



U.S. Department  
of Transportation

Office of the Secretary  
of Transportation

General Counsel

1200 New Jersey Ave., S.E.  
Washington, DC 20590

JUL 10 2017

The Honorable Brian Schatz  
United States Senate  
722 Hart Senate Office Building  
Washington, D.C. 20510

Re: Response to Letter on Potential Hawaii Legislation (Air Ambulances)

Dear Senator Schatz:

Thank you for your letter regarding the State of Hawaii's consideration of legislation impacting air ambulances. The Acting General Counsel has requested that I respond to your inquiry.

Specifically, you ask whether 49 U.S.C. Section 41713(b)(1) of the Airline Deregulation Act (ADA) would preempt the State of Hawaii from (i) prohibiting air ambulance providers from "balance billing" their patients; (ii) prohibiting health care providers from balance billing their patients for all health care services; or (iii) authorizing a State agency to serve as a resolution body for balance billing disputes between air ambulance providers and their patients. As your letter explains, "[b]alance billing occurs when the patient is charged the difference between the provider's charge and what the insurance carrier is allowed or willing to pay."

At the outset, we note the limits of any guidance we can provide on this issue, given the fact-specific nature of each ADA preemption question. Whether the ADA would preempt any particular State law or regulation would be dependent on the precise language of the law or regulation at issue. Nonetheless, we offer below some general information on this topic.

Section 41713(b)(1) provides:

A State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

The primary question is whether State regulation of balance billing "relates" to the price of an air carrier. The Federal courts that have addressed this question have answered in the affirmative, concluding that the State restrictions on balance-billing at issue were preempted. *See Bailey v Rocky Mountain Holdings*, 136 F. Supp. 3d 1376, 1382 (S.D. Fla. 2015) (lawsuit alleging that significant balance bill violated Florida consumer protection laws, "if permitted to proceed,

would naturally affect the provision of [air ambulance] services in addition to the prices of and payment for those services”);<sup>1</sup> *Schneberger v. Air Evac EMS*, No. 16-843, 2017 WL 1026012, at \*4-5 (W.D. Okla. Mar. 15, 2017) (ADA preempted lawsuit challenging significant balance bill under theories of breach of implied contract and unjust enrichment);<sup>2</sup> *cf. Valley Med. Flight v. Dwelle*, 171 F. Supp. 3d 930, 943 (D.N.D. 2016) (the “only fair characterization” of a regulation prohibiting balance billing for amounts not covered by workers compensation is that it “directly impact[s]” an air ambulance provider’s “prices and services under the ADA”).<sup>3</sup>

One State court and two State tribunals have found State laws and requirements regulating billing, including balance billing by air ambulances, to be “reverse-preempted” by the McCarran-Ferguson Act (MFA), 15 U.S.C. Section 1011 *et seq.*, which leaves to the States the regulation of the “business of insurance.” See *In re: Reimbursement of Air Ambulance Services Provided by Phi Air Medical*, No. 454-15-0681.M4, Tex. Off. Admin. Hear. (September 8, 2015), *affirmed in part* by *Texas Mutual Insurance Co. v. Phi Air Medical*, No. D-1-GN-15-004940, Tex. 53rd Jud. Dist. (Dec. 15, 2016);<sup>4</sup> *Oscar Valdovinos v. Castelan Construction*, Neb. Workers’ Comp. Ct, No. 215-0911 (Feb. 17, 2016). Several Federal courts have also addressed that argument, but held that the MFA does not reverse-preempt the ADA. See, e.g., *Bailey*, 136 F. Supp. 3d at 1381 (MFA does not counteract “express preemption” found in another law); *Dwelle*, 171 F. Supp. 3d at 947 (State workers compensation system, which included a prohibition on balance billing, did not regulate the “business of insurance” within the meaning of the MFA).

As you may know, late last year the Government Accountability Office (GAO) began a review of the “costs and business practices of air ambulance providers,” and related matters. (GAO Code No. 101026.) This is a complex area, involving the costs of operation and how air ambulances seek reimbursement from insurance companies, Medicare and Medicaid, patients, hospitals, and others. We expect that the results of the GAO study will be the basis for future discussions on the economic and legal issues impacting the industry and the public.

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<sup>1</sup> This case is currently on appeal before the U.S. Court of Appeals for the Eleventh Circuit, at Docket No. 15-14415.

<sup>2</sup> This case is currently on appeal before the U.S. Court of Appeals for the Tenth Circuit, at Docket No. 17-6154.

<sup>3</sup> As noted above, one of your questions is whether the ADA prevents a State from enacting a law prohibiting *all health care providers* from balance billing their patients. The ADA only impacts a State’s ability to “enact or enforce” laws related to the price, route, or service of an “air carrier.” Therefore, the ADA would not prohibit a State from enacting such a law, although it could not be “enforced” against an “air carrier” specifically, to the extent it relates to the price, route, or service of the carrier. See *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 736 (E.D.N.C. 2008).

<sup>4</sup> This case is currently on appeal before the Texas Third Court of Appeals, at Docket No. 03-17-00081. There are other pending lawsuits concerning the legality of State regulation of balance billing by air ambulances. See, e.g., *Bartley et al. v. Air Methods Corp* (D. Col., Docket No. 17-485); *Air Evac EMS v. Texas* (W.D. Tex., Docket No. 16-60).

With respect to your question on whether a State agency may serve as a “resolution body” for balance billing disputes, we would need more information about the specific proposal before providing guidance on this topic.

Thank you for your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Ronald Jackson". The signature is written in a cursive, flowing style.

Ronald Jackson  
Assistant General Counsel for Operations