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# **YOU PROMISED!—MAY AN EMPLOYER CANCEL OR MODIFY EMPLOYEE SEVERANCE PAY ARRANGEMENTS?**

**EARLE K. SHAWE\***  
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## **I. INTRODUCTION**

Businesses are facing increasing pressures to close unproductive, outmoded plants and open new, competitive facilities. Plants that have long been in service and therefore have large numbers of employees with lengthy service records are the facilities most susceptible to the economic requirement of shutdown in favor of new efficient facilities. One result of these closings has been active litigation on the issue of severance pay, and labor lawyers, as well as general practitioners, are likely to face severance pay issues even more frequently in the future. The basic issue confronting the practitioner is whether or not employees have vested rights in severance pay benefits.

This Article examines the primary theories used when employees have challenged attempts by employers to change or cancel severance benefits and discusses the courts' responses to those theories. The severance pay problem is explored in the context of both non-union employer/employee relationships and in employer/employee relationships that are governed by a collective bargaining agreement. In the non-union setting, employee claims for severance pay have been based on programs contained in company personnel policy manuals. In union settings, such claims arise from the severance pay provisions of a collective bargaining agreement. Because the source of the claim is unique to each setting, the theories advanced by employees to support their claim that severance benefits are vested rights may differ. There are, however, legal theories that are used by both union and non-union employees arguing for severance benefits.

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## II. THE THEORIES

The setting and the sequence of events leading up to a company decision not to pay severance benefits will determine the legal theories that can be advanced by workers seeking to recover those benefits. In the case of a unionized employer, two different scenarios could result in employees, and/or their union, deciding to take legal action to obtain severance benefits. In the first scenario, the expiration of a collective bargaining agreement gives the employer the opportunity to enter into negotiations with the union on the effect of a contemplated plant closing on severance pay benefits. When the parties reach a bona fide impasse,<sup>1</sup> the employer will then attempt to implement a final offer, reducing and/or eliminating the severance benefits provided for in the expired labor contracts. In the second, more drastic case, the employer could wait until the collective bargaining agreement expires, close the plant without paying benefits, and then claim that it was under no obligation to comply with the terms of an expired contract.

A non-union employer, faced with a plant closing, may be even more abrupt. Such an employer, under no obligation to bargain with its workers about employment terms, may simply choose to take a unilateral action to alter or eliminate a severance pay plan or practice.

In response to these scenarios, workers and/or unions have

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1. The requirement of bargaining to impasse arises from section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), which imposes a duty to bargain collectively as to "terms and conditions of employment." See generally 29 U.S.C. § 158(d) (1982). If the subject of bargaining is found to be a term or condition of employment, then bargaining is mandatory, see *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958), but employers are not required to make concessions, 29 U.S.C. § 158(d) (1982). Thus an employer may take a position on a mandatory subject and bargain to impasse. *Borg-Warner*, 356 U.S. at 349. Pension and insurance benefits are clearly recognized as mandatory subjects. See *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971). See also *Central States, Southeast & Southwest Areas Pension Fund v. Chicago-St. Louis Transp. Co.*, 535 F. Supp. 476, 479 (N.D. Ill. 1982) (pension and other fringe benefits are mandatory subjects), *aff'd mem.*, 720 F.2d 681 (7th Cir. 1983); *Home Box Office, Inc. v. Directors Guild of Am., Inc.*, 531 F. Supp. 578, 607 (S.D.N.Y. 1982) (profit sharing plan is mandatory subject), *aff'd per curiam*, 708 F.2d 95 (2d Cir. 1983). See generally O'Keefe & Tuohey, *Economically Motivated Relocations of Work and an Employer's Duties Under Section 8(d) of the National Labor Relations Act: A Three Step Analysis*, 11 *FORDHAM URB. L.J.* 795, 801 n.29 (1983) (detailing range of subjects that are mandatory). The Supreme Court has recognized that the effects of plant closing decisions may be mandatory subjects of bargaining, see *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981), and at least one circuit has recognized an employer duty to bargain over severance pay at the time of a plant closing, see *Electrical Prod. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 983 (3d Cir.), *cert. denied*, 449 U.S. 871 (1980).

attempted to force employers to comply with the terms of severance pay plans under three different theories. Union employees have based their claims on all three theories; non-union employees have based their claims on the second and third theories. The theories are as follows: (1) a claim under the National Labor Relations Act (NLRA)<sup>2</sup> that plant closing and/or layoff benefits may not be terminated following negotiations over those benefits which end in impasse;<sup>3</sup> (2) a claim under the Employee Retirement Income Security Act (ERISA)<sup>4</sup> that the benefits have vested or are otherwise protected by ERISA; and (3) a claim of breach of contract, based either on section 301<sup>5</sup> of the Labor Management Relations Act<sup>6</sup> or on common law contract principles.

*A. Termination of Benefits Upon Reaching Impasse Under the NLRA*

The unionized employer that is considering closing its plant might attempt, through collective bargaining at the expiration of the labor agreement, to secure from the union concessions that modify or eliminate severance pay benefits or other forms of plant closing benefit programs. Securing concessions would be the optimum solution for the company because the union would be bound by the concessions that it made and would therefore be foreclosed from

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2. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

3. Impasse is defined as a deadlock, stalemate, or hiatus in negotiations. *Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). An impasse is generally not reached until the parties' positions have become fixed and neither indicates a willingness to change its position. There is no clear test for determining when an impasse exists; it depends on the "totality of circumstances." The NLRB considers "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is a disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.'" *Saunders House v. NLRB*, 719 F.2d 683, 687 (3d Cir. 1983) (quoting *Taft Broadcasting*, 163 N.L.R.B. 475, 478 (1967), *enforced sub nom.* *AFTRA, Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)). See also *Harding Glass Indus.*, 248 N.L.R.B. 902, 906 (1980) (applying the *Taft Broadcasting* test); *Dust-Tex Serv., Inc.*, 214 N.L.R.B. 398, 405 (1974) ("[G]enuine impasse in negotiations is one where despite parties' best efforts to achieve an agreement neither party is willing to move from its respective position.").

For example, in *Creasey Co.*, 115 L.R.R.M. (BNA) 1131, 1132 (1984), the NLRB held that the parties had reached impasse on the issue of severance pay after five negotiating sessions in a one-month period. The parties had resolved all their differences except severance pay and were unable to settle that issue despite discussing it at each session and the union having put forward three different proposals. *Id.*

4. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (1982)).

5. 29 U.S.C. § 185 (1982).

6. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-187 (1982)).

seeking judicial enforcement of benefits that had been negotiated away.

In the more likely event that the company is unable to secure from the union an agreement on the proposed concessions eliminating or reducing plant closing benefits, the company may unilaterally put into effect its last offer and alter those benefits, provided, however, that the parties have negotiated on the severance pay issue and have reached a bona fide impasse.

The General Counsel of the National Labor Relations Board (NLRB) recently issued an advisory memorandum in a case in which an employer, while in the process of closing its plant at the expiration of the collective bargaining agreement, attempted to renegotiate severance benefits with a union.<sup>7</sup> In *WABCO*, the parties negotiated to impasse, whereupon the employer implemented its final offer, which substantially reduced the severance benefits provided for in the expired contract. The General Counsel dismissed the union's unfair labor practice charge against *WABCO* and thus allowed the reduction in severance benefits to stand.<sup>8</sup>

The General Counsel noted that the mandatory terms and conditions of a collective bargaining agreement are controlling between the parties, even after the agreement expires. Those terms and conditions remain in effect until a new agreement is negotiated or a genuine impasse is reached.<sup>9</sup> But, once the employer bargains to genuine impasse, "the employer may unilaterally put into effect its last offer to the union."<sup>10</sup> Severance benefit provisions are not "exempt from these general rules as being compensation for past work."<sup>11</sup> By merely providing for severance benefits in the contract, the employer does not agree to continue those benefits forever. Rather, as long as the employer bargains to genuine impasse as to the changes it proposed to make in the severance benefit plan, the employer is no longer bound to continue the original benefit plan unchanged.<sup>12</sup>

While typically a unilateral change after impasse involves an *increase* in wages or benefits (although less of an increase than the union is demanding), *WABCO* illustrates that a bargained-for but not agreed-upon *reduction* may also be implemented. Similarly, in an

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7. *WABCO*, 113 L.R.R.M. (BNA) 1103 (1983).

8. *Id.* at 1104.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

analogous case, the NLRB recently held that an employer had *not* committed an unfair labor practice by terminating its payments into three union fringe benefit funds, the Supplemental Unemployment Benefit Fund, the Prepaid Legal Service Fund, and the Education Fund.<sup>13</sup> In *Western Newspaper Publishing Co.*,<sup>14</sup> the parties had reached impasse on bargaining for a new contract in January of 1981. In March, the employer stopped contributing to the union's fringe benefit funds. The union claimed that the employer violated section 8(a)(5) of the Labor Management Relations Act<sup>15</sup> by unilaterally changing the terms of employer participation in the funds. Finding that the employer's unilateral changes were consistent with its pre-impasse proposals, the NLRB held that there was no violation of section 8(a)(5), stating: "It is well settled that, after bargaining to an impasse, an employer does not violate Section 8(a)(5) of the Act by making unilateral changes, as long as the changes are reasonably encompassed by the employer's pre-impasse proposals."<sup>16</sup>

Following the reasoning of these cases, it would appear that, under the NLRA, a company can unilaterally implement its last offer, including its final position with respect to severance benefits contained in the expired contract, upon reaching a bona fide impasse in negotiations with the union.

### B. Severance Benefits under ERISA<sup>17</sup>

While a company may, under the NLRA, prospectively alter severance benefits, it might face a different type of attack if it seeks to extinguish them retroactively for employees who arguably have already qualified for them. If a company attempts to terminate plant

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13. *Western Newspaper Publishing Co.*, 269 N.L.R.B. No. 65, 116 L.R.R.M. (BNA) 1173, 1175 (1984). See also *O'Malley Lumber Co.*, 234 N.L.R.B. 1171, 1178-79 (1970) (employer held not to have violated its bargaining obligation when, upon impasse, it ceased contributions to the union's health and welfare plan in accordance with its bargaining position during negotiations).

14. 269 N.L.R.B. No. 65, 116 L.R.R.M. 1173 (BNA) (1984).

15. Labor Management Relations Act of 1947, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

16. 269 N.L.R.B. No. 65, 116 L.R.R.M. at 1175.

17. Chapter 18 of the United States Code, titled the Employee Retirement Income Security Program (ERISA), regulates employee benefit plans. The purpose of ERISA is to protect participants in such plans by imposing reporting and disclosure requirements, by establishing standards of conduct for the fiduciaries of such plans, by imposing vesting and funding requirements, and by providing appropriate remedies for the violation of these requirements. See 29 U.S.C. § 1001(a)-(c) (1982). Severance pay plans may be subject to ERISA. See *infra* notes 27-39 and accompanying text.

closing benefits, there are two arguments against such action that have been raised under ERISA. Employees have argued first, that the company curtailed benefits vested under the terms of a severance benefit plan by discontinuing the plan;<sup>18</sup> or second, that the company violated fiduciary duties owed to the participants in the plan by discontinuing the plan.<sup>19</sup>

Employees have claimed that their severance benefits under ERISA are "vested" or "nonforfeitable."<sup>20</sup> Under ERISA, however, vesting requirements are inapplicable to non-pension benefits. The legislative history of ERISA indicates that its vesting rules were intended to cover only accrued benefits under retirement plans.<sup>21</sup> Other benefits, such as early retirement, severance, and insurance, classified as ancillary, are not "accrued."<sup>22</sup>

The Fourth Circuit recently considered the argument that ERISA vesting rules applied to severance benefits. Relying on the legislative history of ERISA, the court of appeals, in *Sutton v. Weirton Steel Division of National Steel Corp.*<sup>23</sup> held that ERISA vesting rules do not apply to protect severance benefits. In *Sutton*, the original employer, National Steel Corporation, provided its employees with early retirement benefits and severance pay, which were to be paid

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18. Under 29 U.S.C. § 1132 (1982), an employee may bring a civil action to recover employee benefit plan benefits due him.

19. The fiduciary obligations are described in 29 U.S.C. §§ 1103-1104 (1982). Section 1104 of the Act imposes the following obligations on a plan fiduciary: "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1) (1982).

20. Vested rights are nonforfeitable rights. H.R. REP. NO. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4670, 4719. Section 1002 defines "nonforfeitable" as: "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." 29 U.S.C. § 1002(19) (1982).

21. H.R. REP. NO. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS, 4670, 4726 ("vested employee is protected in his rights to . . . 'accrued benefits'").

22. See, e.g., *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 966 (S.D.N.Y. 1984) (early retirement benefits are not "accrued benefits" within the meaning of ERISA); see also H.R. REP. NO. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4670, 4726 ("The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided employees in conjunction with a pension plan and are sometimes provided separately.")

23. 724 F.2d 406 (4th Cir. 1983), cert. denied, 104 S. Ct. 2387 (1984).

to qualified employees in the event of a shutdown or layoff. National sold its Weirton Steel Division to a new company, Weirton Steel Corporation. Although the employees of the Division became immediately employed by Weirton Steel Corporation upon the sale, the employees argued that their status as National employees was terminated, triggering the payment of contingent benefits, which included severance pay.<sup>24</sup> Noting that the severance pay plan was both contingent and unfunded, the court stated that “[t]he Act was not designed to prohibit modification of these ancillary benefits . . . . An employer may change such benefits without violating ERISA.”<sup>25</sup> Further, the court found that “[t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance payments.”<sup>26</sup>

It seems clear from *Sutton* and from the history of the statute that ERISA vesting provisions will not protect employee severance benefits from retroactive extinguishment. Another argument, however, may be made under ERISA, i.e., that severance pay plans are employee “welfare benefit plans”<sup>27</sup> and, as such, are subject to the ERISA fiduciary provisions, which impose on employers a fiduciary obligation to maintain benefits established by existing severance pay plans.<sup>28</sup> Several courts considering the status of severance benefit plans have held that severance benefit plans *are* employee welfare

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24. *Id.* at 409-10.

25. *Id.* at 410. There is little case law considering forfeiture or elimination of ancillary benefits, but there is analogous case law that considers whether pension benefits that are not required to be nonforfeitable may, under ERISA, be eliminated. Those cases indicate that such non-vested benefits may be forfeited. *See, e.g.,* Fentron Indus., Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1306 (9th Cir. 1982) (“pension plan may cancel benefits not required by ERISA’s minimum vesting provisions”); *Hepple v. Roberts & Dybdahl*, 622 F.2d 962, 967 (8th Cir. 1980) (ERISA does not prohibit forfeiture of benefits in excess of minimum vesting requirement); *Fremont v. McGraw-Edison Co.*, 606 F.2d 752, 760 (7th Cir. 1979) (ERISA does not prohibit forfeiture of benefits in excess of minimum vesting requirement), *cert. denied*, 445 U.S. 951 (1980).

26. 724 F.2d at 410. *See also* *Gutting v. Falstaff Brewing Corp.*, 541 F. Supp. 345, 347 (E.D. Mo. 1982) (ERISA vesting provisions are inapplicable to employee welfare benefit plans).

27. Employee welfare benefit plan is defined at 29 U.S.C. § 1002(1) (1982). An employee welfare benefit plan “is a plan, fund, or program established by an employer to provide common employee benefits other than retirement benefits.” 1a PENS. & PROFIT SHARING (P-H) ¶ 16,115 (1984). Welfare benefit plans are generally subject to ERISA fiduciary responsibility rules. *See* 29 U.S.C. § 1101(a) (1982) (fiduciary responsibility rules apply to all employee benefit plans, including welfare plans); Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1, 3 (1977).

28. ERISA fiduciary provisions impose general standards of conduct: fiduciaries shall discharge duties for the exclusive purpose of providing benefits to participants, 29 U.S.C. § 1103(c)(1982); fiduciaries must act prudently, *id.* § 1104(a). These provisions also detail a number of prohibited transactions. *Id.* § 1106. *See generally* Little &



benefit plans.<sup>29</sup>

If fiduciary obligations apply,<sup>30</sup> an employer alteration of a severance pay plan which does not benefit employee participants may be found to violate ERISA. For example, in *Dependahl v. Fallstaff Brewing Corp.*,<sup>31</sup> the Court of Appeals for the Eighth Circuit upheld the district court's holding that an employer violated its fiduciary duties under ERISA by substantially increasing the eligibility requirements of both its unfunded severance pay plan and its funded insurance benefit program shortly before imposing mass terminations.<sup>32</sup>

In *Dependahl*, the employer had instituted an unfunded severance pay plan in 1973 with no minimum service requirement.<sup>33</sup> In 1975 the company amended its plan to require fifteen years of service before an employee would be eligible for severance benefits.<sup>34</sup> The district court held that an employee who had been with the company for only ten years was entitled to severance pay because the company had amended its plan two months before his termination, in anticipation of mass layoffs.<sup>35</sup> The district court found that this amendment, in these circumstances, was a violation of the ERISA fiduciary provisions,<sup>36</sup> and the court of appeals affirmed.<sup>37</sup>

Although this issue was not discussed by the court of appeals, the district court in *Dependahl* noted that its decision did not mean

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Thraillkill, *supra* note 27, at 11-15. Employers who exercise discretionary authority in regard to severance benefit plans would be considered fiduciaries. *See id.*

29. *See, e.g.*, *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 567 F. Supp. 1184, 1202 (N.D. W. Va. 1983) (stating that severance pay, though not a retirement benefit, does come within the reach of ERISA as an "employee welfare benefit plan"), *aff'd*, 724 F.2d 406, *cert. denied*, 104 S. Ct. 2387 (1984); *Petrella v. NL Indus., Inc.*, 529 F. Supp. 1357, 1361-62 (D.N.J. 1982) ("Congress intended the term 'Welfare Plan' to include a plan for severance benefits"); *Donnelly v. Aetna Life Ins. Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979) (severance pay plan set forth in employer's personnel policy manual held to be employee welfare benefit plan within coverage of ERISA).

30. The general argument is that, although the "vesting" or "accrued benefit" provisions of ERISA do not apply to severance plans, *Sutton*, 724 F.2d at 410, other protective provisions of ERISA do apply, such as safeguards against discrimination, found in 29 U.S.C. § 1140 (1982), and the imposition of fiduciary duties, outlined in *id.* § 1104. *See Sutton*, 567 F. Supp. at 1202; *infra* text accompanying notes 31-40.

31. 653 F.2d 1208 (8th Cir. 1981), *modifying* 491 F. Supp. 1188 (E.D. Mo. 1981), *cert. denied*, 454 U.S. 968.

32. *Id.* *See also* *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357 (E.D. Mo. 1979) (employer's amendment of severance plan to exclude employees otherwise eligible when it was contemplating large layoffs violated its fiduciary duties under ERISA).

33. 491 F. Supp. at 1190.

34. *Id.*

35. *Id.* at 1196-97.

36. *Id.* at 1197.

37. 653 F.2d at 1213-14.

that an employer could never cut back benefits previously provided to employees.<sup>38</sup> Instead, it held only that such a reduction is impermissible under ERISA "when made expressly in contemplation of actions which would otherwise entitle employees to the previously provided benefits."<sup>39</sup>

Under *Dependahl*, an employee might advance an argument that ERISA imposes fiduciary obligations that *restrict* an employer's ability to modify previously established severance benefits. What *Dependahl* does not clarify is when those fiduciary obligations will *allow* an employer to modify such benefits, or when the fiduciary obligations do not apply to modifications. Such clarification is complicated by the dual role an employer plays with respect to benefit plans. As the Supreme Court has recognized, a company may have two roles with respect to an employee benefit plan. As an employer, it is free to take positions in negotiations that are adverse to the interests of plan participants. As a plan administrator, however, a company must use plan assets in the best interest of plan participants.<sup>40</sup>

In the context of an employee welfare plan, the question then arises: When may a company act to further its own economic interests, unconstrained by ERISA, or, if ERISA fiduciary provisions apply, under what circumstances may plan benefits be restricted or even eliminated? In *Amax Coal*, the Supreme Court noted that a company must ignore its "employer" role when it deals with *funded* employee benefit plans,<sup>41</sup> such as those that ERISA requires to be kept in a separate trust.<sup>42</sup> But the obligations of a company regarding an unfunded welfare plan are arguably different from its obligations arising from funded pension plans. Thus, an employer may argue that ERISA's fiduciary standards do not preclude alterations

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38. 491 F. Supp. at 1197. And another district court has noted that, while the fiduciary standards set forth within the Act require that the administration of a severance pay plan may not violate a relationship of trust, the provisions do not prohibit amendment or termination of the plan. See *Dhayer v. Weirton Steel Div. of Nat'l Steel Corp.*, 571 F. Supp. 316 (N.D. W. Va.), *aff'd sub nom. Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984).

39. 491 F. Supp. at 1197.

40. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981). *Amax Coal* concerned employee benefit funds governed by the Labor Management Relations Act, but the Court recognized that ERISA incorporated the fiduciary standards of that act. *Id.* at 332-33.

41. *Id.* at 333-34. The Fourth Circuit in *Sutton* recognized the employer's two roles, and, citing *Amax Coal*, noted that, for a *pension plan*, the employer was not permitted to assume a position in which it had dual loyalties, and was bound by ERISA's fiduciary obligations to ignore its role as employer. *Sutton*, 724 F.2d at 410.

42. 29 U.S.C. § 1002(1)(B) (1982).

to an *unfunded* contingent benefit plan such as severance pay.<sup>43</sup> As the Fourth Circuit stated in *Sutton*: "Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age."<sup>44</sup>

Despite the Fourth Circuit's statement that "changes [in severance pay plans] . . . are not to be reviewed under fiduciary standards,"<sup>45</sup> it seems likely that there are circumstances in which fiduciary standards may be invoked to prevent changes. For example, if an employer terminates an unfunded severance pay plan at the same time as he is taking actions, such as massive layoffs, that would normally trigger severance pay liability, that termination may be viewed as an act of bad faith.<sup>46</sup> As such, the act would be treated as a violation of a fiduciary duty.<sup>47</sup>

### C. *Vesting of Severance Benefits Under Common Law Contract Principles*

The preceding discussion indicates that, under the NLRA, a unionized employer could unilaterally eliminate plant closing severance benefits upon reaching bargaining impasse, and that ERISA may not preclude reductions of severance benefits. Still to be considered, however, is the widely advanced argument that severance pay entitlement is grounded in contract principles.<sup>48</sup> Contract argu-

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43. See, e.g., *Sutton*, 724 F.2d at 410. Cf. *Dependahl*, 653 F.2d at 1214 (unfunded excess benefit plans are exempt from ERISA)(emphasis added).

44. 724 F.2d at 410-11.

45. *Id.* at 411. The district court in *Sutton* found that the severance pay plan, a welfare benefit plan, came within the reach of ERISA fiduciary standards but found that because such plans are not subject to vesting and nonforfeiture requirements, there was no breach of duty when the employer sought to limit benefits. 567 F. Supp. at 1202-03. The Fourth Circuit, in affirming, stressed that ERISA duties that relate to vested rights could not be invoked to prevent modifications of non-vested benefits. *Sutton*, 724 F.2d at 411. The *Sutton* decision apparently leaves open the question of whether there are fiduciary standards, other than those related to vested rights, that could apply.

46. See, e.g. *Dependahl*, 491 F. Supp. at 1196-97; *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 360-61 (E.D. Mo. 1979).

47. The argument would be that the exclusive benefit requirements of 29 U.S.C. § 1103 (1982) impose a common law duty of loyalty upon the employer who administers the severance pay plan, and that termination of an unfunded plan to avoid paying the layoff benefits is a breach of that duty.

48. See, e.g., *Straus-Duparquet, Inc. v. Local Union No. 3*, 386 F.2d 649, 651 (2d Cir. 1967) ("[a]fter the period of eligibility is served, the full severance pay is due whenever termination of employment occurs"); *In re Public Ledger, Inc.*, 161 F.2d 762, 772, 773 (3d Cir. 1947) (severance pay is a "claim within the terms of the hiring," and becomes a "due debt"); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 543, 53 S.E.2d 804, 809 (1949) (recognizing the expressed contract right of an employer to discontinue a sever-

ments have been made that rest either on collective bargaining agreements or on the existence of less formal contractual arrangements.

In a number of cases, employees have challenged termination of employee benefit plans that are made after expiration of a collective bargaining agreement. In the main, the issue in these cases is whether, if the collective bargaining agreement expires or is terminated, there still exists any obligation to pay severance benefits.

Cases dealing with cutbacks of analogous benefits provide a framework within which severance pay cutbacks may be analyzed. In one such case, *International Union, U.A.W. v. Roblin*,<sup>49</sup> the court faced the question of whether a retiree insurance benefit plan, provided for in the collective bargaining agreement, survived a plant closing. The court concluded that the plan did not survive closing of the business, as the agreement contained specific language limiting those benefits to the term of the agreements,<sup>50</sup> and the agreements were terminated by the plant closings. Other courts have reached similar conclusions.<sup>51</sup> In other cases, however, when the collective

ance payment plan, but holding him obligated for severance payments "already earned as of the date of its discontinuance"); *Montefalcone v. Banco Di Napoli Trust Co.*, 268 A.D. 636, 640, 52 N.Y.S.2d 655, 658 (1945) (severance pay constitutes "compensation earned, the amount of which was measured by the extent of previous service"). Two recent Ninth Circuit cases suggest, however, that common law breach of contract claims for severance pay may be preempted by ERISA. See *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985).

49. 561 F. Supp. 288, 298 (W.D. Mich. 1983). The litigation surrounding Roblin Industries' decision not to pay benefits to its former employees, who were terminated as a result of the July 3, 1982, decision to cease operations at its Battle Creek facility, has resulted in four separate decisions thus far, all of the same name. 114 L.R.R.M. (BNA) 2411 (Dec. 9, 1982); 114 L.R.R.M. (BNA) 2418 (Mar. 31, 1983); 114 L.R.R.M. (BNA) 2428 (May 27, 1983); 116 L.R.R.M. (BNA) 2598 (Aug. 19, 1983).

50. 561 F. Supp. at 301. The court stated:

Generally, a collective bargaining agreement does not create an employer-employee relationship and does not guarantee the continuance of any relationship. Consequently, the rights conferred under a collective bargaining agreement do not normally survive the discontinuance of a business or the expiration of a bargaining agreement. However, rights conferred by collective bargaining can extend beyond the term of an agreement, or beyond the termination of operations, if the parties to an agreement so provide. Thus, if any benefits are to extend beyond the termination of plant operations, the agreement must so provide. Accordingly, the validity of plaintiffs' vested rights theory, in the present case, turns on an interpretation of the instant Collective Bargaining Agreement.

*Id.* at 298 (citations omitted).

51. See, e.g., *Metal Polishers Local No. 11 v. Kurz-Kasch, Inc.*, 538 F. Supp. 368 (S.D. Ohio 1982) (insurance benefits limited to duration of agreement); *United Rubber, Cork, Linoleum & Plastic Workers v. Lee Nat'l Corp.*, 323 F. Supp. 1181 (S.D.N.Y. 1971) (insurance benefits limited to duration of agreement).

bargaining agreement has not clearly specified that a particular benefit plan terminated upon plant closing or expiration of the contract, courts have imposed liability for the benefits.<sup>52</sup>

Reasoning from these cases, it seems likely that, for severance pay, the language in the collective bargaining agreement governing the plan will determine whether the severance pay benefits are limited to the term of the agreement. But cases arising today concern severance plans adopted before the parties presumably knew of the importance of such limiting terms. Courts have therefore had to consider allegations that denial of severance pay was a breach of a collective bargaining agreement, when the plan language neither limits the payment of severance pay to the duration of the agreement nor indicates that severance pay is a vested benefit.

One of the first courts to consider whether severance pay benefits continue after the expiration of a contract was the New Jersey Supreme Court in *Owens v. Press Publishing Co.*<sup>53</sup> In *Owens*, the collective bargaining agreement established a right to severance pay when employees left the company for any reason other than gross misconduct. The plaintiffs were former employees who had left their jobs, for reasons other than gross misconduct, in the months of January, February, and May of 1953; the collective bargaining agreement expired August 22, 1952. The plaintiffs sought severance pay in an amount calculated by using their entire length of service, including those months after the contract had expired.<sup>54</sup>

The New Jersey Supreme Court in *Owens* held that the claimants were entitled to severance pay in amounts corresponding to their length of service as of the date that the collective bargaining agreement expired. The court rejected the company's argument that severance pay was not due unless the separations came during the life of the agreement: "[T]he right to such pay can 'arise' only during

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52. See, e.g., *International Union, United Auto., Aerospace, and Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (employer cannot terminate retiree benefits upon plant closure because retiree benefits are "status" benefits with an implication that they continue so long as the beneficiary remains a retiree), *cert. denied*, 104 S. Ct. 1002 (1984); *Upholsterers' Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (insurance benefits intended for duration of retirement absent limiting language); see also *UAW v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525, 2530 (W.D. Mich. 1982) (rebuttable presumption that welfare benefits for retirees are vested for life unless "clear evidence indicating a contrary intention" is shown); Wessel, *Promises, Promises: Firms Seek to Cut Insurance for Retirees*, Wall St. J., Apr. 17, 1985, at 35, col. 4 (discussing current attempts by companies to cut off retirees' health insurance benefits).

53. 20 N.J. 537, 120 A.2d 442 (1956).

54. *Id.* at 543, 120 A.2d at 445.

the subsistence of the contract so providing, and not after its termination; but *once the right thus comes into being it will survive the termination of the agreement.*"<sup>55</sup>

The court was unpersuaded by the former workers' claim that they had earned severance benefits after August 22, 1952. In reasoning used by several state courts that have also held that severance pay is remuneration for past services,<sup>56</sup> the court noted that "the right to separation pay was a creature of the collective bargaining agreement alone, a consensual undertaking limited to a fixed term."<sup>57</sup> The court found that traditional contract law principles limited the severance pay benefits to the period of the collective bargaining agreement, and, when the agreement expired, "its provisions had no *in futuro* force and effect."<sup>58</sup> Severance pay that accrued during the contract period was a vested right, but that right "came to an end" when the agreement expired.<sup>59</sup> In holding that the severance pay was a vested right, the *Owens* court stated that it was actually remuneration for service rendered during the period covered by the agreement. That the event necessary to trigger the severance pay did not occur during the life of the agreement was, according to the New Jersey Supreme Court, irrelevant.<sup>60</sup>

The question of when severance pay rights are vested by contract law has received limited consideration by the federal courts. In *United Steelworkers of America v. H.K. Porter Co.*,<sup>61</sup> the United States District Court for the Western District of Pennsylvania *implied* that severance pay was nonforfeitable. The court held that the company was required to arbitrate a dispute concerning pension, severance pay and vacation benefits after the collective bargaining agreement expired, because the employees might have vested rights in such benefits.<sup>62</sup> The court noted, however, that whether the plaintiffs'

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55. *Id.* at 548, 120 A.2d at 448 (emphasis added).

56. *See, e.g.*, *Dahl v. Brunswick Corp.*, 277 Md. 471, 480-81, 356 A.2d 221, 226-27 (1976); *see also* *Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 198-99, 107 Cal. Rptr. 111, 115-16 (1973); *Willets v. Emhart Mfg. Co.*, 152 Conn. 487, 490-91, 208 A.2d 546, 548 (1965); *Gaydos v. White Motor Corp.*, 54 Mich. App. 143, 147-48, 220 N.W.2d 697, 700, *leave to appeal denied*, 392 Mich. 800 (1974); *Hercules Powder Co. v. Brookfield*, 189 Va. 531, 540-41, 53 S.E.2d 804, 808 (1949).

57. 20 N.J. at 549-50, 120 A.2d at 448.

58. *Id.* at 550, 120 A.2d at 448.

59. *Id.*

60. *See id.* at 548, 120 A.2d at 448.

61. 64 L.R.R.M. (BNA) 2201 (W.D. Pa. 1966).

62. *Id.* at 2202-03 (citation omitted). The court noted that:

The rights of the employees to such benefits as severance and vacation pay and pension do not automatically terminate upon the expiration of the agreement

claims had merit was a question to be decided by the arbitrator and not the court.<sup>63</sup>

As *H.K. Porter* illustrates, disputes over the severance pay provisions of a collective bargaining agreement are likely to be reserved to an arbitrator for decision. In the few reported cases, arbitrators have held that severance pay benefits can survive the expiration of the collective bargaining agreement, absent contractual provisions limiting the benefits to the life of the contract. *Fort Pitt Steel Castings Division*<sup>64</sup> provides an example. In that case, Fort Pitt and a United Steelworkers local union had a collective bargaining agreement effective through March 3, 1978, which included severance pay for all employees terminated as a result of a plant shutdown. The parties were unable to come to a new agreement, and the union struck on March 8, 1978. Several meetings were held through the fall of 1978, but the parties reached impasse on the issue of severance pay. On November 29, 1978, the company announced plans to shut down its plant and terminate all employees. When the company took the position that no severance pay was owing because the contract under which it arose had expired, the union filed a grievance on the issue of severance pay.<sup>65</sup> After the United States Court of Appeals for the Third Circuit affirmed a district court's order that the arbitration provision survived the expiration of the agreement,<sup>66</sup> an arbitrator heard the employees' grievance on severance pay.

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establishing them. They are vested rights and their benefits may well come to fruition at a time beyond the term of the agreement establishing them.

*Id.* (citation omitted).

63. *Id.* at 2203. The arbitrator in that case held that the severance pay was a vested right, payable even though the collective bargaining agreement was no longer in effect. *H.K. Porter Co.*, 49 Lab. Arb. (BNA) 147, 151 (1967) (Cahn, Arb.). In *H.K. Porter*, the arbitrator also held that the company acted improperly in refusing to allow its employees an option to go onto layoff (in order to accrue additional service for pension benefits) rather than be terminated upon plant closing. *Id.* at 152-53. For a contrary view, in a case where the authors' law firm represented the employer, see an unreported decision by arbitrator Alfred C. Dybeck in *Connors Steel Co.* (Nov. 27, 1984). In contrast to *H.K. Porter*, one district court held that a severance benefit was *not* a vested right but more like an insurance policy, with the right to collect contingent upon the happening of an event during the contract period. See *Local No. 358, Bakery & Confectionery Workers Union AFL-CIO v. Nolde Bros.*, 382 F. Supp. 1354, 1358 (E.D. Va. 1974), *rev'd on other grounds*, 530 F.2d 548 (4th Cir. 1975), *aff'd*, 430 U.S. 243 (1977). In reversing the district court, the Court of Appeals for the Fourth Circuit held that the question of whether severance benefits had vested was a question for arbitration and not for the court. 530 F.2d at 550-51.

64. 76 Lab. Arb. (BNA) 909 (1981) (Sembower, Arb.).

65. *Id.*

66. *United Steelworkers v. Fort Pitt Steel Castings*, 635 F.2d 1071 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

The arbitrator held that the severance provisions survived the expiration of the collective bargaining agreement. In reaching his holding, the arbitrator noted that it would be unrealistic to require the parties to provide expressly in the agreement that severance benefits are to continue beyond the expiration of the contract and the existence of the plant—for the parties know that the very nature of a severance plan is “to provide for a remote contingency, and its purpose fails if the expiration date of the contract is to fall like a guillotine and cut off coverage at the very moment when it is needed and makes sense.”<sup>67</sup>

Similarly, in *Brooklyn Eagle*,<sup>68</sup> an arbitrator awarded severance pay to employees who were terminated three and one-half months after the expiration of their collective bargaining agreement, which had included severance provisions. The arbitrator stated that “[t]he fact that the event of dismissal which made the payments due came after the termination date [of the contract] does not affect the matter.”<sup>69</sup>

What these few reported cases indicate is that there is a strong likelihood that arbitrators, confronted with a claim for severance benefits, may find such benefits to be a vested right, even if the terminations occurred after the collective bargaining agreements that authorized the benefits had expired. In such a situation, severance benefits may, however, be limited to benefits accrued during the life of the agreement. While an argument may be made that no benefits should be paid after an agreement expires in the absence of language indicating that the right extends beyond the term of the contract, such an argument is not likely to succeed. Courts and arbitrators will not use the expiration of the agreement to limit benefits that accrued before that expiration. Given the possibility that ambiguous language about the duration of rights will be interpreted in favor of those to whom the rights were initially granted, parties desiring to limit severance benefits must use explicit language.

#### *D. Breach of Contract Claim in the Absence of a Collective Bargaining Agreement*

In the absence of a collective bargaining agreement, state courts have applied traditional contract principles to limit an employer's right to modify or eliminate its employees' severance bene-

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67. 76 Lab. Arb. (BNA) 909, 911 (1981) (Sembower, Arb.).

68. 32 Lab. Arb. (BNA) 156 (1959) (Wirtz, Arb.).

69. *Id.* at 160.



fits unilaterally.<sup>70</sup> In *Kulins v. Malco, a Microdot Co.*,<sup>71</sup> an Illinois appellate court went one step further, examining the modification of severance benefits provided in a personnel policy for employees-at-will as though those benefits were contained in a collective bargaining agreement.<sup>72</sup> The court held that, while an employer can unilat-

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70. Several jurisdictions observe the rule that, by providing a severance pay plan for its employees-at-will, an employer extends a unilateral contract offer, which its employees can accept through continued service with their employer. DeGiuseppe, *The Effect of the Employment-At-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 57 (1981) (citing *Chinn v. China Nat'l Aviation Corp.*, 138 Cal. App. 2d 98, 99-100, 291 P.2d 91, 92 (1955); *Mace v. Conde Nast Publications, Inc.*, 155 Conn. 680, 684-85, 237 A.2d 360, 361-62 (1967); *Dahl v. Brunswick Corp.*, 277 Md. 471, 476, 356 A.2d 221, 224 (1976); *Gaydos v. White Motor Corp.*, 54 Mich. App. 143, 147-48, 220 N.W.2d 697, 700, *leave to appeal denied*, 392 Mich. 800 (1974); *Anthony v. Jersey Cent. Power & Light Co.*, 51 N.J. Super. 139, 144-46, 143 A.2d 762, 764-66 (1958)); *accord Helle v. Landmark, Inc.*, 15 Ohio App. 3d 1, 472 N.E. 2d 765, 775 (1984); *Dulaney Foods, Inc. v. Ayers*, 220 Va. 502, 512, 260 S.E.2d 196, 202 (1979). Under this view, the employer cannot refuse to pay severance benefits once the employees have accepted its offer, *see DeGiuseppe, supra*, at 57; however, if the plan is modified and the employees continue in their employer's service, the terms of the new plan are binding on the employees, *see Kulins v. Malco, a Microdot Co.*, 121 Ill. App. 3d 520, 527, 459 N.E.2d 1038, 1044-45 (1984); *Dulaney Foods, Inc. v. Ayers*, 220 Va. at 511, 260 S.E.2d at 201.

*See also, Livernois v. Warner-Lambert Co.*, 723 F.2d 1148 (4th Cir. 1983) for a discussion of whether the purchaser or seller is liable for severance benefits after the transfer of a business. Warner-Lambert had maintained a severance policy at its Medical Surgical Division facility, located in Greenwood, S.C., since 1957. On January 20, 1982, Warner-Lambert sold that facility to Professional Medical Products, Inc. (PMP). PMP continued to operate the facility with essentially the same work force. Moreover, the former Warner-Lambert employees continued to work for PMP under the same conditions and for the same wages.

Eleven employees brought an action against Warner-Lambert for severance benefits. They claimed that even though they were still employed, they were entitled to severance pay because one of the conditions for severance pay coming due had been met, i.e., their jobs with Warner-Lambert had been eliminated.

The U.S. District Court for the District of South Carolina agreed with the plaintiffs that because their employment with Warner-Lambert had ended they were owed severance pay. The Fourth Circuit, however, reversed, stating that since the plaintiffs were still working at PMP under the same conditions as they had been working for Warner-Lambert, there had been no job termination. The Court then addressed an issue that had not been raised by either side—which party would be liable for severance benefits that came due in the future. The court stated that even though Warner-Lambert had transferred to PMP the responsibility to make severance payments that came due in the future, Warner-Lambert remains primarily bound for severance pay which accrued while it was the employer, i.e., 1957-January, 20, 1982, in the event its agent, PMP, fails to make the payments. PMP would be solely liable for any severance benefits which accrued after it purchased the facility.

71. 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1984).

72. The Illinois Appellate Court was not the first to analyze the benefits contained in a personnel policy in this manner. *See, e.g., Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 197, 107 Cal. Rptr. 111, 114 (1973) (“[T]ermination pay provisions are identically construed whether contained in formal written agreements, such as collective bargaining agreements, or a corporate personnel policy that becomes

erally modify its severance pay plan for its employees-at-will prospectively, those benefits earned prior to the modification cannot be eliminated.<sup>73</sup>

The *Kulins* court's novel approach deserves close consideration. The factual background in the *Kulins* case was as follows: In 1967, Malco Manufacturing Company instituted a severance pay policy, which gave eligible employees one week's pay for each year of service with the company. In 1971, Microdot purchased Malco. The new company modified the old severance pay policy twice, in 1972 and in 1975. The latter modification changed the policy drastically, placing a five-week ceiling on the amount of severance pay available to an eligible worker. Within two weeks of the last revision, Malco began laying off large numbers of employees, paying them severance pay pursuant to the new plan.<sup>74</sup> Workers employed by Malco Manufacturing during the term of the 1967 plan sued for severance benefits that they claimed had vested and accrued during the life of that plan. The court agreed with the employees that those benefits had vested and, therefore, could not be eliminated retroactively.<sup>75</sup>

In reaching this decision, the court rejected the company's argument that the court could not read a vesting requirement into Malco's severance policy because such a decision would intrude into an area preempted by ERISA and, in fact, conflict with the ERISA provision that excludes severance plans from the statute's vesting requirements.<sup>76</sup> Unpersuaded by this argument, the court noted that its decision was grounded on established principles of contract law that do not conflict with ERISA.<sup>77</sup> Further, citing no authority, the court rejected the company's argument that the vesting provi-

part of the understood employment agreement . . . .") (citations omitted), *quoted in* De Giuseppe, *supra* note 70, at 51 n.278.

73. 121 Ill. App. 3d at 527, 459 N.E.2d at 1044-45.

74. *Id.* at 521-22, 459 N.E.2d at 1041.

75. *Id.* at 527, 459 N.E.2d at 1044. Noting that no Illinois appellate court had ever decided whether severance pay benefits accrue or vest during the term of employment of an at-will employee, the court decided that it could consider cases involving organized employees:

[A]lthough the terms of a collective bargaining agreement are not at issue in the present case, because *termination pay provisions are to be identically construed whether contained in a formal written agreement or in a corporate personnel policy that becomes part of the understood employment agreement*, we are not precluded from considering cases which construe collective bargaining agreements.

*Id.* at 524-25, 459 N.E.2d at 1043 (emphasis added); *see also supra* text accompanying notes 71-72.

76. *Id.* at 525, 459 N.E.2d at 1043.

77. *Id.* The court's discussion of ERISA is dicta since Malco failed to raise the ERISA argument at trial, which caused the issue to be waived on appeal. *See id.* at 525 n.2,

sions of ERISA preclude the vesting of severance pay plans, finding that those provisions "merely provided that vesting was not required."<sup>78</sup> In holding that the benefits outlined in the 1967 plan had vested, the court characterized severance pay as deferred compensation, earned each week that the employee works, and payable on discharge.<sup>79</sup>

It is a benefit for which employees work as much as they work for any other benefit held out to them as compensation by the employer, and one which *accrues during each work year that the agreement is in effect, not merely on the date that it becomes payable. When services are rendered, the right to secure the promised compensation is vested as much as the right to receive wages or any other form of compensation . . . , and the lack of a promise to vest does not revoke the employer's obligation to pay.*<sup>80</sup>

The *Kulins* court found further support for its decision in the doctrine of promissory estoppel. Thus, the court held that the company was estopped from retroactively eliminating severance benefits.<sup>81</sup> The company's promise to pay severance benefits induced the employees to stay with Malco and to forego their right to seek employment elsewhere. Malco benefitted since it was able to avoid "unrest on the part of its employees" and, most importantly, retain the services of its employees "during a time of financial difficulty."<sup>82</sup> The court emphasized that to allow the company to retract its promise to pay severance benefits, after years of reliance by its employees, "would run counter to the fundamental principles of equity and justice, and raise a serious question as to Malco's compliance with the implied covenant of good faith essential to every contract."<sup>83</sup>

The *Kulins* decision is indicative of the reasoning that many courts have adopted in concluding that severance benefits are earned compensation and cannot be eliminated retroactively.<sup>84</sup> By holding that the benefits under the 1967 plan had vested and accrued, giving the company no room for adjusting those benefits, the *Kulins* court went further than any court to date. In the future,

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459 N.E.2d at 1043 n.2. The court addressed the compatibility of its decision with ERISA "in the interests of comprehensive discussion." *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 525-26, 459 N.E.2d at 1043-44 (emphasis added) (citations omitted).

81. *Id.* at 527, 459 N.E.2d at 1045. See generally DeGuissepe, *supra* note 70 (discussing use of promissory estoppel in severance benefit claims).

82. *Id.* at 527-28, 459 N.E.2d at 1045.

83. *Id.* at 528, 459 N.E.2d at 1045.

84. See, e.g., *supra* note 70.

should other courts follow the Illinois court's lead—which seems likely since many jurisdictions view severance benefits as earned compensation<sup>85</sup>—companies that hire employees-at-will and have a severance pay plan will not be able to avoid that plan by later modifying it; and those who were employed during the term of the plan will enjoy its benefits, even though they did not make their claims under the plan until after its term expired. To avoid this result, the company can include disclaimer provisions in its severance pay policy.<sup>86</sup> So long as the disclaimer unambiguously states that the policy is subject to unilateral changes by the employer, the employees “have no legitimate expectation that any particular policy will continue to remain in force.”<sup>87</sup>

### III. RELATIONSHIP OF AN EARLY RETIREMENT PROGRAM TO SEVERANCE BENEFITS

One other route has been taken by employers who are confronted with severance pay obligations when a plant closing is contemplated. Employers have attempted to encourage employees eligible for normal or early retirement to retire and thereby exclude them from plant closing benefits. Employees have challenged this practice on the grounds that it violates the Age Discrimination in Employment Act (ADEA).<sup>88</sup>

As two recent cases indicate, employers will find it difficult to defend this practice against such a charge. In *EEOC v. Westinghouse Electric Corp.*,<sup>89</sup> the Equal Employment Opportunity Commission brought an ADEA claim against Westinghouse based on the company's exclusion from its Layoff Income and Benefits (LIB) Plan of those employees who were eligible for early retirement. The exclusion was challenged on the ground that it subjected older employees to different treatment than that afforded younger employees because older employees were denied LIB benefits on the basis of

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85. See *supra* note 48.

86. See *Kulins*, 121 Ill. App. 3d at 526-27, 459 N.E.2d at 1044; *Helle*, 15 Ohio App. 3d at 10, 472 N.E.2d at 774; DeGiuseppe, *supra* note 70, at 53-54 (providing examples of appropriate disclaimers). To the extent that oral assurances conflict with written disclaimers, the disclaimers are negated. *Helle*, 15 Ohio App. 3d at 10, 472 N.E.2d at 775; DeGiuseppe, *supra* note 70, at 54.

87. *Helle*, 15 Ohio App. 3d at 10, 472 N.E.2d at 774 (quoting *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 619, 292 N.W.2d 880, 894-95 (1980)).

88. The ADEA forbids an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.” 29 U.S.C. § 623(a)(1) (1982).

89. 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 105 S. Ct. 92 (1984).

age.<sup>90</sup> The company argued that its policy was permissible under the section of the Act that allows an employer to differentiate among employees if such differentiation is based on a reasonable factor other than age,<sup>91</sup> since the employees involved were denied LIB benefits because of their eligibility for early retirement and not because of their age. The Third Circuit rejected that argument because eligibility for early retirement was too closely related to age to be given credence as a valid justification.<sup>92</sup>

Westinghouse also argued that the LIB, which granted benefits to qualified employees who were not eligible for early retirement, was a bona fide employee benefit plan under the section of the Act that allows such benefit plans, even if they distinguish among individuals on the basis of age, if a plan is not "a subterfuge to evade the purposes of the act."<sup>93</sup> The court held that the LIB was not a bona fide benefit plan. Noting that employee plans under which Congress permits age discrimination to occur (e.g., retirement, pension, and insurance) are the types of plans in which the cost of benefits increases with age (i.e., the cost is greater for newly hired older workers than for other employees), the court stated that severance pay costs no more for a newly hired older worker than for his younger counterpart.<sup>94</sup> Therefore, this exception to the Act was not applicable either. Thus, because older employees were treated differently than younger ones, and because the LIB did not fall under the statutory exceptions allowing such differential treatment, the court held that the company violated the ADEA by excluding early retirees from its layoff benefit plan.<sup>95</sup>

The Ninth Circuit, in *EEOC v. Borden's, Inc.*,<sup>96</sup> also dealt with an ADEA claim based on an early retirement program. In 1979, Borden's shut down its Phoenix, Arizona dairy operation and terminated all its dairy employees. Borden's provided severance pay

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90. *Id.* at 221-22.

91. *Id.* at 222. Section 623(f)(1) of the Act permits an employer to differentiate among employees on the basis of age if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where such differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (1982).

92. 725 F.2d at 222-23.

93. *Id.* at 223. Section 623(f)(2) of the Act allows an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes" of the Act. 29 U.S.C. § 623(f)(2) (1982).

94. 725 F.2d at 224.

95. *Id.* at 224-25.

96. 724 F.2d 1390 (9th Cir. 1984).

upon closing of its plant pursuant to a collective bargaining agreement with the union, but excluded all employees eligible for normal or early retirement.<sup>97</sup> That severance pay plan was challenged on the grounds that it specifically treated older employees differently from younger ones and that it had a differential impact on older employees.<sup>98</sup> The district court denied the disparate treatment claim, but found that the ADEA had been violated by the disparate impact of the denial of severance benefits on older employees.<sup>99</sup> On appeal, the Ninth Circuit not only upheld the finding of disparate impact, but also found disparate treatment of older employees.<sup>100</sup>

The court based its finding of a violation of the ADEA on the fact that severance benefits were denied to those employees who were eligible for early retirement, and that this denial had a discriminatory impact on older employees because all of those who were over 55 were denied severance benefits under this plan.<sup>101</sup> Beyond this disparate impact, the court also found that there had been disparate treatment of older employees since each of the older employees was "forced to give up a newly created benefit given to other employees (severance pay) in exchange for benefits [he] . . . already had (retirement)." <sup>102</sup> The court rejected Borden's arguments that the practice was allowable under exceptions that permit different treatment of older employees. The court found first that because Borden's did not contend that its policy was economically necessary, the defense of business necessity<sup>103</sup> was inapplicable; and, second, the court found that the fact that those denied severance pay were also eligible for pension and insurance benefits did not amount to the statutory defense that allows disparate treatment based on a rea-

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97. *Id.* at 1391-92.

98. *EEOC v. Borden's, Inc.*, 551 F. Supp. 1095, 1097-98 (D. Ariz. 1982), *aff'd*, 724 F.2d 1390 (9th Cir. 1984).

99. *Id.* at 1097-99.

100. 724 F.2d at 1393.

101. *Id.* at 1392.

102. *Id.* at 1393-94 (quoting the district court, 551 F. Supp. at 1098).

103. An employer charged with violating the ADEA may argue that the practice is a business necessity and thus allowable under the "reasonable factor other than age" exception to the Act. *See generally* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 *YALE L.J.* 565 (1979). The justification is most often advanced in the context of a challenge to forced layoffs or early retirements. *See, e.g.*, *EEOC v. Chrysler Corp.*, 733 F.2d 1183, 1186 (6th Cir. 1984) ("Forced early retirements based on economic necessity are unacceptable under the ADEA unless they meet two tests . . . the necessity for drastic cost reduction obviously must be real . . . [and] the forced early retirement must be the least-detrimental-alternative means available to reduce costs."). In *Borden's*, the district court found, and the court of appeals agreed, that Borden's showed no evidence of business necessity. 724 F.2d at 1394.

sonable factor other than age.<sup>104</sup> Finally, as in *Westinghouse*, the bona fide benefit plan exception to the Act was held inapplicable because the severance plan did not serve the purposes for which that exception was developed.<sup>105</sup>

As *Westinghouse* and *Borden's* indicate, it is likely that any type of *mandatory* early retirement program implemented with a view towards excluding older employees from severance or layoff benefits would violate the ADEA. Courts may, however, take a different view where the number of employees eligible for such benefits is decreased due to inducements provided in a *voluntary* early retirement program.<sup>106</sup>

#### IV. CONCLUSION

As the foregoing analysis indicates, employers that seek to limit or deny severance benefits will face challenges from employees based on a variety of legal theories. While severance pay plans can be altered to cut off benefits prospectively, case law reveals the propensity of courts and arbitrators to find that severance benefits are vested or accrued rights and therefore cannot be canceled retroactively. That propensity is intensified when the modification or elimination of severance pay benefits occurs close to the time of plant closure or substantial reductions in force. Courts may take a less hostile view of changes to severance pay plans made well in advance of plant shutdown and significant permanent layoffs. Finally, attempts to limit severance benefits to those not eligible for early or

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104. 724 F.2d at 1393-94. 29 U.S.C. § 623(f)(1) (1982) provides that: "It shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . ."

105. 724 F.2d at 1395-96. The court found the severance pay policy to be a "simple fringe benefit" outside the scope of 29 U.S.C. § 623(f)(2) (1982). *Id.* at 1396-97 (citing *Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982)). Noting that the purpose of the bona fide benefit plan exception was to avoid having ADEA disrupt pensions and other complex benefit schemes, the court agreed with the reasoning of *Westinghouse* that this exception was aimed at plans in which the costs of the plan increased with age. *Id.* at 1396.

106. *See, e.g.*, *Patterson v. Independent School Dist. No. 709*, 742 F.2d 465, 467 & n.3, 468 (8th Cir. 1984) (upholding voluntary early retirement program as bona fide employee benefit plan under ADEA and finding the *Borden's* decision questionable because severance pay was "a *solatium* for the plant closing," separate from early or normal retirement and granted only to employees ineligible for retirement benefits); *see also* *Mason v. Lister*, 562 F.2d 343, 346-47 (5th Cir. 1978) (voluntary early retirement plan did not violate ADEA); *Britt v. E.I. DuPont de Nemours & Co.*, No. 84-2237, slip op. at 3, 6 n.3 (4th Cir. July 25, 1985) (upholding a general severance pay program conditioned upon acceptance of a deferral of pension benefits, without expressing an opinion regarding the validity of the reasoning in *Westinghouse* and *Borden's*).

normal retirement are likely to violate the federal age discrimination statute.

Because there are no federal funding requirements for severance pay plans, as there are for pension plans, and because employers have not considered their commitment to severance plans to be enforceable financial liabilities, employers have tended to fund these plans haphazardly, if at all. The imposition by courts and arbitrators of substantial severance pay liability has caught some employers by surprise. Now that the trend towards enforceability is becoming clearer, employers can no longer treat lightly the announcement or creation of a severance pay program. Benefits under a severance pay plan cannot be eliminated as easily or as painlessly as they were granted.