

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



NOV 25 1987

87-09A
Sec. 514(a)

Mr. Peter M. Kelly
Bell, Boyd & Lloyd
Three First National Plaza
Suite 3200
70 West Madison Street
Chicago, Illinois 60602

Dear Mr. Kelly:

This is in response to your request, on behalf of Travenol Laboratories, Inc., concerning the application of the preemption provisions of title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you have requested the Department's opinion as to whether Act 489 of the Acts of Arkansas General Assembly of 1987 (the Arkansas Act) is preempted under section 514(a) of ERISA. You have also requested, assuming that the Act is preempted, that the Department take action to enforce the ERISA preemption of the Arkansas Act.

The Arkansas Act, entitled "An Act to permit Employee Freedom of Choice for Pharmacy Services; and for Other Purposes", provides as follows:

SECTION 1. After the effective date of this Act, it shall be unlawful for any employer providing pharmacy services including prescription drugs to employees as a part of a health care program to require the employee to obtain drugs from an out-of-state mail order pharmacy as a condition of obtaining the employer's payment for such prescription drugs, or to impose upon an employee not utilizing an out-of-state mail order pharmacy designated by the employer a co-payment fee or other condition not imposed upon employees utilizing the designated out-of-state mail order pharmacy.

SECTION 2. This Act shall not apply to any employer: (1) who offers, as a part of a health care program, health insurance coverage to employees which provides for payment of an equal portion of the cost to the employee for prescription drugs regardless of the supplier, provided that the health insurance plan allows the employee freedom of choice in determining where the drugs are purchased; or (2) who had in force effective January 1, 1987 a mail order prescription drug plan for employees.

SECTION 3. The provisions of this Act shall not be applicable to health care programs in existence on the effective date of this Act.

SECTION 4. Any person or entity violating the provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) and each violation shall constitute a separate offense.

Section 514 of title I of ERISA provides, in relevant part, that:

(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)(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.

* * *

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

Thus, under section 514, state laws not within the savings clause which "relate to" employee benefit plans, either directly or indirectly, are preempted by ERISA. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983), the Supreme Court stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." In that case, the Court held that a New York statute which required employers to pay employees specified benefits clearly "related to" benefit plans and thus was preempted. In the

instant case, the Arkansas Act, in effect, requires employer sponsors of prescription drug programs to afford employees a benefit alternative to out-of-state mail order pharmacy benefits.¹

Therefore, like the statute at issue in Shaw, the Arkansas Act clearly "relates to" employee benefit plans and thus is preempted, unless otherwise saved under section 514(b).

Based on our review of the Arkansas Act, it does not appear that any of the exceptions to ERISA preemption set forth in section 514(b) apply. In particular, we note that, with respect to the insurance savings clause of section 514(b)(2)(A), there is no indication that the Arkansas Act is intended to regulate insurance. To the contrary, the Arkansas Act is specifically directed to the regulation of employer sponsors of prescription drug programs, rather than insurance companies, contracts or policies. Even if the Arkansas Act were considered to regulate insurance, the "deemer" clause of section 514(b)(2)(B) clearly would preclude the treatment of an employee benefit plan, or trust established thereunder, as an insurance company for purposes of any state law purporting to regulate insurance companies or insurance contracts.² We also note that the Arkansas Act would not constitute a generally applicable criminal law for purposes of the exception in section 514(b)(4) because it applies primarily to employee benefit plans. See ERISA Opinion 79-35A (May 31, 1979).

Section 514(b)(8) of ERISA establishes another exception from the general rule of preemption. It exempts from preemption "any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act, to the extent

¹ In this regard we note that it is the view of the Department that a program for the provision of prescription drugs, or for the reimbursement of some or all of the cost of prescription drugs, is the providing of a "medical" benefit within the meaning of ERISA section 3(1), defining the term "employee welfare benefit plan." Accordingly, to the extent that a prescription drug program is established or maintained by an "employer" (as defined in section 3(5)) and/or an "employee organization" (as defined in section 3(4)) for the purpose of providing such benefits to its employees or members, respectively, the program would be an "employee welfare benefit plan" subject to title I of ERISA, unless otherwise excepted under ERISA section 4(b).

² We note that ERISA section 514(b)(6) does provide certain exceptions from ERISA preemption for application of state insurance laws to multiple employer welfare arrangements (as defined in section 3(40) of ERISA). We further note that insurance contracts purchased by employee benefit plans would be subject to applicable state insurance regulation.

such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act." The Department expresses no opinion concerning the applicability of this exception.

For the above reasons, it is the opinion of the Department that the Arkansas Act is preempted under ERISA section 514(a) insofar as (1) it is applied, directly or indirectly, to employee benefit plans covered by title I of ERISA, and (2) it does not qualify for the exception established in section 514(b)(8) of ERISA.³

The foregoing portion of this letter constitutes an advisory opinion under ERISA Procedure 76-1 and, accordingly, is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

With regard to your request that the Department institute an ERISA action to enforce the preemption provisions, we note that you have provided no information which suggests that the State of Arkansas has, in fact, sought to enforce the Arkansas Act against the sponsor of an ERISA-covered employee benefit plan. For this reason, we believe it would be premature to consider what, if any, action might be appropriate at this time. However, we have taken the liberty of forwarding a copy of this letter to the Attorney General of the State of Arkansas.

Sincerely,

Elliot I. Daniel
Associate Director for Regulations and Interpretations

Enclosure

cc: Mr. Steve Clark
Attorney General
State of Arkansas
201 E. Markham
Heritage West Building
Little Rock, Arkansas 72201

³ While your request was limited to Act 489 of the Arkansas Act, we note that a similar analysis and finding would apply to the Section 353.28 of Title 59 of the Oklahoma Statutes (a copy of which you furnished in a subsequent submission) which contains provisions virtually identical, in form and effect, to those of the Arkansas Act.