ALAN WILSON
ATTORNEY GENERAL

March 25, 2024

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Dear Ms. Boone:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter raises concerns about how to reconcile the requirements of Section 19 of the Veterans Auto and Education Improvement Act of 2022 (VAEIA) with South Carolina law governing professional and occupational licensing.

> In addition to programs and benefits for service members, veterans, and their families, the VAEIA included provisions that require states to recognize professional licenses of military servicemembers and their spouses ("military licensees") when they relocate to another state pursuant to military orders. Specifically, section 19 of the Act provides:
>
> > (a) In general.--In any case in which a servicemember or the spouse of a servicemember has a covered license and such servicemember or spouse relocates his or her residency because of military orders for military service to a location that is not in the jurisdiction of the licensing authority that issued the covered license, such covered license shall be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency for the duration of such military orders if such servicemember or spouse—

(1) provides a copy of such military orders to the licensing authority in the jurisdiction in which the new residency is located;

(2) remains in good standing with--

(A) the licensing authority that issued the covered license; and

(B) every other licensing authority that has issued to the servicemember or the spouse of a servicemember a license valid at a similar scope of practice and in the discipline applied in the jurisdiction of such licensing authority;

(3) submits to the authority of the licensing authority in the new jurisdiction for the purposes of standards of practice, discipline, and fulfillment of any continuing education requirements.

(b) Interstate licensure compacts. --If a servicemember or spouse of a servicemember is licensed and able to operate in multiple jurisdictions through an interstate licensure compact, with respect to services provided in the jurisdiction of the interstate licensure compact by a licensee covered by such compact, the servicemember or spouse of a servicemember shall be subject to the requirements of the compact or the applicable provisions of law of the applicable State and not this section.

(c) Covered license defined. In this section, the term "covered license" means a professional license or certificate—

(1) that is in good standing with the licensing authority that issued such professional license or certificate;

(2) that the servicemember or spouse of a servicemember has actively used during the two years immediately preceding the relocation described in subsection (a); and

(3) that is not a license to practice law.

VAEIA, § 19, 136 Stat, at 6137-38 (codified at 50 U.S.C. § 4025a).

...

Recently, LLR has received inquiries from military licensees who are in the process of relocating to South Carolina and desire to work in a licensed profession or occupation after relocating. They, however, do not currently qualify, or do not intend to meet the qualifications, for a South Carolina license either under the requirements set forth in the various practice acts or under South Carolina Code sections 40-1-630 or 25-1-170. Nevertheless, they assert that section 19 of the VAEIA allows them to practice their profession in South Carolina (and in all states). Because they do not qualify for licensure under South Carolina law, LLR believes that it is prohibited from issuing them a South Carolina license. LLR also believes that it is prohibited from requiring criminal background checks, which are mandated by several of the practice acts. Section 19 of the VAEIA, however, still dictates that LLR consider the "covered license" valid at a similar scope of practice and in the discipline applied for, so long as the requirements of section 19 are satisfied.

In LLR's research regarding the potential for conflict between federal and state law, it has learned that states around the country are addressing the issue differently, depending in large part on the current status of the state's own law. The Council of State Governments (CSG) has raised a number of questions regarding the VAEIA, including whether it unlawfully curtails states' authority to regulate professional and occupational licensure, a function that has traditionally been left to the states. ...

Given the uncertainty surrounding the VAEIA and its impact on state licensing laws, in order to comply with federal law and South Carolina law, LLR proposes to provide military licensees who meet section 705 A 19's requirements with an Acknowledgement form reflecting that the military licensee's license is valid in the issuing jurisdiction. While under military orders, the military licensee would not be subject to penalties for unlicensed practice in South Carolina, but would be subject to discipline, standards of practice, and fulfillment of continuing education requirements required by state law, as mandated by section 705A 19. When a military licensee's orders expire, the licensee would be required to obtain a South Carolina license to continue working in South Carolina in their licensed profession or occupation.

With the foregoing in mind, LLR requests an opinion on whether the proposal, as outlined, would be permitted. If the proposal would not be permitted, LLR would ask for guidance on how to reconcile the requirements of section 19 of the VAEIA and South Carolina licensing law.

Law/Analysis

The resolution of a conflict between federal law and state law turns on application of the Supremacy Clause of the United States Constitution. See U.S. Const., art VI, cl. 2. This Office has previously opined on the circumstances where federal law is found to displace state law.

> Although the Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," see Gregory v. Ashcroft, 501 U.S. 452 (1991), decisions of the United States Supreme Court establish that where federal and state law conflict, state law must yield pursuant to the Supremacy Clause. This principle is captured in Article VI of the Constitution, which reads: "This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the ... Laws of any State to the Contrary notwithstanding." U.S. Const., art VI, cl. 2. Soon after the creation of our federal system, the Supreme Court explained that the Supremacy Clause was designed to ensure that states do not "retard, impede, burden, or in any manner control" the execution of federal law. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); see Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.) ("[A]cts of the State Legislatures ... [[that] interfere with, or are contrary to the laws of Congress [are to be invalidated because] [i]n every such case, the act of Congress ... is supreme, and the law of State, though enacted in the exercise of powers not controverted, must yield to it"); see also Printz v. United States, 521 U.S. 898, 913 (1997) (states are duty-bound "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law[;] ... all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid"); Maryland v. Louisiana, 451 U.S. 725, 746 (1981) [under the Supremacy Clause, the federal law displaces the state law, and the state law is rendered entirely void and "without effect"]; City of Cayce v. Norfolk Southern Railway Co., 391 S.C. 395, 706 S.E.2d 6, 8 (2011) [same].

The Supremacy Clause displaces state law so long as state law affects the operation of federal law, notwithstanding the fact that the state legislature did not enact such law expressly to frustrate the federal objective. See Perez v. Campbell, 402 U.S. 637, 651-52 (1971).

> Preemption occurs when Congress ... expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible ... or where the state law stands

> as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service v. FCC, 476 U.S. 355, 368-69 (1986).

Op. S.C. Att'y Gen., 2011 WL 6959373, at 2-3 (December 9, 2011). The South Carolina Supreme Court explained, however, that the Supremacy Clause does not act to supersede a State's power without clear evidence of Congressional intent to do so.

> This Court has recognized that "[f]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement in the language of the legislation of Congress' intent to alter the usual constitutional balance of state and federal powers." Edwards v. State, 383 S.C. 82, 92, 678 S.E.2d 412, 417 (2009) (quoting Nixon v. Mo. Mun. League, 541 U.S. 125, 140, 124 S.Ct. 1555, 158 L.Ed.2d 291 (2004) (citing Gregory v. Ashcroft, 501 U.S. 452, 460–61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991))). "This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory, 501 U.S. at 461, 111 S.Ct. 2395. "Consideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Accordingly, "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." Priester, 401 S.C. at 43, 736 S.E.2d at 252 (quoting Cipollone, 505 U.S. at 516, 112 S.Ct. 2608). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." Id. (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)).

Adams v. McMaster, 432 S.C. 225, 242–43, 851 S.E.2d 703, 712 (2020). We must then determine whether an actual conflict exists between the terms of section 19 of the VAEIA, 50 U.S.C. § 4025a, and the state statutes identified in your letter, S.C. Code §§ 40-1-630 and 25-1-170, and, if so, whether the federal statute manifests Congressional intent to displace state authority to regulate licensing.

Section 40-1-630 authorizes boards and commissions to issue temporary licenses for spouses of active-duty members of the armed services stationed within the state. Subsection(A)

presents the first conflict with 50 U.S.C. § 4025a where it states, "Nothing in this section should be construed as requiring a board or commission to grant licensure to the spouse of an active duty member of the United States Armed Forces absent evidence that all state law requirements for licensure have been met." S.C. Code § 40-1-630(A) (Supp. 2023) (emphasis added). The emphasized language demonstrates the Legislature intended to allow a licensing board to require that an applicant demonstrate compliance with "state law requirements" before issuing a temporary license. Id. Subsection (B)(1)(d) then requires an applicant to submit "a fingerprint-based background check conducted by the State Law Enforcement Division to determine if the applicant has a criminal history in this State and a fingerprint-based background check conducted by the Federal Bureau of Investigation to determine if the person has other criminal history." S.C. Code § 40-1-630(B)(1)(d)(i). However, 50 U.S.C. § 4025a(a) states "[i]n any case ... such covered license shall be considered valid at a similar scope of practice," and there is no reference to "state law requirements" in the state to which the servicemember is relocated. Therefore, as your letter notes, the requirement for fingerprint-based background checks in S.C. Code § 40-1-630(B)(1)(d)(i) likely would not be permitted as a condition for issuing a temporary license thereunder. Finally, subsection 40-1-630(C) only authorizes temporary licensure for "one year from the date of issue" and does not permit its renewal. In contrast, 50 U.S.C. § 4025a(a) requires recognition "for the duration" of the servicemember's relocation in the state for military service.

Section 25-1-170 also establishes a process for a spouse of an active-duty member of the United States Armed Forces who is relocated to and stationed in this State to be "approved to continue work in that profession or occupation ... for such time as normally allotted with receipt of a license or certificate from the appropriate board." S.C. Code § 25-1-170(C) (Supp. 2023). Subsection (B) similarly requires an applicant to "submit to any required criminal or other background check by an authorized board." Further, the applicant must not "not been disciplined by an authorized entity or [be] under investigation ... in relation to a professional license or certificate." Id. Section (G) excludes both "the practice of law or the regulation of attorneys" and "educators" from those professional licenses that may be approved according to the terms of this statute. 50 U.S.C. § 4025a(c)(3) only excludes "license[s] to practice law" and therefore would require recognition of licenses for "educators."

A court may well find Congressional intent to displace state law in 50 U.S.C. § 4025a(b). When reciprocity is established, 50 U.S.C. § 4025a(b) recognizes an "interstate licensure compact," and requires the servicemember or spouse to follow the compact's requirements, rather than section 19 of the VAEIA. Our state licensing statutes do, in fact, allow licensing boards to enter into such interstate licensure compacts. See S.C. Code § 25-1-170(F) ("A board, commission, or agency in this State may establish reciprocity with other states for military spouse professional licensing and certification."). However, where such compacts are not established, the plain language of 50 U.S.C. § 4025a(a) demonstrates legislative intent to displace state licensing requirements in the state to which the servicemember and spouse relocate. See 50 U.S.C. §

4025a(a) ("[S]uch covered license shall be considered valid at a similar scope of practice and in the discipline applied for in the jurisdiction of such new residency...") (emphasis added).

This Office is not aware of any court that has explicitly analyzed whether section 19 of the VAEIA displaces state licensing law. We have located one case, Portee v. Morath, No. 1:23-CV-551-RP, 2023 WL 8040763 (W.D. Tex. Nov. 20, 2023), wherein the District Court permanently enjoined enforcement of a state statute whose terms conflicted with 50 U.S.C. § 4025a. The Commissioner of Education and the Texas Education Agency denied an application filed by Portee, a spouse of an active-duty member who relocated to the state in response to military orders, which sought recognition of her out-of-state school counseling license. Texas' statute required "two academic years of full-time, wage-earning experience in a public or private school in the licensed position" to issue a Texas education certification based on an out-of-state license. Id. at *2. While Portee had been employed in the licensed position, her application "failed to verify" her experience satisfied the two-academic-year requirement. Id. The Court did not directly address conflict preemption because Defendants argued that Texas' two-academic-year work requirement was consistent with section 19 of the VAEIA.

> [B]ecause their proffered interpretation of Section 4025a(c)(2) is compatible with Texas's own two-year work requirement for out-of-state licensees, Defendants also argue there is no conflict preemption between the SCRA and Texas law. (*Id.* at 9) (arguing that "Texas law clearly requires an individual with a non-Texas license to verify two years of experience to receive an exemption from an assessment exam, just as the SCRA requires two years of experience for a license to be deemed 'covered'").

Id. The Court ruled that the Defendant's interpretation of section 4025a was incorrect, and that denying Portee's application because it did not meet Texas' requirement of two-academic-years of employment was a violation thereof. Id. at *6. Again, although the Court did not directly analyze the issue of conflict preemption, permanently enjoining enforcement of the inconsistent terms in the state statue, with respect to Portee's application, impliedly supports a finding of conflict preemption. Id. at *8.

Conclusion

As discussed more fully above, the conflicting directives in the federal and state statutes will inevitably lead to a violation of one or the other. The proposal in your letter appears to comply with section 19 of the VAEIA as described, but "this Office cannot render official opinions on matters of federal law..." Op. S.C. Att'y Gen., 1974 WL 27804 (June 5, 1974). The U.S. Department of Justice, Civil Rights Division has been delegated enforcement authority for the Servicemembers Civil Relief Act, including 50 U.S.C. § 4025a, and can advise on compliance issues. However, a proposal which complies with 50 U.S.C. § 4025a will likely conflict with

provisions in S.C. Code §§ 40-1-630 and 25-1-170 in some circumstances, such as when a criminal background check is required. Legislation would be necessary to remove those conflicts. Of course, our state statutes are presumed valid and remain in force until a court rules otherwise.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

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