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Legal Landmines for Employee Benefit Plan Sponsors During Bad Economic Times

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"Breaking Up Is Hard to Do" is not only the name of a popular song from the 1960s, it also describes the feelings of most employers who, because of competition, business costs or our current bad economy must reduce the size of their employment budget. By the time an employer has to "downsize," the economic factors driving that decision have already done their damage. The question for management is ordinarily not whether a reduction in force or a cut in employee benefits is necessary but, rather, how to do it. Navigating around employee benefit landmines is difficult even in good economic times. It has now become a truly perilous undertaking due to the dramatic declines in retirement plan asset values and the government's increasing scrutiny of employee benefit arrangements.

Dramatic Decline in Retirement Plan Assets

How bad is it? By the end of calendar 2008, old fashioned pension plans (technically called "defined benefit plans" by those practicing in this area) for Fortune 500 companies had accumulated $1.4 trillion in liabilities and had just $1.1 trillion in assets. Just one year earlier these same Fortune 500 plans had a $63 billion surplus. 2008's stock market decline simply decimated plan asset values. For example, the average defined benefit plan experienced a 24 percent decline in the value of its assets during 2008. At the end of calendar 2007, 46 percent of pension plans had funding levels of between 90 percent and 110 percent and only five percent of plans were funded below 70 percent. Today it is estimated that only five percent of pension plans are funded above 90 percent. Over 60 percent of pension plans have funding levels below 70 percent. 401(k) plans have fared no better. By the end of calendar 2008 the average 401(k) plan account balance was down by 26 percent. Sponsors of defined benefit plans are thus reeling from a double whammy—large negative investment results occurring at the same time the federal government is mandating increased plan funding.

Unfavorable Demographics

In the overall U.S. economy, the ratio of active workers to retired workers has been plummeting for many years—it now stands at about three active employers to one retiree compared to 16 active workers to each retiree in 1950. At some companies like Ford and Chrysler, the ratio of active workers to retirees has fallen from six to one in 1950 to one to one now. At GM there is now only one active employee for every two GM retirees.

Beyond demographic factors, the problem is compounded by the fact that the U.S. economy is shrinking. In May 2008, the U.S. unemployment rate stood at 5.5 percent. It is now officially 8.9 percent. Since the recession began in December 2007, over five million jobs have been lost. The Department of Labor estimates that as of April 2009 almost 14 million Americans are out of work.

Increased Government Scrutiny

The Pension Protection Act of 2007 (PPA) added a series of new funding requirements for defined benefit plan sponsors. Generally, the legislation is aimed at requiring all defined benefit plans to achieve 100 percent funding within the next seven years.[1] PPA's new funding mandates include a requirement for every defined benefit plan to now fund the present value of the plans' accrued benefits and amortize any unfunded liabilities over a seven year period, using legislated actuarial assumptions.[2] The PPA also requires all defined benefit plan losses to be amortized over seven years. Defined benefit plan administrators must also now provide a mandatory annual notice to plan participants, labor organizations and the PBGC generally describing the plan's current funding level. For calendar year defined benefit plans, the first annual funding notice was to be issued by April 30, 2009.[3] Asset smoothing techniques which had not been restricted by law prior to the PPA, now cannot exceed 24 months. If a defined benefit plan's funding level falls below 60 percent, no lump sum distributions will be allowed.[4] While there has been a storm of protest from plan sponsors about the wisdom of implementing new funding requirements during a severe recession, those protests have fallen on deaf ears. Many employers face 2009 PPA funding obligations that are multiple times their 2008 contribution amount. Going into 2009, the PBGC was already carrying an $11 billion deficit and recently announced that it posted a $33.5 billion deficit for the first half of fiscal year 2009, the largest in the agency's 35 year history.

The PPA added new provisions to ERISA aimed at making customized investment advice more readily available to 401(k) plan participants. As added to ERISA, new Sections 408(b)(14) and 408(g) provide an exemption from ERISA's prohibited transaction rules for the provision of investment advice, the acquisition of securities pursuant to the investment advice, and the receipt of fees in connection with the provision of participant-level investment advice to a participant directed plan.

The day after President Obama was inaugurated, on January 21, 2009, the Department of Labor published final investment advice regulations that included rules implementing Section 408(b)(14) and a class exemption covering certain transactions outside the scope of the statute and regulations. Shortly thereafter, in response to a memorandum issued by Rahm Emmanuel, Obama's Chief of Staff, the Department of Labor opened a new comment period inviting public comments on any substantive issues raised by the regulation, and delayed the regulation's effective date until May 22, 2009. On May 22, 2009, the Department further delayed the final regulations until November 18, 2009.

This latest delay follows the introduction by Representative Rob Andrews (D-NJ), chair of the Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and Labor, of the "Conflicted Investment Advice Prohibition Act of 2009." Andrews' bill would eliminate Section 408(g) of ERISA and instead require that any investment adviser hired to provide investment advice either to a participant-directed plan or to its participants must qualify as an "independent investment adviser." The bill would retain the current structure that permits advisory programs to be provided either through a fee-based approach or through the use of a computer model. However, the bill imposes new restrictions on these programs that go above and beyond current rules.

Other recently introduced legislation is focused on increasing the transparency of fees associated with 401(k) Plans. On April 21, 2009, George Miller (D-CA), chair of the House Education and Labor Committee (HELP Committee), reintroduced the "401(k) Fair Disclosure for Retirement Security Act of 2009," which is nearly identical to the version of the legislation that was approved by the HELP Committee in April 2008. According to Chairman Miller, among other things, the proposal would (1) require service provider disclosures to employers broken into four categories (plan administration and recordkeeping, transaction fees, investment management fees, and other fees) including disclosure of potential conflicts of interest, (2) require standardized disclosures to participants regarding investment options, investment option performance, and fees associated with each investment option, and (3) condition limited employer liability for participant directed investments under Section 404(c) of ERISA on the use of at least one index fund in a plan's investment lineup.

Prior to the reintroduction of Representative Miller's proposal, Senators Tom Harkin (D-IA) and Herb Kohl (D-WI) reintroduced their fee disclosure legislation on February 10, 2009, "The Harkin/Kohl Defined Contribution Fee Disclosure Act of 2009." We also anticipate that House Ways and Means Committee member Richard Neal (D-MA) will reintroduce his fee disclosure proposal from 2008 sometime in the near future.

Meanwhile the 2009 amendments to COBRA have added a new level of complexity to an already complicated law regulating group health plans. In a nutshell, the 2009 COBRA amendments allow employees who lose their job through no fault of their own between September 1, 2008 and December 31, 2009, to have the federal government pay for 65 percent of their COBRA premiums (the employer receives a payroll tax credit equal to 65 percent of the COBRA premium). New laws mean new rules, new COBRA notices and new unanswered questions.

Good Times for ERISA Plaintiffs Lawyers

With the rapid decline in the U.S. economy has come an upsurge in employee benefit related lawsuits. For example, when Caterpillar and Alcoa announced reductions to their retiree medical benefit plans during 2008 they were immediately hit with class action lawsuits. To no surprise, benefit reductions are very unpopular with retirees. While employers have generally convinced courts they are allowed to share costs with salaried retirees under ERISA regulated retiree medical plans,[5] these same arguments have not fared as well in connection with retiree medical benefits covered under a union contract.[6] To make matters worse for employers trying to maneuver through the many obstacles associated with a decision to reduce benefits, the circuit courts of appeals have patently different opinions about when collectively bargained retiree medical plans can be changed.

The outcome of a retiree medical lawsuit increasingly depends on the analysis employed by the court in considering benefit reduction cases. Retired union members favor the analysis employed by the Sixth

Circuit for a very good reason. Of the 12 important retiree medical decisions arising under the Labor Management Relations Act in the Sixth Circuit, all 12 found retiree medical benefits were vested.[7]

While federal courts in Ohio and Michigan appear to favor retirees in these disputes, the same cannot be said of the federal courts next door in Illinois and Wisconsin. Employers crowd the dockets in Illinois and Wisconsin because the Seventh Circuit has ruled retiree medical benefits are not vested in eight out of 10 published LMRA cases.[8]

Consequently, where the lawsuit is filed, as opposed to the circumstances leading to the benefit reduction, will often be the determinative event in the outcome of a case.

Participants Are Suing Plan Fiduciaries for Investing Money in Risky Companies

The subprime mortgage crisis has had a profound effect on retirement plans regulated by the Employee Retirement Income Security Act of 1974 (ERISA).[9] The most obvious examples are the many lawsuits filed by 401(k) Plan Participants at Countrywide, AIG, Lehman Bros., Bear Stearns, and others alleging that plan fiduciaries knew or should have known it was imprudent to allow employees to ever invest in the stock of these companies. These new class action stock drop cases are the offspring of the debacle at Enron.

What happened at Enron? The class action "stock drop" industry was, of course, born out of Enron's bad facts. In early 2001, Enron Corporation shares were trading at $80. Jeff Skilling unexpectedly resigned as chief executive officer of Enron in August 2001. Enron shares were then trading at $35. Ken Lay, the former chairman of Enron, returned as the CEO. Enron thereupon stunned Wall Street in October 2001 by announcing a $638 million loss and a $12 billion write-down. Between September 2001 and November 2001 the 401(k) plan was in "lock-down" mode. To facilitate the transition to a new plan administrator, Enron 401(k) plan participants were not allowed to change any 401(k) plan investments or trade Enron stock. During the lockdown, Enron stock collapsed from $34 to $10 per share. It was also during this same time period that Ken Lay made a speech in the Enron cafeteria extolling the virtues of buying Enron stock while he was busily selling all of his own Enron shares. All told, Enron's 401(k) plan participants lost about $1 billion in their Enron stock investments. When the lawsuit ended, the ERISA plaintiffs recovered $442 million.

Just as disappointed public shareholders bring federal securities fraud lawsuits when they suffer investment losses, so too do ERISA plan participants when they think plan fiduciaries have done bad things. Following Enron, numerous ERISA "stock drop" cases have been filed based on allegations that plan fiduciaries, like the Enron 401(k) plan fiduciaries, knew or should have known that company stock was not a prudent retirement plan investment, yet they allowed participants to accumulate it anyway.

By now the circumstances leading to the filing of one of these stock drop cases are unfortunately all too familiar. An employer includes its stock as an investment vehicle in the company's retirement plan, participants invest heavily in the stock—perhaps because it is the only stock they are truly familiar with—only to be followed sometime later by a precipitous decline in the share price, leading to the filing of a lawsuit by plan participants, alleging that the plan's fiduciaries knew or should have known that employer stock was not a prudent investment option for the plan.[10]

Employers with company stock in their sponsored-retirement plans need to heed the lessons from Enron and its progeny, especially in this time of economic upheaval.

Securities Lending Programs: Is This the Next Wave of ERISA Litigation?

BP recently sued Northern Trust alleging Northern Trust breached its fiduciary duties when it lost 401(k) plan money by lending out securities (held in certain investment funds) and then failed to tell BP about the losses. It turns out that BP is not alone. Securities lending programs are commonly used by retirement funds as a means to produce additional income on stock portfolios. A 401(k) trustee is often authorized to lend stock out to short seller and other borrowers in exchange for cash as collateral. The cash collateral is then supposedly invested in "safe" investments, such as Treasury bills or money market instruments. Under typical securities lending agreements, the return on the invested cash collateral is split among the retirement fund (for the benefit of its participants), the trustee, and the borrower of the securities. While the gains are usually small in percentage terms (because under applicable Department of Labor exemptive relief allowing participation in such transactions the collateral is required to be invested in low risk investments for short time periods), they can add up to big dollars over time when a large portfolio of securities is involved.

