

ERISA's Anticutback Rule and Contingent Early Retirement Benefits

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Consider the following scenario:¹ Company *X* has an employee benefits plan that provides retirement benefits to employees who are sixty-five years old and have twenty years of service with the company. Company *X*'s benefits plan also contains a Job Separation Provision that states that, in the event of a plant shutdown, employees who are at least fifty years old with twenty years of service will receive supplemental early retirement benefits. These Job Separation Benefits do not reduce the pension amount that employees will receive upon reaching age sixty-five. John Smith is an employee at Company *X*. He is fifty-one years old, and has worked for Company *X* for thirty years. His normal retirement benefits beginning at age sixty-five would be \$1,000 per month. Under the Job Separation Provision, he will receive unreduced benefits in the amount of \$1,000 per month beginning at the time of the plant closure. Company *X* decides to eliminate the Job Separation Provision from its employee benefits plan and shortly afterward closes the plant at which Smith works.

Under the anticutback rule² in the Employee Retirement Income Security Act of 1974 ("ERISA"),³ Company *X* is prohibited from reducing or eliminating Smith's normal pension benefits, whether he begins receiving them at age sixty-five or whether he retires at age fifty-five, and the \$1,000 monthly amount is reduced to reflect the earlier payout and longer annuity period. Pension benefits that begin at *normal* retirement age, and those received for an *early* retirement that are actuarially reduced, are protected because they are considered "accrued benefits."⁴ The anticutback provision also prohibits reduction of a "retirement-type subsidy," although it does not define that term. In the absence of a clear definition of "retirement-type subsidy," courts disagree on whether supplemental early retirement benefits that are

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¹ The facts are based on *Bellas v CBS, Inc.*, 221 F3d 517 (3d Cir 2000).

² 29 USC § 1054(g) (1994).

³ 29 USC §§ 1001 et seq (1994 & Supp 1998).

⁴ ERISA defines "accrued benefits" as "an annual benefit commencing at normal retirement age." 29 USC § 1002(23) (1994). The anticutback rule also provides that early retirement benefits are to be considered accrued benefits. 29 USC § 1054(g).

contingent on an event such as a plant shutdown are “accrued benefits” subject to anticutback protection.⁵

The question of whether contingent early retirement benefits can be cut back reflects the underlying tension between two of ERISA’s primary goals: protecting employees and minimizing pension costs.⁶ Toward the end of containing pension costs, ERISA requires that all employee benefit plans be amendable,⁷ qualified only by the anticutback provision in ERISA Section 204(g). The anticutback provision is an exception to the broad goal of employer flexibility, and its protection is limited to accrued benefits.⁸ Anticutback protection for early retirement benefits contingent on a plant shutdown is an important issue. For an employee facing a job separation, it may mean that the employee receives less than one-third of the income he expected.⁹ The employee may also agree to continue to work at a plant despite an impending shutdown, only to have his benefits eliminated. On the other hand, employers may find themselves locked into plant shutdown benefits and stripped of the flexibility they thought they had to amend benefits as business needs dictate. These benefits may have a significant impact on plant shutdown costs, a particularly important concern because plant shutdown benefits are often offered in troubled industries, such as steel or automotive.¹⁰

This Comment argues that early retirement benefits contingent on a plant shutdown should be protected by the anticutback rule. Part I examines the background of ERISA and the Retirement Equity Act’s¹¹ amendments to the anticutback provision. It also discusses ERISA’s treatment of contingent events for funding and tax purposes. Part II examines the anticutback provision’s language and legislative history and concludes that neither unambiguously manifests an intent to include contingent early retirement benefits.

Part III argues that, given the unclear statutory language and legislative history, additional considerations justify the application of the anticutback provision to contingent retirement benefits. In particular,

⁵ See Part I.B.

⁶ *Mertens v Hewitt Associates*, 508 US 248, 262–63 (1993) (“There is . . . a ‘tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.”), quoting *Alessi v Raybestos-Manhattan*, 451 US 504, 515 (1981).

⁷ 29 USC § 1102(b)(3) (1994).

⁸ 29 USC § 1054(g)(1) (1994).

⁹ Jim McKay, *Appeals Court Upholds Benefit of Engineer*, Pittsburgh Post-Gazette C5 (Aug 20, 2000) (noting that Bellas was paid \$83,000, not the \$300,000 he expected).

¹⁰ Richard Hylton, *Don’t Panic about Your Pension Yet*, Fortune 121 (April 18, 1994) (describing industry concentration of shutdown benefits); see also Richard A. Ippolito, *The Economics of Pension Insurance* 117–18 (Irwin 1998) (describing special early retirement plans by industry).

¹¹ Retirement Equity Act of 1984, Pub L No 98-397, 98 Stat 1426, codified in various sections of title 29.

Part III.A argues that these benefits should be protected because of the strong employee expectations in receiving them. Part III.B addresses concerns that employers should be able to amend shutdown benefits because they cannot prefund for them. This section concludes that the anticutback rule does not need to be interpreted to exclude these benefits because the provision already contains a waiver of funding liability for employers who will face a substantial business hardship. Further, the ERISA statutory scheme shifts the risk of underfunding away from employees to the Pension Benefit Guaranty Corporation ("PBGC") through ERISA's termination insurance program. Part III.C argues that the Internal Revenue Service's contrary interpretation, which does not extend the anticutback provision to contingent benefits, is not controlling. Finally, Part III.D concludes that employers will still have incentives to offer this type of benefit, even if the anticutback provision is applied.

I. THE RETIREMENT EQUITY ACT AND ERISA'S TREATMENT OF CONTINGENT EVENTS

This Part examines the current law related to ERISA's treatment of contingent early retirement benefits. Part I.A provides background on ERISA's anticutback provision¹² and the amendments made in the Retirement Equity Act of 1984 ("REA"). Part I.B discusses the difficulties courts have had in applying the REA amendments and the split of authority on their application to retirement benefits contingent on a plant shutdown. Part I.C explains the IRS's interpretation of the anticutback provision and its relationship to ERISA liability. Finally, Part I.D discusses the treatment of contingent events in ERISA's funding provisions and the constraint these provisions place on employers' ability to prefund contingent benefits.

A. ERISA and the Retirement Equity Act of 1984

Congress enacted ERISA primarily to ensure that employees who are promised pension benefits receive them. Congress was particularly concerned that "many employees with long years of employment [were] losing anticipated retirement benefits" due to inadequately funded pension plans.¹³ In response, ERISA provides for minimum funding and vesting schedules, establishes standards of conduct for benefit plan administrators, and sets out reporting requirements.¹⁴ ERISA does not direct employers to create a pension plan or

¹² 29 USC § 1054(g).

¹³ 29 USC § 1001(a) (1994 & Supp 1998). See also *Nachman Corp v Pension Benefit Guaranty Corp*, 446 US 359, 374-75 (1980) (discussing ERISA's goals).

¹⁴ ERISA is divided into four titles. Title I of ERISA contains reporting, funding, and vest-

provide certain benefits, but rather guarantees the benefits that are promised.¹⁵

Although ERISA's primary concern is protecting employee expectations, it attempts to do so while minimizing pension costs to employers. To this end, employee benefit plans must generally be amendable.¹⁶ For example, employers are generally able to change the level of medical benefits they offer¹⁷ or amend plan terms to comply with tax and regulatory changes.¹⁸ The employer's flexibility to amend is qualified only by the anticutback provision in ERISA Section 204(g).¹⁹ The anticutback provision prohibits employers from reducing participants' "accrued benefits," defined as benefits that begin at "normal retirement age,"²⁰ as well as early retirement benefits and retirement-type subsidies.

Prior to 1984, employers were free to reduce, or even altogether eliminate, early retirement benefits without violating ERISA.²¹ The REA was enacted as an attempt to close the gap in protection for early retirement benefits by expanding the scope of what is considered an accrued benefit. The REA amended ERISA section 204(g) to prohibit employers from "eliminating or reducing an early-retirement benefit or a retirement-type subsidy."²²

ERISA does not define either "early-retirement benefit" or "retirement-type subsidy." However, an "early-retirement benefit" is generally considered to be the retirement benefit that would begin at

ing provisions and provides for enforcement. 29 USC §§ 1001–86 (1994). Title II amended the Internal Revenue Code to conform to Title I standards. 29 USC §§ 1101–91 (1994 & Supp 1998). Title III provides for coordination of enforcement. 29 USC §§ 1201–32 (1994 & Supp 1998). Title IV established termination insurance to protect employees when underfunded plans terminate and created a federal agency to oversee terminations. 29 USC §§ 1301–99 (1994 & Supp 1998). See *Nachman*, 446 US at 361–62 n 1.

¹⁵ *Lockheed Corp v Spink*, 517 US 882, 887 (1996) (noting that nothing in ERISA requires plans to be established or to contain certain benefits, but that ERISA seeks to ensure that employees received guaranteed benefits).

¹⁶ 29 USC § 1102(b)(3).

¹⁷ See, for example, *McGann v H & H Music Co*, 946 F2d 401, 408 (5th Cir 1991) (finding that employer's decision to limit medical benefits payable for AIDS-related claims does not violate ERISA).

