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October 3, 2017

OPINION NO. 2017-08

PUBLIC EMPLOYEES' BENEFITS PROGRAM (PEBP); STATUTORY INTERPRETATION; REGULATORY INTERPRETATION: Where a PEBP rule set forth in statute, regulation or plan documents has a plain meaning, the PEBP Executive Officer must follow that plain meaning, and except where an exception is permitted in the rule or in a related statute, regulation or plan document, the Executive Officer may not generally grant a hardship exception to that rule.

Mr. Damon Haycock
Executive Officer
State of Nevada
Public Employees' Benefits Program
901 S. Stewart Street, Suite 1001
Carson City, Nevada 89701

Dear Mr. Haycock:

You have requested an opinion from the Office of the Attorney General concerning your authority, as the Executive Officer of the Public Employees' Benefits Program (PEBP), to grant hardship exceptions to the rules governing PEBP's program (program rules). As an example of a possible hardship resulting from the application of a program rule, you cite to a section of Plan Year 2018 of PEBP's master plan document, entitled "Eligibility and Enrollment." According to that section, in order to establish PEBP coverage following the loss of coverage under an unrelated plan of insurance, the dependent of a PEBP member must wait until the first day of the

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month following the month in which coverage under the unrelated plan of insurance terminates. Without eliminating that rule entirely, you would like the option of permitting immediate enrollment of the dependent where such a break in coverage would cause a hardship.

QUESTION PRESENTED

Does the PEBP Executive Officer have authority to grant a hardship exception to a program rule when the plain language of the rule itself, as stated in a statute, regulation or plan document, does not provide for an exception?

SUMMARY CONCLUSION TO QUESTION

Where a PEBP rule set forth in statute, regulation or plan documents has a plain meaning, the PEBP Executive Officer must follow that plain meaning, and except where an exception is permitted in the rule or in a related statute, regulation or plan document, the Executive Officer may not generally grant a hardship exception to that rule.

ANALYSIS

If a program rule is set forth in statute, the rules of statutory construction apply. If the statute is clear, then the plain meaning rule ordinarily applies and the plain meaning must generally be given effect. *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857-8, 265 P.3d 688, 690 (2011).¹

A rare exception is that a court may not give a literal reading to an unambiguous statute when that reading would produce an absurd result. *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003); *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. ___, 359 P.3d 1096, 1102 n. 7 (Adv. Op. 21, April 30, 2015).

¹ If the rule is ambiguous, because either "it is capable of being understood in two or more senses by reasonably informed persons or it does not otherwise speak to the issue before the court," *id.*, then other means are used to determine its meaning, such as legislative intent, *id.* Additionally, where an agency has interpreted an ambiguous statute by adopting a regulation, that interpretation will be given great deference by the courts. *Bing Constr. Co. v. Nevada Dep't of Taxation*, 109 Nev. 275, 279, 849 P.2d 302, 304-5 (1993).

Where the program rule is set forth in a regulation, the same rules of interpretation apply as with statutes. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003) (regulations given plain meaning); likewise, an agency's interpretation of its own regulation, if within the regulation's language, will be given deference. *Wynn Las Vegas, L.L.C. v. Baldonado*, 129 Nev. ___, 311 P.3d 1179, 1182 (Nev. Adv. Op. 78, October 31, 2013).

The PEBP Board has adopted plan documents setting forth coverage rules.² While interpretation of PEBP's plan documents has not been the subject of litigation,³ the rationale for the plain meaning rule applies equally to the plan documents. The plain meaning rule ensures that judges and other public officials apply unambiguous language in a consistent and predictable fashion. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (Thomson/West 2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

² The PEBP Board's general grant of authority lies in NRS 287.043, which provides in pertinent part that the Board shall:

(a) Establish and carry out a program to be known as the Public Employees' Benefits Program which:

(1) Must include a program relating to group life, accident or health insurance, or any combination of these; and

(2) May include:

(I) A plan that offers flexibility in benefits, and for which the rates must be based only on the experience of the participants in the plan and not in combination with the experience of participants in any other plan offered under the Program; or

(II) A program to reduce taxable compensation or other forms of compensation other than deferred compensation,
➔ for the benefit of all state officers and employees and other persons who participate in the Program.

