ERISA Preemption of State Vacation Pay Laws: California Hospital Association v. Henning

Donald J. McNeil

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Retirement Security Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol16/iss2/6
ERISA Preemption of State Vacation Pay Laws: 
California Hospital Association v. Henning

INTRODUCTION

When Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA" or "the Act"),\(^1\) popularly known as the pension reform bill,\(^2\) one of the Act’s sponsors called it "the greatest development in the life of the American worker since social security."\(^3\) ERISA is a comprehensive remedial statute\(^4\) designed to protect the interests of workers and their beneficiaries in earned pension and welfare benefit plans.\(^5\) Little did the statute’s proponents realize, however, that nine years after the passage of ERISA, a group of California employer associations would transform the statute’s protective shield against loss of pension and welfare benefits into a weapon to strike down state protection of workers' earned vacation pay.\(^6\)

For several years, ERISA coexisted peacefully with California Labor Code section 227.3, which prohibited forfeiture of vested vacation time upon termination of employment.\(^7\) In 1982, however,

---

3. 120 CONG. REC. 29,933 (1974) (statement of Sen. Javits), reprinted in 3 LEGISLATIVE HISTORY, supra note 2, at 4747. At the bill signing ceremony, President Ford remarked: "I think this is really an historic Labor Day—historic in the sense that this legislation will probably give more benefits and rights and success in the area of labor-management than almost anything in the history of this country." 3 LEGISLATIVE HISTORY, supra note 2, at 5321.
4. See infra notes 21-28 and accompanying text.
7. CAL. LAB. CODE § 227.3 (West Supp. 1984). Section 227.3 provides as follows:

   Unless otherwise provided by a collective-bargaining agreement, whenever a
the California Supreme Court, in *Suastez v. Plastic Dress-Up Co.*,\(^8\) unanimously held that section 227.3’s anti-forfeiture provision required employers to pay a pro rata share of vacation pay to employees who were terminated prior to becoming eligible for full vacations.\(^9\) A group of employer associations reacted to this apparent expansion of the law\(^10\) by filing an amicus curiae petition requesting that *Suastez* be reheard. The associations argued for the first time that Labor Code section 227.3 was preempted by ERISA.\(^11\) After the California Supreme Court denied the request for rehearing,\(^12\) the associations filed suit in federal district court to enjoin state labor officials from enforcing section 227.3 and *Suastez*.\(^13\) In this action by the associations, *California Hospital Association v. Henning*,\(^14\) the court issued a permanent injunction which not only held section 227.3 preempted by ERISA but also barred the California Division of Labor Standards Enforcement from involving itself in any way with any claim against any employer concerning vacation plans, funds, or programs.\(^15\)

*Henning* focused on state regulation of vacation payments from contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

---

8. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).
9. 31 Cal. 3d at 784, 647 P. 2d at 128, 183 Cal. Rptr. at 852.
10. *See* cases cited *infra* note 142.
12. *Suastez*, 31 Cal. 3d at 784, 647 P.2d at 128, 183 Cal. Rptr. at 852.

On appeal, the California labor commissioner objected to the breadth of the court’s order, which granted relief not just to employers represented by the plaintiff associations but to all California employers not excluded from ERISA coverage. The district court thus granted class-action relief without ever having been presented with a motion for class certification under *Fed. R. Civ. P.* 23. Opening Brief for Appellant at 44, *California Hosp. Ass’n v. Henning*, No. 83-6381 and No. 83-6416 (9th Cir. July 26, 1984).
employers' general assets ("nontrusteed plans"). The court held that such payments constituted ERISA-covered "plans" or "programs," despite the failure of such arrangements to comply with ERISA's requirement that plan assets be placed in a trust ("trusteed plans"). The court refused to defer to a United States Department of Labor regulation which excluded vacation payments from general assets from ERISA coverage. Finally, the court held that California's vacation pay laws and administrative procedure for adjudicating vacation pay claims fell within ERISA's pre-emption provisions because the laws and procedures "relate to" benefit plans.

The outcome in *Henning* illustrates the extent to which the federal government may preempt state regulation of a field which Congress has chosen to occupy. After a brief description of ERISA coverage, this note will review the preemption doctrine and examine judicial efforts to define the scope of ERISA preemption. Next, this note will discuss the *Henning* decision that ERISA supersedes both state regulation of vacation pay practices and state administrative enforcement of vacation pay obligations. After examining the potential impact of *Henning*, this note will suggest a way to give full force to ERISA's preemption of the employee benefit field while preserving for the states their traditional role in labor standards enforcement.

**BACKGROUND**

*The Employee Retirement Income Security Act of 1974*

ERISA was enacted to protect certain employee pension and welfare benefit rights. To achieve this goal, Congress established a comprehensive scheme of substantive and procedural requirements designed to assure the equitable character and financial soundness of employee benefit plans. The Act imposes on all em-

---


17. ERISA § 403, 29 U.S.C. § 1103 (1982); see infra notes 174-78 and accompanying text.

18. 29 C.F.R. § 2510.3-1 (1984); see infra notes 200-19 and accompanying text.


20. See supra notes 1-5 and accompanying text.

21. ERISA § 2(a), 29 U.S.C. § 1001(a) (1982), provides in relevant part:

The Congress finds . . . that it is . . . desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be pro-
ployee benefit plans reporting and disclosure requirements and standards of fiduciary responsibility. ERISA also establishes minimum participation, vesting and funding requirements which apply only to pension plans. The statute provides for administration and enforcement through internal plan claims procedures and both civil and criminal court action.

The existence of an “employee benefit plan” is a prerequisite to ERISA coverage and thus a threshold question in any preemption challenge. The Act defines “employee benefit plan” to include both employee pension benefit plans and employee welfare benefit plans. It further defines welfare benefit plan as “any plan, fund or program” which provides ERISA-covered benefits such as medical care, apprenticeship training, and vacation benefits. The statute is unclear, however, as to what constitutes a “plan” or

22. ERISA § 3(3), 29 U.S.C. § 1002(3) (1982), defines “employee benefit plan” as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . . .” ERISA § 3(1), 29 U.S.C. § 1002(1) (1982) defines “employee welfare benefit plan” as any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29. See supra note 22.
32. ERISA § 3(3), 29 U.S.C. § 1002(3) (1982); see supra note 22.
33. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982); see supra note 22.
"program." In Donovan v. Dillingham, the Eleventh Circuit held that an ERISA plan or program had to include intended benefits, intended beneficiaries, a source of funding, and a procedure for application and collection of benefits.

The United States Department of Labor, which is responsible for enforcing the provisions of Title I of ERISA, also has attempted to define the type of benefit practice that will constitute a plan or program under the Act. In response to "numerous inquiries" regarding the scope of ERISA coverage, the Department promulgated a regulation excluding from the definition of "welfare benefit plan" payments of normal compensation from an employer's general assets for periods during which employees are on vacation. The regulation was issued under ERISA section 505's grant of authority to the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this chapter" and to "define accounting, technical, and trade terms used in such provisions."

The amount of deference which a court must give to a properly enacted regulation, such as that promulgated by the Department of Labor, depends upon whether the regulation is "legislative" or "in-
terpretive." While a valid legislative rule has the force of law, courts sometimes substitute their own judgment for administrative interpretations.

A rule is "legislative" when Congress has delegated to the administrative agency the power to make law. The grant of legislative authority need not be specific but must be such that a "reviewing court reasonably [may] conclude that the grant of authority contemplates the regulation issued." While an administrative agency cannot rewrite a statute, Congress may grant an agency the authority to fill any gaps left by the statutory language. Such an exercise of administrative "gap-filling" is accorded controlling weight unless the regulation is "arbitrary, capricious or manifestly contrary to the statute."

Interpretive regulations also have considerable force when they are enacted by agencies charged with the enforcement of the statute being interpreted. The Supreme Court has described as "venerable" the principle that such regulations should be followed "unless there are compelling indications that [they are] wrong." This is particularly true when a regulation is adopted shortly after enactment of the statute being interpreted. An interpretive regulation is entitled to less deference when it can be judged against a corresponding statutory definition.

Prior to *Henning*, several courts had deferred to regulations of the Secretaries of Labor and the Treasury in deciding cases involving ERISA coverage. In fact, portions of the regulation at

---

42. *Id.*
43. *Id.* at 39.
47. See *Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980)* (deference unless "demonstrably irrational"); *Batterton v. Francis, 432 U.S. 416, 426 (1977)* (regulation can be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
52. The Secretary of the Treasury promulgates regulations relating to ERISA's tax provisions. See, e.g., 29 U.S.C. § 1202(c) (1982).
53. Courts deferred to regulations promulgated by the Department of Labor in
issue in *Henning* have been cited in decisions dealing with ERISA coverage of accumulated sick leave\(^5\) and severance pay.\(^5\)

*The Doctrine of Preemption*

Once Congress has legislated in a particular area, the supremacy clause requires that federal law supersede or preempt conflicting state law.\(^5\) This principle mandates that a state law be rendered void when compliance with both the federal and state law is impossible or when the state law defeats congressional purposes or objectives.\(^5\)

Furthermore, Congress may exercise a plenary power such that the federal scheme occupies an entire field to the exclusion of even parallel or complementary state legislation.\(^5\) Indeed, Congress may choose to prohibit state regulation of a particular field even though the federal scheme leaves the field completely unregulated.\(^5\) Congress may do this by explicitly forbidding state regulation, or it may imply occupation of the field in structuring or

---


In rejecting an ERISA preemption challenge to Illinois's vacation pay law, a federal district court upheld the validity of the regulation which excluded vacation payments out of general assets from the definition of "welfare benefit plan." The court noted that the Department of Labor's interpretation of ERISA was entitled to "great weight." *National Metalcrafters v. McNeil*, 602 F. Supp. 232, 237 (N.D. Ill. 1985), *appeal docketed*, No. 85-1263 (7th Cir. Feb. 15, 1985).


\(^5\) L. TRIBE, *supra* note 56, at 376-77.
setting forth the purpose of its enactments. Preemption will be presumed where the scheme of federal regulation is pervasive or the federal interest dominant. Whether preemption of a particular field is express or implied, it often is difficult to define with any certainty the exact boundaries of the field being preempted.

No preemption will take place, however, if Congress has acted unconstitutionally. When Congress exercises its plenary power under the commerce clause, courts will uphold federal regulation of local activities against a constitutional challenge only if Congress has a "rational basis" for finding that the activities affect interstate commerce and chooses reasonable and appropriate means to eliminate the evil it perceives.

If federal regulation passes this "rational basis" test, it may tread on ground traditionally occupied by the states in the exercise of the "police powers" reserved to them by the tenth amendment. There is, however, a strong presumption against preemption of these police powers, which will survive absent an unambiguous congressional mandate that they be superseded by federal law.

---

60. Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 104 S. Ct. 3179, 3185 (1984); see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) ("Congress can act so unequivocally as to make clear that it intends no regulation except its own.").


66. "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

67. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Jones v. Rath Pack-
Whenever Congress clearly has legislated on a particular subject, however, the tenth amendment does not constitute a limitation on the commerce powers, and conflicting state laws, traditional police powers or not, must yield. The tension between Congress’s commerce powers and state police powers that can arise as a result of voiding conflicting state laws is well illustrated by the ERISA preemption challenges to state laws.

ERISA Preemption

Courts presented with the ERISA preemption issue have struggled to define the appropriate scope of ERISA preemption. Some courts have struck down state laws providing for comprehensive health care, minimum coverage in health insurance plans, and damages for breach of contract and intentional infliction of emotional distress. At the same time, other courts have upheld state


court marital property settlements\textsuperscript{74} and support orders\textsuperscript{75} involving ERISA-covered benefits.

ERISA does not eliminate the states entirely from involvement with pension and welfare benefit plans. In fact, the Act specifically preserves a role for state courts in actions by participants or beneficiaries to recover benefits due.\textsuperscript{76} Nevertheless, ERISA does generally preempt “any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.”\textsuperscript{77} While Congress thus explicitly expressed its intent to occupy the field of pension


\textsuperscript{77} ERISA § 514(a), 29 U.S.C. § 1144(a) (1982) (emphasis added). ERISA § 514(a) provides in relevant part:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

\textsuperscript{29} U.S.C. § 1003(a), (b) provides as follows:

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applica-
and welfare benefit plan regulation, the statutory language of the Act has created some doubt as to the exact boundaries of that field. As a result, courts have differed in their conclusions as to which state laws "relate to" employee benefit plans.

In attempting to define the parameters of "relate to" courts have concentrated on one or more aspects of the state law being challenged. The aspects generally focused on include: (1) the extent to which the state law conflicts with a specific provision of ERISA or the overall purpose of the Act ("conflict" analysis); (2) whether the state law regulates or is directed at employee benefit plans ("purpose" analysis); or (3) whether the effect of the state law is so tangential or insubstantial as to warrant an implied exception to preemption ("effect" analysis).

Courts engaging in "conflict" analysis have denied challenges to


80. See generally Kilberg & Inman, supra note 69; The Meaning of "Relate To", supra note 69.

81. See infra notes 87-88 and accompanying text.

82. See infra notes 93-98 and accompanying text.

83. See infra notes 99-105 and accompanying text.
state laws which operate in areas left unregulated by Congress. In enacting ERISA, Congress subjected employee welfare benefit plans which offer benefits other than pensions only to the statute's reporting, disclosure, and fiduciary requirements. Substantive provisions of such plans, such as vesting and funding, were "reserved to private choice." Some courts, apparently unable to believe that Congress intended to cease all regulation of the substantive terms of these plans, have upheld state laws at least in part because of a desire to avoid such a regulatory vacuum. Other courts would strike down only those laws conflicting with the letter or the spirit of ERISA.

As noted above, however, when Congress chooses to occupy a field, it may forbid even parallel or complementary state regulation which does not in any way conflict with the federal scheme. This is true even when Congress chooses to leave all or part of the field completely unregulated, as it did when it exempted welfare benefit plans from ERISA's vesting and funding requirements. Moreover, Congress, in enacting ERISA, empowered the federal courts to develop a body of substantive common law which would fill any regulatory void created by the preemption of state regulation. Accordingly, most courts have spent little time searching for actual conflicts between state laws and ERISA, and instead have utilized a purpose or effect analysis of the state law being challenged.

Some courts suggest that state laws "relate to" employee benefit

84. See infra notes 87, 88.
89. See supra note 58 and accompanying text.
90. Id.
91. See Helms v. Monsanto Co., 728 F.2d 1416, 1420 (11th Cir. 1984); see also 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 2, at 4771 (remarks of Sen. Javits) ("It is also intended that a body of Federal Substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.").
92. See supra notes 82-83 and accompanying text; infra notes 93-105.
plans only insofar as they seek to "regulate" or are "directed at any particular plan or at employee benefit plans in general." It has been suggested that ERISA section 514(c)(2) supports this position because it defines "State" as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." Thus, one appellate judge wrote that this definition would save from preemption state laws which have a "nonregulatory effect," and commentators have suggested that it also would preserve laws which regulate something other than terms and conditions of plans. Moreover, two commentators have concluded that by using the phrase "purports to regulate," Congress may have chosen to limit preemption to laws by which the state intended to regulate benefit plans.

By referring to indirect as well as direct regulation, however, Congress has caused some courts to focus not on the state's purpose but rather on the effect of state regulation. Strict preemptionists have argued that ERISA supersedes state laws even when the effect of those laws on employee benefit plans is "indirect." In contrast, other courts have ignored ERISA's prohibition of indirect state regulation and have upheld state statutes and state causes of action which clearly would have some indirect effect on the op-

---


98. Kilberg & Inman, supra note 69, at 172.


For example, in Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 969 (1981), the Eighth Circuit held that ERISA preempted a state common law claim of tortious interference with contract even though the common law did not purport to regulate and was not directed at employee benefit plans per se. The court found sufficient the fact that the contract with which the defendants allegedly interfered was an employee benefit plan. Id. at 1211.
eration of benefit plans. Some courts have found the effects of state laws too "insubstantial" or "tangential" to justify preemption. These courts, however, generally have required not only that the state laws affect plans indirectly but also that the state laws involve areas of important state concern, thus invoking the strong presumption against preemption of traditional police powers. Alternatively, a court may find a state law "tangential" if it relates primarily to matters not regulated by ERISA.

In attempting to determine which state laws "relate to" ERISA benefit plans, the United States Supreme Court has also concentrated on the effect the challenged state laws have on such plans, rather than on the purpose of the state laws or on the extent to which they conflict with specific provisions of ERISA.

The United States Supreme Court Treatment of ERISA Preemption

In recent years, the Supreme Court has twice decided cases involving the scope of ERISA's preemption clause. The first case to address the preemption issue was Alessi v. Raybestos-Manhattan, Inc. Alessi involved an ERISA challenge to a New Jersey statute which prohibited pension plans from offsetting workers' compensation awards against pension payments. Writing for a unanimous

---

100. See infra notes 101-05. For example, one court found that ERISA preempted a state consumer protection law and an unfair business practices statute, insofar as these laws might alter ERISA's "controls" on a benefit plan, but that ERISA did not supersede state claims against the plan which alleged fraud, intentional infliction of emotional distress and bad faith. The latter claims were not preempted because they had only an "indirect effect" on the plan. See Provience v. Valley Clerks Trust Fund, 509 F. Supp. 388, 391 (E.D. Cal. 1981).


104. See supra note 67 and accompanying text.


107. Alessi, 451 U.S. at 521. Two district court judges upheld the statute, finding that it was "solely concerned with protecting the employee's right to worker's compensation disability benefits." Id. at 524 (quoting Buczynski v. General Motors Corp., 456 F. Supp. 867, 873 (D.N.J. 1978)). The two judges also found that the statute had "only . . . a collateral effect on pension plans." Id. (quoting Alessi v. Raybestos-Manhattan, Inc., No. 78-0434 (D.N.J. Feb. 15, 1979)). The Second Circuit reversed both decisions. Buczynski
Court, Justice Marshall noted that the effect of ERISA’s “relates to” preemption language is unclear when the state law being challenged apparently regulates matters other than pension plans. The Court focused not on the purpose of the state law but on its effect, and held that the workers’ compensation statute “related to” employee benefit plans because it eliminated a method of calculating benefits permitted by ERISA. The Court did not give any weight to the fact that the state’s intrusion into the benefit plan field was indirect rather than direct.

The Court specifically reserved judgment, however, on the nature or extent of the effect necessary to trigger preemption. It noted that it was expressing no view on the merits of two decisions which had upheld state domestic relations and sex discrimination laws that had a peripheral effect on benefit plans. Although the Court employed an effect-type analysis, it seemed to breathe fresh life into the conflict-based line of analysis by concentrating on the state law’s elimination of an ERISA-allowed method of calculation. Subsequent cases and commentary have interpreted Alessi to mean that a direct clash between federal and state requirements or objectives might be a prerequisite to a finding of preemption.

The Supreme Court had another opportunity to define the scope of ERISA preemption in Shaw v. Delta Air Lines, Inc. Shaw involved a challenge to New York’s Human Rights Law, which
prohibited discrimination on the basis of pregnancy in employee benefit plans. Prior to Shaw, this type of challenge generally failed because courts held that fair employment and sex discrimination laws either were saved by ERISA section 514(d) or survived preemption because they failed to conflict with any of ERISA's provisions. In contrast, the Shaw Court struck down the New York law and held that the breadth of the ERISA preemption provisions was apparent from the language of the statute itself. Relying on Black's Law Dictionary as his guide, Justice Blackmun wrote for a unanimous court that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such plan.”


119. The leading case is Gast v. State ex rel. Stevenson, 36 Or. App. 441, 585 P.2d 12 (1978), in which the Oregon court of appeals adopted a conflict-based analysis. This type of analysis has become the minority view. See Hutchinson & Ifshin, supra note 62, at 57. The Gast court found nothing in the legislative history to suggest that Congress intended to leave welfare benefit plans unregulated and held that the word “supersede” in ERISA § 514(a) “connote[d] supplanting one thing with another . . . . Here Congress has only in small part supplanted state regulation . . . . We will not presume Congressional intent to preempt unless Congress ‘has unmistakably so ordained.’ Here it has not.” 585 P.2d at 23 (citation omitted).


120. Shaw, 103 S. Ct. at 2900.

121. Id.
The Court quoted extensively from ERISA's legislative history, which revealed that Congress had rejected narrower preemption provisions in earlier versions of the bill\textsuperscript{122} and in a version proposed by the Administration,\textsuperscript{123} all of which would have limited preemption to state laws conflicting directly with ERISA provisions. The Court also cited the sponsors' concern with "conflicting" or "inconsistent" state laws,\textsuperscript{124} phrases which the Court

\textsuperscript{122} \textit{Id.} at 2900-01 n.18. The Court stated that:

The bill that passed the House, H.R. 2, 93d Cong., 2d Sess., Sec. 514(a) (1974), . . . [3 Legislative History, \textit{supra} note 2, at 4057-58], provided that ERISA would supersede state laws "relating to the reporting and disclosure responsibilities and fiduciary responsibilities," of persons acting on behalf of any employee benefit plan to which part 1 applies." The bill that passed the Senate, H.R. 2, 93d Cong., 2d Sess., § 699(a) (1974), [3 Legislative History, \textit{supra} note 2, at 3820], provided for pre-emption of state laws "relating to the subject matters required by this Act or the Welfare and Pension Plans Disclosure Act." (emphasis added).

\textsuperscript{123} \textit{Shaw}, 103 S. Ct. at 2900-01. The Administration "suggested language making explicit the areas of state law to be preempted." \textit{Id.} at 2901 n.19 (citing 3 \textsc{Legislative History}, \textit{supra} note 2, at 5145-46).

\textsuperscript{124} 103 S. Ct. at 2901. Representative Dent remarked:

Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

\textsuperscript{120} \textsc{Cong. Rec.} 29,197 (1974), \textit{reprinted in 3 \textsc{Legislative History}, \textit{supra} note 2, at 4670.}

Senator Williams stated:

It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

\textsuperscript{120} \textsc{Cong. Rec.} 29,933 (1974), \textit{reprinted in 3 \textsc{Legislative History}, \textit{supra} note 2, at 4745-46.}

Senator Javits said:

Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interest of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. . . . In view of Federal preemption, State laws compelling disclosure from private
concluded referred to conflicts among the states rather than conflicts between state laws and ERISA.\textsuperscript{125} Because the Court believed that Congress was concerned with the states’ passing laws that would be inconsistent with each other, it made sense for the Court to interpret the preemption provision expansively as addressing that concern. Citing no authority, the Court went on to discuss the burdens placed on interstate employers forced to comply with “varied and perhaps conflicting” state regulations.\textsuperscript{126} Such burdens, the Court believed, would result in “inefficiency” in the administration of a nationwide plan which “presumably would be paid for by lowering benefit levels.”\textsuperscript{127}

While Shaw has been described as “clos[ing] a chapter of analysis,”\textsuperscript{128} it left a few more chapters to be written. The Court’s opinion took the phrase “relate to,” which had confused the lower courts, and defined it with the two equally vague phrases of “connection with” or “reference to.”\textsuperscript{129} The Court also noted that some state regulation might have too tenuous or peripheral an effect to support a finding that the state law “related to” the employee benefit plan.\textsuperscript{130}

Despite the broad sweep of Shaw, some state laws which seemingly have a connection with or reference to ERISA benefit plans have escaped preemption. For example, the Seventh Circuit allowed a state to order payment of pension benefits to a participant’s former spouse,\textsuperscript{131} and a district court found that a

\textsuperscript{125} Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 2, at 4770-71.


\textsuperscript{127} Id.

\textsuperscript{128} Kilberg & Inman, supra note 69, at 168.

\textsuperscript{129} Shaw, 103 S. Ct. at 2900.

\textsuperscript{130} Id. at 2901 n.21.

\textsuperscript{131} See Savings & Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038 (7th Cir. 1983).
mistracted plan participant’s claim of emotional distress survived Shaw,\(^{132}\) because the claims in each case had too tenuous an impact on ERISA plans to warrant preemption. In addition, a Minnesota state agency argued that Shaw implied that ERISA does not occupy the field but only preempts conflicting state laws.\(^{133}\) Most courts, however, have read Shaw more broadly in striking down a variety of state laws regulating subjects on which ERISA is silent.\(^{134}\) In fact, the federal district court adopted this broad reading of Shaw in California Hospital Association v. Henning.\(^{135}\)

**DISCUSSION**

**California Hospital Association v. Henning**

**Facts**

The statute at issue in Henning was California Labor Code section 227.3.\(^{136}\) This provision required employers to pay employees who had left their jobs the monetary equivalent of vacation pay vested at the time of cessation of employment. The statute, which was enforced by the state labor commissioner,\(^{137}\) provided for pay-
ment in accordance with the employee's contract of employment or the employer's policy "respecting eligibility or time served."\textsuperscript{138} However, payment had to be made at the employee's final rate of pay and the contract or policy could not provide for forfeiture of vested vacation time at the time of termination.\textsuperscript{139}

No California employer alleged any conflict between ERISA and section 227.3 until the California Supreme Court decided \textit{Suastez v. Plastic Dress-Up Co}.\textsuperscript{140} In that case, employee Suastez was terminated three months before his anniversary date, on which he would have earned a full two weeks of vacation.\textsuperscript{141} When his employer denied his request for prorated vacation pay, Suastez filed a claim with the labor commissioner which was denied.\textsuperscript{142} The California Supreme Court, however, held unanimously that as services are rendered, a proportionate right to vacation pay vests, a right which section 227.3 protects from forfeiture.\textsuperscript{143}

A few months after the California Supreme Court denied rehearing of \textit{Suastez} on the issue of ERISA preemption, six trade associations, representing thousands of California employers, filed suit to enjoin the labor commissioner from enforcing section 227.3, \textit{Suastez}, and the labor commissioner's policy memorandum implementing the \textit{Suastez} holding.\textsuperscript{144} The complaint was filed pursuant to

(\textit{West Supp. 1984}). The Labor Code provided for both civil and criminal penalties, \textit{id.} §§ 203, 216 (\textit{West 1971 and Supp. 1984}), in the event an employer willfully refused to pay wages, including vacation pay.

\textsuperscript{138} \textit{CAL. LAB. CODE} § 227.3 (\textit{West Supp. 1984}).

\textsuperscript{139} \textit{Id}.

\textsuperscript{140} \textit{Id}.

\textsuperscript{141} \textit{Id.} at 777, 647 P.2d at 123, 183 Cal. Rptr. at 847.


\textsuperscript{143} \textit{Suastez}, 31 Cal. 3d at 784, 647 P.2d 128, 183 Cal. Rptr. at 852.


California Division of Labor Standards Enforcement Policy and Procedure Memorandum 82-4, July 25, 1982, interpreted \textit{Suastez} as follows:

This decision means that an employee who is terminated or who terminates before an eligibility date for vacation pay, is entitled to pro rata vacation pay for time served up to the date of termination in that that portion of vacation pay has vested upon termination; and moreover, that such pro rata vacation pay cannot be taken away from the employee, for to do so the employer would be
ERISA section 502(a)(3), which allows fiduciaries to bring a civil action to enjoin any act or practice which violates ERISA.145

The associations alleged that they and their members' vacation plans were "employee benefit plans"146 and that California's vacation pay laws "related to" those plans and thus were preempted by ERISA.147 The employers, represented by the associations, administered three types of vacation plans: those that paid benefits from a trust, those adopted as part of a collective bargaining agreement, and those that the employer funded out of its general assets.148 The labor commissioner conceded that ERISA regulated vacation trusts,149 and that section 227.3's regulatory provisions did not apply to collective bargaining agreements.150 The ERISA preemption argument151 thus centered on the last type of arrangement, one in which the monies for vacation pay come from the general assets of the employer, rather than from a trust fund.

The Henning Opinion and Judgment

The first issue the Henning court had to address was whether vacation payments from an employer's general assets were "employee welfare benefit plans" covered by ERISA and thereby shielded from state regulation. ERISA section 3(1) included in its definition of such plans "any plan, fund or program . . . established or maintained for the purpose of providing . . . vacation benefits."152 The labor commissioner argued that this definition included only those welfare plans which complied with ERISA sec-

---

147. Id. at 19.
148. Id. at 4, 6, 8, 10, 13, 15.
The court rejected both of the commissioner's arguments. It agreed with the plaintiffs' contention that while placing assets in a trust sometimes would be necessary to comply with ERISA, the trust requirement was not a prerequisite to ERISA coverage. Citing Donovan v. Dillingham, it held that a plan or program need include only intended benefits, intended beneficiaries, a source of financing and a procedure for application and collection of benefits. The court found that the Department of Labor regulation applied only to discretionary vacation practices and not to vacation pay plans or programs to which employers were committed, by contract or otherwise. Moreover, to the extent that the regulation would have exempted every nontrusteed vacation program, the court found that it conflicted with the language of ERISA itself and constituted an "invalid arrogation of power by the Department."

The court next considered whether the vacation pay laws "related to" the employers' benefit plans. Finding that Shaw had put to rest any doubt as to the ambit of ERISA's preemption section, the court held that the state laws were preempted because they directly regulated participation, vesting, and benefit calculations. The published order was limited to section 227.3, Suastez, and the enforcement memorandum. When judgment issued a few weeks later, however, the permanent injunction not only struck down the regulatory provisions of the vacation pay laws but also ordered the labor commissioner not to accept, investigate, or take assignment of vacation pay claims, and not to require employer responses, con-

155. 29 C.F.R. § 2510.3-1(b) (1984); see supra note 39 for the text of this provision.
156. Henning, 569 F. Supp. at 1545.
157. Id. at 1546.
158. 688 F.2d 1367, 1372 (11th Cir. 1982).
160. Id.
161. Id.
162. Id. at 1547.
duct hearings, or issue orders relating to vacation pay claims.\textsuperscript{163} As a consequence, California could not provide an administrative forum even for ERISA-based vacation pay claims. The published order and the judgment were silent as to why it was necessary to eliminate the administrative handling of all vacation pay claims in order to prevent enforcement of section 227.3, \textit{Suastez}, and the enforcement memorandum.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}
\item \begin{footnotesize}Judgment at 3-4, California Hosp. Ass'n v. Henning, No. 82-6659 (C.D. Cal. Oct. 12, 1983). The full text of the summary judgment follows:

\textbf{IT IS THEREFORE ORDERED AND ADJUDGED:}

1. That plaintiffs' motion for summary judgment be, and the same hereby is, granted.

2. That any vacation program (i) maintained by an employer engaged in activities affecting interstate commerce for the purpose of providing vacation benefits to employees, other than an employee benefit plan specified in Section 4(b) of ERISA, 29 U.S.C. Sec. 1003 (b), and (ii) which is a "plan, fund or program" is declared an employee welfare benefit plan subject to ERISA coverage, irrespective of whether such arrangement is funded, trustee, or embodied in a writing.

3. That the decision of the California Supreme Court in \textit{Suastez} v. Plastic Dress-Up Company, 31 Cal. 3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 (1982) ("\textit{Suastez}") California Labor Code Sec. 227.3, and Policy and Procedure Memo 82-4 of the California Division of Labor Standards Enforcement, as modified, are declared preempted and superseded by ERISA, 29 U.S.C. Sec. 1144, and therefore inoperative and invalid insofar as they relate to vacation programs which are in fact employee welfare benefit plans within the meaning of ERISA as described in sub-paragraph 2 above.

4. That defendant, his agents, his staff, and employees of the California Division of Labor Standards Enforcement, as well as all those in active concert or participation with the aforementioned individuals, are hereby permanently enjoined from administering, implementing, or enforcing, in any manner whatsoever, Policy and Procedure Memo 82-4, or any other enforcement policy, in any manner that relates to vacation plans, funds or programs which are in fact employee welfare benefit plans within the meaning of ERISA as described in sub-paragraph 2 above. Those activities specifically enjoined regarding such plans, funds or programs shall include:

(a) Accepting or investigating claims or accepting assignments of claims of employees or former employees for vacation benefits;

(b) Requiring employer responses to claims of employees for vacation benefits;

(c) Conducting hearings on claims of employees or former employees for vacation benefits;

(d) Issuing, filing, or prosecuting any order, decision or award pursuant to California Labor Code Secs. 98a, 98.1, 98.3, 98.4 or any other state law relating to claims of employees and former employees for vacation benefits; and

(e) Attempting in any way, through threat of civil sanctions, criminal prosecution, or otherwise, to persuade, coerce, or compel employers to comply with Policy and Procedure Memo 82-4.

5. That judgment be entered in favor of plaintiffs and that plaintiffs recover from defendant taxable costs and disbursements of this action pursuant to 29 U.S.C. Sec. 1132(g)(1) and/or Fed.R. Civ. Pro. 54(d) and Local Rule 15.

\textsuperscript{164} There was a middle ground that the court rejected. The court essentially adopted as its own the draft judgment submitted by the employer associations. \textit{Compare}}

\end{enumerate}
\end{footnotesize}
ANALYSIS

The Henning court struck down California's regulation of the terms of vacation plans and eliminated the state labor commissioner's authority to provide both an administrative forum for vacation pay claims and enforcement of claims found to be valid. While ERISA itself provides some support for the court's finding that benefit payments from general assets can be covered by the Act, well-settled principles of statutory construction and the Act's legislative history undermine the court's determination that vacation payments from general assets are "welfare benefit plans" under ERISA. The Henning court should have deferred to the Department of Labor regulation which excluded such payments from ERISA coverage. If such arrangements are "welfare benefit plans," California's substantive vacation pay laws "related to" the plans within the meaning of ERISA's preemption clause as interpreted by Shaw. It appears, however, that Congress never intended, and Shaw does not support, the conclusion that state administrative enforcement procedures "relate to" such plans. Indeed, there is no evidence that Congress intended to foreclose state administrative agencies from hearing vacation pay claims when it gave state courts concurrent jurisdiction over such claims.

Plaintiffs' Form of Judgment, California Hosp. Ass'n v. Henning, 569 F. Supp. 1544 (C.D. Cal. 1983) with the court's Judgment, supra note 163. The labor commissioner had objected to the breadth of the language submitted by the associations, Defendant's Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law as Amended at 2, California Hosp. Ass'n v. Henning, 569 F. Supp. 1544 (C.D. Cal. 1983), and had suggested the following:

That defendant, his agents, his staff, and employees of the California Division of Labor Standards Enforcement, as well as all those in active concert or participation with the aforementioned individuals, are hereby permanently enjoined from administering, implementing, or enforcing, in any manner whatever, Policy and Procedure Memo 82-4, insofar as the same relates to vacation plans, funds or programs which are in fact employee welfare benefit plans within the meaning of ERISA, as against Plaintiffs and their members.

... That nothing in this judgment shall be construed as to prevent Defendant from taking assignments from claimant/employees under ERISA and proceeding under ERISA.


165. See infra notes 174-78 and accompanying text.
166. See infra notes 180-83 and accompanying text.
167. See infra notes 196-99 and accompanying text.
168. See infra notes 202-19 and accompanying text.
169. See infra notes 220-24 and accompanying text.
170. See infra notes 225-46 and accompanying text.
“Plan” or “Program”

The *Henning* court rejected the California labor commissioner’s argument that ERISA covers only benefit plans funded by a trust. As noted above, ERISA preempts only those state laws which relate to pension and welfare benefit plans. If such plans include only plans whose assets are held in trust, vacation payments from general assets are not employee welfare benefit plans and thus laws that relate to such arrangements are not preempted. On the other hand, if ERISA does cover nontrusteed plans, a literal reading of the statute could mandate inclusion of all plans, funds, or programs maintained to provide vacation benefits and preemption of state laws relating to such plans.

It is true, as the labor commissioner argued in *Henning*, that ERISA section 403 requires that all assets of employee benefit plans be held in trust. Welfare benefit plans, however, are exempt from ERISA’s funding requirements and thus need not have specific assets set aside for payment of benefits. Furthermore, certain provisions of ERISA support an inference that Congress intended coverage of some plans funded from general assets. In defining welfare benefit plan, Congress referred to “any” plan or program providing covered benefits, not just to plans or programs the assets of which are placed in trust. Moreover, ERISA exempts from its bonding requirements plans which provide for payment from the general assets of the employer, and the Department of Labor included such plans in its regulation exempting small welfare plans from ERISA’s reporting and disclosure requirements. If ERISA covered only plans funded by a trust, there would be no need to exempt from these requirements plans funded from general assets since such plans would be entirely outside the statute. Thus, *Henning*’s conclusion that ERISA coverage is not limited to trusteed plans is correct.

To say that plans or programs not established in trust form can

---

172. See supra notes 29-31 and accompanying text.
173. See supra note 22.
174. 29 U.S.C. § 1103 (1982) provides in relevant part: “[A]ll assets of an employee benefit plan shall be held in trust by one or more trustees.”
be "welfare benefit plans," however, is not to say that all such plans or programs fall within the statutory definition. It is true that on its face the statute covers "any plan, fund or program" which provides "vacation benefits." Courts must give effect to a statute's plain language unless there is evidence that Congress intended some more restrictive meaning. Here, however, the words "plan" or "program" are not defined in the statute. Further, even when statutory language appears clear on superficial examination, no rule of law forbids the use of aids to statutory construction. It is, therefore, appropriate to examine the context in which the words appear and the legislative history to determine Congress's actual intent.

Compliance with a statute's requirements is not a prerequisite to coverage. The overall scheme of regulation, however, provides the context in which particular provisions must be examined. Under ERISA, Congress intended that welfare benefit plans would, for example, file annual reports containing statements of assets and liabilities, be established and maintained pursuant to a

---

183. See infra notes 184-92 and 196-99.
184. California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983). In National Metalcrafters v. McNeil, 602 F. Supp. 232 (N.D. Ill. 1985), appeal docketed, No. 85-1263 (7th Cir. Feb. 15, 1985), the court disagreed with this view and held that a vacation pay plan which paid benefits from an employer's general assets was not an employee welfare benefit plan under ERISA because the plan failed to comply with the statute's requirements for such plans. The court stated:

[T]he court is pointed to no established fund, no beneficiaries and no fiduciaries. Plaintiff has submitted no evidence of a summary plan description, no annual reports, no trust agreement, which would lead the court to conclude that this was an ERISA fund established or maintained by the employer for the benefit of its employees. . . .

. . . According to plaintiff, however, the "plain meaning" of the statute mandates a finding that its plan is within ERISA. While it is true that ERISA encompasses "vacation benefits" under the rubric of employee welfare plan, 29 U.S.C. § 1002(1), it is equally true that such benefits must meet the other ERISA requirements that the assets of the plan be funded in trust.

Id. at 236.

written instrument naming one or more fiduciaries,188 establish and carry out a funding policy,189 hold assets in trust,190 and sue or be sued as an entity.191 This scheme simply does not correspond to vacation payments from employers' general assets today or at the time of ERISA's passage. While noncompliance does not equal noncoverage, universal noncompliance over an entire decade and with the seeming approval of Congress provides a useful "social context"192 in which to interpret the definition of welfare benefit plan.

The Henning court also failed to view the statute "in light of the abuses it was designed to correct" and in light of the underlying intent of Congress.193 ERISA was designed to assure the equitable character and financial soundness of employee benefit plans.194 Congress did not try to regulate every form of compensation promised to employees by their employers. It attempted to cover only those types of plans which had suffered from the abuses it wished to remedy.195 In the thousands of pages which make up the legislative history of ERISA,196 there is not the slightest indication that Congress perceived any abuse or sought to regulate in the area of vacation payments from employers' general assets.

Congress did intend to regulate vacation trusts. Such arrangements, commonly found in the construction industry, were subject to the requirements of the Welfare and Pension Plans Disclosure Act ("WPPDA"),197 which ERISA replaced. Earlier versions of

---

192. See Dickerson, supra note 185, at 109 ("The principle that permits a court to take into account what is judicially noticeable relates to the examination of segments in the total relevant social context.").
194. See supra note 21.
195. Murphy v. Inexco Oil Co., 611 F.2d 570, 574 (5th Cir. 1980); Notice of Proposed Rulemaking, U.S. Dep't of Labor, supra note 38.
196. The three-volume legislative history of ERISA compiled by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare contains more than five thousand pages. LEGISLATIVE HISTORY, supra note 2.
197. In Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983), the Supreme Court described a typical vacation trust as follows: As part of the hourly compensation due bargaining unit members, employers pay a certain amount to [the vacation trust], which places the money in an account for each employee. Once a year, [the trust] distributes the money in
ERISA, which did not seek to incorporate provisions of the WPPDA, did not include any reference to vacation benefits.\textsuperscript{198} It was only when Congress decided to include all benefit plan regulations in one statute that the "vacation benefit" language appeared.\textsuperscript{199} There is no evidence that the WPPDA ever was construed to apply to nontrusteed vacation arrangements. Hence, it appears that Congress intended only to include vacation trusts when it appended the revised WPPDA with its reference to vacation benefits to its pension reform legislation.

\textit{The Department of Labor Regulation}

The \textit{Henning} court also declined to defer to an administrative regulation which supported the labor commissioner’s position. In determining whether vacation payments from general assets constituted “plans” or “programs,” the court instead relied upon the Eleventh Circuit’s definition of those terms in \textit{Donovan v. Dillingham}.\textsuperscript{200} Such vacation pay arrangements fit nicely within the \textit{Dillingham} definition: they include intended benefits (vacation pay), intended beneficiaries (normally all employees, or at least all full-time employees), a source of financing (general assets) and a procedure for application and collection of benefits (the employer’s regular personnel and payroll procedures). The \textit{Dillingham} court cited no authority for its definition but appears merely to have restated ERISA’s definition of employee welfare benefit plan.\textsuperscript{201} To the extent that \textit{Dillingham} correctly interpreted that definition, the \textit{Henning} court properly found that vacation payments from general assets constitute plans or programs and thus are ERISA welfare benefit plans.

On the other hand, the \textit{Henning} court had before it a Department of Labor regulation that attempted to define the boundaries of ERISA’s coverage. This regulation excluded from the definition each account to the employee for whom it is kept, provided the employee complies with [the trust’s] application procedures.

\textit{Id.} at 2844 n.2; see also Electrical Workers Local 1 Credit Union v. IBEW-NECA Holiday Trust Fund, 583 S.W.2d 154, 156-57 (Mo. 1979). The Welfare and Pension Plans Disclosure Act was formerly codified at 29 U.S.C. §§ 301-309.

\textsuperscript{198} See, e.g., S. 1179, 93d Cong., 1st Sess. § 501(g)(1) (1973), reprinted in \textit{1 Legislative History}, supra note 2, at 780, 958.

\textsuperscript{199} The bills which the Senate and House sent to the conference committee each consolidated pension benefit plan and welfare benefit plan regulation. \textit{See} the texts of H.R.2, 93d Cong., 2d Sess. (1974), reprinted in \textit{3 Legislative History}, supra note 2, at 3599-895 (Senate version), 3898-4250 (House version).

\textsuperscript{200} 688 F.2d 1367, 1372; \textit{see supra} notes 35-36 and accompanying text.

\textsuperscript{201} 688 F.2d 1367, 1372.
of welfare benefit plan nontrusted vacation payroll practices.\footnote{202} Congress granted the Secretary of Labor authority to promulgate regulations necessary to carry out ERISA's provisions and to define technical and trade terms used in the Act.\footnote{203} To the extent that Congress was delegating the power to make law by filling gaps in the statutory language, the Department's regulation was entitled to controlling weight unless "arbitrary, capricious, or manifestly contrary to the statute."\footnote{204}

When Congress grants authority to make rules necessary for the efficient enforcement of a statute, such rules are binding and should be sustained unless they tend to defeat the purpose of the statutory scheme.\footnote{205} ERISA was designed to protect the interests of workers and their beneficiaries in earned pension and welfare benefit plans.\footnote{206} It is difficult to see how a regulation excluding vacation payroll practices from ERISA coverage would interfere with this purpose since no provision in the Act regulates such practices. Indeed, the only protection of vacation benefits afforded California workers was the statute the Henning court struck down.

The court apparently believed that the Secretary was attempting to rewrite the statute rather than merely fill a gap.\footnote{207} ERISA, however, nowhere defines the terms "plan" or "program" which appear in the definition of welfare benefit plan.\footnote{208} While "plan" and "program" may not be technical or trade terms in everyday conversation, they became technical or trade terms when used by Congress to define the scope of ERISA coverage. When the Secretary followed the congressional mandate to define such terms, his rule arguably had the force of law and the court should have deferred to it.\footnote{209}

Even if the Department's regulation merely interpreted the words "plan, fund or program," the court should have deferred to the Department's interpretation. The regulation had particular

\footnotesize{202. 29 C.F.R. § 2510.3-1(b) (1984); see supra note 39 for the text of this provision.}
\footnotesize{203. ERISA § 505, 29 U.S.C. § 1135 (1982); see supra note 40 and accompanying text.}
\footnotesize{204. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778, 2782 (1984); see supra notes 43, 46, 47 and accompanying text.}
\footnotesize{205. National Ass'n Pharmaceutical Mfrs. v. FDA, 637 F.2d 877, 889 (2d Cir. 1981); Baker v. Otis Elevator Co., 609 F.2d 686, 692 (3rd Cir. 1979).}
\footnotesize{206. See supra notes 1-5, 20-28 and accompanying text.}
\footnotesize{207. Henning, 569 F. Supp. at 1546 ("If that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with language of the statute itself and an invalid arrogation of power by the Department.").}
\footnotesize{208. ERISA § 3(1), 29 U.S.C. § 1002(1) (1982).}
\footnotesize{209. See supra notes 42-43 and accompanying text.}
force because when it was enacted in 1975, it was "a substantially contemporaneous construction of the statute by those presumed to be aware of congressional intent."\textsuperscript{210} The court should have also considered that the regulation had been in force for eight years and had survived two sets of amendments\textsuperscript{211} to the section to which the regulation referred.\textsuperscript{212} Congress's failure to alter the administrative construction adds to the presumption in favor of the Department's interpretation, which the \textit{Henning} court was bound to follow in the absence of compelling indications that the interpretation was wrong.\textsuperscript{213}

An interpretive regulation is entitled to less deference when it can be judged against a corresponding statutory definition.\textsuperscript{214} Although ERISA defines "welfare benefit plan," it says nothing about the terms "plan" or "program" within that definition. At the very least, this is the type of close case where courts should defer to the impartial governmental agency responsible for enforcing the statute.\textsuperscript{215}

The \textit{Henning} court accepted the plaintiffs' position that, even if the Department of Labor regulation was valid, the regulation applied only to "discretionary" payments of vacation from general assets.\textsuperscript{216} The regulation, however, contains no limitation as to "discretionary" payments. Additionally, it is doubtful that employers with no obligation to provide for vacation pay would have generated the inquiries to which the Secretary of Labor referred in proposing adoption of the regulation.\textsuperscript{217} There also is no evidence that the Department of Labor has ever interpreted its regulation in such a limited manner.\textsuperscript{218} An administrative agency's interpretation of its own regulation is entitled to even greater deference than

\begin{itemize}
\item \textsuperscript{210} National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979); \textit{see also} National Metalcrafters v. McNeil, 602 F. Supp. 232, 237 (N.D. Ill. 1985), \textit{appeal docketed}, No. 85-1263 (7th Cir. Feb. 15, 1985) ("The administrative interpretation of ERISA by those entrusted with its enforcement is entitled to great weight.")
\item \textsuperscript{212} \textit{See} National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979) ("Court should look to the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute"); \textit{see also} EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981).
\item \textsuperscript{213} \textit{See} New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 421 (1973); \textit{see also} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).
\item \textsuperscript{214} Rowan Cos. v. United States, 452 U.S. 247, 253 (1981).
\item \textsuperscript{215} LLC Corp. v. Pension Benefit Guar. Corp. 537 F. Supp. 355, 360 (E.D. Mo. 1981), \textit{rev'd in part on other grounds}, 703 F.2d 301 (8th Cir. 1983).
\item \textsuperscript{216} \textit{Henning}, 569 F. Supp. at 1546.
\item \textsuperscript{217} \textit{See supra} note 38.
\item \textsuperscript{218} \textit{Id}.
\end{itemize}
its interpretation of a statute and must be “demonstrably irrational” before it will be overruled.\textsuperscript{219} It certainly was not “demonstrably irrational” for the Department of Labor to believe that its regulations were not limited to discretionary payments.

\textit{The Henning Characterization of “Relate To”}

The Substantive Vacation Pay Regulations

If Congress had intended to include nontrusteed vacation payroll practices within ERISA’s “welfare benefit plans,” then the \textit{Henning} court would have been correct in holding that Labor Code section 227.3, \textit{Suastez}, and the California enforcement policy “related to” such plans. By prohibiting forfeiture and requiring proration, the California state laws effectively imposed vesting requirements on vacation plans or programs. Congress, however, exempted welfare benefit plans from ERISA’s vesting requirements and thus left such matters to “private choice.” Accordingly, it would follow that Congress chose to supplant state regulation of vacation pay with a regulatory void.

This is true even though courts engaging in “conflict” analysis would find such a result unpalatable.\textsuperscript{220} While “conflict” analysis may have survived \textit{Alessi},\textsuperscript{221} it clearly was interred by \textit{Shaw}. In \textit{Shaw}, the Supreme Court held unanimously that states may not regulate welfare benefit plans even in those areas left untouched by ERISA.\textsuperscript{222} To the extent that \textit{Shaw} can be read as requiring some conflict, that conflict was present in \textit{Henning}, because the California laws prohibited practices “lawful under federal law,” and federal law was silent as to such practices.\textsuperscript{223}

The state vacation laws in \textit{Henning} also would “relate to” the plans under the reasoning of those courts and commentators who would limit preemption to state laws which “regulate, directly or indirectly, the terms and conditions of employee benefit plans.”\textsuperscript{224} The laws struck down in \textit{Henning} were “directed” solely at vacation practices which the court deemed plans or programs and regulated terms and conditions such as vesting and rate of pay.

\begin{itemize}
  \item \textsuperscript{219} Horizon Mutual Sav. Bank v. FSLIC, 674 F.2d 1312, 1316 (9th Cir. 1982).
  \item \textsuperscript{220} See supra notes 85-88 and accompanying text.
  \item \textsuperscript{221} See supra notes 114-15 and accompanying text.
  \item \textsuperscript{222} Shaw, 103 S. Ct. at 2900.
  \item \textsuperscript{223} See supra note 133.
  \item \textsuperscript{224} ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2) (1982); see supra notes 95-98 and accompanying text.
\end{itemize}
The State Administrative Adjudicatory Mechanisms

State laws creating administrative mechanisms for settling vacation claims do not "relate to" welfare benefit plans within the meaning of ERISA's preemption section. Such laws merely carry out Congress's grant of concurrent jurisdiction to the states over claims for ERISA-covered benefits. The Henning injunction, however, removed California labor standards officials from the adjudication and collection of vacation pay claims. As Henning and similar cases move toward their dates with the Supreme Court, the real battles may be fought not over the rights of states to regulate the terms of vacation plans, but over state authority to settle vacation pay claims in administrative forums. If the local grocer refuses to pay the stock boy the week's vacation he has coming when he quits, the Henning injunction would send the stock boy to state or federal court, not to his state labor standards officials. This is a result unsupported by either the language or the legislative history of ERISA and not mandated by any reasoned interpretation of Shaw.

Any analysis of ERISA preemption of state administrative procedures should begin with consideration of Supreme Court guidelines. The Court in Shaw placed much emphasis on the Conference Committee's rejection of narrower preemption provisions and the sponsor's comments on the final version. Yet ERISA's final days in Congress illustrate what one commentator has described as "recurrent problems" in the Court's handling of "occupying the field" cases, specifically, the "reliance on unpersuasive and ill-considered remarks in the legislative history and the generalization of a true congressional intent to cover cases unlike

227. Shaw, 103 S. Ct. at 2900-01.
those considered by Congress." 228 In the almost twenty months that the 93d Congress considered the bills that became ERISA, the legislators had the current preemption language before them for less than two weeks. These two weeks, it should be noted, were the weeks following President Nixon’s resignation, a time when Congress may have been somewhat preoccupied. 229

California’s substantive vacation pay laws would have survived either of the preemption provisions which the conferees took into committee since both limited preemption to state laws conflicting directly with ERISA provisions. 230 In a departure from their own rules, however, the legislators emerged not with a compromise between the House and Senate versions of similar limited scope, but with the most sweeping preemption provision ever written by Congress. 231 Thus, a bill which would have preempted state laws relating to reporting, disclosure, and fiduciary requirements turned into the bill which the Henning court used to deprive California labor standards officials of all jurisdiction in vacation matters and to deprive California workers and employers of a relatively inexpensive way to resolve relatively small claims. It is small wonder that several commentators have suggested that Congress did not understand or appreciate the impact of the new preemption language. 232

The sponsors’ comments relied upon in Shaw provide little support for the Henning court’s sweeping injunction as to the state’s adjudicatory powers. In fact, the comments clearly reflect an intention to limit preemption to state regulation, not adjudication, of vacation pay claims. Representative Dent spoke of “the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans." 233 Senator Williams said the conference substitute was intended to “preempt the field for Federal regula-

228. Hirsch, supra note 56, at 548.
230. See supra note 122.
232. Kilberg & Heron, supra note 31, at 391; Turza & Halloway, supra note 62, at 177.
233. 120 Cong. Rec. 29,197 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 2, at 4670.
tions." Only Senator Javits mentioned "displacement of State action in the field of private employee benefit plans," but his remark followed his expression of concern about "endless litigation over the validity of State action that might impinge on Federal regulation." Consequently, it appears that the sponsors were concerned about state regulation of benefit plans, not state investigation, conciliation, or adjudication. The conference committee report, which was the only other guide to Congress's intent, merely parroted the bill's language. In applying ERISA's preemption provision to the Henning facts, it is thus clear that the legislative history supports a narrow interpretation of ERISA preemption when considering nonregulatory state laws.

Although the Henning court erred in enjoining the adjudication of vacation pay claims, it must be noted that the court was hardly writing on a clean slate. Shaw had just come down and seemed to require a broad reading of the phrase "relate to." As a result, there was support for the court's finding that the state law authorizing assignments and investigations of vacation pay claims and creating an adjudicative process to dispose of such claims had a "connection with or reference to" vacation benefit plans.

The Henning injunction, however, took the Shaw definition of "relate to" to an extreme, logical enough, but not in keeping with the actual holding of the case, its dicta, or ERISA itself. In Shaw, the Court limited preemption to the state's prohibition of "practices that are lawful under federal law." This tension between state and federal schemes simply does not exist in connection with the administrative functions outlawed by Henning. Section 502(e)(2) grants "state courts of competent jurisdiction" authority to adjudicate claims for ERISA-covered benefits. In California, the state administrative tribunal can function, in effect, as a lower state court, issuing binding determinations which become final

234. 120 Cong. Rec. 29,933 (1974), reprinted in 3 Legislative History, supra note 2, at 4745 (emphasis added).
235. 120 Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 2, at 4771.
236. 120 Cong. Rec. 29,942 (1974), reprinted in 3 Legislative History, supra note 2, at 4770 (emphasis added).
237. See supra note 137.
239. See supra notes 120, 121 and accompanying text.
240. Shaw, 103 S. Ct. at 2900.
241. Id. at 2906.
judgments if not appealed.\textsuperscript{243} The taking of an assignment\textsuperscript{244} or investigating of a claim is nothing more than a preliminary step in a state court collection action.

Moreover, even if section 502(e)(2) did not authorize the actions forbidden in \textit{Henning}, their effect on benefit plans would be "tenuous, remote or peripheral,"\textsuperscript{245} at least as compared to the state court action ERISA explicitly approves. Indeed, administrative resolution probably would place less of a burden on benefit plans than would a state or federal court action. Finally, ERISA section 506\textsuperscript{246} authorizes the Secretary of Labor to utilize the services of state agencies in performing ERISA enforcement functions. This hardly manifests a congressional animus toward state labor agencies.

\textbf{IMPACT}

The \textit{Henning} opinion and injunction removed the California labor commissioner from the vacation pay business. Should \textit{Henning} become the law of the land, the preemption of vacation pay regulation would have the greatest impact in those states which actually attempt to influence in some way the provisions of vacation promises or policies.\textsuperscript{247} The preemption of administrative resolution of vacation pay claims, however, would have a more profound and widespread effect. Thirty-eight states and the District of Columbia currently assist employees in the collection of vacation pay claims.\textsuperscript{248} Scope of authority and procedures differ from state to state. Some states, like California, grant their state

\begin{footnotesize}
\begin{enumerate}
\item For an ERISA action in which a state sued an assignee see Cartledge v. Miller, 457 F. Supp. 1146 (S.D.N.Y. 1978).
\item Shaw, 103 S. Ct. at 2901 n.21.
\item Illinois currently is the only state with a provision similar to the law struck down in \textit{Henning}. See Ill. Rev. Stat. ch. 48, ¶ 39m-5 (1983), which provides in relevant part:

\begin{quote}
Unless otherwise provided in a collective bargaining agreement, whenever a contract of employment or employment policy provides for paid vacations, and an employee resigns or is terminated without having taken all vacation time earned in accordance with such contract of employment or employment policy, the monetary equivalent of all earned vacation shall be paid to him or her as part of his or her final compensation at his or her final rate of pay and no employment contract or employment policy shall provide for forfeiture of earned vacation time upon separation.
\end{quote}

This provision has survived its first ERISA preemption challenge. See National Metalcrafters v. McNeil, 602 F. Supp. 232 (N.D. Ill. 1985), appeal docketed, No. 85-1263 (7th Cir. Feb. 15, 1985); \textit{supra} note 226.
\item See APPENDIX.
\end{enumerate}
\end{footnotesize}
labor agencies the power to make binding determinations.\textsuperscript{249} Other states allow officials to take assignments of claims and file civil lawsuits.\textsuperscript{250} Many states impose civil penalties or criminal sanctions on employers who willfully refuse to pay vacation pay when due.\textsuperscript{251}

If the \textit{Henning} decision eliminates administrative handling of vacation pay claims, employees will be forced to file civil suits in state or federal court. ERISA, however, provides no federal remedial procedures like those offered by the states. In addition, the Department of Labor has no binding administrative enforcement powers, and the statute contains no criminal sanctions for refusal to pay vacation claims. In contrast to state procedures, which often result in quick recovery with little expense, ERISA remedies could take years. Under ERISA, a claimant would have to first exhaust internal claims procedures under the benefit plan before turning to an often over-burdened civil court system.\textsuperscript{252}

State agencies each year resolve more than 19,000 vacation pay claims,\textsuperscript{253} involving more than $7.5 million.\textsuperscript{254} If vacation pay claimants are forced to turn to the civil courts for relief, many may simply abandon their claims rather than face the time and expense of suing their former employers. Those that do make it to the courthouse door may find themselves overmatched, because even

\begin{flushleft}
\textsuperscript{252} Brief of Amici Curiae N.C. Dep't of Labor and N.Y. Dep't of Labor at 11-12, California Hosp. Ass'n v. Henning, No. 83-6381 and No. 83-6416 (9th Cir. Nov. 10, 1983).
\textsuperscript{253} See \textit{APPENDIX}.
\textsuperscript{254} See \textit{APPENDIX}.
\end{flushleft}
in those jurisdictions with pro se courts, claimants with no legal training often will be up against skilled management attorneys.

Although ERISA does not provide criminal sanctions for an employer's refusal to pay, there is some chance that state criminal penalties would survive Henning. During the final debate on ERISA, Senator Javits remarked that the Act would supersede state laws imposing criminal penalties for failure to make plan contributions, unless such laws were criminal statutes of general application.255 However, no light was shed on which laws fell within the exception. As a result, the courts are divided as to whether state wage payment laws are "generally applicable criminal law[s]" and thus saved from preemption under ERISA section 514(4).256

It is possible that, in future ERISA cases, some courts reviewing Henning will simply hold that ERISA preempts state regulation of vacation pay but allows states to continue to provide administrative forums for resolution of vacation pay claims. If this situation were to arise, ERISA would limit such actions to recovery of benefits due under the terms of the vacation plan which gives rise to the claim.257 Since ERISA imposes no vesting requirements on welfare benefit plans,258 employers would have to pay vacation pay to employees who resign or who are fired only if their vacation plans provide for vested vacation. No employer would be required by statute to pay a pro rata share of vacation pay to employees who leave before a full vacation is earned. If employees must base vaca-

255. 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY, supra note 2, at 4771.


257. See ERISA § 502(a)(1)(B), (e)(1), 29 U.S.C. § 1132(a)(1)(B), (e)(1) (1982). In adjudicating vacation claims, state officials would have to apply the federal common law, which provides that a decision to deny benefits will be overturned only "when (1) arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law." Wolfe v. J.C. Penney Co., Inc., 710 F.2d 388, 393 (7th Cir. 1983) (quoting Peckham v. Board of Trustees, 653 F.2d 424, 426 (10th Cir. 1981)). The Wolfe court noted, "This standard is followed in all circuits which have addressed the question." Wolfe, 710 F.2d at 393 n.8 (citing decisions from all circuits except the sixth and tenth).

tion pay claims on ERISA, however, the federal courts will need to develop a body of substantive common law which well might follow the lead provided by the California Supreme Court in Suastez. While there is no federal statute prohibiting forfeiture of vacation pay when an employee resigns or is terminated, ERISA imposes upon plan fiduciaries the obligation to discharge their obligations "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." Forfeiture could run afoul of this provision. Consequently, the courts may find in ERISA the same implicit prohibition against forfeiture which the California Supreme Court found in section 227.3 when it required proration in Suastez. The employer associations who sued in Henning thus would end up with the same liability they sought to avoid in Henning and with the additional obligation of complying with ERISA's reporting and disclosure requirements.

Courts reviewing ERISA preemption challenges to state vacation pay laws can avoid the Henning result simply by deferring to the Department of Labor regulation on vacation payroll practices. Courts also can imply an exception to ERISA preemption, similar to that found in other cases involving important state concerns which have only tangential effects on employee benefit plans. If other courts accept the Henning rationale, Congress will have no choice but to amend ERISA unless it wishes to leave vacation pay provisions unregulated and vacation pay collection up to the courts.

**CONCLUSION**

The Supreme Court preemption cases, including Shaw v. Delta Air Lines, Inc., establish conclusively that Congress had the power to:

263. See supra notes 101-05 and accompanying text.
264. The National Association of Government Labor Officials has suggested the following addition to Section 514(a):

State laws prohibiting employers from discriminating in the provision of employee benefits, obligating employers to pay employee welfare benefits to its [sic] employees and providing for the enforcement of such obligations shall not be considered laws relating to an employee benefit plan. The foregoing sentence shall not apply to employee pension benefit plans.

to occupy the field of employee benefit plans and to eliminate state regulation even of those areas, like vacation pay, which ERISA leaves virtually unregulated. There is, however, little support for Henning's conclusion that vacation payments from general assets constitute ERISA benefit plans. Without support from the structure of the Act or the legislative history, the Henning court gave little deference to a longstanding construction of the statute by the agency empowered to enforce it. Having reached out to find ERISA coverage, the court went on to impose ERISA preemption even broader than that required under Shaw.

Even if nontrusteed vacation arrangements are ERISA benefit plans, the Henning court should have limited its injunction to the substantive state laws. Instead, it eliminated an important state service and dictated the manner in which California would exercise its concurrent jurisdiction over benefit collection actions. Other courts faced with similar cases should recognize the states' important interest in administrative regulation and adjudication of vacation pay. If they fail to do so, Congress should act to return to the states their traditional role in enforcing minimum labor standards.

DONALD J. MCNEIL*

* The author, a third-year evening student at Loyola University of Chicago School of Law, is superintendent of the Wage Claims Division of the Illinois Department of Labor. However, the views expressed in this article are the author's and do not necessarily represent the official position of the Illinois Department of Labor. As a result of his position as superintendent, the author is the named defendant in National Metalcrafters v. McNeil, discussed supra notes 53, 184, 210, 226, 247, 256.
## APPENDIX

### State Assistance With Vacation Pay Claims

<table>
<thead>
<tr>
<th>State</th>
<th>Assist with vacation pay?</th>
<th>Statutory Authority</th>
<th>No. of vacation pay claims/year</th>
<th>$ volume year (in thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ala.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>Yes</td>
<td>ALASKA STAT. § 23.05.210 (1984)</td>
<td>20</td>
<td>10</td>
</tr>
<tr>
<td>Ark.</td>
<td>Yes</td>
<td>ARK. STAT. ANN. §§ 81-311, 81-312 (1976)</td>
<td>200</td>
<td>60</td>
</tr>
<tr>
<td>Cal.</td>
<td>No&lt;sup&gt;c&lt;/sup&gt;</td>
<td>See supra note 135</td>
<td>10,000&lt;sup&gt;c&lt;/sup&gt;</td>
<td>5,000&lt;sup&gt;c&lt;/sup&gt;</td>
</tr>
<tr>
<td>Colo.</td>
<td>Yes</td>
<td>COLO. REV. STAT. §§ 8-4-101, 8-4-111 (1974)&lt;sup&gt;d&lt;/sup&gt;</td>
<td>No figure given</td>
<td>No figure given</td>
</tr>
<tr>
<td>Conn.</td>
<td>Yes</td>
<td>CONN. GEN. STAT. § 31-76k (Supp. 1984)</td>
<td>400</td>
<td>No figure given</td>
</tr>
<tr>
<td>Del.</td>
<td>Yes</td>
<td>DEL. CODE ANN. tit. 19, § 1109(b) (1975)</td>
<td>180</td>
<td>50.9</td>
</tr>
<tr>
<td>Fla.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ga.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>Yes</td>
<td>HAWAI1 REV. STAT. §§ 388-4, 388-7(3) (1976)&lt;sup&gt;e&lt;/sup&gt;</td>
<td>100</td>
<td>45.2</td>
</tr>
<tr>
<td>Idaho</td>
<td>Yes</td>
<td>IDAHO CODE § 45-615 (Supp. 1984)</td>
<td>50</td>
<td>No figure given</td>
</tr>
<tr>
<td>Indiana</td>
<td>Yes</td>
<td></td>
<td>223</td>
<td>74</td>
</tr>
<tr>
<td>Ill.</td>
<td>Yes</td>
<td>ILL. REV. STAT. ch. 48, ¶ 39m-5 (1983)</td>
<td>3,000</td>
<td>2,775</td>
</tr>
<tr>
<td>Iowa</td>
<td>Yes</td>
<td>IOWA CODE §§ 91A.2(4)(b), 91A.4 (Supp. 1984)</td>
<td>600</td>
<td>300</td>
</tr>
</tbody>
</table>

---

<sup>a</sup> This chart contains the results of a survey conducted by the Illinois Department of Labor in August 1984. Questionnaires were sent to state labor officials in each state and the District of Columbia. The responses were not independently verified. The survey is unpublished; however, copies of all completed questionnaires are on file in the Law Journal office of the Loyola University of Chicago School of Law.

<sup>b</sup> With few easily recognizable exceptions, figures are approximate.


<sup>d</sup> State statute makes no mention of vacation pay. However, in Hartman v. Freedman, 591 P.2d 1318 (Colo. 1979), the Colorado Supreme Court held that vacation pay fell within the statutory definition of "wages."

<sup>e</sup> See also section 12-21-7 of Ch. 21, Administrative Rules.

<sup>f</sup> State agency relies for authority on Die & Mold, Inc. v. Western, 448 N.E.2d 44 (Ind. Ct. App. 1983).
<table>
<thead>
<tr>
<th>State</th>
<th>Yes/No</th>
<th>Statute Details</th>
<th>States Making Specific Mention of Vacation Pay</th>
<th>Other Wage Supplements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kan.</td>
<td>Yes</td>
<td>KAN. STAT. ANN. § 44.313(c) (1981)</td>
<td>900</td>
<td>260</td>
</tr>
<tr>
<td>Ky.</td>
<td>Yes</td>
<td>KY. REV. STAT. §§ 337.020, 337.055, 337.060 (1983)</td>
<td>163</td>
<td>53.9</td>
</tr>
<tr>
<td>La.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Me.</td>
<td>Yes</td>
<td>ME. REV. STAT. ANN. tit. 26, § 626, 626-A (Supp. 1984)</td>
<td>80</td>
<td>13</td>
</tr>
<tr>
<td>Md.</td>
<td>Yes</td>
<td>MD. ANN. CODE art. 100, § 94(a)(3) (Supp. 1984)</td>
<td>500</td>
<td>100</td>
</tr>
<tr>
<td>Mass.</td>
<td>Yes</td>
<td>MASS. GEN. LAWS ANN. ch. 149, § 148 (Supp. 1984)</td>
<td>600</td>
<td>300</td>
</tr>
<tr>
<td>Mich.</td>
<td>Yes</td>
<td>MICH. COMP. LAWS ANN. §§ 408.471, 408.481 (West 1975)</td>
<td>No figure given</td>
<td>No figure given</td>
</tr>
<tr>
<td>Minn.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mass.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miss.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mo.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mont.</td>
<td>Yes</td>
<td>MONT. CODE ANN. § 39-3-201 (1982)</td>
<td>175</td>
<td>87.5</td>
</tr>
<tr>
<td>Neb.</td>
<td>Yes</td>
<td>NEB. REV. STAT. § 48-1229(3) (1984)</td>
<td>No figure given</td>
<td>No given figure</td>
</tr>
<tr>
<td>Nev.</td>
<td>Yes</td>
<td></td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>N.J.</td>
<td>Yes</td>
<td>N.J. STAT. ANN. § 34:11-57 (West 1972)</td>
<td>2,000</td>
<td>900</td>
</tr>
<tr>
<td>N.M.</td>
<td>Yes</td>
<td></td>
<td>123</td>
<td>42.6</td>
</tr>
<tr>
<td>N.Y.</td>
<td>Yes</td>
<td>N.Y. LAB. LAW § 198-c (McKinney Supp. 1984)</td>
<td>3,000</td>
<td>1,000</td>
</tr>
</tbody>
</table>

- State statute makes no specific mention of vacation pay. However, state courts have held that vacation falls within the statutory definition of "wages." See, e.g., Richardson v. St. Mary Hosp., 6 Kan. App. 2d 238, 627 P.2d 1143, review denied, 229 Kan. 971 (1981).
- Statute does not mention vacation pay but vacation pay claims are handled informally.
- Figure includes claims for other "wage supplements."
<table>
<thead>
<tr>
<th>State</th>
<th>Vacation Pay Claimed</th>
<th>Authority</th>
<th>Figure</th>
</tr>
</thead>
<tbody>
<tr>
<td>N.D.</td>
<td>Yes</td>
<td>§ 4115.03 (1978)</td>
<td>200</td>
</tr>
<tr>
<td>Ohio</td>
<td>Yes</td>
<td>§ 652.310 (1983)m</td>
<td>300</td>
</tr>
<tr>
<td>Okla.</td>
<td>Yes</td>
<td>§ 652.310 (1983)m</td>
<td>300</td>
</tr>
<tr>
<td>Ore.</td>
<td>Yes</td>
<td>§ 652.310 (1983)m</td>
<td>300</td>
</tr>
<tr>
<td>Pa.</td>
<td>Yes</td>
<td>§ 28-14-4 (1979)</td>
<td>300</td>
</tr>
<tr>
<td>R.I.</td>
<td>Yes</td>
<td>§ 28-14-4 (1979)</td>
<td>300</td>
</tr>
<tr>
<td>S.C.</td>
<td>Yes</td>
<td>§ 28-14-4 (1979)</td>
<td>300</td>
</tr>
<tr>
<td>Tex.</td>
<td>Yes</td>
<td>No figure given</td>
<td>300</td>
</tr>
<tr>
<td>Utah</td>
<td>Yes</td>
<td>No figure given</td>
<td>300</td>
</tr>
<tr>
<td>Vt.</td>
<td>Yes</td>
<td>No figure given</td>
<td>300</td>
</tr>
<tr>
<td>Va.</td>
<td>No</td>
<td>No figure given</td>
<td>300</td>
</tr>
<tr>
<td>Wash.</td>
<td>No</td>
<td>No figure given</td>
<td>300</td>
</tr>
<tr>
<td>W. Va.</td>
<td>Yes</td>
<td>W. VA. CODE § 21-5-1(c) (1981)</td>
<td>300</td>
</tr>
<tr>
<td>Wis.</td>
<td>Yes</td>
<td>Wis. STAT. ch. 109 § 109.01(3) (1975)</td>
<td>300</td>
</tr>
<tr>
<td>Wyo.</td>
<td>Yes</td>
<td>WYO. STAT. § 27-4-507(c) (1983)</td>
<td>300</td>
</tr>
</tbody>
</table>

l. Vacation pay handled only as a credit toward payment of prevailing wage violations.
m. State statute makes no mention of vacation pay. However, in State ex rel. Nilsen v. Oregon Motor Ass'n, 248 Or. 133, 136, 432 P.2d 512, 514 (1967), the Oregon Supreme Court held that vacation pay fell within the definition of "wages."
n. No state statute but vacation pay claims are handled informally.
o. State agency answered "No" in questionnaire but also indicated that when vacation pay is part of a claim for back wages, vacation pay is included in initial investigation but not pursued if employer does not agree to pay.
q. No specific authority for employees other than minors. See Indus. Comm'n of Utah Order No. 5, art. 10 (1978). However, state Industrial Commission accepts wage claim assignments for vacation pay.
r. Figure includes other benefits, such as sick pay and retirement fund monies.