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The Law of Employee Benefit Plans

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THE LAW OF EMPLOYEE BENEFIT PLANS

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What are commonly called "fringe benefits" in union agreements are formed out of threads taken from many parts of the fabric of law: a large skein of contract law; binding threads from the law of trusts, agency and taxation; and many colorful strands from a host of labor law statutes. The legal principles are for the most part not unique or novel. Rather, the accumulation of new economic and social arrangements has brought together a variety of familiar legal rules that take on the appearance of a system or body of interrelated legal doctrines. In light of the current Congressional investigations, there may soon be special legislation for employee benefit plans. Such legislation will be woven from threads of the present law on the subject; hence, this paper will undertake to trace the salient filaments of that law.

THE BASIC AGREEMENTS

Benefit plans resulting from collective bargaining rest on formal agreements. They may be spelled out in a single document or several. Usually the union agreement provides merely for a commitment or undertaking to establish certain types of benefits. Further details are set forth in another agreement—often a trust agreement or indenture. This is commonly implemented by insurance policies and other contracts. Specimen forms of the basic agreement have been collated and reprinted by the United States Department of Labor, manufacturers' associations and publishers of standard law services.[1] The following outline of the contents of employee benefit plans is presented as a check list for legal draftsmen and as a basis for discussion of the contractual principles involved.

TYPE OF EMPLOYEE BENEFITS

In designating the benefits to be provided by a welfare plan, the parties may choose from a wide range of possibilities. Common benefits fall within the following:

1. Stipulated insurance payments made on designated misfortunes.
   a) On death.

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1. See, *e.g., Health, Insurance, and Pensions,* COLLECTIVE BARGAINING PROVISIONS BULL. No. 908-17 (U.S. Dep't of Labor 1949); DIGEST OF SELECTED HEALTH, INSURANCE, WELFARE AND RETIREMENT PLANS UNDER COLLECTIVE BARGAINING (U.S. Dep't of Labor 1950); DIGEST OF SELECTED HEALTH, INSURANCE, WELFARE AND RETIREMENT PLANS UNDER COLLECTIVE BARGAINING, Spec. Series No. 6 (U.S. Dep't of Labor 1951); FRIEDSON & ZISMAN, NINETEEN EMPLOYEE-BENEFIT PLANS IN THE AIRFRAME INDUSTRY, Bur. Memo. 71 (Fed. Sec. Agcy, Soc. Sec. Adm'n 1951); HANDBOOK ON PENSIONS (Nat. Ind. Conf. Bd, Inc. 1950); CCH PENS. PLAN GUIDE; P-H PENS. & PROFIT SHARING.

b) On accidental death or dismemberment.
c) On each week of incapacity due to nonoccupational illness or accident.

2. Payments made for expenses of illness.
   a) These may be in cash or in the rendering of services.
   b) The services paid for or supplied may be one or more of the following:
      (1) Doctors' office calls, home calls; (2) Hospital room, operating room, ambulance, anaesthetics, drugs, X rays, laboratory tests; (3) Surgery; (4) Maternity care; (5) Christian Science, chiropractor or other healing arts; (6) Dental care; (7) Care of special afflictions such as mental illness and self-inflicted disabilities.
   c) These benefits may be in addition to or in place of state disability insurance.
   d) Dependents may be excluded or given designated benefits.
3. Payments made on retirement from employment.
   a) These are usually on attainment of a certain age, after employment for a certain length of time and/or on retirement due to physical disability.
   b) Payments may be uniform or graduated on the basis of length of service, age, sex or prior earnings.
   c) Payments may be of an assured amount or a right to participate in whatever funds are available.
   d) The right to benefits may be vested in increasing amounts after completion of certain periods of service.
   e) Retirement may be compulsory or optional.
   f) Payments may be in adidtion to or in place of social security payments.
   g) Payments may also be made to surviving dependents, usually with a reduction in the amount of annuity.

Eligibility of Beneficiaries

Eligibility for benefits under welfare plans is ordinarily determined by standards such as the following:

1. Beneficiaries may be limited to employees within a firm, industry, trade, craft or a collective bargaining unit.
2. Beneficiaries may be limited to members in good standing of a union.
3. Active or regular employment is usually required. Temporary, part-time, seasonal and probationary employees may be expressly excluded.

4. Some length of service is usually required.
   a) This may be a certain number of hours or days in a preceding qualifying period.
   b) For pensions, this is ordinarily a number of years.
5. Age may be a qualifying or disqualifying factor.
   a) Advanced age may exempt a person from life insurance or other insurance benefits.
   b) The age of 65 is customarily required for retirement with optional privileges at lower annuities for persons of 62, 60 or 55.
6. A combination of age and length of service may be required for retirement benefits.
7. Physical disability may be accepted as a substitute for age or length of service in qualifying for a reduced pension.
8. Minimum earnings may be a basis for determining eligibility for benefits and the amount of prior earnings may be a basis for computing the amount of a pension.

FINANCING

Financing of employee benefit plans is commonly provided for as follows:

1. The plan is either noncontributory (supported solely by the employer) or contributory (supported in part by the employer and in part by employees).
   a) Some benefits may be on a noncontributory basis, and others or higher benefits or benefits for dependents may be on a contributory basis.
   b) Employee contributions may be obligatory or optional.
2. Contributions are specified.
   a) As a flat sum weekly, monthly or annually for each employee (to be carefully defined).
   b) As a lump sum or a percentage of cost.
   c) As a percentage of pay roll or wages (to be carefully defined).
   d) As a percentage of employer's contribution, or on a matching basis.
   e) In different amounts related to employees' sex or age.
3. A fiscal policy may be declared.
   a) To keep benefits within the purchasing power of the contributions.
   b) To provide benefits on an actuarially sound basis.
   c) To maintain a reserve for safety.
   d) To proceed tentatively and to rely upon the discretion of trustees.

ADMINISTRATION

The administration of employee benefit plans is varied almost infinitely, but the essential components are the following:

1. Method of underwriting.
   a) Benefits are paid directly from the fund or through insurance policies. If insurance is used, policies are purchased through the fund or directly by employers.
   b) Benefits are paid in cash or rendered as services. If paid in cash, they may be paid as flat sums or as reimbursements of expenditures or bills incurred.
2. Administrative personnel.
   a) For policy control.
      1. Trustees—a representative of the union alone, or the union and the employer, or the union, the employer and a neutral.
      2. Advisory council, insurance consultants and attorneys may be added.
   b) For day to day administration.
      1. Insurance company may handle claims.
      2. An administrator or office manager may collect contributions and/or handle claims.
3. Policy control usually includes:
   a) Determination of types and quantities of benefits to procure.
   b) Determination of rules for eligibility of employees.
   c) Purchase of insurance.
   d) Investment of funds.
4. Day to day administration usually involves:
   a) Collection of contributions.
   b) Handling of claims, payment of benefits, handling of complaints.

Rarely are all of these spelled out in written agreements. Frequently they are all left to the discretion of trustees who design and redesign the administration within the limits of the agreements creating their office.

FUND SAFEGUARDS

Special clauses for the protection of the funds or assets of employee benefit plans are usually written along the following lines:

1. Expenditures may be limited to specified purposes or benefits.
2. Administrative expenses may be limited to a percentage of contributions.
3. Expenditures for certain purposes, such as strike benefits, may be prohibited.
4. Services of employer and union representatives may be required gratis.

5. Title to all assets may be placed in trustees and expressly denied to employer, employees and union.
6. Contributions may be made nonreturnable.
7. Benefits may be made nonassignable except to approved hospitals or doctors.
8. Investment of funds may be limited to government securities or to investment trust companies.
9. Periodic reports, audits and access to records may be required.
10. Delinquent contributions may be increased by fines and collection costs, including attorneys' fees.
11. Delinquent contributors may be made subject to court action, unfair listing, strikes and the requirement of good behavior bonds.
12. Defaulting employers may be made liable for benefits denied their unprotected employees.

EMPLOYEE SAFEGUARDS

Special clauses for the protection of the union or employees in employee benefit agreements frequently provide the following:

1. Employee may convert group insurance to an individual policy at his own expense upon temporary layoff, discharge or retirement.
2. Coverage shall hold over for a period of time after termination of employment or other loss of eligibility.
3. Eligibility may be acquired through employment by any employer within an area or industry.
4. Reimbursement may be received for covered expenditures made out-of-town during vacations.
5. Involuntary retirement may be made only with just cause.
6. Annuity rights may be vested at stated periods.
7. If social security or state disability payments overlap private benefits, the funds will be used for other benefits.
8. Disputes may be handled through ordinary grievance and arbitration procedures.

EMPLOYER SAFEGUARDS

Special clauses for the protection of employers commonly incorporated into employee benefit agreements have the following objectives:

1. Protection against increased costs.
   a) Stipulated contributions are expressly made maximum.
   b) A limitation is placed on total cost of all benefits.
   c) The union or employees are required to pay excess costs.
2. Employer is made not responsible for default of insurance carrier or trustees.

3. "Favored Nations" clause—contributions are not to exceed those required of competitors.
4. Adjustments are to be made for overlapping social security or state benefits—contributions or benefits are to be reduced accordingly.

EMPLOYEE BENEFIT PLANS AS CONTRACTS

The several agreements comprising employee benefit plans are governed basically by the rules of law applicable to contracts. Factual situations more or less peculiar to employee benefit plans have posed special problems, and these have given rise to a group of court decisions on the interpretation and enforcement of such plans as contracts.

Parties Covered. Which employees were intended to benefit from a plan has at times been uncertain. Particularly, the coverage of nonunion employees in contracts negotiated by unions has been questioned. The general language of one union agreement was held to embrace union members and all those who might perform the work regularly done by union members, whether members or not.[2] Similarly, a plan to include "all workers" was held to include nonunion as well as union men.[3]

The status of executive, administrative and special employees has also been in doubt. A welfare agreement which referred to "all employees" was held to cover foremen and "permit men."[4] However, express provisions of an agreement excluding executive and other white-collar workers were interpreted to deny them coverage.[5]

In a few instances, employers have sought to deny that they were parties to welfare agreements. A mine operator, who had signed no welfare contract, but who was a member of a trade association, made payments under a 1948 agreement signed by the association. He acknowledged his obligation to pay under a similar 1949 agreement and later declined to honor the association's 1950 agreement. The court held that he had created the appearance of being a party to the agreement and had thereby induced the union to refrain from striking his mine; therefore, he was estopped from denying that he was a party to the agreement.[6] A restaurant owner who signed a basic pension agreement negotiated by his employers' association was held a party to a new agreement concluded under a reopening clause in the first, even though he had not signed the latter.[7]

2. Matthews v. Jeremiah Burns, Inc., 129 N.Y.S.2d 841 (Sup. Ct. 1954).
3. *In re* Martinelli, 132 N.Y.L.J. 9, col. 7 (Sup. Ct. Sept. 23, 1954).
4. Matthews v. Jeremiah Burns, Inc., 129 N.Y.S.2d 841 (Sup. Ct. 1954).
5. *In re* Compania De Los Ferrocarriles, 76 F. Supp. 521 (P.R. 1948).
6. Lewis v. Cable, 107 F. Supp. 196 (W.D. Pa. 1952).
7. *In re* Alamac Restaurant, Inc., 203 Misc. 463, 119 N.Y.S.2d 498 (Sup. Ct. 1953).

