MEWAs

Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): **A Guide to Federal and State Regulation**

U.S. Department of Labor
Pension and Welfare Benefits Administration

This publication has been developed by the U.S. Department of Labor, Pension and Welfare Benefits Administration. It is available on the Internet at: **www.dol.gov/pwba**

For a complete list of PWBA publications, call toll-free: **1-866-275-7922**.

This material will be made available in alternate format upon request:

Voice phone: (202) 693-8664
TTY: (202) 501-3911

This booklet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

MEWAs

Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): **A Guide to Federal and State Regulation**

U.S. Department of Labor
Pension and Welfare Benefits Administration
Revised September 2002

Table of Contents

Foreword

This booklet was prepared by the Pension and Welfare Benefits Administration of the U.S. Department of Labor in an effort to address many of the questions that have been raised concerning the effect of the Employee Retirement Income Security Act (ERISA) on Federal and State regulation of "multiple employer welfare arrangements" (MEWAs). It is the hope of the Department that the information contained in this booklet will not only provide a better understanding of the scope and effect of ERISA coverage, but also will serve to facilitate State regulatory and enforcement efforts, as well as Federal-State coordination, in the MEWA area.

Introduction

For many years, promoters and others have established and operated multiple employer welfare arrangements (MEWAs), also described as "multiple employer trusts" or "METs," as vehicles for marketing health and welfare benefits to employers for their employees. Promoters of MEWAs have typically represented to employers and State regulators that the MEWA is an employee benefit plan covered by the Employee Retirement Income Security Act (ERISA) and, therefore, exempt from State insurance regulation under ERISA's broad preemption provisions.

By avoiding state insurance reserve, contribution and other requirements applicable to insurance companies, MEWAs are often able to market insurance coverage at rates substantially below those of regulated insurance companies, thus, in concept, making the MEWA an attractive alternative for those small businesses finding it difficult to obtain affordable health care coverage for their employees. In practice, however, a number of MEWAs have been unable to pay claims as a result of insufficient funding and inadequate reserves. Or in the worst situations, they were operated by individuals who drained the MEWA's assets through excessive administrative fees and outright embezzlement.

Prior to 1983, a number of states attempted to subject MEWAs to State insurance law requirements, but were frustrated in their regulatory and enforcement efforts by MEWA-promoter claims of ERISA-plan status and Federal

preemption. In many instances MEWAs, while operating as insurers, had the appearance of an ERISA-covered plan — they provided the same benefits as ERISA-covered plans, benefits were typically paid out of the same type of tax-exempt trust used by ERISA-covered plans, and, in some cases, filings of ERISA-required documents were made to further enhance the appearance of ERISA-plan status. MEWA-promoter claims of ERISA-plan status and claims of ERISA preemption, coupled with the attributes of an ERISA plan, too often served to impede State efforts to obtain compliance by MEWAs with State insurance laws.

Recognizing that it was both appropriate and necessary for states to be able to establish, apply and enforce State insurance laws with respect to MEWAs, the U.S. Congress amended ERISA in 1983, as part of Public Law 97-473, to provide an exception to ERISA's broad preemption provisions for the regulation of MEWAs under State insurance laws.

While the 1983 ERISA amendments were intended to remove Federal preemption as an impediment to State regulation of MEWAs, it is clear that MEWA promoters and others have continued to create confusion and uncertainty as to the ability of states to regulate MEWAs by claiming ERISA coverage and protection from State regulation under ERISA's preemption provisions. Obviously, to the extent that such claims have the effect of discouraging or delaying the application and enforcement of State insurance laws, the MEWA promoters benefit and those dependent on the MEWA for their health care coverage bear the risk.

This booklet is intended to assist State officials and others in addressing ERISA-related issues involving MEWAs. The Pension and Welfare Benefits Administration has attempted in this booklet to provide a clear understanding of ERISA's MEWA provisions, and the effect of those provisions on the respective regulatory and enforcement roles of the Department of Labor and the States in the MEWA area. Such understanding should not only facilitate State regulation of MEWAs, but should also enhance Federal-State coordination efforts with respect to MEWAs and, in turn, ensure that employees of employers participating in MEWAs are afforded the benefit of the safeguards intended under both ERISA and State insurance laws.

The first part of this booklet, **Regulation of Multiple Employer Welfare Arrangements under ERISA,** focuses on what constitutes an ERISA-covered plan and the regulatory and enforcement authority of the Department of Labor over such plans. The second part of the booklet, **Regulation of Multiple Employer Welfare Arrangements Under State Insurance Laws,** focuses on what is and what is not a MEWA and the extent to which states are permitted to regulate MEWAs that are also ERISA-covered welfare benefit plans.

Regulation of Multiple Employer Welfare Arrangements under ERISA

The U.S. Department of Labor, through the Pension and Welfare Benefits Administration (PWBA), is responsible for the administration and enforcement of the provisions of Title I of ERISA (29 U.S.C. §1001 et seq.). In general, ERISA prescribes minimum participation, vesting and funding standards for private-sector pension benefit plans and reporting and disclosure, claims procedure, bonding and other requirements which apply to both private-sector pension plans and private-sector welfare benefit plans. ERISA also prescribes standards of fiduciary conduct which apply to persons responsible for the administration and management of the assets of employee benefit plans subject to ERISA.

ERISA covers only those plans, funds or arrangements that constitute an "employee welfare benefit plan," as defined in ERISA Section 3(1), or an "employee pension benefit plan," as defined in ERISA Section 3(2). By definition, MEWAs do not provide pension benefits; therefore, only those MEWAs that constitute "employee welfare benefit plans" are subject to ERISA's provisions governing employee benefit plans.

Prior to 1983, if a MEWA was determined to be an ERISA-covered plan, State regulation of the arrangement would have been precluded by ERISA's preemption provi-

sions. On the other hand, if the MEWA was not an ERISA-covered plan, which was generally the case, ERISA's preemption provisions did not apply and states were free to regulate the entity in accordance with applicable State law. As a result of the 1983 MEWA amendments to ERISA, discussed in detail later in this booklet, states are now free to regulate MEWAs whether or not the MEWA may also be an ERISA-covered employee welfare benefit plan.

Under current law, a MEWA that constitutes an ERISA-covered plan is required to comply with the provisions of Title I of ERISA applicable to employee welfare benefit plans, in addition to any State insurance laws that may be applicable to the MEWA. If a MEWA is determined not to be an ERISA-covered plan, the persons who operate or manage the MEWA may nonetheless be subject to ERISA's fiduciary responsibility provisions if such persons are responsible for, or exercise control over, the assets of ERISA-covered plans. In both situations, the Department of Labor would have concurrent jurisdiction with the state(s) over the MEWA.

The following discussion provides a general overview of the factors considered by the Department of Labor in determining whether an arrangement is an "employee welfare benefit plan" covered by ERISA, the requirements applicable to welfare plans under Title I of ERISA, and the regulation of persons who administer and operate MEWAs as fiduciaries to ERISA-covered welfare plans.

❒ What is an "employee welfare benefit plan"?

The term "employee welfare benefit plan" (or welfare plan) is defined in Section 3(1) of ERISA, 29 U.S.C. §1002(1), as follows:

> *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 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).* ***(Emphasis supplied.)***

A determination as to whether a particular arrangement meets the statutory definition of "welfare plan," typically involves a two-step analysis. The first part of the analysis involves a determination as to whether the benefit

being provided is a benefit described in Section 3(1). The second part of the analysis involves a determination as to whether the benefit arrangement is established or maintained by an "employer" or an "employee organization." Each of these steps is discussed below.

❒ Is there a plan, fund or program providing a benefit described in Section 3(1)?

A plan, fund or program will be considered an ERISA-covered welfare plan only to the extent it provides one or more of the benefits described in Section 3(1).

As reflected in the definition of "welfare plan," the benefits included as welfare plan benefits are broadly described and wide ranging in nature. By regulation, the Department of Labor has provided additional clarifications as to what are and are not benefits described in Section 3(1) (See: 29 CFR §2510.3-1). In most instances, however, it will be fairly clear from the facts whether a benefit described in Section 3(1) is being provided to participants.

For example, the provision of virtually any type of health, medical, sickness or disability benefit will be the provision of a benefit described in Section 3(1). Where there is an employer or employee organization providing one or more of the described benefits, the Department has generally held that there is a "plan," regardless of whether the program of benefits is written or informal, funded (i.e., with benefits provided through a trust or insurance) or unfunded (i.e., with benefits provided from the general assets of the employer or employee organization), offered

on a routine or ad hoc basis, or is limited to a single employee-participant.

If it is determined that a Section 3(1) benefit is being provided, a determination then must be made as to whether the benefit is being provided by a plan "established or maintained by an employer or by an employee organization, or by both." Under Section 3(1), a plan, even though it provides a benefit described in Section 3(1), will not be deemed to be an ERISA-covered employee welfare benefit plan unless it is established or maintained by an employer (as defined in ERISA Section 3(5)), or by an employee organization (as defined in ERISA Section 3(4)), or by both an employer and employee organization.

For example, MEWAs provide benefits described in Section 3(1) (e.g., medical and hospital benefits), but MEWAs generally are not established or maintained by either an employer or employee organization and, for that reason, do not constitute ERISA-covered plans.

❒ What is an "employer"?

The term "employer" is defined in Section 3(5) of ERISA, 29 U.S.C. §1002(5), to mean:

> *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.*

Under the definition of "employer," an employee welfare benefit plan might be established by a single employer or by a group or association of employers acting on behalf of its employer-members with respect to the plan. "Employer" status is rarely an issue where only a single employer is involved in the provision of welfare benefits to employees. However, questions frequently are raised as to whether a particular group or association constitutes an "employer" for purposes of Section 3(5).

In order for a group or association to constitute an "employer" within the meaning of Section 3(5), there must be a bona fide group or association of employers acting in the interest of its employer-members to provide benefits for their employees. In this regard, 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, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of Section 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employers (i.e., the group or association members include persons who are not employers) or where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of Section 3(5).

The following factors are considered in determining whether a bona fide group or association of employers exists for purposes of ERISA: 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 pre-existing relationships of its members; the powers, rights and privileges of employer-members; and who actually controls and directs the activities and operations of the benefit program. In addition, employer-members of the group or association that participate in the benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the benefit program. It should be noted that whether employer-members of a particular group or association exercise control in substance over a benefit program is an inherently factual issue on which the Department generally will not rule.

Where no bona fide group or association of employers exists, the benefit program sponsored by the group or association would not itself constitute an ERISA-covered welfare plan; however, the Department would view each of the employer-members that utilizes the group or association benefit program to provide welfare benefits to its employees as having established separate, single-employer welfare benefit plans subject to ERISA. In effect, the arrangement sponsored by the group or association would, under such circumstances, be viewed merely as a vehicle for funding the provision of benefits (like an insurance company) to a number of individual ERISA-covered plans.

If a benefit program is not maintained by an employer, the program may nonetheless be an ERISA-covered plan if it is maintained by an “employee organization.”

❒ What is an "employee organization"?

The term "employee organization" is defined in Section 3(4) of ERISA, 29 U.S.C. §1002(4). There are two types of organizations included within the definition of "employee organization." The first part of the definition includes:

> *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; . . .*

This part of the definition is generally limited to labor unions. In order for an organization to satisfy this part of the definition of "employee organization," employees must participate in the organization (i.e., as voting members) and the organization must exist, at least in part, for the purpose of dealing with employers concerning matters relating to employment.

The second part of the definition of "employee organization" includes:

> *. . . any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.*

While the term "employees' beneficiary association" is not defined in Title I of ERISA, the Department of Labor applies the same criteria it utilized in construing that term under the Welfare and Pension Plans Disclosure Act, which preceded ERISA's enactment. Applying those criteria, an organization or association would, for purposes of ERISA Section 3(4), be an "employees' beneficiary association" only if: **(1)** membership in the association is conditioned on employment status (i.e., members must have a commonality of interest with respect to their employment relationships); **(2)** the association has a formal organization, with officers, by-laws, or other indications of formality; **(3)** the association generally does not deal with an employer (as distinguished from organizations described in the first part of the definition of "employee organization"); and **(4)** the association is organized for the purpose, in whole or in part, of establishing an employee benefit plan.

It should be noted that the term "employees' beneficiary association" used in Section 3(4) of ERISA is not synonymous with the term "voluntary employees' beneficiary association" used in Section 501(c)(9) of the Internal Revenue Code (the Code). Code Section 501(c)(9) provides a tax exemption for a "voluntary employees' beneficiary association" providing life, sickness, accident or other benefits to its members or their dependents or beneficiaries. While many trusts established under ERISA-covered welfare plans obtain an exemption from Federal taxation by satisfying the requirements applicable to

voluntary employees' beneficiary associations, satisfying such requirements under the Internal Revenue Code is not in and of itself indicative of whether the entity is an "employees' beneficiary association" for purposes of ERISA Section 3(4).

❒ What types of plans are excluded from coverage under Title I of ERISA?

There are certain arrangements that appear to meet the definition of an "employee welfare benefit plan" but which nonetheless are not subject to the provisions of Title I of ERISA.

Section 4(b) of ERISA, 29 U.S.C. §1003(b), specifically excludes from Title I coverage the following plans: **(1)** governmental plans (as defined in Section 3(32)); **(2)** church plans (as defined in Section 3(33)); **(3)** plans maintained solely to comply with workers' compensation, unemployment compensation or disability insurance laws; and **(4)** certain plans maintained outside the United States.

In addition, the Department of Labor has issued regulations, 29 CFR §2510.3-1, which clarify the definition of "employee welfare benefit plan." Among other things, these regulations serve to distinguish certain "payroll practices" from what might otherwise appear to be ERISA-covered welfare plans (e.g., payments of normal compensation to employees out of the employer's general assets during periods of sickness or vacation).

❒ What requirements apply to an employee welfare benefit plan under Title I of ERISA?

In general, an employee welfare benefit plan covered by ERISA is subject to the reporting and disclosure requirements of Part 1 of Title I; the fiduciary responsibility provisions of Part 4 of Title I; the administration and enforcement provisions of Part 5 of Title I; the continuation coverage provisions of Part 6 of Title I of ERISA and the health care provisions of Part 7 of ERISA. It is important to note that, unlike ERISA-covered pension plans, welfare plans are not subject to the participation, vesting, or funding standards of Parts 2 and 3 of Title I of ERISA. It also is important to note that merely undertaking to comply with the provisions of ERISA, such as with the reporting and disclosure requirements, does not make an arrangement an ERISA-covered plan.

The following is a general overview of the various requirements applicable to welfare plans subject to ERISA.

Under Part 1 of Title I, 29 U.S.C. §§1021 - 1031, the administrator of an employee benefit plan is required to furnish participants and beneficiaries with a summary plan description (SPD), which describes, in understandable terms, their rights, benefits and responsibilities under the plan. If there are material changes to the plan or changes in the information required to be contained in the summary plan description, summaries of these changes are also required to be furnished to participants.

The plan administrator also is required, under Part 1, to file with the Department an annual report (the Form

5500 Series) each year which contains financial and other information concerning the operation of the plan. The Form 5500 Series is a joint Department of Labor - Internal Revenue Service - Pension Benefit Guaranty Corporation annual report form series. The forms are filed with the Department of Labor, which processes the forms and furnishes the data to the Internal Revenue Service. Pursuant to regulations issued by the Department, welfare plans with fewer than 100 participants that are fully insured or unfunded (i.e., benefits are paid from the general assets of the employer) are not required to file annual reports with the Department of Labor. If a plan administrator is required to file an annual report, the administrator also generally is required to furnish participants and beneficiaries with a summary of the information contained in that annual report, i.e., a summary annual report.

The Department of Labor's regulations governing the application, content and timing of the various reporting and disclosure requirements are set forth at 29 CFR §2520.101-1, et seq.

Part 4 of Title I, 29 U.S.C. §1101 - 1114, sets forth standards and rules governing the conduct of plan fiduciaries. In general, any person who exercises discretionary authority or control respecting the management of a plan or respecting management or disposition of the assets of a plan is a "fiduciary" for purposes of Title I of ERISA. Under ERISA, fiduciaries are required, among other things, to discharge their duties "solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of

administering the plan." In discharging their duties, fiduciaries must act prudently and in accordance with documents governing the plan, insofar as such documents are consistent with ERISA. (See: ERISA Section 404.) Part 4 also describes certain transactions involving a plan and certain parties, such as the plan fiduciaries, which, as a result of the inherent conflicts of interest present, are specifically prohibited (See: ERISA Section 406). In certain instances there may be a statutory exemption or an administrative exemption, granted by the Department, which permits the parties to engage in what would otherwise be a prohibited transaction, if the conditions specified in the exemption are satisfied (See: ERISA Section 408).

Part 5 of Title I, 29 U.S.C. §§1131 - 1145, contains the administration and enforcement provisions of ERISA. Among other things, these provisions describe the remedies available to participants and beneficiaries, as well as the Department, for violations of the provisions of ERISA (See: ERISA Sections 501 and 502). With regard to benefit claims, Part 5, at Section 503, requires that each employee benefit plan maintain procedures for the filing of benefit claims and for the appeal of claims that are denied in whole or in part (See also: 29 CFR §2560.503-1).

Part 5 also sets forth, at Section 514, ERISA's preemption provisions. In general, Section 514(a) provides that provisions of ERISA shall supersede any and all State laws insofar as they "relate to" any employee benefit plan. Section 514(b), however, saves certain State laws, as well

as Federal laws, from ERISA preemption, including an exception for the State regulation of MEWAs. These provisions are discussed in detail later in this booklet.

Part 6 of Title I, 29 U.S.C. §§1161 - 1168, contains the "continuation coverage" provisions, also referred to as the "COBRA" provisions because they were enacted as part of the Consolidated Omnibus Budget Reconciliation Act of 1985. In general, the continuation coverage provisions require that participants and their covered dependents be afforded the option of maintaining coverage under their health benefit plan, at their own expense, upon the occurrence of certain events (referred to as "qualifying events") that would otherwise result in a loss of coverage under the plan. "Qualifying events" include, among other things:

-- *death of the covered employee, termination (other than by reason of an employee's gross miscon-duct), or reduction of hours of covered employment;*

-- *divorce or legal separation of the covered employee from the em-ployee's spouse;*

-- *a dependent child ceasing to be a dependent under the generally applicable requirements of the plan.*

Continuation coverage may be maintained for periods up to 18 months, 36 months, or even longer depending on the qualifying event and other circumstances.

It is important to note that while Title I of ERISA contains continuation coverage requirements and participants and beneficiaries may enforce their rights to continuation coverage in accordance with the remedies afforded them under Section 502 of Title I of ERISA, the Department of Labor has limited regulatory and interpretative jurisdiction with respect to the continuation coverage provisions. Specifically, the Department of Labor has responsibility for the COBRA notification and disclosure provisions, while the Internal Revenue Service has regulatory and interpretative responsibility for all the other provisions of COBRA under the Internal Revenue Code.

