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Highlights of the Month

- 1. Small Health Plans Must Send HIPPA Privacy Reminder by April 14, 2007**
- 2. Legislative, Regulatory and Litigation Update on 401(k) Fees**
- 3. EBSA Issues Interim Final Rule on Pension Distributions under Qualified Domestic Relations Orders (QDROs)**
- 4. IRS Guidance on PPA Changes to Limits on Plan Contribution Deduction Limits**
- 5. IRS Approves the Use of Unused Vacation and Sick Leave to Fund Health Reimbursement Arrangements**
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- 7. ERISA Preemption of Maryland’s “Wal-Mart” Health Care Law**
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Small Health Plans Must Send HIPPA Privacy Reminder by April 14, 2007

The Health Insurance Portability and Privacy Act (HIPPA) regulations provide that health plans are required to remind participants about their existing privacy notices every 3 years. Small health plans, i.e., health plans with annual receipts of \$5 million or less, that issued their initial notice by the April 14, 2004 deadline are required to send the reminder notice by April 14, 2007. The Department of Health and Human Services (HHS) website (<http://www.hhs.gov/hipaafaq/notice/1065.html>) contains a frequently asked question (FAQ) about the Notice of Privacy Practices. The FAQ states that there are several ways to meet the notice requirement. These methods include:

- ❖ Sending a copy of the notice,
- ❖ Sending a reminder that the notice exists and explaining how to obtain a copy, or
- ❖ Inclusion of a reminder in a plan newsletter or other publication information about the notice and how to obtain a copy.



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Health Plans may have already satisfied this notice requirement by:

- ❖ Sending copies of the notice to subscribers and enrollees annually;
- ❖ Including information regarding the availability of the notice and how to obtain a copy in the annual employee communications, e.g. annual enrollment materials, or
- ❖ If the health plan has amended its notice recently and sent the revised notice to all subscribers and enrollees.

Legislative, Regulatory and Litigation Update on 401(k) Fees

Legislative: On March 6th the House Education and Labor Committee (the “Committee”) held hearings regarding the fees that are charged with respect to 401(k) plans. Several individuals testified that there is a need for better disclosure of fees to participants in 401(k) plans and to the companies that sponsor the plans. The Committee estimates that approximately 50 million workers are covered under 401(k) type plans. Excessive fees charged on 401(k) plans reduce the participant’s retirement income. Stephen Butler of Pension Dynamics Corporation testified that excessive fees charged over the past 20 years have reduced participant accounts by an average of 15%.

Representative Miller said that the Committee will examine what steps are necessary to make sure that workers know how much they are paying in fees on their retirement savings plans. He also said that workers using a 401(k) or similar type plan ought to have all the information regarding returns and fees in order to make an informed decision as to what investment options are the most appropriate for them.

Regulatory Update on Fees: The Employee Benefits Security Administration (EBSA) continues to work on a project that will require greater disclosure of fees that are associated with various investment options in defined contribution plans. In March EBSA issued a statement saying that it was making 401(k) fee disclosure a top priority and that it will publish a proposed regulation this spring. The proposed regulation will require service providers to disclose information concerning direct and indirect compensation, fees and other financial arrangements.

Litigation Update: A dozen similar lawsuits alleging that plan sponsors violated their fiduciary responsibilities by allowing excessive fees to be charged against 401(k) plan participant accounts are in various stages. All of these lawsuits allege that investment-related fees paid to third party administrators to perform recordkeeping and other financial services are unlawful and that the participants are entitled to more savings than they have accumulated.



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Recently a federal judge threw out part of the class action lawsuit against Chicago based Exelon Corp. The lawsuit sought to recover monetary relief for (1) direct losses experienced as a direct result of the fiduciary breach of duty to the participants to manage the plan in the best interests of the plan participants and beneficiaries and only incur reasonable expenses and (2) investment losses attributable to the “ups and downs of the financial markets.” In a brief opinion, the court allowed the lawsuit to continue on the issue of whether the participants’ accounts had suffered direct losses as a result of unreasonable fees and the failure to disclose those fees. However, the court dismissed the portion of the complaint seeking to recover monetary relief for investment losses, stating that the participants’ complaint failed to allege a connection between the administrative fees charged and the market-based losses.

In addition, a federal judge ruled that the complaint against Kraft Foods could proceed since it properly sets forth claims of a breach of fiduciary duty and easily withstands scrutiny.

EBSA Issues Interim Final Rule on Pension Distributions under Qualified Domestic Relations Orders (QDROs)

On March 7th EBSA issued an interim final rule regarding QDRO requirements under ERISA. The Pension Protection Act of 2006 (PPA) required EBSA to issue regulations clarifying:

1. A domestic relations order that otherwise meets the requirements to be a QDRO will not fail to constitute a QDRO merely
 - a. because the order is issued after, or revises, another domestic relations order or QDRO or
 - b. because of the time at which it is issued, and
2. Any order described in (1) shall be subject to the same requirements and protections which apply to QDROs.

This interim rule clarifies that a domestic relations order will not fail to satisfy the requirements to constitute a QDRO solely because it is issued after or revises another domestic relations order or QDRO.

With respect to the issue of timing, the interim rules provide that a domestic relations order will not fail to be treated as a QDRO solely because of the time at which it is



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issued. This means for example that a domestic relations order cannot be denied QDRO status solely because it is issued after the death of a participant or after the couple has already divorced. Additionally, the interim rule provides that an order will not be denied QDRO status solely because it is issued after the participant's annuity starting date.

It is still important to note that while the order cannot be denied QDRO status solely because of one of the above reasons, such order might still fail to qualify as a QDRO if it fails to satisfy all other requirements of a QDRO, for example, if the domestic relations order requires a type or form of benefit that is not provided for in the plan, then the domestic relations order would fail to be a QDRO.

IRS Guidance on PPA Changes to Limits on Plan Contribution Deduction Limits

The Pension and Protection Act of 2006 (PPA) made changes to the tax deduction for employers that sponsor defined benefit pension plans and modified the combined limit on deductions for contributions to both defined benefit plans and defined contribution plans that cover the same group of employees. The changes made by PPA are:

- ❖ Increased maximum deductible limit to 150% of current liability for single employer plans (only applicable for 2006 and 2007 plan years);
- ❖ Repealed the special rule that permitted employers to use different rates to calculate current liability for minimum funding rules and maximum deductible contributions, i.e.,
 - Long-term corporate bond rate for minimum funding rules and
 - 30-year Treasury rate for maximum deductible contributions;
- ❖ Limited the application of the combined defined benefit/defined contribution tax deductible contribution limit to situations where the employer's contribution to defined contribution plans exceed 6% of compensation.

Also, when determining the deductible limit based on the 2006 changes, the limit is determined as of the plan year valuation date and adjusted for interest to the end of the plan year or the end of the employer's taxable year, whichever is earlier.

IRS Notice 2007-28, 2007-14 IRB, contains guidance regarding the employer's tax deduction for years beginning in 2006. PPA also made changes to the maximum deductible limits for 2008 and later taxable years. However, IRS will issue guidance on these rules in the future.



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Different Employer Tax Year and Plan Year. The new limitations are effective for an employer's taxable year that begins after 2005. In many instances an employer's taxable year is different than the plan year. The Notice gives the employers the following alternatives for calculating their maximum deductible limits:

- ❖ The deductible limit for the plan year beginning in the employer's tax year,
- ❖ The deductible limit determined for plan year ending in the employer's tax year, or
- ❖ A weighted average of the first two alternatives.

The plan year that is used in any of these alternatives is the associated plan year. Whichever alternative the employer selects, the deductible limit for a taxable year must be based on one or more associated plan years and must reflect the law in effect for the taxable year rather than the associated plan year. The Notice contains two examples of the application of these rules:

Example 1: For the employer's 2006 tax year, any associated plan year must reflect the 2006 changes. Thus, if the employer's deductible limit is determined based on a plan year that began in 2005 but ends in 2006, the calculation of the limit with respect to that plan year must reflect the use of an interest rate within the permissible corporate rate range that was used for purposes of calculating the minimum funding limitation under IRC § 412 and must reflect the limitation based on 150% of the current liability under IRC § 404(a)(1)(D). The funding method and other actuarial assumptions that were used for purposes of IRC § 412 for that plan year must also be used for the calculations of the deductible limit.

Example 2: For an employer that has a taxable year that began in 2005 and ends in 2006 and sponsors a plan with a plan year that is the calendar year, the deductible limit must not reflect the 2006 changes. For example, the employer's tax year began on July 1, 2005 and ends June 30, 2006 and the deductible limit is based on the plan year that began in the taxable year, i.e., 2006 calendar year, the calculation of the deductible limit must be limited to 100% of the unfunded current liability and may use either the 30-year Treasury rate or the corporate rate.

Combined limit. This limitation applies to employers who sponsor both a defined benefit plan and one or more defined contribution plans that cover the same employees. Prior to the amendment by PPA, an employer's deductible limit for total contributions to all plans was the greater of

1. 25% of compensation or



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2. The amount necessary to fund the defined benefit plan's minimum funding requirements, but not less than the plan's unfunded current liability.

Beginning in 2006, this limitation was changed to exclude from consideration any contributions that the employer makes to multiemployer plans and to only consider employer contributions in excess of 6% of compensation to defined contribution plans. In calculating the percentage employer contribution to defined contribution plans, the employee elective deferrals are disregarded. Thus, a 401(k) plan that is funded solely with employee elective deferrals is not taken into account in determining the combined plan limit.

IRS Approves the Use of Unused Vacation and Sick Leave to Fund Health Reimbursement Arrangements

IRS recently issued a Private Letter Ruling (PLR 200708006) which confirmed that employers can fund health reimbursement arrangements (HRAs) with an employee's unused vacation and sick leave if certain conditions are met. The question raised in the PLR request was whether an HRA plan was eligible for the gross income exclusion for employer provided health benefits and the gross income exclusion for benefit payments from employer-provided health plans. The PLR applied the principles of Revenue Ruling 2005-24, 2005-1, C.B. 892, which held that employers could fund an employee's HRA with an employee's unused vacation and sick leave as long as the employee does not have the option to take the converted benefits in cash. This PLR highlights the fact that HRAs are viable alternatives to health savings accounts (HSAs).

Facts. The employer proposed to establish an HRA plan that would be available to its eligible retiring employees, their spouses and dependents. Eligibility in the HRA would be limited to employees who regularly worked at least 20 hours per week and who met a 30 day waiting period. All retiring employees who met these requirements would automatically be covered by the HRA plan.

Only the employer would make contributions to the HRAs. The employer's contributions would include discretionary contributions and contributions based on sick leave and vacation conversion arrangements. The unused vacation and sick leave eligible for conversion was divided into 3 categories:

1. Vacation and sick leave accrued before the plan's effective date;
2. Annual excess vacation and sick leave that would otherwise be forfeited or paid out at year end; and



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3. Accumulated and unused vacation and sick leave upon retirement.

The employer had the sole discretion to determine the amount or percentage of each category of unused vacation and sick leave that would be converted to HRA contributions.

The employer represented that the HRAs would only be available to pay medical expenses incurred by covered retirees, their spouses or dependents, and for no other purpose. When a covered retiree dies, his/her surviving spouse and dependents could continue using the HRA to pay medical expenses. Any HRA balances remaining after the covered employee and his/her spouse and dependents have died would be forfeited.

IRS Analysis. The IRS stated that the HRA will qualify for the gross income exclusions only if:

1. The HRA is funded solely by the employer and not pursuant to a salary reduction election or otherwise under a cafeteria plan, i.e., an IRC § 125 plan;
2. The HRA only reimburses covered employees or retirees for permissible medical expenses under IRC § 213(d) incurred by the employee or retiree and his/her spouse and dependents; and
3. The HRA provides reimbursements up to a maximum dollar amount, and allows for the carryover of unused balances from one coverage period to the next.

The law requires that HRAs be funded solely with employer contributions and not with any employee salary reduction elections. Therefore, the employer wanted to ensure that the sick leave and vacation conversion arrangement did not violate this requirement. The PLR stated that the HRA as described did not violate this requirement or any other HRA requirement presumably because the employer was the only party who had discretion in deciding if these unused benefits would be converted to cash, contributed to the HRAs or used to pay for other benefits.

Therefore, it was critical that the employees or retirees were not given the option to take unused vacation or sick leave in cash or have an equivalent amount contributed to the HRA.



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District Courts Rule that Cash Balance Plans were not Age Discriminatory

A 7th Circuit District Court in Illinois and an 8th Circuit District Court in Missouri have both ruled that cash balance plans were not age discriminatory. An Illinois District Court recently ruled in *Wheeler v. Pension Value Plan for Employees of the Boeing Co., et al.*, (2007, DCt IL) 2007 WL 781908, AFTRCOVER 2007-646) that Boeing's cash balance plan was not age-discriminatory and that the plan did not violate ERISA's anti-backloading provisions. Additionally, an 8th Circuit District Court rendered a similar ruling in *Sunder, III v. U.S. Bank Pension Plan, et al.*, (2007, D MO) 2007 WL 541595.

The Boeing Plan. In 1997 Boeing merged with the McDonnell Douglas Company and McDonnell Douglas employees became Boeing employees. In 1999, Larry Wheeler and other former McDonnell Douglas employees became participants in the Pension Value Plan for Employees of the Boeing Co. (the "Boeing Plan"). Like all cash balance plans the Boeing Plan established a hypothetical Credit Based Account (CBA) for each participant. Each year a participant received an annual benefit credit to his CBA plus an interest credit that was based on the 30-year Treasury rate. To counterbalance reductions in accrued benefits as a percentage of compensation over time the Boeing Plan provided participants who were age 50 or older with annual benefit credits of 11% of pay. Younger participants received lower annual benefit credits. For example, plan participants under age 30 received annual benefit credits of 3% of pay. In addition, the Boeing Plan established a floor of 5.25% and a maximum of 10% for interest credits.

Wheeler and several other former McDonnell Douglas employees sued the Boeing Plan alleging that the plan violated ERISA's anti-backloading provisions and was also age discriminatory.

Wheeler argument was that the Boeing Plan violated the "133 1/3% rule" since the plan's interest credits were based on a variable index (Treasury's 30-year rate) and that changes in the 30-year rate were "likely to cause" the interest credits allocated to participants in later years to be more than 1/3 higher those allocated to participants in earlier years. The Court rejected Wheeler's argument and stated that under ERISA § 204(b)(1)(B)(iv) and the parallel IRC § 411(b)(1)(B)(iv), the Boeing Plan was entitled to treat relevant factors used in determining benefits as unchanged from year to year. The Court further stated that by using a 5.25% interest rate, the plan was able to show that a participant's benefits would never increase more than 1/3 in any year.



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Wheeler countered this argument by stating that the actual effect of using a variable interest rate to determine the interest credits would be likely to cause backloading. The Court rejected this argument and stated that the Boeing Plan was clearly frontloaded. The Court noted that under IRS Notice 96-8 the 30-year Treasury rate was one of several indices that were classified as safe harbor interest rates and that the use of the 30-year Treasury rate would deem the plan to be frontloaded. The Boeing Plan provided that in the event the 30-year Treasury rate fell below 5.25% the participants would continue to receive interest credits of 5.25%, i.e., a floor. Additionally, when the Treasury rates rose the Boeing Plan would increase to interest credits up to a maximum of 10%. The Court held that plan was not backloaded and, therefore, there was no claim for which the Court could grant relief.

With respect to the age discrimination claim, the Court stated that it was required to follow the opinion rendered in *Cooper v. IBM*, (2006, CA7) 457 F.3d 636, cert den. (2007, S.Ct.) 2007 WL 91579 by the 7th Circuit Court of Appeals since it was a 7th Circuit district court. The Court held that there was no dispute that the Boeing Plan was age-neutral and that its contribution rate did not change due to age, the Court found that *Cooper* must be followed and dismissed the age-discrimination claim.

The Court granted Boeing motion to dismiss and held that Wheeler's claims were "incurably defective" and that granting him the ability to amend his claims would only needlessly prolong the litigation. Therefore, the Court dismissed the claims with prejudice and without leave to amend.

U.S. Bancorp Plan. Through a series of acquisitions U.S. Bancorp became the successor to Mercantile Bancorporation (Mercantile). Mercantile was the plan sponsor of the Mercantile Bancorporation Inc. Retirement Plan (the Mercantile Plan). In 1998 the Mercantile Plan was converted to a cash balance plan, under which participants would receive pay credits and interest credits. The pay credits were a percentage of a participant's pay and increased as the participant aged. Annual interest credits were added to the participant's hypothetical account balance at the rate of the greater of the annual yield on 10-year Treasury notes or 5.5%. The Mercantile Plan also permitted participants to elect to receive a lump sum payment at retirement or to take the payment options that were previously available under the traditional defined benefit pension plan. The Mercantile Plan's name was changed to the U.S. Bank Pension Plan (the U.S. Bancorp Plan).

Edward Sunder III and Louis Jarodsky were former long service employees of Mercantile with 31 and 22 years of service, respectively. They both resigned from Mercantile on August 28, 2000. Both elected to receive lump sum distributions (Sunder - \$493,000 and Jarodsky - \$379,000) from the Mercantile Plan. At the time the Mercantile Plan was



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converted Sunder's account balance was \$394,000 and Jarodsky's was \$297,000. Sunder and Jarodsky filed suit alleging that the Mercantile Plan was age-discriminatory and that their opening account balances had been improperly calculated.

The U.S. Bancorp Plan initially attempted to have the case dismissed for lack of standing to bring an ERISA § 204(b)(1)(H) claim. The U.S. Bancorp Plan's argument was based on the fact that this age discrimination provision only applies to benefit accruals after age 65 and both Sunder and Jarodsky were under age 65. In ruling that the plaintiffs had standing, the Court held that while there was some support for the U.S. Bancorp Plan's claim based on ERISA's legislative history, the statute's plain language stated that discrimination on the basis of "the attainment of any age" was a violation. Thus, the Court held that the plaintiffs had standing to sue.

The Court next ruled that cash balance plans even when viewed as defined benefit plans under ERISA do not violate the age discrimination rules. The Court cited *Register v. PNC Bank Financial Services Group, Inc.* (2007, CA3) 477 F.3d 56, 2007 WL 222019 for the proposition that although a cash balance plan is a defined benefit plan, the benefit is the balance in the hypothetical account, and not an age 65 annuity. The Court also cited *J.P. Morgan Chase Cash Balance Litigation*, (2006, SDNY) 460 F.Supp.2d 479, 2006 WL 3063424 in stating that the key issue in resolving the age discrimination claim is whether the phrase "rate of accrual" in ERISA § 204(b)(1)(H) refers to the employer's contributions to the plan or the employee's retirement benefit. In *JP Morgan* the District Court held that "rate of benefit accrual" referred to the employer's contribution to the plan and not the employee's benefit on retirement.

In reaching its conclusion the Court stated that the definition of "benefit" as meaning the cash balance account was further supported by contrasting the term "benefit accrual," which is used in ERISA § 204(b)(1)(H), with the term "accrued benefit." The Court stated that the two terms were distinct terms and that ERISA only defined "accrued benefit" and that if Congress had intended that "rate of benefit accrual" and "accrued benefit" to mean the same thing it would have said so.

The Court stated that although changing hypothetical employer pay credits and interest credits into a lump sum figure required a future value projection out to normal retirement age and then discounting that amount to present value it was not persuaded that this calculation negated its findings that the benefit the employee received is the hypothetical employer contributions and interest credits. The Court also stated that the alleged discrepancy between two similarly situated employees, who have completed the same number of years of service, is based on the increased benefit due to the time value of money, since a younger person – having more years to retirement – receives more money



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at retirement than the older person. However, the Court stated that this difference is based on time not age. The Court cited the following example to support its conclusion:

Example: If a 60 year old and a 40 year old were to each work for the company for 20 years, and receive the same salary over the same period, then under a cash balance plan, they would each have received the same contributions into the plan.

Thus, the Court stated that the discrimination is not based on age but on the time value of money, a characteristic correlated with age but not age itself. Therefore, the Court held that the cash balance plan was not age discriminatory and did not violate ERISA § 204(b)(1)(H).

Sunder and Jarodsky had also alleged that the plan used an unreasonably high interest rate (8%) to calculate their lump sum payments in violation of IRC § 417(e)(3) and that this rate violated the anti-cutback rule in ERISA § 204(g). The Court held that the cash balance conversion eliminated only early retirement benefits, not accrued benefits and, therefore, the Court dismissed the anti-cutback claim. However, the Court did find that Sunder and Jarodsky provided evidence of a genuine issue of material fact regarding the plan's use of the 8% discount rate in determining their lump sum payouts but not in calculating their opening balance in their hypothetical accounts in the cash balance plan. Thus, the Court denied the U.S. Bancorp's motion for summary judgment on the issue of the lump sum payout determination.

