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TO: The Honorable Joe R. Williams
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Per Request for Attorney General Opinion

QUESTION PRESENTED

Prior to January 1, 1982, § 209(b) of the Social Security Act excluded from the definition of wages any payments to employees under a plan or system which made provision for employees generally or classes of employees on account of sickness or accident disability. For the period January 1, 1978, through December 31, 1981:

(1) Did sick pay plans exist for all classified and exempt employees within the meaning of the Act?

(2) Were such plans legally authorized or mandated?

(3) Did the state exercise its authority to make payments on account of sickness, and were payments on account of sickness made pursuant to such authority?

(4) Should Attorney General Opinion 80-28 be revised?

CONCLUSIONS

(1) Sick pay plans were established for all classified and exempt state employees prior to 1978 and have been continuously in effect since then.

(2) Such plans are constitutionally permitted. Sick pay plans were statutorily mandated for classified and nonclassified employees by 1977. Chapter 307, 1977 Sess. L.

(3) During the relevant time period, the state exercised its authority to make payments on account of sickness for all employees pursuant to ch. 307, 1977 Sess.L., and implementation occurred by 1977 in accordance with the implementation provisions of that chapter. Payments on account of sickness were made pursuant to the requirements thereof.

(4) Attorney General Opinion 80-28 addressed substantially these same questions based upon different factual assumptions. However, critical factual assumptions contained in that opinion, upon which its analysis was based, have proven to be clearly erroneous. Accordingly, Attorney General Opinion 80-28 is hereby rescinded.

ANALYSIS

The questions set forth above are addressed in the context of § 209(b) of the Social Security Act [42 U.S.C. § 409(b)]. During the period January 1, 1978, through December 31, 1981, 42 U.S.C. § 409 provided in pertinent part:

> For the purposes of this subchapter, the term "wages" means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; except that, in the case of remuneration paid after 1950, such term shall not include --

> (b) The amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of (1) retirement, or (2) sickness or accident disability, or (3) medical or hospitalization expenses in connection with sickness or accident disability, or (4) death; [emphasis added].

Thus, Congress has expressly provided that "wages" shall not include the amount of any payment made to an employee under a plan or system established by an employer which makes provision for its employees generally or for a class or classes of its employees on account of sickness or accident disability.

Such statutes are interpreted by the courts in a manner which will give effect to congressional intent. See, e. g., Sierakowski v. Weinberger, 504 F.2d 831 (Sixth Cir. 1974); Evelyn v. Schweiker, 685 F.2d 351 (Ninth Cir. 1982). The pertinent sick pay provisions of § 209 of the Social Security Act [42 U.S.C. § 409] were adopted by Congress in 1939. Section 209 of the Social Security Act was amended at that time to provide in pertinent part:

> The term "wages" means all remuneration for employment including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include ---
>
> ....
>
> (3) The amount of any payment made to, or on behalf of, an employee under a plan or system established by an employer which makes provision for his employees generally or for a class or classes of his employees

> (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), on account of (A) retirement, or (B) sickness or accident disability, or (C) medical and hospitalization expenses in connection with sickness or accident disability, or (D) death, ...

Thus, the pertinent provisions of that act, as they affect the questions you have asked, were identical to those found in § 209 of the Act [42 U.S.C. § 409] prior to January 1, 1982. The Congressional purpose for the provision was explained at page 20, Sen. Rept. No. 734 Soc.Sec. Act Amend. of 1939:

> Exclusion of payments to employer welfare plans. -- The term "wages" is amended so as to exclude from tax payments made by an employer on account of a retirement, annuity, sickness, death or accident-disability plan, or for medical and hospitalization expenses in connection with sickness or accident disability. Dismissal wages which the employer is not legally required to make, and payments by an employer of the worker's Federal insurance contributions or a contribution required of the worker under a state unemployment compensation law are also excluded from tax. This will save employers time and money but what is more important is that it will eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

Thus, the primary purpose of the sick pay amendment was to:

> ... eliminate any reluctance on the part of the employer to establish such plans due to the additional tax cost.