Securities lending programs have not been immune to losses stemming from the recent credit crisis. When supposedly reliable investments drop in market value due to the "flight to quality" and liquidity and liquidity needs, securities lending programs have seen losses for the first time. The losses are realized when the cash collateral is invested in assets that drop in value, thus creating a deficiency between the book value of the cash collateral and the market value of the collateral investments. It is estimated that billions of dollars of losses have been sustained recently by ERISA regulated plans in securities lending programs.

Similar claims are being brought by 401(k) plan fiduciaries who allege that mutual fund trustees running an index fund, such as an S&P 500 index fund, breached their fiduciary duties by engaging in securities lending. S&P funds that employ securities lending often lag the S&P index because of securities lending losses due to investments in subprime mortgage backed securities.

Participants Are Suing Former Investment Advisors

Aside from the lawsuits challenging reduction in retiree medical plans, some retirement plan fiduciaries themselves have filed class action complaints against investment funds who invested ERISA plan money with Bernie Madoff. For example, the Pension Fund for the Hospital and Healthcare Employees of Philadelphia filed a class action ERISA lawsuit against Austin Capital Management on February 12, 2009, alleging that the Austin Capital Management Fund violated ERISA by investing money with Madoff. In a February 5, 2009, notice, "Duties of Fiduciaries in Light of Recent Events Regarding Bernard L. Madoff Investment Securities LLC," the Department of Labor alerted plan fiduciaries they might need to sue Bernie Madoff and his "feeder" funds to properly discharge their fiduciary duties.

Employee Benefit Discrimination Claims

"I'll be back," are probably the three most dreaded words an employer hears at the end of an exit interview. The bad things that can follow these words can range form wrongful termination lawsuits to a baker's dozen of discrimination claims. Faced with shrinking revenues, many employers have little choice but to reduce expenses and often the most significant expenses are those associated with the employee benefit programs. But spinning off a company to jettison an older workforce with its pricey employee benefits plans, if done improperly, may constitute breach of fiduciary duty under ERISA.[11] Moreover, rearranging a workforce so as to avoid paying promised benefits may violate another provision of ERISA, which prohibits the interference with the exercise or attainment of any right to which a person is entitled under a plan or ERISA.[12]

The Supreme Court's decision in *Intermodal Rail Employees Association* is particularly instructive. There, the employer (Oldco) wanted to maintain a subsidiary's (Oldco Sub's) existing unionized workforce but jettison costly employee benefit plans. Oldco decided to do this by putting Oldco Sub's work out to competitive bidding. An unrelated third party (Newco) was the successful bidder. Newco hired Oldco Sub's employees. However, Newco's benefit package was less generous than Oldco Sub's. Newco employees then sued Oldco, Oldco Sub, and Newco for cheating them out of the better benefits they had under Oldco Sub's employee benefit plans.

While workforce restructuring is often a necessary practice by companies faced with concerns about their financial viability, ERISA makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."[13] Put simply, an employer is not allowed to manipulate an employee's terms and conditions of employment if the purpose is to cheat the employee out of promised employee benefits. The Ninth Circuit Court of Appeals had ruled that ERISA § 510 protected the retirement benefits of the former Oldco Sub employees but did not protect their rights to health, dental, vision, and other welfare benefits. Sandra Day O'Connor, writing for a unanimous Supreme Court, disagreed, stating that Congress's use of the word "plan" in Section 510 evidenced a congressional intent to protect an employee's rights to *both* retirement and welfare benefits.[14]

Justice O'Connor explained that although employers may properly amend, modify, or terminate welfare benefit plans at any time, this does not mean an employer has unlimited powers:

> An employer may, of course, retain the unfettered right to alter its promises, but to do so it must follow the formal procedures set forth in the plan. . . . The formal amendment process would be undermined if section 510 did not apply because employers could "informally" amend their plans one participant at a time. Thus, the power to amend or abolish a welfare benefit plan does not include the power to "discharge, fine, suspend, expel, discipline, or discriminate against" the plan's participants and beneficiaries "for the purpose of interfering with [their] attainment of . . . rights" . . . under the plan.[15]

Truth or Consequences!

Employers sometimes have many masters and, in the atmosphere of potential financial collapse, they may feel pressure to frame their explanations for reducing benefits in a manner which they believe will be more palatable to the financial markets or to their shareholders. Before falling prey to such an inclination, it is important to recognize that the Supreme Court made it clear in Varity Corporation v. Howe,[16] that an employer may be subject to breach of fiduciary duty claims under ERISA when it makes misleading statements about employee benefit plans during business reorganizations. In *Varity*, the employer downsized by what football pundits would describe as a misdirection play—pretended to do one thing when it was actually doing something entirely different.

Here's what happened: Varity transferred all of its poorly performing businesses into a newly form subsidiary (Newco). One of the company's primary objectives in forming the Newco was to rid itself of costly employee benefit obligations.[17] Varity persuaded employees to transfer to Newco by making overly optimistic observations about Newco's business outlook, its likely financial liability, and the security of the employee benefit program. The thrust of Varity's remarks was that the employees' benefits would remain secure if they voluntarily transferred to the new subsidiary. Varity made these representations, even though it intended to reduce the employee benefits at Newco in the near future.[18] Moreover, Varity knew that the representations it had made to the employees were untrue at the time they were made.[19] At the time the new subsidiary was formed, it was insolvent (it had a $46 million negative net worth).[20] The new subsidiary ended its first year of operation with an $88 million loss. It ended its second year of operation in receivership. After Newco fell into bankruptcy, Newco's employees stopped receiving certain welfare benefits, including their rights to retiree medical benefits they would have had, had they remained employed at Varity.[21]

The Supreme Court held that Varity was acting in both its capacity as an employer and as a plan fiduciary when it intentionally made misrepresentations to its employees about the security of their employee benefits.[22] The Supreme Court explained: "Reasonable employees could have thought that Varity was communicating with them both in its capacity as employer and in its capacity as the plan administrator."[23] Obviously, the Court's use of the subjective "reasonable belief" standard in evaluating Varity's actions blurs the distinction between when an employer is acting as an employer and when an employer is acting as a plan fiduciary.

Company officers who are also fiduciaries to employee benefit plans must be careful to identify when representations are being made as corporate officers and when their representations are being made as plan fiduciaries. In light of the Supreme Court's holding in *Varity*, it may also be advisable for employers to not name the company as the plan administrator or as a fiduciary of its employee benefit plans in order to minimize the risk that company communications about business activities or proposed benefit changes may be characterized as misleading fiduciary communications.

Retirement Plans and Releases of Claims

What steps can an employer take to minimize the risk of being sued in connection with a reduction in an employee benefit arrangement? Can an employer require an employee to sign a release of all claims as a condition for participation in an early retirement plan incentive plan funded out of the plan's own assets? The U.S. Supreme Court answered, "yes," in Lockheed Corp. v. Spink.[24] It found that Lockheed Corp. did not violate ERISA when it amended its pension plan to provide enhanced early retirement benefits on the condition that the employees sign a complete release of all claims to participate. The court reasoned that neither the employer nor its board of directors, as plan sponsors, acted as ERISA fiduciaries when they amended the plan. Under the amended plan, eligible Lockheed employees were offered increased pension benefits paid out of surplus plan assets.

A class of retirees sued, challenging the early retirement plans, particularly with regard to the feature that benefits were available only to employees who signed a complete release of all employment-related claims. They contended these acts were breaches of ERISA's requirements that plan assets be used exclusively for the purpose of providing benefits and violated fiduciary obligations. In particular, the participants argued that the amendments, which offered increased benefits in exchange for a release of employment, constituted a use of plan assets to "purchase" a significant benefit for Lockheed and was not in the interests of participants and beneficiaries.

The Supreme Court disagreed, ruling that legitimate benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, decreasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily. The court concluded that obtaining waivers of employment-related claims cannot be distinguished from these legitimate purposes because each involves, at bottom, a *quid pro quo* between the plan sponsor and the participant; that is, the employer promises to pay increased benefits in exchange for the performance of some condition by the employee. The Supreme Court observed that an employer can ask an employee to continue to work for the employer, to cross a picket line, or to retire early. The execution of a release of claims against the employer is thus functionally no different and, like these other conditions, it is an act that the employee performs for the employer in return for benefits.

Partial Plan Terminations?

Tough economic times, sometimes force employers to significantly reduce their workforces. One aspect of reduction in force that is often overlooked, is the potential impact of the reduction in force on the employer's qualified retirement plans. A hidden and potentially costly consequence of a significant reduction in force, or a series of reductions in force is that the employer's tax qualified retirement plan may experience a "partial termination."[25]

The law requires all affected retirement plan participants be 100 percent vested in their account balances upon the date of a partial plan termination. A 401(k) Plan participant's elective deferrals are, of course, always 100 percent vested. Employer contributions, however, are *not* required to be fully vested, and are usually subject to a vesting schedule. Upon a full or a partial retirement plan termination, the plan's vesting schedule is disregarded. Instead all matching contributions or any other employer contributions to the retirement plan immediately become 100 percent vested for all affected participants.

Whether a partial termination occurs depends on the facts and circumstances of each case. Generally, a partial termination is deemed to occur when an employer-initiated action results in a workforce reduction of at least 20 percent.[26] In determining whether a partial plan termination has occurred, the IRS and the Courts have focused on the following four factors:

1. The percentage of employees affected;
2. The time period during which the terminations occurred;
3. The presence of a corporate event (such as a merger or a divestiture); and
4. Evidence of good faith on the part of the employer.

To determine whether the 20 percent threshold amount has been met, the IRS requires plans sponsors to take into account all terminated participants unless the plan sponsor can show that the employment terminations were voluntary, for cause, on account of death, disability or retirement. According to the IRS, both vested as well as non-vested participants are to be taken into account in calculating the 20 percent number. However, in Matz v. Household International Tax Reduction Investment Plan,[27] the Seventh Circuit held that only nonvested participants needed to be counted in determining whether a partial termination occurred.

What time period is to be looked at to determine if the 20 percent threshold is met? We do not know. Again, it is a facts and circumstances test.[28] The IRS indicates that a plan sponsor should aggregate all employer initiated terminations during a rolling two-year period, unless the employer can establish the employment terminations were unrelated.

Because retirement plan participants must be 100 percent vested in their employer contribution accounts as a consequence of a partial termination, employers must carefully examine the potential impact of the partial termination rules before implementing a reduction in force, business merger or divesture, site closing, or adopting a plan amendment that excludes a group of employees from plan participation.

Conclusion

As the economic outlook remains challenging, many employers have little choice but to face the difficult decision to reduce employee benefit programs and, in some cases, reduce their workforce. Under such exceptional circumstances, employers are sometimes prone to making decisions without full consideration of the employee benefit landmines to which they are easily susceptible. The wrong decision can actually add to the employer's financial burden. As a result, before any workforce reduction is contemplated or change is made to an employee benefit program, an assessment should be made as to what was promised, and whether what was promised can be changed. Did the plan sponsor reserve the right to amend, modify, or terminate the plan? What are the potholes in reducing an employee benefit arrangement? Has the likelihood of lawsuits and a decline in morale been considered? A thoughtful and deliberate approach to these important decisions is the only true safe course.