¹⁸ John H. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law* 138 (Foundation 2d ed 1995) (noting that section 402(b)(3) allows amendments incorporating tax and regulatory changes).

¹⁹ *Id* at 138–39 (discussing the anticutback provision's limitation on the broad goal of flexibility to amend).

²⁰ 29 USC § 1002(23).

²¹ See, for example, *Bencivenga v Western Pennsylvania Teamsters and Employers Pension Fund*, 763 F2d 574, 577 (3d Cir 1985) (finding that ERISA's plain language and legislative history provide no protection for early retirement benefits); *Sutton v Weirton Steel Division of National Steel Corp*, 724 F2d 406, 410 (4th Cir 1983) (same); *Hernandez v Southern Nevada Culinary & Bartenders Pension Trust*, 662 F2d 617, 619 (9th Cir 1981) (same).

²² Retirement Equity Act, 98 Stat at 1426.

normal retirement age, actuarially reduced to reflect its commencement at an earlier date.²³ For example, if Smith's normal retirement benefits were \$1,000 per month beginning at the normal retirement age of sixty-five, he would not receive \$1,000 per month if he retires early. Instead, benefits may be reduced to \$600 to take into account the longer annuity period and the loss of investment income on the benefits before payout.²⁴

The term "retirement-type subsidy," on the other hand, does not have a commonly understood usage.²⁵ Instead, Congress contemplated that Treasury regulations would be promulgated to define this term.²⁶ To date, no regulations have been provided.²⁷ In the absence of a regulation, several courts have defined a retirement-type subsidy as the excess value over the actuarial equivalent of the normal retirement benefit.²⁸ For example, if Smith's actuarially reduced retirement benefit were \$600 per month beginning at age sixty, any amount Smith receives above \$600 would be considered a retirement-type subsidy.

Benefits contingent on a plant shutdown include both the actuarially reduced normal retirement benefits, plus an additional amount to compensate for the shutdown. Under these definitions, for the anticutback provision to apply to the supplemental benefits, this excess over the normal retirement benefits must be categorized as a retirement-type subsidy.

B. Application of the REA Amendments

Courts generally agree that the REA provisions provide anticutback protection for an early retirement benefit that depends only on

²³ See Dan M. McGill and Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 131-35 (Pension Research Council 6th ed 1989), quoted in Langbein and Wolk, *Pension and Employee Benefit Law* at 378-80 (cited in note 18) (explaining actuarial reduction of early retirement benefits).

²⁴ See *id.*

²⁵ *Arndt v Security Bank S.S.B. Employees' Pension Plan*, 182 F3d 538, 542 (7th Cir 1999) ("It may seem that § 204(g)(2) raises more questions than it answers, the basic one being what exactly is a 'retirement-type subsidy.' . . . Unfortunately there is no regulation yet promulgated which defines the term. We are on our own.").

²⁶ Section 204(g) specifically proscribes reduction of "a retirement-type subsidy (as defined in the regulations)." 29 USC § 1054(g).

²⁷ The Treasury Department has discussed subsidized early retirement benefits in defining what is an accrued benefit under the Internal Revenue Code's anticutback provision. These regulations fail, however, to provide a definition for the term "retirement-type subsidy." See 26 USC § 1.411(d)-(4) (2000).

²⁸ See, for example, *Bellas v CBS, Inc*, 221 F3d 517, 533 (3d Cir 2000) (reasoning that the description is consistent with the IRS's interpretation of benefit subsidy); *Costantino v TRW, Inc*, 13 F3d 969, 977-78 (6th Cir 1994) (finding the subsidized benefit to be the annuity amount available that exceeds the amount available at the normal retirement age). This is consistent with the definition of "benefit subsidy" provided in the Senate Report on the REA. See Retirement Equity Act, S Rep 98-575, 98th Cong, 2d Sess 28 (1984), reprinted in 1984 USCCAN 2547, 2574.

meeting age or service requirements. For example, assume Company X provides early retirement benefits upon reaching fifty-five years of age and twenty years of service. If John Smith meets both these conditions, all circuits that have addressed the issue hold that Section 204(g)'s anticutback protection applies and the employer cannot eliminate these benefits.²⁹ If Smith is only forty-five and has not yet met the age requirement, Company X still may not amend the benefits.³⁰ Smith must be given an opportunity to "grow into" his benefits.³¹

Courts diverge when the early retirement benefits not only depend on age and service requirements, but also on an unpredictable event, such as a plant shutdown. For example, assume that Company X's benefits plan includes \$1,000 per month in retirement benefits beginning at age sixty-five. The plan also provides that employees who meet age and service requirements will receive unreduced early retirement benefits in the amount of \$1,000 per month beginning at age fifty-five in the event of a plant shutdown. If Smith is fifty-five when the plant shuts down, he will begin receiving a total of \$1,000 per month, which will continue past age sixty-five.

Smith's benefits can be categorized several ways. One way is to see Smith as receiving \$1,000 in plant shutdown benefits that end at age sixty-five, at which point his normal retirement benefits begin. On another view, Smith is receiving \$600 in actuarially reduced early retirement benefits beginning at fifty-five, plus an additional \$400 plant shutdown subsidy that begins at age fifty-five and continues past retirement. Circuits disagree over the proper distinction between these benefits and whether the amount of benefits above the actuarially reduced pension amount constitutes a retirement-type subsidy protected by the anticutback rule.

1. Cases finding contingent benefits protected.

Relying on Section 204(g)'s language and legislative history, several courts have held that the anticutback provision extends to contingent early retirement benefits. The Third Circuit considered the issue of retirement benefits triggered by a plant shutdown in *Bellas v CBS*,

²⁹ *Ahng v Allsteel, Inc.*, 96 F3d 1033, 1037-38 (7th Cir 1996) (finding that plaintiffs meeting these requirements can state a claim under Section 204(g)); *Costantino*, 13 F3d at 977-78 (same); *Hunger v AB*, 12 F3d 118, 120 (8th Cir 1993) (same); *Gillis v Hoechst Celanese Corp.*, 4 F3d 1137, 1143-44 (3d Cir 1993) (same); *Harms v Cavenham Forest Industries, Inc.*, 984 F2d 686, 692 (5th Cir 1993) (same); *Aldridge v Lily-Tulip, Inc.*, 953 F2d 587, 590 (11th Cir 1992) (same); *Amato v Western Union International, Inc.*, 773 F2d 1402, 1410 (2d Cir 1985) (same).

³⁰ See, for example, *Gillis*, 4 F3d at 1147-48.

³¹ *Id.* (finding that employees who work for a successor employer can continue to accumulate years of service for the purpose of retirement benefits); *Ahng*, 96 F3d at 1036 (accepting employee's right to "grow into" early retirement benefits).

*Inc.*³² As a CBS employee, Harry Bellas participated in CBS's Westinghouse Plan, which provided a special early retirement benefit for employees terminated as a result of a "Permanent Job Separation."³³ In 1994, CBS amended the plan to make it more difficult to qualify for benefits.³⁴ Three years later, Bellas challenged the plan amendment under Section 204(g) after CBS terminated his employment and denied him early retirement benefits.³⁵

The *Bellas* court held that Section 204(g) extends to contingent early retirement benefits.³⁶ Relying on legislative history,³⁷ the court reasoned that Congress only intended to exclude plant shutdown benefits that end at the normal retirement age from anticutback protection.³⁸ The court also concluded from the legislative history that the benefits are accrued and therefore protected from reduction immediately upon creation.³⁹ In extending the anticutback provision in *Bellas*, the Third Circuit acknowledged that its holding was inconsistent with actuarial practice and ERISA's treatment of contingent events for funding purposes. However, the court noted that "it does not appear that the statute or its legislative history requires or compels such consistency."⁴⁰

The Ninth Circuit also read Section 204(g)'s legislative history and language to conclude that contingent plant shutdown benefits were protected under Section 204(g), although its opinion was later withdrawn on other grounds.⁴¹ In *Richardson v Pension Plan of Bethlehem Steel Corp.*,⁴² former employees of Bethlehem Steel challenged

³² 221 F3d 517 (3d Cir 2000).

³³ The Westinghouse Plan defines "Permanent Job Separation" more broadly than just a plant shutdown, and includes "the termination of the employment of an Employee . . . through no fault of his own through lack of work for reasons associated with the business for whom [the employer] determines there is no reasonable expectation of recall." *Id.* at 520.

³⁴ *Id.* at 520–21. Under the 1994 plan, Bellas's benefits included the full retirement pension, plus additional monthly benefits keyed to the number of years of service. *Id.* at 520.

³⁵ *Id.* at 521.

³⁶ *Id.* at 532 ("[U]npredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefits are retirement-type subsidies, and therefore are accrued benefits under section 204(g), if the benefit continues beyond normal retirement age.").

³⁷ The *Bellas* court relied specifically on the Senate Report on the Retirement Equity Act, S Rep No 98-575 at 30, reprinted in 1984 USCCAN at 2576 (cited in note 28).

³⁸ *Bellas*, 221 F3d at 532–33.

³⁹ *Id.* at 534–35.

⁴⁰ *Id.* at 535.

⁴¹ The opinion was later withdrawn on rehearing when the Ninth Circuit reversed its holding that a settlement agreement constituted an amendment that triggered Section 204(g). Because there was no amendment, the court did not reach the question on rehearing of whether Section 204(g) applies to these benefits. See *Richardson v Pension Plan of Bethlehem Steel Corp.*, 112 F3d 982, 987 (9th Cir 1997).

⁴² 67 F3d 1462 (9th Cir 1995), withdrawn on rehearing, 112 F3d 982 (9th Cir 1997). The benefits plan provided benefits for employees who met age and service requirements, and whose

an agreement they had previously made, under which a plant sale would not trigger shutdown benefits. The *Richardson* court broadly concluded that the shutdown benefits constituted a retirement-type subsidy because their sum was greater than the total of the employees' normal, unreduced retirement benefits.⁴³ The court then narrowed its definition of retirement-type subsidy by reading Section 204(g)'s legislative history to include benefits contingent on a plant shutdown only if they extend beyond retirement age.⁴⁴

Although the plan calculated the shutdown benefits with reference to normal retirement benefits, the *Richardson* court found the shutdown benefits at issue to fit this definition. The court stated that the shutdown benefits were not "miraculously transformed into normal retirement benefits when the recipient reaches" the normal retirement age, but began at the time of shutdown and continued until death.⁴⁵

The Fifth Circuit also addressed the application of Section 204(g) to contingent retirement benefits in *Harms v Cavenham Forest Industries*,⁴⁶ but focused its analysis on the characteristics of the benefits. Crown Zellerbach, which later sold a subsidiary to Cavenham Forest Industries, developed a benefits plan that included early retirement benefits contingent on a "change in control."⁴⁷ When the change in control took place, many of Crown Zellerbach's operating units were sold and their employees were terminated. Shortly after the sale, Crown Zellerbach eliminated the contingent early retirement benefits.⁴⁸

The *Harms* court examined the characteristics of the benefits in Crown Zellerbach's plan and concluded that the benefits were protected under Section 204(g).⁴⁹ The court distinguished the contingent retirement benefits from severance or other welfare benefits, which are not subject to anticutback protection.⁵⁰ In particular, the court

"continuous service [was] broken by reason of a permanent shutdown of a plant." *Id.* at 1464. The employer and the union disagreed over whether the sale of a division constituted a "permanent shutdown" that would trigger the benefits. After negotiations, the union agreed that a proposed plant sale would not trigger the benefits, in exchange for cash payments to employees. *Id.* at 1465.

⁴³ *Id.*

⁴⁴ *Id.* ("We read the Senate Report to mean that shutdown benefits that do continue after retirement age are a retirement-type subsidy.")

⁴⁵ *Id.* at 1469.

⁴⁶ 984 F.2d 687 (5th Cir. 1993). The *Harms* court noted that its holding was consistent with an earlier district court case that also concluded that the benefits in Cavenham's plan were a retirement-type subsidy. See *Harms*, 984 F.2d at 692, citing *Wallace v Cavenham Forest Industries*, 707 F. Supp. 455, 460 (D. Or. 1989).

⁴⁷ *Harms*, 984 F.2d at 688.

⁴⁸ *Id.* at 688. The employees challenged the amendments, arguing they were eligible under both Cavenham's and Crown Zellerbach's benefits plans. *Id.*

⁴⁹ *Id.* at 692.

⁵⁰ *Id.* at 691 n. 6. The term "severance plan" generally refers to benefits made in a lump sum

found support in the fact that the contingent benefits are payable for life, and are calculated similarly to other retirement benefits.⁵¹

2. Cases finding that contingent benefits are not protected.

The courts that have found that contingent retirement benefits are not protected under Section 204(g) also rely on statutory language and the same legislative history.⁵² The Sixth Circuit concluded that benefits contingent on a plant shutdown can never be protected under Section 204(g) in *Ross v Pension Plan for Hourly Employees of SKF Industries, Inc.*⁵³ *Ross* involved early retirement benefits payable upon the shutdown of a facility of SKF Industries.⁵⁴ Employees who met the age and service requirements for SKF's plant shutdown benefits challenged their denial of benefits after the shutdown.

The Sixth Circuit focused on Section 204(g)'s legislative history, which provides that "[t]he committee expects, however, that . . . a plant shutdown benefit (that does not continue past retirement age) will not be considered a retirement-type subsidy."⁵⁵ The Sixth Circuit read the express mention of plant shutdown benefits in the Senate Report as evidence that Congress did not intend to extend anticutback protection to this type of benefit. With no further explanation or analysis, the court concluded that "[t]he legislative history of the Retirement Equity Act, however, specifically addresses the question of whether a plant shutdown benefit falls within the category of a retirement-type subsidy and specifically states that it does not."⁵⁶

Another court has also found that plant shutdown benefits may never be considered within Section 204(g), although it is unclear whether the court intended to exclude all contingent benefits or only those benefits triggered by a plant shutdown. In *Blank v Bethlehem Steel Corp.*,⁵⁷ employees of Bethlehem Steel's Buffalo Tank Division were transferred to the Buffalo Tank Corporation upon the sale of the

payment, calculated with reference to length of service, and offered to employees terminated for a reason other than cause. Langbein and Wolk, *Pension and Employee Benefit Law* at 821 (cited in note 18). The purpose of severance plans is to provide a form of short-term unemployment compensation, rather than serving as a bonus to workers who are laid off or otherwise dismissed. *Id.* The term "welfare plan" refers more generally to plans that provide nonretirement benefits such as health care benefits, death or disability benefits, or vacation plans. See 29 USC § 1002(1). A severance plan is considered a type of welfare plan. See 29 USC § 1002(B)(i).

⁵¹ *Harms*, 984 F2d at 692.

⁵² S Rep No 98-575 at 30, reprinted in 1984 USCCAN at 2576 (cited in note 28). See also note 44.

⁵³ 847 F2d 329, 333 (6th Cir 1988).

⁵⁴ *Id.* at 330-31.

⁵⁵ *Id.* at 333-34, quoting S Rep No 98-575 at 30, reprinted in 1984 USCCAN at 2576 (cited in note 28).

⁵⁶ *Ross*, 847 F2d at 333.

⁵⁷ 758 F Supp 697 (M D Fla 1990).

plant at which they were employed. The employees challenged their denial of contingent early retirement benefits under Section 204(g).⁵⁸

The court initially relied on pre-REA case law to hold that there is no obligation under ERISA to pay “unfunded, contingent early retirement benefits or severance benefits.”⁵⁹ This language suggests that all contingent benefits, rather than just those related to a plant shutdown, are outside the scope of Section 204(g). In a footnote and with no explanation of its reasoning, however, the *Blank* court stated that the result is the same under the anticutback provision as amended by the REA.⁶⁰ The court cited *Ross* for support, noting in the parenthetical that “plant shutdown benefits [are] not within [the] protection of 1054(g).”⁶¹

C. Internal Revenue Code Treatment of Contingent Shutdown Benefits

When Congress enacted ERISA, it also revised the Internal Revenue Code (“IRC”) to give favorable tax treatment to benefit plans that comply with ERISA’s requirements. The IRC provisions are intended to encourage employers to establish voluntary pension plans,⁶² and have been described as the “bedrock” upon which employer-sponsored pension plans are built.⁶³ When a pension plan meets the requirements in the IRC, it is said to be “qualified” for tax benefits,⁶⁴ including deductions for plan contributions, exemptions for the contributions until they are paid out to employees, and exemptions for income on the trust containing the funds.⁶⁵

⁵⁸ *Id.* at 698–700.

⁵⁹ *Blank*, 758 F. Supp. at 700, quoting *Sutton v Weirton Steel Division*, 724 F.2d 406, 410 (4th Cir. 1983).

⁶⁰ *Id.* at 700 n. 3. The footnote provided that:

The Court has also considered the application of 29 U.S.C. § 1054(g), a provision enacted by Congress in 1984 to protect accrued early retirement benefits. The result is unchanged. See *Ross v. Pension Plan for Hourly Employees of SKF Indus.*, 847 F.2d 329, 332–34 (6th Cir. 1988) (plant shutdown benefits not within protection of § 1054(g)), cited with approval in *Roper*, 859 F.2d at 1474.

Id.

⁶¹ *Id.*

⁶² *Gillis v Hoechst Celanese Corp.*, 4 F.3d 1137, 1144 n. 6 (3d Cir. 1993) (noting that “many ERISA sections have such counterparts in the IRC . . . to encourage employers to establish pension plans”), citing *Plucinski v I.A.M. National Pension Fund*, 875 F.2d 1052, 1058 (3d Cir. 1989).

⁶³ Stephen R. Bruce, *Pension Claims: Rights and Obligations* 5–6 (BNA 2d ed. 1992) (discussing the tax advantages available to employers).

⁶⁴ Langbein and Wolk, *Pension and Employee Benefit Law* at 149–50 (cited in note 18) (discussing aspects of tax qualification).