The secondary purpose was to save employers time and money. As noted above, to the extent of any ambiguity in the Act, it should be interpreted in a manner which is consistent with the intent of Congress.

The sick pay provisions of the Act have been interpreted by duly adopted Social Security Regulations (20 C.F.R. § 404.1051A). Those regulations provide:

> (a) Payments made prior to January 1, 1982. Sickness and accident disability payments that are paid by the employer to or on behalf of the employee or employee's dependents or into a fund to provide for such payments are excluded from wages if --
>
> (1) Paid prior to January 1, 1982, and
>
> (2) Paid under a plan or system set up by the employer, or
>
> (3) Paid more than six calendar months after the month the employee last worked.

Such regulations have the force and effect of law provided they are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law (See, e. g., Key v. Heckler, 754 F.2d 1545 (Ninth Cir. 1985). The above-quoted regulation is a restatement of the statutory provisions. As such, it is consistent with Congressional intent and has the force of law.

In addition to the statute and regulations, the Social Security Administration has set forth its interpretation of the sick pay exclusion provisions in Social Security Rulings and in its Handbook for State Social Security Administrators. Neither of the foregoing have the force and effect of law. Schweiker v. Hansen, 450 U. S. 785 (1981); Lewin v. Schweiker, 654 F.2d 631 (Ninth Cir. 1981); Whaley v. Schweiker, 663 F.2d 871 (Ninth Cir. 1981); Evelyn v. Schweiker, 685 F.2d 351 (Ninth Cir. 1982); Powderly v. Schweiker, 704 F.2d 1092 (Ninth Cir. 1983); Luca v. Heckler, 615 F.Supp. 249 (D.C.Fla. 1985). However, courts accord such interpretations some deference where they appear to be consistent with the terms and purpose of the statutes they implement. See, in addition to the above, Chamberlin v.

Schweiker, 518 F.Supp. 1836 (D.C.Ill. 1981); Bouchard v. Sec. of H.H.S., 583 F.Supp. 944 (D.C.Mass. 1984).[1]

Social Security Ruling 79-31 which modifies S.S.R. 72-56, interprets the sick leave exclusion provisions, in pertinent part as follows:

> Payments to employees of state and local governments whose services are covered by a Federal-State agreement under § 218 of the Social Security Act (Act) and who are absent from work due to illness, are excluded from wages under § 209(b) of the Act as payments "on account and sickness" if the following conditions are met:
>
> 1. The payments must be made under a sick leave plan or system established by the employer.
>
> 2. The plan must provide for employees generally, employees generally and their dependents, a class or classes of employees, or a class or classes of employees and their dependents.
>
> 3. The employer must have legal authority to make the payments "on account of sickness" and the employer must have exercised this authority.

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[1]This opinion does not address the question of consistency of administrative interpretations with the language and purpose of 42 U.S.C. § 409. Nor does it address the question whether current administrative interpretations would satisfy the "impracticable" requirement necessary to justify discrimination against state employees as discussed in New Mexico v. Weinberger, 517 F.2d 989 (Tenth Cir. 1975) cert. den., 423 U. S. 1051 (1976). Resolution of such questions is unnecessary in light of the conclusion herein that Idaho satisfies the statutory requirements for exclusion, as administratively interpreted.

4. The payments must be made solely "on account of sickness" and not be merely a continuation of salary while the employee is absent due to illness.

Following this statement of the administrative criteria listed above, the Ruling sets forth three examples, the first two of which involve situations in which sick pay plans exist. These examples, together with handbook statements regarding the criteria, will be examined hereinafter as they relate to Idaho's constitution, laws, and sick pay plan.

The Idaho Constitution places no restriction upon payments of fringe benefits to employees such as payments on account of sickness. It is settled law in Idaho that the constitution is in no manner a grant of power to the legislature, but is a limitation placed thereon; if no interdiction of a legislative act is found in the constitution, then it is valid. State v. Dolan, 13 Idaho 693, 92 P. 995 (1907); Idaho Power Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914); Independent Sch. Dist. v. Pfost, 51 Idaho 240, 4 P.2d 893 (1931); Electors of Big Butte Area v. State Bd. of Educ., 78 Idaho 602, 308 P.2d 225 (1957); Smith v Cenarrusa, 93 Idaho 818, 475 P.2d 11 (1970); State v. Cantrell, 94 Idaho 653, 496 P.2d 276 (1972). Since there is no restriction upon the state's authority to make payments to employees on account of sickness, it is clear that the state has authority to adopt plans to pay employees on account of sickness.

This authority was exercised at both the legislative and administrative levels for both classified and nonclassified employees. In 1977, the Idaho Legislature enacted major revisions to the state's personnel policies. Chapter 307, 1977 Sess. L. That enactment has remained unchanged in relevant detail to the present time. While sick pay provisions existed prior to 1977, the statutes in effect at that time represent the pertinent statutes for the relevant time period of January 1, 1978, to December 31, 1981.

Idaho Code § 67-5333 establishes a mandatory sick leave plan for the state's classified workforce. It defines the rate and conditions under which sick leave shall accrue. It provides that sick leave shall be taken on a workday basis and provides that in cases where absences for sick leave exceed three consecutive work days, the appointing authority may require

verification by a physician or other authorized practitioner. The Idaho Personnel Commission has been given authority to promulgate regulations with respect to sick leave (Idaho Code §§ 67-5338 and 67-5333[7]).

Idaho Personnel Commission Rule 24-1.4 sets forth the circumstances under which sick leave may be used:

> Sick leave shall only be used in case of actual sickness or disability or other medical and health reasons necessitating the employee's absence from work, or in situations where the employee's personal attendance is required or desirable because of serious illness, disability, or death in the immediate family. At the employee's option, vacation leave may be used in lieu of sick leave.

Therefore, those payments to employees for "actual sickness or disability or other medical and health reasons necessitating the employee's absence from work" would be excluded from being considered wages under the terms of section 209(b) of the Social Security Act. Those situations where the state permits the use of sick leave where the employee is not actually ill or where vacation leave may be used in lieu of sick leave would not be excluded from consideration as wages under the terms of § 209(b) of the Social Security Act.

In 1977, the legislature also mandated a sick leave plan for nonclassified employees with the adoption of Ch. 16, Title 59, Idaho Code, which has remained the same in pertinent detail to the present. The chapter addressed various personnel matters including salary comparability with classified employees, credited state service, sick leave, vacation leave, hours of work, and the use of compensatory time and overtime.

Idaho Code § 59-1604 provides credited state service for nonclassified employees for purposes of payroll, vacation leave, and sick leave. Subsection (3) of the section provides in pertinent part:

> Members of the legislature, the lieutenant governor, and members of part time boards,

> commissions, and committees, shall not be eligible for annual leave or sick leave.

Idaho Code § 59-1605 mandates a sick leave plan for nonclassified employees. Subsection (1) of Idaho Code § 59-1605 provides:

> Eligible nonclassified officers and employees shall accrue sick leave at the same rate and under the same conditions as is provided in § 67-5333, Idaho Code, for classified officers and employees. [Emphasis added]

The section is mandatory. It defines the sick leave right by defining both the rate and conditions under which sick leave shall accrue. Subsection (2) then provides:

> Sick leave shall be taken by nonclassified officers and employees in as nearly the same manner as possible as is provided in § 67-5333, Idaho Code, for classified officers and employees. [Emphasis added]

This section is likewise mandatory. However, it provides that sick leave shall be taken "in as nearly the same manner as possible" as provided in Idaho Code § 67-5333. The phrase "same manner" is ordinarily construed to relate to procedural rather than substantive matters. See, generally, cases collected at 38 Words and Phrases 327-331. This result is clear in the context of this statute. It would be unreasonable to construe subsection (1) as mandating the rate and conditions which define the substantive sick leave right, and then construe subsection (2) as permitting an exempt agency to eliminate or defeat that right by a discretionary redefinition of the substantive right.

Rather, subsections (1) and (2) grant nonclassified officers and employees the same substantive rights as those provided to classified employees by Idaho Code § 67-5333. The Language, "in as nearly the same manner as possible," is merely legislative recognition of the fact that different procedural requirements may be necessary for different classes of exempt employees. For example, record keeping forms designed for the classified work force may not be adequate when applied to exempt classes of employees such as employees of the Idaho Military

Department under federal control, employees of the legislative department, or the governor's office.

Thus, while some procedural differences are allowable, Idaho Code § 59-1605(1) and (2) provide the same substantive sick leave rights to nonclassified employees as those provided for classified employees. Such substantive rights include those found in Idaho Code § 67-5333 defining the rate and conditions under which sick leave rights shall accrue, and providing the right to take sick leave on workdays, with the proviso that the employer may require verification by a physician or other authorized practitioner. Separate provisions were statutorily provided for two classes of employees. Idaho Code § 59-1605(3) requires the Idaho Supreme Court to determine the sick leave policy for employees of the judicial department. Idaho Code § 59-1605(4) requires the State Board of Education to determine sick leave policies for the nonclassified employees of the board.

The State Board of Education and the Idaho Supreme Court adopted sick leave policies as required. The State Board of Education policy was in effect during the entire relevant time period.

The relevant provisions of the Board's policy regarding accrual rights and taking sick leave were as follows:

> Sick leave for all faculty and professional employees who are employed on a nine-month or more basis and all classified employees shall accrue at the rate of one (1) day for each full month of service. Sick leave shall accrue without limitation. Sick leave shall be charged for absences due to illness only on working days.
>
> ....

The Idaho Supreme Court's policy which was effective for the relevant period provided in pertinent part:

> Sick leave will accrue at the rate of one day for each month of service and begins accruing in the first month worked. Accumulated sick leave shall be limited to 120 working days of leave, and all sick

> leave shall be forfeited at the time of termination. No employee shall be reimbursed for earned but unused sick leave.
>
> Sick leave is to be used only in cases of actual sickness or disability. With the approval of the Administrative Director of the Courts, sick leave may be used where the individual's personal attendance is required or desirable because of serious illness, disability or death in his/her immediate family, or may be taken in advance of earning that leave in a later month.

Finally, Idaho Code § 59-1605(5) required the State Board of Examiners to adopt comparative charts to compute equivalent sick leave for persons paid on a daily, weekly, bi-weekly, calendar month, or annual period. (This requirement is the counterpart of Idaho Code § 67-5332(3) which requires the Personnel Commission to adopt comparative charts to compute credited state service for sick leave, annual leave, and other purposes on daily, weekly, bi-weekly, monthly, and annual periods.) The Board of Examiners adopted the comparative charts in 1977 as required.

Thus, all requirements for administrative implementation of the mandatory sick leave plans of Idaho Code §§ 59-1605 and 67-5333 for statutorily eligible nonclassified and classified employees were completed by 1977.

From the foregoing discussion, it is apparent that Idaho complied with the actual terms of 42 U.S.C. § 409 which excludes from the definition of wages:

> ... any payment ... made to an employee ... under a plan or system established by an employer which makes provision for ... a class or classes of his employees ... on account of ... sickness or accident disability.

It is also clear that the state has legal authority to make payments on account of sickness, that the state exercised this authority in accordance with state law by statutorily and

administratively establishing and implementing a mandatory sick leave plan for classified and nonclassified eligible employees, and that payments were made on account of sickness pursuant to the sick leave statutes providing benefits in addition to separately defined salary benefits rather than pursuant to salary statutes which provide merely for continuation of salary during illnesses.

As discussed previously, the provisions of 42 U.S.C. § 409(b) have been administratively interpreted by the Social Security Administration in Social Security Rulings and in its Handbook for State Social Security Administrators. S.S.R. 79-31 provides that payments on account of sickness are excluded from the definition of wages if the following conditions are met:

> 1. The payments must be made under a sick leave plan or system established by the employer.
>
> 2. The plan must provide for employees generally, employees generally and their dependents, a class or classes of employees, or a class or classes of employees and their dependents.
>
> 3. The employer must have legal authority to make the payments "on account of sickness" and the employer must have exercised this authority.
>
> 4. The payments must be made solely "on account of sickness" and not be merely a continuation of salary while the employee is absent due to illness.

