LETTER OPINION
93-L-322

November 9, 1993

Mr. Robert Harms
Governor's Counsel
Office of the Governor
State Capitol
600 E Boulevard
Bismarck, ND 58505-0001

Dear Mr. Harms:

Thank you for your letter regarding the request of Federal Beef Processors, Inc. ("Federal Beef"), for an opinion as to whether it will be subject to the North Dakota Workers Compensation Act if it has a self-insurance plan under the Employer Retirement Income Security Act of 1974 ("ERISA").

It is Federal Beef's position that the North Dakota Workers Compensation Act is preempted by ERISA. For this proposition, Federal Beef relies on the recent United States Supreme Court case of District of Columbia v. Greater Washington Board of Trade, 113 S. Ct. 580 (1992). The Court in Greater Washington held that one section of the District's Equity Amendment Act, requiring all employers who provided health insurance coverage for their employees to also provide equivalent health insurance coverage for workers eligible for workers' compensation benefits, was preempted by ERISA. The Court based its holding on the fact that the Equity Amendment Act specifically refers to the welfare benefit plans regulated by ERISA. 113 S. Ct. at 583.

The holding in Greater Washington is narrow and preempted only a minor provision incidental to the District's Workers Compensation Act. It did not purport to broadly preempt states' workers compensation laws.

Additionally, the Greater Washington case is factually distinguishable from Federal Beef's situation. North Dakota's Workers Compensation Act provides for an exclusive state fund while the District of Columbia Act does not. Neither private insurance nor self insurance is allowed in North Dakota. In the District of Columbia, the challenged Equity Amendment Act is merely incidental to the administration of the Workers Compensation Act whereas, the exclusivity provisions of the North Dakota WorkersCompensation Act are fundamental to all aspects of the Workers Compensation system. The entire Act is based on the premise that the State Fund is the exclusive provider of benefits and recipient of premium. This reflects an important legislative policy decision that an exclusive State Fund provides the most beneficial procedure for the administration of workers compensation.

Several other federal cases have dealt with similar preemption issues and have rejected arguments analogous to those presented by Federal Beef. In Foust v. City Ins. Co., 704 F. Supp. 752, (W.D. Tex. 1989) and Gibbs v. Service Lloyds Ins. Co., 711 F. Supp. 874 (E.D. Tex. 1989), plaintiffs sued their insurance companies for allegedly mishandling their workers compensation claims. The cases were originally brought in state court but were removed to federal court based on ERISA preemption of state law. The federal courts remanded the cases to state court, determining that the employee benefit plans at issue were maintained solely for the purpose of complying with Texas' workers compensation law and therefore were specifically exempt from ERISA under 29 U.S.C. ? 1003(b)(3). The Foust court specifically rejected the defendant's contention that its plan was not established solely to comply with the workers compensation law because it provided a "smorgasbord" or benefits in addition to its workers compensation coverage. Federal Beef's position is apparently the same as that of the defendant in Foust. Also of interest is the case of Olivarez v. Utica Mutual Ins. Co., 710 F. Supp. 642 (N.D. Tex. 1989), in which the court determined that the case fell squarely within 29

U.S.C. ? 1003(b)(3), an exception to ERISA preemption, because all of the plaintiff's claims related to a workers compensation policy.

It is the opinion of this office that ERISA does not preempt the North Dakota Workers Compensation Act and that Federal Beef Processors, Inc. will not be exempted from payment of workers compensation premiums in North Dakota by establishing a multi-state self insurance plan under ERISA.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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