APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 29, 2021]

No. 19-35937
D.C. No. 3:18-cv-05092-RBL
Western District of Washington, Tacoma

AIR TRANSPORT ASSOCIATION OF AMERICA, INC., DBA AIRLINES FOR AMERICA,

Plaintiff-Appellant,

v.

THE WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES; JOEL SACKS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES,

Defendants-Appellees,

ASSOCIATION OF FLIGHT ATTENDANTS - COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Intervenor-Defendant-Appellee.

ORDER

Before: GOULD and FRIEDLAND, Circuit Judges, and BOUGH, *District Judge.

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* The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

The Memorandum Disposition filed on May 21, 2021, is amended as set out in the attached Amended Memorandum Disposition filed concurrently with this order. With the concurrently filed amended memorandum, Judges Gould and Friedland have voted to deny the petition for rehearing en banc, and Judge Bough so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

No further petitions for panel rehearing or rehearing en banc will be entertained.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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D.C. No. 3:18-cv-05092-RBL

AIR TRANSPORT ASSOCIATION OF AMERICA, INC., DBA AIRLINES FOR AMERICA,

Plaintiff-Appellant,

v.

THE WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES; JOEL SACKS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES,

Defendants-Appellees,

ASSOCIATION OF FLIGHT ATTENDANTS - COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington Ronald B. Leighton, District Judge, Presiding

Argued and Submitted November 17, 2020
Seattle, Washington

AMENDED MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: GOULD and FRIEDLAND, Circuit Judges, and BOUGH,[**] District Judge.

The Air Transport Association (d/b/a "Airlines for America" or "A4A") has brought this action against Washington's Department of Labor and Industries ("L&I"), seeking to enjoin enforcement of Washington's law governing paid sick leave, Wash. Rev. Code § 49.46. 210 (2021).[1] A4A argues that applying the paid sick leave law (the "PSL") to its members' flight attendants and pilots ("flight crew") is preempted by the Airline Deregulation Act, 49 U.S.C. § 41713, and violates the dormant Commerce Clause.[2] The parties filed cross-motions for summary judgment, and the district court granted L&I's motion. We affirm.

In 2016, voters in Washington enacted a ballot initiative that established a right to paid sick leave "to protect public health and allow workers to care for the health of themselves and their families." Wash. Rev. Code § 49.46.005. The PSL requires that employers provide Washington-based employees at least one

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[**] The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

[1] A4A is a trade association that represents U.S. air carriers Alaska, American, Atlas, Delta, FedEx, Hawaiian, JetBlue, Southwest, United, and UPS. The Association of Flight Attendants-Communication Workers of America, AFL-CIO, intervened as a Defendant to represent the interests of its members. In addition, eighteen states and the District of Columbia filed a brief as amici curiae in support of L&I. Alaska Airlines filed a brief as amicus curiae in support of A4A.

[2] Although the PSL took effect 2018, A4A's counsel stated that Alaska Airlines—which is possibly the only airline to which this law applies, *see infra*—is not complying with the PSL as to flight crew. L&I has not initiated any enforcement actions against A4A's members, despite their lack of compliance, because it has not received any formal complaints.

hour of paid sick leave for every forty hours worked. *Id.* § 49.46.210(1)(a). In addition, the law prohibits employers from penalizing employees for using sick leave—such as through a disciplinary point system—or requiring medical verification for sick leave absences of fewer than three days. *Id.* § 49.46.210(3); Wash. Admin. Code § 296-128-660(1).

A4A argues that compliance with the PSL will deprive the airlines of their "most important" tools for minimizing flight crew shortages, including disciplinary point systems and medical verification requirements, thereby causing flight delays and cancellations. In support, A4A points to Virgin America's experience complying with New York City's Earned Sick Time Act ("ESTA"), which contains provisions similar to those in the PSL.[3] A4A's expert estimated that Virgin America's compliance with the ESTA led to a "cabin crew delay rate" increase of .16 percentage points for the first two years and 1.2 percentage points for the seven months thereafter.

1. The Airline Deregulation Act ("ADA") does not preempt the application of the PSL to A4A's members' flight crew. The ADA preempts state laws "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b). State laws that affect rates, routes, or services in "too tenuous, remote, or peripheral a manner" are not preempted. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)). We have held that generally applicable labor regulations are

[3] Because A4A appeals from the district court's order granting summary judgment to L&I, we view the facts and the reasonable inferences drawn from them in the light most favorable to A4A. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

too tenuously related to airlines' services to be preempted by the Act. *See Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1243 (9th Cir. 2021) ("Laws that apply to airline employees only as they apply to all members of the general public typically fall into th[e] non-preempted category."). The PSL is no exception.

A4A argues that, unlike the wage statement law at issue in *Ward*, the PSL "operates in close proximity to the traveling public." The proper inquiry is whether the PSL itself "*bind*s the [airlines] to a particular price, route, or service." *Bernstein v. Virgin Am., Inc.*, --- F.4th ---, 2021 WL 3047171, at *9 (9th Cir. 2021) (quoting *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 646 (9th Cir. 2014)). The PSL regulates the airline-employee relationship in a way that may ultimately affect the airlines' competitive decisions in the free market. But because the PSL does not regulate the airline-customer relationship or otherwise bind the airlines to a particular price, route, or service, it is not preempted by the ADA. *See Air Transp. Ass'n v. City & County of San Francisco*, 266 F.3d 1064, 1074 (9th Cir. 2001).

2. As applied to A4A's members' flight crew, the PSL does not violate the dormant Commerce Clause. To survive L&I's motion for summary judgment, A4A must show that there is a genuine issue of material fact as to whether complying with the PSL would impose a "substantial burden on interstate commerce," and if so, whether the burden on interstate commerce would be "clearly excessive in relation to the putative local benefits."[4] *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155-56 (9th Cir. 2012) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137,

[4] The parties agree that the PSL is not facially discriminatory.

142 (1970)). Viewing the evidence in the light most favorable to A4A, we hold that the evidence does not demonstrate that requiring A4A's members to comply with the PSL would impose a substantial burden on interstate commerce.

A4A argues that Virgin America's experience complying with the ESTA shows that complying with the PSL would increase unexpected employee absences, which would result in increased flight delays and cancellations. Even assuming that complying with the PSL would lead to the same result for A4A's members that Virgin America experienced complying with the ESTA, A4A's expert's conclusions are insufficient to raise a genuine issue of material fact. A 1.2 percentage point increase in flight delays—with many of those delays lasting fewer than fourteen minutes—is not a substantial burden on interstate commerce for dormant Commerce Clause purposes, particularly for an industry that anticipates delays at much higher rates under ordinary circumstances. A4A's other arguments about the effects of complying with sick leave policies in other states fail for the same reason, and they are based solely on anecdotes.

Separately, A4A argues that complying with multiple states' paid sick leave laws would be impossible or prohibitively expensive for its members. We rejected a similar argument in *Ward*. We explained that "[t]o prevail on this contention," airlines must show that the challenged law "regulates in an area that requires national uniformity." *Ward*, 986 F.3d at 1242. Like the wage statement laws at issue in *Ward*, paid sick leave laws are not among the "aspects of the interstate transportation industry that require national uniformity." *Id.* Although A4A has submitted evidence that complying with paid sick leave laws may result in

some increase in flight delays and cancellations, this evidence falls short of demonstrating that complying with the PSL will "severely disrupt operation of interstate transportation." *Id.*; *see also Bernstein*, 2021 WL 3047171, at *4-5.

Furthermore, the PSL's limited scope undermines A4A's argument as to the impossibility of complying with multiple paid sick leave laws. The PSL only applies to "Washington-based employees" of employers "doing business in Washington." An L&I official testified that flight crew members who are not "based" at a Washington airport and who have no relationship with Washington other than flying in and out of the state are "unlikely to be Washington-based employees." Based on this testimony, we deduce that the PSL primarily—or perhaps solely—applies to employees of Alaska Airlines, which is headquartered in Washington and is the only A4A member airline that has an airport "base" in the state.[5] A4A does not present any concrete examples of Alaska Airlines employees who would be covered by multiple paid sick leave laws if A4A's members were to comply with the PSL. To the extent that Washington-based flight crew are determined to be covered by multiple jurisdictions' laws, an airline could avoid potential concerns by choosing to comply

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[5] In an amicus brief, Alaska Airlines states that it has hundreds of employees who live in Washington and are based in other states, and vice versa. But this information fails to demonstrate that any of these employees would actually be subject to multiple states' laws.

with the law that imposes the strictest requirements. *See Ward*, 986 F.3d at 1242.[6]

AFFIRMED.

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[6] According to A4A, adopting the strictest paid sick leave law to avoid a conflict would violate the dormant Commerce Clause by allowing states to regulate beyond their borders. "Our circuit's law casts doubt on the continued viability of the broad extraterritoriality principle" that A4A invokes. *Ward*, 986 F.3d at 1240. But even if the extraterritoriality principle were to apply here, it would not be violated because the PSL applies only to "Washington-based" employees of employers "who are doing business in Washington." *See id.* at 1240-41 (holding that "even under a broad understanding of the extraterritoriality principle," California's application of its wage statement law to flight crew who were California-based was sufficiently strong to pass constitutional muster).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CASE NO. 18-cv-05092-RBL
DKT. ## 83, 93, & 102

AIR TRANSPORT ASSOCIATION OF AMERICA, DBA AIRLINES FOR AMERICA,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF LABOR & INDUSTRIES AND JOEL SACKS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES,

Defendant,

&

ASSOCIATION OF FLIGHT ATTENDANTS-COMMUNICATION WORKERS OF AMERICA, AFL-CIO, A LABOR ORGANIZATION,

Intervenor.

HONORABLE RONALD B. LEIGHTON

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

THIS MATTER is before the Court on Plaintiff Airlines for America, Defendant Washington Department of Labor & Industries, and Intervenor Association of Flight Attendants-Communication Workers of America's (AFA) Cross-Motions for Summary Judgment.

Dkt. ## 83, 93, & 102. This lawsuit challenges Washington's Paid Sick Leave Law (WPSLL) as applied to flight crew employees. In addition to guaranteeing accrual of paid sick leave hours, WPSLL prohibits employers from requesting medical verification of illness, disciplining employees for using their leave, and preventing employees from using leave in one-hour increments. The Law applies to all employees who are "Washington-based," a status that L&I determines by considering several factors on a case-by-case basis.

Pilots and flight attendants already enjoy paid sick leave under their company-specific collective bargaining agreements, but those CBAs do not contain all the additional protections afforded by WPSLL. According to the Airlines,[1] these protections will increase the rate of flight crew absences, which will ultimately increase flight delays, cancellations, and costs. The Airlines also argue that WPSLL will conflict with other jurisdictions' sick leave laws, contributing to a patchwork of regulations that will burden the Airlines and raise consumer prices. Consequently, the Airlines' argue that WPSLL violates the U.S. Constitution's Dormant Commerce Clause.They also contend that WPSLL is preempted by the Airline Deregulation Act

[1] Airlines for America is an association of prominent U.S. air carriers that includes Alaska Airlines, Inc.; United Airlines, Inc.; American Airlines, Inc.; and Southwest Airlines Co.; among others.

(ADA) and violates the Fourteenth Amendment's Due Process Clause.

L&I and AFA argue that WPSLL does not violate the Dormant Commerce Clause because the Law's health benefits outweigh any speculative burdens on interstate commerce. Furthermore, they argue that WPSLL is not preempted by the ADA because the Law does not sufficiently impact the rate, routes, or services offered by the Airlines. Finally, L&I and AFA contend that WPSLL does not violate the Due Process Clause because it only regulates the activities of parties with significant ties to Washington.

For the following reasons, the Court GRANTS L&I and AFA's Motions for Summary Judgment and DENIES the Airlines' Motion for Summary Judgment.

BACKGROUND

1. The Airlines' Flight Crew Sick Leave Policies

For years, the Airlines have regulated flight crew employment terms pursuant to nationwide CBAs negotiated under the Railway Labor Act (RLA). Although they differ, the Airlines' CBAs for pilots and flight attendants provide for sick leave accrual, banking, and roll-over that generally meet or exceed WPSLL's requirements. For example, pilots at Alaska, American, and United Airlines accrue 5 or 5.5 hours of leave for roughly every month of work. For flight attendants, Alaska and Southwest Airlines employees receive sick leave based on how many "trips for pay," or "TFP," they have flown. A TFP basically amounts to a flight of 243 miles or less. Flight attendants begin accruing one TFP of sick leave for every ten TFP flown after being hired, but they cannot use their paid sick leave until the end of a 180-day probationary period. American and United flight attendants accrue 4.5 and

4 hours of leave for roughly each month worked, respectively. The Airlines' CBAs also have provisions that allow flight crew to bank sick leave hours that carry over from year to year.

Because of the mobile nature of their work, flight crew have unusual schedule structures that complicate the use of sick leave. Schedules are broken down into "trip pairings" comprised of a series of flights that begin and end in a flight crew member's domicile airport, which is sometimes in a different state from where the employee resides. Consequently, when an employee calls in sick for the day a trip pairing begins, they are removed from that pairing and replaced by a different crew member. This replacement is necessary to comply with federal regulations regarding the minimum number of crew members on each flight. If the sick employee later "calls in well," they may trade trips with another employee or pick up a trip to start working again. However, if they are unable to change their schedule, the necessary number of sick leave hours to cover the pairing are deducted from their bank.

The Airlines retain several bargained-for methods of controlling flight crew attendance, which are the main focus of this case. One is the assignment of "points" to employees for sick calls, missed trips, late reports, and no-shows. Building up points can lead to disciplinary actions such as counseling, warnings, and dismissal. Different types of employee actions result in different point assignments. For example, Alaska can assess 3 points for a no-show, 2.5 points or less for calling in sick on short notice, and .5 points per day for calling in sick with adequate notice. Employees can reduce their amount of accumulated points through several

means, such as working for an entire quarter without taking any leave.

The Airlines also retain the right to demand that an employee provide medical verification when they take a sick day. The Airlines can exercise this right regardless of the number of days an employee has been on leave or their reason for taking leave. Some Airlines, such as Alaska, have a standing policy of not requiring verification when flight crew take an absence. However, in periods of concentrated sick leave use Airlines have the ability to reinstate verification requirements to stem increased absences.

2. Washington's Paid Sick Leave Law

In 2016, Washington voters passed Initiative 1433 adding paid sick leave benefits to Washington's Minimum Wage Act. This resulted in Washington's Paid Sick Leave Law and its accompanying L&I regulations. Under WPSLL, employees begin accruing one hour of paid sick leave for every 40 hours worked after a 90-day post-hire period. RCW 49.46.210(1)(a) & (d). If an employee does not use their accrued sick leave by the end of the year, employers are authorized to cap the amount of state-mandated leave that rolls over to the next year at 40 hours. RCW 49.46.210(1)(j).

Most relevant to this case, WPSLL restricts some policies that employers use to control sick leave use. First, under WPSLL, an employer cannot adopt any policy that "counts the use of paid sick leave time as an absence that may lead to or result in discipline." RCW 49.46.210(3). Second, an employer may not require medical verification from employees for sick leave absences of three days or less. RCW 49.46.210(1)(g). Third, an employer may not restrict employees' ability

to take sick leave in small increments, such as one hour. WAC 296-128- 630(4).

These restrictions have exceptions. An employer may require that an employee provide "reasonable notice of an absence from work," RCW 49.46.210(1)(f), which means at least ten days' notice if the absence was foreseeable and notice "as soon as possible before the required start of [the employee's] shift" if it was not. WAC 296-128-650(1). An employer also may require medical verification for absences over three days in length or withhold pay from an employee if they believe sick leave was used for an unauthorized purpose. WAC 296-128-750; RCW 49.46.210(1)(g). There must be a "written policy or a collective bargaining agreement" outlining these procedures before they can be implemented. *Id.*; WAC 296-128-650(3). Finally, L&I grants variances from WPSLL's leave increment restriction if an employer can establish that "compliance with the requirements for increments of use are infeasible, and that granting a variance does not have a significant harmful effect on the health, safety, and welfare of the involved employees." WAC 296-128-640(1). To date, L&I has approved 26 of the 38 waiver applications it has received from employers but has not received an application from any of the Airlines. Johnson Dec., Dkt. # 84 at 6.

WPSLL applies to all "Washington-based" employees. *Id.* at 5. To determine if an employee is "Washington-based," L&I considers the following factors on a case-by-case basis: "(1) Where was the employment agreement made? (2) Does the employee live in Washington? (3) Does the employer have its base of operations in Washington? (4) Does the employee have his or her base of operations in Washington? (5) Does the employer maintain a work site in Washington?

(6) If the employee leaves Washington as part of the employee's work, where does the trip begin and end? (7) Does the employee receive work assignments from a location in Washington? (8) Is the employee's work supervised by individuals operating from the employer's location in Washington? (9) How much of the work is performed in Washington? [and] (10) How long is the contract to do work in Washington?" L&I Explanatory Statement, Dkt. # 103, Ex. 16, at 2-3.

Although L&I considers all these factors, it also states that "some factors may be more relevant than others" in specific situations. *Id*. at 3. For flight crew, who do not spend very much time working in any one place, L&I has indicated that location of work is given less weight.

Johnson Dep., Dkt. # 103, Ex. 4, at 283-86. Being domiciled at a Washington airport may be enough to make an employee Washington-based if other factors are also satisfied, as is likely the case for Alaska flight crew because of that company's ties to the state. Johnson Dec. at 5. However, merely being domiciled at a Washington airport without more would not be enough to make WPSLL applicable. *Id.*

DISCUSSION

1. Summary Judgment Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson Liberty Lobby,*

Inc., 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

The moving party bears the initial burden of showing that there is no evidence which supports an element essential to the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the nonmoving party then must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to establish the existence of a genuine issue of material fact, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323-24. There is no requirement that the moving party negate elements of the non-movant's case. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Once the moving party has met its burden, the non-movant must then produce concrete evidence, without merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson*, 477 U.S. at 248.

2. Dormant Commerce Clause

The Airlines first and most forcefully challenge WPSLL under the Dormant Commerce Clause. The Commerce Clause, which empowers Congress "[t]o regulate Commerce . . . among the several States," also entails a "dormant" or "negative" implication that the states may not interfere with interstate commerce. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337

(2008) (quoting Art. I, § 8, cl. 3). The modern jurisprudence surrounding this Dormant Commerce Clause "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (quoting *Davis*, 553 U.S. at 337-38).

Although the Dormant Commerce Clause analysis normally starts with whether the challenged law discriminates against out-of-state interests, the Airlines do not argue that WPSLL is discriminatory.[2] This means the Law is invalid only if the burden it places on interstate commerce is "clearly excessive in relation to the putative local benefits." *Sullivan v. Oracle*

[2] As a threshold issue, L&I and AFA argue that WPSLL is "invulnerable to Commerce Clause challenge" because Congress expressly authorized the states to pass laws burdening interstate commerce in this area. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652 (1981). They point to the savings clause of the FMLA. *See* 29 U.S.C. § 2651(b) ("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."). However, for a court to find such an authorization, it must be "unmistakably clear" that Congress "affirmatively contemplate[d] [immunizing] otherwise invalid state legislation." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). The FMLA's savings clause does not clearly indicate such an intent. Instead, Congress's most obvious purpose in passing §§ 2651(b) was to ensure that federal regulation did not impede parallel state laws that provide even more leave time. Because such laws can coexist with federal ones without burdening interstate commerce, there is little reason to conclude that Congress intended to give states free reign to violate the Commerce Clause in the areas governed by the FMLA. *See Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1068 n. 8 (N.D. Cal. 2017).

Corp., 662 F.3d 1265, 1271 (9th Cir. 2011) (internal quotation marks omitted) (quoting *Pike*, 397 U.S. 137, 142 (1970)). This balancing test requires "sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670-71 (1981) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978)). If the challenged law has extraterritorial reach, "the court must consider the practical effects of the regulatory scheme, taking into account the possibility that other states may adopt similar extraterritorial schemes and thereby impose inconsistent obligations." *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011). However, there "must be a *substantial burden* on interstate commerce" for a regulation to be struck down. *Harris*, 682 F.3d at 1148 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n. 12 (1997); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987)).

Truly neutral laws that have been struck down under the Dormant Commerce Clause generally entail "inconsistent regulation of activities that are inherently national or require a uniform system of regulation." *Harris*, 682 F.3d at 1148. In *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, for example, the Court invalidated an Arizona law limiting the length of trains because it would force railroads to suffer large inefficiencies and profit losses by shortening their trains upon entering the state. 325 U.S. 761, 771-74 (1945). Similarly, *Bibb v. Navajo Freight Lines, Inc.* held that an Illinois regulation of trucking mudguards that conflicted with the laws in neighboring states would impermissibly require companies to re-equip all their trucks and change to a different type of mudguard at the border. 359 U.S. 520, 527-28 (1959).

The challenged laws in both cases provided meager safety benefits and may even have *decreased* safety. 325 U.S. at 779; 359 U.S. at 525; *see also Kassel*, 450 U.S. at 671 (holding state truck length requirements unconstitutional); *Rice*, 434 U.S. at 445 (same). These cases teach that when a local law offers dubious benefits, is "out of step" with other jurisdictions, and causes unavoidable, excessive compliance inefficiencies, it likely violates the Dormant Commerce Clause. *See Kassel*, 450 U.S. at 671.

On the other hand, congressional control of interstate commerce was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 443–44 (1960). Consequently, in *Huron* the Court sustained a law regulating pollution from ships despite the appellant's arguments that other local governments may pass conflicting laws. *Id.* at 448; *see also Pac. Merch. Shipping*, 639 F.3d at 1180-81 (upholding California regulation raising fuel quality requirements for vessels in the state's coastal waters). Even if multiple state laws do create overlapping obligations on companies, the Commerce Clause does not itself require courts to impose uniform legal standards. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 269-80 (1978) (declining to invalidate Iowa's anomalous method of computing income tax in the absence of congressional action). Finally, the mere fact that a law impacts a "particular structure or methods of operation in a retail market" is not enough to make it unconstitutional. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (upholding Maryland statute that restricted the ability of oil refiners to sell gas within the state).

In this case, the Airlines identify two broad types burdens on interstate commerce. First, the Airlines contend that WPSLL creates administrative and financial burdens by regulating in an area that requires uniform national standards. More specifically, they assert that complying with Washington's new Law will require the Airlines to reconfigure IT systems to track protected sick leave, renegotiate flight crew CBAs, and navigate an increasingly complex and overlapping patchwork of local sick leave regulations. Second, the Airlines argue that WPSLL will lead to more abuse of paid sick leave, which will burden the interstate movement of goods and people by increasing flight delays and cancellations.[3] In contrast to these negative effects, the Airlines contend that WPSLL provides few benefits over the paid sick leave that flight crew already receive under their CBAs and that exempting flight crew from WPSLL would not interfere with the Law's main purpose.

a. Financial and Administrative Burdens from Inconsistent Regulatory Regimes

As both a legal and factual matter, the Court rejects the Airlines' argument that WPSLL creates an unmanageable administrative burden by regulating in an

[3] The Airlines also try to convince the Court that allowing inconsistent sick leave laws will cause personnel troubles between flight crew members who enjoy different types of benefits. *See United Air Lines, Inc. v. Indus. Welfare Comm'n*, 211 Cal. App. 2d 729, 747 (Ct. App. 1963) (holding that California law requiring defendant airline to pay for flight attendants' uniforms would burden commerce by creating personnel issues). However, this purely speculative argument does not amount to the type of substantial burden that is necessary for a law to violate the Dormant Commerce Clause. *See Bernstein*, 227 F. Supp. 3d at 1069 (rejecting the "personnel troubles" argument in a similar context involving airline workers).

area where national uniformity is necessary. The Airlines emphasize that they are instrumentalities of interstate commerce and therefore should not be subject to local regulation. *See Ickes v. F.A.A.*, 299 F.3d 260, 263 (3d Cir. 2002). But such instrumentalities are not automatically beyond the reach of all state regulation. In fact, *Bibb* was quick to recognize that "[t]he power of the State to regulate the use of its highways is broad and pervasive," 359 U.S. at 523, and highways are undoubtedly instrumentalities of interstate commerce. *See United States v. Guest*, 383 U.S. 745, 757 (1966). The question is whether Congress has expressed a need for uniformity in this particular area of regulation. *See Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1180 (9th Cir. 2011).

The answer is no. The Airlines rely on the Railway Labor Act (RLA), which was passed to "promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes" involving railway and airline workers. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *see also* 45 U.S.C. § 151a. But the RLA's dispute resolution system "does not provide for, nor does it manifest any interest in, national or systemwide uniformity in substantive labor rights." *Alaska Airlines Inc. v. Schurke*, 898 F.3d 904, 919 (9th Cir. 2018) (en banc). Consequently, while the RLA dictates that certain disputes arising from a CBA must be resolved in a non-judicial forum, it does not preempt underlying state law rights. *Id.* at 922-23. And, for reasons explained later in this Order, the ADA does not impliedly preempt all state labor rights.

On the other hand, Congress has explicitly permitted local laws ensuring employment benefits beyond those contemplated in federal statutes. Specifically,

the savings clause of the FMLA provides, "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). While the FMLA does not regulate the airline industry specifically, it also does not exempt it, suggesting that Congress generally approves of local laws boosting labor protections for airline employees. *See Pac. Merch.*, 639 F.3d at 1180 (declining to strike down law where Congress had expressed approval of local regulation through a savings clause). The Airlines argue that the FMLA is inapplicable here because it only provides for unpaid leave, but the term "greater family or medical leave rights" logically encompasses leave laws that are more generous in *quality* as well as quantity.

The Airlines also identify several court cases holding that aviation requires uniform regulation. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625-26 (1973); *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 107, 114 (1948). But none of the Airlines' examples address labor rights for airline workers. On that issue, several courts have recently held that local regulation is permissible. *See, e.g., Hirst v. Skywest, Inc.*, 910 F.3d 961, 967 (7th Cir. 2018) (upholding minimum wage requirement); *Bernstein v. Virgin Am., Inc.*, 227

F. Supp. 3d 1049, 1069 (N.D. Cal. 2017) (same); *Mendis v. Schneider Nat'l Carriers Inc*, No. C15-0144-JCC, 2016 WL 6650992, at *6 (W.D. Wash. Nov. 10, 2016) (upholding rest break requirement). Even courts reaching contrary conclusions did not hold that absolute national uniformity was necessary. *See, e.g., Ward*

v. United Airlines, Inc., No. C 15-02309 WHA, 2016 WL 3906077, at *5 (N.D. Cal. July 19, 2016).

In addition to lacking a legal requirement for uniformity, WPSLL's practical application and relation to other jurisdictions' sick leave laws do not create an unmanageable tangle of conflicting regulations. The multi-factor analysis that L&I uses to determine if an employee is Washington-based lends itself to broad patterns that allow the Airlines to accurately identify which employees are covered by WPSLL, especially with L&I's assistance. *See* Grice Dec., Dkt. # 121, at 5. The Airlines make much of L&I's statement that it gives "careful consideration" to where work is performed, but this is only to decide whether WPSLL applies to an employee *at all*, not to divide protected from non-protected hours. *See* Johnson Dep., Dkt. # 103, Ex. 4, at 137-38. WPSLL applies in a binary fashion contingent on whether an employee is Washington-based.[4]

Because of this, it is hard to imagine how L&I's work location factor could be outcome- determinative. Flight crew domiciled at a particular airport begin and end their flight pairings at that location, besides which they are mainly on duty in the air and for a few hours at a smattering of other airports.[5] *See* Grice Dec. at 2-

[4] The one example where different laws could apply to hours worked in different states involves a "tie" among L&I's factors, such as when a contractor from Oregon performs a particular job entirely in Washington. *See* Johnson Dep., Dkt. # 103, Ex. 4, at 199-201. However, it is difficult to see how this situation could arise in the airline industry, where flight crew rarely spend very much time in any one place.

[5] The Airlines do provide two examples of Alaska flight attendants that are based at Sea-Tac but reside in other states. Second Ryan Dec., Dkt. # 111, at 11. They explain that these

4; Ryan Dec., Dkt. # 110, at 5, 7-8; Ryan Dep., Dkt. # 88, Ex. 38, at 107. The Airlines provide no examples of employees that spend an inordinate amount of time at a particular non-domicile airport. If flight crew generally perform a plurality of their work in their domicile state, the main factors for applying WPSLL will be relatively steady criteria, such as a flight attendant's domicile, residence, and their employer's contacts with Washington. *See Bostain v. Food Exp., Inc.*, 159 Wash. 2d 700, 719 (2007) (holding that it is not an excessive burden for employers with multi-state operations to identify Washington-based employees); Simone Dep., Dkt. # 88, Ex. 10, at 81 (stating that American applies sick leave laws according to the airport where flight attendants are domiciled).[6]

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flight attendants commute from their home state to Sea-Tac, then fly pairings that take them back and forth between Sea-Tac and two other states, after which they commute back to their home state. Dkt. # 111, Ex. 2. But even if these unconventional employees do not spend a significant amount of time working in Washington, they still appear to spend more time working there than in any other particular state. Most of their working time, of course, is spent in the air.

Alaska also claims that some flight crew may be based at one airport but fly exclusively out of another airport, which seems theoretically possible if an employee traded *all* of their flights.

Second Ryan Dec. at 11-12; Ryan Dep., Dkt. # 129, Ex. 2, at 72-73. However, Alaska provides no examples or statistics of this actually happening; indeed, the concept of a domicile airport would be almost meaningless if an airline allowed this to occur frequently. The Court therefore does not put much stock in this theory.

[6] These facts distinguish this case from *Ward v. United Airlines, Inc.*, No. C 15-02309 WHA, 2016 WL 3906077 (N.D. Cal. July 19, 2016), upon which the Airlines rely. In *Ward*, the court determined that a California law requiring employers to furnish a semi-monthly pay statement explaining hourly rates applied

Identifying WPSLL's scope of application will thus not pose an unmanageable administrative burden for the Airlines.

Even if this were not the case, the Court rejects the Airlines' argument that WPSLL is per se unconstitutional if it pushes companies to reform their system-wide sick leave policies as the most efficient means of compliance. In *Pacific Merchant*, the Ninth Circuit upheld California's shipping fuel standards despite the obvious impact the regulation would have on the quality of fuel companies could use away from California's waters. *See* 639 F.3d at 1181; *Mendis*, No. 2016 WL 6650992, at *4 (holding that the rest break provision in Washington's Minimum Wage Act was not unconstitutionally extraterritorial as applied to airline workers); *see also Bibb*, 359 U.S. at 526 ("If we had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law"). Rather, a regulation is only per se unconstitutional if it directly and necessarily regulates interstate commerce. *See Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (striking down Nevada

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only to employees who spent the given period working principally in California. *Id.* at 3-4. The court held that this would impose an overwhelming burden on airlines, which would have to track what percentage of each employee's time was spent in California. *Id.* at 5. Here, in contrast, the application of WPSLL does not turn on flight crew working a slightly higher percentage of time in Washington than any other state. Rather, an employee slipping in or out of coverage would likely result from an infrequent and identifiable event, such as changing their domicile airport. Simone Dec., Dkt. # 114 at 3; Second Ryan Dec. at 10. This does away with the prospect of having to dissect each employee's work-location percentages to determine whether WPSLL applies.

law imposing special procedural requirements on NCAA enforcement actions). WPSLL clearly does not fall into this category.

To the extent that WPSLL could potentially overlap with other jurisdictions' sick leave laws, it still does not excessively burden commerce. The risk of incompatible standards is not as severe here as in cases where the Supreme Court has struck down a conflicting law for its obvious and unavoidable inefficiencies. *See Kassel*, 450 U.S. at 671; *Raymond Motor*, 434 U.S. at 445; *Bibb*, 359 U.S. at 527-28; *S. Pac.*, 325 U.S. at 773-75. The Airlines present no evidence of likely widespread overlap between WPSLL and other laws. The most probable source of conflict comes from laws that apply to an employee based solely on the number of hours worked in the jurisdiction, since it is conceivable that a Washington-based flight attendant that frequently flies to such a jurisdiction could meet its quota and be subject to both sick leave laws.[7] But even

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[7] The Airlines cite examples of sick leave laws in New York City, Massachusetts, and San Diego. Airlines' Motion, Dkt. # 102, at 23. Under the New York law, an employee is covered if they work more than 80 hours in the city within a year. R.C.N.Y., Title 6, Chapter 7, § 7-203. But there is a provision that excludes employees subject to CBAs that offer "comparable benefit" in the form of "paid days off." N.Y.C. Admin. Code, § 20-916. The Massachusetts law applies if the employee's "primary place of work" is Massachusetts, which requires spending a plurality of work time within the state. MA Attorney General's Office, "Earned Sick Time in Massachusetts Frequently Asked Questions," *available at*: http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf. It is hard to see how an airline employee domiciled in Washington could meet this requirement. The San Diego law, which applies to any employee who qualifies for California's Minimum Wage Law and works at least two hours in the city in a week, may have the greatest potential for conflict. S.D. Mun. Code § 39.0104. However, that law also states that an

if such fringe cases exist, sick leave laws' requirements for accrual, carryover, and discipline tend to integrate rather than conflict.[8] *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3d Cir. 1994) (explaining that "state laws which merely create additional, but not irreconcilable, obligations" are not unconstitutionally inconsistent).

Furthermore, Washington's law is not the one "out of step" with other jurisdictions when it comes to extraterritorial application. *Kassel*, 450 U.S. at 671. In *Kassel*, *Raymond*, *Bibb*, and *Southern Pacific*, the Supreme Court struck down outlier laws that imposed new rules in conflict with other jurisdictions. But here, WPSLL is not an outlier; indeed, the crux of the Airlines' complaint is that too many localities are passing sick leave laws with similar requirements to Washington's. If anything, laws like San Diego's that could apply to workers who spend a minimal amount of time in the jurisdiction are the most "out of step" because they could apply to workers with little connection to the place. *See* S.D. Mun. Code § 39.0104. Striking down Washington's law would thus amount to holding that *no* jurisdiction can constitutionally

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employer that provides "greater paid time off" through a CBA is deemed in compliance "even if the employer utilizes an alternative methodology for calculation of, payment of, and use of" paid sick leave. § 39.0105. The Airlines' sick leave policies under their CBAs likely qualify them for this exception. In any case, the notice, verification, and discipline provisions of San Diego's law are largely in sync with WPSLL. §§ 39.0106, 39.0111.

[8] There are obviously differences between sick leave laws—for example, the Airlines point out that WPSLL protects sick leave to care for an ill sibling or grandparent while Massachusetts' law does not. Airlines' Motion, Dkt. # 102, at 24. However, these obligations do not conflict in a way that would make it impossible for an employer to comply with both.

regulate sick leave for airline workers. The Dormant Commerce Clause does not mandate such an extreme outcome merely to avoid possible overlap. *See Moorman*, 437 U.S. at 278-79 (holding that the benefits of avoiding duplicative taxation did not justify a court-mandated uniform income tax calculation standard); *Exxon*, 437 U.S. at 128 (declining to hold that the interstate gas market required uniform regulation).

In light of this lack of conflict, the financial burdens imposed by WPSLL alone are not enough to make it unconstitutional simply because aviation is an interstate industry. *See Pac. Merch.*, 639 F.3d at 1181 (9th Cir. 2011); *Burlington N. R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1114 (9th Cir. 1985) (upholding Montana law requiring railroad to staff stations in towns of over 1,000 people). The Airlines exaggerate the size of these burdens, which they have not actually calculated. Airlines' Interrogatory Response, Dkt. # 88, Ex. 36, at 4. Upgrading IT systems will likely not pose a herculean challenge since tracking where flight crew perform each hour of work is not necessary to determine if WPSLL applies. Evidence also suggests that Alaska has already updated its systems to track WPSLL-protected leave and unprotected leave separately for employees. *See* Alaska/L&I Correspondence, Dkt. # 84, Ex. 3. In addition, Alaska's flight attendant CBA contains a savings clause that allows for compliance with new regulatory mandates without renegotiation. *See* Alaska Flight Attendant CBA, Dkt. # 110, Ex. B, at 31-1; *see also* Johnson Dep., Dkt. # 88, Ex. 35, at 116; Taitte Dep., Dkt. # 88, Ex. 16, at 33. WPSLL's administrative compliance costs therefore do not create an unconstitutional burden.

b. Burden on Transportation of Goods and Passengers from Sick Leave Abuse

Unlike cases such as *Bibb* and *Southern Pacific*, the Airlines' argument that WPSLL will directly impede the flow of goods and people does not stem from inefficient clashes between different states' laws. Instead, the Airlines argue that significant delays will result from any law restricting their ability to threaten discipline and request verification when employees call in sick.[9] But the evidence does not show that WPSLL will substantially increase flight delays and cancelations or that the Airlines lack the ability to mitigate any limited impact on operations.

There is some support to back up the Airlines' claim that laws similar to WPSLL influence sick leave abuse, although it is difficult to ascertain how much increased sick leave use is fraudulent vs. legitimate. *See, e.g.*, Butler Dec., Dkt. # 104, at 7 (After New York City's sick leave law was passed, Virgin flight attendants "on occasion" transferred to JFK, maximized their leave, then transferred back); Simone Dec. at 3 (American flight attendants started using more sick leave around the holidays after Massachusetts' sick

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[9] The Airlines also contend that WPSLL's provision ensuring that employees can take sick leave in increments as small as one hour will allow flight attendants to game the system by missing an entire flight pairing by taking just one hour of sick leave at the time of departure. *See* WAC 296- 128-630. But this argument ignores the fact that Washington's law allows companies to apply for a variance if complying with WPSLL's minimum increment requirement would not be feasible. WAC 296-128-640. Evidence suggests that the process for obtaining a variance is straightforward and that L&I has approved most of the applications it has received. Dkt. # 84 at 6. If the loophole that the Airlines describe truly exists, it seems highly likely that the Airlines would receive a variance.

leave law passed). However, a limited increase in sick leave abuse does not necessarily translate into delays, cancellations, and base closures. To prove that it does, the Airlines' primarily rely on Virgin's experience at its JFK base after New York City passed the Earned Sick Time Act (ESTA), which has similar provisions to WPSLL. During the years after Virgin began complying with ESTA, the company saw increased delay and cancellation rates associated with cabin crew shortages. Lee Report, Dkt. # 107, Ex. 2, at 61-65. The Airlines claim that this "contributed significantly" to Alaska's decision to close the JFK base in November 2017 after it acquired Virgin in 2016. Butler Dec. at 7.

However, for the first two years after Virgin began complying with ESTA, cabin crew delays only increased by .16 percentage points, an amount that is almost irrelevant compared to the Airlines' overall delay rates of 15 to 20 percent. Tregillis Report, Dkt. # 87, Ex. 1, at 28-29; Mann Report, Dkt. # 86 at 15-16; Lee Depo., Dkt. # 88, Ex. 28, at 8. During the final seven months before the JFK base's closure, cabin crew delays suddenly increased by 1.2 percentage points, which the Airlines' expert speculatively attributes to flight crew finally becoming "fully aware" of ESTA's terms. Lee Report at 64-65. But other major changes at Virgin around that time, including Alaska's decision to cut reserve pools after the Virgin acquisition and announcements related to closing the JFK base, cast serious doubt on the Airlines' causation theory. Tregillis Report at 36-50; *see also* Am. Airlines Dep., Dkt. # 89, at 130-131 (American has also experienced increased use of sick leave after base closure announcements).

It also seems likely that the JFK base was closed because it was too small to be profitable, not because

of ESTA. Tregillis Report at 41-42; Mann Report at 32-34. Notably, there are no indications of other airlines experiencing closures or other operational impacts because of sick leave laws. Moses Dep., Dkt. # 88, Ex. 7, at 72-73 (American's LAX base has expanded despite LA's sick leave law); Am. Airlines Dep. at 24, 41-42 (sick leave laws do not affect American's plans for network expansion); Shaw Dep., Dkt. # 88, Ex. 15, at 38, 74-75 (Southwest's operations have been unaffected by Oakland, LA, and Baltimore's sick leave laws); Southwest Dep., Dkt. # 91 at 28-31 (Southwest's Baltimore, Atlanta, LA, and Oakland bases have grown despite sick leave laws); United Dep., Dkt. # 88, Ex. 20, at 44-45 (United attributes no base closures, route changes, or fair changes to local sick leave laws); Alaska Dep., Dkt. # 88, Ex. 13, at 79-80 (Alaska's operations have not been impacted by complying with Washington's Family Care Act).

To the extent that WPSLL may have some impact on sick leave abuse, the Airlines have tools to feasibly mitigate these effects. The Airlines currently tolerate a 15-20% rate of 15+ minute delays. Mann Report at 17. To ensure flight crew absences do not push delays beyond that range, the Airlines analyze sick leave trends and allocate resources accordingly. For example, the Airlines may increase the number of reserve flight crew, prohibit flight attendants from trading trips, or, in extreme situations, offer pay incentives for employees to cover for absent coworkers. *See* Am. Airlines Dep. at 60-89, 97; Alaska Dep. at 229-30; United Dep. at 50-51; Jones Dep., Dkt. # 88, Ex. 26, at 65-66. If WPSLL causes flight crew absences to increase somewhat, the Airlines could maintain their level of on-time performance by spending more on these mitigation tools. Admittedly, short-notice absences and sick calls away from a base airport are harder to

address by increasing reserves, since most reserves must take the time to drive to a base airport from home and must be flown to a non-base airport. However, the Airlines do not persuasively show why short-notice calls will increase significantly under WPSLL or why flight crew would often abuse their sick leave in the middle of a flight pairing far from home.

WPSLL's protections also have limitations. For example, employers may require notice "as soon as possible" before the start of the employee's shift "unless it is not practicable to do so." WAC 296-128-650(1)(b). This assuages some of the Airlines' fears about short-notice absences. Second, WPSLL only protects employees for authorized uses of sick leave. WAC 296- 128-750. If an employee abuses sick leave, their employer can withhold payment. And while WPSLL does not explicitly say so, the Airlines could likely discipline an employee if they were proven to have used sick leave for an unauthorized purpose. A contrary interpretation would not harmonize with WPSLL's goal of only protecting employees who have exercised their right to care for themselves and family members. *See* RCW 49.46.200; RCW 49.46.210(4).

In short, WPSLL does not unavoidably obstruct interstate commerce in the same way as other regulations that have been invalidated under the Dormant Commerce Clause. *See Raymond*, 434 U.S. at 445 (truck length regulations "slow the movement of goods"); *Bibb*, 359 U.S. at 527 (mud guards requirements "caus[e] a significant delay"). Instead, the extent to which the Airlines allow delays from slightly increasing because of WPSLL boils down to a calculation of compliance costs. This does not amount to a substantial burden on commerce.

c. Local Benefits of Washington's Paid Sick Leave Law

In light of WPSLL's insubstantial impact on commerce, the burdens created by the Law are not "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Unlike *Kassel*, *Raymond*, *Bibb*, and *Southern Pacific*, WPSLL's health benefits are not illusory. In fact, WPSLL is well-within Washington's "broad authority under [its] police powers to regulate the employment relationship to protect workers" and ensure "occupational health and safety." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). Although it is true that flight crew already accrue paid sick leave under their CBAs, the Airlines' policy of assigning points and requiring verification discourages employees from *using* their leave, especially for early-stage or non-debilitating illnesses. Watkins Report, Dkt. # 95, Ex. 1, at 6. Indeed, several flight attendants have attested to working while sick to avoid acquiring points. Rafferty Dec., Dkt. # 98, at 3; Levin Dec., Dkt. # 99, at 2. But research shows that flight attendants' interactions with passengers make them both the most likely source and recipient of disease on flights. *See* Watkins Report at 10. This translates into a higher need for unencumbered sick leave for flight attendants and greater risks from disincentivizing its use. The Washington Legislature's interest in diminishing this risk and protecting workers is therefore far from "unreasonable or irrational." *See Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991).

The Airlines' challenge WPSLL's benefits by pointing out that workers in some other industries, such as railroads and construction, are exempt from WPSLL, suggesting that it is not essential to the Law's purpose

that every category of worker be covered. However, it is not this Court's role to "second-guess the empirical judgments of lawmakers" regarding WPSLL's scope. *See Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) (quoting *CTS Corp.*, 481 U.S. at 92). Given the heightened potential for spreading disease on crowded airplanes, it is entirely possible that the Washington Legislature considered airline workers one of the *most* important classes to cover under the Law. Weighing these benefits against the limited burden on interstate commerce, WPSLL does not violate the Dormant Commerce Clause.

3. Preemption under the Airline Deregulation Act

The Airlines' second argument against applying WPSLL to flight crew relies on the ADA's preemption clause. The ADA was passed in 1978 to "promote 'efficiency, innovation, and low prices' in the airline industry through 'maximum reliance on competitive market forces and on actual and potential competition.'" *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 280 (2014) (quoting 49 U.S.C. §§ 40101(a)(6), (12)(A)). To further that end, Congress included a provision preempting any state law "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The words "related to" express a "broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The Supreme Court has supplied the following instructions for ADA preemption analysis:

> (1) that "[s]tate enforcement actions having a connection with, or reference to," carrier "rates, routes, or service are pre-empted;" (2) that such pre-emption may occur even if a state law's effect on rates, routes, or services "is only indirect;" (3) that, in respect to pre-emption, it makes no difference whether a

> state law is "consistent" or "inconsistent" with federal regulation; and (4) that pre-emption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and pre-emption-related objectives.

Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 370-71 (2008) (quoting *Morales*, 504 U.S. at 384, 386-87, & 390) (internal citations omitted). Nonetheless, "federal law might not pre-empt state laws that affect fares in only a 'tenuous, remote, or peripheral . . . manner.'" *Id.* (quoting *Morales*, 504 U.S. at 390).

Ninth Circuit precedent provides more guidance on how to determine when a law's impact is too tenuous for preemption. "[I]n 'borderline cases' in which a law does not refer directly to rates, routes, or services, 'the proper inquiry is whether the provision, directly or indirectly, binds the carrier to a particular price, route or service and thereby interferes with the competitive market forces within the industry.'" *Dilts v. Penske Logistics*, LLC, 769 F.3d 637, 646 (9th Cir. 2014) (quoting *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 397 (9th Cir. 2011)).[10] "Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices" and less likely to be preempted when they operate "several steps removed" from that point. *Id.* (citing *S.C. Johnson & Son v. Transp. Corp. of Am.*, 697 F.3d 544, 558 (7th Cir. 2012) & *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011)). It is not enough that a law regulating some aspect of a

[10] Although *Dilts* involved the Federal Aviation Administration Authorization Act, that statute's preemption provision is "nearly identical" to the ADA and therefore the same analytical framework applies for both statutes. *See* 769 F.3d at 644.

company's operations indirectly increases consumer prices. *Id*. Finally, "the scope of the pre-emption must be tempered by the presumption against the pre-emption of state police power regulations." *California Trucking Ass'n v. Su*, 903 F.3d 953, 961 (9th Cir. 2018) (quoting *Dilts*, 769 F.3d at 643).

Here, WPSLL's effects are too far removed from the point of sale for ADA preemption. WPSLL does not dictate what routes and services the Airlines provide or the prices they charge for them. Instead, Washington's Law controls how the Airlines must treat their employees, but the Ninth Circuit has upheld similar labor laws before. *See Dilts*, 769 F.3d at 647 (holding that California's meal and rest break laws were not preempted as applied to truckers); *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (holding that California's minimum wage law was not preempted); *see also Bernstein*, 227 F. Supp. 3d at 1073 (relying on *Dilts* and rejecting Virgin's argument that the ADA preempts meal and rest break claims). Given that laws governing employee benefits like sick leave are within the state's traditional police power, WPSLL's indirect effects are not enough to defeat the presumption against preemption.

Even considering those indirect effects, the Airlines do not show that WPSLL has a "significant impact" on routes, prices, or services. *See Rowe*, 552 U.S. at 371. The Airlines put forward the generic argument that WPSLL will increase labor costs, which will in turn cause the Airlines to increase fares or reduce routes. But these types of arguments, which would invalidate almost any form of safety or health-related regulations, are "foreclose[d]" under Ninth Circuit precedent. *Su*, 903 F.3d at 965. In any case, the Airlines have not

shown that complying with WPSLL will significantly affect prices.

The Airlines also argue that WPSLL will force companies to shuttle more flight crew between airports to cover absences and that carriers will have to schedule more ground time between flights and longer minimum connection times to reduce the likelihood of delays. But the Airlines have not demonstrated a causal link between laws like WPSLL and substantial performance impacts. Rather, it appears more likely that the Airlines' own decisions about expenditures will determine whether paid sick leave laws have any limited effects on delays and cancellations. Under these circumstances, WPSLL is not preempted by the ADA.

4. Due Process Clause of the Fourteenth Amendment

Finally, in a footnote, the Airlines briefly argue that applying WPSLL to flight crew violates the Fourteenth Amendment's Due Process Clause. To comport with Due Process, a state "must have a significant contact or significant aggregation of contacts" to activity in a foreign jurisdiction before it can apply its law extraterritorially. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *see also, e.g., Alaska Packers Ass'n v. Indus. Acc. Comm'n*, 294 U.S. 532, 542 (1935) (upholding application of California law where injury occurred in Alaska, the plaintiff was from Mexico, but the contract originated in California). A constitutional violation occurs when a state applies its own substantive law in a manner "so arbitrary or unreasonable as to amount to a denial of due process." *AT & T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1110 (9th Cir. 2013) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)). Under this standard, "[a] state

court is rarely forbidden by the Constitution to apply its own state's law." *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011).

WPSLL does not violate the Due Process Clause. The multi-factor analysis that L&I uses to determine if an employee is Washington-based has *Shutts*'s "significant contact" requirement baked in. *See Bostain*, 159 Wash. 2d at 720 (holding that applying the Minimum Wage Act to Washington-based employees who perform interstate work did not create unconstitutional extraterritorial effects); *Mendis*, 2016 WL 6650992, at *5 (holding that Washington's rest break law was not unconstitutionally extraterritorial as applied to airline workers). Because WPSLL only applies to employees with strong ties to Washington State, it is not unconstitutional.

CONCLUSION

For these reasons, the Airlines' Motion for Summary Judgment is DENIED. L&I and AFA's Motions for Summary Judgment are GRANTED.

IT IS SO ORDERED.

Dated this 11th day of October, 2019.

/s/ Ronald B Leighton
Ronald B. Leighton
United States District Judge

APPENDIX C

RCW 49.46.210

Paid sick leave—Authorized purposes—Limitations—"Family member" defined.

(1) Beginning January 1, 2018, except as provided in RCW 49.46.180, every employer shall provide each of its employees paid sick leave as follows:

(a) An employee shall accrue at least one hour of paid sick leave for every forty hours worked as an employee. An employer may provide paid sick leave in advance of accrual provided that such front-loading meets or exceeds the requirements of this section for accrual, use, and carryover of paid sick leave.

(b) An employee is authorized to use paid sick leave for the following reasons:

(i) An absence resulting from an employee's mental or physical illness, injury, or health condition; to accommodate the employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care;

(ii) To allow the employee to provide care for a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care; and

(iii) When the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's

child's school or place of care has been closed for such a reason.

(c) An employee is authorized to use paid sick leave for absences that qualify for leave under the domestic violence leave act, chapter 49.76 RCW.

(d) An employee is entitled to use accrued paid sick leave beginning on the ninetieth calendar day after the commencement of his or her employment.

(e) Employers are not prevented from providing more generous paid sick leave policies or permitting use of paid sick leave for additional purposes.

(f) An employer may require employees to give reasonable notice of an absence from work, so long as such notice does not interfere with an employee's lawful use of paid sick leave.

(g) For absences exceeding three days, an employer may require verification that an employee's use of paid sick leave is for an authorized purpose. If an employer requires verification, verification must be provided to the employer within a reasonable time period during or after the leave. An employer's requirements for verification may not result in an unreasonable burden or expense on the employee and may not exceed privacy or verification requirements otherwise established by law.

(h) An employer may not require, as a condition of an employee taking paid sick leave, that the employee search for or find a replacement worker to cover the hours during which the employee is on paid sick leave.

(i) For each hour of paid sick leave used, an employee shall be paid the greater of the minimum hourly wage rate established in this chapter or his

or her normal hourly compensation. The employer is responsible for providing regular notification to employees about the amount of paid sick leave available to the employee.

(j) Unused paid sick leave carries over to the following year, except that an employer is not required to allow an employee to carry over paid sick leave in excess of forty hours.

(k) This section does not require an employer to provide financial or other reimbursement for accrued and unused paid sick leave to any employee upon the employee's termination, resignation, retirement, or other separation from employment. When there is a separation from employment and the employee is rehired within twelve months of separation by the same employer, whether at the same or a different business location of the employer, previously accrued unused paid sick leave shall be reinstated and the previous period of employment shall be counted for purposes of determining the employee's eligibility to use paid sick leave under subsection (1)(d) of this section.

(2) For purposes of this section, "family member" means any of the following:

(a) A child, including a biological, adopted, or foster child, stepchild, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status;

(b) A biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child;

(c) A spouse;

(d) A registered domestic partner;

(e) A grandparent;

(f) A grandchild; or

(g) A sibling.

(3) An employer may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the employee.

(4) An employer may not discriminate or retaliate against an employee for his or her exercise of any rights under this chapter including the use of paid sick leave.