⁶⁵ 26 USC § 501(a) (2000); 26 USC § 402(a) (2000). Deferred taxes on the earnings are of particular importance to employees because they are usually in a lower tax bracket at the time of distribution than they were when the contributions were made. Bruce, *Pension Claims* at 7 (cited in note 63).

In order to be considered a "qualified plan," the benefits plan must meet the IRC's detailed requirements, many of which duplicate ERISA's provisions.⁶⁶ ERISA's Section 204(g) anticutback provision has a counterpart in IRC section 411(d)(6), which also prohibits plan amendments that have the effect of "eliminating or reducing an early retirement benefit or a retirement-type subsidy."⁶⁷

The IRS clearly addressed the application of IRC § 411(d)(6) to contingent plant shutdown benefits in General Counsel Memorandum ("GCM") 39869.⁶⁸ The GCM concludes that an early retirement benefit contingent on a plant shutdown is not considered to be an accrued benefit, and therefore is not subject to anticutback protection, until the event on which it is contingent actually occurs.⁶⁹ The IRS based its interpretation on the REA's legislative history and ERISA's funding provisions, which do not require the benefits to be funded until the triggering event occurs.⁷⁰ Under this interpretation, the IRS would not disqualify a plan if the employer eliminates contingent plant shutdown benefits, provided the shutdown has not yet taken place. If ERISA Section 204(g) is interpreted to apply to plant shutdown benefits, an employer who amends these benefits may face ERISA liability but will not suffer any tax consequences.

D. ERISA's Funding Requirements for Contingent Benefits

Much of ERISA's detailed regulatory scheme addresses the level at which an employer must fund a benefits plan. Funding provisions in both ERISA and the IRC define the employer's funding obligations. Congress directly addressed funding for contingent events in the Omnibus Budget Reconciliation Act of 1987 ("OBRA").⁷¹ Under the funding provisions as amended by OBRA, unpredictable contingent events are not taken into account in determining funding obligations

⁶⁶ If an employer violates a requirement in the IRC, the result is that the plan is disqualified, and tax advantages will be lost. This is distinct from a violation of ERISA, which affects the substantive rights of employees and their beneficiaries. Langbein and Wolk, *Pension and Employee Benefit Law* at 161 (cited in note 18). ERISA covers plans that are not tax qualified as well, but in most cases ERISA and the IRC overlap and both apply. Bruce, *Pension Claims* at 9-10 (cited in note 63).

⁶⁷ 26 USC § 411(d)(6)(B)(i).

⁶⁸ General Counsel Memorandum 39869 (Apr 6, 1992), available on Lexis at 1992 IRS GCM LEXIS 15 (providing technical advice regarding the presence of plant shutdown benefits in a tax qualified plan).

⁶⁹ Id ("Shutdown benefits that are retirement-type benefits, and are not ancillary benefits, become an accrued benefit and therefore protected under section 411(d)(6) upon the occurrence of the event that triggers the right to the benefits (i.e., the contingent event).") (emphasis added).

⁷⁰ See Part I.D.

⁷¹ Omnibus Budget Reconciliation Act of 1987, Pub L No 100-203, 101 Stat 1330, codified in various section of the United States Code.

until the triggering event occurs.⁷² OBRA's legislative history makes clear that, for plant shutdowns, the employer is not obligated to fund the benefits until the shutdown takes place.⁷³

Although ERISA provides only the minimum funding standard, the statutory scheme nonetheless limits the employer's ability to set aside funds to cover contingent benefits. While ERISA acts as a *floor* on employer contributions, the corresponding IRC provisions act as a *ceiling* by limiting the deductions an employer may take for plan contributions.⁷⁴ The employer is unable to deduct contributions above this maximum level, which does not include contingent benefits.⁷⁵ Not only is the employer's incentive to prefund reduced,⁷⁶ but additional funding may trigger taxation on the income from the trust in which the funds are held.⁷⁷

A second obstacle to the employer's ability to prefund plant shutdown benefits is the difficulty in determining the appropriate level of funding. Plan actuaries calculate funding levels based on assumptions that take into account factors such as interest rates and projected work force changes.⁷⁸ ERISA requires each assumption to be reasonable in light of plan experience and "reasonable expectations."⁷⁹ Actuaries have difficulty estimating contingent shutdown

⁷² Omnibus Budget Reconciliation Act of 1987, HR Rep No 100-495, 100th Cong, 1st Sess 842 (1987), codified at 29 USC § 1082(d)(7)(B)(i) ("[A]ny unpredictable contingent event benefit shall not be taken into account until the event on which the benefit is contingent occurs.").

⁷³ Omnibus Budget Reconciliation Act, HR Rep No 100-391, 100th Cong, 1st Sess 717 (1987), reprinted in 1987 USCCAN 2313, 2313-78 ("[L]iability for any benefit contingent on (1) a facility shutdown, (2) a reduction or contraction in workforce, or (3) any event that cannot reliably and reasonably be predicted (as determined under regulations) is not to be taken into account until such shutdown, reduction or contraction, or other event occurs.").

⁷⁴ Langbein and Wolk, *Pension and Employee Benefit Law* at 286 (cited in note 18). This limitation on the ability of the employer to prefund under the IRC reflects the underlying tension between the IRC's goals and ERISA's purposes. Because the IRC is concerned with increasing revenues and reducing deductions, it favors limiting the amount of deductible contributions. At the same time, ERISA is concerned with encouraging companies to fund their pension plans adequately to meet employees' expected benefits. See David Vise, *Firms Stuck Between IRS and US Pension Agency*, Wash Post F1 (Feb 13, 1993) (discussing conflicting goals between ERISA and the IRC).

⁷⁵ The IRC limits the employer's maximum deductible amount by the "full funding limitation." 26 USC § 404(a)(1)(A) (2000). The "full funding limitation" is calculated as a percentage of current plan liabilities, IRC § 412(c)(7)(A)-(B), which do not include contingent benefits until the triggering event occurs, 26 USC § 412(l)(7) (2000).

⁷⁶ See text accompanying notes 62-65.

⁷⁷ 26 USC §§ 402(b), 404(a)(5), 501(a) (2000). See also Brief of Amicus Curiae Association of Private Pension and Welfare Plans in Support of Appellants, *Bellas v CBS, Inc*, No 99-3775, *23-24 (3d Cir filed Nov 22, 1999) (discussing the potential tax ramifications of prefunding).

⁷⁸ See Langbein and Wolk, *Pension and Employee Benefit Law* at 274 (cited in note 18).

⁷⁹ 29 USC § 1082(c)(3)(A)(i) (1994). Prior to 1987, actuarial assumptions only had to be reasonable in the aggregate. The 1987 Pension Protection Act amended ERISA to require that each individual assumption be reasonable. Pension Protection Act of 1987, Pub L No 100-203, § 9307(b)(1), 101 Stat 1330, amending 29 USC § 1082.

benefits in particular because they are based largely on management decisions, rather than historical data.⁸⁰ Employers would therefore be unlikely to prefund at an appropriate level to cover contingent benefits, even if they wanted to do so, out of concern that their assumptions are not "reasonable."

In summary, because Congress left the question of exactly what constitutes a retirement-type subsidy within the anticutback rule unanswered, there have been diverging views on whether the term includes benefits contingent on a plant shutdown. Several circuits have held that this type of benefit is protected as long as it continues past normal retirement age, while both the Sixth Circuit and one district court have concluded that plant shutdown benefits can never be considered a retirement-type subsidy. At the same time, the IRS has interpreted its counterpart of the anticutback provision as not including plant shutdown benefits until the triggering event occurs. This interpretation, based in part on ERISA's funding provisions, allows employers to reduce contingent early retirement benefits without losing tax advantages.

II. APPLICATION OF THE ANTICUTBACK PROVISION AS A MATTER OF STATUTORY INTERPRETATION

In enacting ERISA, Congress created a complex, detailed scheme, and questions of ERISA liability require a close examination of its provisions.⁸¹ However, the anticutback provision's language and legislative history provide few clues as to whether protection extends to contingent early retirement benefits. There are two key questions to be considered in examining the text and legislative history: whether the definition of "retirement-type subsidy" includes plant shutdown benefits and whether a benefit contingent on an event that has not yet occurred can ever be protected as an accrued benefit under the anticutback provision.

A. Can a Plant Shutdown Benefit Be a Retirement-Type Subsidy?

As with any statute, interpretation of ERISA's provisions starts with the statutory language.⁸² The text of the anticutback provision sheds little light on what exactly a "retirement-type subsidy" is, pro-

⁸⁰ Richard Imperato, *FAS 112: The Latest Entry in Accounting for Benefit Plans*, 17 Pension Section News 1, 22 (1993) (discussing the difficulties of developing actuarial data for different types of benefits).

⁸¹ *Hughes Aircraft Company v Jacobson*, 525 US 432, 447 (1999) (stating that "ERISA is a 'comprehensive and reticulated statute'", quoting *Nachman Corp v Pension Benefit Guaranty Corp*, 446 US 359, 361 (1980)).

⁸² *Hughes*, 525 US at 438 (stating that analysis begins with statutory language and also ends there if language is clear).

viding only that it is to be defined in Treasury regulations.⁸³ In the absence of a regulation defining this term, Section 204(g)'s legislative history becomes even more useful in understanding its meaning.⁸⁴ The Senate Report specifically addresses plant shutdown benefits and provides:

The bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, *a subsidy that continues after retirement* is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), *or a plant shutdown benefit (that does not continue after retirement age)* will not be considered a retirement-type subsidy.⁸⁵

Courts have interpreted this paragraph in conflicting ways. In *Ross*, the Sixth Circuit interpreted the anticutback provision narrowly to exclude all plant shutdown benefits given this language.⁸⁶ Because the legislative history expressly mentions plant shutdown benefits, the *Ross* court concluded that plant shutdown benefits in general cannot be considered a retirement-type subsidy.⁸⁷

On the other hand, the Third Circuit in *Bellas* interpreted the legislative history to be more inclusive.⁸⁸ The *Bellas* court read the phrase "that does not continue after retirement age" as qualifying plant shutdown benefits generally, and the court concluded that Congress intended to separate out plant shutdown benefits that end at normal retirement age from those benefits that continue beyond.⁸⁹ Similarly, the Ninth Circuit in *Richardson* concluded that Congress intended "retirement-type subsidy" to include "shutdown benefits that do continue after retirement age."⁹⁰

⁸³ See notes 26–27 and accompanying text.

⁸⁴ See *Varity Corp v Howe*, 516 US 489, 496–97, 512–13 (1996) (using ERISA's legislative history to interpret ERISA section 404).

⁸⁵ S Rep No 98-575 at 30, reprinted in 1984 USCCAN at 2576 (cited in note 28) (emphasis added).

⁸⁶ See *Ross*, 847 F2d at 333 (holding that a shutdown benefit is not a retirement-type subsidy). For further discussion of *Ross*, see text accompanying notes 53–56.

⁸⁷ *Id.* ("The legislative history of the Retirement Equity Act, however, specifically addresses the question of whether a plant shutdown benefit falls within the category of a retirement-type subsidy and specifically states that it does not.")

⁸⁸ See *Bellas*, 221 F3d at 533 (holding that a shutdown benefit is a retirement-type subsidy). See also notes 32–40 and accompanying text.

⁸⁹ *Id.* ("As stated, the Senate Report addressing the amendment of section 204(g) suggests that shutdown benefits continuing beyond normal retirement age are retirement-type benefits.")

⁹⁰ See *Richardson*, 67 F3d at 1468 (interpreting Senate Report and finding shutdown benefits protected as a retirement-type subsidy). See also notes 41–45 and accompanying text.

The Senate Report's reference to welfare benefits that are not considered a retirement-type subsidy, such as medical and disability benefits, is also important in considering plant shutdown benefits.⁹¹ This statement may provide additional support for a narrow reading of the legislative history to exclude plant shutdown benefits from Section 204(g) protection. Generally, ERISA's drafters excluded such benefits to preserve employer flexibility and contain pension costs.⁹² One reason given for allowing employers to amend welfare benefits is that the level of future benefits is difficult to predict and depends on a wide range of unpredictable factors.⁹³ For example, future medical insurance costs depend on inflation, changes in medical practice and technology, and increases in the cost of treatment.⁹⁴ Similarly, retirement benefits contingent on a plant shutdown are also difficult to predict.⁹⁵

Contingent early retirement benefits, however, can be distinguished from other welfare benefits. First, unlike severance payments, which are generally made in one lump-sum payment, contingent retirement benefits are paid in monthly installments over time and are therefore more like traditional retirement benefits. Additionally, welfare benefits are generally services that do not depend on long-term service with the employer,⁹⁶ and, as employees change jobs, these benefits will usually be available from the new employer.⁹⁷ Contingent early retirement benefits, on the other hand, are conditioned on long terms of service with the employer, and an employee who changes jobs will not be eligible for similar benefits from a new employer for a considerable time.

Both the qualifying phrase following plant shutdown benefits and the distinctions from welfare benefits seem to point toward a reading of the term "retirement-type subsidy" that includes contingent retirement benefits continuing past retirement age. Even under an inclusive

⁹¹ S Rep No 98-575 at 30, reprinted in 1984 USCCAN at 2576 (cited in note 28). See also note 50 (describing welfare benefits).

⁹² See Bruce, *Pension Claims* at 197 & n 43 (cited in note 63), quoting 2 ERISA Leg Hist 3306 ("To require the vesting of these ancillary benefits [such as medical insurance or life insurance] would seriously complicate the administration and increase the cost of plans.").

⁹³ *Moore v Metropolitan Life Insurance Co*, 856 F2d 488, 492 (2d Cir 1988) (discussing Congress's recognition that it is difficult to predict future needs and costs for welfare plans and excluding them from ERISA's automatic vesting provisions).

⁹⁴ *Id.*

⁹⁵ See text accompanying notes 78–80.

⁹⁶ See Langbein and Wolk, *Pension and Employee Benefit Law* at 508 (cited in note 18) (discussing the transitory, short-term nature of welfare benefits).

⁹⁷ See Bruce, *Pension Claims* at 197–98 n 43 (cited in note 63), quoting 2 ERISA Leg Hist 3306 ("[W]here the employee moves from one employer to another, the ancillary benefits . . . would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer.").

reading of the legislative history, however, it is still not clear how to determine whether the subsidy continues after retirement. Assume, for example, that John Smith receives his normal, unreduced pension amount of \$1,000 beginning at the time of plant closure and continuing beyond his normal retirement age of sixty-five. Assume also that Smith's actuarially reduced pension benefits would be \$600 if he retired early. Neither the language of Section 204(g) nor the Senate Report makes clear if Smith is receiving \$600 per month in early retirement benefits plus \$400 per month in plant shutdown benefits or \$1,000 per month in plant shutdown benefits until age sixty-five, when normal pension payments begin. Thus, although the legislative history indicates that a plant shutdown benefit that continues beyond retirement age may be a "retirement-type subsidy," it remains unclear how to apply that definition.

B. Is a Contingent Benefit Considered Accrued Prior to the Triggering Event?

Even if a plant shutdown benefit is considered to be a retirement-type subsidy, the second issue that must be addressed is whether a contingent benefit can be considered protected if the triggering event has not yet occurred. The text of the anticutback provision indicates that once a benefit is defined as a "retirement-type subsidy" it is necessarily an accrued benefit and therefore protected.⁹⁸ Section 204(g) initially provides that an "accrued benefit" may not be decreased by a plan amendment.⁹⁹ The provision then goes on to state that "a plan amendment which has the effect of eliminating or reducing . . . a retirement-type subsidy . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits."¹⁰⁰ A straightforward reading of the language suggests that once a contingent retirement benefit is considered to be a "retirement-type subsidy" it is necessarily an accrued benefit and therefore cannot be amended.

However, there is some confusion in treating contingent benefits as accrued benefits because ERISA generally uses the term "accrual" to refer to the accumulation of benefits over a period of time, such as years of employment.¹⁰¹ Because the employee does not become enti-

⁹⁸ See Part II.A (discussing whether plant shutdown benefits are considered retirement-type subsidies).

⁹⁹ 29 USC § 1054(g)(1).

¹⁰⁰ 29 USC § 1054(g)(2).

¹⁰¹ See Langbein and Wolk, *Pension and Employee Benefit Law* at 132-34 (cited in note 18) (discussing accrual over time). ERISA's definition of "accrued benefit" is not helpful because it defines the term as "an annual benefit commencing at normal retirement age." 29 USC § 1002(23).

tled to contingent plant shutdown benefits until the shutdown occurs, these benefits cannot accrue over time in the same way as normal retirement benefits that depend only on age or service.¹⁰²

Despite the difficulty in categorizing plant shutdown benefits as accrued, the text of Section 204(g) appears to protect them from amendment. The anticutback provision applies to participants “who satisf[y] (*either before or after the amendment*) the pre-amendment conditions for the subsidy.”¹⁰³ In the case of contingent plant shutdown benefits, the conditions the employee must meet to receive benefits are age, years of service, and termination due to a plant shutdown. The “before or after amendment” language in the provision indicates that the benefits cannot be reduced even if the employee has not yet met all three of these conditions. Therefore, although the plant shutdown has not occurred, benefits may still be protected. Further, as the *Bellas* court observes, nothing in Section 204(g)’s language distinguishes between contingent and noncontingent benefits.¹⁰⁴

The text of the anticutback provision indicates that Congress intended to protect contingent benefits from amendment despite the problematic application of the term “accrued benefits.” However, neither the text of Section 204(g) nor its legislative history provides a great deal of guidance in determining what constitutes a “retirement-type subsidy” and whether contingent retirement benefits fit within that definition.

III. CONTINGENT PLANT SHUTDOWN BENEFITS SHOULD BE PROTECTED UNDER THE ANTICUTBACK PROVISION

Because of the ambiguity in the statute, policy considerations surrounding the application of anticutback protection to contingent early retirement become important. This Part argues that ERISA’s text, purposes, and statutory scheme justify applying Section 204(g) to prohibit reduction or elimination of contingent early retirement benefits. Part III.A discusses the strength of employees’ expectations with respect to contingent retirement benefits. Part III.B considers the consequences of employers’ inability to prefund these benefits and concludes that the need for employer flexibility to amend benefits in light of this funding gap is overstated. Part III.C evaluates the IRS’s interpretation of the IRC’s corresponding anticutback provision, and the consequences of an inconsistent interpretation between the ERISA or IRC provisions. Finally, Part III.D considers the extent to which em-

¹⁰² This is the argument asserted by the employer in *Bellas*, 221 F3d at 534.

¹⁰³ 29 USC § 1054(g)(2)(B) (emphasis added).

¹⁰⁴ *Bellas*, 221 F3d at 517.

ployer incentives to offer this type of benefit will be reduced if anti-cutback protection is extended.

A. Employees Have Strong Expectations of Receiving Contingent Early Retirement Benefits

ERISA's goal is to provide employees with retirement income that they have been promised and expect to receive.¹⁰⁵ As one commentator has observed, "employers do not give pension plans to their employees gratuitously,"¹⁰⁶ but rather provide retirement benefits generally as a form of deferred compensation, earned by employees during employment and received after retirement.¹⁰⁷ This expectation argument may prove too much, however, because all benefits offered by an employer represent some form of compensation tradeoff, yet not all benefits are protected to the same extent under ERISA. The employee may just as equally have traded the contingent plant shutdown benefits for a better severance package, which is not protected from reduction or elimination.¹⁰⁸

Nonetheless, unlike severance pay, which is ordinarily a lump-sum payment, contingent early retirement benefits are paid in periodic installments, making them closer to normal retirement benefits than a severance plan.¹⁰⁹ Additionally, the tax advantages to the employee associated with receiving benefits in monthly installments—during a time when the employee's taxable income is lower—make it less likely that employees view early retirement benefits as interchangeable with lump-sum severance payments.

Finally, employers themselves help to create a strong expectation interest in contingent plant shutdown benefits. Employers offer this type of benefit to induce valuable employees, with accumulated experience and knowledge, to continue to work during troubled times and plant closings.¹¹⁰ If employees are otherwise eligible to take actu-

¹⁰⁵ 29 USC § 1001 (1994 & Supp 1998).

¹⁰⁶ Dana M. Muir, Note, *Changing the Rules of the Game: Pension Plan Terminations and Early Retirement Benefits*, 87 Mich L Rev 1034, 1070 (1989) (discussing employee expectations regarding early retirement benefits).

¹⁰⁷ The deferred compensation theory is the common explanation of retirement benefits. See Langbein and Wolk, *Pension and Employee Benefit Law* at 16 (cited in note 18) (discussing the deferred wage theory).

¹⁰⁸ Severance plans are considered welfare plans. Under the commonly accepted view, severance benefits are not a form of deferred compensation, but rather preliquidated unemployment compensation. See Langbein and Wolk, *Pension and Employee Benefit Law* at 822 (cited in note 18).

¹⁰⁹ Courts often make this distinction between monthly versus onetime payments in characterizing benefits as ancillary, and therefore not protected under ERISA. See *Young v Washington Gas Light Co*, 206 F3d 1200, 1203-04 (DC Cir 2000) (finding lump-sum payments are not a benefits plan entitled to ERISA protection).

¹¹⁰ See *Renney v A.B. Electrolux*, 1992 US App LEXIS 275, *3-5 (6th Cir) (stating that an

arially reduced early retirement benefits (based on age and service requirements), the employer may offer them special plant shutdown benefits if they continue to work until the plant closure. Absent anticutback protection, the employer would be able to eliminate the plant shutdown benefits and shortly afterward close the plant, leaving the employee who continued to work with only the original actuarially reduced pension.¹¹¹ The anticutback provision should be applied to protect this reliance interest that employers create.

B. Employees Should Not Bear the Risk That Contingent Benefits Will Be Unfunded

Because employers cannot prefund contingent benefits,¹¹² a funding gap may result in which liability for benefits exceeds the assets available if a contingency occurs. This funding gap seems to point toward a narrower reading of the anticutback provision, in order to give employers flexibility in the face of the "hidden liability" for unfunded benefits.

This section argues that courts should not read the anticutback provision to exclude plant shutdown benefits on the basis of the funding gap, however. This section looks at the text of the anticutback provision and ERISA's purposes and concludes that Congress has already addressed the need for employer flexibility in Section 204(g).¹¹³ Further, the statutory scheme indicates that Congress has already contemplated where the risk of underfunding should fall and shifted that risk away from employees. This section concludes by considering the effect of anticutback protection in three contexts where the funding gap may have the greatest impact.

1. The text of the anticutback provision.

It is not necessary to exclude contingent early retirement benefits entirely from anticutback protection in order to provide the flexibility that some employers may require to address the funding gap. This flexibility is already built into the text of the anticutback provision. As a qualification of its prohibition on amendment of benefits, Section 204(g) provides that benefits may be reduced where required by a "substantial business hardship."¹¹⁴ This includes the situation where "it

employer may offer benefits to induce an employee who is tempted to seek other opportunities when faced with a plant closing to stay and help close down the plant).

¹¹¹ Id at *5-6.

¹¹² See Part I.D.

¹¹³ See *Varity Corp v Howe*, 516 US 489, 497 (1996) (interpreting ERISA according to its language, structure, and purposes, taking into account competing Congressional goals).

¹¹⁴ 29 USC § 1054(g); 29 USC § 1082(c)(8).

is reasonable to expect that the plan will be continued only if the waiver [of funding liability] is granted.”¹¹⁵

Both PBGC, which administers this waiver of liability under Section 204(g), and courts read the “substantial business hardship” exception very narrowly.¹¹⁶ The Sixth Circuit has said that a “waiver [of funding obligations] ordinarily should not be granted when the financial hardship was the employer’s own creation,”¹¹⁷ but will be considered only when the company is in financial distress.¹¹⁸ This provision in Section 204(g) already addresses the situation where employer flexibility to amend plans in light of funding obligations outweighs the need to protect employee benefits from reduction. It is therefore not necessary to exclude benefits from anticutback protection to accommodate the funding gap employers face.

2. ERISA’s purposes.

Although ERISA’s primary purpose is to protect employees’ expected benefits,¹¹⁹ Congress was also concerned with containing pension costs.¹²⁰ In close cases, the broad goal of protection of employees does not necessarily trump the competing goal of employer flexibility to amend benefits plans.¹²¹ Rather, it is recognized that ERISA reflects a deal between several competing interests.¹²² Where there is a specific provision that addresses the issue, that provision must decide how to strike the balance between flexibility to contain pension costs and employee protection.¹²³ In the case of anticutback protection for contingent shutdown benefits, although there is a general purpose of employer flexibility, Section 204(g) also speaks clearly on when that flexibility is allowed.¹²⁴ The anticutback provision should not be read to exclude benefits in alignment with the broad goal of employer

¹¹⁵ 29 USC § 1083(b)(4).

¹¹⁶ See, for example, *A-T-O, Inc v Pension Benefit Guaranty Corporation*, 634 F2d 1013, 1022 (6th Cir 1980) (concluding that a waiver is only allowed in cases of financial hardship and declining to consider other equitable factors).

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“These safeguards were aimed at preventing undue financial hardship that would threaten the solvency of a business or would cause a business to curtail or terminate its pension plan.”).

¹¹⁹ See text accompanying notes 13–20.

¹²⁰ See *Mertens v Hewitt Associates*, 508 US 248, 262–63 (1993) (discussing the competing goals of benefiting employees and controlling pension costs).

¹²¹ See *id.* (denying relief where doing so would impose high costs on ERISA plans and advisors); *Curtiss-Wright Corp v Schoonejongen*, 514 US 73, 81 (1995) (rejecting employee claims that the employer’s amendment procedure was inadequate).

¹²² *Mertens*, 508 US at 262.

¹²³ *Id.*

¹²⁴ See Part III.B.1.

flexibility when the text already provides the flexibility Congress intended.

3. Statutory scheme and PBGC's termination insurance.

Even if there is a funding gap for contingent benefits, the statutory scheme indicates that employers should not be able to amend shutdown benefits to alleviate the issues raised by the funding constraints. Congress has already allocated the risk of plan underfunding by providing plan termination insurance to all businesses through the PBGC.¹²⁵ If an employer's plan liability exceeds its assets and it is in financial distress, it may terminate the plan.¹²⁶ PBGC then takes over and guarantees payment for "all nonforfeitable benefits,"¹²⁷ which include benefits contingent on a plant shutdown.¹²⁸

To some extent, shifting the risk to PBGC is an unsatisfactory solution because employees do not fare as well once PBGC takes over a plan. For example, certain types of benefit plans are not guaranteed by PBGC,¹²⁹ and there is a maximum amount of benefits PBGC can guarantee.¹³⁰ Once PBGC takes over the plan, contingent early retirement benefits may be covered, but employees may lose other valuable benefits in the process.

Still, Congress has clearly addressed the cases in which employer flexibility to address underfunding is necessary and has provided a waiver of liability in Section 204(g). In the remainder of cases, Con-

¹²⁵ 29 USC § 1301 et seq (1994 & Supp 1998).

¹²⁶ 29 USC § 1341(c)(2)(B) (1994 & Supp 1998). To terminate a benefit plan voluntarily, the employer must meet one of the distress criteria: (a) the employer has petitioned for liquidation in bankruptcy, (b) the business is in the process of reorganization under bankruptcy laws, or (c) the employer demonstrates to PBGC that it will be unable to continue in business unless the distress termination occurs. *Id.* See generally Langbein and Wolk, *Pension and Employee Benefit Law* at 828-55 (cited in note 18) (discussing PBGC and termination of plans with insufficient assets).

¹²⁷ 29 USC § 1022(a) (1994 & Supp 1998). Although ERISA does not provide a definition of a "nonforfeitable benefit" in the context of the termination insurance program, the Supreme Court has held that a "nonforfeitable benefit" is the same as a vested benefit. See *Nachman Corp v Pension Benefit Guaranty Corp*, 446 US 359, 376 (1980). Accrued benefits are earned by the employee over time, and become vested, nonforfeitable benefits according to the terms of the plan. For example, an employee begins receiving accrued benefits at the beginning of employment, but the accrued benefits may only become vested after five years of service. Once the benefits are vested, the employee has a right to receive his accrued benefit at normal retirement age, even if his employment is terminated. See Dana M. Muir, *Plant Closings and ERISA's Non-interference Provision*, 36 BC L Rev 201, 206 (1995) (discussing accrual compared to vesting).

¹²⁸ Ippolito, *Economics of Pension Insurance* at 37-38 (cited in note 10) (discussing PBGC's guarantee of nonforfeitable benefits).

¹²⁹ For example, state and local plans, foreign plans, and unfunded plans for highly compensated employees are not included. 29 USC § 1321(b).

¹³⁰ Payment is limited to the lesser of average monthly gross income, based on the highest compensation in the past five years, or \$3,392.05 per month for plans ending in 2001. 29 USC § 1322(b)(3) (1994); 26 USC § 2621.3(b) (1994).

gress contemplated that employers would address underfunding through the PBGC's termination insurance program, rather than by reducing expected benefits.

4. Examples where the funding gap may have an impact.

This section applies the anticutback rule in three contexts in which the consequences of a funding gap may have the greatest impact: (1) a profitable employer closing an unprofitable plant, (2) an employer selling a plant, and (3) an unprofitable employer closing a plant where liability will cause the benefit plan to become underfunded.

a) *Profitable company closing an unprofitable plant.* The most compelling case for extending anticutback protection is the case of an otherwise profitable company closing down an unprofitable plant.¹³¹ Although there may be a gap in funding prior to the contingent event occurring, a profitable company can transfer funds to the benefits plan once the decision to shut down the plant occurs, as the funding provisions intend. In this context, extending anticutback protection comports with ERISA's primary purpose of benefiting employees.¹³² The liability for contingent plant shutdown benefits represents a cost of the employer's business that the employer should bear.¹³³

b) *Employer selling the plant.* The gap between funding and liability may also become an issue when an employer tries to sell a plant. Even though the sale of the plant will not usually trigger shutdown benefits,¹³⁴ the hidden liability of unfunded contingent retirement benefits may have a large impact on the company's ability to effect the sale. Prospective buyers may be reluctant to purchase the plant out of concern that they will assume a benefits plan with an uncertain amount of future liability and insufficient funds.¹³⁵ The seller may be forced to keep operating a plant that no longer meets its

¹³¹ See, for example, *A-T-O, Inc v Pension Benefit Guaranty Corp*, 634 F2d 1013, 1023 (6th Cir 1980) (considering waiver of employer liability for closing down an unprofitable plant).

¹³² *Alessi v Raybestos-Manhattan, Inc*, 451 US 504, 515 (1981) (describing ERISA's primary goal as protecting employees).

¹³³ *A-T-O*, 634 F2d at 1026 (reasoning that the liability represents "an actual, measurable cost of . . . [the employer's] business"), quoting *Usery v Turner Elkhorn Mining Co*, 428 US 1, 19 (1976).

¹³⁴ See, for example, *Hickey v Digital Equipment Corp*, 43 F3d 941, 947-49 (4th Cir 1995) (discussing employer liability in the context of a sale).

¹³⁵ Michael Roknick, *Sharon Steel Officially Closes Farrell Mill*, *Sharon Herald* 1 (July 20, 1993) ("Now the plant can be looked at and purchased by an outside concern without worrying about paying \$1 million a month in pension liabilities. . . . This makes it easier to start up or sell the mill."). The typical pattern in a sale is for the buying company to take over the seller's pension plan. Langbein and Wolk, *Pension and Employee Benefit Law* at 874 (cited in note 18).

needs, or may take other actions that are worse for employees in the aggregate, such as idling the plant for an extended period.¹³⁶

The need for employer flexibility in the context of a sale does not require a narrow reading of the anticutback provision, however, because the parties can structure the terms of the sale to address future liability.¹³⁷ For example, the companies can contract for the buyer to be indemnified for pension liability that occurs within a certain time frame.¹³⁸ Additionally, the seller may terminate the benefits plan at the time of sale, paying out all accrued benefits and leaving employees free to become participants in the purchasing company's benefits plan.¹³⁹

c) *Employer shutting down due to financial trouble.* The third context in which employer flexibility to eliminate contingent retirement benefits becomes an issue occurs when a company is already facing financial trouble and liability for these benefits will cause the plan to become underfunded. In this case, the employer may apply for a waiver of liability under Section 204(g)'s exception for a substantial business hardship. If the PBGC does not grant the waiver and requires the employer to meet its funding obligations, the result may be a distress termination, under which the PBGC takes over the employer's plan.

This scenario presents the most compelling case for excluding contingent shutdown benefits from Section 204(g). Only a small subset of employees will receive the contingent retirement benefits,¹⁴⁰ while employees in the aggregate will likely be worse off if the plan becomes underfunded and results in a distress termination.

Although both protecting employee benefits and maintaining employer flexibility are important goals of ERISA, Congress has already addressed the need for employer flexibility to deal with underfunding. The text of Section 204(g) sets out a clear exception to the employer's funding obligation for a substantial business hardship. Where that waiver does not operate, Congress established a termination insurance program so that employees would not bear the risk of

¹³⁶ Michael Roknick, *USW Leader Sees Hope That 720 May be Able to Retire*, Sharon Herald 1 (July 2, 1993) (discussing idling of plant).

¹³⁷ See Richard D. Nix and Timothy Verrall, *Employee Benefit Issues in Mergers and Acquisitions*, 25 Okla City L Rev 435 (2000) (discussing methods of structuring transactions to address unfunded pension liabilities).

¹³⁸ See *Richardson v Pension Plan of Bethlehem Steel Corp*, 112 F3d 982, 986 (9th Cir 1997) (upholding agreement to pay plant shutdown benefits if a shutdown occurred within forty-eight months of the sale).

¹³⁹ Langbein and Wolk, *Pension and Employee Benefit Law* at 874 (cited in note 18); 26 USC § 411(d)(3).

¹⁴⁰ Muir, 36 BC L Rev at 221 (cited in note 127) (discussing the limited nature of special early retirement benefits).

underfunding. Taken together, the text, purposes, and statutory scheme mean that it is not necessary to read the anticutback provision narrowly to address employer flexibility concerns because Congress has already done so.

C. The IRS's Interpretation of the Anticutback Provision Does Not Control

Courts may still interpret ERISA Section 204(g) to prohibit reduction of contingent early retirement benefits despite the IRS's contrary interpretation in GCM 39869, which states that the IRC's anticutback provision does not disqualify a plan for tax benefits if the employer reduces these benefits.¹⁴¹ The IRS's interpretation does not warrant strong deference. Additionally, although employers have relied on the IRS interpretation, courts have discretion to avoid retroactively applying the anticutback provision if doing so will produce inequitable results due to employer reliance on the IRS interpretation.

1. Agency deference.

Ordinarily, courts will use the IRC as a tool to interpret ambiguous ERISA provisions, including other terms in Section 204(g).¹⁴² There is also a great deal of deference to agency interpretations of programs they administer,¹⁴³ particularly in the context of ERISA because of the greater expertise of the IRS and PBGC as well as the need for uniformity.¹⁴⁴

There are several factors, however, that caution against adopting the IRS's interpretation in GCM 39869. First, it is ERISA that sets out rights and duties, while the IRC merely provides the tax incentives.¹⁴⁵ An ambiguous issue should be resolved by reference to employee interests, rather than driven by the tax incentives already established.

¹⁴¹ General Counsel Memorandum 39869 (cited in note 68).

¹⁴² See, for example, *Gillis v Hoechst Celanese Retirement Plan*, 4 F3d 1137, 1144 (3d Cir 1993) (“[W]hen interpreting Section 204(g) of ERISA, in addition to the statute’s legislative history, we may also look for guidance to sources which interpret its IRC counterpart—Section 411(d)(6).”). See also *Hughes Aircraft Co v Jacobson*, 525 US 432, 442–43 n 4 (1999) (supporting its decision by reasoning that it is consistent with the IRS interpretation); *Patterson v Shumate*, 504 US 753, 759 (1992) (using IRC section 401(a)(13) to interpret ERISA section 206).

