participate in global management issues through periodic votes of all partners, but you provided no information on such votes. You assert that each limited partner agrees to contribute more than five hundred (500) hours of “work” per year through the generation, transmission, and sharing of their data, but you provide no information on how that “work” differs in any meaningful way from the personal activities individual limited partners would otherwise engage in while using their personal devices. Neither you nor LP Management representatives have suggested that individual limited partners will have any meaningful equity interest in the limited partnership or that they can expect any appreciable financial benefit for their participation in the partnership, except for the health coverage for which the limited partners pay separate premiums.

Apart from permitting LP Management to track the use of their personal electronic devices, it does not appear that the limited partners perform any work for or through the partnership. According to the representations you have provided in support of your request, limited partners do not appear to report to any assigned “work” location or otherwise notify the partnership that they are commencing their work; and they are not required to possess any particular work-related skills. In fact, the limited partnership agreement does not appear to require that a limited partner perform any service for or through the partnership apart from permitting tracking of the limited partner’s use of the Internet on a personal device, as the limited partner sees fit. It appears that the limited partners would generate economic value for the partnership in much the same way that visitors to websites generate value for the entities that track consumer traffic every day for marketing and advertising purposes. In our view, there is no employer-employee relationship between the partnership and the limited partners, and as a matter of economic reality, it does not

² Requestors of advisory opinions may withdraw requests only “prior to receipt of notice that the Department intends to issue an adverse opinion[.]” ERISA Procedure 76-1, §9, 41 Fed. Reg. 36281, 36283 (Aug. 27, 1976). Because you received such notice, the request may not be withdrawn.

appear that the limited partners depend on the limited partnership as a source of business revenue. Indeed, it appears from your representations that the revenue that a limited partner could reasonably expect from the limited partnership will typically be approximately zero. Based on the representations and materials that you have provided, in operation, the primary reason for an individual or employer to participate as a “limited partner” in the arrangement appears to be to acquire health coverage.

Notwithstanding the absence of factual representations supporting an actual employment or working owner relationship between the individuals participating in the arrangement as limited partners and the limited partnerships, you argue that the limited partnership health benefit programs should be deemed to be single-employer plans because the partnership itself would have a small number of common law employees (possibly only one, as compared to thousands or tens of thousands of non-employee limited partners who could potentially acquire coverage through the arrangement). You argue that the presence of a single employee participant is sufficient to extend ERISA coverage to all the limited partners, without any stated limit.

This position cannot be squared with ERISA’s text. The term “employee welfare benefit plan” is defined in section 3(1) of ERISA, in relevant part, as “any plan, fund, or program ... 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 ... medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment” In addition to providing the types of benefits described in section 3(1) of ERISA, a benefit program must, among other criteria, be established or maintained by an employer, an employee organization, or both, to provide the specified benefits to participants or their beneficiaries to be treated as an “employee welfare benefit plan” within the meaning of ERISA.³ Section 3(7) of Title I of ERISA, in turn, provides, in relevant part, that a “participant” is any employee or former employee of an employer who is or may become eligible to receive a benefit of any type from an employee benefit plan that covers employees of such employer.

These provisions, like the title of the law itself — the *Employee Retirement Income Security Act* (emphasis added) — are replete with references to the employment relationship, and ERISA’s coverage expressly turns on the provision of benefits in the employment context. As the above quoted language demonstrates, ERISA covers *employee* welfare benefit plans sponsored by an *employer* or *employee* organization for the benefit of plan participants who are themselves *employees* or former *employees*. The arrangements proposed by LP Management meet none of these criteria, inasmuch as the partnership is not the limited partners’ employer, and the partners are neither employees nor employers with respect to the partnership.

³ There is no indication that an employee organization within the meaning of section 3(4) of ERISA is involved in the limited partnerships or their health benefit programs. Section 3(4) of ERISA defines “employee organization” as “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.”

Nevertheless, LP Management points to ERISA regulation at 29 CFR § 2510.3-3(b), which, in relevant part, states:

(b) Plans without employees. For purposes of title I of the Act and this chapter, the term “employee benefit plan” shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called “Keogh” or “H.R. 10” plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I.

You argue, by implication, that the limited partnership benefit program can be treated as a single ERISA-covered plan because it would cover at least one common law employee of the partnership itself, and therefore, fall outside the exclusion for “plans without employees,” even if its predominant purpose is to provide health benefits to individuals who are not employees of the partnership, do not look to the partnership for work-based earnings, and are classified by the sponsor as “limited partners”—and even if the single common law employee is outnumbered by thousands or tens of thousands of “limited partners” who obtain health coverage through the arrangement.

The text of the regulation will not support your expansive claim of ERISA coverage. As discussed above, ERISA regulates employment-based benefit programs and 29 CFR 2510.3-3(b) must be read in that context. The fact that one common law employee participates in a purported partnership program does not mean that everyone covered by the arrangement is participating in an ERISA plan. Rather, the regulation must be read in light of the Department’s authority under ERISA to regulate the provision of employee benefits offered in the context of a genuine employment relationship. *See*, for example, ERISA sections 3(1) and 3(4) (limiting coverage to plans maintained by employers or employee organizations), section 3(7) (defining participant in terms of an employment relationship), and section 2 (declaring ERISA’s purpose as “in the interests of employees and their beneficiaries”). Consistent with these statutory limitations, limited partners must participate in the plan as “working owners” to be covered as plan participants within the meaning of Title I of ERISA. The limited partners here are neither employed nor self-employed with respect to the partnership, but rather are merely consumers purchasing health coverage in exchange for premiums and an agreement that the partnership can track their personal activities on their electronic devices.

