

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-31A
514

MAR 20 1981

Mr. Lester Kurtz
New Jersey Business Industry Association
50 Park Place
Newark, New Jersey 07102

Dear Mr. Kurtz:

This is in response to your letters of October 20, 1980, concerning applicability of the preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to certain proposals for state legislation.

You seek the Department's opinion concerning Senate Bill No. 300 and Assembly Bill No. 1699 now pending before the New Jersey State Legislature which you believe would be in conflict with ERISA if enacted. Senate Bill No. 300 would require inclusion of orthomolecular treatment benefits in all group health insurance contracts delivered, issued, executed, or renewed in the state, or approved for issuance or renewal by the New Jersey Commissioner of Insurance. Assembly Bill No. 1699 would require inclusion of reconstructive breast surgery benefits, including prostheses and chemotherapy, following surgery for treatment of breast cancer in all group and individual health insurance contracts in which the medical service corporation has reserved the right to change the premium. The bill would also make inclusion of such benefits a prerequisite for approval for issuance or renewal by the New Jersey Commissioner of Insurance of health insurance contracts. Assembly Bill No. 1699 specifically allows the New Jersey Commissioner of Insurance to promulgate appropriate regulations to give effect to the bill's purposes.

You also ask whether a state law which requires an employer to indefinitely extend group health insurance coverage to former employees who have accepted new employment would be preempted by ERISA.

ERISA section 514 provides in part:

Act Sec. 514 (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

The reasons for broad preemption of state law under ERISA were succinctly stated by former Senator Javits during final consideration of ERISA's passage:

Both the House and Senate bills provided for preemption of State law, but -- with one major exception appearing in the House bill -- defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation -- at either the State or Federal level -- undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required -- but for certain exceptions -- the displacement of State action in the field of private employee benefit programs. 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974).

Section 514(a) does not merely preempt state laws which conflict with ERISA but all state laws which relate to employee benefit plans. Thus, any state law relating to employee benefit plans would be preempted by reason of section 514(a) of ERISA unless it is a "law ... which regulates insurance, banking, or securities" which is specifically saved by section 514(b)(2)(A) of ERISA from preemption.¹

¹ Section 514(b)(2)(B) prevents circumvention of the basic preemptive effects of section 514(a) by barring the states from deeming ERISA covered employee benefit plans to be insurance companies or insurers.

Senate Bill No. 300 and Assembly Bill No. 1699 appear to deal only with health insurance contracts issued by licensed insurance companies in the State of New Jersey without regard to whether they are related to employee welfare benefit plans. It does not appear that the bills as drafted purport to regulate employee welfare benefit plans directly or to deem such plans to be insurers or in the business of insurance. It is therefore the position of the Department of Labor that the bills, as drafted, fall within the exception provided in section 514(b)(2)(A) of ERISA. For that reason, the specific bills you submitted, if enacted, would not be preempted by ERISA section 514.

On the other hand, a state law which requires any private employer with a group health insurance program to indefinitely retain among the active participants in such a program its former employees would be a law directly regulating employee benefit plans and would be preempted by ERISA section 514.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs