No. 08-35531

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRE DANIELS-HALL,
Plaintiffs-Appellees

v.

NATIONAL EDUCATION ASSOCIATION, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Washington

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BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS

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STATEMENT OF INTEREST AND ISSUE PRESENTED

The Secretary of Labor has primary authority to interpret and enforce the fiduciary, reporting and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. She submits this brief pursuant to this Court's July 14, 2009 order inviting the Department of Labor ("Department") to file an amicus brief on a question that may be answered primarily by reference to the Secretary's regulations and interpretations of Title I of ERISA, namely:

Whether, in the subject case, the National Education Association was legally capable of establishing a plan subject to Title I of ERISA offering 26 U.S.C. [Internal Revenue Code] § 403(b) annuities.

STATEMENT OF FACTS

This case is being decided on a motion to dismiss, in which the facts alleged in the complaint must be accepted as true. Plaintiffs' complaint alleges that the National Education Association's ("NEA") negotiation, endorsement and marketing of the NEA Valuebuilder annuities program constituted the establishment or maintenance of an ERISA-covered plan, that the NEA was an ERISA fiduciary of this plan, and that the NEA violated ERISA's fiduciary standards when, among other allegations, it received substantial payments from the insurance company annuity providers for the NEA's promotion of the NEA Valuebuilder annuities. In particular, this brief is based on the following set of alleged facts:

(1) The NEA is an employee organization. (ER 31 ¶ 31)

(2) Plaintiffs Hall and Hamblen are employees of the South Kitsap, Washington, and El Dorado, California school districts and members of the NEA. (ER 30 ¶¶ 22, 23)

(3) The NEA Valuebuilder annuity contracts were purchased by the South Kitsap and El Dorado school district employers, with the purchases made through salary reduction agreements that did not involve any employer contributions. SER 43-46.

(4) The NEA negotiated the terms of the Valuebuilder annuities with providers of the annuity product, first Nationwide Insurance Company and then Security Benefit Corporation. Nationwide and Security Benefit were the exclusive providers of the Valuebuilder annuities. ER 36 ¶ 39(a); ER 37 ¶ 38(c).

(5) The NEA endorsed and extensively marketed the Valuebuilder annuity product to its public school district employee members, monitored the annuities' performance, and provided investment advice to its members regarding the annuities. ER 26 ¶¶ 6-7; ER 35-36 ¶ 39; ER 47 ¶ 72.

(6) The NEA represented on its website and in other promotional materials aimed at its members that the NEA established the Valuebuilder annuities product as a retirement benefit program for its members and chose Nationwide and Security Benefit to provide the annuities after reviewing a number of financial services companies. ER 47 ¶ 73; ER 162. The Valuebuilder annuities program was the only annuity option endorsed by the NEA. ER 26 ¶ 8; ER 47 ¶ 72.

In addition, based on undisputed statements made in the pleadings or in the transcript of oral argument, this brief assumes these facts also to be true:

(7) The NEA Valuebuilder annuity product was one of a number of tax-deferred annuity products offered by the South Kitsap and El Dorado public school district employers in accordance with state laws requiring that the school districts provide a menu of 403(b) annuity investment options to their employees. SER 136; 141-42.

(8) The parties intended the NEA Valuebuilder annuities program to be a tax-deferred

annuity option under section 403(b) of the Internal Revenue Code ("Code"). ER 25 ¶ 3.

On May 23, 2008, the district court dismissed the case. The district court first concluded that the NEA Valuebuilder § 403(b) Annuities are plans. ER 14. The court then concluded that ERISA's exemption for governmental plans did not apply because a Department of Labor "safe harbor" regulation, 29 C.F.R. § 2510.3-2(f), applied, and under that regulation the employer school districts did not establish or maintain the plans. ER 19. The court ultimately held, however, that ERISA did not apply to these "plans" because an employee organization like the NEA "could not establish or maintain a 403(b) employee pension benefit plan within the meaning of ERISA, where the annuities are necessarily purchased by the employees' governmental employer, and where that employer is simultaneously deemed not to have established or maintained the plan." ER 22.

SUMMARY OF THE ARGUMENT

The short answer to the Court's question is that the NEA is legally capable of establishing a plan subject to Title I of ERISA, but not one offering 26 U.S.C. § 403(b) annuities. Plans established or maintained by a governmental employer for its employees are "governmental plans" exempt from ERISA's Title I requirements. 29 U.S.C. §§ 1002(32), 1003(b). Under section 403(b) of the Internal Revenue Code ("Code"), only certain governmental entitites, churches and private tax-exempt employers, and not employee organizations, can create 403(b) plans, which, almost by definition, when offered by public school districts, are governmental plans. On the above-stated facts, the NEA Valuebuilder annuity product that the NEA endorsed and marketed did not constitute a separate "plan" for purposes of ERISA. Instead, the Valuebuilder annuities, offered by school district employers and funded by the salary reduction agreements of

individual employees, were one of many annuity products or options contained in the 403(b) plans of the school district employers. In determining whether a plan was established or maintained under Title I of ERISA, the appropriate focus for analysis should be on these employer-provided 403(b) plans.

The NEA's endorsement, marketing and promotion of individual annuity contracts did not rise to the level of establishment or maintenance of any other kind of employee pension benefit plan. This case cannot be divorced from its 403(b) context since the employer school districts were legally indispensable to offering the Valuebuilder annuities, as one of multiple annuities offered in their 403(b) plans; the parties' and government employers' mutual intent was that the Valuebuilder annuities would qualify for 403(b) tax-deferred status; and the requisites for 403(b) tax deferral were met by the employers' complying with that Code provision, including purchasing Valuebuilder annuities for each member of the plaintiff class through salary reduction agreements and maintaining the contracts under a plan that provides ongoing Code compliance.

Plaintiffs contend here that because the school district employers' role in creating and maintaining the plans was allegedly purely ministerial, the employers should not be considered under the Title I "safe harbor" rules to have established or maintained an ERISA-covered employee pension benefit plan. Those rules, however, which set forth circumstances under which certain specific plans, funds and programs are not employee benefit plans within the meaning of Title I, do not apply to governmental plans. Thus, the governmental employers' supposedly minimal, safe-harbor-covered actions could not

recharacterize governmental 403(b) plans as non-governmental plans, or make the NEA the entity that established or maintained a Title I plan in this case.

Finally, even if the complaint were taken out of the 403(b) context and the allegations were that the NEA established or maintained a plan that did not qualify for tax-deferred status under the Code, the NEA's endorsement and marketing of the Valuebuilder annuity products would not constitute the NEA's establishing or maintaining a Title I plan funded with 403(b) contracts.

ARGUMENT

This case lies at the intersection of ERISA Title I and ERISA Title II. Title I of ERISA sets out reporting, disclosure, fiduciary conduct and civil enforcement requirements for pension and welfare benefit plans that are enforced by the Department of Labor ("Department"). Title II of ERISA, which is part of the Internal Revenue Code administered by the Internal Revenue Service ("IRS"), contains provisions relating to preferential tax treatment for employee benefit plans. The question addressed in this brief is whether a plan has been "established or maintained" for Title I purposes. However, in addressing this question, the Secretary is mindful that Title I and the Code provisions governed by Title II generally parallel or complement each other. Because they are not meant to operate at cross-purposes, the Department and IRS coordinate enforcement and regulatory activities related to both titles. Section 403(b) of the Code is an example of a Title II provision over which the IRS and the Department have coordinated regulatory efforts.

Accordingly, in deciding whether the NEA was legally capable of establishing a plan subject to Title I of ERISA offering Code Section 403(b) annuities, the Court should consider the requirements of Section 403(b) and avoid a Title I result that is at cross-

purposes with Section 403(b)'s purposes. Section 403(b) describes a type of defined-contribution retirement plan made up of tax-deferred annuities or custodial accounts covering employees of public schools, church organizations and section 501(c)(3) tax-exempt organizations.[1] Employees can make pre-tax contributions to these annuities or custodial accounts through salary reduction agreements. Employers can also choose to make voluntary contributions to these plans.

There is nothing in Title I that expands the scope and focus of section 403(b) of the Code by allowing an employee organization (including one whose members are employees of the eligible employers) or any employers other than public school district, church or section 501(c)(3) tax-exempt employers to establish or maintain such plans. The district court therefore reached the correct result in holding that the NEA did not establish a Title I plan because it was legally incapable of doing so. The district court erred, however, in determining that the school districts' section 403(b) plans were not governmental plans because the Secretary's safe harbor regulation at 29 C.F.R. § 2510.3-

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[1] Section 403(b), 29 U.S.C. § 403(b)(1)(A) states [in relevant part]:

> Taxability of Beneficiary under Annuity Purchased by § 501(c)(3) Organization or Public School.
>
> > (1) General rule. If
> > (A) an annuity contract is purchased –
> > (i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a),
> > (ii) for an employee…who performs services for an educational organization…, by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing, or
> > (iii) for [a minister]…
> > then contributions and other additions by such employer for such annuity contract shall be excluded from the gross income of the employee for the taxable year. . .

2(f) applied to them. Under a proper analysis, this Court should conclude that the Valuebuilder annuity product is not a Title I plan, that the school districts' plans are governmental plans, and that the NEA did not establish a Section 403(b) plan or any other kind of Title I plan.

A. IN THIS 403(b) CONTEXT, THE VALUEBUILDER ANNUITIES PROGRAM DOES NOT CONSTITUTE A PLAN UNDER TITLE I OF ERISA

The first step in deciding whether the NEA established or maintained an ERISA-covered plan under Title I is to determine what constitutes the relevant "plan" in the case. The district court erred to the extent that it agreed with the Plaintiffs' contention that the NEA Valuebuilder annuities program constituted a separate plan for the purpose of analyzing whether the NEA established or maintained an ERISA employee pension benefit plan under 29 U.S.C. § 1002(2)(A).[2] ER 14. In the 403(b) context, the menu of annuity options presented by each public school district employer, when viewed as an entire package, and not a single investment product on the menu, is the proper focus for analysis in applying the established definition of "plan." See Winterrowd v. Am. Gen. Annuity Ins. Co., 321 F.3d 933, 939 (9th Cir. 2003) (plan exists if "benefits are offered pursuant to an organized scheme and the terms of the offer are discernable to a reasonable person"); see also Carver v. Westinghouse Hanford Co., 951 F.2d 1083 (9th Cir. 1991) (plan only exists if a "reasonable person could ascertain the intended benefits,

[2] 29 U.S.C. 1002(2)(A) defines an employee pension 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 by its express terms or as a result of surrounding circumstances such plan, fund, or program -- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan."

beneficiaries, source of financing, and procedures for receiving benefits" from the surrounding circumstances).

The Valuebuilder annuities program is just one component of an employer's section 403(b) plan. Viewed from the perspective of both the employers and the employees, the only "organized schemes" or "plans" at issue are the South Kitsap and El Dorado school districts' 403(b) plans. See Zavora v. Paul Revere Life Insurance Co., 145 F.3d 1118, 1120 (9th Cir. 1998) ("[t]he existence of an ERISA plan is a question of fact, to be answered in light of all the surrounding circumstances from the point of view of a reasonable person"). State laws require the South Kitsap and El Dorado school districts to establish 403(b) plans. Wash. Rev. Code § 28A.400.250; Cal Educ. Code § 24950. Like a 401(k) plan through which an employer provides various investment options, each public school district devises its own 403(b) plan through which it offers its employees a menu of different vendors offering various individual annuity contracts or custodial accounts. The public school district employers determine which vendors and contracts to include on the menu of options and provide the list of vendors to the employees. Employees then decide which vendor they want to invest with and sign an individual annuity contract with that vendor. The contracts are generally purchased under salary reduction agreements that the employees enter into with the employer. It is this entire menu of options – and not the individual annuity contracts or custodial accounts within the menu – that constitutes an ERISA plan under the Code and ERISA.[3] See