Part 7 of Title I of ERISA, 29 U.S.C.§1181 et seq., contains provisions setting forth specific benefit requirements applicable to group health plans and health insurance issuers under the Health Insurance Portability and Accountability Act (HIPAA), the Newborns' and Mothers' Health Protection Act (Newborn's Act), the Mental Health Parity Act (MHPA), and the Women's Health and Cancer Rights Act (WHCRA).

The HIPAA portability rules, at Section 701 of ERISA, place limitations on a group health plan's ability to impose pre-existing condition exclusions and provides special enrollment rights for certain individuals that lose other health coverage or who experience a life change. Section 702 contains HIPAA's nondiscrimination rules that

prohibit plans or issuers from establishing rules for eligibility to enroll in the plan or charging individuals higher premium amounts based on a health factor. In addition, Section 703 of Part 7 sets forth provisions for guaranteed renewability in MEWAs and multiemployer plans.

The Newborns' Act (in Section 711 of ERISA) generally requires group health plans that offer maternity hospital benefits for mothers and newborns to pay for at least a 48-hour hospital stay for the mother and newborn following normal childbirth or a 96-hour hospital stay following a cesarean. MHPA, at Section 712, provides for parity in the application of annual and dollar limits on mental health benefits with annual lifetime dollar limits on medical/surgical benefits. WHCRA, at Section 713, provides protections for patients who elect breast reconstruction or certain other follow-up care in connection with a mastectomy.

❒ To what extent does ERISA govern the activities of MEWAs that are not "employee welfare benefit plans"?

Under ERISA, persons who exercise discretionary authority or control over the management of ERISA-covered plans or the assets of such plans are considered fiduciaries and, therefore, are subject to ERISA's fiduciary responsibility provisions. When the sponsor of an ERISA-covered plan purchases health care coverage for its employees from a MEWA, the assets of the MEWA generally are considered to include the assets of the plan (i.e., "plan assets"), unless the MEWA is a State-licensed insurance

company. (See: 29 C.F.R. §§2510.3-101 and 2510.3-102 relating to the definition of "plan assets.") In exercising discretionary authority or control over plan assets, such as in the payment of administrative expenses and in the making of benefit claim determinations, the persons operating the MEWA would be performing fiduciary acts that are governed by ERISA's fiduciary provisions. Where a fiduciary breaches statutorily mandated duties under ERISA, or where a person knowingly participates in such breach, the U.S. Department of Labor may pursue civil sanctions.

Inasmuch as MEWAs typically are not ERISA-covered welfare plans and the Department of Labor does not have direct regulatory authority over the business of insurance, the Department's investigations of MEWAs necessarily focus on whether the persons operating MEWAs have breached their fiduciary duties under ERISA to employee plans that have purchased health coverage from the MEWA. Because of the factual and transactional nature of fiduciary breach determinations, investigations of possible fiduciary breaches tend to be more complex and time-consuming than investigations involving alleged violations of specific statutory requirements, such as the reporting, disclosure, and claims procedure requirements. For example, MEWA investigations typically require detailed reviews of the financial records and documents relating to the operation of the MEWA, the contracts between the MEWA and the service providers to the MEWA, participation or other agreements between the MEWA and ERISA-covered welfare plans, as well as the actual transactions

engaged in by the MEWA, in order to determine whether there has been a violation of ERISA's fiduciary standards.

Accordingly, while the Department may pursue enforcement actions with respect to MEWAs, such action is considerably different from, and often more limited than, the remedies generally available to the states under their insurance laws. In this regard, it is important to note that, in many instances, states may be able to take immediate action with respect to a MEWA upon determining that the MEWA has failed to comply with licensing, contribution or reserve requirements under State insurance laws, whereas investigating and substantiating a fiduciary breach under ERISA may take considerably longer.

Regulation of Multiple Employer Welfare Arrangements under State Insurance Laws

As noted in the introduction, states, prior to 1983, were effectively precluded by ERISA's broad preemption provisions from regulating any employee benefit plan covered by Title I of ERISA. As a result, a state's ability to regulate MEWAs was often dependent on whether the particular MEWA was an ERISA-covered plan. In an effort to address this problem, the U.S. Congress amended ERISA in 1983 to establish a special exception to ERISA's preemption provisions for MEWAs. This exception, which is discussed in detail below, was intended to eliminate claims of ERISA-plan status and Federal preemption as an impediment to State regulation of MEWAs by permitting states to regulate MEWAs that are ERISA-covered employee welfare benefit plans.

The following discussion relating to ERISA's preemption provisions and the 1983 MEWA amendments is intended to clarify what is and what is not a "multiple employer welfare arrangement" within the meaning of ERISA Section 3(40), and the extent to which states may regulate MEWAs, as provided by ERISA Section 514(b)(6).

❒ What is the general scope of ERISA preemption?

Under the general preemption clause of ERISA Section 514(a), 29 U.S.C. §1144(a), ERISA preempts any and all State laws which "relate to" any employee benefit plan subject to Title I of ERISA. However, there are a number of exceptions to the broad preemptive effect of Section 514(a) set forth in ERISA Section 514(b), 29 U.S.C. §1144(b), referred to as the "savings clause."

Section 514(a) of ERISA provides, in relevant part, that:

> *Except as provided in subsection (b) of this section [Section 514], the provisions of this title [title I] . . . supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .*

In determining whether a State law may "relate to" an employee benefit plan, the U.S. Supreme Court has determined that the words "relate to" should be construed expansively. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), the Court held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (See also: *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

As noted above, however, while a state law may be found to "relate to" an employee benefit plan, within the

meaning of Section 514(a) of ERISA, the law may nonetheless be saved from ERISA preemption to the extent that an exception described in Section 514(b) applies.

With regard to the application of State insurance laws to ERISA-covered plans, Section 514(b)(2) contains two relevant exceptions. This section provides, in relevant part, that:

> **(A)** Except as provided in subparagraph (B), nothing in this title [title I] shall be construed to exempt or relieve any person from any law of any State which regulates insurance....
>
> **(B)** Neither an employee benefit plan..., nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer... for purposes of any law of any State purporting to regulate insurance companies, insurance contracts,....

Section 514(b)(2)(A) referred to as the "savings clause" essentially preserves to the states the right to regulate the business of insurance and persons engaged in that business (See: *Metropolitan Life Insurance Co.* v. *Massachusetts*, cited above, for a discussion of the criteria applied by the U.S. Supreme Court in determining whether a State law is one that "regulates insurance."). However, while Section 514(b)(2)(A) saves from ERISA preemption state laws that regulate insurance, Section 514(b)(2)(B), referred to as the "deemer clause," makes clear that a State law that "purports to regulate insurance" cannot deem an employee benefit plan to be an insurance company.

While plans purchasing insurance are, as a practical matter, indirectly affected by State insurance laws (inasmuch as the insurance contracts purchased by the plans are subject to State insurance law requirements), the "deemer clause," prior to 1983, effectively prevented the direct application of State insurance laws to ERISA-covered employee benefit plans. In 1983, however, ERISA was amended, as part of Public Law 97-473 (January 14, 1983), to add Section 514(b)(6) to ERISA's preemption provisions.

In general, Section 514(b)(6) provides a special exception for the application of State insurance laws to ERISA-covered welfare plans that are "multiple employer welfare arrangements" (MEWAs). Because the application of Section 514(b)(6) is limited to benefit programs that are MEWAs, the following discussion first reviews what is and what is not a MEWA for purposes of the Section 514(b)(6) exception, followed by a detailed review of the exception and its effect on state regulation of MEWAs.

❒ What is a "multiple employer welfare arrangement"?

The term "multiple employer welfare arrangement" is defined in ERISA Section 3(40), 29 U.S.C. §1002(40). Section 3(40)(A) provides as follows:

> **(A)** The term "multiple employer welfare arrangement" means **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)** [welfare plan benefits] 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 arrangement that 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*[*] ***(Emphasis supplied.)***

As reflected above, the definition of MEWA includes both ERISA-covered employee welfare benefit plans and other arrangements which offer or provide medical, surgical, hospital care or benefits, or benefits in the event of sickness, accident, disability or any other benefit described in ERISA Section 3(1) (See: definition of "employee welfare benefit plan" on page 6 for a complete list of

[*] The Rural Telephone Cooperative Associations ERISA Amendments Act of 1991 (Public Law No. 102-89) amended the definition of "multiple employer welfare arrangement" to exclude ERISA-covered welfare plans established or maintained by "rural telephone cooperative associations," as defined in ERISA section 3(40)(B)(v), effective August 14, 1991, the date of enactment.

benefits). Therefore, whether a particular arrangement is or is not an employee welfare benefit plan subject to ERISA is irrelevant for purposes of determining whether the arrangement is a MEWA. In order to constitute a MEWA, however, a determination must be made that:

-- *the arrangement offers or provides welfare benefits to the employees of two or more employers or to the beneficiaries of such employees (i.e., the arrangement is not a single employer plan); and*

-- *the arrangement is not excepted from the definition of MEWA as established or maintained under or pursuant to one or more collective bargaining agreements, or by a rural electric cooperative, or by a rural telephone cooperative association.*

Set forth below are a number of issues which should be considered in making a MEWA determination.

❒ Does the arrangement offer or provide benefits to the employees of two or more employers?

1. Plans maintained by one employer or a group of employers under common control

If a plan is maintained by a single-employer for the exclusive purpose of providing benefits to that employer's employees, former employees (e.g., retirees), or beneficia-

ries (e.g., spouses, former spouses, dependents) of such employees, the plan will be considered a single employer plan and not a MEWA within the meaning of ERISA Section 3(40). For purposes of Section 3(40), certain groups of employers which have common ownership interests are treated as a single employer. In this regard, Section 3(40)(B)(i) provides that:

> *two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group.*

In determining whether trades or businesses are within the "same control group," Section 3(40)(B)(ii) provides that the term "control group" means a group of trades or businesses under "common control." Pursuant to Section 3(40)(B)(iii), whether a trade or business is under "common control" is to be determined under regulations issued by the Secretary applying principles similar to those applied in determining whether there is "common control" under section 4001(b) of Title IV of ERISA, except that common control shall not be based on an interest of less than 25 percent. Accordingly, trades or businesses with less than a 25 percent ownership interest will not be considered under "common control" and, therefore, will not be viewed as a single employer for purposes of determining whether their plan provides benefits to the employees of two or more employers under Section 3(40).

With regard to situations where there is a 25 percent or more ownership interest, it should be noted that, the

Department of Labor has not adopted regulations under Section 3(40)(B)(iii). However, regulations issued under Section 4001(b) of Title IV and Section 414(c) of the Internal Revenue Code (See: 29 CFR §2612.2 and 26 CFR §1.414(c)-2, respectively) provided that "common control" generally means, in the case of a parent-subsidiary group of trades or businesses, an 80 percent ownership interest, or, in the case of organizations controlled by five or fewer persons, which are the same persons with respect to each organization, at least a 50 percent ownership interest by such persons in each organization.

2. Plans maintained by groups or associations of unrelated employers

Questions have been raised as to whether a plan sponsored by a group or association acting on behalf of its employer-members, which are not part of a control group, constitutes a "single employer" for purposes of the MEWA definition. The question is premised on the fact that the term "employer" is defined in Section 3(5), 29 U.S.C. §1002(5), to mean "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." As discussed earlier, the Department has taken the position that a bona fide group or association of employers would constitute an "employer" within the meaning of ERISA Section 3(5) for purposes of having established or maintained an employee benefit plan (See: page 8).

However, unlike the specified treatment of a control group of employers as a single employer, there is no indica-

tion in Section 3(40), or the legislative history accompanying the MEWA provisions, that Congress intended that such groups or associations be treated as "single employers" for purposes of determining the status of such arrangements as a MEWA. Moreover, while a bona fide group or association of employers may constitute an "employer" within the meaning of ERISA Section 3(5), the individuals typically covered by the group or association-sponsored plan are not "employed" by the group or association and, therefore, are not "employees" of the group or association. Rather, the covered individuals are "employees" of the employer-members of the group or association. Accordingly, to the extent that a plan sponsored by a group or association of employers provides benefits to the employees of two or more employer-members (and such employer-members are not part of a control group of employers), the plan would constitute a MEWA within the meaning of Section 3(40).

3. Plans maintained by employee leasing organizations

When a health benefit plan is maintained by an employee leasing organization, there is often a factual question as to whether the individuals covered by the leasing organization's plan are employees of the leasing organization or employees of the client (often referred to as the "recipient") employers. If all the employees participating in the leasing organization's plan are determined to be employees of the leasing organization, the plan would constitute a "single employer" plan and not a MEWA. On the other hand, if the employees participating in the plan

include employees of two or more recipient employers or employees of the leasing organization and at least one recipient employer, the plan would constitute a MEWA because it would be providing benefits to the employees of two or more employers.

Like a bona fide group or association of employers, an employee leasing organization may be an "employer" within the meaning of ERISA Section 3(5) to the extent it is acting directly or indirectly in the interest of an employer. However, as with bona fide groups or associations of employers, "employer" status under Section 3(5) does not in and of itself mean the individuals covered by the leasing organization plan are "employees" of the leasing organization. As discussed below, in order for an individual to be considered an "employee" of an "employer" for purposes of the MEWA provisions, an employer-employee relationship must exist between the employer and the individual covered by the plan. In this regard, the payment of wages, the payment of Federal, State and local employment taxes, and the providing of health and/or pension benefits are not solely determinative of an employer-employee relationship. Moreover, a contract purporting to create an employer-employee relationship will not be determinative where the facts and circumstances establish that the relationship does not exist.

4. Determinations as to who is an "employee" of an employer

As discussed above, the term "employer" is defined to encompass not only persons with respect to which there

exists an employer-employee relationship between the employer and individuals covered by the plan (i.e., persons acting directly as an employer), but also certain persons, groups and associations, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered under an employee benefit plan. Therefore, merely establishing that a plan is maintained by a person, group or association constituting an "employer" within the meaning of ERISA Section 3(5) is not in and of itself determinative that the plan is a single-employer plan, rather than a plan that provides benefits to the employees of two or more employers (i.e., a MEWA). A determination must be made as to the party or parties with whom the individuals covered by the plan maintain an employer-employee relationship.

The term "employee" is defined in Section 3(6) of ERISA, 29 U.S.C. §1002(6), to mean "any individual **employed** by an employer." (Emphasis supplied.) The Department has taken the position that an individual is "employed" by an employer, for purposes of Section 3(6), when an employer-employee relationship exists. While in most instances the existence, or absence, of an employer-employee relationship will be clear, there may be situations when the relationship is not entirely free from doubt.

In general, whether an employer-employee relationship exists is a question that must be determined on the basis of the facts and circumstances involved. It is the

position of the Department that, for purposes of Section 3(6), such determinations must be made by applying common law of agency principles.* In applying common law principles, consideration must be given to, among other things, 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; whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders service, etc. In this regard, it should be noted that a contract purporting to create an employer-employee relationship will not control where common law factors (as applied to the facts and circumstances) establish that the relationship does not exist. (See: Advisory Opinion No. 92-05, Appendix A.)

Finally, pursuant to regulations issued by the Department of Labor, certain individuals are deemed not be "employees" for purposes of Title I of ERISA. Under the regulations, an individual and his or her spouse are deemed not be "employees" with respect to a trade or business which is wholly owned by the individual or the individual and his or her spouse. Also under the regulations, a partner

* While common law of agency factors typically have been applied in determining whether a person is an employee or independent contractor, common law principles are equally applicable to determining by whom an individual is employed. See: *Professional & Executive Leasing, Inc. v. Commissioner, 89 TC No. 19(1987)*. Also see: *Nationwide Mutual Insurance Co. et al. v. Darden, 503 U.S., 318, 112 S. Ct. 1344(1992).*

in a partnership and his or her spouse are deemed not to be "employees" with respect to the partnership. (See: 29 CFR §2510.3-3(b) and (c).)

❒ Is MEWA status conditioned upon the plan being established or maintained by an employer(s)?

While the definition of MEWA refers to arrangements that offer or provide benefits to the employees of two or more employers, the definition of MEWA is not limited to arrangements established or maintained by an employer. In fact, Section 3(40) does not condition MEWA status on the arrangement being established or maintained by any particular party. Accordingly, the MEWA status of an arrangement is not affected by the absence of any connection or nexus between the arrangement and the employers whose employees are covered by the arrangement. For example, in Advisory Opinion No. 88-05, the Department of Labor concluded that an arrangement established by an association to provide health benefits to its members, who were full-time ministers and other full-time employees of certain schools and churches, constituted a MEWA even though there was no employer involvement with the association's plan.

❒ Is the arrangement excluded from the definition of MEWA?

Once it has been determined that an ERISA-covered welfare plan provides benefits to the employees of two or more employers, a determination must be made as to

whether any of the exclusions from MEWA status apply to the arrangement. Pursuant to ERISA Section 3(40)(A), three types of arrangements are specifically excluded from the definition of "multiple employer welfare arrangement," even though such arrangements may provide benefits to the employees of two or more employers. Each of these types of arrangements is discussed in general terms below.

1. Plans maintained pursuant to collective bargaining agreements

Section 3(40)(A)(i) specifically excludes any plan or other arrangement that is established or maintained "under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements."

This exception generally includes the type of plans commonly referred to as "multiemployer plans," a term which in some instances has been confused with the term "multiple employer welfare arrangements." Multiemployer plans, as distinguished from MEWAs, are established and maintained under collective bargaining agreements negotiated between unions and employers or an association of employers, and, in accordance with the Labor Management Relations Act, employer contributions to the plans are held in a trust that is jointly administered by labor trustees (appointed by the union) and management trustees (appointed by the employers or employer association).

In general, a collective bargaining agreement is an agreement or contract that is the product of good faith bargaining between bona fide employee representatives and

one or more employers. Determinations as to whether a particular document is the product of good faith bargaining between bona fide employee representatives and one or more employers can be made only upon an examination of relevant facts and circumstances, taking into consideration the pertinent provisions of the National Labor Relations Act, 29 U.S.C. §151 et seq., and the cases decided thereunder, as well as other relevant laws.

For purposes of Section 3(40), an employee benefit plan will generally be considered to be established or maintained "under or pursuant to a collective bargaining agreement" if the agreement is a bona fide collective bargaining agreement and the agreement provides, directly or indirectly, for establishment or maintenance of a plan for the benefit of employees represented by a union in the collective bargaining process.

While no one item is determinative, factors generally indicative of a bona fide collective bargaining agreement may, among others, include: the agreement provides for wages, benefits, working conditions or resolution of grievances; the agreement is executed by representatives of a labor organization/union which is either certified by the National Labor Relations Board or is elected by the majority of employee of signatory employers as the exclusive bargaining representative of the employees; neither the agreement nor of the labor organization/union was promoted by the employer(s); and the agreement is the product of good faith bargaining.

2. Rural Electric Cooperatives

Section 3(40)(A)(ii) specifically excludes from the definition of MEWA any plan or other arrangement that is established or maintained by a "rural electric cooperative."

