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IMPLEMENTING ERISA: OF POLICIES AND "PLANS"*

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I.	INTRODUCTION	560
II.	ERISA POLICIES	565
	A. <i>Conduct Controls</i>	567
	1. <i>Reporting and Disclosure</i>	567
	2. <i>Fiduciary Obligations</i>	568
	3. <i>Preemption</i>	569
	B. <i>Content Controls</i>	571
	1. <i>Protective Policy</i>	571
	a. <i>Pension Plans</i>	571
	b. <i>Note on Health Care Reform</i>	573
	2. <i>Information Costs</i>	574
III.	ERISA PLANS	576
	A. <i>Content Controls</i>	577
	1. <i>Restricted Coverage Cases</i>	577
	2. <i>Protective Policy</i>	580
	3. <i>Information Costs</i>	584
	4. <i>Welfare Benefits</i>	585
	B. <i>Conduct Controls</i>	586

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1. <i>Controlling Discretion</i>	586
2. <i>Protecting Funding</i>	591
3. <i>Promoting Planning</i>	594
IV. CONCLUSION	596

I. INTRODUCTION

Employer-provided benefits are now a major component of compensation. According to the United States Chamber of Commerce, the cost of all employee benefits constituted 38.4% of payroll in 1990.¹ More than one-quarter of this amount, 10.5%, was attributable to paid leave, such as sick leave, vacation, and holiday pay. That figure rises to one-third of the total, 12.9%, when paid rest periods during working days are included (e.g., lunch periods, coffee breaks).² Medical benefits were the second most costly item, amounting to 9.9% of payroll.³ Legally required payments, including the employer's share of Social Security,⁴ Medicare,⁵ and unemployment taxes,⁶ contributed 8.8%,⁷ while employer contributions to retirement and savings programs (pension, profit sharing, and stock bonus plans) constituted only 5.5% of payroll.⁸ The cost of other benefits was quite small; the largest items, disability income and life insurance, each

1. JOSEPH S. PIACENTINI & JILL D. FOLEY, *EBRI DATABOOK ON EMPLOYEE BENEFITS* 378 (2d ed. 1992).

2. *Id.*

3. *Id.* According to a recent study by the Bureau of Labor Statistics, employer expenditures for workplace-based health care plans totalled \$221.4 billion in 1992, while employee contributions amounted to \$37.2 billion. *Employers, Employees in 1992 Spent \$258.5 Billion on Health Care Plans*, 21 *Pens. & Benefit Rep. (BNA)* No. 1, at 42 (Jan. 3, 1994).

4. The Federal Insurance Contributions Act (FICA) requires employers to pay a tax (currently 6.2%) on the amount of wages they pay employees in order to finance the Old Age, Survivors and Disability Insurance (OASDI) program of the Social Security Act. I.R.C. § 3111(a) (1988).

5. FICA also requires employers to pay a tax (currently 1.45%) on wage payments to employees in order to finance the Medicare Hospital Insurance (HI) program. I.R.C. § 3111(b) (1988).

6. The Federal Unemployment Tax Act (FUTA) imposes a tax on employers of 6.2% of the total amount of wages paid employees. I.R.C. § 3301 (1988 & Supp. IV 1992).

7. PIACENTINI & FOLEY, *supra* note 1, at 378. The portion of labor cost attributable to legally required payments is less than the sum of the FICA and FUTA tax rates because of limits on the amount of wages subject to these payroll taxes. The FICA tax to fund OASDI does not apply to employment compensation in excess of the Social Security contribution and benefit base (\$57,6000 in 1993). I.R.C. § 3121(a)(1). Similarly, FUTA applies only to the first \$7000 of remuneration paid to an employee during the year. I.R.C. § 3306(b)(1). Beginning in 1994, the FICA HI tax is levied on the full amount of employment compensation. I.R.C. § 3121(a)(1). *See* I.R.C. § 3121(x) (repealed for 1994 and subsequent calendar years).

8. PIACENTINI & FOLEY, *supra* note 1, at 378.

contributed about one-half of 1% of payroll.⁹

Medical benefits overshadow pensions in coverage as well as cost, apparently because workers place a higher value on health insurance.¹⁰ In 1990, 76% of the private full-time workforce received employer health insurance (45% with dental coverage), but only 60% were covered by any kind of retirement or savings program.¹¹ Although other benefits are not a significant component of labor cost, cost alone understates their significance. In 1990, 79% of the private full-time workforce received life insurance under an employer program, while 29% received long-term disability insurance.¹² Another study showed that 85% of the employers surveyed had a severance pay policy covering some or all employees terminated in 1989.¹³

Deferred compensation and many types of fringe benefits receive preferential tax treatment if certain requirements are satisfied. The magnitude of these tax expenditures affords another quantitative measure of the importance of various forms of non-wage compensation. The most recent estimate of tax expenditures published by the Joint Committee on Taxation finds that the net exclusion of contributions and earnings under qualified retirement plans will reach \$55.3 billion in federal fiscal year 1994, the single largest item in the tax expenditure budget.¹⁴ The

9. *Id.*

10. Surveys conducted by the Gallup Organization for the Employee Benefits Research Institute (hereinafter EBRI) show that a steadily increasing majority of Americans regard health insurance as the most important employee benefit (68% in 1992, 65% in 1991 and 63% in 1990). In 1992, 56% of survey respondents said they would not accept a job that did not provide health insurance, while 40% said they would not take a job that did not offer a pension plan. Carolyn Piucci, *Benefits Continue to Play Key Role in Americans' Job Choices*, 13 EBRI Notes No. 12, at 8, 9 (Dec. 1992). A more recent survey provides confirmation of these results. Carolyn Piucci Pemberton, *Benefits Affect Americans' Job Decisions*, 15 EBRI NOTES No. 2, at 8 (Feb. 1994) ("Eighteen percent of Americans say they or a family member have turned down a job offer or stayed in a job they would have preferred to leave solely because of the health benefits, and 12 percent said they or a family member had done so solely because of pension benefits . . .").

11. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BLS REPORTS ON EMPLOYEE BENEFITS IN THE UNITED STATES, 1990-91 4 (1993) [hereinafter BLS REPORTS ON EMPLOYEE BENEFITS]. See Virginia P. Reno, *The Role of Pensions in Retirement Income: Trends and Questions*, 56 SOC. SECURITY BULL. 29, 33-35 (1993). Reno reports lower coverage rates than the BLS, apparently because her study focused on active participation (*i.e.*, current saving) rather than simply surveying whether the employer maintained a plan. See *Pension Coverage and Participation Growth: A New Look at Primary and Supplemental Plans*, EBRI ISSUE BRIEF No. 144, Dec. 1993, at 6.

12. BLS REPORTS ON EMPLOYEE BENEFITS, *supra* note 11, at 4.

13. PIACENTINI & FOLEY, *supra* note 1, at 407.

14. STAFF OF THE JOINT COMM. ON TAXATION, 103D CONG., 1ST SESS., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 1994-1998 17 (Comm. Print 1993) [hereinafter JOINT

exclusion of employer-provided medical benefits is expected to be \$36.7 billion in federal fiscal year 1994, which is the third largest tax expenditure.¹⁵ Other fringe benefits are far less costly. The exclusion of employer-provided group term life insurance premiums entails \$2.2 billion in reduced taxes in 1994, the tax-free status of employer-provided child care costs about \$600 million, and the exclusion of premiums for employer-provided accident and disability insurance amounts to only \$100 million.¹⁶ A significant and rapidly growing item—\$5.4 billion in 1994, projected to reach \$12.6 billion by 1998—is the exclusion of benefits provided under cafeteria plans (also known as flexible benefit arrangements), which often involve tax-free reimbursement of employees' child care costs or out-of-pocket medical expenses.¹⁷

There have been dramatic changes in the benefits field since the passage of the Employee Retirement Income Security Act of 1974 (ERISA).¹⁸ Most notably, employers' cutbacks in health insurance coverage and cost

COMMITTEE ESTIMATES]. It may seem curious that the qualified plan tax expenditure is substantially larger than the tax expenditure for employer-provided medical care when the subsidy for the former consists of tax deferral while the latter provides outright exclusion (tax forgiveness) and when employer costs for medical care are so much larger. See *supra* notes 3-8 and accompanying text. But if rates remain constant, deferral of tax is financially equivalent to outright exemption of the investment return earned during the period of deferral. See Alvin Warren, *The Relation and Integration of Individual and Corporate Income Taxes*, 94 HARV. L. REV. 717, 741 n.68 (1981). At the close of federal fiscal year 1993, private trustee pension plans held \$2.5 trillion in assets that were earning an average rate of return of almost 15%. Celia Silverman, *Private Trustee Pension Assets Reach \$2.5 Trillion by End of Third Quarter 1993*, 15 EBRI NOTES No. 2, at 5, 6 (Feb. 1994). Accordingly, taxpayers shoulder more of the cost of retirement savings than health care because of the immense accumulation of qualified plan assets.

15. JOINT COMMITTEE ESTIMATES, *supra* note 14, at 17. The second largest tax expenditure is the deductibility of mortgage interest on owner-occupied housing. *Id.* at 13.

16. *Id.* at 16, 17.

17. *Id.* at 16. Out-of-pocket medical expenses reimbursed through a cafeteria plan often include required employee contributions for insurance coverage, as well as expenses not covered by insurance (deductibles, copayments and excluded services). For a brief description of the benefits that can be offered under a cafeteria plan, see *infra* note 24.

The Administration's tax expenditure estimates, which are published in the annual budget request to Congress, generally agree with the Joint Committee's numbers. The corresponding federal fiscal year 1994 numbers are: \$52.6 billion, net exclusion of pension plan contributions and earnings; \$50.8 billion, exclusion of employer-provided medical care; \$2.9 billion, exclusion of premiums on employer-provided group life insurance; \$680 million, exclusion of employer-provided child care; \$140 million, exclusion of premiums on accident and disability insurance. OFFICE OF MANAGEMENT AND BUDGET, BUDGET BASELINES, HISTORICAL DATA, AND ALTERNATIVES FOR THE FUTURE 543, 548 (1993). The Administration's report includes a rank-ordered list of tax expenditures. *Id.* at 561.

18. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1976) (codified as amended in 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992) and codified as amended in scattered sections of Title 26 of the U.S. Code).

shifting in response to escalating medical care costs have spawned the current national debate over health care reform.¹⁹ Less visible, but similarly consequential, is the proliferation of special statutory exclusions from gross income for a variety of fringe benefits. Since 1974, Congress has granted explicit statutory sanction for a host of tax-free employee benefits, including qualified group legal service plans,²⁰ employer-provided commuter transportation,²¹ educational assistance programs,²² dependent care assistance,²³ and cafeteria plans.²⁴

Despite remarkable growth in the number and importance of non-pension fringe benefits, Congress has left the non-pension regulatory regime established by ERISA largely untouched. No such legislative neglect has attended pension plans. Over the past twenty years ERISA has been extensively and repeatedly amended to (*inter alia*): (1) tailor the application

19. The percentage of payroll spent on health insurance by private business increased almost four fold between 1965 and 1991. Ken McDonnell, *Health Care Costs: Who Pays What?*, 15 EBRI Notes No. 3, at 4, 5 (Mar. 1994). "Prompted by ever-rising costs, employers of all sizes have reduced health coverage benefits, raised deductibles, limited coverage and switched to hiring more part-time and contract workers in part to avoid paying health benefits." WHITE HOUSE DOMESTIC POLICY COUNCIL, HEALTH SECURITY: THE PRESIDENT'S REPORT TO THE AMERICAN PEOPLE 4 (1993); see Health Security Act, H.R. 3600, 103d Cong., 1st Sess. (1993); HEALTH SECURITY ACT SECTION-BY-SECTION ANALYSIS (Dec. 1993); WHITE HOUSE HEALTH CARE TASK FORCE, WORKING GROUP DRAFT: THE AMERICAN HEALTH SECURITY ACT OF 1993 (Sept. 7, 1993).

20. I.R.C. § 120 (added by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2134(a), 90 Stat. 1520, 1926).

21. I.R.C. § 132(a)(5), (f)(1) (added by the Energy Tax Act of 1978, Pub. L. No. 95-618, § 242(a), 92 Stat. 3174, 3193) (originally codified as I.R.C. § 124).

22. I.R.C. § 127 (added by the Revenue Act of 1978, Pub. L. No. 95-600, § 164(a), 92 Stat. 2763, 2811).

23. I.R.C. § 129 (added by the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 124(c)(1), 95 Stat. 172, 198).

24. I.R.C. § 125 (added by the Revenue Act of 1978, Pub. L. No. 95-600, § 134(a), 92 Stat. 2763, 2783). A cafeteria plan is a flexible fringe benefit arrangement which permits employees to choose between receiving cash and a variety of nontaxable benefits without running afoul of the constructive receipt doctrine, Treas. Reg. § 1.451-2(a) (as amended in 1971). That is, employees who elect to receive benefits that would be excludable under other Code provisions are not taxed on those benefits merely because they had the opportunity to receive cash instead. The benefits available under a cafeteria plan are known as the cafeteria plan "menu," and may include most benefits that are statutorily exempt from taxation, such as employer-provided medical insurance, group legal insurance and dependent care assistance, but cannot include deferred compensation (other than a qualified cash-or-deferred arrangement), qualified tuition reduction, educational assistance, nor any fringe benefit excluded by § 132 (*i.e.*, no-additional-cost services, qualified employee discounts, working condition fringes, de minimis fringes, qualified transportation and qualified moving expense reimbursements). I.R.C. § 125(d), (f). Prior to the January 1, 1985, the effective date of the 1984 Tax Reform Act amendments to § 125, cafeteria plan menus were also allowed to include taxable fringe benefits other than cash.

of the termination insurance system to multiemployer plans;²⁵ (2) promote gender equity by reducing age conditions on plan participation and vesting and by restricting the application of break in service rules;²⁶ (3) increase protection for surviving and divorced spouses;²⁷ (4) greatly accelerate permissible vesting schedules;²⁸ and (5) strengthen the minimum funding standards and termination insurance system applicable to defined benefits plans.²⁹

ERISA applies only to certain employee benefit plans.³⁰ The statute defines an employee benefit plan as "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."³¹ A program that systematically *defers cash* compensation until termination of employment (or longer) is a pension plan,³² while a program that provides any of certain *specifically-listed benefits* is a welfare plan, whether the benefit

25. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of titles 26 and 29 U.S.C.).

26. Retirement Equity Act of 1984, Pub. L. No. 98-397, §§ 102, 202, 98 Stat. 1426, 1436 (codified as amended at I.R.C. § 410(a) and 29 U.S.C. § 1052 (1988 & Supp. IV 1992)).

27. Retirement Equity Act of 1984, Pub. L. No. 98-397, §§ 103-104, 203-204, 98 Stat. 1426, 1429-36, 1440-49 (codified as amended at 29 U.S.C. §§ 1055-56, 1144 (1988 & Supp. IV 1992) and at I.R.C. §§ 401(a)(11), (13), 414(p), 417).

28. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1113(a), (e)(1), 100 Stat. 2085, 2446 (codified as amended at I.R.C. § 411(a) and at 29 U.S.C. § 1053(a)(2)).

29. Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, §§ 11001-19, 100 Stat. 237-82 (codified as amended in scattered sections of titles 26, 29, and 42 U.S.C.); Pension Protection Act of 1987; Pub. L. No. 100-203, §§ 9301-46, 101 Stat. 1330-31 (codified as amended in scattered sections of titles 26 and 29 U.S.C.).

30. ERISA § 4(a), 29 U.S.C. § 1003(a) (1988). The plan must be established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce or by one or more employee organizations representing employees so engaged, *id.*, because labor title jurisdiction is founded on the Commerce Clause. In addition, some plans are exempt from federal regulation; governmental and church plans being the most important cases. ERISA § 4(b), 29 U.S.C. § 1003(b).

31. ERISA § 3(3), 29 U.S.C. § 1002(3).

32. ERISA § 3(2)(A) defines a pension plan as follows:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

is provided on a current or deferred basis.³³ Because the definitions of pension and welfare plans are not exhaustive, there is a third category of employee benefits entirely beyond ERISA's reach:³⁴ any non-pension employee benefit that is not enumerated in the definition of welfare plan is a permissible subject of state regulation.³⁵

A benefit arrangement must constitute a "plan, fund, or program" to qualify as either a pension plan or a welfare plan.³⁶ To determine the scope of ERISA courts have struggled with the concept of a "plan" in several apparently unrelated contexts.³⁷ This Article will examine the emerging case law definition of an ERISA plan in each of those contexts and show that differing considerations should be applied to further ERISA's multiple objectives. A complete functional definition of an ERISA plan can be derived only by reference to ERISA's policies.

II. ERISA POLICIES

ERISA prescribes two very different levels of federal regulation of employee benefits. The lower level of regulation constrains the administration of all employee benefit plans, both pension and welfare, in three respects. First, reporting and disclosure rules mandate the collection and dissemination of information concerning plan terms and finances to the Secretary of Labor and plan participants and beneficiaries.³⁸ Second, plan fiduciaries are held to exacting standards of conduct derived from trust law.³⁹ Third, state regulation of pension and welfare plans is preempted and federal courts are granted exclusive jurisdiction to enforce ERISA's requirements (including fiduciary duties), as well as jurisdiction concurrent

33. ERISA § 3(1) defines a welfare plan as follows:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit describe in section 186(c) of this title [section 302(c) of the Labor management Relations Act, 1947] (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1).

34. ERISA §§ 4(a), 3(1)-(3), 29 U.S.C. §§ 1003(a), 1002(1)-(3).

35. ERISA §§ 4(a), 514(a), 29 U.S.C. §§ 1003(a), 1144(a).

36. Compare ERISA § 3(1), 29 U.S.C. § 1002(1) with ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

37. See discussion *infra* part III.

38. ERISA §§ 101-05, 29 U.S.C. §§ 1021-25.

39. ERISA §§ 401(a), 404, 29 U.S.C. §§ 1101(a), 1104.

with state courts over suits by a participant or beneficiary to enforce the terms of the plan.⁴⁰

Additional requirements apply to pension plans, which provide retirement income or the deferral of income to the termination of covered employment or beyond.⁴¹ These plans are subject to complex, intensive regulation, including minimum standards governing the terms of the deferred compensation program.⁴² Those minimum standards prevent employers from imposing age or service conditions on plan membership that are more exacting than the attainment of age twenty-one and completion of one year of service,⁴³ and they demand (among other things) that: benefits derived from employer contributions become nonforfeitable within a reasonable period (often five years);⁴⁴ a participant's spouse receive certain protections in the event of death or divorce;⁴⁵ and a participant's interest in the plan be inalienable.⁴⁶ Moreover, defined benefit pension plans are subject to additional requirements, including minimum rates of benefit accrual,⁴⁷ minimum funding standards,⁴⁸ coverage under the Pension

40. ERISA §§ 502(e)(1), 514, 29 U.S.C. §§ 1132(e)(1), 1144. The first component of ERISA's two-part declaration of congressional policy provides:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in *employee benefit plans* and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of *employee benefit plans*, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b) (emphasis added). Recall that "employee benefit plan" is defined to include both pension and welfare plans. ERISA § 3(3), 29 U.S.C. § 1002(3).

41. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). The second component of ERISA's two-part declaration of congressional policy provides:

It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private *pension plans* and their beneficiaries by improving the equitable character and the soundness of *such plans* by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

ERISA § 2(c), 29 U.S.C. § 1001(c) (emphasis added).

42. ERISA §§ 3(3), 4(a), 201-11, 301-08, 29 U.S.C. §§ 1002(3), 1003(a), 1051-61, 1081-86.

43. ERISA § 202(a)(1)(A), 29 U.S.C. § 1052(a)(1)(A). Two years of service may be required for plan entry if all accrued benefits under the plan are at all times completely nonforfeitable. ERISA § 202(a)(1)(B)(i), 29 U.S.C. § 1052(a)(1)(B)(i). Also, a tax exempt educational organization may require one year of service and attainment of age twenty-six if all accrued benefits under the plan are at all times completely nonforfeitable. ERISA § 202(a)(1)(B)(ii), 29 U.S.C. § 1052(a)(1)(B)(ii).

44. ERISA § 203, 29 U.S.C. § 1053.

45. ERISA §§ 205, 206(d)(3), 29 U.S.C. §§ 1055, 1056(d)(3).

46. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1).

47. ERISA § 204, 29 U.S.C. § 1054.

48. ERISA §§ 301(a)(8), 302-08, 29 U.S.C. §§ 1081(a)(8), 1082-86.

Benefit Guarantee Corporation (PBGC) termination insurance program,⁴⁹ and restrictions on termination.⁵⁰

In contrast, ERISA generally does not regulate the content of welfare plans.⁵¹ Rather than restrict private autonomy, Congress chose to facilitate it by means of the three-pronged approach described above—disclosing plan terms and finances, imposing uniform fiduciary obligations, and ousting state regulation.⁵² Thus, ERISA monitors only the *conduct* of privately-constituted welfare plans, while pension plans are subject to both *conduct* and *content* regulation.

A. Conduct Controls

1. Reporting and Disclosure

There is an obvious functional relationship among the three components of ERISA's conduct regulation. Reporting and disclosure provides plan participants and beneficiaries with the information they need to monitor the plan's administration to enforce their rights.⁵³ Disclosure to facilitate oversight and enforcement is a key ingredient of ERISA's conduct controls, but disclosure serves two further goals.⁵⁴ Disclosure of plan finances may

49. ERISA § 4021(a), (b)(1), 29 U.S.C. §§ 1321(a), (b)(1).

50. ERISA §§ 4041, 4041A, 29 U.S.C. §§ 1341, 1341a.

51. There are a few instances in which ERISA controls welfare plan terms, such as the requirement that non-insurance plan assets be held in trust, ERISA § 403, 29 U.S.C. § 1103, and the prohibition on exculpatory clauses, ERISA § 410(a), 29 U.S.C. § 1110(a). But so restricting plan content is necessary to impose uniform standards of fiduciary conduct.

52. See *supra* text accompanying notes 38-40.

53. It was hoped that the Welfare and Pension Plan Disclosure Act of 1958 (the forerunner of ERISA's reporting and disclosure rules) would have this effect, even though it provided no federal fiduciary standards or remedies. S. REP. NO. 1440, 85th Cong., 2d Sess. 4 (1958), *reprinted in* U.S. DEP'T OF LABOR, LEGISLATIVE HISTORY OF THE WELFARE AND PENSION PLANS DISCLOSURE ACT OF 1958 139 (1962) [hereinafter WPPDA HISTORY] (stating that bill will "permit self-policing and self-appraisal of these plans by the participants"); H.R. REP. NO. 2283, 85th Cong., 2d Sess. 9 (1958), *reprinted in* WPPDA HISTORY, *supra*, at 140 ("With such information such participants and beneficiaries will be in a better position to seek relief under existing laws of the various States and the Federal Government against malpractices which may occur in the management and operation of such plans."); CONG. REC. S6289 (daily ed. Apr. 23, 1958), *reprinted in* WPPDA HISTORY, *supra* at 124 ("It will permit self-policing and self-appraisal of these plans by the participants and give them a central point in Washington to report abuses and violations.") (remarks of Sen. Kennedy).

54. The three functions discussed here do not by themselves explain why disclosure is mandatory. Why are not participants' information needs satisfied by voluntary disclosure by plan sponsors? That is, why not rely on the market, and in particular employers' desire to attract the best qualified workers, to supply this information? Mandatory disclosure is the central component of federal securities law, and recent economic analyses of securities law may provide useful analogies in evaluating ERISA's

deter fiduciary misconduct—indeed, this was the objective of the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA), from which ERISA's reporting and disclosure rules were derived.⁵⁵ Disclosure also promotes economic efficiency by providing participants and beneficiaries with the information they need to accommodate their personal financial affairs to the employer's program, as for example, in determining their need for additional savings or insurance.⁵⁶

2. *Fiduciary Obligations*

Fiduciary obligations, the second component of ERISA's conduct controls, flow naturally from the fact that those entitled to plan assets (principally the participants and beneficiaries) have no managerial authority and may have limited ability to monitor plan administration.⁵⁷ Division of enjoyment and control (equitable and legal ownership) is the essence of the trust relationship, and the trustee's obligations provided the model for ERISA's fiduciary duties. Indeed, ERISA generally requires that all employee benefit plan assets be held in trust.⁵⁸ This justification is obviously incomplete, however, for fiduciary obligations apply even if the plan is unfunded (as many welfare plans are). Under ERISA anyone who has or exercises any discretion in the administration of an employee benefit

mandatory disclosure regime. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 276-314 (1991).

55. Pub. L. No. 85-836, 72 Stat. 997 (1958). For example, Senator Douglas, a principal sponsor of the WPPDA, explained that the bill:

does aim to encourage—by the exposure of the financial facts to public view—honest and more efficient management, sounder investments, more responsible trusteeship, more active employer and employee interest, an end to conflict of interest, favoritism and looting, and self-policing by the various groups involved.

Just as sunlight often acts as a disinfectant, we believe disclosure will tend to deter many of the kinds of abuses our investigation revealed.

104 CONG. REC. 7061 (1958), reprinted in WPPDA HISTORY, *supra* note 53, at 123. *Accord* CONG. REC. S6290 (daily ed. Apr. 23, 1958), reprinted in WPPDA HISTORY, *supra* note 53, at 124 ("One of the major objectives of the proposed legislation is to deter abuses.") (remarks of Sen. Kennedy); CONG. REC. H15,060 (daily ed. Aug. 6, 1958), reprinted in WPPDA HISTORY, *supra* note 53, at 127 ("Full disclosure of these plans can act as the most effective deterrent to mismanagement and malpractice.") (remarks of Rep. Roosevelt).

56. This function of disclosure did not figure prominently in the debate over ERISA and has been generally overlooked. *But see* WPPDA HISTORY, *supra* note 53 (referring to self-appraisal of employee benefit plans).

57. Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1113-19 (1988).

58. ERISA § 403(a), 29 U.S.C. § 1103(a).

plan is accountable as a fiduciary.⁵⁹ Here, fiduciary obligations apparently follow from the fact that entitlement to benefits may be (and usually is) determined by agents or employees of the employer—ERISA does not demand independence of the claims administrator.⁶⁰

3. Preemption

Federal preemption and enforcement, the third component of ERISA's conduct controls, obviously promotes uniformity. But the specter of inconsistent state regulation of plans maintained by a multistate employer may be exaggerated, for the trust or employment contracts could be drafted to select the law of a single state. Proper planning might eliminate conflicts in the interpretation and administration of the plan, but there is another source of disuniformity that the employer's choice of law might not overcome. Where a state statute mandates or forbids inclusion of certain benefits, the choice of another state's law might be unenforceable.⁶¹

Although selection of one state's law meets the employer's cost-based need for uniform administrative procedures, it is not enough from the worker's perspective. Even though any one plan could be interpreted and administered in accordance with the law of a single state, one worker may need to evaluate numerous alternative plans associated with different employment opportunities. These plans may select different governing laws (corresponding to the differing locations of corporate headquarters, for example), making the precise contours of competing benefit offers dependent on the idiosyncracies of several states' contract and trust law. Under these circumstances a fully informed evaluation of competing job offers is probably uneconomic—the cost of identifying the vagaries of

59. ERISA § 3(21), 29 U.S.C. § 1002(21) (definition of fiduciary), ERISA § 404, 29 U.S.C. § 1104 (fiduciary obligations), ERISA § 406, 29 U.S.C. § 1106 (prohibited transactions).

60. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). Only persons convicted of certain felonies are barred from serving as plan fiduciaries. ERISA § 411, 29 U.S.C. § 1111. Benefit determinations by plan fiduciaries may be challenged in court, but are generally subject to a deferential scope of review. See generally Jay Conison, *Suits for Benefits Under ERISA*, 54 U. PITT. L. REV. 1 (1992). For an analysis of the proper scope of employer involvement in plan decisionmaking, see Fischel & Langbein, *supra* note 57, at 1126-38.

61. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2) (Supp. 1989) (stating that contractual choice is ineffective if application of law of chosen state "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue" and law of the other state would be otherwise be applied); *id.* cmt. g ("fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Statutes involving the rights of an individual insured as against an insurance company are an example of this sort . . .").

alternative legal regimes would likely exceed the benefit of a marginally more valuable compensation package.⁶² A single set of interstitial rules (contract and trust) governing all plans would limit information costs and increase the efficiency of the labor market. This could be achieved by federal selection of the law of a single state.⁶³ Why did ERISA create a new body of federal fiduciary law?

In addition to uniformity, preemption apparently reflects a preference for a particular rule. Federal fiduciary obligations may be deemed superior to preexisting state law for two reasons. First, they mandate disinterested decisionmaking even when no trust is involved (as with claims administration under an unfunded plan).⁶⁴ Second, the employer cannot contract out of ERISA's fiduciary standards—exculpatory clauses are declared “void as against public policy.”⁶⁵

The scope of ERISA preemption is exceptionally broad, extending far beyond disclosure and fiduciary obligations.⁶⁶ This undifferentiated

62. See also 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent) (asserting that preemption, by “eliminating the threat of conflicting and inconsistent State and local regulation” provides additional protection to participants).

63. Compare the information cost justification of pension content controls. See discussion *infra* part II.B.2.

64. See *supra* note 59 and accompanying text.

65. ERISA § 410(a), 29 U.S.C. § 1110(a). There is some indication that the cases of benefit fund misappropriation uncovered by the 1966 investigations of the Senate Government Operations Committee, which were highly publicized and provided political momentum for the enactment of federal fiduciary standards, may have been facilitated by exculpatory provisions. See S. REP. NO. 1348, 89th Cong., 2d Sess. 21, 27 (1966).

66. As introduced, the preemption provision of H.R. 2 (the bill ultimately enacted as ERISA) provided that state laws “insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans” would be superseded. H.R. 2, 93d Cong., 1st Sess. § 114 (1973), reprinted in 1 STAFF OF THE SUBCOMM. ON LABOR OF THE SENATE LABOR AND PUBLIC WELFARE COMM., 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 50-51 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY]. That language was contained in the House-passed version of the bill and was supplemented by a rule preempting state laws relating to vesting, funding, portability standards and termination insurance under pension plans. H.R. 2, 93d Cong., 2d Sess. § 514(a), (c) (1974), reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra*, at 4057-59. The Senate-passed version of H.R. 2 also preempted only those state laws relating to “subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act.” H.R. 2, 93d Cong., 2d Sess. § 699(a) (1974), reprinted in 3 ERISA LEGISLATIVE HISTORY, *supra*, at 3820. Competing versions of comprehensive pension reform bills also contained only subject-matter limited preemption clauses. E.g., S. 4, 93d Cong., 1st Sess. § 609(a) (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra*, at 186; H.R. 2, 93d Cong., 2d Sess. § 514(a), (c) (1974), reprinted in 2 ERISA LEGISLATIVE HISTORY, *supra*, at 2920-22. ERISA's exceptionally broad preemption rule was a last-minute innovation of the Conference Committee, for which no satisfactory public explanation was offered. See Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. 646-51 (1994).

rejection of state benefit law may also be the product of a preference for a particular rule, or rather, for no rule at all. With preemption, business interests obtained immunity from state-prescribed plan features and state-mandated benefits.⁶⁷

B. Content Controls

1. Protective Policy

a. Pension Plans

In the case of pension plans, ERISA goes beyond conduct regulation and imposes minimum standards for certain plan terms. Such substantive regulation assures that the promise of a pension has some minimum content. Limited content control of pension plans has traditionally been justified as necessary to protect employee reliance interests.⁶⁸ But that rationale begs the question: Under a regime of mandatory disclosure, is reliance worthy of protection? If, for example, participants are made aware that the plan does not allow for vesting, no legitimate expectation is defeated when a pension is denied the employee terminated before retirement age, however long her service.

Minimum standards of pension plan content “protect” reliance only in the sense that they *prevent* reliance that might often be unwarranted. Hence the justification for content regulation must lie in a concern that substantial numbers of plan participants would not make proper use of the information available to them. That concern may be well-founded for either of two reasons.

Workers may miscalculate pension promises due to a systematic bias in

67. See *supra* note 61 and accompanying text. The absence of a convincing explanation for the expansion of ERISA’s preemption provision in conference, *supra* note 66, suggests that the move may have been intended to head off concerted opposition to the legislation by business groups. Conversation with Merton C. Bernstein, Professor of Law, Washington University School of Law (Apr. 1994). (Professor Bernstein’s book, MERTON C. BERNSTEIN, *THE FUTURE OF PRIVATE PENSIONS* (1964), was a stimulant to legislative reform efforts, and he was active in the political debate over ERISA. See generally Karen W. Ferguson, *Mert Bernstein: Pension Pioneer*, 71 WASH. U. L.Q. 999 (1993)).

68. The congressional findings include: “many employees with long years of employment are losing *anticipated* retirement benefits owing to lack of vesting provisions in such plans;” and owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of *anticipated* benefits; and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness. ERISA § 2(a), 29 U.S.C. § 1001(a) (emphasis added).

human judgment.⁶⁹ The enormous tax subsidy for qualified retirement savings,⁷⁰ with all its attendant complexities, is justified (if at all) by the need to provide incentives to counteract an assumed tendency to undersave.⁷¹ If such a tendency originates in overoptimism about future prospects, people would also underestimate the likelihood that various contingencies triggering loss of a pension would occur (e.g., severance before satisfaction of an extended vesting period, or termination of the plan while underfunded). That is, optimism (overestimating returns and underestimating risks) should cause both inadequate personal savings and overreliance on pension promises. If undersaving originates in an overestimation of mortality risks (the "I may be dead" attitude), the matter is slightly more complex. An exaggerated estimate of the probability of forfeiture on death may induce inattention to other contingencies, such as other causes of forfeiture or underfunding. For those plans that provide spousal or survivor benefits, a tendency to undervalue dependents' consumption would likewise cause inattention.⁷² In either case, unrealistic mortality assumptions cause an underestimation of the utility of savings, yet an associated inattention to future risks could exacerbate the problem—the worker might casually rely on the employer's pension promise for what little savings he considers appropriate.

This protective policy (preventing unwarranted reliance) is fundamentally paternalistic. To the extent that content controls guard against judgmental bias, they have much in common with the tax subsidy for qualified plans.⁷³ Not surprisingly, the pension content controls (imposed by ERISA's Title I) were simultaneously incorporated in the Internal Revenue Code (by ERISA's Title II) as additional conditions on the receipt of the

69. See Peter J. Wiedenbeck, *Paternalism and Income Tax Reform*, 33 U. KAN. L. REV. 675, 684-85, 689-91 (1985).

70. See *supra* note 14 and accompanying text.

71. E.g., ALICIA H. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 50-59 (1982); Fischel & Langbein, *supra* note 57, at 1122-23.

72. Wiedenbeck, *supra* note 69, at 689-91. The spousal consent required to elect out of the qualified preretirement survivor annuity or qualified joint and survivor annuity forms of distribution responds to this problem of self-centered decisionmaking. ERISA § 205, 29 U.S.C. § 1055.

73. See Fischel & Langbein, *supra* note 57, at 1122-23 (comparing the anti-discrimination norm, "the bedrock principle of pension taxation," with "[a]nother manifestation of the protective policy in pension law," the anti-alienation rule, which is one of ERISA's content controls). It is also interesting to note that in 1942 the Treasury initially recommended that minimum vesting standards be enacted along with the anti-discrimination rules as conditions on the tax subsidy. 3 *Revenue Revision of 1942: Hearings Before the House Comm. on Ways and Means*, 77th Cong., 2d Sess. 2405-06 (1942) (statement of Randolph Paul, Special Tax Adviser to the Secretary of the Treasury).

tax subsidy (qualification requirements). And it has been argued that ERISA's tax provisions can be viewed as the extension and elaboration of the antidiscrimination principle,⁷⁴ which is the central criterion for qualification because it attempts to channel the tax allowance into retirement savings that would not otherwise occur.⁷⁵

b. Note on Health Care Reform

If pension content controls combat judgmental defects, does ERISA go far enough? Undersaving may be the product of an inherent human tendency to overdiscount the future (shortsightedness), but other issues may befuddle the mind as well. In particular, one might hypothesize a tendency to overdiscount the risk of serious medical problems (morbidity risk)—the indestructible youth syndrome. Any such systematic bias would lead to widespread underinsurance for health care needs, most probably by selection of plans with inadequate limits (lifetime maxima) or high coinsurance rates for long-term care. The enormous tax subsidy for medical care costs is apparently responsive to this phenomenon.⁷⁶ The Clinton health care reform proposal would require that every American be offered a choice in health care plans, but each plan would have to offer a comprehensive package of benefits.⁷⁷ This exacting minimum standard for health plan content can be seen as the extension of ERISA's protective policy to the welfare arena.

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74. Peter J. Wiedenbeck, *Nondiscrimination in Employee Benefits: False Starts and Future Trends*, 52 TENN. L. REV. 167, 173, 265 (1985).

75. Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Meet Economic Reality*, 70 VA. L. REV. 419, 429-34; Wiedenbeck, *supra* note 74, at 246-49. *But see* Joseph Bankman, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH. U. L.Q. 597 (1994) (identifying conditions that must be satisfied for anti-discrimination rules to unambiguously improve welfare of rank-and-file employees).

76. *See supra* note 15 and accompanying text; I.R.C. §§ 104(a)(3) (exclusion of amounts received for injuries or sickness under individually-purchased insurance), 105(b) (exclusion of medical care payments under employer-provided insurance), 106 (exclusion of value of employer-provided health insurance coverage), 213(a), (d)(1) (limited deduction for unreimbursed medical care costs, including premiums under individually-purchased insurance).

77. *See, e.g.*, H.R. 3600, 103d Cong., 1st Sess. § 1101 (Oct. 1993) (list of services included within proposed comprehensive benefit package and requirement that package "shall not be subject to any duration or scope limitation"); WHITE HOUSE HEALTH CARE TASK FORCE, WORKING GROUP DRAFT: THE AMERICAN HEALTH SECURITY ACT OF 1993 19 (Sept. 7, 1993) ("health benefits guaranteed to all Americans provide comprehensive coverage" and the "guaranteed benefit package contains no lifetime limitations on coverage").

2. Information Costs

There is an alternative (and generally overlooked) economic justification for content regulation that does not depend upon a supposed judgmental defect. Minimum standards may respond to a problem of information overload. For most workers, the cost of evaluating the specialized terms and particular finances of numerous alternative plans (associated with different employment opportunities) may exceed the benefit of a marginally more valuable pension. Information costs may be reduced by limited standardization (*i.e.*, restricting the variance) of key contract terms.⁷⁸ By reducing job search costs, content regulation may increase economic efficiency.

From the information cost perspective, pension content controls complement the disclosure regime. Disclosure provides access to information, while content controls limit the volume of information to a manageable level. Together, they facilitate career and financial planning.

It must be conceded that the existing regulatory structure is not always well adapted to achieving this objective. To promote optimal employment choice through informed evaluation of alternative compensation packages, the information contained in the summary plan description and the latest summary annual report should be made available at the job offer stage, not months after participation commences.⁷⁹ And while some content controls greatly simplify the task of communicating an accurate picture of the employer's pension promise (*e.g.*, minimum funding standards⁸⁰), others constrain plan terms that could easily be summarized and understood. In particular, limiting age and service conditions on plan entry seems justified only by the protective policy. Of the limitless number of possible eligibility criteria, age and service conditions alone are restricted, even

78. Observe that this justification for content controls is not paternalistic because it does not assume a systematic bias in human judgment (shortsightedness or selfishness). Even if workers are perfectly rational risk evaluators and utility maximizers, detailed assessment of unregulated pension promises may be irrational.

79. The summary plan description does not have to be provided until 90 after an employee becomes a participant, and the summary annual report is not due for 210 days after the close of the plan's fiscal year. ERISA §§ 101(a), 104(b)(1), (3), 29 U.S.C. §§ 1021(a), 1024(b)(1), (3).

80. On the issue of funding, the summary plan description for a defined benefit pension plan need only "state without further explanation that the contribution is actuarially determined," and contain a brief description of the PBGC insurance program. 29 C.F.R. § 2520.102-3(p), (m) (1993). Similarly, the summary annual report for a defined benefit plan need only state whether or not enough money was contributed to comply with ERISA's minimum funding standards, and indicate that participants have the right to receive actuarial information upon request. *Id.* § 2510.104b-10(d)(3).

though they impose straightforward requirements.⁸¹ Banning extended age and service conditions cannot significantly affect information costs. It does assure that employees who are otherwise eligible begin participation early, making it more likely that they will accumulate adequate retirement savings in spite of any youthful proclivity to overdiscount future support needs.

On the other hand, neither is the protective policy pursued with single-minded consistency. Failure to either prohibit preretirement distributions or demand that they be transferred to another retirement savings program (e.g., rollover IRA) seriously undermines the effort to entice workers to save in spite of themselves.⁸²

Even the antialienation requirement,⁸³ which is central to the protective policy because it bars access to pension savings prior to distribution, has a plausible basis in a campaign to limit information costs. It was common for pension trusts to contain spendthrift restraints long before ERISA demanded it. But under state law, the effectiveness of such restraints is uncertain. Questions such as the extent to which a participant's interest in the pension plan should be treated as self-settled (rendering the spendthrift clause unenforceable), and which classes of creditors should be excepted from the bar, would be resolved differently in different states. Such divergences in spendthrift law when applied to pension trusts could make fully informed evaluation of plans associated with alternative employment opportunities uneconomic. This information cost case for the antialienation requirement is of course the same as one of the arguments that justifies preemption—without uniform legal rules the evaluation of alternative plans becomes needlessly complex.⁸⁴

To the extent that pension content controls follow from an interest in

81. ERISA § 202, 29 U.S.C. § 1052. The vesting rules, in contrast, restrict all of the myriad possible causes of forfeiture but for two or three easily comprehended exceptions. ERISA § 203(a), 29 U.S.C. § 1053(a).

82. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (plan that results in deferral of income to termination of covered employment is a pension plan even if it does not provide retirement income). See Treas. Reg. § 1.401-1(b)(1)(ii), (iii) (qualified profit sharing or stock bonus plan may permit distributions on severance of employment or merely after a fixed number of years or attainment of a stated age); Rev. Rul. 74-254, 1974-1 C.B. 91 (qualified pension plan may permit distributions on termination of employment prior to normal retirement). Recent IRS statistics show that there were 11.6 million lump-sum distributions in 1990, but only 29% of these distributions resulted in any IRA contribution. The aggregate dollar amount of lump sum distributions in 1990 was \$125.8 billion, 57 percent of which was rolled over into IRAs. *Retirement Program Lump-Sum Distributions: Hundreds of Billions in Hidden Pension Income*, EBRI ISSUE BRIEF No. 146, Feb. 1994, at 6, 13.

83. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1).

84. See *supra* text accompanying note 63.

increasing efficiency by reducing information costs, ERISA's content and conduct controls share a unity of purpose. To be useful, disclosure must apprise workers of important features of a pension program without overwhelming them; winnowing is achieved via limited standardization of terms. Standardization is required of certain express terms of the pension promise (content controls). By imposing *uniform* fiduciary obligations and authorizing the development of a federal common law of benefit plans (conduct controls) the unwritten terms of the benefit arrangement are standardized as well. If the information cost hypothesis is correct, all these devices serve the same end—promoting planning.

III. ERISA PLANS

To be subject to ERISA an arrangement providing welfare or pension benefits must cover at least one common-law employee.⁸⁵ In addition, the benefit arrangement must constitute a "plan, fund, or program."⁸⁶ In two situations the courts have concluded that an employer's undertaking to provide some benefit of the type listed in the statutory definitions of welfare plan or pension plan nevertheless does not constitute a "plan" within the intendment of ERISA. First, where a special arrangement covers only one or a few workers it has been found to be part of the individual contract(s) of employment rather than a benefit "plan." Second, where implementation requires no ongoing administrative apparatus, there is no "plan," even if the arrangement would provide an ERISA-listed benefit to many workers. Evaluated with reference to ERISA's policies, the

85. The Labor Department's regulations provide that ERISA does not apply where the *only* plan participants are partners or sole proprietors, as under a Keogh plan which covers no common-law employee. But if any common-law employee is a participant, ERISA applies. 29 C.F.R. § 2510.3-3(b) (1993); *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981) (sole proprietors not employees). See *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992) (stating that deferred compensation program covering insurance agents may not be subject to ERISA because "employee" construed according to common law; remanded for determination whether agents are employees or independent contractors). In addition, the regulations provide that an individual and his or her spouse who own the entire interest in a corporation are not to be treated as employees of the business. 29 C.F.R. § 2510.3-3(c)(1) (1993). Courts have not always followed the regulation's exclusion of plans covering only an employee who is also the corporation's sole shareholder (alone or in combination with spouse). Compare *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1985) (ERISA inapplicable) with *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564 (E.D. Cal. 1988) (ERISA applied). Excluding such dual status employees from ERISA's protections has been criticized. Matthew J. Fairless, Note, *The Participant Status of Sole Shareholders Under ERISA*, 55 Mo. L. REV. 1021 (1990).

86. ERISA § 3(1), (2), 29 U.S.C. § 1002(1), (2).

distinction between individual employment contracts and employee benefit plans is totally misguided.⁸⁷ In contrast, the focus on discretion is justified but dangerously incomplete.⁸⁸

A. Content Controls

Does the core meaning of "plan" necessarily entail a general program?⁸⁹ Dictionaries in common usage indicate that the term normally conveys a sense of prearrangement or design, but do not suggest that generality is an inherent element.⁹⁰ Nevertheless, a number of cases involving pension-type benefits hold that when deferred compensation is extended to only one or a few employees there is no plan, however meticulously designed the program. Instead, the deferred compensation is part of an individual contract of employment.

1. Restricted Coverage Cases

Three considerations seem to come into play in these restricted coverage cases. First, judges trained in the common-law tradition seem to be motivated, at least in part, by a (usually unarticulated) anxiety that without some such limitation ERISA would swallow up the law of employment contracts. This fear is ill-founded, for ERISA does not apply to all forms of compensation, but only to post-employment compensation (*i.e.*, pensions) and enumerated welfare benefits. Second, ERISA's protective policy does not seem necessary when a deferred compensation arrangement is specially designed (perhaps even separately bargained-for) to meet the needs of one or a few employees. It will be shown below that this consideration, although entirely valid, is not germane to the interpretation of "plan." Third, some representations concerning post-employment compensation are so indefinite or tentative that they would not reasonably be understood to constitute a commitment. This concern obviously relates to the design or prearrangement connotation of "plan,"⁹¹ and is also valid. What is lacking in this line of cases is any consistent or coherent reference to the purpose of pension content controls.

87. See discussion *infra* part III.A.

88. See discussion *infra* part III.B.

89. By core meaning the author refers to the paradigmatic sense of the term, which is related to the "plain meaning" approach to statutory construction. Conison, *supra* note 66, at 635.

90. *E.g.*, RANDOM HOUSE COLLEGE DICTIONARY 1014 (rev. ed. 1975); WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1372 (2d ed. rev. 1983).

91. See *supra* text accompanying note 90.

In *Jervis v. Elerding*,⁹² the defendant, an owner of thirteen apartment complexes, agreed to provide the plaintiff, the manager of the units, with an apartment following her retirement or termination. The apartment was to be provided at no cost (*i.e.*, free rent and utilities) for a number of months each year equal to the number of years of the plaintiff's employment as manager.⁹³ Relying on two questionable ERISA advisory opinions issued by the Department of Labor,⁹⁴ the district court found this housing arrangement to be part of an individual employment contract and not an ERISA plan.⁹⁵

A forty-nine-year employee who had been told that he could expect a substantial pension on retirement was disappointed in *Harris v. Arkansas Book Co.*⁹⁶ Earl Kruse, another employee with twenty-five years of service, had not been told that the company had a pension program, but upon retirement he began receiving monthly checks explained as a "gift for staying with the company so long."⁹⁷ When the plaintiff was discharged he demanded his pension. The company refused and discontinued payments to Kruse. Harris sued for benefits under ERISA, but the employer was granted summary judgment because "[n]either the payments to Kruse nor the promise of payments to Harris create such a plan [under ERISA]."⁹⁸

Deferred compensation promises to five employees were involved in *Lackey v. Whitehall Corp.*⁹⁹ Two key executives were recruited with promises of deferred compensation; shortly thereafter identical provisions were included in the employment contracts of three current managers. The court held that the deferred compensation arrangement was "part of the employment agreements with select individuals, and not an ERISA covered

92. 504 F. Supp. 606 (C.D. Cal. 1980).

93. *Id.* at 607.

94. Department of Labor ERISA Opinion Letter 76-79; Department of Labor ERISA Opinion Letter 76-110. Neither opinion provides any explanation for the Labor Department's conclusion. Moreover, the latter opinion involved an employee who was a 50% shareholder and, as part of a buy-out agreement, was to be provided with retirement compensation "for past services." Accordingly, the "retirement compensation" may have been deferred payments of the purchase price of stock, or the top hat plan exception (discussed *infra* notes 113-14 and accompanying text) may have applied.

95. *Jervis*, 504 F. Supp. at 608, 609.

96. 794 F.2d 358 (8th Cir. 1986).

97. *Id.* at 360.

98. 794 F.2d at 360.

99. 704 F. Supp. 201 (D. Kan. 1988).

benefit plan."¹⁰⁰ This conclusion was reached on the authority of *Jervis* and a district court opinion that followed it,¹⁰¹ together with the fact that the deferred compensation arrangement at issue failed to comply with many of ERISA's requirements!¹⁰²

The Fourth Circuit expanded this individual employment contract exception beyond recognition in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*¹⁰³ and *Darden v. Nationwide Mutual Insurance Co.*¹⁰⁴ *Fraver* involved an agency contract providing that upon termination the insurance company would pay the departing agent an amount equal to the agent's renewal commissions for the twelve-month period preceding termination. Payment was to be made in installments over a sixty-month period during which the former agent was barred from selling insurance in North Carolina.¹⁰⁵ This provision was included in every contract between Farm Bureau and its entire sales force of independent agents. Twenty-five former agents brought suit when Farm Bureau ceased installment payments for violation of the noncompetition clause. Ostensibly relying on *Jervis* and the ERISA opinion letters discussed therein, the court of appeals found "that the agreements were simply employment or agency contracts, that the terms in question simply established a final form of compensation for the business created by the agent, and that these payments do not constitute retirement income."¹⁰⁶ *Darden* involved a substantially similar program of post-termination installment payments measured by the agent's prior-year renewal commissions, and the Fourth Circuit followed the precedent it established in *Fraver*.¹⁰⁷

100. *Id.* at 204. *But see* *Bogue v. Ampex Corp.*, 976 F.2d 1319 (9th Cir. 1992) (involving severance plan covering 10 executives on sale of subsidiary subject to ERISA), *cert. denied*, 113 S. Ct. 1847 (1993).

101. *McQueen v. Salida Coca-Cola Bottling Co.*, 652 F. Supp. 1471 (D. Colo. 1987).

102. *Lackey*, 704 F. Supp. at 205. Failure to comply with ERISA does not, of course, support the conclusion that a benefit arrangement is not an employee benefit plan, for that approach would make ERISA's "requirements" elective. Several cases have so held. *E.g.*, *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc) (stating that plan need not be in writing); *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 826 (N.D. Ill. 1993).

103. 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987).

104. 922 F.2d 203 (4th Cir.), *cert. denied on this issue*, 112 S. Ct. 295 (1991), *rev'd and remanded on other grounds*, 112 S. Ct. 1344 (1992) (finding deferred compensation program covering insurance agents may not be subject to ERISA because "employee" construed according to common law; remanded for determination whether agents are employees or independent contractors).

105. *Fraver*, 801 F.2d at 676.

106. *Id.* at 678.

107. *Darden*, 922 F.2d at 208.

2. Protective Policy

Despite their results, *Fraver* and *Darden* should not be read for the proposition that benefits provided under the terms of an individual employment contract are not part of an employee benefit plan. Simply replicating the full terms of a benefit program in a separate employment contract for each worker cannot prevent federal regulation because ERISA demands far more than disclosure of plan terms (*i.e.*, disclosure of plan finances, nonwaivable fiduciary protections, ousting state law, and in the case of pensions, minimum content controls).

Instead, these Fourth Circuit decisions are best understood as rejecting the agents' argument that limited-term payments tied to commissions provide "retirement income" or "deferral of income," so that the arrangement, however widespread and systematic, could not be classified as a *pension* plan.¹⁰⁸ However, this alternative ground of decision is also mistaken. It is partially based on the notion that "deferral of income" requires an advance set aside. But this creates a circularity problem because it makes ERISA's applicability turn on funding, one of ERISA's principle requirements for defined benefit plans!¹⁰⁹ It also depends on an implicit finding that "retirement income" requires long-term support payments.¹¹⁰ But an employee may plan to use short-duration or lump-sum payments to provide retirement income, as by the purchase of a life

108. The *Fraver* court observed without explanation that the "[p]rovisions do not establish any deferral of the agent's or agency manager's income"—this presumably follows from the fact that no funds were set aside. *Fraver*, 801 F.2d at 677. The court went on to explain that the nature of payments in the case was "not indicative of pension or retirement" benefits. *Id.* at 678. The importance of this ground of decision is most apparent in *Darden*, which involved an annuity program in addition to the post-termination commission installments. The annuity arrangement was held to be a pension plan because it provided retirement income, even though the commission-based payments were not. 922 F.2d at 207-08. Moreover, it appears that although *Darden's* agency contract provided for participation in both programs, it did not reproduce the terms of either. See *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 702-03 (4th Cir. 1986), *appeal from remand*, 922 F.2d 203 (4th Cir. 1991), *rev'd and remanded on other grounds*, 112 S. Ct. 1344 (1992).

109. ERISA §§ 301(a), 302, 29 U.S.C. §§ 1081(a), 1082. See Department of Labor ERISA Opinion Letter 89-07A (suggesting that an *unfunded* incentive plan providing lump sum payments to those employees awarded bonuses who continue to be employed for five years, could be a pension plan if, in operation, a disproportionate number of recipients were near retirement age). For a similar circularity problem see *supra* note 102.

110. The disjunctive definition of pension plan ("provides retirement income . . . or results in a deferral of income . . . to the termination of covered employment") makes ERISA applicable whenever the arrangement involves *either* retirement income or deferral of income to termination. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

annuity.¹¹¹ It is the long-term nature of the *promise* of post-employment income, not a long-term form of distribution, that should trigger ERISA's minimum standards for the content of the pension promise because preventing unwarranted reliance is the objective.¹¹²

Lackey is at odds with the statutory structure and policy of ERISA. Classification as a pension plan does not necessarily trigger the full panoply of employee protections (e.g., prohibited age and service conditions, vesting, and spousal rights). A plan that is "unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation to a select group of management or highly compensated employees" is exempt from all ERISA requirements other than reporting and disclosure and the enforcement provisions.¹¹³ Such unfunded "top hat" plans (as they are called) are not subject to ERISA's pension content regulation because key personnel typically have the education, judgment, and bargaining power necessary to protect themselves. For protection, key personnel only need access to information and to the judiciary; for that reason, presumably, only ERISA's disclosure and enforcement mechanisms apply.¹¹⁴

111. See *James v. National Business Sys., Inc.*, 924 F.2d 718, 719 (7th Cir. 1991) (per Posner, J.) (suggesting that a plan for key executives funded by whole life insurance and providing salary continuation payments for ten years upon retirement at age sixty-five or earlier due to death, would be an ERISA pension plan). Numerous Labor Department advisory opinions hold that plans providing short-term payments at or near retirement may be pension plans. E.g., Department of Labor ERISA Opinion Letter 75-12 (stating that a profit sharing plan that provides lump-sum distribution upon termination of employment is a pension plan for purposes of ERISA); Department of Labor ERISA Opinion Letter 89-07A (unfunded bonus plan).

112. See *supra* notes 68-72 and accompanying text.

113. ERISA § 201(2), 29 U.S.C. § 1051(2) (participation, benefit accrual, vesting, spousal rights and anti-alienation), ERISA § 301(a)(3), 29 U.S.C. § 1081(a)(3) (funding), ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1) (fiduciary responsibility), ERISA § 4021(b)(6), 29 U.S.C. § 1321(b)(6) (termination insurance).

114. In practice, however, no disclosure is mandated for participants in unfunded or insured top hat plans—not a summary plan description, nor summary annual report, nor summary of material modifications and changes. ERISA § 110(a)(1) authorizes the Secretary of Labor to prescribe an alternative method for pension plans to satisfy some or all reporting and disclosure requirements, provided that the method is "consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary." ERISA § 110(a)(1), 29 U.S.C. § 1030(a)(1). Regulations issued pursuant to this authority permit unfunded or insured top hat plans to satisfy their reporting and disclosure obligations simply by filing a statement with the Labor Department that sets forth the employer's name, address and tax identification number and declares the number of top hat plans maintained and the number of employees in each. 29 C.F.R. § 2520.104-23 (1993). Such plans are also excused from providing participants with a summary annual report. 29 C.F.R. § 2520.104b-10(g)(4) (1993).

Similarly, ERISA § 104(a)(3) allows the Secretary to exempt welfare plans from some or all

The five division managers in *Lackey* were in exactly the situation that the rules governing unfunded top hat plans were designed to cover.¹¹⁵ The *Lackey* court found the plan to be unfunded and, applying state law, ruled in favor of plaintiff-employees' interpretation of the plan's vesting rules.¹¹⁶ From an ex post perspective, the only material difference in outcome between the court's holding that ERISA is completely inapplicable and a holding that the deferred compensation arrangement was an unfunded top hat plan appears to be the plaintiff's ineligibility for a discretionary award of attorney's fees and costs.¹¹⁷ From an ex ante perspective, however, it is the employer's interest that is jeopardized—without federal preemption employers are exposed to the risk of sweeping damage awards (e.g., consequential and punitive damages) and state-mandated benefits.¹¹⁸

The manager of the apartment complexes in *Jervis* presents the hardest question—can a benefit provided to one employee trigger ERISA? In *Jervis*, the plaintiff was the manager of the business and presumably did not need the protections that ERISA's minimum standards afford pension plan participants, but that is the matter addressed by the top hat plan exemptions.¹¹⁹ The labor regulations indicate that a single-employee

reporting and disclosure obligations or prescribe a simplified system. ERISA § 104(a)(3), 29 U.S.C. § 1024(a)(3). Under this authority unfunded or insured welfare plans maintained primarily for the purpose of providing benefits to a select group of management or highly compensated employees (top hat welfare plans) are excused from all reporting and disclosure obligations (including providing participants with summary plan descriptions and summary annual reports), other than the requirement that plan documents be furnished to the Secretary of Labor on request. 29 C.F.R. §§ 2520.104-24, 2520.104b-10(g)(5) (1993).

115. The *Lackey* court also drew support for its conclusion that there was no plan from the fact that the benefit arrangement was the product of individual contract negotiations. 704 F. Supp. at 205. Such employee leverage or bargaining power should not be taken to negate the existence of a plan. (In fact, the arrangement developed to entice two new employees was thereafter unilaterally extended to three prior employees.) Instead, it is strong evidence that the personnel in question are "managerial" or highly compensated employees: they don't need ERISA's content protection, so the top hat plan exemptions should be applied.

116. 704 F. Supp. at 207 (finding that "deferred compensation was to be paid out of the general assets of Whitehall Corporation").

117. See ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).

118. See *supra* notes 61, 66-67 and accompanying text.

119. Use of the term "group" and the plural "employees" in the statutory specification of exempt top hat plans might be taken to indicate that multiple participants are required. But the policy of the exemption, that interference with private autonomy is not justified where the employee has the ability to protect herself, applies with even greater force to an arrangement designed for the benefit of one employee. Accordingly, the important question is whether a single-employee arrangement can constitute a plan.

arrangement is a plan subject to ERISA,¹²⁰ and a few cases so hold.¹²¹

Legislative history supports this position. ERISA's reporting and disclosure rules and its definitions of welfare and pension plans are drawn from the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).¹²² The WPPDA exempted plans covering twenty-five or fewer participants from disclosure obligations.¹²³ ERISA did not carry forward any such small plan exemption.¹²⁴

Even more telling is the alteration made to the predecessor definitions of welfare and pension plans. The WPPDA required that the plan be "communicated or its benefits described in writing to the employees."¹²⁵ The writing requirement, which ERISA dropped, was designed to "eliminate informal or personal arrangements from the scope of the [WPPDA]," because "[i]ndividual arrangements with executives for benefits are not contemplated as being covered by the [WPPDA]."¹²⁶ Under ERISA executive compensation arrangements are excluded in a more targeted fashion by the top hat plan exemptions. And while ERISA requires all plans (other than unfunded top hat plans) to be "established and maintained pursuant to a written instrument,"¹²⁷ the writing requirement is now a consequence of plan classification, not a predicate of it.¹²⁸

120. 29 C.F.R. §2510.3-3(b) (1993) ("[A] Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I.").

121. *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 827 (N.D. Ill. 1993) (denying defendant's motion to dismiss ERISA claims based on stock appreciation rights granted vice president). See *Katz v. American Diversified Enters., Inc.*, No. 91-Civ. 7667 (PNL), 1992 U.S. Dist. LEXIS 14912 (S.D.N.Y. Oct. 1, 1992) (denying defendant's motion for summary judgment on vice president's suit to enforce alleged agreement to pay \$50,000 per year for five years upon retirement, death or disability, despite argument that single employee pension agreement is not a "plan" subject to ERISA, and observing that authorities have not clearly resolved the issue).

122. Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1975).

123. Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, § 4(b)(4), 72 Stat. 997, 999, as amended by Pub. L. No. 87-420, 76 Stat. 35 (1962).

124. Early versions of pension reform legislation did exempt plans covering not more than twenty-five employees. E.g., S. 4, 93d Cong., 1st Sess. § 104(b)(4) (1973), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 66, at 117; S. REP. NO. 127, 93d Cong., 1st Sess. 18-19 (1973) (stating small plans exempted to avoid inhibiting growth of pension coverage), reprinted in 1 ERISA LEGISLATIVE HISTORY, *supra* note 66, at 604-05.

125. Welfare and Pension Plans Disclosure Act of 1958, Pub. L. No. 85-836, § 3(1), (2), 72 Stat. 997, as amended by Pub. L. No. 87-420, 76 Stat. 35 (1962).

126. S. REP. NO. 1440, 85th Cong., 2d Sess. 25 (1958), reprinted in WPPDA HISTORY, *supra* note 53, at 206; H.R. REP. NO. 2283, 85th Cong., 2d Sess. 11 (1958), reprinted in WPPDA HISTORY, *supra* note 53, at 207.

127. ERISA §§ 401(a), 402(a)(1), 29 U.S.C. §§ 1101(a), 1102(a)(1).

128. *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982).

More importantly, a single-participant or small plan exception is at odds with ERISA's protective policy. If substantive regulation of pension plans was meant to prevent unwarranted reliance, the pertinent inquiry is whether the risk of such reliance is materially lessened by restricted coverage. When the terms of the post-employment compensation are specially tailored to satisfy the interests of one or a few employees, it can be assumed that participation is fully-informed and deliberate. The top hat plan exception addresses this case. But restricted coverage does not by itself assure knowledgeable evaluation—an employer's unilateral promise of a pension to one or a few rank-and-file employees presents as great a risk of unwarranted reliance as a general program. Perhaps more so, for restricted coverage means there is less opportunity to be disabused by the forfeitures and disappointments of coworkers.

These considerations are nicely illustrated by the predicament faced by the blue-collar warehouse employees in *Harris v. Arkansas Book Co.*¹²⁹ Recall that there was no written plan, but on retirement one twenty-five year employee began receiving monthly checks as a gift in recognition of his longevity in service. The plaintiff was promised a pension, but when he demanded it following his discharge, the company reneged and cut off further payments to the earlier retiree.¹³⁰ Informal oral representations, standing alone, may be too tentative or indefinite to induce reliance worthy of protection.¹³¹ Statements such as “management is thinking about making some provision for your retirement” carry their own disclaimer. But an unequivocal representation coupled with consistent contemporaneous practice (as in *Harris*) creates the kind of expectancy Congress sought to regulate.

3. Information Costs

The information cost hypothesis suggests that content controls increase labor market efficiency by reducing job search costs through limited

129. 794 F.2d 358 (8th Cir. 1986). See *supra* notes 96-98 and accompanying text.

130. The Labor Department has provided by regulation that unfunded gratuitous payments to former employees are not subject to ERISA if the payments commenced before September 2, 1974 (the date of enactment of ERISA) and the recipient is notified annually that the payments are gratuitous and do not constitute a pension plan. 29 C.F.R. § 2510.3-2(e) (1993). The *Harris* court did not indicate when the retiree (Kruse) began receiving payments.

131. See *James v. National Business Sys., Inc.*, 924 F.2d 718, 720 (7th Cir. 1991) (per Posner, J.) (stating that for ERISA to come into play the plan must be “intended to be in effect, and not just be something for future adoption” and that documents describing a plan as being tentative, contingent, or *in futuro* should be considered as evidence that no plan was in effect).

standardization of pension contract terms. From this perspective, a small plan exception also appears unjustified. For each current or prospective participant, the cost of evaluating an employer's pension promise should increase as the number of participants decreases. This is because there will be fewer knowledgeable employees to consult (it would be more difficult for potential employees to draw on evaluations of current workers), the accumulated experience in plan operation will be smaller, and if independent expert advice (*e.g.*, financial or actuarial) were desired, its cost would be shared by a smaller group.

Although information costs generally increase as coverage decreases, the top hat plan exception is also sensible from this perspective. A few executives may have the expertise to self-appraise the employer's pension promise, but these are specialized skills not normally possessed by key employees. When a program is tailored to appeal to a "select group of management or highly compensated employees," the employer's interest is aligned with the participants'; to prevail in competition for highly-skilled labor the employer will want to facilitate comparison shopping, and so can be relied upon to shoulder the evaluation burden.

4. *Welfare Benefits*

The cases recognizing an individual employment contract or small plan exception to ERISA's coverage all involve pension-type benefits. The preceding analysis demonstrates that such an exception conflicts with the policy of pension content controls. But should a welfare benefit arrangement having extremely limited membership be immune from federal oversight? Congress refused to constrain the terms of welfare plans, but by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts," it sought to redress the "lack of . . . adequate safeguards concerning their operation."¹³² The inexperience, incompetence, and abuses that led first to the enactment of the WPPDA and ultimately to ERISA's fiduciary standards were understood to be particularly prevalent in the administration of small plans.¹³³ Accordingly, restricted coverage per se should not exempt a

132. ERISA § 2(b), (a), 29 U.S.C. § 1001(b), (a).

133. A proposed amendment to increase from 25 to 100 the number of participants required to trigger coverage under the Welfare and Pension Plans Disclosure Act brought this response:

There is not a person in this Chamber who believes that the pension plans which are operated by some of our major industrial concerns were subject to this corruption and theft.

welfare plan from federal regulation. Yet there may be some situations in which an arrangement for the provision of welfare benefits does not implicate any of the policies that underlie ERISA's conduct controls.¹³⁴

B. Conduct Controls

1. Controlling Discretion

Courts have concluded that an employer's undertaking to provide a benefit described in ERISA is beyond federal supervision for a reason in addition to restricted coverage. Where the undertaking can be fulfilled without an ongoing administrative apparatus, there is no "plan," even if the arrangement would provide an ERISA-listed benefit to many workers. The source for this line of cases is *Fort Halifax Packing Co. v. Coyne*.¹³⁵ There, the Supreme Court held that a Maine law requiring one-time severance payments in the event of a plant closing was not preempted by ERISA because it "neither establishes, nor requires the employer to maintain, an employee welfare benefit 'plan' under that federal statute."¹³⁶

The Court distinguished its earlier summary affirmance of decisions holding an unfunded severance program subject to ERISA because that program entailed an ongoing commitment to pay benefits as each person left employment and so required a continuing administrative scheme.¹³⁷ Equating an ERISA plan with an "ongoing administrative program for processing claims and paying benefits" was supported by the policy of preemption: conforming a benefit program to a patchwork of state regulation would forfeit the advantages of uniform administrative practice, whereas a contingent one-time obligation to make nondiscretionary lump-

It was primarily in the smaller, loosely organized, poorly supervised welfare and pension plans that opportunities existed for malfeasance.

And yet the workers who are covered by these smaller plans have as much at stake, as do the workers who are covered by the plans formulated by our industrial giants and their employee organizations.

CONG. REC. S1748-50 (daily ed. Feb. 7, 1962) (statement of Sen. McNamara), reprinted in WPPDA HISTORY, *supra* note 53, at 343. The amendment was defeated.

134. See *infra* text accompanying notes 177-78.

135. 482 U.S. 1 (1987).

136. *Id.* at 6.

137. *Id.* 17-19 (distinguishing *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), summarily *aff'd*, 477 U.S. 901 (1986) and *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), summarily *aff'd*, 477 U.S. 901 (1986)).

sum payments entails no such inefficiency.¹³⁸ The Court also observed that the Maine plant-closing law “not only fails to implicate the concerns of ERISA’s pre-emption provision, it fails to implicate the regulatory concerns of ERISA itself.”¹³⁹ Looking to the legislative history of ERISA’s fiduciary responsibility rules (which apply to both pension and welfare plans), the Court concluded that “[t]he focus of the statute thus is on the administrative integrity of benefit plans—which presumes that some type of administrative activity is taking place.”¹⁴⁰

A number of recent lower court decisions involving employer-initiated severance programs have fleshed-out the scope of *Fort Halifax*. Arrangements to make a readily-determinable lump-sum cash payment have been found not to constitute an ERISA plan.¹⁴¹ Yet neither the duration of the commitment nor payment in a lump sum is controlling, notwithstanding the Supreme Court’s search for an “ongoing administrative program.” Comparison of decisions concerning *unfunded* executive severance (“golden parachute”) programs demonstrates that the presence or absence of discretion in processing benefit claims is the crux of the matter. In *Fontenot v. NL Industries, Inc.*,¹⁴² the employer adopted, as one compo-

138. 482 U.S. at 8-15 (quotation at 12). The *Fort Halifax* majority observed that “Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations.” *Id.* at 11. As demonstrated above, however, employers could secure the cost advantages of a single set of administrative procedures by including a choice of law provision in their benefit plans. Rather, it is workers who benefit (through lower information costs) from having all plans subject to the *same* set of supplementary rules. See *supra* text accompanying notes 62-63. The Court relied on precedent to support its conclusion that preemption serves the employer’s cost interest in uniformity, 482 U.S. at 10-13, but the cited cases did not involve “administrative procedures” but rather state-mandated benefits. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (holding that ERISA preempted a New Jersey statute prohibiting offsetting workers’ compensation payments against pension benefits); *Standard Oil Co. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *summarily aff’d*, 454 U.S. 801 (1981) (holding that ERISA preempted a Hawaii law mandating employer provision of specified health insurance benefits). In the context of mandated benefits, of course, the employer does have an interest in uniformity. See *supra* text accompanying note 67. In a dissenting opinion Justice White, joined by three other members of the Court, observed that *Agsalud* “involved more than administrative uniformity,” and contended that the Maine plant-closing statute should be preempted. *Fort Halifax*, 482 U.S. at 26. That approach pays heed to the employer’s interest that a uniform rule of *laissez-faire* apply with respect to welfare benefits. This suggests that the majority’s faulty reasoning concerning the parties’ interests in uniformity may have led the Court to adopt an unduly narrow approach to preemption.

139. 482 U.S. at 15.

140. *Id.*

141. *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992); *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

142. 953 F.2d 960 (5th Cir. 1992).

ment of a takeover defense, a plan providing that selected senior executives would receive a lump-sum cash severance payment in an amount equal to three times the highest annual compensation received in the preceding three years if employment was terminated for any reason within two years of a change in control of the corporation.¹⁴³ The plaintiff, who was not included in the program, was terminated one year after the takeover. He sued for benefits, but the court granted the employer summary judgment on the ground that ERISA did not apply.¹⁴⁴

In *Bogue v. Ampex Corp.*,¹⁴⁵ a program covering ten executives of a subsidiary that was to be sold called for severance payments if an executive was not offered "substantially similar employment" within ten months after the sale. The *Bogue* court held ERISA applied.

In this case, Allied-Signal, the program's administrator, remained obligated to decide whether a complaining employee's job was "substantially equivalent" to his pre-acquisition job. Although the program, like the plans in *Fort Halifax* and *Wells*, was triggered by a single event, that event would occur more than once, at a different time for each employee. There was no way to carry out that obligation with the unthinking, one-time, nondiscretionary application of the plan administrators [as] in *Fort Halifax* and *Wells*. Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms. . . . We hold that Allied-Signal was obligated to apply enough ongoing, particularized, administrative, discretionary analysis to make the program in this case a "plan."¹⁴⁶

Similarly, a plan that required a separate determination of each covered executive's eligibility for benefits (specifically, whether post-merger termination was for reasons other than cause) was an ERISA plan.¹⁴⁷

This focus on administrative discretion seems sensible in light of the *Fort Halifax* policy analysis: if preventing mismanagement and abuse by fiduciaries is the central tenet of ERISA, perhaps ERISA should not apply where there are no judgment calls to oversee. ERISA's fiduciary duty and prohibited transaction rules apply only to fiduciaries¹⁴⁸ and the statute provides a broad functional definition that classifies as a fiduciary any person who has or exercises "any discretionary authority" in the manage-

143. *Id.* at 961, 963.

144. *Id.* at 961.

145. 976 F.2d 1319 (9th Cir. 1992).

146. *Id.* at 1323.

147. *Pane v. RCA Corp.*, 667 F. Supp 168, 170-71 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989).

148. ERISA §§ 404(a), 406, 29 U.S.C. §§ 1104(a), 1106.

ment or administration of the plan.¹⁴⁹ This approach is also consistent with the limited abuse-of-discretion standard of review applied to benefit claim denials where the plan gives the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.¹⁵⁰

Although ERISA was intended to afford participants safeguards against abusive decisionmaking in plan administration, that role may be threatened by the Court's incautious language in *Massachusetts Mutual Life Insurance Co. v. Russell*.¹⁵¹ There an employee whose disability benefits were cut off, only to be retroactively reinstated five months later, sued her employer for emotional distress and punitive damages, claiming breach of fiduciary obligations.¹⁵² In a unanimous decision the Court held that ERISA section 409 does not provide a cause of action for such "extracontractual" damages to a participant caused by improper or untimely processing of benefit claims.¹⁵³ Rather, section 409 authorizes only the plan to recover from the breaching fiduciary.¹⁵⁴ In reaching that conclusion, the opinion of the Court strongly suggests that a fiduciary also is not answerable to a participant for such damages under other provisions of ERISA.¹⁵⁵ That suggestion triggered a concurring opinion in which four Justices disavow such broader implications.¹⁵⁶

Notwithstanding the cautionary admonitions of the concurring opinion, most circuits have responded to *Russell* by holding that a participant cannot recover money damages to redress a breach of fiduciary duty under

149. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

150. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

151. 473 U.S. 134 (1985).

152. *Id.* at 136-38.

153. *Id.* at 148.

154. *Id.* at 140, 144.

155. The *Russell* Court stated that: "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute [29 U.S.C. § 1132(a)] as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146. The Court further observed: "In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages." *Id.* at 148. 156.

There is language in the Court's opinion that might be read as suggesting that the fiduciary duties imposed by ERISA on plan administrators for the most part run only to the plan itself, as opposed to individual beneficiaries. . . .

To the extent that the Court suggests that administrators might not be fully subject to strict fiduciary duties to participants and beneficiaries in the processing of their claims and to traditional trust-law remedies for breaches of those duties, I could not more strongly disagree. *Id.* at 151-52 (Brennan, J., concurring).

ERISA.¹⁵⁷ In *Mertens v. Hewitt Associates*,¹⁵⁸ the Supreme Court confirmed that a participant cannot recover money damages in a suit under section 502(a)(3) for “equitable relief” to enforce any provisions of ERISA or the terms of the plan.¹⁵⁹ These decisions, exacerbated by the Court’s crabbed reading of ERISA’s remedial provisions,¹⁶⁰ create a risk that ERISA’s fiduciary duties will be found enforceable *only* by an action under section 409 on behalf of the plan.¹⁶¹ That would leave a participant whose benefits have been denied, deferred, or reduced due to the improper exercise of discretion with no remedy for abusive fiduciary decisionmaking and only a federal common law contract claim for benefits.¹⁶²

157. *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993) (holding that only benefits are available under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and that money damages are unavailable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)); *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), (holding that no monetary damages are available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)), *cert. denied*, 113 S. Ct. 2928 (1993); *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), (holding neither compensatory nor punitive damages available under either ERISA § 502(a)(1)(B) or (a)(3), 29 U.S.C. § 1132(a)(1)(B) or (a)(3)), *cert. denied*, 113 S. Ct. 61 (1992); *McRae v. Seafarers’ Welfare Plan*, 920 F.2d 819 (11th Cir. 1991) (holding that extracontractual damages are not available as a form of relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)); *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990) (stating that emotional distress damages are not recoverable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821 (1st Cir.), (stating that compensatory and punitive damages are unavailable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)), *cert. denied*, 488 U.S. 909 (1988); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (holding that emotional distress damages are unavailable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)); *Sommers Drug Stores Co. v. Corrigan Enters., Inc.*, 793 F.2d 1456 (5th Cir. 1986), (holding that punitive damages are unavailable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)), *cert. denied*, 479 U.S. 1034, *cert. denied*, 479 U.S. 1089 (1987); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (same); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985), (holding that extracontractual and punitive damages are unavailable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)), *cert. denied*, 476 U.S. 1170 (1986). *Contra Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) (adopting the reasoning of Justice Brennan’s concurring opinion in *Russell* to hold that beneficiary has direct cause of action for money damages for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)); *Warren v. Society Nat’l Bank*, 905 F.2d 975 (6th Cir. 1990), (holding that compensatory damages for injuries resulting from breach of “contractual” duty are recoverable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)), *cert. denied*, 111 S. Ct. 2256 (1991); *Vogel v. Independence Fed. Sav. Bank*, 728 F. Supp. 1210, 1228-29 (D. Md. 1990) (allowing recovery of compensatory damages that are proximate result of breach).

158. 113 S. Ct. 2063, 2068-70 (1993).

159. *Id.* at 2069.

160. *Russell*, 473 U.S. at 146-47; *Mertens*, 113 S. Ct. at 2067.

161. *See, e.g., Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986) (explaining that legislative history shows that ERISA was designed to protect the plan, rather than directly protect participants and beneficiaries). *See also Reich v. Rowe*, No. 93-1567, 1994 U.S. App. LEXIS 5964, at *11-13 (1st Cir. Mar. 31, 1994) (holding, on the basis of *Mertens* dicta, that nonfiduciary consultant, who knowingly participated in a fiduciary’s breach but did not engage in a prohibited transaction, could not be enjoined from serving as an ERISA fiduciary or service provider).

162. Compare *infra* notes 172-76 and accompanying text (unfunded top-hat plans).

Even if a participant cannot obtain *pecuniary* relief from a fiduciary,¹⁶³ the integrity of fiduciary decisionmaking in the claims administration process should be policed through ERISA section 502(a)(3), which authorizes civil actions by a participant or beneficiary “(A) to enjoin any act or practice which violates any provision of this title . . . or to (B) obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title”¹⁶⁴ The fiduciary obligations and prohibited transaction rules are, of course, prescribed by Title I of ERISA.¹⁶⁵ Accordingly, an adverse benefit determination that is founded on a breach of fiduciary duty may be set aside and the case remanded to the administrator under an injunction to reassess the claim without reliance on considerations that are off limits to a fiduciary.¹⁶⁶

This approach protects participants from abusive decisionmaking in plan administration. It implements the notion that preventing mismanagement and abuse by fiduciaries is a central tenet of ERISA. Tying plan classification to the existence of discretion (as under *Fort Halifax* and its progeny) is foolish without such an approach, for the statute so triggered would provide no real safeguards, state remedies would be thwarted, and federal dockets would be clogged to no end. Moreover, this approach would achieve consistency in the treatment of benefit grants and denials. Benefits paid in breach of a fiduciary obligation are recoverable from the fiduciary under ERISA,¹⁶⁷ withholding of benefits should be judged by the same standards.

2. Protecting Funding

If the plan is funded, any person who “exercises any authority or control

163. In some cases participants have been allowed to recover out-of-pocket damages (as opposed to punitive damages and emotional distress damages) from a breaching fiduciary under section 409, 29 U.S.C. § 1109. *E.g.*, *Vogel v. Independence Fed. Sav. Bank*, 728 F. Supp. 1210, 1228 n.28 (D. Md. 1990) (disavowing view that ERISA § 409 authorizes recovery only on behalf of plan); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251-52 (6th Cir. 1992), (allowing more than \$3.6 million to be awarded in class action and holding that misleading laid off employees as to the likely availability of a more generous severance program is a breach of fiduciary duties), *cert. denied*, 113 S. Ct. 2416 (1993).

164. 29 U.S.C. § 1132(a)(3).

165. ERISA §§ 404, 406, 29 U.S.C. §§ 1104, 1106; *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 153-54 (Brennan, J., concurring).

166. This approach to enforcing fiduciary standards in claims administration assumes a limited scope of judicial review of adverse benefit determinations. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Conison*, *supra* note 60, at 33-60.

167. ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2); *American Fed'n of Unions v. Equitable Life Assurance Soc.*, 841 F.2d 658 (5th Cir. 1988) (holding the administrator of a union health fund liable for \$109,000 paid to ineligible claimants).

respecting management or disposition of its assets” is also a fiduciary, whether or not that authority involves the exercise of discretion.¹⁶⁸ Plan trustees are always fiduciaries¹⁶⁹ and so too is anyone who handles plan assets, even if her duties are purely ministerial (an agent of the trustee, for example).¹⁷⁰ ERISA’s fiduciary responsibility provisions prohibit outright thievery and looting of benefit funds by anyone with access to the fund, however exalted or subordinate her position. Accordingly, the *Fort Halifax* principle that there is no plan where there is no discretion is justifiable only if the arrangement is unfunded or entirely insurance funded.¹⁷¹ The Supreme Court was correct to observe that preventing mismanagement and abuse by fiduciaries is a central tenet of ERISA, but mishandling of plan assets is as much a threat to the integrity of benefit plans as abusive decisionmaking. ERISA’s drafters understood and attempted to provide against both those threats in defining fiduciary. The courts should not lose sight of this as they elaborate the definition of an ERISA “plan”; federal fiduciary regulation should come into play whenever plan administration involves discretion *or* the plan is funded.

The severance payments required by the Maine plant-closing statute in *Fort Halifax* were unfunded, as were the golden parachute programs examined by the lower courts. But that presents a catch-22 for an executive severance arrangement that does involve the exercise of discretion: the program is subject to ERISA, but because it is an unfunded arrangement providing deferred compensation to a “select group of management or highly compensated employees,” ERISA’s fiduciary responsibility rules do not apply.¹⁷² Accordingly, state law is preempt-

168. ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

169. 29 C.F.R. § 2509.75-8 (D-3) (1993).

170. See 29 C.F.R. § 2509.75-8 (D-2) (1993) (stating that persons who perform various functions “within a framework of policies, interpretations, rules, practices and procedures made by other persons” are not fiduciaries, but of the listed “ministerial functions” only one—“collection of contributions and application of contributions as provided in the plan”—involves handling assets); *Anoka Orthopaedic Assocs., P.A. v. Mutschler*, 709 F. Supp. 1475, 1482-83 (D. Minn. 1989), *aff’d*, 910 F.2d 514 (8th Cir. 1990) (holding that attorney and accountant who prepared year-end financial statements, conducted limited audits, and provided other services that did not involve investment or handling of plan assets were not fiduciaries).

171. If plan assets consist exclusively of insurance contracts, ERISA § 403(b)(1) waives the requirement of a trust and the appointment of a trustee. ERISA § 403(b)(1), 29 U.S.C. § 1103(b)(1). Labor Department interpretive rules provide that merely collecting contributions and forwarding them to the insurance company does not make one a fiduciary. 29 C.F.R. § 2509.75-8 (D-2) (1993).

172. ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1); *Pane v. RCA Corp.*, 868 F.2d 631, 637 (3d Cir. 1989) (stating that no fiduciary obligations would apply to an unfunded severance program covering sixty-one of RCA’s managers that was instituted during pendency of a merger). It might be argued that an executive severance program that is established in response to a particular job-threatening event, such

ed,¹⁷³ yet the decisionmaker owes no duty of loyalty.¹⁷⁴ The disappointed participant is apparently left with only a federal common-law contract claim for benefits.¹⁷⁵ This result may at first seem curious, but it is consistent with the principle that fiduciary rules are called for when monitoring by directly interested parties is unfeasible.¹⁷⁶ Key employees are in a position to foresee circumstances causing a need for post-employment compensation and to bargain for protection.

Are there other situations in which the feasibility of direct monitoring obviates the need for fiduciary obligations? A welfare benefit arrangement limited to key employees is an obvious candidate. Here, too, most contingencies could be provided for by contract at an acceptable cost, and to the extent that residual discretion is necessary, the continuing relationship of the parties and the employer's reputational interest (including the continuing need to compete in markets for highly-skilled labor) provide safeguards against abuse.¹⁷⁷ Although not authorized by statute, such a "top-hat welfare" arrangement could be exempted from ERISA's scope without undercutting any of the policies of conduct regulation, provided that the arrangement is unfunded. If the program is funded, fiduciary rules should apply because they will reduce the cost of monitoring asset managers.¹⁷⁸

as a pending merger or acquisition, does not involve significant *deferred* compensation, although *Pane* is to the contrary. *Pane*, 868 F.2d at 637. Yet a distinction between such a particularized arrangement and an ongoing program triggered by any change in control seems unjustifiable. Moreover, Labor Department regulations indicate that a severance plan offering payments that exceed twice the employee's annual compensation for the year preceding termination may be classified as a "pension plan," 29 C.F.R. § 2510.3-2(b)(1) (1993), which necessarily entails a finding that such program results in "a deferral of income." ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). If a severance plan is not a pension plan, it is a welfare plan. 29 C.F.R. § 2510.3-1(a)(3) (1993).

173. ERISA § 514(a), 29 U.S.C. § 1144(a); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

174. ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2) (fiduciary liability contingent on applicability of part 4 of Title I); *Pane*, 868 F.2d at 637.

175. The appropriate standard of review for such a benefit claim is unclear. In *Pane*, the trial court apparently determined *de novo* that the plaintiff was not covered by the plan. 868 F.2d at 637-38. The court of appeals, which held that ERISA's fiduciary obligations did not apply because the severance program was an unfunded "top hat" plan, did not question that approach. But in *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1324-26 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1847 (1993), the Ninth Circuit applied the abuse of discretion standard in an opinion that did not acknowledge the inapplicability of ERISA's fiduciary obligations. On the standard of review of benefit denials, see sources cited *supra* note 60.

176. See *supra* note 57 and accompanying text.

177. See *Fischel & Langbein, supra* note 57, at 1131-32.

178. See *id.* at 1119. If the promise of benefits is limited to the assets of the fund, the employer has little incentive to monitor fund managers because the employer is immune from liability for a deficiency. (Such fund-specific promises are permissible because vesting is not required of welfare benefits.) Moreover, if the employer has a reversionary interest in any excess fund assets, there is an

3. *Promoting Planning*

A benefit arrangement involving the exercise of discretion or the handling of assets should be classified as a "plan" to give effect to ERISA's fiduciary standards. But that functional definition may be incomplete: fiduciary responsibility is not the only objective of federal regulation; pension and welfare plans are also subject to reporting and disclosure requirements. Are ERISA's informational objectives weighty enough that they should independently trigger plan classification? That is, should a nondiscretionary unfunded benefit arrangement be characterized as a plan because reporting and disclosure would promote better financial planning and oversight by participants? Consider, for example, an unfunded program to pay employees laid off because of a plant closing a lump-sum equal to the total compensation received in the preceding six months. Like the Maine plant-closing statute in *Fort Halifax*, this contingent obligation involves no discretion and requires no ongoing administrative apparatus. Fiduciary protections are unnecessary, but the utility of disclosure is not so easily dismissed. Accurate knowledge of the circumstances, amount, and timing of the payment might affect employee savings decisions. Because the plan is unfunded, information concerning the employer's continued financial solvency is necessary to allow employees to gauge the extent to which they can safely rely on the program. As this example illustrates, a definition of "plan" that is limited to the presence of a fiduciary can, in unusual circumstances, be antithetical to the self-protective function of ERISA.

Even in the typical program involving a fiduciary, ERISA does an inadequate job of facilitating informed decisionmaking. In addition to disclosure of plan terms, ERISA *generally* demands some disclosure of the plan's financial condition and material information concerning plan administration.¹⁷⁹ But disclosure of the *employer's* financial condition is

inducement for imprudent risk-taking. See ERISA § 403(d)(2), 29 U.S.C. § 1103(d)(2) (upon termination of a welfare plan, excess assets distributed according to the terms of the plan).

179. ERISA §§ 101(a)(2), 104(b)(3), 29 U.S.C. §§ 1021(a)(2), 1024(b)(3) (summary annual report requirement); 29 C.F.R. § 2520.104b-10(d) (prescribed contents).

The Secretary of Labor is authorized to prescribe an alternative method for pension plans to satisfy some or all reporting and disclosure requirements, provided that the method is "consistent with the purposes of this subchapter and that it provides adequate disclosure to the participants and beneficiaries in the plan, and adequate reporting to the Secretary." ERISA § 110(a)(1), 29 U.S.C. § 1030(a)(1). Regulations issued pursuant to this authority permit unfunded or insured top hat plans to satisfy their reporting and disclosure obligations simply by filing a statement with the Labor Department that sets forth the employer's name, address and tax identification number and declares the number of such plans maintained and the number of employees in each. 29 C.F.R. § 2520.104-23 (1993). Such plans are

not required, even in the case of an unfunded plan.¹⁸⁰ Unfunded welfare plans are extremely common. The participants in these plans may not have access to the information they need to assess the reliability of the employer's benefit commitment and so are unable to protect themselves by making alternative arrangements when the fiscal viability of the program is in doubt. If knowledgeable, they might purchase their own insurance or elect family coverage under a plan provided by a spouse's employer, for example. Where the plan provides benefits in the current period the risk of welfare plan default is not materially greater than the risk of losing the paycheck. But the information imbalance is not so easily dismissed, for many welfare plans entail substantial deferred compensation (e.g., retiree health insurance, unemployment or severance payments). Hence a financially strapped employer has an incentive to provide unfunded plans promising generous deferred welfare benefits in lieu of higher current compensation, and the workers who choose to invest in such future benefits (by continuing employment, perhaps over a prolonged period) may do so unaware of the risk.¹⁸¹ A suit for breach of fiduciary duty in failing to inform participants of the plan's shaky finances presents a conceivable

also excused from providing participants with a summary annual report. *Id.* § 2520.104b-10(g)(4).

Similarly, ERISA § 104(a)(3) allows the Secretary to prescribe a simplified reporting and disclosure system for welfare plans, or to exempt them from some or all reporting and disclosure obligations. 29 U.S.C. § 1024(a)(3). Under this authority unfunded or insured welfare plans with fewer than 100 participants have been exempted from almost all reporting and disclosure obligations save the requirement of furnishing a summary plan description to participants, and unfunded welfare plans with 100 or more participants need not provide summary annual reports. 29 C.F.R. §§ 2520.104-20, -44(b)(1)(i), 2520.104b-10(g)(1), (2) (1993). Moreover, unfunded or insured welfare plans maintained primarily for the purpose of providing benefits to a select group of management or highly compensated employees are excused from all reporting and disclosure obligations (including providing participants with summary plan descriptions and summary annual report), other than the requirement that plan documents be furnished to the Secretary of Labor upon request. *Id.* §§ 2520.104-24, 2520.104b-10(g)(5).

180. RICHARD M. STEINBERG & HAROLD DANKER, PENSIONS: A FINANCIAL REPORTING AND COMPLIANCE GUIDE 99 (3d ed. 1987). See ERISA § 103, 29 U.S.C. § 1023 (prescribed contents of annual report; all accounting information relates to the plan).

181. Of course, this is the same moral hazard problem that stimulated ERISA's minimum funding and termination insurance requirements for defined benefit pension plans. Michael Allen, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement*, in JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 53 (1990). Observe, however, that the deception element would be involved more often in the case of a privately-held company with a nonunionized workforce, because the federal securities laws require financial disclosure of publicly-held companies and employee representatives in collective bargaining have access to relevant employer financial information. *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); 1 THE DEVELOPING LABOR LAW 651-53, 677-81 (Patrick Hardin, ed. 1992).

remedy. But the expanding caselaw on the duty to inform¹⁸² may yet collide with the Supreme Court's literal interpretations of ERISA's remedial provisions.¹⁸³

IV. CONCLUSION

ERISA's failure to reveal the employer's financial condition—the ultimate fiscal backing of an unfunded or underfunded plan—suggests that the employee planning objective is subsidiary to the oversight (*i.e.*, monitoring plan administration) and deterrence (*i.e.*, discouraging fiduciary misconduct) functions of disclosure.¹⁸⁴ That statutory omission is part of a larger cause for concern. Preemption should also facilitate planning by both employees (evaluation of interstitial plan rules, *e.g.*, fiduciary law) and employers (making benefit commitments voluntary and predictable by outlawing mandated benefits).¹⁸⁵ Yet the Supreme Court has overlooked or slighted those purposes.¹⁸⁶ Moreover, the information cost justification for pension content controls, also designed to facilitate planning, has been completely ignored.¹⁸⁷ These goals are fundamental; they should come into play first in the definition of an ERISA plan (goals must inform scope), and throughout the elaboration of ERISA's requirements. Congress, courts and commentators need to reassess priorities. Absent increased attention to the autonomy-promoting, empowering aspects of ERISA—to the planning perspective—federal regulation of employee benefits may breed increased dependency and distrust.¹⁸⁸

182. Recent cases in the courts of appeals expand the duty to inform to cover prospective changes in benefit programs that are under serious consideration. *See, e.g.*, Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Fischer v. Philadelphia Elec. Co., 994 F.2d 130 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993); Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1993).

183. *See supra* notes 159-60 and accompanying text.

184. *See supra* text accompanying notes 53-56. In *Fort Halifax* the Supreme Court's reading of ERISA's legislative history indicated that it understood oversight and deterrence were the purposes of disclosure. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15-16 (1987) (quoting congressional debate mentioning disclosure to prevent abuses and permit monitoring, and observing that "[n]o financial transactions take place that would be listed in an annual report, and no further information regarding the terms of the severance pay obligation is needed because the statute itself makes these terms clear").

185. *See supra* text accompanying notes 61-67.

186. *See supra* note 138.

187. *See* discussion *supra* part II.B.2.

188. The author has defended paternalism in other contexts, within appropriate limits. Wiedenbeck, *supra* note 69, at 699-700 (tax expenditures generally); Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine—New View of the Policy Against Perpetuities?*, 50 MO. L. REV. 805, 830-33 (1985) (private trusts and the rule against perpetuities). The point here is not that the protective policy is necessarily misapplied in the pension context, but that it has been pursued to the exclusion of other important values.