

**U.S. Department of Labor**

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



90-18A

Mr. J. Scott Kyle  
Texas State Board of Insurance  
1110 San Jacinto  
Austin, Texas 78701-1998

Dear Mr. Kyle:

This responds to your letter of May 8, 1990, regarding MDPhysicians and Associates, Inc. Employee Benefit Plan (MDPEBP). You request the views of the Department of Labor concerning issues that arise, as described below, under section 514(b)(6)(A) of the Employee Retirement Income Security Act of 1974 (ERISA).

In Opinion 90-10A, the Department of Labor (the Department) concluded that MDPEBP is a multiple employer welfare arrangement (MEWA) within the meaning of section 3(40) of ERISA and, therefore, is subject to state regulation at least to the extent provided in section 514(b)(6)(A) of ERISA, regardless of whether MDPEBP is an employee benefit plan covered by title I of ERISA. You state in your letter that MDPhysicians and Associates, Inc., which administers MDPEBP, has filed suit against the Texas State Board of Insurance and Texas Attorney General for a declaratory judgment relating to the ability of the State of Texas to regulate or prohibit MDPEBP. MDPhysicians and Associates, Inc. contends in its complaint that, among other things, any attempt by the State of Texas to regulate MDPEBP by requiring licensure of MDPEBP as an insurer would be inconsistent with title I of ERISA, and that the State of Texas lacks statutory authority to regulate MDPEBP in any respect in the absence of enabling legislation respecting the regulation of self-insured MEWAs.

You state that Texas does not have legislation specifically aimed at regulation of self-funded MEWAs which are employee welfare benefit plans covered by title I of ERISA. It is the position of the State Board of Insurance that such plans are doing an insurance business and are subject to the same requirements as any other insurer operating in Texas. You further state that the Texas Insurance Code provides that no person or insurer may do the business of insurance in Texas without specific authorization of statute, unless exempt under the provisions of Texas or federal law. The Code establishes procedures for issuance of certificates of authority to insurers who meet statutory requirements. Persons who transact insurance business in Texas without a certificate of authority or valid claim to exemption are subject to taxation, fines, and other civil penalties, including injunctive relief to effect cessation of operation.

Assuming, arguendo, that MDPEBP is an employee welfare benefit plan covered by title I of ERISA, you request the Department's views as to whether or not a requirement by the State of Texas that MDPEBP (or any similar plan which might be found to be both an employee welfare benefit plan and a MEWA as defined by ERISA) obtain a certificate of authority to transact insurance business in Texas, and be subject to statutory penalties and injunction should it operate without a certificate of authority, would be inconsistent with title I of ERISA.

Section 514(b)(6)(A) of ERISA provides an exception to preemption under ERISA section 514(a) for any ERISA-covered employee welfare benefit plan that is a MEWA. In general, the exception permits application of state insurance law to a MEWA as follows: If the MEWA is "fully insured" within the meaning of section 514(b)(6)(D) of ERISA, state insurance law may apply to the extent it provides standards requiring the maintenance of specified levels of reserves and contributions, and provisions to enforce such standards (See section 514(b)(6)(A)(i)). If the

MEWA is not fully insured, any law of any state which regulates insurance may apply to the extent not inconsistent with title I of ERISA (See 514(b)(6)(A)(ii)). It appears from your letter that the parties do not dispute that MDPEBP is not fully insured within the meaning of ERISA section 514(b)(6)(D).

We hope the following is responsive to your request.

First, it is the view of the Department of Labor that section 514(b)(6)(A) saves from ERISA preemption any law of any state which regulates insurance, without regard to whether such laws specifically or otherwise reference MEWAs or employee benefit plans which are MEWAs, subject only to the limitations set forth in subparagraphs (A)(i) and (A)(ii) of that section. Similarly, while we are unable to rule on the specific application of the Texas Insurance Code to MDPEBP, a matter within the jurisdiction of the Texas State Board of Insurance, it is the view of the Department that, with the exception of the aforementioned limitations, there is nothing in ERISA which would preclude the application of the same state insurance laws which apply to any insurer which is not an ERISA-covered plan to ERISA-covered plans which constitute MEWAs within the meaning of ERISA section 3(40).

Second, it is the view of the Department that Congress, in enacting the MEWA provisions, recognized that the application and enforcement of state insurance laws to ERISA-covered MEWAs<sup>1</sup> provide both appropriate and necessary protection for the participants and beneficiaries covered by such plans, in addition to those protections afforded by ERISA. For this reason, the Department is of the opinion that in the context of section 514(b)(6)(A)(ii), which, in the case of a MEWA which is not fully insured, saves from ERISA preemption any law of any state which regulates insurance to the extent such law is not inconsistent with the provisions of title I of ERISA, a state law which regulates insurance would be inconsistent with the provisions of title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under title I of ERISA<sup>2</sup> or conflict with any provision of title I of ERISA.<sup>3</sup> For example, state insurance law which would require an ERISA-covered MEWA to make imprudent investments would be deemed to be "inconsistent" with the provisions of title I of ERISA because compliance with such a law would "conflict" with the fiduciary responsibility provisions of ERISA section 404, and, as such, would be preempted pursuant to the provisions of ERISA section 514(b)(6)(A)(ii).<sup>4</sup>

---

<sup>1</sup> The principles discussed in this letter apply to those MEWAs which are also title I plans, and, thus, such MEWAs will be referred to as "ERISA-covered MEWAs".

<sup>2</sup> For example, any state insurance law which would adversely affect a participant's or beneficiary's rights under title I of ERISA to review or receive documents to which the participant or beneficiary is otherwise entitled would be viewed as inconsistent with the provisions of title I. Similarly, any state insurance law which would adversely affect a participant's or beneficiary's right to continuation of health coverage in accordance with Part 6 of title I or to pursue claims procedures established in accordance with section 503 of title I would be viewed as inconsistent with the provisions of title I of ERISA.

<sup>3</sup> In this regard, the Department believes an actual conflict with the provisions of ERISA will occur when state insurance law makes compliance a "physical impossibility". See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

<sup>4</sup> While certain permissive state insurance laws may not be "inconsistent" with the provisions of title I of ERISA as here defined, the behavior permitted under such laws may yet be denied to ERISA-covered MEWAs and their fiduciaries pursuant to ERISA section 514(b)(6)(A)(ii), which applies the provisions of title I as well as state insurance laws which are not inconsistent with the provisions of title I of ERISA to such MEWAs. For example, neither ERISA-covered MEWAs nor their fiduciary managers may take advantage of laws which would permit an ERISA-covered MEWA to engage in transactions which are prohibited under the provisions of ERISA section 406; to effectuate exculpatory provisions relieving a fiduciary from responsibility or liability for any responsibility, obligation or duty under ERISA; or, to fail to meet the reporting and disclosure requirements contained in part 1 of title I of ERISA.

However, a state insurance law will, generally, not be deemed "inconsistent" with the provisions of title I of ERISA if it requires ERISA-covered MEWAs to meet more stringent standards of conduct, or to provide more or greater protections to plan participants and beneficiaries, than required by ERISA. For example, state insurance laws which would require more informational disclosure to plan participants of an ERISA-covered MEWA will not be deemed by the Department to be "inconsistent" with the provisions of ERISA. Similarly, a state insurance law prohibiting a fiduciary of an ERISA-covered MEWA from availing himself of an ERISA statutory or administratively-granted exemption permitting certain behavior will not be deemed by the Department to be "inconsistent" with the provisions of ERISA.

Finally, the Department also notes that, in its opinion, any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions to be met in order for a MEWA to be considered, under such law, able to pay benefits in full when due will generally not be considered to be "inconsistent" with the provisions of title I of ERISA pursuant to ERISA section 514(b)(6)(A)(ii).

Thus, it is the opinion of the Department that a state law regulating insurance which requires the obtaining of a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation, fines, and other civil penalties, including injunctive relief, would not in and of itself adversely affect the protection and safeguards Congress intended to be available to participants and beneficiaries under ERISA, and, therefore, would not, for purposes of section 514(b)(6)(A)(ii), be inconsistent with the provisions of title I. Moreover, given the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws.

Finally, we would note that while section 514(b)(6)(B) of ERISA provides that the Secretary of Labor may prescribe regulations under which the Department may exempt MEWAs from state regulation under section 514(b)(6)(A)(ii), the Department has neither prescribed regulations in this area, nor granted any such exemptions.

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations