Case No. A129914

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION

UNITED AIRLINES, INC.,
Defendant-Appellant,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; RICHARD P. FERGUSON; GEOFFREY W. EVANS; and KATHLEEN WENTWORTH,
Plaintiffs-Appellees.

FROM A FINAL JUDGMENT IN THE SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO, CASE No. CGC-07-468937

BRIEF OF THE SECRETARY OF LABOR, HILDA L. SOLIS, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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QUESTIONS PRESENTED

The California Kin Care Law (hereafter, "Kin Care Law" or "Section 233") requires California employers who pay their employees when they are absent due to personal sickness to also pay their employees when they are absent due to a family member's sickness, but expressly does not apply to employers who provide sick leave through ERISA-covered welfare benefit plans. CAL. Labor Code § 233. The Employee Income Retirement Security Act ("ERISA"), 29 U.S.C § 1001, covers employer-provided sick leave benefits if they are paid out of a bona fide trust separate from the employer's accounts, but not if they are paid out of the employer's general accounts as part of an ordinary "payroll practice." In addition, ERISA preempts state laws that single out ERISA-covered plans for special treatment or require the establishment of, or operate through, an ERISA-covered plan, but does not preempt generally applicable state laws that do not require such establishment or restructuring of ERISA-covered plans to be given effect or that fall within one of its statutory savings provisions. The questions presented are:

1. Whether United Air Lines' "Sick Leave Trust" is an ERISA-covered employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1), 29 C.F.R. § 2510.3-1, and the Department of Labor's Advisory Opinions 2004-08A (July, 2004) (Denny's, Inc. Vacation Pay Plan) and 2004-10A (December 30, 2004) (May Department Stores, Inc.).

2. Whether ERISA preempts Section 233 of the California Labor Code.

STATEMENT OF INTEREST

As the federal agency with the primary responsibility for administering and enforcing Title I of ERISA, the Secretary of Labor has a strong interest in ensuring that courts correctly interpret ERISA. See Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc) (the Secretary's interests include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets); Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983). The Secretary also has a strong interest in ensuring that courts correctly interpret her regulations and guidance. That interest is particularly served in this case because determination of whether the sick leave plan provided by United Air Lines ("United" or "defendant") to its air line pilots (and certain other employees) is covered by ERISA is critical to determining whether Section 233 applies by its own terms, and the Secretary's advisory opinions regarding similar plans are central to disposition of this question. The Secretary's interest in participation is also served with respect to the further question about ERISA preemption of Section 233 because preemption is the principal mechanism through which courts decide where ERISA's reach ends and state police or regulatory powers prevail; ERISA preemption is an

unusually complicated area of the law; and the Secretary has longstanding expertise through her amicus participation in numerous preemption cases, including all the Supreme Court cases relevant to the preemption analysis in this case.

STATEMENT OF THE CASE

This appeal arises out of a suit by several individuals and ALPA, the union representing plaintiffs (collectively "plaintiffs"), against defendant United. Plaintiffs claim that United violated California's Kin Care Law, Labor Code § 233, by denying plaintiff Wentworth sick leave pay for time she took off from work to care for her dying mother. Plaintiffs also sought declaratory relief that United's sick pay policy violates this state law.

Section 233 requires that California employers who pay their employees when they are absent due to personal sickness also pay their employees when they are absent due to a family member's sickness. CAL. Labor Code § 233.[1] Section 233, however, expressly excludes ERISA-

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[1] CAL. Labor Code § 233 states, in relevant part:

> Any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee. All conditions and restrictions placed by the employer upon the use by an employee of sick leave also shall apply to the use by an employee of sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner.

covered plans from its coverage: "'Sick leave' does not include any benefit provided under an employee welfare benefit plan subject to ERISA." CAL. Labor Code § 233(b)(4). United indisputably provides sick leave to plaintiffs when they have a personal medical need to be absent from work but does not allow them to use sick leave to care for sick relatives. 12 CT 4854; 12 CT 4452 (UMF 4) (Amended Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment). The parties dispute, however, whether the United sick leave policy constitutes an "employee welfare benefit plan" as that term is defined in ERISA section (3)(1), 29 U.S.C. § 1002(1), and therefore whether it is excluded or covered by the state law.[2]

United created its "sick leave trust" arrangement in 1989. 12 CT 4854. United states that the "primary reason that [it] maintains the sick leave plan as an ERISA plan is so that it could provide uniform benefits and

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[2] Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan" to include: "[A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or <u>benefits in the event of sickness</u>, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1) (emphasis added).

uniform administration to all its employees, and that would include not having to comply with specific state laws applicable to sick leave" including California's Kin Care law. Id.

During trial, United amended the trust arrangement. See 6 CT 2137-39 (United's Second Revision to the Sick Leave Trust Agreement, effective July 2009). Thus, the original formulation of the trust was in effect at the time of the complaint and throughout the lawsuit up to July 2009. The revised trust arrangement, however, applies from July 2009 onward and is the governing trust instrument with respect to any declaratory relief this Court may affirm or issue.

Both the original and revised sick leave trusts were employed by United to pay sick leave benefits; however, under neither formulation did the trust directly pay the sick leave benefits to the employees. 12 CT 4453-4454 (UMF 10-14). Instead, under both formulations, the sick leave funds passed from United's main operating account to the sick leave trust, and from the trust back to United's main operating account. As to the original trust arrangement, the trial court found that this cycle was irregular and informal, indicating that the trust was not a bona fide separate account, because (1) United's "prior funding formula" according to which United alleged it contributed to the trust was not applied consistently, not written down, and never approved by the plan administrator, 12 CT 4870-71, and (2) the trust's reimbursements to United were – although generally made a

day or two before United ultimately paid sick leave – in some cases made after United paid sick leave. 12 CT 4857.[3]

As to the revised trust arrangement, the payment cycle between United and the trust generally results in the funds being in the trust, outside United's operating accounts, for a pay period or less, indicating a "pass-through" trust. The revised trust provides that United must make contributions to the trust on a monthly basis in amounts "calculated to ensure that the Trust will have sufficient money to cover one month's worth of sick leave payments." 12 CT 4857. United makes these contributions to the trust "on or about the 5th business day of the month." 12 CT 4471 (UMF 86). As amended, the trust is now required to transfer these funds back to United before United pays the monthly sick leave. 12 CT 4858; 12 CT 4500-01 (UMF 215) (The revised Trust "always" transfers funds to United to cover the pilots' and flight attendants' upcoming sick leave payment before the 16th of the month.). As a result, the cycle for funds used to pay the pilots and flight attendants sick leave pass through the trust and return to United's general accounts within 10 days or less.

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[3] As to United's original trust arrangement, United alleged that it had a funding policy, the "Prior Funding Formula," which used historical trends in sick leave usage to forecast the coming month's anticipated sick leave payments. 12 CT 4870-71. United alleged that pursuant to this formula it made monthly contributions calculated to keep the overall trust assets equal to double the month's anticipated sick leave liabilities plus $1 million. <u>Id.</u> The trial court however found that the "Prior Funding Policy" was not applied consistently, such that United's contributions under the original plan did not bear a relationship to the plan's accrued liabilities. <u>Id.</u>

As to both the original and revised trust arrangements, while the funds were in United's main operating account, United collected interest on them, which it retained as its own income. 12 CT 4474 (UMF 95-97). Upon payment to employees utilizing sick leave, the funds passed from the main operating account, through the payroll accounts, to the employees' personal accounts. The only factor affecting which of United's payroll accounts pays the benefits is the employee's election to be paid via direct deposit, with a hard check, or to a credit union. 12 CT 4453 (UMF 13). United also treated the trust assets as its own assets for tax purposes, paying income taxes on the earnings from trust assets as if those earnings were its income. 12 CT 4458 (UMF 42); 12 CT 4873. Similarly, in its audit reports and tax returns, United also reported the trust as its asset, describing trust payments to United as "reimbursements" for sick leave payments – not taxable income from a bona fide separate fund. 12 CT 4474 (UMF 93, 94). Moreover, in United's 2002 bankruptcy proceeding, it reported the trust to the bankruptcy court as personal property (a pre-paid expense). 12 CT 4458 (UMF 43).

As indicated, the only substantive difference between the old and revised trust arrangements concerns United's funding and contribution obligation. United's original trust formulation had no contribution obligation enforceable against United. 12 CT 4868-70. Instead, the original plan expressly provided that the trustee had "no duty to require any

contributions to be made to it or to determine that the contributions received by it comply with the provisions of the Plan." Id.; 2 CT 961. United's revised trust formulation, however, states that the trustee has a duty to require that contributions are made to it and comply with the provisions of the Plan. 6 CT 2137 - 2139. Moreover, in contrast to the original formulation, the trust now requires United to fund the plan as its sick leave liability accrues. 6 CT 2137-2139; see also 12 CT 4870-71.[4]

On cross-motions for summary judgment, the trial court found that under neither the original or revised "sick leave trust" had United established a welfare benefit plan covered by ERISA. Citing factors first identified by the Secretary in her Advisory Opinion ("AO") Denny's, Inc. Vacation Pay Plan, 2004-08A (July 2, 2004), 2004 WL 2074325, the court found that although United had a direct legal obligation to pay benefits, and the revised plan also imposed on United an enforceable contribution obligation, neither trust arrangement created a bona fide separate fund.[5] It

[4] As noted above, the current funding formula requires United to make monthly payments to the trust "calculated [only] to ensure that the Trust will have sufficient money to cover one month's worth of sick leave payments." 12 CT 4857.

[5] In the Denny's AO, the Secretary identified the following factors as being particularly pertinent to determining whether an employer's arrangement for vacation benefits is covered by ERISA: (1) does the plan include a bona fide separate fund, (2) does that fund have a direct legal obligation to pay benefits under the plan, (3) is there a contribution obligation enforceable against the employer, and (4) does the plan involve contributions that are actuarially determined, established through collective bargaining, or

explained, inter alia, that neither offered employees with unpaid sick leave claims any genuine protection from United's creditors in the event of United's insolvency. 12 CT 4878. As such, the "employees' benefits remain tied to the financial health of United," and the trust, as originally and presently formulated, is not covered by ERISA. Id.

SUMMARY OF ARGUMENT

I. ERISA's express purpose is to "protect the interests of participants [and their beneficiaries] in employee benefit plans." 29 U.S.C. §1001(b). ERISA accomplishes this purpose by requiring employers to report and disclose information about ERISA-covered plans, by imposing duties on the fiduciaries of those plans, and by providing remedies to employees when fiduciaries and related parties violate its provisions. Id.; see also id. at §§ 1021, 1104, 1132. ERISA's coverage of "plans," however, does not include coverage of ordinary wage payments; and certain employee benefits, like paid sick or vacation leave, may be provided either through a bona fide trust separate from the employer's general accounts, in which case the employer has established an ERISA-covered plan, or (like wages) through the employer's general accounts, in which case the arrangement is a

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otherwise bear a relationship to the plan's accruing liability. Under ERISA, vacation and sick leave plans are treated alike for coverage purposes. See discussion infra.

"payroll practice" not covered by ERISA. See generally Massachusetts v. Morash, 490 US 107, 115-18 (1989).

The distinction between a bona fide ERISA-covered trust and a mere payroll practice is critical to the resolution of this case. As the Supreme Court held in Morash, employers do not create ERISA-covered plans merely by paying wages for periods during which their employees were sick or taking vacations. Such ordinary wages fall outside the scope of ERISA's concerns, as both the Court and the Secretary have consistently recognized. When an employer creates a bona fide trust to fund promised vacation or sick leave benefits, however, it may effectively create an ERISA-covered plan. This is because ERISA was enacted, in substantial part, to ensure the proper management of assets dedicated to funding promised benefits. Accordingly, when employers separately fund benefits through bona fide trusts that promise a level of protection above and beyond the mere contractual commitment to pay wages, they may effectively create ERISA-covered plans. This line of demarcation between ERISA-covered trust arrangements and mere payroll practices defines the proper scope of ERISA's application and serves important federalism interests by recognizing and preserving states' traditional role in regulating the payment of wages. Morash, 490 US at 115-18.

In this case, United has interposed trust arrangements between its general accounts and its payment, out of those accounts, of sick leave.

Consistent with two advisory opinions involving companies that provided vacation benefits through a similar trust arrangement, the Secretary has concluded that United's sick leave trust is not genuinely separate from its general accounts and provides no additional meaningful protection to employees entitled to sick leave under their employment contracts (or collective bargaining agreement) with United. Instead, the originally-formulated trust that applied until July 2009: (1) was not truly separate from United's general accounts, (2) did not require United to fund it; and (3) gave no party a right to enforce United's contribution obligation, even if there were one. The revised trust currently in effect, by contrast, is a mere pass-through account, set up - unlike a genuine ERISA plan – primarily to benefit United, not its employees, and offering little or no additional protection beyond United's commitment to pay the promised wages. Compare DOL Advisory Opinions 2004-08A (July 2, 2004), 2004 WL 2074325 (Denny's, Inc. Vacation Pay Plan) and 2004-10A (December 30, 2004), 2004 WL 3244869 (May Department Stores, Inc.). Accordingly, United's sick leave benefit is not provided through an ERISA-covered plan. By its own terms, therefore, Section 233 of the California Labor Code (the California "Kin Care Law") applies.

II. ERISA does not preempt California's Kin Care Law as it applies to United for the simple reason that United's sick leave benefits are not provided through an ERISA-covered plan and ERISA preemption only

extends to state laws that "relate[] to" covered plans. Significantly, the same is true even if – contrary to the above analysis – ERISA did cover United's sick leave benefit. ERISA preempts state laws that "relate to" employee benefit plans, and are not otherwise saved from preemption, under certain parameters that have been established by the United States Supreme Court. 29 U.S.C. § 1144; see, e.g., California Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995); Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988). Under these parameters, the portion of Section 233 that exempts ERISA-covered plans from its coverage is preempted by ERISA because it has an express "reference to" ERISA plans that singles them out for special treatment. But under controlling Supreme Court law, ERISA does not preempt the remainder of the statute.

Under a Kin Care Law stripped of its prohibited exclusion of ERISA plans, employers would still be free to provide sick leave benefits either through a funded ERISA-covered trust or through a common, non-ERISA-covered payroll practice. Consequently, the law would not mandate that employers create ERISA plans to pay family sick leave, nor bind existing ERISA fiduciaries to any particular action. Instead, even if, unlike in this case, an employer chooses to provide sick leave benefits through an ERISA-covered plan, the state-mandated family leave benefits could be

provided by a payroll practice not covered by ERISA, without altering or burdening the ERISA-covered plan, such that Section 233 has, at most, only an "indirect economic influence" on ERISA plans. Therefore, ERISA would not preempt Section 233 as applied to United, even if United's plan were covered by ERISA.

ARGUMENT

I. UNITED'S ORIGINAL AND REVISED SICK LEAVE ARRANGEMENTS ARE NOT ERISA PLANS

A. Legal Framework for Analyzing Sick and Vacation Leave Plans

From the earliest days of ERISA, the Secretary has interpreted ERISA to exclude mere "payroll practices" from the scope of ERISA-covered "employee welfare benefit plans." 29 C.F.R. § 2510.3-1(b); Massachusetts v. Morash, 490 US 107, 116-18 (1989). A "payroll practice," as set forth in the Secretary's payroll practices regulation, 29 C.F.R. § 2510.3-1(b), is a payment out of the employer's general accounts of certain specified benefits, including sick leave and vacation. As explained infra, such practices are not covered by ERISA. As relevant here:

> For purposes of Title I of the Act and this chapter, the terms 'employee welfare benefit plan' and 'welfare plan' shall not include -- …(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his

> or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment).

Id.

Thus, as reflected in the Department's regulations, and as supported by the Supreme Court's decision in Morash, employers do not create ERISA-covered plans merely by paying wages that include compensation for time during which employees were absent due to sickness or vacation. Such ordinary compensation is considered a "payroll practice" that raises none of the concerns for which ERISA was enacted and indeed falls outside the scope of ERISA. When, however, an employer creates a separate pool of assets to fund such promised vacation or sick benefits, it may effectively create an ERISA-covered plan. As the Court recognized in Morash, ERISA was enacted, in substantial part, to ensure the proper management of assets dedicated to funding promised benefits. Morash, 490 U.S. at 112. Accordingly, unless an employer, through the creation of a bona fide funded trust, has made legally enforceable commitments to its employees to hold assets separately for their benefit and to provide them a level of protection above and beyond the mere contractual commitment to pay wages, its promise to provide paid sick or vacation leave along with compensation for work performed does not likely entail the establishment of an ERISA-covered plan.

The primary issue in this case is whether United effectively created a plan by establishing the above-described "sick leave trusts." In 2004, the

Secretary addressed essentially the same issue in two advisory opinions involving companies that provided vacation benefits through a trust arrangement. DOL's Advisory Opinions 2004-08A (July 2, 2004), 2004 WL 2074325 (Denny's, Inc. Vacation Pay Plan) and 2004-10A (December 30, 2004), 2004 WL 3244869 (May Department Stores, Inc.). These advisory opinions build on and complement the payroll practices regulation setting forth a specific safe harbor for arrangements in which the employer funds the benefits solely out of general assets without creating a separate trust. That safe harbor from ERISA's scope does not directly apply where, as here, the employer has created a trust for the benefits. May, 2004 WL 3244869 at *2 ("in the Department's view, the regulation's safe harbor for general asset vacation pay payroll practices does not reach programs such as the May Company's that include a VEBA Trust dedicated to vacation pay benefits."); cf. Morash, 490 US at 114.

