



U.S. Department  
of Transportation

General Counsel

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

Office of the Secretary  
of Transportation

May 19, 2014

Mr. Lynn D. Malmstrom  
President and Chief Executive Officer  
California Shock Trauma Air Rescue  
4933 Bailey Loop  
McClellan, CA 95652

Dear Mr. Malmstrom:

Thank you for your letter seeking the Department of Transportation's (DOT) opinion on the potential application of the Federal preemption provision of the Airline Deregulation Act<sup>1</sup> (ADA) to Kern County (County) requirements for air ambulance operations. You express concern that the County has excluded California Shock Trauma Air Rescue (CALSTAR) from operating in the County, and that the County has assessed a fine against CALSTAR for operating an inter-hospital transfer there without holding an "ambulance service contract" with the County.<sup>2</sup> Your letter also asked that DOT request that the County halt its enforcement action against CALSTAR.

It is typically our practice to abstain from involvement in local administrative proceedings, and to refrain from opining on the merits of such a proceeding where we are not a party. That is the case here. However, we offer a general discussion of the issues raised by your letter, in the hopes that you and other interested persons will find it useful. As explained below, after reviewing your letter and its attachments, and speaking with State of California (State) and County officials, it appears to us that the ADA likely preempts certain aspects of the County Ordinance and accompanying contracts regulating economic aspects of air ambulance operations.<sup>3</sup>

Based on our review of your June 20, 2013 submission, our conversations with County and State officials on January 16, 2014 and March 10, 2014, respectively, and the follow-up

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<sup>1</sup> 49 U.S.C. § 41713(a).

<sup>2</sup> Under Section 8.12.040(A) of the Kern County Ordinance Code, "[i]t is unlawful for any person . . . engaged in the business or service of the transportation of any patient by ambulance upon . . . any public way or place in the territory of the county . . . except in conformance with a valid ambulance service contract issued by the county."

<sup>3</sup> The criminal fine imposed by the County also may implicate the Anti-Head Tax Act (AHTA), 49 U.S.C. § 40116. You did not raise this issue in your letter, and we have not reviewed it. For more information on how a State-imposed fee may implicate the AHTA, you may wish to review DOT's Declaratory Order in the Hawaii Inspection Fee Proceeding, Order 2012-1-18. You can find a copy of this Order in DOT Docket DOT-OST-2010-0243 at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2010-0243-0029>.

correspondence we received from the County and State, we understand as follows: the County, after competitive solicitation, granted two air ambulance providers exclusive operating rights to serve within the County and, by ordinance and contract, required each operator to provide 24-hour, 365-day per year ambulance services; charge only those rates authorized by the County; and maintain certain insurance levels and Federal Aviation Administration (FAA) operating authority.

By County Ordinance, air ambulances may not operate within the County without an ambulance service contract with the County.<sup>4</sup> Further, authorized ambulance providers (i.e., those holding air ambulance service contracts with the County) must provide service 24 hours a day, seven days a week, and are prohibited from operating outside of their designated service areas without County approval.<sup>5</sup> The Kern County Board of Commissioners sets the rates for air ambulance services within the County, and all ambulance providers within the County must obtain, at their sole expense, professional liability insurance in amounts established by a County official.<sup>6</sup> A violation of these ordinances is punishable by fine or jail time.<sup>7</sup>

The ADA includes an express preemption provision, as follows:

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. . . .

As a threshold matter, an air carrier holding DOT economic authority to operate as a registered air taxi under 14 CFR Part 298 and an FAA air carrier operating certificate, such as CALSTAR, is an “air carrier” for purposes of the ADA preemption provision.<sup>8</sup>

You believe that the County requirements violate the ADA because they impermissibly relate to an air ambulance operator’s rates, routes, or services, and that the County is acting in its regulatory, not proprietary, capacity in selecting and contracting with certain air ambulance providers. On the other hand, the County claims that its air ambulance service contracts are private agreements between the selected air ambulance providers and the local emergency medical services agency, and any requirements related to air ambulance rates, routes, or services

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<sup>4</sup> Id. at § 8.12.040(B).

<sup>5</sup> Id. at § 8.12.100.

<sup>6</sup> Id. at § 8.12.190.

