U.S. Department of Labor

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

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96-04A
ERISA SEC. 514

Sherry L. Dominick
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New Haven, Connecticut 06508-1832

Dear Ms. Dominick and Ms. Clute:

This is in response to your request concerning the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you have inquired whether Connecticut General Statutes section 38a-537[1] is preempted by section 514(a) of ERISA or whether section 38a-537 is saved from preemption under section 514(b) of ERISA as a law regulating insurance.

Section 38a-537 requires any employer who sponsors a health plan for its employees through the purchase of a group health insurance policy to give its employees at least 15 days' notice before cancelling or discontinuing the policy (or substituting one policy for another). An employer that fails to give timely notice may be fined up to $1,000 for each violation. Subsection (a). In addition, an employer that fails to give notice is liable to pay benefits "to the same extent as the insurer, hospital or medical service corporation or health care center would have been liable if coverage had not been cancelled or discontinued." Subsection (b). The statute also imposes liability on employers who make payroll deductions for group health insurance coverage and fail to procure such coverage; the liability is measured by the amount of the benefits that the insurer would have provided. If benefits are unrecoverable from a corporate employer, section 38a-537 imposes personal liability on the corporate officers who were responsible for procuring the coverage if they willfully failed to do so. Subsection (c). If an employer who has failed to give the notice required by subsection (a) goes out of business, any of its former employees whose group health insurance was discontinued at or before termination of employment are entitled to purchase, at their own expense, an individual health care plan from the former insurer (or from a health reinsurance association), retroactive to the date of policy discontinuation, except that "[n]o retroactive coverage may be purchased for a period during which the employee is eligible for benefits under another group plan." Subsection (d).

Section 514(a) of ERISA, which broadly preempts all state laws insofar as they relate to employee benefit plans covered by Title I of ERISA subject only to certain exceptions expressly provided in section 514(b) of ERISA, was enacted to ensure that ERISA's substantive standards would uniformly apply to all plans to protect plan participants and beneficiaries, to promote the development of employee benefit plans, and to assure uniform regulation of such plans. Congress intended through section 514(a):

to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . ., [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

[1] Your request cited Conn. Gen. Stat. section 38-262c. This provision has since been recodified as Conn. Gen. Stat. section 38a-537 (Conn. Gen. Stat. Ann. (West 1992)).

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 115 S.Ct. 1671, 1677 (1995), quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990).

A law "relates to" an employee benefit plan generally if it has "a connection with or a reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). See also Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990). State laws that make reference to a plan are laws that are specifically directed at ERISA-covered plans, and state laws that have a connection with a plan include, for example, state laws that mandate benefit structures or administration (as in Shaw, FMC Corp. v. Holliday, 498 U.S. 52 (1990), and Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)) and state laws that establish alternate enforcement mechanisms in addition to those provided by ERISA, as in Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

Subsection (a) of section 38a-537 requires employers to notify employees before changing insurers or cancelling or discontinuing an insurance policy that funds its group health plan covering employees. Subsection (b) holds employers liable for failure to give the required notice; the liability extends to payment for the benefits that would have been paid by the insurer if the employer had kept the policy in force. This mandate of administrative duties directly affects the operation of the employer's plan and the plan's administrative processes. By imposing liability on an employer that misappropriates employees' wages intended for group health insurance coverage, subsection (c) establishes an alternative enforcement mechanism in addition to that provided by ERISA's civil enforcement provisions.[2] These requirements have a connection with ERISA-covered plans and "relate to" plans covered by ERISA within the meaning of section 514(a).[3]

The notice, penalty, and liability provisions of subsections (a), (b), and (c) of section 38a-537 are imposed directly on the employer/plan sponsor and do not regulate the insurer (or any other entity connected with the insurance industry). Therefore, these subsections do not, in the view of the Department of Labor (the Department), constitute the regulation of insurance.[4]

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[2] Although ERISA does not specify when or how an employer must notify employees about the termination of a welfare plan, an ERISA fiduciary has a duty not to misrepresent to employees that a plan continues to exist after the plan has been terminated without notice to employees. Cf. In Re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1255 (3rd Cir. 1995) (holding that a fiduciary may not materially mislead those to whom the duties of loyalty and prudence are owed and that a plan administrator has an affirmative duty to speak when it knows that silence might be harmful).

[3] Section 514(b)(2)(A) and (b)(4) exempts from ERISA preemption generally applicable state criminal laws and those state laws that regulate insurance, banking, or securities. Furthermore, section 4(b) of ERISA exempts from ERISA coverage certain specified employee benefit plans, including plans maintained solely for the purpose of complying with applicable state workers' compensation, unemployment compensation, or disability insurance laws. None of these exceptions applies in this case.

[4] See Powell v. Chesapeake & Potomac Telephone Co., 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986) (holding that an employer was not an insurer or otherwise engaged in the business of insurance by virtue of its sponsorship of an employee benefit plan). Nevertheless, because state laws regulating the content of insurance policies constitute the regulation of insurance, such state laws are not preempted by ERISA even though such state laws may indirectly impose obligations on employers that purchase such insurance.

Subsection (d), however, gives certain employees the right to purchase individual health coverage from the plan's former insurer or from a health reinsurance association. Although this purchase right appears to be conditioned on the employer's failure to give the notice required by subsection (a), this subsection regulates the conduct of the former insurer and imposes no duty directly or indirectly on the employer or the plan. Subsection (d), thus, insofar as it may be interpreted as a matter of state law to be severable and operative apart from the preempted portions of section 38a-537, is saved from preemption under ERISA §514(b)(1) as a state law that regulates insurance.

Accordingly, it is the position of the Department that subsections (a), (b), and (c) of section 38a-537 are preempted by ERISA insofar as they are applied, directly or indirectly, to employee benefit plans covered by Title I of ERISA. However, subsection (d) constitutes the regulation of insurance and is preserved from preemption by ERISA to the extent that it remains operative in light of the preemption of subsections (a), (b), and (c).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure explains the effect of advisory opinions.

Sincerely,

Susan G. Lahne
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Office of Regulations and Interpretations