You additionally argue that ERISA section 732(d) supports LP Management’s position, but this argument too is unpersuasive. Section 732(d) provides “for purposes of this part,” [*i.e.*, Part 7 of ERISA] that “[a]ny plan, fund, or program which would not be (but for this subsection) an employee welfare benefit plan and which is established or maintained by a partnership, to the extent that such plan, fund, or program provides medical care (including items and services paid for as medical care) to present or former partners in the partnership or to their dependents (as defined under the terms of the plan, fund, or program), directly or through insurance, reimbursement, or otherwise, shall be treated (subject to paragraph (2)) as an employee welfare

benefit plan which is a group health plan.”⁴ Paragraphs (2) and (3) provide that, in the case of a group health plan, the term “employer” also includes the partnership in relation to any partner and the term “participant” also includes, in connection with a group health plan maintained by a partnership, an individual who is a partner in relation to the partnership.

The regulations emphasize the need for an employment or self-employment services-based relationship with respect to the partners participating in a group health plan maintained by a partnership. Specifically, the regulations clarify that, for purposes of Part 7 of ERISA, a partner must be a “bona fide partner” in order to be considered an employee, and the partnership is considered the employer of a partner only if the partner is a “bona fide partner.” 29 CFR 2590.732(d)(2), (d)(3). The regulation also states that whether an individual is a bona fide partner is determined based on all the relevant facts and circumstances, including whether the individual performs services on behalf of the partnership. *Id.*

The limited partners here are not “bona fide partners” within the meaning of ERISA section 732 because they do not work or perform services for the partnership; they have only a nominal (at best) ownership interest in the partnership; and they do not earn income based on work performed for or through the partnership that is a material income-producing factor for the partnership. If the limited partners worked for or through the partnership, had a material ownership interest in the partnership, and earned income for work that generated material income for the partnership, it would be plausible to treat them as employed by the partnership in the relevant sense. In such circumstances, the partners could have dual status, like self-employed individuals who earn income from their self-employment with respect to a group health plan (*i.e.*, the partner could be both an “employer” for purposes of the partnership’s sponsoring the group health plan and an “employee” for purposes of participating in the partnership’s group health plan).

As discussed above, however, the limited partners in the arrangement merely obtain health benefits through the partnership and permit it to capture data based on their personal use of their personal devices. Their nominal ownership interests do not appear to have economic or operational substance; they do not appear to perform labor for the partnership in any meaningful sense; there is no basis to conclude the limited partners will derive any income from the partnership for the performance of services; and the limited partners neither give nor take directions in a work context from the partnership. They are simply purchasers of health coverage who, like other purchasers of individual health insurance, are responsible for paying all of the health care premiums for their coverage under the limited partnership arrangement. To treat them as employee participants in an ERISA-covered plan would effectively read the employment-based limitations on ERISA coverage out of the statute. As noted at the beginning of this letter, any marketer could claim coverage of any arrangement as a single ERISA-covered plan, as long as the buyer had a smartphone, signed a “limited partnership” agreement, and was willing to permit the marketer to track the buyer’s activities on the phone (just as numerous firms already track a buyer’s activities on the Internet, without claiming any employment relationship).

⁴ The Department’s regulation at 29 CFR 2590.732 expressly states that its provisions on the treatment of partnerships are “[f]or purposes of this part.” The parallel Department of Health and Human Services regulation at 45 CFR 146.145(c) and the Department of the Treasury regulation at 26 CFR 54.9831–1 similarly limit the application of those provisions for purposes of certain requirements applicable to group health plans.

Such a reading and result is insupportable under the clear employment-based language of the statute.

For the foregoing reasons, and based on your representations, information in the complaint you filed against the Department, and the materials we reviewed, it is the Department's view that the proposed LP Management health benefit programs would not be single-employer group health plans or ERISA plans at all.⁵ To the contrary, treating the limited partnership program as a single ERISA plan would effectively eliminate ERISA's important statutory distinction between offering and maintaining employment-based ERISA covered plans, on the one hand, and the mere marketing of insurance and benefits to individuals outside the employment context, on the other.⁶ We have consulted with the Departments of Health and Human Services and the Treasury. They have advised the Department that other than to the extent that the LP Management has established a separate welfare plan for the partnership's common law employees, the limited partnership programs described by LP Management would not be a group health plan within the meaning of 45 CFR 146.145(a) or 26 CFR 54.9831-1, and thus, the limited partnership programs would generally be subject to regulations applicable to the individual market, and not the small or large group markets.

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. This opinion relates solely to the application of the provisions of Title I of ERISA addressed in this letter. Further, this letter is not determinative of any particular tax treatment under the Internal Revenue Code and does not address any issues arising under any other federal or state laws.

Sincerely,

John J. Canary
Director, Office of Regulations and Interpretations

⁵ To the extent the limited partnership program covers common law employees of the partnership, the Department would consider the limited partnership to have established a separate welfare benefit plan for those employees. That plan would be subject to ERISA, and the persons responsible for operating the plan would be subject to the reporting, disclosure, fiduciary, group health, and enforcement provisions in Parts 1, 4, 5, 6, and 7 of ERISA.

⁶ You did not ask and this letter does not address the status of the limited partnership programs as multiple employer welfare arrangements (MEWAs) within the meaning of ERISA section 3(40). In light of our conclusion that the programs are not ERISA-covered plans, the programs would be subject to broad state insurance regulation regardless of whether they were multiple employer welfare arrangements (MEWAs) within the meaning of ERISA section 3(40) and ERISA section 514(b)(6).