

Welfare Arrangements and Certain Entities Claiming Exception with the Secretary of Labor for the purpose of determining whether the requirements of part 7 are being met.

This reporting requirement also responds to a 1992 recommendation of the General Accounting Office (GAO). See "Employee Benefits: States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," March 1992, GAO/HRD-92-40. In that report, the GAO detailed a history of fraud and abuse by some MEWAs and recommended that the Department develop a mechanism to help states identify MEWAs. The problems pointed out in that report continue to this date. By the end of Fiscal Year 2002, the Department had initiated approximately 522 civil and 90 criminal investigations (with 70 criminal convictions) affecting over 1.825 million participants and beneficiaries and involving monetary violations of over \$121.6 million. During the last three years, the Department has had an average of over 100 MEWA cases under active investigation. Thus, the identification of problem MEWAs and correction of violations remains an important investigative priority and consumes substantial resources.

In the preamble to the February 2000 interim final regulation, the Department sought comments from those affected. After consideration of all the comments received on the MEWA reporting requirement, the Department is publishing this final rule. The final rule does not significantly modify the reporting requirement established in the interim rule. Instead, several clarifications were added to make clearer the application of the reporting requirement to different types of arrangements. Some of these clarifications were initially issued in the form of question-and-answer guidance during the period of interim effectiveness of this rule and were included in the instructions to the Form M-1 in Years 2000, 2001, and 2002.

## B. Overview of the Final Rule

### (1) Definitions

(a) *Entity Claiming Exception (ECE)*. The final rule retains the term "entity claiming exception" or "ECE." An "ECE" is defined as an entity that claims it is not a MEWA due to the exception in section 3(40)(A)(i) of ERISA. In general, this exception is for entities that are established or maintained under or pursuant to one or more agreements that the Secretary finds to be collective bargaining agreements. In connection with this

exception, today the Department is also publishing a final regulation under ERISA section 3(40) setting forth specific criteria that, if met and if certain other factors set forth in the regulation are not present, constitute a finding by the Secretary of Labor that a plan is maintained pursuant to one or more collective bargaining agreements and, therefore, excluded from the definition of a MEWA. See 29 CFR 2510.3-40. In a separate regulation also published today, the Department adopts a process pursuant to which a plan or other arrangement may, if subject to an action under state law, seek an individualized finding from a Department of Labor Administrative Law Judge (ALJ). See 29 CFR 2570.150 through 2570.159.

However, because some entities may incorrectly claim the exemption under § 2510.3-40, this final rule retains the requirement that ECEs file a Form M-1 with the Department for three years following an "origination" (the three-year rule). Of course, if an entity does have a determination from an ALJ that it is a collectively-bargained plan, that entity does not have to file while the opinion remains in effect unless the circumstances underlying the determination change.

Moreover, because, some operators of insurance fraud schemes continue to market health coverage to small employers under the guise of collectively bargained plans using, among other things, sham unions and collective bargaining agreements, in an effort to avoid state insurance regulation, the retention of the three-year rule provides an important enforcement tool for the Department and state insurance departments, while imposing little burden on bona fide collectively bargained plans. Finally, bona fide collectively bargained plans and their sponsors also benefit from the early identification of sham MEWA operators.

Under the final rule, as under the interim final rule, the term origination continues to be defined as the occurrence of any of the following three events: (1) The MEWA or ECE first begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals); (2) The MEWA or ECE begins offering or providing coverage for medical care to the employees of two or more employers (including one or more self-employed individuals) after a merger with another MEWA or ECE (unless all of the MEWAs or ECEs that participate in the merger previously were last originated at least three years prior to the merger); or (3)

The number of employees receiving coverage for medical care under the MEWA or ECE is at least 50 percent greater than the number of such employees on the last day of the previous calendar year (unless the increase is due to a merger with another MEWA or ECE under which all MEWAs and ECEs that participate in the merger were last originated at least three years prior to the merger).

(b) *Excepted Benefits*. The final rule adds a definition of "excepted benefits" and defines the term by reference to section 733(c) of ERISA and 29 CFR 2590.732(b). This definition was added because of a clarification that MEWAs or ECEs that provide coverage consisting solely of excepted benefits are not required to report under this section. This clarification is discussed in more detail below, under the heading Persons required to report.

### (2) Persons Required To Report

Paragraph (c) of the final rule sets forth the persons required to report under the final rule. As under the interim final rule, the final rule requires filing by the administrator of a MEWA that provides benefits consisting of medical care, whether or not the MEWA is a group health plan. It also requires filing by the administrator of an ECE that offers or provides coverage consisting of medical care during the first three years after the ECE is originated.

The final rule also contains language to clarify the scope of the reporting requirement. The clarifications were initially included in question-and-answer guidance published by the Department in April and June of 2000, and are described in the Instructions to the Form M-1 for the Years 2000, 2001, and 2002.

(a) *Exception for coverage consisting solely of excepted benefits*. First, because coverage consisting solely of excepted benefits is not subject to the requirements of part 7 of ERISA (pursuant to ERISA sections 732 and 733 and § 2590.732), the final rule provides that a MEWA or ECE is not subject to this filing requirement if it provides coverage that consists solely of excepted benefits. However, if the MEWA or ECE provides coverage that consists of both excepted benefits and other benefits for medical care that are not excepted benefits (and is, therefore, subject to the requirements of part 7 of ERISA), the administrator of the MEWA or ECE is required to file the Form M-1.

(b) *Exceptions for coverage not subject to ERISA*. In addition, because governmental plans, church plans, and