The Ruling then sets forth three illustrative cases. The first two involve sick pay plans in which payments qualify for exclusion from "wages" under the Act.

In the first case, a hospital district established a plan under which employees received one day of sick leave for each month of service. Sick leave could be used only for the employee's illness or disability, and the hospital could require a doctor's statement justifying use of sick leave. The hospital maintained records which showed sick leave used and expenses in

connection with such use. State law did not restrict the hospital district's authority to pay employees on account of sickness.

In the second case, a city established a sick leave plan under which employees received four hours of sick leave each two-week pay period. The city passed an ordinance providing that sick leave was intended to be payment "on account of sickness" and not as a continuation of salary. Sick leave absences beyond five working days required a doctor's statement explaining the reason for absence. The state attorney general issued an opinion which concluded that while the state did not have legal authority to pay state employees on account of sickness from its regular salary account from funds appropriated for salary purposes, there was no such restriction applicable to political subdivisions.

In the case of the hospital district, the ruling found:

> Accordingly, payments made under the hospital district's sick leave plan are excluded from wages under § 209(b) of the Act. The hospital district has the legal authority to pay "on account of sickness," and the creation of a sick leave plan with separate accounting for sick leave use and expenditures is evidence that this authority has been exercised.

In the case of the city, the ruling found:

> Accordingly, the payments to the employees of City A absent on sick leave are excluded from wages under § 209(b) of the Social Security Act as payments "on account of sickness." The opinion of the attorney general of State B plus the local ordinance adopted by the governing body of City A establish that the city has the legal authority to pay "on account of sickness," and the ordinance and creation of the sick leave plan are evidence that this authority has been exercised.

The ruling makes it clear that evidence of compliance with the administrative criteria established can be shown in various ways. For example, although the hospital district had not adopted a resolution or ordinance such as the city's, it separately accounted for sick leave use and expenses evidencing it had exercised its authority to make sick leave payments. The city, on the other hand, did not separately account for personal sick leave expenses, but was permitted by state law to pay sick leave from its salary account and adopted an ordinance distinguishing payments on account of sickness from regular salary provisions.

Like the city and hospital district, Idaho has adopted a sick leave plan which defines accrual of sick leave rights. Employees receive the equivalent of one day of sick leave for each month of service (96 hours per 2080 hours of credited state service). Like the city and hospital district, Idaho employees have the right to use sick leave on work days on account of sickness. (As discussed previously, only those payments due to the employee's sickness or accident disability are excluded. Situations in which the state permits sick leave to be used for other purposes, such as serious illness in the family, are not excluded.) Like the city and hospital district, Idaho may require verification of illness by a physician or other authorized practitioner. Like the city and hospital district, Idaho is legally authorized to pay employees on account of sickness.

The city by ordinance and the state by statute mandated that payments be made to employees absent from work on account of sickness to the extent of their sick leave accrual rights. Like the city, these payments are payments statutorily separate and distinct from salary rights set out separately in Idaho's statutes.

In the case of the city, state law permitted the city to pay sick leave from its salary account. Idaho appropriates funds for various programs utilizing standard classifications of personnel costs, operating expenditures, and capital outlay. Personnel costs include a number of things, including, salary, sick leave, annual leave, overtime, compensatory time, and the employer's share of contributions relating to employees such as retirement, health and life insurance, workmen's compensation, employment security, and social security. Thus, Idaho's budgeting process permits payment of sick leave from

appropriations for personnel costs more clearly than was the case in the city example of the social security ruling. Idaho, like the city, meets the terms of the sick pay exclusion as interpreted by the ruling.

The hospital district, by contrast, provided evidence that it exercised its authority to pay on account of sickness by accounting for sick leave use and expenses as distinguished from regular salary and vacation leave. Likewise, Idaho maintained records separately accounting for sick leave accruals and utilization during the relevant period. The State Auditor's Office undertook a program to review the relevant records of the various agencies. Sick leave use and expenses were identified. Payments made for other than personal sick leave were excluded as well as leave which could not be distinguished from other types of leave such as family sickness. The Auditor, like the hospital district thereby separately identified and accounted for sick leave utilization and expenditures qualifying for exclusion.

