IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOAN SHERFEL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 2:09-cv-871
ROBERTA GASSMAN, et al.,	)	
Defendants.	)	

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

NATHANIEL I. SPILLER
Counsel for Appellate and Special Litigation
Plan Benefits Security Division

STEPHEN SILVERMAN
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax

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STATEMENT OF THE ISSUE

Whether Section 514 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144, preempts the leave substitution provision of the Wisconsin Family and Medical Leave Act ("WFMLA"), Wis. Stat. § 103.10(5)(b), to the extent that it requires employers to allow the substitution, for unpaid WFMLA maternity leave, of short-term disability-benefit leave from an ERISA-covered employee welfare benefit plan or, alternatively, pay such benefits out of the employer's general assets.

INTEREST OF THE SECRETARY

The Secretary of Labor bears primary responsibility for interpreting and enforcing Title I of ERISA, 29 U.S.C. § 1001, et seq. In this capacity, she has a strong interest in ensuring that courts correctly apply ERISA's preemption provisions, including expressing her views on the intersection of ERISA and state Family and Medical Leave Acts. Accordingly, she has participated as amicus curiae in many ERISA preemption cases, including prior litigation involving the same WFMLA leave substitution provision in Aurora Med. Group v. Dep't of Workforce Development, Equal Rights Div., 236 Wis. 2d 1, 612 N.W.2d 646 (2000).

STATEMENT OF THE CASE

Nationwide Insurance Company ("Nationwide") sponsors the Nationwide Insurance Companies and Affiliates Plan for Your Time and Disability Income Benefits ("the Plan"), an employee welfare benefit plan providing disability benefits for employees. Sherfel v. Gassman, 2010 WL 3860627, *1 (S.D. Ohio Sept. 27, 2010). The Plan's disability benefit programs "do not provide accrued paid leave; rather, they provide disability income benefits to associates who become disabled and are unable to work." Id. The Plan's Your Time Program allows paid time

off for, among other things, leave under the federal Family and Medical Leave Act ("FMLA") or any similar state law such as the Wisconsin Family and Medical Leave Act ("WFMLA"). Id. Leave under the WFMLA is generally unpaid, except that "[a]n employee may substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer." Wis. Stat. § 103.10(5)(b).

In early 2007, Katherina Gerum, an associate of Nationwide employed in Wisconsin, made a request for short-term disability ("STD") benefits during time off to care for her newborn child. Sherfel, 2010 WL 3860627, at *2. Nationwide denied Ms. Gerum's request, and she filed a complaint with the Wisconsin Department of Workforce Development ("DWD") alleging WFMLA violations on the part of Nationwide. Id. On August 14, 2009, an administrative law judge issued a final order "concluding that Nationwide violated the WFMLA by not permitting Ms. Gerum to substitute paid STD benefits for unpaid leave under the WFMLA." Id. The judge ordered Nationwide to permit Ms. Gerum to substitute paid STD leave from the Plan for the days she had requested or, in the alternative, for Nationwide to pay the requested benefits itself. Id. Nationwide asked the Plan's Benefits Administration Committee ("Committee") to permit Ms. Gerum to receive her STD benefits pursuant to the ALJ's order, but the Committee denied that request because, according to Nationwide, payment of such benefits would violate the Committee's fiduciary duty to the Plan participants to follow the terms of the Plan. Id.[1] Nationwide later settled the matter with Ms. Gerum. Id.

Shortly thereafter, Nationwide, the Committee, and the Committee's chairperson

[1] According to the earlier decision in this case, Ms. Gerum was able to use her paid Your Time benefits for the WFMLA family leave, but was denied short-term disability benefits that would result in a credit to her Your Time benefits. Id.

(collectively, "Plaintiffs") filed the instant district court action against the Secretary of the DWD, Roberta Gassman, the Administrator of the DWD's Equal Rights Division, Jennifer Ortiz,[2] and the Attorney General of the State of Wisconsin ("the Defendants") seeking a declaration from this Court that (a) the WFMLA is preempted by ERISA to the extent that it requires the payment of disability income benefits to employees who are not entitled to benefits under the Plan and/or ERISA; (b) the Committee is not required to grant substitution requests for STD income benefits to non-disabled employees; and (c) Nationwide is not required to pay substitution requests for STD income benefits made by non-disabled employees out of general assets. Id. at *3. On September 27, 2010, this Court denied the Defendants' motion to dismiss the Plaintiffs' complaint. Id. at *15. Following an October 20, 2010, hearing, the Court requested briefing on the merits of the Plaintiffs' claim for permanent injunctive relief.

SUMMARY OF THE ARGUMENT

ERISA generally preempts state laws that "relate to" employee benefit plans. 29 U.S.C. § 1144(a). However, ERISA expressly excludes from preemption laws that are encompassed within its savings clauses. ERISA's federal savings clause, id. § 1144(d), precludes ERISA preemption that would "impair" the operation of other federal laws. FMLA is a federal law whose operation and purpose include the encouragement and affirmative protection of state FMLA rights that are greater than those provided by FMLA. As challenged in this case, the WFMLA provides greater family and medical leave rights by requiring employers to allow the substitution of disability benefits for WFMLA leave or pay the same amount out of the

[2] On October 21, 2010, the Court ordered the substitution of LeAnne Ware, in her official capacity as Administrator for the DWD's Equal Rights Division, in place of Jennifer Ortiz, who is no longer the administrator.

employer's general assets. Preemption of that greater family and medical leave right would "impair" an express purpose of FMLA. As the federal agency responsible for interpreting and enforcing ERISA and FMLA, the Department's views are entitled to deference.

Agreeing with the Secretary, who submitted an amicus brief on this issue, the Supreme Court of Wisconsin in the Aurora case unanimously concluded that ERISA preemption of the same WFMLA leave substitution provision would "impair" federal FMLA. The court concluded that the interplay of the plain text of federal FMLA with ERISA's federal savings clause showed that Congress sought to avoid preemption of the WFMLA substitution provision. Aurora further noted that the legislative history of FMLA showed a congressional intention not to preempt state FMLAs, including specifically Wisconsin's, that provide greater family and medical leave rights. Following Aurora, the Department reached the same "impairment" conclusion in an Advisory Opinion addressing preemption of another state's leave substitution provision. Aurora, the Advisory Opinion, and the Department's position as stated in this brief are consistent with the Supreme Court's decision in Shaw v. Delta Air Lines, 463 U.S. 85 (1983), finding that preemption of a state law that furthers a federal law's objectives "impairs" the federal law.

The Plaintiffs' conflict-related arguments fail because there is no conflict between complying with ERISA and the challenged disability benefit substitution requirement. WFMLA imposes no legal obligations on ERISA plans and therefore does not at all implicate plan administration. Rather, WMFLA only imposes obligations on employers to abide by the statute's family and medical leave provisions. As a result, the WFMLA disability benefit substitution as challenged in this case presents no conflict for the Plaintiffs because Nationwide, not the Plan, is the entity with compliance obligations under the WFMLA disability leave substitution

requirement. The WFMLA leave substitution, as challenged, also does not supplement ERISA remedies, because it does not require any plan payments or create ERISA benefits that could otherwise be enforced in an ERISA cause of action. As in the case of Ms. Gerum, Nationwide's WFMLA obligations to substitute paid disability leave for unpaid FMLA leave may be satisfied by paying for such leave wholly out of its general accounts, without touching the Plan's funds if the Plan's administrator determines that such substitution is not authorized under the terms of the Plan. Thus, the Plaintiffs' request for a permanent injunction and declaratory relief should be denied because there is no conflict between ERISA and the Wisconsin and federal FMLA statutes, and preemption of the challenged leave substitution provision would impair federal FMLA.

ARGUMENT

I. ERISA DOES NOT PREEMPT THE WFMLA SUBSTITUTION PROVISION TO THE EXTENT THAT IT REQUIRES THE PAYMENT OF DISABILITY BENEFITS FOR LEAVE OR THE PAYMENT OF THOSE SAME BENEFITS OUT OF AN EMPLOYER'S GENERAL ASSETS.

A. ERISA Preemption Principles

In considering whether a state law is preempted by ERISA, "the starting presumption [is] that Congress does not intend to supplant state law." New York State Conference of Blue Cross v. Travelers Ins., 514 U.S. 645, 654 (1995) ("we have never assumed lightly that Congress has derogated state regulation"); Assoc. Builders & Contractors v. Mich. Dep't of Labor and Econ. Growth, 543 F.3d 275, 282 (6th Cir. 2008) ("We therefore start with the presumption that [the state's] requirements fall outside of ERISA's preemptive reach"). In cases like this one, where the state law operates in "in [a] field[] of traditional state regulation," there is an "'assumption

that the historical police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Travelers, 514 U.S. at 655 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); see Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12-13 (2004) (family law long recognized as area of traditional state concern); Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) ("There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law"); Moore v. Sims, 442 U.S. 415, 435 (1979); Aurora, 216 Wis.2d at 11 ("historic police powers of the State include labor standards, as well as matters of health and safety") (citations omitted).

ERISA preemption may be "by express provision, by implication, or by a conflict between federal and state law." Travelers, 514 U.S. at 654; see 29 U.S.C. § 1144(a) (ERISA expressly "supersede[s] any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute); Aetna Health Inc. v. Davila, 542 U.S. 200, 216 (2004) (implied preemption of state remedies duplicating or supplementing ERISA's civil enforcement scheme); Boggs v. Boggs, 520 U.S. 833, 841 (1997) (conflict preemption if compliance with both state and federal law is not possible, or when compliance with a state law will frustrate the purpose of the federal law). In addition to the starting presumption against preemption, however, the scope of ERISA preemption is curtailed by specially tailored savings provisions. Among other provisions (e.g., clause applicable to state insurance, banking, or securities laws, see 29 U.S.C. § 1144(b)(2)(A)), the Act's federal savings clause states that nothing in the statute "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d).

