P/OPINION 75-128

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June 20, 1975

Dear :

This is in response to your letter to the Secretary of Labor asking whether (State) law relating to self-insured health and medical plans has been preempted by the Employee Retirement Income Security Act of 1974. We believe that it has been.

As you described the (State) law in your letter and in a telephone conversation with of my staff, it requires employers who have established self-insured plans for their own employees to meet requirements for insurance companies. Clearly the (State) law is preempted under section 514 of ERISA unless it is saved from preemption by paragraph 514(b)(2). This paragraph preserves State laws regulating insurance, but provides in pertinent part:

> "Neither an employee benefit plan…nor any trust established under such plan, shall be deemed to be an insurance company or other insurer…for purposes of any law of any State purporting to regulate insurance companies, insurance contracts…"

We believe this provision is not susceptible to an interpretation under which the (State) law would be saved from preemption. Section 514 (b)(2) adopts a distinction between insurance and employee benefit plans similar to a line of state cases typified by State ex rel. Farmer v. Monsanto Company, 517 S.W. 2d 129 (Mo. 1974). In that case the court held that a company which provides benefits directly to its own employees and their dependents is not in the insurance business. To be covered under the Missouri law, said the court, the company must be in the business of selling insurance to persons other than its own employees. It is our opinion that Congress established a similar rule when it adopted the above-quoted language in the statute.

In your conversation with you suggested two reasons why Congress might have wished to preserve the (State) law from preemption. The first is that ERISA does not provide any assurance that welfare benefits will be paid as promised, and thereby leaves room for the (State) law which, by requiring insurance companies to have capital and surplus, does provide such assurance. Although it is true that ERISA does not require employee welfare benefit plans to be funded (ERISA §301 (a) (1)), this does not mean that there is no Federal assurance that benefits will be paid as promised. Other provisions of ERISA provide some assurances of this type. However, the exemption of welfare plans from funding requirements reflects an affirmative congressional decision that they not be required to be funded. See e.g. 120 congressional record (daily ed. Aug. 22, 1974).

The second reason you cited was that (State) depends upon the revenue it derives from the insurance tax on plans. We do not believe that this factor affects the basic nature of the preemption required by section 514 of ERISA.

Sincerely,