ERISA Preemption of Maryland's "Wal-Mart" Health Care Law

A 4th Circuit Court panel upheld the Maryland District Court's ruling that ERISA preempted Maryland's Fair Share Health Care Fund Act which was scheduled to take effect on January 1, 2007. The law was enacted to require certain large employers either to provide health insurance coverage for their employees or to pay money into the state's Medicaid fund. (*Retail Industry Leaders Ass'n v. Fielder* (2007, CA4) 475 F.3d 180, 2007 WL 102157)

Background. On January 12, 2006 the Maryland General Assembly enacted the Fair Share Health Care Fund Act (the "Act") which required Maryland employers with 10,000 or more employees to spend at least 8% of their total payroll on employees' health insurance costs or to pay the shortfall between what the employer spent on health insurance and the 8% into the state's Medicaid fund. This law was commonly referred to as the Wal-Mart Health Care law since it was the culmination of a campaign to force Wal-Mart Stores, Inc. to increase health insurance benefits for its 16,000 Maryland



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employees. The minimum spending provision in the law was crafted just to affect Wal-Mart.

The Retail Industry Leaders Association (RILA) brought suit against James D. Fielder, Jr., Maryland Secretary of Labor, Licensing, and Regulation, in his capacity as a representative of Maryland to obtain a declaratory judgment that the Act was preempted by ERISA, and to enjoin the Act's enforcement on or after its effective date. Wal-Mart is a member of RILA. On cross-motions for summary judgment, the District Court entered judgment declaring that the Act was preempted by ERISA and was not enforceable. Fielder appealed on behalf of the State of Maryland.

The Appeal. A panel of the 4th Circuit affirmed the District Court's ruling. The Court held that because the Act effectively required employers in Maryland covered by the Act to restructure their employee health insurance plans, the Act conflicted with ERISA's goal of permitting uniform nationwide administration of these plans. Therefore, the Act was preempted by ERISA.

The Court said that an examination of the Act's legislative history made it clear that the Maryland legislature fully intended that the law force Wal-Mart to increase its spending on healthcare benefits rather than to pay money to the state. In reaching this conclusion, the panel cited a statement made by one of the Act's sponsors in a floor debate. This the court opined exemplified evidence that the Maryland legislature intended the Act to force large employers to restructure their health plans or pay a penalty to the state. The Court concluded that the impact of the Act was an impermissible infringement on ERISA's primary objective of providing a uniform, national system of benefit plan administration regulation. The Court further stated that this would require additional recordkeeping on the part of effected employers which was clearly an interference with the administration of an employer's ERISA benefit plans. Thus, the Act had a direct regulatory effect on plan administration and was preempted by ERISA and unenforceable.

Court Rules that Vacation Plan is Not an ERISA Plan

ERISA excludes certain types of benefits from the definition of an employee benefit if they are considered payroll practices. Vacation benefits are one of the benefits that are considered payroll practices if the benefits are paid to the employees from the employer's general assets. In *Polk v. Adecco USA, Inc.*, 2007 U.S. Dist. LEXIS 16637 (N.D. Ill. 2007), the employer attempted to avoid state wage laws by claiming that its vacation plan did not fall within the payroll practices exemption and was an ERISA covered plan.



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In order to support its claims, the employer stated that it operated the vacation plan as an ERISA covered plan and filed Form 5500s. The vacation plan's funds were held in 5 bank accounts. Four of the five bank accounts were set up in the employer's name and federal employer identification number (EIN). The fifth account was set up in the name of the VEBA trust and under the VEBA's EIN after the plan's auditors advised the employer that employer-owned bank accounts were not sufficient to create a funded ERISA plan. When vacation benefits were paid from the VEBA account, the monies were routinely transferred to the employer's general account and benefits were paid through the employer's payroll system for "administrative convenience."

The Court found that it was dispositive that the vacation benefits were paid from the employer's general assets and under its EIN. Therefore, the Court ruled that the vacation plan was not an ERISA plan and remanded the case to state court to hear the employee's state law claims.

This case is similar to several cases that have been decided regarding employers who established VEBA trusts to fund vacation benefits. Both the courts and the Employee Benefits Security Administration (EBSA) have ruled that even when a separate trust exists, if it is not a bona fide separate trust that satisfies certain requirements including the requirement that the trust have a direct legal obligation to pay benefits, the plan that is funded through the trust is not an ERISA covered plan and is subject to state law.