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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 7, 2002

The Honorable André Bauer
Senator, District No. 18
Post Office Box 142
Columbia, South Carolina 29202

Re: Your Letter of October 28, 2002
S.C. Code Ann. §42-15-95

Dear Senator Bauer:

In your above-referenced letter, you indicate that, on behalf of a constituent, you are seeking an opinion from this Office "... as to whether the State or the Federal regulations regarding charges for medical records takes precedence in South Carolina." With your letter, you include materials provided by your constituent related to the request. The materials indicate that the constituent is concerned with the effect of regulations promulgated by the U.S. Department of Health and Human Services on the application of S.C. Code Ann. §42-15-95. Your constituent's question turns on whether Section 42-15-95 is preempted by the federal regulations.

LAW / ANALYSIS

Preemption Generally

Federal preemption of state law is rooted in the second clause of Article VI of the United States Constitution (the Supremacy Clause). The Supremacy Clause provides, in pertinent part, that "... the Laws of the United States ... shall be the supreme Law of the Land; and the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In determining whether federal laws preempt state laws, congressional intent must be examined. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982). Courts have held that Congress' intent to preempt is shown when it is physically impossible to comply with both federal and state regulation, the nature of the subject matter requires federal supremacy and uniformity or if the Congress has clearly intended to displace state legislation. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). Federal regulations preempt state law to the same extent as federal statutes. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. at 153.

South Carolina Law

S.C. Code Ann. §42-15-95 provides, in pertinent part, that

> All existing information compiled by a health care facility, as defined in Section 44-7-130, or a health care provider licensed pursuant to Title 40 pertaining directly to a workers' compensation claim must be provided to the insurance carrier, the employer, the employee, their attorneys, or the South Carolina Workers' Compensation Commission, within fourteen days after receipt of written request. A health care facility and a health care provider may charge a fee for the search and duplication of a medical record, but the fee may not exceed sixty-five cents per page for the first thirty pages and fifty cents per page for all other pages, and a clerical fee for searching and handling not to exceed fifteen dollars per request plus actual postage and applicable sales tax. The facility or provider may charge a patient or the patient's representative no more than the actual cost of reproduction of an X- ray. Actual cost means the cost of materials and supplies used to duplicate the X-ray and the labor and overhead costs associated with the duplication.

Section 42-15-95 provides that a fee may be charged for the production of health care information based on a per page copying cost, the cost of searching for and handling the information (not to exceed $15.00 per request), the cost of postage and any sales tax involved.

Federal Regulations

The federal regulations relevant to the question at hand have been promulgated by the Department of Health and Human Services ["HHS"]. The specific regulation at issue is found at 45 C.F.R. §164.524 and is entitled "Access of individuals to protected health information." Generally, Section 164.524 provides a right of access to certain health information and provides that, with some exceptions, "... an individual has a right of access to inspect and obtain a copy of protected health information about the individual ... ." Section 164.524(c)(4) relates to fees that may be charged to an individual for obtaining copies of the information and provides:

> ... If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:
> (i) Copying, including the cost of supplies for and labor of copying, the protected health information requested by the individual;
> (ii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and
> (iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(ii) of this section

Section 160.203 relates to "Preemption of State Law" and, with certain exceptions, provides that "[a] standard, requirement, or implementation specification adopted under this subchapter (subchapter includes §164.524) that is contrary to a provision of State law preempts the provision of State law. Section 160.202 sets forth a definition of "contrary" as used in Section 160.203 and states that "Contrary,

when used to compare a provision of State law to a standard, requirement, or implementation specification adopted under this subchapter, means: (1) A covered entity would find it impossible to comply with both the State and federal requirements; or (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub.L. 104-191, as applicable."

Effect of HHS Regulations on State Law

It is apparent that HHS intended to preempt state law in the field of access to health care information and the cost of providing health care information. It is further clear, however, that HHS did not intend to preempt the field entirely. Rather, only those state laws that are contrary to HHS regulation or stand as an obstacle to the goals of the federal laws which necessitated the regulations are preempted.

As mentioned above, Section 42-15-95 allows for a fee to be charged for copying costs, searching and handling costs, the cost of postage and any applicable sales tax. It appears that the fee allowed for in Section 42-15-95 could be considered a "cost-based fee" as provided for in 45 CFR §164.524(c)(4). That is, a fee for per page copying costs and searching and handling costs do not appear to be clearly in contravention of the allowance in Section 164.524(c)(4)(i) for a fee "... including the cost of supplies for and labor of copying ... ." Further, Section 164.524(c)(4)(ii) specifically allows for a fee based on the cost postage. This conclusion, however, is not free from doubt. The materials provided to this Office with your request include a letter concerning Section 164.524(c)(4) from general counsel for a member corporation of the Association of Health Information Outsourcing Services. The letter concludes that Section 164.524(c)(4) prohibits a state law which allows a fee to be charged for "handling" a request for health information.

CONCLUSION

HHS regulations preempt state laws that are contrary to the regulations or stand as an obstacle to the goals of the federal laws which necessitated the regulations. It does not necessarily appear that S.C. Code Ann. §42-15-95 is contrary to HHS regulations or that it stands as an obstacle to federal laws in the field of access to health information. Therefore, S.C. Code Ann. §42-15-95 may not be preempted by 45 CFR §164.524(c)(4). This conclusion, however, is not free from doubt.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

David K. Avant
Assistant Attorney General

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