³ The Board's authority to determine benefits without conducting rulemaking under NRS Chapter 233B was recognized in *Morgan v. Committee on Benefits*, 111 Nev. 597, 894 P.2d 378 (1995).

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As with statutes and regulations, PEBP's plan documents must be applied in a consistent and predictable fashion in order to effectuate reasonably uniform outcomes for PEBP members. The plan documents define the benefits, exclusions, enrollment conditions, and eligibility and interpretive rules of the programs of insurance provided by PEBP. For example, the 2018 Master Plan Document for PEBP's Consumer Driven Health Plan (2018 CDHP Plan), while setting forth coverages and exclusions, also gives interpretive authority over said rules of coverage and exclusion to PEBP's Plan Administrator (i.e., the Executive Officer):⁴

In carrying out their respective responsibilities under the Plans, the Plan Administrator and its designees have discretionary authority to interpret the terms of the Plans and to determine eligibility and entitlement to Plan Benefits in accordance with the terms of the Plans. Any interpretation or determination under such discretionary authority will be given full force and effect, unless it can be shown that the interpretation or determination was arbitrary and capricious. Such interpretations or determinations regarding Benefits should be guided by evidence based practice of medicine and Medical Necessity.

2018 CDHP Plan, p. 123.

By conferring upon the Executive Officer the discretionary authority to interpret plan terms, and specifying that such authority is reviewed on an arbitrary and capricious standard, the PEBP Board is consciously following case law developed by Federal courts in the context of the Employee Retirement Income Security Act of

⁴ The Executive Officer is the Plan Administrator. NRS 287.0424(1) permits the Board to delegate its authority to the Executive Officer. While the 2018 CDHP Plan refers to "Plan Administrator" as PEBP with the pronoun "it" and "its," the PEBP Board's Duties, Policies and Procedures effect a delegation of the plan administrator function to the Executive Officer, providing that "the Executive Officer is responsible for implementing the plan of benefits, decisions, direction, internal controls and policies approved by the Board." Duties, Policies and Procedures, April 2016, p. 5.

1974 (ERISA) (Pub. L. No. 93-406, 88 Stat. 829, enacted September 2, 1974, codified in part at 29 U.S.C. Ch. 18); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 964 (9th Cir. 2006); *Kracht v. Aalfs Associates H.C.P.*, 905 F. Supp. 604, 612 (N.D. Ia. 1995). Under case law developed under ERISA, even where the terms of a plan give a heightened level of discretion to the plan administrator to interpret its terms, the plain meaning of the plan governs, and courts have repeatedly found it to be an abuse of discretion to deviate from that plain meaning. *Canseco v. Construction Laborers Pension Trust for Southern California*, 93 F.3d 600, 606 (1996) (“[T]rustees abuse their discretion if they . . . construe provisions of [a] plan in a way that clearly conflicts with the plain language of the plan.”). Only if the rule itself authorizes exceptions may they be allowed.⁵

⁵ A program rule might set forth conditions, principles or criteria to govern the granting of exceptions. See, e.g., NAC 607.040:

Notwithstanding any provision of this chapter to the contrary, in special cases, upon a showing of good cause or the (Labor) Commissioner's own motion, the Commissioner may permit deviation from the provisions of this chapter with regard to a matter if:

1. The Commissioner determines that:

(a) Compliance with those provisions is impractical or unnecessary; or

(b) Deviation from those provisions would not adversely affect the substantial interests of the parties to the matter; and

2. Except when the requested deviation from those provisions is based upon the motion of the Commissioner, the person requesting the deviation provides to the Commissioner a specific reference to each provision of this chapter from which he is requesting deviation.

The Office of the Attorney General stands ready to assist PEBP in crafting language that would give PEBP flexibility in its program rules.

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CONCLUSION

PEBP's Executive Officer may not grant exceptions to PEBP program rules in contravention of the plain meaning of the text of those rules or unless specifically authorized to do so by a rule of equal or higher authority.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By:



DENNIS L. BELCOURT
Deputy Attorney General
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