

Economic Forces Push ERISA Into Forecourt

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Now, Shippenberg is one of four retirees leading a suit against the company, charging that the change in the terms of the plan violates the Employee Retirement Income Security Act, "ERISA," the federal statute that regulates pension and employee welfare benefits plans.

"They promised us, and I stress, in writing and verbally, that you and your wife would receive, at no cost, medical and dental insurance and this would continue for your lifetimes," says Shippenberg. "You don't promise and then renege on a promise."

Shippenberg's suit, which seeks class-action status, is one of a growing number of ERISA claims fast finding their way into Connecticut courts as corporate cutbacks chip away at employee benefits.

Connecticut's federal court does not keep a separate count of ERISA claims, but both plaintiff and defense employment lawyers in Connecticut say legal and economic shifts are turning ERISA into a staple of their practice.

"You've got both the plaintiffs bar and the defense bar focusing on it and saying 'Wow,'" says Linda L. Yoder, an associate with Hartford's Shipman & Goodwin, which recently formed a six-person ERISA litigation team.

Sorting Out the Law

ERISA has waited a long time to get its day in court.

A voluminous statute—it has been compared in complexity to the tax code—ERISA was shunned by most employment litigation lawyers after its 1974 creation. Enforcement fell largely to the oversight of the Internal Revenue Service and the U.S. Department of Labor, as plaintiffs attorneys found the statute unattractive on several counts.

Circuit courts have limited emotional distress and punitive damages and have made it difficult to recover attorneys' fees. ERISA's pre-emption clause invalidates many state claims, and there is no statutory right to a jury trial.

Though these disincentives still stand—plaintiff-oriented amendments to ERISA failed to pass in Congress this year—other legal trends appear to be fostering ERISA filings.

Plaintiffs' lawyers who had pursued cases of sex, race and religious discrimination in employment under Title VII of the 1964 federal Civil Rights Act now say that type of class-action work is drying up, as employers have become more law-abiding and the U.S. Supreme Court has increased plaintiffs' legal burdens.

And ERISA lends itself to class-action suits, as an employer's change in a benefits plan can affect hundreds of workers in one fell swoop.

"Plaintiffs' lawyers like myself who are interested in helping a lot of people at once now find ERISA a natural place to look," says David N. Rosen, name partner in New Haven's Rosen & Dolan, which handles employment work along with personal-injury and civil-rights litigation. Rosen this year filed a suit with ERISA claims on behalf of 19 plaintiffs against Stamford-based Pitney-Bowes, and he says he expects to handle many more ERISA cases in the future.

"You have to swim in the ERISA ocean," Rosen says.

While plaintiffs' lawyers warm up to ERISA, employers' attorneys say they also are discovering how ERISA, originally intended to protect employees' pension rights, is actually advantageous to their corporate defendant clients, primarily because it pre-empts state tort claims and prohibits punitive damages.

"In the last year we have been using ERISA very aggressively, raising it in cases that are not filed as ERISA cases," says Yoder of Shipman & Goodwin, which has used ERISA in representing Blue Cross & Blue Shield of Connecticut, Aetna Life & Casualty and CIGNA in litigation over health insurance coverage.

Economic forces also appear to be driving ERISA work, both in the employment and health benefits areas. Corporate measures aimed at cost cutting in this declining economy—cost containment devices in benefits plans, early retirement packages and layoffs—all can give rise to ERISA claims.

With benefits a major part of compensation and medical costs on the rise, employees who lose their jobs or have trouble getting insurance companies to foot their medical bills are often motivated to litigate.



Victoria de Toledo, a plaintiffs' employment lawyer, says ERISA now accounts for half of her employment cases compared to about 10 percent four years ago.

"As your employee benefits replace the equity in your house as the greatest asset, you're going to see more cases," says Charles Pillsbury, an ERISA plaintiffs' lawyer for eight years and a member of the advisory board to the National Pension Assistance Project, a Washington, D.C., legal assistance program aimed at helping workers and retirees protect their pension rights.

All these factors are leading to the creation of ERISA law in circuits throughout the country. But the ground for ERISA claims in Connecticut is particularly fertile: The state's economic problems are creating an ERISA-friendly climate; Connecticut is home to many of the corporate headquarters where employee-benefits policymaking occurs; and the 2nd Circuit is one of only two federal circuit courts in the country in which attorneys' fees are consistently awarded when a plaintiff prevails in ERISA litigation.

Lawyers who deal with ERISA are thriving on the excitement of presenting untested issues and making new law. But in the process, they are encountering the unforeseen roadblocks and pitfalls that are bound to arise in uncharted territory.

"The law is in such a state of development, you can't just look at a case and say it's clear under the law if you're going to win," says Yoder. "The circuits are split on even the most basic issues. It's going to be an active area of law until it all gets sorted out."

An ERISA Plan—Or Is It?

The retirees' claim against Combustion Engineering highlights the type of complications that can shoot up in the lifetime of an ERISA case.

Combustion allegedly induced hundreds of employees throughout the country to retire between 1983 and 1985 by offering, among other things, compa-

ny-paid medical and dental coverage for life.

Since Jan. 1, 1990, the retirees who took the deal several years ago have been required to pay \$19.50 per person per month in premiums. A small group of the retirees is determined to see that the company, which was purchased last year by Swiss-based Asea Brown Boveri Inc., keeps what they say was its word.

But waging an ERISA case is no easy task, for client or attorney.

The Combustion plaintiffs have formed an eight-person committee that works on an almost daily basis to gather information and financial support from Combustion retirees throughout the country.

Judy D. Rintoul, an associate in the Rocky Hill law offices of Igor I. Sikorsky Jr. and the lawyer who filed the Combustion case, says many potential ERISA plaintiffs do not have the energy to complete the legwork critical to an ERISA case, especially when they have trouble understanding their legal claim.

"They usually decide it's too much work and they just walk out," says Rintoul.

While the Combustion retirees try to do their share of fact finding, the motions filed thus far in U.S. District Court in New Haven indicate the makings of a contentious battle in the case, called *Devine, et al. v. Combustion Engineering, Inc. and Asea Brown Boveri, Inc.*

Combustion employees believe they know what they were told: that the plan under which they were retiring, called the Voluntary Separation Incentive Program, or VSIP, promised a lifetime of medical and dental coverage at the company's expense.

But the court must decide whether VSIP is actually an independent legal plan under ERISA or whether it was an

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outgrowth of ERISA plan documents already on file with the U.S. Department of Labor.

The company claims VSIP was only a description of benefits already conferred in a master plan that had been on file with the Labor Department, in compliance with ERISA, before the VSIP offering. That master plan reserved the company's right to modify benefits, and summaries of the master plan were distributed to the plaintiffs, the company says.

"The plan documents under which plaintiffs received their benefits contained a clear reservation of the company's right to amend the documents," says Gregory C. Braden of Alston & Bird in Atlanta, the firm representing ABB. "The summaries of those documents were distributed to the plaintiffs."

Adds Braden: "The VSIP documents are consistent with the plan documents."

The plaintiffs counter that the information they received about VSIP did not indicate that the company reserved the right to change the plan. They insist that VSIP should have been filed with the U.S. Department of Labor as a new plan or plan amendment. Failure to file constitutes an ERISA breach, they say.

If Combustion prevails, it will try to have the entire case dismissed, on grounds that all other state law claims are pre-empted in an ERISA case.

Everyday ERISA

Not all ERISA cases are as extensive as the Combustion case, which demands \$350 million in damages and could conceivably affect several hundred retirees. In many employment cases, ERISA is



Dru Nadler

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just another factor in administrative negotiations between an employee and employer.

Victoria de Toledo, a plaintiffs' employment lawyer and name partner in Stamford's Casper & de Toledo, says that where four years ago ERISA was an issue in about 10 percent of her employment cases, mostly severance, now it arises in about half.

"ERISA is really just part of employment discrimination claims," says de Toledo. "A good many of the cases I settle with in-house counsel."

Those that do reach court are not nec-

essarily class action and are not always litigated ultimately on the ERISA claim.

A Bridgeport ERISA case against Société National Elf Aquitaine, the Paris oil conglomerate that purchased Stamford-based Texasgulf Inc. in 1981, was brought on behalf of only one plaintiff and has been pursued primarily as a breach-of-contract case.

Since 1974, Texasgulf had provided 80 percent reimbursement for medical and health-care expenses to all retirees and 100 percent reimbursement to senior executives. But in April of this year, former chief executive officer Richard D. Mollison was informed that senior executives' coverage would be pared back to the general 80 percent.

Mollison, 74, who along with his wife has been treated for serious illnesses, including cancer, claims the company breached its contract and violated ERISA. The company contends it maintained a right to modify the benefits plan.

In August, U.S. District Judge T. F. Gilroy Daly granted a preliminary injunction against the company, but only on grounds that Mollison established a "strong likelihood" of success on the breach-of-contract claim. The judge did not address the ERISA issue.

"My ERISA claim is just sort of an ancillary claim," says Marilyn J. Ward Ford, a University of Bridgeport School of Law professor who represents Mollison. "Most courts are not going to want to get bogged down in the morass of ERISA."

Settlement negotiations are continuing.

Whether to Tap ERISA

In Mollison's case, Ford pursued the matter primarily as a breach of contract, with ERISA an added option. But often the choice is being made for the plaintiffs.

Though ERISA can lie adjacent to other federal claims, like those brought under the Age Discrimination in Employment Act, the statute often pre-empts state remedies that plaintiffs' lawyers would otherwise like to keep alive alongside ERISA.

The U.S. Supreme Court in 1987 unanimously ruled in *Pilot Life Ins. Co. v. Dedeaux* that ERISA pre-empts most relevant state law, which often holds more fruitful plaintiff remedies. Defense lawyers have been trying to make the most of that interpretation.

"ERISA has been a big bonus for defense lawyers," says Cynthia K. Courtney, counsel in the litigation department at CIGNA and formerly an ERISA litigation lawyer at Shipman & Goodwin. "That pre-emption provision is what defense lawyers woke up and discovered."

De Toledo, the Stamford plaintiffs' employment lawyer, says many of her severance claims used to be straightforward contract matters. Now, she expects defense lawyers to be looking for ERISA pre-emption at every turn.

"More and more you see . . . courts saying no, you can't bring this as a contract claim," says de Toledo.

While at Shipman & Goodwin, Courtney argued the first Connecticut case in which claims under state laws, including the Connecticut Unfair Trade Practices Act and the Connecticut Unfair Insurance Practices Act, were all dismissed after a federal magistrate ruled that ERISA pre-empted.

In that 1988 case, *Stone v. Blue Cross & Blue Shield of Connecticut*, plaintiff Fern B. Stone sought damages for the insurance company's alleged failure to honor its contractual responsibility to pay her medical bills. But federal Magistrate Arthur L. Latimer ruled, "Neither plaintiffs' common law nor statutory claims can survive ERISA's pre-emptive force."

Defense Uses ERISA to Pre-empt State Claims

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Salvaging ERISA

To be sure, ERISA does not necessarily mean a plaintiff's doom.

Last week, in a ruling believed to be the first of its kind in Connecticut, a plaintiff in an ERISA "Section 510" suit won a right to a jury trial.

In *Weber v. Jacobs Manufacturing Co.*, plaintiff Edward M. Weber alleges his employer fired him purposefully to avoid paying health benefits, an action prohibited by ERISA Section 510.

Weber's attorney, associate JoNel Newman of New Haven's Garrison, Silbert & Arterton, argued that Weber should be entitled to a jury trial because his claim is essentially one of wrongful discharge, an action based on contract principles that would routinely hold a right to a jury trial.

That, according to Newman, distinguishes Section 510 claims from most ERISA claims that request a jury trial. Those disputes center on the benefits available under the plan and more clearly fall under the equitable law of trusts, where the right to a jury trial is usually deemed unavailable.

"The fact that ERISA grants plaintiffs a federal right and a federal forum in which to pursue interests previously protected only by state tort and contract law in no way changes the essential nature of his claim," argued Newman in her brief. "It would be anomolous if the ERISA statute, designed to expand protections for vulnerable workers, were to be interpreted to deprive unjustly discharged workers of their right to a jury trial."

U.S. District Judge T. Emmet Clarie relied on a 1990 U.S. Supreme Court

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decision, *Teamsters Local 391 v. Terry*, to find that the Seventh Amendment allows a jury trial in cases where both the issues of the case, and the remedies sought, compensatory damages, are legal in nature.

"It's a very significant decision," says Newman. "I think that it will encourage other plaintiffs' lawyers to consider bringing an ERISA 510 action."

ERISA will also continue to be a key player in health benefits cases, in which a worker or retiree disputes the extent of coverage to which his employer or insurance company says he is entitled.

Courtney, counsel at CIGNA, says she anticipates more litigation as cost-conscious employers impose "cost containment" devices in their medical

plans. Such programs would require, for example, that a patient receive company approval before being admitted to a hospital for treatment. Once admitted, the company might review a patient's status to determine the appropriate length of stay.

"I think it's going to spark litigation," says Courtney. "That's where you're probably going to see the next wave."

For Courtney, who has handled ERISA litigation for four years, the prospect of another wave of ERISA caselaw is what makes this budding field so exciting.

"It's just moving in 10 directions at lightning velocity," she says. "It's great." ■