Under this federal savings provision, FMLA is a "law of the United States" that ERISA

may not "alter, amend, modify, invalidate, impair, or supersede." FMLA establishes minimum standards for the states to follow in enacting their own family and medical leave act laws. See Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 739 n.12 (2003) (FMLA rights are a "floor, thus leaving States free to provide their employees with more family-leave time if they so choose"). FMLA does not itself require employers to provide or substitute paid leave for unpaid FMLA leave. Instead, it requires covered employers to offer their employees reasonable leave from work for family and medical reasons, while permitting the substitution of paid leave under certain circumstances. 29 U.S.C. § 2612(a)(1), (c), (d)(2). Under FMLA, an employee may "substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee" when the employee or a family member has a serious health condition, so long as the employer would normally provide paid leave in that situation. 29 U.S.C. § 2612(d)(2)(A), (B). FMLA affirmatively provides that "[n]othing in the 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" the Act. 29 U.S.C. § 2651(b). This anti-preemption provision unambiguously expresses Congress's intention to encourage states to provide more substantial family and medical leave rights, including those pertaining to leave substitution. See Aurora, 236 Wis.2d at 19-21.

B. The Interplay of ERISA with the Wisconsin and Federal Family and Medical Leave Acts

The question in this case is whether ERISA preemption of a state law providing "greater family or medical leave rights than the rights established under" FMLA "impair[s]" or otherwise "supersede[s]" the FMLA pursuant to ERISA's federal savings clause. The Secretary, as the

head of the federal agency responsible for administering, interpreting, and enforcing both ERISA and FMLA, contends that ERISA preemption would have that proscribed effect. Indeed, ERISA preemption would directly negate the plain meaning and intent of FMLA's signature anti-preemption provision, by turning FMLA's floor into a ceiling.

The WMFLA, in relevant respects, "provides greater family and medical leave rights" than those provided by FMLA. In particular, WFMLA states that an employee may "substitute, for portions of family leave or medical leave, paid or unpaid leave of any other type provided by the employer." Wis. Stat. § 103.10(5)(b). That provision allows an employee to substitute any type of paid leave provided by the employer, even if the employer's leave policy would not otherwise allow such substitution, Richland Sch. Dist. V. Dep't of Indus., Labor, & Human Relations, 174 Wis. 2d 878, 498 N.W.2d 826 (1993). Like the FMLA, the Wisconsin Law permits a parent to take family leave to spend time taking care of a newborn child. Utilizing FMLA's encouragement of more protective state-provided rights, however, WFMLA allows, at the employee's option, the substitution of paid disability benefits for this purpose, as occurred in the case of Ms. Gerum.

On similar facts involving the substitution of paid sick leave, the Wisconsin Supreme Court unanimously "conclude[d] that Congress did not intend for ERISA to pre-empt the Wisconsin FMLA's substitution provision because pre-emption would 'impair' the federal FMLA, as prohibited by ERISA § 514(d), 29 U.S.C. § 1144(d)." Aurora, 236 Wis.2d at 21. The Aurora court invoked the "presumption against preemption" of state law, because "[t]here is no dispute here that the Wisconsin FMLA's substitution provision is within the area of traditional

state regulation." Id. at 14-15.[3] Additionally, in examining "the interplay between . . . § 514(d) of ERISA and §§ 401(b) and 402(b) of FMLA," the court determined that "the plain text of the federal FMLA" showed that "Congress did not intend to pre-empt the substitution provision of the Wisconsin FMLA." Id. at 19. Specifically, the court identified two express goals of FMLA that the Wisconsin substitution provision advanced: "one, that the States provide greater family or medical leave rights, and two, that ERISA employee benefit plans not diminish employee rights advanced by the federal FMLA." Id. at 21. Finally, the court found that FMLA's legislative history showed that "(1) Congress intended to encourage states to enact family and medical leave acts that provided a greater scope of protection than that afforded by the federal FMLA, and (2) that ERISA is not to pre-empt these state laws that give greater rights." Id. at 23. Holding WFMLA leave substitution not preempted was therefore "[t]he only interpretation that would give both § 514(a) of ERISA and § 401(b) of the federal FMLA full effect." Id. at 25.

The second FMLA goal recognized in the Aurora opinion – that FMLA rights not be diminished by the terms of ERISA employee benefit plans – is evident from 29 U.S.C. § 2652(b) of federal FMLA, which provides that "the rights established for employees under [FMLA] . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan," and 29 U.S.C. § 2652(a), which affirms "the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees." Federal FMLA defines

[3] The court then ruled that the WFMLA leave substitution does not "relate to" plans, because it "has no reference to, nor clear connection with, ERISA plans." Id. at 15. We disagree with that part of the decision, but this disagreement has no effect on the ultimate conclusion that the WFLMA is saved under ERISA section 514(d).

"employment benefit" (including expressly "disability insurance") by reference to ERISA's definition (at 29 U.S.C. § 1002(3)) of "employee benefit plan," see 29 U.S.C. § 2611(5), meaning that the Act expressly contemplates and seeks to ensure that ERISA does not diminish family and medical leave rights. Accordingly, Congress intended ERISA and FMLA to work hand-in-hand to guarantee workers the greater of (1) federal FMLA leave rights, (2) state FMLA leave rights, or (3) collectively bargained or employer-provided employment benefits.

The Department is the federal agency responsible for interpreting and enforcing both ERISA and FMLA. See 29 U.S.C. §§ 1132-1135 (ERISA); 29 U.S.C. §§ 2616, 2617, 2654 (FMLA). For that reason, to the extent either statute is ambiguous, the Secretary's views are entitled to deference in resolving that ambiguity. Massachusetts v. Morash, 490 U.S. 107, 116 (1989) (ERISA); Thorson v. Gemini, Inc., 205 F.3d 370, 379-380 (8th Cir. 2000) (FMLA); see also Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 175 (2007) (deferring to and adopting the Department's views set forth in an Advisory Memorandum in response to the instant litigation); Auer v. Robbins, 519 U.S. 452, 461-462 (1997) (deferring to and adopting Department's interpretation of FLSA regulation set forth in amicus brief submitted to the Court). In addition, the Secretary is "normally accord[ed] particular deference [for] an agency interpretation of longstanding duration [because] well-reasoned views of an expert administrator rest on a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Alaska Dep't of Envtl. Conservation v. E.P.A., 540 U.S. 461, 487 (2004) (citations and internal quotation marks omitted) (heightened deference given to EPA's statutory interpretation of the Clean Air Act). The Supreme Court has "not[ed] that the [ERISA] preemption and saving clauses 'perhaps are not a model of legislative drafting'" and therefore

deferred to Departmental interpretations of those clauses in briefs submitted to the Court. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46, 52 (1987) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985)). The Sixth Circuit likewise accords "'great deference to the views of a federal agency'" set forth in legal briefs when those briefs explain the preemptive scope of the statutes that the agency administers and enforces. Gustafson v. City of Lake Angelus, 76 F.3d 778, 786 (6th Cir. 1996) (quoting Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991)).

Consistent with its long-held position, the Department concludes that ERISA does not preempt the WFMLA substitution provision to the extent that it is interpreted to require the payment of disability benefits for leave or the payment of those same benefits out of the employer's general assets.[4] This position, as set forth more fully below, is entitled to "particular deference." Alaska Dep't of Envtl. Conservation, 540 U.S. at 487.

C. ERISA Preemption of the WFLMA Substitution Requirement Would "Impair" the FMLA within the Meaning of ERISA Section 514(d)

As the Secretary argued to the Wisconsin Supreme Court in Aurora, the leave substitution provision "relates to" ERISA plans, but is saved from preemption by ERISA's federal savings clause insofar as FMLA's express encouragement of more generous state family leave provisions than it provides directly would be "impaired" by ERISA preemption. DOL Am. Br., Aurora Med. Group v. Dep't of Workforce Development, Equal Rights Div., 2000 WL 34221105 (Wis.).

[4] This brief assumes that WFMLA leave substitution requires STD benefit substitution or the equivalent payment out of general assets. The Plaintiffs have likewise assumed that Gerum is the law and seek relief under ERISA. Thus, any attempt by the Plaintiffs to relitigate Gerum is not properly before the Court. See Pls.' Mot. for TRO & Prelim. Inj. at 23, 25-26.

The federal savings clause in Section 514(d) of ERISA, 29 U.S.C. § 1144(d), provides that "[n]othing in [Title I of ERISA, including the preemption provision in Section 514(a)] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." ERISA "impairs" another federal statute if it "frustrate[s] the goal of" that statute. Shaw, 463 U.S. at 102. As the Supreme Court later elaborated, and the Sixth Circuit has recognized, to impair the goals of another federal statute is "'[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" Humana, Inc. v. Forsyth, 525 U.S. 299, 309-10 (1999) (quoting Black's Law Dictionary 752 (6th ed. 1990)); accord Riverview Health Institute, LLC v. Medical Mut. of Ohio, 601 F.3d 505, 515 n.3 (6th Cir. 2010). Even if two laws do not directly conflict, one law may impair another if the enforcement of the former law "frustrates" or "interferes with" the policy, objective, or purposes of the latter. Humana, 525 U.S. at 310. ERISA Section 514(d) serves as "a guide to the scope of the state law that Congress understood would survive," Travelers, 414 U.S. at 656, because it shows that ERISA was drafted to avoid state law preemption that would frustrate a federal law's purpose and scheme. See Shaw, 463 U.S. at 102. Impairment challenges are evaluated based on the particular circumstances of the applicable federal and state laws, "as applied." See Brown v. Cassens Transports Co., 546 F.3d 347, 362 (6th Cir. 2008) (citing Humana, 525 U.S. at 312).

ERISA does not preempt WFMLA's leave substitution provision, as challenged, because such preemption would impair FMLA's express goal of encouraging and preserving more protective state laws. See Shaw, 463 U.S. at 102; 29 U.S.C. § 2651(b). FMLA achieves its overall purpose of "balanc[ing] the demands of the workplace with the needs of families," 29 U.S.C. § 2601(b)(1), by setting a floor of guaranteed federal benefits upon which states and

employers can provide enhanced family leave rights. See Nevada Dep't of Human Resources, 538 U.S. at 739 n.12. FMLA section 401(b), 29 U.S.C. § 2651(b), the anti-preemption provision permitting "State or local law that provides greater family or medical leave rights than the rights established under this Act," 29 U.S.C. § 2651(b), "provides authority, even encouragement" for states to enact greater family and medical leave rights. Aurora, 236 Wis.2d at 20; cf. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 87 (2002) (construing similar language in FMLA § 403, 29 U.S.C. § 2653, regarding employers providing "more generous" policies than required by the Act as "encouraging" the adoption of greater family and medical leave rights). As demonstrated supra, at 8-10, WFMLA's provision of disability benefit substitution rights is an example of a provision that "provides greater family or medical leave rights than the rights established" by FMLA.

By itself, FMLA Section 401(b) ensures a Wisconsin employee's WFMLA right to substitute disability benefits, or receive a payment from the employer in the same amount, for family and medical leave. Permitting ERISA to preempt Wisconsin's ability to provide the more generous rights that FMLA contemplates and encourages necessarily frustrates and therefore "impair[s]" FMLA Section 401(b)'s protection of additional family and medical leave rights – a result that is prohibited by ERISA's federal savings clause. ERISA § 514(d), 29 U.S.C. § 1144(d). This reading is most consonant with the interplay of the two statutes: since employee benefits under ERISA and family and medical leave under FMLA substantially overlap, Section 401(b) of FMLA would be mere surplusage unless it protects state FMLA rights from being

undermined by ERISA.[5] Compare 29 U.S.C. § 1002(1) ("employee welfare benefit plan" includes a plan whose purpose is to provide "medical, surgical, or hospital . . . benefits, or benefits in the event of sickness, accident, [or] disability . . . ") (ERISA) with id. § 2612 (establishing leave rights of employees for childbirth and post-birth care, adoption, or a serious health condition of self or family member) (FMLA).

In enacting FMLA, Congress understood that FMLA rights could piggy-back on ERISA-covered employee benefits. See FMLA § 402(b), 29 U.S.C. § 2652(b) (stating that "[t]he rights established for employees under this Act . . . shall not be diminished by any collective bargaining agreement or any employment benefit program or plan," as that term is defined by ERISA); see also 29 U.S.C. § 2611(5) (defining "employment benefits"). It is assumed that Congress, by referring to ERISA in its drafting of FMLA's savings clauses, was aware of ERISA's preemption and savings provisions. See Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1043-44 (6th Cir. 1986) (citation omitted). "By defining 'employee benefit' by referring to ERISA, Congress apparently contemplated ERISA's potential effect on employee protection established under the federal FMLA, including access to greater benefits provided by the States under § 401(b), and, determined that such rights are not to be diminished by ERISA." Aurora, 216 Wis.2d at 21.

This analysis is consistent with the Supreme Court's decision in Shaw. Shaw involved an ERISA preemption challenge to a state law prohibiting pregnancy discrimination in the provision

[5] FMLA Section 401(b) would be rendered superfluous if ERISA preempts it, because "the States could not do exactly what Congress attempted to prompt the States to do." Aurora, 236 Wis.2d at 20. That would violate the maxim to "expect '[e]very word in the statute' to have 'meaning,' since we try to 'give effect to all the words to avoid an interpretation which would render words superfluous or redundant.'" Day v. James Marine, Inc., 518 F.3d 411, 417 (6th Cir. 2008) (quoting Walker v. Bain, 257 F.3d 660, 667 (6th Cir. 2001)).

of health benefits. Appellants in Shaw argued that preemption of the state law would "impair" Title VII in violation of ERISA section 514(d). 463 U.S. at 101. As applied to the facts of the case, the Court held that Title VII would not be "impaired" under ERISA § 514(d) because "Title VII is neutral on the subject of all employment practices it does not prohibit." Id. at 103. Yet, that was not to say that Title VII would not be "impaired" and "frustrate[d]" by ERISA preemption of a state law that furthered Title VII's objectives. Id. at 102.[6]

