WHAT DO YOU GET WITH THE GOLD WATCH? AN ANALYSIS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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One of the more ingrained customs of American society is that people stop working at a specified age. A necessary consequence of mandatorily retiring healthy people is that they must be supported for a substantial period of time by some means other than the immediate fruits of their own work. A major method of providing for this need has been pension plans—the employer defers a portion of the employee's compensation until he reaches retirement age. Congress has long recognized the merit of such programs by according preferential tax treatment to pension funds.[1] As a result, it is estimated that 35 million workers are presently covered by some form of retirement plan other than social security.[2] The economic resources required to support such a system are enormous: in 1974, over $130 billion was held by private pension plans.[3]

From the standpoint of the individual worker, however, the operation of the system has been far from perfect. Whether caused by the high mobility of the American work force, corrupt or incompetent management of pension fund assets, or deliberate exclusion, only about one-third of the full-time workers can expect to receive any benefits

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1. *See generally* INT. REV. CODE OF 1954, §§ 401-407.
2. *Hearings on S. 4 & S. 75 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess., 174 (1973).
3. *See* CCH PENSION PLAN GUIDE No. 328, at 5-6 (Nov. 22, 1974). *See also* 4 CCH PENSION PLAN GUIDE ¶ 25,226 (1974).

from a pension plan upon retirement.[4] As a result, Congress, after extensive public hearings and debate, devised a comprehensive legislative program designed to increase the average worker's expectation of receiving retirement benefits. Generally, the Employee Retirement Income Security Act of 1974 [ERISA][5] defines minimum conditions for participation in a retirement plan and for receipt of benefits. It also attempts to prevent mismanagement of plan assets, to require adequate funding of plans, and to insure individual participants against plan failure.

A great deal of discussion and comment has already arisen as attorneys, actuaries, accountants, and employers attempt to understand the effect of the new law upon the management of existing plans. Much less has been heard about the manner in which the new law can benefit the individual plan participant. Accordingly, this Article has been prepared for the attorney who is representing individuals whose pension plan is covered by ERISA. The divisions within the Article approximate the process of analysis that an attorney will follow when representing an individual plan participant: analysis of the written pension plan and evaluation of the plan under ERISA requirements;[6] statutory reporting and disclosure requirements;[7] proceedings on initial plan qualification before the Internal Revenue Service [IRS];[8] claims procedures and judicial review;[9] and fiduciary responsibility.[10]

One caveat is in order. The authors have reported on proposed regulations, suggested interpretations, and interim procedures where they are available. It will be several years before many of the major areas of confusion are clarified, areas about which there is a great deal of room for speculation and debate. This Article cannot provide definitive interpretations on the status of the law. Rather, its purpose is to outline a complex statute, suggest where the issues lie, and provide arguments in favor of interpreting the statute to best effectuate the purpose of protecting the individual participant.

ERISA PENSION PLAN REQUIREMENTS

Before ERISA, byzantine eligibility requirements often disqualified retired workers from receiving expected pension benefits.[11]

4. See *Coverage & Vesting of Full-Time Employees Under Private Retirement Plans*, 36 SOC. SEC. BULL. No. 73 (1973).
5. 29 U.S.C.A. §§ 1001-1381 (1975).
6. *Id.* § 1001.
7. *Id.* §§ 1021-1031.
8. *Id.* § 1201.
9. *Id.* §§ 1132-1133.
10. *Id.* §§ 1101-1114.
11. *See generally* R. NADER & K. BLACKWELL, YOU AND YOUR PENSION 30-44 (1973).

Many plans required both lengthy service and employment under the plan upon retirement.[12] Thus, long service alone was no guarantee of a pension. Indeed, long service with one employer often meant that insufficient working years remained to permit the worker to amass the required service with another firm. Under the new ERISA provisions, however, extended service in covered employment assures the worker of eligibility for at least some benefits.

The status of an individual under a pension plan is a function of three basic concepts: participation, vesting, and accrual of benefits. Participation determines whether the employee is covered by the plan at all. Vesting determines whether he has a right to any benefits, and accrual determines the amount of benefits to which he is entitled. The substantive protection afforded by ERISA results from the regulation of pension plan requirements in each of these areas. Although benefit eligibility may still vary enormously, the participation, vesting, and accrual requirements of ERISA establish minimum requirements. ERISA's eligibility rules establish only the minimum standards—employers are always free to be more liberal.[13] This section of the Article will examine participation, vesting, and accrual of benefits, first defining each in general and then analyzing the limitations placed by ERISA upon the employer's formulation of his retirement plan.

Participation

Most pension plans condition eligibility for benefits and the amount of benefits on the length of time the worker has served the employer.[14] Nevertheless, under both ERISA and prior law, not all periods of service count toward establishing pension rights, and established service credits can be erased by a break in employment. Un-

12. M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 21-22 (1964).

13. 29 U.S.C.A. § 1053(d) (1975) provides: "A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part."

The Act's minimum rules are contained in generally identical provisions in ERISA's labor and tax titles. The labor title, Title I, applies to all plans meeting the extremely broad "commerce" test of coverage contained in 29 U.S.C.A. § 1003(a) (1975). The tax title, Title II, applies to those plans which seek, or in some instances have previously enjoyed, qualification of employer contributions to retirement plans as business expense deductions. *Id.* § 1321. In addition to reiterating the requirements of the labor title, the tax title amends portions of the Internal Revenue Code which prohibit discrimination in favor of employees who are officers, shareholders, or highly compensated. INT. REV. CODE OF 1954, § 401. Existing tax law which requires plans to benefit substantial segments of the employer's work force is also continued in somewhat stronger form. Due to the consequences of noncompliance with the tax title, nearly all pension plans will seek to meet the tax requirements which go beyond the mandatory requirements of the labor title. Briefly, these consequences are that the income of a nonqualifying pension trust is taxable to the employer, *id.* § 501(a), and the employer cannot deduct his contributions to the trust. *Id.* § 404(a)(1).

14. M. BERNSTEIN, *supra* note 12, at 20.

der ERISA, however, the effect of such breaks are, for the first time, regulated.[15]

Participation means the right to have periods of service or membership counted toward the potential right to receive a retirement benefit.[16] The general rule of the Act is that a retirement plan may not exclude an employee from participation if he is at least 25 years old and has had 1 year of service.[17] An exception permits exclusion of workers who begin service in a defined benefit or target benefit plan within 5 years of normal retirement age.[18] This exception results in a weakness in the statute since it permits discrimination against a worker who begins work at an advanced age but continues to work past normal retirement age and has accumulated a sufficient number of years of service otherwise to qualify for benefits.[19] This permits clear cases of age discrimination. Two workers can begin and end their employment on the same days and work side-by-side, yet if one begins within 5 years of retirement age, the Act allows his compensation to be lower because it does not include pension rights. Although the Age Discrimination in Employment Act of 1967 arguably forbids such discrimination,[20] the more recently enacted provisions of ERISA would seem to have superceded the Age Discrimination Act in this regard. There are, however, at least two mitigating factors. First, this exception does not apply to pension plans which define normal retirement age in terms of a given number of years of service, since under such a plan no employee can, by definition, begin work within 5 years of retirement.[21] If a plan does not fix a normal retirement age, then the statute fixes normal retirement age with respect to age or service so that this exception cannot apply.[22] Second, the coverage rule of the Internal Revenue Code would prevent an employer from qualifying his plan for tax purposes if a large number of his employees were affected by the exception.[23]

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15. *See* H.R. REP. No. 93-807, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4711-12 (1974).
16. *See* 29 U.S.C.A. § 1002(7) (1975).
17. *Id.* § 1052(a)(1)(A); INT. REV. CODE OF 1954, § 410(a)(1)(A).
18. 29 U.S.C.A § 1052(a)(2) (1975); INT. REV. CODE OF 1954, § 410(a)(2). These terms are defined and discussed in the section on accrual of benefits. See text & notes 71-72 *infra*.
19. For a particularly harsh result based upon such a plan requirement, see Presler v. State Div. of Human Rights, 36 App. Div. 2d 793, 319 N.Y.S.2d 392 (App. Div.), *appeal dismissed*, 29 N.Y.2d 649, 324 N.Y.S.2d 1033, *appeal denied*, 29 N.Y.2d 485, 325 N.Y.S.2d 1025 (1971), *cert. denied*, 405 U.S. 1006 (1972).
20. *See* 29 U.S.C. § 623(a)(1) (1970). *But cf. id.* § 631. *See generally* Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 ARIZ. L. REV. 495 (1975).
21. H.R. CONF. REP. No. 93-1280, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 5044-45 (1974).
22. 29 U.S.C.A. § 1002(24) (1975).
23. See text & notes 25-29 *infra*.

Not all employees who fulfill the age and service requirements are entitled to participate in the plan. The coverage rule and the antidiscrimination provisions of the Internal Revenue Code,[24] however, limit the degree to which the employer may exclude classes of employees from participation on grounds other than age or length of service. These long standing rules have been continued in strengthened form under ERISA.

The Code contains two alternative tests on percentages. Either the plan must actually benefit 70 percent or more of the employees, or 80 percent of all those eligible to participate if 70 percent are eligible.[25] As under prior law, employees who have not met the minimum age and service requirements for participation in the plan are excluded in calculating the percentages.[26] Note, however, that the minimum requirements are now limited by ERISA's participation rules. Also, nothing in the Code permits excluding from the calculations employees who may be ineligible for participation simply because they are too close to normal retirement age.

Although this coverage rule is not new, it has been modified by ERISA in two important respects. The first major change in the coverage rule is that employers may now exclude, for purposes of the percentage computations, those employees who are covered by a collective bargaining agreement which does not include participation in the employer's plan. The employer must show, however, that participation in the plan was a good faith subject of the collective bargaining process.[27] This provision eases a serious hardship that existed under prior law in those cases where an employer had large groups of both union and nonunion employees. Formerly, if the union was offered retirement benefits and rejected them in favor of, for example, higher wages, the employer could not establish a retirement plan without violating the coverage phase of the antidiscrimination rule, because the union members were included in computing the participation percentages. This change is, therefore, salutary since it grants more flexibility for collective bargaining over pension benefits, provided that the IRS establishes reasonable standards for evaluating a claim that plan exclusion was, in good faith, a subject of collective bargaining.[28]

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24. INT. REV. CODE OF 1954, § 401.
25. *Id.* § 410(b)(1). *See generally* Dederick, *What Constitutes Discrimination in Pension and Profit-Sharing Plans?*, 22 J. TAXATION 272 (1965). This rule was formerly contained in section 401(a)(3) of the INTERNAL REVENUE CODE OF 1954 and is now incorporated there by reference to section 410(b)(1).
26. INT. REV. CODE OF 1954, § 410(b)(1)(A).
27. *Id.* § 410(b)(2).
28. BNA PENSION L. RPTR., A-24 (Sept. 16, 1974).

Under the second major change in the coverage rule, the practice of treating the employees of formally distinct corporations separately for purposes of applying the coverage rule has been made unlawful. This change is exceedingly significant since employers will no longer be able to circumvent the antidiscrimination rules by putting all key employees in a separate management corporation and providing benefits covering only those employees. Under the new rule, all employees of affiliated companies are considered as a single group.[29]

In addition to being nondiscriminatory in terms of coverage, a plan cannot discriminate in favor of officers, shareholders, or highly compensated employees.[30] This does not mean that such individuals cannot receive higher pension benefits or have higher contributions made on their behalf. Rather, it requires that the ratio between present compensation and benefits, in a defined benefit plan,[31] or contributions, in a defined contribution plan,[32] cannot be higher for these individuals than for other participants. Obviously, a plan will be discriminatory on its face if it applies a higher benefit or contribution formula for officers, shareholders, or highly compensated employees than for others.[33] In addition, the plan must be nondiscriminatory in operation.[34]

An example of a coverage arrangement which is on its face uniform but is discriminatory in operation would be a requirement that participants contribute a relatively high proportion of their earnings in order to participate and benefit from employer contributions.[35] While all employees could theoretically participate, economic reality and the press of everyday needs would bar all but the highly compensated from participation. Another clear case of discrimination occurs where a profit sharing plan permits an employee's investment in stock of the employer when it is available, but the sole shareholder of the company in fact sells stock only to officers of the company.[36]

Vesting

Vesting describes the unconditional and legally enforceable pres-

29. Section 414(b) of the INTERNAL REVENUE CODE OF 1954 provides that all employees shall be considered together for purposes of applying the antidiscrimination rules. A controlled group of corporations is broadly defined in section 1563(a) of the Code.
30. *Id.* § 401(a)(4).
31. *See* Rev. Rul. 74-142, 1974-1 CUM. BULL. 95.
32. *See* Rev. Rul. 68-653, 1968-2 CUM. BULL. 177.
33. *See* Rev. Rul. 69-158, 1969-1 CUM. BULL. 126.
34. Treas. Reg. § 1.401-1(b)(3) (1975). The requirement of operational evenhandedness must extend not only to contributions or benefits, but also to coverage. *See* Fleitz v. Commissioner, 50 T.C. 384 (1960).
35. 1 CCH PENSION PLAN GUIDE ¶ 2565 (1975).
36. Rev. Rul. 71-93, 1971-1 CUM. BULL. 122.

sent right to receive a retirement benefit, either immediately or at some time in the future.[37] When an employee is fully vested, he has an enforceable right to all benefits which have accrued to him in the past and will accrue to him in the future.[38] When he is partially vested, he has a right to a fractional share of his accrued benefits.

The concept of vesting had no place in early pension law since the courts analyzed pensions as pure gratuities in which an employee could never acquire indefeasible rights because he gave no consideration.[39] As courts came to analyze pension plans in contractual terms,[40] the concept of vesting emerged. Prior to ERISA, retirement plans ranged from total lack of vesting prior to retirement to 100 percent vesting after as little as 1 year of service.[41] Generally, however, courts have refused to find that pension benefits have vested apart from the express terms of the plan, except in unusual circumstances.[42] ERISA carries the concept of vesting one further step by protecting the worker against unreasonable vesting conditions. The vesting provisions of ERISA confer new and substantive rights upon pension plan participants.

Under the new law, a plan subject to the vesting provisions must provide an employee with: (1) complete vesting of his retirement benefits on attaining normal retirement age;[43] (2) immediate, complete vesting of all accrued benefits derived from his own contributions to a plan;[44] and (3) complete vesting of all accrued benefits derived from his employer's contributions. This last benefit must be based upon a schedule which is at least as liberal as one of the following three alternatives: (1) full vesting of accrued benefits after 10 years of service; (2) graduated vesting of accrued benefits on an accelerating basis, with full vesting after 15 years of service; or (3) graduated vesting of accrued benefits under a formula combining age and service, called the Rule of 45, with full vesting when the employee has 5 years of service and his age and service add up to 45.[45]

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37. *See* 29 U.S.C.A. § 1002(19) (1975).

38. In order to determine the amount of the benefit to which an individual is entitled at any particular time, both vesting and accrual of benefits must be taken into account. *See* text & notes 72-73 *infra*.

39. *See* B. AARON, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS 5-9 (1961).

40. Askinas v. Westinghouse Elec. Corp., 330 Mass. 103, 111 N.E.2d 740 (1953); New York City Omnibus Corp. v. Quill, 189 Misc. 892, 73 N.Y.S.2d 289 (Sup. Ct.), *modified*, 272 App. Div. 1015, 74 N.Y.S.2d 925 (App. Div. 1947), *aff'd*, 297 N.Y. 832, 78 N.E.2d 859, 75 N.Y.S.2d 774 (1948).

41. M. BERNSTEIN, *supra* note 12, at 24-28.

42. For an example of a decision affording pension rights apart from the express terms of the plan, see Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971).

43. 29 U.S.C.A. § 1053(a) (1975); INT. REV. CODE OF 1954, § 411(a).

44. 29 U.S.C.A. § 1053(a)(1) (1975); INT. REV. CODE OF 1954, § 411(a)(1).

45. 29 U.S.C.A. § 1053(a)(2) (1975); INT. REV. CODE OF 1954, § 411(a)(2).

The choice of a vesting schedule is up to the plan managers, subject to the limits specified in the Act. Such actuarial factors as average employee age, rate of turnover, and continuity of employment will affect the cost of each particular plan under the various formulae. All things being equal, the three vesting schedules are generally considered to be comparable on a cost basis.[46] The Rule of 45 may be somewhat less expensive, particularly where turnover is high and average employee age is low, but the bookkeeping required to administer such a vesting schedule may deter many employers from using it.[47]

The minimum vesting standards of the Act are subject to certain adjustments. The IRS may require more rapid vesting than the Act requires if necessary to prevent the plan from violating the antidiscrimination provisions of the Internal Revenue Code.[48] The standards may also be lowered during the transition period when ERISA comes into effect if necessary to prevent collapse of the plan. Thus, under certain carefully defined circumstances, plans which were already in existence at the beginning of 1974 may obtain an easing of the vesting requirements of the Act.[49]

Employees are protected against loss due to changes in a plan vesting formula even though the new formula would comply with ERISA. In the event that an employer elects to change its vesting formula, any employee with at least 5 years of service may choose to remain under the old vesting schedule. The election must be made within a reasonable period after the change,[50] and, in the absence of an

Under the Rule of 45, an employee with 5 or more years of service must be at least 50 percent vested when the sum of his age and years of service total 45, with 10 percent additional vesting for each year of service thereafter. Plans using the Rule of 45 must also provide 50 percent vesting for employees with 10 years of service and 10 percent for each year of service thereafter, regardless of age.

46. *See* BNA PENSION L. RPTR., A-9 (Oct. 21, 1974); H.R. REP. No. 93-533, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4652 (1974).

47. The prohibitive amount of bookkeeping required is illustrated by the formula which must be followed in using the Rule of 45. *See* 29 U.S.C.A. § 1053(a)(2)(C)(i) (1975); INT. REV. CODE OF 1954, § 411(a)(2)(C)(i). This prohibitive effect is exaggerated by the new requirement that employers maintain a detailed statement of service credits and provide it to each employee on request. 29 U.S.C.A. § 1025(a) (1975).

48. INT. REV. CODE OF 1954, § 411(d). In this regard, note that employers are permitted to maintain separate plans for highly mobile employees, providing accelerated vesting and lower benefits, without violating the antidiscrimination rules. *Id.* § 401(a)(5). For analysis of limitations placed upon the IRS in setting alternative vesting requirements, see H.R. CONF. REP. No. 93-1280, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 5057-58 (1974).

49. Applications for a vesting variance must be made to the Secretary of Labor before September 3, 1976. 29 U.S.C.A. § 1057 (1975). Variances are available only where plan failure or substantial reduction of benefits is imminently threatened, and then only if said termination would be adverse to the plan participants in the aggregate, and further, only if the desired result cannot be achieved by a funding variance. *Id.* Because vesting variances may permanently reduce the benefits of some participants, it is likely that they will be granted reluctantly.

50. *Id.* § 1053(c)(1)(B); INT. REV. CODE OF 1954, § 411(a)(10)(B). A change in vesting schedules cannot result in the forfeiture of any previously vested benefits. 29 U.S.C.A. § 1053(c)(1)(A) (1975); INT. REV. CODE OF 1954, § 411(a)(10)(A).

election, the participant comes under the new schedule.[51] In order to secure the protection of this provision for employees, the reasonableness of the election period should be determined with reference to when the necessary information becomes available to them. In all events, participants must be notified of such a change within 210 days after the end of the plan year in which the change occurs.[52] If this notice fails to inform employees of their right to remain under the former vesting schedule and how that right may be exercised, then arguably they have not received a reasonable election period. Any such period should be sufficiently long to give employees time to be fully informed of these rights. Conversely, plans can protect themselves against long selection periods by fully informing employees of their rights.

Forfeiture of vested benefits was not prohibited before ERISA, although forfeitures have been declared unlawful by the courts when based upon circumstances beyond the control of the employee[53] or when the employee was penalized for exercising his right under the federal labor laws to work for a rival union.[54] The Act narrowly confines the circumstances under which vested rights can be forfeited. Such forefitures are limited to death of the employee before retirement;[55] withdrawal of mandatory employee contributions by a participant who is less than 50 percent vested;[56] or, in the discretion of the Secretary of Labor, in connection with certain retroactive plan amendments.[57] In cases where an employee retires and subsequently returns to work for the same employer—or, in the case of a multiemployer plan, in the same industry, the same trade or craft, or the same geographic area—the Act authorizes suspension, but not permanent forfeiture of benefits.[58] Under prior law, some plans conditioned receipt of retirement benefits upon complete retirement from the industry, the employee's changes in occupational classification upon reemployment notwithstanding. In other cases, return to work without prior written

51. *See* 29 U.S.C.A. § 1053(c)(1)(B) (1975); INT. REV. CODE OF 1954, § 411(a)(10)(A).
52. 29 U.S.C.A. § 1024(b)(1) (1975).
53. *See* Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971).
54. *See* Progressive Mine Workers v. NLRB, 422 F.2d 538 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).
55. 29 U.S.C.A. § 1053(a)(3)(A) (1975); INT. REV. CODE OF 1954, § 411(a)(3)(A). But this rule does not apply if the employee continued to work after becoming eligible for retirement, and a joint and survivor annuity was to be provided.
56. 29 U.S.C.A. § 1053(a)(3)(D)(i) (1975); INT. REV. CODE OF 1954, § 411(a)(3)(D)(i). Benefits must, however, be restored if the employee restores the amounts withdrawn. 29 U.S.C.A. § 1053(a)(3)(D)(ii) (1975); INT. REV. CODE OF 1954, § 411(a)(3)(D)(ii).
57. 29 U.S.C.A. § 1053(a)(3)(C) (1975); INT. REV. CODE OF 1954, § 411(a)(3)(C).
58. 29 U.S.C.A. § 1053(a)(3)(B) (1975); INT. REV. CODE OF 1954, § 411(a)(3)(B).

consent of the plan administrator resulted in permanent forfeiture of all pension benefits. Imposition of these harsh provisions was accepted by the courts as within the sound discretion of plan managers.[59] Thus ERISA's restrictions on the forfeitability of vested rights is a marked improvement in workers' rights.

Years of Service and Break in Service

Under both the participation and vesting provisions of the Act, a "year of service" is a 12-month period during which the employee renders at least 1,000 hours of service.[60] Special rules for certain industries are included in the Act. For example, in the case of seasonal industries in which the customary period of employment is less than 1,000 hours per year, a year of service will be defined by regulations to be issued by the Secretary of Labor.[61] In maritime industries, 125 days of service will be treated as 1,000 hours of service.[62]

For both participation and vesting purposes, service with a predecessor of the employer will be credited as service with the employer if the employer maintains the predecessor's plan.[63] In computing service for participation and vesting purposes, all employees of corporations which are members of a controlled group of corporations[64] are treated as employed by a single employer.[65] Under prior law, there was no obligation to recognize closely related service. This deficiency, which resulted in unfair practices in certain industries where workers moved on a seasonal basis, has been remedied under ERISA.[66]

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59. *See* DeLorraine v. Marine Eng'rs Benevolent Ass'n Pension Trust, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974). In *DeLorraine*, the employee actually obtained permission to return to work, worked for 4 years, and was then advised that the permission had been retroactively revoked. Nevertheless, the court refused to find the plan requirements invalid.

60. 29 U.S.C.A. §§ 1052(a)(3)(A), (C) (1975); INT. REV. CODE OF 1954, §§ 410(a)(3)(A), (C). For participation purposes, the 12-month period starts on the first day of employment. For vesting purposes, the plan may designate a calendar year, plan year, or other 12-month period. INT. REV. CODE OF 1954, § 411(a)(5)(A).

61. 29 U.S.C.A. §§ 1052(a)(3)(B), 1053(b)(2)(C) (1975); INT. REV. CODE OF 1954, §§ 410(a)(3)(B), 411(a)(5)(C). It is anticipated that there will be strong pressure to make these regulations unduly restrictive, particularly in view of the difficulty of recordkeeping relating to migrant farm workers.

62. 29 U.S.C.A. §§ 1052(a)(3)(D), 1053(b)(2)(D) (1975); INT. REV. CODE OF 1954, §§ 410(a)(3)(D), 411(a)(5)(D). This is significant because the maritime industry pension plans have long been noted for their complex and confusing formulas, including fractional years of service, and for harsh break in service provisions in an industry often beset by economic adversity.

63. 29 U.S.C.A. § 1060(b)(1) (1975); INT. REV. CODE OF 1954, § 414(a)(1). If the successor employer establishes a new plan, Treasury regulations will provide the formula for crediting service under the predecessor plan.

64. *See* INT. REV. CODE OF 1954, § 1563(a). Parent-subsidiary and brother-sister corporations are included within the controlled group category.

65. 29 U.S.C.A. § 1060(c) (1975); INT. REV. CODE OF 1954, § 414(b). Further, all employees of trades or businesses which are under common control are treated as employed by a single employer. 29 U.S.C.A. § 1060(d) (1975); INT. REV. CODE OF 1954, § 414(b).

66. 29 U.S.C.A. §§ 1052(a)(3)(B), 1053(b)(2)(C) (1975); INT. REV. CODE OF 1954, §§ 410(a)(3)(B), 411(a)(5)(C).

With regard to breaks in service, most of the Act's rules are the same for both participation and vesting purposes. The Act defines a "one-year break in service" as any 12-month period designated by the plan, and not prohibited under Labor Department regulations, during which the employee accumulates 500 or fewer hours of service.[67] Thus, under the ERISA requirements an employee may find himself in one of three classifications with regard to a given service year. If he has more than 1,000 hours of service, he has earned a year of service credit. If he has fewer than 500 hours, he has incurred a 1-year break in service. If he is in between, he fails to add to his credited service, but he avoids losing credit earned in previous years.

Under prior law, break in service provisions were used to deprive many deserving workers of pension benefits.[68] Under ERISA, the circumstances under which a break in service may result in loss of prior earned service credit are carefully limited. If the employee has no vested benefits at the time of the break in service, the service credits prior to the break may be disregarded only if the number of consecutive years of the break equals the total years of service preceding the break.[69] Since the provision covers workers with only partially vested rights, only relatively short service employees will be severely penalized by a break in service. The new requirements in this area will increase the complexity of employer recordkeeping, particularly since the Act now requires for the first time that the employer maintain a detailed statement of service credits and provide it to each employee on request.[70]

Accrual

Once an individual has satisfied the requirements for participation in the retirement plan, his years of service or membership will be credited toward his eventual retirement benefit. Accrual of benefits is the rate at which benefits are accumulated, although not necessarily vested, in the employee's account. The accrual formula selected by an employer will affect the amount of benefits due an employee who terminates before normal retirement age. Further, it will affect the funding liability of the employer under the funding provisions of the Act.

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67. 29 U.S.C.A. § 1053(b)(3)(A) (1975); INT. REV. CODE OF 1954, § 411(a)(6)(A).
68. *See* Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971).
69. 29 U.S.C.A. §§ 1052(b)(4), 1053(b)(3)(D) (1975); INT. REV. CODE OF 1954, §§ 410(a)(5)(D), 411(a)(6)(D). The plan may require a full year of service after the break before crediting years of service prior to the break. 29 U.S.C.A. §§ 1052(b)(3), 1053(b)(3)(B) (1975); INT. REV. CODE OF 1954, §§ 410(a)(5)(C), 411(a)(6)(B).
70. 29 U.S.C.A § 1025(a) (1975).

Accrual formulae are of two basic types: (1) defined benefit, and (2) defined contribution or individual account.[71] In a defined benefit plan, a fixed annual amount is set as the benefit due an employee who stops work at the normal retirement age.[72] The accrued benefit at any point in time is a percentage of this amount. If, for example, the normal retirement benefit is $1,000 per year and the plan uses an accrual formula of 3 percent of the normal benefit for each year of service, an employee with 10 years of service has an accrued benefit of 30 percent or $300 per year. If he also is 50 percent vested, he would have a nonforfeitable right to receive $150 per year upon reaching retirement age, even if he earns no further service credit.

The Act contains three alternative rules concerning minimum accrual rates for defined benefit plans.[73] The purpose of these rules is to prevent excessive "backloading" of plans, the practice of accelerating the accrual rate after attainment of a specified age or number of years of service[74] which effectively decreases the benefit due employees who leave the employer before retirement. Further, since the Act's funding requirements are based upon the accrual rate, backloading unrealistically minimizes the employer's funding liability in the plan's early stages, thus increasing the risk of plan failure.

In a defined contribution plan, the employer contributes a specified amount to the employee's account for each year of service. Unlike the defined benefit plan, the retirement benefit is not fixed, but varies with the amount of such contributions and the performance of the plan's investments during the employee's career. The accrued benefit under a defined contribution plan is merely the balance in the individual's account at any given time.[75] Unexpected debate has arisen concerning the classification of collectively bargained retirement plans in this context. Virtually all such plans provide their members with plan descriptions which outline retirement benefits in terms of a specified monthly amount, depending on length of service. Accordingly, it appears that they are defined benefit plans. However, some representatives of employer groups have argued strenuously, if informally, that since the collective bargaining process under which these

71. *Id.* §§ 1002(34)-(35).

72. Normal retirement age may be defined in the plan, but in no event may it be delayed beyond the later of the participant's attaining age 65 or the 10th anniversary of initial participation in the plan. *Id.* § 1002(24).

73. *Id.* §§ 1054(b)(1)(A)-(C) (1975); INT. REV. CODE OF 1954, §§ 411(b)(1)(A)-(C).

74. *See* H.R. REP. No. 93-807, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4688 (1974); H.R. CONF. REP. No. 93-1280, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 5054-56 (1974).

75. 29 U.S.C.A. § 1002(23) (1975); INT. REV. CODE OF 1954, § 411(a)(7)(A)(ii).

plans are established involves negotiation of a dollar amount to be contributed for each unit of work under the contract, these plans are in fact defined contribution plans. If this rationale is accepted, many of the salutary funding rules of the Act would be undercut and the risk of adverse investment performance would, in large measure, be shifted to the employees. The argument should not be accepted, since the Act's definitions of defined benefit and individual account plans refer to the provisions of the plan itself and not the basis from which they are derived.[76]

REPORTING AND DISCLOSURE

One of the major difficulties faced by plan participants in the past has been a relative dearth of knowledge concerning the provisions, administration, and operation of their retirement plans. This information is necessary if participants are to ensure that they can qualify for benefits and if they are to have a meaningful opportunity to protect themselves against loss from mismanagement of their plans. Participants have often found themselves pensionless upon retirement due to failure to comply with one obscure regulation or another, of which they had no fair opportunity to learn.[77] Under ERISA's reporting and disclosure requirements, however, participants will not only be able to keep track of eligibility requirements more easily than in the past, but will also, in concert with the Secretary of Labor, be able to police the financial management of their plans.

The Welfare and Pension Plans Disclosure Act,[78] which predated ERISA, required plans to file only certain very basic information with the government. Virtually no significant aspect of plan or fund management was required to be divulged. ERISA has repealed the Welfare and Pension Plan Disclosure Act and replaced it with comprehensive requirements for reporting and disclosing information to the government, to plan participants and, in many cases, to the general public.[79] Information available under ERISA to participants in and bene-

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76. 29 U.S.C.A. §§ 1002(34)-(35) (1975).

77. Plan provisions are often ambiguous. Without an explanation of the meaning of the provision, participants sometimes will assume the interpretation most favorable to themselves, which may bear no resemblance to the interpretation of the trustees. Unfortunately, the interpretation of the trustees, if reasonable, governs. For an example of an interpretation by trustees which was found unreasonable, see Cuff v. Gleason, 382 F. Supp. 1144 (E.D.N.Y. 1974), *vacated on other grounds*, 515 F.2d 127 (2d Cir. 1975). Further, participants often did not receive a pension due to their failure to meet a requirement which was added as an amendment to the plan without the participants ever receiving notice of the new requirement. *See generally* Krouner, *Employee Benefit Plans: Due Process for Beneficiaries*, 23 LAB. L.J. 425, 434-40 (1972).

78. Act of Aug. 28, 1958, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1975).

79. 29 U.S.C.A. §§ 1021-1031 (1975). Despite such liberal disclosure rules and ERISA's consistent policy of increasing the participant's voice in initial plan qualifica-

ficiaries of pension plans falls into three main categories: the provisions of the plan, the financial condition and performance of the plan, and the rights which have accrued to the individual under the plan. After discussing each of these areas, this section will examine the enforcement methods contemplated for the reporting and disclosure provisions of ERISA. A fourth consideration—notice of pending administrative decisions concerning the lawfulness of the plan—will be discussed in conjunction with the administrative procedures.[80]

Plan Description and Plan Summary

The plan description and summary plan description are the participants' sources of information about the plan's eligibility requirements. The Act requires filing with the Secretary of Labor a plan description containing the basic elements of the plan. In addition to identifying information such as the name of the trustees, the plan description must reveal provisions regarding participation, accrual, vesting, financing, claims procedure, and forfeiture of benefits. It must also provide a description of any relevant portions of a collective bargaining agreement under which the plan has been adopted.[81] The Secretary of Labor has prescribed the precise form of the plan description.[82]

In addition to the plan description, each plan is required to furnish all participants and beneficiaries with a summary plan description which shall "include the information [required in the plan description,] . . . shall be written in a manner calculated to be understood by the average

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tions and enforcement of fiduciary duties, *see* text accompanying notes 128-32 & 138-58 *infra*, there are no requirements to give to a participant notice of any proceedings, determinations, or orders subsequent to the initial notice of plan termination. 29 U.S.C.A. § 1342(d)(2) (1975). Thus, participants are not informed as to whether they have been included on the list of those who are entitled to benefits and, if so, to what extent. *See id.* § 1346. They are not notified of the financial data sent by the plan administrator to the trustee. *See id.* §§ 1346(1)-(3). In fact, participants need not be notified of the completion of the termination proceedings.

In short, to determine their status and the status of proceedings, the burden is on the participants to inquire of the Pension Benefit Guarantee Corporation [PBGC], the watchdog created in the Department of Labor to ensure plan continuity. *Id.* § 1302. On June 11, 1975, a representative of the PBGC advised the authors that no action was planned to overcome this lack of notice. It was stated, however, that the PBGC would give participants whatever information they requested. While a participant who is "adversely affected" by an act of the PBGC or a trustee may sue in federal court, *id.* § 1303(f), this right is severely limited if the participant cannot determine in a meaningful way whether or not his rights have in fact been adversely affected. Reasonably, plan administrators should be responsible for informing participants of all steps of these proceedings, including the various decisions made by the trustee. Participants should be entitled, at a minimum, to be notified whether or not they have been included for eventual receipt of benefits.

80. See text & note 138-53 *infra*.

81. 29 U.S.C.A. § 1022(b) (1975).

82. The Secretary has issued a proposed form EBS-1. *See* 39 Fed. Reg. 42239 (1974) (proposed 29 C.F.R. § 2522.40); 39 Fed. Reg. 42241 (1974) (proposed 29 C.F.R. § 2523.30). The proposed form is reprinted at 1 CCH PENSION PLAN GUIDE ¶ 5550 (1975).

plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[83] It is hard to imagine a more difficult task for a plan administrator than the preparation of this document; the dilemma for plan administrators is to draft a summary that is comprehensible to the average participant without oversimplifying it to the point where it is misleading.

Of particular concern are the consequences of a misleading plan summary. Under ERISA, a misleading summary would not comply with the Act and accordingly would invite the sanctions discussed below.[84] A suggested alternative remedy stems from a line of pre-ERISA cases holding that under some circumstances, a summary of the plan will control over the plan itself where they are inconsistent.[85] Thus, in *Gould v. Continental Coffee Co.*,[86] the court found for the plaintiff employee on the ground that the summary of the profit sharing plan, on which the plaintiff had relied, controlled the defendant employer's plan. The opinion notes that the summary failed to designate a time and place on the employer's premises for the employees to inspect the plan, and that the plaintiff was never furnished with a copy of the plan.[87] The court's holding was based principally on the fact that a summary which is misleading and does not direct the employee to the plan itself violates IRS rulings.[88]

There is one important limitation to these cases. When the literature distributed to participants expressly states that it is merely a brief outline or description of the plan and is to be read with the understanding that the plan itself governs the descriptive literature, the plan itself governs the rights of the parties. Thus, in *Fields v. Western Equipment Co.*,[89] the court held that the following statement in a brochure distributed by the employer gave adequate warning to the participants that the plan itself controlled the language of the brochure: "The purpose of this announcement is to highlight the various benefits and provisions of the plan of interest to you. A complete copy of the profit sharing plan and trust agreement will be maintained in the company's

83. 29 U.S.C.A. § 1022(a)(1) (1975).
84. See text & notes 128-34 *infra*.
85. *See* Miller v. Dictaphone Corp., 334 F. Supp. 840 (D. Ore. 1971); Gould v. Continental Coffee Co., 304 F. Supp. 1 (S.D.N.Y. 1969); *cf.* Voigt v. South Side Laundry & Dry Cleaners, Inc., 24 Wis. 2d 114, 128 N.W.2d 411, 413 (1964). Although none of the cases makes an effort to set forth a tight, cogent argument as a basis for decision, the common law doctrine of estoppel, namely that an individual has been misled and in some way has relied on this misinformation to his detriment, appears to be the foundation for these decisions.
86. 304 F. Supp. 1 (S.D.N.Y. 1969).
87. *Id.* at 3.
88. Rev. Rul. 61-157, 1961-2 CUM. BULL. 67, 74.
89. 255 Ore. 615, 469 P.2d 779 (1970).

office for your inspection."[90] The continuing validity under ERISA of the principle that disclaimers put participants on notice to consult the full plan document is extremely doubtful. The Act specifically requires that the summary "shall be sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan."[91]

The plan administrator must also cope with the requirement of understandability. Despite the irreverent doubts occasionally voiced concerning whether anyone, including the drafters, understands some plans now in existence, the Act requires extensive simplification of plan language to enable communication of requirements to participants.[92] Additionally, if a sizeable segment of an employer's work force speaks a language other than English, efforts must be made either to translate the summary or to make available someone who can explain the plan in the individual's native language.[93] This task has been simplified by regulations allowing different plan descriptions to be prepared for different groups of employees.[94]

Participants and beneficiaries are entitled to a copy of the plan description and summary automatically and without charge within 90 days of becoming participants or first receiving benefits.[95] Moreover, they must receive a summary description of any material changes in the subject matter of the summary plan description within 210 days of the end of the plan year in which the change is made.[96] Every fifth

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90. *Id.* at 620, 469 P.2d at 782.

91. 29 U.S.C.A. § 1022(a)(1) (1975).

92. Under proposed regulations, the drafter of a plan summary would be required to:

> exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross references, and a table of contents.

40 Fed. Reg. 24653 (1975) (proposed 29 C.F.R. § 2520.102-2(a)).

93. 40 Fed. Reg. 24654 (1975) (proposed 29 C.F.R. § 2520.102-2(d)).

94. 40 Fed. Reg. 24655 (1975) (proposed 29 C.F.R. § 2520.102-4).

95. 29 U.S.C.A. § 1024(b)(1)(A) (1975). Plans are not required to furnish this information to participants and beneficiaries until May 30, 1976, unless the plan first becomes subject to the reporting and disclosure provisions of ERISA after February 1976. 40 Fed. Reg. 24655-56 (1975) (proposed 29 C.F.R. § 2520.104-3). Plans in this category have 120 days after they first become subject to the requirements to comply. 29 U.S.C.A. § 1024(b)(1)(B) (1975). Thus, new pension plans have an additional month to supply the first round of summary plan descriptions to participants; after that, additional participants must receive them within 90 days.

Permission to withhold summary plan descriptions until May 30, 1976, has been granted existing plans because they have, for one reason or another, had great difficulty in complying with the Act's provisions by the effective dates originally enacted. Thus far, the Department of Labor has acceded to their wishes for extensions, apparently as a matter of course. It is hoped that the latest extensions will be the last and that the Department of Labor will not, as it should not, become an avenue to circumvent or indefinitely postpone compliance with the provisions of the Act.

96. 29 U.S.C.A. § 1024(b)(1) (1975).

year after the plan becomes subject to the Act, the plan must furnish participants and beneficiaries with an updated summary plan description if such changes are made; otherwise, an updated summary is due them every 10 years.[97] Finally, participants and beneficiaries may request additional copies of the summary plan description, the plan description, and the underlying documents of the plan, such as collective bargaining agreements and trust agreements, but a reasonable charge may be levied for these papers.[98] Additionally, these documents must be available for review, without charge, by participants and beneficiaries.[99] The plan description and summary plan description are also public documents available through the Department of Labor.[100]

The Act authorizes the Secretary of Labor to reject unsatisfactory plan and summary plan descriptions.[101] It is contemplated, however, that most rejections will be of annual reports and perhaps plan descriptions for reasons of accounting deficiencies. Accordingly, it will probably be the responsibility of participants themselves to initiate complaints about plan summaries that continue to be bafflingly complex, prolix, and incomprehensible. In so doing, they will be armed with the remedies discussed at the end of this section.[102]

Annual Report

The annual report of a pension plan provides data relating to the financial posture of the plan and to the soundness with which it is being managed. An annual report must be prepared for every employee benefit plan subject to the reporting and disclosure provisions of ERISA.[103] It must include a financial statement[104] accompanied by the opinion of an independent qualified public accountant.[105] In addi-

97. *Id.*
98. *Id.* § 1024(b)(4). A reasonable charge is the lesser of actual cost of reproduction or 10 cents per page. 40 Fed. Reg. 24661 (1975) (proposed 29 C.F.R. 2520.104b-30). This maximum charge also applies to copies of the full annual report. See discussion at text & notes 103-20 *infra*. Ten cents per page is a substantial improvement over the 20 cents per page maximum originally proposed. 39 Fed. Reg. 42242 (1974). However, for a large number of lengthy documents—and in this area documents tend to be lengthy—the cost could still be prohibitive to a relatively poor participant, especially to a beneficiary, since he has already retired and is probably living on a low, fixed income. Unfortunately, any expectation that the definition of a reasonable charge will be lowered further is unrealistic.
99. 29 U.S.C.A. § 1024(b)(2) (1975).
100. *Id.* §§ 1024(a)(1)(B)-(C).
101. *Id.* § 1024(a)(4).
102. See text & notes 128-34 *infra*.
103. 29 U.S.C.A. § 1023(a)(1)(A) (1975).
104. *Id.* § 1023(b). Financial statements must set forth in detail all financial transactions which the plan has undertaken during the previous fiscal year and must also list assets and liabilities, receipts and disbursements, the details of all transactions involving parties in interest, and other financial matters so as to present a complete financial picture of the fiscal strengths and weaknesses of the plan.
105. *Id.* §§ 1023(a)(3)(A), (D). This opinion must pertain to the accuracy of the

tion, the annual report must disclose the number of employees covered, the name and address of each fiduciary, and the name of each person who received compensation for services rendered to the plan or its participants. This report must include the nature of the services, the amount of compensation, and the person's relationship to the plan. The report must also disclose the reason for any change of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.[106]

Any employee pension benefit plan must file a complete actuarial statement with its annual report.[107] The administrator of a pension benefit plan must hire[108] an enrolled actuary[109] who, in addition to compiling the actuarial statement, must certify[110] that the matters included in that statement are reasonably related to the prior performance of the plan and to reasonable future expectations, and represent his best estimate of anticipated results under the plan.[111] The provision for enrollment of actuaries is significant since, for the first time, it provides some assurance of actuarial reliability.[112]

The annual report is to be distributed to the Secretary of Labor[113] and to any participant or beneficiary who requests it within 210 days of the end of the plan year.[114] The plan may charge for the full annual

financial statement, specifically to the accuracy of the separate schedules required by section 1023(b)(3), relating to assets and liabilities, receipts and disbursements, and other financial transactions.

106. *Id.* § 1023(c).

107. *Id.* § 1023(d). A number of exceptions are listed in this section. They basically relate to profit-sharing plans, individual account plans, insurance plans, and plans generally exempt under section 1003(b).

Actuarial valuations need be done only every third plan year. *Id.* § 1023(d). The general practice prior to the passage of ERISA was to do a valuation every 5 years. While this new provision will be of some help, it would be much easier to ensure that plans are providing benefits at the highest level if an actuarial valuation were done annually.

