Vesting under ERISA Health Plans: Can “Lifetime” Benefits Be Reduced or Eliminated?
by Helen M. Kemp

Although General Motors stopped promising retiree medical benefits to new workers in the early 1990s, the automaker still carried enormous liability. In 1997, soon after the Financial Accounting Standards Board required companies to put their promises for retiree medical care on the books, GM set up a dedicated trust to cover its obligation.

The trust balance now stands at $16.5 billion, with $5 billion added in 2004 alone. But the annual cash outlay for the benefits has outstripped contributions to the trust almost every year, rising from $2.3 billion in 1998 to $3.6 billion in 2003. See generally Alix Stuart, “Promises, Promises,” CFO Magazine (Human Capital Special Issue), Feb. 22, 2005. The cost of providing health care has been alleged to add about $1,500 to the cost of each of the 4 million plus vehicles GM sells each year.

Faced with this cost, General Motors began cutting the benefits of 85,000 salaried retirees. Jerry Deising, 74, who retired from GM in 1991 as a nonunion salaried employee, has gotten used to paying for his and his wife’s health insurance, even though he’s seen the premiums, deductibles, and co-pays steadily increase. He says he’s paying 50% more now than he did in 1991, and that adds up to a yearly premium of $704 for medical insurance, $110 for dental, and $154 for long-term-care insurance.

“The company told us we would always have the same medical insurance we had for the rest of our lives,” he says. “We paid no premiums and had good coverage. Two years after we retired, they said you have to be a team player and we’re going to have to ask you to contribute. That was a nice way of saying they were going to renege on their promise.” Kiplinger’s Retirement Report, Disappearing Retiree Health Benefits, December 2005.

Litigation over Employee Health Benefits Likely to Increase

As employers like GM decrease retiree benefits or subsidies in response to increasing health care costs and an increasingly competitive global economy, litigation with regard to retiree health benefit issues will most likely increase as retirees seek to enforce what they believe to be the company’s promise to pay them such benefits.

There are generally three steps in analyzing a claim for the vesting of welfare benefits, the first of which is to examine plan documents to determine if there is any language that can be construed as a promise to pay the benefit.

Assuming that there is language that could be construed as conferring a benefit, the next step is to review plan documents to determine if the employer or the plan clearly and unambiguously reserved the right to change, amend, or terminate benefits offered by the plan.

The third step, in cases where there is some ambiguous language that suggests the company intended benefits to vest, is to examine available extrinsic evidence to determine if the retirees reasonably relied, to their detriment, on statements (or conduct) made by plan fiduciaries or company management.

Vesting and Reservations of Right

There are two types of employee benefit plans covered by ERISA: pension plans and welfare plans. See 29 U.S.C. §§ 1002(1) and (2)(A). The latter includes medical, surgical, or hospital benefits in the event of sickness, although ERISA does not apply to the welfare benefit plans sponsored by
governmental agencies or some churches.

"Vested" benefits generally refer to normal retirement benefits to which an employee has a "nonforfeitable" claim; in other words, accrued benefits a retiree is entitled to keep. 29 U.S.C. § 1002 (19). ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits, as "unlike pension plan benefits, the benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time." American Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp., 116 F.3d 976, 979 (2d Cir. 1997) ("Multifoods"); see also Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995).

It is well settled law in all circuits that although benefits do not automatically vest under an ERISA welfare plan, "if any employer promises vested benefits, that promise will be enforced." Multifoods, 116 F.3d at 980. However, a commitment to vest welfare benefits "is not to be inferred lightly." See Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998); Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851, 858 (4th Cir. 1994).

Because ERISA plans cannot be amended through informal communications, to find a promise of vested benefits, a court will look at the employer's welfare benefit plan documents, including the summary plan description, to determine an employee's rights under the plan. The Supreme Court, followed by several courts of appeals which include the Fourth, Fifth, and Seventh Circuits, has indicated that a modification that purports to vest welfare benefits must be both contained in the plan documents and be stated in clear and express language. See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co., 520 U.S. 510, 515 (1997).

The first place to look for "vesting" language is in the summary plan description (SPD). However, even if the employee clears the hurdle of identifying plan language that reasonably could be construed as promising lifetime welfare benefits, those benefits do not vest if the plan documents reserve the plan's right to cancel or amend the plan.

Courts are in general agreement that an unambiguous reservation of rights provision in an SPD generally negates a claim of vested retiree health benefits, as it is strong evidence that an employer did not intend to allow vesting. See Alday v. Container Corp. of Am., 906 F.2d 660, 665 (11th Cir. 1990) (holding that reservation of right to terminate or amend welfare benefits in SPD unambiguously manifested intent on the part of employer not to contractually vest welfare benefits). As courts have stated, employees cannot reasonably believe that benefits are vested when the same document that promises them the benefit also clearly informs them that the benefits may be amended or terminated. See Abbruscato v. Empire Blue Cross & Blue Shield, 274 F.3d 90, 99 (2d Cir. 2001).

Plan Provisions Supporting or Negating Vested Benefits

The following are examples of typical reservation of rights provisions that courts have held negate any inference that the employer intended for benefits to vest:

- Although the Company has established this Group Insurance Plan with the intention of continuing it indefinitely, the uncertainty under which all businesses operate, as well as possible future changes in the law, make it necessary for the Company to reserve the right to amend or terminate the Plan at any time. 
  

- Although the company expects and intends to continue the plan indefinitely, it reserves the right to modify, amend, suspend or terminate them at any time.
  
  *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 701 (7th Cir. 2003).

The following are examples of reservation of rights provisions that courts found to be "ambiguous" and
have allowed extrinsic evident to be presented on the issue:

The Company expects to continue this plan indefinitely, but necessarily reserves the right to amend, modify, or discontinue the Plan in the future in conformity with applicable legislation.


Control Data expects to continue the Long-Term Disability Plan indefinitely, but must reserve the right to change or discontinue it if it becomes necessary. This would be done only after careful consideration.

*Barker v. Ceridian Corp.*, 122 F.3d 628, 635-39 (8th Cir. 1997).

The Third Circuit found the following language *insufficient* to reserve the right to amend, modify, or terminate benefits with regard to employees who were terminated from employment:

>[R]eserves the right at any time and from time to time ... to amend, suspend, or terminate the Plan or any Component Plan for any reason, in whole or in part, and to adopt any amendment or modification thereto, all without the consent of any Employee or other person. However, the Company shall not have the right to amend or terminate this Plan or any Component Plan or any Benefit with respect to Benefit claims already incurred at the time of amendment, suspension, or termination.

*Adams v. Freedom Forge Corp.*, 204 F.3d 475, 483 (3d Cir. 2000).

The key to a successful reservation of rights clause is that it must be clear and unambiguous in retaining the employer’s unilateral, unqualified right to amend, change, or terminate benefits. The case of *Karl v. Asarco Inc.*, 2004 WL 2997872 (S.D.N.Y. Dec. 23, 2004), is illustrative of this point. The reservation of rights clause in this case stated:

> Your coverage under the Plan terminates when:

  - Your employment with the Company terminates; or
  - You no longer are eligible; or
  - The Group Policy terminates ....

The court held that this language did not unequivocably reserve defendants’ right to modify or amend the plan, as while the paragraph listed three circumstances that would cause the employee’s coverage under the plan to terminate, it did not unconditionally reserve the defendants’ right to unilaterally terminate the plan. Accordingly, there were issues as to whether the plaintiff’s benefit had indeed vested.

There is little doubt that an unambiguous reservation of rights clause is a formidable obstacle to vesting, but what happens when there is no reservation of rights clause in the plan documents? For several circuits, the complete omission of a reservation of rights clause from the documents (or “silence”) does not necessarily operate to waive the employer’s right to terminate or modify the available benefits under the position that any commitment must be stated in clear and express language. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993); see also *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004) (silence in the documents about the vesting of benefits means that the benefits are not vested).

**Extrinsic Evidence**

If the reservation of rights is couched in ambiguous terms, or if there is any other ambiguous language in the plan, a court may resort to extrinsic evidence to aid its interpretation of the plan and to resolve the ambiguity. However, if the language is not ambiguous, extrinsic evidence cannot be used to create

As with any issue of contract interpretation, the courts begin with the language of the contract to determine if an ambiguity exists and if extrinsic evidence is required. In most circuits, there must be both an ambiguous reservation of rights clause and language in the agreement to suggest a grant of lifetime benefits, before the courts will allow extrinsic evidence to be presented.

For example, many plans or contracts contain the phrase “benefits will continue” or “lifetime benefits.” However, if the employer or plan has retained an unambiguous reservation of rights, the fact that the benefit may have been described as a “lifetime” benefit for retirees is generally insufficient by itself to indicate vesting, as in this situation “lifetime” may be construed as “good for life unless revoked or modified.” See UAW v. Rockford Powertrain, Inc., 350 F.3d 698, 704 (7th Cir. 2003):

> We must resolve the tension between the lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them. Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible surviving spouses, the terms of the plan -- including the plan’s continued existence -- are subject to change at the will of [the employer]. The health insurance section of the plan description unambiguously does not provide the plaintiffs with vested lifetime health insurance benefits.

(Internal citations omitted.) See also In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig., 58 F.3d 896, 904 (3d Cir. 1995) (“An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits provided the plan continues to exist.”); Chiles v. Ceridian Corp., 95 F.3d 1505, 1512 n.2 (10th Cir. 1996) (“The weight of case authority supports the Unisys approach, that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits.”).

In the eyes of the law, the “lifetime” nature of a welfare benefit does not operate to vest that benefit if the employer reserved the right to amend or terminate the benefit, given what it takes to overcome the presumption that welfare benefits do not vest, combined with a court’s reluctance to “interpret a contract as being at war with itself.” Diehl v. Twin Disc, 102 F.3d 301, 307 (7th Cir. 1996). All courts allow extrinsic evidence to be presented if they determine that there is an ambiguous reservation of rights and language to suggest vesting. See Bidlack v. Wheelabrator Corp., 993 F.2d 603, 609 (7th Cir. 1993) (allowing parties to present extrinsic evidence to “disambiguate” a collective bargaining agreement’s health benefits provisions).

Once allowed, the type of extrinsic evidence considered by the court can take many forms, including not only handbooks, brochures, letters, and other documentation, but also informal communications such as oral promises made by human resources or other management employees; especially when those statements are in contravention of plan documents. United Steel Workers of Am., AFL-CIO v. Newman-Crosby Steel, Inc., 822 F.Supp. 862, 865-66 (D.R.I. 1993) (considering oral statements as extrinsic evidence of parties’ intent in construing ambiguous terms of collective bargaining agreement); Schonholz v. Long Island Jewish Medical Center, 87 F.3d 72, 78, 80 (2d Cir. 1996) (considering two letters as to a promise of vested benefits).

In the case of collective bargaining agreements, courts will also allow extrinsic evidence in the form of other contractual provisions and even actions of the union to determine the construction of ambiguous terms. See UAW Local 134 v. Yard-Man, Inc., 716 F.2d 1476, 1480 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984) (interpreting ambiguous terms in collective bargaining agreement concerning vesting of retiree benefits by examination of the context of the other provisions of the agreement); United Steel Workers of Am., AFL-CIO v. Textron, Inc., 836 F.2d 6, 9-10 (1st Cir. 1987) (holding that promise to pay retirees’ insurance costs throughout retirement even after the collective bargaining agreement expired
provided proof of meaning of contract language); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989) (finding that retiree benefits vested in collective bargaining agreement in part because “employees [were] willing to forego current compensation in expectation of retiree benefits”). Other courts have held that the payment of retiree health care benefits during periods when no contract was in effect is extrinsic evidence of an intent to provide lifetime health care benefits. *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1225 (9th Cir. 1984).

**Vesting Presumptions**

As noted earlier in this article, almost all jurisdictions hold that, although the law does not require the vesting of health insurance plans, as it does for pension plans, employers may create vested rights in such benefits when the intent is expressed unambiguously. From that starting point, however, several different approaches have emerged.

The Seventh Circuit in *Bidlack* established a presumption that an employee’s entitlement to such benefits expires with the agreement creating the entitlement, rather than vesting, but that the presumption can be knocked out by a showing of genuine ambiguity, either patent or latent, beyond silence. *Bidlack*, supra, 993 F.2d at 606-07. As Judge Posner remarked in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 638, 544 (7th Cir. 2000), the presumption against vesting is defeated by “any positive indication of ambiguity, something to make you scratch your head.”

Some courts presume vesting of benefits if there is some ambiguity in the language conferring the benefit. *E.g.*, *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 914-17 (6th Cir. 2000). Other courts insist that a presumption of vesting can only occur when there is some express language to that effect. *E.g.*, *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Skinner Engine Co.*, 188 F.3d 130, 139-47 (3d Cir. 1999) ("Skinner"); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994). Some circuits presume nothing. *E.g.*, *Deboard v. Sunshine Mining & Refining Co.*, 208 F.3d 1228, 1240-41 (10th Cir. 2000); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999); *Barker v. Ceridian Corp.*, 122 F.3d 628, 634-38 (8th Cir. 1997); *Int'l Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 231-32 (5th Cir. 1997).

The courts imposing a presumption against vesting base that approach largely on their construction of ERISA – drawing an adverse inference from Congress’ decision to require vesting for pension rights, but not to include a comparable requirement for welfare benefits. *See, e.g.*, *Skinner*, 188 F.3d at 137-38; *Wise*, 986 F.2d at 935.

Conversely, those courts that impose a presumption in favor of vesting rely on the status-based nature of retirement benefits and shift the burden to the employer to disprove vesting based on a contractual ambiguity. *See Maurer*, 212 F.3d at 914-17 (reiterating holding of *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)) (seminal case articulating view that retiree benefits are “status” benefits which carry with them an inference that they continue so long as the prerequisite status is maintained).

Courts have found that the following language is capable of creating a vested benefit in retirees:

> The Company shall contribute the full premium or subscription charge for health care, ... coverage ..., for ... a retired employee and his eligible dependents provided such retired employee is eligible for benefits under Article II of the ... Pension Plan.


> Retired employees after completion of twenty years of full-time permanent service and at least age 55 will be insured ....

*Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d. 76, 83 (2d Cir. 2001).
Courts have found that the following language is ambiguous and have allowed extrinsic evidence to be presented on the issue of vesting:

While on long term disability status the company will pay the premiums for all the company-sponsored benefits (medical, life and dental) for which you and your dependents were allowed before your disability began. The company will continue paying all premiums until you and your dependents are no longer eligible for the plans.

*Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996).

Company will continue to cover such eligible retired employees.


Health insurance and dental "... coverage remains in effect as long as you or your surviving spouse are living" and "if a retired employee dies, the surviving spouse will have basic coverage continued for his or her lifetime at no cost."

*Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 785 (7th Cir 2005)

Courts have found the following language insufficient to create a vested benefit for retirees:

When a Retired Employee dies who has selected a joint and survivor form of pension, the above coverage shall continue for the surviving spouse and dependent children until the earlier of the surviving spouse’s death or remarriage ....

*John Morrell & Co. v. United Food and Commercial Workers, Int’l*, 37 F.3d 1302, 1312 (8th Cir. 1994).

**Theories of Recovery**

Claims for denial of benefits are generally brought pursuant to section 502(a)(1)(B) of ERISA, which permits a civil action by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” Essentially, plaintiffs assert under this section a “contractual right under a benefit plan.”


Case law makes clear that even if a court rejects an ERISA benefit claim, a party may nevertheless pursue a breach of fiduciary duty cause of action. *See In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig.*, 57 F.3d 1255, 1264 n.13 (3d Cir. 1995) (“Unisys I”). Any examination of ERISA fiduciary duties should start with the statutory text. The first ERISA section applicable to misrepresentation and related claims is 29 U.S.C. §1104(a) (hereinafter “ERISA § 404”). It provides in relevant part:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims ....

This charge imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan’s participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation. *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984). Furthermore, when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries. *Unisys I*, 57 F.3d at 1264 .
To establish a claim for breach of fiduciary duty based on alleged misrepresentations concerning coverage under an employee benefit plan, a plaintiff must show: (1) that the defendant was acting in a fiduciary capacity when it made the challenged representations; (2) that they constituted material misrepresentations; and (3) that the plaintiff relied on those misrepresentations to their detriment. See Unisys I, 57 F.3d at 1266; McMunn v. Pirelli Tire, LLC, 161 F.Supp.2d 97, 120 (D. Conn. 2001). Thus, the breach of fiduciary claim focuses not on the company’s failure to continue to provide lifetime or continued benefits, but on its conduct or actions in leading employees to believe that the plans did provide these benefits.

Generally an employer may modify or terminate its retiree benefit plan without implicating fiduciary duties, see Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996), but the law in most circuits instructs that “when a plan administrator explains plan benefits to its employees, it acts in a fiduciary capacity.” Unisys I, 57 F.3d at 1261 n.10. Courts have found that once an ERISA beneficiary has requested information from a fiduciary who is aware of the beneficiary’s status and situation, the fiduciary has a duty to convey complete and accurate information, even if that requires conveying information about which the beneficiary did not specifically inquire. See Krohn v. Huron Memorial Hosp., 173 F.3d 542, 548 (6th Cir. 1999).

“[A] misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision in pursuing disability benefits to which she may be entitled.” Krohn, 173 F.3d at 547 (citing Unisys I, 57 F.3d at 1264.) Misleading communications to plan participants “regarding plan administration (for example, eligibility under a plan, the extent of benefits under a plan) will support a claim for a breach of fiduciary duty.” Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992).

The Sixth Circuit case of Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998), analyzed a possible breach of fiduciary duty in terms of three disjunctive conditions. A breach of fiduciary duty occurs if (1) an early retiree asks a plan provider about the possibility of the plan changing and receives a misleading or inaccurate answer, or (2) a plan provider on its own initiative provides misleading or inaccurate information about the future of the plan, or (3) ERISA or its implementing regulations required the employer to forecast the future and the employer failed to do so. Id. at 405-06. Based on this analysis, Sprague concluded that there was no breach of fiduciary duty because none of these conditions were met.

In Pirelli, the Sixth Circuit held that a breach of fiduciary duty claim was made where a company – both of its own accord and in response to specific employee inquiries – misrepresented to employees that a reservation of rights clause in the plan did not allow retirement benefits to be changed when the legal effect of the clause was precisely the opposite. James v. Pirelli, 305 F.3d 439, 455-56 (6th Cir. 2002).

In Unisys I, the Third Circuit found the plaintiffs could maintain a claim for breach of fiduciary duty under ERISA, since “Unisys affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life.” Unisys I, 57 F.3d at 1264.

Not all misleading communications constitute affirmative or material misrepresentations. In Varity Corp. v. Howe, 516 U.S. 489 (1996), the Court held that when a company intentionally misleads beneficiaries about the future of their benefits, the company is acting as a fiduciary; but also cautioned that a company does not act as a fiduciary “simply because it makes statements about its expected financial condition or because “an ordinary business decision turned out to have an adverse impact on the plan.”” Id. at 505.

The Second Circuit, which has given the broadest scope to ERISA fiduciary duty claims, has held that representing to plan participants that a plan’s benefits are “lifetime” when they are not vested can create a genuine issue of material fact as to whether misrepresentations were made or whether there was a failure to provide complete and accurate information. Abbruscato v. Empire Blue Cross, 274 F.3d 90, 102-03 (2d Cir. 2001).
This is inapposite to the Seventh Circuit case of Frahm which has held that advice to employees stressing the availability of “lifetime” benefits without any qualifiers indicating that the employer reserved the right to change or terminate the benefit was not a breach of fiduciary duty. Frahm v Equitable Life Assur. Soc’y, 137 F.3d 955, 959 (7th Cir. 1998).

There is no dispute that both equitable and promissory estoppel are valid legal theories of recovery in the ERISA context. However, it should be noted from the onset that, in general, principles of estoppel cannot be applied to vary the terms of unambiguous plan documents; estoppel can usually only be invoked in the context of ambiguous or unwritten plan provisions coupled with oral representations. Bakery Confectionary Union & Indus. Int’l Pension Fund v. Ralph’s Grocery Co., 118 F.3d 1018, 1027 (4th Cir. 1997) (doctrine cannot operate to alter the written terms of an ERISA-regulated plan); Algren v. Pirelli Armstrong Tire Corp., 197 F.3d 915, 917 (8th Cir. 1999) (any federal law claim of estoppel, whether under federal common law or ERISA itself, must fail because the representations relied upon are contrary to the plain and unambiguous language of the plan documents).

The elements of equitable estoppel are “(1) material representation, (2) reliance and (3) damage.” See Lee v. Burkhart, 991 F.2d 1004, 1008 (2d Cir. 1993). The elements of promissory estoppel are “(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.” Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 151 (2d Cir. 1999).

In all circuits, both theories require that a plaintiff also demonstrate the existence of extraordinary circumstances, such as an intentional inducement that goes beyond the concept of reasonable reliance. See Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1318-19 (3d Cir. 1991) (claim for equitable estoppel available under § 502(a)(3) in “extraordinary circumstances”); Aramony, 191 F.3d at 151 (requiring the “extraordinary” element to lessen the danger that commonplace communications from employer to employee will routinely be claimed to give rise to employees’ rights beyond those contained in formal benefit plans).

Although “extraordinary circumstances” has not yet been specifically defined, it usually requires that “surrounding circumstances are indeed beyond the ordinary.” Aramony, 191 F.3d at 152. The circuits have generally found “extraordinary circumstances” where an employer promised benefits to an employee in bad faith in an intentional inducement to take some action, and the employer later reneged on its promise. See Jordan v. Federal Exp. Corp., 116 F.3d 1005, 1011 (3d Cir. 1997) (finding that “extraordinary circumstances generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant change in the plan, or commission of fraud”); Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76, 86 (2d Cir. 2001) (upholding estoppel claims where defendant intentionally promised lifetime life insurance benefits to lure (and retain) employees away from other firms paying higher salaries); Abbruscato, 274 F.3d at 101 (finding that defendants intentionally induced plaintiffs to take early retirement and forego future years of salary and the opportunity to obtain other life insurance as sufficient to satisfy “extraordinary circumstances” standard); Schonholz, 87 F.3d at 79-80 (finding “extraordinary circumstances” where the employer used promised severance benefits to induce the plaintiff to retire).

With regard to estoppel claims, the courts first look to the plan documents, and if the documents unambiguously reserve the right to deny, change, or terminate benefits, the employees’ estoppel claim must fail because they cannot show reasonable reliance. The Third Circuit’s decision in In re Unisys Corp. Retiree Medical Benefits “ERISA” Litig., 242 F.3d 497 (3d Cir. 2001) (“Unisys II”), is indicative of this position. Applying this standard to the facts, the Unisys II court held that due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could terminate its retiree medical benefit plans, the regular retirees cannot establish “reasonable” detrimental reliance based on an interpretation that the SPDs promised vested benefits. The retirees’ interpretation of the plans as providing lifetime benefits is not reasonable as a matter of law because it cannot be reconciled with the unqualified reservation of rights clauses in the plans.
Id. at 501, citing Unisys I, 58 F.3d at 904-06.

The Second Circuit has allowed estoppel claims even if the plan contains an unambiguous reservation of rights when the employees’ reliance is reasonable based upon responses made by management personnel to their specific questions about the retirement program. McMunn, 161 F.Supp.2d at 132.

The prerequisite of the claim being “extraordinary” is difficult to overcome, as indicated in the Second Circuit decision of Devlin v. Transportation Communications Int’l Union, 173 F.3d 94 (2d Cir. 1999). In Devlin, retired union employees challenged their former employer’s amendment of a welfare benefit plan to require retirees to pay a monthly premium for medical benefits – benefits which were previously provided at no charge. As part of their evidence, the retirees proffered numerous oral and written communications in which they had been told their health benefits would be provided throughout their retirement and that their health benefits would always be free.

The Second Circuit assumed that the retirees could satisfy the material misrepresentation element. However, the court rejected the claim based on its view that the retirees had failed to adduce evidence sufficient to show detrimental reliance or extraordinary circumstances:

Admittedly, there is evidence in this record to support the notion that some employees – though not necessarily any of the appellants – considered the promised medical benefits in timing their retirements. But reliance is one of the four basic elements of promissory estoppel, and would not by itself render this case “extraordinary”.... In the instant case ... there is no evidence to suggest that appellees sought the retirement of any of the appellants, or that the promise of free, lifetime health benefits was used to intentionally induce any particular behavior on appellants’ part.

Id. at 102.

Conclusion

Unless there is an extenuating circumstance such as a collective bargaining agreement, companies are generally not legally obligated to maintain benefits. Accordingly, a growing number of employers, faced with increasing health care costs and an equally increasing retiree population, are curtailing retiree benefit coverage.

The cases in this article demonstrate the necessity of both a clear and concise “reservation of rights” provision to change or terminate benefits and, more importantly, of employer control over any communication, oral or written, regarding the permanent nature of the benefits.

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