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THE IMPACT OF ERISA ON COLLECTIVE BARGAINING

Mona N. Glanzer*

INTRODUCTION

In recent years, employee retirement benefits have become an increasingly important issue in the collective bargaining process. Recognizing the need to safeguard the interests of the "millions of employees and their dependents [who] are directly affected by [pension] plans," Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA). While ERISA does not require employers to make pension benefits available to employees, a plan, once created, is subject to extensive regulation under the statute.  


3 ERISA includes within its coverage employee welfare benefit plans, which provide for medical or hospital care, benefits covering sickness, accident, death, disability or unemployment, vacation benefits, apprenticeship or training programs, day care centers, scholarship funds, prepaid legal benefits and benefits under section 302(c) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c) (1976). See ERISA § 3, 29 U.S.C. § 1002 (1976). This article will focus solely upon those provisions of ERISA which affect employee pension benefit plans.

ERISA preempts all state laws governing employee benefit plans, except those relating to insurance, banking and securities. ERISA § 514(a), 29 U.S.C. § 1144(a)-(b) (1976); see Cate v. Blue Cross & Shield, 434 F. Supp. 1187, 1190 (E.D. Tenn. 1977). In Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977), aff'd per curiam, 571 F.2d 502 (9th Cir.), cert. denied, 47 U.S.L.W. 3222 (U.S. Oct. 3, 1978), the court ruled that a state healthcare plan did not control minimum funding, reporting or disclosure standards, but that these provisions were subject to ERISA. 425 F. Supp. at 1297, 1302. While a state cannot regulate an "employee benefit plan" by labelling it "insurance," neither can an insurer market an insurance package free of state control by calling it an "employee benefit plan." Bell v. Employee Sec. Ben. Ass'n, 437 F. Supp. 382, 390 (D. Kan. 1977).

Initially, this Article will review some of the specific requirements of ERISA which are likely to be topics of negotiation between union and employer representatives. The balance of the Article will be devoted to a discussion of the interplay of ERISA and the National Labor Relations Act (NLRA), and particular problems which may arise during the course of negotiations and after a collective bargaining agreement has been concluded.

**Types of Pension Plans**

Qualified pension plans under ERISA can be grouped into two general categories: defined benefit and defined contribution. Under a defined benefit plan, a fixed benefit is guaranteed the employee at retirement. An employer who funds a defined benefit plan is obliged to make such payments into the fund as are required to ensure that the promised benefit will be paid upon retirement. In contrast, under a defined contribution plan the employee is not guaranteed a fixed benefit. Rather, the plan establishes a contribu-

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5 ERISA §§ 3(35), 1015, 29 U.S.C. § 1002(35); I.R.C. § 414(i). Labor Department statistics indicate that, as of 1974, there were 250,000 defined contribution plans and 100,000 defined benefit plans in existence. See Policies and Problems, supra note 4, at 545 n.40, 546 n.42 (citing 120 Cong. Rec. 16,552-53 (1974)). See also [LRX] LAB. REL. REP. (BNA) 129-30 (1975).


7 A “defined contribution plan” or “individual account plan” is one which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

tion formula which reflects income earned, expenses, gains and losses and determines the amount contributed to each participant's account.⁴ The liability of an employer in a defined contribution plan is limited to the fixed periodic contribution set forth in the collective bargaining agreement.⁵

**PARTICIPATION AND COVERAGE REQUIREMENTS**

In order to qualify under ERISA, all benefit plans must meet certain minimum participation requirements. For the purposes of negotiation, the minimum age requirements and the determination of years of service are most relevant. Generally, a plan must permit employee participation not later than age 25 or completion of 1 year of service.¹⁰

Computing years of service poses significant problems. A year of service is defined as "a 12-month period during which the employee has not less than 1,000 hours of service."¹¹ An hour of service includes each hour for which the employee is paid or entitled to be paid¹² by the employer, and each hour for which the employee has received backpay,¹³ by either a grievance or judicial procedure, up to a maximum of 501 hours.¹⁴ The above method of computing years and hours of service is not utilized, however, if the employer uses the elapsed time method of computing service time, in which case accrual is based on the total period of employment rather than the

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⁴ ERISA §§ 3(34), 1015, 29 U.S.C. § 1002(34) (1976); I.R.C. § 414(i); see Connolly v. PBGC, 581 F.2d 729 (9th Cir. 1978). Examples of defined contribution plans are profit sharing plans, stock bonus plans and money purchase pension plans. See S. THOMPSON, PENSION REFORM: HOW TO COMPLY WITH ERISA 3-30 (1976).


¹² 29 C.F.R. § 2530.200b-2(a)(1) (1977). Hours for which the employee is "entitled" to be paid notwithstanding the lack of actual service includes time spent on vacation, jury duty, military leave and leave of absence. Id. § 2530.200b-2(a)(2). Nonworking service, however, does not include time covered by state workmen's compensation laws, unemployment compensation laws, disability laws, medical plans or severance pay. Id. § 2530.200b-2(a)(2)(ii).

¹³ Id. § 2530.200b-2(a)(3).

¹⁴ Id. § 2530.200b-2(a)(2)(i), (a)(3).
actual completion of a given number of hours. Computation of the employee’s hours of service begins with the first hour of employment until the date of severance. The severance from service date occurs immediately upon discharge, death, retirement or voluntary termination. If the employee leaves for other reasons such as disability, vacation, layoff, or leave of absence, however, the severance date does not occur until 12 months following the beginning of an absence from active employment. Thus, if an employee is given a 1-year leave of absence or layoff from the firm, that period would be included as service under the plan. Significantly, an employer would not use this method of computing service time if layoffs were prevalent and if it would have a disruptive effect upon the funding of the plan. It should also be noted that in the event there is a layoff and the employee quits or is discharged during the period of layoff and reemployed within 12 months of the absence, for purposes of eligibility and vesting, the employee is given full service credit for his period of severance.

Generally, all of the employee’s years of service are counted when determining the minimum service requirements under the plan. Break in service rules, however, are the exception. If an employee has a period of 12 consecutive months during which he has not completed more than 500 hours of service, there are three instances where service in prior years will not be counted toward an employee’s minimum service requirements. The first involves a participant who has no vested benefits when the break in service begins. The years of service before the break are not included “if the number of consecutive 1-year breaks in service equals or exceeds the aggregate number of such years of service before such break.” Second, service prior to a break is not included when determining whether the employee has satisfied the minimum requirements unless the employee completes 1 year of service after his return. Third, where the plan provides for full vesting after 3 years of service, service prior to a 1-year break need not be included for those employees who have not met the 3-year eligibility requirement at

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11 Id. § 2530.200b-9(a)(1).
12 Id. § 2530.200b-9(a)(2)(i).
13 Id. § 2530.200b-9(a)(2)(ii).
15 Id.
16 Id. § 2530.200b-g(a)(3)(vi), (c)(2)(iii)(A).
18 ERISA § 1011; I.R.C. § 410(a)(5)(C).
19 ERISA § 1011; I.R.C. § 410(a)(5)(D).
the time of break in service.\textsuperscript{24}

ERISA also requires that certain coverage standards be met before a plan will qualify. The statute establishes a percentage test under which a plan will qualify if it covers at least 70\% of all employees,\textsuperscript{25} or 80\% of all eligible employees where at least 70\% of all employees are eligible for membership under the terms of the plan.\textsuperscript{26} Alternatively, a plan will qualify without regard to percentage coverage if it benefits all the employees that "qualify under a classification set up by the employer."\textsuperscript{27} Concerned that an employer may unfairly classify employees for purposes of eligibility, Congress added the proviso that the classification not be discriminatory in favor of "officers, shareholders or the highly compensated."\textsuperscript{28} An employer who wishes to set up a classification must receive a determination from the IRS that the plan does not discriminate in the prescribed manner.\textsuperscript{29} It is important to note that the coverage of employees continues to be a relevant factor even after a plan has been established, since an initial qualification will not sustain a plan if it becomes discriminatory in actual operation.\textsuperscript{30}

While the provisions of ERISA proscribe classifications based on an employee's status, both the employer and the union should be aware of statutes which prohibit employment practices which discriminate on the basis of age or sex. There has been a widespread and common practice of forced retirement at the age of 65 due to

\textsuperscript{24} ERISA § 1011; I.R.C. § 410(a)(5)(B). An additional problem arises for successor employers since, under John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964), a successor employer is required to honor an employee's years of service for his predecessor if he continues the former employer's plan. \textit{Id.} at 548; see ERISA § 1015; I.R.C. § 414(a)(1). If the successor institutes a plan unlike his predecessor's, however, the prior years of service would be counted only in very limited circumstances. ERISA § 1015; I.R.C. § 414(a)(2). \textit{But see} Fillion & Trebilcock, \textit{The Duty to Bargain Under ERISA}, 17 WM. & MARY L. REV. 251, 271 (1975).

\textsuperscript{25} ERISA § 1011; I.R.C. § 410(b)(1)(A).

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} ERISA § 1011; I.R.C. § 410(b)(1)(B). Eligibility requirements may be modified by establishing criteria or classifications such as age, length of service or job group. For example, under a defined benefit plan which provides for 100\% vesting after 1 year of service, a maximum age may be imposed provided the employees began their employment at an age at least 5 years less than the plan's normal retirement age. ERISA § 1011; I.R.C. § 410(a)(2). Otherwise, an employer would be reluctant to hire an older job applicant since his full benefits must be funded within a short period of time. ERISA does not permit exclusion of a participant who is older than normal retirement age where the plan is set up as a defined contribution plan.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} Notwithstanding the Internal Revenue Code's prohibition on discrimination in favor of officers, shareholders or highly paid employees, the plan may distinguish between current and new employees without losing its qualification status. ERISA § 1011; I.R.C. § 410(b)(1)(A); Treas. Reg. § 1-410(a)-3(d)-(e) (1978).

\textsuperscript{30} ERISA § 1012(a); I.R.C. § 411(d)(1).
the problems which arise as a result of the continued presence of employees over the age of 65 on the payroll. The majority of defined benefit pension plans in existence specify the later of age 65 or the tenth anniversary of participation in the plan as the normal retirement age. When an employee reaches retirement age, his rights have fully vested and he is then entitled to terminate his employment and receive a pension without any forfeiture. Indeed, many plans make it actuarially disadvantageous to remain an active employee beyond the normal retirement age. Benefits may stop accruing so that subsequent earnings will not increase a participant’s accrued benefits. In some plans, if the employee retires after normal retirement age he will receive the same benefit level as if he had retired at the normal retirement age despite the fact that his life expectancy is now shortened by the number of years he has worked beyond normal retirement age. Additionally, the employee may not be allowed to begin drawing a pension without actually terminating employment.

Of relevance to any discussion of plan provisions respecting a participant’s age are the 1978 amendments to the Age Discrimination in Employment Act of 1967 (ADEA), which increase the mandatory retirement age from sixty-five to seventy.\(^1\) The amendments also provide:

> It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of . . . any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall exclude the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.\(^2\)


Clearly, under the 1978 amendments to the ADEA, employee benefit plans may not be used as a device for imposing mandatory retirement before age seventy; but, it is still necessary to balance the requirements of ERISA against the provisions of the ADEA. In this respect, the recent testimony by a Labor Department official before Congress is relevant. According to this official: neither the ADEA nor ERISA requires pension plans to credit years of service after normal retirement age for purposes of benefit accrual; neither Act requires the pension payable to a participant who works beyond the normal retirement age to be the actuarial equivalent of the pension he would have been paid at normal retirement age; and, if a plan participant does work beyond normal retirement age, neither the ADEA nor ERISA requires this pension to begin before actual retirement. It is clear that in a collective bargaining situation these views could not be used as a basis for the unilateral imposition of mandatory retirement at an age beyond the plan retirement age in order to comply with ADEA.

While the effective date of the increase in the mandatory retirement age is January 1, 1979, the provision denying a plan the right to involuntarily retire a member takes effect upon enactment, April 6, 1978. For non-complying plans established in a collective bargaining agreement “in effect” on September 1, 1977, the effective date is the earlier of either the termination of the agreement or January 1, 1980. The immediate effect of the legislation is that plans which have mandated retirement before age 65 are immediately prohibited from continuing the practice. Employees who become 65 in 1978, however, may still be forced to retire in accordance with a pension plan provision.

ERISA § 3(24), 29 U.S.C. § 1002(24) (1976), defines normal retirement age as the earlier of the normal retirement age as stated in the plan, or the later of age 65 or the tenth anniversary of participation in the plan. This definition would not be affected by the increase in age from 65 to 70 under the ADEA Amendments.


Id. According to Elisburg’s statements, the 1978 amendments to ADEA would not require any additional benefit accruals or actuarial adjustments other than those already required by ERISA. Id.

Id.

See notes 130-131 & accompanying text infra.


Id. § 2(b), 29 U.S.C. § 623(f)(2).

Id.

Compulsory retirement between the ages of 65 and 70 is still permissible for two
In the area of benefit plans and retirement programs, any gender-based classifications will be closely scrutinized by the courts. Most of the sex discrimination problems in the pension area are related to equating contributions or benefits for females with contributions or benefits for males. If the contributions remain the same, it is argued that females should receive lower benefits because as a group they have an actuarially longer life span. Similarly, many employers have required higher contributions from females who wish to receive benefits equivalent to those received by males. Corporate pension plans which require females to make higher contributions to pension plans in order to receive equal benefits, however, have been held to violate Title VII of the Civil Rights Act of 1964.43 The pension plan in City of Los Angeles v. Manhart44 was based on actuarial tables showing that the average woman lives longer than the average man and that, therefore, a larger contribution to the pension plan by females was required for them to receive the same level of benefits as males.45 The Supreme Court struck down the plan, stating that Title VII “precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.”46 The Court determined that the difference in treatment violated section 703(a)(1) of Title VII47 because there was no evidence that any factor, other than the employee’s sex, was used to calculate the different rates of contributions for men and women.48 When the only issue in Manhart was the unequal contributions by men

limited classes of employees: executives entitled to immediate nonforfeitable pensions of at least $27,000 per year, and tenured college and university faculty members. The latter exemption expires on July 1, 1982. Id. § 3(a), 29 U.S.C. § 631. The executive class is narrowly defined to include only those employees who have occupied executive or high policy making positions for at least 2 years immediately prior to retirement. Id.


Id. at 704-05.

Id. at 708. When Manhart was before the ninth circuit, the court refused to accept the argument that actuarial distinctions were permissible under the “bona fide occupational qualification exception” of 42 U.S.C. § 2000e-2(e) (1976). 553 F.2d 581, 587 (1976). For any differentiation to fall within the statutory exception, it must be “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e) (1976). Under this standard, the court held that greater contributions by women were not necessary to the department’s function of providing water and power to the residents of Los Angeles. 553 F.2d at 587. Assuming that a “relevant business function” of the department was to provide a sound pension plan, the court further held that the statutory exception was inapplicable to the defendant’s plan, since “providing a financially sound pension plan [would not require] an actuarial classification based wholly on sex.” Id. According to the ninth circuit, the Department of Water could have provided substantial benefits without distinguishing between the sexes with respect to the amount of retirement contributions. Id.


and women to an employer-operated pension fund, the Court did suggest that it would not be unlawful for an employer to have such an employee make an equal contribution and with this "purchase the largest benefit which his or her accumulated contributions could command in the open market." It is clear, however, that the courts will not look favorably upon gender-based classifications.

VESTING

ERISA requires that at some point the employee's right to receive retirement benefits must become nonforfeitable. These minimum vesting standards apply to both employee and employer contributions and may be satisfied in any one of four ways. The first method requires 100% vesting after 10 years of service and the second requires 25% vesting after 5 years of service and 5% per annum thereafter until 100% vesting is achieved after another 15 years. The third alternative is the Rule of 45 under which there must be 50% vesting when the combination of the employee's age and his years of service equals 45. Under this approach, the employee's rights must be fully vested when the combination equals 55. The final possibility, the 4-40 vesting rule, provides for 40% vesting after 4 years, an additional 5% in the fifth and sixth year and 10% thereafter, resulting in 100% vesting after 11 years.

The method of vesting is crucial in determining which employees receive the maximum benefits under the terms of the plan. Under the first alternative, although it is possible not to have any vesting at all until the completion of 10 years, the employee will be fully protected after 10 years of service. This plan is perhaps the

Id. at 717-18. In a separate opinion, Chief Justice Burger pointed out that actuarial tables based on gender have been utilized since 1843 and their accuracy has often been validated. 435 U.S. at 725-26 (Burger, C.J., concurring in part and dissenting in part). Additionally, the Chief Justice reasoned that Congress did not intend to prohibit use of actuarial findings when the data is based upon longevity and not sex. Id. (Burger, C.J., concurring in part and dissenting in part).

See note 112 infra.


most easily understood by employees and employers because of the elimination of the costs of recordkeeping for partially vested rights. The second alternative, the graded vesting method, defers complete vesting until a relatively late date. It does minimize the cost of establishing a new plan or improving benefits under an existing plan, particularly from an employer's point of view. Moreover, the number of employees with at least 25% vested rights will be increased under the graded vesting method. The "Rule of 45" was designed to benefit the older employee since it takes into account age as well as years of service. The 4-40 rule is usually required in what is believed to be an abuse situation. The IRS would seek this form of accelerated vesting if, upon investigation, it was determined that there was a high percentage of employees whose services were terminated before their accrued benefits vested or if there were reason to believe the plan tends to discriminate in favor of officers, shareholders or highly paid employees.

**Funding**

Another factor to be considered by an employer and the union in establishing a pension plan is the means of funding the trust from which benefits are to be paid. While the means of funding pension trusts is the responsibility of union and management, ERISA does provide safeguards to prevent the underfunding of benefit plans.

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60 See Policies and Problems, supra note 4, at 574.


These minimum funding requirements, however, are not absolute. If an employer can demonstrate to the Secretary of the Treasury that a "substantial business hardship" will result from imposition of such standards, the Secretary may waive the standards for 1 plan year, up to 5 years during any 15-year period. ERISA §§ 303(a), 1014(d), 29 U.S.C. § 1083(a) (1976); I.R.C. § 914(d). "Substantial business hardship" includes, but is not limited to, operation at an economic loss, ERISA § 303(b)(1), 1014(d)(2)(A), 29 U.S.C. § 1083(b)(1) (1976); I.R.C. § 412(d)(2)(A), substantial unemployment in the business, ERISA § 303(b)(2), 1014(d)(2)(B), 29 U.S.C. 1083(b)(2) (1976); I.R.C. § 412(d)(2)(B), decline in industry sales and profits, ERISA § 303(b)(3), 1014(d)(2)(C), 29 U.S.C. § 1083(b)(3) (1976); I.R.C. § 412(d)(2)(C), and plan discontinuance if the waiver is not granted, ERISA § 303(b)(4), 1014(d)(2)(D), 29 U.S.C. § 1083(b)(4) (1976); I.R.C. § 412(d)(2)(D). Congress has set forth the following liberalized standard for determining waivers:
Major ERISA provisions in this area include: stricter minimum standards of funding to ensure that normal, yearly plan costs are met and outstanding unfunded liabilities for past service are decreased; an increase in the maximum allowable deduction for contributions exceeding the minimum amount; creation of a funding standard account; establishment of a Joint Board for the Enrollment of Actuaries in order to facilitate control and review of the process of funding by the government; and more stringent disciplinary measures for failure to satisfy the new funding standards. It is clear that these statutory safeguards are designed to make union and management trustees accountable for the method of funding as well as the actual funding of benefit plans established through the collective bargaining process.

[S]ubstantial business hardship . . . will only occur in situations where the employer did not foresee, and could not reasonably have been expected to foresee (at the time the plan . . . was established), the event which causes the business hardship.


An employer would consider the concept of employee contributions more favorably than a union, since the employee’s contributions will either increase the benefits the employee will receive or reduce the employer’s contribution. See 43 Fed. Reg. 14,010 (1978). In bargaining over the wisdom of employee contributions, unions will claim that the employer has a deductible factor for his contributions whereas the employee’s contributions are made without the tax dollar. Furthermore, employee contributions do, of course, reduce the amount of take home pay, thereby placing a greater need for increased wages. Both employers and unions should be concerned with the issue of employee contributions, particularly if it would
PENSION PLAN FIDUCIARIES

ERISA section 3(21)(A) defines a fiduciary as one who exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) . . . renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) . . . has any discretionary authority or discretionary responsibility in administration of such plan.69

A fiduciary of a pension plan must discharge his duties solely in the interests of the participants and beneficiaries70 by working to provide maximum benefits and to defray expenses incurred in administering the plan. ERISA requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."71

A fiduciary is personally liable to the plan for any losses resulting from a breach of any of his responsibilities, obligations or duties72 and no plan provision can relieve him of this liability.73 If there appear that the plan itself might be jeopardized under the percentage participation requirements. If employee contributions are required, but prove to be so burdensome that lower paid employees are effectively kept out of the plan, the plan may not qualify. Treas. Reg. § 1.401-3(d) (1977); see notes 27-30 and accompanying text supra.

69 ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1976). The term fiduciary may also encompass persons designated by the named fiduciaries to carry out their responsibilities. Id. § 405(c)(1)(B), 29 U.S.C. § 1105(c)(1)(B).
70 Id. § 404(a)(1), 29 U.S.C. § 1104(a)(1).
71 Id. § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Under the common law, a trustee was required to "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Restatement (Second) of Trusts § 174 (1959); see Exchange Trust Co. v. Doudera, 270 Mass. 227, 229, 170 N.E. 73, 74 (1930). It has been suggested that ERISA imposes a higher degree of care on pension plan trustees. See Policies and Problems, supra note 4, at 644-45.
72 ERISA § 409(a), 29 U.S.C. § 1109(a) (1976). Subjecting the plan fiduciaries to personal liability reflects a significant departure from the common law where the trustees were not considered parties to the contract and therefore were not liable under traditional contract principles. See, e.g., Lewis v. Mearns, 168 F. Supp. 134 (N.D. Va. 1958), aff'd per curiam, 268 F.2d 427 (4th Cir. 1969); Napoli v. Unkel, 38 LAB. CAS. (CCH) ¶ 66,009 (County Ct. Suffolk County 1959). Moreover, since fiduciaries normally act without supervision of the employer, they will be solely liable for their unlawful conduct. See Nicholson, Collections and Settlement under ERISA, 29 LAB. L.J. 364, 367 (1978).
73 ERISA § 410(a), 29 U.S.C. § 1110(a) (1976). Only by allocating specific responsibilities to other fiduciaries, id. § 405(b)(1), 29 U.S.C. § 1105(b)(1), or by appointing a trust manager pursuant to ERISA § 405(d)(1), 29 U.S.C. § 1105(d)(1), may the trustees be relieved of their statutory duties.
are two or more fiduciaries, each must use reasonable care to prevent the others from committing a breach.\textsuperscript{74} ERISA does permit plan insurance coverage against liability for losses incurred by reason of an act or omission of a fiduciary,\textsuperscript{75} but the policy must permit recourse by the insurance company against the fiduciary. In effect, there must be a recourse insurance policy in addition to the original policy in order to cover the individual fiduciary and this second policy may not be expensed to the plan.

ERISA requires trustees to serve for the sole and exclusive benefit of participants and beneficiaries. If we accept the assumption that a union-appointed trustee would be more liberal than an employer-appointed trustee in bestowing benefits, the question arises whether that would serve to disqualify union trustees automatically for failure to preserve the assets of the trust or, in the alternative, disqualify employer trustees for failure to serve for the sole and exclusive benefit of participants and beneficiaries. The answer to this question appears to be no. The union-appointed trustee would be subject to the restraint of ERISA and would be required to perform within those limitations. This would be equally true for employer trustees. In \textit{Toensing v. Brown}\textsuperscript{76} those eligible for retirement benefits in a carpenter's pension trust fund brought suit against the trustees alleging a violation of section 302(c)(5) of the LMRA\textsuperscript{77} for

\textsuperscript{74} \textit{Id.} § 405(b)(1)(A), 29 U.S.C. § 1105(b)(1)(A). A fiduciary is liable for the acts or omissions of a co-fiduciary if:

\begin{enumerate}
  \item he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
  \item by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
  \item he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.
\end{enumerate}

\textit{Id.} § 405(a), 29 U.S.C. § 1105(a).

\textsuperscript{75} \textit{Id.} § 410(b), 29 U.S.C. § 1110(b). Plan insurance may be purchased by a plan itself, an employer, a union or a fiduciary. \textit{Id.} In multi-employer plans the union would most likely insure their own designated trustees, and the costs of covering non-union fiduciaries would be apportioned among the employers. A single employer might insure its fiduciaries under a general corporate policy; however, it must provide broad and detailed coverage to meet the liabilities imposed by ERISA. Since there is a 6-year statute of limitations under ERISA for the breach of fiduciary duties, \textit{id.} § 413, 29 U.S.C. § 1113, coverage of former fiduciaries should be continued until expiration of the limitation period.

\textsuperscript{76} 374 F. Supp. 191 (N.D. Cal. 1974), \textit{aff'd}, 528 F.2d 69 (9th Cir. 1975).

\textsuperscript{77} A cause of action for breach of fiduciary duties is also available under the Labor Management Relations Act (LMRA) which is aimed at protecting employees from possible corruption and abuse of power occurring during the collective bargaining process. LMRA § 302, 29 U.S.C. § 186 (1976); see Arroyo v. United States, 359 U.S. 419, 425-26 & nn.5-6 (1959); United States v. Annunziato, 293 F.2d 373, 379-80 (2d Cir.), \textit{cert. denied}, 368 U.S. 919 (1961). Section 302 makes it illegal for an employer to pay or agree to pay, or for an employee or union representative to request or accept, any payment or loan. LMRA § 302(a), (b), 29
granting pension increases more favorable to active employees than to retired employees. At least two employee trustees of the fund also served as collective bargaining representatives for the union. There was no question, however, that their actions complied with the collective bargaining agreement.\textsuperscript{78} The court noted that Congress enacted section 302(c)(5) "believing that the trust fund was best managed when the contending views of employer and union were resolved in the best interests of the beneficiaries."\textsuperscript{79} It did not, according to the court, prohibit a person from serving both as a collective bargaining representative and as a trustee of the fund,\textsuperscript{80} especially where the petitioners did not allege unfair representation, arbitrary and discriminatory conduct, or bad faith on the part of the union.\textsuperscript{81} Presumptively, trustees should not be placed in untenable, conflicting roles since ERISA requires motivation for the sole and exclusive benefit of the participants and their beneficiaries. This requires trustees to resist attempts by either the union or

\begin{itemize}
\item U.S.C. § 186(a), (b) (1976). Employer payments into a pension fund are specifically excepted from this general prohibition by LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5). Pension funds must be kept separate from other union funds, id. § 302(c)(5)(C), 29 U.S.C. § 186(c)(5)(C), and the employer and the union representatives must administer the fund jointly, id. § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B). Willful violations of these provisions is a misdemeanor and subjects the offender to fines of up to $10,000, imprisonment for up to 1 year, or both. Id. § 302(d), 29 U.S.C. § 186(d). Application of § 302(c), however, was often inconsistent and failed to protect adequately the interests of employees. See Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971). In response to these shortcomings, Congress enacted ERISA which sets forth detailed prohibited transactions, see note 82 infra, and permits direct recourse to the federal courts, see Nicholson, supra note 72, at 366.
\item 78 374 F. Supp. at 200 & nn.12, 14.
\item 79 Id. at 195.
\item 80 Id. Suggesting that administrative decisions of trustees are, to some extent, affected by the collective bargaining process, the court encouraged the trustees to refer to the collective bargaining agreement in administering the pension plan. Id. at 196. The court stated that it "would be anomalous to impose upon trustees, as representatives of the employer and union, a duty to ignore the terms agreed upon by the employer and union." Id. To rule otherwise would cause the trustee to have "schizophrenic duties" arising from "conflicting roles." Id. In affirming, however, the ninth circuit expressed a contrary view with respect to the effect of the collective bargaining agreement on the trustees' duties: "trustees have a duty to exercise their independent judgment in administering trust funds established under § 302." 528 F.2d at 72 (emphasis added). The court emphasized that "[r]ecommendations of collective bargaining parties . . . are not binding or obligatory." Id. The trustees' action was upheld even though two trustees "may have had a misconception about the weight . . . accorded to [collective bargaining] recommendations," since 10 of 14 trustees considered the increases and unanimously accepted them. Id.
\item 81 374 F. Supp. at 202 (citing Vaca v. Sipes, 386 U.S. 171, 190 (1967)). In Toensing, the court indicated that a union's ability to represent effectively its members depended on "its strength in the workplace." 374 F. Supp. at 203. Therefore, in representing both active and retired employees, the union might naturally prefer the interests of active employees over those of retirees. Id. (citing Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 173 n.12 (1971)).
\end{itemize}
the employer to utilize the trust fund for their own purposes. The adoption of proposals recommended by one side, however, is not in and of itself arbitrary and capricious action by the trustees.

Clearly, regardless of whether trustees are union or employer appointed, they have the affirmative obligation to prevent any transaction prohibited by ERISA. The trustees in the due performance of their duty, however, may seek exemptions from the prohibited transactions provisions. The bases or conditions needed to obtain a variance should be a subject of bargaining, but the requirements of the collective bargaining agreement should not be controlling upon either the Secretary of the Treasury or the Secretary of Labor if granting an exemption is necessary to preserve the trust.

The responsibilities of fiduciaries should be considered part of the negotiation process. If agreed-upon qualifying conditions are merely a reaffirmation of the statute, ERISA would control and such conditions could not be challenged. If either party’s demands go beyond ERISA requirements, however, the free choice of the other party could be limited, thus resulting in a violation of a basic tenet of labor law which is to have both labor and management participate as trustees. The negotiating parties are permitted, however, to limit the ability of the trustees to control the appointment of trustee-employees of the other party by creating additional criteria for qualification.

**Challenging Fiduciary Action**

Where a fiduciary denies a claim for benefits by a plan participant or beneficiary, ERISA requires that the aggrieved party be given adequate notice in writing setting forth the specific reasons for the denial. In addition, the claimant must be given the opportunity to obtain review of the adverse decision by a fiduciary designated in the plan. Beyond these internal procedures, the claimant may sue in federal court to recover benefits. Judicial review of the fiduciary action is governed by 29 U.S.C. § 1132.

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1. Section 403 of ERISA specifically forbids fiduciaries from using plan assets for his own benefit, engaging in any transaction which would adversely affect the plan, and receiving any personal consideration in connection with a plan transaction. ERISA § 406(b)(1)-(3), 29 U.S.C. § 1106(b)(1)-(3) (1976). Additional financial transactions are rendered impermissible by ERISA § 407, 29 U.S.C. § 1107. Exemptions from these prohibited practices are provided in ERISA § 408(b), 29 U.S.C. § 1108(b).

2. Id. § 403(a)(1), 29 U.S.C. § 1103(a)(1).

3. Id. § 502, 29 U.S.C. § 1132. These internal procedures, the claimant may sue in federal court to recover benefits.
ciary's determination, however, is limited to the question whether the action was arbitrary, capricious or an abuse of discretion.87

As previously discussed, ERISA imposes personal liability on trustees for breach of their fiduciary duties.88 Failure to conform to strict standards of conduct gives rise to a cause of action for any losses resulting from the breach.89 Where the complaint alleges violation of the trustee's statutory obligations, the courts will apply the "prudent man standard"90 in reviewing the trustee's actions.91 By enumerating specific proscribed transactions and establishing a liberal standard of review, ERISA clearly expands the ability of plan participants and beneficiaries to challenge fiduciary actions.

Where suit is commenced against a fiduciary, problems may arise if a right of recourse is available under the collective bargaining agreement. Although ERISA specifically provides a civil cause of action to plan participants and beneficiaries, when there is an agreement to arbitrate in the collective bargaining agreement, resolution of disputes by arbitration generally has been favored. Consequently, if a plan provided for arbitration of benefit claims in which the basic requirements of due process were satisfied, both federal and state courts would decline initial jurisdiction. Illustrative of the judiciary's deference to the arbitration process is LMRA section 301, which requires exhaustion of contractual remedies.92 Thus, actions

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87 See Bueneman v. Central States, Southeast and Southwest Areas Pension Fund, 572 F.2d 1208, 1209 (8th Cir. 1978); Riley v. Meba Pension Trust, 570 F.2d 406, 410 (2d Cir. 1977); Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976); Danti v. Lewis, 312 F.2d 345, 348 (D.C. Cir. 1962).
88 See notes 72-74 & accompanying text supra.
89 Section 409 provides:
Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary . . . .

90 See note 71 supra.
91 See, e.g., Morrissey v. Curran, 567 F.2d 546, 548-49 (2d Cir. 1977); Nedd v. Thomas, 92 L.R.R.M. 2177, 2209 (D.C. Pa. 1976). In Nedd, an action was brought to compel the fiduciaries to collect payments due to the pension fund. Because the employers were operating under serious financial difficulties, the trustees had not enforced their obligations to the fund. Id. at 2205. While the court recognized that a tolerant approach may have been reasonable under the circumstances, id. at 2207-08, it felt that common prudence would have required the trustees to exercise greater diligence in pursuing the delinquencies under the plan. Id. at 2215. Thus, even tolerance by the trustees will not insulate them from liability for failure to collect payments where such failure jeopardizes the fund itself. See Nicholson, supra note 72, at 367.
under section 301 for "violation of a contract between an employer and a labor organization" will not be entertained unless there has been exhaustion of the agreed arbitration remedy by the suing party. It is clear that prior to ERISA, arbitration of benefit claims was greatly favored by Congress and the courts. 93

Under the provisions of ERISA, however, a different conclusion has been reached with regard to arbitration. In Lewis v. Merrill Lynch, 94 the court held that a prospective agreement to arbitrate disputes arising out of termination of employment could not be used to compel the former employee to forego his action under ERISA and submit to arbitration. 95 Lewis, upon employment with Merrill Lynch, signed an agreement to arbitrate disputes arising out of employment or termination of employment. The Merrill Lynch Pension Plan had a forfeiture provision if the employee joined a competitor business. 96 Prior to his termination Lewis was informed that his pension rights were 100% vested but, after joining a competitor, he was informed that his pension rights were forfeited. Lewis brought suit under ERISA and Merrill Lynch sought to stay the action pending arbitration. 97 In denying the stay, the court balanced the strong federal policy favoring arbitration with ERISA's desire to give pension plan participants maximum protection. The court stated that the congressional intent of allowing ready access to federal courts could be frustrated by allowing employers the freedom to require agreements to arbitrate ERISA claims as a condition precedent to participation in a plan. 98 Acknowledging the strong policies favoring prior agreements to arbitrate, the court nevertheless found that the promises of ERISA to pension plan participants are best kept by holding prospective agreements to arbitrate ERISA claims invalid. 99 It is reasonable to conclude that by enacting ERISA, the court stated, "Congress in-

95 Id. at 277-78.
96 Id. at 271.
97 Id.
99 431 F. Supp. at 277-78.
tended to [grant protection to] plan participants from arbitration and similar agreements, often unilaterally imposed, which 'snip and whittle' at federally granted rights,' similar to the protection afforded securities purchasers under the securities laws.ERISA AND THE NATIONAL LABOR RELATIONS ACT

Generally, employee pension plans are subject to regulation under both ERISA and the NLRA. The relevant sections of the NLRA are 8(a)(5) and 8(b)(3) which place a mandatory obligation on employers and employee representatives to bargain in good faith concerning “wages, hours and other terms and conditions of employment.” Wages, for the purposes of the NLRA, have been held “to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship.” It is important to recognize that the applicability of ERISA

100 Id. at 276.
101 Id. at 274-75. In weighing the federal policy favoring arbitration against the remedies available under ERISA, the court compared ERISA with other federal laws which grant judicial resolution of disputes arising under them. Since arbitration clauses have not been enforced where relief is available under the securities laws, id. at 274, the court found that “[t]he Congressional purpose behind ERISA dictates that it should receive a similar interpretation.” Id. at 275 (citing Wilko v. Swan, 346 U.S. 427 (1953)). According to the court, both ERISA and the securities laws were passed to protect pension plan participants and investors who

are in similar circumstances, at the mercy of pension plan sponsors and administrators or securities sellers and brokers, each better informed and in a superior bargaining position. In addition, a pension plan participant is in reality an indirect securities investor, making his investments through an institutional intermediary, his pension plan. ... The same potential which exists for fraud and overreaching between securities sellers and purchasers exists between pension plans, their sponsors and administrators as pension “sellers” and plan participants and beneficiaries as “buyers.” In short, a pension plan participation is in many ways comparable to a security ... .

431 F. Supp. at 275.
104 Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949) (quoting In re Inland Steel Co., 77 N.L.R.B. 1, 4 (1948)). But see Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971) (bargaining over rights of retired employees is permissive). The Inland Steel court reasoned that even if pension and insurance benefits were not considered “wages,” they would still fall within the ambit of § 9(a) of the NLRA under the phrase “other terms and conditions of employment.” 170 F.2d at 251. One author viewed the Inland Steel decision as a “significant impetus to pension growth” because it “elevated the pension issue to a formal bargaining posture.” Policies and Problems, supra note 4, at 543. The significance of an employer’s duty to bargain over pension plans is illustrated by Plumbers Local 519 v. Service Plumbing Co., 404 F. Supp. 1008 (S.D. Fla. 1975). In Plumbers, the union had entered into a collective bargaining agree-
in no way affects the duty to bargain imposed by the NLRA.

Although implementation of pension plans is a mandatory subject of bargaining, a union may waive its statutory right to de-

ment with Service Plumbing Co. (Service), which provided for a pension plan. Id. at 1009-10. Included in the agreement was a provision stating:

If an Employer . . . controls or operates any other business within the trade and territorial jurisdiction of the Union, such other business entity shall either have a signed Agreement with the Union or this Agreement shall be interpreted as including such business entity under the term "Employer."

Id. at 1010. In violation of this provision, Service established the AJA Plumbing Co. (AJA) which did not make benefit contributions for its employees to the pension plan. Id. at 1012. The union and plan trustees brought suit against Service and AJA to enforce the terms of the pension plan against AJA. Id. at 1009-10. The court concluded that the activities of the two defendant corporations were so "intertwined and related" that Service and AJA were a single corporate entity and were thus bound by the contractual obligations of one another. Id. at 1013. Among the factors considered relevant by the Plumbers court were: commingling of funds, interchanging employees, common officers, shareholders and executives, and sharing of expenses and salaries. Id. at 1012. Under such circumstances the court held that the corporate entity could be disregarded to insure protection of employees' rights under the collective bargaining agreement. Id. at 1013 (citing Fisher v. Cast, 114 F.2d 177, 191 (10th Cir. 1940)).

105 Any term in the collective bargaining agreement which relates to "wages, hours, and other . . . conditions of employment" is a mandatory subject of bargaining, NLRA § 8(d), 29 U.S.C. § 158(d) (1976), and refusal to bargain with respect to such terms is a violation of the NLRA. Id. § 8(a)(5), (b)(3), 29 U.S.C. § 158(a)(5), (b)(3); see NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958). Matters not deemed a condition of employment are permissive and bargaining is discretionary for both employers and employee representatives. Id. Generally, unless the issue involved is likely to have a substantial impact on employees' job rights and security it will be deemed a permissive subject. See, e.g., NLRB v. Adams Dairy, Inc. 350 F.2d 108, 110-11 (8th Cir. 1965), cert. denied, 382 U.S. 1011 (1966); General Motors Corp., 191 N.L.R.B. 951, 952 (1971), petition for review denied sub nom. International Union, United Auto. Aerospace and Agricultural Workers v. NLRB, 470 F.2d 422 (D.C. Cir. 1972).

Collective bargaining is defined as

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . .

NLRA § 8(d), 29 U.S.C. § 158(d)(1976). Subjects of bargaining which have been held to be mandatory include: stock purchase plans, Richfield Oil Corp., 110 N.L.R.B. 356 (1954), enforced, 231 F.2d 717 (D.C. Cir.), cert. denied, 351 U.S. 909 (1956); grievance procedures, Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945); profit sharing plans, Dickten & Masch Mfg. Co., 129 N.L.R.B. 112 (1960); and contracting work previously performed by employees to independent contractors, Fiberboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).

The employer's duty to bargain includes the duty to furnish all information necessary to the union's performance of its bargaining obligation. In Milgo Indus., Inc., 229 N.L.R.B. 25, enforced, 557 F.2d 540 (2d Cir. 1977), an employer was held to have violated § 8 of the NLRA by withholding information concerning revised costs of its pension plan despite repeated requests by the unions. Such information was deemed by the NLRB to be relevant to the union's effort to bargain. 229 N.L.R.B. at 30. The second circuit, however, found that the employer had not violated the LMRA by failing to supply the union with a copy of its standard Blue Cross/Blue Shield health plan because a copy of its provisions could have been easily obtained. 567 F.2d at 543. An employer's refusal to furnish the union with information
mand negotiations. If a waiver is successfully proven, it can be raised as a defense to an unfair labor practice charge under the NLRA. Waiver of this statutory right, however, must be "clear and unmistakable." A union will be deemed to waive its right to bargain with regard to pensions if the parties have fully discussed the subject during the course of negotiations, even though pension plan negotiations are not mentioned in any written documents. If the plan was not a subject of negotiation, the waiver should be included in the collective bargaining agreement.

concerning its obligation to contribute to a fringe benefit fund has been held to be a violation of § 8 of the NLRA. Ellsworth Sheet Metal Inc., 224 N.L.R.B. 1506 (1976), supplemented, [1977-1978] LAB. L. REP. (CCH) (NLRB Dec.) ¶ 18,610. In Ellsworth, the employer was ordered to produce his "payroll records, cash disbursements journal, general ledger and general journal, . . . payroll reporting forms and annual . . . workman's compensation insurance carrier . . . reports." 224 N.L.R.B. at 1506. The administrative law judge set forth the standard for reviewing § 8 violations as follows:

Section 8(a)(5) of the Act obligates an employer to provide, on the request of its employees' collective bargaining agent, all information relevant to the proper performance of that agent's functions, including information needed by the Union to police and administer the collective bargaining agreement. This right arises by operation of the statute upon an appropriate request and limited only by consideration of relevancy.


The broad disclosure provisions of ERISA require notice to employees of the plan description, eligibility requirements, vesting, funding, participation and forfeiture provisions, and the types of benefits provided. It is suggested that this increase in knowledge will enhance the bargaining position of the employee representatives. See Fillion & Trebilcock, supra note 24, at 267.

109 See Crest Beverage Co., 231 N.L.R.B. No. 25 (1977); Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), enforced, 196 F.2d 680 (2d Cir. 1952); cf. N. L. Indus., Inc. v. NLRB, 536 F.2d 786 (8th Cir. 1976) (employer ordered to bargain over pension benefits absent prior negotiations). In NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954), the court held that once parties had specifically negotiated over insurance and hospitalization benefits, the union waived its right to bargain further over these matters, even though they did not appear in the agreement.

10 Tide Water Assoc. Oil Co., 85 N.L.R.B. 1096, 1098 (1949). Although the collective bargaining agreement in Tide Water contained a management function clause, the board held that the union had not waived its right to bargain over retirement benefits. Similarly, in Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), enforced, 196 F.2d 680 (2d Cir. 1952), the employer was ordered to bargain with the union on the subject of pensions upon the union's request. A reopening clause to "discuss wage rates" was not deemed a waiver of pension discussions where there was no written pension plan and the subject had neither been discussed during the negotiations nor mentioned in their contract. 94 N.L.R.B. at 1214-15.
The Collective Bargaining Process

Once negotiations over a pension plan begin, the standards embodied in ERISA present several important bargaining issues. For example, in considering one of the four methods of vesting\(^\text{111}\) the average length of service and age of the employees will render one formula more attractive to the employee over another. The employer, however, will seek adoption of an alternative which minimizes his costs without placing an extra burden on his bookkeeping and accounting departments. It should be noted that, on these subjects, the employer's bargaining power has been significantly restricted since ERISA expressly limits the situations where vested rights may be forfeited.\(^\text{112}\)

Of significant importance to both sides will be the type of plan to be adopted: defined benefit or defined contribution.\(^\text{113}\) In most cases the employer will opt for a defined contribution plan, since his liability is limited to the plan assets and termination insurance is not required. The union, on the other hand, will bargain for a defined benefit plan which guarantees employees a certain amount without respect to the actual accumulation of employer contributions. Since an employer's obligation to an employee benefit plan is believed to be controlled by the negotiation process and defined by the terms of the collective bargaining agreement,\(^\text{114}\) it is particularly important that the parties make certain that the desired type of plan is clearly stated in the written agreement. The significance of this point is illustrated by Connolly v. Pension Benefit Guaranty Corp.\(^\text{115}\) In Connolly, an operating engineer pension trust was established pursuant to a multi-employer agreement.\(^\text{116}\) Eleven employers

\(^{111}\) See notes 50-57 & accompanying text supra.


\(^{113}\) See notes 4-9 & accompanying text supra.

\(^{114}\) See, e.g., Connolly v. PBGC, 581 F.2d 729 (9th Cir. 1978), rev'd 419 F. Supp. 737 (C.D. Cal. 1978).

\(^{115}\) Id. at 731. A multi-employer plan is defined by ERISA §§ 37(A), 1015(f)(1); 29 U.S.C. § 1002(37)(A) (1976); I.R.C. § 414(f)(1) as one:
agreed to contribute to the fund at a specified rate per month based upon the employee’s hours of service. While the employer’s rate of contribution was fixed in the collective bargaining agreement, benefits were determined by a formula which multiplied an actuarial pension factor by an employee’s pension credit and, where applicable, a prior service credit.\textsuperscript{117} The value of the pension factor as determined by the trustees was based upon the nature of the trust’s investments, the amount of income previously earned by these investments, prior expenses and losses, possible forfeitures of benefits, mortality rates and any unforeseen delinquencies in employer contributions.\textsuperscript{118} An employee’s pension credit was determined by the number of hours worked, and the prior service credit was based on services rendered prior to the adoption of the pension plan in 1960.\textsuperscript{119} A dispute arose when the Pension Benefit Guaranty Corporation

\[ (A) \text{ to which more than one employer is required to contribute,} \\
(B) \text{ which is maintained pursuant to a collective bargaining agreement between employee representatives and more than one employer,} \\
(C) \text{ under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions,} \\
(D) \text{ under which benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such plan, and} \\
(E) \text{ which satisfies such other requirements as the Secretary of Labor may by regulations prescribe.} \]

If the benefits are reduced to the rate in effect when the employer first joined the plan, the remaining employers would be liable for any increases in the benefit level since the withdrawing employer joined the plan. Internal Revenue Service Technical Advice Memorandum 7751002, ¶ 107292 (Sept. 17, 1977).


\textsuperscript{117} Under the operating engineers pension plan, the employers’ rate of contribution to the trust multiplied by the hours of employees’ service comprised the total amount the employer was required to contribute to the plan per month. 581 F.2d at 731.

\textsuperscript{118} Id.

\textsuperscript{119} Id.
PBGC) refused to classify the plan as a defined contribution plan and thus exempt from the termination insurance provisions of ERISA. It was argued that, if the plan was held to be a defined benefit plan, the potential liability of the employer in the event of termination would be extended far beyond that contemplated in the collective bargaining agreement. The district court held for the trustees, finding that to categorize the plan as a defined benefit plan would "force upon the employer a greater obligation and liability than he had agreed to in his contract." In reversing the lower court's decision, the ninth circuit placed little weight on the intent of the parties. Rather, the court focused on the actual operation of

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The PBGC is comprised of a board of directors, formed by the Secretaries of Labor, the Treasury and Commerce, and a seven-member advisory committee recommended by the board and appointed by the President. ERISA § 4002(d), (h)(1)-(2), 29 U.S.C. § 1302(c), (g)(1)-(2) (1976). The PBGC was established to encourage voluntary private pension plans, to provide timely and contiguous payment of pension benefits to plan participants and to maintain insurance premiums at the lowest level possible without sacrificing effective administration. See id. § 4002(a), 29 U.S.C. § 1302(a).

A serious problem ERISA was designed to relieve was loss of pension benefits caused by plan termination before complete funding. See ERISA § 2(a), (c), 29 U.S.C. § 1001(a), (c) (1976); H.R. Rep. No. 533, 93d Cong., 2d Sess. 1-2, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4639, 4639-40; H.R. Rep. No. 807, 93d Cong., 2d Sess. 2, 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4670, 4671, 4676-77; S. Rep. No. 127, 93d Cong., 2d Sess. 1-2, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4838, 4838-39. To guarantee nonforfeitable benefits to employees, ERISA requires plan-termination insurance, ERISA § 4022(a), 29 U.S.C. § 1322(a) (1976), regulated by the Pension Benefit Guaranty Corporation (PBGC), id. § 4002(a), 29 U.S.C. § 1302(a). Under ERISA § 4062, 29 U.S.C. § 1362, the PBGC is authorized to make benefit payments in excess of amounts actually in the pension fund as of the termination date. The PBGC may then proceed against the employer and collect up to 30% of the employer's net worth as reimbursement for the Corporation's expenditures. Id. An insurance program is maintained by the PBGC to enable employers to protect themselves against this liability. Id. § 4023(a), 29 U.S.C. § 1323(a). Excluded from ERISA's termination insurance requirements are defined contribution or individual account plans. Id. § 4021(b)(1), 29 U.S.C. § 1321(b)(1). Defined benefit plans, however, are required to maintain plan termination insurance. Id. § 4021(a)(1), 29 U.S.C. § 1321(a)(1). If an uninsured or underinsured plan is terminated, the PBGC may proceed against delinquent employers for trust deficiencies up to 30% of the net worth of each employer. Id. §§ 4062(b), 4064(b), 29 U.S.C. §§ 1362(b), 1364(b); Section 4062 of ERISA sets forth the employer's liability to the PBGC in the event of termination and provides:

(b) Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

1. the excess of—
   a. the current value of the plan's benefits guaranteed under this subchapter on the date of termination over
   b. the current value of the plan's assets allocable to such benefits on the date of termination, or

2. 30 percent of the net worth of the employer determined as of the day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

Id. § 4062(b), 29 U.S.C. § 1362(b).

the plan. It was pointed out that the trust funds were pooled, that no participants had an individual account and that each participant had the right to receive benefits whether or not his particular employer contributed on his behalf. On the basis of these findings, the court held the operating engineers’ plan to be a defined benefit plan rather than a defined contribution plan. This holding thus extended the liability of the employer far beyond the expectations of those who were parties to the collective bargaining agreement.

Although the Connolly court was clearly concerned with protecting the plan participants in the event of termination, it is believed that the decision places an undue burden on the union with regard to negotiating pension plans. In practice, most statutory pension trusts operate on the same “pooled” basis as did the one in Connolly. It is clear from Connolly that the PBGC takes the position that this type of pension trust will generally be treated as a defined benefit plan. The union’s past ability to negotiate similar plans was enhanced by its representation that the employer’s contribution to the plan would be fixed. If, however, the plan is treated as a defined benefit plan, the employer who participates in such a program is subject to a fluctuating and uncertain obligation. Clearly, it will be far more difficult for unions to negotiate pension benefits where the employer’s liability is open ended and uncertain, the ultimate

123 581 F.2d at 733.
124 Id. Noting that the primary concern of Congress in enacting ERISA was the need to secure retirement benefits for workers, the Connolly court rejected the argument that compliance with ERISA’s insurance requirements subjected the employers to greater obligations than those originally set forth in the collective bargaining contract. Id. at 732. Judge Harper, speaking for the ninth circuit, stated that extending the employers’ liability beyond the collective agreement was “precisely what the termination insurance provisions of the Act were intended to do.” Id. The Connolly court recognized two statutory conditions a plan must satisfy to avail itself of the defined contribution exemptions: (1) each participant must have an individual account under the plan; and (2) the benefit due each participant must accrue solely from sums accumulated in the individual account. Id. at 733; see ERISA § 3(34), 29 U.S.C. § 1002(34) (1976). The engineers’ plan was found not to have satisfied either requirement. 581 F.2d at 733. Rather than providing individual accounts, the trust pooled employer contributions. Id. Moreover, the pension factor formula used in determining the amount due a participant at retirement did not determine a benefit level based solely on the individual’s accrued account. Id.

The Connolly decision was probably a result of the court’s fear that trust assets would fall short of the benefits owing plan participants under the union contract. 581 F.2d at 731. The court did note, however, that termination under multi-employer pension plans is less likely to occur than under single employer plans. Id. at 734; see note 116 supra.

125 Cost data is often a crucial factor in negotiation of a pension plan proposal. See E. Beal, E. Wickesham & P. Kienast, The Practice of Collective Bargaining 361-66 (5th ed. 1976). Where the union urges an employer to adopt a defined contribution plan, cost information is irrelevant since the employer will not incur liability to the trust beyond the fixed contract rate. Under a defined benefit proposal, however, the union must project annual
result of establishing a defined benefit plan.

Another aspect of ERISA affecting the collective bargaining process is that employers now have the ability to exclude from a benefit plan employees who are in all other respects covered in the collective bargaining agreement. Section 1011 provides that a plan meets the requirements of ERISA, despite the exclusion of union members, “if there is evidence that retirement benefits were the subject of good faith bargaining between . . . employee representatives and . . . employer or employers.” Illustrative of the above provision is Western Foundries, Inc., where an employer had promulgated a profit-sharing plan whose summary description excluded any union member covered by a collective bargaining agreement from participation in the plan where the party’s current collective bargaining agreement did not provide for any unit employee participation. The employer was further held to have violated section 8(a)(5) of the NLRA by refusing to bargain with the union about the decision to establish the plan. The employer was ordered by the National Labor Relations Board to amend the plan description by eliminating the disqualification of union members from participation and to open accounts for union members who had been disqualified under that plan provision.

employer contributions based on the anticipated income, losses and expenses of the trust, the approximate number of qualified participants and the mortality rate of the retirees.


Where employees covered by the collective bargaining agreement are included within the employer’s plan, he may still make distinctions within the union, based on certain permissible classes. A class may be based on a specific location, department, or job category. Even with union consent, however, the employer will jeopardize such a qualification of the plan by discriminating in favor of officers, shareholders or highly compensated employees. ERISA § 1011; I.R.C. § 410(b)(1)(B); see notes 27-29 & accompanying text supra.

Neither profit-sharing nor a profit-sharing plan was discussed during the negotiations which ultimately led to the collective bargaining agreement. Id. at 31,412.

Compare Western Foundries, Inc. [1978 Transfer Binder] LAB. L. REP. (CCH) ¶ 18,925, with Winn-Dixie Stores, Inc. v. NLRB, 567 F.2d 1343 (5th Cir. 1978). The court in Winn-Dixie held the evidence insufficient to support the NLRB’s findings that an employer’s retirement and profit-sharing plan violated NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), because it excluded employees covered by their union pension plan. While agreeing that the employer had unlawfully refused to bargain over continued participation by employees covered by the union in the company plan, 567 F.2d at 1348, the court stated that “there was no way to evaluate, or even to identify, the harm flowing to the employees as a result of that violation,” id. at 1351. Thus, the Board’s order, similar to the Western Foundries order, was deemed too speculative and “unduly burdensome” on the employer. Id. at 1352. Although
Finality of the Collective Bargaining Agreement

Since the duty to bargain imposed by the NLRA is continuous, unilateral termination of a pension plan during or following the term of a collective bargaining agreement is a violation of section 8(a)(5). This was illustrated in Crest Beverage Co., where an employer was held to have violated section 8(a)(5) by discontinuing pension, health and welfare contributions upon the expiration of the collective bargaining agreement. A different conclusion may be reached, however, where termination is effected under sections...
4041 and 4042 of ERISA, which permit plan termination by both the plan administrator and the PBGC. Where termination is initiated by the plan administrator, there will be little effect on the duty to bargain since the termination provisions of the collective bargaining agreement will continue to bind the administrator. Where the PBGC terminates the plan on its own initiative, however, the corporation is not bound by any term in the plan agreement. Although the PBGC infrequently exercises its authority to terminate, where the circumstances warrant termination the bargaining power of the union will be substantially reduced since the plan provisions would be rendered unenforceable.

The question of the employer’s post-agreement duty to bargain may arise in other contexts. For example, an employer who is unable to satisfy the minimum funding standards for a plan year without substantial business hardship may apply to the Secretary of the Treasury for a waiver. Similarly, an extension of the amortization period may be obtained from the Secretary of Labor if he determines that the extension would provide adequate protection for the participants and beneficiaries under the plan and that failure to grant an extension would result in either a substantial risk to the voluntary continuation of the plan or a significant curtailment of pension benefits to employees. When an employer seeks a waiver from either the Secretary of the Treasury or the Secretary of Labor the question arises whether the employer must first bargain with the union. The union position would be that neither agency should consider such a waiver unless the union has concurred; however, this would in effect give unions a veto power over the Secretary of the Treasury and the Secretary of Labor. It is clear that the congressional intent of both provisions would be frustrated by such a bar-

intention on its part to be bound by the terms of the agreement, it was estopped from establishing its failure to sign the agreement as a defense. Id. at 130-31.

Among the activities mentioned in Vin James were the employer’s payment of wages as provided by the contract, his deduction of union dues from the employees’ paychecks, and his general compliance with the terms of the agreement. Similarly, in Crest, the Board held that an employer could not discontinue payments to the pension fund even though the collective bargaining agreement containing the terms of the plan had expired. Although there was some evidence indicating that the employer and the union had reached an impasse in negotiating a new contract, the Board further held that the employer was permitted to make unilateral changes only if consistent with offers previously rejected by the union. [1977-1978] Lab. L. Ref. (CCH) (NLRB Dec.) ¶ 18,449.

135 See Fillion & Trebilcock, supra note 24, at 287-88.
136 E.g., ERISA § 303(a), 29 U.S.C. § 1083(a) (1976); see note 62 supra.
gaining obligation since the ability to protect the plan participants and beneficiaries and to maintain the stability of the plan could be curtailed, or at least hampered, by the negotiation process.

Problems may also arise where an attempt is made to modify the employer's obligation to the plan by amending the collective bargaining agreement with the consent of the union. A case arising in the milk industry, *Hurd v. Hutnick*, 138 is significant in this respect. Under the pension program in *Hurd*, booklets were given to employees along with the formal plan document. The booklet prom-

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138 419 F. Supp. 630 (D.N.J. 1976). Many cases in this area involve attempts by trustees of separate trusts to extend the employers' obligation by merging the trusts. One case of significance dealing with the enforceability of a merger agreement is *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 89 L.R.R.M. 2316 (Sup. Ct. Queens County), aff'd mem., 49 App. Div. 2d 755, 374 N.Y.S.2d 590 (1st Dep't 1975). In *Brewery Workers*, the trustees of two pension funds agreed to merge trusts subject to employee ratification and IRS approval. Section 6058 of the Internal Revenue Code provides in pertinent part:

(a) In General.—Every employer who maintains a pension, annuity, stock bonus, profit-sharing, or other funded plan of deferred compensation . . . shall file an annual return . . . .

(b) Actuarial Statement in Case of Mergers, etc. — Not less than 30 days before a merger, consolidation, or transfer of assets or liabilities of a plan described in subsection (a) to another plan, the plan administrator . . . shall file an actuarial statement of valuation evidencing compliance with the requirements of section 401(a)(12).

ERISA § 1031(a); I.R.C. § 6058.

Section 401(a)(12) of the Internal Revenue Code provides:

A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation.

ERISA § 1021(b); I.R.C. § 401(a)(12). The employees of the plaintiff's fund did ratify but the defendant fund elected not to abide by the agreement. The defendant alleged that after execution, one of the participating employers in the plaintiff's fund, Rheingold Brewery, closed, resulting in a reduced work force and reduced pension contributions. The court did not review the possibility of an increased burden on the defendant's fund or its contributing employers under ERISA and held that the integration agreement was valid and enforceable. 89 L.R.R.M. at 2317. It is thus incumbent upon both trustees and negotiators to carefully review the possibility of financial hardship prior to effectuating such agreements. In small funds the percentage of liability can be adversely affected by such agreements which may be beyond the control of any one participating employer. Under *Brewery Workers*, an employer who was a contributor to the merged fund would assume the liability of both funds and, under the ruling in *Connolly*, see notes 115-125 & accompanying text supra, could have his liability greatly extended beyond what was initially contemplated by the collective bargaining agreement.
ised benefits “for life” once a retiree’s application was approved. The pension fund suffered due to a decrease in the number of contributing employers and the number of employees for whom contributions were made, and a simultaneous increase in the number of retirees. It became apparent to the trustees that an increase in the amount of contributions was necessary to cover the existing obligations of the trust fund as well as its future obligations. Eventually, the collective bargaining agreement was amended by deleting the provision for requiring continued contributions to the fund. It was agreed that thereafter each employer would establish a separate plan. The problem of insufficient capital remained, however, and the fund was unable to continue benefits for the existing retirees. Dissatisfied with the terms of payment under the new plan, the retirees brought suit alleging that the employers and the union could not agree to extinguish pension funds by eliminating further employer contributions to the funds without providing for the financial protection of the former employees who retired and who were already receiving benefits. The court framed the issue before it as follows:

When employers who have previously entered into a multi-employer pension plan find the plan too expensive to maintain, may they enter into a new agreement with the union extinguishing the pension fund by eliminating further contributions to it...? Finding that employers were committed to make contributions solely by virtue of the collective bargaining agreements, the court nevertheless held that they would not be able to abandon the fund since it would be inequitable to permit the reasonable and justified expectations of those employees who had been advised that they would be paid benefits “for life” to be frustrated. The employers

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139 419 F. Supp. at 641. In Hurd the pension trustees were authorized to regulate the terms and conditions of the benefit program. Id. at 639. Pursuant to this power, the trustees issued a schedule of qualifications and benefits which provided that each participant “shall receive on retirement a pension for his lifetime” or “may voluntarily retire at a pension for his lifetime.” Id. at 641 (emphasis in original). Neither the collective bargaining agreement nor the trust agreement guaranteed a lifetime pension to employees. Id. at 655.

140 Id. at 637. Nine of the dairy owners in Hurd contended that retirees were entitled only to the amount of assets accumulated as of the November 30, 1975, termination date. Id. at 642-43. One owner argued that since its pension fund payments were determined by the number of employee hours worked, its duty to contribute ended when the dairy ceased operations. Id. at 643-44. Another owner contended that it had never been a party to the collective bargaining agreement establishing the pension trust and, therefore, had no obligation under the pension agreement. Id. at 643.

141 Id. at 637.

142 Id. at 651-56. The court in Hurd focused its analysis on two questions: whether the pensioners’ rights had vested; and, if so, whether such rights extended only to amounts
were required to make payments to the fund to secure the pensions of current retirees. Thus, while retirees could not sue for anything beyond what had been initially promised them, the employer and union could not agree to change the collective bargaining agreement to the detriment of retirees already receiving benefits under the original agreement.\textsuperscript{143}

\section*{Conclusion}

While ERISA does not appear to have affected the duty to bargain imposed by the NLRA, it does have implications with respect to the collective bargaining process itself and the issues that may arise after an agreement is concluded. Labor negotiators must be attuned to ERISA's scheme for protecting plan participants and beneficiaries. The applicable provisions relating to vesting, participation and the obligations of plan fiduciaries require close scrutiny of plan terms before a collective bargaining agreement is concluded. It is especially important for the employer to be aware that the plan, as set forth in the collective bargaining agreement, generally will be considered binding by the courts and that attempts to circumvent agreed upon obligations will be closely scrutinized.

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removing in the fund as of its termination date. \textit{Id.} at 653. Applying New Jersey law, the court found that vesting entitled the pensioners to benefits which could not be reduced or eliminated. \textit{Id.} at 654. Moreover, the court reasoned that lifetime benefits were guaranteed because representations made during collective bargaining were relied on by employees who opted for retirement. \textit{Id.} at 655. An express disclaimer of employer liability included in the collective bargaining agreements did not authorize the employers to discontinue pension benefits. The disclaimer provided "that the agreement [was] limited to contribution without guarantee of benefits by Union or Employer." \textit{Id.} at 638. The court determined that since the disclaimer was deliberately deleted in subsequent collective bargaining contracts, \textit{id.} at 638-39, it was no longer operative. In any event, the court held that the disclaimer did not limit the duration of benefits to a period less than life but, rather, was intended to avoid liability for possible actuarial errors in the level of benefits. \textit{Id.} at 654 n.5.
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\textsuperscript{143} \textit{Id.} at 654. \textit{But see Toensing v. Brown,} 528 F.2d 69 (9th Cir. 1975). In \textit{Toensing,} pension plan trustees adopted a proposal to increase benefits for participants retiring after July 1, 1971. \textit{Id.} at 71. Pensioners who retired prior to July 1, 1971, brought suit against the trustees, claiming that the limited increase was arbitrary, capricious and a breach of the trustees' fiduciary duty. \textit{Id.} The court held that the trustees' action was a rational and valid exercise of authority. \textit{Id.} at 72.
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