Thus, evidence that Idaho exercised its authority to make payments on account of sickness is provided by both methods found to be sufficient evidence in S.S.R. 79-28. Idaho qualifies for the exclusion as it is interpreted by the ruling.

The Handbook for Social Security Administrators, also discusses the administrative criteria set forth in Social Security Ruling 79-31. The guidelines generally follow the provisions of S.S.R. 79-31. However, in addition to the types of evidence found sufficient in S.S.R. 79-31 to establish that payments were made pursuant to authority to pay on account of sickness, the handbook provides that such evidence might take the following forms:

> ...
>
> 2. A separate appropriation or budgeting solely for payments on account of sickness; or
> 3. A separate sick-pay account. The sick-pay account may be used either to make payments direct to the employee or to reimburse the regular salary account for payments on account of sickness made from it.

In conclusion, the state of Idaho met the sick pay exclusion requirements of 42 U.S.C. § 409 and 20 C.F.R. 404.1051A for the period January 1, 1978, through December 31, 1981. The state likewise met the terms of the Act and regulations as administratively interpreted.

On December 12, 1980, Attorney General Opinion No. 80-28 was issued. That opinion addressed substantially the same questions as those addressed in this opinion. Since that time, the State Auditor's Office conducted an extensive review of the state sick-pay policies and implementation thereof for the period January 1, 1978, through December 31, 1981. In the process, it was learned that various critical factual assumptions which formed the basis of Opinion 80-28 were in error.

The Auditor learned, for example, that the administrative implementation provisions of Idaho Code § 59-1605 had, in fact, occurred. The opinion also erroneously assumed that only the State Auditor's bi-weekly payroll records after 1980 provided identification of sick leave use and expenses. This also proved to be untrue.

Attorney General Opinion No. 80-28 is hereby rescinded and is replaced by this opinion.

AUTHORITIES CONSIDERED:

Attorney General Opinion No. 80-28

Ch. 16, Title 59, Idaho Code

Ch. 307, 1977 Sess. L.

42 U.S.C. § 409

Handbook for State Social Security Administrators.

Idaho Code § 59-1604

Idaho Code § 59-1605

Idaho Code § 67-5332

Idaho Code § 67-5333

Idaho Code § 67-5338

Idaho Personnel Commission Rule 24-1.4

Social Security Act § 209(b)

Social Security Act § 218

Social Security Ruling 79-31

Page 20, Sen. Rept. No. 734 Soc.Sec. Act Amend. of 1939

38 Words and Phrases 327-331

20 C.F.R. § 404.1051A

Bouchard v. Sec. of H.H.S., 583 F.Supp. 944 (D.C.Mass. 1984).

Chamberlin v. Schweiker, 518 F.supp. 1836 (D.C.Ill. 1981)

Electors of Big Butte Area v. State Bd. of Educ., 78 Idaho 602, 308 P.2d 225 (1957)

Evelyn v. Schweiker, 685 F.2d 351 (Ninth Cir. 1982)

Idaho Power Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914)

Independent Sch. Dist. v. Pfost, 51 Idaho 240, 4 P.2d 893 (1931)

Key v. Heckler, 754 F.2d 1545 (Ninth Cir. 1985)

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New Mexico v. Weinberger, 517 F.2d 989 (Tenth Cir. 1975) cert. den., 423 U. S. 1051 (1976)

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Schweiker v. Hansen, 450 U. S. 785 (1981)

Sierakowski v. Weinberger, 504 F.2d 831 (Sixth Cir. 1974)

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State v. Cantrell, 94 Idaho 653, 496 P.2d 276 (1972)

State v. Dolan, 13 Idaho 693, 92 P. 995 (1907)

Whaley v. Schweiker, 663 F.2d 871 (Ninth Cir. 1981)

DATED this 18th day of March, 1986.

ATTORNEY GENERAL
State of Idaho

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