Employee Vacation Pay Regulation Under the Employee Retirement Income Security Act of 1974

Melanie Caron Gold

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COMMENTS

EMPLOYEE VACATION PAY REGULATION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Joe works for a company that has a policy providing that employees are eligible for a three week paid vacation after they have reached the anniversary date of their fifth year. After continuously working for this company for four and one-half years, he is terminated from his employment for unspecified reasons. Joe, who had full notice of his employer’s vacation pay policy, is denied his request for pro rata vacation benefits. Since he did not meet the clearly stated condition precedent of five years employment, Joe does not have a valid legal cause of action to enforce this claim.

Legislators in the state in which Joe lives and works have become concerned that Joe and many others are having to forfeit earned benefits because of strict conditions precedent which are attached to fringe benefit plans. In an effort to address this concern, the state legislature passes a law providing that all vested vacation pay must be paid at the date of an employee’s termination. The state supreme court then interprets “vested” to mean “earned at the time the labor is rendered.” Thus, pro rata vacation benefits must be paid to an employee regardless of the employer’s policy. The federal government and employers throughout the state challenge this state’s authority to enact such a law. Does this state have the authority to require that vacation benefits vest as they are earned?

I. INTRODUCTION

State power to regulate in the field of employee benefit plans has been severely limited by the enactment of the Employee Retire-

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1. Vested interest is defined as a “present right or title to a thing, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the future.” BLACK'S LAW DICTIONARY 1735 (5th ed. 1979).
Employee Retirement Income Security Act of 1974 (ERISA), a complex federal regulatory scheme governing employee pension and welfare plans. Hailed as landmark social legislation representing the "greatest development in the life of the American worker since social security," the Act was "designed to protect interstate commerce, federal taxing power, and the interests of participants in private employee benefit plans and their beneficiaries." To eliminate state interference with the accomplishment of these goals, Congress included a sweeping preemption provision providing that all state laws are superseded "insofar as they . . . relate to any employee benefit plan." For purposes of this preemption section, ERISA defines state law to include "all laws, decisions, rules, regulations, or other State action having the effect of law." Since ERISA affects many areas traditionally governed by state law, significant questions are raised concerning the extent to which states may continue to regulate various types of benefit plans. In fact, employer vacation plans constitute one such type of arrangement in which states have shown concern for protecting the rights of employers and employees. Almost all employment agreements today provide

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3. Pension plans provide deferred income upon retirement and commonly take the form of retirement, profit sharing, thrift and savings, and qualified stock bonus plans. See generally J. Mamorsky, Employee Benefits Law (1981).

4. A welfare plan typically provides benefits such as medical, hospitalization, and disability coverage. These plans can also provide vacation benefits, dental coverage, and group legal services. ERISA § 3(1), 29 U.S.C. § 1002(1) (1976).


8. Id. § 514(c), 29 U.S.C. § 1144(c) (1976).
for some form of a paid vacation, accounting for nearly five percent of payroll costs for the average employer.\(^9\) Notwithstanding the importance of employee vacation benefits, both in terms of deferred compensation to employees and in terms of costs to employers, relatively few cases involving vacation benefits reach the courts. This is due to the fact that most of the issues raised in this area are a matter of contract interpretation and are settled in arbitration\(^{10}\) or administrative\(^{11}\) contexts.

In 1982, however, the issue of vacation pay was addressed by the California Supreme Court in the case of *Suastez v. Plastic Dress-Up Co.*\(^{12}\) The particular question before the court involved the interpretation of the term "vested time" within the meaning of California Labor Code section 227.3.\(^{13}\) In *Suastez*, the court held that an employee's proportionate right to a paid vacation vests as the labor is rendered.\(^{14}\) Once the paid vacation vests, this right is protected from forfeiture by Labor Code section 227.3. The court rejected the argument that vesting is determined solely by looking at the terms of the employment contract or employer policy.\(^{15}\) Thus, regardless of the reason for which an employee is terminated, an employee is fully entitled to a pro rata share of his or her vacation pay.

There is little doubt that the vesting requirements mandated by *Suastez* will significantly affect the rights and obligations of employers and employees in relation to an ERISA type of employee benefit plan.\(^{16}\) Since *Suastez* prohibits employers from enforcing any cond-

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11. For example, in California the Division of Labor Law Enforcement has the authority to settle disputes and enforce rights relating to vacation pay agreements. *Cal. Lab. Code* § 217 (West 1971).

12. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).


14. 31 Cal. 3d at 784, 647 P.2d at 128, 183 Cal. Rptr at 852.

15. *Id.* at 781, 647 P.2d at 126, 183 Cal. Rptr at 849.

16. In light of the potential conflict between ERISA and the *Suastez* decision several large employer associations have filed a complaint in federal district court seeking declaratory
tions precedent to the receipt of vacation pay, the decision will have a large impact on employer costs associated with providing vacation benefits. In addition, the Labor Commissioner has announced that the decision will have a retroactive effect. Consequently, huge sums of unanticipated monetary obligations will be imposed upon California employers. Many employers may further decide to drop vacation policies entirely or to severely limit them to certain kinds of employees. The Suastez case also raises concerns about whether the ruling will be extended to other types of employee benefits.

In the face of ERISA and its broad preemption provision, this comment analyzes whether a state has the authority to regulate the vesting of vacation pay. Discussion begins with an overview of ERISA's statutory scheme and a review of the litigation surrounding its preemption clause. Next, an examination of the Suastez decision, which is representative of a minority, yet growing view of the nature of vacation pay, demonstrates that it was based on sound legal analysis. This comment offers two potential grounds for finding that a state vacation benefit vesting regulation, such as that embodied in the Suastez decision, is not preempted by federal law. First, it can be argued that vacation plans are not “employee benefit plans” within the meaning of ERISA and, therefore, are not affected by the Act. Secondly, it can be argued that state vacation pay vesting requirements fall outside the scope of ERISA's preemptive language. Although these arguments contain some validity, this comment concludes that a better approach would be to uphold the Suastez decision based on federal common law.

II. ERISA

A. General Statutory Scheme

ERISA is an extremely complex regulatory scheme representing the most comprehensive reform of private employee benefit systems to date. Prior to ERISA's enactment, there was a phenomenal expansion in the size and scope of private employee benefit plans.
sulting from wartime wage stabilization programs coupled with favorable tax rules that encouraged fringe benefits as a substitute for wage increases. This rapid growth of benefit plans, unchecked by effective state or federal regulation, resulted in widespread funding and disclosure abuses and led to massive forfeiture of benefits. ERISA was a product of a concentrated congressional effort to curb the inequities associated with these benefit plans. The Act's purpose was essentially twofold. First, the Act sought to protect the expectations of the American worker by ensuring that private plans had adequate minimum standards and safeguards for guaranteeing the payment of promised benefits. Secondly, the Act sought to encourage the growth and development of voluntary private employer financed benefit plans.

