

William & Mary Law Review

Volume 17 (1975-1976)
Issue 2 Symposium: *The Employee Retirement
Income Security Act of 1974 - Labor Law
Considerations*

Article 5

December 1975

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THE DUTY TO BARGAIN UNDER ERISA

JOHN A. FILLION* AND ANNE MCLEOD TREBILCOCK**

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA)¹ profoundly affects the collective bargaining of employee benefit plans. The Act prescribes the minimum requirements an employee benefit plan must satisfy. Further, it defines certain bargaining choices, and provides for alternative means of compliance, variances, and extensions of time, all of which raise bargaining issues. Nonbenefit contract provisions will be affected by ERISA, as will doctrines of successorship and the law of information availability in collective bargaining. Finally, ERISA raises questions of the relationship of its termination provisions to contract terms agreed upon by the parties. Although the changes effected by ERISA are quite significant, the aspects of the bargaining process left unaltered by the Act are equally important. ERISA removes neither the traditional duty of labor and management to bargain over most aspects of employee benefits, nor the parties' obligation to abide by the legally enforceable contract terms to which they have agreed.

The relationship of certain provisions of ERISA to the rights and duties of labor and management outlined in the National Labor Relations Act² will be explored and discussed in this Article, and suggestions will be offered for resolution of problems inherent in that relationship. As litigation³ was needed to clarify the connection between contractual

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Authors—Appreciation is expressed to Patricia Dufey, Actuarial Consultant, UAW, Phillip G. Dunn, then a student at Northeastern University School of Law, and Leonard R. Page, Assistant General Counsel, UAW, for assistance in the preparation of this Article.

1. Pub. L. No. 93-406, 88 Stat. 829 [hereinafter cited as ERISA].

2. The Wagner Act, 49 Stat. 449 (1935), as amended by the Taft-Hartley Act, 61 Stat. 136 (1947), comprises the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970), as amended, 29 U.S.C.A. §§ 152, 158 (Supp. 1975) [hereinafter cited as NLRA].

3. See *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972); *Hutchings v. United States Indus., Inc.*, 428 F.2d 303 (5th Cir. 1970); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971). The relationship between arbitration and litigation under Title VII was resolved by the Supreme

grievance arbitration clauses and individual rights under Title VII of the Civil Rights Act of 1964,⁴ and the interplay of unfair labor practices and arbitration,⁵ judicial guidance ultimately will be required to elucidate the relationship of collective bargaining and resultant contractual rights to the statutory scheme of ERISA.

Although most of the questions for collective bargaining examined in this Article have not yet been answered, labor law practitioners already are encountering new problems resulting from the enactment of ERISA. For example, if benefit plans are rewritten to satisfy the requirements of the Act, the employer's proposed language may omit provisions agreed upon in prior contracts that have given employees rights exceeding ERISA minimum standards.⁶ To reap the benefits of ERISA, however, unions cannot be required to relinquish gains previously won in bargaining. The legislative history and the statutory and regulatory structure of ERISA demonstrate that the union need bargain over only those changes required to bring the plan into compliance with the law.

In the area of plan terminations, conflicts already have arisen between determinations of the Pension Benefit Guaranty Corporation, charged with administering the insurance provisions of ERISA, and collective bargaining contract provisions that relate to plan terminations. Divergences occur chiefly over the circumstances triggering plan termination, date of termination, the allocation of plan assets upon termination, and the relationship of termination to other issues subject to bargaining. Here, as in plan formulation, if the contract affords better protection to employees than that imposed by the Corporation, the government and

Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that prior arbitration of a claim under Title VII would not bar trial de novo of that claim in federal court. See generally Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.: Separate and Unequal*, 16 WM. & MARY L. REV. 439 (1975).

4. 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

5. For example, in *Local 55, UAW v. Silver Creek Precision Corp.*, 89 L.R.R.M. 2922 (W.D.N.Y. 1975), the union was permitted to resort to arbitration over an employer's failure to contribute to a pension plan at the same time that an unfair labor practice charge and a criminal complaint were pursued.

6. This problem has been increased by the announcement that the Internal Revenue Service will prepare model contract language for compliance with ERISA. The agency was offering the prototype language to employers faced with amending existing plans or establishing new plans. DAILY LAB. REP., Apr. 17, 1975, at A-1. In addition to the inappropriateness of the preparation of such collective bargaining language by the IRS, the action was taken without any recognition of the bargaining duties of employers whose workers are represented by labor unions.

judiciary should respect the parties' agreement under the National Labor Relations Act.

The purpose of ERISA, to protect plan participants' and beneficiaries' rights to earned benefits, and that of the National Labor Relations Act, to foster good faith collective bargaining and enforcement of contracts for the peaceful resolution of labor-management disputes, can be accommodated and achieved only by the recognition that ERISA lays down minimum standards for employee benefit plans. Employers and unions should remain free to negotiate greater protection for workers than that provided by statute.

I. THE IMPACT OF ERISA UPON COLLECTIVE BARGAINING

A. *The Scope of the Traditional Duty To Bargain*

The National Labor Relations Act imposes a duty upon employers and unions to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment."⁷ This duty encompasses bargaining over employee benefits. Most employee benefits, including pensions⁸ and insurance coverage,⁹ are mandatory subjects of bargaining,¹⁰ though an isolated few are permissive subjects only.¹¹ The employer,

7. NLRA §§ 8(a)(5), (b)(3), (d), 9(a), 29 U.S.C. §§ 158(a)(5), (b)(3), (d), 159(a) (1970).

8. Pensions were first established as mandatory subjects of bargaining in *Inland Steel Co.*, 77 N.L.R.B. 1, 21 L.R.R.M. 1310 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

9. Insurance benefits were designated mandatory subjects in *W.W. Cross & Co.*, 77 N.L.R.B. 1162, 22 L.R.R.M. 1131 (1948), *enforced*, 174 F.2d 875 (1st Cir. 1949), and in *General Motors Corp.*, 81 N.L.R.B. 779, 23 L.R.R.M. 1422 (1949), *enforced*, 179 F.2d 221 (2d Cir. 1950).

10. The designation of a bargaining subject as "mandatory" has legal ramifications beyond compelling inclusion of the subject in collective bargaining; the employer is forbidden to take unilateral action with regard to that subject and employees are not permitted to make individual agreements with the employer in the area. *See generally* THE DEVELOPING LABOR LAW 389-439 (C. Morris ed. 1971).

The distinction between mandatory and permissive bargaining subjects has been criticized for its inflexibility and lack of sound basis in the bargaining process. *See Note, Application of the Mandatory-Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation*, 15 WM. & MARY L. REV. 918 (1974).

11. By statute, Taft-Hartley type plans for child-care facilities and the establishment of educational scholarship funds are permissive subjects of bargaining. 29 U.S.C. § 186 (c)(7) (1970). *But see* Braeman, *Child Care: A Mandatory or Permissive Item of Bargaining*, 26 LAB. L.J. 250 (1975). The Supreme Court also has declared retiree benefits permissive subjects on the ground that retirees are not "employees" in the bargaining unit within the meaning of section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970).

thus, cannot make a unilateral change with regard to most aspects of employee benefit plans without first bargaining in good faith with the union to the point of impasse; to do otherwise constitutes a refusal to bargain and gives rise to an unfair labor practice.¹² A reciprocal duty is imposed upon the union, with identical results for a breach.¹³ Section 8(d) of the Act,¹⁴ however, specifies that bargaining over subjects raised during the term of a collective bargaining agreement is required only if the subjects were not discussed and made part of the agreement then in effect.¹⁵

A corollary to the duty to bargain is the obligation placed on the employer to furnish the employees' collective bargaining representative the information needed to bargain intelligently¹⁶ and to police a contract

Allied Chem. Workers, Local 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971), *aff'g* Pittsburgh Plate Glass Co., Chem. Div. v. NLRB, 427 F.2d 936 (6th Cir. 1970). For a critique of the appellate court decision, see Note, *Retirees in the Collective Bargaining Process: A Critical Review of Pittsburgh Plate Glass Co. v. NLRB*, 23 STAN. L. REV. 519 (1971). Although deferring to *Pittsburgh Plate Glass*, the NLRB usually has managed to link bargaining over retirees' benefits with issues directly affecting active employees, provided the union has so framed the case. See, e.g., Connecticut Light & Power Co., 220 N.L.R.B. No. 143, 90 L.R.R.M. 1307 (1975); Union Carbide Corp., 187 N.L.R.B. 113, 75 L.R.R.M. 1548 (1970), *reaff'd*, 197 N.L.R.B. 717, 80 L.R.R.M. 1429 (1972).

The other notable exception to employee benefits as mandatory subjects of bargaining is less settled. The Court of Appeals for the Second Circuit has held that selection of an insurance carrier for an employee benefit plan, when that selection is not integral to the plan's existence, is only a permissive subject, Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079 (2d Cir. 1973). Cf. NLRB v. Medical Manors, Inc., 497 F.2d 292 (9th Cir. 1974) (employer's unilateral transfer of two employees to another health plan a marginal violation of section 8(a)(1) of the NLRA). But see Bastian-Blessing, Div. of Golconda Corp. v. NLRB, 474 F.2d 49 (6th Cir. 1973) (employer's unilateral change to a self-insured plan a violation of section 8(a)(5)).

The National Labor Relations Board recently reaffirmed its position that a performance bond to insure payment of wages and fringe benefits is not a mandatory subject of bargaining. Lathing Contrs. Ass'n, Inc., 223 N.L.R.B. No. 8 (1976). The Board rejected the union's argument that the funding requirements of ERISA compelled the Board to change its position on the duty to bargain over such bonds.

12. NLRB v. Katz, 369 U.S. 736, 743 (1962). An employer's refusal to bargain in good faith is a violation of NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).

13. A union's refusal to bargain in good faith is a violation of NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970).

14. 29 U.S.C. § 158(d) (1970).

15. NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952), *enforcing* 94 N.L.R.B. 1214, 28 L.R.R.M. 1162 (1951).

16. See generally THE DEVELOPING LABOR LAW 309-22 (C. Morris ed. 1971); Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23 (1972); Fanning, *The Obligation to Furnish Information During the Contract Term*, 9 GA. L. REV. 375 (1975). It has been urged that "[W]hen a party presents a claim, the requirement of good faith bargaining should be held to entail that the claim be substan-

during its term.¹⁷ The duty to divulge applies with equal force in the area of employee benefit bargaining.¹⁸ Equally fundamental to labor-management relations is the obligation placed on both parties to abide by the agreements they have reached. Section 301 of the Labor Management Relations Act¹⁹ empowers federal courts to entertain suits for violations of contracts between unions and employers.

Notwithstanding a few permutations such as retiree pension benefits,²⁰ employee benefits have come within the traditional definition of mandatory subjects for collective bargaining and contract enforcement. ERISA alters the scope of bargaining over employee benefits and, thus, fundamentally affects the collective bargaining relationship. The vast statutory changes wrought by the Act have not, however, eroded the cornerstones of the duty to bargain and to abide by agreements.

B. *The Scope of Bargaining Under ERISA*

ERISA significantly affects the scope and substance of the bargaining in which labor and management must engage if they are to have a viable pension plan or other employee benefit plan.²¹ The Act designates subjects that must be included in any pension plan falling within its coverage, and specifies alternatives for compliance, variances, and extensions of time for compliance. Each of these provisions raises bargainable issues. The choices allowed by the law are all subject to the further constraint of the statute's limits on decreasing participants' benefits by amendment to any pension plan. Moreover, changes in employee benefit plans necessi-

tiated, even in the absence of . . . a specific need for the information." Bartosic & Hartley, *supra*, at 50.

17. See Bartosic & Hartley, *supra* note 16, at 26-29; Fanning, *supra* note 16, *passim*.

18. See NLRB v. Feed & Supply Center, Inc., 294 F.2d 650 (9th Cir. 1961); NLRB v. John S. Swift Co., 277 F.2d 641 (7th Cir. 1960). See also Bartosic & Hartley, *supra* note 16, at 30-33.

19. Section 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141-44, 171-87 (1970), as amended, 29 U.S.C.A. §§ 169, 183, 186 (Supp. 1975) [hereinafter cited as LMRA] provides in pertinent part:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

LMRA § 301(a), 29 U.S.C. § 185(a) (1970).

20. See note 11 *supra*.

21. Although parts 1, 4, and 5 of Title I of ERISA, relating to reporting and disclosure, fiduciary responsibility, and enforcement, apply to all employee benefit plans, the Act comes into full force with regard to pension plans. Accordingly, this Article focuses on pension plans, particularly single employer plans.

tated by ERISA may lead parties to seek other adjustments in their collective bargaining agreements.

1. *Establishment of Minimum Standards*

The most obvious impact of ERISA upon collective bargaining results from its designation of certain subjects for mandatory inclusion in pension plans. For every plan, the Act thus establishes a minimum scope of bargaining, which cannot be altered by the parties. A pension plan, for example, must include a qualified joint and survivor option,²² must meet minimum vesting provisions,²³ and must fulfill certain funding requirements.²⁴ The minimum requirements also may dictate changes in provisions of collective bargaining agreements or plan documents that do not overtly deal with participation, vesting, or funding, but that are affected by the statute.²⁵

The parties must adopt in their pension plans at least the minimum standards prescribed by ERISA. They are under no duty to consent to less, because such an agreement would in effect create an unenforceable, illegal contract provision.²⁶ Should the parties seek to go beyond ERISA's minimum requirements, of course, they could elect to bargain for more stringent standards in their own plan. A party to a pension plan agreement that exceeds ERISA's requirements, however, cannot be required to engage in midterm bargaining to degrade the plan to ERISA's minimum standards in any way.²⁷

Because ERISA establishes the subjects that must be included in a viable plan and requires those subjects to meet certain criteria, the im-

22. ERISA § 205, 29 U.S.C.A. § 1055 (1975).

23. *Id.* § 203(a), 29 U.S.C.A. § 1053(a).

24. *Id.* §§ 302-06, 29 U.S.C.A. §§ 1082-86.

25. Thus, a contract that provides for a worker's compensation award offset against pension benefits may be invalidated by the nonforfeiture provisions of ERISA. *Id.* § 203(a), 29 U.S.C.A. § 1053(a).

ERISA also will induce bargaining over subjects that would be troublesome to ignore under the Act. For example, the Department of Labor has indicated that a fiduciary's liability can be limited in certain circumstances, if the fiduciary's duties are specified and if the document establishing the plan authorizes such division of responsibilities. If the instrument does not provide for such allocation, any division of responsibilities by the fiduciaries themselves will be ineffective to relieve a named fiduciary from liability stemming from breach of the responsibilities allocated to other fiduciaries. 40 Fed. Reg. 47492 (1975). This advice is sure to lead to many revised plan documents.

26. It is axiomatic that portions of labor-management contracts that are illegal will not be enforced by the federal courts. Accordingly, one party cannot require the other to bargain over unlawful contract proposals. *See, e.g., Meat Cutters' Union*, 81 N.L.R.B. 1052, 23 L.R.R.M. 1464 (1949).

27. *See* notes 116-30 *infra* and accompanying text.

pact of the Act on collective bargaining is of obvious importance. Never before has legislation mandated the basic contents that a pension plan must encompass.²⁸ In this respect, ERISA's function resembles that of the contract bar doctrine applied under the National Labor Relations Act.²⁹ Just as a collective bargaining agreement must contain certain subjects and meet selected criteria to qualify as a bar to a representation election during its term,³⁰ a pension plan must include certain elements to earn the protections and benefits of ERISA.

ERISA additionally constrains bargaining between the parties by limiting plan amendments that would decrease the benefits of any participant, measured by various standards. Thus a plan amendment changing a vesting schedule cannot result in a smaller nonforfeitable benefit.³¹ Similarly, a participant's accrued benefit is protected from reduction through plan amendment.³² These benefits are further sheltered from reduction through a plan merger or transfer.³³ Even the limited retroactive amendments that may be allowed to reduce an accrued benefit are subject to governmental approval before becoming effective.³⁴ Any plan amendment that results in a decreased payable benefit to any participant constitutes a reportable event, which the plan administrator must report to the Pension Benefit Guaranty Corporation.³⁵ Such a reportable

28. Although prior to ERISA the Internal Revenue Code set forth requirements for a plan to qualify for a tax deduction, a pension plan did not need to qualify to exist. INT. REV. CODE OF 1954, §§ 401(a), 404(a).

29. The contract bar doctrine provides in essence that a contract meeting certain requirements, with a term of up to three years, will bar another representation election for its entire term. *General Cable Corp.*, 139 N.L.R.B. 1123, 51 L.R.R.M. 1247 (1962). This doctrine was created by the NLRB to stabilize established collective bargaining relationships. *New Idea, Div. Avco Mfg. Corp.*, 106 N.L.R.B. 1104, 32 L.R.R.M. 1618 (1953).

30. To constitute a bar to a midterm representation election, a collective bargaining agreement must meet certain criteria. The contract must be for a fixed duration, *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 N.L.R.B. 990, 42 L.R.R.M. 1477 (1958), must contain the written substantial terms and conditions of employment necessary to stabilize the bargaining relationship, *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160, 42 L.R.R.M. 1506 (1958); *Levi Strauss & Co.*, 218 N.L.R.B. No. 103, 89 L.R.R.M. 1402 (1975), and must have been signed before the petition for a certification election was filed, *Mt. Clemens Metal Prods. Co.*, 110 N.L.R.B. 931, 35 L.R.R.M. 1159 (1954).

31. ERISA § 203(c) (1) (A), 29 U.S.C.A. § 1053(c) (1) (A) (1975).

32. *Id.* § 204(g), 29 U.S.C.A. § 1054(g).

33. *Id.* § 208, 29 U.S.C.A. § 1058.

34. *Id.* § 302(c) (8), 29 U.S.C.A. § 1082(c) (8); *id.* § 203(a) (3) (C), 29 U.S.C.A. § 1053(a) (3) (C).

35. *Id.* §§ 4043(a), (b) (2), 29 U.S.C.A. §§ 1343(a), (b) (2). The Pension Benefit Guaranty Corporation is the body created by Title IV of ERISA to administer pension plan termination insurance. *Id.* § 4002, 29 U.S.C.A. § 1302. The Corporation may termi-

event could cause the Corporation to terminate the plan; therefore, the parties would be wise to avoid bargaining a plan amendment that would jeopardize payable benefits.

2. *Alternative Methods of Compliance, Variances, and Extensions*

Several provisions of ERISA provide for variances from standards, alternative methods of compliance, or optional extensions of time for compliance. The statute, however, is largely silent on the bargaining issues raised by these choices. This silence cannot be interpreted to condone the establishment of variant standards, methods of compliance, or time extensions by the unilateral action of the employer. Nor does ERISA relieve an employer from previously agreed upon contractual obligations that exceed the requirements of the Act. ERISA establishes minimum standards,³⁶ but does not forbid provisions that exceed the statutory minimums.

The choices made among ERISA's approved options have important ramifications to plan participants, whose protection depends on the vesting and funding provisions used. Accordingly, the determination of these alternatives cannot be relegated to unilateral decisions by either party, but should be subject to full and informed bargaining.

a. *Alternative Methods of Compliance*

ERISA offers alternatives for compliance with several of its provisions. Three minimum choices are presented for compliance with vesting requirements: full vesting of the accrued benefit after 10 years of service,³⁷ graded vesting, progressing from 25 percent vesting after 5 years of service to 100 percent vesting after 15 years of service,³⁸ or vesting in accordance with "the rule of 45."³⁹ Although a plan that incorporates

nate plans that fail to meet standards imposed by the Act. *Id.* § 4042, 29 U.S.C.A. § 1342.

36. The Department of Labor recognized this in formulating its minimum standards for compliance with the participation and vesting provisions, *id.* §§ 201-11, 29 U.S.C.A. §§ 1051-61. The implementing regulations issued by the Department provide: "The standards contained in [ERISA], and the related [Internal Revenue] Code provisions, are 'minimum' standards. In general, more liberal plan provisions (in terms of the benefit to be derived by the employee) are not prohibited." Department of Labor Reg. § 2530.200a-1(a), 40 Fed. Reg. 41661 (1975).

37. ERISA § 203(a)(2)(A), 29 U.S.C.A. § 1053(a)(2)(A) (1975).

38. *Id.* § 203(a)(2)(B), 29 U.S.C.A. § 1053(a)(2)(B).

39. *Id.* § 203(a)(2)(C), 29 U.S.C.A. § 1053(a)(2)(C). The basic "rule of 45" provides that an employee with at least 5 years of service, the sum of whose age and service is at least 45 years, has a 50 percent vested right to the accrued benefit. *Id.* § 203(a)(2)(C)(i), 29 U.S.C.A. § 1053(a)(2)(C)(i).

any of these three alternatives satisfies ERISA, costs to the plan and coverage of employees will be affected by the choice. Benefit accrual requirements for employee pension plans also may be met by using one of three methods: the "3 percent rule,"⁴⁰ the "133 and 1/3 rule,"⁴¹ or the "pro-rata rule,"⁴² each of which carries slightly different consequences for participants of the plan. Moreover, for certain types of plans, alternative minimum funding standards are available, which conceivably could bear upon the financial soundness of a plan.⁴³

b. Variances and Extensions of Time for Compliance

ERISA allows application for variances to several of its standards. The Secretary of Labor has discretion to grant a variance from the Act's reporting and disclosure requirements.⁴⁴ Upon the plan administrator's petition or the Secretary's own motion, an alternative method may be approved if it provides adequate disclosure to participants and beneficiaries, and if the standard compliance method would increase costs to the plan or impose unreasonable administrative burdens, thus making the standard method adverse to the interests of plan participants measured in the aggregate.⁴⁵ If a determination on a variance involves an individual plan, the Secretary must provide notice and an opportunity for interested persons to present their views.⁴⁶ If proposed for a group of plans, the variance is subject to the publication requirements of proposed regulations.⁴⁷ The procedure to obtain a variance thus contains some protection against unilateral action by one of the parties to a collective bargaining agreement containing a pension plan.

In jointly administered plans, both the union and the employer will know when the administrator seeks a variance. In the case of employer-administered plans, however, the statute does not require that any notice be given the union. The union should be considered an interested party, and its views on the variance application should be sought. Plan participants who are union members, and, in some cases, union officials, will be

40. *Id.* § 204(b)(1)(A), 29 U.S.C.A. § 1054(b)(1)(A).

41. *Id.* § 204(b)(1)(B), 29 U.S.C.A. § 1054(b)(1)(B).

42. *Id.* § 204(b)(1)(C), 29 U.S.C.A. § 1054(b)(1)(C).

43. *Id.* § 305, 29 U.S.C.A. § 1085.

44. *Id.* § 110(a), 29 U.S.C.A. § 1030(a).

45. *Id.* §§ 110(a)(1)-(3), 29 U.S.C.A. §§ 1030(a)(1)-(3).

46. *Id.* § 110(b), 29 U.S.C.A. § 1030(b).

47. The Department of Labor already has approved alternative methods of compliance, deferred compliance dates, and limited exemptions for certain types of plans. Department of Labor Reg. §§ 2520.104-3, -20 to -25, 40 Fed. Reg. 34534 (1975).

apprised of the variance, however, giving the union indirect notice. If the plan is part of a group for which the Secretary of Labor proposes a blanket variance, the *Federal Register* may be the only source of information about the proposed variance. This type of notice places special burdens of vigilance upon employers and labor organizations who wish to have a voice in determining the applicability of a variance for their pension plan.

The other variances available under ERISA unfortunately do not have even these inadequate requirements of notice to affected persons. Prior to September 2, 1976, a vesting variance may be sought by an administrator of a plan that existed on January 1, 1974.⁴⁸ The Secretary of Labor may approve the alternate vesting method for a period of not more than four years, with an additional extension of up to three years possible in certain circumstances.⁴⁹ Although there is no requirement under ERISA that the Secretary first consult the collective bargaining representatives of the plan participants, it will be difficult to assess fairly the factors in the decision without consulting the union. Moreover, the employer has a duty under the National Labor Relations Act to keep the union apprised of developments such as requests for variances and extensions of time that affect the collectively bargained plan.

The most significant variances permitted are those from the funding standards of ERISA. The Secretary of the Treasury has authority to grant variances from the basic funding provisions of section 302⁵⁰ if the employer proves inability to satisfy the minimum standard because of "substantial business hardship."⁵¹ Section 303(b) outlines the factors to

48. ERISA § 207, 29 U.S.C.A. § 1057 (1975).

49. Such a request for an extension must be filed at least a year before the expiration date of the original extension. *Id.* The variance may be granted only when: "(1) the application [of the standard] requirements would increase the costs of the plan to such an extent that there would result a substantial risk to the voluntary continuation of the plan or a substantial curtailment of benefit levels or the level of employees' compensation, (2) [it] would be adverse to the interests of plan participants in the aggregate, and (3) a waiver or extension of time granted under Section 303 or 304 of this Act [funding provisions] would be inadequate." *Id.*

50. *Id.* § 302, 29 U.S.C.A. § 1082.

51. *Id.* § 303(a), 29 U.S.C.A. § 1083(a). The statute provides for a variance "(a) If an employer, or in the case of a multi-employer plan, 10% or more of the number of employers contributing to or under the plan are unable to satisfy the minimum funding standard for a plan year without substantial business hardship and if application of the standard would be adverse to the interest of plan participants . . ." *Id.* The variance is not total, however, as the employer still must pay at least the amount necessary to amortize each waived funding deficiency for each prior plan year in equal installments until fully administered, over a period of 15 years. *Id.* § 302(b)(2)(C), 29 U.S.C.A. § 1082(b)(2)(C).

be taken into account to determine substantial business hardship: economic business loss, substantial unemployment or underemployment in the trade or business and industry, depressed or declining sales and profits in the industry, and a reasonable expectation that the plan can continue only if the waiver is granted.⁵²

In addition, the Secretary of the Treasury may authorize an extension of the period of years required to amortize any unfunded liability of a plan. Such an extension may be granted if it would provide adequate protection for participants and their beneficiaries; further, failure to grant the extension must be shown to lead to a substantial risk of voluntary discontinuation of the plan or substantial curtailment of pension benefit levels or employee compensation, and to be adverse to the interests of plan participants in the aggregate.⁵³ The Secretary of the Treasury also can permit extensions for retroactive changes in plans that may bring temporary hardship to some plan participants.⁵⁴

Finally, the Secretary of Labor has discretion to authorize certain retroactive plan amendments.⁵⁵ The criteria for approval are substantial business hardship⁵⁶ and the unavailability or inadequacy of waiver under section 303.⁵⁷ Aside from the obvious direct effect, such approval from the Secretary has ramifications for future benefits bargaining. Section

52. *Id.* § 303(b), 29 U.S.C.A. § 1083(b).

53. *Id.* § 304(a), 29 U.S.C.A. § 1084(a).

54. *Id.* § 1023, INT. REV. CODE OF 1954, § 401(b). Extensions will be allowed only if all provisions of the plan that are necessary to satisfy such requirements are in effect by the end of the extension period, and have been made effective for all purposes for the whole of the period. *Id.*

55. *Id.* § 302(c)(8), 29 U.S.C.A. § 1082(c)(8). A plan amendment that retroactively reduces the accrued benefits of any participant cannot take effect unless the plan administrator files a notice with the Secretary and the Secretary has approved the amendment within 90 days after the notice was filed, or has failed to disapprove it. *Id.* A plan amendment applying to a plan year can be retroactive only if it:

- (A) is adopted after the close of such plan year but no later than two and a half months after the close of the plan year (or, in the case of a multi-employer plan, no later than two years after the close of such plan year),
- (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and
- (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances

Id.

56. The criteria are those of *id.* § 303(b), 29 U.S.C.A. § 1083(b). See notes 51-52 *supra* & accompanying text.

57. ERISA § 302(c)(8), 29 U.S.C.A. § 1082(c)(8) (1975).

304(b) forbids any plan for which there has been obtained a waiver under section 303(a), an extension of time under section 304(a), or approval of a plan amendment under section 302(c)(8) within the preceding 12 months, from being amended to increase its liabilities. Included is any amendment involving "any increase in benefits, any change in the accrual of benefits, or any change in the rate with which benefits become nonforfeitable."⁵⁸ Exceptions are made if the plan amendment is determined to be reasonable and to involve only de minimis increases in plan liabilities,⁵⁹ or if certain other limited conditions are met.⁶⁰ Thus, the granting of a funding variance, a retroactive plan amendment, or an extension of time could constrict bargaining over improvement in pension benefits, because the parties are limited in the interim to benefit improvements that have a de minimis effect on plan liabilities.

c. ERISA Alternatives and the Duty To Bargain

The variances, extensions of time, and alternative compliance methods made available by ERISA give rise to two primary issues involving collective bargaining: the union's right to participate in the decisionmaking process opting for such alternatives, and the relationship of these statutory accommodations to the obligations created by an existing collective bargaining agreement. The impact a variance or extension may have on a pension plan is substantial; similarly, each of the three alternatives in vesting and benefit accrual may bring different results to a plan. These are decisions that vitally affect collectively bargained plans, and should be mandatory subjects of bargaining under traditional notions of the duty to bargain.⁶¹ An employer taking unilateral action involving a variance, extension of time, or choice of an alternative method for compliance would proceed at the risk of the union pursuing appropriate legal relief.⁶² Yet ERISA encourages such employer action by failing to provide adequate notice of requested changes to the collective bargaining representative, a gap that has not been filled by regulations. However, the pension plan incorporated in a collective bargaining agreement normally includes vesting and funding provisions that can be amended only by the

58. *Id.* § 304(b)(1), 29 U.S.C.A. § 1084(b)(1).

59. *Id.* § 304(b)(2)(A), 29 U.S.C.A. § 1084(b)(2)(A).

60. *Id.* §§ 304(b)(2)(B)-(C), 29 U.S.C.A. §§ 1084(b)(2)(B)-(C).

61. See notes 7-20 *supra* & accompanying text.

62. Usually, this will mean filing an unfair labor practice charge against the employer with the NLRB pursuant to NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970). It also could entail arbitration or a suit under section 301, depending upon the contract provisions to be enforced. LMRA § 301, 29 U.S.C. § 185 (1970). See note 19 *supra* & accompanying text.

parties' agreement. Thus an employer may receive a requested variance from the government and still face an unfair labor practice charge and proceedings to enforce the contract.

C. *The Duty To Provide Information Under ERISA*

ERISA does not change the basic duty of an employer to provide the union with the information necessary to enable intelligent bargaining and to police the collective bargaining agreement.⁶³ The new law, however, fundamentally affects that duty by creating additional avenues for the flow of information, thus indirectly providing the union with a fuller information base, and by introducing more complex issues into the bargaining arena, which will in turn necessitate even greater availability of information for the union to perform its duty properly.

1. *Reporting and Disclosure Requirements*

The reporting and disclosure aspects of ERISA⁶⁴ require the automatic revelation of information about employee benefit plans that previously was available to plan participants, beneficiaries, and the labor organizations representing them⁶⁵ only through great persistence. Title I of

63. See note 16 *supra*.

64. ERISA §§ 101-11, 29 U.S.C.A. §§ 1021-31 (1975). A full survey of the reporting and disclosure requirements of ERISA is beyond the scope of this Article, which is intended merely to elucidate the relationship of those requirements to the duty to bargain.

65. In the past, unions often have had to sue employers for their refusal to provide information about employee benefits. Employers have refused to give information about actuarial assumptions to be used in a pension plan, *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969); hours worked by individual employees, *NLRB v. F.W. Woolworth Co.*, 352 U.S. 938 (1956) (per curiam), *rev'g* 235 F.2d 319 (9th Cir.); employees' dates of hire, *Herron Yarn Mills, Inc.*, 165 N.L.R.B. 553, 65 L.R.R.M. 1584 (1967); employees' ages, *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, 28 L.R.R.M. 1608 (1951); data on retiree benefits, *Connecticut Light & Power Co.*, 220 N.L.R.B. No. 143, 90 L.R.R.M. 1307 (1975); *Union Carbide Corp.*, 187 N.L.R.B. 113, 75 L.R.R.M. 1548 (1970); data on benefits to which active employees are entitled, *Ohio Car & Truck Leasing, Inc.*, 169 N.L.R.B. 198, 67 L.R.R.M. 1150 (1968); costs of the plan to the employer, *Industrial Welding Co.*, 175 N.L.R.B. 477, 71 L.R.R.M. 1076 (1969); *International Ass'n of Machinists*, 172 N.L.R.B. 2086, 69 L.R.R.M. 1148 (1968); *Skyland Hosiery Mills, Inc.*, 108 N.L.R.B. 1600, 34 L.R.R.M. 1254 (1954); and information on employee payments and disposition of dividends in an insurance plan, *Phelps Dodge Copper Prods. Corp.*, 101 N.L.R.B. 360, 31 L.R.R.M. 1072 (1952). Companies have refused even to give the union a copy of the employee benefit plan itself, *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 70 L.R.R.M. 1433 (1969); *Rangaire Corp.*, 157 N.L.R.B. 682, 61 L.R.R.M. 1429 (1966). They also have denied unions information necessary to perform an audit on a plan that the union feared was inadequately funded,

ERISA, which applies to all employee benefit plans, requires the plan administrator to file with the Secretary of Labor a plan description,⁶⁶ an annual plan report,⁶⁷ a copy of the summary plan description

Michael Rossi Carpet Co., 208 N.L.R.B. 748, 85 L.R.R.M. 1347 (1974); Curtiss-Wright Corp., 193 N.L.R.B. 940, 78 L.R.R.M. 1598 (1971).

The Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997, repealed by ERISA § 111(a)(1), 29 U.S.C.A. § 1031(a)(1) (1975), made some information available to the public, but was criticized as being inadequate and ineffective.

66. ERISA §§ 102(b), 104(a)(1)(B), 29 U.S.C.A. §§ 1022(b), 1024(a)(1)(B) (1975).

The proposed form for reporting the plan description includes inquiries about identification of the plan, its administrator, and its agent for service of process; the plan structure (such as single-employer), type (such as defined benefit plan or profit sharing plan), and fiscal year; the type (such as hourly employees) and number of active and retired participants, allocated among those vested and those in pay status; the persons performing various functions for the plan; whether the plan is maintained pursuant to one or more collective bargaining agreements; the sources and methods of determining contributions to the plan, accumulation of assets, and disbursement of benefits; and the procedures for presenting claims for benefits and review of claim denials.

The proposed form also contains inquiries peculiarly directed to pension plans. Information sought includes the general eligibility requirements for participants under the plan; the general vesting provisions for employer contributions; the method used to determine length of service for purposes of participation, vesting, and benefit accrual; any break in service rules; and requirements for benefits eligibility. Several questions are posed for welfare plans only: the types of benefits provided, and the circumstances that would result in ineligibility, denial, loss, forfeiture, or suspension of such benefits. The form proposed by the Department of Labor appears at 40 Fed. Reg. 48096-102 (1975).

Department of Labor Reg. § 2520.104-3, 40 Fed. Reg. 34529 (1975), has extended the period for compliance with the plan description requirements to May 30, 1976. A short form document on basic plan information, however, was due August 31, 1975, or, for plans not at that time covered by ERISA, 120 days after it became so covered. *Id.*

67. ERISA §§ 103, 104(a)(1)(A), 29 U.S.C.A. §§ 1023, 1024(a)(1)(A) (1975). To collect annual reports, the Internal Revenue Service and the Department of Labor proposed form 5500. The form requires employers of all sizes (except those maintaining a Keogh plan that includes fewer than 100 participants, at least one of whom is an owner-employee) to provide the following information: identification of the plan, the sponsor or employer, and the fiduciaries; the number of plan participants, beneficiaries and fiduciaries; whether the plan was amended or subject to termination action within the reporting year; whether it was merged or consolidated with another plan, or its assets or liabilities transferred to another plan; an explanation of any changes made in the appointment of any trustee, qualified public accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian; any payments made to fiduciaries and to persons who rendered services to the plan; and statements of the plan's assets and liabilities, income and expenditures during the reporting year. Schedule A attached to form 5500 requires information about insurance coverage for plans and the costs thereof, and schedule B contains the actuary's report. This report is the crucial piece of information for those seeking to analyze a plan's financial status. It contains information on contributions received, contributions required for the plan to meet the minimum funding standard (or the alternate standard), the accumulated

that must be given to plan participants and beneficiaries,⁶⁸ and, within 60 days of their occurrence, any modifications or changes made in the plan.⁶⁹ The administrator, moreover, must give each participant and beneficiary a copy of the summary plan description, summaries of the latest annual report, and certain other information.⁷⁰ In addition, the participant or beneficiary may request much more detailed information about the plan in general or the individual's account, which the administrator must furnish within certain time limits.⁷¹

These requirements make more information about employee benefit plans publicly available than ever before. The reporting and disclosure requirements are supplemented by civil and criminal sanctions⁷² for failure to honor requests for information, thus providing remedies much more effective than any available to a labor union for breach of the duty to provide information under the National Labor Relations Act.⁷³

Although the statute carelessly fails to provide for the collective bargaining representative to obtain copies of all information that is reported and disclosed, as a practical matter the union should be able to obtain it.⁷⁴ Unions whose local officers serve on joint boards of administration

funding deficiency, the normal cost for the plan year, and the current market value of assets in the plan. It also lists the number of individuals covered by the plan, divided into active participants, terminated participants with vested rights, retirees, and beneficiaries of deceased participants. Finally, the actuary must state the actuarial assumptions used and the monthly contributions made by the employer and the employees; he also must set forth the funding standard account statement, showing charges and credits. Proposed form 5500, form 5500-K (which applies to Keogh plans with fewer than 100 participants), and instructions are reproduced at 40 Fed. Reg. 45135-56 (1975).

68. ERISA §§ 102(a), 104(a)(1)(C), 29 U.S.C.A. §§ 1022(a), 1024(a)(1)(C) (1975).

69. *Id.* § 104(a)(1)(D), 29 U.S.C.A. § 1024(a)(1)(D).

70. *Id.* § 101(a), 29 U.S.C.A. § 1021(a).

71. *Id.* §§ 104(b)(4), 105, 29 U.S.C.A. §§ 1024(b)(4), 1025.

72. An administrator who fails to comply with a proper request for information from a beneficiary or participant within 30 days after the request is made may be personally liable for up to \$100 a day from the date of the failure or refusal. Other relief lies within the discretion of the court. *Id.* § 502(c), 29 U.S.C.A. § 1132(c). Any individual convicted of willfully violating the reporting and disclosure provisions of the Act or any regulation or order promulgated thereunder may be fined not more than \$5,000 or imprisoned for not more than one year. A maximum fine of \$100,000 may be imposed on corporations. *Id.* § 501, 29 U.S.C.A. § 1131.

73. Failure to provide the union with the information necessary to bargain intelligently is an unfair labor practice under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970), the remedy for which is an order by the NLRB to the employer to furnish the information requested by the union, under section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1970).

74. The union could request the information through an officer or member who is also a plan participant. Alternatively, the union could examine the annual report re-

for employee benefit plans should be privy to whatever information is available to the employer's representatives on the board. When the joint board is the plan administrator under the definition included in ERISA,⁷⁵ the union representatives on the board should have access to the data on which the administrator's annual report is based.

2. *Termination Notification Requirements*

The termination provisions of ERISA also could free more detailed information about an employer's financial soundness. The employer bears the duty of immediately informing the plan administrator of the occurrence of a "reportable event" within the meaning of section 4043.⁷⁶ These events include the failure of a plan to meet the minimum funding standard of the Act,⁷⁷ its inability to pay benefits when due,⁷⁸ and its merger, consolidation, or transfer of assets.⁷⁹ Such information may provide the union with data it might not otherwise obtain until a much later time. Given this information, the union should be in a much better position to judge the overall fiscal strength of the company. In turn, more informed bargaining on both sides of the table should result.⁸⁰

3. *The Increased Need for Information*

Although ERISA should increase the data flow for pension bargaining, it also creates a greater need for information. Through its direct and in-

quired to be filed in the Department of Labor offices. See ERISA § 106(a), 29 U.S.C.A. § 1026(a) (1975). If necessary, the union could gain access to the information through a request to the government under the Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974), amending 5 U.S.C. § 552 (1970), with the avenue of litigation in federal district court available if the Department of Labor withheld the requested information. *Id.* § 552(a)(3).

75. ERISA § 3(16)(A), 29 U.S.C.A. § 1002(16)(A) (1975), defines the plan "administrator" as "(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor . . ." The term "plan sponsor" is defined to include "in the case of a plan established or maintained . . . jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." *Id.* § 3(16)(B)(iii), 29 U.S.C.A. § 1002(16)(B)(iii).

76. *Id.* § 4043, 29 U.S.C.A. § 1343.

77. *Id.* § 4043(b)(5), 29 U.S.C.A. § 1343(b)(5).

78. *Id.* § 4043(b)(6), 29 U.S.C.A. § 1343(b)(6).

79. *Id.* § 4043(b)(8), 29 U.S.C.A. § 1343(b)(8).

80. A union also can gain information about the financial dealings of a company if the plan administrator applies for a variance from the prohibited transaction provisions under *id.* § 408(a), 29 U.S.C.A. § 1108(a), which require notice of the application for the exemption to interested parties.

direct effects on the scope of bargaining, ERISA will push unions to seek more information than they may have requested in the past. Just as ERISA prescribes the contents of each plan, it requires that pension provisions be more skillfully drafted and carefully watched.

Moreover, since participants and beneficiaries receive direct notice under the Act,⁸¹ they may use their greater awareness to pressure union leadership in pension bargaining. The right of a participant or beneficiary to sue,⁸² coupled with the potential of attorney's fees and costs,⁸³ also will encourage the union to base its bargaining decisions and its contract administration on the most information available. Although a union rarely will face a successful suit for breach of the duty of fair representation,⁸⁴ union officials who are plan fiduciaries under ERISA face possible personal liability.⁸⁵ Informed decisionmaking and contract administration can best protect against political consequences as well as remote

81. See notes 66-72 *supra* & accompanying text.

82. ERISA § 502, 29 U.S.C.A. § 1132 (1975).

83. *Id.* § 502(g), 29 U.S.C.A. § 1132(g).

84. Attempts to demonstrate that a union has acted arbitrarily, discriminatorily, or in bad faith in the pension area have failed. The standard for showing a breach of the duty of fair representation, established in *Vaca v. Sipes*, 386 U.S. 171 (1967), and reaffirmed in *Hines v. Anchor Motor Freight, Inc.*, 44 U.S.L.W. 4299 (U.S. Mar. 3, 1976), has not been met in cases involving pensions. See, e.g., *Jackson v. Trans World Airlines, Inc.*, 457 F.2d 202 (2d Cir. 1972); *Nedd v. UMW*, 400 F.2d 103 (3d Cir. 1968).

Before the adoption of ERISA, injured plan participants and beneficiaries seeking to hold a union liable relied on one of four remedies: suit against the union for breach of its duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967); suit under section 301 of the LMRA, 29 U.S.C. § 185 (1970); suit under section 302(c)(5) of the LMRA, 29 U.S.C.A. § 186(c)(5) (Supp. 1975), amending 29 U.S.C. § 186(c)(5) (1970), for breach of the union trustees' fiduciary responsibility to the employees whom they represented; and suit under section 302(e) of the LMRA, 29 U.S.C. § 186(e) (1970), which gave the federal courts jurisdiction to order affirmative relief to remedy the failure of a plan to qualify under LMRA section 302(c)(5). See Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911 (1970).

85. The Department of Labor has attempted to clarify the definition of fiduciaries and their potential liability. Basically, anyone with "discretionary authority or discretionary responsibility in the administration" of a plan within the meaning of section 3(21)(A) of ERISA, 29 U.S.C.A. § 1002(21)(A) (1975) is a fiduciary. 40 Fed. Reg. 47491 (1975); cf. Department of Labor Reg. § 2510.3-21, 40 Fed. Reg. 50842 (1975) (definition of fiduciary includes investment advisors of plan). This definition encompasses many union officials sitting with management on joint boards of trustees to administer pension plans. Union officials, of course, also remain subject to the fiduciary responsibility constraints in the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 29 U.S.C. § 501 (1970). *Hood v. Journeymen Barbers*, 454 F.2d 1347 (7th Cir. 1972). See generally Gertner, *Trustee Liability Insurance Under ERISA*, 17 WM. & MARY L. REV. 233 (1975).

legal exposure. The following are but two examples of plan provisions requiring particular vigilance.

a. *Prohibited Transactions*

ERISA renders impermissible many types of financial transactions that were common for pension plans in the past.⁸⁶ Among these are certain types of loans from a pension fund⁸⁷ and limitations on plan purchases of securities or real property of the company or of any of its affiliates.⁸⁸ Union representatives who are involved in plan financial decisions must be privy to information to enable them to protect themselves as well as the plans. Thus they must have access to an employer's corporate structure in addition to information on all the plan's loans and investments.

b. *Joint and Survivor Options*

A union should be sure that a joint and survivor option newly added to a plan meets all pertinent legal requirements, including not only compliance with ERISA but with other laws as well. The option must provide equal coverage to husbands and wives to satisfy Title VII of the Civil Rights Act of 1964.⁸⁹ Similarly, the forfeiture provisions and the option

86. ERISA §§ 406-07, 29 U.S.C.A. §§ 1106-07 (1975) detail the transactions that are prohibited. These are more exhaustive than the restrictions that were placed on pension plans established under LMRA § 302(c)(5), 29 U.S.C.A. § 186(c)(5) (Supp. 1975), *amending* 29 U.S.C. § 186(c)(5) (1970), which required only that payments to a pension fund be held in trust, that the payments be made pursuant to a written agreement with the employer, that employees be equally represented, that an annual audit take place, and that payments designed for use as pensions and annuities be held exclusively for that purpose.

87. ERISA prohibits a fiduciary from involvement in a transaction if the fiduciary knows or should know that the transaction is a direct or indirect loan between the plan and any party in interest. ERISA § 406(a)(1)(B), 29 U.S.C.A. § 1106(a)(1)(B) (1975). This, of course, requires the fiduciary to know who qualifies as a party in interest in relationship to the fund, necessitating even greater information to be freely available to union representatives. Exemptions to the Act's prohibitions appear in *id.* § 408(b), 29 U.S.C.A. § 1108(b). *See also* 40 Fed. Reg. 34587 (1975) (clarifying the section 414(c)(4) exemption from prohibited transactions).

88. ERISA § 407, 29 U.S.C.A. § 1107 (1975).

89. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972). In addition to ensuring that benefits are awarded to survivors on the same basis regardless of sex, parties to a pension benefit plan may need to reexamine actuarial assumptions, which often contain sex-based differences that may violate the antidiscrimination provisions of Title VII. *Henderson v. Oregon*, 11 BNA F.E.P. Cas. 1218 (D. Ore. 1975); *Manhart v. Los Angeles*, 387 F. Supp. 980 (C.D. Cal. 1975), *appeal docketed*, No. 2729, 9th Cir., Aug. 7, 1975. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classification in Pension Programs*, 74 COLUM. L. REV. 1203 (1974); Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624 (1973). *But cf.*

to cancel the survivor's potential benefit could raise questions for unions representing workers living in states that employ community property concepts for married couples.⁹⁰

Although ERISA should moot previous labor-management conflict over the availability of basic information regarding benefit plans,⁹¹ it will raise new disputes over the employer's duty to provide additional information that the union feels is now necessary for employee benefit bargaining. A union cannot adequately protect its members' interests in a pension plan unless it has access to information far more detailed and on a wider range of subjects than employers are accustomed to providing. Having created more complexities for pension bargainers, ERISA should stimulate the National Labor Relations Board to impose a more stringent obligation upon employers to provide unions with whatever information they seek relevant to employee benefits.

D. *Employer Successorship Under ERISA*

The duty of a successor employer to bargain with an incumbent union is altered significantly by ERISA. The Act presents new variables that must be considered by an employer contemplating the purchase of a company that maintained a pension plan for its employees.

1. *The Burns Doctrine*

The relationship of a successor employer to an incumbent union has been the subject of several important Supreme Court decisions.⁹² The

Note, *Sex Discrimination in Employee Fringe Benefits*, 17 WM. & MARY L. REV. 109, 132-34 (1975).

90. In some community property states, such as California, a spouse's share in the employee spouse's vested retirement benefits is regarded as part of the body of marital property to be divided in a preretirement dissolution. See, e.g., *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. REV. 635 (1975). A pension plan covering members in such a state therefore would require provisions recognizing this principle while still complying with the joint and survivor and forfeiture provisions of ERISA.

91. See note 65 *supra*.

92. See *Howard Johnson Co. v. Detroit Local, Hotel Employees*, 94 S. Ct. 2236 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns Int'l. Sec. Serv., Inc.*, 406 U.S. 272 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

The doctrine of successorship also has been a fertile field of commentary. Several of the most notable recent articles are Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Vernon, *Successorship and Collective Bargaining Agreements in Business Com-*

Court ruled in *NLRB v. Burns International Security Services, Inc.*⁹³ that a successor employer has a duty to bargain with the collective bargaining representative of the predecessor employer's workers if a majority of those employees constitute the new employer's work force, and if the former bargaining unit is still appropriate after the change in ownership. A new employer "may be a successor for some purposes and not for others."⁹⁴ The successor employer is not bound by the terms of the collective bargaining agreement negotiated by the union and the predecessor employer, however.⁹⁵ In formulating this policy, one of the Court's main concerns was to ensure that a potential buyer of a failing business would not be discouraged by the prospect of assuming all of the predecessor's past obligations.⁹⁶

2. Successorship Provisions of ERISA

ERISA introduces new considerations into the relationship of a union and successor employer with respect to pension plan coverage. Section 210(b) of the Act states that for purposes of participation, vesting, benefit accrual, and funding, when an employer maintains a plan of a predecessor employer, "service for such predecessor shall be treated as service for the employer."⁹⁷ Even when the successor employer initiates a new

binations and Acquisitions, 24 VAND. L. REV. 903 (1971); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975); Note, *Recent Developments in Labor Law Successorship*, 26 SYRACUSE L. REV. 798 (1975).

93. 406 U.S. 272 (1972).

94. *Howard Johnson Co. v. Detroit Local, Hotel Employees*, 94 S. Ct. 2236, 2243 n.9 (1974).

The Court has distinguished between obligations under a contract and continuing obligations under the NLRA. Thus, if a new employer retains former employees, he may be obligated to remedy the predecessor employer's unfair labor practices to protect the rights of incumbent employees under the NLRA. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184-85 (1973). Similarly, the Court could distinguish between obligations under a former contract and obligations under ERISA to protect employees' rights to benefits.

95. 406 U.S. at 286-91.

96. "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work locations, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 287-88 (1972). This emphasis on the easy transfer of capital is a possible means of reconciling the somewhat inconsistent approaches of *NLRB v. Burns Int'l Sec. Serv., Inc.*, *supra*, and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). See Note, *Recent Developments in Labor Law Successorship*, 26 SYRACUSE L. REV. 798, 810-12 (1975).

97. ERISA § 210(b)(1), 29 U.S.C.A. § 1060(b)(1) (1975).

plan, service for the predecessor, to the extent provided by regulations to be issued by the Treasury Department, will be considered service for the successor employer.⁹⁸ These provisions promise to have both practical and legal effects on the doctrine of successorship.

As applied to pensions, the rule of *Burns*, that a successor employer cannot be bound by the terms of its predecessor's collective bargaining agreement,⁹⁹ will be undermined by section 210(b). Once an employer has decided to maintain the predecessor's pension plan, ERISA constricts considerably the ability to alter the contents and obligations of that plan. This is particularly evident when section 210 is coupled with the restrictions on forfeiture and reduction of benefits that appear throughout the Act.¹⁰⁰ ERISA will tend to bind a successor employer to the terms of the predecessor's collective bargaining agreement when the successor has decided to maintain the predecessor's plan.

Even more precedent shattering is the provision of section 210(b)(2), which purports to bind even those who have not explicitly assumed the pension plans of their predecessors.¹⁰¹ Within the scope of the forthcoming Treasury Department regulations, the new employer will be bound to recognize service with the predecessor employer even when a completely new plan is established. This protection is crucial to the effectuation of one purpose of ERISA, the prevention of abuses of employee benefit forfeiture. The Act, however, also obviously imposes constraints on the maneuverability of successor employers, which the courts have sought to protect in the past.¹⁰²

3. *Practical Implications*

As a practical matter, the blessings of section 210 may indeed be mixed for employees and labor organizations. In dealing with new employers who are willing to assume the predecessor's pension plan or establish a new plan, the effects of section 210 probably will be beneficial. Employees will keep their earned pension rights without risking diminution of benefits. Since the past service liability assumed by the successor employer will relate to previously negotiated benefit levels, those levels may act as a floor for future pension benefit bargaining with the successor.

98. *Id.* § 210(b)(2), 29 U.S.C.A. § 1060(b)(2).

99. See notes 92-96 *supra* & accompanying text.

100. See notes 55-58 *supra* & accompanying text.

101. ERISA § 210(b)(2), 29 U.S.C.A. § 1060(b)(2) (1975). See note 98 *supra* & accompanying text.

102. See notes 92-96 *supra* & accompanying text.

An uncooperative successor employer may use section 210 to justify a more intransigent position toward the incumbent union and the pension plan it had negotiated. In an attempt to avoid the past service liability incurred through assumption of the employees' credited service with the predecessor employer, the successor may refuse to agree to any pension plan. The successor employer might propose an employee profit sharing plan, free from ERISA requirements, in its place.

In combination with traditional successorship doctrine, section 210(b) could even encourage a successor employer to discharge all incumbent employees with vested pensions. In this way, the employer would attempt to avoid both the potential obligations under section 210(b) and the duty to bargain under *Burns*, which requires bargaining only in case of continuity in the work force.¹⁰³ Such discharges, however, would run afoul of the National Labor Relations Act¹⁰⁴ and the Age Discrimination in Employment Act.¹⁰⁵

Finally, the assumption of a large past service liability could discourage a prospective buyer who wishes to retain incumbent employees but who does not want to assume the pension debt. In some cases, section 210(b) could scare off the few potential purchasers that a financially troubled business has been able to attract.

4. *Termination Consequences*

The interplay of ERISA with traditional notions of successorship also arises in the termination insurance provisions of the Act. ERISA provides an express definition of successorship for purposes of plan termination insurance coverage: termination insurance covers a "successor plan," defined as "a continuation of a predecessor plan."¹⁰⁶ The government,

103. See notes 92-96 *supra* & accompanying text.

104. The successor employer would be discriminating against incumbent employees for exercise of their NLRA section 7 rights in having bargained for an effective pension plan with the old employer, in probable violation of NLRA §§ 8(a)(1), (3), 29 U.S.C. §§ 158(a)(1), (3) (1970).

105. If incumbent employees aged 40 to 65 with vested pension benefits were discharged in disproportionate numbers, they could pursue remedies under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970).

106. ERISA § 4021(a), 29 U.S.C.A. § 1321(a) (1975). The statute continues: "For this purpose, a successor plan is a plan which covers a group of employees which includes substantially the same employees as a previously established plan, and provides substantially the same benefits as that plan provided." *Id.* For purposes of liability to the Pension Benefit Guaranty Corporation, moreover, section 4062(d) covers a "successor corporation," a notion that there refers to corporate reorganization rather than to a bargaining relationship. *Id.* § 4062(d), 29 U.S.C.A. § 1362(d).

through the Pension Benefit Guaranty Corporation, is liable to fewer employees following plan termination than are successor employers. *Burns* requires that only a majority of the successor employer's work force be incumbent employees to result in potential past service liability for the successor, whereas section 4021(a) of ERISA insists upon "substantially the same employees" as those included in the predecessor plan. This enables the successor plan to obtain credit for the time the predecessor plan was in effect.¹⁰⁷ This discrepancy occurs without explanation, but may be due to the effect of this restrictive definition on the amount of guaranteed pension benefits. Under section 4022(b)(8) of the Act, the amount of the benefit that is covered by termination insurance relates directly to the length of time that a benefit has been in effect.¹⁰⁸ Thus, assuming equal benefit levels, a successor plan with a pension benefit that has been in effect for five years will be worth more in termination insurance benefits than a new plan with the same pension benefit level in effect for only one year. ERISA's failure to follow the *Burns* definition of "successor," then, was probably not accidental, but deliberately designed to limit the liability of the Pension Benefit Guaranty Corporation to plan participants whose pension plans have terminated.

E. In Summary

Despite its claims to the contrary,¹⁰⁹ ERISA clearly does not leave the federal labor law of collective bargaining intact. ERISA will alter at least three important aspects of the duty to bargain: the scope of bargaining, the availability of information for collective bargaining over employee benefits, and a successor employer's duty to bargain with an incumbent union. Moreover, ERISA already has generated debate over

107. *Id.* § 4022(b)(2), 29 U.S.C.A. § 1322(b)(2).

108. Benefits covered by the insurance protections of ERISA are guaranteed only to the extent of the greater of: "(A) 20 percent of the amount which, but for the fact that the plan or amendment has not been in effect for 60 months or more, would be guaranteed under this section, or (B) \$20 per month, multiplied by the number of years (but not more than 5) the plan or amendment, as the case may be, has been in effect." *Id.* § 4022(b)(8), 29 U.S.C.A. § 1322(b)(8).

109. *See id.* § 514(d), 29 U.S.C.A. § 1144(d): "Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law." ERISA § 111(a)(1), 29 U.S.C.A. § 103(a)(1) (1975), repealed the Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958), and ERISA § 507(b), 29 U.S.C.A. § 1147(b) (1975), authorized creation of new positions within the Department of Labor. By implication, therefore, ERISA disclaims any change in federal labor laws.

the scope of the parties' duty to negotiate midterm contract changes. Changes necessitated by ERISA may carry ramifications for other parts of the collective bargaining agreement, and labor and management may disagree over their responsibility to bargain over such indirectly related subjects.

In these various ways, ERISA fundamentally affects the collective bargaining relationship regarding employee benefits. The fact that such effects were unintentional is but a cogent reminder that this statute was enacted to cover both collectively bargained plans and those established in other ways. For those plans that were collectively bargained, the parties' fundamental duties to bargain in good faith and to abide by their agreements must not be forgotten.

II. PENSION PLAN AMENDMENTS RELATED TO ERISA: THE EXTENT OF THE DUTY TO BARGAIN

Many collective bargaining agreements are being opened midterm in order to make the pension plan changes mandated by ERISA. Midterm opening poses the question whether the scope of the duty to bargain extends only to changes required by the Act, or to other proposed collective bargaining agreement amendments as well.

This question arises primarily in two contexts. Employers will propose plan amendments in areas other than those requiring modification, or in other sections of the agreement, to seek relief from the higher cost of employee benefits¹¹⁰ incurred by ERISA compliance.¹¹¹ Alternatively, a union may see the negotiations over ERISA-mandated changes as an opportunity to increase their bargaining gains in employee benefits or other contract areas.

110. For example, a pension plan may have been operating with a 30-year amortization period, which exceeds ERISA requirements, but at a funding level below ERISA standards. The employer may attempt to trade the added costs of funding for relief in the amortization area, extending the period to 40 years, the maximum allowable under ERISA § 302(b)(2)(B)(i), 29 U.S.C.A. § 1082(b)(2)(B)(i) (1975). Alternatively, an employer may propose that additional funding costs be offset by reducing a cost-of-living allowance formula previously agreed upon.

111. Few plans will escape an increase in costs due to ERISA. Solicitor of Labor William J. Kilberg outlined three areas of cost impact: "the minimum standards for participation, vesting and funding; the fiduciary responsibility rules—including the prohibited transaction restrictions—and the cost of administration, including records and recordkeeping. . . . In [the Solicitor's] opinion it is the medium and small plans, which exceed the big plans in number but cover in the aggregate fewer employees, which have the most catching up to do." *DAILY LAB. REP.*, Apr. 4, 1975, at A-13.

Although the desire of the union to maximize gains and the employer's concern for recouping added costs are understandable, such proposed midterm changes do not fall within the scope of the duty to bargain. The legislative history of ERISA, as well as its statutory scheme, demonstrate that the parties are obliged to bargain only over those changes necessitated by the new law. Traditional labor law instructs that parties cannot be compelled to bargain midterm on subjects that were discussed in good faith bargaining during the most recent contract negotiations. Although labor and management, of course, can agree to discuss whatever they wish during the contract term, a refusal by one party to bargain over changes not mandated by ERISA cannot be an unfair labor practice under the National Labor Relations Act.

A. *The Duty To Bargain Midterm*

The duty to bargain over employee benefits under ERISA is governed by the National Labor Relations Act.¹¹² ERISA states that "[n]othing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."¹¹³ This broad declaration encompasses the National Labor Relations Act, which ERISA does not purport to amend or repeal.¹¹⁴ The definitional sections of ERISA, as well, heed traditional notions of collective bargaining.¹¹⁵

The language of the Act and its legislative history evince a congressional recognition that the subjects addressed by ERISA raise bargainable issues. Congress also considered the special problems caused for collectively bargained employee benefit plans in existence at the time of the enactment of ERISA. The guidance that the congressional reports provide to parties engaged in midterm bargaining over changes caused by ERISA thus is especially persuasive.

112. See notes 7-20 *supra* & accompanying text.

113. ERISA § 514(d), 29 U.S.C.A. § 1144(d) (1975). See note 109 *supra*.

114. A basic maxim of statutory construction also prescribes that there is a strong presumption against repeal by implication, and that new statutes will be construed to effectuate their operation consistent with previous legislation. 1A SUTHERLAND STATUTORY CONSTRUCTION § 23.10 at 230-31 (4th ed. C. Sands 1972).

115. See, e.g., ERISA § 3(4), 29 U.S.C.A. § 1002(4) (1975): "The term 'employee organization' means any labor union . . . which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships . . ."

1. *Legislative History*

The clearest statement of congressional intent on the scope of the duty to bargain midterm is contained in the report of the conference committee, which indicates that the committee envisioned a midterm bargaining duty only as to matters that must be changed for the benefit plan to comply with the new law.¹¹⁶ The report stated the understanding of the committee that it would not be an unfair labor practice to refuse to bargain "regarding matters *unrelated* to the modification required by [ERISA]," ¹¹⁷ implying that the parties are required to bargain over subjects "related to" such required modifications. Read broadly to encompass such subjects as reciprocal relief, in areas outside the benefit plan, from increased employee benefit costs compelled by ERISA, this interpretation arguably would defeat the purpose of ERISA to improve private pension plans.¹¹⁸ A narrower intent appears more likely in view of the conferees' earlier statement that the plan "may be reopened solely for the purpose of allowing the plan to meet the requirements of [ERISA], without having to be opened for any other purpose."¹¹⁹ The motivation behind the conference substitute, "that the opening of the

116. The report acknowledges that existing collectively bargained plans are subject to the participation and vesting requirements in plan years beginning after December 31, 1975, and further states:

However, in order that the opening up of the contract to comply with the requirements of this bill will not require negotiations with respect to other matters, the conference substitute provides that a collective bargaining contract, in existence on January 1, 1974, which does not expire until after the general effective date for existing plans, may be reopened *solely for the purpose of allowing the plan to meet the requirements of this bill, without having to be opened for any other purpose.* Where it is necessary, as a result of this bill, to modify an employee benefit plan, it is the conferees' understanding that *it is not an unfair labor practice under the National Labor Relations Act for a party to a collective bargaining agreement to refuse to bargain regarding matters unrelated to the modification required by this bill,* provided this refusal is not otherwise an unfair labor practice. In addition, the changes required to be made in a plan are not themselves to be treated as constituting the expiration of a contract for purposes of any other provisions of this bill which depend on the date of the expiration of a contract.

