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March 9, 1989

ATTORNEY GENERAL OPINION NO. 89- 30

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
State Capitol, Room 255-E
Topeka, Kansas 66612

Re: Labor--Employee Retirement Income Security Program;
Protection of Employee Benefit Rights--General
Provisions

Synopsis: Proposed state legislation that relates to a
welfare benefit plan and is not otherwise excepted
is preempted by Section 514 of the Employee
Retirement Income Security Act of 1974 (ERISA).
Cited herein: 29 U.S.C. §1001 et seq.; U.S.
Const., Art. VI, cl. 2.

* * *

Dear Senator Reilly:

As Senator for the Third District you inquire whether the language of certain proposed legislation violates the Employee Retirement Income Security Act of 1974 (ERISA). You indicate that the proposed Utah legislation in question involves limitations on third party payors for pharmaceutical services and requires employers who contract with an out-of-state pharmacy for provision of medication to their employees to also reimburse employees who choose to purchase medication locally. You state that the bill further requires that those reimbursements be made at the same ratio as the cost of medication from the out-of-state pharmacy. We understand that your interest in having a bill with similar provisions proposed in Kansas prompts your inquiry.

The proposed legislation states:

"Third Party Payor for Pharmaceutical -
Limitations.

"(1) Any third party payor for pharmaceutical services within the state of Utah may not require any pharmacy patient to obtain prescription drugs from an out of state pharmacy as a condition of obtaining third party for such prescription drugs.

"(2) This section does not prohibit any third party payor of pharmaceutical services, who provides for reimbursement to the pharmacy patient or payment on his behalf, from exercising 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. This third party payor shall offer the same amount of payment for the cost of prescription drugs purchased in Utah. For the purposes of this subsection each third party payor of pharmaceutical services shall identify as a party of the third party agreement or contract the designated out of state pharmacy which shall be used as the base line comparison."

The legal issue presented by your inquiry is whether the proposed legislation is preempted under section 514 of ERISA codified at 29 U.S.C. §1144. The preemption doctrine dictates that to the extent a conflict exists between state and federal law, state law must yield. U.S. Const., Art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981); cited in Rural Gas, Inc. v. North Central Kan Prod. Cred. Corp., 243 Kan. 109, 120 (1988) [other citations omitted]. Thus, under this doctrine state law is "preempted" by superseding federal law.

ERISA is federal legislation with a comprehensive legislative scheme designed to reorganize the regulatory roles of the state and federal governments with respect to employee benefit plans. "ERISA and the Preemption of State Law," VI Fordham Urban L.J., 599 (Spring, 1978). Section 514 (29

U.S.C. §1144) of ERISA provides for federal preemption of the state's authority to regulate such plans. It states in part:

"(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."

Under subsection (a) state laws that "relate to" employee benefit plans, either directly or indirectly, are preempted by ERISA, unless they regulate insurance, banking or securities [subsection (b)]. A state law, such as the proposed legislation we are addressing, "relates to" any employee benefit plan if it has a connection with or references to such a plan. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). You have clearly indicated that the proposed legislation in question requires employer

sponsors of prescription drug programs to afford employees a benefit alternative to an out-of-state mail order pharmacy benefit. Thus the legislation clearly "relates to" an employee benefit plan and unless otherwise excepted under subsection (b) [the regulation of insurance, banking or securities] it is preempted.

Based on our perusal of the proposed legislation there is no indication that any of the exceptions apply. Compare General Motors Corp. v. Caldwell, 647 F.Supp. 585 (N.D. Ga. 1986) where the Court finds that a Georgia third-party prescription program law, similar to the one in question, is preempted by ERISA. In making the determination that the law is preempted, the court addresses the question of what constitutes the business of insurance for purposes of being excepted or "saved" from preemption by ERISA. Bell v. Employee Security Benefit Association, 437 F.Supp. 382 (1977) involved an action for permanent injunctive relief brought by the Kansas Commissioner of Insurance against the Employee Security Benefit Association selling medical and death benefit plans. In holding the plans were not ERISA-covered employee benefit plans and thus subject to state regulation, the court sets forth factors for distinguishing between a state law which relates to a welfare benefit plan and one that is an insurance law.

In conclusion, it is our opinion that the proposed legislation is preempted by ERISA in that it relates to a welfare benefit plan under Section 514 of ERISA and does not come under any of the exceptions to preemption therein.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Guen Easley
Assistant Attorney General