Notes

1. IRC §430.
2. *Id.*
3. U.S. Department of Labor FAB 2009-01.
4. IRC § 436(d).
5. *See, e.g.,* Sprague v. General Motors, 133 F.3d 388, 400 (6th Cir. 1998) (en banc).
6. UAW v. Yard-Man, 716 F.2d 1476, 1479-1480 (6th Cir. 1983).
7. Noe v. Polyone Corp., 520 F.3d 548 (6th Cir. 2008); Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571 (6th Cir. 2006); McCoy v. Meridian Auto. Sys., Inc., 390 F.3d 417 (6th Cir. 2004); Maurer v. Joy Techs., Inc., 212 F.3d 907 (6th Cir. 2000); UAW v. BVR Liquidating, 190 F.3d 768 (6th Cir. 1999); Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996); Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991); Smith v. ABS Indus., Inc., 890 F.2d 841 (6th Cir. 1989); Weimer v. Kurz-Kasch, Inc., 773 F.2d 669 (6th Cir. 1985); Policy v. Powell Pressed Steel Inc., 770 F.2d 609 (6th Cir. 1985); UAW Cadillac v. Malleable Iron Co., 728 F.2d 807 (6th Cir. 1984); UAW v. Yard-Man, 716 F.2d 1476 (6th Cir. 1983).
8. *See* Barnett v. Ameren Corp., 436 F.3d 830 (7th Cir. 2006); Cherry v. Auburn Gear, Inc., 441 F.3d 476 (7th Cir. 2006); Int'l Union, UAW of Am. v. Rockford Powertrain, Inc., 350 F.3d 698 (7th Cir. 2003); Rossetto v. Pabst Brewing Co., 217 F.3d 539 (7th Cir. 2000); Pabst Brewing Co. v. Corrao, 161 F.3d 434 (7th Cir. 1998); Dieht v. Twin Disc., Inc., 102 F.3d 301 (7th Cir. 1996) (vested); Murphy v. Keystone Steel & Wire Co., 61 F.3d 560 (7th Cir. 1995); Bidlack v. Wheelabrator Corp., 993 F.2d 603 (7th Cir. 1993) (potentially vested); Senn v. United Dominion Indus., 951 F.2d 806 (7th Cir. 1992); Ryan v. Chromalloy Am. Corp., 877 F.2d 598 (7th Cir. 1989).
9. 29 U.S.C. § 1001, et seq.
10. *See, e.g.,* In re WorldCom, Inc., 263 F. Supp. 2d 745 (S.D.N.Y. 2003); Rankin v. Rots (Kmart); 278 F. Supp. 2d 853, 875–877 (E.D. Mich. 2003); In re Dynegy Inc. ERISA Litigation, 309 F. Supp. 2d 861 (S.D. Tex. 2004); In re Enron Corp. Securities, Derivative & ERISA Litig., 284 F. Supp. 2d 511, 601 (S.D. Tex. 2003).
11. *See, e.g.,* Varity Corp. v. Howe, 517 U.S. 882 (1996); Lessarol v. Applied Risk Management, MMI Companies, 307 F.3d 1020, 1026 (9th Cir. 2000).
12. ERISA § 510, 29 U.S.C. § 1140. *See* Intermodal Rail Employees Association v. Atchison, Topeka & Santa Fe Railroad Co., 520 U.S. 510, 117 S. Ct. 1513 (1997).
13. ERISA § 510, 29 U.S.C. § 1140.
14. 117 S. Ct. at 1515.
15. 117 S. Ct. at 1516. The Supreme Court remanded to the Ninth Circuit the issue of whether or not section 510 protects participants from interference with "attaining" their welfare plan coverage:

> Respondents argue that . . . an employee who is eligible to receive benefits under an ERISA welfare benefits plan has already "attained" her "rights" under the plan, so that any subsequent actions taken by an employer cannot, by definition, "interfere" with the "attainment" of . . . rights under the plan. According to respondents, petitioners were eligible to receive welfare benefits [at Oldco Sub] at the time they were discharged, so they cannot state a claim under section 510.

117 S. Ct. at 1516–1517.

16. 516 U.S. 489, 116 S. Ct. 1065 (1996).
17. 116 S. Ct. at 1068.
18. 116 S. Ct. at 1069.
19. *Id.* at 1071.
20. *Id.* at 1072.
21. *Id.* at 1069.
22. *Id.* at 1071–1074.
23. 116 S. Ct. at 1073.
24. 517 U.S. 882, 116 S. Ct. 1783 (1996).
25. IRC § 411(d)(3).
26. *See* Revenue Ruling 2007-43.
27. 227 Fed.3d 971 (7th Cir. 2000).
28. *Matz, supra.*

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