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MEMO PERD#32-10
May 10, 2010

TO: Directors
Division Administrators
Agency Personnel Liaisons
Agency Personnel Representatives

FROM: Teresa Thienhaus, Director
Department of Personnel

SUBJECT: AG Opinion Regarding application of SB 283 of the 2009 Legislative Session (Nevada Domestic Partnership Act) in relation to sick leave

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Following the passage of the Nevada Domestic Partnership Act of the 2009 Legislative Session, the Department of Personnel requested an Attorney General's opinion regarding the rights granted to registered domestic partners in relation to the use of family sick leave, as provided for under NAC 284, and the Family and Medical Leave Act (FMLA). This opinion does not speak to issues that may arise regarding health benefits and/or retirement. The Attorney General's opinion is attached for your reference. Additionally this is the link to the text of the bill: http://leg.state.nv.us/75th2009/Bills/SB/SB283_EN.pdf .

In summary the opinion concludes that the term "spouse" as used in NAC 284.5235 ""*Immediate family" defined"* and NAC 284.558 *"Sick leave: Illness in employee's immediate family"* includes registered domestic partners. Additionally, SB 283 requires the State to afford the same rights to an employee with a registered domestic partner as are provided for a spouse under the FMLA, e.g., cover leave time and procedural requirements.

We anticipate you will receive questions regarding whether documentation of a registered domestic partnership should be obtained when such leave is requested. In order to ensure the fair and equitable treatment of employees, you should handle requests for documentation similarly to when and how you request documentation from married employees.

Please ensure that your employees are aware of their rights under the Nevada Domestic Partnership Act and that your supervisors and managers are aware of how to handle such requests.

If after reading the text of the bill and the Attorney General's opinion, you have additional questions regarding leave please don't hesitate to contact Carrie Hughes at cphughes@dop.nv.gov or (775) 684-0111.

STATE OF NEVADA

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April 12, 2010

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Dear Ms. Thienhaus:

You have requested an opinion from the Office of the Attorney General regarding the application and interpretation of the Act of June 1, 2009, ch. 393,§§ 1-13, 2009 Nev. Stat. 2183 (S.B. 283) of the 2009 Legislative Session as it relates to Chapter 284 of the Nevada Revised Statutes, the Nevada Administrative Code, and the Family and Medical Leave Act.

BACKGROUND

S.B. 283, otherwise known as the Nevada Domestic Partnership Act, was passed by the 2009 Legislature and became effective on October 1, 2009. The bill establishes a domestic partnership as a new type of civil contract recognized in the State of Nevada. Under the provisions of the bill, domestic partners have the same rights, protections, and benefits, with the exception of mandated employer health care benefits, as do parties to any other civil contract created pursuant to Title 11 of the Nevada Revised Statutes, and are subject to the same responsibilities, obligations, and duties under the law as are granted to spouses if registered as domestic partners with the Secretary of State. The bill further clarifies that a domestic partnership is not a marriage for purposes of NEV. CONST. art. 1, § 22.

QUESTION

Does S.B. 283 require the interpretation of the term "employee's immediate family" or the word "spouse" as used in NRS and NAC 284, to include domestic partners? For example, is a domestic partner considered an immediate family member for purposes of family sick leave pursuant to NAC 284.558?

ANALYSIS

In 1996, Congress enacted the federal Defense of Marriage Act (DOMA). Pub. L. No. 104-199, 100 Stat. 2419 (September 21, 1996). DOMA has two sections, one defining "marriage" for purposes of federal law, and the other affirming federalism principles under the authority granted by U.S. CONST. art. IV, § 1, the Full Faith and Credit Clause. The first section states that for purposes of federal law, marriage means a legal union between a man and a woman, and spouse means a person of the opposite sex who is husband or wife. Specifically:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. No. 104-199, § 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997).

The Family Medical Leave Act (FMLA), 29 U.S.C. § 2601-2654, is a federal law that entitles a qualified employee to a total of twelve workweeks of leave under certain enumerated conditions, such as to care for the employee's spouse, parent, or child with a serious health condition. The FMLA defines spouse as an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized. 29 C.F.R. § 825.122(a). Currently, the FMLA does not grant domestic partners the same rights as spouses.

While the FMLA does not grant benefits to domestic partners, states can be more generous and elect to grant such leave to domestic partners. Federal law in certain cases preempts state law by operation of the Supremacy Clause. Under Article VI of the Constitution, laws of the federal government "shall be the supreme

Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. However, preemption only occurs in three circumstances: (1) where preemption is explicit in the federal law, (2) where the intent of Congress is that the federal government occupy the entire field, and (3) where there is an actual conflict between state and federal law. *Oxygenated Fuels Ass'n Inc. v. Davis,* 331 F.3d 665, 667 (9th Cir. 2003). Actual conflict occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted).

None of these three circumstances exist in this case. There is first of all a presumption against preemption of traditional state powers unless Congressional intent to preempt is "clear and manifest." *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). "[C]ourts generally presume that Congress has not intended to preempt state law, starting with the assumption that the historic police powers of the States are not to be superseded by federal legislation unless that is the clear and manifest purpose of Congress." *American Bankers Ass'n. v. Gould*, 412 F.3d 1081 (9th Cir. 2005).

In this instance, there is no explicit preemption of state law contained in the federal statutes. In fact, the FMLA expressly reserves state laws that are not in conflict: "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." 29 U.S.C. §2651(b).

Likewise, there is no Congressional intention expressed or implied in the DOMA or FMLA that the federal government occupy the field of domestic relations, leaving nothing for the States to regulate. Preemption has been found absent in much closer cases. *See e.g. Rose v. Rose*, 481 U.S. 619 (1987) (state court has jurisdiction to hold a disabled veteran in contempt for failure to pay child support, even if benefits must come from benefits paid for a service-connected disability).

Finally, there is no actual conflict between state and federal law in this instance. "A mere conflict in words is not sufficient. State family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (internal quotations omitted). No such conflict—i.e. "major damage" to federal interest—exists here. Instead, the state law merely accords greater rights than federal law does, a common circumstance. *See e.g. Marshall v. Lauriault,* 372 F.3d 175, 187 (3rd Cir. 2004) (New Jersey constitution provides greater rights than the federal constitution), *Smith v. Brough,* 248 F.Supp. 435, 442 (D. Md. 1965) (state may

accord defendant greater rights than it is required to accord him by federal constitution).

"It is axiomatic . . . that a state may grant greater rights than required by the federal minimum." Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression,* 33 U. Kan. L. Rev. 305, 313 (1985). That is what the legislature has done in this case.

Although the DOMA and FMLA do not recognize domestic partners, with the enactment of S.B. 283, the 2009 Nevada Legislature elected to be more generous than federal law by granting registered domestic partners the same rights, benefits, duties, and responsibilities that spouses have under Nevada law. Specifically, Section 7(e) of S.B. 283 provides:

> To the extent that provisions of Nevada law adopt, refer to or rely upon provisions of federal law in a way that otherwise would cause domestic partners to be treated differently from spouses, domestic partners must be treated by Nevada law as if federal law recognized a domestic partnership in the same manner as Nevada law.

Thus, under S.B. 283, domestic partners must be treated as the legal equivalent of a spouse.

An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. 29 C.F.R. § 825.112(a)(3). FMLA's definition of immediate family member does not extend to domestic partners. Although NAC 284.5235, as currently written, extends the term "immediate family member" beyond that of the FMLA, it also does not include the term domestic partners.[1] However, because S.B. 283 requires domestic partners to have the same legal status

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[1] NAC 284.5235 defines immediate family as:

> 1. The employee's parents, spouse, children, regardless of age, brothers, sisters, grandparents, great-grandparents, uncles, aunts, nephews, grandchildren, nieces, great-grandchildren and stepparents; and
> 2. If they are living in the employee's household, the employee's father-in-law, mother-in-law, son-in-law, daughter-in-law, grandfather-in-law, grandmother-in-law, great-grandfather-in-law, great-grandmother-in-law, uncle-in-law, aunt-in-law, brother-in-law, sister-in-law, grandson-in-law, granddaughter-in-law, nephew-in-law, niece-in-law, great-grandson-in-law and great-granddaughter-in-law.

as a spouse, and the definition of immediate family in NAC 284.5235 includes a spouse, the term spouse infers that these rights are given to domestic partners under S.B. 283. Thus, S.B. 283 requires the interpretation of the term "immediate family member" in NAC 284.5235, as well as in NAC 284.558,[2] to include domestic partners. S.B. 283 requires the State to afford the same rights to an employee with a domestic partner as are provided for a spouse under the FMLA.

CONCLUSION

S.B. 283 requires the interpretation of the term "employee's immediate family" or the word "spouse" as used in NRS and NAC 284, to include domestic partners. Although NAC 284.5235, as currently written, does not expressly include the term domestic partners, the Department of Personnel may wish to add the term to the Nevada Administrative Code for clarification.

Sincerely,

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By: _____
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KSA/LSD

[2] NAC 284.558 provides for sick leave if there is an illness in an employee's immediate family.