[3] While Plaintiffs allege no facts related to the issue of whether non-NEA members were also participants in their alleged plan, an employee benefit plan would not be established or maintained by an employee organization if non-members participate. DOL Advisory 85-02A (January 15, 1985)

Department's Field Assistance Bulletin 2007-02 (describing 403(b) programs established or maintained by tax-exempt employers as "pension plans" within the meaning of section 3(2) of ERISA and covered by section 4(a) of ERISA; see also 26 C.F.R. 1.403(b)-2(b)(16)(ii) (section 403(b) plan means the plan of the employer under which 403(b) contracts for its employees are maintained); cf. id. § 1.403(b)-3(b)(3) (starting in 2010, amounts contributed to a contract are not tax deferred unless maintained pursuant to a written defined contribution plan); IRS Publication 571 (describing annuity contracts as "individual accounts in a 403(b) plan").[4]

Here, the employees could participate in the multiple annuity options they had in their capacity as public school employees, and not as NEA members. See Carver, 951 F.2d at 1083. They may also have been aware from the NEA website and promotional materials that the NEA endorsed the Valuebuilder annuity product and provided other ancillary services. But the fact that the Valuebuilder annuities may have come with ancillary NEA-provided services not offered for other annuities in the employer's plan is not significant for the plan analysis.[5]

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[4] The revised IRS regulations concerning section 403(b) tax-sheltered plans went into effect on January 1, 2009. 26 C.F.R. 1.403(b)-11(a). However, the requirement that a 403(b) plan have a written plan document does not become applicable until January 1, 2010 and therefore does not apply to the plans in this case. Nevertheless, the written plan requirement sheds light on what the IRS considers to be a bona fide 403(b) plan insofar as the statutory language has not changed and the regulations serve to interpret section 403(b) of the Code. See 72 Fed. Reg. 41128, 41130 (2007) (providing in the preamble to the 403(b) regulations that the written plan requirement "implements the statutory requirements of section 403(b)(1)(D), which provides that the contract must be purchased 'under a plan'").

[5] In this same manner, many investment products offered as part of a 401(k) plan provide individualized services or features not available with other investment products offered as part of the plan, but this does not make each individual investment product a separate plan.

The structure and purpose of ERISA's disclosure and reporting requirements also indicate that the "plan" here is the employer's program offering a number of annuity options. The "disclosure and reporting . . . of financial and other information" with respect to plans is one of the primary ways ERISA protects participants and beneficiaries. 29 U.S.C. § 1001(b). ERISA generally requires each pension and welfare benefit plan to file an annual report, the Form 5500, regarding the plans' financial condition, investments, and operations. Among other things, the information reported on the Form 5500 identifies the plan in question and the assets it holds. However, the Form 5500 revisions and attendant regulations do not contemplate a Form 5500 filing for each individual annuity option, or that an employee organization would file a Form 5500 for the annuity option it endorses while the employer files one (or many) Form 5500s for all of the other annuity options.[6] Instead, the new regulations consider 403(b) plans to constitute a "collection of individual contracts" the assets of which constitute the assets of a 403(b) "plan" for reporting purposes. See Department of Labor Field Assistance Bulletin No. 2009-02.

A number of illogical situations would result if this Court were to accept the allegation that the NEA Valuebuilder annuities program constitutes a "plan" within the meaning of ERISA. First, every public school employee with an individual Valuebuilder annuity contract would simultaneously be a participant in the NEA's employee pension

[6] Prior to the 2009 reporting year, 403(b) plans covered by Title I of ERISA were subject to special limited reporting requirements. Under new regulations issued by the Department and the IRS such 403(b) plans are required to file Form 5500s with detailed plan information, including an audit report for large plans. See 72 Fed. Reg. 64731 (2007). The regulations apply only to private-sector 403(b) plans, since governmental and church plans, like those sponsored by the South Kitsap and El Dorado school districts, do not file Form 5500s. Id.

benefit plan and the public school district's 403(b) plan. Moreover, if the NEA Valuebuilder annuities program itself constituted an ERISA plan, employees who were participants in the NEA Valuebuilder annuities program would be participants in an NEA-sponsored ERISA employee pension benefit plan, but employees of the same public school district who chose other annuity contract options from the same menu listed by the same employer would not be participants in an ERISA plan at all. Additionally, using the Plaintiffs' logic, any employee who withdrew assets from a Valuebuilder annuity option and invested them in a different 403(b) annuity option made available by its employer would be transferring assets from an ERISA-covered pension benefit plan to a non-covered governmental plan, and, without changing employers, would be moving in and out of ERISA coverage every time such a transfer was executed. Coverage status would not change, however, if the focus remains on the employer, which is the focus of section 403(b) of the Code. In the instant case, then, the Court should find that the "plan" is each public school district's package of annuity options on its vendor menu, and the collection of individual annuity contracts that go along with it. The NEA did not maintain or establish a plan in this sense but rather offered just one option from the employer's vendor menu of options.

B. THE NEA VALUEBUILDER ANNUITIES ARE OPTIONS UNDER A GOVERNMENTAL PLAN

1. Governmental Plan Analysis

ERISA excludes from Title I coverage "governmental plans," which are generally defined as plans "established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any

agency or instrumentality of the foregoing." 29 U.S.C. 1002(32), 1003(b)(1). The governmental exclusion was enacted largely because of concerns about federalism. See Feinstein v. Lewis, 477 F.Supp. 1256, 1260 (S.D.N.Y. 1979), aff'd 622 F.2d 573 (2d Cir. 1980); Montoya v. ING Life Ins. and Annuity Co., et al., No. 07-2574 (S.D.N.Y. August 31, 2009) at *14.[7] Congress created the governmental plan exemption so that local and state governments would be able to run their own pension and welfare benefit plans without having to comply with Title I requirements that would place demands on the financial resources of sovereign states and their political subdivisons and instrumentalities. H.R.Rep. No. 807, 1974 U.S.Code Cong. & Ad.News at 4830; Pierson v. Continental Casualty, 2000 WL 1879895 at *11 (C.D. Cal.). The exemption reflected the belief expressed in the legislative history that state and federal funding resources would be available if the plans could not deliver promised benefits. See S.Rep. No. 383, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Ad. News 4890, 4965; H.R.Rep. No. 93-533, reprinted in 1974 U.S.C.C.A.N. 4,639, 4,646 (statement of Sen. Williams); see also Feinstein, 477 F.Supp. at 1262 ("These discussions clearly demonstrate that Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained"). Here, there is no question that the public school employers offering the NEA Valuebuilder annuities, within the menu of annuity options they offer, are governmental entities that employed the public school teachers

[7] Montoya is a similar case in which plaintiffs raised essentially the same allegations as in this case against a different union. See Montoya v. ING Life Ins. and Annuity Co., et al., supra. The court dismissed the case on the grounds that the 403(b) plans in question were governmental plans not subject to ERISA or to the 403(b) safe harbor. Id. at *14.

who participated in the purchase of the annuities.[8] ER 31 ¶¶ 22, 23. The only pertinent question is whether these employers "established or maintained" the plans.

The structure of 403(b) plans necessarily implicates governmental action regardless of the presence of direct government funding. Indeed, the creation of a governmental employer's 403(b) plan may begin with a state law requiring the creation of such plans by a public school district, as is the case here with respect to the school districts in Washington and California. Wash. Rev. Code § 28A.400.250; Cal Educ. Code § 24950. Even if funded entirely by employee salary reduction contributions, the school district must agree to the creation of the plan and set up a system for salary deductions to pay for the public school employees' investment in the 403(b) annuities. See, e.g., Cal Educ. Code § 24950(e). The public school district must also decide which vendors the employer wants to make part of its plan, provide this information to public school employees, and make a determination about how and when the marketing of these products will be allowed. See e.g., Cal Educ. Code § 24950(d); Wash. Rev. Code § 28A.400.250. Finally, the school district can terminate the offering of the annuities, including the NEA Valuebuilder annuities, as part of its plan. See e.g., Cal Educ. Code § 24951. Plaintiffs' interpretation of the "plan" question under which these actions are insufficient for the school district to establish or maintain the plans would undermine the rationale for the governmental plan exemption by opening up the 403(b) arrangements

[8] The determination of whether a plan is "governmental" involves consideration of the government's role in establishing or maintaining a plan. See Feinstein, 477 F.Supp. at 1260. By their nature, the structure of 403(b) plans covering governmental employees necessarily implicates governmental action regardless of the presence of direct government funding. See Pierson, 2000 WL 1879895 at *10. Government funding, therefore, is not a prerequisite to their being a governmental plan.

between local governments and their employees to federal regulation under ERISA. For example, treating the Valuebuilder annuities program as an ERISA plan sponsored by the NEA, not merely a part of the governmental plan of each school district, would mean that the school districts, while not considered to have established or maintained the plan, would be subject to ERISA fiduciary rules in their handling and forwarding of employee contributions to the NEA "plan." See 29 C.F.R. § 2510.3-102.

2. Safe Harbor Analysis

The district court decided that the school district employers did not establish or maintain governmental plans in this case because it found that their actions fell within the Title I regulatory safe harbor for section 403(b) programs. ER 19. The safe harbor provisions, at 29 C.F.R. § 2510.3-2, are part of a Department regulation intended to "clarif[y] the limits of the defined terms 'employee pension benefit plan' and 'pension plan' for purposes of title I of the Act . . . by identifying specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes." Id. § 2510.3-2(a). Paragraph (f) applies to annuity contracts "described in section 403(b) of the Internal Revenue Code of 1954." Id. § 2510.3-2(f). It generally states that a 403(b) program established "pursuant to salary reduction agreements . . . which meets the requirements of 26 C.F.R. 1.403(b)-1(b)(3) shall not be 'established or maintained by an employer' as that phrase is used [in Title I]." 29 C.F.R. § 2510.3-2(f). This "safe harbor" is conditioned on certain other factors being met, such as participation being "completely voluntary" for employees and the employer's sole involvement being limited to specified acts of a ministerial or neutral nature, such as facilitating employee access to vendors. Id. § 2510.3-2(f)(1) – (4). An employer that qualifies for the 403(b) safe harbor is

considered not to have established or maintained an employee pension benefit plan under ERISA.

It is clear, however, from the Department's regulations and other opinions that the regulatory safe harbor was designed for tax-exempt employers that otherwise might have been subject to Title I of ERISA. See Montoya v. ING Life Ins. and Annuity Co., et al., supra at *10. The safe harbor was never intended to apply to 403(b) plans provided by public school districts since those plans are governmental plans and thus already exempt from ERISA. For example, the preamble to 29 C.F.R. 25103.3-2(f) at n. 1, provides that "[c]ertain 'governmental plans' defined in section 3(32) of the Act, and 'church plans' defined in section 3(33) of the Act are not affected by the regulation because they are excepted from the requirements of Title I of the Act by virtue of section 4(b)(1) and (2) of the Act" (emphasis added). [9] 44 Fed. Reg. 23525 n.1 (1979) The same assumption is clear from the Department of Labor's Field Assistance Bulletin No. 2007-02, 2007 WL 4698897 ("Under ERISA § 4(b)(1) and (2), 'governmental plans' and 'church plans' generally are excluded from coverage under Title I of ERISA. Therefore, 403(b) contracts and custodial accounts purchased or provided under a program that is either a 'governmental plan' under § 3(32) of ERISA or a non-electing 'church plan' under § 3(33) of ERISA are not subject to Title I."); see also Department of Labor Field Assistance

[9] In Otto v. Variable Annuity Life Ins., 814 F.2d 1127 (7th Cir. 1986), the court applied the safe harbor regulations to find that a public school district employer offering 403(b) tax-deferred annuities to its public school district employees had not established or maintained an employee pension benefit plan. Reliance on the safe harbor regulations in that case, without consideration of the Secretary's stated intent not to apply them to statutorily exempt governmental or church plans, was harmless error because, regardless of whether the court relied on the safe harbor regulations or on the governmental plan exclusion to find that the annuity was not established or maintained by the governmental entity, the result in Otto would have been the same.

Bulletin No. 2009-2, 2009 WL 2215075 (only 403(b) plans established or maintained by a tax-exempt organization that is not a governmental plan or church plan is a pension plan within the meaning of section 3(2) of ERISA and subject to the Form 5500 annual reporting requirements).[10]

Plaintiffs nonetheless argue that once an arrangement falls within the safe harbor and therefore does not constitute a plan established or maintained by an employer, the court could find that the plan was instead established or maintained by an employee organization like the NEA. The argument is incorrect. The conclusion that a plan falls within the 403(b) safe harbor is equivalent to the conclusion that no one established or maintained an ERISA plan, since both the structure of the safe harbor and Code section 403(b) do not contemplate any party apart from an eligible employer being able to establish or maintain a 403(b) plan. See 42 Fed. Reg. 61,258 (Dec. 2, 1977) (Department's statement, in preamble to interim and proposed safe harbor regulation, that section 403(b) programs meeting specified requirements "are not plans which are 'established or maintained' by an employer or employee organization or both"). Contrary to the Plaintiffs' argument, therefore, Plaintiffs cannot rely on the safe harbor provision for the argument that the NEA's actions, combined with the governmental employers' supposedly minimal, safe-harbor-covered actions, made the NEA the entity that established or maintained a Title I plan in this case.

Rather, the language of the safe harbor provision for 403(b) plans refers specifically to employers establishing or maintaining plans and contains no reference to

[10] The interpretation of the regulatory safe harbor as not applying to governmental plans is entitled to deference under Auer v. Robbins, 519 U.S. 452, 461 (1999); see also Kraus v. Presidio Trust Facilities Div. Residential Management Branch, 522 F.3d 1039, 1045 (9th Cir. 2009).

employee organizations doing so. The omission of employee organizations from the 403(b) safe harbor indicates that the Department did not contemplate employee organizations being able to establish or maintain 403(b) plans. As suggested by the district court, the omission of employee organizations from the language of the 403(b) safe harbor is particularly significant given that the separate safe harbor for the establishment of welfare benefit plans specifically refers to employee organizations and their ability to create employee welfare benefit plans. 29 C.F.R. § 2510.3-2(f); ER 20; see also 29 C.F.R. § 2510.3-2 (safe harbor from ERISA coverage for Individual Retirement Account ("IRA") plans similarly specifically refers to employee organizations). Regulatory interpretations of section 403(b) of the Code similarly leave no room for employee organizations' establishing or maintaining plans funded exclusively with 403(b) contracts. For example, the discussion of the safe harbor in the Department's Field Assistance Bulletin, No. 2007-02, refers only to the employers' ability to establish or maintain tax-sheltered annuities under 403(b).

C. THE NEA'S ENDORSEMENT AND MARKETING OF THE NEA VALUEBUILDER ANNUITIES PROGRAM DID NOT RISE TO THE LEVEL OF ESTABLISHMENT OR MAINTENANCE OF AN EMPLOYEE BENEFIT PLAN IN THE SPECIFIC CONTEXT OF THIS CASE

While it is clear that the NEA cannot establish a 403(b) plan, as an employee organization it can establish a plan under Title I without the plan complying with any tax code provisions or being eligible for special tax treatment.[11] DOL Adv. Op. 2003-01A,

[11] For purposes of a Title I analysis, and in response to the question presented in this Court's order, we are addressing here whether the NEA established or maintained any kind of employee pension benefit plan even if it could not have established a tax-qualified 403(b) plan.

2003 WL 1201015 (January 24, 2003). However, regardless of whether the focus is a 403(b) plan or any employee pension benefit plan, the NEA's endorsement and promotion of the Valuebuilder annuities program did not rise to the level of establishment or maintenance of an employee pension benefit plan, because, as previously argued, the NEA's actions cannot be divorced from the 403(b) context in which it was operating.

Plaintiffs allege that the NEA's role in negotiating the terms of the NEA Valuebuilder annuity product with the insurance companies, endorsing the annuities and marketing the annuities to the public school district employers and their NEA-member employees amounted to the NEA's establishment or maintenance of a nationwide employee pension plan. However, the NEA's involvement in offering its NEA Valuebuilder program as an option within the public school employers' vendor menu of options was necessarily circumscribed by the fact that it was operating within the 403(b) structure. The state laws governing the creation of 403(b) plans require the public school district employer to determine which annuity options are offered to the employees, to set up a salary reduction system and to regulate the access vendors have to public school district employees. Even if the employer makes no contributions, the employer is deemed to purchase the annuities by setting up the salary reduction system. See 26 U.S.C. § 403(b)(1)(A)(ii). The employer must also take other steps, such as determining which annuity options or custodial accounts are offered to the employees. Thus, while the public school district employers could have acted alone to establish 403(b) plans, the NEA could not. Rather, the NEA could not and did not deliver the option of the Valuebuilder annuities program to its members without the involvement of the public

school district employers in setting up the salary reduction structure and purchasing the annuities on behalf of the employees.

While the NEA marketed the Valuebuilder annuities program through its website and other promotional materials, the annuity had to be placed on the public school employer's vendor menu of annuity options before employees could choose it over other annuities. Insofar as the salary reduction agreements were between the participants and the employer and the annuity contracts were between Nationwide or Security Benefit and the participants, the NEA had no plan administration function and had no contractual or financial agreements with participants related to the provision of the Valuebuilder annuities. The cases cited by Plaintiffs in support of the establishment of a non-governmental benefit plan by an employee organization that relied on the government to make payroll deductions and on the employees for funding the plan required significantly more involvement by the union in substantive aspects of plan administration and creation than alleged here. See, e.g., Hanson v. United Life Ins. Co., 170 F. Supp. 2d 966 (C.D. Cal. 2001) (insurance plan established by employee organization and funded through employer's salary reduction process was also administered by a board made up of the organization's members and selected by the organizations' members).

Moreover, if the NEA's actions contributed to the establishment or maintenance of plans, they were part of a joint activity by the public school district employer and the NEA and would therefore fall within the Title I exception for governmental plans. Cf. Feinstein, 477 F.Supp. at 1260; DOL Adv. Op. 79-83A, 1979 WL 7017 (November 20, 1979); DOL Adv. Op. 79-36A, 1979 WL 6974 (June 11, 1979). Thus, even if it were

possible to divorce this case from the 403(b) context, the NEA's actions by themselves did not constitute the establishment or maintenance of an employee pension benefit plan.

CONCLUSION

The NEA did not establish or maintain the 403(b) annuity plans at issue in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 32-3, the attached amicus brief ordered by the court is a proportionately spaced brief in which the word count divided by 280, does not exceed the designated 20 page limit.

/s/ Melissa Bowman
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid to the following non-CM/ECF participants:

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