Eligibility of Beneficiaries. The uncertainty of contract provisions has caused some difficulty in determining the eligibility of employees for benefits. Since employees are often a fluid group, the time and status of their employment have been significant. A plan that provided for persons "who are either now in the employment of the employer or may be hereafter employed" was held to confer benefits not upon those who resigned or were discharged, but only upon those who remained in the employment.[8] That ruling was applied to the exhaustion of a welfare fund even after the termination of the collective bargaining agreement. In another case involving the application of a pension plan by the receivers of a railroad, persons who had qualified by age and length of service were held eligible for benefits even though they were later discharged or resigned.[9] As a general rule, employees who have been discharged before they established their eligibility have not been entitled to benefits.[10]

A special problem has arisen with respect to employees who have refused to be discharged merely because they have reached the retirement age. Involuntary retirement has been construed to be a discharge. One court expressed the significance of volition in such matters by the aphorism, "Children are put to bed, adults retire."[11] When a union agreement permitted discharge only for cause, involuntary retirement under a separate pension plan was held a breach of contract.[12]

The extent to which pension plan trustees may exercise their discretion in applying eligibility standards has been the subject of a few decisions. An agreement required the attainment of a certain age and certain years of service for a pension; an employee took two days off for illness and immediately thereafter the mine where he worked was shut down by a strike; during the strike he reached retirement age and the trustees sought to disqualify him because the continuity of his employment had been broken. The court found the discrepancy too trivial.[13] In another case, the pension plan was confined to union

8. Del Veccio v. Hood, 4 N.J. Super. 254, 256, 66 A.2d 738, 739 (1949).

9. Vallejo v. American R.R., 188 F.2d 513 (1st Cir. 1951).

10. Gelhaus v. Eastern Air Lines, Inc., 194 F.2d 772 (5th Cir. 1952); Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 224 P.2d 386 (1950); Pullano v. Aluminum & Magnesium, Inc., 24 CCH LAB. CAS. ¶ 67,983 (Ohio 1953), *appeal dismissed*, 160 Ohio St. 206, 115 N.E.2d 4 (1953).

11. International Ass'n of Machinists v. Electric Vacuum Cleaner Div., G.E. Co., 17 CCH LAB. CAS. ¶ 65,350 (Ohio 1949).

12. United Protective Workers v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952); International Ass'n of Machinists v. Electric Vacuum Cleaner Div., G.E. Co., 17 CCH LAB. CAS. ¶ 65,350 (Ohio 1949). In Bakery and Confectionery Workers v. National Biscuit Co., 78 F. Supp. 517 (E.D. Pa. 1948), the court upheld a compulsory retirement against a union's insistence that it be postponed until a pension plan was negotiated.

13. Bednar v. UMW Welfare and Retirement Fund, 25 CCH LAB. CAS. ¶ 68,352 (D.C. 1953).

members; the union constitution prohibited membership to anyone who sold intoxicating liquor; a miner left the mines because of ill-health and operated a saloon; the union continued to accept his dues and thereafter he reached retirement age. The pension agreement gave the trustees "full authority" on matters of eligibility, but the court held that "full authority" was not synonymous with absolute or unlimited discretion. Thus, the union was deemed to have waived its constitutional prohibition by accepting dues and the trustees were required to pay the pension.[14] Where eligibility for a pension rested upon the recommendation of a medical staff, however, the requirement that an employee have a permanent illness not compensable under a workmen's compensation law was upheld.[15]

Benefit Rights. The concept of an agreement normally implies the existence of rights and obligations; but the practice of providing many aspects of employee benefit plans through separate documents, resolutions and communications has led to dispute over what rights, if any, have been created. Early welfare plans were promulgated by employers unilaterally, and many expressly stated that they were mere gratuities, that no rights were vested in the employees, and that the plans were subject to modification or abandonment within the sole discretion of the employer.[16] In some instances, however, courts recognized that unilateral welfare plans were in the nature of continuing offers, subject to acceptance by employees through a continuation of their work on an implied condition that the plan would be continued. Under those circumstances, the employees acquired enforceable rights to the benefits.[17] In some instances, companies were estopped from invoking voluntary provisions unknown to employees or inconsistent with representations of company officials.[18] When collective bargaining agreements incorporated or referred to welfare plans, it was

14. Forrish v. Kennedy, 377 Pa. 370, 105 A.2d 67 (1954).

15. Bromberg v. United Cigar-Whelan Stores Corp., 19 CCH LAB. CAS. ¶ 66,203 (N.Y. Sup. Ct. 1951). McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y. Supp. 98 (4th Dep't 1898), involved a unilateral plan. The majority of the court upheld the trustees' determination of eligibility; but a dissent stated that the trustees must act in accord with rules and regulations established by the agreement and must have cause for their conduct.

16. Hughes v. Encyclopedia Britannica, Inc., 21 CCH LAB. CAS. ¶ 66,747 (N.D. Ill. 1952); McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N.Y. Supp. 98 (4th Dep't 1898); Pullano v. Aluminum & Magnesium, Inc., 24 CCH LAB. CAS. ¶ 67,983 (Ohio 1953), *appeal dismissed*, 160 Ohio St. 206, 115 N.E.2d 4 (1953).

17. Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948); Bromberg v. United Cigar-Whelan Stores Corp., 19 CCH LAB. CAS. ¶ 66,203 (N.Y. Sup. Ct. 1951); Schofield v. Zion's Co-op. Mercantile Institution, 85 Utah 281, 39 P.2d 342 (1934) Gilbert v. Norfolk & W. Ry., 114 W. Va. 344, 171 S.E. 814 (1933).

18. Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948); Henderson v. Railroad Federal Savings & Loan Ass'n, 272 App. Div. 893, 71 N.Y.S.2d 96 (1st Dep't 1947). In Bos v. United States Rubber Co., 100 Cal. App. 2d 565, 224 P.2d 386 (1950), there was no proof that the employee had no knowledge of a written plan, or that oral representations were made in bad faith.

obvious that they were obligatory plans.[19] Under contracts between an employer and insurance companies for annuities, it would seem that employees are to be treated as third party beneficiaries.[20]

The benefits to which employees are entitled are ordinarily explicit; but the courts have been called upon to define them. A union agreement provided for the payment of pensions to qualified employees "during their lives." After the qualification of some employees, the agreement terminated. The court found the agreement displayed a manifest intent to require the employer to continue the annuities for the balance of the lives of those who had qualified within the life of the employment contract.[21] A negotiated agreement providing for group insurance was held to require the employer to pay for that insurance even though he had purchased similar insurance under a private arrangement.[22] Whether an employee benefit plan is intended to supplement workmen's compensation, state disability insurance or social security payments is considered below.[23]

Administration Problems. The administration of employee benefit plans is governed by rules of agency and trusts. Pertinent rules of trust are set forth below.[24] The agency situations do not appear to have resulted in court decisions.

Enforcement Problems

Actions to Collect Contributions. The liability of employers for contributions is ordinarily undeniable;[25] but a problem of calculation was presented by a contract that called for contributions as a percentage of the "entire payroll." An issue was raised as to the obligation of the employer to pay on extra compensation for overtime, and the court held that he was required to do so.[26]

Further difficulty has arisen when a defaulting employer has been insolvent or in receivership. A corporation that rendered itself insolvent by purchasing its own stock did so in contravention of state laws, and welfare plan trustees were allowed a preference over the claims of the former stockholder who sought to be paid for the stock he had sold to the corporation.[27] A railroad company made deductions from the wages of its employees but failed to turn them over to an insurance company before the railroad went into receivership. The

19. Vallejo v. American R.R., 188 F.2d 513 (1st Cir. 1951).
20. See Restatement, Contracts §§ 133, 134 (illustration 4), 135, 140 (illustration 4) (1932); 2 Williston, Contracts §§ 367-369 (rev. ed. 1936).
21. N.Y. City Omnibus Corp. v. Quill, 297 N.Y. 832, 78 N.E.2d 859 (1948) (mem. decision).
22. *In re* Martinelli, 132 N.Y.L.J. 9, col. 7 (Sup. Ct. Sept. 23, 1954).
23. See pp. 141-143, 147-150 *infra*.
24. See pp. 122-125 *infra*.
25. See note 22 *supra*.
26. Matthews v. Jeremiah Burns, Inc., 129 N.Y.S.2d 841, 844 (Sup. Ct. 1954).
27. Jarroll Coal Co. v. Lewis, 210 F.2d 578 (4th Cir. 1954).

court held that there was no trust in the funds while in the hands of the employer and the insurance company had only the rights of an ordinary creditor.[28]

A special dilemma in the collection of contributions was presented by three cases involving contracts negotiated by the International Woodworkers of America. The contracts differed in certain respects but all of them provided a wage increase of seven and one half cents an hour and then authorized the employer to pay the same amount to a health and welfare fund. In each case a number of employees objected to the contribution and demanded that the money be paid to them as increased wages.

The first case arose in Idaho and the court held that though the seven and one half cents was probably an increase in wages, it was provided by a collective bargaining agreement for the specific purpose of financing an employees' benefit program; the contribution did not result in a loss of wages; on the contrary, it involved a gain of benefits; hence, it could not be recovered or enjoined.[29] The second case arose in Oregon. The court said that the Oregon case differed factually from the Idaho case, but indicated merely that prior to the designation of an insurance company which was to receive the premiums for the employee insurance, the employer had paid the money directly to the employees. The court stressed its interpretation that this was not "an employer paid plan" and then went on to rule that the union had no authority to direct how wages should be spent without the express authorization of its members. The court said that "[n]o matter how laudable the cause . . . it would certainly be an opening wedge for eventual dangerous control by . . . [unions] over the expenditures of the individual employee's wages."[30] The third case arose in California. The contract in that case provided explicitly for written authorization of the employees, and in the absence of such authorization, the contributions were not permitted. Since the Labor Code of California prohibited wage deductions without written authorization of the employees, the court also refused to reform the agreement on the possible basis of a mistake.[31] Some trustees and unions have expressed a desire to regard employer contributions as wages in order to take advantage of state wage collection laws; these cases illustrate vividly, however, the need for careful consideration of the kickback and wage assignment laws as well.[32]

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28. Continental Casualty Co. v. Powell, 83 F.2d 652 (4th Cir. 1936).
29. Potlatch Forests, Inc. v. International Woodworkers of America, 108 F. Supp. 906 (N.D. Idaho 1951).
30. Coos Bay Lumber Co. v. International Woodworkers of America, 22 CCH LAB. CAS. ¶ 67,144 (Ore. 1952).
31. International Woodworkers of America v. McCloud River Lumber Co., 119 F. Supp. 475 (N.D. Cal. 1953).
32. Kickback and wage assignment laws are discussed on pp. 139, 140 *infra*.

Actions to Collect Benefits. Although most actions to recover benefits under plans established by collective bargaining have been brought by trade unions,[33] the courts have permitted individual employees to sue in their own names.[34] A union has been held to be without authority to bargain away a former member's pension rights so as to deprive him of the right to recover the pension himself.[35] An employee who took a refund of his contributions to a pension plan and signed a release was clearly barred from recovering a pension.[36]

In suits against trustees to enforce benefit claims there has been a problem of acquiring jurisdiction. Service on one of several trustees has been said to be sufficient only in an action based upon wrongdoing on his part.[37] There has been dictum to the effect that, in order to hold the other trustees personally liable or to enjoin their action, service must be had on all of the trustees.[38] However, even if service is properly made, it has been held that a suit seeking to seize or tie up the funds of a welfare plan had to be brought in the state where the funds were kept.[39]

EMPLOYEE BENEFIT PLANS AS TRUSTS

Employee benefit plans negotiated in collective bargaining almost invariably involve elements of a trust. Except in situations in which insurance is purchased directly by employers, there is some provision for the accumulation of funds and their expenditure for the benefit of persons other than the donor. By operation of law, a trust will inhere in that relationship regardless of the organizational devices and techniques employed. However, most employee benefit plans are now consciously prepared with the Labor-Management Relations Act (LMRA)[40] in mind and an express trust is created. Contributions are made by an employer (with or without employee contributions)

33. See, *e.g.*, AFL v. Western Union Tel. Co., 179 F.2d 535 (6th Cir. 1950). See notes 124-127 *infra*. In cases in which union agreements have followed unilateral welfare plans and have not expressly referred to such plans, the arbitration clause in the union agreement has not been available for the adjudication of disputes involving welfare matters. American Federation of Grain Millers v. Allied Mills, Inc., 196 Misc. 517, 91 N.Y.S.2d 732 (Sup. Ct. 1949); Grocery Warehousemen v. Kroeger Co., 17 CCH LAB. CAS. ¶ 65,443 (Pa. 1949).

34. Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954) (This was obviously the case under unilateral welfare plans.); Western Union Tel. Co. v. Hughes, 228 Fed. 885 (4th Cir. 1915); McLemore v. Western Union Tel. Co., 88 Ore. 228, 171 Pac. 390 (1918).

