

ERISA Litigation

Second Edition

Jayne E. Zanglein

Susan J. Stabile

CHAPTER THIRTY-SEVEN

Contingent Workers and Employee Benefits

Daniel N. Janich

Janich Law Group

Chicago, Illinois



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I. Overview

The contingent worker,¹ or generally the use of an alternative workforce,² has assumed a significant role in today's American workforce. Competitive market forces have caused employers in recent years to increasingly rely on a contingent workforce as a means of decreasing overhead costs while increasing overall efficiency through flexible staffing arrangements. Millions of individuals are employed as contingent workers in factories, offices, and other commercial and industrial sites throughout the country. Statistics issued by the U.S. Department of Labor (DOL) show that, in 2001, 5.4 million people were employed as contingent workers (other than independent contractors), and an additional 8.6 million were employed as independent contractors. These figures translate into contingent workers (other than independent contractors) comprising 4 percent of the total U.S. workforce, and independent contractors representing another 6.4 percent.³ The popularity of using such workers may be attributable, at least in part, to the economics involved in not having to provide traditional employee benefits—such as pension, health care, and skills training and enhancement—to these workers.⁴

In today's competitive business environment, the trend toward the increased use of an alternative workforce will likely continue unabated. Companies that use the services of contingent workers, therefore, need to understand the potential legal hazards that this type of arrangement may pose to their employee benefit plans. Absent the development of an effective strategy to deal with the issues involved, such companies will likely find themselves embroiled in time-consuming and potentially costly litigation defending claims relating to the denial of employee benefits. Correspondingly, individuals who

¹In its broadest sense, a contingent worker is an individual working in any capacity other than as a common-law employee. Such workers may include independent contractors and leased employees, as well as temporary or seasonal workers.

²Contingent workers are also known as "alternative workers" participating in an alternative employment relationship.

³Bureau of Labor Statistics, U.S. Dep't of Labor, Contingent and Alternative Employment Arrangements, Feb. 2001 (USDOL 01-153, May 24, 2001). Note that the Department of Labor (DOL) differentiates, for statistical purposes, between contingent workers and independent contractors. For purposes of this chapter, however, a reference to "contingent workers" includes, unless otherwise stated, independent contractors as well as leased employees and temporary or seasonal workers.

⁴Historically, these types of benefits have been "employment based," i.e., reserved exclusively for workers who are deemed to be employees of the company that sponsors such benefit plans.

are deemed to be part of the contingent workforce must also be aware of the impact that a “nonemployee” classification has on their ability to qualify for and receive plan benefits, as well as the remedies that are available to them to redress abuse of their employment status by recipients of their services.⁵

Individuals designated as contingent workers, and thus routinely excluded from participating in a service recipient’s benefit plans, frequently are not readily distinguishable from the company’s regular, full-time employee workforce that qualifies for participation in the company’s employee benefit plans. In situations where this is indeed the case, a company’s benefit plans will certainly be exposed to significant risk.⁶

In several well-publicized lawsuits in recent years, independent contractors⁷ who had been reclassified as “common-law employees” by the Internal Revenue Service (IRS) for tax-withholding purposes⁸ as well as leased employees⁹ claimed that they were eligible to participate in the service recipient’s pension and welfare benefits retroactive to the date they had first rendered service. Reclassification of workers for federal tax purposes is not the only instance where contingent workers have claimed an entitlement to participate in a service recipient’s benefit plans. In 1999, the DOL entered the fray by filing a high-profile lawsuit for breach of fiduciary duty against Time Warner Inc. arising from the company’s denial of pension and health benefits to contingent workers who were never reclassified by the IRS as common-law employees.¹⁰ Two federal district courts have recognized that a breach of fiduciary duty claim may be asserted by contingent workers for plan benefits denied them even when such workers were not reclassified by the IRS as common-law employees.¹¹

The debate in the courts over the classification of workers and their right to participate in benefit plans evolves principally from two federal statutes: the

⁵For purposes of this chapter, the term “service recipient” generally refers to a company that uses the services of a contingent workforce. A service recipient generally has a regular, full-time workforce for whom it provides employee benefits through the sponsorship of various pension, welfare, and fringe benefit plans.

⁶The U.S. Government Accountability Office has estimated that 38% of employers examined by the IRS have misclassified workers as independent contractors. Center for a Changing Workforce, <http://www.cfcw.org>.

⁷An independent contractor is a worker who is generally considered to be self-employed. For further discussion of independent contractors, see *infra* III.D.1.

⁸See I.R.C. §§3402 (income tax), 3102 (FICA), 3302 (FUTA).

⁹A leased employee is a worker who is “leased” to the service recipient by a staffing organization in the business of providing such workers. For a more complete discussion of leased employees, see *infra* III.D.4.

¹⁰*Herman v. Time Warner Inc.*, 56 F. Supp. 2d 411, 23 EB Cases (BNA) 2646 (S.D.N.Y. 1999).

¹¹See *Edes v. Verizon Communications, Inc.*, 288 F. Supp. 2d 55, 61–62 (D. Mass. 2003) (breach of fiduciary duty claim dismissed as untimely pursuant to ERISA §413 statute of limitations provision); *Godshall v. Franklin Mint Co.*, 285 F. Supp. 2d 628, 31 EB Cases (BNA) 1665 (E.D. Pa. 2003) (rejecting defendants’ assertion that breach of fiduciary duty claim was actually claim for denial of benefits). Citing the district court decision in *Tinley v. Gannett Co.*, 2002 U.S. Dist. LEXIS 6826, at *7–8 (D. Del. Mar. 25, 2002) (unreported), *aff’d*, 55 Fed. Appx. 74, 30 EB Cases 1179 (3d Cir. Jan. 9, 2003), the district court in *Godshall* denied the defendants’ summary judgment motion on the basis that the plain language of the complaint alleged a violation of fiduciary duties, “including [the] duties to act solely in the interest of the participants and beneficiaries; to administer the plans in accordance with their written terms; and to identify and enroll all persons who are eligible.” 285 F. Supp. 2d at 633.

Internal Revenue Code (Code)¹² and the Employee Retirement Income Security Act of 1974 (ERISA).¹³ In addition, with the advent of the professional employer organization (PEO), the scope of this debate is no longer confined to a determination of whether a worker is a common-law employee, but also includes an inquiry into precisely who the employer is.

This chapter discusses how the courts have dealt with the Code and ERISA in ascertaining

- whether and under what circumstances contingent workers have been found eligible to participate in a service recipient's benefit plans; and
- whether a service recipient is in fact the actual employer in cases where the contingent worker was employed by a PEO.

II. Statutory Language

Tax Code Section 401(a)(2) Qualified Pension, Profit-Sharing, and Stock Bonus Plans

(a)–Requirements for qualification.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section— . . .

- (2) if under the trust agreement it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a)), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination)

Tax Code Section 414(n) Definitions and Special Rules; Employee Leasing

- (1) In general.—For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter in this subsection referred to as the “recipient”) for whom a leased employee performs services—
- (A) the leased employee shall be treated as an employee of the recipient, but

¹²26 U.S.C. §1 et seq.

¹³ERISA §2 et seq.

- (B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.
- (2) Leased employee.—For purposes of paragraph (1), the term “leased employee” means any person who is not an employee of the recipient and who provides services to the recipient if—
- (A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the “leasing organization”),
 - (B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and
 - (C) such services are performed under primary direction or control by the recipient.
- (3) Requirements.—For purposes of this subsection, the requirements listed in this paragraph are—
- (A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401(a),
 - (B) sections 408(k), 408(p), 410, 411, 415, and 416, and
 - (C) sections 79, 106, 117(d), 120, 125, 127, 129, 132, 137, 274(j), 505, and 4980B.
- (4) Time when first considered as employee.—
- (A) In general.—In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).
 - (B) Years of service.—In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).
- (5) Safe harbor.—
- (A) In general.—In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if—
 - (i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and
 - (ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of the recipient’s nonhighly compensated work force.
 - (B) Plan requirements.—A plan meets the requirements of this subparagraph if—

- (i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,
- (ii) such plan provides for full and immediate vesting, and
- (iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than \$1,000.

(C) Definitions.—For purposes of this paragraph—

- (i) Highly compensated employee.—The term “highly compensated employee” has the meaning given such term by section 414(q).
 - (ii) Nonhighly compensated work force.—The term “nonhighly compensated work force” means the aggregate number of individuals (other than highly compensated employees)—
 - (I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or
 - (II) who are leased employees with respect to the recipient (determined without regard to this paragraph).
 - (iii) Compensation.—The term “compensation” has the same meaning as when used in section 415; except that such term shall include—
 - (I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402(e)(3) or 402(h)(1)(B),
 - (II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125), and
 - (III) any amount contributed to an annuity contract described in section 403(b) pursuant to a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).
- (6) Other rules.—For purposes of this subsection—
- (A) Related persons.—The term “related persons” has the same meaning as when used in section 144(a)(3).
 - (B) Employees of entities under common control.—The rules of subsections (b), (c), (m), and (o) shall apply.

**ERISA Section 404(a)(1)
Fiduciary Duties****(a) Prudent Man Standard of Care.—**

- (1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
 - (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
 - (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
 - (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
 - (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV

**ERISA Section 510
Interference With Protected Rights**

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 shall be applicable in the enforcement of this section.

III. Benefit Eligibility as a Function of Worker Status

A contingent worker's relationship with the service recipient is nontraditional.¹⁴ These workers may work full or part time and are paid either directly by the recipient or by an outside agency that leases such workers or assumes human resource responsibilities for the service recipient. The federal tax rules

¹⁴In a survey compiled by the DOL, Bureau of Labor Statistics, contingent workers are described as those individuals "who do not perceive themselves as having an explicit or implicit contract for ongoing employment." Bureau of Labor Statistics, U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements* (1999) (DOL News Release 99-362, Dec. 21, 1999).

recognize that employee benefits are employment-based, i.e., tax-favored treatment for various employee benefits is accorded to workers employed as common-law employees of the plan sponsor and, correspondingly, also to the sponsor itself. Failure to include workers who are mistakenly classified as independent contractors may entitle such workers to seek retroactive benefits under one or more of the plan sponsor's tax-favored benefit plans. The deliberate inclusion of independent contractors who are misclassified as regular employees in a company's tax-favored benefit plan may either disqualify the plan or otherwise cause it to lose its tax-favored status, resulting in the recognition of income for some or all of the plan participants. Thus, to ensure the continued integrity of its tax-favored benefit plans, plan sponsors who employ contingent workers must be able to defend the validity of their worker classifications.

A. Favorable Treatment of Employee Benefit Plans Under the Tax Code

Companies whose employee benefit plans qualify for favorable tax treatment under the Code, and employees who participate in them, enjoy significant tax advantages. For the company sponsoring the plan involved, the principal advantage is the immediate deduction of contributions made to the plan. In the case of qualified retirement plans, participating employees benefit from deferral of tax on amounts credited to their account as well as the deferral of taxes on any fund earnings. In the case of welfare and fringe benefit plans, participating employees generally exclude from their taxable income benefits they receive from their plan. In exchange for favorable tax treatment, such plans generally must operate in a nondiscriminatory manner.¹⁵

For a pension plan to be "tax qualified" it must be maintained for the exclusive benefit of employees and their beneficiaries.¹⁶ Similarly, for some welfare benefits to remain excluded from income for tax purposes, the plans from which such benefits derive often must restrict their eligibility to current

¹⁵Qualified retirement plans are subject to various nondiscrimination rules the purpose of which is to prohibit the plan from disproportionately favoring highly compensated employees (HCEs) regarding contributions or rights, benefits, or features in the plan. The various Code provisions that address this issue set up discrimination tests that the plan must continue to satisfy in order to retain its tax-qualified status. See, e.g., the tests set forth in I.R.C. §§401(a)(4) and 410(b). Several welfare benefits that are specifically excluded from gross income are administered through plans, such as cafeteria plans, that are also subject to various nondiscrimination rules.

¹⁶I.R.C. §401(a)(2). Self-employed individuals are treated as "employees" for this purpose. See I.R.C. §401(c). For further discussion of the exclusive benefit rule, see the discussion of professional employer organizations (PEOs) in this chapter *infra* V. A pension plan that includes independent contractors may fail to qualify for favorable income tax treatment under I.R.C. §401. See *Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 753 (9th Cir. 1988) (because employer did not exercise sufficient control over the management and professional employees it leased to other businesses, no employment relationship was established even under lower standard applicable to professionals; therefore, employer's retirement plans did not qualify under I.R.C. §401 as being exclusively for benefit of employees). Permitting leased employees to participate in a tax-qualified plan would also violate the requirements of I.R.C. §401(a)(2), although such workers are often required to be counted for nondiscrimination testing purposes. See I.R.C. §414(n)(3); IRS Notice 84-11, Q&A-14 & 15, 1984-2 C.B. 469. See also *Burnetta v. Commissioner*, 68 T.C. 387, 1 EB Cases (BNA) 1724 (1977).

and former employees.¹⁷ However, the Code itself does not require a plan that is subject to the tax rules to offer eligibility to all employees or to any particular class of employees.¹⁸

Plan sponsors are generally free, within limits,¹⁹ to designate classes of employees who are eligible to participate in its benefit plans. Although several courts initially appeared to be confused when addressing whether tax qualification rules—regardless of the plan’s eligibility language—required contingent workers (whether or not previously reclassified) to be eligible to participate in a company’s pension plan,²⁰ most courts today acknowledge that this is not the case; in fact, certain reclassified workers may indeed be excluded pursuant to applicable plan language.²¹

B. Tax Consequences of Misclassification

The consequences of misclassifying workers either as employees who are independent contractors or as independent contractors when they are common-law employees may have serious ramifications for plan sponsors as well as for plan participants.

¹⁷Welfare benefit plans are also subject to their own nondiscrimination rules. Illustrations of the nondiscrimination rule in the welfare benefit context are as follows: self-insured medical expense reimbursement plans may not discriminate in favor of “highly compensated individuals” (I.R.C. §105(h) requires 70% of all employees or 80% of eligible employees or a nondiscriminatory classification of employees to be covered by the plan); group term life insurance may not discriminate in favor of “key employees” (I.R.C. §79(d) requires 70% of all employees, or a group of whom at least 85% are non-key employees, or a classification that does not discriminate in favor of key employees); dependent care, educational assistance, and tuition reduction plans under I.R.C. §§117(d)(3), 127(b)(2), and 129(d)(2)–(4) may not discriminate in favor of “highly compensated employees” as defined in I.R.C. §414(q); and cafeteria plans cannot discriminate in favor of “highly compensated individuals” for eligibility purposes or in favor of “highly compensated participants” for contribution and benefit purposes. In fact, cafeteria plan benefits are restricted solely to employees (I.R.C. §125(d)(1)(A), (b)(1)). Group term life insurance benefits included in a cafeteria plan are subject to the cafeteria plan nondiscrimination rules. Some miscellaneous fringe benefit plans, such as no additional cost services or employee discounts, must be administered in a uniformly nondiscriminatory manner to remain tax-free. *See* I.R.C. §132(e)(2), (j)(1).

¹⁸IRS Field Directive (Nov. 22, 1994), PENS. PLAN GUIDE (CCH) ¶23,902F, provides that the Code and its regulations do not preclude a qualified plan from requiring, as a condition of participation, that an employee be employed in a specific job classification.

¹⁹An employer’s ability to exclude classes of employees from coverage under a tax-qualified retirement plan is limited by the provisions of I.R.C. §410(b), which requires plan coverage to be nondiscriminatory.

²⁰In *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 5 EB Cases (BNA) 1971 (10th Cir. 1984), the Tenth Circuit determined that provisions in two ERISA-covered employee benefit plans that required the plans to be “qualified for approval by the U.S. Treasury, Internal Revenue Service and the Department of Labor” caused the pension plan, which included participation and vesting tax rules, to require all employees to be eligible to participate in the plan. Likewise, the district court in *Renda v. Adam Meldrum & Anderson Co.*, 806 F. Supp. 1071, 1082 (W.D.N.Y. 1992), relied on the plan eligibility rules set forth in 29 U.S.C. §1052(a)(1)(A) and the minimum coverage rules of 26 C.F.R. §1.410(b)-(4)(c)(3) as forbidding employers from discriminating against leased employees when designing an ERISA plan. For further discussion of *Renda*, see *infra* III.D.5.

²¹See the discussion *infra* III.D.5.

1. Consequences of Excluding Common-Law Employees

The improper exclusion of common-law employees from participation in a qualified retirement plan due to their misclassification as contingent workers may result in an operational plan failure insofar as the plan is not being operated in accordance with its stated terms that allow for eligibility of regular employees. This qualification failure can usually be corrected through one of the corrective programs established by the IRS.²² Depending on the nature and extent of the violation involved, the accepted method of correction can be quite costly to the plan sponsor.

Absent a violation of specific plan nondiscrimination rules, the improper exclusion of employees from a welfare benefit or fringe benefit plan would generally not entail adverse tax consequences for the plan or its other participants. Misclassified workers, including independent contractors, participating in a welfare and fringe benefit plan incur income tax on the value of such benefits because the tax exclusion for benefits is available only to employees.²³ The welfare and fringe benefit plans are, however, otherwise unaffected. Where common-law employees are improperly excluded (due to misclassification) from such plans, the applicable nondiscrimination tests may be affected. If the plan subsequently fails the applicable nondiscrimination test, plan participants who comprise the “prohibited group”²⁴ will have their benefits subject to income tax.

