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Contingent Workers: A Full-Time Job for Employers, Benefit Plan Administrators and the Courts

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CONTINGENT WORKERS: A FULL-TIME JOB FOR EMPLOYERS, BENEFIT PLAN ADMINISTRATORS AND THE COURTS

Richard J. Freddo*

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* The author is a graduate of SMU School of Law, class of 1999. He wishes to thank his wife, Lisa, and son, Alex, for their patience and understanding while daddy has been thousands of miles away working towards his dreams. To the law school experience the author owes his five-year-old's profound observation of the American Dream: "Mommies work and daddies go to school."

I. SCOPE OF ANALYSIS

THE United Parcel Service Strike of 1997 drew attention to the impact of part-time workers on the economic functioning of corporations in the United States. In light of the reality that part-timers, independent contractors, leased employees, and other members of the "contingent workforce" play a major role in corporate America, a recent decision of the Ninth Circuit was met with a collective gasp by employers when it seemingly held the use of the contingent workforce to be a contemptuous practice.

This Comment focuses on the impact of classification of workers on the benefits required to be provided to the members of the contingent workforce. It takes an in-depth look at the approaches of the various circuits that have addressed the issue, their reasoning, and their analyses. Of course, the courts' treatment of any particular case does not, and cannot, occur in a vacuum. This Comment emphasizes the specific factual scenarios which have led to litigation in the various circuits. Numerous factors may cause a court to hand down a particular decision on any given day, and the social, political, and economic views of a court will necessarily influence that court's decision. In some areas of contemporary significance, such factors may even play a substantial role. However, but for the particular fact pattern of a given case, the result might very well be different. One of the goals of this Comment is to demonstrate to the practitioner, the employer, and the casual reader alike that the way "employment" arrangements are structured, and as a last resort, litigated, may tip the hat in favor of one party or the other, regardless of the views held by any particular court.

In the final analysis, this Comment will demonstrate that it is up to those employers and their legal representatives to take control of shaping their workforces within the limits of this dynamic and sometimes controversial area of the law. In the area of employment law, perhaps more so than others, the Supreme Court's caution that "'bad facts make bad law,' [and] so too odd facts make odd law"¹ is particularly applicable. It is the responsibility of the employers and their representatives to create *good* facts that will result in the application of *good* law.

II. INTRODUCTION AND BACKGROUND

A. THE UNITED PARCEL SERVICE STRIKE

The 1997 strike by the Teamsters Union against United Parcel Service,

1. *Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting). Though used in the context of a criminal law case, this quote seems to be quite appropriate and applicable to the interesting and sometimes bizarre fact patterns that surround many of the cases in the employee benefits arena.

America's largest strike in three decades,² has brought the issue of employer flexibility in hiring and employee benefits into the spotlight.³ "The walkout against United Parcel Service stemmed from the inevitable clash of two powerful forces in the nation's economy: the revitalized labor movement's opposition to the use of part-time workers and corporate America's insistence that it needs such workers to remain competitive."⁴

To remain successful, "[c]ompanies will fight to keep the flexibility that they achieved in the past decade to dictate where, when, and how to produce products and services."⁵ In an age when flexibility and speed are corporate necessities, United Parcel Service and others see part-timers as an "economic lifeline."⁶ At United Parcel Service, success has stemmed in part from an aggressive growth plan based on hiring large quantities of part-time workers in an effort to keep costs low.⁷ "Growing labor costs threaten a cut in profits and pressure to raise prices."⁸

On the other hand, it is argued that corporate profits at the expense of employee well-being "is not the right direction for America . . . our communities, . . . [or our] working families."⁹ "There are no part-time mortgages [and] . . . no part-time loan payments."¹⁰ The disgruntled note a sense that job security has vanished.¹¹

While the United Parcel Service strike provides a useful case study of the effect of part-time workers on the economy, it does not complete the picture. The mounting concern over the imbalance between corporate wealth and employment classification actually considers a much wider field.¹² It is this broader category of workers, the "contingent workforce," that comprises the subject of the remainder of this Comment.

2. See *The Teamsters and UPS: America's flexible labour market is a wonderful thing, so long ads firms handle their employees wisely and equitably*, *ECONOMIST*, Aug. 16, 1997, at 14, available in 1997 WL 13361151.

3. See Janine Jackson, *Business-as-usual Labor Coverage*, IN *THESE TIMES*, Sept. 22, 1997, at 8 (noting that the strike "forced the media to report on the shake-down in the American workplace").

4. Steven Greenhouse, *The U.P.S. Walkout: News Analysis; High Stakes for 2 Titans*, *N.Y. TIMES*, Aug. 5, 1997, Late Edition at A1.

5. Paul Magnusson et al., *A Wake-up Call for Business*, *BUS. WK.*, Sept. 1, 1997, at 28, available in 1997 WL 8271479.

6. See Greenhouse, *supra* note 4.

7. See Aaron Bernstein, *At UPS, Part-time Work is a Full-time Issue*, *BUS. WK.*, June 16, 1997, at 88, available in 1997 WL 8270406.

8. James C. Cooper & Kathleen Madigan, *Shoppers are Back Stoking the Economy's Fire*, *BUS. WK.*, Sept. 1, 1997, at 25, available in 1997 WL 8271477.

9. Greenhouse, *supra* note 4 (quoting Rand Wilson, spokesman for the Teamsters Union).

10. Jennifer Wells et al., *Labor's Rising Tide: As the economy improves, unions demand their share*, *MACLEAN'S*, Sept. 15, 1997, at 58, available in 1997 WL 14335860 (quoting Darrell Tingley, president of the Canadian Union of Postal Workers).

11. See *Teamsters*, *supra* note 2. "[E]mployment has become only a temporary relationship that can be altered or terminated at the employer's convenience." *Id.*

12. See Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 557, 564-70 (1996).

B. THE CONTINGENT WORKFORCE

The term contingent workforce has become a catch-all for the types of employment arrangements typically referred to in the context of individuals who work something other than the traditional full-time job.¹³ Part-timers as well as contract workers, temporary workers, independent contractors, leased employees, and day workers all fall within the ranks of the contingent workforce.¹⁴

Those who opposed the use of the part-time workforce gloss over "workplace realities."¹⁵ In fact, most part-time workers, according to surveys, prefer their arrangement.¹⁶

Of the estimated [twenty-one million] part-time workers, about [six million] are students, and another [two million] are retirees seeking to supplement their pensions. A further [five and a half million] say that family or personal obligations make part-time work desirable. This feeling is particularly pronounced among mothers with young children. In [a] recent survey by America's Labour [sic] Department, fewer than [five percent] of part-time workers say they work part-time because they could not find full-time jobs. Above all, all the evidence shows that America's flexible labour [sic] market has created jobs, not destroyed them.¹⁷

It is also a widely held fallacy that more and more people are being *forced* into the part-time workforce.¹⁸ In reality, about eighteen percent of people in the workforce can be categorized as part-timers, according to a 1995 study by the U.S. Department of Labor,¹⁹ and part-time jobs have been fairly steady at this level for about twenty years.²⁰

Regardless of one's perceptions of the practical and social pros and cons of the widespread use of a contingent workforce, there remains the issue of under what set of guidelines and regulations must those who choose to employ a contingent workforce operate regarding employee benefit plans. The struggle to find a suitable answer is the subject of the remainder of this comment.

13. See *id.* at 564 (noting that approximately "thirty-two to thirty-seven million, or about one-quarter of the nation's working population," fall into the various categories of workers comprising the contingent workforce).

14. See *id.* at 564-70.

15. See Matthew Miller, *Packaging the Strike: In the UPS strike, the real issues were obscured*, U.S. NEWS & WORLD REP., Sept. 1, 1997, at 44, 46 (noting that, at least in the case of UPS, nearly half of the part-timers were under 25, 40% were college students, and only five percent had been with the company more than 10 years). The article also notes that the "bulk" of those workers preferred part-time work to help pay college bills or to provide flexibility. See *id.* at 46.

16. See *Teamsters*, *supra* note 2.

17. *Id.*

18. See Jim Barlow, *Stats Don't Back Teamsters' Charge*, HOUST. CHRON., Aug. 7, 1997, at 1, available in 1997 WL 13054964.

19. See *id.*

20. See Miller, *supra* note 15, at 46 (referencing economist Alec Levenson of the Milken Institute, a think tank based in Santa Monica).

C. CONGRESS AND THE COURTS' STRUGGLE TO FIND THE SOLUTION

Through the years, Congress has enacted various measures aimed at employee protection. Unfortunately, these acts do little to provide a clear standard by which length of service, hours worked, or type of employment can be utilized for the determination of required benefits.²¹

1. *The Fair Labor Standards Act*

What is clear is that in its more recent enactments, Congress has drifted away from the broad inclusion of employees under the umbrella of the Fair Labor Standards Act of 1938.²² Under the Fair Labor Standards Act, Congress included, as covered employees, any individual who is employed by an employer to work in interstate commerce.²³ Under the Act, to "employ" means "to suffer or permit to work."²⁴ The early decisions interpreting the Act made it clear that such a broad reading was the intention of the Congress.²⁵

2. *The Employee Retirement Income Security Act*

More recent enactments, such as ERISA,²⁶ provide a much more restrictive approach to the determination of coverage. ERISA protection is limited to "employees with significant periods of service."²⁷ Employees, under ERISA, are not granted credit for a year of service until they have completed at least 1,000 hours of service within a consecutive twelve month period.²⁸ From the language of ERISA, it is clear that it was not the intent of Congress to provide benefits to all employees, absent a significant amount of service to their employers. In fact, even opponents of the widespread use of the contingent workforce admit that Congress made a "deliberate choice to exclude part-time or short-term workers

21. See Middleton, *supra* note 12, at 571.

22. 29 U.S.C. §§ 201-219 (1994). See also 29 C.F.R. § 791.2 (1996).

23. See Fair Labor Standards Act § 203(e)(1).

24. *Id.* at § 203(g).

25. See *Wirtz v. Louisiana Trailer Sales, Inc.*, 294 F. Supp. 76, 79 (E.D. La. 1968) (noting that the Act is not to be read restrictively, but "with Congress' purpose in mind"); see also *Walling v. John J. Casale, Inc.*, 51 F. Supp. 520, 526 (S.D.N.Y. 1943) (noting that the act must be construed in the context of the history of governmental authority over industrial enterprise); *Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F. Supp. 680, 683 (N.D. Cal. 1965), *aff'd*, 370 F.2d 328 (9th Cir. 1966) (noting that the proper test to be applied in construing the Fair Labor Standards Act is the economic reality of the case).

26. 29 U.S.C. §§ 1001-1461 (1994).

27. 29 U.S.C. § 1001(c). ERISA does not define "significant periods of service" in section 1001(c). However, section 1053(a) does provide some guidance. An employee benefit plan is in compliance with ERISA if, *inter alia*, "an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a)(2)(A). Additionally, a plan is in compliance "if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions." 29 U.S.C. § 1053(a)(2)(B). The percentage is based upon the number of years of service, with the minimum required for tenure being three years, at which time the employee must be eligible for twenty percent of the accrued benefit. See *id.*

28. See 29 U.S.C. § 1053(b)(2)(A).

from the protections of its most recent labor legislation"²⁹

Unfortunately, the matter is more convoluted than a simple look at ERISA would suggest. Movements in Congress have attempted to address the perceived imbalance between corporate America and its workers, but to date such movements have been ineffective.³⁰ In the words of one commentator, "temporary-employment relationships are so evanescent that they elude definition, [and] the legislative impasse has forced the courts to define modern [contingent] employment using a superannuated common law framework that originally contemplated nothing more complex than the permanent employment situation."³¹

3. *The Courts Offer Their Two Cents*

The courts of appeal for the various circuits have taken a varied and divergent approach to the classification of employees, the resultant burdens placed on employee benefit plans, and the benefits due workers. The courts are split along lines similar to those found in the general populace. Several of the circuits have based their opinions on what the author perceives to be a "big business" mentality, while others have taken an alternate route, putting the concerns of the employee first, perhaps to the detriment of the employer.

Various tests have been utilized in an attempt to facilitate the classification of workers and benefit plans, and even those have met with dissimilar application in the courts of appeal. The courts have relied, *inter alia*, on the common law, the Internal Revenue Code,³² and the Employee Retirement Income Security Act (ERISA).³³

III. ANALYSIS

A. THE CASES³⁴

1. *Setting the Stage—Microsoft I*³⁵

In October of 1996, the Court of Appeals for the Ninth Circuit decided

29. Middleton, *supra* note 12, at 574.

30. See Note, *Temporary Employment and the Imbalance of Power*, 109 HARV. L. REV. 1647, 1649 (1996).

31. *Id.*

32. I.R.C. §§ 1-9722 (1994).

33. 29 U.S.C. §§ 1001-1461 (1994).

34. The cases must be thoroughly scrutinized in order to understand their holdings clearly and to prevent the sort of widespread paranoia that resulted from the Microsoft cases which are addressed at the outset of this section. Only after a detailed analysis of the facts of a particular case, and the application of law to those facts, will the employer or attorney be prepared to assess his own hiring and benefit plans, or those of his client or a hypothetical client. After reviewing several cases decided in the wake of *Microsoft I* by different circuits, it is hoped that the reader will recognize a pattern of generally acceptable practices as well as practices which may or may not be acceptable based on established law, and in some cases, the political or social climate of a particular circuit.

35. *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), *aff'd on reh'g*, 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 899 (1998) [hereinafter *Microsoft I*].

Microsoft I,³⁶ and in so doing “cast a cloud over the way some . . . companies employ free-lance workers.”³⁷ As a result of this single case, many employers have taken to reviewing carefully their use of a free-lance workforce.³⁸ While such review is to be applauded, in many cases employers have simply run scared and taken *Microsoft I* for more than it is worth, in some cases even eliminating the practice of using free-lance workers altogether.³⁹ Not only has this “knee jerk” approach hurt those businesses who have determined that free-lancers are the best solution for their particular needs, it “also hurts those individuals who, for whatever reason, prefer to offer their services as free-lance workers rather than become regular employees.”⁴⁰ Considering that *Microsoft I* is, as characterized by one commentator, a “somewhat anomalous Ninth Circuit case,”⁴¹ such abandonment of a widespread practice with potentially mutual benefits to employers and workers alike may be premature.

The *Microsoft I* court found that employees designated as independent contractors had been misclassified, and on that basis had been wrongfully denied participation in Microsoft’s benefit plans.⁴² The plaintiffs’ claim was that although classified as independent contractors by Microsoft, they actually fell within the common-law definition of employee and, therefore, were entitled to the benefits that the company provided to all of its regular or permanent employees.⁴³ The workers, though not currently covered by an ERISA plan, nonetheless had the requisite standing to bring the suit under ERISA.⁴⁴

36. *See id.*

37. G. Pascal Zachary & Tom Herman, *Microsoft Case on Free-Lancers Will Be Reheard*, WALL ST. J., Feb. 11, 1997, at B9, available in 1997 WL-WSJ 2409143.

38. *See* Beverly W. Garofalo, *Microsoft II Forces Closer Look at Use of Free-lance Workers*, CORP. COUNS., Aug. 1997, at *1.

39. *See id.* at *11; *see also* Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., July 30, 1997, at A1, available in 1997 WL-WSJ 2429728 (quoting Tim Sparks, a lawyer at Wilson Sonsini in Palo Alto, California “That decision “sends a wakeup call to employers that they need to go back and review their plans and their documents.”).

40. Garofalo, *supra* note 38, at *11.

41. Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519, 1566 n.42 (1997).

42. *See Microsoft I*, 97 F.3d at 1197. From the first sentence of its lengthy opinion, the *Microsoft I* court made it clear that it considered contemporary employment practices involving large scale use of the contingent workforce to be suspect. *See id.* at 1189. The court declared that “[l]arge corporations have increasingly adopted the practice of hiring temporary employees or independent contractors as a means of avoiding payment of employee benefits, and thereby increasing their profits.” *Id.* (emphasis added). Such a forceful opening remark leaves little room for the possibility that the Ninth Circuit sees much, if any, redeeming value in corporate America’s use of the contingent workforce.

43. The workers’ claims focused on the Microsoft Savings Plus Plan (SPP) and the Employee Stock Purchase Plan (ESPP). The court determined that the SPP was a 26 U.S.C. § 401(k) plan which is covered by ERISA, and that the ESPP was a 26 U.S.C. § 423 plan which is not covered by ERISA, but is governed in part by Washington state law principles. *See id.* at 1192, 1196-97.

44. The terms of ERISA provide that a person is empowered to bring a civil action if he is either a participant or a beneficiary seeking “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

The United States Supreme Court has determined that a claimant with a "colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future in order to establish" his eligibility has standing under ERISA.⁴⁵ The district court disagreed with the validity of the workers' claims and granted a motion for summary judgment in Microsoft's favor. On appeal, the 9th Circuit reversed in part and remanded in part.⁴⁶ When it was announced that the Court of Appeals for the Ninth Circuit would grant rehearing in the case, this time by the full eleven judge panel, the media saw the announcement as a "potential boost to scores of high-tech companies that employ contract professionals in order to gain flexibility and cut benefit costs."⁴⁷ Unfortunately, in its en banc rehearing, the Ninth Circuit did not reverse the earlier panel decision as had been anxiously anticipated by corporate America and the media alike.⁴⁸ The en banc rehearing, *Microsoft II*, is discussed *infra*, Part III-A-2.

2. *Microsoft II*

What follows is a detailed analysis of four of the pre-eminent and most recent cases from the Fourth, Seventh, Ninth, and Tenth Circuits which tackle the "contingent worker" benefits dilemma head-on. After addressing those cases, this Comment addresses the main issues with which the courts dealt, as well as issues which should be considered by the employer and his legal representatives when making employment decisions involving the use of the contingent workforce.

future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B) (1994). A "participant" means:

any employee or former employee of an employer, or any member or former member of an employee organization, who is or *may become* eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (1994) (emphasis added).

45. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 103 (1989).

46. *See Microsoft I*, 97 F.3d at 1200. The court reversed the district court's grant of summary judgment in favor of Microsoft and denial of summary judgment in favor of the plaintiffs. The remaining issue of eligibility of individual members was remanded, as was calculation of the damages or benefits due the class members. *See id.*

47. *Zachary*, *supra* note 37. The authors noted that decisions by the appellate court to rehear a case are rare. *See id.* The article quoted San Francisco attorney Victor Schacter as saying that the decision "bodes very well for the possibility that the entire Ninth Circuit will take a different view." *Id.*

48. In *Microsoft II*, discussed *infra* Part III-A-2, the full Ninth Circuit Court of Appeals again reversed and remanded, with eight justices concurring in part and dissenting in part, in two separate opinions.

a. Microsoft II⁴⁹

Microsoft II was the Ninth Circuit's en banc rehearing of *Microsoft I*. The Microsoft workers who brought the suit were, in the words of the court:

"fully integrated . . . into its workforce: they often worked on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours. Because Microsoft required that they work on site, they received admittance card keys, office equipment and supplies from the company." However, they were not paid for their services through the payroll department, but rather submitted invoices to and were paid through the accounts payable department.⁵⁰

Upon hiring, Microsoft entered into two written agreements with each of the workers. The first, a "Microsoft Corporation Independent Contractor Copyright Assignment and Non-Disclosure Agreement," contained a provision that the worker "agrees to be responsible for all federal and state taxes, withholding, social security, insurance and other benefits."⁵¹ The second set of forms, entitled "Independent Contractor/Freelancer Information," made it clear that the worker is "self-employed and [is] responsible to pay all [his/her] own insurance and benefits."⁵² Additionally, evidence before the Ninth Circuit panel in *Microsoft I* indicated that "(1) the plaintiffs understood that they were not to receive benefits under the plans in the case at the time of hiring and (2) the plaintiffs understood that they would receive more cash on an hourly basis than regular employees."⁵³

In 1989 and 1990 the Internal Revenue Service (IRS) audited Microsoft's records and determined that the company should have withheld and paid taxes on the subject workers' behalf.⁵⁴ This finding was based on the IRS's determination that the workers were employees rather than independent contractors.⁵⁵ The IRS made this determination by applying traditional common law principles⁵⁶ and the applicable Treasury Regulations concerning the terms "employee"⁵⁷ and "relationship of

49. 120 F.3d 1006 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 899 (1998) [hereinafter *Microsoft II*].

50. *Id.* at 1008 (quoting *Microsoft I*, 97 F.3d at 1190).

51. *Microsoft I*, 97 F.3d at 1190.

52. *Id.*

53. *Microsoft Employees Who Were Misclassified as Independent Contractors Get Benefits Under the Company's Thrift and Stock Purchase Plans*, ERISA LITIG. REP., Dec. 1996, at *11.

54. *See Microsoft II*, 120 F.3d at 1008.

55. *See id.*

56. The Internal Revenue Service definition of an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." I.R.C. § 3121(d)(2) (emphasis added).

57. "The term *employee* includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee." 26 C.F.R. § 31.3401(c)-1(a) (1999).

the employer and employee.”⁵⁸ The same essential principles are used for determinations under 401(k) plans such as the SPP, and 423 plans such as the ESPP.⁵⁹ “As soon as Microsoft realized that the IRS, at least, thought that the Workers were employees, it took steps to correct its error.”⁶⁰ These steps included issuing W-2 forms to the workers and paying Microsoft’s share of the Federal Insurance Contributions Act (FICA) taxes to the government.⁶¹ At the same time, Microsoft changed its payment system. Because it “made no sense to have *employees* paid through the accounts payable department, . . . those who remained in essentially the same relationship as before were tendered offers to become acknowledged employees.”⁶²

[B]oth Microsoft and the SPP have *conceded* for purposes of this appeal that the Workers were common law employees. In fact, they have asserted that the Workers’ status is a “nonissue” because they concede that the Workers were common law employees. That is to say, they were employees of Microsoft.⁶³

Microsoft probably felt safe in making the concession, under the assumption that the waivers would certainly shield it from liability.⁶⁴ By its

58. Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

26 C.F.R. § 31.3401(c)-1(b).

59. See 26 C.F.R. §§ 1.410(b)-9, 1.423-2(e)(2), 1.421-7(h); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (noting that when Congress uses the word employee, the courts must assume the established meaning of that word, unless a particular statute indicates otherwise).

60. *Microsoft II*, 120 F.3d at 1011 (emphasis added). This immediate compliance with the IRS by Microsoft touches on the issue of the safe harbor provisions of section 530 of the Revenue Act of 1978. These provisions may, in certain limited cases, grant some relief to taxpayers who have a reasonable basis for treating workers as other than employees and who satisfy other statutory requirements. See Revenue Act of 1978 § 530, Pub. L. No. 95-600, 92 Stat. 2763 (codified as amended at 26 U.S.C.A. 3401 note (West Supp. 1997)). From the facts of the Microsoft case, it is not clear that the provisions would have had any effect, or even have been a sound argument. It is also not clear to what extent the IRS placed liability on Microsoft. However, the provisions are a factor to be considered by the legal professional when dealing with the IRS in the employee classification situation.

61. See *id.*

62. *Id.* at 1009 (emphasis added).

63. *Id.* at 1010 (emphasis added).

64. See F. Lee Perkins, *Vizcaino v. Microsoft Corp.: Are Independent Contractors Eligible for Employee Benefits?*, 21 AM. J. TRIAL ADVOC., 205, 207 (1997). Though perhaps over-exaggerating, one commentator remarked:

immediate actions, Microsoft management expressed its recognition that the workers' signed statements were not effective waivers of income tax withholding. However, Microsoft took no actions at that time that could be understood to indicate that it had abandoned the employment agreements as they apply to benefits ordinarily reserved for "employees."

Once the workers realized that they had been determined to be employees of Microsoft, at least for federal income tax purposes, they asserted a right to participate in Microsoft's benefit plans. When Microsoft's management refused, the workers asked the SPP plan administrator to exercise his authority to declare them eligible for benefits. A panel, convened by the SPP administrator, determined that the employees were not entitled to benefits from ERISA plans, such as the SPP, or from non-ERISA plans, such as the ESPP.⁶⁵ The panel argued that regardless of the workers' new-found status, they had voluntarily waived the right to participation in benefit plans.⁶⁶ It was this disagreement between the panel and the workers that led to the litigation.

The Ninth Circuit, in interpreting the alleged waivers, found that the agreements "merely warn the Workers about what happens to them if they are independent contractors."⁶⁷ In so finding, the court conceded that a possible argument existed that "the statements about benefits, unlike statements about withholding, stand on their own footing as a waiver of benefits, regardless of the Workers' true status as employees."⁶⁸ However, as the court pointed out, "Microsoft assured us at argument that this is not a waiver case."⁶⁹

Having rather summarily dismissed any waiver effect of the employment agreements, the court addressed the benefit plans, which were the subject of the litigation. The court first reviewed the decision of the SPP's administrative panel to deny benefits,⁷⁰ and in so doing, announced

In view of Microsoft's concession that the contingent workers were indeed common-law employees, the court's decision in *Microsoft I* [the same decision, in essence, was ultimately reached in *Microsoft II*] was noteworthy more for its critical tenor toward the growing practice of companies utilizing contingent workers than for its ultimate holding that the workers were eligible for benefits under the terms of the plans.

Garofalo, *supra* note 38, at *5.

65. See *Microsoft II*, 120 F.3d at 1009.

66. See *id.*

67. *Id.* at 1011. The court considered that the waivers hinged on the status determination itself. Having found that the independent contractor label was an error, by Microsoft's own admission, there was "no reason to embrace and perpetuate that error" by giving weight to the waivers. *Id.* at 1012. The court recognized a possible argument that they would have to reform the contracts in order to remove the mistake but asserted that Microsoft had "saved [the court] and the Workers the trouble of applying reformation doctrine when it agreed that the Workers were, in fact, not independent contractors." *Id.*

68. *Id.* at 1012.

69. *Id.* This precluded an at-length analysis by the court of the waiver issue as it applies to the ERISA benefit plan scenario. In Part III-B-2 *infra*, this comment addresses waiver as a separate issue. Waiver is of very real importance to the employer or his legal representative, and there is case law to support the use of a waiver argument.

70. See *id.* at 1013.

that it was applying an arbitrary and capricious standard.⁷¹

The court saw two possible justifications for the panel's decision: first, the panel's incorrect assumption that the workers were independent contractors; and second, the panel's incorrect application of waiver law to the agreements.⁷² The court determined that "the reasons given for denying benefits were arbitrary and capricious because they were based upon legal errors which 'misconstrued the Plan and applied a wrong standard to a benefits determination.'" ⁷³ Here again the court noted that "[t]he SPP now concedes as much" ⁷⁴ Had Microsoft made a strong case for waiver, it may have succeeded in overcoming the arbitrary and capricious standard.⁷⁵

The court did not, however, make a final determination as to the workers' rights under the SPP. The court recognized an issue of plan construction brought up by the SPP and the workers for the first time at the district court level. The issue was whether the plan's restriction to workers on the United States payroll of the employer applied to employees who were not on the US payroll, but *ought* to be.⁷⁶ The court accepted the fact that such a decision was one for the plan administrator and not the courts, as it "is not the court's function ab initio to apply the correct standard to [the participant's] claim. That function, under the Plan, is reserved to the Plan administrator."⁷⁷ Because the panel never had an opportunity to review that question, the court correctly provided it with one, through remand. The court's treatment of this issue seems to indicate that a specific, non-arbitrarily applied plan might have been met with a greater willingness by the court to let a denial of benefits to the workers

71. It is not entirely clear that the actual standard applied by the court meets the traditional, deferential understanding of the arbitrary and capricious standard, however. The Supreme Court has determined that benefit determinations are to be reviewed using a *de novo* standard, unless the administrators of the plan have discretionary authority to determine eligibility. Where such discretion exists, the review is to be conducted using the arbitrary and capricious standard. See *Firestone*, 489 U.S. at 111. "The arbitrary or capricious standard is the *least demanding* form of judicial review of administrative action. Any questions of judgment are left to the . . . administrator of the Plan." *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985) (emphasis added). Absent special circumstances such as fraud or bad faith, the Committee's decision may not be deemed arbitrary or capricious so long as it is possible to offer a reasoned explanation, based on the evidence, for that decision. See *Exbom v. Central States, Southeast & Southwest Areas Health & Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990).

72. See *Microsoft II*, 120 F.3d at 1013.

73. *Id.* (quoting *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 461 (9th Cir. 1996)).

74. *Id.*

75. A decision is arbitrary and capricious when the decision maker: has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence . . . or is *so implausible* that it could *not be ascribed to a difference in view* or the product of . . . expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (emphasis added).

76. See *Microsoft II*, 120 F.3d at 1013-14.

77. *Id.* at 1014 (quoting *Saffle*, 85 F.3d at 461) (citations omitted in original) (alterations in original).

stand, regardless of their status as employees.⁷⁸

The court next addressed the ESPP, which was established under 26 U.S.C. § 423, and which, as previously noted, is *not* covered under ERISA. The court found that the plan was “approved by the board of directors and by the shareholders of Microsoft. Their action was an offer to employees, as that term is defined in section 423.”⁷⁹ The court also found that under Washington state law, such an offer could be accepted by employees by merely continuing to work with knowledge of the offer, regardless of their knowledge of the precise details of the plan.⁸⁰

In accordance with its prior findings concerning the mistaken classification, the court held that the plaintiffs were employees for the purposes of eligibility for the ESPP.⁸¹ Since their continued employment constituted acceptance of that offer, the court found that they must be allowed to participate if they so choose. Because the ESPP required employees to pay for any purchase of stock, the court remanded the ESPP issue to the district court for the determination of an appropriate remedy.⁸² The court’s treatment of this issue indicates that plans such as the ESPP, which is governed by 26 U.S.C. § 423, will be interpreted in light of applicable state law, and depending on that law, may not be subject to further interpretation.⁸³

In a separate opinion, three judges took exception to the majority’s analysis and applied a much more conservative, employer-oriented approach. The dissent noted that the majority had refused to call the plaintiffs “freelancers,” the term used within the Microsoft community and by the plaintiffs themselves, and insisted on referring to them as “workers.”⁸⁴ The dissent also noted that the freelancers were *not* treated the same as other Microsoft workers. “They had different color employee badges, different e-mail addresses, and were not invited to company par-

78. In a separate opinion, five judges pointed out that had it been proper for the court to address the US payroll issue, the court could have found for the workers on the issue without even interpreting the language of the plan. *See id.* at 1017-18. The judges determined that the workers were clearly employees and, just as clearly, they were on Microsoft’s payroll, retrospectively. When combined with the fact that the employees were US citizens, the judges found that *any* interpretation of the requirement that recipients of the plan’s benefits be on the United States payroll of the employer would be satisfied. *See id.* This separate opinion also seems to suggest that carefully worded plan requirements are essential in achieving the employer’s goals.

79. *Id.* at 1014.

80. *See id.* The court based this finding on *Dorward v. ILWU-PMA Pension Plan*, 452 P.2d 258 (Wash. 1969) (finding the consideration rendered for a promise in a pension contract to be established when an employee is shown to have knowledge of the pension plan and continues his employment, even though the precise terms of the pension agreement are not known).

81. *See id.*

82. *See id.* at 1014-15.

83. The thrust of this comment is the treatment of employee benefit plans as administered on a non-state-specific basis. As a result, the author’s selection of case law and depth of analysis is weighted towards those plans applicable without regard to state borders. Such plans are typically of the variety covered by ERISA.

84. *See Microsoft II*, 120 F.3d at 1018 (O’Scannlain, J., concurring in part and dissenting in part).

ties and functions. Instead of receiving a regular paycheck from Microsoft's Payroll department (like Microsoft's regular employees), freelancers submitted invoices for their services to the Accounts Payable department."⁸⁵ The thrust of the dissent focused on the majority's treatment of the ESPP. The dissent found the issue to be "a simple contracts case."⁸⁶ Noting that offer, acceptance, and consideration are requisites to contract formation under Washington law, the dissent found that these elements were not satisfied.⁸⁷

As to an offer, the dissent pointed out that under Washington law, an "employer revokes a generally promulgated offer when it enters into a specific agreement with an employee which is inconsistent with the offer."⁸⁸ In the words of the dissent:

Microsoft's board offered the ESPP to employees generally, and then Microsoft told the freelancers: "We aren't offering the ESPP to you; ESPP benefits are not included in your contract." Knowing that they wouldn't get ESPP benefits, the freelancers nevertheless agreed to work for Microsoft. Their contract therefore does not include ESPP benefits because the offer of those benefits was revoked.⁸⁹

Additionally, the dissent found that the contract failed for a lack of consideration. There was no detrimental reliance on the part of the freelancers, who knew they were not entitled to ESPP benefits, yet chose to work for Microsoft for several years on Microsoft's terms.⁹⁰

With regard to the SPP, the dissent concurred with the majority's decision to remand to the plan administrator for interpretation of the requirement that the workers be on the United States payroll of the employer.⁹¹ However, the dissent disagreed with the court's dicta suggesting that Microsoft might *not* have been properly able to classify employees for participation or non-participation in ERISA benefits based on whether the employees were regular hires paid through the payroll department or freelancers paid through the Accounts Payable department.⁹² The dissent found the term "on the United States payroll of the employer" to be "a term of art with significance within the Microsoft community."⁹³

In contrast to the anti-big business approach espoused by the Ninth Circuit Court of Appeals in *Microsoft I* and *II*, other circuits have taken a softer approach. These circuits have given a much greater level of defer-

85. *Id.* at 1019.

86. *Id.*

87. *See id.* (citing *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1087 (Wash. 1984)).

88. *Id.*

89. *Id.* at 1020.

90. *See id.* The dissent found that if sufficient consideration was involved, it was in the form of Microsoft paying higher wages to the freelancers than it did to its regular employees in exchange for the lack of benefits. *See id.*

91. *See id.* at 1022.

92. *See id.* The dissent reiterated that the court's statements in dicta do not bind the plan administrator in any way. *See id.*

93. *Id.* at 1022. If properly construed as a term of art, such usage would go a long way towards overcoming the *Motor Vehicle Mfrs. Ass'n* arbitrary and capricious standard. *See supra* note 75.

ence to employers' considerations, the individual plans at issue, and reasonable interpretations of those plans.

b. *Clark*⁹⁴ v. E.I. DuPont De Nemours⁹⁵

Earlier in the same year as the *Microsoft II* decision, the Fourth Circuit separately addressed the employee benefits issue. The Fourth Circuit, however, showed much greater deference to the employer, and the outcome of the case was thus squarely in the employer's favor. While the fact scenario is clearly different from that in the *Microsoft* cases, the two courts faced many of the same legal issues, yet varied greatly in their application of the law to the facts. This case is also important for its in-depth treatment of the flexibility ERISA purports to bestow upon corporate management and plan administrators in the writing and enforcement of their plans.⁹⁶

In both cases the courts were convinced, and rightly so, that the ultimate decision to exclude members from the covered class rests with the plan administrator. Interestingly, the *Clark* court decided that the plan clearly excluded the plaintiff and thus granted a dismissal for lack of subject matter jurisdiction.⁹⁷ In *Microsoft II*, on the other hand, the court was not willing to reach a similar conclusion. The *Microsoft II* court properly remanded the SPP to the plan administrator for further analysis of the plan's content. However, the *Microsoft II* court was unwilling to go even that far in the employer's favor without first opining in dicta as to its negative feelings about Microsoft's interpretation.⁹⁸

Also, though not immediately evident from the Fourth Circuit's opinion, it may be surmised that DuPont's approach to the litigation did not create many of the issues that the *Microsoft* courts were required to wade through, such as the admission that waiver was no longer an issue, and immediate compliance, such as Microsoft's compliance with the IRS.⁹⁹

94. Andrew Clark, Jr. was the original petitioner. Mr. Clark passed away after filing the notice of appeal, and his executrix, Anne Navey Clark was substituted. Throughout this comment reference will be made to "Clark" and "plaintiff" as if Mr. Clark was still acting as petitioner.

95. No. 95-2845, 1997 WL 6958 (4th Cir. Jan 9, 1997), *cert. denied*, 117 S. Ct. 2425 (1997).

96. At least one practitioner has relied on *Clark* as clear evidence that "leased employees may be excluded from participation in an employer's qualified plans by express language to that effect." Joni L. Andrioff, *Leased Employee/Independent Contractor Issues*, SD07 A.L.I.-A.B.A. COURSE OF STUDY 677, Jun. 29, 1998, at 685 (citing *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996) and *Bronk v. Mountain States Tel. & Tel., Inc.*, 140 F.3d 1335 (10th Cir. 1998)).

97. See *Clark*, 1997 WL 6958 at *1, 3.

98. See *Microsoft II*, 120 F.2d at 1012-15.

99. From the litigants' perspective, the streamlining of the judicial process itself is a benefit in terms of resources spent. However, the real value to subsequent litigants may be a realization that issues such as waiver are winnable, and that administrative agencies such as the IRS are not always correct, or for that matter, controlling in any given situation. Where the litigant takes a potentially winnable issue out of the court's hands and forecloses the issue through its own actions, it may have done itself a disservice.

In *Clark*, there was no dispute as to the employment status of the plaintiff. The plaintiff had been a full-time employee of DuPont prior to being terminated and going to work for a succession of employment agencies and employee leasing agencies. During his subsequent employment, he had occasional and, during certain periods, extensive opportunity to do contract work for DuPont while on the payroll of outside companies. However, “[i]t is undisputed that Clark was [an employee of one of the leasing agencies], and he understood that he was not on DuPont’s payroll.”¹⁰⁰

After leaving the employ of a leasing agency, Clark applied for unemployment, listing the leasing agency as his former employer. Additionally, Clark applied for coverage under DuPont’s plans, *not* for the time in which he was a full time employee, but rather for that time during which he was an employee of the several outside agencies.¹⁰¹ DuPont determined that Clark had not been DuPont’s employee since his termination in 1970 and was thus ineligible for benefits under the plain language of the plans themselves.¹⁰² Clark did not claim that his alleged entitlement included the period of time when he was a full time employee of DuPont.

The Fourth Circuit’s dismissal for lack of subject matter jurisdiction stemmed from its finding of a lack of a colorable claim to entitlement and thus a failure of the requisite standing to bring the action.¹⁰³ The court’s test for determining whether a colorable claim exists includes whether “he is, according to the language of the plan itself, eligible to receive a benefit under the plan.”¹⁰⁴ The court determined that the plan did, in fact, “unmistakably confer discretionary authority upon the Plan Administrator to make benefits determinations.”¹⁰⁵ Having made that determination, the court then reviewed the administrator’s denial of benefits under the plans.¹⁰⁶

The court first classified the plans into two groups.¹⁰⁷ The plans in the first group limited entitlement to “any person designated by the Company as a full time employee. Any full service employee on the roll [as

100. *Clark*, 1997 WL 6958 at *1. Clark submitted time sheets to his new employer and participated in the employer’s health benefits plan. *See id.* DuPont made no contributions to any benefit plans on Clark’s behalf, and most significantly, the leasing agreement between Clark’s employer and DuPont made it clear that leased workers were to be considered employees of the leasing agency and that none should be regarded as employees of DuPont in any instance. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at *5.

104. *Id.* at *2.

105. *Id.* at *3. The court’s review of the language of the plans was *de novo*. The court also conducted a *de novo* review to determine whether the administrator acted within the scope of that discretion, and found that he did. *See id.* at *2-*3.

106. *See id.*

107. *See id.* at *3. In the first group were a contributory group life insurance plan, a noncontributory group life insurance plan, a career transition financial assistance plan, a medical and dental assistance plan, and a vacation and holiday benefits policy plan. *See id.* The second group consisted of a stock ownership plan and a savings and investment plan. *See id.*

of] 12/1/85 who continues to work at least 20 hours per week on a regular basis will be considered a Full Service Employee.”¹⁰⁸ With respect to this first group, Clark admitted that if a person is not on the DuPont roll, that person will not receive the benefits.¹⁰⁹ Clark was not on DuPont’s payroll at the time the suit was commenced, thus he was not eligible to participate in the first group of plans.

As to the second group, for the limited purpose of obtaining favorable tax treatment under the IRC, DuPont counted *all* employees, payroll and leased, as covered employees for the plan.¹¹⁰ While the court did not provide the specific tax advantages sought by DuPont, it can be deduced from the court’s reference to I.R.C. § 414 that DuPont sought to include leased employees as a means of increasing the scope of the term “employee” for minimum participation requirements purposes.¹¹¹

The plans within the second group, however, specifically exclude individuals who are treated as employees of DuPont for the limited purpose of satisfying I.R.C. § 414(n) from the receipt of benefits. The court found that, because Clark was a leased employee and leased employees were excluded by the specific language of the plan, the plan administrator did not abuse his discretion in denying benefits.¹¹²

Clark argued entitlement to benefits under the plans in the second group because DuPont could not include employees for tax purposes yet exclude them for benefits purposes. The court disagreed, noting that “ERISA actually mandates the opposite conclusion.”¹¹³ Citing a recent Fifth Circuit case,¹¹⁴ the court noted that ERISA allows an employer to limit plan coverage to certain employees, as long as the employer’s choice to do so is not based on age or length or service.¹¹⁵ “ERISA simply does not require an employer to provide benefits to every individual in that

108. *Id.* (quoting J.A. 717) (alternation in original).

109. *See id.* (citing J.A. 447).

110. The Internal Revenue Code provides favorable tax treatment for certain “qualified” employee benefits plans. Under the Code, a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries is a “qualified” trust if, *inter alia*, the plan of which the trust is a part satisfies the minimum participation requirements of I.R.C. § 410. *See* I.R.C. § 401(a)(3). Section 410 in turn requires that the plan benefit a certain percentage of employees who are not highly compensated employees. *See* I.R.C. § 410(b).

111. The code provides, in pertinent part, that for the purposes of § 401(a)(3), “with respect to any person . . . for whom a leased employee performs services . . . the leased employee shall be treated as an employee of the recipient” I.R.C. § 414(n)(1) - (n)(1)(A) (1994). The code further defines a leased employee as “any person who is not an employee of the recipient and who provides services to the recipient . . .” if such services are provided to the recipient pursuant to an agreement between the recipient and another person, the other person has performed such services for the recipient for at least one year, and the recipient exerts primary direction or control over the services. I.R.C. § 414(n)(2) - (n)(2)(A)-(C) (1994).

112. *See Clark*, 1997 WL 6958 at *3.

113. *Id.*

114. *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996).

115. *See Clark*, 1997 WL 6958 at *4; *see also* 29 U.S.C. § 1052(a); *infra* note 146 and accompanying text.

company's employment."¹¹⁶ The court also noted that the Internal Revenue Service's definition of employee does not "add any gloss to the ERISA definition of an 'employee' or a 'participant' in a benefit plan established pursuant to ERISA."¹¹⁷

Clark's claims included a refusal by DuPont to provide him with copies of the plan documents. As the court found that Clark did not have a colorable claim for benefits under the plans, it also denied non-disclosure statutory damages provided for under ERISA.¹¹⁸

c. *Trombetta v. Cragin Federal Bank*¹¹⁹

Plaintiffs worked for Cragin as loan originators. Their employment contracts specified that "it is the parties' intention that [each plaintiff] shall be an independent contractor and not Cragin's employee for *all* purposes."¹²⁰ While Cragin allowed the plaintiffs to participate in certain employee benefit programs at their own expense, an invitation was never extended to participate in the employee stock purchase plan (ESOP) governed by ERISA.¹²¹

When Cragin Financial Corporation was purchased, the ESOP was liquidated and plaintiffs filed suit to enjoin the sale until their claims for benefits under the ESOP had been addressed. The complaint was dismissed without prejudice by the district court to allow the plaintiffs time to bring their claim to the plan administrators. The administrators denied the claim, and the plaintiffs subsequently refiled their action in the district court.¹²²

The plan included language establishing that the administrator had the "exclusive responsibility and authority to control and manage the operation and administration of the Plan, including the interpretation and application of its provisions,"¹²³ as well as the power to "determine which Employees qualify to enter the Plan."¹²⁴

The committee established by the plan administrator determined, using the *Darden* factors, that the plaintiffs were not common law employees of

116. *Id.* (citing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986)).

117. *Id.*; see also *Darden*, 503 U.S. at 322-24 (holding that employee status under ERISA is determined not by the tax code but by the common law of agency).

118. See 29 U.S.C. §§ 1024(b)(4), 1132(c)(1)(B). "The Supreme Court has interpreted the disclosure provisions as covering, among others, all former employees with colorable claims that they will fulfill eligibility requirements in the future." *Clark*, 1997 WL 6958 at *4 (quoting *Firestone*, 489 U.S. at 117-18). The issue of non-disclosure is well settled, as evidenced by the *Firestone* case, and is not at issue for purposes of this comment.

119. *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435 (7th Cir. 1996).

120. *Id.* at 1436 (emphasis added) (alterations in original).

121. See *id.*

122. See *id.* at 1437.

123. *Id.* (quoting Cragin ESOP at § 12.1).

124. *Id.* (quoting Cragin ESOP at § 12.9).

the bank.¹²⁵ The Seventh Circuit, applying the arbitrary and capricious standard announced in *Firestone Tire & Rubber Co. v. Burch*,¹²⁶ together with the clear grant of discretionary authority in the plan's language, found that "[a]ll of these Committee decisions were well within the bounds of its discretion to interpret the terms of the plan. . . ."¹²⁷

In a statement showing much more deference to employers than the Ninth Circuit was willing to give in the *Microsoft* cases, the *Trombetta* court finally noted: "It is not enough to determine that they are common law employees of Cragin because Cragin need not extend this benefits plan to all employees."¹²⁸

d. *Capital Cities/ABC, Inc. v. Ratcliff*¹²⁹

In *Ratcliff*, plaintiffs were a group of newspaper carriers claiming entitlement to welfare and qualified plan benefits subsequent to an IRS technical advice memorandum which classified the workers as common law employees.¹³⁰ However, the plaintiffs' employment contracts contained an agreement that they were independent contractors and were not entitled to benefits.¹³¹

As the court was unable to find language in the plans which conferred discretionary authority upon the plan administrators to determine entitlement, the court applied a *de novo* standard of review of the decision to withhold benefits.¹³² The court agreed with the administrators' decision to deny benefits on two grounds. First, the carriers contractually agreed prior to commencing employment that they would not be entitled to benefits; and second, the plans, by their terms, exclude the carriers.¹³³

As to the contractual agreement, the court refuted plaintiffs' argument that *Darden* requires that workers who meet the *Darden* common law employee test are automatically entitled to ERISA benefits.¹³⁴ "Indeed, it is well established that employers may exclude categories of employees from their ERISA plans."¹³⁵ Under existing Tenth Circuit case law, the court found expressed contractual waivers such as that at issue to "define the relationship of [the Carriers] and [the Star] and determine their rights

125. *See id.* at 1439-40; *see also supra* note 59 and accompanying text. It should be noted that Cragin never conceded that status as common law employees would entitle the plaintiffs to participation. *See Trombetta*, 102 F.3d at 1439.

126. 489 U.S. 101 (1989). *See supra* note 71.

127. *Trombetta*, 102 F.3d at 1439.

128. *Id.* at 1440.

129. 141 F.3d 1405 (10th Cir. 1998).

130. *See id.* at 1408. For unknown reasons, this advice memorandum was later retracted by the IRS. *See id.* at 1408 n.2.

131. *See id.* at 1408.

132. *See id.* at 1408-09. All parties agreed to the application of *de novo* review in these circumstances and the use of this standard of review is not critical to the outcome of the case. *See id.* at 1409.

133. *See id.* at 1409-11.

134. *See id.*

135. *Id.* (citations omitted). The court noted that the intent in *Darden* was simply to provide a helpful definition of employee for use in the ERISA framework. *See id.*

inter se.”¹³⁶

As to the terms of the plans, the court analyzed each of the four applicable plans and determined, based on the wording of the plans, that the carriers were intended to be excluded.¹³⁷ More telling than the specific wording of each of the plans is the court's extreme level of deference to employer intention. For example, noting that two of the plans did not provide specific guidance as to those eligible for participation, the court latched on to the use of the phrase “eligible employees.”¹³⁸ In taking a step that might seem a stretch by ordinary standards, the court took what would be a gargantuan leap by *Microsoft* standards when it announced: “The use of the term ‘eligible’ suggests that some sub-group of all employees would be participants; it therefore connotes some criteria for determining eligibility.”¹³⁹ Using that logic, the court found that the plans could not be construed to include all employees or the use of “eligible” would become superfluous.¹⁴⁰

In the final analysis, the court could not, applying common sense, “ignore the fact that the Carriers had signed the Agreements, which specifically provided that they would receive no benefits.”¹⁴¹

B. THE ISSUES

The cases addressed in the previous section demonstrate the divergence of the circuits in applying employee benefit law to the contingent worker scenario. On one end of the spectrum we find the *Microsoft* cases, at least philosophically holding all attempts to deny workers benefits in contempt. At the other extreme is *Ratcliff*, allowing denial of benefits utilizing a “common sense” approach. Unfortunately, though presented with several opportunities to resolve the issue, the United States Supreme Court has refused to grant certiorari in any recent case involving contingent workers and benefit entitlement.¹⁴² Regardless of the sociological or philosophical underpinnings of a Supreme Court decision, guidance must be given.

The following sections look at the larger issues presented by the case law in this area, with the goal being to aid the reader in establishing an appropriate, well suited package of benefits plans in consideration of a particular company's needs, as well as those of the workers affected.

136. See *id.* at 1410 (quoting *Boren v. Southwestern Bell Tel. Co.*, 933 F.2d 891, 894 (10th Cir. 1991) (alterations in original)).

137. See *id.* at 1411-12.

138. See *id.* at 1412.

139. *Id.*

140. See *id.*

141. *Id.*

142. See *Microsoft Corp. v. Vizcaino*, 118 S. Ct. 899 (1998) (petition for writ of certiorari denied); *Ratcliff v. Capital Cities/ABC, Inc.*, 119 S. Ct. 173 (1998) (petition for writ of certiorari denied); *Clark v. E.I. DuPont de Nemours & Co.*, 520 U.S. 1259 (1997) (petition for writ of certiorari denied).

1. Required ERISA Plan Coverage

One of the first questions anyone involved with establishing or administering an employee benefit plan ought to ask is whether particular worker classes may be systematically excluded from a benefit plan in which they might otherwise be eligible to participate. As seen in *Clark*,¹⁴³ the answer would appear to be that such exclusion may be legally accomplished. In fact, the weight of the case law supports this conclusion.

Assuming a well written plan whose intended coverage is self-evident,¹⁴⁴ one must first ask whether the plan's coverage terms comport with the requirements of ERISA. As noted by the *Clark* court, the Fifth Circuit has boiled the coverage requirements down to their essence.¹⁴⁵

Section 1052(a) does nothing more than forbid employers from denying participation in an ERISA plan to an employee on the basis of age or length of service if he is at least twenty-one years of age and has completed at least one year of service. Section 1052(a) does not prevent employers from denying participation in an ERISA plan if the employer does so on a basis other than age or length of service.¹⁴⁶

As a general proposition, and disregarding the issue of worker misclassification brought up in the *Microsoft* cases, it is well established that the mere fact of employment does not automatically entitle employees to participation in a plan established pursuant to ERISA.¹⁴⁷ Rather, it is the written terms of the plan, as determined at its inception or subsequent amendment, which are controlling.¹⁴⁸ Further, it is those written terms which control, even where the tax code seems to indicate otherwise.¹⁴⁹

143. 1997 WL 6958.

144. In making this assumption, it must be kept in mind that a plan's terms will be interpreted using "common understanding as revealed in common speech." See *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1052 (7th Cir. 1991).

145. See *Clark*, 1997 WL 6958 at *4.

146. See *Abraham*, 85 F.3d at 1130. "A plan shall be treated as not meeting the requirements [for plan coverage] unless it provides that any employee who has satisfied the minimum age and service requirements . . . and who is otherwise entitled to participate in the plan, [is given the opportunity to, and] commences participation in the plan . . ." 29 U.S.C. § 1052(a)(4) (emphasis added).

147. See, e.g., *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434-35 (4th Cir. 1986); *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 227 (5th Cir. 1981); *Nugent v. Jesuit High Sch.*, 625 F.2d 1285, 1286 (5th Cir. 1980). "[T]he definition of the term participant does not include, according to the United States Supreme Court . . . a person who claims to be, but who is not entitled to receive plan benefits." 1 RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE § 2:8, at 2-40 to 2-41 (1996) (quoting *Firestone*, 489 U.S. at 103).

148. See *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 56 (4th Cir. 1992). "[I]t is particularly inappropriate [to deviate from the written terms of a contract] in a case involving ERISA, which places great emphasis upon adherence to the written provisions in an employee benefit plan." *Id.*

149. See *West v. Clarke Murphy, Jr. Self Employed Pension Plan*, 99 F.3d 166, 169 (4th Cir. 1996) (finding that Internal Revenue Code sections 401, 410, 411, 414, 761, and 7701 "deal with minimum participation, vesting, and funding standards that must be satisfied in order for an employee pension benefit plan to receive favorable tax treatment. . . . These provisions of the Tax Code, however, do not vary ERISA's definition of participant . . ."); see also *Reklau v. Merchants Nat'l Corp.*, 808 F.2d 628, 630-31 (7th Cir. 1986) (finding that there is no basis anywhere in ERISA to find that the provisions of the tax code that relate

a. Arguing Breach of Fiduciary Duty

One argument that has been proffered by disgruntled employees in an effort to overcome the rather easily satisfied requirements of section 1052(a) is that it is a breach of the employer's fiduciary duty to draft a plan with the intention of excluding workers who would otherwise be eligible.¹⁵⁰ This argument prompts debate on two levels. First, there has been disagreement about the term "participants." Second, there is debate as to whether the argument itself, without regard to the meaning of participants, is valid.

As to the term participant, the ERISA definition,¹⁵¹ as interpreted by the United States Supreme Court,¹⁵² has received varying treatment from the circuit courts. One camp has "adopted a 'zone of interests' analytical framework for the determination of participant status, which analysis has the apparent effect of conferring participant status on persons who do not meet the requirements articulated in *Firestone*"¹⁵³ "The decisions adopting the 'zone of interests' theory have adopted a 'but for' analysis, i.e., but for the employer misrepresentations or other misconduct, the employee would still be a participant."¹⁵⁴ Others have discounted this position on the basis of its contradiction with the clear language of ERISA.¹⁵⁵

b. And Why the Argument Fails

Without regard to where one comes out on the issue of defining participant, the argument that it is a breach of the employer's fiduciary duty to

to the criteria for tax qualification under the IRS are imposed on pension plans by the substantive terms of ERISA).

150. "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants" 29 U.S.C. § 1104(a)(1). A fiduciary, with respect to a plan, is one who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . [or] has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

151. See *supra* note 44.

152. See *id.*; *supra* note 147.

153. COOKE, *supra* note 147, at 2-42. See, e.g., *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2d Cir. 1994) (finding that a worker who had accepted an early retirement plan had standing to sue under ERISA because he claimed that the employer had misled him concerning the availability of a more substantial retirement benefits package).

154. *Id.* at 2-43. See also *Swinney v. Gen. Motors Corp.*, 46 F.3d 512, 519 (6th Cir. 1995) (holding that so long as a former employee would have been in a class eligible for membership in the plan but for the fiduciary's alleged breach of duty, he "may become eligible" for benefits under that plan as that term is used in the ERISA definition of participant).

155. See, e.g., *Stanton*, 792 F.2d at 435 (finding that the plaintiff's broad interpretation of participation was inconsistent with ERISA); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1536 (10th Cir. 1993) (holding "that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous.") (quoting *Firestone*, 489 U.S. at 117). Additionally, ERISA sets minimum standards for participation and provides that a plan may require one year of service and the attaining of age twenty-one before an employee is qualified as a participant. 29 U.S.C. § 1052(a)(1)(A)-(B). "A new employee does not automatically become a participant by remaining on his job while waiting to become a vested employee in the future." *Stanton*, 792 F.2d at 435.

draft a plan with the intention of excluding workers who would otherwise be eligible fails on other grounds. It is possible, and quite probable, that an employer, in designing his plan, does so with valid and legal business motivations at heart.¹⁵⁶ It is well accepted that an employer does not act as a fiduciary when designing an ERISA plan.¹⁵⁷ It was not Congress's intent "that ERISA circumscribe employers' control over the content of benefits plans they offered to their employees."¹⁵⁸ Additionally, it clearly was Congress's intent in enacting ERISA that any amount of costs to the employer in providing employee benefits would not exceed the foreseeable amount of benefit to the employee.¹⁵⁹ It is not the job of the courts to usurp the business manager's authority, expertise, or judgment in this regard.¹⁶⁰

2. Waiver of Benefits

a. As a General Proposition

On its face, the *Microsoft II* case might appear to stand for the notion that ERISA benefits may not be waived. As a general proposition, however, this would be a misinterpretation.¹⁶¹ Where an employee, other-

156. "An employer can wear two hats: one as a fiduciary administering a pension plan and the other as the drafter of a plan's terms." *McGath v. Auto-Body N. Shore, Inc.*, 7 F.3d 665, 670 (7th Cir. 1993).

157. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *McGath*, 7 F.3d at 670-71; *Abraham*, 85 F.3d at 1130; see also *Izzarelli v. Rexene Prod. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) (finding that as part of the balance between an employer's need to manage its business and Congress's desire for the regulation of ERISA plans, an employer is given greater discretion to act with regard to a plan when his actions are as an employer, *instead* of as a fiduciary); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1498 (3d Cir. 1994) (holding that "an employer is free to develop an employee benefit plan as it wishes because when it does so it makes a corporate management decision, unrestricted by ERISA's fiduciary duties"). Other examples of business practices that have been held not to be regulated by ERISA include decisions to amend or even terminate plans. See *Izzarelli* 24 F.3d at 1524; *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991); *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993).

158. *McGann*, 946 F.2d at 407.

159. "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). See generally *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159 (3d Cir. 1990) (noting that an interpretation that plans, once created, cannot be narrowed or eliminated by later amendment is inconsistent with ERISA's language, structure, and legislative history). For a thorough yet straightforward analysis of the policy reasons behind separating the roles of fiduciary and business manager, see *id.* at 1159-60.

160. Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.

Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d 454, 456 (6th Cir. 1984).

161. An argument has been made that this is a proper effect in the case of misclassified workers such as in *Microsoft*, and a proposal for this anomalous situation is considered *infra* Part III-B-2-b.

wise qualified for participation in an ERISA plan, signs a waiver of his rights of participation, such waiver may in fact be valid and legally binding. "ERISA contains no specific statutory prohibition against . . . waivers of rights to benefits under ERISA, and case authority has confirmed that neither public policy nor the specific provisions of ERISA preclude a . . . waiver of pension participation and pension rights."¹⁶² In fact, as noted by the Second Circuit, a finding that waiver of ERISA benefits is impermissible would be surprising, "since ERISA does not require all eligible individuals to participate in a plan, explicitly recognizing, for example, that an employee may decline to contribute to a plan that requires employee contributions for participation."¹⁶³

The legislative history behind ERISA confirms that public policy concerns would dictate that waiver should be allowed. "A fundamental aspect of present law, which the committee bill continues, is reliance on *voluntary action* by employers (and employees under contributory plans). . . ." ¹⁶⁴ "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."¹⁶⁵

For such a waiver to be effective, however, it must comport with the traditional standards for waivers. That is, the waiver must be knowingly and voluntarily made.¹⁶⁶ The *Laniok* court listed the following six factors for determining through the "totality of the circumstances" that the release of benefits was knowing and voluntary:

- 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of the plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, . . . and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or

162. 2 RONALD J. COOKE, *ERISA PRACTICE AND PROCEDURE* § 8:11, at 8-53 (1996). See *Laniok v. Advisory Comm.*, 935 F.2d 1360, 1366 (2d Cir. 1991) (holding that "an individual waiver of the right to participate [does not] var[y] the terms of the plan itself Moreover, it is precisely because we find no ERISA provision . . . mandating participation for all who are eligible that we hold permissible an individual waiver of participation."). See also *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588 (1st Cir. 1993) (finding employee not entitled to benefits from a long term disability plan where he signed a release and waiver in accepting benefits from another plan); *Astor v. Int'l Bus. Mach. Corp.*, 7 F.3d 533 (6th Cir. 1993) (rejecting claim of fraudulent inducement on the grounds that the employees accepted an incentive retirement package in exchange for a complete release of their right to sue); *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Boyd*, 762 F. Supp. 1263, 1265 (S.D. Miss. 1991) (holding that ERISA does not prevent a waiver of welfare plan rights).

163. *Laniok*, 935 F.2d at 1365 (referring to 29 U.S.C. § 1053(b)(1)(B)).

164. H.R. REP. NO. 93-807, at 18 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4676 (emphasis added).

165. H.R. REP. NO. 93-533, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639 (emphasis added).

166. See *Laniok*, 935 F.2d at 1367-68.

law.¹⁶⁷

b. Waiver as Applied to Misclassified Workers

The *Microsoft* court was able to sidestep the issue of waiver of ERISA benefits thanks, in part, to Microsoft's concession that waiver was not at issue.¹⁶⁸ It has been argued that while the *Microsoft* court "correctly found that the workers were eligible for benefits, its emphasis on the character of the agreements failed to confront the real issue facing courts: the validity of waivers of federally regulated benefits."¹⁶⁹ The proponents of that argument call for an announcement of a rule of interpretation that would invalidate any disclaimer of benefits by *misclassified* employees on a *per se* basis, finding that such a rule would allow courts to better confront future attempts to contract around benefit provisions.¹⁷⁰ The crux of the argument is that misclassified workers do not and cannot realize that they are entitled to the benefits they are waiving, and thus any waiver of those benefits will not comport with the *knowingly* and *voluntarily* requirements of traditional waiver doctrine.¹⁷¹

However, such a rule would be overly restrictive. The person who chooses to work as an independent contractor or the like understands, and *knowingly and voluntarily* accepts, that he will not receive benefits. To allow the worker benefits as a result of a reclassification could quite possibly result in a windfall to the worker.¹⁷² Considering the number of workers who choose to enter into a contingent work arrangement for its flexibility and potentially higher wages, such a rule would have potentially catastrophic consequences for businesses that rely on the contingent workforce.¹⁷³

The argument of the proponents of the *per se* waiver rule that "[m]isclassified employees cannot know that they qualify for benefits conditioned on employee status [and therefore] cannot make a knowing waiver"¹⁷⁴ is inconsequential. What *is* of consequence is that the employees waive their rights to benefits and are willing to accept the working arrangement on that condition, often at the reward of a higher salary. Whether the right to benefits arises out of a subsequent reclassification or

167. *Id.* (cautioning that any attempt to establish a checklist of *all* applicable factors or insisting on adherence to such a list is futile).

168. *See supra* notes 67-69 and accompanying text.

169. *Contracts—Independent Contractor Agreements—Ninth Circuit Finds That Misclassified Employees are Eligible for Federally Regulated Employee Benefits.—Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997) (*En Banc*), 111 HARV. L. REV. 609, 612 (1997) [hereinafter *Contracts*].

170. *See id.*

171. *See id.* at 612-13.

172. Consider for example the *Microsoft* workers. *Microsoft* paid these workers at a higher hourly rate than its regular employees as consideration for their giving up entitlement to benefits. *See Microsoft II*, 120 F.3d at 1018 (O'Scannlain, J., concurring in part and dissenting in part).

173. *See supra* text accompanying notes 16-17.

174. *Contracts*, *supra* note 169, at 612.

any other number of reasons should not be determinative of the validity of the waiver at issue.

If the *per se* waiver proponents' argument is sound, and an individual cannot waive that to which he does not know he is entitled, the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁷⁵ is incorrect. The *Gilmer* Court upheld an arbitration agreement in the face of Gilmer's claim that he had the right to a judicial remedy under the Age Discrimination in Employment Act of 1967.¹⁷⁶ Gilmer had no knowledge that he would one day seek redress for perceived age discrimination, yet the Court found that his signing of a contract including an arbitration agreement was effective in waiving his right to judicial resolution.¹⁷⁷

IV. LESSONS TO BE LEARNED

With their obvious ramifications for corporate America, the *Microsoft* cases have received a great deal of attention.¹⁷⁸ The resultant widespread paranoia that has hit corporate America and her legal counsel in the wake of *Microsoft II* may have given those decisions more credence than they are worth,¹⁷⁹ yet they do have some practical significance for corporations and individuals who utilize or extend their services as members of the contingent workforce.¹⁸⁰ At the very least, the differing treatment afforded by the various circuits should put corporate and employment attorneys on notice that some circuits may be critical of the use of the contingent workforce and should prompt those attorneys to encourage their clients to conduct a thorough review of current employment practices and benefit plans.¹⁸¹

First and foremost, employers should take an honest, objective look at the need for using members of the contingent workforce, particularly independent contractors, temporary and leased employees, and the current policies and practices in place relating to their use.¹⁸² Corporate heads must also ensure that managers are educated regarding worker classification issues, encouraging managers to think about the issues and to consider the consequences before entering into employment contracts.¹⁸³ If the use of the contingent workforce remains the best option, there are several things which must be done to protect the employer's interests.

175. 500 U.S. 20 (1991).

176. *See id.* at 23.

177. *See id.* at 35.

178. *See En Banc Ninth Circuit Rehears Oral Argument in Vizcaino, ANDREW'S PENSION FUND LITIG. REP.*, May 2, 1997, at 7670.

179. "In view of the fact-specific nature of the decision[s], [they are] unlikely to be of great precedential or persuasive value to other courts in the future." Garofalo, *supra* note 38 at *11.

180. *See id.*

181. *See Perkins, supra* note 64, at 209.

182. *See Garofalo, supra* note 38, at *11.

183. *See Andrioff, supra* note 96, at 705.

The employer would be well-served to evaluate his utilization of those workers to determine if his use might be questionable should an audit or claim for benefits arise, perhaps using the IRS guidelines as a starting point.¹⁸⁴ Also, rather than directly hiring contingent workers, employers may do better to utilize the services of temporary employment agencies and employee leasing agencies, in particular, those that extend their own benefits.¹⁸⁵

It goes without saying that employers *must* enter into written agreements with their employees. However, this critical step in shielding the employer from surprises, should legal action arise, is often overlooked when it comes to certain members of the contingent workforce.¹⁸⁶ When these agreements include benefit plans, the employer can take numerous precautions in the drafting of such plans to ensure that his intentions are understood by the workers while increasing the odds that the courts will follow that intent.

The following suggestions assume the existence of a current plan but are equally useful in the development of a new plan. It should be remembered that an employer may amend existing plans, and, if he does so, he acts in the capacity of businessman rather than fiduciary.¹⁸⁷ If amendments are made, however, the amendments must be furnished to the plan participants and beneficiaries receiving benefits under the plan not later than 210 days after the end of the plan year in which the change is adopted.¹⁸⁸

As evidenced by *Microsoft II*, *Clark*, *Trombetta*, and *Radcliff*, precise wording is absolutely critical to the success of any plan in achieving its originator's intentions.¹⁸⁹ Employers and plan administrators must conduct a thorough analysis of their plans' definitions of eligible employees.¹⁹⁰ Having conducted a review, there are several possibilities for handling reclassification by the IRS. First, the plan might simply state that workers who are initially classified as independent contractors on the employer's books and records are excluded from coverage.¹⁹¹ An even clearer plan might include language declaring that even if a worker is

184. *See id.*; *see also supra* notes 54-58.

185. *See* Garofalo, *supra* note 38, at *11.

186. *See* Brent Giddens, *Terminating the Temporary Employee: A Trap for the Unwary Employer*, ANDREWS EMPLOYMENT LITIG. REP., Feb. 11, 1997, at *1. "While most companies have written agreements with their customers or suppliers, few which use temporary agency employees have an agreement that specifically addresses the consequences of legal action by a temporary employee." *Id.*

187. *See supra* notes 157-58.

188. *See* I.R.C. § 1024 (b)(3) (West Supp. 1997).

189. It should be noted that even the *Microsoft II* opinion indicated that a more carefully worded plan may have saved the day for Microsoft. *See supra* note 78 and accompanying text.

190. *See* Arthur D. Rutkowski & Barbara Lang Rutkowski, *Independent Contractors or Employees as it Pertains to Employee Benefit Plans—Microsoft Update*, EMPLOYMENT L. UPDATE, Sept. 1997, at *3.

191. *See* Alson R. Martin, *Current Tax and Planning Developments Concerning Retirement Plans, Welfare Plans, Professional Corporations and LLCs, Estate Planning, and Health Care*, SB51 A.L.I.-A.B.A. COURSE OF STUDY, Feb. 13, 1997, at *47.

subsequently determined to be an employee by the IRS, such reclassification does not automatically entitle the worker to benefits.¹⁹² Along the lines of this consideration, it has been suggested that the plan include a directive that the employer must take some affirmative action upon change of status in order for the workers to become entitled to benefits.¹⁹³ Finally, an alternate method, if appropriate in the particular circumstance, might include language to the effect that cash payment is the sole compensation for a particular class of workers even if they are eventually reclassified as employees, and if the employer is forced to include them in employee benefit plans, they may be liable to repay their cash compensation.¹⁹⁴

It is vital that the plan clearly and conclusively confer discretion upon the plan administrator to interpret the plan and to decide any questions arising under the plan. The United States Supreme Court's holding in *Firestone v. Bruch*¹⁹⁵ made it clear that the appropriate standard for reviewing a plan administrator's determination of benefit eligibility is *de novo*, unless the plan gives the administrator discretionary authority, in which case the courts must apply an arbitrary and capricious standard.¹⁹⁶ "Although no specific language need appear in a plan for a court to apply deferential review, the broader the language conferring discretion, the more likely a court is to apply deferential review."¹⁹⁷

Assuming that the plan grants full discretion to the administrator, it is important that certain procedures be followed by the administrator in making determinations. If a worker disputes the plan administrator's ruling, it is critical that the administrative record reflect not just conclusions, but the analysis applied in reaching those conclusions.¹⁹⁸

Finally, employers should think twice before leaping into settlement agreements with the IRS and should consider all of the potential ramifications to their employee benefit plans. On the one hand, such agreements may invite suits for retroactive benefits.¹⁹⁹ On the other, an employer who hastily concedes to the IRS's decision may overlook the availability of the safe harbor provisions of section 530 of the Tax Reform

192. See Rutkowski, *supra* note 190.

193. See Andrioff, *supra* note 96, at 705.

194. See *Microsoft Employees*, *supra* note 53, at 15.

195. 489 U.S. 101, 103 (1989).

196. See *supra* note 71. For an in-depth look at the various circuits' interpretations of the arbitrary and capricious standard announced in *Firestone*, see Roger C. Siske et al., *What's New In Employee Benefits*, SB17 A.L.I.-A.B.A. COURSE OF STUDY, Oct. 3, 1996, at 246-52.

197. *Id.* at 247.

198. See Catherine L. Creech, *Worker Classification Issues: Consequences for Employee Benefit Plans*, SB66 A.L.I.-A.B.A. COURSE OF STUDY, Mar. 19, 1997, at 336.

199. Such a settlement may be much more expensive than anticipated if it leads to lawsuits from the workers for retroactive benefits and salary. For this reason, companies faced with an IRS payroll tax dispute over the status of contract workers may decide it is more in their long-term interest to mount a vigorous defense of their treatment of the workers . . .

Id. at 337.

Act of 1978.²⁰⁰

V. CONCLUSION

As corporate America becomes increasingly centered on technology, its need for efficient, short-term labor will continue to grow. With this growth, corporations will be forced to step up the vigilance in their relations with the workforce. The courts and the legislature will struggle right along-side corporate America as all involved search for *the* most efficient and just method of dealing with contingent workers.

For now, there is no correct answer. Several circuits have taken a first stab at the issue, but there is no consensus on many of the relevant issues. In time, the United States Supreme Court will likely address the issues and put to rest much of the debate. Until that happens, corporate America and her attorneys must step up to the plate and take control. This comment has pointed out several avenues which have worked in the past and passed judicial scrutiny. Based on their sound reasoning, these approaches will likely continue to work in the future.

When future decisions with the tone of *Microsoft I* and *II* come down, as they surely will, the informed attorney and businessman will not see them as a harbinger for the death of the contingent workforce, but as a reminder to reanalyze their own practices. By looking at these decisions under a microscope and carefully reviewing current practices, a large step will have been taken towards ensuring compliance.

Remember, odd facts make odd law,²⁰¹ and it never hurts to understand the political climate of the court before which you are arguing.²⁰²

200. See *supra* note 60.

201. See *supra* text accompanying note 1.

202. As humorously put in one commentary, "Readers are, no doubt, familiar with the curse—'may you live in interesting times.' If the speaker had said 'may you live in an interesting circuit,' it would have meant the 9th." Robert N. Eccles & David E. Gordon, *The 9th Circuit—Threat or Menace?*, ERISA LITIG. REP., Feb. 1997, at *2.

