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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

TINA M. HARRIS,  
  
vs.  
  
MANPOWER, INC.,  
  
Plaintiff,  
  
Defendant.

CASE NO. 09-cv-2368 BEN (JMA)  
  
ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
  
[Docket No. 25]

Before the Court is Defendant's Motion for Summary Judgment ("Motion"). For the reasons set forth below, the Motion is **GRANTED**.

**BACKGROUND**

This action is a class action that arises from the alleged nonpayment of vacation benefits at the time of an employee's termination, as required under California Labor Code section 227.3 and related provisions. Plaintiff is the only named plaintiff. It is undisputed that Plaintiff was an associate employed by Defendant from November 2008 through August or September 2009. (Compl., ¶ 18; Honesty Decl., ¶ 3.) Plaintiff does not dispute that her eligibility for vacation benefits is governed by the associate vacation policy, Paid Leave Plan and Trust Agreement, which were in effect at the time of her employment.

On October 23, 2009, the action was removed to this Court. (Docket No. 1.) The operative complaint is the First Amended Complaint that states three causes of action: (1) Violation of California Labor Code §§ 200 et seq. (First Cause of Action); (2) Unjust Enrichment (Second Cause of Action);

1 (3) Violation of Business & Professions Code §§ 17200 et seq. (Third Cause of Action). (Docket No.  
2 14.)

3 On June 30, 2010, Defendant filed the Motion currently before the Court. (Docket No. 25.)  
4 Plaintiff filed an opposition, and Defendant filed a reply.

5 For the reasons that follow, the Court **GRANTS** Defendant's Motion.

### 6 **DISCUSSION**

7 Summary judgment should be granted when "the pleadings, the discovery and disclosure  
8 materials on file, and any affidavits show that there is no genuine issue as to any material fact and that  
9 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp.*  
10 *v. Catrett*, 477 U.S. 317, 322 (1986). Defendant seeks summary judgment on two grounds: (1) all of  
11 Plaintiff's claims are preempted by federal law under the Employee Retirement Income Security Act  
12 ("ERISA"), and (2) assuming ERISA preemption does not apply, Plaintiff's claims fail as a matter of  
13 state law.

#### 14 **I. PREEMPTION**

15 ERISA's preemption provision is codified at 29 U.S.C. § 1144 and states that ERISA  
16 supercedes state laws that "relate to" an ERISA benefit plan. 29 U.S.C. § 1144. ERISA displaces all  
17 state laws "within its sphere, even including state laws that are consistent with ERISA's substantive  
18 requirements." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). The Supreme  
19 Court has interpreted this preemption provision as "deliberately expansive." *Pilot Life Ins. Co. v.*  
20 *Dedeax*, 481 U.S. 41, 46 (1987). The issue here is whether Defendant's vacation policy and related  
21 contracts constitute a ERISA benefit plan. Under the facts of this case, Defendant's vacation policy  
22 is a ERISA benefit plan if it is not a "payroll practice" under 29 C.F.R. § 2510.3-1(b)(3).

23 A policy or plan is not a "payroll practice" if vacation benefits are not paid from an employer's  
24 general assets (including a payroll account) but rather are paid from a trust account that is a bona fide  
25 separate fund, has a direct legal obligation to pay benefits under the plan, contains a contribution  
26 obligation enforceable against the employer, and contains contributions that are actuarially determined  
27 or otherwise bear a relationship to the plan's accruing liability. 29 C.F.R. §2510.3-1(b)(3); *see also*  
28 *Massachusetts v. Morash*, 490 U.S. 107, 117-18 (1989); Department of Labor Advisory Opinion 2004-

1 10A, 2004 ERISA LEXIS 11, at \* 2-3 (Dec. 30, 2004). As the Supreme Court explained, in enacting  
2 ERISA, "Congress' primary concern was with the mismanagement of funds accumulated to finance  
3 employee benefits and the failure to pay employees benefits from accumulated funds." *Morash*, 490  
4 U.S. at 115.

5 Here, it is undisputed that an employee's vacation benefits were paid through the employee's  
6 regular payroll check. (Ostroff Decl., Ex. 9, Nos. 9, 10.) It is further undisputed that, during the  
7 relevant time period, vacation benefits were paid as part of an "advance and recapture" arrangement  
8 whereby vacation benefits were paid from Defendant's payroll account, when due, and then  
9 reimbursed from a separate trust account that was maintained for the purpose of satisfying these  
10 obligations. (Ostroff Decl., Ex. 9, Nos. 9, 10, 17; Honesty Decl., ¶¶ 13-14.) The Court finds that the  
11 vacation benefits in this case were clearly paid from Defendant's general assets. However, the facts  
12 are made more complicated by the reimbursement aspect of the plan.

13 Reimbursement of funds from a trust account may bring a plan under ERISA where, as noted,  
14 the trust account has a direct legal obligation to pay benefits under the plan, contains a contribution  
15 obligation enforceable against the employer, and contains contributions that are actuarially determined  
16 or otherwise bear a relationship to the plan's accruing liability. Department of Labor Advisory  
17 Opinion 2004-10A, 2004 WL 3244869, at \* 3 (Dec. 30, 2004); *see also Villegas v. Pep Boys Manny*  
18 *Moe & Jack of California*, 551 F. Supp. 2d 982, 985-989 (C.D. Cal. 2008). In this case, it is  
19 undisputed that a bona fide separate fund existed during the relevant time period. Additionally, the  
20 evidence shows Defendant made large contributions to the trust each year, which bore at least some  
21 relationship to the accrued liability. (Honesty Decl., ¶¶ 12, 18.) However, Defendant, not the trust,  
22 was liable for the payment of benefits. (Ostroff Decl., Ex. 9, Nos. 9, 10, 17; Honesty Decl., ¶¶ 13-14.)  
23 The function of the trust was merely to reimburse Defendant for benefits paid under the vacation  
24 policy. (Honesty Decl., ¶ 10, Ex. C.) That the trust may contain an obligation to pay the benefits and  
25 an obligation on Defendant to make contributions does not change the essential nature of the trust as  
26 "a mere pass-through vehicle" for Defendant's payment of vacation benefits or result in the trust  
27 constituting a separate fund that provides genuine protections for the accrued benefits. Department  
28 of Labor Advisory Opinion 2004-08A, 2004 WL 2074325, at \* 9-10 (July 2, 2004); *see also Villegas*,

1 551 F. Supp. 2d at 991-92.

2 Accordingly, the Court finds that Defendant's vacation policy is not a ERISA plan and,  
3 therefore, ERISA preemption does not apply.

## 4 II. SUMMARY JUDGMENT

5 Defendant contends that summary judgment is still appropriate because Plaintiff's claims fail  
6 as a matter of state law. As noted, Plaintiff asserts three causes of action: (1) Violation of California  
7 Labor Code §§ 200 et seq. (First Cause of Action); (2) Unjust Enrichment (Second Cause of Action);  
8 (3) Violation of Business & Professions Code §§ 17200 et seq. (Third Cause of Action). (Docket No.  
9 14.) These claims are based on Plaintiff's allegations that Defendant's vacation policy imposed  
10 unlawful condition precedents, precluded the payment of pro rata vacation benefits, and resulted in the  
11 forfeiture of benefits. The Court only addresses those allegations that pertain to Plaintiff, as Plaintiff  
12 is the only named plaintiff in this action. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010,  
13 1013, n.1 (9th Cir. 2000).

### 14 A. WAITING PERIOD

15 It is undisputed that Defendant's vacation policy requires an employee to work 1,500 hours  
16 within a single plan year before accruing vacation benefits. (Honesty Decl., ¶ 10, Ex. G.) Once the  
17 condition is met, the employee is immediately vested with 40 hours of vacation pay benefits. *Id.*

18 In *Owen v. Macy's Inc.*, 175 Cal. App. 4th 462 (2009), the California Court of Appeals found  
19 that a similar waiting period did not violate the Labor Code. In *Owen*, the employer required an  
20 employee to work a minimum of six months before accruing vacation benefits. The court affirmed  
21 the trial court's finding that, if an express written policy forewarns new employees that they have no  
22 right to vacation benefits until a certain waiting period expires, then no vacation pay is earned and  
23 vested during that waiting period. *Id.* at 465, 470. The court noted that state law does not require an  
24 employer to grant vacation benefits and, if an employer does grant such benefits, state law does not  
25 dictate the point at which those benefits commence. *Id.* at 469-70. Accordingly, the court held that  
26 because the employee did not accrue vacation benefits during his employment, the employee's claim  
27 for forfeiture under the Labor Code failed as a matter of law.

28 Here, Defendant's express written policy clearly and unambiguously states that vacation

1 benefits do not accrue until an employee completes 1,500 hours of work, at which point the employee  
2 is immediately vested with 40 hours of vacation pay benefits. (Honesty Decl., ¶ 19, Ex. G.) It is  
3 undisputed that Plaintiff failed to work 1,500 hours. (Honesty Decl., ¶ 21.) As such, similar to the  
4 plaintiff in *Owen*, Plaintiff did not accrue vacation benefits. Although Defendant's policy conditions  
5 vacation benefits on the number of hours that an employee works rather than the number of months,  
6 the Court finds this distinction irrelevant and merely reflective of the type of employment at issue here,  
7 namely temporary employment. The Court also does not find it dispositive that the 1,500-hour waiting  
8 period must be satisfied each year, as such condition is likewise the result of the employees' unique  
9 employment.

10       Additionally, as noted, state law does not require that an employer grant vacation benefits.  
11 *Owen*, 175 Cal. App. 4th at 468. Rather, an employer must, among other things, abide by any express  
12 written policy that sets forth the employee's right to vacation benefits. *Id.* The existence of a clear  
13 and express waiting period in Defendant's policy distinguishes this case from *Suastez v. Plastic Dress-*  
14 *Up Co.*, 31 Cal.3d 774 (1982). In *Suastez*, the employer's policy stated vacation benefits began to  
15 accrue upon employment, but did not vest until after one year. The court held that the *Suastez* policy  
16 constituted an unlawful forfeiture of benefits when the plaintiff's employment terminated before the  
17 one-year period expired. Those circumstances are not present here and, therefore, *Suastez* is  
18 inapposite.

19       Accordingly, as held in *Owen*, the Court finds that Plaintiff's claims based on Defendant's  
20 "waiting period" fail as a matter of law.

#### 21                   **B.     USE-IT-OR-LOSE-IT AND OTHER PROVISIONS**

22       Plaintiff's claims are not based merely on the vacation policy's waiting period. Rather,  
23 Plaintiff also asserts claims based on the vacation policy's allegedly impermissible use-it-or-lose-it  
24 provision, 90-day work period provision, and other provisions. (Opp., 6.) As noted above, Plaintiff  
25 did not work 1,500 hours for Defendant and did not accrue vacation benefits. Therefore, these other  
26 claims do not apply to Plaintiff. Plaintiff also cites vacation policies and related contracts that pre-date  
27 her employment or pertain to "professional consultants" as opposed to "associates" like Plaintiff. *Id.*

28       At this stage of the case, because the Court only determines whether the named plaintiff's

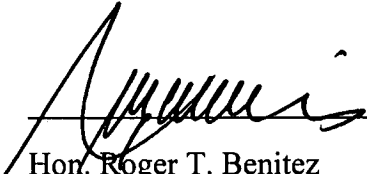
1 claims fail as a matter of law, the Court declines to address these other claims. *Aguilera*, 223 F.3d at  
2 1013, n. 1.

3 **CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Defendant's motion for summary judgment.  
5 The Clerk is directed to enter judgment in favor of Defendant and close the file in this case.

6 **IT IS SO ORDERED.**

7 Date: October 06, 2010

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10 Hon. Roger T. Benitez  
11 United States District Court Judge  
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