To ensure that the first objective, protecting employee rights,
was met, Congress established detailed regulatory standards to govern employee benefit plans. These substantive provisions are contained in Title I of the Act. 27 Title I is divided into five parts, each part addressing a specific aspect of the regulatory program. Part 1 establishes detailed reporting and disclosure standards, such as requiring plan administrators to furnish a detailed plan description and annual report to employees, beneficiaries, and the Secretary of Labor. 28 Part 2 sets forth strict participation and vesting requirements. 29 The participation standards generally require plans to include any employee who is twenty-five years of age and who has completed one year of service. 30

Alternative vesting schedules are also provided to ensure that employees do not lose their expected benefits. 31 Part 3 establishes minimum funding standards, 32 which are further supported by plan termination insurance required under Title IV. 33 Part 4 of Title I governs the fiduciary standards for plan administrators, requiring


31. The Act provides three alternative vesting formulas. The first possibility allows for a graded schedule under which the participant becomes 25% vested after five years and receives an additional 5% interest for each of the next five years and an additional 10% for each of the remaining five years. Id. § 203(a)(2)(B), 29 U.S.C. § 1053(a)(2)(B) (1976). The next alternative establishes a vesting schedule which allows the participant to become fully vested after 10 years of service. Id. § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A) (1976). The third possibility, the "rule of 45", allows a worker with at least 5 years of service to become 50% vested when the sum of his age and years of service equals 45, after which an additional 10% must become vested for each of the next five years. Id. § 203(a)(2)(C), 29 U.S.C. § 1053(a)(2)(C) (1976). For a detailed explanation of these elaborate vesting provisions, see Comment, supra note 5, 571-83. See also Brummond, supra note 5, at 62.


strict standards of conduct for plan trustees.\textsuperscript{34} Part 5 of Title I contains a broad administrative and enforcement section,\textsuperscript{35} which establishes civil and criminal penalties for violation of the Act and gives the Secretary of Labor broad investigatory and regulatory powers.\textsuperscript{36}

These substantive regulations contained in Title I cover two types of employee benefit plans—employee pension plans\textsuperscript{37} and employee welfare benefit plans.\textsuperscript{38} Pension plans were the main subject of congressional concern and are the primary focus of the statutory scheme.\textsuperscript{39} These plans are subject to all of the provisions established in Title I. Unlike pension plans, welfare benefit plans received little attention in ERISA's legislative history and are exempt from many of the Act's substantive requirements. These plans are not required to conform to the vesting, participation, or funding requirements established in parts 2 and 3 of Title I.\textsuperscript{40} Because such plans remain subject only to the disclosure, fiduciary, and administration sections, this has resulted in a large regulatory vacuum for welfare benefit plans.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{34} Id. §§ 401-414; 29 U.S.C. §§ 1101-1114 (1976). The fiduciary standards require trustees to act solely in the interest of plan beneficiaries, id. § 403(C)(1) (1976), and establish a list of prohibited transactions, id. § 406, 29 U.S.C. § 1106 (1976). Hutchinson & Ifshin, supra note 5, at 32-33; Brummond, supra note 5, at 63; Comment, supra note 5, at 642-58.
  \item \textsuperscript{36} Id. §§ 501, 502, 504-506, 29 U.S.C. §§ 1131, 1132, 1134-1136 (1976).
  \item \textsuperscript{37} ERISA defines an employee pension plan as:
    \begin{itemize}
      \item any plan fund or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —
        \begin{itemize}
          \item (A) provides retirement income to employees, or
        \end{itemize}
        \begin{itemize}
          \item (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
        \end{itemize}
    \end{itemize}
    regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

  \item \textsuperscript{38} ERISA defines an employee welfare benefit plan as:
    \begin{itemize}
      \item any plan, fund, or program . . . 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, . . . 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).

  \item \textsuperscript{39} Id. § 2, 29 U.S.C. § 1001; Comment, supra note 5, at 549.
  \item \textsuperscript{40} Brummond, supra note 5, at 117.
  \item \textsuperscript{41} See infra text accompanying note 126. See also Brummond, supra note 5, at 118-20;
\end{itemize}
B. **ERISA's Preemption Provision**

To meet ERISA's second objective, encouraging the growth of benefit plans, Title I also contains section 514,\(^{42}\) a sweeping preemption clause which prohibits states from enacting any laws which "relate to" employee benefit plans. In choosing to retain a voluntary system, Congress was aware of the need to limit the cost of private plans in order to encourage employers to maintain or increase the level of employee fringe benefits. ERISA's provisions were carefully designed to provide enough protection to employees while not overburdening employers with costly regulations.\(^{43}\) Section 514 was included in ERISA to foreclose the possibility that benefit plans would be subject to additional conflicting and inconsistent state and local laws.\(^{44}\) Congress further sought to protect multi-state plans from the administrative expense of complying with numerous state requirements.

Congress also included this sweeping preemption provision to prevent the possibility of endless litigation which would arise under a more specific provision.\(^{46}\) This goal, however, has not been met. Since 1974, there has been a flood of litigation concerning the scope of ERISA's intrusion upon state law.\(^{46}\) In defining the scope of pre-

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42. The key provisions of section 514 are as follows:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(c)(2) The term "State" includes 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 covered by this title.


44. 120 Cong. Rec. 29,933 (1974) (remarks of Senator Williams).

45. *Id.* at 29,942 (remarks of Senator Javits).

46. The Ninth Circuit Court of Appeals has suggested that "Congress has blown up a dam" by preempting state law in the enactment of ERISA. Alvares v. Erickson, 514 F.2d 156, 161 (9th Cir. 1975) (dictum), *cert. denied*, 423 U.S. 874 (1975).

emptions under section 514, courts have articulated at least four distinct theories: the plain meaning theory, the legislative purpose theory, the proximity theory, and the specific conflict theory. The scope of preemption associated with each theory ranges from very broad under the plain meaning theory to very narrow under the specific conflict theory. In 1981, the Supreme Court faced the issue of ERISA preemption for the first time and noted the conflicting decisions, but declined to indicate the outer limits of preemption.

The uncertainty surrounding the language of section 514 derives from the very nature of preemption provisions, which commonly raise difficult interpretation problems. Generally, congressional exercise of a granted power may supersede a state law if the state law directly conflicts with federal regulation or if federal law "occupies the field." Since a federal law rarely supersedes an entire

United Techs. Corp., 458 F.Supp 84 (N.D. Cal. 1978). Civil rights, see, e.g., Bucyrus-Erie Co. v. Department of Indus., 599 F.2d 205 (7th Cir. 1979); Gast v. State, 36 Or. App. 441, 585 P.2d 12 (1978); Pervel Indus. Inc. v. Connecticut Comm'n on Human Rights & Opportunities, 468 F. Supp. 490 (D. Conn. 1978), aff'd, 603 F.2d 214 (2d Cir. 1979). The courts have also addressed the issue of the scope of § 514 in other contexts such as debtor-creditor relations, taxation, worker's compensation, professional licensing, and restitution. Comment, supra note 26, 145-46.

