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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ANTHONY MARC MOSTAJO, and  
ELAINE QUEDENS, on behalf of  
himself and all others  
similarly situated,  
  
                                Plaintiffs,  
  
                                v.  
  
NATIONWIDE MUTUAL INSURANCE  
COMPANY, and Does 1 through  
50, inclusive,  
  
                                Defendants.

No. 2:17-cv-00350-JAM-AC

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING DEFENDANT'S  
CROSS-MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

Anthony Marc Mostajo and Elaine Quedens ("Plaintiffs") bring class claims against Nationwide Mutual Insurance Company ("Defendant" or "Nationwide"), their former employer, for Nationwide's alleged failure to pay overtime and unused but accrued vacation time to claims adjusters in California. Second Am. Compl., ECF No. 23.

The parties filed cross-motions for summary judgment on a single issue: whether Nationwide's "Your Time Program," through which Nationwide provides a paid a time-off benefit to its employees, is regulated by ERISA. Mostajo Mot., ECF No. 29-1; Nationwide Opp'n and Cross-Mot., ECF No. 39. Plaintiffs argue the Your Time Program is an ERISA-exempt "payroll practice";

1 Nationwide asserts the contrary. Id.

2 For the reasons set forth below, the Court GRANTS  
3 Plaintiffs' motion and DENIES Defendant's cross-motion.<sup>1</sup>

4 I. PROCEDURAL BACKGROUND

5 Defendant Nationwide is based in Columbus, Ohio and provides  
6 insurance and financial services throughout the United States.  
7 Plaintiffs Anthony Marc Mostajo ("Mostajo") and Elaine Quedens  
8 ("Quedens") worked for Nationwide as claims adjusters in  
9 California from 1998 to December 2015 and January 2016,  
10 respectively. Mostajo Decl., ECF No. 29-6, at 1; Quedens Decl.,  
11 ECF No. 29-7, at 1.

12 On January 9, 2017, Mostajo filed a Complaint against  
13 Nationwide in the Superior Court of the State of California,  
14 County of Sacramento (Case No. 34-2017-00206005-CU-OE-GDS),  
15 alleging, among other individual claims, class claims for  
16 Nationwide's failure to pay overtime in violation of the  
17 California Labor Code and California Business and Professions  
18 Code. Compl., EFC No. 1-9. The putative class consists of all  
19 claims adjusters employed by Nationwide in California since  
20 January 2013. Compl. ¶ 11. A month later, Mostajo, joined by  
21 Quedens, amended the complaint to include a class claim for

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22 <sup>1</sup> This motion was determined to be suitable for decision without  
23 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
24 scheduled for October 2, 2018. Additionally, both Plaintiffs  
25 (ECF No. 45-1) and Nationwide (ECF Nos. 39-7, 46-1) submitted  
26 objections to evidence in support of the cross-motions. The  
27 Court has reviewed these evidentiary objections, but declines to  
28 individually rule on them as it is unnecessary to the  
determination of this motion. See Judge William Shubb's  
excellent discussion of evidentiary objections in Burch v.  
Regents of the University of California, 433 F.Supp.2d 1110,  
1118-1122 (E.D. Cal. 2006).

1 failure to pay, upon termination, accrued but unused vacation  
2 time. Am. Compl., ECF No. 1-11. Shortly thereafter, Nationwide  
3 removed the case to federal court. Notice of Removal, ECF No. 1.

4 On February 15, 2018, Plaintiffs filed their Second Amended  
5 Class Action Complaint against Nationwide which includes, in  
6 relevant part, an allegation that that Nationwide "had in place a  
7 policy whereby it failed to pay for all accrued vacation time,  
8 precluding claims adjusters from carrying over all accrued  
9 vacation time from year to year" and "failed to pay all accrued  
10 vacation time at termination." Second Am. Compl. ¶ 7. Based on  
11 this policy, Plaintiffs allege that Nationwide violated  
12 California Labor Code Section 227.3, which requires employers to  
13 pay employees for all accrued vacation time. Id. ¶¶ 41-50.

14 Nationwide filed an answer with affirmative defenses on  
15 March 29, 2018. Ans., ECF No. 26. Nationwide's twenty-first  
16 affirmative defense argues that the Plaintiffs' California law-  
17 based causes of action related to the vacation time benefits are  
18 completely preempted by ERISA. Ans. at 16.

19 After a period of discovery, Plaintiffs filed a motion for  
20 summary judgment arguing that the Your Time Program is exempt  
21 from ERISA as a "payroll practice" and so Nationwide's twenty-  
22 first affirmative defense fails as a matter of law. See Mostajo  
23 Mot. Nationwide opposed and brought a cross-motion for summary  
24 judgment as to ERISA's applicability. See Nationwide Opp'n and  
25 Cross-Mot.

## 26 II. FACTS

27 The Nationwide Insurance Companies and Affiliates Plan for  
28 Your Time and Disability Income Benefits ("the Plan"), provides

1 three benefits programs: (1) the Your Time Program; (2) the  
2 Short-Term Disability Income Benefit Program; and (3) the Long-  
3 Term Disability Income Benefit Program. Mostajo Responding  
4 Statement of Facts, ECF No. 45-4, ¶ 1. The Plan first became  
5 effective for California employees on October 24, 2005.  
6 Nationwide Responding Statement of Facts, ECF No. 39-5, ¶ 3; Plan  
7 Governing Document, ECF No. 44, Ex. B. The Your Time Program  
8 provides a paid time-off benefit, including for vacation and sick  
9 days. Mostajo Responding Statement of Facts ¶ 3; Mostajo Decl.  
10 at 1. The Plan Administrator is the Nationwide Benefits  
11 Administrative Committee, which is composed exclusively of  
12 Nationwide officers. Nationwide Responding Statement of Facts  
13 ¶ 14.

14 An Amended and Restated Directed Trust Agreement ("Trust  
15 Agreement") was entered into between the Plan and Nationwide  
16 Trust Company, FSB in May 2014 and made effective as of January  
17 1, 2014. Nationwide Responding Statement of Facts ¶ 7; Trust  
18 Agreement, ECF No. 44, Ex. E. The Agreement appoints Nationwide  
19 Trust Company ("Trustee") as trustee of the Nationwide Insurance  
20 Companies & Affiliates Employee Health Care Trust ("Trust") and  
21 establishes the Trust as a voluntary employee beneficiary  
22 association account to be held and administered for the uses and  
23 purposes set forth in the Trust Agreement. Nationwide Responding  
24 Statement of Facts ¶¶ 7-8; Trust Agreement § 12.04. The Trust  
25 Agreement provides that the Trust "shall constitute the sole  
26 source of funds which may be used to pay benefits under the Plan,  
27 and the Participating Employers shall not be liable in any way or  
28 in any manner for any such benefits beyond those monies which

1 have been contributed to this trust.” Mostajo Responding  
2 Statement of Facts ¶ 10; Trust Agreement § 9.13.

3 The Trustee has no power or responsibility to determine  
4 employees’ entitlement to Your Time benefits. Nationwide  
5 Responding Statement of Facts ¶ 10; Trust Agreement § 5.3. The  
6 Trustee makes payments from the Trust to the claims administrator  
7 “from time to time at the Plan Administrator’s direction” and  
8 only “in such amounts and for such purposes as may be specified  
9 in the Plan Administrator’s direction.” Nationwide Responding  
10 Statement of Facts ¶ 11; Trust Agreement § 3.4. The Trust has no  
11 power to require Nationwide to make any contributions to the  
12 Trust to fund Your Time benefits nor does the Trustee bear  
13 liability for inadequacy of any contributions Nationwide may make  
14 to the Trust or for their failure to fund the Trust fully.  
15 Nationwide Responding Statement of Facts ¶¶ 12-13; Trust  
16 Agreement § 3.4.

17 For each payroll period, Nationwide determines its  
18 contributions to the Trust to fund Your Time benefits.  
19 Nationwide Responding Statement of Facts ¶ 16. Nationwide’s  
20 contributions to the Trust are not determined by an actuary. Id.  
21 ¶ 15. Instead, Nationwide’s Human Resources Information System  
22 (“HRIS”) automatically calculates the total accrued Your Time  
23 hours for each eligible employee based on the Plan’s accrual  
24 schedule. Id. ¶ 16. Nationwide’s benefits accounting group then  
25 calculates the dollar value of the total accrued hours for the  
26 payroll period based on employees’ current salary rates. Id.  
27 Next, the benefits accounting group initiates an Automated  
28 Clearing House transfer of the dollar value of these total

1 accrued hours, without regard to the actual paid time off used  
2 during the payroll period, from Nationwide's main funding account  
3 to the Trust. Mostajo Responding Statement of Facts ¶ 13.  
4 Nationwide's main funding account holds the general assets of the  
5 company. Nationwide Responding Statement of Facts ¶ 17.

6 At each two week payroll period, at the same time HRIS  
7 determines the total accrued Your Time hours, HRIS also  
8 determines the amount of Your Time hours that employees  
9 reportedly used during that period. Nationwide Responding  
10 Statement of Facts ¶ 22. The Nationwide benefits accounting  
11 group again calculates the dollar value of the Your Time hours  
12 used for the payroll period based on employees' current salary  
13 rates. Id. The benefits accounting group then initiates another  
14 Automated Clearing House transfer of this total amount of funds  
15 needed to pay the benefits for the payroll period from the Trust  
16 back to Nationwide's main funding account. Nationwide Responding  
17 Statement of Facts ¶ 23; Mostajo Responding Statement of Facts  
18 ¶ 17. Finally, that same day, the transferred Your Time benefit  
19 funds move directly from the main funding account through a  
20 payroll cash account and to the employees. Nationwide Responding  
21 Statement of Facts ¶ 24; Mostajo Responding Statement of Facts  
22 ¶¶ 17-18. The employees receive a single paycheck for each  
23 payroll period which includes both normal pay and any payment of  
24 the Your Time benefit, but the two are reflected as separate line  
25 items on the paystub. Mostajo Responding Statement of Facts  
26 ¶ 20.

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1 III. OPINION

2 A. Legal Standard

3 "The court shall grant summary judgment if the movant shows  
4 that there is no genuine dispute as to any material fact and the  
5 movant is entitled to judgment as a matter of law." Fed. R.  
6 Civ. P. 56(a). Initially, the moving party must provide  
7 evidence demonstrating the absence of any genuine dispute of  
8 material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-  
9 24 (1986). The burden then shifts to the opposing party to  
10 establish a genuine dispute. See Matsushita Elec. Indus. Co. v.  
11 Zenith Radio Corp., 475 U.S. 574, 586 (1986). In opposing  
12 summary judgment, the party cannot rely on allegations in its  
13 pleadings but instead must tender evidence in the form of  
14 affidavits and/or other admissible evidence. See Fed. R. Civ.  
15 P. 56(c); Matsushita, 475 U.S. at 586 n.11 (1986). The opposing  
16 party must also demonstrate that a disputed fact is material,  
17 that it makes a difference in the outcome of the case. See  
18 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And  
19 the party must show that the dispute is genuine, that a  
20 reasonable trier of fact could return a verdict in its favor.  
21 See Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th  
22 Cir. 1987). Neither Plaintiffs or Nationwide contend that there  
23 is a genuine dispute as to any material fact which prevents this  
24 Court from granting summary judgment on the issue that is the  
25 subject of the instant motion/cross motion.

26 B. Preclusion

27 First, Nationwide asserts that a consent decree entered in a  
28 case in the United States District Court for the Southern

1 District of Ohio conclusively determines that the Plan and Your  
2 Time Program are governed by ERISA. Nationwide Opp'n and Cross-  
3 Mot. at 8-9, 33; *McGoldrick v. Angela Bradstreet*, No. 2:08-cv-  
4 0001-JLG-MRA (S.D. Ohio Sept. 26, 2008). Nationwide contends  
5 that because the California Labor Commissioner was a party to the  
6 consent decree the Plaintiffs here are also bound, and the  
7 determination there goes "beyond *res judicata*" and requires this  
8 Court to find that ERISA governs. Id. at 33.

9 The consent decree in *McGoldrick* has no such preclusive  
10 effect. *Res judicata* (claim preclusion) applies when there is  
11 (1) an identity of claims, (2) a final judgment on the merits,  
12 and (3) privity between the parties. Cell Therapeutics, Inc. v.  
13 Lash Grp., Inc., 586 F.3d 1204, 1212 (9th Cir. 2009), as amended  
14 on denial of reh'g and reh'g en banc (Jan. 6, 2010). The  
15 Plaintiffs here were not party to the *McGoldrick* case.  
16 Collateral estoppel (issue preclusion) applies when "(1) the  
17 issue at stake was identical in both proceedings; (2) the issue  
18 was actually litigated and decided in the prior proceedings;  
19 (3) there was a full and fair opportunity to litigate the issue;  
20 and (4) the issue was necessary to decide the merits." Oyeniran  
21 v. Holder, 672 F.3d 800, 806-07 (9th Cir. 2012), as amended (May  
22 3, 2012). Again, the Plaintiffs here (against whom issue  
23 preclusion is asserted) did not have a "full and fair  
24 opportunity" to litigate this issue in the *McGoldrick* case.  
25 Additionally, because this is a consent order, the issue of  
26 whether the "payroll practices" exemption applies (and even  
27 whether ERISA preemption applies) was never "actually litigated."  
28 Arizona v. California, 530 U.S. 392, 414 (2000) (consent



1 judgments “ordinarily occasion no issue preclusion. . .”). Thus,  
2 neither issue preclusion nor claim preclusion apply.

3 Second, Nationwide argues that a decision in the United  
4 States District Court for the District of New Hampshire, as well  
5 as certain determinations by state-level administrative entities,  
6 that the Plan is governed by ERISA should persuade this Court to  
7 find the same. Nationwide Opp’n and Cross-Mot. at 9-10, 33-35.  
8 While the Court may consider these decisions for persuasive  
9 value, the Court is not bound by decisions of sister District  
10 Courts, nor state administrative agencies. This Court  
11 necessarily adjudicates disputes pursuant to the applicable legal  
12 framework and specific facts of the case.

13 C. ERISA Payroll Practices Exemption

14 ERISA regulates “employee welfare benefit plans,” which  
15 include “any plan, fund, or program . . . maintained for the  
16 purpose of providing . . . vacation benefits . . .” 29 U.S.C.  
17 § 1002(1). “[ERISA] does not further define ‘plan, fund, or  
18 program’ or ‘vacation benefits,’ and does not specify whether  
19 every policy to provide vacation benefits falls within its  
20 ambit.” Massachusetts v. Morash, 490 U.S. 107, 109 (1989).  
21 However, Department of Labor regulation 29 C.F.R. § 2510.3-(1)(b)  
22 excludes from the reach of ERISA certain “payroll practices”  
23 including the “[p]ayment of compensation, out of the employer’s  
24 general assets, on account of periods of time during which the  
25 employee . . . is on vacation . . .” 29 C.F.R. § 2510.3-1(b)(3);  
26 Morash, 490 U.S. 107 (finding employer’s policy of paying  
27 employees for unused vacation time an ERISA-exempt “payroll  
28 practice” where benefits were paid from the employer’s general

1 assets).

2 The payroll practices exemption applies here if the Your  
3 Time Program vacation benefits are paid from Nationwide's  
4 "general assets."

5 1. Benefits Reviewed Individually

6 As a preliminary issue, Nationwide argues the Court should  
7 examine the Plan as a whole (the Your Time Program together with  
8 the short-term and long-term disability benefits) in determining  
9 whether ERISA applies. Nationwide Opp'n and Cross-Mot. 1-2. On  
10 the contrary, Ninth Circuit case law suggests that the inquiry of  
11 whether the payroll practices exemption applies is focused on the  
12 particular benefit at issue. See, e.g., Alaska Airlines, Inc.,  
13 v. Oregon Bureau of Labor, 122 F.3d 812 (9th Cir. 1997)  
14 (analyzing whether payroll practice exemption applies to  
15 employer's system for payment of sick leave); Bassiri v. Xerox  
16 Corp., 463 F.3d 927 (9th Cir. 2006) (analyzing whether payroll  
17 practice exemption applies to employer's plan for payment of  
18 long-term disability benefits); see also Clay v. AT & T Commc'ns  
19 of California, Inc., No. 2:12-CV-2027-JAM-KJN, 2012 WL 5868767,  
20 at \*5 (E.D. Cal. Nov. 19, 2012), report and recommendation  
21 adopted, No. 2:12-CV-2027-JAM-KJN, 2012 WL 6560729 (E.D. Cal.  
22 Dec. 14, 2012) (holding that while the defendant's "Umbrella Plan  
23 and the Disability Program f[e]ll squarely within ERISA" the  
24 "appropriate focus of the [payroll practice exemption] analysis  
25 is the particular benefit at issue."). The Court thus focuses  
26 its inquiry on the vacation benefits of the Your Time Program.

27 2. Payment of Benefits from General Assets

28 In Massachusetts v. Morash, 490 U.S. 107 (1989), the Supreme

1 Court held that an employer's practice of paying employees'  
2 vacation benefits from the employer's "general assets" was an  
3 exempted payroll practice under 29 C.F.R. § 2510.3-(1)(b)(3) and  
4 therefore did not implicate ERISA. The Morash court also  
5 observed, however, that "the creation of a separate fund to pay  
6 employees vacations benefits" would be subject to ERISA. Morash,  
7 490 U.S. at 114.

8 The Ninth Circuit clarified that an employer must do more  
9 than simply create a separate trust for the benefits payments to  
10 be regulated by ERISA; that separate trust must actually be  
11 liable for and pay the benefits. Alaska Airlines, Inc., v.  
12 Oregon Bureau of Labor, 122 F.3d 812 (9th Cir. 1997). In Alaska  
13 Airlines, the airline established a trust for the payment of  
14 benefits but made the benefits payments directly to the employees  
15 from its general assets and then sought reimbursement from the  
16 trust. Id. at 813. The Ninth Circuit found this practice  
17 (called "advance and recapture") to be a payroll practice under  
18 the "plain words" of 29 C.F.R. § 2510.3-(1)(b) because the  
19 payment was made from the airline's general assets. Id. at 814.

20 It is undisputed that Nationwide pays the Your Time Program  
21 vacation benefits from its main funding account via a payroll  
22 cash account. Nationwide Responding Statement of Facts ¶ 24;  
23 Mostajo Responding Statement of Facts ¶¶ 17-18. Therefore, under  
24 the plain words of 29 C.F.R. § 2510.3-(1)(b), the Your Time  
25 Program is an ERISA-exempt payroll practice because the vacation  
26 benefits are ultimately paid from Nationwide's general assets,  
27 rather than a separate trust. See Alaska Airlines, 122 F.3d at  
28 814 (instructing that courts "must focus on the actual methods of

1 payment").

2       However, in Alaska Airlines the Ninth Circuit also suggested  
3 that courts must look at the substance of the payment procedure  
4 in determining whether a literal application of the regulation is  
5 proper in each case. Id. ("Applying the regulation literally to  
6 Alaska Airlines does not defeat the purposes of ERISA, because  
7 Alaska's system has more of the characteristics of an unfunded  
8 payment than of an ERISA trust fund payment.").

9       In this case, the substance of Nationwide's vacation  
10 benefits payment procedure bears more similarity to an unfunded  
11 benefit program with the true source of payments being  
12 Nationwide's general assets. Even though Nationwide's vacation  
13 benefits payment method is not an "advance and recapture"  
14 practice per se, Nationwide's main funding account remains the  
15 true proximate source of funding. On a fortnightly basis,  
16 Nationwide funds the trust account from its general assets and  
17 that same day a portion of those funds return to Nationwide's  
18 general assets, from which Nationwide pays the vacation benefits.  
19 The Trust has no other source of funding beyond Nationwide, the  
20 Nationwide Benefits Administrative Committee determines the  
21 payments to be made to the Trust and by the Trust, and the Trust  
22 has no independent recourse against Nationwide for failure to  
23 pay. Thus, the vacation benefits payments here rely almost  
24 entirely on Nationwide's, not the trust's, financial health  
25 because Nationwide is essentially funding the account on a  
26 fortnightly basis in relation to its anticipated payments.

27       Under Ninth Circuit precedent, the plain language of 29  
28 C.F.R. § 2510.3-(1)(b) controls this inquiry, and the Court finds

1 the payroll practice exemption applies to the vacation benefits  
2 payments from the Your Time Program because the undisputed facts  
3 demonstrate Nationwide pays the benefit from its general assets.

4 3. Department of Labor Four-Factor Guidance

5 Since the Court has found the Your Time Program exempt from  
6 ERISA as a payroll practice, it need not reach the parties'  
7 arguments regarding whether the Your Time Program is also exempt  
8 under the Department of Labor's four-factor guidance. See DOL  
9 Advisory Opn. No. 2004-08A (July 2, 2004) 2004 WL 2074325  
10 (Denny's Opinion), at \*3 ("Vacation pay programs that fail to  
11 satisfy all of the conditions of [exemption under 29 C.F.R.  
12 § 2510.3-1], however, are not necessarily covered by Title I of  
13 ERISA."); see also Bassiri v. Xerox Corp., 463 F.3d 927, 933 (9th  
14 Cir. 2006); Gilbert v. Securitas Sec. Servs. USA, Inc., No.  
15 CV 06-1981 CAS MANX, 2007 WL 7648314, at \*5 (C.D. Cal. Feb. 26,  
16 2007).

17 D. ERISA Preemption

18 ERISA broadly preempts state laws relating to employee  
19 benefit plans. 29 U.S.C. § 1144(a). Plaintiffs bring their  
20 claims for Nationwide's alleged failure to pay, upon termination,  
21 unused vacation time accrued through the Your Time Program as  
22 violations of California law. Nationwide alleges ERISA preempts  
23 these state law claims. However, as discussed above, the  
24 vacation benefits payments for the Your Time Program constitute a  
25 "payroll practice" within the meaning of 29 C.F.R. § 2510.3-1,  
26 rather than an employee welfare benefit plan covered by ERISA.  
27 Thus, ERISA does not preempt Plaintiffs' state law claims as to  
28 the vacation benefits.

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**IV. ORDER**

For the reasons set forth above, the Court GRANTS Plaintiffs' motion for partial summary judgment (ECF No. 29) and DENIES Defendant's cross-motion for partial summary judgment (ECF No. 39).

IT IS SO ORDERED.

Dated: November 13, 2018



JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE