

Amending the Plan

In General

The plan document may be amended by the company at any time and such changes are binding on all of the covered persons.

Reduction In Plan Benefits

Employers often consider the reduction of plan benefits for both active and retired participants in an effort to control plan costs. Such deductions are possible of some circumstances; the reductions must be done carefully or the plan might find itself in legal difficulty.

Reasons for Benefit Reductions

These are the usual reasons why an employer would consider a reduction in plan benefits:

- COBRA burdens.
- FASB retiree reserve requirements.
- Corporate mergers or acquisitions.
- New medical procedures.
- Rising and uncontrolled medical costs.

Legal Considerations

In General

There are three legal objections to a reduction in benefits:

- Breach of fiduciary duty.
- Breach of employer's contractual obligation to the participants.
- Breach of statutory obligation of employer to provide benefits.

Fiduciary Breach

Welfare plans, under ERISA, differ from pension plans in this way: welfare benefits need not ever be vested. For there to be an ERISA fiduciary breach in a benefit reduction, it must occur in one of these ways:

- General fiduciary standards of ERISA, Title 1, Part 4.
- Interference with participants' rights set forth in ERISA § 510.
- Reporting and disclosure standards of ERISA Title 1, Part 1.

General Fiduciary Standards. Some will agree that the employer would breach its fiduciary obligation by reducing a plan benefit. The courts have generally held, however, that cutbacks do not necessarily constitute an ERISA breach by employer.

Employers Cut Back Retiree Medical Benefits. No mention was made of ERISA fiduciary standards. Employers have a right to make a business decision to modify or amend the plan. ERISA demands only that, whatever the plan, it be operated in a fair manner. To modify the plan is clearly not a fiduciary breach.

Recent AIDS-Related Court Cases. In both *Storehouse* and *McGann*, the plan was permitted to reduce the benefits for AIDS by means of a plan amendment, the effect of which would be to reduce or cut out benefits for ongoing AIDS patients. In both cases, the court honored the employer's legitimate business interest for modifying the plan benefit. In both cases, the court was mindful of the need for the plan's solvency to be protected. ERISA, after all, was legislation primarily aimed at the fostering of sound funding.

Employer Changed Terms of an Unwritten Severance Pay Plan. In other cases, there was clear plan document language which permitted the employer to fully amend the plan. Here, the employer amended the plan where there was no clear plan language because the plan document did not exist. Even so, the court permitted the unwritten plan (even though technically in violation of ERISA) to be amended. The court should not use ERISA fiduciary standards to judge the appropriateness of plan modifications.

Application to the Escape Clause. The escape clause is one which says that the plan is always secondary to other health care plan benefits. The court held that this clause was in violation of ERISA's fiduciary standards; its inclusion is impermissible conduct. The court believed putting in the escape clause violated the arbitrary and capricious standards to which fiduciaries should abide. No compelling logic of plan or employer financial survival could be found in this instance. It must be noted that the case being cited was a Taft-Hartley plan. A single employer plan put in the escape clause in its retiree benefits and had such challenged by the retirees. The court held that such modification did not constitute a fiduciary breach. These two cases highlight the distinction which the court will make between negotiated and single employer plan.

Statutory Objections to Benefit Reductions

There are numerous statutory roadblocks to benefit reductions which must be considered.

ERISA § 510-Interference with Participant Rights. ERISA demands that the participant's rights not be interfered with. Usually a benefit reduction will not be interference for these reasons:

- Employer does not do a prohibited act.
- Employer's act is not done for the purpose of interfering.
- Employer's right was not interfered with because there never was a right.

Americans with Disabilities Act of 1990. Reduction of benefits will need to be reconsidered when this law goes into effect which was July 26, 1992 for employers with 25 or more employees. In effect, the plan may not discriminate in benefits against the handicapped. Exactly how the ADA will effect benefit reduction will be determined by

forthcoming regulations and court decisions. It is known that the ADA will permit these plan provisions:

- Preexisting conditions.
- Include limitations for mental/nervous disorders.
- Benefit limitation for certain procedures so long as they are uniformly applied.

The law also specifically allows design and administration which conforms to standard actuarial and underwriting practices; this could mean that benefit reductions would not be acceptable but substandard ratings are (for AIDS, e.g.) to be acceptable. It is simply too early to tell what effect the ADA will have-which in any event is some time off.

Labor Laws. Clearly, the courts permit an employer to terminate a negotiated plan after the termination of the labor contract. Exceptions would be where the labor agreement states that some or all of the benefits should be continued, such as retiree benefits.

State Laws. Most state insurance laws would present an employer from reducing benefits except at renewal; numerous state court decisions have denied plans the right, even at renewal, to reduce plan benefits for those currently receiving such benefits. With a self-funded plan, any state law or court decision would be preempted by ERISA.

Sex and Age Discrimination. Care must be taken to see that de facto discrimination by age, sex, race, etc. does not occur. To reduce benefits which would be used primarily by an older person, e.g., could be held by the EEOC to be discriminatory. Certain rules may be followed in these areas:

- ERISA does not preempt state pregnancy laws which are more strict than the federal laws.