35. Nichols v. National Tube Co., *supra* note 34.

36. Gelhaus v. Eastern Air Lines, Inc., 194 F.2d 772 (5th Cir. 1952).

37. Kane v. Lewis, 282 App. Div. 529, 125 N.Y.S.2d 544 (3d Dep't 1953); Friedman v. Hall, 24 CCH LAB. CAS. ¶ 68,092 (N.Y. Sup. Ct. 1954); Hobbs v. Lewis, 26 CCH LAB. CAS. ¶ 68,599 (Tenn. 1954).

38. *See* Kane v. Lewis, 282 App. Div. 529, 530, 125 N.Y.S.2d 544, 546 (3d Dep't 1953).

39. Kane v. Lewis, 282 App. Div. 529, 125 N.Y.S.2d 544 (3d Dep't 1953); Friedman v. Hall, 24 CCH LAB. CAS. ¶ 68,092 (N.Y. Sup. Ct. 1954); Hobbs v. Lewis, 26 CCH LAB. CAS. ¶ 68,599 (Tenn. 1954).

40. 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952).

to trustees for designated benefits to employees. Powers and duties of the trustees are stipulated. But apart from, or in addition to, such contractual arrangements, there are common law and statutory rules of trust that apply.

Rules of Fiduciary Relationship. Most significant are the rules emanating from the fiduciary relationship. Those rules require trustees to be personally disinterested in their trust, to administer their trust faithfully and honestly, to disclose to the beneficiaries all information the trustees may have that may be necessary for the protection of the trust; to preserve trust funds and to take certain steps to augment them; to carry out the express purposes of the trust; and to refrain from waste, damage or personal aggrandizement. They demand the exercise of devotion to the interests of the beneficiaries far beyond the requirements of ordinary business transactions. They carry the moral implications of trust over to the legal obligations of trustees.[41]

The courts have been called upon to expound these principles in only a few cases involving employee benefit plans; yet, it is clear that these fundamental rules of trusts apply to such plans. In one case the court said it "considers such funds as rather sacred."[42] In another, the court went beyond the facts before it to remonstrate:

> The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated; excessive restrictions, either in the insurance policies or the by-laws and regulations, or the providing of small benefits to the employee-members in proportion to the amount contributed by the employee-parties or the premiums paid, taking into consideration the risk involved, will cause more than a lifting of the eyebrows.[43]

Recent reports of the misuse of trust funds by trustees suggest the commission of crimes such as embezzlement or misappropriation of funds.[44] The availability of criminal laws to deal with those situations is obvious. The fiduciary relationship, however, imposes obligations at the opposite end of moral behavior—positive obligations to protect, conserve and augment, to prosecute and perpetuate, to disclose and to avoid conflicting interests. And the remedies of declaratory judgments and injunctions apparently are available to clarify or to enforce those fiduciary obligations in employee benefit plans.[45]

Rules of Charitable Trusts. There is dictum to the effect that em-

41. 3 BOGERT, TRUSTS AND TRUSTEES §§ 541-544 (1946); 2 SCOTT, TRUSTS §§ 163A-185 (1939).
42. United Garment Workers v. Jacob Reed's Sons, 83 F. Supp. 49, 52 (E.D. Pa. 1949).
43. Upholsterers' Int'l Union v. Leathercraft Furniture Co., 82 F. Supp. 570, 575 (E.D. Pa. 1949).
44. *Hearings before Committee on Education and Labor on H.R. 115*, 83d Cong., 2d Sess. (1954) (Investigation of Welfare Funds and Racketeering).
45. *See* Van Horn v. Lewis, 79 F. Supp. 541, 545 (D.C. 1948).

ployee benefit trusts are charitable trusts. The miners' welfare and retirement fund was called "a beneficial charitable trust" in connection with the sufficiency of a majority decision of the board of trustees.[46] It has also been suggested by serious students of trusts that employee pension trusts should be deemed to be charitable trusts—at least for the purpose of avoiding the rule against perpetuities.[47] A logical argument can be made to the effect that most, if not all, employee benefit trusts are for charitable or public purposes and not for the personal gain of the employer contributors. Whether, in the long run, all the purposes of employee benefit plans would be served by dealing with them as charitable trusts—with the concept of the cy pres doctrine instead of the industrial notion that the employee beneficiaries might have something to say about the modification of their benefits—is a question perhaps best left to further experience.

Rules against Perpetuities and Accumulations. Trusts, having developed historically under an atmosphere of discouragement, were burdened with restrictive rules that have not yet been eliminated. The rule against perpetuities required title in property to vest in the beneficiaries within 21 years after the death of the last survivor of those living at the time of the trust's creation—thereby terminating the trust. A similar time limitation was placed upon the accumulation of trust income. These rules, with various modifications, obtain in most states today. Twenty-four states have statutes exempting employees' trusts from the rule against perpetuities.[48] Statutes exempting accumulations of employee trusts from common law restrictions are fewer.[49] Employee benefit plans under collective bargaining are probably too young to have experienced court litigation under these rules; and it may be well to press for remedial legislation or for judicial exemption through a construction of employee benefit trusts as charitable trusts in order to avoid trouble in the future.

Rules against Indefinite Beneficiaries. A common law rule of trusts has required the beneficiaries to be definitely ascertainable. Not so for charitable trusts. Since employee benefit trusts have a fluctuating group of beneficiaries, often with inchoate interests at any particular time, such trusts may conflict with that rule. A number of state statutes have exempted employees' trusts from the requirement of

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46. *Ibid.*

47. Lauritzen, *Perpetuities and Pension Trusts*, 24 TAXES 519 (June 1946).

48. Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Virginia, West Virginia and Wisconsin. CCH PENS. PLAN GUIDE ¶ 1116 (1954); P-H PENS. & PROFIT SHARING ¶ 6206 (1954).

49. Illinois, Indiana, Michigan, Minnesota, Missouri, Ohio, Pennsylvania, Rhode Island and Wisconsin. CCH PENS. PLAN GUIDE ¶ 1116 (1954); P-H PENS. & PROFIT SHARING ¶ 6296 (1954).

definitely ascertainable beneficiaries, but here too the concept of a charitable trust may help.[50]

Rules on Trust Investments. There have been numerous statutes restricting the type of investments that might be made by trusts. The early approach was to list the permitted classes of investments. These included government securities, first mortgages, some corporate bonds, but excluded corporate stocks. Some states continuing their legal lists have expanded them to include some stocks.[51] Another approach has been to permit trustees to purchase whatever investments a prudent man would make for the permanent investment of his own funds. The prudent man theory is now law in approximately half the states.[52] A third approach has been to spread risk through use of common trust funds,[53] and, recently, a fourth approach has been to permit trustees to invest by purchasing shares in investment companies.[54]

The power of trustees to invest the funds of an employee benefit plan was tested in a recent case.[55] Pension funds were loaned by the trustees to employees in limited amounts and with security in the nature of a lien against the employee's accumulated annuity interests. The court noted that the LMRA, by referring to the "income" from funds, contemplated that such trust funds might be invested. It held the loans to be prudent investments, but took occasion to state:

> Certainly it would not be within the law for trustees to permit the interested members to destroy such trust funds to the end that when a retirement should be available, the member would have already used and made way with the funds, and, therefore, the purpose of the law would be vitiated. . . . [I]t is the purpose of the law that they be available when due under the contract.[56]

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50. See text following note 49 *supra.*

51. District of Columbia, Indiana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Carolina and Wisconsin. 4 P-H WILLS ESTATES & TRUST SERVICE ¶ 15,301 (1954). Trusts seeking to qualify for tax exemptions under the Internal Revenue Code are also subject to a list of prohibited transactions, which may constitute restraints on investment. INT. REV. CODE of 1954, § 401(a).

52. By statute: California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Texas, Utah, Washington and West Virginia. By court decision: Kentucky, Maryland, Missouri, North Carolina, Rhode Island and Vermont.

53. All states but Iowa, Missouri, Montana, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina and Wyoming.

54. New Hampshire, New Mexico, Ohio, South Carolina, Tennessee and Washington.

55. United Garment Workers v. Jacob Reed's Sons, 83 F. Supp. 49 (E.D. Pa. 1949).

56. *Id.* at 52.

EMPLOYEE BENEFIT PLANS AND STATUTORY REGULATION

LABOR-MANAGEMENT RELATIONS ACT OF 1947

The impact of the LMRA upon employee benefit plans is threefold: first, through its explicit provisions on health and pension funds; second, through its broad code of collective bargaining; and third, through its special provision for suits on labor agreements. In its regulation of welfare trust funds, it seeks to assure joint employer-employee control and to check fiscal abuses; in its more general regulation, it deals with welfare plans as one of many subjects of collective bargaining; and, in its provision for suits on union agreements, it opens the federal courts as a special forum for redress of grievances.

WELFARE FUND REGULATION—SECTION 302

The starting point of LMRA regulation over employee benefit funds is its prohibition of payments by an employer to representatives of his employees. To avoid company unionism and union racketeering, Congress made it unlawful for an employer to pay money or to give anything of value to a representative of his employees or for a representative to receive it from him. At the same time, exceptions were provided for obviously benign purposes. One of these was a trust fund for employee benefits. The statute requires that the money be paid to a trust fund devoted to certain purposes and created under specified formalities.[57] The trust fund must be: (1) for the sole and exclusive benefit of employees, their families and dependents (of the one employer or jointly with employees, families and dependents of other employers making similar payments); and (2) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational injury, or for insurance on the foregoing, or for unemployment benefits, or for life, disability, sickness or accident insurance. Employer payments intended for employee pensions or annuities must be made to a separate trust not to be used for any other purposes.[58]

The requirement that the trust must be exclusively for "the benefit of his employees" has been held not to call for the inclusion of all the employees of an employer.[59] It is recognized that a union may bargain for and establish a plan merely for the employees in a collective bargaining unit.

In regard to the purposes of the trust, a general designation of any of the approved types of benefits appears to be sufficient. The fact

57. 61 STAT. 157 (1947) (§ 302(c)(5)), 29 U.S.C. § 186(c)(5) (1952).
58. *Ibid.*
59. Upholsterers' Int'l Union v. Leathercraft Furniture Co., 82 F. Supp. 570 (E.D. Pa. 1949).

that an insurance company may return surplus premiums to the trustees and that they might divert such funds to purposes foreign to the parties' agreement does not invalidate the trust.[60] The use of pension trust funds for temporary loans to employees, with adequate security, has been permitted as not inconsistent with the purpose of the trust.[61] An agreement which authorizes trustees to determine the kind and quantity of welfare and retirement benefits also has been upheld on a finding that the plan adopted is reasonable, though tentative and subject to change at the trustees' will.[62]

The LMRA requires further that the trust fund be established by a written agreement.[63] This must provide for: (1) the basis upon which payments are to be made; (2) administration of the trust fund by equal representatives of employers and employees, with such neutral persons as may be mutually agreed upon; (3) arbitration of deadlocks by an impartial umpire, or, if none can be agreed upon within a reasonable time, by a United States district court; (4) an annual audit of the trust fund, a statement of which shall be available for inspection by interested persons at the principal office of the fund and at such other places as may be designated.

The written instrument of trust is customarily separate and apart from the collective bargaining agreement. A mere statement in a union agreement to the effect that the employer would not abandon or modify a pre-existing benefit and pension plan was held to import incorporation by reference, and the two agreements were read together as one binding contract.[64] An oral agreement by an employer to make contributions under a plan established in writing by an employers' association of which he was not a member was also sufficient to meet the need for a written trust agreement.[65]

The prohibition of employer contributions to employee representatives other than trustees equally representative of the employer and his employees has not proved watertight. In the phonograph recording industry, trustees designated by employers (with a right in the United States Secretary of Labor to appoint successors) were held acceptable even though union certification was made a prerequisite to approval of services to be covered by the plan.[66] In St. Louis, a corporate health institute which the union did not control was permitted to receive employer contributions for medical and hospital

60. *Id.* at 575.
61. United Garment Workers v. Jacob Reed's Sons, 83 F. Supp. 49 (E.D. Pa. 1949).
62. Van Horn v. Lewis, 79 F. Supp. 541 (D.C. 1948).
63. 61 STAT. 157 (1947) (§ 302(c)(5)(B)), 29 U.S.C. § 186(c)(5)(B) (1952).
64. AFL v. Western Union Tel. Co., 179 F.2d 535 (6th Cir. 1950).
65. United Marine Div. v. Essex Transportation Co., 216 F.2d 410 (3d Cir. 1954).
66. OP. ATT'Y GEN., RELEASE OF DEP'T OF LABOR (Dec. 13, 1948).

services to employees.[67] In a recent case in which there were joint trustees, but the employer trustees were selected by employers not in privity with the defendant employer, the district court found compliance with the LMRA and stated, "we think that when set up as a board . . . these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees."[68] Since the LMRA refers only to trust funds and requires equal representation, Congress must have intended to regard the trustees as representative of those who appointed them. The court would be on firmer ground if it stated that the Act requires merely equal representation of labor and management without direct or personal representation of all participants in the plan.