2. Consequences of Including Independent Contractors

Plan sponsors and participants may also suffer negative consequences for including independent contractors in a tax-favored benefit plan. Qualified retirement plans that cover independent contractors risk plan disqualification arising from the plan’s failure to comply with the “exclusive benefit rule” of

²²IRS programs for the correction of failures that affect the qualification of a plan under I.R.C. §§401(a), 403(a), 403(b), or 408(k) are consolidated in a single system: the “Employee Plans Compliance Resolution System” (EPCRS). EPCRS is described in detail in Rev. Proc. 2003-44, 2003-25 I.R.B. 1051 (June 23, 2003). In Private Letter Ruling 95-46-018 (Nov. 17, 1995), the IRS ruled that an independent contractor’s participation in a company’s qualified employee pension plans did not trigger plan disqualification provided corrective measures were taken. Furthermore, the IRS acknowledged that disqualifying a plan for violating the exclusive benefit rule is a penalty that should be invoked sparingly. Field Service Adv. 1998-289, No. 700.

²³Unlike most other welfare and fringe benefit plans, educational assistance plans require the participation of all employees. Therefore, erroneously covering an independent contractor in an educational assistance plan will result in the loss of tax benefits for all participants, not just the prohibited group. Where common-law employees are excluded, the exclusion may affect the nondiscrimination test. If the plan fails the test, then all employees that receive tuition assistance under the plan must include the benefit in income for the open tax years. Also, employee stock purchase plans under I.R.C. §423 require that all employees be eligible under the plan. Therefore, if an employee is improperly excluded from a §423 plan, then all options granted under the plan are denied favorable tax treatment. To date, there have been no reported IRS cases on the denial of tax benefits under an I.R.C. §423 plan.

²⁴The makeup of the “prohibited group” depends on the type of welfare benefit plan involved. See *supra* note 17, at III.A, for a description of what would constitute a “prohibited group” for each welfare benefit plan.

Code Section 401(a)(2), which restricts plan participation to employees and former employees.²⁵

The disqualification of the plan will also cause the plan sponsor to lose the benefit of its previous tax deductions for contributions made to the plan. Additionally, other plan participants are negatively impacted insofar as the loss of tax-favored status will result in the loss of their tax-deferral advantages. The loss of tax-favored status of the plan will also render the trust holding plan assets to lose tax-exempt status, causing earnings accumulating in the trust to become subject to income tax.

Welfare and fringe benefit plans that include independent contractors as participants do not incur plan disqualification. However, including independent contractors as participants in welfare benefit and fringe benefit plans will likely result in the taxation of these benefits for such individuals.²⁶

C. Who Is a “Common-Law Employee” for Benefit Eligibility Purposes?

Although all tax-qualified retirement plans and many welfare and fringe benefit plans covered by ERISA may be maintained only for “employees,” ERISA does not provide meaningful guidance as to what is meant by this critical term. ERISA defines “employee” to mean any individual employed by an employer.²⁷ In *Nationwide Mutual Insurance Co. v. Darden*,²⁸ the U.S. Supreme Court acknowledged that “ERISA’s nominal definition of ‘employee’ as ‘any individual employed by the employer’ is completely circular and explains nothing . . . [nor is there] any provision . . . giving specific guidance on

²⁵ See *Professional & Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225, 8 EB Cases (BNA) 2153 (1987), *aff’d*, 862 F.2d 751, 10 EB Cases (BNA) 1627 (9th Cir. 1988). As a condition for qualification of a retirement plan, I.R.C. §401(a)(2) requires that the plan provide that it be impossible, at any time prior to the satisfaction of all liabilities with respect to employees and beneficiaries under the trust, for any part of the plan assets to be used for, or diverted to, purposes other than for the exclusive benefit of the employees or their beneficiaries. This is known as the “exclusive benefit” rule. For further discussion of the exclusive benefit rule, see *infra* V. Contingent workers often allege a purported violation of the exclusive benefit rule arising from their exclusion from participation in plan benefits. See *Godshall v. Franklin Mint Co.*, 285 F. Supp. 2d 628, 633, 31 EB Cases (BNA) 1665 (E.D. Pa. 2003) (amended complaint of freelance workers alleged that defendants violated their fiduciary duties, including duties to act solely in the interest of participants and beneficiaries).

²⁶ An independent contractor may be considered a “beneficiary” under ERISA and therefore entitled to receive benefits under a welfare benefits plan. *Turnoy v. Liberty Life Assurance Co. of Boston*, 2003 U.S. Dist. LEXIS 1311, at *12–16, 29 EB Cases (BNA) 2609 (N.D. Ill. Jan. 30, 2003). See also *Shyman v. UNUM Life Ins. Co. of Am.*, 2004 U.S. Dist. LEXIS 4964, at *23–25 (N.D. Ill. Mar. 25, 2004) (claim by independent contractor for benefits under ERISA employee welfare benefit plan is claim by beneficiary pursuant to ERISA §502(a)(1)(B)). An independent contractor who otherwise satisfies the eligibility requirements under a disability plan may be entitled to receive disability benefits. *Ruttenberg v. United States Life Ins. Co.*, 2004 U.S. Dist. LEXIS 2300, at *35–37, 33 EB Cases 1464 (N.D. Ill. Feb 19, 2004) (independent trader did not establish plan eligibility insofar as he was unable to establish that he worked full time).

²⁷ ERISA §3(6) defines “employee” as “any individual employed by an employer.”

²⁸ 503 U.S. 318, 14 EB Cases (BNA) 2625 (1992).

the term's meaning."²⁹ The Court in *Darden* chose to adopt the traditional common-law agency test³⁰ to assess whether a worker qualifies as an "employee" for ERISA purposes.³¹ Under this test, "employee" status is determined by assessing the extent to which the hiring party retains the right to control the manner and means by which work is accomplished.³² The Court did not address how the term "employee" is defined under the Code. *Darden* is discussed in Chapter 1 (Is an ERISA Welfare Plan Involved?).

In subsequent cases, courts have indicated that "the law provides for an all or nothing approach," refusing to recognize the existence of any hybrid status between that of an employee and that of an independent contractor. If the worker does not meet the *Darden* test, the worker is an independent contractor.³³

²⁹ 503 U.S. at 323. The definition of "employer" in ERISA §3(5) does not clear up the confusion: "The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer." ERISA §3(7) defines a "participant" as an employee or former employee "who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." See the discussion of the terms "employer" and "employee" in Chapter 1 (Is an ERISA Welfare Plan Involved?).

³⁰ This test developed under tort law as a basis for recovery from the "master" for torts committed by his "servant" during the course of the servant's employment. See, e.g., RESTATEMENT (SECOND) OF AGENCY §219 (1958). The liability of the master is based on his presumed control over the actions of his servant. See, e.g., *id.* §220.

³¹ Before *Darden*, several courts had used common-law tests. See e.g., *Cohen v. Martin's*, 537 F. Supp. 766, 3 EB Cases (BNA) 1313 (S.D.N.Y. 1982), *aff'd*, 694 F.2d 296, 3 EB Cases (BNA) 2481 (2d Cir. 1982); *Holt v. Winpisinger*, 811 F.2d 1532, 8 EB Cases (BNA) 1169 (D.C. Cir. 1987). Others adopted their own approaches: either examining the work relationship in terms of the parties involved, see *Mayerke v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 12 EB Cases (BNA) 1713 (D.C. Cir. 1990), or the employee benefit plan at issue, *Bell v. Employee Security Benefit Ass'n*, 437 F. Supp. 382, 1 EB Cases (BNA) 1703 (D. Kan. 1977), taking into account the economic realities that created the need for ERISA and applying common-law principles, *Harlow v. Nationwide Mutual Insurance Co.*, 1987 U.S. Dist. LEXIS 8419 (D. Conn. June 23, 1987), or examining the representational interests of union employees, *Baucom v. Pilot Life Insurance Co.*, 674 F. Supp. 1175 (M.D.N.C. 1987). Since *Darden*, which made it clear that the federal common-law test for employee status is the same for tax and ERISA purposes, any contrary argument has been rejected by the courts. See *Coonley v. Fortis Benefit Ins. Co.*, 956 F. Supp. 841 (N.D. Iowa 1997) (corporate officer who was independent contractor found ineligible under ERISA-covered life insurance plan). However, a plan administrator has discretion to interpret undefined plan terms differently from the federal common-law definition, provided that the definition is reasonable and consistent with the plan's overall intention. *Hensley v. Northwestern Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 26 EB Cases (BNA) 1769 (9th Cir. 2001) (administrators should be given full benefit of discretion afforded them by their respective plans in interpreting plan terms; thus their use of W-2 employee definition to exclude plaintiffs from participation in plans was not abuse of discretion).

³² In addition to this "right to control test," the Court cited the following additional factors that should be given equal weight: the skill required; the source of the instruments and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Darden*, 503 U.S. at 323-24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989)).

³³ In *Barnhart v. New York Life Insurance Co.*, 141 F.3d 1310, 21 EB Cases (BNA) 2953 (9th Cir. 1998), the court ruled that an insurance agent was not an employee under the Age Discrimination in Employment Act (ADEA) or ERISA but rather was an independent contractor. The Ninth Circuit specifically rejected the plaintiff's argument that his employment status with

The IRS,³⁴ as well as the DOL, has resorted to use of the common-law agency test to determine whether a worker should properly be classified as a common-law employee. The IRS approaches the determination of whether a worker is an employee as a fact-based inquiry whose outcome depends on the application of 20 factors³⁵ that were initially developed in an IRS revenue ruling³⁶ to determine whether an employment relationship existed for federal employment tax purposes.³⁷ The IRS and the courts now use the same test to determine worker status for purposes of benefit eligibility.³⁸ The courts have consistently held that each of the 20 factors—in addition to the “right to control” test—is to be weighed when determining whether a worker qualifies as an “employee” for ERISA purposes.³⁹ Because the totality of the circumstances

the defendant is a “hybrid between that of independent contractor and employee.” As the court pointed out, the plaintiff

fails to point to any provision within ERISA or the ADEA that provided protection for someone who can demonstrate only some characteristics of an employee. In this sense, the law provides an all or nothing approach. Either [the plaintiff] is an employee and thus entitled to the protection of ERISA and the ADEA, or he is not.

141 F.3d at 1313. Courts continue to consider the *Darden* factors in determining common-law employee status. See *Landry v. Georgia Gulf Corp.*, 91 Fed. Appx. 950, 952, 33 EB Cases (BNA) 1117 (5th Cir. Mar. 8, 2004) (plaintiffs failed to meet *Darden* standards for common-law employment).

³⁴I.R.C. §3121(d) and 26 C.F.R. §31.3121(d)-1(c)(2) (employment tax regulations) provide that an employee includes any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee. This analysis is equally applicable in determining whether an individual is a common-law employee for purposes of I.R.C. §401(a). See *Professional & Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225, 231, 8 EB Cases (BNA) 2153 (1987); *Edward L. Burnetta, O.D., P.A. v. Commissioner*, 68 T.C. 387, 397, 1 EB Cases (BNA) 1724 (1977); *Packard v. Commissioner*, 63 T.C. 621, 629 (1975).

³⁵The 20 factors identified by the IRS and discussed in Revenue Ruling 87-41 are as follows: instructions; training; integration; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full time required; doing work on employer’s premises; order of sequence set; oral or written reports; payment by hour, week, month; payment of business and/or traveling expenses; furnishing of tools and materials; significant investment; realization of profit or loss; working for more than one firm at a time; making service available to general public; right to discharge; and right to terminate.

³⁶Rev. Rul. 87-41, 1987-1 C.B. 296.

³⁷Prior to the seminal case of *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 20 EB Cases (BNA) 1873 (9th Cir. 1996), most employers focused on worker classification issues primarily for income and employment tax withholding purposes, not in connection with tax-qualified plans. The successor to Revenue Ruling 87-41, in terms of providing useful guidance regarding worker classification for tax purposes, is “Worker Classification Training Guidelines: Independent Contractor or Employee?” This document is a training publication for IRS examiners on worker classification and may be found at <http://www.irs.gov/pub/irs-utl/emporind.pdf>.

³⁸The common-law agency test used in determining worker status for benefit eligibility is distinguishable from the analysis employed to determine who the plaintiff’s employer is for ERISA purposes, as defined in 29 U.S.C. §1002(5). In *Castiglione v. United States Life Insurance Co.*, 262 F. Supp. 2d 1025, 1031–32 (D. Ariz. 2003), the district court found a leasing agency that had agreed to provide insurance benefits on behalf of a plaintiff to be the plaintiff’s employer for ERISA purposes, notwithstanding that the agency did not control the plaintiff’s day-to-day job activities.

³⁹An example of the court’s analysis of these factors is found in *Rumpke v. Rumpke Container Service*, 240 F. Supp. 2d 768, 775–76, 28 EB Cases (BNA) 2349 (S.D. Ohio 2002), where the district court reiterated that the common-law test “provides no ‘shorthand formula or magic phrase that can be applied to find the answer[;] . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” (citing *Nationwide Mut. Ins.*

controls whether the worker is classified as an employee, the court's analysis of these factors generally is quite fact intensive.

Notwithstanding the 20-factor test, the IRS recognizes that most often the determining factor in assessing employee status is the service recipient's right to control "not only as to the result to be accomplished by the work but also . . . the details and means by which that result is accomplished."⁴⁰

D. Who Is a Contingent Worker?

Of the three principal categories of contingent workers⁴¹—independent contractors, leased employees, and temporary or seasonal workers—it is the independent contractor that usually presents the greatest risk of misclassification for employers.

1. Independent Contractors

Unlike an employee, an independent contractor is not subject to an employer's direction or control regarding the manner or means to accomplish a given assignment. This term describes self-employed individuals or "freelancers" who are paid directly by a recipient for services rendered on one or more projects for either a finite or indefinite length of time. Aside from reduced overhead, an independent contractor offers an employer increased staffing flexibility due to the relative impermanence of this working relationship.

The most widely known case involving freelancers, *Vizcaino v. Microsoft Corp. (Vizcaino II)*,⁴² perhaps best illustrates that a misclassification of workers may have unintended, expensive consequences for companies using contingent workers.

2. Benefit Claims and Misclassification: *Vizcaino v. Microsoft and Its Progeny*

In *Vizcaino*, workers brought a class action suit under ERISA⁴³ against the company seeking benefits pursuant to Microsoft's savings and stock pur-

Co. v. Darden, 503 U.S. 318, 324, 14 EB Cases (BNA) 2625 (1992)). See also *Mulzet v. R.L. Reppert Inc.*, 54 Fed. Appx. 359, 361, 29 EB Cases (BNA) 2844 (3d Cir. Dec. 11, 2002) (applying *Darden* factors; lower court ruling that contractor was independent contractor, not employee, was affirmed).

⁴⁰Treas. Reg. §§31.3121(d)-1(c)(2), 31.3306(i)-1(b), 31.3401(c)-1(b). No actual control need be exercised as long as the employer has the right to control, Rev. Rul. 57-21, 1957-1 C.B. 317.

⁴¹An individual hired through a professional employer organization (PEO) raises issues regarding the identity of the employer. This is a distinctly different inquiry from the misclassification issues encountered with independent contractors and leased employees. Consequently, PEOs are discussed separately below (see *infra* V).

⁴²120 F.3d 1006, 21 EB Cases (BNA) 1273 (9th Cir. 1997). *Vizcaino II* is the Ninth Circuit's en banc decision agreeing with the earlier panel ruling in *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 20 EB Cases (BNA) 1873 (9th Cir. 1996) (*Vizcaino I*). In *Vizcaino I*, the Ninth Circuit reversed the district court's grant of summary judgment in favor of Microsoft.

⁴³Many contingent worker claims for eligibility to participate in a service recipient's benefit plans have been brought as class action lawsuits. In order to file a class action lawsuit, plaintiffs must meet the criteria for class action certification pursuant to Rule 23 of the Federal Rules of

chase plans. Each of the workers had signed agreements with Microsoft when hired that stated that the worker was “an Independent Contractor for [Microsoft],” and nothing in the agreement would be considered as creating an “employer-employee relationship.”⁴⁴ Although the workers were fully integrated into Microsoft’s workforce, they were paid through the accounts payable department rather than through the payroll department.⁴⁵ Because Microsoft would not be withholding tax or making FICA payments on behalf of these workers, the company required each to sign an information form that explained the following: “[A]s an Independent Contractor to Microsoft, you are self employed and are responsible to pay all your own insurance and benefits. Microsoft . . . will not subject your payments to any withholding You are not either an employee of Microsoft, or a temporary employee of Microsoft.”⁴⁶

The IRS subsequently classified the workers as common-law employees rather than independent contractors for tax purposes.⁴⁷ After resolving the tax issue, Microsoft allowed some of the workers to join its regular workforce as full-time employees and required others to discontinue their direct relationship with Microsoft and become temporary workers through a staffing agency that was to supply Microsoft’s future temporary needs.⁴⁸ Some of the workers who had not been chosen to stay with Microsoft as part of its regular employee workforce asserted their claim that at the time they were classified as independent contractors they had, in fact, been employees of Microsoft and, as such, should have been given the opportunity to participate in the company’s savings plan and stock purchase plan.⁴⁹ In the internal appeal, the plan administrator denied their claim on the basis that they were independent contractors who had

Civil Procedure. Specifically, the rule requires a showing of numerosity, commonality, typicality, and adequacy of representation. The first two criteria evaluate the sufficiency of the class itself, whereas the last two ascertain the sufficiency of the named class representative. *See Hassine v. Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 391, 26 EB Cases (BNA) 1789 (E.D. Pa. 2001) (citing *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994)). In *Thomas*, the court found that the plaintiffs, who were all contingent workers although labeled as either “leased” or “temp” employees, satisfied the prerequisites of Rule 23 to file a claim under ERISA for benefits. Specifically, they satisfied the following: (1) the numerosity prerequisite, because the class contained approximately 1,100 people; (2) the commonality prerequisite, given that the named plaintiffs shared questions of law with other class members with regard to the administrators’ interpretation of the plans’ definition of the term “employee” and whether that interpretation violated ERISA; (3) the typicality requirement, insofar as the named plaintiffs’ claims arose from the same course of conduct of SmithKline Beecham that gave rise to the claims of the class members; and (4) the adequacy of representation requirement, insofar as there was no conflict of interest between the named plaintiffs and the other class members. *Thomas*, 201 F.R.D. at 391–92, 396. *See also* *Flanagan v. Allstate Ins. Co.*, 213 F. Supp. 2d 862 (N.D. Ill. 2001) (class action certification required to file suit for breach of fiduciary duty under ERISA for constructively dismissing plaintiffs with intent to interfere with their attainment of eligibility for severance payments); *Rumpke v. Rumpke Container Serv.*, 205 F.R.D. 204 (S.D. Ohio 2001) (proposed class, i.e., route supervisors and route drivers, did not satisfy prerequisites for certification under FED. R. CIV. P. Rule 23 to file suit under ERISA for benefits as common-law employees entitled to participate in company’s benefit plans).

⁴⁴ *Vizcaino II*, 120 F.3d at 1010.

⁴⁵ *Id.* at 1008.

⁴⁶ *Id.* at 1010.

⁴⁷ *Id.* at 1009.

⁴⁸ *Id.*

⁴⁹ *Id.*

waived their right to participate in the company's benefit plans.⁵⁰ In subsequent litigation, Microsoft conceded that the workers were common-law employees of the company, not just for tax purposes but for all purposes, and that, notwithstanding the workers' prior agreements, the company acknowledged that this case was not a waiver case.⁵¹ Referring to the "independent contractor" description of the workers' status in the agreements, the Ninth Circuit found that this classification was based on a mutual mistake, thereby rendering that language entirely meaningless for purposes of the court's analysis.⁵²

The Ninth Circuit first addressed the workers' eligibility to participate in the savings plan. Finding the plan administrator's determination of ineligibility based on their status as independent contractors to be "arbitrary and capricious," the court focused its attention on the savings plan language, which restricted plan eligibility to common-law employees who were "on the United States payroll of the employer."⁵³ Ultimately, the court remanded the issue of the workers' eligibility under this plan language back to the plan administrator for an initial determination.⁵⁴ Second, with respect to the stock purchase plan, the court observed that it had been created as a tax-favored plan requiring the participation of all employees.⁵⁵ The court stated that the misclassified workers could maintain a contractual claim to such benefits even if they had not been aware of the plan's specific terms, stating, "[t]he [employee stock purchase plan] was created and offered to all employees, the [w]orkers knew of it, even if they were not aware of its precise terms, and their labor gave them a right

⁵⁰*Id.*

⁵¹*Id.* at 1012. The validity of an ERISA waiver may be subject to closer scrutiny than the validity of other waivers. The courts generally have required clear evidence of a knowing waiver of ERISA benefits before giving effect to a contractual waiver.

⁵²In its analysis, the court relied on the factually similar case of *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 17 EB Cases (BNA) 1731 (11th Cir. 1993), which involved a plaintiff who had gone to work for Honeywell and had signed an agreement that stated that she was an independent contractor, that she was not an employee, and that she was not "entitled to any benefits or privileges provided by Honeywell to its employees." 3 F.3d at 1490. Subsequently, she asserted that she was entitled to certain ERISA benefits because she was, in fact, an employee. In reversing the district court's grant of summary judgment in favor of Honeywell, the Eleventh Circuit found that there were issues of material fact as to the plaintiff's status as an employee or independent contractor and that the plaintiff would be entitled to "employee benefits for the period during which she performed services as a consultant," if she were an employee. *Id.* at 1493.

⁵³120 F.3d 1006, 1013, 21 EB Cases (BNA) 1273 (9th Cir. 1997). In *Vizcaino I*, the plaintiffs asserted that the phrase refers to "Microsoft employees who are paid from United States sources." *Vizcaino I*, 97 F.3d 1187, 1193, 20 EB Cases (BNA) 1873 (9th Cir. 1996).

⁵⁴Applying the rule of *contra proferentem*, the panel in *Vizcaino I* determined that the phrase "on the United States payroll of the employer" plausibly referred to "those persons who are on the list of, or among the total number of, persons employed by Microsoft and paid from its United States accounts." *Vizcaino I*, 97 F.3d at 1194. Thus, in the court's view, this phrase can be read to extend eligibility to the plaintiff. *Id.* at 1196. In a strongly worded dissent, several members of the court in *Vizcaino II* expressed their view that the court should determine that the workers are entitled to participate in the savings plan insofar as remand is improper because the plan "should not be permitted to assert on judicial review reasons for denial that were not contained in the plan administrator's [original] decision." *Vizcaino II*, 120 F.3d at 1016. The savings plan administrator denied the eligibility claim in 1999.

⁵⁵The panel decision in *Vizcaino I* determined that the plaintiffs were entitled to enforce the stock purchase plan "in the same manner as would any of Microsoft's other employees." 97 F.3d at 1197.

to participate in it.”⁵⁶ Because any benefits available under the employee stock purchase plan required the plan participants to pay for their stock purchase, the court determined that an appropriate remedy arising from the workers’ failure to participate in this plan would best be left to the district court on remand.⁵⁷ The case eventually settled for \$96.885 million.⁵⁸

⁵⁶ *Vizcaino II*, 120 F.3d at 1014.

⁵⁷ *Id.* Certiorari was denied by the U.S. Supreme Court. *Microsoft Corp. v. Vizcaino*, 522 U.S. 1098 (1998). In a subsequent ruling, the Ninth Circuit granted a mandamus petition after the district court had narrowed the class of employees seeking participation in Microsoft’s stock purchase plan. In doing so, the Ninth Circuit observed, in dicta, that “even if for some purposes a worker was considered an employee of the [temporary employment] agency, that would not preclude his status of common-law employee of Microsoft. The two are not mutually exclusive.” *Vizcaino v. Microsoft Corp.*, 173 F.3d 713, 723, 23 EB Cases (BNA) 1209 (9th Cir. 1999) (*Vizcaino III*). This quote may be interpreted as implicit approval of PEO-type arrangements. See the discussion *infra* V. To learn more about how to draft or defend a *Vizcaino*-type claim, see *Arbitrary Enactment or Application of Eligibility Requirement for Private Pension Benefits*, 17 AM. JUR. PROOF OF FACTS 2d §51; *Participation of Independent Contractors in Employee Benefit Plans After the Microsoft Decision*, 50 AM. JUR. PROOF OF FACTS 3d §1. There are numerous articles on the *Vizcaino* decision and the issues addressed therein. See, e.g., James G. McMillan, III, *Misclassification and Employer Discretion Under ERISA*, 2 U. PA. J. LAB. & EMP. L. 837, 866 (2000); Richard J. Freddo, *Contingent Workers: A Full-Time Job for Employers, Benefit Plan Administrators and the Courts*, 52 S.M.U. L. REV. 1817, 1845 (1999); Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 356 (1999); Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 368 (2001); *New Mentality Required for Corporations Hiring Independent Contractors*, 7 J. TAX’N EMP. BENEFITS 214 (2000); Mary Clare Gartland, *Independent Contractors and Qualifying Corporate Pension Plans Under the Employee Retirement Income Security Act After Vizcaino v. Microsoft*, 49 CATH. U. L. REV. 505, 534 (2000); Philip D. Hixon, Note: *Contingent Workers and ERISA: Should the Law Protect Workers With No Reasonable Pension Expectations?*, 25 OKLA. CITY U. L. REV. 667, 712 (2000); Lisa Horwedel Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as They Relate to Employee Benefit Plans*, 29 CAP. U. L. REV. 1079 (2001); John McGee, *Benefits for Contingent Employees*, 63 TEX. B.J. 870 (2000); Judith E. Bendich, *When Is a Temp Not a Temp?*, 37 TRIAL 42 (Oct. 2001); John M. Vine & Michael J. Francese, *Contingent Workers Under Employee Benefit Plans: Problems if They Are Covered and Problems if They Are Not*, 664 PLI/LIT. 327 (2001); Phillip R. Maltin, *By Any Other Name—No Matter What Workers Are Called, Their Status and Treatment as Employees Are Subject to a Variety of Fact-Based Tests*, 24 L.A. LAW. 53 (Sept. 2001); Daniel M. Feinberg, *Independent Contractors, Leased Employees, and Other Contingent Workers*, SG017 ALI-ABA 247 (2001); Katherine M. Forster, *Strategic Reform of Contingent Work*, 74 S. CAL. L. REV. 541 (2001); Lara Turcik, *Rethinking the Weighted Factor Approach to the Employee Versus Independent Contractor Distinction in the Work for Hire Context*, 3 U. PA. J. LAB. & EMP. L. 333 (2001); Mark Berger, *Rethinking the Legal Oversight of Benefit Program Exclusions*, 33 RUTGERS L.J. 227 (2002); Lisa Horwedel Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as They Relate to Employee Benefit Plans*, 29 CAP. U. L. REV. 1079 (2002); Patricia Ball, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers From the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901 (2003); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003); Kevin J. Doyle, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 SETON HALL L. REV. 641 (2003); Thomas A. Kirschbaum, *Selected Issues Regarding Contingent Workers*, SJ013 ALI-ABA 215 (2003); Rodney L. Caughron, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 J. LEGAL ASPECTS SPORT 47 (2004).

⁵⁸ *Hughes v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. Mar. 26, 2001).

In a case contemporaneous with *Vizcaino I*, the Seventh Circuit, in *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan*,⁵⁹ relied heavily on the deferential standard of review⁶⁰ to uphold a plan administrator's decision that loan originators were independent contractors rather than common-law employees and thus not entitled to participate in an employee stock ownership plan (ESOP). The loan originators brought an action to recover ESOP benefits after they had signed agreements that designated each plaintiff as "an independent contractor and not Cragin's employee for all purposes."⁶¹ The court found that the plan at issue granted discretion to the administrative committee to interpret and apply the plan's terms and that the plan administrator's decision to deny benefits to these claimants was not arbitrary and capricious.⁶² The plan limited eligibility to "employees," defining as an employee "any individual who is or has been employed or self-employed by an Employer."⁶³ The plan administrator found that the plaintiffs were not "employed" by an employer because each had signed an agreement designating themselves as independent contractors for all purposes and thus were self-employed.⁶⁴ Furthermore, the plan administrator determined that the plan sponsor did not intend to treat them as employees.⁶⁵ In support of this latter conclusion, the plan administrator relied heavily on the service contracts that made explicit their loan originators' status as independent contractors and not as employees.⁶⁶

The Seventh Circuit in *Trombetta* recognized that although the court relied on other factors in support of its decision, the court was entitled to use the express language of the service agreements as a factor in its decision in that such agreements evidenced "the intent of the parties that the status of plaintiffs be that of an independent contractor and not an employee."⁶⁷

A recent example of the court's deference to plan administrators when interpreting a plan's eligibility provision appears in *Kolling v. American Power*

⁵⁹ 102 F.3d 1435, 20 EB Cases (BNA) 2265 (7th Cir. 1996). Unlike *Vizcaino*, the plaintiffs in *Trombetta* were not reclassified as common-law employees by the IRS prior to their filing of benefit claims.

⁶⁰ When an ERISA plan grants the plan administrator sole discretion to interpret the plan document and resolve ambiguities, the administrator's decisions are subject to lesser judicial scrutiny under the "arbitrary and capricious" standard of review than the de novo standard. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 10 EB Cases (BNA) 1873 (1989) (decision to deny benefits is to be reviewed under de novo standard unless benefit plan gives administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe terms of plan). Standard of review is discussed in Chapter 21 (What Is the Appropriate Standard of Review?).

⁶¹ *Trombetta*, 102 F.3d at 1436.

⁶² *Id.* The Seventh Circuit in *Trombetta* recognized that "[n]othing in ERISA . . . compels a plan to use the term 'employee' in the same way it is used in the statute." *Id.* at 1440. See also *Hensley v. Northwestern Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 1001 (9th Cir. 2001) (citing the *Trombetta* quote with approval).

⁶³ *Trombetta*, 102 F.3d at 1438.

⁶⁴ *Id.* at 1439.

⁶⁵ *Id.* at 1437, 1439.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1439–40. See generally *Kiper v. Novartis Crop Prot., Inc.*, 209 F. Supp. 2d 628, 28 EB Cases (BNA) 1020 (M.D. La. 2002) (treatment of independent contractor agreement, as discussed in text below).

*Conversion Corp.*⁶⁸ In *Kolling*, the First Circuit stated that, although Kolling had a plausible argument that he was a common law employee of American Power Conversion, “it is the language of the Plan, not common law status, that controls.”⁶⁹ After recognizing that the plan adopted a circular definition of employee, i.e., “employee of the employer,” the court upheld the plan administrator’s exercise of discretion to reasonably determine the meaning of that phrase to include only individuals who received W-2 forms and leased employees.⁷⁰ Another example is found in *MacLachlan v. Exxon Mobil Corp.*,⁷¹ where the Fifth Circuit upheld as not an abuse of discretion the plan administrator’s exclusion of independent contractors from the plan on the basis that the plan eligibility term “regular employees” was intended to refer solely to employees on the payroll of the plan sponsor.

The Tenth Circuit addressed language in “agency agreements” similar to that found in the Microsoft agreements. In *Capital Cities/ABC, Inc. v. Ratcliff*,⁷² newspaper carriers, who for many years had operated as independent contractors, were required to sign “agency agreements” after the Kansas City Star Co. was purchased by Capital Cities. The agreements provided the following:

The Agent [newspaper carrier] is and will continue to be a self-employed independent contractor and not an employee or servant of The Star. . . . It is expressly understood and agreed between the parties that The Agent will not be treated by The Star as an employee for federal, state, or local tax purposes. . . . It is further expressly understood that, as an independent contractor, The Agent will not receive, and has no claim to, any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees. The Agent’s compensation under this Agreement shall consist, in its entirety, of the fees set forth in paragraph 8 below.⁷³

The IRS later reclassified many of these carriers as common-law employees of the Star.⁷⁴ The newspaper carriers filed a class action suit seeking benefits under two retirement and two welfare benefit plans. The Kansas City Star Co. and its four benefit plans and committees also brought their own declaratory judgment action to preclude the newspaper carriers from claiming entitlement to participate in these four benefit plans. Both cases were consolidated. The district court held that the plans correctly denied benefits to the carriers on two bases: “the Agency Agreements foreclosed their right to benefits and the terms of the four plans evinced an intent to exclude the carriers.”⁷⁵ The Tenth Circuit

⁶⁸ 347 F.3d 11, 31 EB Cases (BNA) 1513 (1st Cir. 2003), *cert. denied*, 124 S. Ct. 2413, 32 EB Cases (BNA) 2983 (June 1, 2004).

⁶⁹ 347 F. 3d at 14.

⁷⁰ *Id.*

⁷¹ 350 F.3d 472, 480–81, 31 EB Cases (BNA) 1993 (5th Cir. 2003). *See also* Boggess v. Monsanto Co., 2003 WL 715985, at *5–6 (S.D. W. Va. Feb. 10, 2003) (denial of benefits by plan administrator not abuse of discretion where it was objectively reasonable to construe phrase “regular employee” as including only those employees on plan sponsor’s payroll); Jaeger v. Matrix Essentials, Inc., 236 F. Supp. 2d 815, 829, 29 EB Cases (BNA) 1042 (N.D. Ohio 2002) (benefits denied where plan excluded “any individual for whom the Employer does not report wages on Form W-2”).

⁷² 141 F.3d 1405, 22 EB Cases 1004 (10th Cir. 1998).

⁷³ 141 F.3d at 1408.

⁷⁴ *Id.* This IRS determination was later retracted by the IRS. *Id.* at 1409.

⁷⁵ *Id.*

upheld the district court's decision on the basis that the carriers were not entitled to benefits because "the promise of benefits was a unilateral offer which they expressly rejected under the terms of the Agency Agreements" and because the eligibility terms of the plans themselves excluded the carrier's participation.⁷⁶

Notwithstanding the IRS reclassification of the carriers as common-law employees, the Tenth Circuit did not adopt the "mutual mistake of fact" rationale used by the Ninth Circuit in *Vizcaino*, choosing instead to give effect to the description of the workers as independent contractors under the agency agreements, which provided that "the Carriers and the Star mutually agreed that the Carriers would not be treated as employees, would not receive any benefits or other compensation currently paid by The Star to its employees or hereafter declared by The Star for the benefit of its employees."⁷⁷ In construing the eligibility provisions of the plans, the court also relied on the apparent intent of the employer.⁷⁸ Specifically, the savings plan shall include

any staff or talent employee of the Company who is remunerated in U.S. currency, but shall not include . . . an individual who is hired by the Company pursuant to an employment agreement or personal services agreement if such agreement provides that such individual shall not be eligible to participate in the Plan.⁷⁹

The court concluded from that language that "the clear intent of the Plan was to exclude from participation those with whom the Star had contractually agreed not to provide benefits."⁸⁰

Similarly, the pension plan defined eligibility by reference to an individual's "hours of service." The *Capital Cities* court stated that "when the Pension Plan is construed as a whole, it is clear that it did not contemplate individuals like the Carriers when it defined and described its participants."⁸¹ The remaining two plans, the insurance plan and spending account plan, both referred to "eligible employees." Participants were required to make payments to the plan that were deducted from the participants' payroll checks. Because the carriers were never on the company's payroll, the court accepted the argument that they were never intended to participate in either of these two plans.⁸²

⁷⁶ *Id.*

⁷⁷ *Id.* at 1410.

⁷⁸ In *Capital Cities*, the court found that because no plan language conferred discretionary authority on the plan administrators to determine entitlement to benefits, a de novo standard was properly applied at both the district court level and on appeal. *Id.* at 1409.

⁷⁹ *Id.* at 1411.

⁸⁰ *Id.*

⁸¹ *Id.* at 1412.

⁸² *Id.* In *Stewart v. Project Consulting Services*, 2001 U.S. Dist. LEXIS 18274, 26 EB Cases (BNA) 2910 (E.D. La. Oct. 26, 2001), the district court found that the plaintiff, a consultant who had not been previously reclassified, was not entitled to benefits because he was not an employee. The plaintiff had signed an agreement with the defendant that contractually designated him as an independent contractor. However, the court did not address the plaintiff's purported waiver of his ERISA claim pursuant to this agreement. In contrast to the Agency Agreement in *Capital Cities*, the court in *Stewart* stated that the agreement here was silent as to the ability or inability of a nonemployee to pursue an ERISA claim. Therefore, the court found that the plaintiff had not waived his right to pursue his ERISA claim. Courts will enforce an agency agreement in misclassification cases where the specific terms relating to employment status and noneligibility for benefits are clearly stated. A failure to furnish an agency agreement, however, precludes the court from making this consideration. See *Muller v. American Mgmt. Ass'n Int'l*, 315 F. Supp.

In *Kiper v. Novartis Crop Protection, Inc.*,⁸³ the district court enforced an independent contractor agreement where the factual circumstances indicated that the plaintiffs requested that the defendants hire them as independent contractors, signed agreements designating them as such, received a mark-up in their hourly rate in lieu of employee benefits, and worked for eight or more years in that capacity. According to the district court, these facts equitably estopped plaintiffs from consideration as common-law employees because “[t]o now allow the plaintiffs to claim employee status solely to get benefits under the Plans would not only be inequitable, but it would totally destroy the clear meaning of a contract voluntarily entered into by the parties.”⁸⁴ However, there must be clear evidence of a knowing relinquishment of ERISA benefits.⁸⁵

The importance of clearly expressing in the plan document an intent to exclude classes of common-law employees from eligibility under ERISA is illustrated in *Gustafson v. Bell Atlantic Corp.*⁸⁶ In *Gustafson*, a former chauffeur alleged that the defendant intentionally misclassified him as an independent contractor in order to deny him overtime pay, benefits, and participation in the company’s retirement and health care plans.⁸⁷ The plans provided that employees were only eligible if they were “on the payroll of a participating Company.”⁸⁸ As a contract chauffeur, the plaintiff was paid through accounts payable rather than the company’s payroll. Except for benefits provided to company chauffeurs, the company treated employee and contract chauffeurs identically.⁸⁹ Although the court questioned the plan administrator’s determination that the plaintiff was not an “employee,” inasmuch as the administrator relied on the contract designation of the plaintiff as an independent contractor rather than applying the common-law agency test in making this determination, the court nonetheless upheld the plan administrator’s denial of the claim. Applying the arbitrary and capricious standard of review, the court found that the administrator’s

2d 1136, 1139 (D. Kan. 2003) (dismissal of misclassification claim denied where agency agreement was not provided to court for consideration of its specific terms).

⁸³ 209 F. Supp. 2d 628, 28 EB Cases (BNA) 1020 (M.D. La. 2002), *aff’d*, 67 Fed. Appx. 252, 2003 U.S. App. LEXIS 10519 (5th Cir. May 8, 2003).

⁸⁴ 209 F. Supp. 2d at 637–38.

⁸⁵ In *Baraschi v. Silverwear, Inc.*, 2002 U.S. Dist. LEXIS 24515, at *14–17, 29 EB Cases (BNA) 2311 (S.D.N.Y. Dec. 23, 2002), the district court refused to dismiss an employee’s claim for ERISA benefits, stating that the worker “could conceivably prove that, in signing the employment contract, she did not knowingly relinquish her ERISA benefits.” The disclaimer language of the agreement is just one of many factors taken into account in assessing whether the “totality of the circumstances” evidence supports a knowing waiver. *Baraschi*, 2002 WL 31867730, at *5. However, where the agreement expressly states that the worker would be paid as an independent contractor and would be ineligible to participate in any employee benefit plans, the agreement may sufficiently evidence the worker’s awareness of plan ineligibility for purposes of triggering the statute of limitations in any subsequent ERISA §503(a)(1)(B) claim for benefits. In *Brennan v. Metropolitan Life Insurance Co.*, 275 F. Supp. 2d 406, 410 (S.D.N.Y. 2003), the district court rejected the argument that the plaintiffs’ benefits claim did not accrue until later denied by the plan administrator in administrative proceedings, stating that the agreements contained a “clear and unequivocal repudiation of employee benefits” and, as such, caused the plaintiffs’ claims for benefits to accrue on the date the agreements were signed.

⁸⁶ 171 F. Supp. 2d 311, 26 EB Cases 2679 (S.D.N.Y. 2001).

⁸⁷ 171 F. Supp. 2d at 316.

⁸⁸ *Id.* at 320.

⁸⁹ *Id.* at 317.

determination that the plaintiff was ineligible for plan benefits was reasonable because he was not “on the payroll of a participating company.”⁹⁰

In response to *Vizcaino*, companies with contingent workers have attempted to minimize their exposure to eligibility claims through adoption of what has become known as the “Microsoft inoculation provision” that bars retroactive participation in the plan even where a worker has been reclassified. A typical Microsoft inoculation provision that might appear in the plan’s section that defines an “eligible employee” would exclude from plan eligibility:

an individual who is not characterized or treated by the Participating Employer as a common law employee of a Participating Employer [is not an Eligible Employee for purposes of plan eligibility]. In the event an individual described [above] is reclassified or deemed to be reclassified as a common law employee of a Participating Employer who meets the definition of an Eligible Employee, the individual shall be eligible to participate in the Plan as of the actual date of such reclassification (to the extent such individual otherwise qualifies as an Eligible Employee hereunder). If the effective date of any such reclassification is prior to the actual date of such reclassification, in no event shall the reclassified individual be eligible to participate in the Plan retroactively to the effective date of such reclassification.⁹¹

Another example of a Microsoft inoculation provision appears in the disability benefit plans discussed in *Jaeger v. Matrix Essentials, Inc.*⁹² These plans specifically excluded

[a]ll leased employees, as defined in Section 414(n) of the Internal Revenue Code, all independent contractors and all other individuals whom the Employer does not treat as its employees for federal income and employment tax purposes, even if it is subsequently determined by a court or the [IRS] that such individuals should be, or should have been, properly classified as common law employees of the employer.⁹³

In an unreleased technical advice memorandum,⁹⁴ the IRS took the view that Microsoft inoculation provisions are valid and enforceable and do not violate any of the tax-qualification rules governing qualified retirement plans.⁹⁵

⁹⁰*Id.* at 321.

⁹¹See Section 14.12 of ABC Corporation 401(k) plan, in David L. Raish, *Cash or Deferred Arrangements*, B-122 (TM Portfolio No. 358-3d) (Worksheet 1). See generally Alden J. Bianchi, *Employee Benefits for the Contingent Workforce* (TM Portfolio No. 399).

⁹²236 F. Supp. 2d 815, 29 EB Cases (BNA) 1042 (N.D. Ohio 2002).

⁹³236 F. Supp. 2d at 825. The widespread use of such provisions is apparent by the increasing frequency with which courts are addressing them. See, for example, *Schwartz v. Independence Blue Cross*, 299 F. Supp. 2d 441, 448, 32 EB Cases (BNA) 1047 (E.D. Pa. 2003), where the eligibility provision of the retirement plan provided: “If [independent contractor] is subsequently reclassified as . . . an employee . . . such individual will not become eligible to become a Participant in this Plan by reason of such reclassification or determination.”

⁹⁴The memorandum was dated July 28, 1999. The National Office of the IRS issues technical advice on request by the IRS or a taxpayer. The IRS is bound to the advice it provides to the requesting taxpayer with respect to an interpretation or application of tax laws or rules to given facts. The IRS is not bound by an erroneous interpretation relied on by a taxpayer other than the one to whom the technical advice was issued. See *Mid-Continent Supply Co. v. Commissioner*, 67 T.C. 37 (1976), *aff’d*, 571 F.2d 1371 (5th Cir. 1978).

⁹⁵The IRS has instructed reviewers to add a caveat to any determination letter pertaining to approval of a tax-qualified retirement plan with an exclusionary classification. Tech. Adv. Mem. (July 28, 1999) (unnumbered), *reprinted in* 27 Pens. & Ben. Rep. (BNA) 1161 (May 2, 2000).

This technical advice memorandum also states that “special assignment employees” who are excluded from plan participation by reference to their categorization under company codes may also be excluded, provided that the exclusion does not operate as an indirect age- or service-based exclusion. In another technical advice memorandum, the IRS sanctioned use of language in plan provisions that specifically excludes reclassified workers from plan eligibility.⁹⁶

3. *DOL Fiduciary Claims: The Herman v. Time Warner Inc. Litigation*

ERISA does not require employers to maintain employee benefit plans. Courts have recognized that the establishment and maintenance of such plans is an entirely voluntary undertaking.⁹⁷ However, once that undertaking is assumed, the plan sponsor must adhere to ERISA’s fiduciary obligations in its administration of the plan.⁹⁸ Included among those obligations is the duty of a fiduciary to operate the plan in accordance with its terms. This duty requires that plan sponsors, as fiduciaries, properly classify workers with respect to their eligibility and participation in ERISA-covered plans. Thus, a misclassification of a worker may give rise to a claim for breach of fiduciary duty.

The Secretary of Labor challenged a company’s worker classification by asserting an ERISA breach of fiduciary duty claim in *Herman v. Time Warner Inc.*⁹⁹ In *Herman*, the Secretary claimed that, at least since 1990, Time and various divisions and subsidiaries had misclassified workers as temporary employees and independent contractors when they were, in fact, regular project or supplementary employees. The government asserted that, but for the misclassification, these employees would have been eligible to participate in Time Warner’s benefit plans.

The benefit plans were administered by a single administrative committee that was a fiduciary of the plans under ERISA Section 3(21), “because it had the sole authority to interpret the terms of the plans, including eligibility terms, and to decide any matters related to the administration of the plans.”¹⁰⁰ The government alleged that Time Warner and the administrative committee failed to “(1) properly apply the plans to all eligible persons; (2) identify all employees eligible to participate in the plans; and (3) ensure that all eligible participants were, in fact, included in the plans.”¹⁰¹ According to the government, the fiduciaries’ failure to ascertain the actual status of the temporary employees and independent contractors led to their wrongful exclusion from benefit plans.

The defendants filed a motion to dismiss the government’s complaint for failure to state a cause of action and challenged the government’s authority to

⁹⁶Tech. Adv. Mem. (May 2, 2000) (unreleased TAM), *reprinted in* 27 Pens. & Ben. Rep. (BNA) 1161 (May 2, 2000). *See IRS Technical Advice Memo Addresses Plan Participation for Reclassified Employees*, 27 Pens. & Ben. Rep. (BNA) 1129 (May 2, 2000).

⁹⁷*Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 20 EB Cases (BNA) 1257 (1996). *See also Shaw v. Delta Air Lines*, 463 U.S. 85, 91, 4 EB Cases (BNA) 1593 (1983) (ERISA does not require employers to provide welfare or pension plans but merely regulates those that employer elects to sponsor).

⁹⁸ERISA’s fiduciary obligations are set forth in §404(a)(1)(A)–(D).

⁹⁹56 F. Supp. 2d 411, 23 EB Cases (BNA) 2646 (S.D.N.Y. 1999).

¹⁰⁰56 F. Supp. 2d at 411, 414.

¹⁰¹*Id.*

bring the breach of fiduciary duty cause of action against them. The district court analyzed the sufficiency of the complaint consistent with the principles enunciated by the U.S. Supreme Court in *Varity v. Howe*.¹⁰² In *Varity*, the Court stated that the scope of a fiduciary's duties under ERISA must be ascertained by reference to the common law of trusts while "bearing in mind the special nature and purpose of employee benefit plans."¹⁰³ Courts are thus to depart from the common law "if the language of the statute, the structure, or its purposes" so require.¹⁰⁴ In *Herman*, the court concluded that the government had sufficiently stated a cause of action for breach of fiduciary duties against the administrative committee and Time Warner by asserting that as fiduciaries they failed to identify workers "who were indeed eligible to participate in the plans but who were misclassified by the hiring managers as temporary employees and independent contractors."¹⁰⁵ The court further analyzed the government's statutory authority to bring the breach of fiduciary duty claim against the defendants by relying on Section 502(a)(5) of ERISA, which states that the government may seek an order enjoining "any act or practice which violates any provision of this subchapter, or . . . [seek to] obtain other equitable relief (i) to redress such violation or (ii) to enforce any provision of this chapter." The court rejected the defendants' contention that the government's breach of fiduciary duty claim was nothing more than an "impermissible" claim for benefits, stating "if the allegations of the complaint are true, governmental action is appropriate . . . [insofar as] [m]isclassified employees . . . may not even know their rights under ERISA might have been violated."¹⁰⁶ The case subsequently settled in November 2000 for \$5.5 million.¹⁰⁷

The settlement has left unresolved the issue dealing with the extent of a plan fiduciary's responsibilities to oversee the process of worker classification for benefit eligibility purposes. Notwithstanding the settlement, and perhaps because of it, the fiduciary aspect of worker misclassification is an issue that

¹⁰² 516 U.S. 489, 19 EB Cases (BNA) 2761 (1996).

¹⁰³ 516 U.S. at 497.

¹⁰⁴ *Id.* (cited in *Herman v. Time Warner Inc.*, 56 F. Supp. 2d 411, 416, 23 EB Cases (BNA) 2646 (S.D.N.Y. 1999)).

¹⁰⁵ *Herman*, 56 F. Supp. 2d at 417.

¹⁰⁶ *Id.*

¹⁰⁷ In *Administrative Committee of Time Warner Inc. Benefit Plans v. Biscardi*, 2000 U.S. Dist. LEXIS 16707, 25 EB Cases (BNA) 2325 (S.D.N.Y. Nov. 17, 2000), the administrators of Time Warner's benefit plans sought a declaratory judgment that the defendants, alleged to be independent contractors for subsidiaries of Time Warner, were not entitled to benefits under Time Warner's plans. The district court applied the arbitrary and capricious standard to review the plan administrators' decision that the workers were independent contractors and, as such, ineligible to receive benefits under the plans. The court found that there were genuine issues of fact regarding the administrators' conclusion that the workers were independent contractors and not employees, insofar as the administrators did not either discuss or apply the *Darden* standards and, more specifically, the "hiring party's right to control the manner and means by which the product is accomplished" standard. 2000 U.S. Dist. LEXIS 16707, at *28 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 14 EB Cases (BNA) 2625 (1992)). However, notwithstanding this finding, the court concluded that the administrators' determination that the workers were not eligible for benefits under the plans was reasonable under the arbitrary and capricious standard. 2000 U.S. Dist. LEXIS 16707, at *39-42. Additional reading on the issues raised in this litigation are as follows: Stephen J. Arsenault et al., *An Employee By Any Other Name Does Not Smell as Sweet: A Continuing Drama*, 16 LAB. LAW. 285, 305 (2000); Gail I. Bass, *Good*

needs to be addressed seriously by all plan sponsors that utilize the services of a contingent workforce.¹⁰⁸

In contrast, plan design issues affecting who is entitled to receive plan benefits do not implicate ERISA's fiduciary duties, as illustrated by *Tinley v. Gannett Co.*¹⁰⁹ In *Tinley*, the plaintiffs were independent contractors who contracted with Gannett to haul and deliver newspapers to various sites. Each contractor performed services pursuant to a written contract with Gannett. The plaintiffs filed an action against the company, its subsidiaries, and the plans alleging that the defendants committed a breach of fiduciary duty by misclassifying them as independent contractors rather than common-law employees of the company. The retirement plan, as amended, expressly stated that "[a]ny independent contractor shall not be included in this definition [of employee]."¹¹⁰ In dicta, the district court stated that the alleged misclassification did not relate to the administration of the company's retirement plan but rather to plan design, which does not implicate fiduciary duties under ERISA.¹¹¹ Consequently, the plan's exclusion of independent contractors did not breach any fiduciary duty.

News About Sick Retirement Plans—The Cure Is Here, 56 J. Mo. B. 206, 209 (2000). See also the discussion of the *Viczaino* settlement, *supra* III.D.2.

¹⁰⁸In *Montesano v. Xerox Corp. Retirement Income Guaranty Plan*, 117 F. Supp. 2d 147 (D. Conn. 2000), the plaintiffs, former and current supplemental contract workers who performed services for Xerox Corp. through third-party leasing agencies, brought an action to recover benefits allegedly due them under Xerox's employee benefit plans. Additionally, the plaintiffs asserted a breach of fiduciary duty claim under ERISA §502(a)(3) on the basis that the fiduciaries breached their duties by permitting Xerox to classify workers as supplemental contract workers, failing to ensure that all eligible employees were included in the plans for which they were eligible, failing to examine whether persons classified as supplemental contract workers were eligible to participate in the plans, incorrectly misclassifying workers as supplemental contract workers, and failing to provide misclassified workers with documents and information about the plans. 117 F. Supp. 2d at 165. The court held that the plaintiffs could not simultaneously maintain a claim for benefits under ERISA §502(a)(1)(B) and a claim for breach of fiduciary duty under ERISA §502(a)(3), because the relief sought was substantially the same in both counts. *Id.* at 166. The Second Circuit subsequently affirmed the district court's decision in part and vacated it in part for the district court's further consideration of the retaliation claim. 256 F.3d 86, 26 EB Cases (BNA) 1609 (2d Cir. 2001). Where a breach of fiduciary duty is based on a broader claim of a failure to consider the eligibility of entire classes of potential participants and related failures to comply with various ERISA-imposed duties relating to the proper administration of the plan, the claim may not be considered by the court as entirely co-extensive with their §502(a)(1)(B) claim. In *Schultz v. Stoner*, 308 F. Supp. 2d 289 (S.D.N.Y. 2004), the district court distinguished *Montesano*, stating that

nothing in the language of section 502(a)(3) or the Supreme Court's *Varity* decision suggests that the possibility that broad-based corrective action could result incidentally in a plan's payment of benefits that might have been recoverable pursuant to [section] 502(a)(1)(B) on an individual basis precludes a participant or beneficiary from seeking appropriate plan-wide equitable relief in connection with an assertion of breach of fiduciary duty.

308 F. Supp. 2d at 301.

¹⁰⁹55 Fed. Appx. 74, 30 EB Cases (BNA) 1179 (3d Cir. Jan. 9, 2003).

¹¹⁰*Tinley v. Gannett Co., Inc.*, 2002 U.S. Dist. LEXIS 6826, at *4 (Mar. 25, 2002).

¹¹¹The district court actually granted summary judgment for the company on the basis that the plaintiffs' breach of fiduciary duty claim was time-barred under the three-year statute of limitations governing ERISA fiduciary claims. 2002 U.S. Dist. LEXIS 6826, at *2-3. In affirming, the Third Circuit upheld the district court's determination under the given facts that the statute of limitations had expired on the breach of fiduciary duty claim in that the workers had actual knowledge of the breach upon classification of their employment as independent contractors.

4. Leased Employees

Leased employees are generally hired and paid by a leasing organization (also known as a staffing company) that contracts with a recipient company to provide these workers' services for a fee. The fee is calculated to include a certain percentage retained by the leasing organization and the rest is used to pay the leased employees. Some leasing organizations furnish their workers with employee benefits, whereas others do not. Leased employees frequently offer a recipient company the same advantages as independent contractors, such as lower overhead costs, increased staffing flexibility, and the opportunity to obtain expertise at a reasonable cost. In most instances, leased employees are treated as common-law employees of the leasing organization. However, in some circumstances, individuals hired through a leasing company may also be subject to the direction and control of the service recipient and therefore satisfy the requisites of the test for common-law employee status with the recipient company.¹¹²

55 Fed. Appx. at 78. *See also* *Edes v. Verizon Communications, Inc.*, 288 F. Supp. 2d 55 (D. Mass. 2003) (breach of fiduciary duty claim dismissed where actual knowledge of misclassification was determined to have occurred upon date of hire). For purposes of fixing the accrual date of a breach of fiduciary duty claim, application of the statute of limitations requires actual knowledge of the breach. Therefore, a fiduciary breach claim will not be barred on statute of limitations grounds absent proof that the workers classified in a nonemployee role had possessed knowledge of all facts necessary to understand that some claim may exist under ERISA. *See* *Godshall v. Franklin Mint Co.*, 285 F. Supp. 2d 628, 636 (E.D. Pa. 2003). In *Schultz v. Stoner*, 308 F. Supp. 2d 289 (S.D.N.Y. 2004), the district court refused to dismiss a breach of fiduciary duty claim in a misclassification case despite the fact that the plaintiffs had been aware since the early 1990s that they had been moved or hired into positions that Texaco had designated as ineligible for employee benefits. The court found that because it was not until January 2000 that they received copies of plan documents and summary plan descriptions (SPDs) upon which the plan administrator relied to make her fiduciary determinations of ineligibility for plan benefits, the defendant did not show that the plaintiffs "had actual knowledge of the claimed breaches of fiduciary duty prior to their access to the relevant plan provisions" and as such their ERISA §502(a)(3) claim was timely. 308 F. Supp. 2d at 298–99. In *Thomas v. Smithkline Beecham Corp.*, 297 F. Supp. 2d 773, 784–85 (E.D. Pa. 2003), the district court, applying the Third Circuit's two-pronged test for "actual knowledge" of a breach or violation, which requires "a showing that plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation under ERISA," rejected the defendant's assertion that the plaintiffs' claim was time-barred on the basis that although the plaintiffs were aware that they were considered employees of temporary employee agencies and as such would not be receiving plan benefits, under the given facts they acquired the requisite "actual knowledge" of the breach only when they became regular employees and received plan descriptions that contained the eligibility definitions. 297 F. Supp. 2d at 787.

However, in some jurisdictions it may be difficult to refute that actual knowledge of misclassification occurred within a reasonable time after the plaintiff's date of hire. In *Downes v. JP Morgan Chase & Co.*, 2004 U.S. Dist. LEXIS 10510, 33 EB Cases (BNA) 1273 (S.D.N.Y. June 3, 2004), the district court dismissed the plaintiff's breach of fiduciary duty claim as untimely, rejecting the argument of no actual knowledge of misclassification prior to expiration of the statute of limitations because it would "blink reality" insofar as its consequences—lack of employee benefits—would have soon, if not immediately, been apparent.

¹¹²In any leasing situation where the leasing organization provides benefits directly to the leased employees, the potential may exist for the tax treatment of such plans to be disqualified if such workers are not "common-law employees" of the leasing organization. At least one court has determined that the management personnel and licensed professionals who were leased by the taxpayer to other businesses were not, in fact, employees of the leasing organization in that

A “leased employee” as defined under Code Section 414(n)(2) describes a narrower class of leased workers, i.e., any person who is not an employee of the recipient and who provides services to the recipient if

1. “such services are provided pursuant to an agreement between the recipient and any other person,” such as the leasing organization;
2. “such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year”; and
3. “such services are performed under primary direction or control by the recipient.”¹¹³

Individuals who are leased employees under Code Section 414(n), by definition, are not “employees of the recipient” and therefore can never be reclassified as common-law employees of the service recipient.¹¹⁴ Section 414(n) does not require that leased employees be covered under a service recipient’s plan but merely be counted as “employees” of the sponsoring service recipient for nondiscrimination coverage testing purposes.¹¹⁵ This tax rule requirement is intended to discourage employers from using these leased employee rules as a means to exclude a significant portion of the workforce from the company’s qualified retirement plan.¹¹⁶

5. *Case Law Treatment of Leased Employees’ Eligibility to Participate in a Service Recipient’s Plans*

Courts have addressed numerous¹¹⁷ challenges made by leased employees claiming the right to participate in one or more of the service recipient’s

the recipient of services as well as the workers themselves controlled the details of how and when work would be performed. *Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751, 10 EB Cases 1627 (9th Cir. 1988). Consequently, the leasing organization’s retirement plans, which covered such workers, did not qualify under I.R.C. §401 as tax-qualified retirement plans provided exclusively for the benefit of employees.

¹¹³I.R.C. §414(n)(2)(A)–(C).

¹¹⁴With respect to the “primary direction and control” prong of the test applied under I.R.C. §414(n), Revenue Ruling 75-41, 1975-1 C.B. 323, describes a set of circumstances wherein a recipient employer may have primary direction and control but is not the common-law employer of the leased employee. Revenue Ruling 75-41 presumes that the leasing company’s involvement with the worker is substantial in that it retains the ultimate right to hire and discharge its personnel as well as, perhaps, the unexercised right to control the manner in which the work is to be performed.

¹¹⁵See *supra* note 16, at III.A.

¹¹⁶A comparable rule for independent contractors does not exist under the Tax Code. However, unlike “leased employees,” independent contractors are not, by definition, “employees,” and therefore they may not participate in a qualified plan without risking its disqualification.

¹¹⁷See e.g., *Bogess v. Monsanto Co.*, 2003 WL 715985 (S.D. W. Va. Feb. 10, 2003); *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 23 EB Cases (BNA) 2497 (11th Cir. 2000); *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388, 22 EB Cases (BNA) 1887 (9th Cir. 1998); *Bronk v. Mountain States Tel. & Tel. Inc.*, 140 F.3d 1335, 21 EB Cases (BNA) 2862 (10th Cir. 1988) (*Bronk I*), *aff’d*, 216 F.3d 1086 (10th Cir. June 27, 2000) (unpublished table decision); *Clark v. E.I. du Pont de Nemours & Co.*, 105 F.3d 646, 20 EB Cases (BNA) 2308 (4th Cir. Jan. 9, 1997) (unpublished table decision); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 20 EB Cases (BNA) 1353 (5th Cir. 1996); *Montesano v. Xerox Corp. Ret. Income Guar. Plan*, 117 F. Supp. 2d 147 (D.

benefit plans. These challenges are often asserted in the absence of any prior reclassification of employment status by the IRS. Many are simply based on the assertion that the claimants have performed the same or similar functions as the service recipient's regular workforce and, as such, should be entitled to participate in the service recipient's benefit plans.

Early cases involving leased employee eligibility for benefits focused on plan language that expressly incorporated tax rules and regulations that courts interpreted as requiring leased employee plan participation. This line of analysis, however, has not generally been followed by the courts and, in many cases, has been expressly repudiated in subsequent court decisions, including *Abraham v. Exxon Corp.*, *Clark v. E.I. du Pont de Nemours & Co.*, and *Bronk v. Mountain States Telephone & Telegraph, Inc.*¹¹⁸ In its place, courts have adopted a two-pronged analysis of the eligibility issue: the first prong is a threshold requirement whereby courts must first determine whether the claimant was a common-law employee and/or leased employee; the second prong requires an analysis of the benefit plan's language to ascertain whether the plan expressly excluded the claimant's worker classification.¹¹⁹ Specifically, if the court reaches consideration of the second prong, then it will examine closely any plan language that suggests that the newly classified common-law employee is nevertheless excluded from plan participation. For the plan administrator's determination of eligibility to be deemed reasonable by the court, it must be based on an adequate set of facts presented and consistent with the governing plan documents.¹²⁰

In one of the first cases to address whether a "leased employee" may maintain a claim for benefits in a plan sponsored by the service recipient, *Renda*

Conn. 2000); *Casey v. Atlantic Richfield Co.*, 2000 U.S. Dist. LEXIS 6836, 25 EB Cases (BNA) 1187 (C.D. Cal. Mar. 30, 2000); *Renda v. Adams Meldrum & Anderson Co.*, 806 F. Supp. 1071 (W.D.N.Y. 1992).

¹¹⁸*Abraham*, 85 F.3d 1126; *Clark*, 105 F.3d 646; *Bronk I*, 140 F.3d 1335. Courts continue to repudiate early cases involving leased employees that incorporated tax regulations. *See* *Edes v. Verizon Communications, Inc.*, 288 F. Supp. 2d 55 (D. Mass. 2003) (failure to comply with tax rules and regulations affecting minimum participation requirements for qualified pension plans do not permit court to rewrite plan's eligibility provisions); *Bauer v. Summit Bancorp.*, 325 F.3d 155, 162, 30 EB Cases (BNA) 1225 (3d Cir. 2003) (salaried-only plan does not violate ERISA's minimum participation requirements). *See also* *Landry v. Georgia Gulf Corp.*, 91 Fed. Appx. 950, 952, 33 EB Cases (BNA) 1117 (5th Cir. 2004) (rejecting argument of contract workers that "intent [of the benefit plans] to remain tax qualified should militate in favor of finding that plaintiffs . . . are common law employees" and stating that "no precedent conflates tax exempt status with common law employment under the *Darden* factors").

¹¹⁹*See* *Jaeger v. Matrix Essentials, Inc.*, 236 F. Supp. 2d 815, 821–22, 29 EB Cases (BNA) 1042 (N.D. Ohio 2002). *See also* *Schwartz v. Independence Blue Cross*, 299 F. Supp. 2d 441, 449, 32 EB Cases (BNA) 1047 (E.D. Pa. 2003) (district court found computer programmer sufficiently alleged common law employee status and evidence did not establish that programmer was not eligible to receive benefits as leased employee under language of company's ERISA plans).

The two-pronged analysis to plan eligibility has also been used to determine eligibility in cases involving independent contractors. *See* *Kolling v. American Power Conversion Corp.*, 347 F.3d 11, 14, 31 EB Cases (BNA) 1513 (1st Cir. 2003) (language of plan controls).

¹²⁰*Boin v. Verizon S., Inc.*, 283 F. Supp. 2d 1254, 1268, 31 EB Cases (BNA) 2250 (M.D. Ala. 2003) (plan failed to present evidence that plan exclusion was made rationally and in good faith); *Schultz v. Stoner*, 308 F. Supp. 2d 289, 307, 32 EB Cases (BNA) 2522 (S.D.N.Y. 2004) (SPD that narrows plan's original participation provisions does not supersede official plan text to extent of any conflict between two documents).

v. Adam Meldrum & Anderson Co.,¹²¹ the claimant worked in the jewelry department of the defendant's department store, which operated under a lease agreement with the store.¹²² The lease agreement detailed the lessor's right to control the manner and method by which the jewelry department was to operate. In finding that the claimant was the common-law employee of the department store, notwithstanding her previous designation as a "leased employee," the court found that the "defendant AM&A exercised a substantial amount of control over plaintiff . . . [including the right to discharge plaintiff]. . . . Such details amount to 'control over the manner and means by which the [the work] is accomplished.'"¹²³ After determining that the plaintiff was a common-law employee of the plan sponsor, the court ruled that she should have been permitted to participate in the department store's pension plan insofar as the plan was required to satisfy the minimum participation requirements of ERISA Section 202(a).¹²⁴ The district court reasoned that it could not ignore "the authority of guidelines and regulations developed by the Treasury Department in interpreting provisions of ERISA" that compelled her plan participation.¹²⁵ Citing favorably *Crouch v. Mo-Kan Iron Workers Welfare Fund*,¹²⁶ the district court found that these regulations "are useful for extracting subtler shades of meaning necessary to paint a more detailed portrait of an individual's substantive rights under ERISA."¹²⁷

In several subsequent cases, leased employee plaintiffs have been unsuccessful in their attempts to persuade various courts to utilize the *Renda* rationale to allow them to assert claims for benefits under the service recipients' ERISA plans. In *Abraham v. Exxon Corp.*,¹²⁸ the plaintiffs were leased employees working at various Exxon facilities. The nature of their work and treatment by Exxon were indistinguishable from the way Exxon dealt with its regular full-time employee workforce. The company's ERISA plan specifically excluded leased employees from becoming eligible to participate. Exxon conceded that the plaintiffs, who were designated as "leased" or "special agreement" employees, were, in fact, common-law employees.¹²⁹ The court first disposed of the threshold issue of standing,¹³⁰ finding that the plaintiffs had "a colorable claim"

¹²¹ 806 F. Supp. 1071 (W.D.N.Y. 1992).

¹²² See also Rev. Rul. 66-162, 1966-1 C.B. 234 (1966) (IRS determined that department store sales clerks were employees of both concessionaire and retail store).

¹²³ *Renda*, 806 F. Supp. at 1079-80.

¹²⁴ I.R.C. §1052(a) prohibits a pension plan from requiring as a condition of plan participation that an employee complete a period of service with the employer extending beyond the later of the date the employee attains age 21 or the date on which the employee completes one year of service. ERISA §202(a)(1)(A).

¹²⁵ 806 F. Supp. at 1083.

¹²⁶ 740 F.2d 805, 5 EB Cases (BNA) 1971 (10th Cir. 1984). For further discussion of *Crouch v. Mo-Kan Iron Workers Welfare Fund*, see *supra* III.A.

¹²⁷ 806 F. Supp. at 1083.

¹²⁸ 85 F.3d 1126, 20 EB Cases (BNA) 1353 (5th Cir. 1996).

¹²⁹ 85 F.3d at 1129. Obviously, the plaintiffs did not contend that they were leased employees subject to I.R.C. §414(n).

¹³⁰ Only a "participant or beneficiary" of an ERISA plan has standing to bring a civil action under ERISA. ERISA §502(a)(1). Contingent workers must first be able to satisfy the threshold question as to whether they are "participants" in order to be in a position to assert a claim for benefits under ERISA §502(a)(1)(B). In 1989, the U.S. Supreme Court, in *Firestone Tire &*

for benefits and therefore satisfied ERISA's definition as a "participant" who "may become eligible to receive a benefit."¹³¹

The Fifth Circuit, however, rejected the plaintiffs' reliance on *Renda*, stating that (1) ERISA Section 202(a) "does not prevent employers from denying participation in an ERISA plan if the employer does so on a basis other than age or length of service," and (2) "[t]he Treasury regulations"¹³² [which set forth the factors that the Secretary must consider when determining whether a plan is nondiscriminatory] do not create substantive rights under ERISA that would permit the relief Abraham requests."¹³³ Upholding summary judgment in favor of Exxon, the Fifth Circuit found that the Exxon plan unambiguously excluded leased employees from participation, and consequently the plaintiffs' claims for benefits were unavailing.

Reliance on *Renda* again failed in *Clark v. E. I. du Pont de Nemours & Co.*,¹³⁴ which involved a former employee of the defendant who asserted a claim for coverage under du Pont's pension and welfare benefit plans after he had worked as a "leased employee" at the du Pont plant. After elimination of its construction division in 1970, du Pont terminated the plaintiff's employment with the company. Thereafter, the plaintiff worked for various staffing organizations performing contract work at du Pont. In 1975, the plaintiff began to work for Belcan Engineering Group, Inc. (Belcan), a national employee-leasing firm

Rubber Co. v. Bruch, 489 U.S. 101, 117, 10 EB Cases (BNA) 1873 (1989), construed ERISA's definition of "participant" to include anyone who "ha[s] a colorable claim that . . . he or she will prevail in a suit for benefits." The Fifth Circuit in *Abraham* concluded that, given this standard, plaintiffs would have standing under ERISA consistent with the *Renda* court's rationale relied on by the plaintiffs "even if he is ultimately not entitled to receive benefits under the plan," *Abraham*, 85 F.3d at 1129. However, in *Boren v. Southwestern Bell Telephone Co.*, 933 F.2d 891 (10th Cir. 1991), the Tenth Circuit upheld the district court's ruling that the plaintiff had no standing to bring his ERISA action because he was an independent contractor who was not eligible to participate in the plan. The court examined neither the work relationship nor the relevant plan documents. Similarly, in *Yak v. Bank Brussels Lambert, BBL (USA) Holdings, Inc.*, 252 F.3d 127, 131, 26 EB Cases (BNA) 1334 (2d Cir. 2001), the court held that the plaintiff had unambiguously waived her right to employee benefits in a consulting agreement.

¹³¹ ERISA §3(7).

¹³² Referring to 26 C.F.R. §1.410(b)-(4)(c)(3), the *Abraham* court stated that these regulations "purport to do no more than determine whether a plan is a qualified tax plan. Failure to meet the requirements of those regulations results in the loss of a beneficial tax status; it does not permit a court to rewrite the plan to include additional employees." *Abraham*, 85 F.3d at 1131. The Fifth Circuit in *Abraham* distinguished *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 808, 5 EB Cases (BNA) 1971 (10th Cir. 1984), where the Tenth Circuit ruled that a union employee had been improperly excluded from participating in the union's pension plan because the plan stated that it was to be construed to meet the requirements of ERISA, and "shall be such as will qualify for approval by the U.S. Treasury Department, Internal Revenue Service and the Department of Labor, and as will continue as a qualified plan." The Tenth Circuit had interpreted these statements to require the plaintiff's participation to ensure that the plan would continue to satisfy the Code's minimum coverage requirements. The Fifth Circuit noted, however, that, unlike the plan in *Crouch*, the Exxon plan did not contain any explicit provision declaring that it was to be construed to meet the requirements of an ERISA plan: "Absent such a requirement in the plan itself, a court is not entitled to look to Treasury regulations to determine employee eligibility for participation in an ERISA plan." *Abraham*, 85 F.3d at 1131.

¹³³ *Abraham*, 85 F.3d at 1130-31.

¹³⁴ 105 F.3d 646, 20 EB Cases (BNA) 2308, 1997 U.S. App. LEXIS 2309 (4th Cir. Jan. 9, 1997) (unpublished table decision).

with extensive employee leasing arrangements with du Pont. The leasing agreement between Belcan and du Pont stated that the leased workers were to be considered “employees of [Belcan], and that none . . . shall be regarded as employees of [du Pont] in any instance.”¹³⁵ When du Pont terminated its contract with Belcan in 1993, the plaintiff terminated his employment with Belcan. He thereafter applied for coverage under du Pont’s plans, “asserting that he remained a DuPont employee after 1970 while he was nominally working for various contracting organizations, most especially, Belcan.”¹³⁶

The life insurance and medical plans sponsored by du Pont defined eligible participants as “any person designated by the Company as a full-time employee. Any full-time employee on the roll as of [December 1, 1985] who continues to work at least 20 hours per week . . . will be considered a Full Service Employee.”¹³⁷ The stock ownership and savings plans expressly excluded individuals “who must be treated as employees of the Company, for limited purposes under the ‘leased employee’ provisions of Section 414(n) of the [IRC].”¹³⁸ The Fourth Circuit used a two-pronged analysis of standing to determine whether the plaintiff could assert a claim under ERISA by stating that, in order for the plaintiff to qualify as a “participant” under ERISA, he had to (1) be an employee and (2) be eligible “according to the language of the plan itself, to receive a benefit under the plan.”¹³⁹ The court stated that “[a]n individual who fails on either prong lacks standing to bring a claim for benefits under a plan established pursuant to ERISA.”¹⁴⁰

In rejecting Clark’s argument that he should be eligible, notwithstanding the plan eligibility language, the Fourth Circuit also rejected *Renda*’s rationale, stating: “ERISA allows an employer to limit plan coverage to certain employees, as long as said ‘discrimination’ is not based on age or length of service.”¹⁴¹ In dismissing the claim for lack of subject matter jurisdiction, the Fourth Circuit determined that, because the plaintiff was not eligible to participate in du Pont’s pension and welfare benefit plans, he could not be considered a “participant” under ERISA and therefore lacked standing to bring his benefit claims.¹⁴²

In *Bronk v. Mountain States Telephone & Telegraph, Inc. (Bronk I)*,¹⁴³ the plaintiffs were leased employees who performed services for U.S. West pursuant to various leasing contracts. These plaintiffs filed suit under ERISA, challenging the plan administrator’s denial of participation in U.S. West’s employee welfare and pension plans on the basis that they were not “regular employees” of U.S. West or its subsidiaries. The plaintiffs argued that they were common-law employees of U.S. West and therefore should have been permitted to participate in its plans. Under the terms of the pension plan, eligibility for participation was restricted to individuals who were employees

¹³⁵ 1997 U.S. App. LEXIS 2309, at *3.

¹³⁶ *Id.*

¹³⁷ *Id.* at *3.

¹³⁸ *Id.*

¹³⁹ *Id.* at *2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *4 (citing *Abraham v. Exxon Corp.*, 85 F.3d 1126, 20 EB Cases (BNA) 1353 (5th Cir. 1996)).

¹⁴² *Id.* at *5.

¹⁴³ 140 F.3d 1335, 21 EB Cases (BNA) 2862 (10th Cir. 1998).

in the “active service” of and who received regular and stated compensation from U.S. West or one of its subsidiaries. The eligibility language of the welfare benefit plans required that an individual be classified as a “regular employee” in accordance with the payroll records of U.S. West or one of its subsidiaries. In reversing the district court, the Tenth Circuit also rejected the plaintiffs’ *Renda* argument,¹⁴⁴ stating that “an employer need not include in its pension plans all employees who meet the test of common-law employees.”¹⁴⁵ On remand, the district court subsequently entered judgment in favor of U.S. West, concluding that the “plaintiffs were not entitled to participate in either the welfare plans or the pension plans.”¹⁴⁶

The plaintiffs again appealed the district court’s decision to the Tenth Circuit in *Bronk v. Mountain States Telephone & Telegraph, Inc. (Bronk II)*.¹⁴⁷ The leased employees reasserted the arguments advanced in *Bronk I* (and added a few new ones) in challenging the denial of their request to participate in the company’s pension and welfare benefit plans. The court found that the plaintiffs were not “regular employees” for purposes of the pension and welfare plans: “Even though plaintiffs may in fact qualify as ‘employees’ under [*Nationwide Mutual Insurance Co. v. Darden*] (for purposes of ERISA generally), that does not mean they otherwise satisfy the plans’ eligibility requirements.”¹⁴⁸ The Tenth Circuit stated that, although the plaintiffs may have been similar in many respects to the company’s ordinary or “regular” employees, in fact they were not the same: The plaintiffs were hired as leased employees and, as such, were not on the payroll records of the company and did not receive compensation directly from the company.¹⁴⁹ Consequently, they did not satisfy the express eligibility language of each employee pension and welfare benefit plan.

These cases suggest that neither the Code nor ERISA prevents a plan sponsor from excluding certain employees from plan participation as long as the exclusion is neither entirely arbitrary nor based on impermissible criteria. A potential trap for the unwary service recipient company may be the plan language used to exclude leased workers from participation. If the plan defines the leased employee exclusion by a simple reference to Code Section 414(n), then leased employees outside of Section 414(n)’s ambit may still claim plan benefits as common-law employees of the service recipient. Therefore, from a drafting perspective, it may be better to exclude “leased employees” from plan eligibility without any reference to Code Section 414(n). In fact, two

¹⁴⁴The court in *Bronk I* distinguished *Crouch*, concluding that, unlike *Crouch*, there was no evidence that the pension plans at issue in this case “contained similar language requiring the plans to comply with all [IRC] and Treasury regulations, as well as ERISA.” 140 F.3d at 1338 n.5.

¹⁴⁵140 F.3d at 1338.

¹⁴⁶See 216 F.3d 1086, 2000 U.S. App. LEXIS 14677, at *3 (10th Cir. June 27, 2000) (unpublished table decision).

¹⁴⁷216 F.3d 1086, 2000 U.S. App. LEXIS 14677 (10th Cir. June 27, 2000) (unpublished table decision).

¹⁴⁸2000 U.S. App. LEXIS 14677, at *24–25. In substance, the plaintiffs argued that the term “employee,” as used in the various plans, “should be defined to mean a person who is a common-law employee (and thus any express requirements set forth in the plans for determining who was an employee should be ignored).” *Id.* at *7. The Tenth Circuit considered this argument to be “confusing” and therefore treated it simply as an “equitable” argument.

¹⁴⁹*Id.*

cases, *Burrey v. Pacific Gas & Electric Co.*¹⁵⁰ and *Wolf v. Coca-Cola Co.*,¹⁵¹ illustrate the importance of precise plan drafting and the courts' willingness to closely examine and rely on the express language of the plan when determining the merits of a contingent worker's benefit claim.

In *Burrey*, the plaintiff and others first worked as temporary employees for Pacific Gas & Electric (PGE) and later as leased workers supplied to PGE by various staffing firms. Their lawsuit claimed the right to participate in PGE's retirement, savings, health, and severance plans. In reversing the district court's grant of summary judgment in favor of PGE, the Ninth Circuit noted that, although the plan documents expressly excluded "leased employees," PGE had extended coverage to such employees by adopting the definition of "leased employees" by reference to Code Section 414(n).¹⁵² This narrow definition would not preclude all leased employees from participating in the plans if they otherwise could have been deemed to be common-law employees. The Ninth Circuit remanded the case to the district court to determine whether the plaintiffs were common-law employees of PGE. The *Burrey* case exemplifies a court's reliance on the actual plan language to determine a contingent worker's eligibility to participate in a plan sponsor's benefit plans. This case underscores the importance of drafting carefully the definitions contained in the eligibility provisions of a plan that are used to exclude a class of workers from participation.

In *Wolf*, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the Coca-Cola Co. The plaintiff was a computer programmer and analyst who worked as an "independent contractor" at Coca-Cola for more than six years pursuant to an employment contract with Access, Inc. As a staffing company, Access maintained its own contract with Coca-Cola to provide workers at designated compensation rates and for specified durations. Wolf's services were terminated when Access was told that Wolf was no longer needed at Coca-Cola.¹⁵³ Thereafter, she claimed to be a common-law employee of Coca-Cola entitled to benefits under its ERISA plan.¹⁵⁴ The terms of Coca-Cola's ERISA plan included the following language: "You're eligible for coverage under the plan if you're a regular employee of The Coca-Cola Company or one of its participating subsidiaries. You're not eligible for coverage under the plan if you're a temporary employee or seasonal employee, as

¹⁵⁰ 159 F.3d 388, 22 EB Cases (BNA) 1887 (9th Cir. 1998).

¹⁵¹ 200 F.3d 1337, 23 EB Cases (BNA) 2497 (11th Cir. 2000).

¹⁵² I.R.C. §414(n) provides that only an individual who is not an employee of the recipient may be treated as a "leased employee." Thus, a common-law employee could not be a leased employee that would be properly excludable from PGE's plans, and a worker who was not a common-law employee must satisfy I.R.C. §414(n)'s other statutory requirements before the individual would be disqualified from participating in PGE's plans.

The district court decision in *Godshall v. Franklin Mint Co.*, 285 F. Supp. 2d 628, 632, 31 EB Cases (BNA) 1665 (E.D. Pa. 2003), includes an analysis of an exclusionary provision for leased employees that specifically references Code §414(n).

¹⁵³ See *Wolf*, 200 F.3d at 1339.

¹⁵⁴ *Id.* at 1340. Although the nature of the plan involved is not entirely clear from the court's opinion, the Eleventh Circuit's affirmance of the district court's ruling granting the defendant summary judgment on the plaintiff's claim to benefits under COBRA suggests that the "ERISA plan" is a welfare benefit plan providing group medical benefits. The Eleventh Circuit stated that, "because [the plaintiff] was not entitled to benefits under Coca-Cola's ERISA plan, the district court correctly held that the 'finding by the court that plaintiff is not entitled

defined by your employer.”¹⁵⁵ The plan defined “leased employees” as “individuals who perform services for the Company under an agreement with a leasing organization.”¹⁵⁶

The court followed the same two-pronged analytical framework discussed above to ascertain whether the plaintiff, as a contingent worker, had “standing” to assert an ERISA claim as a plan participant.¹⁵⁷ Using this approach, the Eleventh Circuit found that although the plaintiff may have had a legitimate argument that she was a common-law employee of Coca-Cola, her claim for ERISA benefits nevertheless failed the second prong because she was specifically excluded from eligibility by the terms of Coca-Cola’s ERISA plan.¹⁵⁸ The court likened its analysis to that of the Fifth Circuit in *Abraham*, where “leased employees” were expressly excluded from plan coverage, and of the Tenth Circuit in *Bronk I*, where the ERISA plan covered only “regular employees.”¹⁵⁹ The court also distinguished the plan eligibility language found in this case from the language in both *Vizcaino* and *Burrey*, stating that in each of these cases the claimant was not specifically excluded from eligibility as a “common-law employee” under the terms of the plan itself.¹⁶⁰

6. Temporary and Seasonal Workers

Temporary workers are, by definition, hired for a limited duration. Temporary workers that regularly and periodically service the same company (or companies within the same industry) are known as “seasonal” workers. Such workers may be direct hire payroll employees who are generally recognized by the company as part of its regular workforce or hired as independent contractors through a staffing agency.¹⁶¹

to ERISA benefits is determinative regarding plaintiff’s entitlement to benefits under COBRA.” *Id.* at 1342.

¹⁵⁵*Id.* at 1341.

¹⁵⁶*Id.* at 1342.

¹⁵⁷The district court’s opinion in *Moxley v. Texaco, Inc.*, 2001 U.S. Dist. LEXIS 3930 (C.D. Cal. Feb. 15, 2001), is additional authority supporting an employer’s ability to exclude from qualified retirement plans classes of workers, such as leased employees, on grounds other than age and service. In granting summary judgment for the defendant, the district court found that excluding leased employees from participating in an employer’s benefit plans does not violate ERISA §202. It is not clear whether the Ninth Circuit’s decision in *Casey v. Atlantic Richfield Co. Capital Accumulation Plan II*, 21 Fed. Appx. 727, 2001 U.S. App. LEXIS 24134 (9th Cir. Nov. 2, 2001), will undermine this district court decision.

¹⁵⁸*Wolf*, 200 F.3d. at 1342.

¹⁵⁹*Id.* (citing *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1128, 20 EB Cases (BNA) 1353 (5th Cir. 1996)).

¹⁶⁰*Id.* at 1341–42. In *Casey v. Atlantic Richfield Co.*, 2000 U.S. Dist. LEXIS 6836, 25 EB Cases (BNA) 1187 (C.D. Cal. Mar. 30, 2000), the plaintiffs, all leased employees, asserted a class action suit that was dismissed by the district court for lack of standing in that their ERISA claims failed the second prong “because Plaintiffs are specifically excluded from eligibility by the terms of ARCO’s ERISA plan even if they are determined to be common-law employees.” 2000 U.S. Dist. LEXIS 6836, at *23. However, the Ninth Circuit reversed the district court’s dismissal on the basis that “the amended complaint raises factual issues related to standing, namely, whether the Workers are participants consistent with Section 502(a)(1) of ERISA.” *Casey*, 2001 U.S. App. LEXIS 24134, at *4.

¹⁶¹Temporary workers hired for an indefinite duration are often known as “perma-temps.” Perma-temps that are treated as independent contractors are particularly susceptible to raising

With regard to eligibility for participation in employee benefit plans, temporary workers' status as common-law employees is generally not at issue. However, such workers pose special eligibility problems because they may not meet the minimum service requirements that company plans often impose on employees as conditions precedent to becoming eligible to receive benefits. Code Section 410(a) provides that a plan is not qualified if it requires an employee, as a condition of participation, to complete a period of service beyond the later of the employee's reaching age 21 or the date of completion of one year of service (two years for certain plans subject to Code Section 410(a)(1)(B)(i)). Therefore, an otherwise eligible employee must be permitted to begin his participation no later than age 21 or the completion of, generally, one year of service with the plan sponsor. However, the law recognizes that not all employees need to be covered for a plan to be valid.

Assuming that an employer can otherwise satisfy its minimum participation and coverage nondiscrimination tests, as a matter of company policy and/or economics, a company sponsor may want to simply exclude temporary or seasonal workers from participation in its benefit plans. If the class of workers excluded from participation is deemed to be reasonable, then such workers may be and often are excluded. This is particularly true of seasonal workers whose temporary employment with a plan sponsor is cyclical in nature and who therefore may pose the greatest risk to employers of satisfying the service requirements of one or more of their plans. This exclusion, however, cannot operate as an indirect service requirement in violation of Code Section 410(a)(4). In an IRS Field Directive¹⁶² issued on November 22, 1994, the IRS made it clear that a plan sponsor may not expressly exclude its part-time workforce (defined as "persons who work less than 40 hours per week") from qualified plan participation where the worker otherwise satisfies the plan's age and service requirements of Code Section 410(a) for plan eligibility. A plan that excludes part-timers from participation as a class risks plan disqualification.

The Third Circuit's decision in *Epright v. Environmental Resources Management, Inc. Health & Welfare Plan*¹⁶³ illustrates that a "temporary employee" may not be excluded from plan participation if he otherwise satisfies the plan's

misclassification claims when their working relationship with the company is otherwise indistinguishable from that of the company's regular, full-time workforce.

¹⁶²A field directive is issued by the National Office of the IRS. It is an interpretation of tax laws and rules to given facts. However, it is not binding on the IRS, even for the case in which it is requested. Therefore, the primary purpose is to assist a field office that requests such advice to determine its own position on the issue or issues involved. The field service of the IRS generally considers this type of memoranda to be "highly regarded" and the advice it contains is "generally taken." *Tax Analysts v. Internal Revenue Serv.*, 77 A.F.T.R.2d (RIA) 96-1386, *aff'd & remanded*, 80 A.F.T.R.2d (RIA) 97-5152, 117 F.3d 607 (D.C. Cir. 1997). Field service advice cannot be relied on or cited as precedent. *See Marsh & McLennan Co. & Subsidiaries v. United States*, 2001 TNT 155-8 (Fed. Cl. Aug. 10, 2001). A plan disqualification may occur even if the minimum coverage requirements of I.R.C. §410(b) are otherwise satisfied by the plan, IRS Field Directive (Nov. 22, 1994), *reprinted in* 21 *Pens. & Ben. Rep.* (BNA) 2253 (Nov. 28, 1994). *See also Holt v. Winspisinger*, 811 F.2d 1532, 8 EB Cases (BNA) 1169 (D.C. Cir. 1987) (court held that plaintiff's work as part-time employee should be counted as year of service for pension vesting purposes, notwithstanding her treatment as independent contractor because she was, in fact, common-law employee).

¹⁶³81 F.3d 335, 19 EB Cases (BNA) 2936 (3d Cir. 1996).

stated eligibility criteria. In *Epright*, the plaintiff was a former employee of ERM Enviroclean, Inc., who alleged that he was improperly denied medical benefits by ERM in violation of ERISA. The plaintiff was classified as a “temporary employee” despite having regularly worked 40 to 65 hours per week from the time of his employment until the date of his injury, July 31, 1993. His employer, ERM Enviroclean, Inc., sponsored a health and welfare plan, which defined “eligible classes” of participants as all “active, full-time employees” of ERM.¹⁶⁴ The plan defined “active” service as working more than 30 hours per week, which the plaintiff did.¹⁶⁵ However, neither the medical plan nor the company’s employee handbook made any reference to “temporary employees,” a classification that the company’s president may assign to an employee at the time of his hire. The plaintiff’s claim for benefits arose when, after he was notified that he would become eligible for plan coverage as of August 1, 1993, he sustained an injury the day before his coverage was to take effect. In reversing the grant of summary judgment for the defendant, the Third Circuit found that the company had unlawfully imposed the “temporary employee” classification to deny the plaintiff benefits notwithstanding the clear eligibility language of the medical plan. Because the plaintiff met all of the requirements for coverage under the plan, the court found that the plan administrator’s denial of health benefits was arbitrary and capricious.¹⁶⁶

The courts also will not permit an employer to exclude an employee from plan eligibility solely by defining his position as a part-time job if he otherwise satisfies the plan’s eligibility requirements. In *Cerra v. Harvey*,¹⁶⁷ the district court granted summary judgment in favor of the employee on his claim that the defendants, West Virginia Laborers Pension Fund and West Virginia Laborers Trust Fund, wrongfully denied his pension benefits. The plaintiff, a trustee on the defendants’ board of trustees, was expected to work as an administrator of two funds for no more than 20 hours a week. However, due to the demands of the position, he worked for the board between 160 and 200 hours per month for 20 years until his retirement. Every version of the plan defined eligible employees as “full-time employees of the Board of Trustees.” In 1996, for the first time the term “full time” was defined as “an individual who works 1000 or more hours during the 12 month period measured from the individual date of hire, or any anniversary thereof.”¹⁶⁸ The court, rejecting the defendant’s argument that the plaintiff should be denied benefits because he was originally hired as a part time employee and had not formally requested to have his status changed, as required by the board, found overwhelming evidence that the plaintiff was a full-time employee for almost 20 years, including the board’s own records, which showed that the plaintiff was working no less than 147

¹⁶⁴ 81 F.3d at 338.

¹⁶⁵ *Id.* at 339.

¹⁶⁶ *Id.* at 343. *See also* Thomas v. SmithKline Beecham Corp., 297 F. Supp. 2d 773, 794, 32 EB Cases (BNA) 1953 (E.D. Pa. 2003) (denying defendants’ summary judgment and concluding that insofar as “only explanation for classifying plaintiffs as ‘temporary employees’ rather than ‘regular employees’ was their length of service,” committee’s classification was arbitrary and capricious).

¹⁶⁷ 279 F. Supp. 2d 778, 31 EB Cases 2743 (S.D. W. Va. 2003).

¹⁶⁸ 279 F. Supp. 2d at 784.

hours a month as an administrator during his tenure with the board. As such, he was eligible to participate in the pension plan and therefore was entitled to receive plan benefits.

IV. Worker Changes in Status: ERISA Section 510 Claims

To what extent does the law permit employers to replace their regular, full-time employees with a contingent workforce? ERISA Section 510 protects employees from retribution for exercising their ERISA rights and ensures that workers are free of interference with respect to the attainment of their protected rights. Specifically, Section 510 makes it unlawful to “discharge . . . a [plan] participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.” A reclassification of a worker from employee to contingent status to prevent him from accruing or receiving plan benefits that he otherwise would have received had he remained classified as an employee may constitute an unlawful interference with protected rights in violation of ERISA Section 510.

Several court decisions have supported an interference claim under Section 510 of ERISA when the employer, by reclassifying an employee’s work status, has clearly exhibited an intent to interfere with the former employee’s benefits.¹⁶⁹ Absent a reason that does not suggest discriminatory intent, an employer who changes a worker’s employment status to nonemployee may run afoul of this provision.¹⁷⁰

In *Berger v. AXA Network, LLC*,¹⁷¹ the district court recognized that the claim of insurance agents who alleged that they were reclassified from “statutory employee” to “self-employed” for the purpose of interfering with the attainment of rights under the defendant insurer’s benefit programs stated a cause of action for violation of ERISA Section 510. According to the court, the reclassification of their employment status may constitute a “discriminatory or wrongful change in the employer-employee relationship” in violation of ERISA Section 510.¹⁷²

¹⁶⁹ERISA §510 “targets discriminating conduct designated to interfere with the exercise or attainment of vested or other rights under [a] plan or ERISA.” *DeGrooth v. General Dynamics Corp.*, 837 F. Supp. 485, 489 (D. Conn. 1993). Specifically, ERISA §510 provides that it is unlawful to discharge, fire, suspend, expel, discipline, or discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any rights under ERISA to which the participant may become entitled. This section protects against “(1) the disruption of employment privileges to prevent the vesting or enjoyment of benefit rights; (2) the disruption of employment privileges to punish the exercise of benefit rights; and (3) the disruption of employment privileges to present or punish the giving of testimony in any proceeding relating to ERISA or a sister act.” *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 334, 21 EB Cases (BNA) 2301 (2d Cir. 1997). Lawsuits alleging violations of ERISA §510 may be brought by participants and beneficiaries through ERISA §502(a)(3), which allows for equitable relief to redress such violations. *Berger v. AXA Network, LLC*, 2003 U.S. Dist. LEXIS 11555, 30 EB Cases (BNA) 2688 (N.D. Ill. July 7, 2003).

¹⁷⁰In *Romero v. Allstate Insurance Co.*, 2004 U.S. Dist. LEXIS 5261 (E.D. Pa. Mar. 30, 2004), the court permitted a class action claim for violations of ERISA to proceed against an insurance company that terminated the employment of agents who refused to voluntarily switch from employee to independent contractor status.

¹⁷¹2003 U.S. Dist. LEXIS 11555, 30 EB Cases (BNA) 2688 (N.D. Ill. July 7, 2003), *class action status granted*, 220 F.R.D. 316 (N.D. Ill. 2004).

¹⁷²2003 U.S. Dist. LEXIS 11555, at *5.

In *Schultz v. Texaco, Inc.*,¹⁷³ former employees brought a class action alleging, in part, a violation of Section 510¹⁷⁴ arising from their change in status from employees of Texaco (or its affiliate) to independent contractors or leased employees, “since the purpose of this shift was to interfere with their attainment of ERISA rights.”¹⁷⁵ This claim was ultimately dismissed as time-barred.¹⁷⁶

The Eleventh Circuit, in *Seaman v. Arvida Realty Sales*,¹⁷⁷ found a salesperson’s termination to be actionable under ERISA Section 510 where she had refused to accept a change in her status from employee to independent contractor and as a result was terminated from her employment, resulting in her loss of nonvested health insurance coverage as well as a loss of participation in her 401(k) pension plan. The Eleventh Circuit determined that “the validity of a [Section] 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge.”¹⁷⁸

The Eleventh Circuit reaffirmed its stance in *Gitlitz v. Compagnie Nationale Air France*.¹⁷⁹ In that case, two former employees of Air France sued under ERISA Section 510 for interference with their benefits when their salaried outside sales representative positions were eliminated, but they were offered the opportunity to continue doing essentially the same jobs as independent contractors. Citing its earlier decision in *Seaman*, the court reversed the district court’s grant of summary judgment in favor of the defendant company, stating

¹⁷³ 127 F. Supp. 2d 443, 25 EB Cases (BNA) 1714 (S.D.N.Y. 2001).

¹⁷⁴ The plaintiffs in *Schultz* also alleged, among other claims, a violation of ERISA §502(a)(1)(B) (wrongful denial of employee benefits) and of ERISA §502(a)(3) (breach of fiduciary duty by failing to identify all eligible employees and ensuring their plan participation). The former was dismissed as time-barred, and the latter was allowed to proceed against the named plan administrator. 127 F. Supp. 2d at 452.

¹⁷⁵ *Id.* at 447.

¹⁷⁶ In *Schultz*, the district court relied on the standard that a claim for benefits accrues on a clear repudiation by the plan that is known or should be known, in support of its finding that the plaintiffs’ injury occurred at the time the plaintiffs were taken off the payroll of the employer. As the court stated, that is the time that the repudiation of the plaintiffs’ right to benefits was known or, at a minimum, should have been known to the plaintiffs. *Id.* at 448. The district court in *Kryzer v. BMC Profit Sharing Plan*, 2001 U.S. Dist. LEXIS 18300, 26 EB Cases (BNA) 2743 (D. Minn. Nov. 1, 2001), followed the court’s rationale in *Schultz* when it dismissed the plaintiff’s benefit claim as time-barred by the applicable two-year statute of limitations. The court found that, when the plaintiff was reclassified as an independent contractor, he “knew, or should have known, that the Plan would not consider him eligible for [plan] benefits.” 2001 U.S. Dist. LEXIS 18300, at *11. A federal district court in Minnesota arrived at the same result for the same reasons in *Evertz v. Aspen Medical Group*, 2001 U.S. Dist. LEXIS 17589, 26 EB Cases (BNA) 2324 (D. Minn. Sept. 14, 2001) (ERISA claim for lost pension benefits arising from employment transfer in joint venture was time-barred). Courts continue to address when an ERISA §510 claim accrues for statute of limitations purposes. See *Williams v. American Int’l Group*, 2002 U.S. Dist. LEXIS 17886, 29 EB Cases (BNA) 1251 (S.D.N.Y. Sept. 23, 2002) (temporary employee’s §510 claim accrued when her status as temporary was decided, i.e., on date of her hire); *Edes v. Verizon Communications, Inc.*, 288 F. Supp. 2d 55, 2003 (D. Mass. 2003) (same). The Fifth Circuit rejected application of the continuing violation exception to tolling of the statute of limitations and upheld dismissal of an ERISA §510 action as time-barred, determining that a claimant’s §510 claims accrue whenever the worker is first informed of plan ineligibility. *Berry v. Allstate Ins. Co.*, 84 Fed. Appx. 442, 444, 31 EB Cases (BNA) 2769 (5th Cir. Jan. 5, 2004).

¹⁷⁷ 985 F.2d 543, 16 EB Cases (BNA) 1689 (11th Cir. 1993).

¹⁷⁸ 985 F.2d at 546.

¹⁷⁹ 129 F.3d 554, 21 EB Cases (BNA) 2736 (11th Cir. 1997).

that the plaintiffs had created genuine issues of fact on the issue of whether Air France reclassified the salespersons from employees to independent contractors with the specific intent of interfering with their ERISA benefits: "Plaintiffs have adduced evidence from which a fact finder could find that the change of status was accompanied by no substantial change in the job function, in the manner the job was expected to be performed, in the supervisors, or in the control exercised by the supervisors."¹⁸⁰

Interference with a worker's right to plan benefits will not always constitute a violation of ERISA Section 510.¹⁸¹ The employer must have a specific intent to interfere with the worker's future benefit rights before Section 510 is implicated. Therefore, the stated reasons for an employer's actions will be relevant in determining whether a violation of Section 510 occurred.¹⁸² Moreover, as discussed in *Williams v. American International Group*, the act of hiring a worker as a temporary employee, rather than as a regular employee, does not support a claim for violation of ERISA Section 510, which protects against the disruption of existing employment relationships.¹⁸³

Section 510 claims are addressed in detail in Chapter 28 (Interference With Protected Rights).

V. Professional Employer Organizations: Who Is the Employer?

The National Association of Professional Employer Organizations (NAPEO) estimates that approximately 700 PEO companies are responsible for generating approximately \$42 billion in gross revenues in the United States.¹⁸⁴ A relatively recent phenomenon, PEOs clearly are the fastest growing segment of the contingent workforce market today.¹⁸⁵ An estimated 2 to 3 million workers in America today are working under a PEO-type arrangement.¹⁸⁶ The emerging popularity of PEOs presents a new set of legal challenges involving their

¹⁸⁰ 129 F.3d at 559.

¹⁸¹ A plaintiff must show more than a lost opportunity to accrue benefits to sustain an ERISA §510 claim. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111, 10 EB Cases (BNA) 1169 (2d Cir. 1988).

¹⁸² *See Schwartz v. Independence Blue Cross*, 299 F. Supp. 2d 441, 450, 32 EB Cases (BNA) 1047 (E.D. Pa. 2003) (allegedly unlawful misclassification of plaintiffs as nonemployees or purported refusal to rehire former employees does not constitute violation of §510's antidiscrimination provision even if that refusal is based on employer's desire to avoid creating future pension liability disproportionately greater than that incurred if it hired new employees without past service or pension credit); *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1299 (N.D. Okla. 2001) (§510 requires evidence that employer's desire to block attainment of benefits rights was determinative factor in employee's discharge).

¹⁸³ 2002 U.S. Dist. LEXIS 17886, 29 EB Cases (BNA) 1251 (S.D.N.Y. Sept. 23, 2002).

¹⁸⁴ *See* National Ass'n of Professional Employer Organizations, FAQ 10, How Many Americans are Employed in a Co-Employment PEO Arrangement?, available at <http://www.napeo.org/peoindustry/faq.cfm#10>.

¹⁸⁵ A great deal of information on PEOs exists on the Internet. For more information on PEOs generally, refer to the Web site of the national trade association for the PEO industry, the National Association of Professional Employer Organizations (NAPEO), at <http://www.napeo.org>.

¹⁸⁶ *See* National Ass'n of Professional Employer Organizations, FAQ 10, How Many Americans are Employed in a Co-Employment PEO Arrangement?, available at <http://www.napeo.org/peoindustry/faq.cfm#10>.

workers' eligibility for participation in benefit plans of the service recipient company.

PEOs are typically corporate entities that specialize in providing employers with outsourcing services in human resource management. As such, the PEOs will handle some or all of the human resource functions of an employer in exchange for a fixed service fee.¹⁸⁷ PEOs either assume the human resource functions for their client's existing workforce or supply their own workers to the recipient company. As part of their services, PEOs often provide a broad range of employee benefit plans, including health insurance and retirement benefits, for workers who are subject to this arrangement. The contractual agreement usually provides that the recipient company retains sole responsibility for on-site supervision of workers and the furnishing of any tools, machinery, or other facilities. Neither the Code¹⁸⁸ nor ERISA recognizes the concept of PEOs insofar as the relevant provisions of these statutes governing benefit plans contemplate traditional "employers" as the only entities to provide tax-favored benefits.

Given that there are no clear statutory guidelines with regard to the provision of benefits in the PEO context, PEOs have posed a great deal of confusion to companies using them. The fundamental question that needs to be addressed arising from the PEO-recipient company relationship is: Who is the "legal employer" under this arrangement? Specifically, when employee benefits are offered through the PEO, the question that inevitably arises is: Who is the worker's "employer" for benefit purposes? There are three possibilities: the PEO, the recipient, or both. In an attempt to clarify some of the legal confusion, several states have enacted licensing requirements for PEOs that render them the actual legal employer or co-employer of worksite employees.¹⁸⁹

In *Delcastillo v. Odyssey Resource Management, Inc.*,¹⁹⁰ the plaintiffs brought an action under ERISA alleging that the defendants, Odyssey Management Co. and Odyssey Resource Co., failed to provide them with adequate COBRA notice and breached their fiduciary duties with respect to the plaintiffs' health benefits. The court addressed the duties that a PEO or co-employer may have with respect to notifying the plaintiffs regarding their COBRA rights and concluded in this case that the defendants were jointly and severally liable for breach of fiduciary duty, failure to provide the plaintiffs with adequate COBRA notice, and failure to notify them regarding the occurrence of a "qualifying event."

¹⁸⁷ Generally, by contract, the PEO assumes employer responsibility for employment tax, benefit plans, workers' compensation, and other human resource functions and provides health insurance, retirement savings plans, and other critical employee benefits for their worksite employees. However, various state and federal laws generally make "employers" responsible for providing such matters.

¹⁸⁸ The IRS has stated that, although a dual-employer arrangement is possible, "[t]he concept of a 'co-employer' is not recognized in Subtitle C of the Internal Revenue Code." Employment Taxes and Collection of Income Tax, Gen. Couns. Mem. 2000-17-041 (Apr. 28, 2000).

¹⁸⁹ Among the states that have enacted laws affecting PEOs are Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, New Jersey, New York, North Carolina, Oklahoma, South Dakota, Texas, Utah, Virginia, and Wisconsin.

¹⁹⁰ 320 F. Supp. 2d 889, 32 EB Cases (BNA) 3009 (D. Neb. 2004).

By analogy to the determination of whether a worker is an employee or an independent contractor, employer status in the case of PEOs is likely to be determined essentially by ascertaining who retains control over the manner and means by which the work is accomplished. This control is usually reserved by the recipient company pursuant to agreement with the PEO.

There are no reported cases on the role of PEOs as sponsors of tax-favored benefit plans.¹⁹¹ Under the “exclusive benefit rule” set forth in Code Section 401(a)(2), a trust that is part of a qualified plan must be established and maintained by an employer for the exclusive benefit of that employer’s employees and their beneficiaries. Therefore, a qualified plan that provides benefits for individuals who are not employees of the employer maintaining the plan violates this rule and risks disqualification. With regard to benefit plans, the exclusive benefit rule requires a PEO that sponsors benefit plans for its client’s workers to find a way to somehow qualify as an “employer.” Under this regimen, PEOs that offer employee benefits must either (1) claim a “co-employment” relationship with the recipient company or (2) establish their benefit plans as “multiple employer plans.”¹⁹²

Co-employment usually arises as an issue if the PEO assumes responsibility for providing benefits to the service recipient’s existing workforce in that such workers are clearly common-law employees of the service recipient. Specifically, the question is whether the PEO’s assumption of the service recipient’s human resource responsibilities also makes such workers the common-law employees of the PEO. PEOs that have adopted the “co-employment” approach for their benefit plan coverage generally use the term to mean some form of “dual employment” with the recipient service company, where both the PEO and the recipient service company may be considered as the employer of the same worker.¹⁹³ In such cases, the worker may be hired and furnished by the PEO but is subject to direct supervision by the service recipient.¹⁹⁴

¹⁹¹ The *Vizcaino* case recognized the possibility that both the PEO and the recipient company can be the employer of a worker but did not find that such a dual-employer arrangement existed in that case. In dicta, the Ninth Circuit endorsed a “borrowed servant” approach to co-employment. Using the “borrowed servant” approach described in RESTATEMENT (SECOND) OF AGENCY §227, the Ninth Circuit stated, “[e]ven if for some purposes a worker is considered as employee of the agency, that would not preclude his status as a common-law employee of Microsoft. The two are not mutually exclusive. . . . At common law, ‘a servant . . . permitted by his master to perform services for another may become the servant of such other in performing the services.’” *Vizcaino v. Microsoft Corp.*, 173 F.3d 713, 727, 23 EB Cases (BNA) 1209 (9th Cir. 1999) (*Vizcaino III*) (quoting RESTATEMENT (SECOND) OF AGENCY §227 (1958)).

¹⁹² A multiple-employer plan is one that is maintained by two or more unrelated employers. I.R.C. §413(c). Employers who are members of the same controlled group (for purposes of I.R.C. §414(b) and (c)) are treated as one employer. Treas. Reg. §1.413-2(a)(2).

¹⁹³ The IRS has recognized the existence of dual employment in contexts other than PEOs: Rev. Rul. 66-162 (payroll and withholding); Rev. Rul. 69-316; *In re Earthmovers, Inc.*, 199 B.R. 62 (Bankr. M.D. Fla. 1996) (employment tax liability).

¹⁹⁴ In a strict sense, however, “dual employment” requires that the worker perform services on behalf of both entities. RESTATEMENT (SECOND) OF AGENCY §226 describes simultaneous employment as follows: “A person may be the servant of two masters, not joint employers, at one time, as to one act, if the service to one does not involve the abandonment of the other.” The Ninth Circuit’s approach in *Vizcaino* endorses a “borrowed servant” concept rather than the “simultaneous employment” approach found in §226 of the *Restatement*. In *Russell v. Bronson Heating & Cooling*, 345 F. Supp. 2d 761 (E.D. Mich. 2004), the district court found under the

Tax authority exists in cases where the PEO has adopted the multiple-employer plan approach. Using this approach, the recipient company and PEO are considered as “co-sponsors” of the plan in question. In such cases, a multiple-employer plan will exist in that the workers of more than one unrelated employer are participating in a single plan.¹⁹⁵ Under Code Section 413(c)(2), each entity would be considered the employer of all employees covered under the plan.¹⁹⁶ Under this approach, service eligibility and vesting are computed without regard to whether services were performed on behalf of one or the other or both of the co-sponsors.¹⁹⁷ However, the multiple-employer approach fostered under Code Section 413 does not, and is not intended to, avoid all issues relating to who the true employer is in this situation. Nondiscrimination testing under Code Section 410(b) for plan coverage purposes and 401(a)(4) for equal availability of plan rights, benefits, and features still must be performed by just one of these entities, acting as the true employer, because there is nothing that joins these two businesses together for nondiscrimination testing purposes.

On April 24, 2002, the IRS issued Revenue Procedure 2002-21,¹⁹⁸ in recognition of “the complexity involved in the determination of whether a Worksite Employee¹⁹⁹ is the common-law employee of the PEO or the client organization (CO), as well as the needs of the PEO, the CO, Worksite Employees, and plan administrators for certainty in this area.”²⁰⁰ Revenue Procedure 2002-21 provides a limited form of relief from disqualification for defined contribution plans established and maintained by PEOs prior to May 13, 2002, for the benefit of a client’s existing workforce.²⁰¹ Section 1.03 of Revenue Procedure 2002-21 rejects (by implication) the use of “co-employment” as an effective means to address issues relating to the “exclusive benefit” rule, stating “this revenue procedure provides a framework under which plans sponsored by PEOs will not be treated as violating the exclusive benefit rule [of Code

given facts that the joint employer doctrine was applicable for purposes of imposing liability under the Family and Medical Leave Act.

¹⁹⁵Welfare plans of a service recipient or PEO that is involved in a multiple arrangement may be treated as “multiple employer plans” known as “multiple employer welfare arrangements,” or MEWAs.

¹⁹⁶By making each co-sponsor the “employer” of all employees covered under the plan, I.R.C. §413(c)(2) thereby satisfies the “exclusive benefit” rule required of qualified retirement plans.

¹⁹⁷See I.R.C. §413(c)(1), (3).

¹⁹⁸According to an IRS News Release issued April 24, 2002, Revenue Procedure 2002-21 may be found on the IRS Web site at <http://www.irs.gov> and was published in the *Internal Revenue Bulletin* 2002-19 on May 13, 2002, the revenue procedure’s effective date.

¹⁹⁹Rev. Proc. 2002-21, §6.04, defines “Worksite Employees” as “employees who receive amounts from a PEO for providing services to a CO [client organization] pursuant to service agreement between the PEO and the CO.”

²⁰⁰See Rev. Proc. 2002-21, §1.03.

²⁰¹Rev. Proc. 2002-21, §2.02, states that the relief provided under this guidance applies “only with respect to the PEO Retirement Plan for which relief is granted and not to other plans maintained by a CO or the PEO.” Consequently, the manner in which welfare benefits furnished by a PEO for a client’s employees are to be treated remains unaddressed at this time. Rev. Proc. 2002-21, §6.01, excludes from the definition of PEO retirement plans “a plan maintained as a multiple employer plan that has been adopted by a PEO and one or more COs.” Thus, if the PEO plan is already a multiple-employer plan in that the COs who receive the services of the

Section 401(a)(2)] solely because they provide benefits to Worksite Employees.”²⁰²

This revenue procedure provides PEOs that maintain defined contribution plans for “Worksite Employees” with the option of either converting the PEO retirement plan to a multiple-employer plan or terminating the plan²⁰³ in order to avoid plan disqualification for a violation of the exclusive benefit rule. Section 4 provides that PEOs must decide their course of action by the PEO decision date, i.e., “the date that is 120 days after the first day of the plan year beginning on or after January 1, 2003.” To receive the relief from disqualification provided by this revenue procedure, PEOs must complete their remedial action by the compliance date, which is “the last day of the first plan year of the PEO Retirement Plan beginning on or after January 1, 2003.”²⁰⁴

The revenue procedure affords the PEO’s client, the CO, an opportunity to choose whether and how the PEO’s decision to terminate the plan or establish a multiple-employer plan should be implemented with respect to its own workers. In either case, the CO retains the right to elect either (1) a trust-to-trust transfer of plan assets to the CO plan or (2) a spin-off of plan assets and liabilities to a separate plan established by the PEO that is later terminated.²⁰⁵ Obviously, if the PEO elects to convert its plan to a multiple-employer plan, its CO may timely adopt the multiple-employer plan of the PEO or choose either option listed above. Because of the options available to COs, the PEO will be required to handle the plan assets attributable to the accounts of worksite employees in accordance with the timely elections made by their COs.

On November 25, 2003, the IRS released Revenue Procedure 2003-86,²⁰⁶ which amplifies the relief of Revenue Procedure 2002-21. PEOs were given a compliance period under Revenue Procedure 2002-21 during which they could choose between terminating the PEO plan or converting it from a single employer plan to a multiple employer retirement plan (MERP).²⁰⁷ Revenue Procedure 2003-86 provides additional guidance for MERPs, thus providing PEOs with valuable flexibility consistent with the remedial purposes of Revenue Procedure 2002-21. This guidance, provided in the form of transitional rules that will require appropriate plan amendment, should be of particular interest to plan administrators of defined contribution plans that were covered by Revenue Procedure 2002-21. The transitional rules can be summarized as follows:

worksite employees are co-sponsoring the plan, then no correction under this revenue procedure would be required.

²⁰² Rev. Proc. 2002-21, §1.03.

²⁰³ Rev. Proc. 2002-21, §5.06(2), makes clear that the IRS will consider distributions made from terminated PEO retirement plans or spin-off retirement plans eligible for favorable tax treatment accorded distributions from qualified plans (including eligibility for tax-free rollovers) notwithstanding any previous violation of the exclusive benefit rule of I.R.C. §401(a)(2).

²⁰⁴ Rev. Proc. 2002-21, §4.02.

²⁰⁵ See Rev. Proc. 2002-21, §§5.02(3) (plan termination) and 5.03(4) (multiple-employer plan).

²⁰⁶ Rev. Proc. 2003-86 was published in the *Internal Revenue Bulletin* 2003-50 on December 15, 2003—the revenue procedure’s effective date. 2003-50 I.R.B. 1211, 2003 WL 22846753.

²⁰⁷ Revenue Procedure 2003-86 refers to converted multiple-employer retirement plans by the acronym MERP.

1. *Successor Plans*: Plan distributions may be made to worksite employees from a terminated spin-off plan notwithstanding the existence of another defined contribution plan maintained by the PEO for its own employees or by the CO for its own employees.
2. *Top-Heavy Rules*: When determining the top-heavy status of the MERP, the worksite employees' benefits that accrued in the PEO plan before Revenue Procedure 2002-21's compliance date may be attributable either to the CO or to the PEO.
3. *ADP and ACP Testing*: The MERP must be treated as a new plan for purposes of ADP and ACP testing, rather than as a successor plan to the PEO plan.
4. *Minimum Distribution Requirements*: For 2004 and subsequent years, minimum distributions must be made for each 5 percent owner who has by then attained age 70½. The required beginning date for required minimum distributions in 2004 is April 1, 2005.
5. *Highly Compensated Employee Status*: The highly compensated employee status of an individual who was a worksite employee in the year preceding the first plan year of a MERP and who performed services for the CO in that look-back year is determined by treating the worksite employee as an employee of the CO for the look-back year. The MERP must treat compensation received by the worksite employee in that look-back year as compensation from the client organization.²⁰⁸

VI. Conclusion

The contingent workforce will continue to assume a role of increasing importance in today's business environment. Both workers and plan sponsors must be cognizant of the impact that a worker's employment status will have on his plan eligibility. The worker must ascertain his true employment status, regardless of the designation or description that may be affixed to an operative contract or agreement and regardless of any previous classification of his status by the IRS for tax purposes. Companies that use the services of a contingent workforce must review and, if necessary, amend the provisions of their benefit plans to ensure that those individual workers who are intended to be excluded are, in fact, ineligible for plan benefits. Such work may require a clearer statement of plan eligibility, revised or additional definition of terms, and a clear statement of discretionary authority for a plan administrator to determine plan eligibility.

Additional steps that such companies may take to minimize their risk of this type of litigation would include a review and, if necessary, revision of company policies and procedures governing its regular and contingent workforces to ensure that, when considering the common-law agency factors, there are legitimate and significant distinctions that are made in the manner in which

²⁰⁸ Rev. Proc. 2003-86.

these two classifications of workers are treated. Any operative contracts or agreements directly or indirectly governing the employment relationship should also be reviewed and, if necessary, revised to ensure that any express waivers of benefits are knowingly and voluntarily made. Finally, sponsoring companies must also be aware that their actions with respect to plan eligibility may be challenged at any time in an ERISA action for breach of fiduciary duty and therefore should be aware of their ERISA fiduciary duties.

VII. Table of Significant Cases

U.S. Supreme Court:

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 14 EB Cases (BNA) 2625 (1992).

First Circuit:

Kolling v. American Power Conversion Corp., 347 F.3d 11, 31 EB Cases (BNA) 1513 (1st Cir. 2003).

Edes v. Verizon Communications, Inc., 288 F. Supp. 2d 55 (D. Mass. 2003).

Second Circuit:

Baraschi v. Silverwear, Inc., 2002 U.S. Dist. LEXIS 24515, 29 EB Cases (BNA) 2311 (S.D.N.Y. Dec. 23, 2002).

Williams v. American Int'l Group, Inc., 2002 U.S. Dist. LEXIS 17886, 29 EB Cases (BNA) 1251 (S.D.N.Y. Sept. 23, 2002).

Gustafson v. Bell Atl. Corp., 171 F. Supp. 2d 311, 26 EB Cases (BNA) 2679 (S.D.N.Y. 2001).

Schultz v. Texaco, Inc., 127 F. Supp. 2d 443, 25 EB Cases (BNA) 1714 (S.D.N.Y. 2001).

Herman v. Time Warner, Inc., 56 F. Supp. 2d 411, 23 EB Cases (BNA) 2646 (S.D.N.Y. 1999).

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