U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

May 31, 2005

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State of Washington
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2005-13A
ERISA SEC.
514(a) and 514(d)

Dear Mr. Ervin:

This responds to your request for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you asked whether section 514(a) of ERISA would preempt the application of certain leave substitution provisions in the Washington State Family Care Act (Family Care Act) to the Northwest Airlines, Inc. Sick and Occupational Injury Leave Plan for Employees.

The following summary is based on facts and representations contained in your correspondence. Northwest Airlines, Inc. (Northwest) sponsors the Northwest Airlines, Inc. Sick and Occupational Injury Leave Plan for Employees (Sick Leave Plan). You represent that the Sick Leave Plan is maintained pursuant to bargaining agreements for certain Northwest employees represented by labor organizations and also pursuant to administrative policies for covered management employees. Various provisions in the Sick Leave Plan apply according to the particular bargaining agreement covering the employee in question. For example, there are different provisions regarding the rate of sick leave accrual, requirements for a physician's note, and different maximum amounts of total sick leave accumulation. None of the provisions in the Sick Leave Plan provide that an employee has the right to use paid sick leave to care for a child or other family member with a health condition or experiencing a health emergency.

Northwest established the Northwest Airlines, Inc. Voluntary Employees' Beneficiary Trust (Trust) to fund the Sick Leave Plan. The Trust is intended to be a tax-exempt voluntary employees' beneficiary association (VEBA) under section 501(c)(9) of the Internal Revenue Code. The Trust Agreement provides that the Company shall make an initial contribution to the Trust and shall thereafter make contributions to the Trust from time to time as the Board of Directors of the Company or its designee shall determine. The Trust Agreement further provides that nothing in the Trust Agreement shall be construed as constituting an obligation on the part of the Company to make a contribution to the Trust Fund, and the Trustee shall have no right to demand contributions. To the extent that the Trust Fund is not adequately funded to pay benefits due and owing under the Sick Leave Plan, the Trust provides that participants

shall look to the Company for payment. The Benefit Booklet describing the welfare plans offered by Northwest, including the Sick Leave Plan, provides that "[t]o the extent Northwest does not fund these plans through the VEBA, Northwest will fund the plans directly."

The Family Care Act generally provides that employees entitled to sick leave or other paid time off may use such paid time off to care for certain relatives of the employee who have health conditions or emergency conditions. Specifically, the Act states that:

> If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for: (a) A child of the employee with a health condition that requires treatment or supervision; or (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition. An employee may not take advance leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave.

Wash. Rev. Code § 49.12.270 (2002).

Section 514(a) of Title I of ERISA generally preempts any state law which "relates to" an employee benefit plan covered under that title.[1] There are, however, a number of exceptions. Section 514(d) acts as a federal savings limit on ERISA's broad preemption provision. Specifically, section 514(d) provides, subject to certain exceptions not relevant here, that: "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." The Family and Medical Leave Act (FMLA) is a law of the United States whose overall purpose and structure parallel those of the Family Care Act. The purpose of the Family Care Act is to require "employers to accommodate employees by providing reasonable leaves from work for family reasons." Wash. Admin. Code 296-130-010. As set out in the federal statute, one of the purposes of the FMLA is to "entitle employees to take reasonable leave for medical

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[1] This letter should not be read as expressing an opinion on whether the Sick Leave Plan is an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA. *See* Advisory Opinion 2004-08 (Dec. 30, 2004). Rather, in accordance with your request, we have assumed, without examining the issue, that the Sick Leave Plan is a plan covered by Title I of ERISA. Based on that assumption, the leave substitution provisions of the Family Care Act appear to function as a mandated benefits law that would apply directly to the plan, and, therefore, would "relate to" the plan within the meaning of section 514(a) of ERISA.

reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b)(2). In addition, both provide for the substitution of paid leave under certain circumstances.[2] Under the FMLA, an employee may substitute paid sick leave only when the employee or a family member has a serious health condition, and only when the employer would normally provide paid leave in that situation. 29 U.S.C. § 2612(d)(2)(A), (B); 29 C.F.R. § 825.207. Section 401(b) of the FMLA further provides that "[n]othing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. § 2651(b). In addition, section 402(b) of the FMLA provides that "[t]he rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." 29 U.S.C. § 2652(b).

Because the FMLA does not afford all employees the automatic right to substitute paid sick leave for unpaid leave to care for a relative, we do not address whether ERISA preemption of the Washington Family Care Act providing such a right would "alter, amend, modify, invalidate, . . . or supersede" the FMLA. Rather, this letter addresses only whether ERISA preemption would "impair" the FMLA within the meaning of section 514(d) of ERISA. For the reasons discussed below, it is the view of the Department that the Family Care Act's leave substitution provision is saved from ERISA preemption by ERISA's federal savings clause because a determination that ERISA preempts the Family Care Act would "impair" the FMLA, which expressly encourages more generous state family leave rights than the FMLA provides directly.

It is the Department of Labor's view that the legislative history of the FMLA makes clear that Congress intended to protect more generous state leave laws not only from preemption by FMLA but also from preemption by ERISA and other federal laws. In this regard, the Senate report accompanying the FMLA explains, among other things:

> Section 401(b) makes it clear that state and local laws providing greater leave rights than those provided in [FMLA] are not preempted by [FMLA] or any other federal law. . . .

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[2] *Compare* FMLA, 29 U.S.C. §2612(a)(1) (eligible employees entitled to 12 weeks of leave in order to care for spouse, parent or child with a serious health condition), 29 U.S.C. §2612(c) (leave granted under FMLA may be unpaid), 29 U.S.C. §2612(d)(2) (employer may require or employee may elect to use certain accrued paid leave for any part of the 12 week FMLA leave) *with* Washington State Family Care Act, Rev. Code Wash. § 49.12.270(1) (see description supra at p.2).

> . . . .
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> Likewise, Wisconsin State law provisions under which employees may substitute paid or unpaid leave of any other type provided by the employer for portions of family leave or medical leave would not be superseded by the FMLA.
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> Section 401(b) also clarifies that state family leave laws at least as generous as that provided in [FMLA] (including leave laws that provide continuation of health insurance or other benefits, and paid leave), are not preempted by ERISA, or any other federal law.

S. Rep. No. 103-3, at 38 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 40. *See also* S. Rep. No. 102-68, at 55 (1991).

As additional support for this conclusion, a colloquy on the Senate floor between the FMLA's chief sponsor, Senator Dodd, and Wisconsin Senators Feingold and Kohl, makes the same point even more specifically:

> Mr. FEINGOLD.
> A few years ago a Wisconsin administrative law judge concluded that the provision of the Wisconsin FMLA enabling employees to substitute accrued paid leave for unpaid family leave was preempted by ERISA to the extent it impacted an employer's ERISA plan that paid out sick leave. Is it the intent of the sponsors of this bill that the provisions of the Employee Retirement Income Security Act of 1974, as amended, shall not prevent the substitution of accrued paid leave, regardless of the source of funding for the paid leave?
>
> Mr. DODD.
> Yes. This Federal legislation provides that either an employer or an employee may elect to substitute accrued paid leave for unpaid family and medical leave, although the scope of an employee's rights in that regard are more generous under the Wisconsin law. The provisions of this Federal Family and Medical Leave Act are intended to supersede ERISA and any Federal law. The authors of this legislation intend to prevent ERISA and any other Federal law from undercutting the family and medical leave laws of States that currently allow the provision of substitution of accrued paid leave for unpaid family leave, regardless of the nature of the family leave, so long as those State law provisions are at least as generous as those of this Federal legislation. Certainly, if Wisconsin law allows either an employer or an employee to substitute

> accrued paid leave to care for a newly born or adopted child on terms at least as generous as in this legislation, it is our intent that no Federal law prevent Wisconsin law from making this allowance.

139 Cong. Rec. 2254 (Feb. 4, 1993).

Accordingly, it is the view of the Department that ERISA section 514(a) does not preempt application of the leave substitution provision in Washington's Family Care Act to the Northwest Airlines, Inc. Sick and Occupational Injury Leave Plan for Employees to the extent it is more generous than the FMLA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations