

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 84-18A  
Sec. 514, 3(10)

APR 19 1984

Mr. Samuel Robbins  
Enrolled Actuary  
Pension Planners of Puerto Rico  
The Wyatt Company  
Suite 306, Pan Am Building  
255 Ponce de Leon Avenue  
Hato Rey, Puerto Rico 00917

Dear Mr. Robbins:

This is in reply to your letter of October 19, 1983, requesting advice regarding the preemption provisions of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether section 5(g) of Puerto Rico Act. No. 17 (approved April 17, 1931) as amended is preempted under section 514(a) of title I of ERISA.

You advise that, as amended by Act No. 195 of July 23, 1974, section 5(g) of Puerto Rico Act No. 17 provides:

(g)(As amended by Act No. 195 of July 23, 1974). When the laborer authorizes his employer in writing to deduct from his wages a sum stipulated by the laborer or stipulated in a labor collective agreement entered into between an employer and a representative of his employees in a appropriate unit for collective bargaining as an assessment or payment toward any plan or group pension, saving, retirement, allowance, annuity life, life, accident and health and hospital insurance policy, any combination of these plans, or any similar social security plan authorized by the laborer and by the union in case there exists a labor organization duly certified or recognized to bargain collectively with the employer or authorized by the laborer and the Secretary of Labor in the case of the nonexistence of such labor organization duly certified and recognized, but in both cases for the sole benefit of the laborers or their dependents or beneficiaries, provided that the employer contributes with a sum not less than the sum contributed by the laborer and subject to the condition that said deduction shall be used by the employer to pay the cost of said benefit or for the said purposes: (1) an insurance company, acceptable to the union or, in default thereof, to the Secretary of Labor, which has issued a contract insuring the employees and is authorized to operate in Puerto Rico under the supervision of the Commissioner of Insurance of Puerto Rico, or (2) a trust bank acceptable to the union or, in default thereof, to the Secretary of Labor, authorized to operate in Puerto Rico under the supervision of the Secretary of Treasury, if the

deductions are not used as afore said, no deduction shall be made until the plan or insurance policy has been approved in writing by the Secretary of Labor of Puerto Rico. Every plan or policy under this section shall be filed with the Department of Labor of Puerto Rico before it takes effect. No deduction shall be made for any plan or insurance which permits the employer to receive, take or withhold for his own use and benefit the total or any part of the sum deducted. All plans shall contain appropriate provisions to permit the voluntary retirement of any laborer in a manner consistent with the continuation and due operation of the plan.

You further advise that you have been informed by the Honorable Nestor Barbosa Vargas, Solicitor of Labor of the Department of Labor and Human Resources of the Commonwealth of Puerto Rico, that the last sentence of section 5(g) of Puerto Rico Act No. 17 requires appropriate provisions to be established under employee benefit plans to enable an employee to withdraw from a plan whenever he or she wishes to do so.

Section 514 of title I of ERISA provides, in pertinent part:

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 establishing 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.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilitates of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

The term "State" is defined in section 3(10) of title I of ERISA to include Puerto Rico.

In this respect, we note that the Department of Labor has concluded previously, in another context, that employee benefit plans are not excluded from coverage under title I of ERISA solely by virtue of being established or maintained in Puerto Rico. See Advisory Opinion 78-6A (issued March 13, 1978, copy enclosed).

Thus, section 5(g) of Puerto Rico Act No. 17 is a State law (within the meaning of section 514(c)(1) of ERISA). Further, it appears that section 5(g) has been interpreted to apply to benefits provided by an employer under an employee benefit plan. Accordingly, to that extent, section 5(g) of Puerto Rico Act No. 17 relates to employee benefit plans covered by title I of ERISA and is preempted under section 514(a) of ERISA. In reaching our conclusion that section 5(g) of Puerto Rico Act No. 17 is preempted by ERISA, we have also considered whether the criminal sanction provided by section 7 of that Act is a "generally applicable criminal law of a State" which would be saved from preemption under section 514(b)(4) of ERISA. Section 7 establishes criminal penalties for any violation of Puerto Rico Act No. 17, including section 5(g). Although section 7 thus deals with many aspects of an employer's relations with its employees, we believe each activity proscribed by the Act must be separately evaluated in order to determine whether the criminal sanction, as applied to that conduct, is "generally applicable." In this respect, section 5(g) prohibits specified conduct by employers in their capacity as providers of benefits, and, accordingly, section 7, as applied to section 5(g), is not a generally applicable criminal law.

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,

Morton Klevan  
Deputy Administrator  
Pension and Welfare Benefit Programs

Enclosure