Section 3(40)(B)(iv) defines the term "rural electric cooperative" to mean:

> **(I)** any organization which is exempt from tax under Section 501(a) of the Internal Revenue Code of 1986 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and
>
> **(II)** any organization described in paragraph (4) or (6) of Section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under Section 501(a) of such Code and at least 80 percent of the members of which are organizations described in subclause (I).

3. Rural Telephone Cooperative Associations

Section 3(40)(A)(iii) specifically excludes from the definition of MEWA any plan or other arrangement that is established or maintained by a "rural telephone cooperative association." This exception to MEWA status for rural telephone cooperative associations became effective on August 14, 1991, the enactment date of the Rural Telephone Cooperative Associations ERISA Amendments Act of 1991 (Public Law No. 102-89).

Section 3(40)(B)(v), also added to ERISA by Public Law No. 102-89, defines the term "rural telephone cooperative association" to mean an organization described in paragraph (4) or (6) of Section 501(c) of the Internal Revenue Code of 1986 which is exempt from tax under Section 501(a) and at least 80 percent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

To restate the definition of MEWA somewhat differently, a MEWA, within the meaning of Section 3(40), includes any ERISA-covered employee welfare benefit plan which is <u>not</u>:

(1) a single employer plan (which includes employers within the same control group);

(2) a plan established or maintained under or pursuant to a collective bargaining agreement;

(3) a plan established or maintained by a rural electric cooperative; or

(4) a plan established or maintained by a rural telephone cooperative association.

If an ERISA-covered employee welfare benefit plan is a MEWA, states may, as discussed below, apply and enforce State insurance laws with respect to the plan in accordance with the exception to ERISA preemption under Section 514(b)(6).

❒ To what extent may States regulate ERISA-covered welfare plans that are MEWAs?

If an ERISA-covered welfare plan is a MEWA, states may apply and enforce their State insurance laws with respect to the plan to the extent provided by ERISA Section 514(b)(6)(A), 29 U.S.C. §1144(b)(6)(A). In general, Section 514(b)(6)(A) provides an exception to ERISA's broad preemption provisions for the application and enforcement of State insurance laws with respect to any employee welfare benefit plan that is a MEWA within the meaning of ERISA Section 3(40).

In effect, Section 514(b)(6)(A) serves to provide an exception to the "deemer clause" of Section 514(b)(2)(B),

which otherwise precludes states from deeming an ERISA-covered plan to be an insurance company for purposes of State insurance laws, by permitting states to treat certain ERISA-covered plans (i.e., MEWAs) as insurance companies, subject to a few limitations. While the range of State insurance law permitted under Section 514(b)(6)(A) is subject to certain limitations, the Department of Labor believes that these limitations should have little, if any, practical affect on the ability of states to regulate MEWAs under their insurance laws.

There is nothing in Section 514(b)(6)(A) that limits the applicability of State insurance laws to only those insurance laws which specifically or otherwise reference "multiple employer welfare arrangements" or "MEWAs." Similarly, while the specific application of a particular insurance law to a particular MEWA is a matter within the jurisdiction of the State, there is nothing in Section 514(b)(6) that would preclude the application of the same insurance laws that apply to any insurer to ERISA-covered plans which constitute MEWAs, subject only to the limitations set forth in Section 514(b)(6)(A).

Under Section 514(b)(6)(A), the extent to which State insurance laws may be applied to a MEWA that is an ERISA-covered plan is dependent on whether or not the plan is fully insured.

❒ What state insurance laws may be applied to a fully insured plan?

Section 514(b)(6)(A)(i) provides:

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 sub-paragraph (B)),* ***any law of any State which regulates insurance may apply to such arrangement to the extent 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... **(Emphasis supplied.)**

Under Section 514(b)(6)(A)(i), it is clear that, in the case of fully insured MEWAs, states may apply and enforce any State insurance law requiring the maintenance of specific reserves or contributions designed to ensure that the MEWA will be able to satisfy its benefit obligations in a timely fashion. Moreover, it is the view of the Department of Labor that 514(b)(6)(A)(i) clearly enables states to subject MEWAs to licensing, registration, certification, financial reporting, examination, audit and any other

requirement of State insurance law necessary to ensure compliance with the State insurance reserves, contributions and funding requirements.

❒ What is a "fully insured" MEWA?

Section 514(b)(6)(D) provides that, for purposes of Section 514(b)(6)(A), "a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State." In this regard, a determination by the Department of Labor as to whether a particular MEWA is "fully insured" is not required in order for a state to treat a MEWA as "fully insured" for purposes of applying State insurance law in accordance with Section 514(b)(6).

❒ What state insurance laws may be applied to a plan that is not fully insured?

Section 514(b)(6)(A)(ii) provides:

> *in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title [title I],* ***any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding***

sections of this title *[Title I].* ***(Emphasis supplied)***

Accordingly, if a MEWA is not "fully insured," the only limitation on the applicability of State insurance laws to the MEWA is that the law not be inconsistent with Title I of ERISA.

❒ Under what circumstances might a state insurance law be "inconsistent" with Title I of ERISA?

In general, a State law would be inconsistent with the provisions of Title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under Title I or would conflict with any provision of Title I, making compliance with ERISA impossible. For example, any State insurance law which would adversely affect a participant's or beneficiary's right to request or receive documents described in Title I of ERISA, or to pursue claims procedures established in accordance with Section 503 of ERISA, or to obtain and maintain continuation health coverage in accordance with Part 6 of ERISA would be viewed as inconsistent with the provisions of Title I. Similarly, a State insurance law that would require an ERISA-covered plan to make imprudent investments would be inconsistent with the provisions of Title I.

On the other hand, a State insurance law generally will not be deemed "inconsistent" with the provisions of Title I

if it requires ERISA-covered plans constituting MEWAs to meet more stringent standards of conduct, or to provide more or greater protection to plan participants and beneficiaries than required by ERISA. The Department has expressed the view that any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions in order for a MEWA to be considered, under such law, able to pay benefits will generally not be "inconsistent" with the provisions of Title I for purposes of Section 514(b)(6)(A)(ii). The Department also has expressed the view that a State law regulating insurance which requires a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation, fines and other civil penalties, including injunctive relief, would not in and of itself be "inconsistent" with the provisions of title I for purposes of Section 514(b)(6)(A)(ii). (See: Advisory Opinion 90-18, Appendix A).

❒ Has the Department of Labor granted any exemptions from State regulation for MEWAs which are not fully insured?

Pursuant to Section 514(b)(6)(B), the Secretary of Labor may, under regulations, exempt from Section 514(b)(6)(A)(ii) MEWAs which are not fully insured. Such exemptions may be granted on an individual or class basis. While the Department has the authority to grant exemptions from the requirements of Section 514(b)(6)(A)(ii), such authority does not extend to the requirements of

Section 514(b)(6)(A)(i) relating to the maintenance of specified levels of reserves and specified levels of contributions under State insurance laws.

The Department has neither prescribed regulations for such exemptions nor granted any such exemptions since the enactment of the MEWA provisions in 1983.

Form M-1 Filing Requirement for MEWAs

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) established a filing requirement for MEWAs. The purpose of the Form M-1 filing requirement is to provide PWBA with information concerning compliance by MEWAs with the requirements of Part 7 of ERISA (including the provisions of HIPAA, the Mental Health Parity Act, the Newborns' and Mothers' Health Protection Act, and the Women's Health and Cancer Rights Act).

Under the new reporting requirement, the one-page Form M-1 is generally required to be filed once a year, due on March 1; however, plan administrators can request a 60-day extension.

To help filers, PWBA has published a guide for completing the Form M-1, which is available by calling the PWBA toll-free line at **1-866-275-7922** and on the Internet at **www.dol.gov/pwba**. Plan administrators may also contact us with any questions or for assistance in completing the Form M-1 by calling the PWBA Help Desk at 202-693-3860.

ERISA ADVISORY OPINIONS

Advisory opinions relating to Title I of ERISA are issued by the Pension and Welfare Benefits Administration and represent the official views of the U.S. Department of Labor on the interpretation and application of the provisions of ERISA. Advisory opinions are issued pursuant to ERISA Procedure 76-1, which, among other things, describes the circumstances under which the Department will and will not rule on particular matters and the effect of advisory opinions generally. A copy of ERISA Procedure 76-1 is reprinted as Appendix B. Pursuant to Section 12 of ERISA Procedure 76-1, advisory opinions, as well as advisory opinion requests, accompanying documentation, and related correspondence are available to the general public.

It should be noted that the advisory opinion process is not a fact-finding process. Advisory opinions are generally based solely on the facts and representations submitted to the Department by the party or parties requesting the opinion. Therefore, advisory opinions should not be viewed as determinations by the Department as to the accuracy of any of the facts and representations provided by the requesting party and cited in such opinions.

- **Is an advisory opinion on the MEWA status of an arrangement necessary in order for a state to exercise jurisdiction over the arrangement?**

No. First, there is nothing in ERISA Section 3(40) which conditions MEWA status on the obtaining of an opinion from the Department. Second, in most instances, the question of whether a particular arrangement is a MEWA will require factual, rather than interpretative, determinations. That is, if the arrangement meets the definition of a MEWA - because it is providing health or similar benefits to the employees of more than one employer (i.e., the arrangement is not a single-employer plan) and the arrangement is not established or maintained under or pursuant to a collective bargaining agreement or by a rural electric cooperative, or by a rural telephone cooperative association - the arrangement is, by definition, a MEWA, whether or not the Department rules on the matter.

