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Changes to Retiree Health Benefits

Part One of a Two-Part Article

By Thomas M. Beck and Pamela M. Keith

Employers, who for many years have contracted with their labor unions to provide retiree health benefits, are now finding the burden debilitating. Changes in accounting rules, spiraling health-care costs, increased competition and changing demographics converge to make it economically infeasible for some employers to continue providing such benefits at the generous levels of years past. Consequently, many companies have been compelled to modify their retiree health plans in ways that reduce or eliminate some benefits or that require retirees to pay more out of pocket. These changes have resulted in an avalanche of litigation.

Unfortunately, on some of the questions that are at the core of such litigation, the applicable law is far from uniform. Employers are left with little clear guidance about how to mitigate the legal — and thus financial — risks associated with modifying retiree health benefits. This two-part article identifies practical steps that employers can take to prepare for and defend against litigation stemming from changes to retiree health care benefits.

Current Status of the Law

Litigation about retiree health benefits involves competing policy concerns. Companies must be able to adapt to changed circumstances if they are to remain economically viable. On the other hand, retirees have often relied on the belief that their medical benefits would remain at a certain level; changes to these benefit levels can strike at the foundations of their retirement plans. Courts are hardly in agreement about which policy considerations should hold sway, and their inconsistent rulings have created great uncertainty for both employers and retirees. Two issues about which the judicial conflicts are most obvious are: 1) the legal standing of unions to represent and litigate on behalf of retirees, and 2) the vesting of retiree health benefits.

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Union Standing to Represent Retirees

In a key case, the Supreme Court held that unions represent current employees only, and that retirees are, therefore, not represented by their (former) union. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971). Some employers took this to mean that unions did not have standing to represent retirees in litigation against the employer. *See, e.g., United Steelworkers of Am. v. Canron, Inc.*, 580 F.2d 77, 80-81 (3d Cir. 1978). The Third Circuit however, held that the reasoning in *Pittsburgh Plate Glass* applied only to the union collective bargaining role, and that unions could represent retirees for the purpose of enforcing promises that had already been bargained for. *United Steelworkers*, 580 F.2d at 80-81 (holding that under accepted contract principles the union has a legitimate interest in protecting the rights of the retirees and is entitled to seek enforcement of the applicable contract provisions. *See also, United Auto., Aero. & Agric. Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1486 (6th Cir. 1983) (holding that, as a signatory to a collective bargaining agreement, the union has standing to bring an action for the third party beneficiary retirees. *cert. denied*, 465 U.S. 1007 (1984).

This view fails to acknowledge that retirees may not wish to have their interests represented by a union — particularly since a union's first priority must be the interests of its current members, which potentially can conflict with the interests of retirees. *See generally, UMWA Health & Ret. Funds v. Robinson*, 455 U.S. 562, 574-75 (1982) (holding that former [union] members and their families may [permissibly] suffer from discrimination in collective bargaining agreements because the union need not affirmatively … represent [them] or … take into account their interests in making bona fide economic decisions in behalf of those whom it does represent, (citation omitted) *criticized on other grounds in, Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581 (1993). *See also Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985).

Currently, few courts maintain that unions may not, under any circumstances, represent retirees. Without actually deciding the issue, the Second Circuit has stated that it had doubts that a union could represent retirees. *See Schweizer Aircraft Corp. v. Local 1752, Int Union, United Auto., Aero. & Agric. Implement Workers*, 29 F.3d 83, 87 (2d Cir. 1994). *See also Toussaint v. J.J. Weiser & Co.*, No. 04 Civ. 2592, 2005 WL 356834 (S.D.N.Y. Feb. 13, 2005) (holding that union officials acting in official capacity, even if viewed as the union itself, did not have standing to pursue ERISA claims on behalf of retirees). The Fifth, Sixth, and Seventh Circuits have reasoned that, in order to protect the rights of retirees to pursue their own claims, unions must obtain consent from retirees before representing them. *See Int Ass of Machinists and Aero. Workers Local Lodge 2121 v. Goodrich Corp.*, 410 F.3d 204 (5th Cir.), *cert. denied*, 126 S. Ct. 647 (2005); *Cleveland Elec. Illuminating Co. v. Util. Workers Union, Local 270*, 440 F.3d 809, *reh denied*, 2006 U.S. App. Lexis 12081 (6th Cir. May 11, 2006); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001). The Third and Eighth Circuits allow unions to represent retirees without obtaining consent. The Ninth Circuit has not clearly decided the issue; however, a recent district court decision held that a union need not obtain consent to represent retires. *See Int Bhd. of Elec. Workers v. Citizens Telecomms. Co. of Cal., Inc.*, No. CIV. S-06-0677, 2006 WL 1377102 (E.D. Cal. May 18, 2006). The First, Fourth, Tenth, Eleventh and D.C. Circuits also appear not to have directly decided the issue.

The conclusion of this article in next month's issue will address cases involving the presumption of vesting and offer tips for managing changes in retirement plans and negotiating future plans.

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Part Two of a Two-Part Article

By Thomas M. Beck and Pamela M. Keith

The first part of this article discussed the current state of the law with regard to the legal standing of unions to represent and litigate on behalf of retirees. The conclusion addresses cases involving the presumption of vesting, and offers tips for managing changes in retirement plans and negotiating future plans.

The Presumption of Vesting

Another area that is fundamentally unsettled is whether and in what circumstances retiree benefits "vest" upon the retirement of an employee. The Sixth Circuit favors a presumption that retiree health benefits are vested. *See UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). According to the Sixth Circuit, since benefits for retirees are only permissive rather than mandatory subjects of collective bargaining, "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations." *Id.* at 1482. (In a more recent decision, the Sixth Circuit appeared to move away from the presumption of vesting, holding that "This [c]ourt has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent … All that *Yard-Man* and subsequent cases instruct is that the court should apply ordinary principles of contract interpretation." *Yolton v. El Paso Tennessee Pipeline Co.*, 453 F.3d 571, 580 (6th Cir. 2006). However, this assertion appears to mischaracterize previous Sixth Circuit holdings. *See, e.g., Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 613 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) (This court has recognized that normally retiree benefits are vested."). It remains to be seen how Sixth Circuit courts will reconcile *Yolton* with *Yard-Man* and its progeny in the future.) Naturally, there are courts that have come to the opposite conclusion — that there is a presumption that benefits *have not vested* in the absence of express and unambiguous language of intent for such benefits to vest. *See Int'l Union, United Auto., Aero. & Agric. Implement Workers v. Skinner Engine Co.*, 188 F.3d 130, 142 (3d Cir. 1999); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995). Some courts have applied the presumption of vesting only if there is some ambiguity in the language conferring the benefit. *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1505, *reh'g denied en banc*, 861 F.2d 1281 (11th Cir. 1988). The majority of circuits favor neither a presumption in favor of nor against vesting, but decide the question on the facts of each case, often relying on extrinsic evidence to discern the intent of the parties. *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206 (1st Cir. 2006) (rejecting *Yard-Man* presumption of vesting); *Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1240-41, *amended by*, 2000 U.S. App. Lexis 8639 (10th Cir. 2000); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999); *Bazzone v. Auto. Indus. Welfare Fund*, No. 87-2175, 1988 WL 58340, at *4 (9th Cir. Oct. 4, 1988) (unpublished decision); *Int'l Ass'n of Machinists & Aero. Workers, Woodworkers Div., v. Masonite Corp.*, 122 F.3d 228, 231-32 (5th Cir. 1997); *Barker v. Ceridian Corp.*, 122 F.3d 628, 634 -38 (8th Cir. 1997), *cert. denied*, 529 U.S. 1109 (2000).

Practical Steps for Managing Changes

Employers can expect that unions and retirees will seek to exploit the disarray among the courts. An employer may suffer at the hands of unfavorable legal precedent if it allows plaintiff groups to gain the initiative and to dictate the forum of litigation. There are, however, practical steps that employers can take to exert some control before, during and after an announcement of changes to retiree health benefits.

Communicating with Affected Retirees

Before announcing changes to retiree benefits, employers can communicate directly with retirees. Since retirees are not union members; accordingly, direct communication (and dealing) with them is not prohibited by the National Labor Relations Act. *See Pittsburgh Plate Glass Co.*, 404 U.S. at 172. Thus, employers can contact retirees directly to explain changes or even to offer cash buyouts or other settlements of potential claims. There are likely some retirees who would accept cash payment or other compensation in exchange for releasing claims associated with benefits changes.

Providing Information To the Union

As a general rule, the union is entitled to information needed for the policing of the collective bargaining agreement. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *Lamar Adver.*

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Assocs. of Dayton, 257 N.L.R.B. 90 (1981). However, unions are not presumptively entitled to information about non-employees. *Bohemia Inc.*, 272 N.L.R.B. 1128 (1984); *NLRB v. Rockwel-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). Moreover, there is no duty to furnish information to the union concerning a permissive subject of bargaining. *Pieper Elec., Inc.*, 339 N.L.R.B. 1232, 1235 (2003) ("since it is not an 8(a)(5) violation to terminate a contract provision concerning a permissive subject, neither can it be an 8(a)(5) violation to refuse to furnish information relevant to policing such a provision."); *Social Serv. Union, Local 535*, 287 N.L.R.B. 1223, n.1 (1988). The employer can withhold information about retirees from the union until ordered by a court without committing an unfair labor practice. *See Pieper Electric Inc., supra* (holding that employer was under no obligation to give union information about retirees receiving benefits under pension plan).

Finding the Right Forum

Under the Supreme Court's ruling in *Pittsburgh Plate Glass*, retirees are not union members. This creates an anomalous situation in which a union is seeking to enforce a contract provision — relating to retiree health care — that exists for the benefit of persons who are not union members. In addressing this anomaly, some courts have concluded that, in order to pursue retiree claims at arbitration, unions must first obtain consent from retirees. *See Cleveland Elec. Illuminating Co. v. Util. Workers, Local 270*, 440 F.3d 809 (6th Cir. 2006); *reh denied*, 2006 U.S. App. Lexis 12081 (6th Cir. May 11, 2006); *Int'l Ass'n of Machinists and Aero. Workers Lodge 2121 v. Goodrich Corp.*, 410 F.3d 204 (5th Cir.), *cert. denied*, 5Ct.697 2005 U.S. S.Ct. (2005); *Rosetto v. Pabst Brewing Company*, 217 f.3d 539 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Paper, Allied–Industrial, Chem. & Energy Workers Int'l Union v. UCAR Carbon Co., Inc.,* 368 F. Supp. 2d 548 (N.D. W. Va. 2005) (holding that union had to obtain permission from retirees before representing them at arbitration). At least one court has concluded that the employer must consent to union representation of retirees at arbitration. *Rossetto*, *supra* ("[w]hat we are saying is that any right District 10 has to pursue arbitration of the retiree's grievance must come from the retirees. And, of course, *Pabst must agree to deal with District 10 in this context.*").

It is well established that retirees can pursue ERISA and/or LMRA Section 301 claims in court. *See Pittsburgh Plate Glass Co.*, 404 U.S. at 181 (holding that retiree has a federal remedy under § 301 for breach of contract). A union can pursue breach of contract claims through arbitration or, if arbitration is not available, in court; however, it is unclear whether unions have standing to pursue ERISA claims for individual retirees. *Compare New Jersey State AFL-CIO v. New Jersey*, 747 F.2d 891(3d Cir.1984) (holding that union did not have standing to pursue ERISA claim because it was neither a participant nor a beneficiary), with *S. Ill. Carpenters Welfare Fund v. Carpenters Welfare Fund*, 326 F.3d 919 (7th Cir. 2003) (both cases involve union standing to represent "members," but the reasoning would appear to extend to retirees.). It is also unclear if individual retirees can compel an employer to arbitrate claims pursuant to a collective bargaining agreement. Collective bargaining agreements are entered into between an employer and a union, and it may be difficult for an individual to claim a right to arbitrate under those provisions without the union as its representative. Certainly, some courts have found that retirees should not be forced to arbitrate their claims for the very reason that the union is under no duty to represent them. *See Anderson v. Alpha Portland Industries, Inc.*, 727 F.2d 177 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985). *But see, Perrino v. Southern Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1315 (11th Cir. 2000) (holding that employees had to exhaust contract grievance procedures before pursuing ERISA claim in court).

Given the conflicting law regarding arbitration of retiree claims and because retiree benefits claims are often packaged as ERISA claims, federal courts will often be the first and most appropriate venue for resolution of retiree claims. It is crucial for employers to litigate in a forum with favorable law. Some bold employers have preemptively initiated declaratory judgment actions against their retirees (often naming unions as co-defendants) in an effort to ensure that the legal issues will be resolved under favorable precedent — particularly as it relates to vesting. *See Halliburton Co. Benefits Comm. v. Graves,* 463 F.3d 360 (2006), *reh'g denied*, 2007 U.S. App. Lexis 3257 (5th Cir. Feb. 13, 2007)*; Rexam Inc. v. United Steelworkers of Am.,* No. 03-2998 ADM/AJB, 2005 WL 2318957 (D. Minn. Sept. 22, 2005); *Bowe Bell + Howell Co. v. Immco Employees' Ass'n*, No. 03 C 8010, 2005 WL 1139645 (N.D. Ill. May 11, 2005). In fact, some companies have filed suits on the same day that they announced reductions in benefits. *See* William T. Payne, John Stember, Stephen M. Pincus*, Battling for Benefits*, 41-DEC Trial 26, 31-32 (2005).

A glaring omission in the current jurisprudence is what effect a resolution of claims brought by a union will have on those retirees who did not consent to be represented by that union. In *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990), the court held that the retiree was not precluded from bringing suit under the theory of *res judicata* because he was not in contractual privity with the union that brought the previous suit against the employer. The holding in *Meza* prompted certain courts to conclude that a union must have consent from retirees to represent them in any action. *See Int'l Ass'n of Machinists and Aero. Workers Local Lodge 2121*, 410 F.3d at 212; *Cleveland Elec. Illuminating Co., Local 270*, 440 F.3d at 817. However, no court has ruled on whether the union must obtain consent from *all* retirees to proceed, and if the union does not obtain universal consent, what happens to the claims of those retirees who withhold consent. *See Id.* at 817-18 (remanding determination of whether union must obtain consent from all retirees to arbitrator).

Due to the uncertain preclusive effect of litigation pursued by the union, it may be in the employer's best interest to resolve all claims at one time, rather than to litigate claims brought by the union only to face subsequent claims asserted by individual retirees. In such instances, the employer should take the position that the union must have universal consent from retirees before it can represent their interests, or use Fed. R. Civ. P. 19(1) to join retirees who have not consented to be represented by the union.

Defeating Class Certification

In retiree health benefit litigation, there are

potentially three types of putative class representatives: 1) qualified individuals; 2) retiree committees; and 3) unions. With respect to union representation, while some courts have certified plaintiff classes under Rule 23, *see IUE-CWA v. General Motors Corp.*, No. 06-12151, 2006 WL 3147739, at **9-10 (E.D. Mich. Nov. 1, 2006); *UAW v. General Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at **9-11 (E.D. Mich. Mar. 31, 2006); *United Steelworkers of Am. v. Ivaco*, 216 F.R.D. 693 (N.D. Ga. 2002), other courts have held that such may not be appropriate because the union's chief allegiance is to current employees rather than retirees. As stated by the court in *Anderson*:

> In addition to creating difficulties for the union, the conflict of interest between active employees and retirees also threatens the retirees' interests. The threat is to the retirees' interests, not the active employees' interests, because of the politics of the situation. The union leadership has a political interest in serving the interests of the active employees because the active employees vote in union certification elections and union leadership elections.

Id., 727 F.2d at 183. *See also Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union*, 368 F. Supp. 2d at 551 ("Placing retirees outside of the bargaining unit 'acknowledges the potential for conflict between the interests of retirees and the interests of active employees'"); *Retired Chicago Police Ass'n v. City of Chicago*, No. 90 C 407, 1994 WL 163630 (N.D. Ill. April 28, 1994) (finding that conflicts between interests of members precluded association from representing all retirees).

Consequently, an employer facing putative class claims brought by a union on behalf of retirees can argue against class certification by challenging the union's ability adequately to represent retirees whose interests may be inconsistent with the interests of current union members.

Negotiating Future CBAs

Removing Retiree Benefits from Collective Bargaining Agreements

The first and most obvious solution for employers going forward is not to offer retiree health benefits at all. They are not required by law. If, however, abandonment of retiree health benefits is not a practical option, employers can take steps to allow themselves more flexibility. Because retiree benefits are not a mandatory subject of bargaining, employers may offer retiree benefits without negotiating them with the union and without including them in the CBA. An employer would have to make clear that the benefits are offered to retirees only, and are not a benefit offered presently to employees in the form of deferred compensation. A possible way to accomplish this is by offering the retiree benefits in the form of a severance benefit that is terminable at the employer's option rather than a part of compensation for current work. It would be more difficult for a court to find that unions have a stake in such benefits if they are: 1) not negotiated by the union; and 2) not a part of an employee's compensation. If an employer were to change retiree health benefits, there would be less of a perception that retirees were deprived of something they had earned and that had vested while working, and more of a view that retirees were merely losing a bonus or benefit not related to compensation.

While there are reasons to include health benefits for current employees in CBAs, there is little benefit in including retiree benefit plans in collective bargaining agreements. The case law is decidedly inconsistent with respect to the effect incorporating plan language into the contract, even if the plan language allows the employer to amend or terminate benefits. *Cf. Yard-Man, supra,* with *Skinner Engine Co.*, 188 F.2d at 130 (finding that retiree benefits were not vested because the plan, which was incorporated into the CBA, allowed for unilateral modification of its terms by the employer); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).

Using the Right Contract Language

At a minimum, employers should ensure that any contract terms about retiree health benefits unequivocally state that such benefits do not and cannot ever 'vest,' that they are terminable at will, and that no other provisions of the contract, plan documents or other actual or implied covenants supersede the terms giving the employer the right to modify or terminate plan benefits at will. It is possible that, even with strong contract language, a court will presume that retiree benefits would not be offered unless the parties intended for retirees to receive them so long as they maintained the status of retirees. *See Yolton v. El Paso Tenn. Pipeline Co.,* 435 F.3d 571 (6th Cir.), *cert. denied*, 127 S. Ct. 555 (2006), *cert. petition pending*; *Yard-Man*, 716 F.2d at 1482 ("it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations."). But most courts will respect such clear and unambiguous language, and will enforce management's reserved right to modify retiree benefits.

Conclusion

Now more than ever, when dealing with their unions and when offering retiree benefits, employers must seek to ensure maximum flexibility that will enable them to respond to changed circumstances later. When it comes to litigating changes to retiree health benefits, court rulings are inconsistent and sometimes based on questionable logic. An employer's best protection is to understand the potential pitfalls, take proactive steps to head off litigation where possible, and to minimize the union's ability to pursue claims relating to benefits changes.