
FEHB Program Carrier Letter

U.S. Office of Personnel Management

All FEHB Carriers

Healthcare and Insurance

Letter No. 2016-13

Date: October 26, 2016

Fee-for-Service

Experience-rated HMO

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SUBJECT: State Tax Preemption

OPM has reviewed the Federal Employees Health Benefits Act preemption provision at 5 U.S.C. § 8909(f) since many states are now assessing taxes on providers that bill FEHB carriers.

Title 5 USC § 8909(f)(1) provides: “No tax, fee, or other monetary payment may be imposed, directly or indirectly, on a carrier or an underwriting or plan administration subcontractor of an approved health benefits plan by any State, the District of Columbia, or the Commonwealth of Puerto Rico, or any political subdivision or other governmental authority thereof, with respect to any payment made by the Fund.”

In Carrier Letter 2004-12 OPM advised carriers that 8909(f) does not preempt the West Virginia Health Care Provider Tax Act of 1993 pursuant to a ruling of the United States Court of Appeals for the Fourth Circuit, *United States v. West Virginia*, 339 F.3d 212 (4th Cir. 2003). The West Virginia Health Care Provider Tax Act of 1993, W. Va. Code § 11-27 et seq. imposed a tax of 1.75% to 5.5% of the gross receipts of various categories of healthcare providers in the state of West Virginia, such as hospitals. Since the issuance of that letter, many more states have begun assessing taxes on health care providers. For example, the state of Minnesota imposes a 1.56% surcharge on hospitals’ net patient revenues. Minn. Stat. § 256.9657 (2015). Recently, the Minnesota Supreme Court found that section 8909(f)(1) did not preempt the Minnesota surcharge on hospitals.

In light of these decisions and the proliferation of these laws, OPM is directing FEHB carriers to pay the cost of state taxes on providers as part of the providers’ billed charges for FEHB enrollees. This determination does not change OPM’s position that any taxes imposed directly or indirectly on FEHB carriers are preempted by section 8909(f)(1).

If you have any questions regarding this letter please contact Michael Kaszynski, Senior Policy Analyst at Michael.kaszynski@opm.gov. Thank you.

Sincerely,

John O’Brien

Director

Healthcare and Insurance