U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-39A
Sec. 514

JUL 29 1983

Marvin Rosen, Director
Bureau of Abandoned Property
Office of the State Comptroller
State of New York
270 Broadway
New York, New York 10007

Dear Mr. Rosen:

This is in reply to your letter of December 3, 1982, requesting an advisory opinion regarding the preemption provisions of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether section 1316 of the New York Abandoned Property Law (NY Aband. Prop. Law) is preempted under section 514 of title I of ERISA.

You advise that section 1316 of the NY Aband. Prop. Law provides:

> 1316. Unclaimed insurance proceeds other than life insurance
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> 1. Any amount (except an amount upon which an instrument has been issued which upon its face is nonnegotiable by the insured) payable to a resident of this state on or because of a policy of insurance other than life insurance, which is held or owing by a domestic insurer or a foreign insurer authorized to do business in this state or by an agent or agency of such insurer, shall be deemed abandoned property if unclaimed for three years by the person entitled thereto. Where such amount is held or owing by a domestic insurer for an unknown person or a person whose address is unknown, such amount is presumed to be payable to a resident of this state.

You further advise that pursuant to this section the Comptroller of the State of New York (the Comptroller) is authorized to take custodial possession of these insurance proceeds, including proceeds of group accident and health insurance policies, which are due and owing but have remained unclaimed for the prescribed dormancy period. You state that several insurance companies licensed to do business in the State of New York have not reported and paid to the Comptroller proceeds of certain group insurance plans which are funded by employer or employer/employee contributions as they assert that these plans are employee benefit plans under title I of ERISA and that section 514 of ERISA preempts application of section 1316 of the NY Aband. Prop. Law.

You also state that the insurance companies have stated that it is their practice to charge drafts, issued in payment of claims, to group plan accounts only after the drafts are presented for payment and approved. Consequently, compliance with section 1316 of the NY Aband. Prop. Law, the insurance companies allege, would increase the premium rate paid by employers and/or employees contributing to a group insurance plan since premium increases or refunds

are based on experience rating factors. Because of this effect on premiums, the insurance companies argue that the NY Aband. Prop. Law "relates" to employee benefit plans and therefore is preempted by section 514 of ERISA.

You state that the Comptroller's opinion is that the NY Aband. Prop. Law does not "relate" to group accident and health insurance plans and that the NY Aband. Prop. Law does not regulate or in any other way affect the operation of such plans. You note that, although some insurance companies do offer experience rating credits, they are not generally required to do so contractually and that, therefore, if these companies do choose to increase premiums, it is a matter of company policy. Further you state that experience rating credits cannot be applied in certain situations such as cancellation of a policy.

Based on the above you ask whether a sample group insurance policy is an employee benefit plan subject to ERISA and, if so, whether section 514 of ERISA preempts section 1316 of the NY Aband. Prop. Law in relation to the proceeds of such group insurance a) if the insurance company elects to provide experience rating claims or b) if the insurance company does not provide experience rating credits.

Title I of ERISA covers employee benefit plans which are defined to include both employee welfare benefit plans and employee pension benefit plans. The term "employee welfare benefit plan" is defined by section 3(1) of ERISA to include:

> ... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

The document submitted with your opinion request appears to be a specimen group insurance contract that provides benefits described in section 3(1) of ERISA. Thus, if an employer or employee organization establishes a program to provide accident and health benefits for employees, through the purchase of such a contract, that program would be an employee welfare benefit plan covered by title I of ERISA unless otherwise excluded.

Section 514 of ERISA states 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.
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> (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.
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> (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.
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> (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 ….
>
> (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.

While it is clear from the legislative history of ERISA that section 514(a) was intended to broadly preempt state laws relating to employee benefit plans, section 514(b)(2)(A) excludes state laws regulating insurance from that broad preemptive power. It is the Department of Labor's view that section 1316 of the NY Aband. Prop. Law is a law regulating insurance and thus is not preempted by section 514(a) of ERISA. Further, from the information you submitted, it does not appear that the reference to a "policy of insurance" in NY Aband. Prop. Law section 1316 has been interpreted to include any employee benefit plan or any trust established under such a plan. Therefore, the exception in section 514(b)(2)(B) to the general "savings" provision of section 514(b)(2)(A) would not appear to apply.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs