CHAPTER 1

INTRODUCTION TO EMPLOYEE BENEFITS LAW

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A. EMPLOYEE BENEFITS LAW IN YOUR FUTURE PRACTICE

Health care and retirement issues frequently are in the news. Consider the following examples:

> Will The Supreme Court's Contraceptive Decision Affect Coverage Of Other Drugs?, FORBES, June 30, 2014.
>
> AOL CAVES: Tim Armstrong Restores 401(k) Plans for Employees, BUSINESS INSIDER, Feb. 8, 2014.
>
> Boeing to End Traditional Pension Plans for Nonunion Workers, ST. LOUIS BUSINESS JOURNAL, Mar. 6, 2014.
>
> Local Companies Promote Wellness to Lower Insurance Costs, DAYTON DAILY NEWS, June 28, 2014.
>
> Millennials (With Jobs) Are Super Saving Their Way to Retirement, TIME.COM, July 14, 2014.

For most workers, retirement and health care security is achieved through an employer-sponsored benefit plan. Whatever the nature of your future legal practice, you are likely to encounter employer-sponsored benefit plans and the body of federal law that regulates them. In a 1997 speech at the dedication of the Harrison Law Grounds at the University of Virginia Law School, former United States Supreme Court Chief Justice William H. Rehnquist described the importance of studying employee benefits law:

> If one examines the current offerings of the University of Virginia Law School, one learns that this year there are some 160 courses offered, and some 90 seminars. This is an intellectual feast that stands in sharp contrast, certainly, to the offerings of my law school when I attended long ago. When one looks further, one sees that there are at least three courses offered just on the First Amendment to the United States Constitution. By contrast, there seems to be no course offering devoted to federal regulation of employer-employee benefit and retirement plans—an area of the law which is much less

> glamorous, receives much less media attention, but the ramifications of which have a far greater effect on the daily lives of people than do the nuances of First Amendment law. Surely practitioners are much more likely to have clients with pension and benefit plan problems than with separation of church and state problems.

Chief Justice William H. Rehnquist, Address at the Dedication of the David A. Harrison II Law Grounds, University of Virginia (Nov. 8, 1997).

Of course, at the time Chief Justice Rehnquist could not foresee that the First Amendment (specifically, the Free Exercise Clause) would become the basis for employers to challenge federally-mandated health care plan benefits! E.g., Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (denying request for preliminary injunction). Nevertheless, the broader point of his remarks continues to ring true, namely that employee benefits law is of practical importance in the everyday practice of law. (By the way, today the University of Virginia Law School does offer an employee benefits law course.)

This casebook has been written with two goals in mind. First, the casebook introduces the types of employee benefits law issues that are likely to arise in legal practice, whether that practice lies in the areas of litigation, corporate law, tax law, labor and employment law, family law, or estate planning. Second, the casebook introduces the major public policy issues that permeate this area of federal law and encourages you to think about and debate these issues with your classmates.

The casebook is organized into seven chapters. The remainder of Chapter One summarizes the history of the federal regulation of employee benefit plans and describes several of the major public policy issues that underlie this body of federal law. Chapter Two describes the types of plans subject to ERISA and the federal law requirements for plan operation and administration. Chapter Three focuses on the Code requirements that govern employer-sponsored retirement plans. Welfare benefit plans, including health care plans, are discussed in Chapter Four. Fiduciary responsibilities, the types of ERISA claims that may be brought by private litigants, and ERISA remedies are covered in Chapters Five and Six. The topic of ERISA preemption of state law is explored in Chapter Seven.

B. HISTORICAL BACKGROUND

1. HISTORY OF THE REGULATION OF EMPLOYEE BENEFIT PLANS[a]

Pre-ERISA

Over the course of the 20th century, the regulation of employee benefit plans has progressed from a few measured steps in the early 1920s to an accelerating march of increasingly complex and comprehensive regulation. Before 1921 there were few, if any, federal or state laws with respect to employee benefits generally. Employers that sponsored such plans for their employees generally did so without an incentive or a compulsion from federal or state law.

In 1921, Congress for the first time encouraged companies to establish retirement programs for their employees by providing a tax deduction for employers who contributed to employee pension plans. The Revenue Acts of 1926 and 1928 brought further encouragement, providing for tax-exempt trusts and the shielding of employees from income taxation because of contributions by employers on their behalf. The 1926 Act allowed contributions to be made to a trust that would accumulate income free of tax until distributed in the form of benefits to covered employees. The 1928 Act permitted additional deductible contributions in amounts actuarially determined to provide benefits based on service prior to adoption and to amortized benefit increases.

Some companies took advantage of these tax incentives by providing contributions disproportionately for executives and other highly compensated employees. In the Revenue Acts of 1938 and 1942, Congress conditioned the tax incentives by requiring that, in order to be tax-qualified, pension, profit-sharing, or stock bonus plans may not discriminate in favor of the highly compensated in their benefits or eligibility. These basic principles are still contained in the Internal Revenue Code today.

In the midst of the Depression, Congress in 1935 passed the Social Security Act. The old age and survivor benefits initially provided under that law were relatively modest compared to the breadth and size of today's Social Security benefits. The Social Security Act, however, evidenced Congress' growing awareness of the need for programs that would contribute to the retirement income security of the population.

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Also in 1935, the National Labor Relations Act (NLRA) was enacted. The NLRA provided a basic framework for the regulation of relations between organized labor and management and provided a framework of collective bargaining that would be held to encompass pension and welfare plans as "terms and conditions of employment." During World War II, labor relations were heavily regulated by the War Labor Board, which was vested with extensive authority to maintain peace in the labor force so that the war effort would continue unabated. The War Labor Board, like the National Labor Relations Board, helped to foster a collective bargaining environment that could give rise to employee benefit plans. In addition, under its authority to impose terms in labor disputes, the War Labor Board mandated the establishment of new retirement plans.

As company-sponsored pension plans were becoming more commonplace in the decades of the 1930s and 1940s, many workers were still without coverage, especially in industries characterized by a mobility of workers between relatively small employers. Because of their size, the conditions and traditions of their industries, and the transience of their work forces, these companies were slower to establish employee benefit plans. Many of these companies were in businesses known as "trades" (e.g., construction, needlework and garment manufacturing, dairies, confectionery, and retailing). In many areas, their employees were organized by unions, which, beginning after World War II and accelerating in the 1950s, moved to fill the pension and health and welfare coverage void. The same lack of employer-sponsored plans in the coal mining industry had earlier led to formulation of a pension and health and welfare plan by the United Mine Workers (UMW), which succeeded in obtaining collective bargaining agreements with mining employers under which contributions were made to the UMW plans on a cents-per-ton-of-coal-mined basis.

In 1947, two major developments significantly affected employee benefits. The first was the Seventh Circuit decision in *Inland Steel v. NLRB,* 170 F.2d 247 (7th Cir. 1948), holding that pension benefits were a mandatory subject of collective bargaining. The second major development was enactment of the Labor Management Relations Act of 1947 (LMRA or Taft-Hartley Act). Responding to concerns that the United Mine Workers plan might be used as a "war chest" to finance strike activity and, more generally, that a lack of regulation over union-sponsored plans allowed too many opportunities for abuse, Congress imposed a series of requirements on union-sponsored plans financed with employer contributions.

Accordingly, Section 302 of the Taft-Hartley Act made it a criminal violation for an employer to provide anything of value to a representative of employees. Among the exceptions to this rule was one for employer

contributions to employee benefit plans that met the conditions specified in Section 302(c)(5). Chief among these was the requirement that the plan be administered by a joint board of trustees with equal representation of management and labor. Thus began the jointly administered Taft-Hartley plan. The LMRA also required that there be provision for the breaking of deadlocks through the appointment of either an impartial trustee or other decision maker, and that contributions be made pursuant to a written instrument and used for the exclusive benefit of plan participants and beneficiaries. An extensive case law was developed under Section 302(c)(5) that, among other things, established certain principles of fiduciary responsibility for the administration of these plans and the investment of their assets.

In the post-World War II economic expansion, employer sponsorship of retirement and welfare plans grew rapidly. In response to certain inadequacies in protection of plan participants and beneficiaries, the Welfare and Pension Plans Disclosure Act (WPPDA) was enacted in 1958. It required limited reporting to the U.S. Department of Labor (DOL) by private sector plans and disclosure of certain information to their participants, and specified certain behavior relating to employee benefit plans as criminal felonies, subject to fine and imprisonment. In 1962, the WPPDA was amended to require bonding of all persons who handled plan assets and to provide limited investigatory and enforcement powers for the DOL.

While the federal government was expanding its involvement with retirement and welfare plans, the states were also playing a role. Various states enacted laws dealing with disclosure, collection of delinquent contributions, and the assertion of claims by plan participants. State insurance commissioners took an increasingly active role in the regulation of plans. Plan sponsors—companies and unions alike—in particular were increasingly concerned about having to deal with different and sometimes inconsistent state laws. For example, in *State v. Monsanto Co.,* 517 S.W.2d 129 (Mo. Sup. Ct. 1974), the Missouri State Insurance Commissioner successfully asserted that a self-insured plan constituted insurance and was subject to his jurisdiction. The impact of this decision was a key motivation for Congress to include strong preemption rules in ERISA, largely precluding states from regulating benefit plans.

Enactment of ERISA

By the 1960s, a consensus began to form that existing federal and state regulation of employee benefit plans did not sufficiently protect the interests of participants and beneficiaries. Through the years, examples were reported in the media of employees putting in long years of service and not receiving pension benefits because of lengthy vesting requirements and harsh break in service rules. One occurrence that

shaped public opinion was the demise of the Studebaker Company. Employees of Studebaker lost not only their jobs, but also the vast bulk of their pensions, even though Studebaker had complied with all then-existing laws and tax-qualification rules. Another source of widespread negative publicity was certain pension funds, especially the Central States, Southeast and Southwest Areas Pension Fund (Central States Teamsters Plan), in which there were repeated allegations of organized crime influence leading to questionable investment activity.

The effort to enact comprehensive employee benefit regulation started in earnest in 1963, when a study was initiated by President Kennedy. Its report, issued in 1965, recommended most of the reforms that were enacted nine years later as part of ERISA. In 1967, Senator Jacob Javits (R-N.Y.) introduced a relatively modest bill that would have imposed certain standards relating to eligibility, vesting, and funding. Hearings on this and later bills laid the foundation for the subsequent comprehensive pension legislation. By 1971, Senator Harrison Williams (D-N.J.), Chairman of the Senate Labor and Human Resources (then Labor and Public Welfare) Committee, and Congressman John Dent (D-Pa.), Chairman of the House Education and Labor Committee's Subcommittee on Employment Standards, had become sufficiently interested in the subject of pension reform to spearhead major efforts to enact a bill.

In 1973, comprehensive legislation was introduced in both the Senate and the House by Senators Williams and Javits and Congressman Dent. The legislation formed the basis for what was to become ERISA. The House Labor Committee acted first on the legislation and was followed by the Senate Labor Committee. Although initially reluctant, the Senate Finance Committee and the House Ways and Means Committee actively participated in the development of the legislative proposals. By the spring of 1974, both the Senate and the House had passed bills, and after a lengthy period of conference, a bill acceptable to both houses was passed, and was signed on Labor Day of 1974 by President Ford.

2. LEGISLATIVE HISTORY OF ERISA

House of Representatives Report No. 93–533 (1973)

The Committee on Education and Labor, to whom was referred the bill (H.R. 2) to revise the Welfare and Pension Plans Disclosure Act, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

Synopsis

The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement

income security. The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases has been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant. In broad outline, the bill is designed to:

(1) establish equitable standards of plan administration;

(2) mandate minimum standards of plan design with respect to the vesting of plan benefits;

(3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;

(4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and

(5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Provision is made for the imposition of criminal penalties on those willfully violating their duties under the Act. The Labor Department is given primary authority to administer the provisions of the Act, but the Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries.

Background

The private pension system is a relatively modern economic institution tracing its role as an important social and economic factor only from the mid 1940's. A variety of converging financial and social trends in our society has created a favorable environment for the growth and expansion of private deferred compensation schemes and retirement programs in general. As our economy has matured, an ever increasing number of employers have recognized their responsibility for the physical and economic welfare of their employees, even for the years beyond retirement. Its development parallels and is a response to the transition of the American life style from its rural agrarian antecedents into its present urbanized, wage earner society. The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.

The growth of the private pension movement in the United States proceeded slowly until the years preceding World War II. As the full implications of the economic changes sweeping the nation were felt, American beliefs and attitudes regarding retirement security changed. The passage of the Railroad Retirement Act and the Social Security Act marked the turning point in American thinking, and dissatisfaction with those early governmental programs contributed to an accelerated interest in private retirement plans. The wage freezes imposed during World War II and the Korean conflict focused increased attention on the deferred component of compensation as a means of avoiding the freeze restrictions.

In 1947 a series of administrative proceedings and court decisions under the National Labor Relations Act of 1935 held that pensions were a form of remuneration for the purposes of that Act, and they accordingly became mandatory subjects of collective bargaining. Inland Steel Company v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). In the same time period a Presidential fact finding commission in presenting its report on the steel industry labor dispute in 1949 stated that:

> We think all industry, in the absence of adequate Government programs, owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement—in the same way as it now does for plant and machinery.

In 1940, an estimated four million employees were covered by private pension plans; in 1950, the figure had increased to almost 10 million, and in 1960, over 21 million were covered. Currently, over 30 million employees or almost one half of the private non-farm work force are covered by these plans. This phenomenal expansion of coverage has been matched by an even more startling accumulation of assets to back the benefit structure. Today, in excess of $150 billion in assets are held in reserve to pay benefits credited to private plan participants.

This rapid growth has constituted the basis for legislative efforts at both the federal and state levels to assure equitable and fair administration of all pension plans.

Various aspects of pension plans have been affected to some degree by most of the major labor legislation of the twentieth century, including the National Labor Relations Act (1935), the Labor Management Relations Act (1947), and the Labor Management Reporting and Disclosure Act (1959). However, not until 1958, with the enactment of the Welfare and Pension Plans Disclosure Act, was legislation effected which was specifically designed to exercise regulatory controls over pension and welfare funds. Based upon disclosure of malfeasance and improper activities by pension administrators, trustees, or fiduciaries, the Act was

amended in 1962 to designate certain acts of conduct as federal crimes when they occurred in connection with welfare and pension plans. The amendments also conferred investigatory and various regulatory powers upon the Secretary over pension and welfare funds. In the decade since the amendments were enacted, experience has shown that, despite intermittent enforcement of the reporting requirements and the criminal provisions, the protection accomplished by statute has not been sufficient to accomplish Congressional intent.

The Existing Law

The growth and development of the private pension system in the past two decades have been substantial. Yet, regulation of the private system's scope and operation has been minimal and its effectiveness a matter of debate. The assets of private plans, estimated to be in excess of $150 billion, constitute the only large private accumulation of funds which have escaped the imprimatur of effective federal regulation.

At the federal level, there are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities. These are the Welfare and Pension Plans Disclosure Act, the Labor Management Relations Act, and the Internal Revenue Code of 1954.

After a comprehensive investigation of abuses in the administration and investment of private fund assets, Congress adopted the Welfare and Pension Plan Disclosure Act in 1958. The policy underlying enactment of this Act was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. The essential requirement of the Act was that the plan administrator compile, file with the Secretary of Labor, and send to participants and their beneficiaries upon written request, a description and annual report of the plan. It was expected that the knowledge thus disseminated would enable participants to police their plans. The Act was amended in 1962 to make theft, embezzlement, bribery, and kickbacks federal crimes if they occur in connection with welfare and pension plans. The 1962 amendments also conferred limited investigatory and regulatory powers upon the Secretary of Labor, and required bonding of plan officials.

Experience in the decade since the passage of the above amendments has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act in regulating the private pension system for the purpose of protecting rights and benefits due to workers. It is weak in its limited disclosure requirements and wholly lacking in substantive fiduciary standards. Its chief procedural weakness can be found in its reliance upon

the initiative of the individual employee to police the management of his plan.

The Labor Management Relations Act provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish, nor does it provide, standards for the preservation of vested benefits, funding adequacy, security of investment, or fiduciary conduct.

Tax deduction benefits accruing to employers are prescribed by the Internal Revenue Code under which the employer is granted a deduction within certain limits for contributions made to a qualified plan, and the investment earnings on such plans are made tax-exempt. To attain "qualified status" under the Code, the plan must: (1) be for the exclusive benefit of the participants; (2) be for the purpose of distributing the corpus or income to the participants; (3) be established in such a manner to make it impossible for the employer to use or divert funds before satisfying the plan's liabilities; and (4) not discriminate in favor of officers, stockholders, or highly-compensated or supervisory employees.

The Internal Revenue Code provides only limited safeguards for the security of anticipated benefit rights in private plans since its primary functions are designed to produce revenue and to prevent evasion of tax obligations. The essence of enforcement under the Code lies in the power of the Internal Revenue Service to grant or disallow qualified status to a pension plan, thus determining the availability of statutory tax advantages. The Internal Revenue Service jurisdiction and enforcement capabilities are solely to allow various tax advantages to accrue to employers who establish and maintain pension plans which can qualify for such tax benefit privileges.

In the absence of adequate federal standards, the participant is left to rely on the traditional equitable remedies of the common law of trusts. A few states, including New York, Washington, Wisconsin, Massachusetts, and California have codified existing trust principles and enacted legislation which requires in many instances a degree of disclosure similar to that required by federal statute.

The fact that statutory rules exist says little as to their efficacy in adjusting inequities that are visited upon plan participants, as evidenced by the hearings before this Committee. In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. Courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording. Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.

The proposed bill would, therefore, establish minimum standards of vesting, funding, and fiduciary and a system of compulsory benefit insurance to protect the security of pension rights.

As suggested by the President's Cabinet Committee Report of 1965, "[a]s a matter of equity and fair treatment an employee covered by a pension plan is entitled, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment." Concern for loss of benefits by workers after long years of labor through circumstances beyond their control was similarly expressed by President Richard M. Nixon on December 8, 1971, when, in a message to the Congress he said, "When a pension plan is terminated, an employee participating in it can lose all or a part of the benefits which he has long been relying on, even if his plan is fully vested . . . even one worker whose retirement security is destroyed by the termination of a plan is one too many."

Major Issues

Although the need for legislative reform has been and continues to be widely acknowledged among all persons and sectors affected, federal mandation of essential improvements has been resisted due to the belief that such legislation might impede plan growth. However, the Committee's inquiries have revealed that the costs associated with the vesting and funding proposals in the Act are sufficiently modest as not to constitute a major impediment to plan growth. Additionally, any added cost attributable to the imposition of vesting and funding standards will inure directly to the benefit of the participants in each plan in the form of increased availability of benefits and added security.

The principal issues affecting the vital and basic needs for legislation involve consideration of the essential elements of pensions:

a. Vesting

One of the major private pension plan considerations centers around the concept of vesting. Vesting refers to the nonforfeitable right of interest which an employee participant acquires in the pension fund. The benefit credits may vest in the employee immediately, although in most cases participants do not become eligible for vesting of benefits until a stipulated age or period of service, or a combination of both, is attained.

Upon compliance with the basic requirements of age or service, many places will grant their participants vested rights to those benefits earned to that time. However, should employment terminate prior to such time, the employee will receive no benefits. Some pension plans, however, specify "graded" vesting formulas, whereby only a defined percentage of the accrued benefits earned will vest upon fulfillment of minimum

requirements, and such percentage may increase periodically, as the employee continues in his employment and completes additional service.

Despite the recognized and acknowledged need for pension plans to provide for vesting of earned benefits, if pension promises are to be meaningful to workers, there is need for federal statutory requirements which will compel an employer to grant such vesting benefits. The difficulties and hardships resulting from non-existent or inadequate plan provisions for vesting of benefits have been vividly established by the Committee's studies and hearings.

It is noteworthy that in 1965, the President's Commission on Public Policy and Private Pensions, while acknowledging that there had been some improvement in private plans by increased adoption of vesting provisions, nonetheless found and recommended legislation to make minimum vesting provisions mandatory. That Commission concluded that "the degree of retirement protection in private pension plans varies widely and in many cases remains quite inadequate." President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans, January, 1965, at 39.

Despite claims by opponents that progress made in pension plan provisions to provide vesting manifests movement toward an eventual voluntary vesting system, plans involving substantial numbers of workers which contain no vesting are still not uncommon. Opponents of mandatory vesting believe that compulsory vesting provisions will discourage development of new plans and impede flexibility and latitude in formulating employee benefits because of excessive costs that are certain to result. However, in the face of Committee findings relative to projected costs to plans for imposed vesting, indications are that the resistance of opponents to universal vesting is essentially structured upon extreme reluctance to submit to governmental regulatory measures concerning pension plan administration and operations. In its final analysis, the issue basically resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits that have been placed for them in a fund for retirement purposes.

b. Funding

Another major issue in private pension plans relates to the adequacy of plan funding. Funding refers to the accumulation of sufficient assets in a pension plan to assure the availability of funds for payment of benefits due to the employees as such obligations arise. Today, funding of pension plans for the limited and specific purpose of qualifying for tax benefits permitted by law for contributions made is governed by statutory and

regulatory requirements which are under the jurisdiction of the Internal Revenue Service. The minimum funding rules require an employer to make contributions to a pension fund, qualified by the Internal Revenue Service, of amounts at least equal to the pension liabilities being created currently, and the interest due upon those amounts of monies which reflect unfunded accrued liabilities. The inherent weakness of this required minimum funding is that the employer is not required under law to make payments toward the principal of the unfunded accrued liabilities. Without mandatory funding of past service liabilities, a pension plan may never be in a financial posture to meet its pension obligations to its employees. The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities, and with a contribution rate sufficient to maintain that status at all times. However, since plans are revised and amended to provide new benefits which create new and different liabilities for the plan, opponents of compulsory funding argue that it is unrealistic to expect that plans maintain a full funding status at all times. The same opposition is voiced for new plans, which invariably assume a large unfunded liability at the outset of the plan, due to the granting of credit for past service by employees to the employer.

The ineffectiveness of funding requirements was acknowledged in the President's Cabinet Committee Report of 1965, when it concluded that "the minimum standards for funding under present tax law do not assure adequate funding. The setting of standards for adequate funding therefore becomes an important public concern." Public Policy and Private Pension Programs, 1965, at 50–51. The promise and commitment of a pension can be fulfilled only when funds are available to pay the employee participant what is owed to him. Without adequate funding, a promise of a pension may be illusory and empty.

c. Fiduciary Responsibility and Disclosure

Another area of concern of the Subcommittee has involved the conduct of administration and operations of pension plans. Of particular interest has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension "fiduciaries," and the standards of accountability they shall be governed by in the management and disposition of pension funds. The only current federal requirement is that the Secretary of Labor require fiduciaries, trustees, etc., to make disclosure of the provisions and financial operations of the pension plan under the Welfare and Pension Plans Disclosure Act.

An important issue relates to the effectiveness of communication of plan contents to employees. Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an

employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

Committee Action

The Committee endorses the concept of a comprehensive private pension reform program. It believes that expeditious enactment of H.R. 2 will institute a program which will achieve a strengthening of the role played by private retirement plans within the fabric of our economic and social structures. Its most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society. The enactment of progressive and effective pension legislation is also certain to increase stability within the framework of our nation's economy, since the tremendous resources and assets of the private pension plan system are an integral part of our economy. It will also serve to restore credibility and faith in the private pension plans designed for American working men and women, and this should serve to encourage rather than diminish efforts by management and industry to expand pension plan coverage and to improve benefits for workers. The Committee believes that the legislative approach of establishing minimum standards and safeguards for private pensions is not only consistent with retention of the freedom of decision-making vital to pension plans, but in furtherance of the growth and development of the private pension system. At the same time, the Committee recognizes the absolute need that safeguards for plan participants be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which have resulted in tragic hardship to so many.

The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations in maintaining flexibility in the design and operation of their pension programs, and the need of the workers for a level of protection which will adequately protect their rights and just expectations. In adopting this approach, the Committee believes it has designed a bill, which, like the National Labor Relations Act, the wage-hour laws and other labor standards laws, brings the workers' interests up to parity with those of employers. This legislation strikes an appropriate and equitable balance between two opposing schools of thought—those who advocate complete and stringent control of private

pensions and those who oppose any form of government supervisory or regulatory control.

3. PUBLIC POLICY GOALS OF ERISA

ERISA § 2

Findings and Declaration of Policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and

obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

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

NOTES AND QUESTIONS

1. What were the historical problems with private employer pension plans that Congress intended ERISA to address? How did ERISA attempt to resolve these problems?

2. *The Studebaker Incident.* One of the key events that galvanized public opinion in favor of the reforms enacted by ERISA was the 1963 closing of the Studebaker Corporation plant in South Bend, Indiana, and the resulting adverse consequences for participants in the company's pension plan. The workers at the Studebaker plant were covered by a pension plan negotiated on their behalf by the United Automobile Workers Union (UAW). When the plant closed, Studebaker and the UAW negotiated an agreement to terminate the pension plan. Under this termination agreement, of the approximately 10,500 retirees and active workers covered by the plan, only 3,600 individuals received their full benefits promised under the terms of the plan. Due to grossly inadequate funding, the remaining plan participants received only part, or none, of their pension benefits. The plight of the Studebaker workers, many of whom had long years of service with the company, was well-publicized by the national media. Studebaker became a public symbol of the insecurity of pension plan benefits and a rallying cry for pension system reform.

Although ERISA enacted minimum standards for the funding of pension plans sponsored by private industry employers, plans sponsored by governmental entities are exempt from these minimum funding requirements. See ERISA § 4(b)(1). Moreover, the independent agency established by ERISA to insure the benefits provided by defined benefit plans in the event of employer insolvency, the Pension Benefit Guaranty Corporation, does not insure retirement benefits provided by governmental plans. When state and municipal governments experience a decline in tax revenues during periods of economic recession, funding shortfalls in pension plans for public sector workers may jeopardize their retirement benefits. Due to the combination of ERISA's minimum funding and PBGC insurance, the employees of private employers enjoy a measure of security regarding their pension benefits that is not available to public sector workers.

3. *ERISA and Participant-Directed 401(k) Plans.* When Congress enacted ERISA in 1974, the participant-directed 401(k) plan did not exist. Employer insolvency (as exemplified by the Studebaker incident) was the major source of insecurity for retirement plan benefits. Today, participants in 401(k) plans face other sources of financial insecurity in addition to the problem of employer insolvency. Workers may invest heavily in company stock through their 401(k) plan, only to find that their employer has become bankrupt. Retirees and workers may invest broadly in the stock market, only to find that stock values decline. Alternatively, retirees and workers can invest in bonds, but the interest income generated may not keep pace with the rate of inflation. Or, retirees and workers may invest in mutual funds, but the fund's fees and expenses may erode their investment returns over time. These issues related to participant-directed 401(k) plans are discussed in Chapter Five of the casebook.

C. EMPLOYEE BENEFIT PLANS IN THE MODERN WORKPLACE

The nature of work and the organization of the modern American workplace have changed significantly since the enactment of ERISA in 1974. Workers today are increasingly mobile and no longer expect to spend their entire career with one employer. The traditional employer-employee relationship that characterized the workplace of the 1960s has evolved into nontraditional forms of employment. Many individuals work as self-employed independent contractors. Other individuals serve as temporary workers whose services are leased to the employer by an employment agency. Employers have become increasingly willing to accommodate the personal needs and preferences of workers. For example, some employers now permit individuals to work a nontraditional three or four day workweek, to work primarily from home, or to job-share a single position.

Despite these changes, employee benefit plans continue to be a fixture of the modern workplace. Since the enactment of ERISA, the design of employee benefit plans and the types of benefits provided by these plans have evolved in response to broad societal, demographic and economic trends. Retirement plans have moved increasingly from a paternalistic, employer-managed system to one where the plan's participants are primarily responsible for funding and managing their own retirement plan assets. Retirement plan benefits are increasingly portable rather than being linked to one employer. In the area of health care benefits, employers have responded to rising costs by replacing the traditional indemnity insurance model, first with employer-insured health care plans and managed care networks, and more recently with high-deductible health care plans coupled with health savings accounts. As the baby boomer generation of workers ages, disability plans designed

to replace lost wages in the event an individual becomes unable to work have become an increasingly popular employee benefit.

These trends have caused the roles and responsibilities of persons associated with employee benefit plans—the sponsoring employer, the plan's participants, and the other parties who assist in managing and administering employee benefit plans—to change dramatically. Yet ERISA's core statutory provisions that regulate the conduct of persons associated with employee benefit plans have changed very little since 1974. As a result, federal regulators and the federal courts increasingly have struggled to apply ERISA's statutory language to situations that are produced by the modern workplace.

One of the reasons that many of the key provisions of ERISA have remained unchanged is that the current regulatory structure represents a delicate balancing of competing private interests and public policy objectives. Section D of Chapter One introduces some of the major public policy issues that underlie the federal regulation of employee benefit plans. Periodically throughout this course, pause and consider whether the legal rules you are studying continue to strike the appropriate policy balance. Does ERISA need to be "modernized" to better accommodate changing circumstances in society? If so, what changes would you favor, and why?

D. EMPLOYEE BENEFITS LAW TODAY: PUBLIC POLICY ISSUES

1. FEDERAL TAX POLICY AND EMPLOYEE BENEFIT PLANS

Professor Michael J. Graetz has described the importance of examining federal tax policy in the following terms:

> The tax law . . . is the primary link between the nation's citizens and their government . . . The tax law . . . is a window into the nation's views about justice, about how much economic inequality the society considers appropriate . . . [N]owhere in American law is there a better place to examine carefully . . . the tensions between citizens' insistence that the government perform well its assigned functions, on the one hand, and each person's personal resistance to sacrificing private resources to the public treasury, on the other.

Michael J. Graetz, *2001 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Erwin Griswold's Tax Law-And Ours*, 56 TAX LAW. 173, 174 (2002).

Employee benefit plans and the United States income tax system are deeply intertwined. The income tax system subsidizes health care,

retirement, and other types of benefits by providing employers and employees an income tax incentive to sponsor and participate in employee benefit plans. The technical term used to describe this income tax subsidy is a *tax expenditure*. Essentially, a tax expenditure represents revenue that the government does not collect in the form of income taxes because an economic activity receives preferential treatment under the Internal Revenue Code.

For fiscal year 2016, the tax expenditure for health care plans and long-term care plans sponsored by employers is estimated at $161.5 billion. This amount represents the single largest tax expenditure in the federal budget. The tax expenditure for qualified retirement plans in 2016 is estimated at $135.0 billion. This amount represents the second largest tax expenditure in the federal budget. To put these numbers in perspective, in comparison the tax expenditure for the home mortgage interest deduction is estimated to be "only" $79.2 billion in 2016. See JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017 (2013).

Conceptually, a tax expenditure is analogous to other social policy entitlement programs subsidized through direct payments by the federal government. The public policy that underlies the tax expenditure for qualified retirement plans is to encourage employers and employees to save for retirement. As a matter of social policy, we want retired workers to have an additional source of income during retirement other than Social Security benefits. A similar public policy rationale underlies the tax expenditure for health care plans and long-term care plans. As a society, we want to encourage employers and employees to provide for their own health care-related needs, particularly in the years prior to attaining eligibility for the federal Medicare program.

Keep these tax expenditure figures in mind as you study the qualified retirement plan system in Chapter Three and health care and other welfare benefit plans in Chapter Four of the casebook. Who benefits from these tax expenditures? Are these tax expenditures allocated fairly among all segments of society?

2. DEMOGRAPHIC TRENDS: EMPLOYEE BENEFIT PLANS AND PUBLIC BENEFIT PROGRAMS[d]

The aging of the American population and the impending retirement of the baby boomer generation will place significant strains over the next several decades on both Social Security and on retirees' own financial resources. The decline in birth rates since the 1960s, coupled with longer life spans, will result in fewer workers relative to the number of retirees.

[d] Based on CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS, INCOME OF AMERICANS AGED 65 AND OLDER, 1968 TO 2008 (Nov. 4, 2009), and U.S. SAVINGS FOR RETIREMENT IN 2010 (July 23, 2013).

Consequently, Social Security benefits will have to be financed by a working population that is shrinking relative to the number of retirees. With continued increases in average life expectancies, retirees in the 21st century will have to stretch their savings and other assets over longer periods of retirement than were experienced by their parents and grandparents.

America's Aging Population

Americans are living longer than ever before. The average life expectancy of Americans born in 1968 was 70.5 years. It has been estimated that persons born in 2010 will live for an average of 78.3 years. Women continue to have a longer average life expectancy than men, but both men and women have experienced gains in average life expectancy since the 1960s.

As more people live into old age, the age-profile of the population will shift. In 1968, 18.6 million people in the United States—9.4% of the population—were 65 or older. By 2030, according to projections made by the Census Bureau, there will be 71.5 million people aged 65 and older, comprising 19.7% of the U.S. population.

Table 1.1

Projections of the Resident U.S. Population, by Age

(in thousands, as of July 1 each year)

Age	2010	2012	2030	2040	2050
Under 20	83,236	88,887	95,104	101,625	109,147
20–64	185,456	192,285	197,027	210,270	224,001
65–84	34,120	47,363	61,850	64,640	65,844
85 and older	6,123	7,269	9,603	15,409	20,861
Total	**308,935**	**335,804**	**363,584**	**391,944**	**419,853**
65 and older	**40,243**	**54,632**	**71,453**	**80,049**	**86,705**
% of Total	**13.0%**	**16.3%**	**19.7%**	**20.4%**	**20.7%**

The aging of the population will strain the components of the traditional "three-legged stool" of retirement income: Social Security, pensions, and personal savings. Social Security is the largest source of income among the elderly. Earnings are the second largest source of income among people aged 65 and older, but much of this income is earned by people under 70 years of age. Pensions are the third largest source of income among the elderly, but only about half of all workers in the United States have pension coverage through their jobs, and more employers offer 401(k) plans than traditional pension plans. In a typical 401(k) plan, the worker must elect to participate, decide how much to

contribute to the plan, how to invest the funds, and what to do with the account when he or she changes jobs or retires. Workers who do not choose to save, save too little, or make poor investment choices may face difficult financial circumstances in retirement.

Trends in Retirement Plan Design

Since the 1970s, the proportion of workers who participate in employer-sponsored retirement plans has remained relatively stable at approximately half of the workforce. In the early 1980s, however, employers moved away from *defined benefit* (DB) plans to *defined contribution* (DC) plans. Defined benefit plans—what most people think of as traditional pensions—are required by federal law to offer plan participants a retirement benefit in the form of a lifetime annuity. The amount of the annuity typically is based on the employee's length of service and average salary. In the private sector, DB plans usually are funded solely by employer contributions and investment earnings on those contributions. Defined contribution plans, in contrast, are more like savings accounts maintained by employers on behalf of each participating employee. In the most common type of DC plan, the employee defers a portion of his or her salary, which is invested in stocks, bonds, or other assets. The employer often matches some or all of the employee's contribution to the plan. At retirement, the balance in the account is the sum of past contributions plus interest, dividends, and capital gains or losses. The account balance is often distributed to the departing employee as a single lump sum.

One of the key distinctions between a defined benefit plan and a defined contribution plan is that in a DB plan, the employer bears the investment risk. The employer must ensure that the plan has sufficient assets to pay the benefits promised to workers and their surviving dependents. In a DC plan, the worker bears the risk of investment losses. The worker's account balance depends on how much has been contributed to the plan over the years and how the plan's underlying investments have performed.

Retirement Savings

The amounts that Americans have saved for retirement are an important component of evaluating the effectiveness of public policies aimed at achieving retirement income. Despite tax incentives to promote saving for retirement, 57% of Americans surveyed by Gallup in January 2013 reported that they were worried about outliving their savings after they retired. Many factors affect the accumulation of financial and non-financial assets by American households. Some of these factors include: education; income; the number of children in a household; the amount, if any, of non-measured wealth, such as future Social Security or DB pension benefits; and tax policy as established by Congress.

Although workers may retire at any age, ages 62 to 67 might generally be thought of as retirement age. Individuals are eligible to receive reduced Social Security benefits at age 62, are eligible for Medicare at age 65, and are eligible for full Social Security benefits at their normal retirement age (age 67 for individuals born on or after January 1, 1960). In addition, age 65 is often the normal retirement age in private-sector and state and local pension plans. In 2010, for households in which the head of the household was ages 62 to 67, only 57.2% had retirement assets. The table below shows the median and average amounts for retirement assets.

Median and Average Retirement Assets in 2010 Among Households in Which the Head Was Ages 62 to 67

		All Households	Single Households	Married Households
Total Retirement (IRA and DC) Assets	Median	$150,000	$70,000	$178,000
	Average	$341,417	$205,227	$384,000
IRA Assets	Median	$115,000	$50,000	$140,000
	Average	$265,475	$148,792	$307,300
DC Assets	Median	$80,000	$30,000	$100,000
	Average	$246,115	$152,123	$272,761

Source: Congressional Research Service Analysis of the 2010 Survey of Consumer Finances.

Many households have wealth other than retirement accounts on which they will be able to draw during retirement. For example, the most valuable asset owned by many families is their home. The broadest measure of net household wealth—the difference between a household's total assets and total liabilities—is called *net worth*. In 2010, among

married households in which the age of the head of the household was younger than 35, 25% had a net worth that was less than or equal to $1,170; 50% had a net worth less than or equal to $15,000 (which was the median net worth for this group); and 75% had a net worth less than or equal to $63,900. Within each age group, median net worth was higher for married households than for single households.

Conclusion

Are Americans saving adequately—and wisely—for retirement? On the one hand, the widespread adoption of tax-favored retirement savings plans over the past 30 years indicates that many workers are taking seriously their responsibility to save for retirement. On the other hand, the balances in these accounts for many persons,—even among those who are near retirement age—are low.

The uncertain future of Social Security and the declining prevalence of defined-benefit pensions that provide a guaranteed lifelong income have put much of the responsibility for preparing for retirement directly on workers. The low rate of personal saving in the United States and the lack of any retirement savings accounts among millions of American households indicate that there is a need for greater awareness among the public about the importance of setting aside funds to prepare for life after they have stopped working. Most workers in the United States will need to begin saving more of their income if they wish to maintain a standard of living in retirement comparable to that which they enjoyed while working. The alternatives would be to work longer or to greatly reduce their standard of living when they retire.

3. THE SCOPE AND COST OF RETIREMENT AND HEALTH CARE PLAN COVERAGE

The modern employee benefits system established by ERISA makes plan sponsorship by an employer voluntary. Given the voluntary nature of the system, the cost of providing retirement, health care, and other benefits to employees is an important factor in the employer's decision whether or not to offer such benefits. The Bureau of Labor Statistics estimates that the total compensation (defined as wages and salaries plus employee benefits) for private industry workers in June of 2013 averaged $29.11 per hour. Of this amount, 70.3% ($20.47 per hour) was attributable to wages and salaries. The remaining 29.7% ($8.64 per hour) represented the employer's cost to provide various types of benefits to employees. See BUREAU OF LABOR STATISTICS, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION—JUNE 2013 (Sept. 11, 2013).

For retirement benefits, 64% of all private industry workers in 2013 had access to an employer-sponsored retirement plan, but only 49% actually participated in their employer's plan. In contrast, 89% of state

and local government employees had access to a retirement plan, and 85% of those workers participated in a retirement plan. See BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN THE UNITED STATES—MARCH 2013 (July 17, 2013). The difference is attributable in part to the type of retirement plan offered by the employer. Private industry employers have shifted heavily toward 401(k) plans, which are funded primarily by employee contributions. In contrast, many state and local governmental employers continue to offer employer-funded defined benefit retirement plans to their workers. The distinctive features of the various types of retirement plans are explained in Chapter Three of the casebook.

With regard to health care benefits, 85% of full-time private industry workers (defined as employees who regularly worked 35 or more hours per week) had access to an employer-sponsored group health plan in 2013. Sixty-four percent (64%) of these full-time workers participated in an employer-sponsored plan. For state and local government workers, 99% of full-time employees had access to a health care plan through their employers, and 84% participated in a plan. In contrast, only 24% of part-time private industry and state and local government workers (defined as regularly working 34 or fewer hours per week) had access to an employer-sponsored group health plan. Of these part-time workers, only 13% in private industry and 17% in state and local government actually participated in the employer's plan. See BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN THE UNITED STATES—MARCH 2013 (July 17, 2013). Note that these statistics do not fully reflect the scope of health insurance *coverage*, but only measure whether or not a worker had access to and participated in a group health plan sponsored through the workplace. For example, the employee may decline coverage under the employer plan for dependent children. Or, an employee who is under age 26 may decline coverage under his or her employer's plan and elect to continue to be covered under a parent's plan.

On average, in 2013 private industry employers paid 79% of the premium for employee-only coverage and 68% of the premium for family coverage for workers who participated in employer-sponsored group health plans. The comparable percentages for state and local governments were 87% and 70%, respectively. See BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN THE UNITED STATES—MARCH 2013 (July 17, 2013). As a result of employer cost-sharing, many employees are not aware of the true cost of their health care insurance. Each year, the Kaiser Family Foundation's Health Research and Educational Trust surveys more than 2,000 small and large employers to assess trends in employer-sponsored health care insurance plans. In 2013, this survey found that the average annual total cost of family coverage offered through an employer was $16,351. For individual coverage offered through an employer, the average total cost in 2013 was $5,884. The historical trend shows that the cost of group health plan insurance

continues to rise. In 2009, this same survey found that the total cost for employer-sponsored health care insurance was $13,375 for family coverage and $4,824 for individual coverage. See THE KAISER FAMILY FOUNDATION, EMPLOYER HEALTH BENEFITS, 2009 & 2013 ANNUAL SURVEYS.

4. FEDERALISM AND PREEMPTION OF STATE LAW

The limited nature of the claims and remedies available to private litigants under ERISA has proven controversial. Although ERISA often preempts potential state law claims and remedies, the statute may not supply a substitute federal claim or an adequate federal remedy. This result, commonly known as "betrayal without a remedy," has been an ongoing source of both public and judicial frustration. The federal court's reaction in *Suggs v. Pan American Life Insurance Co.*, 847 F.Supp. 1324 (S.D. Miss. 1994), is typical:

> The overriding purpose of the judiciary is to provide justice. When Congress passes legislation and clearly sets out the purposes and intentions of such legislation, "to protect . . . the interest of participants in private pension plans and their beneficiaries," and Courts acknowledge that ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries," and yet the Courts have to say "for what may have been a serious mistake there is no remedy, state or federal" or even worse, ERISA's preemption may leave a victim of fraud or misrepresentation without a remedy, something is wrong. The system isn't working. Either Congress is incapable of writing legislation to accomplish what they plainly say is their intent, or the Courts lack the ability to interpret the statute to do what Congress plainly says it intended to do, or both, or a mixture. In any event, the system fails.

Id. at 1357 (citations omitted). Although consumer advocacy groups lobbied Congress to expand the scope of ERISA claims and remedies as part of the reforms enacted by the Affordable Care Act, the final legislation left ERISA's claims and remedies provisions unchanged. As you study this statutory scheme for federal claims, remedies, and preemption of state laws later in Chapters Six and Seven of the casebook, try to discern who benefits from the status quo. Who would "win" and who would "lose" if the current system is changed?

E. STUDYING AND RESEARCHING EMPLOYEE BENEFITS LAW

Employee benefits law is the product of two distinct federal statutes. The Employee Retirement Income Security Act of 1974, 29 U.S.C.

§§ 1001–1461 (ERISA), is the primary federal law that regulates retirement, health care, disability, and other welfare benefit plans sponsored by private employers for their employees. In addition, selected provisions of the Internal Revenue Code of 1986, 26 U.S.C. §§ 1–9833 (Code), establish specific requirements that retirement plans must satisfy to qualify for highly favorable income tax treatment for both the employer who sponsors the plan and the employee who participates in the plan. Retirement plans that satisfy these Code requirements are commonly referred to as qualified plans.

Employee benefits law has a well-deserved reputation among practicing lawyers for being a difficult subject. See Martha Neil, *ERISA*, A.B.A. J. 54 (June 2001) ("Employee benefits law is thorny as ever, and recent changes mean lawyers need to be doubly careful when trekking though the brambles."). This complexity results from several factors:

- The statutory provisions of ERISA have generated a substantial body of federal common law, particularly in the areas of claims, remedies and preemption of state law. Outright conflicts among the federal circuit courts of appeals exist, along with numerous circuit-by-circuit variations in how the federal courts interpret ERISA's statutory language.
- Although the key substantive provisions of ERISA have remained relatively stable since their enactment in 1974, the Code provisions regulating qualified retirement plans have been amended by Congress every few years. Such amendments require employers, in turn, to amend their plans to remain in compliance with the Code's highly technical requirements for qualified retirement plans.
- The statutory numbering system for ERISA is confusing to novices. Title I of ERISA (known as the *labor provisions* of ERISA) is codified in Title 29 of the United States Code. The statutory sections of ERISA do not equate with the section numbers used in the United States Code. For example, ERISA Section 404 is found at 29 U.S.C. § 1104. This casebook follows the convention used by ERISA scholars and practitioners, which is to refer to the original section numbers as enacted by ERISA (e.g., ERISA Section 404), rather than the numbering system used in the United States Code, when citing to a statutory provision. References in this casebook to Code sections are to the corresponding section of the Internal Revenue Code of 1986, as amended, which are codified in Title 26 of the United States Code. Thus, "Code Section 401(a)" refers to 26 U.S.C. § 401(a). Finally, to compound the statutory confusion, some of the

Code requirements for qualified retirement plans are duplicated in ERISA. For example, Code Section 401(a)(13), which provides that plan benefits may not be assigned or alienated, is duplicated in ERISA Section 206(d). Where a dual Code/ERISA provision exists, the convention of this casebook is to provide a dual citation.

- The statutory provisions of both ERISA and the Code are accompanied by numerous and detailed regulations, which are issued by the Department of Labor and the Treasury Department. This casebook refers to Department of Labor regulations codified in Title 29 of the Code of Federal Regulations as "DOL Reg." Similarly, references in this casebook to "Treas. Reg." are to the Treasury Department regulations codified in Title 26 of the Code of Federal Regulations.
- In addition to issuing regulations, both the Department of Labor and the Treasury Department have created another layer of governing legal authority through the issuance of various administrative rulings, announcements, opinion letters, advisory letters and private letter rulings. As a practical matter, this additional body of legal authority is best researched electronically.
- Lawyers who practice in the field of employee benefits law converse using a virtual alphabet soup of acronyms. To the uninitiated, such conversations may sound like a foreign language. The acronyms used by ERISA lawyers typically refer to either major pieces of enacted legislation or technical defined terms used in ERISA or the Code. Appendix H of the casebook contains a list of the most common acronyms associated with employee benefit plans. To familiarize you with this new legal vocabulary, many of these acronyms are used throughout the casebook.

Secondary Sources

This casebook provides an introduction to employee benefits law. It is designed to familiarize you with the key statutory provisions of Title I of ERISA, the primary Code requirements for qualified plans, and the major cases interpreting these statutory provisions. In legal practice, however, familiarity with the basic statutory rules and the major cases usually provides only a starting point for much more detailed research.

There are numerous secondary sources available to assist you in researching employee benefit plan issues. Although the following list is certainly not exhaustive, these secondary sources form the core library for many ERISA practitioners.

AMERICAN BAR ASSOCIATION, EMPLOYEE BENEFITS LAW (3rd ed. 2012) (with cumulative supplements). This book, written by various members of the ABA Section of Employee Benefits Law, is the most authoritative single volume treatise in the field. It is accompanied by an annual supplement containing the most recent developments in the law.

ERISA FIDUCIARY LAW (Susan P. Serota and Frederick A. Brodie (2d. ed. 2007)) (with cumulative supplements). ERISA fiduciary law is the product of a vast body of complex, and often conflicting, federal judicial decisions. This book and its cumulative annual supplement provide an overview of recent judicial trends in the interpretation of ERISA's provisions regulating the conduct of plan fiduciaries.

JAYNE E. ZANGLEIN, LAWRENCE A. FROLIK & SUSAN J. STABILE, ERISA LITIGATION (4th ed. 2011) (with cumulative supplements). Written primarily by three well-known legal scholars in the ERISA field, with additional chapters contributed by specialized ERISA practitioners, this book provides detailed coverage of both the procedural and substantive aspects of ERISA litigation.

DONALD J. MEYERS & MICHAEL B. RICHMAN, ERISA CLASS EXEMPTIONS (4th ed. 2012) (with cumulative supplements). This book describes and reproduces all of the Department of Labor's administrative class exemptions, and also provides an explanation and historical background. It is truly a one-stop shopping guide to the arcane world of ERISA prohibited transaction exemptions.

JEFFREY D. MAINORSKY, HEALTH CARE BENEFITS LAW (2014). Everything you may need to know about health care plans is described in this book. The breadth of coverage includes a more detailed discussion of the federal laws described in Chapter Four of this casebook, with an emphasis on compliance and transactional issues.

BNA TAX MANAGEMENT PORTFOLIO SERIES. Selected portfolios of this series provide a more detailed discussion of many of the topics covered in this casebook.

Internet Resources

The official web sites of the Internal Revenue Service (http://www.irs.gov) and the Employee Benefits Security Administration at the Department of Labor (http://www.dol.gov/ebsa/) contain public education materials, official agency announcements and publications and the various forms used for governmental filings.

For the latest developments, ERISA practitioners rely on the daily postings at the Benefitslink web site (http://www.benefitslink.com), which hyperlinks to all posted material. Benefitslink also provides two daily electronic newsletters—one for retirement plans, one for welfare plans—that summarize the most important news of the day. This newsletter

service is free. Try subscribing during your employee benefits law course to supplement and enrich your classroom experience. There also are numerous blogs devoted to employee benefits law topics. Find one or two that you like and check them periodically for commentary and analysis on new developments.

F. DISCUSSION QUESTION FOR CHAPTER ONE

Based on your personal knowledge and experience, have employer-sponsored benefit plans achieved the policy goals described in Section 2 of ERISA? What do you perceive to be the most pressing problems associated with employee benefit plans in today's modern workplace? What reforms do you favor? Why?