47. For a general discussion of these varying theories, see Comment, supra note 26, at 151-53.


49. The legislative purpose theory focuses on the relationship between the state law and ERISA rather than on the relationship between the state law and the benefit plan. Several versions of the theory have been espoused in recent cases. See, e.g., Bucyrus-Erie Co. v. Dept. of Indus., 599 F.2d 205 (7th Cir. 1979); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978).

50. Courts adopting the proximity theory assert that the scope of ERISA's coverage excludes state laws which have only an indirect relationship with an employee benefit plan. See e.g., AT&T v. Merry, 592 F.2d 118 (2d Cir. 1979); In re Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (1978).


54. This is based on the supremacy clause of the United States Constitution. U.S. CONST. art. VI, cl. 2. See GUNTER, CASES AND MATERIALS IN CONSTITUTIONAL LAW 127-34 (9th ed. 1975). It is beyond the scope of this comment to fully discuss the preemption doctrine. See generally Note, The Preemption Doctrine: Shifting Perspectives on Federalism
field of law, the Supreme Court has attempted to develop standards to determine when a particular law has been preempted. However, these decisions have taken on an "ad hoc quality seemingly bereft of any consistent, doctrinal basis." 

Despite the lack of analytical standards, there are two overriding principles governing the interpretation of preemption provisions. First, a court's attitude towards federalism has historically been a key factor in judicial preemption analysis. Recently, there has been a very strong presumption in favor of state law, especially in areas in which states have historically played an important role and have continuing responsibilities. Secondly, it is generally agreed that the ultimate question is one of legislative and statutory intent to preempt state laws. The Supreme Court recently reaffirmed the importance of clear congressional intent to preempt a state law in light of the strong presumption in favor of state laws:

The exercise of federalism is not lightly presumed. Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.

In fact, ERISA's preemption provision is unique because of the


55. The mere existence of federal activity will not eliminate all state functions in that area. "Federal law is generally interstitial in its nature. . . . Congress . . . acts against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330, 470-71 (2d. ed. 1973).


57. Note, supra note 54, at 624.

58. Id. at 623. See also Comment, Regulation of Employee Welfare Benefit Plans: The Scope of ERISA's Preemption and State Power to Regulate Insurance, 4 U. DAYTON L. REV. 177, 193 (1979). The approach, however, has been criticized as constitutionally impermissible: "The approach taken by the Court . . . alters . . . the literal and traditional reading of the supremacy clause. The proper judicial inquiry should be accomplished through statutory construction aided by legislative history, not by a balancing of competing federal and state policy objectives." Hutchinson & Ifshin, supra note 5, at 38.

59. It has been suggested that the growing tendency to emphasize the interests of states in preemption analysis may, in part, be explained by the present Supreme Court's generally restrained view of federal power. See Catz & Lenard, The Demise of the Implied Federal Preemption Doctrine, 4 HASTINGS CONST. L.Q. 295, 307-09 (1977).


strong evidence in its language and its legislative history showing "unmistakable" congressional intent to displace state law. This intent is demonstrated by the sweeping language of the statute which is tempered only by specific limiting exceptions. Since Congress expressly provided for these exceptions, it can be reasonably inferred that it intended no others. Legislative history further makes it clear that Congress devoted considerable attention to the question of preemption and that it purposely intended a different policy towards state laws than was previously embodied in the old Welfare and Pension Disclosure Act of 1958, which recognized and preserved state authority to regulate pension plans. Balancing the arguments for broad preemption against the danger that such broad preemption might lead to unforeseen problems, Congress chose not to limit the scope of preemption, but instead to entrust the task of recommending new legislation to a watchdog body. Four years after the enactment of ERISA, the task force reaffirmed the need for continued broad preemption:

Based on our examination of the effects of [section] 514, it is our judgment that the legislative scheme of ERISA is sufficiently broad to leave no room for state regulation within the field preempted . . . the Federal interest and the need for na-

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63. ERISA § 514(b), 29 U.S.C. § 1144 provides that ERISA's preemption provision does not apply to: (1) causes of action arising before Jan. 1, 1975; (2) other federal laws; (3) any generally applicable criminal law of a state; and (4) state regulation of insurance, banking or securities.

64. This maxim is expressio unius est exclusio alterius. Comment, supra note 26, at 151 n.39.


67. The reasons for broad preemption have been stated as: (1) the need to prevent conflicting regulation over interstate plans; (2) the desire to avoid the litigation which would result from a narrower provision; (3) the emergence of a pervasive federal interest in employee benefit plans; (4) the existence of a comprehensive federal program for further study. Department of Labor ERISA Advisory Opinion No. 78-3A (1978).

68. 29 U.S.C. §§ 1221-1222 (1982). These sections provide for the formation of a Joint Pension Task Force which is to report to Congress on the implementation of ERISA. One of the matters to be studied by the task force was the effect of federal preemption on state law. But see Turza & Halloway, supra note 20, at 223 (asserting that such a body is an inappropriate group to make an effective study of the preemption problem).
tional uniformity are so great that enforcement of state regula-
tion should be precluded.\textsuperscript{69}

III. SUASTEZ V. PLASTIC DRESS-UP

In 1982, the California Supreme Court decided a case involving
employee benefits in the form of vacation pay. In \textit{Suastez v. Plastic
Dress-Up Co.},\textsuperscript{70} the defendant employer maintained an ordinary va-
cation policy providing that each employee was entitled to one to
to four weeks of paid vacation annually based on the employee's length
of employment.\textsuperscript{71} The policy expressly limited eligibility for vacation
benefits to employees who were employed on their anniversary date\textsuperscript{72}
and expressly prohibited the payment of pro rata vacation pay.\textsuperscript{73}
Employees had full notice of the vacation policy and its restrictions.\textsuperscript{74}
The plaintiff employee was terminated before his anniversary date
and was refused a pro rata share of his benefits.\textsuperscript{75}

Based on existing precedent, the court of appeal denied the
plaintiff's claim for pro rata vacation pay.\textsuperscript{76} The court relied on a
line of California cases that held that the vesting of vacation pay
could be subject to conditions precedent which are determined solely
by looking at the terms of the employment contract or company pol-
icy.\textsuperscript{77} The plaintiff contended that these cases did not control since

\begin{itemize}
  \item \textsuperscript{69} \cite{HouseCommOnEducationAndLabor94thCong2dSessOversightReportOfThePensionTaskForce9CommPrint1977}
  \item \textsuperscript{70} 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).
  \item \textsuperscript{71} \textit{Id.} at 776, 647 P.2d at 123, 183 Cal. Rptr. at 847.
  \item \textsuperscript{72} \textit{Id.}
  \item \textsuperscript{73} \textit{Id.} at 776 n.2, 647 P.2d at 123 n.2, 183 Cal. Rptr. at 847 n.2.
  \item \textsuperscript{74} \textit{Id.} The vacation policy was orally communicated to the employees in English and
Spanish. The policy was also posted above the time clock and on the employees' bulletin board. \textit{Id.} at 776 n.1, 647 P.2d at 123 n.1, 183 Cal. Rptr. at 847 n.1.
  \item \textsuperscript{75} \textit{Id.} at 777, 647 P.2d at 123-24, 183 Cal. Rptr. at 847-48.
  \item \textsuperscript{76} 125 Cal. App. 3d 550, 178 Cal. Rptr. 11 (1981) (depublished by order of the Cali-
   fornia Supreme Court).
  \item \textsuperscript{77} \textit{Id.} at 550, 178 Cal. Rptr. at 14. \textit{See} Div. of Labor Law Enf. v. Anaconda Copper

  Notwithstanding this generally accepted rule, California courts have used various doc-
trines to uphold an employee's right to recover pro rata vacation pay when forfeiture appeared
produce an inequitable result. \textit{See}, e.g., Div. of Labor Law Enf. v. Ryan Aeronautical Co.,
a contract provision as a promise rather than a condition precedent and allowed the employee
who was terminated only five days prior to completion of his first year to recover pro rata
vacation pay on a theory of substantial performance. \textit{But see} Anaconda Copper Mining Co.
138 Cal. App. 2d 92, 291 P.2d 169 (employee who was employed for four years and eleven
months not qualified to receive vacation pay based on a policy requiring five years of service).
they were decided before enactment of section 227.3, which extended broad protection to an employee's right to his vested vacation pay. The court rejected this argument and held that while section 227.3 prohibited forfeitures of vacation pay, it did not change the existing rule that a determination of when the vesting occurred must still be decided with reference to the employment contract. The court supported this finding with the statutory language of section 227.3, which required that benefits be paid "in accordance with such contract of employment or employer policy respecting eligibility of time served."

The California Supreme Court reversed the court of appeal, holding that "vested time" within the meaning of the Labor Code section 227.3 is not defined by the employer policy or contract of employment, but vests as the labor is rendered. In support of this position, the court reaffirmed the well-established principle that vacation pay is an alternative form of wages and is not to be regarded as a gift or gratuity. The court went on to reject the view held by a number of courts that regards vacation pay as an inducement for future services, constituting an offer or reward for constant and continuous service. Instead, the court asserted that vacation pay is simply a form of deferred compensation. Under this concept, conditions

Doctrines of waiver and frustration of purpose and general equitable principles have also been considered relevant to the granting of a claim for pro rata vacation pay. Posner v. Grunwald-Marx, Inc., 56 Cal. 2d 169, 189, 363 P.2d 313, 325, 14 Cal. Rptr. 297, 309 (1961).

78. CAL. LAB. CODE § 227.3 (West Supp. 1984) provides that:

[w]henever a 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.


80. See supra note 77.

81. 31 Cal. 3d at 784, 647 P.2d at 128, 183 Cal. Rptr. at 852.

82. Id. at 779, 647 P.2d at 125, 183 Cal. Rptr at 849. The case most often cited for this proposition is In re Wil-Low Cafeterias, 111 F.2d 429 (2d Cir. 1940), where it was stated that "[v]acation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee." Id. at 432. See also Ryan Aeronautical Co., 106 Cal. App. 2d Supp. at 836. See generally R. Feinberg, Do Contract Rights Vest?, LABOR ARBITRATION & INDUSTRIAL CHANGE 193-97 (1963).

83. 31 Cal. 3d at 782, 647 P.2d 126-27, 183 Cal. Rptr. at 850-51. The court stated that in adopting this view "[c]ourts merely interpreted the language of the agreements before them . . . [relying] on what is now an outdated notion of the nature of vacation pay." Id.
precedent cannot be allowed to defeat the claim to benefits, since these benefits, like wages, have already been earned—the required consideration has been paid and the employee is entitled to his quid pro quo.  

Finding further support for its interpretation of "vested time" in the language of section 227.3, the court stated that "[i]f the Legislature had intended the contract to control the time of vesting, it could easily have drafted that statute to compel such a result." The court found that the statutory reference to the employer's policy or contract of employment concerned the amount of vacation pay an employee was entitled and was not relevant to the issue of vesting. Moreover, in the requirement that vacation pay disputes be settled by applying "principles of equity and fairness," the court found evidence that the Legislature intended vesting to occur immediately.

The court's reasoning on the basis of statutory interpretation appears to be weak. After a careful reading of the statutory language, it is difficult to find immediate support for the court's assertion that the Legislature intended immediate vesting of vacation benefits. Nor is there any relevant legislative history to assist the court in overturning the well-established rule that the employer's policy controls the time at which vesting occurs.

Nevertheless, the court's decision is supported by its analogy of vacation pay with earned wages. Although courts in many jurisdictions similarly view vacation pay as an earned right, many of these courts wrongfully allow express or implied conditions precedent to defeat the payment of pro rata vacation pay. Special rules are applied depending on the reason for the employee's termination. The California Supreme Court's view, however, appears to be the better one. Once it is acknowledged that vacation pay is equivalent to earned wages, no distinction should be made among these different situations. A benefit that is already earned survives the expiration of

84. Id. at 779, 647 P.2d at 125, 183 Cal. Rptr at 849. See Feinberg, supra note 82, at 194.

85. 31 Cal. 3d at 783, 647 P.2d at 127, 183 Cal Rptr. at 851.

86. Id.


a contractual agreement and negates the validity of any condition precedent to its receipt.

IV. STATE'S AUTHORITY TO REGULATE VESTING REQUIREMENTS FOR EMPLOYEE VACATION BENEFITS

The two most frequently litigated issues under the preemption provision of ERISA concern the definition of an employee benefit plan covered by ERISA and the scope of preemption coverage. These issues arise when addressing the question of a state's authority to mandate vesting requirements for employee vacation benefits.

A. Is a Vacation Plan an "Employee Benefit Plan?"

Before section 514 of ERISA can be said to preempt a state law or an application of such law, the plan must be an "employee benefit plan" within the meaning of ERISA. Although ERISA was enacted over seven years ago, and the Department of Labor has issued regulations clarifying the statutory definition of an "employee benefit plan," the question of what constitutes a plan remains unclear.89 This uncertainty can be attributed to the great variety of methods which can be used to provide employees with deferred compensation and the difficult distinctions required when classifying such arrangements as employee benefit plans. The most difficult questions arise when attempting to qualify an arrangement as a "plan, fund, or program" within the meaning of the Act. This issue must be addressed when determining whether vacation pay programs meet the statutory definition of an employee benefit plan.

As defined by the Act, an employee benefit plan90 is a generic term covering pension plans and welfare plans. Plans that provide


90. ERISA defines an employee benefit plan: "the term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3) (1982).
vacation benefits are expressly included within the statutory definition of an employee welfare benefit plan:

any plan, fund, or program which was . . . 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 . . . .

Notwithstanding this clear statutory language, the Department of Labor has issued regulations designed to wholly exempt certain types of vacation plans from Title I of the Act.92 These regulations enumerate various payroll “practices” that do not qualify as ERISA welfare benefit plans including:

Payment of compensation, out of the employer’s general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons . . . performs no duties; for example:

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons . . . .

Because section 514 only applies to employee benefit plans covered by Title I, the effect of these regulations is to bring these employer “practices” outside the scope of the general preemption provision.

The Department of Labor has interpreted these regulations to exclude all unfunded plans, which are those that provide vacation benefits through the general assets of the employer rather than through a separate fund. At the time these regulations were promulgated, the reason for excluding these unfunded vacation plans from ERISA coverage was that they were “more closely associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization.”94 The Labor Department has consistently applied this distinction between funded and unfunded vacation

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91. Id. § 3(1), 29 U.S.C. § 1002(1).
92. 29 C.F.R. § 2510 (1976).
93. Id. § 2510.3-1(b)(3).
ERISA plans in its enforcement activities. For example, an examination of the Department's Advisory Opinions shows that the determination that a particular vacation scheme was an ERISA benefit plan rather than a "payroll practice" each time has depended on a showing that the benefit plan was separately funded, such as in the form of a vacation trust. Because the majority of vacation plans are funded through an employer's general assets, these regulations have the effect of entirely excluding most vacation plans from ERISA coverage.

Although labor law authorities and one state court have acquiesced in the Department of Labor's interpretations, these regulations have not been subjected to detailed analysis. This can be attributed to the fact that an agency's consistent construction of its own administrative regulation is generally respected by the courts. This longstanding rule of administrative law, however, is limited when an agency defines words which have already been defined within the Act. The United States Supreme Court recently considered the standard used to review a regulation that operates to restrict a term defined in a federal statute. The Court stated:

In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of

95. The Department of Labor ERISA Advisory Opinions are authorized by ERISA § 108, 29 U.S.C. § 1028, which provides that reliance on a written ruling of the Secretary precludes criminal liability under the Act. ERISA Advisory Opinions will hereinafter be cited as ERISA Ad. Op.


97. See, e.g., Mamorsky, supra note 3, at § 10.02 (1982) ("the regulations specify a number of practices and arrangements that provide benefits to employees that are not regarded as employee benefit plans within the meaning of ERISA. They are (1) vacations . . . ."); Calif. Continuing Education of the Bar, Advising California Employers § 1.26, 23 (1981) ("ffunded vacation plans may be subject to ERISA . . . .") (emphasis added); Research Institute of America, Inc., Employee Benefits Compliance Coordinator, Vol. 3, ¶ 18,403 (1982).

98. In Richardson v. St. Mary Hospital, 6 Kan. App. 2d 238, 627 P.2d 1143 (1981), a state court of appeals held that a state vacation pay statute was not preempted by ERISA. Id. at 243, 627 P.2d at 1146. Assuming arguendo that federal law did apply, the court interpreted the Department of Labor regulations as excluding from the definition of an ERISA employee benefit plan a vacation plan which was funded through the employer's general assets. It should be noted, however, that the court relied solely on the face of the regulations and failed to provide any analysis in its decision, and, furthermore, that the court's conclusion was dicta. This case appears to be the only reported decision which has addressed the issue of whether ERISA preempts a state's regulation of vacation benefits.


the statute, its origin, and its purpose.' Harmony between statutory language and regulation is particularly significant in this case. Congress itself defined the word at issue . . . and the Commissioner interpreted Congress's definition only under his general authority to 'prescribe all needful rules.' 26 U.S.C. § 7805(a). Because we therefore can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference . . . . 101

Thus, it becomes necessary to examine whether the Department of Labor's interpretation of its regulation "harmonizes with the plain language of the statute, its origin, and its purpose." In fact, the statutory language of ERISA gives no indication that Congress intended to exempt any form of formal vacation plan from Title I. Section 4(a) of ERISA provides that all employee benefit plans are covered by Title I unless specifically excluded by section 4(b). 102 Section 4(b), in turn excludes from Title I five specific categories of plans, none of which in any way relates to unfunded vacations plans. 103 Because Congress provided these specific exceptions, this suggests that it intended no other exceptions. 104

Further examination of the statute reveals that Congress was aware of the distinction between funded and unfunded plans when it enacted the statute and specifically distinguished between such plans in those areas where it felt such a distinction was required. For example, in section 4(b) Congress excluded unfunded excess benefit plans from Title I, while retaining coverage of funded excess benefit plans. 105 The act also provides that an unfunded plan maintained primarily to provide retirement income for a select group of management employees would not be required to conform to certain standards, such as vesting and funding requirements. 106 Congress further

101. Id. at 253 (quoting National Muffler Dealers Ass’n v. United States, 440 U.S. 472, 477 (1979)).
103. ERISA § 4(b), 29 U.S.C. § 1003(b) (1975), exempts from ERISA coverage governmental plans, church plans, plans maintained to comply with applicable workmen’s compensation laws or unemployment compensation or disability insurance laws, plans maintained primarily for the benefit of nonresident aliens, and unfunded excess benefit plans.
104. See supra note 64.
105. 29 U.S.C. § 1003(b)(5). An excess benefit plan is defined as a plan maintained to provide benefits for certain employees in excess of the statutory limitations on contributions and benefits established by ERISA. ERISA § 3(36), 29 U.S.C. § 1002(36). The distinctions between funded and unfunded excess benefit plans also appear in § 201(7), 29 U.S.C. § 1051(7).
106 See also ERISA §§ 201(2), 201(7), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051(2), 1051(7), 1081(a)(3), 1101(a)(1). For details of this unfunded exception, see Goodman & Stone, supra note 88, at 459-65.
limited Title I coverage to scholarship "funds." Consistent with this statutory language, the Department of Labor regulations exclude scholarship programs paid through the employer's general assets and point to the word "funds" as dispositive of this issue. In contrast to these numerous distinctions, there is no mention anywhere in the legislative history of ERISA that Congress intended to distinguish between funded and unfunded vacation plans.

A minority of courts have held that ERISA's definition of employee benefit plans includes only those plans in which assets are held separately in trust type arrangements. This view finds support from the fact that the primary focus of congressional concern in ERISA's legislative history was the accumulation and misappropriation of assets characterized by an identifiable "fund" or "res." However, this view is not supported by a majority of courts nor is it supported by the Act. Courts have consistently applied section 514 to preempt a state law regardless of whether the employee benefit plan was funded through a trust, insurance, or a self-funded arrangement. The Department of Labor has similarly held that, in general, an ERISA "plan" does not require any special type of funding.

In fact, the overall structure and purpose of the Act reflects an intent to define employee benefit plans as broadly as possible. It has been noted that ERISA's definition of employee benefit plans closely resembles a broad "decisional matrix or process." For example, an employee benefit plan can come under ERISA's regulatory coverage before any of its terms exist. Moreover, ERISA "plans" are all-encompassing concepts which include, but are not limited to, trust funds, plan documents, insurance contracts, and funding procedures. One court, noting that Congress intended such an inclusive definition of an ERISA "plan," stated that Congress specifically chose broad language when it referred to any plan, fund, or program and "was

113. Note, supra note 89, at 483-85.
114. Id. at 484.
fully aware of the functions and scope of employee benefit plans ... A narrow definition of an ERISA employee benefit plan would be inadvisable since it would constrain the flexibility purposely built into the Act.

Because the clear language and purpose of the statute seems to require that all formal vacation plans be covered by the Act, the Department of Labor regulations, which exclude unfunded vacation plans, should be entitled to little deference. In addition, there are reasons why a court should not find a definition of employee benefit plans conclusive on the issue of whether ERISA preempts the state regulation of employee vacation plans. First, if the distinction between funded and unfunded plans is allowed to stand, only vacation benefit plans which are separately funded would be included within the definition of an ERISA “plan”. Since only ERISA “plans” are subject to the Act’s preemption provision, this would create an inequitable situation, allowing some employers to escape the effect of state law by taking the minor steps necessary to establish a self-funded or trustee arrangement. An example of a separately funded vacation scheme is a vacation trust fund, which is typically established by larger and more sophisticated employers in certain industries. This would mean that these employers could completely avoid the Suastez decision’s vesting requirements. In contrast to the strict state regulations which potentially could be imposed on unfunded vacation plans, “funded” plans would operate in a regulatory vacuum since most of ERISA’s substantive standards do not apply to such plans. Furthermore, difficult and numerous problems could potentially arise in the determination of what constitutes a “funded” plan.

Secondly, when a court bases it’s decision regarding ERISA

117. Recently, in Franchise Tax Board v. Construction Laborers Trust, 679 F.2d 1307 (9th Cir. 1982), the Ninth Circuit found that a vacation trust is an “employee benefit plan” within the meaning of ERISA. Id. at 1309. The court went on to hold that the state’s attempt to levy on an employee vacation trust for fund taxes unpaid by the employee tax beneficiary was preempted by ERISA. Id.
118. For a description of a typical vacation trust plan, see id. at 1308. See also Sulmeyer v. Southern Cal. Pipe Trades Trust Fund, 301 F.2d 768, 769-70 (9th Cir. 1962).
119. Vacation trusts typically exist in industries such as construction and longshoring where employees work for many employers during any single year and have long periods of unemployment between jobs. In these industries it is usually unnecessary for employees to be granted leave from any job in order to take a vacation. Brief of the American Federation of Labor Congress of Industrial Organizations As Amicus Curiae at 21-3, California Hospital Ass’n v. Henning, No. 32-6659 (C.D. Cal. filed Dec. 20, 1982).
preemption on a simplistic interpretation of an "employee benefit plan," it is not focusing on the important issue. In recent years, courts have increasingly avoided determining ERISA's preemptive scope by narrowly defining an ERISA "plan." This approach has been criticized because it circumvents a more fundamental question concerning the balance of power between the federal and state governments in ERISA's legislative scheme. The importance of determining the relative roles of the federal and state governments in the regulation of fringe benefit plans demands that courts address this basic issue. It is crucial to the states, employers, and employees, that a clear understanding of the scope of federal power to govern employee benefit plans be arrived at in a principled manner.

B. Does a State Vacation Pay Regulation Fall Within the Scope of ERISA's Preemption Provision?

The question of the scope of ERISA preemption of state law is primarily a matter of determining legislative intent. Commentators and courts have generally agreed that the intent of Congress in the area of pension and other employee benefits was that federal preemption would be "virtually total." Notwithstanding this unusually strong showing of broad preemptive intent, the scope of ERISA's preemption provision is not unlimited. The plain language of the Act clearly states that section 514 displaces state law only when enforcement "relates to" an ERISA plan. In addition, courts have often been willing to narrowly construe the scope of section 514 in order to uphold state law. In part, these judicially created exceptions from the broad scope of section 514 are based on a "natural tendency to restrict the scope of preemption where it appears to produce an inequitable result in a particular case." These exceptions further reflect a general judicial trend towards upholding state laws when challenged on preemption grounds. But, these decisions also stand on a more principled ground—that with a more careful interpretation of congressional intent, the particular state law should stand. Therefore, an attempt must be made to determine whether there is evidence of legislative intent showing that a state vacation pay vesting requirement falls outside the preemptive scope of

119. Hutchinson & Ifshin, supra note 5, at 43-52.
120. See supra note 60 and accompanying text.
122. Hutchinson & Ifshin, supra note 5, at 42. See also Okin, Preemption of State Insurance Regulation by ERISA, 13 FORUM 652, 653-54 (1978).
ERISA. The analysis depends upon the underlying theory regarding the dimensions of ERISA’s preemptive scope.

1. Narrow Reading of Section 514

There are several persuasive arguments demonstrating that Congress did not intend to preempt such a state law. First, there is no evidence in the entire history of ERISA to show that a state was prohibited from regulating vested vacation pay. Nor is there any clear evidence that Congress intended that the time at which welfare benefits “vested” should be left for the employer to determine. In fact, a careful look at ERISA’s legislative history shows that the preemption provision was hastily written, little understood, not exposed to public debate, and comprised only a minor part of a complicated reform measure. The present language of section 514 was inserted by conference committee ten days before final action, after no congressional hearings and with little explanatory comment. In this context it is unlikely that the consequences of preempting a decision such as Suastez were contemplated. This evidence makes it difficult to infer an unmistakable legislative intent to completely occupy the field of employee benefit plans.

Secondly, under ERISA vacation plans are exempt from the vesting, funding, and participation requirements established in Title I. Thus, in order to find a congressional intent to preempt a state vacation pay vesting regulation, it is necessary to find that Congress intended to leave such plans almost entirely unregulated. Such a finding is contrary to a primary objective of ERISA’s legislative scheme—the prevention of illusory benefits.

The legislative history of ERISA is filled with examples of beneficiaries of welfare benefit plans who had to forego promised benefits because of inadequate vesting provisions. The facts of the Suastez case illustrate that the problem of illusory benefits with respect to vacation pay has not yet been resolved. Because of the

123. Furthermore, it has been noted that because the Conference Report came up for congressional approval during the month of Richard Nixon’s resignation, “[i]t would be naive to suppose that during this period any serious attention could have been devoted to such matters as the status of an obscure preemption provision in a 250-page federal statute.” Brummond, supra note 5, at 116.

124. Note, supra note 89, at 477.

125. Id.

126. In Suastez, the court noted that in one year 300 employees of the employer defendant were terminated and each was denied the right to his or her share of pro rata vacation benefits. 31 Cal. 3d 774, 776 n.4, 647 P.2d 122, 124 n.4, 183 Cal. Rptr. 846, 852 n.4 (1982).

127. See Brummond, supra note 5, at 118-20. See also Note, supra note 89, at 477.
lack of any vesting requirements, ERISA's regulatory scheme does not provide adequate protection that vacation benefits will not come to represent false promises.

The term "regulatory vacuum" has been frequently used to describe the status of welfare benefit plans under ERISA. Many courts have refused to find an explicit congressional intent to leave these areas wholly unregulated. In a particularly thoughtful opinion, the court in *Gast v. State* rejected the plaintiff's argument by stating:

>[If we are to adopt the construction of [section 514] advanced by the plaintiffs we must import to Congress not only an intent to preempt state law, but also an intent to cease all governmental regulation, state or federal, other than the disclosure and fiduciary requirements of health and welfare benefits paid by employers or employee organizations. There is nothing in the legislative history suggesting such an intent. To the contrary, the legislative history indicates Congress was concerned with the inadequacy of governmental regulations and concluded that there should be at least minimum federal standards with respect to disclosure and fiduciary responsibility.]

Furthermore, during oversight hearings, Senator Javits, a primary sponsor of ERISA and supporter of the original broad preemption provision, showed concern about the regulatory vacuum "which has arisen in areas such as funding and vesting where ERISA sets no substantive standards.""130

128. See, e.g., Electrical Workers Local 1 v. IBEW-NECA Holiday Trust, 583 S.W.2d 154, 162 (Mo. 1979); *Gast v. State*, 36 Or. App. 441, 585 P.2d 12 (1978).
130. *Id.* at 446, 585 P.2d at 22. Although this case represents a minority view, the concerns it expresses have influenced other courts. Many of these courts state similar doubts about the broad scope of § 514 but ultimately decide the issue on alternate grounds. Hutchinson & Ishin, *supra* note 5, at 57-58.


>There are at least two ways of resolving the preemption problem involving welfare benefit plans. The first is to provide for complementary State and Federal jurisdiction by not preempting State statutes with additional standards for welfare plans. The second is to extend ERISA's substantive standards, for example, its funding requirements to welfare plans. The matter is very serious and should be thoroughly reviewed by Congress.

*Id.* at 62.

However, it should be noted that this congressional concern has not been translated into legislation. In 1980 Congress amended portions of ERISA to enact the Multiemployer Pension Act of 1980. Pub. L. 96-364 Title IV §§ 402(a)(3), 403(b) Sept. 26, 1980. A Senate proposal would have included a provision in the bill to limit the scope of ERISA's preemptive effect in regard to certain types of welfare plans. This proposal, however, was rejected during Confer-
In a similar argument, it is possible that Congress intended such a broad preemption provision to apply to pension plans and not to welfare plans. In fact, the legislative history demonstrates that ERISA was primarily aimed at preventing abuses to private plan systems and only a small segment of the lengthy testimony was devoted to problems relating to employee welfare plans. While pension plans are subject to minimum vesting and funding standards, welfare plans—including vacation plans—have no analogous minimum requirements. The difference is dramatic. While employers must carefully provide minimum pension benefits under ERISA, welfare benefits may be illusory.

2. Broad Reading of Section 514

A narrow reading of section 514 gives rise to convincing arguments which show that Congress did not intend the scope of section 514 to broadly preempt a state law such as that embodied in Sustez. However, an examination of the policies behind ERISA and a proper regard for legislative intent seems to require that a court find that a state lacks authority to impose substantive vesting requirements on vacation pay plans. The argument that a state law falls outside the scope of ERISA's preemption provision if there is no direct conflict with an ERISA regulation lacks validity because the Act's clear language and legislative history show that its regulatory scheme was intended to "occupy the entire field" of employee benefit plans. Congress had purposely rejected a narrower provision which would have limited the scope of preemption to state regulation of areas expressly covered by the bill. During congressional debates Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare emphasized that Congress intended to supersede all state laws, even in areas in which ERISA provided no substantive regulations:

It should be stressed that with the narrow exceptions specified in this bill, the substantive and enforcement provisions are intended to preempt the field for Federal regulations, thus elimi-
nating the threat of conflicting or inconsistent state and local regulations of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of state and local governments.\textsuperscript{134}

Moreover, in \textit{Alessi v. Raybestos-Manhattan Inc.},\textsuperscript{135} the most recent Supreme Court case involving the question of ERISA preemption, the Court expressly rejected the contention that section 514 is triggered only when there is a specific conflict between a state law and an ERISA provision.\textsuperscript{136}

Furthermore, allowing states to impose vacation pay vesting requirements is counterproductive to several of ERISA's major policy goals. Although the \textit{Suastez} decision may be viewed as socially progressive because it appears to provide increased benefits and protect against illusory benefits, it is probable that it will produce the opposite result. Congress enacted ERISA to encourage employer adoption of such employee benefit plans. Because vacation benefits are not statutorily required, however, the added costs imposed by \textit{Suastez} may force employers to drop desired vacation benefits or to severely restrict them to a select group of employees. This will have the most adverse effect on low wage employees who can ill afford to lose these benefits.

ERISA's goal of national uniformity will not be met if the \textit{Suastez} decision escapes the preemptive scope of section 514. Greater costs associated with providing vacation benefits will be imposed on California employers than on employers in other states due to the decision's requirement of immediate vesting. In addition, if \textit{Suastez} is upheld over objections on preemption grounds, other states may then enact their own elaborate vesting regulations which will result in additional costs to multi-state employers who must then tailor their actions to comply with the regulations of each state.

\textsuperscript{134} 120 \textit{CONG. REC.} 32,430 (1974) (statement of Senator Williams).
\textsuperscript{135} 451 U.S. 504 (1981).
\textsuperscript{136} 451 U.S. at 525. The issue in \textit{Alessi} involved a New Jersey statute which prohibited private pension benefits from offsetting worker's compensation awards. The district court had denied the preemption challenge because it viewed ERISA's preemptive scope narrowly—to supersede a state law only when that law directly interferes with or relates to an ERISA pension plan. The Supreme Court expressly discredited this direct relationship requirement and held the New Jersey law to be preempted. 451 U.S. at 526.

The \textit{Alessi} decision, however, should be qualified in two respects. First, the case involved an ERISA pension plan and not a welfare benefit plan. The Court declined to express its views on several recent lower court decisions which had narrowed the scope of preemption in relation to welfare benefit plans. 451 U.S. at 525 n.21. Secondly, the Court refused to adopt the overly expansive view of the appellate court and was careful to note that under the present case the dispositive issue was that there was a clear relationship between the state law prohibition and federal law permission. 451 U.S. at 525-26.
their particular plans to each state's vesting requirements. Thus, it is clear that:

[I]n the final analysis, the victims of federal and multistate regulation of benefit plans are likely to be the employees themselves—the very persons intended to be benefited by plan regulation. Faced with mounting costs, unwieldy administration, and vexatious litigation, at least some employers will undoubtedly terminate their employee welfare benefit plans . . . a result . . . not only . . . contrary to the best interests of employees but also [to the congressional] intent in adopting ERISA.\textsuperscript{137}

A more fundamental reason for finding that a state vacation pay regulation falls within ERISA's preemptive scope is a proper regard for the power of the federal legislature to enact broad, carefully balanced regulatory programs that leave no room for state action. In the face of clear legislative intent to displace state laws, it is the role of Congress, and not the judiciary, to develop exceptions to the broad scope of section 514. Although Congress has noted the existence of a "regulatory vacuum" for welfare plans, it has shown an unwillingness to limit the scope of the ERISA preemption clause.\textsuperscript{138} The result of judicial narrowing of section 514 on the basis of a court's perceived notions of desirable public policy has resulted in doctrinal confusion. By tinkering with ERISA's legislative program, "the potential for mischief if not major disruption of Congress's regulatory scheme should be apparent."\textsuperscript{139}

V. Upholding the Suastez Decision Based on Federal Common Law

Based on the foregoing preemption analysis, a court would be required to invalidate the Suastez decision's interpretation of the meaning of "vested" time. The result, however, does not appear to be satisfactory. The Suastez decision was based on the California Supreme Court's conception of vacation pay, which represents sound legal analysis and the better view concerning the nature of a vested benefit.

Despite the fact that ERISA preempts the Suastez decision, a court is not required to end its analysis at that point. Instead, a better approach would be to carry the analysis further and formulate federal common law to govern the vesting of vacation benefits.

\begin{footnotes}
\footnote{137. Brummond, \textit{supra} note 5, at 119.}
\footnote{138. See \textit{supra} note 130 and accompanying text.}
\footnote{139. Hutchinson & Ifshin, \textit{supra} note 5, at 52.}
\end{footnotes}
authority to create common law in this situation can be implied from ERISA's legislative scheme. Since Congress rarely includes express statutory language requiring a court to apply federal common law in a particular situation, "a delegation of [such] lawmaking power generally occurs by implication."\textsuperscript{140} The situation in which a court should most readily find this implied power is when a state is preempted from acting and the "court is forced to make law or leave a void."\textsuperscript{141} This situation arises in the area of vacation benefits plans since ERISA does not provide any substantive vesting requirements governing such plans.

Further support for the power of the judiciary to formulate common law governing the vesting of vacation benefits can be found in specific statements in ERISA's legislative history. Speaking on behalf of the conference version of ERISA, Senator Javits explained that federal courts were empowered to create rules of law governing aspects of the employee benefit field: "In view of Federal preemption . . . [i]t 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."\textsuperscript{142} Several courts have additionally affirmed judicial authority to formulate rules to govern employee benefit plans, in the face of ERISA's broad preemption provision.\textsuperscript{143}

Once the power to apply federal law is established, a court must then determine what that law should be. Generally, if there is a related statutory scheme, judicial common law must adhere to the policies underlying that legislative program.\textsuperscript{144} Thus, in this case the policies underlying ERISA must be the "guideposts in fashioning a rule of decision."\textsuperscript{145}

In fact, on one level the analysis used in the creation of a federal common law under ERISA greatly resembles the analysis used

\textsuperscript{141} Id.
\textsuperscript{142} 120 CONG. REC. 15,751 (1974).
\textsuperscript{145} Wayne Chemical, 426 F. Supp. at 322.
in determining the extent of ERISA's preemptive scope—both must focus on the legislative intent and underlying policies of ERISA. It has been stated that there is often only "a thin line between the creation of federal common law and the interpretation and application of federal statutory mandates." On a deeper level, however, there is a significant difference between the two types of analysis. The formulation of federal common law permits a court to take a much broader view, focusing its attention on the relationship between the overall policies underlying the regulatory scheme and the specific facts before the court.

Using the broad legislative purpose to determine the governing rule, a federal court may embrace a state law if it will "best effectuate the federal policy." An analysis of ERISA's legislative scheme demonstrates that a court should adopt the rule embodied in the Suastez decision as the governing federal rule. ERISA's primary objective was to protect against illusory benefits. The Suastez rule will further this goal by ensuring that vacation benefit promises are meaningful to workers. The vesting of vacation benefits will confer upon a worker a nonforfeitable right to a portion of his vacation benefit as he discharges his daily assignments. The enactment of ERISA demonstrates the need for legal requirements compelling employers to grant such vested benefits. Without these requirements, an employer is free to make illusory promises in place of providing additional compensation which the employee has bargained for and is entitled to receive.

Moreover, in creating this federal rule, it is important to focus on the specific findings of the Suastez case. The rule logically derives from a particular conception of vacation pay which is the modern and best view. The underlying issue which was resolved in this case was whether a fringe benefit, such as vacation pay, is payment for past services or is an inducement for future services. Vacation pay was traditionally viewed as payment for future services which provided a worker with a short interval of complete rest to ensure his continued productivity. However, today it is a benefit that is so closely linked to wages in the minds of employees that the judiciary should consider this benefit as payment for past services already completed. Once this view of vacation pay is accepted, a court has no choice but to require that vacation pay, like wages, vest immediately.

146. Id. at 323.
147. See Note, supra note 140, at 1522.
as the services are rendered.

Before fully accepting the Suastez decision, it may be argued that the rule does not meet one important policy objective of ERISA—the encouragement of the adoption and growth of benefit plans. In fact, there is a possibility that Congress purposely exempted welfare plans from vesting requirements to prevent imposing a costly regulation which would discourage benefit coverage. Nonetheless, in this case such a concern is not applicable. It is doubtful that employers will wholly eliminate their vacation pay policies because this type of deferred compensation arrangement has become an integral part of employment in this country. The costs of employee dissatisfaction, if these plans were eliminated, would strongly deter employers from abolishing these desired policies.

Although it appears that the formulation of federal common law to uphold the Suastez decision is the same result that may be arrived at by narrowing the scope of preemption, there are different implications. First, a court is likely to arrive at a more reasoned conclusion when it formulates federal common law than when it liberally interprets ERISA's preemption section. The creation of a federal rule results from a careful analysis of specific facts of vacation pay vesting, rather than an analysis of historical and often nebulous congressional intent concerning the scope of preemption. Moreover, often section 514 analysis requires a court to distort the meaning of ERISA's preemptive scope in order to reach an equitable result. Secondly, the creation of federal common law requiring immediate vesting of vacation benefits represents a very narrow decision which applies uniformly and only to vacation benefits. On the other hand, if a court found that such a vesting regulation falls outside the scope of section 514, each state would be free to impose elaborate vesting schedules on employee welfare plans—which would be very costly and clearly counterproductive to ERISA's legislative program.

VI. Conclusion

It is certain that Congress intended through the enactment of ERISA to regulate the entire field of employee benefit plans. It is also certain that by including section 514, Congress intended that states would be prohibited from regulating any portion of these plans. The Suastez decision potentially interferes with this clear legislative mandate. Although there are valid arguments showing that such interference does not occur, in the end such a finding must fail because it is the role of the legislature and not the judiciary to narrow the scope of preemption.
This conclusion, however, does not mean that courts are powerless to act. Although a federal court has found the Suastez decision to be preempted by ERISA, it has the authority to formulate a federal rule governing the vesting of vacation pay. That rule should adopt the vesting requirement embodied in the Suastez decision.

Resolution of the issue of whether a state has authority to regulate vacation vesting has significant ramifications for all employee non-wage benefit plans. The underlying policy question concerns the relative power of the states and the federal government to substantially govern employee benefit plans. It appears that until Congress acts to allow states to regulate in this area or acts to address the issue of welfare benefit vesting on a national level, it will be the role of the courts to formulate vesting rules based on the underlying policies of ERISA's regulatory program.

Melanie Caron Gold