U.S. Department of Labor

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

NOV 17 1993

Mr. Joseph S. Dunn
Southern Company Services, Inc.
64 Perimeter Center East
Atlanta, Georgia 30346

Dear Mr. Dunn:

This responds to your request for an advisory opinion as to whether The Southern Company wholly-owned subsidiaries' Wellness Programs ("PROGRAMS") are employee welfare benefit plans within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA").

According to the information provided, the PROGRAMS are offered to employees by four subsidiaries of The Southern Company. You represent that the PROGRAMS are paid for by the participating employees or by the sponsoring subsidiary from its general assets. Participation by the employees in the PROGRAMS is voluntary except for certain physical examination programs that are annually required for executives. As indicated in the documentation you provided to this Department, for several of the programs, Southern reserves the right to terminate the program, reduce the benefits or otherwise modify the program.

You urge the Department of Labor ("Department") to consider "whether the administrative burdens associated with the reporting and disclosure requirements of Title I of ERISA are appropriate to programs of such narrow scope and infrequent nature" as the PROGRAMS. You emphasize to the Department that none of the PROGRAMS provides "treatment" for medical conditions, that some of the services are "diagnostic or preventative in nature. In other cases ... the services are educational and/or lifestyle oriented." You assert that none of the PROGRAMS provides "benefits of a medically remedial nature" which you contend to be a distinguishing factor between the programs at issue in ERISA Advisory Opinions 88-04 and 91-26A.

There is no prerequisite condition of a formal, written plan for coverage under ERISA section 3(1). See Donovan v. Dillingham, 688 F. 2d 1367, 1370 (11th Cir. 1982). Neither does the scope or frequency of the plan benefits affect the status of the program in our determination of what activities constitute the establishment of an employee welfare benefit plan. The PROGRAMS may constitute "employee welfare plans" if the PROGRAMS provide benefits described in ERISA section 3(1).

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to mean:

> [A]ny 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 benefits, or benefits in the event of sickness,...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).

Department regulation 29 C.F.R. section 2510.3-1 describes certain employer practices that do not constitute employee welfare benefit plans within the meaning of ERISA. Section 2510.3-1(c) provides:

> (c) On-premises facilities. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include --
>
> (1) The maintenance on the premises of an employer or of an employee organization of recreation, dining or other facilities (other than day care centers) for use by employees or members; and
>
> (2) The maintenance on the premises of an employer of facilities for the treatment of minor injuries or illness or rendering first aid in case of accidents occurring during working hours.

The Department did not describe the employee assistance program in ERISA Opinion 88-4A as "providing benefits of a medically remedial nature". In ERISA Opinion 88-4A, we stated that "benefits for the treatment of drug and alcohol abuse, stress, anxiety, depression, and similar health and medical problems constitute 'medical' benefits or 'benefits in the event of sickness' within the meaning of ERISA section 3(1)". We distinguished the program in ERISA Opinion 91-26A because the program provided only referrals and did not provide any benefits which are in the nature of "medical" benefits or "benefits in the event of sickness" to the employees.

An employee welfare benefit plan within the meaning of ERISA section 3(1) may provide benefits not specifically set forth in that section. The use of the phrase "to the extent" indicates that it is possible for an entity to provide a combination of benefits described in section 3(1) and benefits not described in that section. The entity would be an employee welfare benefit plan subject to the provisions of Title I of ERISA because of those benefits it provides which are described in section 3(1). It is the position of the Department that the addition of benefits not described in section 3(1) to those already being provided by an employee welfare plan will not alter the plan's status under Title I of ERISA. See ERISA Opinion 92-12A, copy enclosed.

In ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976), the Department published general procedures for issuing information letters and advisory opinions. Because of the nature of your request, we have determined it is appropriate to respond to your inquiry in the form of an information letter. An information letter calls attention to well-established principles or interpretations of ERISA without applying them to a specific factual situation.

We hope you find this information helpful.

Sincerely,

Helene A. Benson
Chief
Division of Coverage
Office of Regulations
and Interpretations

Enclosures