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MEMORANDUM

TO: Ken Sharp, Division Director
Rebecca Curtiss, Bureau Chief

CC: Kathy Stone, Interim Deputy Director
Martha Gelhaus, Bureau Chief
Rebecca Swift, CON Program Manager

FROM: Heather Adams, Assistant Attorney General HLA

RE: Air Ambulances and Certificate of Need

DATE: February 26, 2016

This memorandum is in response to your request for advice regarding whether air ambulances are required to obtain a Certificate of Need (CON) from the Department of Public Health (Department) prior to operating in the state of Iowa. For the reasons outlined below, I conclude that air ambulances are not required to obtain a CON prior to operating in Iowa because state CON law is preempted by federal aviation law.

State Law

Iowa law provides that a "new institutional health service" may not be offered or developed in this state without prior application to the Department for and receipt of a CON. Iowa Code § 135.63(1). A "new institutional health service" includes "any air transportation service for transportation of patients or medical personnel offered through an institutional health facility at a specific time but which was not offered on a regular basis in or through that institutional health facility within the twelve-month period prior to the specific time." Iowa Code § 135.61(18)(k). Accordingly under Iowa law a facility could not commence operation of a new air ambulance service absent application for and receipt of a CON.

Federal Law

The Federal Aviation Act (FAA) was enacted in 1958 and amended through the Airline Deregulation Act (ADA) of 1978 to create both a uniform framework for regulating air carriers and a competitive marketplace for air carriers nationwide. The Act regulates helicopter air ambulances as air carriers. The Act includes a preemption provision which expressly prohibits a state from enacting or enforcing any statute or rule "related to price, route, or service of an air carrier." 49 U.S.C. § 41713(b). This provision has been interpreted broadly by the U.S. Supreme Court and other federal courts to apply to state statutes which have a direct or indirect impact on rates, routes, or services of an air carrier. *See, e.g., Morales v. TransWorld Airlines, Inc.*, 504 US 374 (1992).

Preemption Analysis

State law may be preempted under the federal Supremacy Clause in three circumstances:

> (1) When Congress has clearly expressed an intention to do so ("express preemption"); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation ("field preemption"); and (3) when a state law conflicts with a federal law ("conflict preemption").

Med-Trans Corp. v. Benton, 581F.Supp.2d. 721, 729 (E.D. N.C. 2008) (citations omitted).

Federal and state courts have concluded that state laws requiring air ambulances to obtain a CON are expressly preempted by the preemption provision of the ADA as such state laws clearly relate to the price, routes, and services of an air carrier. These courts have held that "the purposes underlying CON law directly contravene the pro-competition purposes underlying the ADA" and that CON laws constitute "a direct substitution of [the state's] own governmental commands for competitive market forces." *Med-Trans Corp,* 581 F.Supp.2d at 736; *see also Baptist Hosp., Inc. v. CJ Critical Care Transp. System of Florida, Inc*, CV-07-900193 (Cir.Ct.Ala 2007) (state court holding that federal law preempts Alabama's CON law); *Rocky Mountain Holdings, LLC v. Cates*, 97-4165-CV-C-9 (W.D.Mo. 1997); *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 375 N.W.2d 496 (Minn.Ct.App. 1985).

Several Attorney General's Offices across the country have reviewed this issue and have likewise concluded that their state CON laws are preempted by the ADA. *See, e.g.,* Michigan Attorney General's Office, Potchen to Falahee, March 22, 2013 (concluding Michigan CON requirements relating to air ambulances are preempted by federal aviation laws); 1987 Ariz. Op. Atty. Gen. 261, Op. Atty. Gen. 187-164 (December 12, 1987) (concluding that Arizona could not enforce CON statutes as the law related to air ambulance providers).

Similarly, the United States Department of Transportation has issued recent guidelines which conclude:

> States are also prohibited from requiring that air ambulance operators obtain certificates of authority (also known as certificates of need (CON) or certificates or public convenience and necessity (PC &N certificates)) to operate, as operating certificates are within the DOT office of the Secretary's jurisdiction and could be used by a state to erect economic barriers to entry into the air ambulance market. Guidelines for the Use and Availability of Helicopter Emergency Medical Transport (HEMS), United States Department of Transportation, April 2015, p. 11.

These guidelines comport with earlier decisions of the Office of General Counsel of the U.S. Department of Transportation. *See, e.g.*, Opinion Letter dated April 23, 2007, from Knapp to Walden (concluding that Hawaii's CON law, as applied to air ambulances, is preempted by federal aviation law); Opinion Letter dated October 10, 2007, from Gribbin to Grief (concluding that Florida's CON provisions are expressly preempted by the ADA); *see also* United States Government Accountability Office, *Air Ambulance: Effects of Industry Changes on Services Are Unclear*, September 2010, pp. 22 – 23.

Summary

In sum, Iowa's requirement that air ambulances must obtain a CON prior to operating in this state is preempted by federal aviation laws and should not be enforced by the Department.[1] The Department should advise operators of air ambulances that in light of holdings by federal and state courts, as well as recent guidelines issued by the U.S. Department of Transportation, a CON is no longer required to operate an air ambulance in this state. I would also recommend that the Department pursue legislation next session to strike Iowa Code section 135.61(18)(k) from the CON statute.

Please note that this opinion constitutes informal advice and is not a formal opinion of the Attorney General.

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1 Note that the Department, through its Bureau of Emergency and Trauma Services, may continue to maintain its authorization requirements for air ambulances contained in 641 IAC chapter 144 as those requirements relate to matters of patient care. Several courts and the United States Department of Transportation have concluded that the following state EMS air ambulance licensure laws are *not* preempted by the FAA's aviation authority: laws related to patient care, standards governing medical services provided inside an air ambulance, requirements for medical equipment, and training and licensure requirements of air ambulance medical crew that relate to patient care.