In contrast to Title VII as it existed at the time of Shaw, FMLA is not neutral on the subject of family and medical leave laws. While Shaw found "no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther than saving such laws from pre-emption by Title VII itself," 463 U.S. at 103 n.23, the opposite is true with respect to FMLA, where the statute's savings provisions and legislative history make explicit a federal interest in saving more protective state family and medical leave laws (including, specifically, Wisconsin's) from preemption by ERISA, FMLA, and any other federal law. It follows that ERISA preemption in this case would "frustrate the goal of" FMLA to preserve more generous state leave laws and therefore "impair" FMLA within the meaning of ERISA's federal savings clause. Contrary to Nationwide's argument, therefore, the Department's analysis is not a "simplistic 'double savings clause' argument'": we do not argue that because ERISA does not preempt federal FMLA, and federal FMLA does not preempt state FMLAs, ERISA therefore does not preempt any state FMLAs. Pls.' Mot. for TRO & Prelim. Inj. at 25

[6] As the Supreme Court later explained, "[w]e held in Shaw that . . . the blanket preemption urged by the employer appellees in Shaw . . . would 'impair' Title VII by 'frustrat[ing] the goal of encouraging joint state/federal enforcement of [the] federal measure.' . . . Shaw thus supports the view that to 'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law." Humana, 525 U.S. at 310-11.

("Pls.' Mot."). Instead, rather than "save almost all state laws from pre-emption," Shaw, 463 U.S. at 101 n.22, the approach taken here and in Aurora is faithful to the harmonizing purpose of section 514(d) and the anti-preemption purpose of FMLA.

In similar fashion, ERISA has repeatedly been found not to preempt state laws that further the goals and purposes of other federal statutes due to the potential for "impairment." See Colonial Life & Accident Ins. Co. v. Medley, 572 F.3d 22, 27 (1st Cir. 2009) (pursuant to section 514(d), "we have held that 'state statutory claims target[ing] conduct unlawful under the ADA . . . would be exempt from ERISA preemption'") (citation omitted); Associated Builders & Contractors of Southern California, Inc. v. Nunn, 356 F.3d 979, 985 (9th Cir. 2004) (ERISA preemption of state apprenticeship laws would violate section 514(d) due to impairment of National Apprenticeship Act of 1937, which "recognized pre-existing state efforts in regulating apprenticeship programs and apparently expected that those efforts would continue"); Mitchell Energy & Development Corp. v. Fain, 311 F.3d 685, 687-88 (5th Cir. 2002) ("Were ERISA to preempt Texas state law [regarding unemployment compensation], it would impair the operation of th[e] [Social Security Act's unemployment compensation] system. By its own terms, ERISA does not preempt in such situations. 29 U.S.C. § 1144(d)."); Minnesota Chapter of Associated Builders & Contractors Inc. v. Minnesota Dep't of Labor & Industry, 47 F.3d 975, 980 (8th Cir. 1995) (state apprenticeship provisions within prevailing wage law not preempted by ERISA because preemption would have impaired the purposes of National Apprenticeship Act).

Moreover, a few years after Aurora, the Department issued an Advisory Opinion addressing the interaction of ERISA preemption with the Washington State FMLA's leave

substitution provision. DOL Adv. Op. 05-13A, 2005 WL 1460527 (May 31, 2005).[7] Advisory Opinions are agency interpretations that reflect carefully "considered views" of the Department and are entitled to deference. Alaska Dep't of Envtl. Conservation, 540 U.S. at 487; cf. Long Island Care, 551 U.S. at 175 (according deference to Departmental views set forth in internal Advisory Memorandum in response to litigation). In the Opinion, the Department concluded "that the [state FMLA'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 [federal] FMLA, which expressly encourages more generous state family leave rights than the FMLA provides directly." Adv. Op. 05-13A, 2005 WL 1460527, at *3. The Opinion relied on both ERISA and FMLA's plain language and legislative history "mak[ing] 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." Id. at *3. Specifically, the Opinion relied on the Senate report accompanying FMLA, which demonstrates, among other things, that Congress was well aware of the Wisconsin substitution provision and expected it to be saved by ERISA:

> 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 . . .
>
> 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.
>
> 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

[7] The specific plan at issue in Advisory Opinion 2005-13A was self-funded, whereas that does not appear to be the case with Nationwide's Plan. This slight factual distinction does not alter the Advisory Opinion's applicability to the instant case.

or other benefits, and paid leave), are not preempted by ERISA, or any other federal law. Adv. Op. 05-13A, at *3 (quoting S. Rep. No. 103-3, at 38 (1993); reprinted in 1993 U.S.C.C.A.N. 3, 40 (emphasis added)); accord S. Rep. No. 102-68, at 55 (1991). As the Opinion also states, further support specifically addressing the Wisconsin FMLA is found in an exchange between FMLA's chief sponsor, Senator Dodd, and Wisconsin Senators Feingold and Kohl:

> SENATOR FEINGOLD.... Is it the intent of the sponsors of this bill that the provisions of [ERISA], as amended, shall not prevent the substitution of accrued paid leave, regardless of the source of funding for the paid leave?
>
> SENATOR DODD. Yes. The provisions of [FMLA] 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.

Adv. Op. 05-13A, at *3 (quoting 139 Cong. Rec. 2254 (Feb. 4, 1993) (emphasis added)).[8]

Like the Supreme Court of Wisconsin, see 236 Wis.2d at 23 n.1, the Secretary found the legislative history helpful in informing her understanding of FMLA's meaning and intent. The Supreme Court has likewise used legislative history to support its reading of ERISA's clear statutory terms. See, e.g., LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 254-56 (2008) (discussing both Section 409(a)'s plain reference to "plan" injuries and "harms that

[8] A January 29, 1993 letter, from the Congressional Research Service of the Library of Congress to the House Committee on Education and Labor provides legislative history to the contrary, 139 Cong. Rec. 1994, 2010 (Feb. 3, 1993), but that letter was neither authored by a Member of Congress nor included in the official Senate or House Reports on FMLA and therefore does not demonstrate congressional intent. Kelly v. Robinson, 479 U.S. 36, 51 & n.13 (1986).

concerned the draftsmen of § 409"). The Department's Advisory Opinion thus found that the combination of FMLA's express encouragement and protection of more substantial state FMLA rights, combined with its "clear" legislative history meant that ERISA Section 514(a), did not preempt Washington's FMLA.[9] Given FMLA's overall statutory purpose, its savings provisions for more generous leave benefits, and its explicit legislative history on ERISA preemption and the Wisconsin Act, ERISA does not preempt Wisconsin's disability substitution provision despite its reference to a type of ERISA-covered plan.

D. ERISA Does Not Preempt the WFLMA Leave Substitution Requirement under Conflict Analysis

Conflict preemption analysis leads to the same conclusion that ERISA does not preempt the WFLMA leave substitution requirement. There is no conflict between complying with the WMFLA disability benefit substitution requirement and ERISA because the WFMLA solely regulates employers and thereby imposes no legal obligation on, and requires no action on the part of, plans or plan administrators regulated by ERISA. Conflict preemption analysis begins by "asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects." Boggs, 520 U.S. at 841. That question is answered here in the negative. For the purposes of this case, the relevant articulation of Wisconsin law is the one set forth in the Gerum decision, in

[9] At the Court's October 20, 2010, hearing, the Plaintiffs suggested that Advisory Opinion 2005-13A is distinguishable because it addressed a state law that carved out disability benefits from its leave substitution requirements. Hr'g Tr. at 105-06. The Plaintiffs have also contrasted this case with Oregon family leave law's exclusion of disability benefits from leave substitution. Pls.' Mot. at 23. Both states' "carve outs" are completely beside the point. The instant litigation assumes that disability benefits qualify as leave under WFMLA; the Plaintiffs have opted not to challenge that assumption. As a result, the Oregon law's exclusion is irrelevant and the question presented in the Advisory Opinion aligns with that presented by the instant WFMLA challenge.

which the ALJ held that Nationwide could comply with its WFMLA leave substitution obligations by either permitting Ms. Gerum to substitute paid disability leave from the Plan for the days she had requested or, in the alternative, paying the requested benefits itself. See Brown, 546 F.3d at 362 (preemption challenges are strictly "as applied"). The order required nothing of the Committee, the Plan or its dedicated funds, because WFMLA imposes no legal obligations on ERISA plans, and therefore does not implicate a plan administrator's fiduciary obligations with respect to plans. Because WFMLA does not regulate ERISA plans and thereby enforce or supplement ERISA rights, this case only involves the effect of leave substitution requirements on employers such as Nationwide and thus poses no conflict with ERISA.

Indeed, in Gerum, Nationwide attempted to comply with the ALJ's order by asking the Plan's Committee to authorize the benefit payment out of Plan funds, but the Committee denied Nationwide's request as contrary to the terms of the Plan. The burden of complying with the ALJ's order remained exclusively with Nationwide, as Ms. Gerum's employer, and Nationwide in fact did pay for her leave out of its general assets; presumably future cases would be handled in exactly the same way. Under Wisconsin's leave substitution provisions, an employee may file a complaint with the DWD against his or her employer if the employee "believes his or her employer has violated" WFMLA. Wis. Stat. § 103.10(12)(b). "If the DWD decides that the employer violated an employee's rights under the WFMLA, it may 'order the employer to take action to remedy the violation.'" Harvot v. Solo Cup Co., 320 Wis. 2d 1, 16, 768 N.W.2d 176, 183 (2009) (quoting Wis. Stat.§ 103.10(12)(d)). Upon completion of the administrative action, the employee or DWD may bring a civil action "against the employer" for the same WFMLA violation. Harvot, 320 Wis.2d at 16, 768 N.W.2d at 183 (citing Wis. Stat. § 103.10(13)(a)).

Nationwide acknowledges that it was "the only respondent" in the Gerum case and the only entity ordered to either provide the disability benefit substitution or pay the same amount out of general assets. Pls.' Mot. at 2. It is therefore undisputed that, pursuant to the plain language of WFMLA, only an employer is subject to the Act's leave substitution requirements, only an employer is a proper party to a WFMLA action, and only an employer is subject to a WFMLA enforcement. As a result, Nationwide is simply wrong that disability benefit substitution means that it and similarly situated employers can only follow the terms of the Wisconsin law by violating the terms of the plan. See Pls.' Mot. at 19, 25. Nationwide can comply with both the Wisconsin law and the plan's terms simply by making the required payments itself.[10]

In the same way, it is equally untrue that "the Defendants have provided an alternative enforcement mechanism for seeking payment from an ERISA plan, since they provided a forum that processed, investigated and adjudicated a claim for ERISA benefits in favor of an associate who claimed that she was wrongfully denied those benefits." Pls.' Mot. at 20. "ERISA's civil enforcement remedies were intended to be exclusive," Pilot Life Ins. Co., 481 U.S. at 54, but obtaining WFMLA disability substitution or the right to the same benefit from a company's general assets is not a "mechanism for seeking payment from an ERISA plan," because plans have no legal obligations to make payment under WFMLA. The only issue in Gerum and this case is WMFLA's leave substitution requirement, under which Ms. Gerum was denied benefits from the Plan. See Sherfel, 2010 WL 3860627, at *2. In Gerum, Ms. Gerum never claimed that

[10] For this reason, the Plaintiffs' repeated reliance on the Supreme Court's decision in Egelhoff is inapplicable: the state statute in Egelhoff compelled plan administrators to pay certain benefits. See Pls.' Mot. at 21-22 (citations omitted). WFMLA has no such binding effect on plan administration, and therefore the Plaintiffs' alleged conflicts are non-existent.

"she was wrongfully denied [ERISA] benefits" (as the Defendants mischaracterize), but instead filed a WFMLA complaint with DWD alleging that Nationwide violated her WFMLA rights and seeking to "remedy [a] violation of a legal duty independent of ERISA." See Davila, 542 U.S. at 214. Ms. Gerum's complaint was properly litigated in an administrative proceeding set up to "process[], investigate[], and adjudicate[] a claim for WFMLA benefits," Pls.' Mot. at 20, not ERISA benefits, and Nationwide was found to have violated legal duties under WFMLA. Sherfel, 2010 WL 3860627, at *2. The Plan and Committee were not parties to the WFMLA proceeding (neither is a proper party to a WFMLA cause of action), and were never ordered to pay a plan benefit to Ms. Gerum. Thus, WFMLA's requirement that the employer provide disability benefit substitution or pay the same benefit out of general assets creates a WFMLA right with WFMLA remedies that in no way supplement or duplicate ERISA claims within the contemplation of Davila and predecessor Supreme Court case law mistakenly invoked by Nationwide.[11]

CONCLUSION

For the foregoing reasons, this Court should find that ERISA does not preempt the Wisconsin Family and Medical Leave Act to the extent that it requires an employer to either allow the substitution of disability benefits for family and medical leave or pay the same benefit out of the employer's general assets.

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[11] Davila involved a state law claim against a plan administrator disputing a denial of benefits provided by the plan, which was duplicative of an ERISA § 502(a)(1)(B) claim. 542 U.S. at 211-14. The instant case also involves state law claims, but they would be filed against employers disputing denials of rights protected by the WFMLA and lacking any nexus with ERISA § 502(a)(1)(B), plan benefits, or plan administration. See Sherfel, 2010 WL 3860627, at *1-4. In other words, as previously noted, WFMLA imposes "a legal duty independent of ERISA." See Davila, 542 U.S. at 214.

Respectfully Submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

NATHANIEL I. SPILLER
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division

/s/ Stephen Silverman
STEPHEN SILVERMAN
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2010, a copy of the foregoing was filed electronically using the CM/ECF system, which will send notification of such filing to the following:

Daniel W. Srsic
Melanie Anne Hougton
Littler Mendelson, P.C.
21 East State Street
Suite 1600
Columbus, Ohio 43215

James J. Oh
Littler Mendelson, P.C.
200 North LaSalle Street
Suite 2900
Chicago, Illinois 60601

Susan Katz Hoffman
Littler Mendelson, P.C.
Three Parkway
1601 Cherry Street
Suite 1400
Philadelphia, PA 19102-1321

Richard Briles Moriarty
Steven C. Kilpatrick
Assistant Attorneys General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857

Jack W. Decker
Principal Assistant Attorney General
Employment Law Section
Rhodes State Office Tower, 23rd Floor
30 East Broad Stret
Columbus, Ohio 43215

/s/ Stephen Silverman
Stephen Silverman (DC# 985297)
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax
silverman.stephen@dol.gov