<sup>7</sup> Id. at § 8.12.200.

<sup>8</sup> See Hiawatha Aviation of Rochester, Inc. v. Minn. Dep’t of Health, 389 N.W.2d 207 (Minn. 1986); Hughes Air Corp. v. Pub. Util. Comm’n, 644 F.2d 1334 (9<sup>th</sup> Cir. 1981).

are the product of competitive solicitations and contractual undertakings.<sup>9</sup> In addition, the County argues that its regulatory framework, including exclusive operating areas and regulations governing rates and services, are primarily “medically-related requirements on air service providers,” and that both the case law and DOT have recognized that medically-related requirements are not preempted.<sup>10</sup>

As stated above, DOT typically does not take a position on specific matters subject to local administrative proceedings. Thus, we offer only general guidance based on our review of the submissions and our conversations with the State and County. It appears to us that the ADA preempts certain Ordinance Code provisions, because they regulate the rates, routes, and services of air ambulances.

The U.S. Supreme Court has broadly interpreted the words “related to a price, route or service,” from Section 41713(b)(1). As illustrative examples, we refer you to the decisions in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Rowe v. N.H. Motor Transp. Ass’n, 552 U.S. 364 (2008); and Northwest, Inc. v. Ginsberg, 134 S.Ct. 1422 (2014).

The County’s ordinances relate to air carrier “services” by requiring an air ambulance operator wishing to serve the County to enter into a service contract<sup>11</sup> mandating service on a 24 hour, 365 day basis. See Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721, 738-39 (E.D.N.C. 2008) (finding that a State law requiring 24 hour per day air ambulance service “clearly relates to an air carrier service” and is preempted by the ADA). The ordinances relate to air carrier “rates” as well, because they call upon the County Board of Commissioners to set rates for air ambulances serving within the County. The ordinances relate to air carrier “routes,” because they preclude any operation within the County by an air ambulance operator not selected by the County and, for those selected operators, they preclude operation outside of the operators’ designated service areas. Id. at 738 (holding that State limitations on an air carrier’s ability to define its own service area “relate to...routes, and...are preempted by the ADA”).

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<sup>9</sup> Letter from Gurujodha Khalsa, Deputy General Counsel, Kern County, to Ronald Jackson, Assistant General Counsel for Operations, U.S. Department of Transportation, dated February 17, 2014.

<sup>10</sup> See Letter from D.J. Gribbin, General Counsel, U.S. Department of Transportation, to Honorable Greg Abbott, Attorney General, State of Texas, dated Nov. 3, 2008 (“Moreover, we state again our agreement with the holdings in both Hiawatha, and Med-Trans, that State regulations serving ‘primarily a patient care objective’ are properly within the states’ regulatory authority.”).

<sup>11</sup> Several courts have found that certificates, licenses, and other prerequisites to air ambulance market entry are preempted by the ADA. See Med-Trans Corp., 581 F. Supp. 2d 721 (finding that a North Carolina requirement that air ambulances obtain a “certificate of need” from the State in order to operate within the State and requiring 24-hour/7-day-a-week air ambulance service were pre-empted by the ADA); Hiawatha Aviation of Rochester, Inc., 389 N.W.2d 507 (holding that a State licensing provision that effectively controlled entry into the air ambulance market within the State of Minnesota was preempted by the ADA).

The State has explained that a county may act as a customer, or purchaser, of air ambulance operations, as opposed to regulating them.<sup>12</sup> Based on our review and discussion with the County, however, it does not appear that Kern County is acting as a customer of air ambulance services. Among other things, the primary consideration provided by the County to the selected air ambulance operators is merely the award of exclusive operating areas; the County does not routinely pay for the services (with certain exceptions, such as insurance payments for Medi-Cal patients). Moreover, a contract to which a Government entity is a party may still have the “force and effect of law” under the ADA.<sup>13</sup> Here, the County ordinances and associated contracts are similar to the Port of Los Angeles’ drayage contract recently struck down by the U.S. Supreme Court under an identical preemption provision at 49 U.S.C. Section 41713(b)(4). Am. Trucking Ass’n, Inc. v. City of Los Angeles, Cal., 133 S.Ct. 2096, 2103 (2013) (finding the Port’s drayage contract was preempted because it wielded “power over private parties, backed by the threat of criminal punishment”). The County contracts and ordinances force the selected air ambulance operators to conform their rates, routes, and services to contractual provisions established by County Ordinance, under criminal penalties. Moreover, all other air ambulances operations are prohibited from access to County markets, also under criminal penalties. The provisions of the County Ordinance Code underscore the regulatory framework furthered by the ambulance service contracts: “The purposes of this chapter are . . . to enact regulations, policies, procedures, and protocols for . . . issuing contracts and *regulating air . . . ambulance services . . . within the County.*”<sup>14</sup> The ambulance service contract provisions governing ambulance rates, routes, and services do not appear to be the product of “ordinary bargaining,” see Am. Trucking Ass’n, 133 S.Ct. at 2103, but, instead, appear to be another mechanism for enforcing County ordinances regulating air ambulance services.<sup>15</sup> While we understand that the County intends

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<sup>12</sup> Letter from Howard Backer, Director, State of California Emergency Medical Services Authority, to R. Michael Scarano, Jr., Foley and Lardner LLP, dated May 24, 2012. We have previously stated that a “State or local government entity, as a customer of air ambulance services, could opt to contract with or use the services of only those [air ambulance providers] who offer a 24 hours service,” and that “such a position by the State or local government *as a customer* is distinguishable from action by the State or local government *as a regulator.*” Letter from Lindy Knapp, Deputy General Counsel, U.S. Department of Transportation, to Greg Walden, Counsel, Patton Boggs LLP, dated April 23, 2007.

<sup>13</sup> The County’s contracts are consistent with its ordinances, which regulate air ambulance rates, routes, and services, and are enforceable by criminal penalties. KERN COUNTY, CAL. CODE §§ 8.12.010 & 8.12.200. Given that the County’s contracts have the “force and effect of law,” we do not need to analyze whether the County, in any aspect of its relationship with air ambulance providers, is acting as a customer.

<sup>14</sup> KERN COUNTY, CAL. CODE § 8.12.010 (emphasis added); see also id. at § 8.12.200 (setting penalties of fines or jail time for violations of requirements applicable to air ambulance providers under the ordinance and required service contracts).

<sup>15</sup> See Am. Trucking Ass’n, supra, at 2103 (“Contractual commitments resulting not from ordinary bargaining . . . , but instead from the threat of criminal sanctions manifest the government *qua* government, performing its prototypical regulatory role.”).

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these regulations “to protect the public health,”<sup>16</sup> the Supreme Court in Rowe held that, “[T]he ADA says nothing about a public health exception.” 552 U.S. at 374. To be sure, the courts and DOT have consistently recognized that regulations serving “primarily a patient care objective” do not violate the ADA. Med-Trans v. Benton, 521 F.Supp.2d at 738; Letter from D.J. Gribbin, General Counsel, U.S. Department of Transportation, to Honorable Greg Abbott, Attorney General, State of Texas, dated Nov. 3, 2008. However, the courts have found that regulations of the type enforced by the County (i.e., prerequisites to market entry, requirements for 24 hour/7 day service) are preempted by the ADA.<sup>17</sup> Thus, it appears that the County’s ordinances and resulting service contracts are preempted.

We are taking the liberty of copying the State of California Emergency Medical Services Authority and Kern County Emergency Medical Services Department on this letter. I trust that this letter will be helpful to you, as well as State/County officials. Please be advised, however, that this letter provides only guidance and does not constitute a final action of the Department, either on the matters you raised or the merits of any particular proceeding.

If you have any questions concerning this letter, please do not hesitate to contact me at (202) 366-9151. Thank you.

Sincerely,



Ronald Jackson  
Assistant General Counsel for Operations

cc:

Dr. Howard Backer, Director, Emergency Medical Services Authority, State of California  
Mr. Gurujodha Khalsa, Deputy General Counsel, County of Kern

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<sup>16</sup> Letter from Gurujodha Khalsa, Deputy General Counsel, Kern County, to Ronald Jackson, Assistant General Counsel for Operations, U.S. Department of Transportation, dated February 17, 2014.

<sup>17</sup> See, e.g., supra note 11, and accompanying text.