



JUL 19 1991

Mr. Alton C. Ward  
2700 Barnett Plaza  
101 East Kennedy Boulevard  
Post Office Box 1102  
Tampa, Florida 33601-1102

91-26A

ERISA SEC.

3(1)

Dear Mr. Ward:

This is in reply to your correspondence on behalf of Publix Super Markets, Inc. (Publix) concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion concerning whether the Publix Employee Assistance Program (the Program) constitutes an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

Your correspondence contains the following facts and representations. Publix established the Program on October 1, 1989 to encourage Publix employees to seek assistance for drug and alcohol abuse, marital, personal and/or other health problems that may affect job performance. The Program is primarily voluntary for employees but is mandatory for employees identified under the Publix random drug testing program as substance abusers.

The Program provides referrals by means of two toll-free numbers listed in the booklet Publix distributes to employees describing the Program. One telephone number used by the Program is staffed by an "employee" in the Publix personnel office. The employee staffing the phone referral service in the Publix personnel office (the EAP Coordinator) has no special training in counseling, psychology, social work, public health, or any other related discipline. The second telephone number connects the employees with a "hotline" provided nationwide at no charge by the National Institute for Drug Abuse (NIDA).

Both phone numbers provide callers with a referral after the nature of the problem is discussed. The Publix employee phoning the office of the EAP coordinator is referred to an appropriate professional person, agency, or service clinic equipped to provide service to the employee. The NIDA "hotline" appears to provide the same type of referral. If covered by other benefit arrangements established and maintained by Publix or if discounts for Publix employees from some referral services apply, the employee may receive services at no or reduced cost. Payment terms are handled directly by the employee with referral agencies, but no payment for services or benefits is made to the employee or to the referral agency from the Program itself.

Names of agencies provided by the EAP coordinator are selected from an annual publication of the Florida Department of Health and Rehabilitative Services (HRS). The book includes agencies that have been "approved" by HRS and details each agency's services and location. If there is not an appropriate agency listed that is convenient for an employee, the EAP coordinator contracts other "approved" agencies in the area for a referral.

As indicated in your correspondence, the sole issue you are requesting the Department of Labor (the Department) to address is whether the Program constitutes an "employee welfare benefit plan" within the meaning of section 3(1) of title I of ERISA. Section 3(1) defines the term "employee welfare benefit plan" as:

. . .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 of retirement or death, and insurance to provide such pensions). (Emphasis supplied.)

It has consistently been the view of the Department that benefits for 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 section 3(1). On the basis of your representations, however, it appears that the Program provides only referrals and does not provide any benefits which are in the nature of "medical" benefits or benefits "in the event of sickness" to Publix employees. The Program, accordingly, does not appear to provide any employee benefit within the meaning of section 3(1) of ERISA. Neither the Publix toll-free number, staffed by Publix personnel office employees with no special training in counseling or a related discipline, nor the NIDA "hotline" appear to provide more than generally available public information when making telephone referrals to Publix employees. Unlike employee assistance programs identified as employee welfare benefit plans in ERISA Opinions 88-4A and 83-35A (copies enclosed), the Program employs no counselors, either in-house or on a contractual basis, and apparently provides no benefits in addition to referrals an employee could obtain free of charge regardless of employee status. The Program's use by Publix in connection with its random drug testing program as a mandatory

step for employees identified as substance abusers further differentiates the Program from an employee welfare benefit plan. Accordingly, it is the view of the Department that the Program, under the conditions you have described, does not provide any benefit included in the definition of an employee welfare benefit plan in section 3(1) of title I of ERISA. Based on your representations to the Department, the Program would not be subject to the requirements administered by the Department under title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter 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

Enclosures