COMMITTEE OF CONFERENCE, JOINT EXPLANATORY STATEMENT, H.R. REP. NO. 1280, 93d Cong., 2d Sess. 266 (1974) (emphasis supplied) [hereinafter cited as CONFERENCE COMMITTEE STATEMENT].

117. *Id.* (emphasis supplied).

118. See ERISA § 2(c), 29 U.S.C.A. § 1001(c) (1975); note 126 *infra* & accompanying text.

119. CONFERENCE COMMITTEE STATEMENT, *supra* note 116, at 266.

contract to comply with the requirements of [ERISA] will not require negotiations with respect to other matters" ¹²⁰ sustains a more stringent interpretation of "related matters."

Congressional consideration of added costs from ERISA-mandated changes also suggest that the legislators did not envision required mid-term bargaining over cost relief.¹²¹ They weighed the fear that increased costs would discourage the growth and improvement of private pension plans, and modified the cost impact of ERISA at the legislative stage. Through compromise amendments,¹²² Congress already has given employers cost relief under ERISA.

The lawmakers also proceeded on the assumption that plan changes following ERISA would improve pension plans.¹²³ An amendment to improve vesting provisions could not be conditioned on downgrading in another area; Congress did not hinge plan improvements on relinquish-

120. *Id.*

121. The House dismissed this problem, noting, "any added cost attributable to the imposition of vesting and funding standards will inure directly to the benefit of the participants in each plan in the form of increased availability of benefits and added security." H.R. REP. NO. 533, 93d Cong., 2d Sess. in 1974 U.S. CODE CONG. & AD. NEWS 4643. Clearly, no reduction in the coverage of the plan or in the protection of other provisions was envisioned by Congress as a result of ERISA.

Arguably, there is historical support for the view that compensation for cost increases could be broached in negotiations for a new contract. The proposed three-year delay for vesting and funding requirements in collectively bargained plans were rationalized in part "to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire. . . ." S. REP. NO. 127, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4872.

122. For example, bill provisions calling for earlier eligibility standards were abandoned in view of the unwarranted additional cost. See S. REP. NO. 127, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4855; H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4689; S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4905. Similarly, immediate and full vesting was abandoned because of its substantial cost. *Id.* Rather, the alternative chosen involved cost that the Congress expected to be moderate. *Id.* at 4906; H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4691.

The Committee recognized that unduly large cost hikes could impede the growth and improvement of the private pension system. "For this reason, in the case of those requirements which add to the cost of financing retirement plans, the Committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits." S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4904. See also H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4671; S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4890.

123. See, e.g., S. REP. NO. 127, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4844, 4849, 4890.

ment of previously achieved gains.¹²⁴ In predicting the bill's revenue effect on the federal treasury, Congress made the explicit assumption that benefits would not be reduced.¹²⁵ This implies that portions of the plan that afford greater protection to benefits, such as a shorter amortization period, also would be insulated from an employer's insistence on downgrading in other areas.

2. *Statutory Scheme and Purpose of ERISA*

The congressional intent that the duty of midterm mandatory bargaining be limited in scope to those changes that must be made to satisfy ERISA is demonstrated also by the purpose and statutory scheme of the Act. The explicit policy of ERISA, "to protect . . . the interests of participants in private pension plans and their beneficiaries by *improving* the equitable character and the soundness of such plans,"¹²⁶ should bar employer efforts to force midterm bargaining over changes that would weaken employee benefit protection in exchange for compliance with the new law in other areas. Moreover, certain provisions of ERISA refer to a midterm bargaining obligation that is limited in scope. The vesting provisions of the Act specify that changes in a pension plan, incorporated within a collective bargaining agreement, made "solely to conform [the plan] to any requirement contained in this Act" will not be considered a termination of the collective bargaining agreement.¹²⁷ Collectively bargained plans receive similar treatment under section 306(c), which sets effective dates for meeting funding requirements.¹²⁸ These sections,

124. "If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans." S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4904.

125. Congress estimated revenue effects first assuming that additional employer pension contributions could be a substitute for cash wages, and then assuming the additional contributions would be an addition to cash wages. "The estimate under both cases assumes that benefits under pension plans are not decreased and that no benefit increases are foregone as a result of the bill." *Id.* at 4940. See also H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4738.

The isolated suggestion to the contrary, that federal revenue loss could be minimized "to the extent that plans adjust their benefit levels to absorb the increased employer costs resulting from the [minimum vesting] requirement" is so outweighed by other legislative history and the purpose clause of ERISA as to have negligible import. S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4922.

126. ERISA § 2(c), 29 U.S.C.A. § 1001(c) (1975) (emphasis supplied).

127. *Id.* § 211(c)(1), 29 U.S.C.A. § 1061(c)(1). See note 116 *supra* & accompanying text.

128. ERISA § 306(c)(1), 29 U.S.C.A. § 1086(c)(1) (1975), provides: "In the case of

therefore, contemplate that collective bargaining agreements will be opened during their terms only to change language that must be amended to comply with ERISA.

Section 205(h) of ERISA also suggests this conclusion, albeit by negative implication. In its treatment of the joint and survivor annuity, the section explicitly provides that a plan may take into account, in "any equitable fashion," the increased costs resulting from the provision of the joint and survivor election for annuity benefits.¹²⁹ Although this mention may merely recognize that a joint and survivor option often necessitates a cost assessment on an individual participant exercising the option, section 205(h) is nonetheless the only reference in ERISA to costs.¹³⁰ The failure of Congress to specify that cost considerations may be taken into account in other sections of ERISA suggests that the parties to a collective bargaining agreement cannot be compelled midterm to discuss costs of other ERISA-mandated changes.

The statutory scheme, purpose, and legislative history of ERISA indicate that the duty to bargain midterm is limited to subjects involving only those plan changes that must be made to comply with the Act. That intention should be respected by courts and by parties engaged in midterm collective bargaining over ERISA-mandated contract changes. A party cannot be required to bargain over modifications related to the added costs of complying with ERISA, or over other changes not required by ERISA.

B. Disagreement over the Scope of Midterm Bargaining

Despite strong indicia from the language of the Act and its legislative history that the duty to bargain is to extend only to changes required by ERISA, the parties may disagree on the scope of mandatory bargain-

a plan maintained on January 1, 1974, pursuant to one or more agreements which the Secretary [of Labor] finds to be collective bargaining agreements between employee representatives and one or more employers, this part shall apply only with respect to plan years beginning after the earlier of the date specified in subparagraph (A) or (B) of section 211(c)(1)." These dates are the last of the expiration dates for the collectively bargained agreements or December 31, 1980.

129. *Id.* § 205(h), 29 U.S.C.A. § 1055(h). The Secretary of the Treasury determines equitability under this section.

130. The statute precisely refers to adjustment for "any increased cost resulting from providing joint and survivor annuity benefits under an election made under subsection (c)." *Id.* The legislative history confirms that this section was treated differently from the rest of the bill with respect to cost considerations. See H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4733; S. REP. NO. 383, 93d Cong., 1st Sess., in 1974 U.S. CODE CONG. & AD. NEWS 5061.

ing. Several possible consequences confront parties engaged in a dispute over the changes ERISA entails, the most significant being unfair labor practice charges, arbitration suits under section 301 of the Labor Management Relations Act and section 502 of ERISA, and resort to strike.

1. *Unfair Labor Practice Charges*

An unfair labor practice charge related to ERISA-induced bargaining could arise in several ways. An employer might unilaterally change a pension plan without discussion with the union, clearly an unfair labor practice under *NLRB v. Katz*.¹³¹ Alternatively, the union could refuse to agree to any changes in the plan even though its inaction would result in a nonconforming plan; this too would constitute an unfair labor practice.¹³² Most predictable, however, is a disagreement over the scope of bargaining in which the parties must engage. Under ERISA and traditional principles of collective bargaining, of course, neither the refusal of a union to consider changes other than those mandated by ERISA nor the refusal to accept an employer's proposals unnecessary to satisfy ERISA should be an unfair labor practice.¹³³ Although both parties may agree to go beyond the narrow scope of ERISA-necessitated alterations, they may not be forced to do so.

The employer, however, can make unilateral changes after having engaged in good faith bargaining on a mandatory subject to the point of impasse.¹³⁴ ERISA does not change this basic precept but restricts its exercise in the pension field. The restrictions on benefit reduction along with the Act's funding requirements limit the range of unilateral employer action to offset increased costs in the plan.¹³⁵ And, of course, ERISA narrows the options a plan can use and still satisfy its requirements. These constraints, as a result, may force the employer to seek changes outside the pension plan to achieve monetary savings.

The specter of compulsory deferral to arbitration under the doctrine of *Collyer Insulated Wire*¹³⁶ will haunt a union seeking relief from the

131. 369 U.S. 736 (1962). See note 10 *supra* & accompanying text.

132. If the plan did not conform to ERISA and the employer thereby was disqualified from tax benefits for its contributions, the employer could argue that the basis of its agreement to maintain a pension plan had been voided by the union's action.

133. See notes 112-30 *supra* & accompanying text.

134. *NLRB v. Katz*, 369 U.S. 736, 741-43 (1962).

135. See notes 22-35 *supra* & accompanying text.

136. 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). *Collyer* announced a rule of deferral to arbitration when "the breadth of the arbitration provision [in the collective bargaining agreement] makes clear that the parties intended to make the grievance and arbitration

National Labor Relations Board for an employer's refusal to bargain over ERISA changes. If the collective bargaining agreement contains both a provision regarding the scope of reopening for midterm negotiations and a broad arbitration clause, the Board may decide that a decision on the scope of the midterm negotiation provision properly lies with an arbitrator. Again, the Board may opt for arbitration of the contract, rather than order the parties to bargain, if, in violation of ERISA, an employer fails to satisfy the funding obligations of a collective bargaining agreement. Of course, if this is a bona fide option, a party may choose arbitration rather than resorting to the Board.

2. *Adjudication in Federal Courts*

Disagreements over the scope of ERISA-related bargaining also may be resolved in federal courts, indirectly under section 502 of ERISA¹³⁷ and directly under section 301 of the Labor Management Relations Act.¹³⁸

If an employer's bargaining position or unilateral action denies a participant or beneficiary any rights under ERISA or under the terms of the applicable employee benefit plan, a suit could be maintained pursuant to section 502(a)(1)(B)¹³⁹ or section 502(a)(3) of ERISA.¹⁴⁰ A union thus indirectly could force the employer to comply with ERISA provisions by suing for damages or an injunction through a plan participant who is a union member. Alternatively, a union successfully could resist an employer's attempts to gain cost relief in some portions of the plan in exchange for added funding costs by suing through a participant, beneficiary, or fiduciary to enforce the more comprehensive terms of the plan.¹⁴¹

If the employer seeks to evade a pension plan incorporated in a collective bargaining agreement¹⁴² that extends greater protection than

machinery the exclusive forum for resolving contract disputes." The Board then will dismiss an unfair labor practice charge. *Id.* at 839, 77 L.R.R.M. at 1933.

137. ERISA § 502, 29 U.S.C.A. § 1132 (1975).

138. LMRA § 301, 29 U.S.C. § 185 (1970).

139. ERISA § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B) (1975), authorizes suits by plan participants or beneficiaries "to recover benefits due . . . , to enforce his rights under the terms of the plan, or to clarify his right to future benefits"

140. *Id.* § 502(a)(3), 29 U.S.C.A. § 1132(a)(3), authorizes suits by a participant, beneficiary, or fiduciary to enjoin violations of the Act or seek other appropriate equitable relief.

141. *Id.* § 502(a)(3)(B)(ii), 29 U.S.C.A. § 1132(a)(3)(B)(ii). See note 140 *supra*.

142. The collective bargaining agreement need not explicitly incorporate the benefit plan; section 301 covers suits based on the plan if it is referred to in the agreement or

ERISA, the union could pursue arbitration to enforce the employer's contractual obligations. This later might entail a suit under section 301 of the Labor Management Relations Act.¹⁴³ Governed by the federal common law of labor contracts,¹⁴⁴ a section 301 suit enables the union to assure retention of previously gained pension improvements that exceed the minimum protections set forth in ERISA. The union could maintain this action even though the employer's stance also constituted an unfair labor practice.¹⁴⁵

3. *Strikes and Injunctions*

Although as a practical matter a strike over a pension dispute alone is an unlikely phenomenon, it nevertheless could occur in conjunction with a dispute over the scope of required pension bargaining. The threat of injunction, however, limits the legal strike option under no-strike and broad compulsory arbitration clauses found in the majority of modern collective bargaining agreements. The federal courts have yet to interpret these clauses in the context of bargaining over ERISA, but analogies can be drawn from litigation of similar clauses in other areas of labor-management relations.

Whether a strike caused by a dispute over ERISA-related bargaining can be enjoined will depend upon the basis for the work stoppage and upon the scope of the parties' agreement to arbitrate disputes. An employer confronted by a strike may seek an injunction in federal courts under the authority of *Boys Markets, Inc. v. Retail Clerks Local 770*.¹⁴⁶

is intended to implement an agreement reached through bargaining. See Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 937-38 (1970).

143. LMRA § 301, 29 U.S.C. § 185 (1970).

144. Section 301 was intended to make collective bargaining contracts enforceable by either party. Federal law governs, though suit may be brought in federal or state court. See, e.g., *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Congress intended that ERISA be guided by federal common law developed under section 301. The conference committee report declared that actions brought under section 502 of ERISA in federal or state court to enforce benefit rights or to recover benefits outside of Title I of ERISA would be governed by federal, not state, law and "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." CONFERENCE COMMITTEE STATEMENT, *supra* note 116, at 327.

145. A section 301 suit can be maintained against the employer for breach of the collective bargaining agreement even though the employer's alleged conduct is concededly an unfair labor practice. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

146. 398 U.S. 235 (1970).

For the employer to prevail, the collective bargaining agreement must contain a broad compulsory arbitration clause and the dispute must be "arguably arbitrable."¹⁴⁷ If, however, the dispute concerns proposed alterations to conform the plan to ERISA requirements, the union probably could successfully resist the injunction and any subsequent suit for damages.¹⁴⁸ An alteration of the contract presents an issue for interest arbitration, not for the grievance arbitration contemplated by *Boys Markets*, because no interpretation of existing contract language would be at issue.¹⁴⁹

147. The rationale of *Boys Markets* permits a strike to be enjoined if the collective bargaining agreement contains a no-strike clause, if the dispute over which the strike occurs is within the scope of the arbitration clause, and if the employer can prove he will be injured irreparably if an injunction does not issue. A collective bargaining agreement need not contain an express no-strike clause for a *Boys Markets* injunction to issue; a court will imply an obligation not to strike from a clause in the contract calling for grievance arbitration, and provide injunctive relief if the clause is reasonably susceptible of an interpretation that covers the asserted dispute. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974).

This rationale, that a compulsory arbitration clause within a collective bargaining agreement that could be enforced against an employer in a section 301 suit also should be enforceable against a union by enjoining its strike, is based on the presumption in favor of arbitrability of labor disputes first expressed in the "Steelworkers Trilogy": *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navig. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The Court of Appeals for the Seventh Circuit, however, ruled in *Teledyne Wis. Motor v. UAW Local 283*, 91 L.R.R.M. 2313 (7th Cir. 1976), that a *Boys Market* injunction will not issue where the court faces neither a mandatory arbitration clause, as in *Inland Steel Co. v. UMW Local 1545*, 505 F.2d 293 (7th Cir. 1974), nor an express "no strike" clause, as in *Avco Corp. v. UAW Local 787*, 459 F.2d 968 (3d Cir. 1972). Where no express "no strike" clause exists, the *quid pro quo* to infer a mandatory arbitration clause is lacking. *Teledyne Wis. Motor v. UAW Local 283*, *supra*, at 2316. But where an express "no strike" clause is present, the court may decide that a dispute is "arguably arbitrable." *See, e.g., Monongahela Power Co. v. IBEW Local 2332*, 484 F.2d 1209 (4th Cir. 1973); *cf. NAPA Pittsburgh, Inc. v. Automotive Chauffeurs Local 926*, 502 F.2d 321 (3d Cir.), *cert. denied*, 419 U.S. 1049 (1974). *But see Parade Pubs., Inc. v. Philadelphia Mailers Local 14*, 459 F.2d 369 (3d Cir. 1972); *Amstar Corp. v. Meat Cutters*, 468 F.2d 1372 (5th Cir. 1972) (refusing to enjoin strikes under *Boys Markets* when the legality of the strike itself is the issue sought to be arbitrated).

148. Suits for damages can be maintained under LMRA § 301, 29 U.S.C. § 185 (1970), due to alleged losses from a strike during the term of a collective bargaining agreement containing a no-strike pledge. *See, e.g., Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

149. In *Boys Markets* the Court emphasized: "We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure." 398 U.S. at 253 (emphasis supplied).

The union could rely also on the rationale presented in *NLRB v. Lion Oil Co.*, 352

Regardless of the availability of an injunction, employees who strike over an employer's refusal to make ERISA-mandated changes or to retain plan provisions exceeding the protections of ERISA should be entitled to reinstatement. If the employer has refused to bargain in good faith, their strike would be against a substantial unfair labor practice, and thus their jobs should be protected.¹⁵⁰ Moreover, striking employees who also are plan participants would be sheltered by section 510 of ERISA, which prohibits reprisals against any plan participant or beneficiary who exercises any right under the statute or who acts to attain such a right.¹⁵¹

The various remedies available to parties engaged in a conflict over ERISA-related bargaining are those of more traditional areas of labor law. The relationship between ERISA and procedures for resolution of conflicts over a labor agreement, though not yet clarified, will be developed within the framework of the National Labor Relations Act.

III. TERMINATION OF PENSION PLANS:

ACCOMMODATING ERISA WITH COLLECTIVE BARGAINING AGREEMENTS

Labor and management traditionally have been obligated to bargain over the decision to terminate a pension plan, and have been bound by the terms relating to pension plan terminations of their collective bargaining agreements. Although ERISA does not change these obligations expressly, the pension plan termination portions of the Act inject a volatile new element into the labor-management relationship.

U.S. 282 (1957), in which the Court stated: "It would be anomalous for Congress to recognize such a duty [to bargain over modifications when the contract contemplates bargaining] and at the same time deprive the union of the strike threat which, together with 'the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements.'" *Id.* at 291 (footnote omitted), *quoting* SUBCOMMITTEE ON LABOR & LABOR-MANAGEMENT RELATIONS, 82d CONG., 1ST SESS., REPORT ON FACTORS IN SUCCESSFUL COLLECTIVE BARGAINING UNDER S. RES. 71, at 7 (Comm. Print 1951). Because Congress has compelled the reopening of contracts at midterm to comply with ERISA, arguably it cannot be implied that it left the union weaponless in those negotiations.

150. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), held that employees engaged in a strike against an employer's unfair labor practice will keep their status as employees, and stated: "In the absence of some contractual or statutory provision to the contrary, petitioners' unfair labor practices provide adequate ground for the orderly strike that occurred here. Under those circumstances, the striking employees do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made." *Id.* at 278 (footnote omitted). The strike at issue in *Mastro*, the Court emphasized, however, "was not to terminate or modify the contract." *Id.* at 286 (footnote omitted).

151. ERISA § 510, 29 U.S.C.A. § 1140 (1975).

Case law prior to ERISA prohibited an employer from terminating an employee benefit plan, whether during negotiations or the term of the contract, without first bargaining to impasse with the union.¹⁵² This rule prevailed even when the pension plan was not formally incorporated into the collective bargaining agreement but existed only as an established practice.¹⁵³ The terms of the collective bargaining agreement governed the manner of plan termination, including distribution of assets upon liquidation. The federal government imposed only meager restrictions on termination that were poorly enforced.¹⁵⁴

Pension plan terminations often occurred in conjunction with the relocation or cessation of an employer's operations.¹⁵⁵ Because such a drastic change in business conduct frequently was occasioned by the severe financial difficulties of the company, the effect on employee benefits was often catastrophic. Indeed, reports of pension rights wiped out

152. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Borden, Inc.*, 196 N.L.R.B. 1170, 1174-75, 80 L.R.R.M. 1240, 1243 (1972).

153. *See Reapp Typographical Service, Inc.*, 204 N.L.R.B. 792, 83 L.R.R.M. 1604 (1973) (termination of insurance policies).

154. Compliance with two requirements regarding plan termination was necessary to avoid retroactive disqualification of the pension plan from the favorable tax treatment of section 401, INT. REV. CODE OF 1954. The plan termination had to be motivated by business necessity and the assets of the plan, upon termination, had to be allocated in a nondiscriminatory manner. *See Comment, The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 607-08 (1975).

155. An employer may not be forced to bargain over the decision to sell its operation, such decision being "at the very core of entrepreneurial control," *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B. 951, 952, 77 L.R.R.M. 1537, 1539 (1971), *enforced sub nom. UAW v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972). *See Kingwood Mining Co.*, 210 N.L.R.B. 844, 86 L.R.R.M. 1203 (1974). An employer must bargain, however, over the impact of that decision upon its workers, before the decision is made. *See, e.g., Arnold Graphic Indus., Inc.*, 206 N.L.R.B. 327, 329, 84 L.R.R.M. 1343, 1346 (1973). A failure to bargain over the impact of a plant closing can result in a back pay award. *See, e.g., Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254 (8th Cir. 1970); *Electronic Prods. Int'l Corp.*, 208 N.L.R.B. 350, 85 L.R.R.M. 1268 (1974); *Royal Norton Mfg. Co.*, 189 N.L.R.B. 489, 77 L.R.R.M. 1022 (1971); *Ozark Trailers, Inc.*, 161 N.L.R.B. 990, 63 L.R.R.M. 1045 (1966).

An employer is required to bargain over the decision to relocate an operation, as well as over its effects on employees. *Royal Typewriter Co.*, 209 N.L.R.B. 1006, 85 L.R.R.M. 1501 (1974); *American Needle & Novelty Co.*, 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973). *See also Rovins & Rosen, Labor Law Obligations of Parties to the Sale of a Business*, 25 LABOR L.J. 231 (1974); Rubinstein, *Plant Relocation and Its Effects on Labor-Management Relations*, 18 LABOR L.J. 544 (1967); Schwarz, *Plant Relocation or Partial Termination—The Duty To Decision-Bargain*, 39 FORDHAM L. REV. 81 (1970); Swift, *Plant Relocation: Catching Up With the Runaway Shop*, 14 B.C. IND. & COM. L. REV. 1135 (1973); 25 WASH. & LEE L. REV. 96 (1968).

after years of productive work acted as an impetus to the lobbying that resulted in ERISA.¹⁵⁶

In plan terminations prior to ERISA, strong contract language and

156. Characteristically, a failing company would fall considerably behind in contributions to the pension fund, thereby jeopardizing benefits. If the company were on an insecure financial footing, this deficit often was not recovered by the time the company declared bankruptcy. Since the Supreme Court, in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), held that an employer's contributions to a union welfare fund did not constitute "wages" within the meaning of Bankruptcy Act § 64a(2), 11 U.S.C. § 104a(2) (1970), and thus were not entitled to a second priority in the bankruptcy distribution, benefits often were lost altogether when the employer declared bankruptcy. The Court also denied section 64a(2) priority to employer contributions to a union annuity plan in *Joint Indus. Bd. of the Elec. Indus. v. United States*, 391 U.S. 224 (1968). Under the plan, the funds were payable to an employee only upon his departure from the industry; for this reason, the court held that the fundamental purpose of section 64a(2), to secure to workers money directly due them in back wages, would not be satisfied by according a priority to a claim for overdue contributions to the plan. The Proposed Bankruptcy Act section 4-405(a)(4) would overrule *Embassy Restaurant* and *Joint Industry Board* by allowing, within certain limits, a fourth priority in the bankruptcy distribution to claims for contributions to employee pension and similar benefit plans. See Proposed Bankruptcy Act § 4-405(a)(4), in II REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. (1971).

Under ERISA, a lien, equal in status to a federal tax lien, arises in favor of the Pension Benefit Guaranty Corporation for any liability to the corporation occasioned by the employer's bankruptcy. ERISA § 4068(c), 29 U.S.C.A. § 1368(c) (1975). Beyond that debt to the Corporation, bankruptcy courts probably will limit the enforceability of liability arising from the collective bargaining agreement. The Court of Appeals for the Second Circuit has held that a bankruptcy court may grant a petition in a Chapter XI proceeding to reject a collective bargaining agreement as an onerous executory contract under section 313(1) of the Bankruptcy Act, 11 U.S.C. § 713(1) (1970). The court warned, however, that this judgment could not be made without seriously taking into account the loss of employee rights and benefits under the agreement. The Second Circuit remanded the case to the district court to make a determination on the petition based on a consideration of such losses and procedures for termination of collective bargaining agreements under section 8(d) of the NLRA, 29 U.S.C. § 158(d) (1970). *Iron Workers, Local 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698 (2d Cir. 1975), *rev'g & remanding* 381 F. Supp. 336 (S.D.N.Y. 1974). See generally THE DEVELOPING LABOR LAW 816-18 (C. Morris ed. 1971).

A conflict over pension rights jurisdiction between the bankruptcy courts and federal district courts seems inevitable. Bankruptcy courts claim broad jurisdiction and powers under section 2 of the Bankruptcy Act, 11 U.S.C. § 11 (1970). Yet section 4042(f) of ERISA provides that upon the filing of an application by the Pension Benefit Guaranty Corporation for appointment to a trustee or the issuance of a decree to terminate a plan, that court has exclusive jurisdiction over the plan and its property. ERISA § 4042(f), 29 U.S.C.A. § 1342(f) (1975). To the extent consistent with the purposes of this section, the court is given the powers of a bankruptcy court under chapter 10 of the Bankruptcy Act. Pending an adjudication on plan termination under ERISA section 4042(c), "the court shall stay . . . any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property. . . ." ERISA § 4042(f), 29 U.S.C.A. § 1342(f) (1975). In addition,

the bargaining power of a union often formed the only effective shield between an older worker and total disaster. Although the harsh realities of a business shutdown or a relocated shop have meant severe hardship to the workers left jobless, unions have been able to negotiate and enforce contractual obligations that netted benefits beyond those initially offered by employers.¹⁵⁷ The termination provisions of ERISA have fortified most unions' bargaining positions in plan terminations. By assuring certain pension rights, however, ERISA also limits a union's

the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan. *Id.*

157. In the past, for example, a contractual promise by the employer to provide pensions or to fund a plan on an "actuarially sound" basis has resulted in a funding obligation extending beyond the termination of the plan. See, e.g., *International Ass'n of Machinists, Lodge 1194 v. Sargent Indus.*, 522 F.2d 280 (6th Cir. 1975), *aff'g in part & rev'g in part International Ass'n of Machinists, Lodge 1194 v. Garwood Indus., Inc.*, 368 F. Supp. 357 (N.D. Ohio 1973); *Briggs v. Michigan Tool Co.*, 369 F. Supp. 920 (E.D. Mich. 1974). Cf. *Clark v. Kraftco Corp.*, 510 F.2d 500 (2d Cir. 1975). The obligations under a collective bargaining agreement may be held to run for its entire term, despite a midterm cessation of operations. See *UAW v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), *enforcing* 61 Lab. Arb. 320 (Seitz, 1973), *cert. denied*, 95 S. Ct. 1588 (1975). Cf. *Metal Polishers, Local 44 v. Viking Equip. Co.*, 278 F.2d 142 (3d Cir. 1960) (*per curiam*) (employer's move did not terminate the collective bargaining contract). But see *Knoll v. Phoenix Steel Corp.*, 465 F.2d 1128 (3d Cir. 1972), *aff'g* 325 F. Supp. 666 (E.D. Pa. 1971), *cert. denied*, 409 U.S. 1126 (1973); *Oddie v. Ross Gear & Tool Co.*, 305 F.2d 143 (6th Cir.), *cert. denied*, 371 U.S. 941 (1962) (seniority rights not transferred upon plant relocation); *Cona v. Jim Walter Corp.*, 83 L.R.R.M. 2541 (E.D. Mich. 1973) (group insurance coverage not extended beyond termination of collective bargaining agreement); *Baake v. General Am. Transp. Corp.*, 351 F. Supp. 962 (N.D. Ill. 1972) (employer's obligation limited to amounts paid to pension fund).

The duty to provide health and life insurance may survive the expiration of the labor agreement, *Operating Eng'rs Local 9 v. Siegrist Constr. Co.*, 458 F.2d 1313 (10th Cir. 1972); *American Standard, Inc. v. UAW Local 667*, 57 Lab. Arb. 698 (Warns, 1971); cf. *Upholsterers Int'l Union v. American Pad & Textile Co.*, 372 F.2d 427 (6th Cir. 1967) (retired employee covered despite expiration of contract with employer). See also *Bressette v. International Talc Co.*, 91 L.R.R.M. 2077, 2080 (2d Cir. 1975). A plant shutdown and expiration of the collective bargaining agreement do not relieve the employer from arbitrating employees rights to severance pay. *Bakery & Confectionery Workers, Local 358 v. Nolde Bros., Inc.*, 78 CCH LAB. CAS. ¶ 11,221 (4th Cir. 1975). The failure to make promised contributions to an employee benefit plan can constitute a violation of section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970), *American Needle & Novelty Co.*, 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973); *Latin Quarter Cafe, Inc.*, 182 N.L.R.B. 997, 76 L.R.R.M. 1552 (1970), as well as section 8(d) of the Act, 29 U.S.C. § 158(d), as a failure to abide by contract terms.

Termination must follow the language of the collective bargaining agreement even though the bargaining representative has changed. *United Brick & Clay Workers v. UMW District 50*, 439 F.2d 311 (8th Cir. 1971), *aff'g* 315 F. Supp. 224 (E.D. Mo. 1970) (loss of majority status by a union in favor of another did not terminate a pension agreement).

flexibility in negotiating a plant closing agreement.¹⁵⁸ Because a "reportable event could trigger pension termination by the Pension Benefit Guaranty Corporation,"¹⁵⁹ an employer's obligation to bargain over the decision to terminate a pension plan should extend to a duty to bargain over the "reportable event."

Now that the requirements of ERISA for plan termination and insurance coverage apply, employers can be expected to argue that the new statute renders bargaining obligations and contract and plan language concerning pension plan terminations ineffective and superfluous. Such a position is not sustainable. Moreover, insofar as pension plan language is not inconsistent with ERISA, it should remain legally enforceable as part

158. In a plant shutdown or relocation, the union may attempt to bargain for compensation not provided by the collective bargaining agreement. Additional severance pay is a common form of attempted consolation given to a jobless worker. If a company maintains other facilities, the union may seek concessions to enable workers to transfer with application of past seniority at the new plant, or provision for a family moving allowance. The union, as an alternative, may be able to negotiate employee health insurance for an additional six months beyond the term of the contract. The compensation a union may be able to win in negotiations with a relocated employer can take many forms, depending upon the parties' past bargaining relationship and their present situations.

The union often has faced competing interests of retirees and active workers in plant relocations and shutdowns. Given a fund that is too small for all to share equally, the union must give certain groups of workers priority over others in the negotiations surrounding relocation or termination; as long as the union does not breach its duty of fair representation, however, all those affected by the employer's action need not be treated equally. For example, in *Smith v. DCA Food Indus., Inc.*, 269 F. Supp. 863, 867 n.5 (D. Md. 1967), a union and an employer agreed to distribute pension plan assets to provide for employees over age 60 with 15 years minimum service, which resulted in nothing at all for the other employees. This arrangement was sustained. See also *Bosi v. USM Corp.*, 90 L.R.R.M. 2867 (D.N.J. 1975).

Afforded a "wide range of reasonableness," union action that is not arbitrary, discriminatory or in bad faith will be insulated against a claim for breach of the duty of fair representations. *Hines v. Anchor Motor Freight, Inc.*, 44 U.S.L.W. 4299 (U.S. Mar. 3, 1976). See also *Vaca v. Sipes*, 386 U.S. 171 (1967).

The standards set out in ERISA for pension plans to qualify for termination insurance and tax benefits will limit the amount of discrimination permissible in a pension plan. The stipulation of minimums for much of a plan's substance will help prevent possible abuses by bargainers. Although the complete favoritism for older employees and retirees permitted by *Smith* and *Bosi* is a relic of the past, the sections of ERISA regarding benefit forfeitability and priorities in assets allocation will tip the balance in favor of retirees and those with vested pension rights in a plant relocation against younger active employees who might have gained reemployment opportunities or additional severance pay.

159. This would include, for example, a long term layoff of 20 percent or more of an employer's work force who are also pension plan participants. See note 167 *infra* & accompanying text.

of a collective bargaining contract binding both parties for the duration of its term. In this way the agreement can complement the basic safeguards contained in ERISA to achieve the maximum protection of employee benefits.

A. ERISA's Termination Scheme: Potential Conflict with Collective Bargaining Agreements

The termination of a pension plan places the potential disjunctures of ERISA and the collective bargaining agreement in sharp relief. Title IV of ERISA establishes a scheme of partial pension insurance administered by the Pension Benefit Guaranty Corporation.¹⁶⁰ A pension plan may be terminated under certain conditions by the plan administrator,¹⁶¹ or by the Corporation on its own initiative.¹⁶² Once terminated, benefits in a qualified plan will be insured to a limited extent. The power of the Corporation to terminate a plan relates to a concern for limiting its liabilities as an insurer. For this and other reasons, a termination under ERISA should be dispositive of the parties' rights to benefits only insofar as those rights are protected by the statute. When a collective bargaining agreement affords further protection, its provisions still should be honored after the employer's obligations under ERISA have been met.

1. Administrator Termination

A plan administrator may terminate a plan by filing a notice of termination in conformity with the requirements of section 4041(a) of the Act.¹⁶³ The statute does not specify events that can result in a termination by an administrator, or the method whereby the termination decision may be made.¹⁶⁴ By implication, therefore, the administrator is to be guided by the applicable provisions of the plan or the collective bargaining agreement, and the duty to bargain concerning the decision to terminate the plan also should continue to apply. This provision for administrator termination, containing no substantive guidance to parties with a collectively bargained plan, seems aimed particularly at plans that were established through other means. Thus section 4041 should

160. The Pension Benefit Guaranty Corporation was created pursuant to ERISA § 4002, 29 U.S.C.A. § 1302 (1975).

161. *Id.* § 4041, 29 U.S.C.A. § 1341.

162. *Id.* § 4042, 29 U.S.C.A. § 1342.

163. 29 U.S.C.A. § 1341(a) (1974).

164. See *In re Trustees of Joint Welfare Fund, Operating Eng'rs, Local 14*, 88 L.R.R.M. 3262 (S.D.N.Y. 1975).

have no effect on the initial stages in the termination of a pension plan that is governed by negotiated language.¹⁶⁵

2. *Termination by the Pension Benefit Guaranty Corporation*

Unlike the administrator of a collectively bargained plan, however, the Pension Benefit Guaranty Corporation is not directly circumscribed in its actions by any contract between labor and management. ERISA provides that the Corporation may act on its own to terminate a plan. Under section 4042 of the Act the Corporation enjoys extensive powers to terminate any plan upon a determination that the minimum funding standards have not been met, the plan cannot pay benefits when due, a reportable event as described in the Act has occurred, or continuation of the plan would cause an unreasonable longrun loss to the Corporation with respect to the plan.¹⁶⁶ Thus the Corporation can terminate a plan if 20 percent of the work force is laid off long enough to cease being plan participants,¹⁶⁷ even though the parties to an applicable collective bargaining agreement never have agreed to terminate the plan under such circumstances.

However, though the termination power of the Corporation is extensive, its guarantee of benefits is not. By statute, the insurance guarantee is limited to nonforfeitable benefits¹⁶⁸ of qualified plans.¹⁶⁹ A maximum

165. Section 4041 prescribes the steps an administrator must take once the decision to terminate has been made. ERISA § 4041, 29 U.S.C.A. § 1341 (1975). Moreover, the plan, once terminated, would be subject to the provisions regulating assets allocation (which may differ significantly from plan language) set forth in section 4044, 29 U.S.C.A. § 1344 (1975), and the regulations thereunder. Proposed regulations for section 4044 are set out at 40 Fed. Reg. 51368-73 (1975).

166. ERISA §§ 4042(a)(1)-(4), 29 U.S.C.A. §§ 1342(a)(1)-(4) (1975).

167. A reportable event that could lead to plan termination occurs "when the number of active participants is less than 80 percent of the number of such participants at the beginning of the plan year, or is less than 75 percent of the number of such participants at the beginning of the previous plan year." *Id.* § 4043(b)(3), 29 U.S.C.A. § 1343(b)(3). The 20 percent layoff rate appears again to gauge the employer's liability for withdrawal under sections 4062, 4063, 4064, and 4065. *See id.* § 4062(e), 29 U.S.C.A. § 1362(e). Were this provision for termination by the Corporation strictly enforced, in a recessionary economy the existence of many plans would be threatened, particularly in industries characteristically affected first, such as the automobile and steel industries.

168. *Id.* § 4022(a), 29 U.S.C.A. 1322(a). The nonforfeitable benefits are those that are nonforfeitable under the terms of a plan, other than those that become nonforfeitable solely because of plan termination. Thus, a worker without vested benefits under the plan also will receive nothing from the Corporation.

169. To be qualified for Corporation coverage, a plan must either have:

in practice met the requirements of Part I of subchapter D of chapter 3 of the Internal Revenue Code of 1954 (as in effect for the preceding 5 plan

value is set for "basic benefits,"¹⁷⁰ but as a practical matter, few participants in hourly workers' plans ever will approach those upper limits. The statute also limits the guaranteed benefits to benefits in effect for five years, with a pro rata guarantee for more recently won benefits. Thus, a new benefit is guaranteed only to the extent of the greater amount of either \$20 a month or 20 percent of the amount that would be guaranteed but for the fact that the plan or amendment has not been in effect for five years, multiplied by the number of years (not exceeding five) that the plan or plan amendment has been in effect.¹⁷¹ Under the first formulation, a typical plan that has benefit increases negotiated every three years will have the new levels guaranteed only to the extent of three years times \$20, or \$60, assuming termination took place at the contract's expiration. Alternatively, a benefit level in effect for one year would be 20 percent guaranteed, one in effect for two years would be 40 percent guaranteed, and so forth, up to a benefit in effect for five years, which would be insured 100 percent. Optimally, then, the Corporation will guarantee payment of the basic benefit to which a recipient would have been entitled five years ago, plus a prorated share

years of the plan) applicable to plans described in paragraph (2) for the preceding 5 years; or (2) . . . been determined by the Secretary of the Treasury to be, a plan described in section 401(a) of the Internal Revenue Code of 1954, or which meets, or has been determined by the Secretary of the Treasury to meet, the requirements of section 404(a)(2) of such Code.

ERISA § 4021(a), 29 U.S.C.A. 1321(a) (1975).

170. The basic insured benefit is limited by *id.* § 4022(b)(3), 29 U.S.C.A. § 1322(b)(3), which provides:

The amount of monthly benefits . . . provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from that employer was greater than during any other such period with that employer determined by dividing 1/12 of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

(B) \$750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denominator of which is such contribution and benefit base in effect in calendar year 1974.

171. *Id.* § 4022(b)(8), 29 U.S.C.A. § 1322(b)(8).

of recent basic benefit improvements.¹⁷² This guaranteed amount will be inadequate in an inflationary period.

The Corporation has not exercised its discretion to guarantee nonbasic benefits;¹⁷³ accordingly, the Corporation defines a guaranteed benefit¹⁷⁴ as excluding health insurance, life insurance, some death benefits, and other fringe benefits that may be necessary for retirement security. In this and other ways the Corporation limits its potential liability to plan participants and beneficiaries as an insurer, so that its guarantee is worth much less than ERISA sponsors had envisioned. In addition to its purposes of encouraging the continuation and maintenance of private pension plans for participants' benefit, and providing for the timely and uninterrupted payment of pension benefits, the Corporation is charged with maintaining premiums that are as low as possible.¹⁷⁵ The statute also instructs the Corporation to terminate a plan if its maintenance threatens to increase the liability of the Corporation.¹⁷⁶ In short, the Corporation must act like an insurance company, jealous of its own assets. Not only plan participants but also employers and a frugal treasury pressure the Corporation in making its decisions regarding plan terminations, which will affect insurance premium rates.

Accordingly, it would be inequitable to relegate participants solely to the protection of the Pension Benefit Guaranty Corporation, which has other interests at heart, if greater protection is available to participants under their collective bargaining agreement. The circumscribed guarantees¹⁷⁷ of the Corporation would suggest that other protection should be sought for the participant. The balance of the benefit, not guaranteed by the Corporation or fulfilled in assets allocation under section 4044, still should be an enforceable debt owed to the participants or their beneficiaries under the collective bargaining agreement that incorporates the pension plan. Otherwise ERISA would negate an employer's contractual obligation to furnish benefits through the entire term of the agreement, while providing inadequate protection of its own in return.

172. The guaranteed amount also is subject to the limitations under *id.* § 4022(b)(3), 29 U.S.C.A. § 1322(b)(3). See note 170 *supra*.

173. See ERISA § 4022(c), 29 U.S.C.A. § 1322(c) (1975).

174. The regulations of the Corporation concerning guaranteed benefits appear in Department of Labor Reg. §§ 2605.1-8, 40 Fed. Reg. 43509-12 (1975). The definition of "benefit" to which part 2605 refers appears in *id.* § 2605.2, 40 Fed. Reg. 43510 (1975).

175. ERISA § 4002(a)(3), 29 U.S.C.A. § 1302(a)(3) (1975), specifies that the Corporation should maintain "the lowest level [of premiums] consistent with carrying out its obligations."

176. *Id.* § 4042(a)(4), 29 U.S.C. § 1342(a)(4). See note 166 *supra* & accompanying text.

177. See note 168-76 *supra* & accompanying text.

Fortunately, however, the benefits guaranteed by the Corporation are not the only solace for plan participants and beneficiaries. If the Corporation seeks termination, the court may appoint a trustee who has the power to collect any payments that are due to the plan.¹⁷⁸ The trustee also can sue on behalf of the plan, provided the Corporation is not an adverse party.¹⁷⁹ ERISA, therefore, creates the potential for full protection for plan participants, but it does not mandate that the trustee exercise these powers.¹⁸⁰ Moreover, the statute affords no such protection for a plan terminated by an administrator rather than by the Corporation. If there is a liquidation, however, both are protected to a considerable extent by the allocation-of-assets provisions of section 4044.¹⁸¹ Concern for these termination protections can obscure a basic issue: the plan may be terminated under ERISA, but not under a collective bargaining contract.

3. Labor-Management Conflicts over Pension Benefit Guaranty Corporation Terminations

The termination date of a pension plan is the focus of the dispute between the Pension Benefit Guaranty Corporation and a union seeking to enforce a collective bargaining agreement until the expiration of its term. The Corporation will favor a termination date that avoids a financial drain upon it while at the same time providing the minimum protection required under the Act for participants and beneficiaries. A union with a strong collective bargaining agreement, pledging maintenance of a pension plan throughout the term of the contract, will oppose the use of an earlier date. An employer will prefer the Corporation alternative: the sooner the termination, the less the employer's cost, as fewer benefits will have accrued.¹⁸² Moreover, the employer can be expected to

178. ERISA § 4042(d)(1)(B), 29 U.S.C.A. § 1342(d)(1)(B) (1975).

179. *Id.* § 4042(d)(1)(B)(iv), 29 U.S.C.A. § 1342(d)(1)(B)(iv).

180. Such actions may, however, fall within the scope of the trustee's duties as a fiduciary. *Id.* § 4042(d)(3), 29 U.S.C.A. § 1342(d)(3).

181. *Id.* § 4044, 29 U.S.C.A. § 1344.

182. The employer will be liable to the Corporation if plan assets are not sufficient to pay benefits owing at the time of termination:

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day,

argue that termination by the Corporation extinguishes any remaining rights under the contract. Some employers already have suggested, thus far unsuccessfully, that ERISA deprives a court of jurisdiction to act under the Labor Management Relations Act.¹⁸³

B. Conflicts Between ERISA and Collective Bargaining Agreements on Plan Termination: A Proposed Resolution

A method of accommodating plan terminations under ERISA with collective bargaining agreements is needed to fulfill the Act's purposes of protecting plan participants and beneficiaries, while maintaining the integrity of the collective bargaining process. A possible solution is that contractual obligations to secure rights beyond those guaranteed by the Pension Benefit Guaranty Corporation should remain binding upon the parties to the extent they do not conflict directly with statutory requirements. The contract should take over when ERISA stops.¹⁸⁴ If contractual and plan provisions do not clash with ERISA, there is no reason why they should not remain enforceable under traditional contract and labor law principles. Indeed, the Act appears to contemplate a plan continuing or being reestablished after termination by the Corporation.

chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

Id. § 4062(b), 29 U.S.C.A. § 1362(b).

In addition, when an employer ceases operation at a facility in any location and, as a result of that cessation, more than 20 percent of the employee-participants are terminated, the employer may be treated pursuant to *id.* § 4062(e), 29 U.S.C.A. § 1362(e), as a substantial withdrawing employer subject to *id.* §§ 4063-65, 29 U.S.C.A. §§ 1363-65. The latter sections contain reporting requirements and provide for the possibilities of equitable fund allocation, bond posting, or payment of liability to the Corporation at its discretion.

183. The argument that ERISA deprives the federal courts of their jurisdiction under section 302 of the LMRA, 29 U.S.C.A. § 186 (Supp. 1975), was rebuffed in *In re Trustees of Joint Welfare Fund, Operating Eng'rs, Local 14*, 88 L.R.R.M. 3262 (S.D.N.Y. 1975). The court commented that no language in ERISA explicitly repealed section 302, and stated that: "Unless some specific provision of the new Act is incompatible with [the court's] exercise of jurisdiction under the Taft-Hartley Act [LMRA], it considers its function under the latter to be unchanged." *Id.* at 3264. *Local 14* did not involve a plan termination under Corporation jurisdiction, however, nor were the ERISA provisions that were cited to block the allocation of assets by the court as yet effective as to the plan in question.

184. The creation of the Corporation could lead ultimately to contract provisions that are drafted as deliberate supplements to the governmental guarantee, in the same way that contractual supplemental unemployment benefits pick up where state unemployment compensation ends.

An employer thus may continue to be bound by contract to provide benefits under a plan that the Corporation has terminated: after termination, the plan would operate under the collective bargaining agreement but would lack Corporation insurance protection or tax benefits until it requalified.¹⁸⁵ The employer's obligation would be adjusted to offset benefits already received through allocation of assets under section 4044¹⁸⁶ and through Corporation coverage. This approach would protect the interests of plan participants while preserving the financial integrity of the Corporation, and thus best serve the purposes of ERISA without subverting traditional labor law principles.

1. *Legislative History and Structure of ERISA*

The legislative history of ERISA indicates that Congress envisioned Corporation insurance as a basic protection that could be supplemented by a collective bargaining agreement. The conference committee report noted: "[O]nce a qualified plan loses its qualification, *benefits thereafter accruing* are not insured."¹⁸⁷ The concept that benefits could accrue after a plan loses its qualification, which could be through termination, rests on the assumption that there may be obligations that the insurance provisions in ERISA do not affect. This view is buttressed further by a statement that even after a plan has terminated, the employer still is obligated to fulfill funding requirements under the plan until the date of termination.¹⁸⁸ The Pension Benefit Guaranty Corporation may also subscribe to this view.¹⁸⁹

185. Alternatively, the parties could agree to establish a new plan, less comprehensive in coverage but more viable in view of the employer's financial condition. Benefits would not be fully guaranteed by the Corporation until the end of the fifth year of the plan, however. ERISA § 4022(b)(1)(B), 29 U.S.C.A. § 1322(b)(1)(B) (1975). See note 171 *supra* & accompanying text.

186. ERISA § 4044, 29 U.S.C.A. § 1344 (1975), establishes priorities for allocation of plan assets upon termination. The Department of Labor has issued proposed regulations further identifying the types of benefits within each priority category. 40 Fed. Reg. 51368-73 (1975).

187. CONFERENCE COMMITTEE STATEMENT, *supra* note 116, at 367 (emphasis supplied).

188. H.R. REP. NO. 807, 93d Cong., 2d Sess., in 1974 U.S. CODE CONG. & AD. NEWS 4731.

189. George Driesen, Deputy General Counsel of the Pension Benefit Guaranty Corporation, has indicated that a Corporation termination occurs when there is a cessation of accruals and a cessation of contributions to a plan. "Driesen said that the general counsel of PBGC has held that a claim of legal obligations to contribute does not keep a plan alive if contributions are not in fact made. However, if a court decrees that contributions should have continued, PBGC will agree with the court decree." BNA PENSION REP., Oct. 27, 1975, at A-15. Such a court order may be based on a ruling that contributions were to continue through the life of a collective bargaining agreement.

Several provisions of ERISA also contemplate the continuing vitality, during and after termination, of a pension plan incorporated in the collective bargaining agreement. A trustee appointed under section 4042(b)¹⁹⁰ has the power¹⁹¹ to do acts deemed necessary to continue the operation of the plan without increasing the potential liability of the Corporation, if those acts may be done under the provisions of the plan.¹⁹² Theoretically, then, the trustee would follow collective bargaining agreement language that directs that a pension plan be maintained, insured by the Corporation or not, for the term of the contract. The liability of the Corporation would be limited to the period during which the plan was insured, but the employer would remain obligated to comply with the contract if it extended beyond the governmentally set termination date.

This interpretation is supported further by the remedy provisions of ERISA. Section 502 was enacted for the purpose of enforcing employee benefit rights *or* the terms of the plan.¹⁹³ Nowhere does the statute provide that pension plan termination under Title IV supplants all beneficiaries' and participants' rights under the plan. Indeed, the implication of section 502 is that parties' rights under ERISA and under the plan may be distinct, and not always coextensive.¹⁹⁴ Section 4003(f), moreover, authorizes a suit by any participant, beneficiary, administrator, or employee adversely affected by actions of the Pension Benefit Guaranty Corporation or a receiver or trustee appointed by the Corporation.¹⁹⁵

The fundamental motivation behind Title I of ERISA, it should be remembered, is to "protect . . . the interests of participants in employee benefit plans and their beneficiaries."¹⁹⁶ Title IV of the Act, creating plan termination insurance, established the Pension Benefit Guaranty Corporation to achieve that underlying aim. Accordingly, two purposes of the Corporation are to provide for timely and uninterrupted pay-

190. 29 U.S.C.A. § 1342(b) (1975).

191. This power is limited somewhat by ERISA § 4042(c), 29 U.S.C.A. § 1342(c) (1975).

192. *Id.* § 4042(b), 29 U.S.C.A. § 1342(b). The trustee appointed under this section can do any act authorized by the plan. *Id.* § 4042(d)(1)(A)(i), 29 U.S.C.A. § 1342(d)(1)(A)(i).

193. *Id.* §§ 502(a)(3)(A), (B)(ii), 29 U.S.C.A. §§ 1132(a)(3)(A), (B)(ii).

194. This view is in accord with that of the conference committee. *See* note 187 *supra* & accompanying text.

195. ERISA § 4003(f), 29 U.S.C.A. § 1303(f) (1975).

196. *Id.* § 2(b), 29 U.S.C.A. § 1001(b).

ments of pension benefits that the participant has earned¹⁹⁷ and "to encourage the *continuation* and maintenance of voluntary private pension plans for the benefit of their participants."¹⁹⁸ These goals are best accomplished by enforcing contracts that result in greater protection for plan participants or their beneficiaries.

2. *Consistency with Traditional Principles*

The conclusion that contractual pension termination rights that exceed Pension Benefit Guaranty Corporation guarantees remain enforceable also is consistent with fundamental concepts governing labor relations law. To the extent that contractual provisions are not illegal, they are enforceable. Since most collective bargaining agreements contain "saving clauses,"¹⁹⁹ parties to a contract can enforce pension plan termination provisions that do not conflict with ERISA.

Furthermore, explicit and implicit contract rights that overlap with rights under federal law are enforceable as long as they avoid conflict with the statute. Equal employment opportunity laws are illustrative of this principle. One who is the victim of discrimination on the basis of race, sex, national origin, or religion can file a complaint with the Equal Employment Opportunity Commission, later pursue the claim in federal court,²⁰⁰ and still avail himself of remedies under the collective bargaining agreement if that contract also bans such discrimination. The aggrieved party need not elect one remedy exclusively, but may pursue both. Just as the contract remedy cannot bar the individual from exercising his federal statutory rights,²⁰¹ the existence of a remedy through governmental and judicial channels cannot bar use of the contract to redress his claim. In other areas of labor law as well, rights under a contract also may be remediable under a federal statute.²⁰²

197. *Id.* § 4002(a)(2), 29 U.S.C.A. § 1302(a)(2).

198. *Id.* § 4002(a)(1), 29 U.S.C.A. § 1302(a)(1) (emphasis supplied).

199. For example, a contract with a saving clause that in 1963 contained pay differentials based upon sex was invalidated by the Equal Pay Act, 29 U.S.C. § 206(d) (1970), in those respects but in no others. Thus, the portions of the agreement dealing with the grievance procedure, seniority, vacations, and other matter that did not relate to violations of the Equal Pay Act, still were viable.

200. 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972).

201. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But cf. *Satterwhite v. United Parcel Service, Inc.*, 496 F.2d 448 (10th Cir.), cert. denied, 419 U.S. 1079 (1974) (dismissing a claim for overtime compensation under the Fair Labor Standards Act that had been previously submitted to arbitration). See also Donaldson, *The Use of Arbitration To Avoid Litigation Under ERISA*, 17 WM. & MARY L. REV. 215 (1975).

202. An employer's refusal to supply data on contributions made to an employee pension fund, for example, was both a violation of the contract and an unlawful refusal to

A more direct comparison to the relationship between collective bargaining agreements and the role of the Pension Benefit Guaranty Corporation in plan termination is seen in the protection provided by the Federal Deposit Insurance Corporation, which, like the Pension Benefit Guaranty Corporation, insures privately contributed deposits in the interest of protecting innocent individuals. Insurance by the Federal Deposit Insurance Corporation of savings deposits up to \$40,000 does not, however, bar a depositor from suing the financial institution that fails to return the deposits in excess of the insured amount.²⁰³ In the same fashion, payment of Pension Benefit Guaranty Corporation insurance benefits should not bar enforcement of a collective bargaining agreement between the employer and the union to recover the amounts to which plan participants are entitled under the contract. Since the Pension Benefit Guaranty Corporation does not guarantee all benefits and its interests lie in early plan termination, a strong contract almost always will result in rights that exceed those protected by the statute.

C. Remedies To Enforce Collective Bargaining Agreements After Pension Benefit Guaranty Corporation Action

If the Pension Benefit Guaranty Corporation should seek to terminate a plan that has not expired under the contract, a union may seek an injunction to stay termination.²⁰⁴ Other remedies available to the union are

bargain under the LMRA. *Summit Tooling Co.*, 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972), *enforced mem.*, 474 F.2d 1352 (7th Cir. 1973).

203. 12 U.S.C. §§ 1811-31 (1970). The Federal Deposit Insurance Corporation insures deposits in a defined set of financial institutions. The amount insured was increased to \$40,000 in 1974. Act of October 28, 1974, Pub. L. No. 93-495, § 102, 88 Stat. 1500, *amending* 12 U.S.C. § 1813(m) (1970). Section 1821(g) provides, in cases of a closed national or District of Columbia bank, that upon the payment by the Federal Deposit Insurance Corporation to the depositor of the deposited insured amount, the Corporation "shall be subrogated to all rights of the depositor against the closed bank *to the extent of such payment.*" 12 U.S.C. § 1821(g) (1970) (emphasis supplied). If the depositor does not claim the insurance benefit within the prescribed statutory time, "all rights of the depositor against the closed bank and its shareholders, or the receiver-ship estate to which the Corporation may have become subrogated, shall thereupon *revert* to the depositor." *Id.* § 1822(e) (emphasis supplied). Section 1822(b) provides that payment of the insured deposit discharges the FDIC and a successor bank to the same extent that payment to the depositor by the closed bank would have discharged it from liability for the insured deposit. The uninsured balance owing to the depositor remains an enforceable debt against the defaulting bank. *Id.* § 1822(b).

204. The union would sue through an individual plaintiff. Section 502(a)(3)(A) provides that a participant, beneficiary, or fiduciary may sue to enjoin any act or practice that violates any provision of the terms of the plan. ERISA § 502(a)(3)(A), 29 U.S.C.A. § 1132(a)(3)(A) (1975). The Pension Benefit Guaranty Corporation also

arbitration, or, if the employer has failed to make required contributions, suit to enforce the contract under section 301 of the Labor Management Relations Act. Alternatively, the union may seek relief before the National Labor Relations Board for the employer's failure to live up to promises made in collective bargaining.²⁰⁵

With two minor exceptions, ERISA preempts no federal laws;²⁰⁶ its termination provisions, however, will certainly affect the use of other statutes. After the Pension Benefit Guaranty Corporation has opted to institute termination proceedings under section 4042, the court to which the application for appointment of a trustee is made has exclusive jurisdiction of the plan and its property.²⁰⁷

This provision should prevent an employer from evading pension obligations by a petition to repudiate the collective bargaining agreement under the Bankruptcy Act.²⁰⁸ Unless the suit under section 502 of ERISA is against the plan, section 4042 should not prevent a union from attempting to enforce compliance with the collective bargaining agreement. Even if subjected to the constraints of section 4042, a suit under section 301 of the Labor Management Relations Act would only be stayed rather than barred. The effect on section 302(5)(B) of the Labor Management Relations Act would be substantial, however, if a petition were filed to break a deadlock in a Taft-Hartley plan that the Pension Benefit Guaranty Corporation sought to terminate.²⁰⁹

In the context of plan terminations, obligations under the collective bargaining agreement or pension plan should remain enforceable if they do not conflict with ERISA. The Pension Benefit Guaranty Corporation could, therefore, institute termination proceedings for the plan, without

is amenable to suit. *Id.* § 4002(b)(1), 29 U.S.C.A. § 1302(b)(1). Similarly, any participant, beneficiary, plan administrator, or employee adversely affected by any action of the Corporation or a trustee appointed thereby may sue the Corporation, trustee, or receiver if he has an interest in the plan. *Id.* § 4003(f), 29 U.S.C.A. § 1303(f).

205. Section 8(d) of the NLRA provides in part: "[W]here there is . . . a collective bargaining contract [in effect] . . . , the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . ." 29 U.S.C. § 158(d) (1970).

206. See note 109 *supra* & accompanying text.

207. ERISA § 4042(f), 29 U.S.C.A. § 1342(f) (1975). See note 156 *supra*.

208. See note 156 *supra*.

209. 29 U.S.C.A. § 186(c)(5)(B) (Supp. 1975). Section 302 remains an open avenue for multiemployer plans to reorganize, however, until such plans come under the termination provisions of ERISA, as of January 1, 1978. ERISA §§ 4082(b)(1); (c), 29 U.S.C.A. §§ 1381(b)(1), (c) (1975). The Pension Benefit Guaranty Corporation has discretion to cover a multiemployer plan before that date, however. *Id.* § 4082(c)(1), 29 U.S.C.A. § 1381(c)(2).

vitating the employer's pledge to maintain a pension plan for the duration of its collective bargaining agreement with the union. The limited guarantee of the Corporation, which may be augmented by the exercise of the trustee's collection powers, is available to everyone, unionized or not, in a qualified plan. Guarantee of pension rights beyond ERISA levels and time limits still will depend on collective bargaining achievements. Once gained at the bargaining table, those protections should not be rendered ineffective by ERISA. This reconciliation of ERISA and collective bargaining agreements best serves the purposes of federal labor laws to encourage collective bargaining²¹⁰ and to respect the integrity of contracts arrived at through that mechanism, without exposing the Pension Benefit Guaranty Corporation to any liability not intended by Congress.²¹¹ Moreover, it ensures plan participants the most extensive guarantee of their benefits now possible under current laws. By enforcing collective bargaining agreements that contain pension obligations, the purposes of both ERISA and the labor laws will be served.

CONCLUSION

In several major respects, ERISA will have a substantial impact on the collective bargaining process. The Act virtually prescribes minimum contract language, thus limiting the parties' acceptable range of agreement. It requires revisions of employee benefit plans, which often must be negotiated in midterm. Although more information is made freely available to unions, ERISA creates a greater need for detailed information to enable effective bargaining on employee benefits. In addition, because the definition of a successor employer included in the Act differs from that of the Supreme Court, another variable has been introduced into the uncertain status of former and successor employers in relation to incumbent unions.

The changes brought about by ERISA should not obfuscate those areas of labor law that the Act has not altered. The parties still are obligated to bargain over changes in employee benefit plans, and a refusal

210. Section 1 of the NLRA provides in pertinent part: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions of the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining" 29 U.S.C. § 151 (1970).

211. The Corporation will not have to guarantee post-termination benefits until the plan has requalified under ERISA. *See* ERISA §§ 4021(a), 4022(b)(1)(A), 29 U.S.C.A. §§ 1321(a), 1322(b)(1)(A) (1975).

to bargain will result in the traditional consequences. The scope of the duty to bargain, however, should extend only to those changes necessary to satisfy the Act. Nor does the scheme for plan terminations incorporated in the Act void obligations under a collective bargaining agreement that do not conflict with the Act. Participants' and beneficiaries' rights under a terminated plan are satisfied by Pension Benefit Guaranty Corporation insurance only to the extent of that guarantee; the balance of their pension rights remains enforceable through traditional remedies.

ERISA was enacted to protect participants in collectively bargained plans, as well as in plans formulated by other means. This statutory goal cannot be achieved if the Act is construed to repeal rights and duties in force prior to its enactment. If the parties to a collective bargaining contract reach agreement on standards more protective of employee rights than the provisions of the Act, ERISA should be interpreted to preserve those rights.