As a result, the payroll practices regulation does not resolve the question of ERISA coverage. However, the advisory opinions make clear the Secretary's view that a particular arrangement is not necessarily covered by ERISA just because it falls outside the specific safe harbor set forth in the regulation.[6] May, 2004 WL 3244869 at *2-3 ("vacation pay programs

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[6] Because they are not promulgated through the notice-and-comment procedure generally used for rulemaking, the Secretary's advisory opinions do not carry the force of law. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Such opinions, however, are "entitled to respect" by courts.

that fail to satisfy all of the conditions of the regulation are not necessarily covered by Title I of ERISA. Rather, such programs are subject to further evaluation under section 3(1) of ERISA to determine whether the program includes the requisite elements to constitute an ERISA employee benefit plan."); Denny's, 2004 WL 2074325 at *3 ("the mere presence of a trust or other separate account from which vacation benefits are paid should not automatically result in ERISA coverage in the absence of the trust providing genuine protections to accrued benefits under the plan or otherwise preventing risks ERISA was intended to address"); see also Alaska Airlines v. Oregon Bureau of Labor, 122 F.3d 812, 814 (9th Cir.1997) (holding under nearly identical facts that the airline's sick leave payment arrangement was not covered by ERISA even though the airline created a separate trust to fund the benefits).

To determine whether a sick leave or vacation leave plan that employs a trust is a covered welfare benefit plan and not merely a payroll

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Id. (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); see Beck v. PACE Int'l. Union, 551 U.S. 96, 104 (2007) (quoting Mead Corp. v. Tilley, 490 U.S. 714, 722 (1989), and deferring to the Pension Benefit Guarantee Corporation's and Department of Labor's joint interpretation of ERISA set forth in an amicus brief because "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.") Thus, even when an interpretation has not been codified through formal notice-and comment procedure, 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. EPA, 540 U.S. 461, 487 (2004).

practice, the primary consideration is whether the arrangement provides some level of genuine protection to the sick or vacation leave beyond that already provided by an employer's contractual obligation to pay. May, 2004 WL 3244869 at *2-3. This overarching focus is supported by the rationale underlying the payroll practices regulation, as well as the Supreme Court's Morash decision and Ninth Circuit's Alaska Airlines decision, which post-date the regulations.

In Morash, the Supreme Court ruled that ERISA did not preempt a Massachusetts law requiring employers to pay discharged employees their full wages, including holiday and vacation pay. Morash, 490 U.S. at 109-112. The defendant employer argued that its vacation pay policy was an ERISA plan, but the Court found that the Secretary's payroll practices regulation exempting ordinary vacation pay from ERISA coverage was valid and controlling. Id. at 109, 116-18. As described more fully below, the Court reasoned that ERISA does not govern and preempt ordinary vacation leave policies because, inter alia, states already extensively regulate wage practices and ERISA was not designed to address such practices. Id. at 115-16, 119. In Alaska Airlines, the Ninth Circuit held that ERISA did not preempt application of Oregon's parental leave laws to that airline's sick leave policy, even though that policy incorporated a sick leave trust. Alaska Airlines, 122 F.3d at 815. Alaska Airlines' sick leave arrangement was substantially similar to United's. At the end of each fiscal

year, Alaska Airlines partially "prefunded" the trust. Id. at 813. The airline then "immediately be[gan] removing that money on a monthly basis as reimbursement for the employee benefits that the airline pays." Id. Those reimbursements went directly to Alaska Airlines, who paid all sick leave to employees with their regular paychecks. Id. at 813. Applying Morash, the Ninth Circuit reasoned that Alaska Airlines' sick leave arrangement was an exempt payroll practice because "the employee is not paid by the fund and the fund is not maintained in a manner designed to protect employee sick pay benefits." Id. at 814. Moreover, the Court noted, "sick pay . . . is no less a traditional state function than was the regulation of vacation pay considered in Morash." Id. at 815.

In a single-employer setting, it is highly unusual for a "sick leave trust" to establish or constitute an ERISA-covered plan. Where a separate fund exists, an employer that pays ordinary sick or vacation leave is unlikely to have created an ERISA plan because such a plan: (1) is "associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization;" (2) is unlikely to address "the risks ERISA is intended to address;" and (3) involves areas of "extensive state regulation" such as sick and vacation leave where employees would "actually receive less protection if ERISA were applied." Morash, 490 U.S. at 114-19; Denny's, 2004 WL 2074325 at *2-3. A sick leave trust that (1) pays ordinary sick leave benefits, and (2) provides no genuine protection to

sick leave funds nor otherwise prevents risks ERISA was intended to address is, thus, not an ERISA plan. Denny's, 2004 WL 2074325 at * 2-3. Under such a plan, the employees' risk of losing their sick leave benefits is not meaningfully affected by the existence of the trust. Rather, the employees' risk of losing sick leave benefits remains the same as their "ordinary employment risk," i.e., the risk of non-payment (or adequate legal recourse in that event). See Morash, 490 U.S. at 115 ("Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed - a danger Congress chose not to regulate in ERISA.").

The Secretary has identified various factors for analyzing whether a sick or vacation leave trust is an ERISA-covered plan. Most basically, a trust set up to hold sick or vacation leave payments does not provide genuine protections to the employees or otherwise prevent risks ERISA was intended to address – and is therefore not an ERISA plan – if:

> (1) the trust is not a bona fide separate fund holding assets distinct from the employer's own funds;
> (2) the trust has no direct legal obligation to pay benefits under the plan;
> (3) there was no contribution obligation enforceable against the employer; or

> (4) contributions are not actuarially determined, established through collective bargaining, or otherwise bearing a relationship to the plan's accruing liability.

Denny's, 2004 WL 2074325 at *2-3. Furthermore, a trust set up to hold sick or vacation leave payments is also unlikely to provide genuine protections to the employees or otherwise prevent risks ERISA was intended to address – and thus unlikely to be an ERISA plan – if:

> (1) the principal function of the trust is to benefit the employer, not the employees;
> (2) the employees' right to benefits under the program is not dependent on the amount or frequency of employer contributions to the trust or the level of assets in the trust;
> (3) the employees' entitlement to benefits would not be affected if the trust were terminated;
> (4) the employees do not receive or have any right to receive payments directly from the trust, including in the event of the employer's insolvency; and/or
> (5) the employees do not contribute to the trust (even though it is established as a voluntary employee benefit association, or VEBA).

May, 2004 WL 3244869 at *2-3. As formulated in Denny's and May, these multiple factors are not exclusive and, under a totality of circumstances approach, do not all have to be present to conclude that the arrangement in question is not an ERISA-covered plan. See e.g. May, 2004 WL 3244869 at *3 (concluding that although the plan was a bona fide separate fund, it was not an ERISA plan).

B. Neither the Original nor Revised Sick Leave Trust is a Bona Fide Separate Fund.

The United "sick leave trust" does not, on balance, meet the Denny's/May criteria for establishing ERISA coverage. Instead, even under its revised funding policy, the trust is little more than a pass-through arrangement set up for the convenience of United, offering little or no additional protection beyond United's commitment to pay the promised wages without deducting for absences due to sickness or other medical leave. United has thus not established an ERISA-covered sick leave plan.

It is undisputed that United does not directly transfer the sick leave funds from the trust to the employees. 12 CT 4453-4454 (UMF 10-14). Instead, the sick leave funds pass from United's main operating account to the sick leave trust, and from the trust back to United's main operating account – a cycle that results in the funds that eventually pay the sick leave generally staying in the trust for 10 days or less (i.e., less than a pay period). Direct payment to the employees is made on a fixed day each month from the main operating account, through the payroll accounts in United's general accounts, to the employees' personal accounts. 12 CT 4453 (UMF 8); 12 CT 4454 (UMF 18); 12 CT 4471 (UMF 86); 12 CT 4500 (UMF 214); 12 CT 4500-01 (UMF 215). The only factor that affects which of United's accounts pays the benefits is the employee's election to be paid via direct deposit, with a hard check, or to a credit union, an

election that applies to the entirety of their wage payment. 12 CT 4453 (UMF 13); 12 CT 4857 (UMF 6-12).

While the funds sit in its main operating account, United collects interest on them, which it retains as its own income. 12 CT 4474 (UMF 95-97); 12 CT 4858. United also treats the trust assets as its own assets for tax purposes. United pays income taxes on the earnings from trust assets as if those earnings were its income. 12 CT 4458 (UMF 42); 12 CT 4873. Moreover, as the trial court emphasized, 12 CT 4871-78, the funds in United's sick leave trust are not truly separate from its own in the event of United's insolvency. Thus, in United's 2002 bankruptcy proceeding, it reported the trust to the bankruptcy court as personal property (a pre-paid expense). 12 CT 4458 (UMF 43). Similarly, in its audit reports and tax returns, United also reported the trust as its asset, describing trust payments to United as "reimbursements" for sick leave payments – not taxable income from a bona fide separate fund. 12 CT 4474 (UMF 93, 94)

Therefore, United's trust does not provide any genuine level of protection beyond that provided by a company's contractual promise in an individual employment contract or, as here, a collective bargaining agreement to pay a benefit. 12 CT 4469-4470 (UMF 77-80). If United is solvent, the employees can expect to receive their sick leave benefits with their next paycheck. If United is insolvent, as noted by ALPA, the Bankruptcy Code already provides significant protection for all sick leave

pay earned within 180 days of a debtor's filing for bankruptcy. 11 U.S.C. § 507(a)(4) (priority for up to $10,000 of wages, including sick leave pay, per employee). See ALPA Brief at 24. Given that the United trust is set up to hold assets for approximately 10 days or less, this legal protection should, as a practical matter, give the employees complete priority over United's general unsecured creditors, and render largely irrelevant whether the trusts, as a formal matter, also do so (which the trial court found they do not).

The trial court's conclusion that United did not and does not treat the sick leave trust like a bona fide separate fund is, therefore, amply supported by the findings of facts and the underlying record. The salient facts supporting this conclusion include the company's retention of interest on trust monies transferred to its accounts; its treatment of trust assets as its own for tax and other purposes; the brief time that sick leave funds are held in the trust account; the ostensible availability of the trust's assets (subject to the Bankruptcy Code's special treatment of sick-leave liabilities) to United's creditors in the event of United's insolvency; and the direct payment of sick leave benefits out the United payroll accounts (albeit in conjunction with United's associated contribution to, and reimbursement from, the trust). Indeed, United concedes that the primary purpose of the trust, and the 2009 revisions to the trust, was to evade compliance with more-protective state Family and Medical Leave Act laws – not to provide additional protections for their employees' sick leave benefits. 10 CT 3890-

93; see also 7 CT 2864-65 (UMF 22); 5 CT 1876-77; 12 CT 4484 (UMF 150).

Under these circumstances, United's hiring of an actuary to predict how much the upcoming month's sick leave liabilities were likely to be and its decision to give the trustee power to enforce this contribution obligation does not change the fundamental nature of the revised trust arrangement as a mere pass-through trust. See Denny's, 2004 WL 2074325 at *2-3. The Denny's enforceable-contribution-obligation and funding factors are only relevant to the extent that they ensure additional genuine protections to the employees' sick leave funds. However, in the context of a benefit like sick leave that is eligible for exclusion from ERISA as a payroll practice, this kind of pay-as-you-go funding of the trust has little or no bearing on the employees' likelihood of receiving the benefits when the trust provides no genuine protection beyond the employer's contractual promise to pay benefits. Enforceable funding of the trust has little relevance when, as here, a plan is designed to fund only one month's worth of sick leave at a time and to only hold that month's worth of sick leave for 10 days or less before returning the assets to the employer's general accounts. See discussion of current trust funding and divestment cycle supra pp. 5-6. Accordingly, United's post-litigation (2009) revision of its "sick leave trust" did not cure the key elements in the original trust that kept it from being an ERISA plan. If anything, the revisions succeeded only in converting a plan

that was not covered by ERISA because it was only haphazardly funded and not truly separate from United's general accounts into a pass-through trust that is still not truly separate from United's general accounts and still fails to genuinely protect the employees' benefits.

