U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

FEB 10 1989

89 – 01A
Sec. 514

Mr. J. Stephen Mikita
Office of the Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114

Dear Mr. Mikita:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the proposed provisions of Utah Code Ann. §58-17-26 (the proposed Utah Act) are preempted under the general preemption provision of section 514(a) of title I of ERISA.

You advise that the proposed Utah Act provides:

> 58-17-26. Purchases of pharmaceutical services by third parties.
>
> (1) Any third party purchaser of pharmaceutical services within the State of Utah shall not:
>
> (a) require any pharmacy patient to obtain prescription drugs from an out of state pharmacy as a condition of obtaining third party payment for such prescription drugs; or
> (b) impose upon any pharmacy patient not utilizing an out of state pharmacy designated by the third party purchaser any condition not imposed upon other pharmacy patients of a same benefit class using a designated out of state pharmacy under provisions of a third party agreement or contract.
>
> (2) Nothing in this section shall prohibit any third party purchaser of pharmaceutical services, who provides for reimbursement to the pharmacy patient or to his benefit, the right to limit the amount reimbursed for the cost of prescription drugs based upon the cost of identical prescription drugs available through a designated out of state pharmacy.
>
> For the purposes of this subsection each third party purchaser of pharmaceutical services shall identify as a part of the third party agreement or contract the designated out of state pharmacy which shall be used as a baseline comparison.

(3) Nothing in this section shall act to preempt provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") of the federal government, to the extent that provisions of this section are specifically worded in a way which preempts any provision of ERISA.

(4) Any person violating the provisions of this section, shall be guilty of a class A misdemeanor. Each such 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 proposed Utah Act, in effect, would require employer sponsors of prescription drug programs to afford employees a benefit alternative to out-of-state mail order pharmacy benefits.[1]

[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

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

Based on our review of the proposed Utah 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 proposed Utah Act is intended to regulate insurance. To the contrary, the proposed Utah Act is specifically directed to the regulation of third party purchasers (such as employer sponsors) of prescription drug programs, rather than insurance companies, contracts or policies. Even if the proposed Utah 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 proposed Utah 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 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 proposed Utah Act would be preempted under ERISA section 514(a) insofar as (1) it is applies, directly or indirectly, to employee benefit plans covered by title I of ERISA, and (2) it does not qualify for the exception established in

---

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.

section 514(b)(8) of ERISA. We note that in Opinion 87-09 (issued November 25, 1987) to which you refer, the Department held that a similar Arkansas law (Act 489 of the Acts of the Arkansas General Assembly of 1987) was similarly preempted under section 514(a) of title I of ERISA.

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.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

Enclosure