The actuarial statement must include: the date of the plan year and the date of the actuarial valuation applicable to the plan year for which the report is filed; the date and amount of the contributions received by the plan for that year; the normal costs, accrued liabilities, and benefits not included in the calculations; a statement of facts and actuarial assumptions used to determine costs; the reasons for any change in assumptions or cost methods; the minimum contribution required by section 1082, relating to funding; the number of retired and nonretired participants and beneficiaries covered; statements relating to value of assets; liabilities for nonforfeitable pension benefits; and a certification of the contribution necessary to reduce the accumulated funding deficiency to zero. *Id.* § 1023(d). The actuary must certify that the report is complete and accurate and that all assumptions and methods used were reasonable. *Id.* § 1023(d)(8).

108. *Id.* § 1023(a)(4)(A).

109. *See id.* §§ 1241-1242.

110. *Id.* § 1023(d)(8).

111. *Id.* § 1023(a)(4)(B).

112. "Now, of course, the Court knows from a rather long business experience that actuaries can reach very many different conclusions if they want to reach them.

"I once knew of an insurance actuary, a rather famous one, who claimed he could reach any conclusion you asked him to reach." Van Horn v. Lewis, 79 F. Supp. 541, 542 (D.D.C. 1948).

113. 29 U.S.C.A. § 1024(a)(1) (1975).

114. *Id.* § 1024(b)(3).

report,[115] but each participant and beneficiary is entitled to receive without charge the financial statement portion of the report, showing receipts, disbursements, assets, and liabilities in a form which facilitates comparison with the previous year.[116] The financial statement must be accompanied by any other material necessary to fairly summarize the full annual report[117] and must be rendered within 210 days of the close of the plan year.[118] Additionally, the full annual report may be obtained through the Department of Labor.[119] These provisions will not apply to plan years beginning before January 1, 1975.[120] Thus, the first annual reports under ERISA will not appear until well into 1976.

Statement of Individual Benefit Rights

The Act entitles individuals to learn the amount of the pension, if any, to which they will be entitled upon retirement. First, a participant or beneficiary may request in writing a statement indicating his total accrued benefits and his total accrued and vested benefits.[121] If the participant has no vested benefits, the statement must show when benefits will first vest.[122] Second, all plans subject to the vesting provisions of the labor title of ERISA must provide participants with a pension statement when they terminate employment under the plan.[123] This statement must show the "nature, amount, and form" of the participant's vested rights.[124] Third, the information which must be provided employees upon separation must also be provided to the IRS, together with evidence that it has been given to the appropriate employees.[125] From there, this information is forwarded to the Department of Health, Education, and Welfare [HEW],[126] which will provide it to the participant or beneficiary upon request.[127] Thus, an employee's belief that he has qualified for benefits under one or more plans may be verified through HEW.

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115. *Id.* § 1024(b)(4); see discussion note 98 *supra.*
116. 29 U.S.C.A. § 1024(b)(3) (1975).
117. *Id.* Plans could encounter as much trouble with this requirement as with the comprehensibility provision for summary plan descriptions. See text & note 83 *supra.*
118. 29 U.S.C.A. § 1024(b)(3) (1975).
119. *Id.* §§ 1024(a)(1), 1026.
120. *Id.* § 1031(b)(1); 40 Fed. Reg. 24655 (1975) (proposed 29 C.F.R. § 2520.-104-2).
121. 29 U.S.C.A. § 1025(a) (1975). Such a request can be made no more than once a year. *Id.* § 1025(b).
122. *Id.* § 1025(a).
123. *Id.* § 1025(c); INT. REV. CODE OF 1954, § 6057(e).
124. INT. REV. CODE OF 1954, § 6057(a)(2)(D).
125. *Id.* § 6057(a).
126. *Id.* § 6057(d).
127. 42 U.S.C.A. § 1320b-1(a)(2) (1974).

Enforcement

ERISA provides for enforcement of its reporting and disclosure requirements through criminal sanctions and civil remedies available to the government and individuals.[128] An indirect enforcement device already touched upon is that the employer must show in his annual registration statement with the IRS that separated employees have received separation statements. The criminal sanctions, apply to all willful violations of the reporting and disclosure requirements.[129] The basic civil remedy available to the government and individuals is injunctive or other equitable relief.[130] Recovery of attorneys fees is available to private litigants who bring actions to enforce any of the requirements.[131] Individuals may also recover a statutory penalty of $100 per day, for which the plan administrator is personally liable if he fails to supply an individual with required information within 30 days of a request.[132]

The fact that the participant or beneficiary must request information in order to trigger the civil sanction reveals a basic flaw in the enforcement of the all important automatic disclosure requirements of ERISA. That flaw is that there is no effective means provided for ensuring that participants and beneficiaries receive, without request, the summary plan description, updates to it, and the excerpts from the annual report to which they are entitled.[133] There is no requirement that plans furnish enforcement agencies with evidence of distribution of these documents to participants and beneficiaries. Thus, unlike the separation statement, which must be filed with the IRS, the government has no ready method of determining whether the required disclosure has been made to participants. This gap in the Act's method of enforcing reporting and disclosure requirements provides a clear need for the Secretary of Labor to exercise his authority to require plans to furnish participants and beneficiaries with a statement of their rights under the Act.[134] Individuals who are apprised of their right to receive various reports would be in a better position to secure compliance with the reporting and disclosure rules.

If a participant avails himself of all the opportunities for disclosure and thus keeps abreast of the pension requirements and his own pension status, then a great many problems which previously resulted from a lack of information may be avoided. One problem, however, will

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128. 29 U.S.C.A. § 1132 (1975).
129. *Id.* § 1131.
130. *Id.* §§ 1132(a)(3), (5).
131. *Id.* § 1132(g).
132. *Id.* § 1132(c).
133. See text & notes 116-20 *supra*.
134. 29 U.S.C.A. § 1024(c) (1975).

undoubtedly linger. For the most part, participants, especially blue collar workers, lack the education and resources, such as access to accountants or lawyers, to understand and deal with this myriad of pension plan documents. Thus, it is probable that most participants will not be overly concerned with their plans until retirement. Then, despite the far more lenient eligibility requirements provided by the Act, some participants will find that due to misunderstanding or a lack of diligence on their part, they have not qualified. Unintentional oral misinformation will still be given by officials attempting to clarify plan requirements and such information will be detrimentally relied on by participants. Only a strong educational program emphasizing the importance of careful review of pension requirements can avoid these unfortunate experiences.

INITIAL PLAN QUALIFICATION

Preferential Tax Treament for Plans Complying with the Internal Revenue Code

A prior determination by the IRS as to the qualified status of a plan is not necessary in order to receive preferential tax treatment. However, in order to assist employers and to encourage the establishment of plans, the IRS has for many years followed a procedure for issuing determination letters indicating whether or not proposed plans or amendments qualify for preferential tax status. Most plans take advantage of this procedure in order to minimize the risk of loss that would result if a plan were deemed unqualified after contributions had been made.[135]

This section of the Article will deal with the major procedural innovations contained in the tax provisions of ERISA, under which employees will for the first time have standing in IRS qualification determination proceedings.[136] Because of the pervasive impact of ERISA's requirements for participation and vesting, virtually every retirement plan now in existence will be seeking new or amended determinations of tax qualification from the IRS. It has been estimated that at least 400,000 plans presently in existence will require amendment to conform to the new law.[137] Thus, in the next few years, the IRS will be setting administrative precedents that will control the structure of retirement plans for as long as ERISA is the law.

135. *See* S. REP. No. 93-383, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4995 (1974).
136. 29 U.S.C.A. § 1201 (1975).
137. Remarks of Isidore Goodman, Chief of the Pension Trust Branch, IRS, BNA PENSION L. RPTR., A-2 (Nov. 4, 1974).

These initial determination proceedings will provide perhaps the most effective means for representatives of employee interests to secure for their clients the Act's basic protections in the fundamental areas of coverage, participation, and vesting of benefits. Failure of employee groups to exercise their right to oppose unfairly structured plans at the tax qualification stage will greatly diminish the chances of providing meaningful assistance to individual plan participants in subsequent years.

Employee Participation in Proceedings Before the IRS

Under ERISA, employees have both a direct and an indirect method of participating in IRS review of plan qualifications. First, employees may be entitled as "interested parties" to notice and a direct opportunity to comment upon the application of a letter of determination.[138] Under ERISA, an employer is required to accompany his application for a letter of determination with proof that he has notified all "interested party" employees of the application.[139] The term "interested party" is to be defined in proposed Treasury Regulations,[140] which give the term broad meaning. The general rule is that the first time a plan is scrutinized by the IRS to determine its compliance with ERISA, all employees are to be considered interested parties.[141] Thereafter, all employees who are eligible to participate in the plan are considered interested parties. Additional groups are to be included if an amendment affects participation—in which case all employees are to be included—or contributions or benefits—in which case employees with vested rights in the plan are to be included.[142] The exceptions to the general rule are narrow. If the plan does not exclude any employees on the basis of age or length of service and meets the antidiscrimination ratios,[143] then employees who are ineligible to participate need not receive notice of any proceedings.[144] Similarly, employees excluded from participation under a collective bargaining agreement, where pension benefits were rejected in favor of other compensation, need not receive notice.[145]

With the exception of this last exclusion, the notice regulation appears reasonable. Generally, employees who will not get notice are

138. See text & notes 139-53 *infra.*
139. Notice must also be given the PBGC and the Secretary of Labor. 29 U.S.C.A. § 1201(b)(1) (1975).
140. *See* INT. REV. CODE OF 1954, § 7476(b)(1).
141. 40 Fed. Reg. 24012 (1975) (proposed Treas. Reg. § 1.7476-1(b)(1)).
142. 40 Fed. Reg. 24012 (1975) (proposed Treas. Reg. § 1.7476-1(b)(2)).
143. See text & notes 25-36 *supra.*
144. 40 Fed. Reg. 24012 (1975) (proposed Treas. Reg. § 1.7476-1(b)(4)(i)).
145. 40 Fed. Reg. 24012 (1975) (proposed Treas. Reg. § 1.7476-1(b)(4)(ii)(A)).

those whose interests could not be unlawfully affected. However, in the case of the collective bargaining exception, if the employer claims that his plan need not cover parties to a collective bargaining agreement because retirement benefits were omitted after good faith bargaining, the fair way to test the claim would be to give those employees notice of the proceeding and standing to oppose tax qualification.

The statute provides that any interested employee has the right to "comment" upon the application within 45 days after it has been filed with IRS. The Pension Benefit Guaranty Corporation [PBGC], created in the Department of Labor to insure pension benefits,[146] has the same prerogative.[147] The Secretary of Labor, however, may comment only if requested in writing to do so by the PBGC or the lesser of 10 employees or 10 percent of all employees.[148] To the extent that the Secretary accepts an employee request to intervene, the requesting employees may not themselves participate.[149] If, on the other hand, he declines the request, either partially or completely, then the employees may participate directly on those matters which he declines to raise.[150] It will be some time before the manner and extent to which the Secretary of Labor will participate in determination proceedings can be predicted. If he is aggressive in asserting employee interests, the official status of his position will make him a strong ally of the individual employee. Moreover, employees will be spared the cost of preparing material for the proceeding. If his comments are routine or merely formal, however, employees may better forego his assistance and prepare their own case for submission to the IRS.

This tactical problem is complicated by the ambiguity of the term "comment" used in describing the degree of participation to be afforded interested employees. The Senate Finance Committee report stated in this regard: "[I]t is anticipated that the Service will adopt procedures similar to those procedures provided for employers making the request for the determination."[151] This should include an opportunity to submit written comments and documentary evidence, but probably would not extend to oral testimony or cross-examination of witnesses.

The employer's application and supporting documents are open

146. 29 U.S.C.A. § 1302 (1975).
147. *Id.* § 1201(b)(1).
148. *Id.* § 1201(b)(2). This section does not expressly restrict the petitioners to employees who are "interested parties." Such a restriction, however, may be inferred from section 1201(b)(4).
149. *See id.* § 1201(b)(4).
150. *Id.*
151. S. REP. No. 93-383, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4998 (1974)).

to public inspection.[152] Thus, participants in the determination proceeding will have the opportunity to comment directly upon those submissions, and they will be included in the administrative record in the event judicial review is sought. Employees will also be able to seek judicial review under new provisions for review of IRS determinations.[153]

The indirect method of participation in IRS review of plan qualifications is by employee request of an IRS audit of the retirement plan to ensure that antidiscrimination rules[154] are being complied with in a practical sense. Although ERISA does not provide for a specific procedure for initiating an audit, the IRS has enforced prior law on retirement plans by such audits[155] and presumably would act upon receipt of a bonafide complaint.

If a plan is found in violation through such an audit, the IRS is directed to notify the Secretary of Labor of its intent to disqualify the plan.[156] The Secretary in turn has 60 days to seek compliance, either administratively or through court action, unless the collection of a tax delinquency is actually in jeopardy.[157] This opportunity for plan compliance is an improvement over the pre-ERISA procedure. A plan then found in violation had to be disqualified, resulting in termination of the plan.[158] Such a consequence was grossly unfair to most of the participating employees and did not really help the excluded individuals. ERISA however, allows an employee to trigger a mechanism which may lead to correction of discriminatory plan policies without destroying the plan.

Tax Court Declaratory Judgment Procedure

Under prior law, an employer who was denied an affirmative advance determination of plan tax qualification had a serious problem. He could put the plan into effect, have the IRS disallow his deductions for contributions to the plan, and contest the assessment. Alternatively, he could, and usually did, dispense with a retirement plan for his employees. In order to avoid this hard choice, the Act has created a new procedure whereby both administrative and judicial review are available to any party dissatisfied with the initial determination.[159]

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152. INT. REV. CODE OF 1954, § 6104(a)(1)(B).

153. S. REP. No. 93-383, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & ADMIN. NEWS 4998-99 (1974). See text & notes 159-67 *infra*.

154. INT. REV. CODE OF 1954, § 401.

155. *See* Rev. Rul. 61-157, part 4(i), 1961-2 CUM. BULL. 67, 83.

156. *See* 29 U.S.C.A. § 1201(d) (1975).

157. *See id.* § 1202. An extension of the 60 day period may be possible if it is determined that compliance will follow within the extension period. *Id.*

158. *See generally* INT. REV. CODE OF 1954, § 404(a); text & note 159 *infra.*

159. The procedure was first available September 3, 1975. Employee Retirement In-

The tax court declaratory judgment procedure provides for an appeal to the tax court for an employer or administrator whose plan was found unqualified and for any interested employee whose challenge to IRS plan qualification failed.[160] The procedure before the tax court is generally straightforward,[161] except for possible abuse of the 90-day statute of limitations provision, under the following conditions. In order to assure an article III controversy, the Code requires that the plan be in effect before a declaratory judgment action will lie.[162] The action must also be subsequent to a determination by the IRS with respect to the initial or continued tax qualification of the plan, or the failure to issue such a determination within 270 days after a request for the determination is made.[163] The short limitation period of 90 days, however, begins when the IRS has sent notice of a final determination.[164] Thus, employees could be deprived of the declaratory judgment remedy if the employer waits more than 90 days after notice of the IRS decision to put the plan into effect. To prevent this abuse, the limitation period should be deemed tolled until the plan is in effect. Courts frequently toll a statute of limitations under circumstances which prevent the plaintiff, even with diligence, from bringing his action within the applicable period.[165] Alternatively, interested employees can protect themselves by filing a petition. Notwithstanding its prematurity, such an action would likely satisfy the statute of limitations.[166]

It should also be noted that the short limitations period problem is compounded by the Act's express provision that the Secretary of

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come Security Act of 1974, Pub. L. No. 93-406, § 1041, 88 Stat. 949, *amending* 26 U.S.C. § 7441 (1970) (codified at INT. REV. CODE OF 1954, § 7476).

160. The PBGC may also use the procedure. INT. REV. CODE OF 1954, § 7476(b)(1). Note, however, that the procedure is not available to the Secretary of Labor, although he is among those who may be heard on initial plan qualification.

161. *See id.* § 7476. Note also that the party who is dissatisfied with the result in the tax court may appeal to the courts of appeal. *Id.* § 7482(a).

162. *Id.* § 7476(b)(4).

163. *Id.* §§ 7476(a)(1)-(2), (b)(3).

164. *Id.* § 7476(b)(5).

165. *See, e.g.*, Honda v. Clark, 386 U.S. 484, 499-500 (1967); Guaranty Trust Co. v. United States, 304 U.S. 126, 136-37 (1938); Exploration Co. v. United States, 247 U.S. 435, 449 (1918).

166. A statute of limitations will be tolled by the filing of an improper action when "congressional purpose is effectuated by tolling [it] in given circumstances." Burnett v. New York Central R.R., 380 U.S. 424, 426-27 (1965). Whether an action filed prematurely and not reasserted until the limitation period has lapsed is barred turns on whether the plaintiff had a cause of action when the action was filed. *Compare* Radar v. Rogers, 49 Cal. 2d 243, 317 P.2d 17 (1957), *with* Walton v. Kern County, 39 Cal. App. 2d 32, 102 P.2d 531 (Ct. App. 1940). The language of section 7476(b)(4) of the Internal Revenue Code can be read with equal facility as either preventing the tax court from hearing a premature petition, although a cause of action exists, or as requiring the plan to go into effect before a cause of action arises. The former construction should be adopted in order to avoid defeating the congressional intent to permit use of the declaratory judgment procedure by interested party employees. *See id.* § 7476(b)(1).

Treasury may designate an employee representative to receive the required notice of determination.[167] The Act thus does not appear to protect an interested person employee who is not actually made aware of the decision within the 90-day period. The Secretary, in promulgating regulations under the section, should endeavor to ensure that all interested persons receive prompt actual notice of the determination.

One of the major unanswered issues raised by the Act is the effect of an initial determination that a plan is tax qualified upon subsequent proceedings in which it is claimed that the plan, as written, violates the requirements of the Act with regard to those matters reviewed in the first proceeding, notably vesting and participation requirements. The Act provides: "The Secretary of Labor shall accept the determination of the Secretary of the Treasury as *prima facie* evidence of initial compliance by the plan with the standards [relating to participation, vesting, funding, and fiduciary responsibility] of this chapter."[168] This indicates an intention to accord great weight to the initial determination by the IRS. The decision, however, is only prima facie evidence. Upon a showing of material facts not submitted in the initial application, the Secretary of Labor could decline to follow the decision. In any event, the only effect of making an IRS determination prima facie evidence before the Secretary of Labor is to establish it as a hurdle which employees must overcome before they can enlist the Labor Department to bring an action to invoke the Act against a plan which has been found tax-qualified.[169]

Participants acting without the aid of the Department of Labor can still individually pursue judicial remedies to test the legality of a plan, notwithstanding an IRS determination. And, it appears that these judicial remedies are not limited to declaratory relief from the tax court. The Senate Finance Committee report, commenting upon the declaratory judgment provisions, states that "there is no requirement that a party use this new procedure to determine the status of a plan."[170] Presumably, however, parties unsuccessfully attacking a plan in declaratory proceedings could not then attack the plan in some independent action, unless subsequent operation of the plan indicates that it does not in fact qualify under the Act.[171]

It will be several years before a final assessment can be made regarding the efficacy of ERISA's attempt to expand the rights of em-

167. INT. REV. CODE OF 1954, § 7476(b)(5).
168. 29 U.S.C.A. § 1201(d) (1975) (emphasis added).
169. *Id.* § 1132(b).
170. S. REP. NO. 93-383, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 4997 (1974).
171. *Id.*

ployees to participate in proceedings to determine whether plans are being lawfully drawn. The extent to which the procedures provided by the Act are utilized by employees and their representatives could have a major and beneficial impact on the policies of the IRS and the effective application of ERISA.

PROCEDURES FOR OBTAINING BENEFITS UNDER THE TERMS OF THE PLAN

The protections for employees provided by ERISA's control of plan structure would lose their significance without adequate procedures for passing upon and reviewing claims made by participants who do not challenge the lawfulness of the plan as written, but rather assert a right to benefits under the terms of the plan. Prior to the Act, the type of procedure required when benefits were denied pursuant to the terms of a plan was far from clear. At least one court had indicated in dicta that a hearing, including the right to cross-examine witnesses, present evidence, and to obtain a reviewable record and a written decision, was required, at least under plans operated by a trust.[172] Most plans, however, provided merely for informal review by either a plan official or the trustees, with no written record and no statement of reasons for the denial of benefits. In addition, many plans expressly precluded any right to judicial review. This state of affairs has been dramatically changed by the Act, which deals extensively with both claims procedures and judicial review of denied claims.

Claims Procedures

The Act provides[173] that every employee benefit plan must in accordance with regulations of the Secretary of Labor: (1) provide adequate notice, in writing, to any participant whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, and written in a manner calculated to be understood by the participant;[174] and (2) afford a reasonable opportunity for a full and fair review by the appropriate named fiduciary of the decision denying a claim for benefits.

Regulations dealing with the filing of claims and review of claim denials have been proposed by the Secretary of Labor[175] but have not

172. Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1966). See discussion note 190 *infra*.
173. 29 U.S.C.A. § 1154 (1975).
174. Considerations which were pertinent to meeting the understandability requirement in the writing of plan summaries, see text & notes 93-94 *supra*, are equally important with respect to claim denials.
175. 39 Fed. Reg. 42242-43 (1974) (proposed 29 C.F.R. §§ 2560.1-.8). These regu-

yet been adopted. The proposed regulations provide that a claim is properly filed when either reasonable procedures established by the plan are followed or, if none have been established, when an oral or written communication is made which is "reasonably calculated to bring the claim to the attention of" the appropriate persons.[176] If a claim is denied, notice[177] of denial must be furnished to the claimant within a reasonable time.[178] If a claim has not been decided and notice sent within a reasonable period after filing, it will be deemed denied.[179]

The proposed rules further require every plan to establish an internal review procedure to deal with an appeal from a denial of a claim.[180] Review must be by an appropriate named fiduciary[181] upon written application to the employer by a claimant or his representative.[182] The claimant may review pertinent documents[183] and submit issues and comments in writing.[184] Time limits, within which review may be requested, may be established,[185] but such time limits must be both reasonable and related to the nature of the benefit which is the subject of the claim.[186] In any case, a claimant must be given at least 60 days following notice of denial within which to request review.[187] The review decision must be made not later than 60 days after receipt of the request for review,[188] must be in writing, and must adhere to the requirements of a notice of denial of claim.[189]

The review procedures outlined above do not require a hearing. In order to ensure the fullest and fairest review, however, hearings should be held to review all denied claims. The hearing should include at least the fundamentals of due process.[190] The court of appeals

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lations would apply to those plans covered by 29 U.S.C.A. § 1101 (1975) and not exempted by section 1003(b).

176. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.3).

177. Notice must include the specific reasons for the denial, reference to the pertinent plan provisions upon which the denial is based, a description of all additional material and information necessary to perfect the claim with, and an explanation of the plan's review procedure. Further, the notice must be written in language calculated to be understood by the claimant. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.6); see text & notes 93-94 *supra*.

178. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2650.5(a)).

179. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.5(b)).

180. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(a)).

181. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(a)).

182. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(a)(1)).

183. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(a)(2)).

184. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(a)(3)).

185. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(b)).

186. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(b)).

187. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.7(b)).

188. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.8(a)).

189. This regulation further permits a decision to be rendered as long as 120 days after receipt of a request for review, providing special circumstances, such as holding a hearing, would so require. 39 Fed. Reg. 42243 (1974) (proposed 29 C.F.R. § 2560.8).

190. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). The issue of the right of a participant in a Taft-Hartley pension plan, 29 U.S.C. § 186(c)(5) (1970), to a full due proc-

in *Sturgill v. Lewis*[191] found this necessary because the trustees of a Taft-Hartley pension plan "perform their function as such pursuant to an Act of Congress in an area of social concern and importance."[192] Although intimating a constitutional underpinning, the *Sturgill* court apparently based its ruling on the concept that denial of a pension without a hearing would be an arbitrary and capricious action, impermissible under the Taft-Hartley Act in light of that Act's purpose to carefully guard pensioner's interests.[193] Since Congress has, by enacting ERISA, expressed its greatest concern to date in the area of private pensions and since ERISA requires more involvement and control of private pensions by federal agencies than ever before, the rationale of *Sturgill* would seem to require hearings upon review of claim denials.

Judicial Review

As a practical matter, the point at which the courts will intervene in a decision by the trustees of a pension plan that a particular applicant is ineligible for benefits defines the boundaries of ERISA's protection for an employee's right to receive benefits. ERISA has great impact on the jurisdiction of the federal courts to decide whether benefits have been wrongfully denied. It has very little impact, however, on the standards which the courts will apply when reviewing such a decision. The constraining effect of ERISA's substantive provisions is somewhat diluted by the broad discretionary authority which a trustee must abuse before his decision will be reversed.

Before any review may occur, however, the courts must have jurisdiction. Under pre-ERISA law, federal jurisdiction in actions for pen-

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ess hearing was the subject in the case of Lugo v. Employees' Retirement Fund, 388 F. Supp. 997 (E.D.N.Y. 1975). After the trial, the court dismissed the complaint, stating that since the plan required the trustees to act in good faith, there was no structural defect which would confer jurisdiction under the Taft-Hartley Act, even though no hearing was required. *But see* Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1967) (dictum):

> [T]he proceedings before the Trustees should conform to at least elemental requirements of fairness, which requirements in these circumstances normally include, in addition to notice, a hearing at which the applicant is confronted by the evidence against him, an opportunity to present evidence in his own behalf, articulated findings and conclusions having a substantial basis in the evidence taken as a whole, and a reviewable record.

191. 372 F.2d 400 (D.C. Cir. 1967).

192. *Id.* at 401.

193. More precisely, the *Sturgill* court threatened to reconsider its ruling in Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962), in which the court held that standards of judicial review generally applicable to administrative proceedings also apply to eligibility determinations by the trustees of a pension fund, at least where the underlying instrument commits these determinations to the trustees' discretion. *Sturgill* suggested that if these determinations are fundamentally unfair for want of a hearing, they would be arbitrary and capricious, and in order to avoid a futile remand, a trial de novo would be necessary. 372 F.2d at 401; *see* Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 102-03 (E.D.N.Y. 1973).

sion benefits had to be predicated on either diversity jurisdiction[194] or on the Taft-Hartley Act,[195] which established jurisdiction for pension plans connected with collective bargaining agreements. The scope of review in actions depending on the latter source of jurisdiction may be exceedingly narrow, according to whether the pension plan is part of the collective bargaining agreement or merely established pursuant to a collective bargaining agreement. If the pension plan is part of the agreement, a court may range rather freely in applying the federal common law to interpret the labor contract.[196] If the pension program is established separately from the collective bargaining agreement, claimants may find relief in the federal courts only if the trust has a so-called "structural defect."[197] The courts reason that only structural defects violating the provision of the Taft-Hartley Act—which requires pension plans established under collective bargaining agreements to be "for the sole and exclusive benefit of the employees"[198]—are cognizable by the courts under this jurisdictional basis. Thus, in one case, where the claimant alleged that the plan permitted denial of benefits without a hearing, the court held that it had jurisdiction to hear the case,[199] but upon finding that the terms of the plan required the trustees to act in good faith, dismissed the action on the ground that the failure to grant a hearing was, if anything, a defect in administration rather than structure.[200]

Under ERISA, federal jurisdiction is no longer so limited. Indeed, federal courts have concurrent jurisdiction with state courts to hear actions to recover benefits[201] without regard to the amount in controversy or the citizenship of the parties.[202] However, for workers who are now at or nearing retirement age and thus probably not covered by ERISA, the Taft-Hartley provisions will remain of crucial impor-

194. 28 U.S.C. § 1332(a) (1970). *See, e.g.*, Tolbert v. Union Carbide Corp., 495 F.2d 719, 720 (4th Cir. 1974); Connell v. United States Steel Corp., 371 F. Supp. 991, 993 (N.D. Ala. 1974); Dersch v. UMW Welfare & Retirement Fund, 309 F. Supp. 395, 396 (S.D. Ind. 1969).

195. 29 U.S.C. §§ 185(a), 186(e) (1970). *See, e.g.*, Tolbert v. Union Carbide Corp., 495 F.2d 719, 720 (4th Cir. 1974); Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 101-03 (E.D.N.Y. 1973); Insley v. Joyce, 330 F. Supp. 1228, 1231 (N.D. Ill. 1971).

196. Tolbert v. Union Carbide Corp., 495 F.2d 719, 720-21 (4th Cir. 1974); *see* 29 U.S.C. § 185(a) (1970). *See generally* Lewis v. Benedict Coal Corp., 361 U.S. 459, 470 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

197. *E.g.*, Cuff v. Gleason, 382 F. Supp. 1144, 1145-46 (E.D.N.Y. 1974), *vacated on other grounds*, 515 F.2d 127 (2d Cir. 1975); Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 101 (E.D.N.Y. 1973); Insley v. Joyce, 330 F. Supp. 1228, 1231 (N.D. Ill. 1971); *see* 29 U.S.C. § 186(e) (1970).

198. 29 U.S.C. § 186(c)(5) (1970).

199. Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 103 (E.D.N.Y. 1973).

200. Lugo v. Employees Retirement Fund, 388 F. Supp. 997, 1002 (E.D.N.Y. 1975). See discussion at note 190 *supra*.

201. 29 U.S.C.A. § 1132(e)(1) (1975).

202. *Id.* § 1132(f).

tance both as a source of federal jurisdiction and as a source of substantive law. Although ERISA has some limited retroactive effect, for the most part its focus is prospective. Moreover, jurisdiction under ERISA is granted only for actions arising under the Act or under the terms of the plan.[203] Thus, Taft-Hartley will continue to control until the provisions of ERISA and its grant of federal jurisdiction free the courts from the distinction between structural defects and mere errors in administration.

Despite expanded jurisdiction under ERISA, judicial review will continue to be limited in scope. Several distinct issues may be involved in an eligibility determination, and the scope of review varies according to the particular issue. Prior to ERISA, the different standards were summarized in *Kennet v. UMW Union*:[204]

> [T]he Court will review the legal rights of the plaintiff and determine whether any erroneous decision has been reached by the trustees on questions of law. It will also review, to a limited extent, decisions of the trustees on questions of fact; certainly whether there is any substantial evidence sustaining the decision on questions of fact. The Court would not go as far as to review the question whether their decision is contrary to the weight of evidence, but it will determine whether there is substantial evidence in the record as a whole sustaining their finding. Finally . . . the Court will review the question whether the action of the trustees is in any way arbitrary or capricious.[205]

These limited rules were derived from the common law of trusts.[206]

Under the pre-ERISA case law, where the plan itself specifies eligibility standards, the meaning of those standards will be determined by the court.[207] On the other hand, the plan may leave the fixing of eligibility standards to the discretion of the trustees.[208] If so, the court will determine the scope of the trustees' discretion, and review will be limited to whether they acted within their authority in fixing eligibility requirements. But even where the trustees have complete discretion,

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203. *Id.* §§ 1132(a), (e)(1).
204. 183 F. Supp. 315 (D.D.C. 1960).
205. *Id.* at 318.
206. *See* Danti v. Lewis, 312 F.2d 345, 352 & n.7 (D.C. Cir. 1962) (Bazelon, C.J., dissenting).
207. *See* Tolbert v. Union Carbide Corp., 495 F.2d 719, 722 (4th Cir. 1974); Starr v. Brotherhood's Relief & Compensation Fund, 268 Ore. 66, 72-76, 518 P.2d 1321, 1325-26 (1974).
208. The extent of the trustees' discretion is by implication limited. Eligibility requirements, even those determined by trustees, must be submitted to the IRS and the Secretary of Labor for approval. *See* INT. REV. CODE OF 1954, §§ 401-407; 29 U.S.C.A. §§ 1001, 1021, 1201-1204 (1975); 29 U.S.C. §§ 301-309 (repealed 1975).

they may not act arbitrarily or capriciously.[209] Similarly, eligibility requirements may not be interpreted arbitrarily or capriciously by trustees.[210] Once the applicable eligibility requirements are determined, the question whether the claimant has satisfied them is primarily a factual one. As noted, the standard of review of factual determinations is whether there was substantial evidence before the trustees to support their findings of fact.[211] Unfortunately, ERISA does not appear to modify these standards of judicial review. Yet, the existing arbitrary or capricious test is inadequate to protect the rights of pension plan participants. For example, one court case ruled that it was not arbitrary and capricious to refuse to credit a foreman's service on the ground that he was a supervisory employee, even though he did some production work. This ruling was especially pernicious because the applicable regulation defined supervisory personnel as those who did no production work.[212]

ERISA does, however, limit the areas in which discretion may be exercised. First, some types of conditions on eligibility will be unlawful under ERISA. For example, benefits must now vest regardless of how long before retirement the necessary service credits were accumulated.[213] Thus, the one-time rule of the UMW Welfare and Retirement Fund, requiring 20 years of service to be rendered within 30 years of the application for benefits, would be unlawful. Second, amendments to a plan may generally not reduce the vested portion of an employee's pension rights.[214] Finally, participants with at least 5 years of service must be given the opportunity to elect to remain under the old vesting schedule if it is changed.[215]

Thus, fiduciaries will still be able to disregard the weight of the evidence to find that the applicant did not meet lawful requirements, so long as substantial evidence supports their finding. ERISA does, however, improve the denied applicant's ability to protect his pension if he can meet the burdens imposed by the standards of review. Under the reporting and disclosure rule, he can obtain an early determination of his rights, enabling him to seek review under the plan and then liti-

209. *E.g.*, Assolone v. Carey, 473 F.2d 199, 205 (D.C. Cir. 1972); Roark v. Boyle, 439 F.2d 497, 499 (D.C. Cir. 1970); Collins v. UMW Welfare & Retirement Fund, 298 F. Supp. 964, 968 (D.D.C. 1969), *aff'd*, 439 F.2d 494 (D.C. Cir. 1970).

210. *E.g.*, Gomez v. Lewis, 414 F.2d 1312, 1314 n.4 (3d Cir. 1969); Danti v. Lewis, 312 F.2d 345, 349-50 n.5 (D.C. Cir. 1962); Haynes v. Lewis, 298 F. Supp. 331, 333-34 (D.D.C. 1969).

211. *E.g.*, Sturgill v. Lewis, 372 F.2d 400, 401 (D.C. Cir. 1966); Haynes v. Lewis, 298 F. Supp. 331, 335 (D.D.C. 1969); Burk v. Lewis, 282 F. Supp. 620, 621 (D.D.C. 1968).

212. Miracle v. UMW Welfare & Retirement Fund, 373 F. Supp. 603, 604 (D.D.C. 1974).

213. 29 U.S.C.A. § 1053 (1975).

214. *Id.* § 1053(c)(1)A).

215. *Id.* § 1053(c)(1)(B).

gate, if necessary, while the evidence and witnesses are still available.[216] Moreover, an unlawful denial will no longer devalue an applicant's pension by forcing him to bear the expense of litigation to enforce his rights. In an action to recover benefits, courts are empowered to award attorney's fees and costs to either party.[217] The fact that either party may recover such fees, however, should make participants wary of frivolous litigation. If participants wish to retain the threat of attorney's fees and costs to encourage plans to comply with the Act, suits should not be brought merely because jurisdiction exists. Courts will not take kindly to such litigation and may thus become loathe to grant attorneys' fees and costs to plaintiff-participants, regardless of the circumstances.

FIDUCIARY DUTIES AND REMEDIES

ERISA's new, stricter standards of conduct for those who exercise discretion in the operation of a pension plan have stimulated more discussion and perhaps apprehension in the professional pension plan management community than any other single aspect of the Act. Although trustee conduct is regulated under both the labor title and the tax title, the remedies available to participants are based on the labor title. Accordingly, the emphasis in this section of the Article will be on these provisions. Under the labor title, coverage is as broad as the Act's coverage of plans.[218] "Fiduciary" is defined very broadly and includes virtually all persons connected with the management or administration of the plan and its assets, including the trustees, officers, and directors of the company or the trust, members of the plan's investment committee, or anyone who selects these individuals.[219]

Establishment of the Plan and Trust

The Act requires that every plan must: be established in writing, provide a named fiduciary with authority to manage the operation and administration of the plan, establish a funding policy which is consistent with the objectives of the plan and the requirements of the labor title of the Act, describe procedures for allocation of responsibility, set forth the procedure for amending the plan, and specify how payment from the plan is to be made.[220] All funds must be held in trust[221] for the

216. *Id.* §§ 1025(a), 1132.
217. *Id.* § 1132(g).
218. There are some technical exceptions set forth in *id.* § 1101.
219. *Id.* § 1002(21)(A).
220. *Id.* §§ 1102(a), (b). If this requirement is met by a section of a collective bargaining agreement, a description must be included in the plan description. *Id.* § 1022(b).
221. An exception is made for certain insurance contract plans and custodial accounts. *Id.* § 1103(b).

exclusive benefit of plan participants and their beneficiaries and may not inure to the benefit of the employer.[222] These requirements apply regardless of whether the plan seeks qualified tax status.

Basic Fiduciary Duties

The fiduciary obligations imposed by the Act are potentially one of the strongest sections of ERISA.[223] The development of a federal common law of trusts based upon the Act and derived partly from existing state common law, but extending into new areas, has been foreseen.[224] The basic fiduciary duties are subdivided into two categories.

First, fiduciaries are to act solely in the interests of the participants and with the degree of care that a prudent man acting in a like capacity and familiar with such matters would use in a like enterprise.[225] Accordingly, the view has been expressed that Taft-Hartley trustees should be relieved of collective bargaining responsibilities in order to ensure their ability to act solely in the interests of participants.[226] Further, the standard of care means that plan administrators may no longer act merely in good faith; they must maintain a certain minimum standard of knowledge in the area of investment policy. This has raised much discussion regarding the appointment and monitoring of investment managers. The emerging consensus appears to be that trustees must fulfill the responsibility of setting basic long term investment policy and must take steps to ensure that the investment manager follows that plan and not his own high-risk goal of maximizing return in a fluid market situation.[227]

Second, the Act imposes a new standard regarding diversification. Pension fund investments have often been heavily concentrated in the employer's own securities, occasionally for illegitimate purposes.[228] The new law requires diversification of investments in all cases unless

222. An exception is made for certain contributions to a plan which is later found unqualified under other circumstances. *Id.* § 1103(c). The trust agreement or other instrument must be listed on the plan description. *See* 1 CCH PENSION PLAN GUIDE ¶ 5550 (1975) (proposed form EBS-1, p. 10, item 14).

223. The Department of Labor has indicated that the promulgation of regulations in this area will have early priority. Statement of William J. Kilberg, Solicitor of the Department of Labor in BNA PENSION L. RPTR., A-7 (Sept. 16, 1974).

224. Statement of James E. McKinney, BNA PENSION L. RPTR., A-14 (Sept. 23, 1974).

225. 29 U.S.C.A. § 1104(a)(1)(B) (1975).

226. Statement of Senator Eugene Allen, Chairman of the Board, Oregon Hospitality Pension Trust, in BNA PENSION L. RPTR., A-12 (Oct. 21, 1974).

227. For a discussion of the possible standards for evaluating investment policy, particularly with regard to reasonable level of risk in portfolio management, see Note, *Fiduciary Standards and the Prudent Man Rule Under the Employment Retirement Income Security Act of 1974*, 88 HARV. L. REV. 960 (1975).

228. For a history of the maneuverings of the Teamsters Union's giant pension funds, see W. SHERIDAN, THE FALL AND RISE OF JIMMY HOFFA (1972).

under the circumstances it is clearly prudent not to do so.[229]

Prohibited Transactions

In addition to the general fiduciary rules, parallel provisions in the labor and tax titles[230] specifiy classes of prohibited transactions. These provisions are designed to eliminate self-dealing and insider abuses by persons involved in the administration of the plan and its assets. Generally, no "interested person"[231] may engage in a transaction with the plan which involves his property, his services, or a loan. Nor may a fiduciary cause the plan to deal with him or with any person whose interests conflict with those of the plan. Finally, the plan may not invest more than 10 percent of its total assets in the employer's securities.[232] The Secretaries of Labor and Treasury may grant discretionary exemptions from these rules within specified statutory limits and after adequate notice.[233] Certain classes of exemptions have already been approved in order to give adequate time for existing plans to comply with the Act.[234] Other exemptions have been proposed on broader policy grounds, including, for example, permission for pension funds in the construction industry to lend substantially more than the normally permissible percentage of their assets to construction industry employers.[235] These broad exemptions hold a grave threat of abuse if not carefully supervised by the responsible government agencies.

Violations of the provisions outlined above are subject to redress through civil action in the federal courts.[236] The Act authorizes suits by the Secretary of Labor or by a plan participant, beneficiary, or fiduciary.[237] The remedies available in such an action include personal liability of the fiduciary to make good any losses and the return of any personal profits resulting from the violation.[238] Further, the judgment

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229. 29 U.S.C.A. § 1104(a)(1)(C) (1975).
230. The labor provisions are *id.* §§ 1106-1108. The tax provision is INT. REV. CODE OF 1954, § 4975.
231. "Interested person" is defined very broadly in 29 U.S.C.A. § 1002(14) (1975) to include virtually any person who occupies a position of trust vis-á-vis the plan, provides services to the plan, or is affiliated with the plan's employer or employee groups. Under the tax title, the definition of "disqualified person," set forth in INT. REV. CODE OF 1954, § 4975(e)(2), is virtually identical to that of "interested person." Cases decided under the current provisions of the Code concerning nonprofit organizations, *id.* §§ 501-503, will undoubtedly be applied by analogy to cases arising under ERISA.
232. *See* 29 U.S.C.A. § 1107(a)(2) (1975).
233. *Id.* § 1108; INT. REV. CODE OF 1954, § 4975(c)(2).
234. *See* BNA PENSION L. RPTR., A-1 (Feb. 10, 1975).
235. 40 Fed. Reg. 23772, 23800 (1975). The stated purpose of the proposed regulations is to permit continuation of long standing custom in that particular industry found to be essential to the continued financial stability of many employers.
236. The jurisdiction of the federal courts is exclusive, 29 U.S.C.A. § 1132(e) (1975), except for actions arising under *id.* § 1132(a)(1)(B).
237. *Id.* § 1132(a)(2).
238. *Id.* § 1109. Several remedies exist for breach of the prohibited transactions rules. The Treasury Department is authorized to levy an excise tax of 5 percent upon

may include "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."[239] Finally, the Act specifically authorizes the award of costs and attorney's fees.[240] In short, the framers of the Act are clearly hopeful that private individuals will assume at least partial responsibility for enforcement of the foregoing provisions by bringing violations to the attention of the Secretary of Labor or, in the appropriate cases, by direct litigation. Indeed, since budgetary constraints and other priorities will undoubtedly restrict Department of Labor activity in this area, the courts should be receptive to prayers for class relief and for attorney's fees if enforcement of these provisions by private action is to become a reality.

Conclusion

ERISA represents a potential revolution in the establishment and operation of retirement plans in this country. A major aspect of this legislation is the effort to increase the role of individual employees in all aspects of plan initiation and operation by conferring upon them the right to receive substantial knowledge about the plan's structure and operation, the right to guaranteed benefits after reasonable periods of service, and the right to seek redress from administrative tribunals and from the courts. The success of this effort depends upon the early awareness of these rights by employees and upon their initiative in enforcing them. It is hoped that this Article will provide some initial impetus toward the achievement of these goals.

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the amount involved in such transactions, increased to 100 percent upon failure to correct the violation. INT. REV. CODE OF 1954, §§ 4975(a)-(b). This tax, however, does not apply to all classes of prohibited transactions. *Compare* 29 U.S.C.A. § 1106 (1975), *with* INT. REV. CODE OF 1954, § 4975(c)(1). Further, the imposition of the tax may be waived in "appropriate cases." 29 U.S.C.A. § 1203(a) (1975). In most cases, the Secretary of Treasury is required to notify the Secretary of Labor before imposing the excise tax and to accord him the opportunity to comment. *Id.* Since the Secretary of Labor has jurisdiction to redress violations of the prohibited transaction rules by means of the same civil action remedy applicable for breach of other fiduciary duties, it appears that the intent of Congress was to permit efforts by the Secretary of Labor to redress the wrong without resort to levying a tax upon the transaction except in extreme circumstances. *See* H.R. CONF. REP. No. 93-1280, 93d Cong., 2d Sess. (1974), in U.S. CODE CONG. & AD. NEWS 5138-39 (1974).

239. 29 U.S.C.A. § 1109(a) (1975).

240. *Id.* § 1132(g).