- **Is it necessary to determine by advisory opinion whether a MEWA is an ERISA-covered employee benefit plan?**

In most cases, ***no***. While the MEWA exception to ERISA's preemption provisions does impose a few limitations on the ability of states to regulate MEWAs that are ERISA-covered plans, these limitations, as discussed earlier and in Advisory Opinion No. 90-18 (See: Appendix A), should not, as a practical matter, have any significant effect on a state's application and enforcement of its insurance laws with respect to a MEWA which is an ERISA-

covered plan. Accordingly, a determination as to whether or not a MEWA is an ERISA- covered plan is not necessary in most instances.

❒ If it is determined that an advisory opinion is necessary, what information is required in order for the Department to issue a ruling?

If a MEWA determination is needed, the advisory opinion request should include sufficient facts and representations to conclude whether the arrangement is providing benefits described in Section 3(1) of ERISA (See: pages 7-8) whether benefits are being provided to the employees of two or more employers, whether the employers of covered employees are members of the same control group of employers, and whether the arrangement is established or maintained pursuant to or under a collective bargaining agreement or by a rural electric cooperative or rural telephone cooperative association.

If an ERISA-coverage determination is needed, the advisory opinion request should also include sufficient information to determine whether the arrangement is established or maintained by an employer, employee organization, or by both (See: pages 9-16). An advisory opinion request for such a determination should include copies of plan and trust documents, constitutions and by-laws, if any, administrative agreements, employer-participation agreements, collective bargaining agreements, if applicable, and any other documents or correspondence that might have a bearing on the status of the arrangement for ERISA purposes.

❒ **Where should advisory opinion requests be sent?**

Requests for advisory opinions involving MEWAs should be sent to the following address:

Office of Regulations and Interpretations
Pension and Welfare Benefits Administration
U.S. Department of Labor
Room N-5669
200 Constitution Avenue, NW
Washington, DC 20210

ERISA ENFORCEMENT

Enforcement of the provisions of Title I of ERISA is carried out by the Pension and Welfare Benefits Administration's Office of Enforcement. The Office of Enforcement consists of a national office and 15 field offices located throughout the United States. The national office provides policy direction and technical and management support for the field offices, in addition to conducting investigations in selected sensitive areas. Most, if not all, MEWA-related investigations are conducted by the field offices under the supervision of an area or district director, with oversight and coordination provided by the national office.

In an effort to facilitate State and Federal enforcement efforts in the MEWA area, PWBA's field offices have established, or are in the process of pursuing, cooperative arrangements with the states in their jurisdiction pursuant to which the offices will share and discuss cases opened and closed by PWBA involving MEWAs. In addition, field offices will, in accordance with such agreements, make available documents obtained through voluntary production or pursuant to a civil subpoena. In order to ensure proper coordination of MEWA-related initiatives, state officials should direct information and/or inquiries (other than advisory opinion requests) to the director of the PWBA area office responsible for their particular state.

For more information for the field office near you, contact PWBA's Participant and Compliance Assistance toll-free number - **1-866-275-7922** - or view it on the agency's Web site.

View this and other free PWBA publications at **www.dol.gov/pwba**.

Appendix A
Advisory Opinions

July 2, 1990

U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington. DC 20210

90-18A
ERISA SEC
514(b)(6)(A)(ii)

Mr. J. Scott Kyle
Texas State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Dear Mr. Kyle:

This responds to your letter of May 8, 1990, regarding MDPhysicians and Associates, Inc. Employee Benefit Plan (MDPEBP). You request the views of the Department of Labor concerning issues that arise, as described below, under section 514(b)(6)(A) of the Employee Retirement Income Security Act of 1974 (ERISA).

In Opinion 90-10A, the Department of Labor (the Department) concluded that MDPEBP is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of ERISA and, therefore, is subject to state regulation at least to the extent provided in section 514(b)(6)(A) of ERISA, regardless of whether MDPEBP is an employee benefit plan covered by title I of ERISA. You state in your letter that MDPhysicians and Associates, Inc., which administers MDPEBP, has filed suit against the Texas State Board of Insurance and Texas Attorney General for a declaratory judgment relating to the ability of the State of Texas to regulate or prohibit MDPEBP. MDPhysicians and Associates, Inc. contends in its complaint that, among other things, anyattempt by the State of Texas to regulate MDPEBP by requiring licensure of MDPEBP as an insurer would be inconsistent with title I of ERISA, and that the State of Texas lacks statutory authority to regulate MDPEBP in any respect in the absence of enabling legislation respecting the regulation of self-insured MEWAs.

You state that Texas does not have legislation specifically aimed at regulation of self-funded MEWAs which are employee welfare benefit plans covered by title I of ERISA. It is the position of the State Board of Insurance that such plans are doing an insurance business and are subject to the same requirements as
any other insurer operating in Texas. You further state that the Texas Insurance Code provides that no person or insurer may do the business of insurance in Texas without specific authorization of statute, unless exempt under the provisions of Texas or federal law. The Code establishes procedures for issuance of certificates of authority to insurers who meet statutory requirements. Persons who transact insurance business in Texas without a certificate of authority or valid claim to exemption are subject to taxation, fines, and other civil penalties, including injunctive relief to effect cessation of operation.

Assuming, arguendo, that MDPEBP is an employee welfare benefit plan covered by title I of ERISA, you request the Department's views as to whether or not a requirement by the State of Texas that MDPEBP (or any similar plan which might be found to be both an employee welfare benefit plan and a MEWA as defined by ERISA) obtain a certificate of authority to transact insurance business in Texas, and be subject to statutory penalties and injunction
should it operate without a certificate of authority, would be inconsistent with title I of ERISA.

Section 514(b)(6)(A) of ERISA provides an exception to preemption under ERISA section 514(a) for any ERISA-covered employee welfare benefit plan that is a MEWA. In general, the exception permits application of state insurance law to a MEWA as follows: If the MEWA is "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards (See section 514(b)(6)(A)(i)). If the MEWA is not fully insured, any law of any state which regulates insurance may apply to the extent not inconsistent with title I of ERISA (See 514(b)(6)(A)(ii)). It appears from your letter that the parties do not dispute that MDPEBP is not fully insured within the meaning of ERISA section 514(b)(6)(D).

We hope the following is responsive to your request.

First, it is the view of the Department of Labor that section 514(b)(6)(A) saves from ERISA preemption any law of any state which regulates insurance, without regard to whether such laws specifically or otherwise reference MEWAs or employee benefit plans which are MEWAs, subject only to the limitations set forth in subparagraphs (A)(i) and (A)(ii) of that section. Similarly, while we are unable to rule on the specific application of the Texas Insurance Code to MDPEBP, a matter within the jurisdiction of the Texas State Board of Insurance, it is the view of the Department that, with the exception of the aforementioned
limitations, there is nothing in ERISA which would preclude the application of the same state insurance laws which apply to any insurer which is not an ERISA-covered plan to ERISA-covered plans which constitute MEWAs within the meaning of ERISA section 3(40).

Second, it is the view of the Department that Congress, in enacting the MEWA provisions, recognized that the application and enforcement of state insurance laws to ERISA-covered MEWAs 1/ provide both appropriate and necessary protection for the participants and beneficiaries covered by such plans, in addition to those protections afforded by

---

1/ The principles discussed in this letter apply to those MEWAs which are also title I plans, and, thus, such MEWAs will be referred to as "ERISA-covered MEWAs" .

ERISA. For this reason, the Department is of the opinion that in the context of section 514(b)(6)(A)(ii), which, in the case of a MEWA which is not fully insured, saves from ERISA preemption any law of any state which regulates insurance to the extent such law is not inconsistent with the provisions of title I of ERISA, a state law which regulates insurance would be inconsistent with the provisions of title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under title I of ERISA,2/ or conflict with any provision of title I of ERISA. 3/ For example, state insurance law which would require an ERISA-covered MEWA to make imprudent investments would be deemed to be "inconsistent" with the provisions of title I of ERISA because compliance with such a law would "conflict" with the fiduciary responsibility provisions of ERISA section 404, and, as such, would be preempted pursuant to the provisions of ERISA section 514(b)(6)(A)(ii).4/

However, a state insurance law will, generally, not be deemed "inconsistent" with the provisions of title I of ERISA if it requires ERISA-covered MEWAs to meet more stringent standards of conduct, or to provide more or greater protections to plan participants and beneficiaries, than required by ERISA. For example, state insurance laws which would

---

2/ For example, any state insurance law which would adversely affect a participant's or beneficiary's rights under title I of ERISA to review or receive documents to which the participant or beneficiary is otherwise entitled would be viewed as inconsistent with the provisions of title I. Similarly, any state insurance law which would adversely affect a participant's or beneficiary's right to continuation of health coverage in accordance with Part 6 of title I or to pursue claims procedures established in accordance with section 503 of title I would be viewed as inconsistent with the provisions of title I of ERISA.

3/ In this regard, the Department believes an actual conflict with the provisions of ERISA will occur when state insurance law makes compliance a "physical impossibility". See Florida Lime & Avocado Growers. Inc., v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

4/ While certain permissive state insurance laws may not be "inconsistent" with the provisions of title I of ERISA as here defined, the behavior permitted under such laws may yet be denied to ERISA-covered MEWAs and their fiduciaries pursuant to ERISA section 514(b)(6)(A)(ii), which applies the provisions of title I as well as state insurance laws which are not inconsistent with the provisions of title I of ERISA to such MEWAs. For example, neither ERISA-covered MEWAs nor their fiduciary managers may take advantage of laws which would permit an ERISA-covered MEWA to engage in transactions which are prohibited under the provisions of ERISA section 406; to effectuate exculpatory provisions relieving a fiduciary from responsibility or liability for any responsibility, obligation, or duty under ERISA; or, to fail to meet the reporting and disclosure requirements contained in part 1 of title I of ERISA.

require more informational disclosure to plan participants of an ERISA-covered MEWA will not be deemd by the Department to be "inconsistent" with the provisions of ERISA. Similarly, a state insurance law prohibiting a fiduciary of an ERISA-covered MEWA from availing himself of an ERISA statutory or administratively-granted exemption permitting certain behavior will not be deerned by the Department to be "inconsistent" with the provisions of ERISA.

Finally, the Department also notes that, in its opinion, any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions to be met in order for a MEWA to be considered, under such law, able to pay benefits in full when due will generally not be considered to be "inconsistent" with the provisions of title I of ERISA pursuant to ERISA section 514(b) (6)(A) (ii) .

Thus, it is the opinion of the Department that a state law regulating insurance which requires the obtaining of a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation, fines, and other civil penalties, including injunctive relief, would not in and of itself adversely affect the protections and safeguards Congress intended to be available to participants and beneficiaries or conflict with any provision of title I of ERISA, and, therefore, would not, for purposes of section 514(b)(6)(A)(ii), be inconsistent with the provisions of title I. Moreover, given the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws.

Finally, we would note that while section 514(b)(6)(B) of ERISA provides that the Secretary of Labor may prescribe regulations under which .the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has neither prescribed regulations in this area, nor granted any such exemptions.

This letter constitutes an advisory opinion under ERISA Procedures 76-1.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretaions

January 27, 1992

Mr. Chuck Huff
Georgia Insurance Department
Seventh Floor, West Tower
Floyd Building
2 Martin Luther King, Jr., Drive
Atlanta, Georgia 30334

92-05A
ERISA SECTION
3(40), 514(b)(6)

Dear Mr. Huff:

This is in response to your request regarding the status of a self-funded health benefit program sponsored by Action Staffing, Inc. (Action) under title I of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested an opinion as to whether the Action health benefit program is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA, and whether the Action health benefit program is a multiple employer welfare arrangement (MEWA), within the meaning of ERISA section 3(40) and, therefore, subject to applicable state insurance laws at least to the extent permitted under section 514(b)(6)(A) of title I of ERISA.

According to your letter, Action identifies its operations as those of a "staff leasing" company. Action markets its services and issues proposals to potential client employers in a variety of trades and businesses. If a client employer agrees to the terms of the proposal, an Agreement for Services is executed with Action. Under the terms of the Agreement for Services, a specimen copy of which accompanied your request, Action agrees to lease personnel to the client employer, subject to the payment of certain fees being paid by the client employer. Pursuant to the "Services" section of the Agreement for Services, it is provided that:

> Action shall . . . provide the following services with regard to the leased employees: The recruitment, hiring, directing and controlling of employees in their day-to-day assignments; the disciplining, replacing, termination and the designation of the date of separation from employment; the promotion, reward, evaluation and from time to time the redetermination of the wages, hours and other terms and conditions of employment of the employees. . .

Action maintains a self-funded health program for leased employees.

With regard to its health benefit program, Action represents that the program is an ERISA-covered employee welfare benefit plan maintained by a single employer, i.e., Action.

Information submitted with your request, however, indicates that, in at least one instance, an Action client, with employees participating in the Action health benefit program, hired Action to enable employees to participate in the Action health benefit program. According to the information provided, the client, rather than Action, retains the right to control, evaluate, direct, hire and fire all employees.

ERISA section 3(40)(A) defines the term "multiple employer welfare arrangement" to mean:

> . . . 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) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such arrangement does not include any plan or 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.

Inasmuch as there is no indication that the Action health benefit program is established or maintained under or pursuant to one or more collective bargaining agreements, by a rural electric cooperative, or by a rural telephone cooperative association, the only issue relating to the health program's status as a MEWA appears to be whether the program provides benefits, as described in ERISA section 3(1), "to the employees of two or more em- ployers." The resolution of this issue is dependent on whether, for purposes of ERISA section 3(40), the employees covered by the Action health benefit program are employees of a single employer (i.e., Action) or more than one employer (i.e., Action's clients).

ERISA section 3(5) defines the term "employer" to mean:

> . . . 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.

As reflected above, the term "employer", for purposes of title I of ERISA, encompasses not only persons with respect to whom there exists an employer-employee relationship between the employer and individuals covered by the plan (i.e., persons acting directly as an employer), but also certain persons, groups and associa- tions, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered under an employee benefit plan. Therefore, merely be- cause a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5) does not mean that the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.

The term "employee" is defined in ERISA section 3(6) to mean "any individual employed by an employer." (Emphasis added). An in- dividual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For pur- poses of section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles and taking into account the remedial purposes of ERISA. In making such determinations, therefore, consider- ation must be given to whether the person for whom services are being performed has the right to control and direct the individual who performs the ser- vices, 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, among other considerations.

While the Action Agreement for Services submitted with your request purports, with respect to the leased employees, to establish in Action the authority and control associated with a common law employer-employee relationship, your submission indicates that in at least one instance the client employer, rather than Action, actually retained and exercised such authority and control.* In this regard, it should be noted that a contract purporting to create an employer-employee relationship will not control where common law factors (as applied to the facts and circum- stances) establish that the relationship does not exist.

It should also be noted that it is the view of the Department that where the employees participating in the plan of an employee leasing organiza- tion include "employees" of two or more client (or "recipient") employers,

* Although we conclude in this situation that some of the individuals participating as "employees" in the health benefit program are "employees" of the client employers, the Department notes that Action may also considered an "employer" within the meaning of ERISA section 3(5).

or employees of the leasing organization and at least one client employer, the plan of the leasing organization would, by definition, constitute a MEWA because the plan would be providing benefits to the employees of two or more employers.

On the basis of the information provided, the Action health benefit program covered at least one client's employees with respect to whom Action did not have an employer-employee relationship and, accordingly, were not "employees" of Action within the meaning of ERISA section 3(6). Therefore, in the absence of any indication that Action and its client employers constitute a "control group" within the meaning of ERISA section 3(40)(B)(i), it is the view of the Department that the Action health benefit program provides benefits to the employees of two or more employers and is, therefore, a multiple employer welfare arrangement within the meaning section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the Action health benefit program to the extent provided in ERISA section 514(b)(6)(A). In this regard, we are enclosing, for your information, a copy of Opinion 90-18A (dated July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to section 514(b)(6)(A) of ERISA.

Because your request for an opinion was concerned primarily with the issue of whether or not the Action health benefit program is subject to the applicable regulatory authority of the State of Georgia's insurance laws 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 it is not necessary at this time to render an opinion as to whether the Action health benefit program is an employee welfare benefit plan within the meaning of section 3(1) of that title.

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
Enclosure

Appendix B
Advisory Opinion Procedure

ERISA Proc. 76-1—Procedure for ERISA Advisory Opinions.

It is the practice of the Department of Labor (the Department) to answer inquiries of individuals or organizations affected, directly or indirectly, by the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406, hereinafter "the Act") as to their status under the Act and as to the effect of certain acts and transactions. The answers to such inquiries are categorized as "information letters" and "advisory opinions." This "ERISA Procedure" (ERISA Proc. 76-1) describes the general procedures of the Department in issuing information letters and advisory opinions under the Act, and is designed to promote efficient handling of inquiries and to facilitate prompt responses.

Section 7 of this procedure (instructions to individuals and organizations requesting advisory opinions relating to prohibited transactions and common definitions) is reserved. This section will set forth the procedures to be followed to obtain an advisory opinion relating to prohibited transactions and common definitions, such as whether a person is a party in interest and a disqualified person. In general, this section will incorporate a revenue procedure to be published by the Internal Revenue Service.

This advisory opinion procedure consists of rules of agency procedure and practice, and is therefore excepted under 5 U.S.C. 552(b)(3)(A) of the Administrative Procedure Act from the ordinary notice and comment provisions for agency rulemaking. Accordingly, the procedure is effective August 27, 1976.

SEC. 1. Purpose. The purpose of this ERISA Procedure is to describe the general procedures of the Department of Labor (the Department) in issuing information letters and advisory opinions to individuals and organizations under the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406), hereinafter referred to as "the Act." This ERISA Procedure also informs individuals and organizations, and their authorized representatives, where they may direct requests for information letters and advisory opinions, and outlines procedures to be followed in order to promote efficient handling of their inquiries.

SEC. 2. General practice. It is the practice of the Department to answer inquiries of individuals and organizations, whenever appropriate, and in the interest of sound administration of the Act, as to their status under the Act and as to the effects of their acts or transactions. One of the functions of the Department is to issue information letters and advisory opinions in such matters.

SEC. 3. Definitions. .01 An "information letter" is a written statement issued either by the Pension and Welfare Benefit Programs (Office of Employee Benefits Security), U.S. Department of Labor, Washington, D.C. or a Regional Office or an Area Office of the Labor-Management Services Administration, U.S. Department of Labor, that does no more than call attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation. An information letter may be issued to any individual or organization when the nature of the request from the individual or the organization suggests that it is seeking general information, or where the request does not meet all the requirements of section 6 or 7 of this procedure, and it is believed that such general information will assist the individual or organization.

.02 An "advisory opinion" is a written statement issued to an individual or organization, or to the authorized representative of such individual or organization, by the Administrator of Pension and Welfare Benefit Programs or his delegate, that interprets and applies the Act to a specific factual situation. Advisory opinions are issued only by the Administrator of Pension and Welfare Benefit Programs or his delegate.

.03 Individuals and organizations are those persons described in section 4 of this procedure.

SEC. 4. Individuals and organizations who may request advisory opinions or information letters. .01 Any individual or organization affected directly or indirectly, by the Act may request an information letter or an advisory opinion from the Department.

.02 A request by or for an individual or organization must be signed by the individual or organization, or by the authorized representative of such individual or organization. See section 7.03 of this procedure.

SEC. 5. Discretionary Authority to Render Advisory Opinions. .01 The Department will issue advisory opinions involving the interpretation of the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions issued by the Department to a specific factual situation. Generally, advisory opinions will be issued by the Department only with respect to prospective transactions (i.e., a transaction which will be entered into). Moreover, there are certain areas where, because of the inherently factual nature of the problem involved, or because the subject of the request for opinion is under investigation for a violation of the Act, the Department ordinarily will not issue advisory opinions. Generally, an advisory opinion will not be issued on alternative courses of proposed transactions, or on hypothetical situations, or where all parties involved are not sufficiently identified and described, or where material facts or details of the transaction are omitted.

.02 The Department ordinarily will not issue advisory opinions relating to the following sections of the Act:

.02(a) Section 3(18), relating to whether certain consideration constitutes adequate consideration;

.02(b) Section 3(26), relating to whether the valuation of any asset is at current value;

.02(c) Section 3(27), relating to whether the valuation of any asset is at present value;

.02(d) Section 102(a)(1), relating to whether a summary plan description is written in a manner calculated to be understood by the average participant.

.02(e) Section 103(a)(3)(A), relating to whether the financial statements and schedules required to be included in the Annual Report are presented fairly in conformity with generally accepted accounting principles applied on a consistent basis;

.02(f) Section 103(b)(1), relating to whether a matter must be included in a financial statement in order to fully and fairly present the financial statement of the plan;

.02(g) Section 202 (other than section 202(a)(3) and (b)(1)) relating to minimum participation standards;

.02(h) Section 203 (other than sections 202(a)(3)(B), (b)(1) (flush language), (b)(2), (b)(3)(A);

.02(i) Section 204 of the Act (other than sections 204(b)(1)(B), (b)(1)(A), (C), (D), (E)), relating to benefit accrual requirements;

.02(j) Section 205(e), relating to the period during which a participant may elect in writing not to receive a joint and survivor annuity;

.02(k) Section 208, relating to mergers and con-

solidation of plans or transfer of plan assets;

.02(1) Section 209(a)(1), relating to whether the report required by section 209(a)(1) is sufficient to inform the employee of his accrued benefits under the plan, etc.

.02(m) Sections 302 through 305, relating to minimum funding standards;

.02(n) Section 403(c)(1), relating to the purposes for which plan assets must be held;

.02(o) Section 404(a), relating to fiduciary duties as applied to particular conduct; and,

.02(p) Section 407(a)(2) and (3) and (c)(1), relating to fair market value, as applied to whether the value of any particular security or real property constitutes fair market value.

This list is not all inclusive and the Department may decline to issue advisory opinions relating to other sections of the Act whenever warranted by the facts and circumstances of a particular case. The Department may, when it is deemed appropriate and in the best interest of sound administration of the Act, issue information letters calling attention to established principles under the Act, even though the request that was submitted was for an advisory opinion.

.03 Pending the adoption of regulations (either temporary or final) involving the interpretation of the application of a provision of the Act, consideration will be given to the issuance of advisory opinions relating to such provisions of the Act only under the following conditions:

.03(a) If an inquiry presents an issue on which the answer seems to be clear from the application of the provisions of the Act to the facts described, the advisory opinion will be issued in accordance with the procedures contained herein.

.03(b) If an inquiry presents an issue on which the answer seems reasonably certain but not entirely free from doubt, an advisory opinion will be issued only if it is established to the satisfaction of the Department, that a business emergency requires an advisory opinion or that unusual hardship to the plan or its participants and beneficiaries will result from failure to obtain an advisory opinion. In any case in which the individual or organization believes that a business emergency exists or that an unusual hardship to the plan or its participants and beneficiaries will result from the failure to obtain an advisory opinion, the individual or organization should submit with the request a separate letter setting forth the facts necessary for the Department to make a determination in this regard. In this connection, the Department will not deem a "business emergency" to result from circumstances within the control of the individual or organization such as, for example, scheduling within an inordinately short time the closing date of a transaction or a meeting of the Board of Directors or the shareholders of a corporation.

.03(c) If an inquiry presents an issue that cannot be reasonably resolved prior to the issuance of a regulation, an advisory opinion will not be issued.

.04 The Department ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund, or program (or a particular provision or provisions thereof) subject to Title I of the Act. For example, the Department will not issue an advisory opinion on whether a plan satisfies the requirements of Parts 2 and 3 of Title I of the Act.

SEC. 6. Instructions to individuals and organizations requesting advisory opinions from the Department. .01 If an advisory opinion is desired, a request should be submitted to: Office of Regulations and Interpretations, Room N5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

.02 A request for an advisory opinion must contain the following information:

.02(a) The name and type of plan or plans (e.g., pension, profit-sharing, or welfare plan); the Employer Identification Number (EIN); the Plan Number (PN) used by the plan in reporting to the Department of Labor on Form EBS-1 or a copy of the first two pages of the most recent Form EBS-1 filed with the Department.

.02(b) A detailed description of the act or acts or transaction or transactions with respect to which an advisory opinion is requested. Where the request pertains to only one step of a larger integrated act or transaction, the facts, circumstances, etc., must be submitted with respect to the entire transaction. In addition, a copy of all documents submitted must be included in the individual's or organization's statement and not merely incorporated by reference, and must be accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions.

.02(c) A discussion of the issue or issues presented by the act or acts or transaction or transactions which should be addressed in the advisory opinion.

.02(d) If the individual or organization is requesting a particular advisory opinion, the requesting party must furnish an explanation of the grounds for the request, together with a statement of relevant supporting authority. Even though the individual or organization is urging no particular determination with regard to a proposed or prospective act or acts or transaction or transactions, the party requesting the ruling must state such party's views as to the results of the proposed act or acts or transaction or transactions and furnish a statement of relevant authority to support such views.

.03 A request for an advisory opinion by or for an individual or organization must be signed by the individual or organization or by the individual's or organization's authorized representative. If the request is signed by a representative of an individual or organization, or the representative may appear before the Department in connection with the request, the request must include a statement that the representative is authorized to represent the individual or organization.

.04 A request for an advisory opinion that does not comply with all the provisions of this procedure will be acknowledged, and the requirements that have not been met will be noted. Alternatively, at the discretion of the Department, the Department will issue an information letter to the individual or organization.

.05 If the individual or organization or the authorized representative, desires a conference in the event the Department contemplates issuing an adverse advisory opinion, such desire should be stated in writing when filing the request or soon thereafter in order that the Department may evaluate whether in the sole discretion of the Department, a conference should be arranged and at what stage of the consideration a conference would be most helpful.

.06 It is the practice of the Department to process requests for information letters and advisory opinions in regular order and as expeditiously as possible. Compliance with a request for consideration of a particular matter ahead of its regular order, or by a specified time, tends to delay the disposition of other matters. Requests for processing ahead of

the regular order, made in writing (submitted with the request or subsequent thereto) and showing clear need for such treatment, will be given consideration as the particular circumstances warrant. However, no assurance can be given that any letter will be processed by the time requested. The Department will not consider a need for expedited handling to arise if the request shows such need has resulted from circumstances within the control of the person making the request.

.07 An individual or organization, or the authorized representative desiring to obtain information relating to the status of his or her request for an advisory opinion may do so by contacting the Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C.

SEC. 7. Instructions to individuals and organizations requesting advisory opinions relating to prohibited transactions and common definitions. .01 [Reserved]

.02 [Reserved]

.03 [Reserved]

SEC. 8. Conferences at the Department of Labor. If a conference has been requested and the Department determines that a conference is necessary or appropriate, the individual or organization or the authorized representative will be notified of the time and place of the conference. A conference will normally be scheduled only when the Department in its sole discretion deems it will be necessary or appropriate in deciding the case. If conferences are being arranged with respect to more than one request for an opinion letter involving the same individual or organization, they will be so scheduled as to cause the least inconvenience to the individual or organization.

SEC. 9. Withdrawal of requests. The individual or organization's request for an advisory opinion may be withdrawn at any time prior to receipt of notice that the Department intends to issue an adverse opinion, or the issuance of an opinion. Even though a request is withdrawn, all correspondence and exhibits will be retained by the Department and will not be returned to the individual or organization.

SEC. 10. Effect of Advisory Opinion. An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.

SEC. 11. Effect of Information Letters. An information letter issued by the Department is informational only and is not binding on the Department with respect to any particular factual situation.

SEC. 12. Public inspection. .01 Advisory opinions shall be open to public inspection at the Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20216.

.02 Background files (including the request for an advisory opinion, correspondence between the Department and the individual or organization requesting the advisory opinion) shall be available upon written request. Background files may be destroyed after three years from the date of issuance.

.03 Advisory opinions will be modified to delete references to proprietary information prior to disclosure. Any information considered to be proprietary should be so specified in a separate letter at the time of request. Other than proprietary information, all materials contained in the public files shall be available for inspection pursuant to section 12.02.

.04 The cost of search, copying and deletion of any references to proprietary information will be borne by the person requesting the advisory opinion or the background file.

SEC. 13. Effective date. This procedure is effective August 27, 1976, the date of its publication in the Federal Register.

Signed at Washington, D.C., this 24th day of August 1976.

James D. Hutchinson
Administrator of Pension and
Welfare Benefit Programs
U.S. Department of Labor