For all these reasons, United's sick leave benefit is analogous to the vacation benefits in Denny's and May, which the Secretary, applying the rationale of Morash, concluded were not ERISA plans. Denny's, 2004 WL 2074325 at * 3; May, 2004 WL 3244869 at *3 (both citing Morash, 490 U.S. at 116). It is also analogous to the Alaska Airlines benefits that the Ninth Circuit held to be non-covered payroll practices. Alaska Airlines, supra. As in those situations, United's sick leave arrangement does not constitute an employee benefit plan covered by ERISA.

II. ERISA DOES NOT PREEMPT THE CALIFORNIA KIN CARE LAW AS APPLIED TO THE UNITED SICK LEAVE ARRANGEMENT

Where ERISA preemption applies to invalidate a state law, it only preempts the state law to the extent it "relates to" ERISA plans. 29 U.S.C. § 1144(a). It does not otherwise invalidate the state law to the extent it operates outside of ERISA. See, e.g., Colonial Life & Acc. Ins. Co. v. Medley, 572 F.3d 22, 29 (1st Cir. 2009). ERISA does not preempt California's application of its Kin Care Law to United's sick leave arrangement for the simple reason that the arrangement is not covered by ERISA in the first place. Instead, it is precisely the sort of payroll practice

that the states have traditionally regulated, without any overlay of federal regulation under ERISA. Since United's sick leave is provided outside of ERISA, there is no need for this Court to address the broader preemption questions potentially raised by this case unless it determines, contrary to the arguments stated above, that the United sick leave program is an ERISA-covered plan. Even if United's sick leave practices were ERISA-covered, however, the Kin Care Law would not be preempted by ERISA.

A. Legal Framework for Analyzing ERISA Preemption

Section 514(a) of ERISA preempts state laws that "relate to" employee benefit plans. 29 U.S.C. § 1144(a). "A law 'relates to' a covered employee benefit plan for purposes of § 514(a) 'if it has a connection with or reference to such a plan.'" Dillingham, 519 U.S. at 324 . (citations omitted).

A state statute contains an impermissible "reference" to ERISA plans if it "acts immediately and exclusively upon" ERISA plans by singling them out for special treatment, or the existence of ERISA plans is essential to the law's operation because employers cannot comply with the law unless they create ERISA plans. Dillingham, 519 U.S. at 324-25 (citing District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992), and Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 828 n.2, 829-30 (1988)). If a statute references ERISA plans by singling them out for special treatment, ERISA preempts the portion of the

law containing the prohibited reference.[7] Id. Whether the resulting generally applicable law, stripped of any provision affording ERISA plans express special treatment, "relates to" ERISA plans depends on whether that law has a "connection with" ERISA plans.

The starting assumption in "connection with" analysis is "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Dillingham, 519 U.S. at 325 (citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)); Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson, 201 F.3d 1212, 1217 (9th Cir. 2000) ("[T]he Court has established a presumption that Congress did *not* intend ERISA to preempt areas of traditional state regulation that are quite remote from the areas with which ERISA is expressly concerned -

[7] Whether the preempted portion of the law is severable from the remainder of the law is ultimately a question of state law. Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability [of state statutory provisions] is of course a matter of state law," primarily concerned with the question "[w]ould the [state] legislature have passed the statute without the unconstitutional section?"). Although this brief takes the position that Section 233 of the California Labor Code's exemption of ERISA welfare benefit plans constitutes an impermissible reference to such plans, and is therefore preempted as a matter of ERISA federal law, it takes no position on whether that provision is severable as a matter of state law.

reporting, disclosure, fiduciary responsibility, and the like.") (emphasis in original; internal quotation marks omitted).[8]

To determine whether a state law has "the forbidden connection" with ERISA plans, courts must look "both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' . . . , as well as to the nature of the effect of the state law on ERISA plans." Dillingham, 519 U.S. at 325 (citing Travelers Ins. Co., 514 U.S. at 656, 658-659). State statutes that "mandate[] employee benefit structures or their administration" are considered to have such a prohibited connection. Id. at 328 (citing Travelers Ins. Co., 514 U.S. at 658). However, state statutes that regulate employers' conduct but do not "bind ERISA plans to do anything" are not preempted. Id. at 332.

Consequently, when employers can comply with a state law without creating an ERISA-covered plan, and without altering the terms, structure or administration of an ERISA plan, the state law lacks a prohibited "connection with" ERISA. Dillingham, 519 U.S. at 325 (finding no "connection with" ERISA plans because no ERISA-covered apprenticeship program is required by California law to meet California's standards, which

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[8] Because of this presumption, the "considerable burden" for proving federal preemption of state statutes is on the party asserting preemption as a defense. De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 814 (1997).

can also be met by non-ERISA-covered apprenticeship programs). In that circumstance, it is a matter of employer choice whether an existing ERISA plan is the mechanism through which it meets its state-law obligations. Cf., De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806, 815-16 (1997) (holding a state tax on hospital receipts to be "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute," even though "[t]his particular ERISA fund has arranged to provide medical benefits for its plan beneficiaries by running hospitals directly, rather than by purchasing the same services at independently run hospitals") (citation omitted); Golden Gate Restaurant Ass'n v. City and County of San Francisco, 546 F.3d 639, 646-47, 650 (9th Cir. 2009), cert. denied, 130 S.Ct. 3497 (U.S. Jun 28, 2010).[9] Such laws thus have at most only an "indirect economic influence"

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[9] In Golden Gate, the Ninth Circuit rejected a preemption challenge to a San Francisco ordinance establishing a city-wide health care program for private employees, funded in part by employer contributions. The non-preemption holding was based in large part on a finding that the ordinance did not require individual employers to create ERISA-covered health plans:

> We make two observations about the Ordinance. First, the Ordinance does not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans. Employers may choose to make up the difference between their existing health care expenditures and the minimum expenditures required by the Ordinance either by altering existing ERISA plans or by establishing new ERISA plans. However, they need not do so. The City-payment option allows employers to make payments

on ERISA plans, insufficient to trigger ERISA preemption. De Buono, 520 U.S. at 816; Dillingham, 519 U.S. at 329-34; Travelers Ins. Co., 514 U.S. at 659; Golden Gate, 546 F.3d at 656.

B. Insofar as United's Sick Leave Trust is not an ERISA Plan, ERISA Does Not Preempt the Application of the California Law to It.

As applied here, Section 233 is not preempted by ERISA because United's sick leave arrangement is not an ERISA plan. As explained above, most sick leave arrangements are not covered by ERISA because such coverage would not advance ERISA's objectives; and the United sick leave plan falls within this broad category of ERISA-exempted payroll practices. ERISA neither governs such practices nor preempts state regulation of such practices, including state innovations like California's Section 233 that go beyond traditional enforcement of state wage laws by mandating paid family medical leave where an employer otherwise pays for the employee's

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> directly to the City, if they so choose, without requiring them to establish, or to alter existing, ERISA plans. . . . Second, the Ordinance is not concerned with the nature of the health care benefits an employer provides its employees. . . . An employer can satisfy its spending requirements by paying the City; it can satisfy those requirements by funding exclusively preventive care; it can satisfy those requirements by setting up an on-site clinic and reimbursing employees for the purchase of over-the-counter medications; or it can satisfy those requirements in some other manner, such as funding a traditional ERISA plan. The Ordinance does not look beyond the dollar amount spent, and it does not evaluate benefits derived from those dollars.

Golden Gate. 546 F.3d at 646-47; see also id. at 650.

own sick leave. Morash, 490 U.S. at 107 (holding that ERISA does not preempt state law's application to particular vacation pay arrangement because such arrangement was not an ERISA plan); cf. Dillingham, 519 U.S. at 328 (finding that California's apprenticeship law made no impermissible "reference to" ERISA-covered apprenticeship programs because the state law was "indifferent to the funding, and attendant ERISA coverage, of apprenticeship programs," and thus "'functions irrespective of . . . the existence of an ERISA plan.'") (citation omitted); Golden Gate, 546 F.3d at 646-47, 650.

C. Even if United's Sick Leave is Provided through an ERISA Plan, ERISA does not Preempt the State Law's Application to It.

Section 233 does include a specific reference to ERISA plans, by expressly exempting them from coverage. CA Labor Code § 233(b)(4). As noted above, a state law that "acts immediately and exclusively upon ERISA plans," including one that specifically exempts ERISA plans from an otherwise generally applicable law by "singl[ing] out ERISA employee welfare plans for different treatment," is preempted to the extent of the prohibited reference. Dillingham, 519 U.S. at 324-325; Mackey, 486 at 830. Thus, in Mackey, the Supreme Court refused to honor a carve-out for ERISA-covered welfare plans in a generally applicable state garnishment law and held instead that the garnishment provisions would apply equally to such ERISA-covered plans. Mackey, 486 U.S. at 829 ("we have

virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a)") (citations omitted); id. at 830 ("Legislative 'good intentions' do not save a state law" from ERISA preemption).

Under Mackey, despite the stated intent of the California legislature as expressed in the statute to steer clear of ERISA, the ERISA-specific exemption of Section 233 is, as a matter of federal law, preempted. As a result, to avoid any "singl[ing] out" of ERISA problem, id., the law should be read to apply equally to employers who pay sick leave through ERISA-covered plans and to employers who pay sick leave through non-ERISA payroll practices.[10]

If the Court reads Section 233's impermissible exclusion of ERISA plans out of the statute, as Mackey requires, the law would no longer contain an impermissible "reference to" ERISA plans.[11] Despite the

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[10] Again, the Secretary takes no position on whether Section 233's ERISA-specific exemption is severable from the rest of the statute as a matter of state law, but assumes here that it is, i.e., that invalidation of the part does not require invalidation of the whole as far as the state legislature is concerned.

[11] A state law could also impermissibly "reference" ERISA plans if employers cannot comply with the law without creating ERISA plans. See Greater Washington Board of Trade, 506 U.S. at 130 (1992); Ingersoll-Rand v. McClendon, 498 U.S. 133, 140 (1990). Because employers can fund family sick leave out of their general assets, and because such an arrangement is not an ERISA plan, 29 C.F.R. § 2510.3- 1(b), the California law also does not contain this type of impermissible reference to ERISA plans.

potential application to ERISA plans, however. the generally applicable law would also lack any impermissible "connection with" ERISA plans, because Section 233 still would not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." Dillingham, 519 U.S. at 329 (citing Travelers Ins. Co., 514 U. S. at 659).

In Dillingham, the challenged California law permitted contractors to pay a lower wage to workers participating in state-approved apprenticeship programs. Dillingham, 519 U.S. at 332-33 The Supreme Court upheld the law, even though many or most apprenticeship programs are ERISA-covered plans. Id. The Court held that the law did not contain a prohibited "reference to" ERISA plans because it functioned in the same manner irrespective of whether the particular apprenticeship program was ERISA-covered or not. Id. at 334. The Court also held that the apprenticeship law did not have a sufficient "connection with" ERISA-covered plans to trigger ERISA preemption, even though the state law directly affected the wages a contractor could pay to participants in ERISA-covered apprenticeship plans. See id. at 332. In concluding that ERISA did not preempt the statute, the Court noted, in particular, that the apprenticeship law applied to wage practices that were a traditional subject of state regulation, the law did not mandate particular benefit structures or administration, and the law left parties free to comply by relying upon non-ERISA arrangements, even if most apprenticeship plans were, in fact,

ERISA covered. Id. at 334 ("The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is 'no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.'") (quoting Travelers Ins. Co., 514 U. S. at 668).

Here too, Section 233, even without the special (but preempted) carve-out for ERISA plans, regulates an area of traditional state wage regulation; does not require employers to pay benefits through or otherwise express a preference for or against compliance through an ERISA plan; and does not require employers to amend ERISA-covered sick leave plans. Accordingly, employers are still entirely free to choose whether to provide sick leave through mere payroll practices or ERISA-covered plans. And, even if they choose to provide sick leave benefits through an ERISA-covered plan, they may provide any additional sick leave mandated by the law as part of their normal payroll practices, without creating a new ERISA plan or changing any of the terms or administrative practices of the existing plan. 29 C.F.R. § 2510.3-1(b) (an employer's practice of paying sick leave benefits out of its general assets is not an ERISA plan.). See Dillingham, 519 U.S. at 328; Golden Gate, 546 F.3d at 646-47, 650.

Thus, Section 233 has, at most, only an "indirect economic influence" on ERISA plans, much the same as the indirect influence on ERISA plans of the hospital receipts tax in De Buono, the prevailing wage

law in Dillingham, and the hospital surcharge law in Travelers [12] As the courts in those cases held, however, such indirect economic influences are insufficient to trigger ERISA preemption. Section 233, even when read to apply to ERISA plans as well as non-ERISA plans, "does not bind ERISA plans to anything." Dillingham, 519 U.S. at 332. Accordingly, even without the express carve-out for ERISA plans in Section 233, nothing in that law requires United to create an ERISA-covered plan, alter the terms of an existing ERISA plan, or change its administration of any ERISA plan. Whether or not its current sick leave arrangement is covered by ERISA, United could readily comply with the law merely by providing additional sick leave benefits to its employees as part of its regular payroll practices, without engaging in any ERISA conduct whatsoever. As a result, even if the express carve-out for ERISA plans is preempted as an impermissible "reference to" ERISA-covered plans, Section 233 is not preempted as applied to an employer that sponsors an ERISA-covered sick leave plan,

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[12] Unlike the health benefits at issue in Golden Gate, supra, sick leave and vacation pay are readily, and even typically, provided through state-regulated payroll practices, without the creation or utilization of ERISA-covered plans. For this reason, this is an easier case for a non pre-emption argument than was Golden Gate. Generally, when employers provide health benefits to their employees, they create an ERISA-covered plan regardless of whether or not the benefits are funded out of their general accounts. The same, however, is not true for sick leave and vacation pay. As discussed, ERISA generally does not cover such arrangements at all, but rather cedes primary authority to the states in the regulation of such matters.

much less to one that provides sick leave through a non-covered payroll practice.[13]

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[13] Because the Kin Care Law is not preempted under section 514(a) of ERISA (and the United sick leave benefit is not provided through an ERISA-covered plan that could trigger ERISA preemption even where section 514(a) does preempt state law), the Secretary is not addressing the alternative argument raised by the parties on appeal of whether Section 233 is saved from ERISA preemption under section 514(d) of ERISA, 29 U.S.C. § 1144(d), a provision of ERISA that preserves "any law of the United States" that would be impaired by ERISA, including ERISA preemption of state law. We note that the Secretary, who administers both ERISA and the federal Family and Medical Leave Act, ("FMLA"), 29 U.S.C. § 2601 et seq., has taken the position that the FMLA encourages states to enact more protective laws than the minimal standards mandated in the federal law, and that ERISA preemption of a more protective Wisconsin "family and medical leave act" would thereby impermissibly interfere with the FMLA's protective purposes, contrary to the section 514(d) savings provision. See Secretary's Amicus Brief in Sherfel v. Gassman, Case No. 2:09-cv-871 (S. D. Ohio, filed Dec. 7, 2010), www.dol.gov/sol/media/briefs/sherfel(A)-12-7-2010.htm; and Secretary's Amicus Brief in Aurora Med. Group v. Dep't of Workforce Development, Equal Rights Div., 612 N.W.2d 646 (Wis. 2000); see also Northwest Airlines Sick and Occupational Leave Plan, DOL AO 05-13A (May 31, 2005), 2005 WL 1460527 (stating Secretary's guidance that ERISA does not preempt Washington State Family Care Act's application to Northwest Airlines' Sick Leave Plan because such preemption would impair the purpose and policy of the FMLA). Although Sherfel is yet to be decided, in Aurora the Wisconsin Supreme Court, relying on ERISA's impairment clause, held that ERISA does not preempt Wisconsin's more protective FMLA because such preemption would frustrate the purpose and policy of the federal FMLA. The Secretary expresses no opinion here, however, on how the California Kin Care Law resembles or differs from the Wisconsin or Washington State laws she has previously addressed in this context.

CONCLUSION

For the above reasons, this Court should affirm the trial court's decision that the United "sick leave trust" does not constitute the establishment of an ERISA-covered plan and conclude that ERISA does not preempt Section 233 of the California Labor Code.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R.App. P. 32(a)(7)(B), I certify this brief contains 9,368 words. The brief has been prepared using Microsoft XP in Times New Roman 13-point font size. The brief has been scanned and is virus free.

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I am over the age of 18 and not a party to the within action. My business address is: 200 Constitution Ave., NW, Room N-4611, Washington, DC 20210.

On October 3, 2011, I served the foregoing Amicus Brief on Court of Appeals, the Superior Court, and the interested parties in this action:

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I served this application on these parties by express/priority mail. I am employed in the county where the mailing occurred:

> I enclosed a copy in an envelope and placed the envelope for collection and mailing on the date and at the place shown in items below, following our ordinary office practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/3/2011 _/s/ Nathaniel I. Spiller_
Date Nathaniel I. Spiller, Esq.