Honorable Paul Fuhs
Commissioner
Department of Commerce
and Economic Development

December 6, 1993

663-93-0492

465-2398

Are employees of federally funded Native health corporations exempt from state occupational licensing statutes?

Sarah J. Felix
Assistant Attorney General
Commercial Section - Juneau

In your May 24, 1993, memorandum you asked for our advice on whether dental assistants employed by federally funded, private, nonprofit Native health corporations are exempt from state occupational licensing laws. The short answer to this question is no.[1]

DISCUSSION

This office addressed a similar issue in a March 1992 opinion, copy attached. In that opinion, we considered whether pharmacists employed by Native regional corporations were subject to state licensure laws. As noted in the opinion, before the passage of the Indian Self-Determination and Education Assistance Act (the "Act"), employees in Native health facilities were employed directly by the federal government. After passage of the Act, most employees became direct employees of the Native corporations. We concluded that Alaska is not prohibited from applying state occupational licensure laws to employees of Native regional corporations. These employees are not contractors with or employees of the federal government and, therefore, are not exempt from state licensure statutes. 1992 Inf. Op. Att'y Gen. (Mar. 31; 663-91-0104). The reasoning in that memorandum applies to your current question.[2]

---

[1] You indicated that these employees are currently acting as "expanded-function dental assistants," sealing teeth and placing amalgam fillings. Under state law, dental assistants may not seal teeth and may not place amalgam fillings. See 1988 Inf. Op. Att'y Gen. (July 7; 661-88-0298), copy attached. Therefore, dental assistants who are not exempt from state law may not perform these functions. Id.

[2] You indicated in your May 24, memorandum that some of the Native corporation employees are federal employees and some are not. Because it is clear that federal employees are not subject to state regulation, this memorandum is limited to consideration

You asked us to evaluate the Native health corporation's claim of federal supremacy over state statutes. We first looked at the Act itself and three regulations promulgated as a result of it. At section 450a of the Act, Congress declared that the policy underlying the Act was to "permit an orderly transfer from federal domination of programs for . . . participation by the Indian people in . . . those programs and services." Section 450i and C.F.R. • 275.3 permit federal employees to be loaned to Native organizations on or before December 31, 1985, in such a way that they can retain their benefits as federal employees. This implies that without these specific sections, such employees would cease to be federal employees.[3]

We also analyzed whether the Act is so comprehensive as to preempt state regulation under the federal supremacy clause. A state's powers are not presumed to be superseded unless that is the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Congressional intent is clearest when the federal statute involved explicitly prohibits state regulation in the same area. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). When the federal statute contains no such prohibition, Congressional intent to preempt may be implied by three factors: (1) the intent of Congress as revealed by the statute itself and its legislative history; (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and implemented by the federal agency; and (3) the nature of the subject matter regulated.

Even if Congress did not intend to preempt all state regulation in a given area, a state law is invalid if it actually conflicts with federal law as determined by two factors: (1) where compliance with both federal and state laws is a physical impossibility, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or (2) where the state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Courts are not to seek out conflicts between state and

---

of dental assistants employed by Native corporations who are not federal employees.

[3] As explained in the March 1992 Opinion, 25 U.S.C. • 450f(a) provides that employees of Native corporations are deemed federal employees for limited purposes. These limited purposes do not include exemption from enforcement of state licensure laws. 1992 Inf. Op. Att'y Gen. (Mar. 31; 663-91-0104).

federal regulation where none clearly exists, Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960).

In the above Act, there was no specific preemption by Congress. Likewise, there appears to be no intent by Congress for exemption from state regulation. Preemption cannot be implied, because neither the Act nor the implementing regulations appear so comprehensive as to exempt Native organizations from state regulation. The Act mainly covers the ways contracts will be made with Native organizations, and there are very few sections concerning employee status. The state has a legitimate public health interest in insuring that all dentists, dental hygienists, and dental assistants employed by such Native organizations are properly trained and do not cause harm to state residents. It is not physically impossible for employees of Native organizations to comply with both state and federal regulations.

It is a closer question whether state regulation stands as an obstacle to Congress's objectives in passing this Act. Division staff anticipate that regional Native health corporations may claim their productivity and efficiency will be diminished by state regulation. Staff expects that the corporations will make this claim because state law prohibits dental assistants from performing expanded functions, such as sealing teeth and placing amalgam fillings.

In response, we must consider that dental assistants are currently unregulated; they are not required to have any specific training, nor are they required to be licensed.[4] There is a risk to the public health and safety if unregulated dental assistants are allowed to place amalgam fillings when licensed and trained dental hygienists are not. Similarly, there is a risk if dental assistants are allowed to seal teeth, where only hygienists, and not assistants, are specifically authorized to perform this expanded function. Congress did not intend to create a risk to the public health and safety. Therefore, state

[4] Although the legislature has given the dental board the authority, in AS 08.36.070(a)(11), to issue permits to dental assistants for specific procedures that require specific education, this authority is limited by the statutes governing dental hygienists. AS 08.36.070(a)(11) does not authorize the board to issue permits to dental assistants to perform expanded functions that hygienists are authorized to do by statute, nor does it authorize permitting assistants to engage in other "expanded functions" beyond the scope of practice of hygienists. Additionally, the board has not adopted regulations providing for the issuance of permits to assistants.

regulation of dental practices prohibiting assistants from performing extended functions does not stand as an obstacle to Congress's objectives in passing the Act.

In summary, it is our opinion that the Act is not so comprehensive that it preempts state regulation of this area under the standards for federal preemption.

We trust this memorandum answers your questions.

SF/JMW/prm

Attachments

cc: Karl Luck, Director
Division of Occupational Licensing, DCED