¹⁴³ *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837, 843 (1984) (noting that deference is appropriate where the agency’s interpretation “is based on a permissible construction of the statute”).

¹⁴⁴ Muir, Note, 87 Mich L Rev at 1062–63 (cited in note 106) (discussing appropriate level of deference to IRS).

¹⁴⁵ *Rybarczyk v TRW, Inc*, 235 F3d 975, 985 (6th Cir 2000) (“[A]djudication of [an employee’s] rights is for the federal courts, not the . . . IRS.”), quoting *Esden v Bank of Boston*, 229 F3d 154, 177 (2d Cir 2000).

Second, as a matter of administrative law, an agency interpretation is entitled to less deference when it is not in the form of a treasury regulation or revenue ruling.¹⁴⁶ A General Counsel Memorandum represents only the opinion of a lawyer within the agency.¹⁴⁷ Finally, PBGC is also an agency responsible for administering ERISA, and it has taken a stronger position on protecting shutdown benefits, considering them to be nonforfeitable benefits.¹⁴⁸

2. Employer reliance.

Interpreting the anticutback provision as extending to contingent early retirement benefits, contrary to the IRS's position for the past ten years, may upset notions of fairness. Many employers relied on the IRS interpretation before reducing this type of benefit. These employers may find themselves facing not only liability under ERISA, but possible disqualification for tax benefits, despite reasonable reliance on GCM 39869.¹⁴⁹

There are two ways to address the concern about possible tax disqualification. First, many employers received determination letters from the IRS prior to amending the plan, which will protect against disqualification in individual cases.¹⁵⁰ Second, courts can avoid applying section 411(d)(6) retroactively if doing so would result in disqualification and the employer reasonably relied on GCM 39869. The Supreme Court has addressed retroactive liability in pension cases previously, and provided a three-prong test for determining whether the employer should be liable: (1) whether the decision establishes a new principle of law, (2) whether retroactive awards are necessary to deter deliberate violations, and (3) whether retroactive liability would produce inequitable results.¹⁵¹

¹⁴⁶ See *Tupper v United States*, 134 F3d 444, 448 (1st Cir 1998) ("GCM's may be looked at as a research tool by any interested court or party, but they are not authority in this court."); *In re Gulf Pension Litigation*, 764 F Supp 1149, 1163 n 4 (S D Tex 1991) (rejecting interpretation in an IRS Plan Termination Handbook).

¹⁴⁷ *Stubbs, Overbeck & Associates, Inc v United States*, 445 F2d 1142, 1146-47 (5th Cir 1971) (rejecting the argument that a revenue ruling has the force and effect of law).

¹⁴⁸ *Ippolito, Economics of Pension Insurance* at 38 (cited in note 10) (discussing PBGC's guarantee of nonforfeitable benefits as well as how 29 USC § 2621.4 has been interpreted to include pre-termination shutdown benefits).

¹⁴⁹ See *Bellas*, 221 F3d at 539 (finding that contingent early retirement benefits are protected by the anticutback provision, but noting that "we do not suggest that employers have not relied reasonably on GCM 39869").

¹⁵⁰ See *Esden v Bank of Boston*, 229 F3d 154, 176 (2d Cir 2000) (stating that a "favorable determination letter indicates only that an employee retirement plan qualifies for favorable tax treatment"); see also Brief of Amicus Curiae Association of Private Pension and Welfare Plans in Support of Appellants, *Bellas v CBS, Inc* at *23-24 (cited in note 77) (discussing employers' reliance on determination letters).

¹⁵¹ See *Florida v Long*, 487 US 223, 230 (1988). See also Muir, Note, 87 Mich L Rev at 1067-68 (cited in note 106) (applying the retroactivity analysis to determine if early retirement benefit

An employer would probably meet the first prong of the test because of the lack of clarity surrounding contingent early retirement benefits. As to the second prong, disqualification of the plan would not likely be necessary to ensure that employers comply in the future. Finally, retroactive disqualification would produce inequitable results for both employers and employees, who would be subject to taxes on the benefits plan, despite reasonable reliance on the IRS memo.¹⁵² Applying this retroactivity analysis, it is not necessary to deny anticut-back protection for all contingent early retirement benefits to avoid inequity resulting from reliance on the IRS interpretation.

D. Employers Will Still Have Incentives to Offer Contingent Retirement Benefits

Although employers have argued that incentives to offer contingent early retirement benefits will be diminished if they lose flexibility to amend them later,¹⁵³ there are still incentives to offer these benefits. In particular, contingent early retirement benefits are valuable tools to induce employees, especially those with years of service and accumulated knowledge, to stay and help the employer close the plant.¹⁵⁴ In general, employers have incentives to offer attractive benefit plans because of their role in attracting workers, improving morale, and increasing employee retention.¹⁵⁵

It is true to some extent that employers will be reluctant to offer benefits that will become a permanent part of the benefits plan. However, shutdown benefits are important to unions,¹⁵⁶ who will still likely bargain for them. Additionally, employers may still prefer to offer this type of benefit rather than a wage increase because it does not require as much immediate cash and is guaranteed by the government.¹⁵⁷ Finally, the employer's need to encourage experienced workers to con-

payments should be paid for plans with excess assets terminated before 1984).

¹⁵² See *Bellas*, 221 F3d at 539.

¹⁵³ *Id.* (rejecting arguments that employers will be discouraged from offering future shutdown benefits).

¹⁵⁴ See *Renney v A.B. Electrolux*, 1992 US App LEXIS 275, *2-5 (6th Cir) (noting that benefits are offered to employees as an incentive to retain employees during shutdown). See also Bradley R. Schiller and Randall D. Weiss, *The Impact of Private Pensions on Firm Attachment*, 61 Rev Econ and Stat 369, 379 (1979) (concluding that retirement benefits, including special early retirement benefits, do affect employees' decisions to stay with employers).

¹⁵⁵ Muir, Note, 87 Mich L Rev at 1065-66 (cited in note 106).

¹⁵⁶ See Joel Chernoff, *Government Hits at Underfunding*, Pension and Investments 1, 35 (Aug 20, 1990) (noting that unions "fiercely guard" contingent benefits, including plant shutdown benefits).

¹⁵⁷ See David A. Vise, *Putting Pension Reforms into Gear*, Wash Post F1 (Apr 16, 1993) (discussing role of pension benefits in labor talks).

tinue to work through troubled times means employers will consider offering early retirement benefits contingent on a plant shutdown.¹⁵⁸

The role of collective bargaining in shaping the terms of benefits plans may reduce the need to use the anticutback provision to protect benefits. Employees who want additional protection from cutbacks can bargain to include provisions in the plan limiting the employer's discretion to eliminate benefits.¹⁵⁹ For example, the collective bargaining agreement may require agreement from union leaders before shutdown benefits are reduced.¹⁶⁰ In practice, however, this type of provision may offer only nominal protection to employees, who are relatively powerless at the point where the decision is made to shut down a plant.¹⁶¹ Additionally, non-unionized employees or those with nonbargained plans could be left without any protection.

CONCLUSION

Courts have struggled with the appropriate scope of the anticutback rule and its application to contingent early retirement benefits. Authority has been split, deciding the issue largely as a matter of statutory interpretation. Although the text and legislative history are inconclusive, policy considerations favor protecting contingent early retirement benefits from reduction or elimination. Employers offer this type of benefit to induce employees to continue to work despite a plant's declining financial situation, helping to create the type of expectation that the anticutback provision is intended to protect. Although employers are limited in their ability to prefund for contingent benefits, Congress has already shifted the risk of underfunding away from employees and created an exception for employers in cases of business hardship. Finally, anticutback protection will not eliminate employers' incentives to offer contingent early retirement benefits. This type of benefit is a valuable tool to induce employees with experience and knowledge to remain with the employer. The anticutback provision should be read to prohibit employers from amending the benefits they have offered and that employees reasonably expect.

¹⁵⁸ See *Renney*, 1992 US App LEXIS 275 at *8-9 (discussing the role of contingent plant shutdown benefits in inducing employees to continue to work).

¹⁵⁹ See *Hozier v Midwest Fasteners, Inc.*, 908 F2d 1155, 1162 (3d Cir 1990) (noting that "employees and their unions remain free to bargain" to limit the employer's ability to make amendments, beyond the requirements in the statute); *Corcoran v Bell Atlantic Corp.*, 1997 US Dist LEXIS 14662, *16 (E D Pa) (noting that pension plans can be drafted to extend protection beyond what Section 204(g) offers).

¹⁶⁰ See, for example, *Hagan v Kaiser Aluminum & Chemical Corp.*, 668 F Supp 1298, 1300 (E D Mo 1987) (describing terms of the collective bargaining agreement).

¹⁶¹ See *Hagan*, 668 F Supp at 1299-1300 (describing actions of union president agreeing under protest to plan amendments eliminating retirement benefits after the employer threatened to shut down the plant).

