



February 8, 2008

Eugene Scalia, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

2008-02A
ERISA SEC.
514(a)

Dear Mr. Scalia:

This is in response to your request on behalf of the Sprint Nextel Welfare Benefit Plan for an advisory opinion regarding the applicability of the preemption provisions in section 514 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you asked whether section 514(a) of ERISA preempts a Kentucky state law that requires an employer to obtain written consent before withholding amounts from an employee's wages for contribution to an ERISA-covered group health or other welfare benefit plan.

You represent that the Sprint Nextel Welfare Benefit Plan is a "cafeteria" style plan that allows participants to choose among a variety of benefits and levels of coverage. Benefit elections are made by all employees, part-time and full-time, through an enrollment system using the company's internal intranet system. The Sprint Nextel New Hire Employment packet, given to all new employees, contains a FlexCare Benefits New Hire Enrollment Guide and Brochure. The Brochure explains that an employee who fails to make a medical coverage election, or certify that he or she has medical coverage from another source, will receive default coverage, which includes medical coverage under the SprintChoice Healthcare or SprintIndemnity Healthcare, and the Base Plus Plan option of the prescription drug program. All enrollments, whether affirmatively elected by the employee or made through the default process, are confirmed in a written statement mailed to the participant. Elections and default coverage assignments are generally binding until the next annual enrollment period. Sprint Nextel collects the employees' shares of the cost of coverage, whether default or affirmatively elected, through payroll deductions. Sprint Nextel employs more than 55,000 people across the United States and relies on a single, uniform benefits plan. You represent that uniformity is important to the company's ability to maintain the level of coverage it now offers to its employees.

Your request identified a wage withholding law from the State of Kentucky, section 337.060(1) of the Kentucky Revised Statutes (KRS), which provides, in pertinent part:

No employer shall withhold from any employee any part of the wage agreed upon. This section shall not make it unlawful for an employer to

withhold or divert any portion of an employee's wage when the employer is authorized to do so by local, state, or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital and medical dues, or other deductions

Section 514(a) of ERISA states that the provisions of Title I of ERISA "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)." ¹ In determining the scope of section 514(a), as in any preemption analysis, "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (citations omitted). It is well settled that when Congress enacted section 514(a) of ERISA it intended, among other things:

'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.'

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-57 (1995) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

The Supreme Court has said that a state law "relates to" an ERISA benefit plan if it makes "reference to" or has a "connection with" employee benefit plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). The Court has identified at least three instances where a state law can be said to have a prohibited "connection with" employee benefit plans -- when it (1) mandates employee benefit structures or their administration; (2) binds employers or plan administrators to particular choices or precludes uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself; and (3) provides an alternative enforcement mechanism to ERISA. See *Travelers*, 514 U.S. at 658-60.

In the Department's view, the Kentucky state law at issue here has a prohibited connection with ERISA plans because it prohibits automatic enrollment arrangements

¹ Section 514(b)(4) saves from preemption under section 514(a) "generally applicable criminal laws of a State." Inasmuch as the Kentucky law at issue in your request is not a criminal law, section 514(b)(4) could not save the Kentucky law from the application of section 514(a). With regard to the application of section 514(b)(4), see Advisory Opinion Nos. 84-18A and 88-17A.

in such plans and regulates Sprint Nextel's decisions on how it provides employee medical coverage and plan funding.² Much like the state law at issue in *Egelhoff*, 532 U.S. 141, which regulated the payment of benefits, KRS section 337.060 implicates an area of core ERISA concern because it directly interferes with plan requirements respecting eligibility for participation and benefits and the funding mechanism for the plan. Section 402(b) of ERISA, in listing the "requisite features" of an employee benefit plan, provides in subparagraph (b)(1) that every employee benefit plan shall "provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title" Section 402(b)(4) further requires ERISA-covered employee benefit plans to "specify the basis on which payments are made to and from the plan," and Congress explained that to satisfy this requirement plans must, among other things, "specify what part (if any) of contributions are to come from employees" H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. 297 (1974). Department of Labor regulations issued under ERISA also provide protective rules that specifically address employer handling of payroll deduction contributions. *See* 29 C.F.R. § 2510.3-102 ("definition of 'plan assets'--participant contributions"). In light of the pervasiveness of wage withholding as a vehicle for funding employee benefit plans and the Kentucky state law's express inclusion of deductions to cover employee contributions for "insurance premiums, hospital and medical dues," it appears that employee benefit plans are among the entities at which the written consent requirements in KRS section 337.060 are specifically directed.

The Department has previously concluded in ERISA Opinion 94-27A that a written consent requirement in a New York wage withholding law was preempted to the extent it prohibited employers from allowing their employees to implement or change salary reduction contributions to ERISA-covered plans via telephone or voice response system. We concluded that New York Labor Law Section 193, by requiring written authorization for employee wage deductions of contributions or payments for "insurance premiums, pension or health and welfare benefits," and "similar payments for the benefit of the employee," clearly "relates to" benefits provided under employee benefit plans in that it is specifically designed to affect employee benefit plans and seeks to restrict the choices of such plans with regard to the administration of their funding policies. The Department opined that, to the extent that Section 193 is interpreted to limit, prohibit, or regulate the funding of employee benefit plans covered by Title I of ERISA, including wage deductions to employee benefit plans covered by Title I, it is preempted by section 514(a) of ERISA.

Consistent with the foregoing, it is the view of the Department that to the extent that section 337.060(1) of the Kentucky Revised Statutes is interpreted to limit, prohibit, or

² You represent that the State of Kentucky has not accepted that the Sprint Nextel's default withholding practice is "authorized" by federal law within the meaning of KRS section 337.060.

regulate deductions from wages for contribution to ERISA covered plans, it is preempted by section 514(a) of ERISA.³

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

Sincerely,

Lisa M. Alexander
Chief, Division of Coverage,
Reporting and Disclosure
Office of Regulations and Interpretations

³ No contrary inference should be drawn from the recent amendments to ERISA's preemption provisions made as part of the Pension Protection Act of 2006 (PPA). Under those amendments, ERISA section 514(e) would expressly preempt "any law of a State which would directly or indirectly prohibit or restrict the inclusion in any plan of an automatic contribution arrangement." The Staff Report of the Joint Committee on Taxation of the United States Congress, *Technical Explanation of H.R. 4* at 230 (Aug. 3, 2006) states: "The preemption of conflicting State regulations is effective on the date of enactment. No inference is intended as to the effect of conflicting State regulations prior to date of enactment." Further, while the staff report also explains that "[t]he State preemption rules under the bill are not limited to arrangements that meet the requirements of a qualified enrollment feature[.]" the Department views the PPA provisions as addressing only individual account pension plans.