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ERISA: Enforcing Oral Promises to Pay Employee Benefits

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ERISA: ENFORCING ORAL PROMISES TO PAY EMPLOYEE BENEFITS

Pension plans represent an increasingly important and powerful accumulation of wealth in the United States. In 1950, employer-established private pension plans in the United States held, in the aggregate, 12.1 billion dollars.[1] By 1970 that amount increased to 137.1 billion dollars.[2] Currently, more than 350 billion dollars[3] in employee benefit fund assets exist to provide some form of pension to more than half of all employees.[4] This phenomenal growth in pension plans is attributable to a combination of factors, including favorable tax treatment of employer contributions, employer attempts to increase employee productivity and attract and retain personnel, and union demands.[5] As the importance of private pension plans grows, however, so do the problems of protecting the rights of employees under those plans.[6]

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA" or the "Act"),[7] a comprehensive federal statute, to regulate privately established employee benefit plans.[8] Congress designed ERISA to protect plan participants and beneficiaries[9] from such unfair practices by employers as unconscionable forfeiture provisions and the

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[1] E. ALLEN, J. MELONE, & J. ROSENBLOOM, PENSION PLANNING 3 (4th ed. 1981) (Table 1-1) [hereinafter PENSION PLANNING].

[2] *Id.*

[3] *Id.* at 2.

[4] Feldstein, *Private Pensions as Corporate Debt*, in THE CHANGING ROLES OF DEBT AND EQUITY IN FINANCING U.S. CAPITAL FORMATION 75 (B. Friedman ed. 1982).

[5] *See* PENSION PLANNING, *supra* note 1, at 7–14; D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 21–28 (4th ed. 1979) [hereinafter MCGILL].

[6] Snyder, *Employee Retirement Income Security Act of 1974*, 11 WAKE FOREST L. REV. 219, 223 (1975).

[7] 29 U.S.C. §§ 1001–1461 (1982). The Act is divided into four Titles. Title I provides for the protection of employee rights through, among other things, increased reporting and disclosure and the imposition of fiduciary duties on plan trustees. *Id.* §§ 1001–1145. Title II contains primarily the Internal Revenue Code tax provisions regarding pension plans. I.R.C. §§ 401–419A (1982 & Supp. III 1985). Title III contains formal provisions for compliance with Titles I and 2. 29 U.S.C. §§ 1201–42. Title IV establishes a program of plan termination compliance. *Id.* §§ 1301–1461.

ERISA empowers the United States Department of Labor to promulgate regulations to carry out the provisions of Title I (reporting and disclosure) and Title IV (regulation of plan termination insurance provided by the Pension Benefit Guaranty Corporation). *Id.* § 1135. Similarly, the United States Treasury Department promulgates regulations under the Internal Revenue Code provisions governing the qualification of employee benefit plans for favorable tax treatment. *Id.* § 1202. Section 3004 of Title III of ERISA provides for the coordination between the Department of the Treasury and the Department of Labor where provisions relating to the same subject overlap. *Id.* § 1204.

For an excellent general discussion of the provisions of ERISA's various Titles see MCGILL, *supra* note 5, at 37–40.

[8] 29 U.S.C. § 1001(b). The Act is comprehensive in that it occupies the entire field of pension plan regulation. Lieben, *The Coverage of Title I of ERISA: Some Recent Developments*, 61 NEB. L. REV. 428, 429 (1982). ERISA pre-empts all state law regulation of employee benefit plans covered under the Act. 29 U.S.C. § 1144 (1982 & Supp. III 1985).

[9] A plan participant is any employee or former employee who is eligible to receive a benefit, or whose beneficiaries are eligible to receive a benefit, from an ERISA plan. *Id.* § 1002(7). A plan beneficiary is any person designated by a plan participant who is or may be entitled to a benefit from an ERISA plan. *Id.* § 1002(8).

misuse of plan assets.[10] To this end, ERISA provides, among other things, broad coverage requirements,[11] minimum vesting standards[12] and fiduciary responsibilities for those persons who deal with the plan or plan assets on any discretionary basis.[13]

The Act's coverage provisions apply broadly to all "employee benefit plans" established or maintained by an employer.[14] ERISA defines employee benefit plans to include both welfare benefit plans and employee pension benefit plans.[15] Welfare benefit plans

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[10] H.R. REP. No. 533, 93d Cong. 1st Sess. 5–13 (1973) [hereinafter HOUSE REPORT]. *See* Note, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 546–49 (1975).

[11] 29 U.S.C. § 1003. The coverage provisions of ERISA are contained in section 4 of Title I of the Act and include all employee benefit plans unless specifically exempt. *Id.* See *infra* note 14 for the relevant statutory language of section 4.

[12] 29 U.S.C. § 1053. "Vesting" refers to the portion of the employee's benefit which is nonforfeitable and cannot be revoked by the employer, even at termination of employment. HOUSE REPORT, *supra* note 10, at 5–6. Each pension plan must contain a vesting schedule under which the nonforfeitable portion of an employee's benefit is determined. 29 U.S.C. § 1053. A participant's benefit must vest within specified periods under both ERISA, *id.*, and the Internal Revenue Code, I.R.C. § 411. *See also* MCGILL, *supra* note 5, at 135–47. Before ERISA, employers were not required to vest an employee's benefit before retirement. MCGILL, *supra* note 5, at 139. This meant that if the employee terminated employment even one day before he or she could retire the employee could lose all of his or her benefits, even if he or she had worked for the same employer his or her entire working life. *See* HOUSE REPORT, *supra* note 10, at 6. The Committee on Education and Labor stated "the issue basically resolves itself into whether workers, after many years of labor, whose jobs terminate voluntarily or otherwise, should be denied benefits that have been placed for them in a fund for retirement purposes." *Id.* For current provisions related to ERISA minimum vesting standards, see 29 U.S.C. §§ 1051–1061.

[13] 29 U.S.C. §§ 1101–1114; Goodman & Stone, *Exempt Compensation Arrangements Under ERISA*, 28 CATH. U.L. REV. 445, 445 (1979). Generally, ERISA imposes fiduciary duties on *any* person who exercises any discretionary authority, responsibility or control over the management or administration of the plan or exercises any authority or control over plan assets, including the rendering of investment advice for a fee. MCGILL, *supra* note 5, at 49. Thus, under this definition an employer, directors or officers of the plan sponsor, members of the plan investment committee or investment advisors are fiduciaries. *Id.*

[14] 29 U.S.C. § 1003. The Act's coverage provisions state, in pertinent part:

> [E]xcept as [otherwise] provided . . . [T]itle [I of ERISA] . . . shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce . . . or by any employee organization . . . or organizations representing employees engaged in commerce . . . or by both.

Id. The coverage provisions of ERISA specifically exclude: governmental plans (plans established or maintained by the governement of the United States or any municipality); church plans (plans established by a church exempt from taxation under Internal Revenue Code § 501(c)); plans maintained solely for the purpose of complying with the workers' compensation laws; plans maintained outside the United States for nonresident aliens; and unfunded excess benefit plans (plans maintained for management employees which exceed limits allowed under the Internal Revenue Code § 401(a) and which are paid out of the employer's general corporate assets). *Id.* § 1103(b).

Labor Regulation 2510.3-2, issued pursuant to section 505 of ERISA, also excludes from Section 3(2) any severance pay plan that is unrelated to retirement, does not exceed twice the employee's annual compensation, and is paid out within a specified period following employment. 29 C.F.R. § 2510.3-2(c), (d) (1975). Also excluded from ERISA are certain bonus programs and Individual Retirement Accounts. *Id.*

[15] *Id.* § 1002(3). Section 3(3) of the Act defines an "employee benefit plan" as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." *Id.*

provide, for example, medical, disability or severance pay benefits.[16] Employee pension benefit plans, in contrast, provide retirement or other income benefits deferred beyond termination of employment.[17] Neither of these statutory definitions explicitly require that a plan be in writing to be subject to ERISA.

Although ERISA's coverage provisions do not require that a plan be in writing, section 402 of the Act, included in the section governing the duties of plan fiduciaries, states that every employee benefit plan must be established "pursuant to a written instrument."[18] Because the fiduciary provisions require a writing, and the general definition of an employee benefit plan contains no such requirement, it is unclear from the statutory provisions whether the lack of a writing precludes the enforcement of a plan under ERISA. At least one court has interpreted section 402's writing requirement to

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[16] 29 U.S.C. § 1002(1). The Act defines a welfare benefit plan as:

> [A]ny plan, fund, or program which was heretofore or hereafter established or maintained by an employer or employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in [section 302(c) of the Labor Management Relations Act, 1947] (other than pensions on retirement or death, and insurance to provide such pensions).

Id.

[17] 29 U.S.C. § 1002(2). The Act defines a pension plan as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by any employer or by an employee organization, or by both, to the extent that by its express terms or as the result of surrounding circumstances such plan, fund, or program —
> (i) provides retirement income to employees, or
> (ii) results in a deferral of income by employees for periods extending to the termination of employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Id. § 1002(2)(A).

[18] 29 U.S.C. § 1102(a)(1). Section 402 states, in pertinent part:

> [E]very employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries, who jointly or severally shall have authority to control and manage the operation and administration of the plan.

Id. One commentator has called ERISA "a statutory affirmation of the proposition that employee rights are governed solely by the terms of the plan." Wieck, *Pension Reform Act of 1974: An Alternative to Contractual Theories of Preserving Retirement Benefits*, 14 J. FAM. L. 97, 102 (1975) [hereinafter Wieck, *An Alternative*].

The Internal Revenue Service also requires that employee benefit plans be written. Treas. Reg. § 1.401-1(a)(2) (1956). The Internal Revenue Code provides that contributions made to pension plans that comply with section 401(a) of the Code are tax deductible to the employer in the year of contribution and do not constitute income to the employee until actual receipt. I.R.C. § 404(a) (1982 & Supp. III 1985). *See also* PENSION PLANNING, *supra* note 1, at 9–10. A plan that fails to meet the writing requirement and thus does not obtain favorable tax treatment is still subject to all the requirements of Title I of ERISA, such as minimum vesting, minimum funding standards, reporting and disclosure and fiduciary standards. *See* Note, *Private Enforcement of Employees Retirement Income Security Act*, 47 U. CIN. L. REV. 272, 275 (1978) [hereinafter Note, *Private Enforcement*].

preclude enforcement of oral agreements under ERISA.[19] This court reasoned that the writing requirement is a prerequisite to enforcement under the Act.[20] Several other federal courts, however, have held that an employee benefit plan is enforceable notwithstanding the lack of a written instrument.[21] These courts reasoned that an employer's failure to adopt a written plan constitutes a breach of fiduciary duty under ERISA, but it does not preclude enforcement of the plan's benefit provisions.[22] Furthermore, these courts concluded that an oral promise establishes an ERISA plan if a reasonable person could identify the plan benefits, the beneficiaries, the source of funding and the benefit claims procedures.[23]

This note discusses the courts' conflicting interpretations of ERISA's writing requirement and evaluates the enforceability of oral promises to pay welfare or retirement benefits under ERISA.[24] Part I of this note reviews the development of ERISA, including the historical background against which Congress designed the Act[25] and the statutory provisions pertinent to ERISA's writing requirement.[26] Part I also examines how courts have interpreted these provisions.[27] Part II analyzes whether oral promises to pay welfare or retirement benefits are enforceable under ERISA and concludes that such promises are enforceable.[28] Finally, this note discusses the appropriate standard to apply in order to determine whether an oral agreement establishes an ERISA plan, especially in light of the policy problems and implications of enforcing oral promises to pay benefits. This note proposes a stricter standard, which incorporates the concept of justifiable reliance

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[19] Nachwalter v. Christie, 611 F. Supp. 655, 661–62 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956, 960 (11th Cir. 1986).

[20] *Id.*

[21] *See, e.g.*, Gilbert v. Burlington Indus., 765 F.2d 320, 324–25 (2d Cir. 1985) (employee manual that referenced severance policy found to be an ERISA plan even though employer never executed a plan document nor complied with ERISA), *aff'd mem.*, 106 S. Ct. 3267 (1986); Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503–04 (9th Cir. 1985) (severance pay practice may constitute an ERISA plan); Donovan v. Dillingham, 688 F.2d 1367, 1372–73 (11th Cir. 1982) (insurance provided by the purchase of policies through a multiple-employer insurance trust found to be an ERISA plan even though the employer did not adopt a formal written document); Bausch & Lomb, Inc. v. Smith, 630 F. Supp. 262, 264 (W.D.N.Y. 1986) (severance pay practice found not to be an ERISA plan where plaintiff offered "office scuttlebut" as evidence to support his claim that unwritten plan existed).

[22] *See, e.g.*, *Dillingham*, 688 F.2d at 1372. The court stated "[t]here is no requirement of a formal written plan in either ERISA's coverage section or its definition section. Once it is determined that ERISA covers a plan, the Act's fiduciary and reporting provisions do require the plan to be established pursuant to a written instrument." *Id.*

[23] *Id.*

[24] Benefits not covered by ERISA are enforceable under state law. *See, e.g.*, Jervis v. Elerding, 504 F. Supp. 606, 609 (C.D. Cal. 1980) (personal service contract containing retirement benefits not an ERISA plan and therefore enforceable in a state law contract action). This Note does not discuss the treatment of benefits not covered by ERISA.

[25] See *infra* notes 30–59 and accompanying text for a discussion of the historical background of ERISA.

[26] See *infra* notes 60–97 and accompanying text for a discussion of the statutory provisions pertinent to ERISA's writing requirement.

[27] See *infra* notes 98–160 and accompanying text for a discussion of the judicial interpretation of the ERISA writing requirement.

[28] See *infra* notes 161–85 and accompanying text for an assessment of the enforceability of oral agreements under ERISA.

into the standard courts currently employ when assessing an employer's oral promise to pay employee benefits.[29]

I. The Development of Federal Employee Benefits Law

A. *Employee Benefit Regulation Before ERISA*

Prior to ERISA's enactment, attempts to protect an individual participant's rights to employee benefits generally were ineffective.[30] For the most part, benefit regulation was largely a matter of non-uniform state law.[31] Although the Internal Revenue Code provided some protection through its requirement that employers meet certain standards to qualify for favorable tax treatment, this protection was insufficient because it failed to provide employees a private right of action to enforce their right to benefits.[32] Furthermore, despite the 1958 enactment of the Welfare Pension Plan Disclosure Act,[33] a federal statute that mandated increased reporting and disclosure to beneficiaries about plan procedures and benefits, employees' ability to enforce those rights remained minimal.[34] Thus, it was not until Congress enacted ERISA in 1974 that a comprehensive scheme setting forth protection for participants and beneficiaries was established.[35]

Prior to the enactment of federal legislation regulating benefits plans, the only recourse available to employees who wrongfully had been denied benefits was to sue under state law.[36] This avenue of recovery, however, did not afford the employee effective protection, because the majority of courts traditionally viewed such benefits as "mere

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[29] See *infra* notes 186–93 and accompanying text for a discussion of the problems of enforcing oral agreements under ERISA, and a suggested solution that would require, among other things, that the plaintiff show detrimental reliance on the employer's alleged promise.

[30] House Report, *supra* note 10 at 3. The House committee reported that until ERISA was enacted, "regulation of the private system's scope and operation ha[d] been minimal and its effectiveness a matter of debate." *Id.*

[31] *See* Note, *Pension Plans and the Rights of the Retired Worker*, 70 Colum. L. Rev. 909, 916–22 (1970) [hereinafter Note, *Rights of the Retired Worker*]. Although all states eventually rejected the theory that benefits were mere gratuities given by the employers, the contract theories that the states adopted were inconsistent. Wieck, *An Alternative, supra* note 18, at 103–04. The majority of courts viewed the pension plan as a contract but avoided defining the relationship of the parties. *Id.* The courts that did attempt to define the relationship reached differing results. *Id.* at 104. Some courts concluded that the plan was a contract with a condition subsequent while other courts viewed the plan as a contract with a condition precedent. *Id.* at 105–06. Contracts most commonly were described, however, as unilateral contracts that the employee accepted by completing service with the employer. *Id.* at 106.

[32] House Report, *supra* note 10, at 4.

[33] Welfare & Pension Plan Disclosure Act of 1958, Pub. L. 85-836, 72 Stat. 997 (1958) (29 U.S.C. §§ 301–309 (1976)) *repealed by* Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1031 (1982); *see* Hahn, *Federal Remedies for Pension Benefit Losses*, 47 UMKC L. Rev. 321, 323–24 (1979).

[34] *See* Hahn, *supra* note 33, at 323–24. Hahn notes that Congress eventually viewed the WPPDA as piecemeal legislation that failed to meet its goals of inducing self-policing by administrators.

[35] *See* Note, *Private Enforcement, supra* note 18, at 274–75.

[36] Note, *Rights of the Retired Worker, supra* note 31, at 924. See *id.* at 916–22, for a discussion of the various contract theories on which benefit recovery was based before Congress enacted ERISA.

gratuities" which the employer could grant and withdraw freely.[37] Although courts gradually began to apply common law contract theories in employee benefits cases, this approach did not protect employees because the employees frequently lacked necessary information about their benefits.[38] Thus, suits under state law were ineffective in protecting an employee's benefit rights.[39]

The Internal Revenue Code (the "Code") afforded some limited safeguards to plan beneficiaries, however, by only granting favorable tax treatment to contributions made to qualified plans that complied with section 401 of the Code.[40] Section 401 required that the plan be maintained pursuant to a formal trust or other binding agreement for the exclusive benefit of participants and beneficiaries.[41] The employer whose plan failed to qualify under section 401 lost favorable tax treatment for plan contributions.[42] Furthermore, the mishandling of plan funds resulted in possible tax penalties to the employer.[43] The Code did not provide, however, for a private right of action to enforce its provisions.[44] Thus, employees could not enforce their rights to benefits on the basis of the Internal Revenue Code.

By 1958, Congress determined that mandating the disclosure of plan information to employees could provide the needed protection of employees' benefit rights.[45] Accordingly, Congress enacted the Welfare and Pension Plan Disclosure Act ("WPPDA").[46] To protect the interests of plan participants, the WPPDA required that employers report financial and other information about their employee benefit plans to the plans' participants and beneficiaries.[47] Specifically, the WPPDA required the employer to make available a description of the benefit plan and publish an annual report disclosing the plan's

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[37] *Id.* at 916; Hickey, *The Establishment and Administration of Pension Plans in the Labor Relations Process*, 18 VAND. L. REV. 151, 153–54 (1964). According to Hickey, courts viewed pension plans generally in one of four ways: "a gratuity; a unilateral contract; a deferred wage or a charitable contribution." *Id.* at 153. Under the gratuity theory, the employees had no vested rights in their benefits until payments began. *Id.* Courts disliked denying pensions to employees who relied on employers' promises and enforced the promises on grounds of estoppel. *Id.* at 154.

Under the unilateral contract theory, in contrast, employers offered the employee a pension which the employee generally accepted by performing a specified number of years of service. *Id.* Because the employer established his or her plan to encourage the employee's longevity of service, an employee who left voluntarily without completing the required number of years would receive no benefit. *Id.* at 154–55.

Similarly, an employer who unilaterally promised a pension may have been held liable under the "deferred wage theory." *Id.* at 155. The employee accepted the employer's unilateral offer by performing daily work. *Id.* Thus, the courts viewed the pension as the employee's withheld earnings, to be paid when the employee retired. *Id.* at 155–59.

Finally, some courts characterized the pension plans as charitable trusts. *Id.* at 159. The rationale for this position may have stemmed from, among other things, the fear that trusts created under the plans otherwise would be invalid under the Rule Against Perpetuities. *Id.* at 160.

[38] *See* Note, *Rights of the Retired Worker*, *supra* note 31, at 916–22.

[39] *See* Wieck, *An Alternative*, *supra* note 18, at 101.

[40] HOUSE REPORT, *supra* note 10 at 4. A plan is "qualified" because it receives favorable tax treatment under the Code.

[41] I.R.C. § 401(a).

[42] Note, *Private Enforcement*, *supra* note 18, at 275.

[43] *Id.* at 274.

[44] *Id.* at 275.

[45] HOUSE REPORT, *supra* note 10, at 4.

[46] 29 U.S.C. §§ 301–09 (1976). *See also* Hickey, *supra* note 37, at 175.

[47] *Id.* §§ 305–07.

assets and liabilities and the benefits conferred to plan beneficiaries.[48] In addition, in its definition of a benefit plan, the WPPDA required that the benefit program be in writing.[49]

In sum, Congress enacted the WPPDA in the belief that employees who received sufficient information about their employee benefits could enforce their rights under the plan.[50] In actual operation, however, the WPPDA proved wholly inadequate to protect plan participants' rights.[51] The WPPDA's disclosure requirements were weak and the statute did not establish a standard of conduct for persons dealing with benefit plans on a discretionary basis.[52] Congress formally repealed the WPPDA in 1974 when it enacted ERISA.[53]

The legislative history of ERISA begins nearly a decade before its enactment. In 1961, President Kennedy commissioned the Cabinet Committee on Corporate Pension Funds to investigate and recommend legislative changes in the structure and operation of the private pension system.[54] In fashioning ERISA, Congress was concerned principally with protecting an employee's expectation of receiving retirement income after many years of work.[55] Employers too frequently had frustrated this expectation by acting

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[48] *Id.* §§ 304–07. Section 307 of the WPPDA provided for the publication and distribution of a description of the plan and the plan's annual report to the government and to the plan's participants. *Id.* Penalties for failure to comply with these requirements were limited only to fines, *id.* § 308(a), and injunctive relief, *id.* § 308(f), without addressing the problem of participants who lost benefits due to a failure to comply. *Id.*

[49] *Id.* § 302(a)(1).

[50] HOUSE REPORT, *supra* note 10, at 4.

[51] *Id.* As pointed out in Hahn, *supra* note 33, at 323, employers were not willing to protect employees by ensuring that pension plans contained adequate vesting, funding or fiduciary standards.

[52] *Id.*

[53] 29 U.S.C. § 1031.

[54] MCGILL, *supra* note 5, at 34. The Senate committee investigating the private pension system identified four major problem areas in pension plan regulation. First, pension regulation lacked uniform government standards. Second, inadequate vesting provisions prevented many lifelong employees from receiving benefits. S. REP. No. 127, 93d Cong., 1st Sess. 7 (1973). See *supra* note 12 for a discussion of "vesting." Next, plans were funded inadequately, especially plans that terminated before sufficient funds accumulated to pay promised benefits. S. REP. No. 127, 93d Cong., 1st Sess. 9 (1973). Funding refers to the accumulation of assets to pay promised pension benefits. *Id.* While the Internal Revenue Code required the employer to contribute an annual amount equal to the pensions earned for that year, it did not require the employer to make payments for benefits earned before the inception of the plan. This is known as the "unfunded past service liability." *Id.* Thus, when an employer terminated the plan, the plan often contained insufficient assets to meet its obligations to plan participants. *Id.* For current rules on ERISA minimum funding requirements, see 29 U.S.C. §§ 1081–86.

Finally, credits earned lacked portability. S. REP. No. 127, 93d Cong., 1st Sess. 10–11 (1973). "Portability" refers to the ability of the participant to transfer earned credits from one employer to another. *Id.* The current mechanism for transferring vested benefits from the tax-qualified plan of one employer to another tax-qualified plan or Individual Retirement Account generally consists of receiving a distribution from the plan in which the employee has an interest and "rolling over" the interest into the plan of the current employer. PENSION PLANNING, *supra* note 1, at 415–19. For current rules regarding the rollover provisions of the Internal Revenue Code, see I.R.C. § 408(d)(3).

[55] S. REP. No. 127, 93d Cong., 1st Sess. 1 (1973). The Committee on Labor and Public Welfare stated that the bill's provisions "are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives." *Id.* As the Ninth Circuit stated, "[ERISA] is a comprehensive remedial statute designed to protect working men and women and to cure widespread

with their own, rather than their employees', interests in mind.[56] Testimony before both the House and Senate committees during the two years immediately prior to ERISA's enactment is replete with stories of employees who worked for as many as 50 years with the same employer only to lose their jobs, and their right to receive benefits, just before the retirement age specified in a written agreement.[57] In other instances, employees lost their benefits when an employer terminated a plan either because of the employer's insolvency or the plan's failure to generate sufficient assets to pay its promised benefits.[58] Many employees were left with no job, no pension and no chance for a decent retirement. In 1973, the Senate Committee on Labor and Public Welfare concluded that participants lost their benefits primarily because of the way employers operated their plans.[59] In 1974, ten years of investigation culminated in ERISA's enactment.

B. *ERISA: Statutory Protection of Employee Benefit Rights*

Congress enacted ERISA to protect employees who rely on promises of welfare and pension benefits made by their employers.[60] The Act is designed to provide uniform standards for employee benefit plans, to prevent those who deal with such plans in a discretionary manner from abusing that discretion, and to set minimum standards for vesting and benefit accrual.[61]

Title I, the heart of ERISA, governs the protection of employee benefit rights.[62] These protections extend to virtually every employee benefit plan that is established by an employer or an employee organization.[63] This part of the Act also provides for reporting and disclosure,[64] minimum participation and vesting standards,[65] and minimum funding standards.[66]

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weaknesses in the private pension system." Blau v. Del Monte Corp., 748 F.2d 1348, 1352 (9th Cir. 1984).

[56] HOUSE REPORT, *supra* note 10, at 4.

[57] 120 CONG. REC. 29,934 (1974) (statement of Senator Javits).

[58] *Id.*

[59] S. REP. No. 127, 93d Cong., 1st Sess. 5 (1973). The Committee stated that "participants lose their benefits . . . because of the manner in which the plan is executed with respect to its contractual requirements." *Id.*

[60] 29 U.S.C. § 1001(a). S. REP. No. 127, 93d Cong., 1st Sess. 1 (1973). In referring to a proposed version of ERISA the Senate Report stated that "[t]he provisions of [the bill] . . . respond [to the need to protect employees] by mandating protective measures, and prescribing minimum standards for promised benefits." *Id.*

[61] HOUSE REPORT, *supra* note 10, at 1.

[62] 29 U.S.C. §§ 1001–1145 (1982). In fact, Title I is called "Protection of Employee Benefit Rights." *Id.*

[63] *Id.* § 1003. See *supra* note 14 for ERISA's statutory coverage provisions. An "employer" is defined under ERISA as "any person acting directly as an employer or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(6). An "employee organization" is "any labor union or organization of any kind, or any agency or employee representation committee . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning an employee benefit plan . . . or any employees' beneficiary association organized for the purpose . . . of establishing the plan." *Id.* § 1002(4).

[64] *Id.* §§ 1021–30.

[65] *Id.* § 1053.

[66] *Id.* §§ 1081–86.

Title I of ERISA also defines which employee benefit plans are covered by ERISA.[67] Employee benefit plans include both welfare and pension benefit plans.[68] Section 3(1) of the Act defines an employee welfare benefit plan as any plan, fund or program established or maintained by an employer to provide medical, disability, vacation and similar benefits.[69] Section 3(2) of ERISA further defines an employee pension benefit plan as any plan, fund or program established or maintained by an employer, which arises by express terms or results from surrounding circumstances, to provide retirement or other income which has been deferred until the employment relationship ceases.[70] Neither the statute nor the legislative history defines the meaning of the term "established and maintained" in section 3(1), nor what "surrounding circumstances" give rise to a plan under section 3(2).

Proposed versions of ERISA section 3(2) defining employee pension benefit plans initially adopted the WPPDA's requirement that a plan be "communicated or its benefits described in writing to employees."[71] The final version of section 3(2), which defines pension benefit plans in ERISA, did not require specifically that a plan be communicated in writing to employees.[72] None of the congressional inquiries from 1965 to 1974, however, considered whether an employee benefit plan had to be in writing to qualify as an employee benefit plan. Congress did not explain its reasons for deleting the writing requirement when it adopted the final version of the Act.[73]

Title I of ERISA also imposes fiduciary duties on those persons who deal with a plan or plan assets on a discretionary basis.[74] A fiduciary who breaches his or her duty to the plan or its participants may be liable personally for any losses arising from the breach.[75] Under the specific terms of the Act, a participant has a private right of action to recover benefits due under a plan and to enforce the fiduciary's responsibilities under the Act.[76]

Although the coverage provisions contained in Part 1 of Title I of the Act do not require that an ERISA plan be in writing, Part 4 of Title I, which delineates an employer's fiduciary responsibilities, states that a plan must be in writing.[77] Specifically, section 402 contains a requirement that a plan "be established and maintained pursuant to a written instrument."[78] Because ERISA integrates the section 3 definitions of employee benefit

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[67] 29 U.S.C. § 1103.

[68] *Id.* § 1002(3). See *supra* note 15 for the statutory definition of an employee benefit plan.

[69] 29 U.S.C. § 1002(1). See *supra* note 16 for the specific statutory definition of a welfare benefit plan.

[70] *Id.* § 1002(2). See *supra* note 17 for the specific statutory definition of a pension plan.

[71] *E.g.*, H.R. 9824, 93d Cong., 1st Sess. (1973).

[72] *See* 29 U.S.C. § 1002(2).

[73] H.R. Rep. No. 1280, 93d Cong., 1st Sess. 1–2, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5038–39 (joint statement of the committee conference).

[74] *Id.* § 1104. This section sets forth the standard of care required of ERISA fiduciaries.

[75] *Id.* § 1109.

[76] *Id.* § 1132. In addition, the Department of Labor may bring its own civil action to obtain sanctions against those persons who breach their fiduciary duties, such as compelling fiduciaries to disgorge profits that have been made through the use of plan assets, removing a fiduciary, and other equitable relief as the court may deem appropriate. *Id.* § 1109(a). ERISA sets forth no specific criminal sanctions for violations of fiduciary duties.

[77] 29 U.S.C. § 1102. For the specific statutory definition of the section 402 writing requirement see *supra* note 18.

[78] *Id.* § 1102(a)(1). Section 402 of the Act also contains the requisite features of an employee

plans into all of Title I, Title I's fiduciary responsibility provisions apply to all employee benefit plans.[79]

In ERISA's legislative history, section 402 is discussed in the section governing fiduciary responsibities.[80] The final joint committee report stated that a written plan was required so that an employee could review plan documents to determine his or her rights and obligations under the plan, as well as determine who was responsible for operating the plan.[81] Accordingly, section 402 requires a written plan to contain procedures for funding the plan, provisions allocating the fiduciary responsibilities, procedures for amendment and the basis for payments to and from the plan.[82] Thus, the legislative history of section 402 of the Act indicates that a plan must be in writing principally to aid the employee in ascertaining the exact benefit to which he or she is entitled.

The Act also imposes both general and specific duties upon individuals who exercise any discretionary control over plan assets, render investment advice, or administer employee benefit plans.[83] The fiduciary duties imposed in section 404 are similar to the duties of a fiduciary at common law.[84] Section 404 requires the fiduciary to act in the exclusive interest of the plan participants and beneficiaries.[85] Thus, a fiduciary must exercise the same prudence and diligence that a reasonable person acting in a similar capacity and familiar with such matters would use in similar circumstances.[86]

A breach of fiduciary duty may result in personal liability for any losses resulting from the breach.[87] The Act provides that both plan participants or beneficiaries and the

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benefit plan. Every plan must provide for the establishment of a funding policy, describe the basic administrative functions, provide for the amendment of the plan, and specify the basis on which payments are made to and from the plan. *Id.* § 1102(b). Subsection (c) sets forth the optional features of the plan. *Id.* § 1102(c).

[79] *Id.* § 1002. The Act's definitional provisions integrate the definitions into the rest of Title I by prefacing Act section 3, entitled Definitions, with the phrase "for purposes of this title [the following definitions apply]:"

[80] H.R. REP. No. 1280, 93d Cong., 1st Sess. 297, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5030, 5077–78.

[81] *Id.* The committee report states that a written plan is required so "that every employee may upon examining the plan documents, determine exactly what his rights and obligations are under the plan. Also a written plan is required so the employees may know who is responsible for operating the plan." *Id.*

[82] 29 U.S.C. § 1002(b).

[83] 29 U.S.C. § 1104. As a fiduciary, the employer must establish a trust to hold the assets contributed to its pension plan. *Id.* § 1003(a).

[84] S. REP. No. 127, 93d Cong., 1st Sess. 29 (1973). The Senate report states that "[t]he fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." *Id.*

[85] 29 U.S.C. § 1104(a)(1)(A).

[86] *Id.* § 1104(a)(1)(B). Nevertheless, because of the complexity of administration of large trust funds and the presumed expertise of fiduciaries, courts limit their review of trustees' decisions. *See, e.g.*, Holland v. Burlington Indus., 772 F.2d 1140, 1148 (4th Cir. 1985) (court employs arbitrary and capricious standard to review fiduciary's actions regarding severance pay plan), *aff'd mem.*, 106 S. Ct. 3267 (1986). In general, a court will overturn a trustee's decision with respect to the administration of the plan only if the trustee's actions were "arbitrary, capricious or made in bad faith." *See, e.g.*, *id.* at 1148; Jung v. FMC Corp., 755 F.2d 708, 711 (9th Cir. 1985).

[87] 29 U.S.C. § 1109. See *supra* note 76 and accompanying text for a discussion of other remedies for a trustee's breach of fiduciary duty.

Department of Labor have standing to bring actions for breaches of fiduciary duty.[88] Because courts have held that the purpose of the fiduciary responsibility provisions is to deter fiduciary misconduct, the plaintiff may bring an action even if the plan suffers no direct loss due to the breach.[89] If the court finds a fiduciary breach, the plaintiff may recover, on behalf of the plan, all damages directly from the employer.[90] In such a case, the amount of damages is equal to the profits earned by defendant as a result of the breach of fiduciary duty, or losses sustained by the plan as a result of defendant's breach.[91]

Finally, the Act specifically provides that federal law is the exclusive authority over ERISA-covered plans.[92] Thus, although states regulated employee benefit plans before ERISA,[93] ERISA pre-empts all state law regulation of employee benefit plans,[94] including all state law contract claims relating to ERISA covered plans.[95] The pre-empted state rights are replaced by a federal right of action.[96] Moreover, courts have construed ERISA's pre-emption provisions broadly.[97]

C. *Judicial Interpretation of ERISA's Coverage Provisions*

Although the Act provides for exclusive federal jurisdiction, Congress left many gaps in the employee benefit regulatory scheme. In particular, ERISA does not refer to a body of contract law governing the interpretation and enforcement of employee benefit plans.[98] As the United States Court of Appeals for the Ninth Circuit noted in *Menhorn v. Firestone*, Congress intended the courts to develop a body of substantive federal law to deal with issues arising under ERISA.[99] Accordingly, the courts have incorporated

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[88] 29 U.S.C. § 1132(a).

[89] *See, e.g.*, Leigh v. Engle, 727 F.2d 113, 122–27 (7th Cir. 1984).

[90] McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir. 1986). In *McDowell*, the plaintiff-employees claimed that the trustees' failure to collect contributions owed by the employer to the plan breached the trustees' fiduciary duties to the plan. *Id.* at 108. The court rejected this argument because the company had obtained government approval of a "waiver" of contributions from the Internal Revenue Service. *Id.*

[91] 29 U.S.C. § 1132.

[92] *Leigh*, 727 F.2d at 122.

[93] *See generally* Note, *Rights of Retired Workers, supra* note 31, at 916–24.

[94] 29 U.S.C. § 1144. Section 514 provides, in pertinent part: [e]xcept as provided in subsection (b) [relating to state regulation of insurance] . . . the provisions of this subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." *Id.* Any state law, however, which regulates insurance, banking or securities is not pre-empted under ERISA. *Id.* § 1144(b)(2)(A). Any cause of action which arose before January 1, 1975 also is not pre-empted by federal law. *Id.* § 1144(b)(1).

[95] *See* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522–23 (1981) (workers' compensation offset permitted).

[96] 29 U.S.C. § 1132.

[97] *See, e.g.*, Powell v. Chesapeake & Potomac Tel. Co. of Va., 780 F.2d 419, 421 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986).

[98] Ray & Halpern, *The Common Law of ERISA*, 21 TRIAL 20, 22 (June 1985).

[99] 733 F.2d 1496, 1498–1500 (9th Cir. 1984). The court stated that Congress "empowered the courts to develop, in the light of reason and experience, a body of federal common law governing employee benefits plans." *Id.* at 1499. 120 CONG. REC. 29,942 (1974) (statement of Senator Javits).

contract, trust and labor law doctrines into a substantive federal law governing rights and obligations under private employee benefit plans.[100]

One contract law principle that courts apply in the employee benefit context is the doctrine of the statute of frauds.[101] A state's statute of frauds generally requires, among other things, that a contract which is not to be performed within one year of its making must be in writing.[102] Before Congress enacted ERISA, courts that applied pure contract theory to benefit plans found that the applicable statute of frauds precluded the enforcement of unwritten promises of benefits which could not be fulfilled within one year of the making of the contract.[103] Thus, before ERISA, unwritten promises of employee benefits generally were not enforceable in a contract action.

In a post-ERISA action in 1985, *Nachwalter v. Christie*, the Federal District Court for the Southern District of Florida treated section 402 as a statute of frauds, holding that an alleged oral amendment to a written retirement plan was invalid because it contravened the section's writing requirement.[104] In *Nachwalter*, the express terms of the plan precluded distribution of benefits until one year after the participant incurred a "break in service."[105] Before the benefits were distributed to the plaintiff, however, the value of the plan assets decreased through the malfeasance of an unrelated third party.[106] The plaintiff claimed that the trustees should be bound by their oral agreement to value the benefits in the plan at an earlier date than that stated in the plan, that is, at a date before the decrease in the entire fund's value.[107] The *Nachwalter* district court rejected the plaintiff's argument and held that an oral agreement to change the express terms of an ERISA plan is unenforceable.[108] The district court interpreted the section 402 writing requirement to preclude a cause of action based on any oral agreement to provide

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[100] Ray & Halpern, *supra* note 98, at 22.

[101] Statute of Frauds, 29 Car. 2 ch.3 (1677), *reprinted in* W. HOLLOWAY & M. LEACH, EMPLOYMENT TERMINATION RIGHTS & REMEDIES 55 (1985).

[102] *See, e.g.*, MASS. GEN. L. ch. 259, § 1 (1959). Nearly every American jurisdiction has adopted a statute of frauds except Pennsylvania, North Carolina and Louisiana. W. HOLLOWAY & M. LEACH, *supra* note 101, at 55.

[103] *See, e.g.*, Lee v. Jenkins Bros., 268 F.2d 357, 372–73 (2d Cir.) (employees' claim for pension benefits that were allegedly orally promised by employer barred by the Connecticut Statute of Frauds), *cert. denied*, 361 U.S. 913 (1959).

[104] 611 F. Supp. 655, 663 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986).

[105] *Id.* at 659. A "break in service" is a period during which the employee works for fewer than 500 hours of service in a consecutive 12-month computation period selected in the plan. I.R.C. § 411(a)(6) (1982 & Supp. III 1985). A break in service affects the employee's accrual, vesting, and participation in the plan and usually occurs when an employee severs employment with the company. *See* MCGILL, *supra* note 5, at 89. In *Nachwalter*, the significance of the break in service period related to the date that benefits from the plan were to be distributed to the participant. 611 F. Supp. at 658–60. A terminated participant could receive his or her plan benefit only upon written request within 30 days following a break in service. *Id.* If the participant failed to request the plan distribution he or she would be required to wait an additional twelve months before he or she could request a distribution of his or her benefit from the plan. *Id.* at 658–60. Thus, because the plaintiff terminated employment before his death and had not requested a distribution immediately after his break in service, his beneficiaries were not entitled to receive his benefit at any date earlier than he himself would have been entitled had he lived. *Id.* at 664.

[106] *Nachwalter*, 611 F. Supp. at 657.

[107] *Id.* at 661.

[108] *Id.*

benefits.[109] The district court extrapolated from this premise that the writing requirement precludes oral amendments to written plans.[110]

The *Nachwalter* district court reasoned by analogy to cases involving Section 302(c)(5) of the Labor Management Relations Act ("LMRA"),[111] the federal labor statute that includes a writing requirement similar to section 402 for plans and trusts established pursuant to collective bargaining agreements.[112] The policy behind the LMRA writing requirement, the *Nachwalter* district court stated, is to prevent collusion to the detriment of beneficiaries.[113] In the district court's view, this policy is applicable also to ERISA plans.[114] The district court further recognized that oral statements invite such collusion and are difficult to prove.[115] The *Nachwalter* district court thus refused to enforce the alleged oral amendment to the written retirement plan.[116]

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[109] *Id.* The court stated that "[a]n oral agreement cannot be the basis of a cause of action under ERISA due to the fact that such an oral agreement would be contrary to the express provisions of ERISA." *Id.*

[110] *Id.* Courts also have held that agreements to extend eligibility in employee benefit plans to individuals not covered under the terms of the plan contravene Section 402 of the Act. *See, e.g.*, Saret v. Triform Corp. No. 83-C-4650 (N.D. Ill. Aug. 22, 1986) (LEXIS, Genfed library, Dist file). In *Saret*, for example, the court rejected the plaintiff's claims for medical benefits under an ERISA welfare plan maintained by the company for full-time employees. *Id.* The plaintiff, a former part-time director of the defendant company, argued that the employer was estopped from not providing the benefits because the employer already had enrolled the plaintiff in the plan under a false designation as a full-time employee. *Id.* The court found that the terms of the plan were specific as to the classification of covered employees and that the plaintiff was not among those employees. *Id.* The court reasoned that the Section 402 writing requirement was a "central feature" of the Act and "not a mere technicality." *Id.* Thus, the court concluded that the purpose of the writing requirement, to protect the plan from collusion which may arise from private verbal agreements, would be contravened by extending eligibility to the plaintiff. *Id.*

[111] 29 U.S.C. § 186(c)(5) (1982). Section 302(c)(5) is a penal statute which provides that, as a condition precedent to its existence, a plan established under a collective bargaining agreement of which a union member is trustee must be in writing. *Id.* Section 302(c)(5), however, provides no independent basis for regulating plans. *See* United Mine Workers Ass'n v. Robinson, 455 U.S. 562, 570–72 (1982).

[112] Section 302 of the LMRA provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts . . . in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce . . . .
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> (c) [except that] this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative for the sole and exclusive benefit of the employees of the employer . . . *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . .

29 U.S.C. § 186(c)(5). Congress designed section 302(c)(5) to "prevent bribery, extortion, and corruption of the collective bargaining process." Chicago Dist. Council of Carpenters Pension Fund v. Strom, 634 F. Supp. 163, 173 (N.D. Ill. 1986).

[113] *Nachwalter*, 611 F. Supp. at 662.

[114] *Id.*

[115] *Id.* at 663.

[116] *Id.* at 662–63.

In 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the *Nachwalter* district court's refusal to enforce the oral plan amendment.[117] The Eleventh Circuit adopted the district court's finding that the section 402 writing requirement precluded oral modification of a written plan.[118] The appeals court stated that only agreements "established and maintained" pursuant to written instruments were enforceable under ERISA.[119] To hold otherwise, the appeals court reasoned, would undermine ERISA's goal of protecting employees' interests because employees would be unable to rely on the written plan's terms.[120] The appeals court also found that this reliance problem would be exacerbated by the lengthy time lapse that would be likely to occur between the making of the oral agreement and the benefit distribution.[121] Thus, the Eleventh Circuit concluded, oral agreements should not be enforced.[122]

In the post-ERISA period, however, several courts have held that the lack of a writing does not render an ERISA welfare benefit plan unenforceable.[123] The seminal ruling in this line of decisions is the 1982 case of *Donovan v. Dillingham.*[124] In *Dillingham,* the United States Court of Appeals for the Eleventh Circuit held that an unwritten program to provide medical benefits to employees through the purchase of insurance constituted an ERISA plan.[125]

In *Dillingham,* the Secretary of Labor brought suit against the trustees of a "multiple employer insurance trust," alleging that the trustees, in determining benefits, had violated ERISA's fiduciary duty provisions.[126] To determine whether these trustees were subject to ERISA's fiduciary duties, the court first had to determine whether the group purchase of insurance policies constituted an employee benefit plan under the Act.[127] The defendant employer claimed that the mere purchase of health insurance by subscription to a multiple employer trust did not establish an employee welfare benefit plan subject to ERISA.[128] The employer further argued that, because the purchase of insurance did not result in the accumulation of plan assets, nor in employer liability for

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[117] Nachwalter v. Christie, 805 F.2d 951, 961 (11th Cir. 1986). In *Nachwalter,* the Eleventh Circuit made no attempt to distinguish Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), in which it held, on the basis of the general definitions contained in ERISA, that oral agreements to provide employee benefits are enforceable under ERISA. The *Nachwalter* court ignored the *Dillingham* decision and instead relied entirely on the section 402 writing requirement. Thus, a conflict exists within the Eleventh Circuit on the proper interpretation of the writing requirement.

[118] *Nachwalter,* 805 F.2d at 960.

[119] *Id.*

[120] *Id.* at 960–61.

[121] *Id.* at 960.

[122] *Id.* at 961.

[123] *See, e.g.,* Gilbert v. Burlington Indus., 765 F.2d 320, 325 (2d Cir. 1985); Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982).

[124] 688 F.2d 1367 (11th Cir. 1982).

[125] *Id.* at 1373–74.

[126] *Id.* at 1369. A multiple-employer trust, also known as a "MET," is an organization to which many employers belong for the purpose of providing welfare benefits to employees. *See* Brummond, *The Legal Status of Uninsured, Noncollectively-Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Laws,* 28 SYRACUSE L. REV. 701, 703 (1977). Initially there was some question whether ERISA pre-empted state law regulation of METs because the activities of the METs were similar to those of insurance providers, who are not pre-empted. *Id.* at 703–05. In 1983, however, Congress amended ERISA to resolve the question by specifically excluding METs from the pre-emption provisions of the Act. 29 U.S.C. § 1144(b)(6).

[127] *Dillingham,* 688 F.2d at 1372.

[128] *Id.* at 1370.

benefits, no trust, and hence, no "plan," as defined by ERISA existed.[129] Thus, the employer claimed, the fiduciary provisions of ERISA should not apply.[130]

The Eleventh Circuit rejected the employer's arguments and concluded that ERISA does not require a formal written plan.[131] In finding that the group insurance plan constituted an ERISA plan, the *Dillingham* court first recognized that surrounding circumstances may give rise to an ERISA plan.[132] Once an ERISA plan is found, the court continued, it is then subject to ERISA's fiduciary requirements.[133] The court reasoned, therefore, that it was the fiduciary's responsibility to provide a writing and not a prerequisite to coverage under the Act.[134] The court stated that to construe the Act to require a writing as a prerequisite to coverage would be inconsistent with the purposes of ERISA because it would allow the breach of fiduciary duty to preclude the existence of the plan.[135] The court concluded that such an interpretation would deny benefits to the very group ERISA was intended to protect.[136]

The *Dillingham* court, however, rejected the Department of Labor's contention that the employer's "ultimate decision" to establish a plan to provide benefits gave rise to an ERISA plan.[137] No single act, the court stated, establishes a plan.[138] Rather, the court reasoned, if a reasonable person could determine from the surrounding circumstances the intended benefits, the beneficiaries, the source of funding and the benefit claims procedure, an ERISA plan existed.[139] The court found in this case that the purchase of an insurance policy was substantial evidence that the employer had established a plan.[140]

Similarly, in *Scott v. Gulf Oil Corp.* the Ninth Circuit Court of Appeals held that an ERISA plan may exist notwithstanding the lack of a written document.[141] The issue in *Scott* was whether an alleged severance pay practice — unwritten and funded out of the employer's general assets — constituted an employee welfare benefit plan subject to ERISA.[142] The court held that because ERISA's writing requirement was *not* part of the definition contained in section 3(1) of the Act, failure to meet the writing requirement did not preclude the existence of a plan.[143] Rather, the court concluded that the lack of

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[129] *Id.*

[130] *Id.*

[131] *Id.* at 1372.

[132] *Id.*

[133] *Id.* at 1372–73.

[134] *Id.* at 1372. As the court stated, "clearly these are only the responsibilities of . . . fiduciaries and are not prerequisites to coverage under the Act." *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 1372–73.

[138] *Id.* at 1373.

[139] *Id.*

[140] *Id.* at 1374–75.

[141] 754 F. 2d 1499, 1503 (9th Cir. 1986). The *Scott* court specifically agreed with the Eleventh Circuit's decision in *Dillingham*, stating that "the existence of a written instrument is not a prerequisite to ERISA coverage." *Id.*

[142] *Scott*, 754 F.2d at 1501–03. The defendant acknowledged that ERISA covered severance benefits, but argued that the practice, if it existed, constituted a "payroll practice," which was exempt from coverage under ERISA. *Id.* at 1502. The court rejected this argument on the grounds that the definition of a payroll practice was quite specific and severance pay was not among the named categories. *Id.* at 1503. See *supra* note 14 and accompanying text for a discussion of the statutory exemptions and regulatory exclusions from ERISA.

[143] 754 F.2d at 1503–04.

a written instrument resulted from a failure to comply with the fiduciary provisions of ERISA.[144] The court also adopted the *Dillingham* court's conclusion that a mere assertion that an employer decided to establish a benefit does not result in ERISA coverage, but the existence of a plan depended on whether a reasonable person could determine the intended benefits, the beneficiaries, the funding source and the benefit claims procedure.[145] Consequently, the *Scott* court remanded the case to the district court to determine whether the asserted practice in fact constituted a plan under the *Dillingham* standard.[146]

Conversely, the existence of a writing does not automatically create a plan.[147] In the 1986 case of *Taylor v. Hercules*, for example, the First Circuit Court of Appeals held that a pamphlet that described severance benefits did not give rise to an ERISA plan.[148] The pamphlet in *Taylor* contained a statement that some employer locations provided severance pay.[149] The same page of the pamphlet also contained a caveat to the effect that the summary was incomplete and that employees covered by a severance pay plan would receive a plan description at their location.[150] Although the summary referred to a formal plan document,[151] it merely summarized "typical plan benefits" in effect at most of the company's locations.[152] The court construed this language as not promising any particular benefit.[153] Further, the court reasoned that because the employee was on notice as to the existence of a formal document, he could not properly rely solely on the summary plan description to establish a right to benefits.[154]

Similarly, another court has found that a minor written reference to a benefit does not establish a plan subject to ERISA.[155] In *Molyneux v. Arthur Guinness and Sons*, the Federal District Court for the Southern District of New York rejected the plaintiff-employee's contention that the mention of a possible termination benefit in a letter agreement between the employer and employee constituted an ERISA plan.[156] The court, applying the standards enunciated in *Dillingham*, dismissed the claim on the grounds that the plaintiff failed to allege that other employees were aware that the company had a practice of paying severance benefits, that the company had established benefit claim

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[144] *Id.* at 1503.
[145] *Id.* at 1504.
[146] *Id.* at 1506.
[147] *See, e.g.*, Taylor v. Hercules, Inc., 780 F.2d 171, 175 (1st Cir. 1986).
[148] *Id.* at 175.
[149] *Id.* at 173.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 175.
[153] *Id.*
[154] *Id.*
[155] *See, e.g.*, Molyneux v. Arthur Guinness & Sons, 616 F. Supp. 240, 243 (S.D.N.Y. 1985). A written agreement to provide retirement benefits to one employee pursuant to an individual retirement contract also is not an ERISA plan. Jervis v. Elerding, 504 F. Supp. 606, 608 (C.D. Cal. 1980). In *Jervis*, the court found that an employment contract that recited as additional consideration certain in-kind pension benefits was a "personal service contract" and not an ERISA plan. *Id.* at 608. The court adopted the Department of Labor's position that such employment contracts were part of the employee's compensation arrangement rather than an ERISA pension plan. *Id.* at 609. For an excellent discussion of exempt compensation arrangements see generally Goodman & Stone, *supra* note 13.
[156] *Id.* at 243.

procedures, that the company had identified covered employees or that the company had determined a method of funding or benefit calculations.[157]

In sum, courts differ on the issue of whether ERISA requires a plan to be in writing to be enforceable under the Act. As recently as 1986 a federal appeals court held that the writing requirement contained in section 402 of ERISA precluded the enforcement of unwritten agreements.[158] Several other federal courts, however, have held that the section 402 writing requirement does not preclude enforcement of unwritten plans, but gives rise to a fiduciary duty to put the plan into writing, and a breach of fiduciary duty for failure to do so.[159] Moreover, these courts follow the *Dillingham* standard to determine that an ERISA plan exists, in the absence of a writing, where a reasonable person could determine from the surrounding circumstances the intended benefits, the beneficiaries, the source of funding and the benefit claims procedures.[160]

In conclusion, ERISA is not explicit as to whether the lack of a written instrument renders an employee benefit plan unenforceable. Neither ERISA's definitional provisions, nor the Act's coverage provisions require a written plan. The fiduciary provisions, however, require that the employer establish and maintain an ERISA plan pursuant to a written document. Further, this conflict has resulted in courts differing as to whether the writing requirement is a prerequisite to coverage under the Act. Most judicial decisions on this issue hold that the lack of a writing does not preclude coverage under ERISA, but instead gives rise to a breach of fiduciary duty.

II. Assessing the Enforceability of Informal Agreements to Provide Employee Benefits

Congress enacted ERISA principally to protect employees' expectations of welfare and pension benefits. To ensure the effectiveness of ERISA, therefore, courts clearly should find oral promises to pay welfare and retirement benefits enforceable under ERISA. The statutory language of ERISA, as well as its legislative history, and the judicial interpretation of its provisions supports this conclusion.

Given the enormous liabilities that employers potentially may incur upon the enforcement of an oral promise to pay benefits, however, the standard must clearly define when such a plan exists. The *Dillingham* standard that courts currently follow is inadequate because it does not satisfactorily balance the expectations of the employee against the employer's need to know with certainty when liability attaches under ERISA. This note suggests that a stricter standard, which incorporates the concept of an employee's justifiable reliance with the *Dillingham* standard, would provide employers reasonable certainty and protection against liability under ERISA.

The following section analyzes the reasons courts should enforce oral promises to pay benefits under ERISA and suggests the proper standard to determine when oral promises give rise to an ERISA plan. Part A of this section reviews the statutory language

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[157] *Molyneux*, 616 F. Supp. at 243–44.

[158] *Nachwalter*, 805 F.2d at 960–61.

[159] *See, e.g.*, *Scott*, 754 F.2d at 1503–04 (severance pay practice may constitute a plan); *Dillingham*, 688 F.2d at 1372–77 (purchase of insurance found to be an ERISA plan even though no written plan adopted by the employer).

[160] *See, e.g.*, *Scott*, 754 F.2d at 1504; Bausch & Lomb, Inc. v. Smith, 630 F. Supp. 262, 264 (W.D.N.Y. 1986); *Molyneux*, 616 F. Supp. at 243.

and legislative history of ERISA and the interpretation given it by the courts, and concludes that Congress intended for courts to enforce oral promises under ERISA. Part B reviews the *Dillingham* standard for determining when oral promises give rise to an ERISA plan. The note then concludes that a standard which includes the requirement of justifiable reliance on the part of the employee is more appropriate, in the absence of a writing, to determine when an ERISA plan exists.

A. *Enforceability of Oral Promises to Provide Employee Benefits*

Congress did not state explicitly that oral promises to provide employee benefits would be enforceable under ERISA. That Congress intended such a result, however, is supported by the nature of ERISA itself. Because the statutory language of sections 3(3) and 402 of the Act are ambiguous when read together, however, it is necessary to examine the legislative history — as well as the policies and purposes of ERISA — to discern that Congress did not intend the Act's writing requirement to preclude the enforceability of oral promises. In addition, the developing judicial interpretation of ERISA's statutory requirements confirms the sound conclusion that Congress intended to enforce oral promises to pay benefits under ERISA.

The Act's definition of employee benefit plans does not mandate the existence of a written document. Section 3(1) defines a welfare plan as one that is established or maintained by an employer, although the section does not define the term "established or maintained."[161] Similarly, section 3(2) defines an employee benefit pension plan as one established or maintained by an employer and which may arise by express terms or by surrounding circumstances.[162] Neither of the Act's definitional provisions explicitly mandates that a benefit plan be in writing.[163]

Section 402, however, requires that each employee benefit plan be "established and maintained pursuant to a written instrument."[164] Because Title I incorporates section 3 definitions, the writing requirement, contained in the part of ERISA delineating fiduciary duties, applies to all employee benefit plans.[165] The statute does not address specifically the consequences of an employer's failure to memorialize a promised benefit in writing.

The inclusion and integration of section 3 definitions into section 402's writing requirement renders ambiguous the Act's writing requirement. Two possible interpretations of section 402 exist. Section 402 may be considered merely to set forth the employer's fiduciary obligations to plan beneficiaries. In contrast, section 402 may be interpreted to preclude enforcement of oral promises to pay benefits. Examining the

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[161] 29 U.S.C. § 1002(1). See *supra* note 16 and accompanying text for the statutory definition of a welfare benefit plan.

[162] 29 U.S.C. § 1002(2). See *supra* note 17 and accompanying text for the statutory definition of a pension plan.

[163] The Act's coverage provision also does not require that a plan be in writing. 29 U.S.C. § 1003(a).

A comparison of regulations issued by the Department of Labor under ERISA also indicates that the Act does not require a writing to establish an ERISA plan. *See* 29 C.F.R. 2510.3-37(b)(2)(i)(A) (multi-employer plans covered by "withdrawal liability" provisions on ERISA's enactment date not considered to be in existence unless reduced to writing; thus if Congress wanted ERISA to require a writing generally it could have said so more clearly).

[164] 29 U.S.C. § 1102(a). See *supra* note 18 and accompanying text for the statutory language of the writing requirement.

[165] 29 U.S.C. § 1002.

legislative history of the Act and Congress's purpose in enacting ERISA resolves this ambiguity.

The legislative history of section 402 consistently discusses the writing requirement as a fiduciary duty.[166] This duty arises from the administrative aspects of the plan.[167] Congress expected the written plan to enable each employee, by examining the plan documents, to find out the information necessary to enforce his or her rights.[168] Thus, to construe the absence of a writing as precluding the plan's existence would deny benefits to those individuals the Act was designed to protect.[169]

Arguably, however, section 402 also serves as a statute of frauds. The statute of frauds requires a writing to exist in certain situations before an agreement may be enforced.[170] This writing requirement serves an evidentiary purpose by providing "proof that the agreement was actually made."[171] A statute of frauds provision in the retirement benefit plan context, therefore, could inform a plan participant of his or her rights, and serve as evidence of the promise made by the employer to pay benefits.[172] It would be inequitable to subject an employer to potentially enormous liability for promised retirement benefits on the basis of what might be a misunderstood or casual statement.

ERISA's overriding purpose, however, was not to protect employers against the enforcement of oral promises. Rather, Congress fashioned ERISA to protect employees' expectations of promised benefits. Consequently, Congress intended that courts broadly construe the Act's coverage provisions.[173] As the Senate Committee on Labor and Public Welfare reported, "coverage under the Act [is] to be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."[174] The incorporation of a statute of frauds provision, which protects promisors, in the section of the Act governing the promisor's fiduciary duties, therefore is inconsistent with the overriding purpose of the Act to protect employees' benefit rights.

Furthermore, ERISA's historical background demonstrates that Congress did not intend the section 402 writing requirement to codify the statute of frauds in ERISA. ERISA's enactment resulted from Congress's awareness that employees, under the existing inconsistent state law, could not rely on or enforce their employers' promises to provide adequate retirement benefits.[175] Congress correctly saw that the proposed legislation must focus on the areas of fiduciary responsibility and disclosure in order to provide more than the inadequate requirements found in the WPPDA.[176] Congress included the section 402 writing requirement among these fiduciary provisions.[177]

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[166] H.R. Rep. No. 1280, 93d Cong., 1st Sess. 295–98, *reprinted in* U.S. Code Cong. & Admin. News 5038, 5076–78.

[167] *See* McMahon v. Mc Dowell, 794 F.2d 100, 109–10 (3d Cir. 1986).

[168] H.R. Rep. No. 1280, 93d Cong., 1st Sess. 297, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5077–78.

[169] *See Dillingham*, 688 F.2d at 1372.

[170] See *supra* notes 101–02 and accompanying text for a discussion of the Statute of Frauds.

[171] E. Farnsworth, Contracts 372 (1982).

[172] *Id.*

[173] S. Rep. No. 127, 93d Cong., 1st Sess. 18 (1973).

[174] *Id.*

[175] 120 Cong. Rec. 29,933–34 (1974) (statement of Senator Javits).

[176] Senate Consideration of S.4, *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act, 1974, at 1637 (speech of Senator Lloyd Bentsen).

[177] 29 U.S.C. §§ 1101–1102.

Although ERISA does not predicate a plan's existence on a written instrument, employers are encouraged to have written plans in order to obtain favorable tax treatment under the Internal Revenue Code.[178] Employee benefits plans that qualify under section 401 of the Code, however, also must comply with ERISA.[179] A plan which fails to qualify for favorable tax treatment for lack of a writing, therefore, still must comply with ERISA.[180] Thus, the current legislative scheme encourages, but does not mandate, employers to commit benefit plans to writing.

In sum, although the statutory provisions alone fail to clarify whether a plan must be in writing to be covered under the Act, an examination of the legislative history and of Congress's purpose in enacting ERISA indicates that the Act's writing requirement is a fiduciary duty and does not preclude enforcement of an oral agreement. Congress enacted ERISA to protect employees' expectations in receiving benefits from employers who, in the past, had not operated their plans in the employees' best interest.[181] To permit lack of a written instrument to preclude coverage would be inconsistent with ERISA's purpose of protecting employee's expectations; it would permit employers to avoid liability upon breaching promises actually made to employees.

Moreover, the majority of courts that have considered the question found that an ERISA plan may exist without a writing. There courts have concluded that section 402 operates solely to set forth the employer's fiduciary responsibilities.[182] Courts, therefore, generally do not predicate coverage under ERISA upon a writing. To deny the existence of the plan, these courts reasoned, would allow employers to escape ERISA's coverage by violating the Act's fiduciary requirements, a result clearly inconsistent with the purposes of the Act.[183] Moreover, these courts have recognized that the Act itself provides that surrounding circumstances may give rise to an ERISA plan. Thus, a majority of courts have found that an ERISA plan may exist without a writing.

Nevertheless, one court has held that oral agreements to provide benefits are unenforceable in light of section 402's writing requirement.[184] The courts in *Nachwalter*, however, read section 402 in isolation. Section 402 is but one part of a comprehensive statutory scheme, and must be read in connection with other provisions of the Act, particularly sections 3(1) and 3(2). The *Nachwalter* district court's reasoning focused on a valid purpose for imposing the writing requirement, that is, the need to prevent collusion.[185] But the district court failed to reconcile this policy, in light of the conflicting statutory language, with the overriding purpose of the Act, that is, to protect employees' expectations in receiving promised benefits. Further, although the Eleventh Circuit considered ERISA's purposes in deciding *Nachwalter*, it failed to consider the explicit definitional language contained in section 3(2) and ignored its own analysis and reasoning set forth in *Dillingham*. Thus, the interpretation given by the *Nachwalter* courts is of limited use in determining the scope of the writing requirement.

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[178] I.R.C. § 401(a)(1986); Treas. Reg. § 1.401-1(a)(2).

[179] Note, *Private Enforcement*, *supra* note 18, at 275.

[180] *Id.*

[181] HOUSE REPORT, *supra* note 10, at 5.

[182] *See, e.g.*, *Scott*, 754 F.2d at 1503–04 (severance pay practice may constitute a plan); *Dillingham*, 688 F.2d at 1372–73 (purchase of insurance constituted an ERISA plan).

[183] *See, e.g.*, *Scott*, 754 F.2d at 1503.

[184] 611 F. Supp. at 663. *See* Taylor v. Hercules, Inc., 780 F.2d 171 (1st Cir. 1986). See *supra* note 147 and accompanying text for an example of a writing which does not give rise to a plan.

[185] *Taylor*, 780 F.2d at 662.

In sum, most of the judicial decisions addressing whether a plan must be in writing to be enforceable under ERISA hold that no such writing is required. These decisions ensure employee expectations, a result consistent with Congress's intent. To allow an employer to escape liability by violating the statute, i.e., by failing to put a plan in writing, the courts reason, creates a result inconsistent with the main purpose of ERISA. Moreover, the sole case that decided this issue to the contrary, *Nachwalter v. Christie*, did so in the context of an oral modification to a written agreement. Moreover, *Nachwalter* was decided in the same circuit that decided *Dillingham*, a strong precedent to the contrary.

B. *Standards for Determining When an Oral Agreement Becomes Enforceable Under ERISA*

Given this note's conclusion that Congress intended courts to enforce oral promises under ERISA, it is necessary to determine when such oral promises establish an ERISA plan. The enormous liabilities that potentially could accrue to employers and fiduciaries, however, necessitate a clearly established standard. The *Dillingham* court established criteria that the majority of courts currently follow to determine when a benefit plan exists, that is, when a reasonable person could determine the plan benefits, the beneficiaries, the source of financing and the benefit claims procedure.[186] The *Dillingham* standard is inadequate, however, because it produces uncertainty as to when liability attaches under ERISA. Thus, courts ought to adopt a stricter standard before oral agreements are enforced under ERISA. This stricter standard should incorporate the concept of justifiable reliance. Before an oral agreement would be enforceable under ERISA, the employees would need to show that they relied to their detriment on the employers' alleged promise.

Without a clear standard to determine when oral promises give rise to an ERISA plan, employers may be discouraged from providing benefits to employees. Employers who do not demonstrate clearly their intent to establish a plan via a written document create several problems. First, oral promises are subject to significant problems of proof. To find an employer liable based soley on testimony of oral statements may invite collusion among the intended beneficiaries. The employees also may misinterpret the statements. Because Congress enacted ERISA to provide a uniform standard for employee benefit plans on which employers and employees could rely, allowing undefined facts to give rise to a plan could create uncertainty among both employers and employees as to what actions are necessary to establish a plan. This uncertainty would be counterproductive to the purposes of ERISA because employers would be discouraged from establishing plans.

If an oral promise is enforced without a clear standard, employers could face enormous potential liabilities because they will not know whether they are required to comply with the funding or reporting and disclosure requirements of both ERISA and the Internal Revenue Code. For example, in a situation involving an oral retirement contract where the plan computes the benefit with regard to years of service, the employer would not only be liable for future benefits earned, but also for accrued benefits which have not yet been funded. This liability for unfunded past service is potentially enormous. In fact, when an employer establishes a plan and elects to provide for past service, ERISA allows the employer to amortize this cost over a thirty year period.[187] If

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[186] *Dillingham*, 688 F.2d at 1373.
[187] 29 U.S.C. § 1082(b)(2)(B).

an employer erroneously believes the promise to be unenforceable under ERISA and fails to maintain minimum funding standards, the employer may be required to contribute a large lump sum immediately to fund all amounts that should have been contributed.

Moreover, if the corporation does not have sufficient assets to meet its pension obligations, the breaching fiduciary may become personally liable for the remaining liability.[188] In a situation involving an oral defined benefit plan a particularly egregious situation results. Failing to meet the minimum funding requirement may produce a penalty greater than 100% of the amount due.[189] The breach subjects the employer and the fiduciaries to additional penalties for failing to file the appropriate periodic disclosure forms with the government.[190]

In view of the problems possibly created by enforcing oral promises to pay under ERISA, therefore, courts must establish a clear standard to determine when an oral ERISA plan exists. The *Dillingham* court set forth criteria for determining the existence of an employee benefit plan subject to ERISA. According to the *Dillingham* court, a plan exists where a reasonable person can determine the intended benefits, the beneficiaries, the source of financing and the benefit claims procedure.[191] *Dillingham,* however, inadequately set forth the criteria because a past practice, without an explicit oral promise, may give rise to an ERISA plan. This is best demonstrated in *Scott v. Gulf Oil,* where the Ninth Circuit Court of Appeals found that an alleged past practice to pay severance benefits may have given rise to a plan subject to ERISA.[192] The inherent problem in *Scott v. Gulf Oil* is that of determining what level of practice establishes a plan. If the existence of a past practice allows the inference of an oral promise which meets the *Dillingham* standard, it is arguable that when any two employees have been given a benefit an ERISA plan exists. Even where the practice of paying benefits is inconsistent, an ERISA plan still may be found. Applying the *Dillingham* criteria a "plan" founded on past practice arises and becomes subject to ERISA at an unknowable point in time. This uncertainty is counterproductive to the goals of ERISA because it discourages the establishment of benefit programs by making such plans both onerous and risky. Thus, while it seems clear that a writing need not exist for a plan to arise under ERISA, courts should adopt a higher standard than *Dillingham.*

The inadequate *Dillingham* standard, therefore, necessitates establishment of a standard that takes into account the need to protect employees' expectations without subjecting the employer to hidden liabilities. Courts should incorporate an additional element into the *Dillingham* standard: justifiable reliance. When an employee has relied to his or her detriment on the employer's alleged promise and the *Dillingham* criteria have been met, courts should enforce the promise. Under this alternative, the employer who represents the existence of an employee benefit on which an employee justifiably relies to his or her detriment, would be estopped from asserting the lack of a written instrument

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[188] See *supra* note 76 and accompanying text for a discussion of remedies for fiduciaries' breaches under ERISA.

[189] I.R.C. § 4971 (1982). There is an intial tax of 5% for late payment of the amount owed to the plan. *Id.* If the employer fails to cure the deficiency within time periods set forth in § 4971, a 100% non-deductible tax is assessed against the employer. *Id.*

[190] *See, e.g.,* 2 PENSION PLAN GUIDE (CCH) ¶ 5542 (I.R.S. Form 5500, Annual Return of Employee Benefit Plan, 1985) (instruction form lists the daily penalty for failing to file as $25).

[191] *Dillingham,* 688 F.2d at 1373.

[192] 754 F.2d at 1503–04.

as a bar to enforcement.[193] Thus, an employee seeking to obtain alleged benefits would need to prove the existence of the plan by demonstrating the *Dillingham* criteria in combination with the employee's justifiable reliance. The employee would need to show the employer's representation as to the existence of a plan, the employee's justifiable reliance on that representation to his or her detriment, the benefit promised, the intended class of beneficiaries, the source of funds, and the benefit claims procedure. Thus, if a reasonable employee would not rely on the employer's statements or acts, the *Dillingham* criteria should not be enough to hold the employer liable for benefits.

In sum, although oral agreements clearly are enforceable under ERISA, serious problems may result from such enforcement. Although most courts have adopted the *Dillingham* criteria, this standard inadequately protects employees because it fails to state with certainty when liability attaches under ERISA. Given the serious problems of proof and the potential liabilities that might accrue to an employer or a fiduciary upon the finding of an oral agreement, courts should require a stricter standard to protect employers adequately and to encourage them to provide benefits to employees. Courts should modify the *Dillingham* standard to take into account the employee's reliance and the detriment he or she may have suffered. When these elements are present, an oral agreement to provide benefits under ERISA should be enforced.

III. Conclusion

In enacting ERISA, Congress sought to encourage the growth of benefit plans while protecting the right of employees to rely on promises of benefits made by their employers. Prior to the enactment of ERISA, employees had little hope of enforcing their rights to promised employee benefits. Because Congress may not have anticipated that employer promises might be unwritten, however, ERISA does not provide uniform standards to determine if and when an oral agreement would be subject to ERISA.

ERISA does not state that a plan must be in writing to be subject to the Act. Neither ERISA's definition nor its coverage sections require that a plan be written to be enforced under ERISA. The fiduciary provisions, however, contain a writing requirement. The legislative history treats the writing requirement as part of the discussion of fiduciary duties. Courts generally interpret the writing requirement as a fiduciary duty, and not as a bar to enforcement under the Act.

Courts should enforce oral agreements to provide employee benefits under ERISA. Although the language of the Act is ambiguous, the purpose of the Act is clear. By design, the Act protects employees' interests in employee benefit plans against infringement by employers seeking to avoid liabilities. To this extent, the *Dillingham* court was correct in enforcing oral agreements to provide benefits. The *Dillingham* court, however, did not adequately address the problems that arise from enforcing oral agreements, such as an employer's need to know with certainty when liability attaches under ERISA.

Enforcement of oral agreements presents numerous difficulties. These difficulties include problems of proof, the potential for collusion among employees, and potential liability for the company or the fiduciary. Thus, courts should strengthen the *Dillingham* standard to establish clearly when an employer may incur liability for oral agreements.

[193] J. Calamari & J. Perillo, The Law of Contracts 445 (2d ed. 1977).

Courts should enforce only those oral promises that meet both the *Dillingham* standard and upon which an employee justifiably relies to his or her detriment. This solution conforms with Congress's intent to protect an employee's expectation of receiving employer promised benefits while providing some protection to employers against hidden liabilities.

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