The LMRA expressly exempts from its terms welfare trust funds established prior to January 1, 1946.[69] Even though an employer did not contribute to such a fund prior to 1946, he might do so later with impunity.[70]

The welfare trust provisions of the LMRA, unlike the collective bargaining provisions, are penal in nature; violation is a misdemeanor punishable by fine or imprisonment or both.[71] But there has been little effort to enforce those provisions. The National Labor Relations Board has rejected all responsibility for the enforcement of that section of the Act. When asked to proceed against a violation of another portion of Section 302 (requiring written authorization for a dues checkoff), the Board declined to do so on the ground that the legislative history of the Act, as well as its language, established criminal prosecution and injunction at the request of the Attorney General as the exclusive methods of enforcing that section. Congress, it said, did not intend the newly created limitations in Section 302 to have any impact on the older unfair labor practice jurisdiction of the Board.[72] The Board will deal with checkoffs, welfare trust funds or any other industrial practice, regardless of whether it is mentioned in Section 302, if the practice falls within the definitions of unfair labor practices in the Act; but it will do so under the specific limita-

67. Rice-Stix Co. v. St. Louis Labor Health Institute, 15 CCH LAB. CAS. ¶ 64,727 (E.D. Mo. 1948).

68. United Marine Div. v. Essex Transportation Co., 216 F.2d 410, 412 (3d Cir. 1954).

69. 61 STAT. 157 (1947) (§ 302(g)), 29 U.S.C. § 186(g) (1952); Upholsterers' Int'l Union v. Leathercraft Furniture Co., 82 F. Supp. 570 (E.D. Pa. 1949); Van Horn v. Lewis, 79 F. Supp. 541 (D.C. 1948).

70. Fur Dressers Union v. Fur Dressers Guild, Inc., 87 F. Supp. 400 (S.D.N.Y. 1949); *In re* Feller, 196 Misc. 18, 82 N.Y.S.2d 852 (Sup. Ct. 1948); *In re* Baker, 194 Misc. 51, 85 N.Y.S.2d 193 (Sup. Ct. 1948).

71. 61 STAT. 157 (1947) (§ 302(d)), 29 U.S.C. § 186 (d) (1952).

72. Local 1664 (Dock Division), 103 N.L.R.B. 1217 (1953); New Orleans Laundry, Inc., 100 N.L.R.B. 966 (1952); Crown Products Co., 99 N.L.R.B. 602 (1952); Salant & Salant, Inc., 88 N.L.R.B. 816 (1950).

tions of other portions of the Act and not in enforcement of Section 302. Complaints concerning violations of the welfare trust provisions of Section 302 are referred to the Attorney General.

For reasons unknown to the writer, the Attorney General has never expressed a formal opinion with respect to the meaning or import of Section 302 of the LMRA, nor have any rulings emanated from his department concerning the penal provisions found in the statute.[73] It seems reasonable to conclude that the penal provisions of the LMRA, as the penal provisions of most labor laws, are distinguished by their desuetude.

Unfair Labor Practices

It would be accurate to say that health and pension plans are treated no differently from any other conditions of employment; hence, the reader interested in knowing how the unfair labor practice provisions of the LMRA apply to employee benefit plans would do well to consult a comprehensive treatise on the decisions of the NLRB. For the principles enunciated in all those decisions are applicable, whenever pertinent, to situations involving employee benefit plans. Space does not permit a résumé of all those principles in this article. Yet the reader may desire, for ready reference, some mention of NLRB rulings in cases that happen to involve employee benefit plans. Such a presentation is attempted in the following paragraphs.

Employer's Refusal to Bargain—Section 8a(5). Now that approximately eleven million workers are covered in welfare plans with total assets exceeding seventeen billion dollars, it seems a bit strange that less than a decade ago it was seriously contended that welfare plans were not a proper subject for collective bargaining. Although the National Labor Relations Act (NLRA) clearly required bargaining with respect to wages and other conditions of employment, many employers, who had established employee benefit plans unilaterally, argued that Congress had not intended to compel them to submit such plans to union negotiation. The NLRB, however, found that "wages" must be construed to include emoluments of value like pension and insurance benefits, and there was no sound basis for excluding them from "other conditions of employment." A refusal to bargain on pension and health plans was, therefore, an unfair labor practice.[74] The union's right to negotiate changes in a company

73. Letter dated December 27, 1954, from the Chief of the General Crimes Section, United States Department of Justice. On another occasion, the writer submitted an inquiry to the United States Attorney General in Washington and to the United States Attorney in Los Angeles for an interpretation as to the legality of making employers beneficiaries of a health and welfare plan along with their employees; no reply was received from either official.

74. Inland Steel Co., 77 N.L.R.B. 1 (1948), *enforcement granted*, 170 F.2d 247 (7th Cir. 1949); Black-Clawson Co., 103 N.L.R.B. 928 (1953); Anchor Rome Mills, Inc., 86 N.L.R.B. 1120 (1949); Allied Mills, Inc., 82 N.L.R.B. 854 (1949).

initiated plan was recognized,[75] and once a union expressed an interest in an established plan, the Board required the employer to consult the union before modifying his plan.[76] Enforcement of one of the Board's orders in such a case was denied by a district court which found that subsequent bargaining without incorporating the plan in the union agreement waived the union's right to be consulted on the abandonment of a unilateral plan.[77] When no plan was in existence and a union indicated its desire to bargain on the subject, it was held that an employer was not free to institute a welfare plan by unilateral action.[78]

The complexity of bargaining on pension plans or other benefits has not excused a refusal to bargain on them,[79] even when there were several unions and different plans involved.[80]

The duty to bargain has certain correlative obligations. One of these is to negotiate in good faith at a time and place reasonably convenient to both parties.[81] Unilateral action by an employer while negotiations were suspended has been regarded as a breach of good faith.[82] If a welfare or pension plan had been the subject of collective bargaining and an agreement were reached without including it, no further negotiations would be required during the term of that contract; but when there had been no previous discussion of the subject, the union could insist upon bargaining on it within the term of an existing union agreement.[83] On the other hand, an employer's refusal to incorporate a reopening clause permitting renegotiation of a pension plan in the middle of a contract term was held to be justified on the basis that the inherent nature of pension plans required long range planning.[84]

Another corollary of the duty to bargain is the obligation to furnish data required for intelligent bargaining. Refusal to supply pension and other welfare data requested by a union has been held to show

75. W.W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted*, 174 F.2d 875 (1st Cir. 1949).

76. Inland Steel Co., 77 N.L.R.B. 1 (1948), *aff'd*, 170 F.2d 247 (7th Cir. 1949). See *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 451 (Nov. 14, 1952) (unpublished).

77. NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954), *denying enforcement*, 103 N.L.R.B. 1695 (1953). Also, a unilateral change in the insurance company underwriting a plan which does not affect the benefits has been approved by the General Counsel of the Board. *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 404 (Oct. 10, 1952) (unpublished).

78. General Motors Corp., 81 N.L.R.B. 779 (1949).

79. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

80. Phelps Dodge Corp., 15 N.L.R.B. 732 (1939).

81. 61 STAT. 142 (1947), 29 U.S.C. § 158(d) (1952).

82. W.W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted*, 174 F.2d 875 (1st Cir. 1949); Square D Company, 105 N.L.R.B. 253 (1953).

83. Jacobs Manufacturing Co., 94 N.L.R.B. 1214 (1951), *enforcement granted*, 196 F.2d 680 (2d Cir. 1952).

84. National Carbon Division, Union Carbide & Carbon Corp. & National Carbon Co., 100 N.L.R.B. 689 (1952).

bad faith in bargaining.[85] The requirement to furnish relevant data may be waived by the union, but such a waiver must be quite clear.[86] A contract provision recognizing "retirement of employees" as an exclusive function of management was held too indefinite to constitute a waiver of a union's right to open negotiations on a pension plan, because the contract may have referred only to the time of retirement and not to retirement benefits.[87]

If an employer bargains in good faith, he need not consent to any benefit plan. He must "hold himself open to persuasion"; but he need not submit to marathon discussion, and, after "reasoned discussion," he may refuse to accede to any specific terms.[88] An employer who refused for valid economic reasons to entertain proposals for pension adjustments was held justified in putting the same changes into effect a year later when economic conditions had changed.[89] If, in the course of bargaining with several unions, one union rejected a plan acceptable to the others, the Board's general counsel has ruled that the employer may proceed with that plan even for employees represented by the recalcitrant union.[90]

An employer has been required to bargain with a new union over a plan established with a predecessor union;[91] and, even when a purchaser of a business has not assumed the union contracts negotiated by his seller, the purchaser has been held duty bound to bargain on a welfare plan in his own behalf.[92]

Employer's Unfair Discrimination — Section 8a(3). The LMRA makes it an unfair labor practice for an employer to discriminate in hire, discharge, or terms of employment for or against union membership. A pension or welfare plan with greater or lesser benefits for union members, as distinct from nonunion employees, poses the issue of such discrimination, and the Board has accordingly ruled that such cases involve unfair labor practices.[93] In one case, even though the

85. Jacobs Manufacturing Co., 94 N.L.R.B. 1214 (1951), *enforcement granted*, 196 F.2d 680 (2d Cir. 1952); Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942); Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952); Reed & Prince Manufacturing Co., 96 N.L.R.B. 850 (1951).

86. NLRB v. Nash-Finch Co., 211 F.2d 622 (8th Cir. 1954); Standard Oil Co., 92 N.L.R.B. 227 (1950); *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 793 (Sept. 11, 1953) (unpublished).

87. Tide Water Associated Oil Co., 85 N.L.R.B. 1096 (1949).

88. *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 451 (Nov. 14, 1952) (unpublished); *see* Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360, 366 (1952).

89. National Carbon Division, Union Carbide & Carbon Corp. & National Carbon Co., 100 N.L.R.B. 689 (1952).

90. *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 819 (Oct. 9, 1953) (unpublished).

91. Phelps Dodge Copper Products Corp., 101 N.L.R.B. 360 (1952).

92. NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948); Stonewall Cotton Mills, 80 N.L.R.B. 325 (1948).

93. Bedding & Drapery Workers Union, 34 L.R.R.M. 1332 (1954); Jandel Furs, 100 N.L.R.B. 1390 (1952); Rockaway News Supply Co., 94 N.L.R.B. 1056 (1951).

parties abandoned their original closed shop agreement pending NLRB proceedings and negotiated a new plan not limited to union members, the Board found the parties guilty of an unfair labor practice.[94] The United States Court of Appeals for the Seventh Circuit in *Montgomery Ward & Co. v. NLRB*,[95] upheld a Board order against a plan that discriminated to the disadvantage of union members. The District Court for the District of Columbia, however, in a case not involving a Board order, ruled that a plan resulting in benefits only to union members was not in violation of the LMRA.[96] The court noted that "this agreement was not made between the operators and the employees. It was made between the operators and the United Mine Workers of America, which is a very different proposition."[97] Apparently the court was of the opinion that a union is not required to provide for nonunion members in the absence of an express provision against them.

Theoretically, two separate but equal plans for union and nonunion employees will not violate the Act; but a separate plan for nonunion employees which stated it was for employees who did not become union members was held to suggest a continuation of nonmembership and, therefore, interfered with the exercise of the employee's free choice of membership.[98]

Differences among employers, and the economics of insurance, make some differentiation among classes of employees unavoidable. Discrimination based on craft, class, seniority, merit rating, pay scale or disability has been declared legitimate provided it is not in reality a subterfuge for discrimination involving union affiliation.[99]

The issue of discrimination in the administration of a valid pension plan was posed by the re-employment of strikers and non-strikers, all of whom had been out of work during a nine-week strike. The employer allowed credit for continuous service toward pension benefits to the non-strikers and denied it to the strikers. The Board reasoned that pensions were equivalent to wages; that the employer could not be required to pay wages to economic strikers; that he was privileged to pay non-strikers stand-by pay; hence, that there was no unfair labor practice in the discriminatory allowance of pension time credit.[100]

94. Jandel Furs, 100 N.L.R.B. 1390 (1952).
95. 107 F.2d 555 (7th Cir. 1939).
96. Van Horn v. Lewis, 79 F. Supp. 541 (D.C. 1948).
97. *Id.* at 543.
98. Interstate Motor Freight Systems, Inc., NLRB Case No. 14-CA-830 (trial examiner's intermediate report, Dec. 10, 1952).
99. *Administrative Decisions*, NLRB GEN. COUNSEL, Case No. 356, 30 L.R.R.M. 1319 (1952). See INT. REV. CODE of 1954, §§.401(a)(4), 501(a) (A trusteed pension plan created by an employer for the exclusive benefit of his employees does not qualify for tax exemption if the benefits of the plan discriminate in favor of officers, supervisors, stockholders, or highly paid employees.).
100. General Electric Co., 80 N.L.R.B. 510 (1948).

Company Unionism—Section 8a(2). Since private welfare plans had been offered for years as a substitute for unionism, it was to be expected that the ban upon company unions, introduced by the NLRA,[101] would disturb some existing health and pension plans. In the *Kresge Department Store* case,[102] a workers' mutual aid association had functioned for 44 years prior to the enactment of the NLRA. Upon enactment of the NLRA it became a "labor organization" subject to the Act and some steps were taken to divorce it from management. Nevertheless, company executives continued to hold office in the association and the employer gave space, rent-free, for a medical department, paid the salaries of medical and nursing personnel and gave the association a monetary gift. The Board found that company "interference" remained active, and ordered the association disestablished. At the same time, the Board noted that nothing in its order should be taken to require the company to vary or abandon the substantive features of any existing contract relative to rates of pay or other conditions of employment.[103] The practical effect of that ruling would appear to be that a welfare plan might be kept intact even though a company-dominated labor organization is ordered dissolved.

Employer's Restraint of Employees in the Exercise of Their Rights —Section 8a(1). It is an unfair labor practice for an employer to restrain, coerce or intimidate employees in the exercise of their rights under Section 7 of the Act which primarily consists of the right to join a union and to bargain collectively or to refrain from doing so. Most of the conduct constituting the unfair labor practices of refusal to bargain and antiunion or prounion discrimination are also unfair labor practices of restraint or coercion; therefore, the same conduct generally involves unfair labor practices under two sections of the Act.

Certain conduct of employers has been found unfair particularly as a restraint or coercion of employees in their choice or rejection of a labor organization. Any threat of reprisal or promise of a benefit by an employer to influence the action of employees in the course of a union organization campaign or in a representation election is such an unfair labor practice. The use of threats or promises in connection with health and pension plans may be such an unfair labor practice depending upon the circumstances surrounding the employer's statement.

An employer's announcement threatening to discontinue medical services if a union were successful in a forthcoming election was held a clear violation of the Act.[104] So was a statement to the effect that

101. 49 STAT. 452 (1935), 29 U.S.C. § 158(2) (1941).
102. 77 N.L.R.B. 212 (1948).
103. *Id.* at 217.
104. Burns Brick Co., 80 N.L.R.B. 389 (1948).

if workers organized they would lose life insurance and health and accident policies carried by the employer.[105] In a case in which a hospitalization plan had been under consideration for some time, the employer's announcement of the plan in the week immediately preceding an election was found to be calculated to coerce the decision of the employees.[106] On the other hand, a pre-election listing of benefits given by an employer in the past, including pension and insurance plans, was held to involve no threat of retraction, and, hence, no unfair labor practice.[107]

Union's Unfair Labor Practices — Section 8b(1)(2)(3). The acts of labor organizations, proscribed by the LMRA, may involve employee benefit plans very much in the same manner as the unfair labor practices of employers. A union was held in violation of the Act jointly with an employer for a closed shop agreement restricting pension benefits to union members.[108] A union, however, may be guilty alone of restraining or coercing employees in the exercise of their right to refrain from joining a union. Such was indicated in a case in which a welfare fund agreement did not contain any discriminatory clauses, but the union sought to deprive certain members of their benefits after they had been declared not in good standing.[109] It is also an unfair labor practice on the part of the union for it to induce an employer to discriminate against nonunion employees. A union's insistence, in the course of collective bargaining, upon a welfare and retirement fund for union members only was held such coercion of employer discrimination.[110]

A union has the right to adopt rules of conduct for its members and such rules are exempt from the prohibition against restraint or coercion upon employees by a union.[111] In a situation in which expulsion from a union might have resulted in the loss of a job and other economic benefits, such as a pension, the United States Court of Appeals for the Seventh Circuit decided that the threat of expulsion for infraction of union rules was not a violation of the LMRA.[112] The court found that coercion by a labor organization was illegal only to the extent declared by Congress and that Congress made illegal only such action as would "not impair the right of a labor

105. Hazen & Jaeger Funeral Home, 95 N.L.R.B. 1034 (1951).
106. Lake Superior District Power Co., 88 N.L.R.B. 1496 (1950); Agar Packing & Provision Corp., 81 N.L.R.B. 1262 (1949); Minnesota Mining & Mfg. Co., 81 N.L.R.B. 557 (1949).
107. L.H. Butcher Co., 81 N.L.R.B. 1184 (1949).
108. Jandel Furs, 100 N.L.R.B 1390 (1952).
109. *See* Bedding & Drapery Workers Union, 34 L.R.R.M. 1332, 1334 (1954).
110. Penello v. International Union, UMW, 88 F. Supp. 935 (D.C. 1950).
111. 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(1)A (1952).
112. American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951); *cf.* Bedding & Drapery Workers Union, 34 L.R.R.M. 1332 (1954) (expulsion for refusal to sign a checkoff authorization).

organization to prescribe its own rules with respect to the acquisition or retention of membership. . . ."[113]

No decisions have been found involving employee benefit plans in the unfair labor practices of secondary boycotts and sympathetic strikes, but such cases may arise.

REPRESENTATION PROBLEMS—SECTION 9

Welfare plans have posed a few problems in the determination of the proper representatives of employees for the purposes of collective bargaining. Again, no comprehensive treatment of the subject will be attempted in this article, but those cases involving such plans shall be noted.

Unit Appropriate for Collective Bargaining. The certification of a labor organization as a proper bargaining agent rests upon the choice made by employees within a unit appropriate for the purposes of collective bargaining. The delineation of the appropriate unit, or the designation of which employees shall be included within it and which are to be excluded from it, is determined by a multitude of factors such as the mutuality of interests among the workers, the history of union affiliation, past bargaining practices, prior employer affiliations and customary craft and industrial alignments.

Retired employees used only occasionally have been excluded from an appropriate unit because they had no substantial interest in shop working conditions.[114] Thus, pensioners subject to recall have been excluded from a production and maintenance unit.[115] In one case, although pensioners were bargained for informally, they were excluded from a voting group because of a lack of community of interest with employees in active service and their status as employees under the Act was said to be in doubt.[116]

Contractual Bars to Elections. In order to promote collective bargaining as enjoined by Congress, the Board has ruled that existing contracts between proper employee representatives and employers may not be upset by new negotiations until the existing contracts have run their terms or have been undisturbed for a reasonable length of time. Such contracts are a bar to demands for new negotiations or for new representation elections. In plants or industries having employee benefit plans, the problem may be compounded by the existence of different terms for the collective bargaining agreement and the welfare or pension agreement. The Board has held uniformly that when a pension plan has extended beyond the term of a union agree-

113. American Newspaper Publishers Ass'n v. NLRB, *supra* note 112 at 800.
114. Whiting Corp. v. NLRB, 200 F.2d 43 (7th Cir. 1952); Jasper Wood Products Co., 66 N.L.R.B. 333 (1946).
115. Wisconsin Power & Light Co., 67 N.L.R.B. 1219 (1946); W.D. Byron & Sons of Md., Inc., 55 N.L.R.B. 172 (1944).
116. Public Service Corp. of N.J., 72 N.L.R.B. 224 (1947).

ment, it has not been a bar to a petition for an election by a rival union at the time the union agreement expired.[117]

Interference with Elections. Elections may be invalidated by irregularities that render a free choice impossible or extremely doubtful. Employer statements containing threats of reprisal or promises of benefits on the eve of an election have been considered above as unfair labor practices;[118] but such conduct would also be grounds for challenging the result of the election.[119] In an internal union struggle, a group of officers shifted their allegiance to a new union, seized the sick benefit funds and allowed claims of only those employees who signed up with the new organization. This was held to invalidate an election in which both old and new unions were placed on the ballot.[120]

Enforcement Powers of the NLRB

In unfair labor practice and representation cases involving health and pension plans, the NLRB has exercised its usual powers. Orders have been issued directing respondents to cease and desist unfair practices, to engage affirmatively in conduct required to effectuate the purposes of the Act and to post the usual notices of intent to comply. The Board once had occasion to order an employer to reinstate dismissed employees with back pay and to pay insurance to the representatives of one employee who had died and had been deprived of an employee benefit.[121] Though that decision was reversed as to the deceased employee on other grounds, there is no reason to doubt that in an appropriate case, an order to pay benefits necessary to restore a wrongfully discharged employee to his former status would be enforced. Back pay should reasonably include retroactive contributions to a benefit plan.

The refusal of the Board to engage itself with the enforcement of Section 302 has been noted above.[122] In another situation also the Board has refused to deal with problems arising out of a welfare fund. A change in union affiliation was followed by a dispute over credits built up in a fund of the original union. The Board refused to adjudicate the conflict over property rights, stating that such questions were not controlled by the LMRA and were to be decided by a court.[123]

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117. Gates Rubber Co., 95 N.L.R.B. 351 (1951); Independence Lumber & Mfg. Co., 93 N.L.R.B. 1353 (1951); Aluminum Co. of America, 80 N.L.R.B. 1342 (1948). By Section 9(c)(3) of the LMRA, an election cannot be held in any unit in which a valid election has taken place within twelve months.

118. See text at note 104 *et seq. supra.*

119. See notes 104-106 *supra.*

120. Kearney & Trecker Corp. v. NLRB, 210 F.2d 852 (7th Cir. 1954).

121. NLRB v. Glen Raven Silk Mills, Inc., 203 F.2d 946 (4th Cir. 1953).

122. See pp. 128, 129 *et seq. supra.*

123. Boston Machine Works Co., 89 N.L.R.B. 59 (1950).

SUITS BY OR AGAINST UNIONS—SECTION 301

The LMRA makes provision for federal court remedies going beyond matters involving the NLRB, and such remedies are available in disputes arising out of employee benefit plans. Section 301 of the Act provides that suits for violation of contracts between an employer and a labor organization in an industry affecting interstate commerce may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Under this section of the LMRA, suits have been allowed to compel an employer to contribute to a sickness and accident fund,[124] to obtain pension benefits under a plan incorporated in the union agreement only by reference,[125] to avoid involuntary retirement,[126] and to determine the exemption of old trust funds from the LMRA.[127]

In all of these instances, the actions were brought also for declaratory relief under the Declaratory Judgment Act;[128] but there is no reason why suits may not be founded upon Section 301 of the LMRA alone.

In a Ford Motor Company case, suit was filed jointly by the union and the aggrieved employee. The parties plaintiff complained that an involuntary retirement at age 65 was in violation of a union agreement that permitted discharge only for just cause. The court indicated that under Section 301 the employee was not a proper party; however, since he had a good cause of action for breach of contract under state laws, and since he did allege diversity of citizenship and the proper jurisdictional amount, he was privileged to join with the union in this federal action.[129] In the same case, the court recognized that suit under Section 301 subjected prayers for injunctive relief to the requirements of the Norris-LaGuardia Act.[130] The court also declared that when a union agreement details a grievance procedure it must be exhausted before suit is filed, unless, as in this instance, the employer made such a course futile by insisting that the matter in dispute was not subject to the union agreement and by denying the union's request to follow the grievance procedure.[131]

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124. Upholsterers' Int'l Union v. Leathercraft Furniture Co., 82 F. Supp. 570 (E.D. Pa. 1949).
125. AFL v. Western Union Tel. Co., 179 F.2d 535 (6th Cir. 1950).
126. United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952); Bakery & Confectionery Workers' Int'l Union v. National Biscuit Co., 78 F. Supp. 517 (E.D. Pa. 1948).
127. Fur Dressers Union v. Fur Dressers Guild, Inc., 87 F. Supp. 400 (S.D. N.Y. 1949).
128. 62 STAT. 964 (1948), 28 U.S.C. §§ 2201, 2202 (1952).
129. United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952).
130. *Id.* at 1001.
131. *Id.* at 1001, 1002.

There remains as yet unsettled the very important question of the extent to which the LMRA has preempted the field of labor relations and has placed problems of employee benefit plans exclusively within federal jurisdiction. The relevant cases do not involve welfare plans;[132] it is quite likely, however, that Supreme Court decisions in recent and pending cases may determine that certain disputes involving employee benefit plans of employers engaged in activities affecting interstate commerce shall fall within the exclusive jurisdiction of the NLRB and the federal courts.[133]

FEDERAL MINIMUM WAGE LAWS

In so far as contributions to, and payments from, employee benefit plans may be considered wages, it is important to consider their status under the federal minimum wage laws.

The Fair Labor Standards Act (FLSA) requires employers engaged in interstate commerce or in activities affecting interstate commerce to pay a specified minimum wage,[134] and, for all hours over 40 in any week, to pay time and a half the "regular rate" of pay.[135] The Walsh-Healey Act requires all persons who contract with the federal government to manufacture or furnish materials, supplies, articles or equipment in an amount exceeding $10,000 to pay prevailing minimum wages as determined by the Secretary of Labor.[136] Work beyond eight hours a day or forty hours per week may be done only by permission of the Secretary and on the payment of one and one-half times "the basic hourly rate" of pay.[137]

Employer contributions and benefit payments under welfare plans are not regarded as part of the minimum wages required by those laws. The FLSA expressly provides that:

> [T]he "regular rate" . . . shall not be deemed to include . . . contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident or health insurance or similar benefits for employees.[138]

The same principle has been applied to the Walsh-Healey Act by regulation.

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132. United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954); Garner v. Teamsters Union, 346 U.S. 485 (1953); Plankinton Packing Co. v. Wis. Emp. Rel. Board, 338 U.S. 953 (1950); Richman Bros. Co. v. Amalgamated Clothing Workers, 114 F. Supp. 185 (N.D. Ohio 1953).

133. *Ibid.*

134. 52 STAT. 1062 (1938), 29 U.S.C. § 206 (1952).

135. 52 STAT. 1063 (1938), 29 U.S.C. § 207 (1952).

136. 49 STAT. 2036 (1936), as amended, 54 STAT. 681 (1940), 41 U.S.C. § 40 (1952).

137. 49 STAT. 2038, 2039 (1936), as amended, 54 STAT. 681 (1940), 41 U.S.C. § 40 (1952).

138. 63 STAT. 913, 914 (1949), 29 U.S.C. § 207(d)(4) (1952).

The Wage-Hour Administrator, who functions for the Secretary of Labor under the FLSA and the Walsh-Healey Act, has issued a set of standards for determining when a plan comes within the above terms of the FLSA. The same standards are applied to ascertain whether contributions or payments under a plan are to be excluded from the computation of "the regular rate of pay," or "the basic hourly rate." These criteria are as follows:

1. A specific plan must be adopted by an employer or by a collective bargaining contract. Employees must have notice of it. It may be employer financed or contributory.

2. The plan must provide death, disability, advanced age or retirement benefits, or sick benefits, medical expenses, hospitalization and the like.

3. The plan must set out one of the following:
   a) Benefits that are specified or definitely determinable on an actuarial basis.
   b) A definite formula for determining employer contributions and the benefits of each participating employee.
   c) Such a formula by a method consistent with the purposes of the plan under the statute.

4. Employer contributions must go irrevocably to a trustee or a third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed by law on trustees. There must be no recapture or diversion of funds by an employer, but he may receive return of the excess paid in error or by reason of an overestimation of costs. There must be no employee contributions that cut beneath the minimum wage, unless paid to a third person or to a trustee not affiliated with the employer.[139]

"KICKBACK" OR COPELAND ACT

Congress has made it a misdemeanor for anyone to induce an employee engaged in the construction or repair of a public building, or engaged in any public work (or work financed in whole or in part by loan or grant from the United States), to give up any part of the compensation to which he is entitled under his contract of employment. This may not be done by force, intimidation, threat of dismissal or by any manner whatsoever.[140]

The Secretary of Labor is empowered to make reasonable regulations under the Copeland Act, and he has interpreted the Act as not prohibiting

139. 29 CODE FED. REGS. § 778.6(g) (Cum. Supp. 1953) (overtime compensation).

140. 18 U.S.C. § 874 (1952).

> [t]he payment of dues or premiums to unaffiliated insurance companies or associations for medical or hospitalization insurance where the employer is not required by federal, state or local laws to supply such insurance or benefits.[141]

The Secretary has also indicated that upon application, he will give written permission for the deduction of contributions to a pension fund, if the employee voluntarily consents in writing or if the plan is provided for in a union contract.

STATE WAGE DEDUCTION AND ASSIGNMENT LAWS

To permit employers to transmit employee contributions directly to welfare trustees or insurance companies, as part of wage payment, it is necessary to comply with state laws on wage deductions and assignments.

Approximately one third of the states require a written authorization signed by the employee before wages may be withheld and paid to a third party.[142] A few require that a written statement of the total amount of deductions must be given the employee.[143] Michigan and New Jersey laws state that the authorization must be voluntarily agreed to,[144] and Indiana makes it revocable at any time.[145] Missouri limits the effect of an assignment to wages earned at the time of assignment.[146] In New York, no individual assignment is needed if a union agreement provides for the wage deduction,[147] and in West Virginia, such agreements are exempted from the wage assignment law.[148]

AGE DISCRIMINATION LAWS

Pension plans may run counter to state laws prohibiting discrimination in hiring, firing or terms of employment on the basis of age. Massachusetts has made void all contracts which tend to prevent employment of persons between the ages of 45 and 65,[149] and its Fair

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141. 29 CODE FED. REGS. § 3.5(e)(4) (1949) (payroll deductions under the Anti-Kickback Regulations).

142. CAL. LABOR CODE ANN. § 224 (1953); ILL. ANN. STAT. c. 48, § 39.1 (1950); IND. STAT. ANN. § 40-210 (Burns 1952); IOWA CODE ANN. c. 539, § 539.4 (1950); KY. REV. STAT. § 371.110(1) (1953); MASS. ANN. LAWS c. 154, § 2 (1948); MINN. STAT. ANN. § 181.04 (West 1947); NEB. REV. STAT. § 36-213 (1952); N.M. STAT. ANN. § 43-1-12. (1953) (notarized and recorded); N.Y. PERS. PROP. LAW § 46-c (unless authorized by union agreement—see annotations to section); R.I. GEN. LAWS c. 292, § 1 (1938).

143. DEL. CODE ANN. tit. 19, § 701 (1953); MICH. STAT. ANN. § 17.271 (1950) (common carriers); ORE. REV. STAT. § 652.610 (1953); UTAH CODE ANN. § 34-10-4 (1953); VA. CODE § 40-25 (1950) (certain industries).

144. MICH. STAT. ANN. § 28.585 (1954); N.J. STAT. ANN. § 43:21-33 (1950) (majority approval of the plan authorizes deductions by the employer).

145. IND. ANN. STAT. § 40-214 (Burns 1952).

146. MO. REV. STAT. § 432.030 (1949).

147. N.Y. WORKMEN'S COMP. LAW § 209. See Section 205 for a list of permissible deductions.

148. W. VA. CODE § 2352 (1949).

149. MASS. ANN. LAWS c. 149, § 24A (1950).

Employment Practices Act was amended to make all discrimination because of age unlawful. Under that Act, the Massachusetts Commission against Discrimination has ruled that involuntary retirement by virtue of a pension plan was void.[150] Colorado has banned discharge for age at any time between the ages of 18 and 60.[151] In Louisiana, it is unlawful for an employer of 25 or more persons to discharge an employee upon any age limit under 50 years except where an old age pension system is adopted.[152]

VETERAN'S RE-EMPLOYMENT RIGHTS

The U. S. Department of Labor has published a handbook on the re-employment rights of veterans under the Universal Military Training and Service Act.[153] In commenting on the right of veterans to be reinstated without loss of rights, the Department stated:

> The extent to which insurance and pension benefits are part of job status varies with the employer's personnel practices or custom or collective bargaining agreement in effect which grants such advantages to other employees. Where a veteran enjoyed those benefits before entering service, and to the extent that they are dependent upon security, the veteran should not be deprived of them because of military service.[154]

If benefits depend on contributions of both employer and employee, neither is required to continue his contributions during the service. The full period of military service, however, is counted as employment in computing seniority for a pension or insurance.[155]

SOCIAL SECURITY ACTS

Social Security Acts have presented several problems of possible overlapping or conflict with private benefit plans. The practical question has been whether one type of benefits must be added to or subtracted from the other type. Because of the diversity of statutes and private agreements, that question can be answered only in terms of a specific statute and a particular employee benefit plan.

Old Age and Survivors Insurance. The federal OASI program makes no reference to private pension or other benefit plans.[156] Em-

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150. *Memo of Position*, MASS. COMM'N AGAINST DISCRIMINATION (Oct. 1952).
151. COLO. STAT. ANN. § 80-4-16 (1953).
152. An employer may adopt rules for the discharge of employees under fifty years of age where he has
> adopted a system of old age pension for the pensioning of employees with periods of service no greater than thirty-five years and with pension allowances of no less than forty-five dollars per quarter.

LA. REV. STAT. § 23:893 (1950).
153. 65 STAT. 85 (1951), 50 U.S.C. APP. § 459 (1952).
154. U.S. DEPT. OF LABOR, SOLICITOR OF LABOR, INTERPRETIVE BULLETIN AND LEGAL GUIDE; VETERANS' REEMPLOYMENT RIGHTS UNDER THE SELECTIVE TRAINING & SERVICE ACT OF 1940 (1948).
155. *Ibid.*
156. 42 U.S.C. §§ 401-419 (1952); P-H SOC. SEC. TAX SERV. ¶ 31,060 (1954).

ployer and employee contributions to the federal plan are taxes that must be paid regardless of private plans. Annuity payments are paid under the federal law even to persons receiving private pensions; but the federal payments are withheld if a person earns more than $1200 per year in other employment. Private employee benefit plans, however, may provide for full benefits, or reduced benefits, under their schemes for recipients of a federal pension.

Unemployment Compensation. The state UC laws require contributions in all cases regardless of private benefit plans.[157] There again, payment is a matter of taxes—tied to both federal and state laws. In providing for unemployment benefits, the state laws differ considerably. A large group of states have adopted the rule by administrative decision that an unemployed worker is not to be disqualified for any portion of the state compensation because he is receiving benefits under a private pension plan.[158] The general rule that an unemployed worker must be ready, able and willing to accept new employment, however, disqualifies many retired employees.[159]

Many states reduce the state payment by the amount of the private pension, especially if the employee benefit plan is financed substantially by the employer.[160] In respect to benefits paid for sickness, accident or other disability, only a few states deduct the amount of such receipts from state unemployment compensation.[161]

Private pension plans contemplate the retirement of a worker, and ordinarily take no cognizance of any new employment or unemployment that may follow. Conceivably, the private plan might take that into account. Other benefit plans are similarly geared to events or disabilities that do not call for consideration of unemployment benefits. If a private unemployment compensation scheme were estab-

157. 1A CCH UNEMPL. INS. REP. ¶ 2300 (1950). Three of the four states which have state disability benefit plans do, however, provide for private as well as state operated plans. See text at notes 163-166 *infra*.

158. California, Colorado, District of Columbia, Florida, Georgia, Illinois, Kentucky, Maine, Massachusetts, Mississippi, New Jersey, New York, North Dakota, Pennsylvania, Texas, Virginia, Washington and Wyoming. CCH PENS. PLAN GUIDE ¶ 2303 (1954); P-H SOC. SEC. TAX SERV. § 27,826 (1954).

159. California, Illinois, New Jersey and New York have rulings to the effect that voluntary retirement under a pension plan disqualifies a person by taking him out of the labor market; Virginia and Wyoming have rulings that there is a rebuttable presumption to the same effect; and Pennsylvania and Kentucky have made the receipt of unemployment compensation contingent upon willingness to take jobs involving the relinquishment of private pension rights. CCH PENS. PLAN GUIDE ¶ 2303 (1954); P-H SOC. SEC. TAX SERV. § 27,826 (1954).

160. Alabama, Connecticut, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Dakota, West Virginia and Wisconsin require such an offset; Arkansas grounds eligibility for state compensation on the nonreceipt of any private pension payments. All but the first three states mentioned and Nebraska, however, require reduction only in the case of plans controlled and/or financed, in whole or in part, by the employer. CCH PENS. PLAN GUIDE ¶ 2303 (1954); P-H SOC. SEC. TAX SERV. ¶ 27,826 (1954).

161. Arkansas, New Hampshire and South Dakota. P-H SOC. SEC. TAX SERV. ¶ 27,826 (1954).

lished—as a guaranteed annual wage plan or plans of a similar nature —it could make any provision the parties wished with respect to the subtraction or supplementation of state unemployment benefits.

Old Age Assistance. The state laws for aid to the aged and the handicapped (with matching federal grants) are ordinarily based on a proof of need.[162] Whether the receipt of benefits under a private employee benefit plan would eliminate need depends upon the circumstances of the recipient and the amounts involved.

Sickness and Accident Disability. Only four states have laws providing compensation for sickness and accident disability. Rhode Island has a compulsory public plan, not affected by private plans.[163] New York requires employers to institute private plans which meet certain standards; additional benefit plans are permitted, but as long as the employee receives the statutory minimum payment in the event of disability, other private benefits may be reduced or maintained.[164] California and New Jersey have public disability insurance plans with optional provisions allowing employers to substitute private plans maintaining specified standards. New Jersey permits the reduction of the temporary disability payments to the extent that the employer makes pension or permanent disability payments.[165] California permits the deduction of wages paid from the disability benefits.[166]

Private sickness and accident benefit plans (other than those designed to substitute for state disability insurance) may provide for either a diminution of private benefits upon the receipt of public benefits or for full private benefits in addition to public benefits.

BANKRUPTCY AND REORGANIZATION

The effect of the Bankruptcy Act[167] upon the rights of parties under employee benefit plans has been clarified in several decisions.

Benefit plan trustees sought to establish a preference for the recovery of overdue contributions from the estate of a bankrupt employer in two different situations. In the first, the claim to a preference was based on the theory of a constructive trust. The United States Supreme Court said that the employer was not expected to accumulate a separate fund, that there had been no transfer or ear-

162. 1A CCH UNEMPL. INS. REP. ¶ 2240 (1952).
163. R.I. GEN. LAWS c. 1200 (1942).
164. N.Y. WORKMEN'S COMP. LAW § 211 (Disability Benefits Law). See Section 205 for a list of permissible deductions.
165. N.J. STAT. ANN. § 43:21-30 (1950); P-H SOC. SEC. TAX SERV. ¶ 28,826 (1954).
166. CAL. UNEMPL. INS. CODE ANN. § 2656 (1953). Some private benefit plan payments have been held to be "wages" under this act. 2 CCH UNEMPL. INS. REP. ¶ 2630 (1954).
167. 62 STAT. 874 (1938), as amended, 66 STAT. 426 (1952), 11 U.S.C. § 104 (1952).

marking of funds, and that there remained only a debtor-creditor relation between the employer and his employees or between the employer and the welfare association. On the basis of the foregoing, the Court declined to recognize a constructive trust or a preference.[168] In the second situation, time for a wage preference had not elapsed and priority was claimed on that ground. The plan called for both employer and employee contributions, and a federal district court agreed with the welfare trustees' contention that both contributions were in the nature of wages.[169]

An employee's interest in a benefit fund and the effect of a spendthrift clause were also considered in a bankruptcy proceeding. The benefit plan was a contributory pension scheme and the agreement prohibited any assignment or anticipation of the employee's interest in the fund. The employee became bankrupt and his creditors desired to receive his accumulated interest in the fund. The court held that the fund did not create a savings account for the employee and that the non-assignment clause was not contrary to law; hence, at the time of bankruptcy there was no asset that could be transferred to the trustee in bankruptcy or to the bankrupt's creditors.[170]

The responsibilities of trustees in a reorganization proceeding under the Bankruptcy Act were detailed on a few occasions. In the reorganization of a Puerto Rican railway the trustees were required to honor pension claims[171] and were later ordered to pay benefits for the lives of the annuitants rather than to the date of the final decree in the reorganization proceeding.[172] In another railway reorganization, the trustee was directed to pay pensions as part of his operating expenses even though he had not assumed the collective bargaining contract establishing the pension plan.[173]

TAX LAWS

FEDERAL TAX LAWS

In the preparation of health and welfare plans, special tax exemptions can be obtained if advantage is taken of certain sections of the Internal Revenue Code. The tax law differentiates annuities and accident and health payments under ordinary individual insurance policies from those under employer-employee plans. Greater exemptions are allowed for the latter if they meet certain criteria.

168. McKee v. Paradise, 299 U.S. 119 (1936).
169. *In re* Schmidt, 24 CCH LAB. CAS. ¶ 68,012 (S.D. Cal. 1953).
170. *In re* Baxter, 104 F.2d 318 (6th Cir. 1939).
171. Vallejo v. American R.R., 188 F.2d 513 (1st Cir. 1951).
172. American R.R. v. Vallejo, 202 F.2d 149 (1st Cir. 1953).
173. *In re* Schenectady Ry., 93 F. Supp. 67 (N.D. N.Y. 1950). Employees not covered by the collective bargaining agreement were said to be getting a gratuitous annuity and the trustee was allowed to discontinue payments to them. *Id.* at 70.

To qualify for special tax exemptions, an employees' pension plan must meet the following standards:[174]

1. All contributions must be made to a trust for the purpose of distributing funds (and income) for the exclusive benefit of employees or their beneficiaries.

2. The plan must benefit a certain number of employees—either (a) 70% or more of all the employees or if 70% are eligible, it must benefit 80% or more of those eligible (excluding employees of less than five years employment, part time employees and seasonal employees); or (b) a classification of employees found by the Secretary of the Treasury not to be discriminatory.

3. The plan must not be discriminatory in favor of officers, shareholders, supervisors and highly paid employees.

A plan will not be considered discriminatory merely because (a) it excludes employees who receive only wages, (b) it is limited to salaried or clerical employees, (c) its contributions or benefits bear a uniform relationship to total compensation or rate of pay, (d) its contributions or benefits based on wages differ from contributions or benefits based on other remuneration, or (e) its contributions or benefits differ because of state or federal retirement benefits.

An advance ruling on whether a plan qualifies under the Internal Revenue Code may be obtained from the District Director of Internal Revenue.[175]

Such a qualified trust plan confers these principal benefits:

1. The trust pays no tax on its income from qualified investments.[176]

2. The employer, in computing his gross income for income tax purposes, may deduct his contributions to the plan within prescribed limits.[177]

3. The employee pays no income tax on the contributions made in his behalf by his employer.

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174. INT. REV. CODE of 1954, § 401(a). The United Mine Workers Welfare and Retirement Fund was denied tax exemption in 1953 because contributions were not earmarked for pensions alone. Section 404(c) of the Internal Revenue Code of 1954 makes a special dispensation for this fund. In addition to statutory standards, the Commissioner of Internal Revenue has required an intent to have a permanent plan, not just one designated to siphon off earnings in a prosperous year.

175. Rev. Rul. 32, 1 CUM. BULL. 265 (1953).

176. Prohibited transactions are those in which the trust (a) lends money without receiving adequate security, (b) pays unreasonable compensation for services, (c) makes its services available on a preferential basis, (d) buys securities for more than their worth, (e) sells its property for less than its worth, or (f) substantially diverts its funds or income to a creator of the trust, to a substantial contributor to the trust, or to a member of the family of either or to a corporation at least half controlled by such person. INT. REV. CODE of 1954, § 503(c).

177. An employer may deduct up to 5% of each employee's compensation (actual cost if employer is a corporation) and may carry forward larger payment for deduction in a later year if his contribution then is less than the allowable amount. INT. REV. CODE of 1954, § 404.

4. The employee pays an income tax only on the benefits he receives, and then, if he has contributed to the fund, a corresponding portion of the annuity benefits is exempt.[178]

5. If the employee designates a beneficiary to take the benefits after his death, the first $5000 received is exempt from the recipient's income tax[179] and the full amount paid to the beneficiary (except for that part attributable to the employee's contributions) is exempt from the estate tax.[180]

Negotiated accident and health plans are treated in the same manner as unilateral insurance plans. Contributions of the employer are not included in the gross income of the employee,[181] and are deductible by the employer.[182] Amounts received by the employee under the accident and health plan are generally included in the employee's gross income except amounts received by the employee as reimbursement of medical expenses incurred by him, sums that constitute payment for permanent disability and sums that constitute wages or payment in lieu of wages during absence from work because of disability.[183]

State Tax Laws

If maximum advantage is taken of the Internal Revenue Code in the planning of an employee benefit plan, little more can be done to gain additional advantages under the state tax laws. A minuscule review of general aspects of state tax laws may, however, be suggestive of additional precautions that may be taken.

Tax on Trust Property. The real property and tangible personalty owned by employee benefit trusts are ordinarily taxable. Obligations of the United States government are exempt from state taxation by virtue of federal law. Bonds of a state and political subdivisions thereof are frequently exempt within the state and rarely outside the state. Corporate bonds and securities held by trusts are fully taxable in many states, but receive favored treatment in others.

Tax on Trust Income. One third of the states have no income taxes at all. Of the rest, many states tax trust income as individual income, that is, they tax net trust income less the amounts currently distributed or distributable to beneficiaries. Most states allow some special exemptions for employee trusts on the basis of qualifications similar to those in the Internal Revenue Code.

178. If the employee has himself contributed, he may recoup that amount through deductions each year by averaging his contributions against his life expectancy. If the employee gets full benefits in one year, he may treat the amount of his employer's contribution as a capital gain. Int. Rev. Code of 1954, § 403.
179. Int. Rev. Code of 1954, § 101(b).
180. Int. Rev. Code of 1954, § 2039(c).
181. Int. Rev. Code of 1954, § 106.
182. Int. Rev. Code of 1954, § 404.
183. Int. Rev. Code of 1954, § 105.

Employers' Contributions to Welfare Funds. These are deductible in income tax states in so far as they can be justified as necessary, ordinary and reasonable expenses incurred in the general conduct of business.

Employee's Contributions to Welfare Funds. These are treated as payments for personal insurance and are not deductible from gross income.

Tax on Benefits Received. Generally these are taxable but numerous variations exist.

INSURANCE LAWS

Insurance laws are voluminous. Each state has a set of regulatory statutes. They authorize certain companies to sell insurance; they license brokers and agents; they spell out provisions of several distinct types of insurance; and they empower insurance commissioners to supervise, inspect and administer the established principles of law. The primary purpose of most of this legislation is to assure the solvency of insurance companies although many provisions do serve to furnish lay policyholders a reasonable opportunity to understand their contractual rights.

These laws impinge upon employee benefit plans essentially through provisions for group insurance. There are statutes governing group life insurance, group disability insurance, group hospital and medical service insurance and group annuity insurance. The National Association of Insurance Commissioners has approved and recommended the enactment of model group insurance laws, and many states have adopted model or similar provisions.[184]

The following are some common provisions of group insurance statutes tending to preserve the stability and clarity of employee benefit plans.[185]

1. *Minimum Number of Insured.* The laws have required a minimum of insured employees for group coverage—originally 50, later 25 and now 10. They have also specified a minimum percentage of those eligible who must be insured—generally 50% for disability and 75% for life insurance. The group eligible has often been undefined so that employees with other insurance or with special circumstances might be excluded; whereas, permission is commonly extended for the inclusion of employees of affiliated employers, officers and managers of corporate employers and sole proprietors or partners.

184. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, PROCEEDINGS OF ANNUAL SESSIONS 54 (1940); *id.* at 338 (1946); *id.* at 185 (1948); *id.* at 310 (1954).

185. For purposes of illustration, the California group insurance laws are cited. CAL. INS. CODE ANN. §§ 10200-10213 (1950) (Group Life); *id.* §§ 10270.4-10275 (Supp. 1953) (Group Disability); *id.* §§ 11512.2-11512.3 (Supp. 1953) (Group Hospital Service Contracts).

2. *New Employees.* The laws have required that all new employees eligible to, and applying for, insurance shall be added to the group or class originally covered.

3. *Individual Selection of Insurance Limited.* The statutes have required a master policy based on a plan which will preclude individual selection by members as to the amount of insurance coverage for any particular employee. The risk is thereby kept common to a large group.

4. *Collection or Transmission of Premiums.* Ordinarily the collection or transmission of premiums has been made the responsibility of the principal policyholder—an employer or trustees.

5. *Individual Certificates.* The laws have required insurance companies to provide the policyholder with an individual certificate for each insured, setting forth the benefits and exceptions applicable to the insured.

6. *Approval of Forms.* Approval of all policy forms has been entrusted to the State Insurance Commissioners. Temporary plans for a limited period (often 120 days) pending approval have been authorized upon the filing of specified data.

7. *Entirety of Contract.* The policy and application forms have been declared to constitute an entire contract. All statements by an individual insured have been deemed, in the absence of fraud, to be mere representations and not warranties. These terms have restricted the defenses which might be raised against a benefit claim.

8. *Effect on Workmen's Compensation.* Group disability and hospital service insurance policies have been required to state that they are not in lieu of, and do not affect, any requirement for coverage by workmen's compensation insurance.

9. *New Rules and Regulations.* The state insurance commissioners have been authorized to promulgate additional rules and regulations relating to the substance, form or issuance of any contract for group insurance.

10. *Special Group Life Insurance Rules.* Group life policies have been made uncontestable, except for nonpayment of premiums, after they have been in existence an initial period. The maximum amount of insurance for any one employee has been controlled by a ratio of it to the minimum carried by other employees. Special clauses limiting losses due to war, military service or aviation have been permitted. The penalty for an insured's misstatement of age has been restricted to an equitable adjustment of benefits.

11. *Special Group Annuity Rules.* Companies writing group annuity policies have been required to maintain a reserve fund adequate to meet future payments calculated on specified mortality tables.

12. *Special Group Hospital and Medical Insurance Rules.* Since most policies for medical and hospital insurance call for reimbursement of expenses, the laws have provided that the expenses incurred by any member of a family or a dependent (when such are covered) shall be deemed to be incurred by the insured.

These standards for group insurance relate to the normal operations of insurance companies. They do not reach the abuses recently highlighted in public investigations, such as the earning of excessive commissions and their division among peddlers of influence or the charging of excessive premiums. Commissions paid brokers and agents have not been regulated by law. Nearly all states, however, do have a law prohibiting any rebate in premiums or commissions. Proper prosecution under these laws may correct some of the efforts of corrupt union leaders and business men to convert group insurance to their illicit gain. To the extent that commissions may be excessive for services rendered by brokers, there has been no statutory restraint.

The premiums charged by insurance companies have also been a matter of unregulated competition. The provisions of some statutes, and the regulations of some insurance commissioners, have been designed to prevent premiums too low for profitable operation. There has been no statutory control of excessive profits. Some policies and insurance company practices provide for dividends or premium refunds; and statutes have required the policyholder receiving such dividends or refunds to apply them (after paying for insurance and administrative expenses) to the benefit of the insured employees generally. Otherwise, insurance premiums have been uncontrolled.

The inspection of insurance company operations has been systematized for the country as a whole by the National Association of Insurance Commissioners. That organization has arranged for examinations to be held in six zones and for the results to be made available to all state commissioners. Every insurance company is examined once every three years. The fiscal operations of each company are inspected minutely. Group insurance policies and practices are scrutinized along with other types of insurance. The objective, however, has been to determine the soundness of underwriting practices and the stability of each particular company. The interrelations between insurance companies, brokers, union business agents and trustees have not been investigated.

An even wider unregulated area has been the activities exempt from or not embraced by insurance statutes.[186] Labor unions and

186. UNITED STATES CHAMBER OF COMMERCE, STATE INSURANCE LAWS AFFECTING EMPLOYEE PENSION AND WELFARE FUNDS (1954). This publication is unfortunately confined to a poll of state insurance commissioners on laws regulating programs administered by a labor organization or an employee. It by-passes most employee benefit plans in so far as insurance companies are involved.

their insurance schemes have been expressly exempted from the insurance laws of some states. Other laws have referred only to insurance companies and defined them in such a way as not to include a group, an industry or a trust fund maintaining a self-insurance scheme or a direct service plan. New York has enacted a law authorizing its superintendent of insurance to investigate all types of employee benefit plans;[187] but whether that is the forerunner of regulation covering employee benefit plans not involving insurance companies is a matter of political speculation.

PROTECTION AGAINST ABUSES

The administration of employee benefit plans has been the subject of investigation by committees of the United States Senate and the House of Representatives, the New York Insurance Department, labor organizations and management groups.[188] Though the inquiries still continue, they have disclosed numerous abuses, which, while not characteristic of most plans, are sufficiently serious to warrant the early adoption of preventive and punitive measures. The principal abuses may be summarized as follows:

1. Abuses of Employers and/or Unions.
   a) Negotiation under threats and violence.
   b) Discrimination against nonunion employees.
   c) Coercion of trustees' actions.
   d) Failure to disclose personal dealings for profit.
2. Abuses of Insurance Companies, Brokers and Consultants.
   a) Excessive premiums.
   b) Excessive operating charges.
   c) Excessive commissions.
   d) Collusive advance opening of competitive bids.
3. Abuses of Trustees and Administrators.
   a) Improper payment of claims.
   b) Squandering of assets.
   c) Improper investments.
   d) False accounts.

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187. N.Y. Laws 1954, c. 278 (effective March 27, 1954).

188. United States Senate Committee on Labor and Public Welfare, *Welfare and Pension Plan Investigation*, SEN. RES. 225, SEN. RES. 270, 84th Cong., 1st Sess. (1954); United States House Committee on Education and Labor, *Investigation of Welfare and Pension Funds*, H.R. RES. 115, 83d Cong., 2d Sess. (1954); STATE OF NEW YORK INSURANCE DEP'T, PRELIMINARY REPORT ON UNION AND EMPLOYER WELFARE PLANS (1954); REPORT OF C.I.O. STANDING COMMITTEE ON ETHICAL PRACTICES (1954); A.F. OF L., PROCEEDINGS OF SEVENTY-THIRD ANNUAL CONVENTION, 573-76 (1954); UNITED STATES CHAMBER OF COMMERCE, KIT OF MATERIALS ON UNION WELFARE FUNDS (1954); UNITED STATES CHAMBER OF COMMERCE, LABOR RELATIONS LETTER, Issues 120, 122, 123 (1954).

Thoughtful analysis of these abuses and suggestions for their correction have come from several sources.[189] Basically they all require a willingness to face the problem and an eagerness to remedy it. The national organizations of labor and management, Congress and the leaders of the insurance industry have announced their readiness and have taken forward steps. There remains great diversity in their points of emphasis and specific proposals.

From the standpoint of existing doctrines of law, much can be accomplished through contractual arrangements and proper enforcement of present rights. By way of illustration, it is quite feasible for the parties to a collective bargaining agreement or a welfare trust agreement to require that:

1. The trustees or administrators of health, welfare and retirement programs whether union, company, or joint, and all others exercising responsibility in connection with such programs, have the obligation to make sure that maximum benefits are provided from the money available.

2. All welfare funds should be audited at least semiannually by independent certified public accountants who should certify that the audits fully and comprehensively show the financial condition of the funds and the results of the operation of these funds.

3. There should be full disclosure and report to the beneficiaries at least once a year by the trustees or administrators of all pertinent facts concerning the administration of welfare funds, including detailed financial reports and audits which shall specify the salaries, expenses and fees paid in connection with the administration of the program, to whom paid, and how much and for what purpose.

4. Persons occupying full time paid positions with unions or companies should not receive additional compensation for acting as trustees or administrators of their own organization's health, welfare and retirement funds.

5. Where welfare benefits are carried through an insurance company, the carrier should be selected through genuinely competitive bids on the basis of the lowest net cost for given benefits provided by a responsible company. The company should warrant that no fee has been paid directly or indirectly to any representative of the parties in connection with the coverage provided.

6. The insurance carriers should be required to file statements with the trustees or administrators of welfare programs specifying claim experience, commissions paid by the carriers, to whom paid, retentions, and amounts of dividends received and to whom paid. This information should be made available by the trustees or administrators to the beneficiaries.[190]

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189. United States Senate Committee on Labor and Public Welfare, *Welfare and Pension Plan Investigation, supra* note 188; REPORT OF C.I.O. STANDING COMMITTEE ON ETHICAL PRACTICES (1954).

190. REPORT OF C.I.O. STANDING COMMITTEE ON ETHICAL PRACTICES, 18-19 (1954).

Insistence upon such contract provisions and their enforcement would do much to correct current abuses. To accomplish such protection in cases in which contracts are not carefully drawn, it may be necessary to have additional legislation.

The problem of controlling insurance commissions, retentions, operating charges and premiums is an exceedingly difficult one to regulate by law. Proper authorization of group insurance to take care of the new needs of employee benefit plans seems clearly indicated, and with such laws should come regulatory provisions.[191] The insurance industry has fought bitterly against federal regulation, and proper inspection of company practices under state laws requires a large degree of cooperation among state departments. Whether regulation should be state or federal and the extent to which company practices can be controlled are matters that can not be settled for years. Realistically, some beginning may be made promptly by state insurance commissioners themselves; legislatures that have been loath to adopt the uniform statutes heretofore recommended by most authorities in the field are not likely to take revolutionary action at this time. New York has pointed the way by subjecting records of employee benefit plans to the inspection of the state insurance commissioner.[192]

Federal laws requiring full disclosure, inspection and supervision, and enforcement of honest accounting have been suggested. If any lesson is to be learned from experience with the LMRA, it should be that penal sanctions are practically impossible to enforce and that administrative control is complicated and costly. Still, if positive results are to be achieved, it will be necessary to utilize administrative agencies and procedures. Mere filing or publication of reports, as now required for the finances of unions, is of very little value. Inspection and supervision as are required for national banks would be effective, but such measures require extensive machinery. Whether the mere fact that billions of dollars and millions of workers are involved is enough to justify the expense is a political question.

Fundamentally, the legal principles of contracts, agency and trust are sufficient to afford adequate remedy for most abuses in employee benefit plans. Equitable doctrines make available swift injunctive remedies. Criminal statutes provide numerous grounds for the punishment of dishonest or corrupt dealings. The real need in this relatively new field of labor relations is to learn to use existing legal facilities to the best advantage. A positive approach to what responsible labor and management desire in employee benefit plans calls for full utilization of contractual powers and for optimum use of trusts, group in-

191. ILSE, GROUP INSURANCE AND EMPLOYEE RETIREMENT PLANS 46-84 (1953).
192. N.Y. Laws 1954, c. 278 (effective March 27, 1954).

surance, medical care plans and whatever schemes men of intelligence and good will can devise. Governmental aids in the keeping, disclosure, inspection and supervision of records, and possibly in the fees and charges for services rendered, may help. The law of employee benefit plans should be adapted to the needs and experiences of the persons involved. Since those needs and experiences are still in a state of growth, the law should be kept viable.