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What Employment Neutrals and Advocates Should Know About Employee Benefits

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I. Introduction

If a tree falls in a forest, and no one hears it, does it make a sound? An attorney, faced with a difficult question like this, might avoid it, answering, "it does not matter" or "who cares?" These are the common responses of many employment law practitioners involved in employment disputes when they hear "employee benefits." If an employee benefits claim may be lurking in a dispute, however, a better answer is, "let's figure this out!" Read on to learn why.

A. Why should employment neutrals and advocates know something about employee benefits claims?

Disputes between employees and employers include a broad range of claims, such as wage and hour, breach of contract, fraud, restrictive covenant, misclassification, whistleblower, and statutory discrimination claims. Employment law evolves quickly. Keeping up with changes in the law keeps practitioners busy. Given the breadth of substantive employment law, it is not surprising that there are few employment law practitioners—whether neutrals or advocates—who also handle employee benefits disputes on a regular basis. As a result, neutrals and advocates involved in employment disputes may not have knowledge of employee benefits law and how disputes they

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are handling might be affected by it. Indeed, they may not recognize when claims involved in a dispute may be governed, not by state common law, but rather by the federal statute known as "ERISA."

It matters. It is important to recognize when a claim is governed by ERISA. If it is, there are substantial limitations on the claims a claimant can assert and the remedies a claimant can obtain. First, ERISA has a powerful preemption provision, ERISA Section 514.[1] ERISA Section 514 sweeps broadly and encompasses, with limited exceptions, "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. State law claims that fall into ERISA's remedial scheme are preempted. For example, a claimant's breach of contract claim against an employer seeking promised employee benefits may be preempted by ERISA.

Second, ERISA has a comprehensive remedial scheme, ERISA Section 502(a),[2] that limits a claimant's remedies to "appropriate equitable relief." Therefore, a claimant whose claims are governed by ERISA is not able to recover the full panoply of damages available under common law—and familiar to employment law practitioners—such as compensatory damages or punitive damages.[3]

II. The Basics

A. What is "ERISA"?

"ERISA" stands for the "Employee Retirement Income Security Act." ERISA is a federal statute enacted in 1974, and amended in significant ways many times since.[4] ERISA governs pension and welfare benefit plans for employees and former employees who are plan participants and their beneficiaries. That brief description is misleading. ERISA covers a vast amount of ground. It includes complex rules governing vesting and forfeitures of benefits, mandatory disclosures, minimum funding requirements,

[1] 29 U.S.C. § 1144.

[2] 29 U.S.C. § 1132(a).

[3] In addition, claims governed by ERISA that are litigated in court can be brought in, and removed to, federal court, pursuant to federal question jurisdiction.

[4] *See* 29 U.S.C. §§ 1001-1146.

prohibited transactions and fiduciary obligations. Moreover, its provisions impact many substantive legal areas in addition to employment and employee benefits law, including labor law, corporate law, and family law. It includes provisions of the Multiemployer Pension Plan Amendments Act of 1980—the "MPPAA." Among its notable features, the MPPAA requires arbitration of most withdrawal liability claims involving multi-employer pension plans (also known as Taft-Hartley plans). Specific rules for initiating arbitration, the appointment of an arbitrator, and the powers of the arbitrator are set forth in Pension Benefit Guaranty Corporation ("PBGC") regulations and the American Arbitration Association's ("AAA") rules for withdrawal liability disputes.[5]

B. What claims can employees assert that are governed by ERISA?

The parts of ERISA most important for employment practitioners to know about are those that govern claims that employees have standing to assert. Pursuant to ERISA, benefit plan "participants" have standing to assert claims under ERISA. A "participant" means "any employee or former employee of an employer . . . 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."[6] Some claims may only be brought against plan "fiduciaries." A "fiduciary" is defined as a person "with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or . . . disposition of its assets, (ii) [he] renders investment advice for a fee or other compensation . . . or (iii) [he] has any discretionary authority or . . . responsibility in the administration of such plan."[7]

Section 502(a) of ERISA sets forth ERISA's remedial scheme for claims brought by plan participants (among other potential claimants):

[5] *See* 29 C.F.R. § 4221.

[6] 29 U.S.C. § 1002(7).

[7] 29 U.S.C. § 1002(21)(A).

- Section 502(a)(1)(B) governs claims for accrued benefits due or to enforce or clarify rights under a plan.
- Section 502(a)(2) governs claims for breach of fiduciary duty.
- Section 502(a)(3) governs claims for appropriate equitable relief not otherwise provided for under Section 502(a) (the "Catch-all" provision).
- Section 502(a)(1)(A) and Section 502(a)(4) govern claims for the failure to provide requested information.[8]

Benefit claims under Section 502(a)(1)(B) and breach of fiduciary duty claims under Section 502(a)(2) are more likely than other claims to be mistaken for ordinary common law claims. In addition to claims under ERISA Section 502(a), employees may assert claims of retaliation or interference with rights protected under ERISA against their employers pursuant to Section 510 of ERISA.[9]

C. What is an ERISA Plan?

To be governed by ERISA, a participant's claim must also involve an employee benefit "plan." ERISA defines a "plan" as a "plan, fund or program established and maintained by an employer to provide benefits to employees or former employees." There are two types of employee benefit plans: welfare plans and pension plans.[10] ERISA Section 3(1) sets out five factors that a court will consider in deciding whether an ERISA plan is a welfare plan. An employee welfare benefit plan is a (1) plan, fund, or program (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing an enumerated benefit (5) to a participant or beneficiary.[11] Examples of welfare plans include health insurance, life insurance, and disability benefit plans.[12]

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[8] *See* 29 U.S.C. § 1132(a).

[9] *See* 29 U.S.C. § 1140.

[10] *See* 29 U.S.C. § 1002.

[11] *See Donovan v. Dillingham*, 688 F.2d 1367, 1370-71 (11th Cir. 1982).

[12] *See* 29 U.S.C. § 1002(1).

ERISA Section 3(2)(A) states that a pension plan is any plan, fund, or program that is established or maintained by an employer, an employee organization, or both, if it "provides retirement income to employees" or "results in a deferral of income by employees for periods extending to [or beyond] the termination of . . . employment."[13] Examples of pension plans include retirement plans, profit-sharing plans, and certain other deferred compensation plans or programs. In most cases, plans are easily identifiable as ERISA-governed plans. Some plans or programs, including certain severance plans, deferred compensation plans, and bonus plans or programs, are more likely to be misclassified. To make matters worse, an ERISA plan does not have to be in writing, and informal plans can be created by mistake.[14] An employer can unknowingly and inadvertently create an ERISA plan based on a variety of acts, such as oral representations, written agreements, or setting aside money to pay benefits.

Suppose an employee's employment terminates, and the employee sues her former employer for failure to offer severance per an alleged severance policy, plan, or program. The employee may allege that while the employer had no formal, written severance plan, it had a policy of paying employees whose employment is terminated without cause a formulaic severance amount, subject to certain terms and conditions. A severance plan may be an ERISA-governed welfare benefit plan. The question turns on many factors including ongoing administration of the plan. Because severance is often a single lump payment or a brief period of post-employment salary continuation, a severance plan or program does not usually require ongoing administration, as is required for a plan to be an ERISA-governed welfare plan. As a result, courts often hold that severance plans are not ERISA-governed plans. This, however, is not always the outcome.

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[13] 29 U.S.C. § 1002(2).

[14] *See, e.g.*, *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (an informal ERISA plan is established "if from the surrounding circumstances a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *See also Woerner v. Fram Grp. Operations, LLC,* 658 F. App'x 90, 95 (3d Cir. 2016); *Kenney v. Roland Parsons Contracting Corp.*, 28 F.3d 1254, 1257 (D.C. Cir. 1994); *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Emps.*, 974 F.2d 391, 400 (3d Cir. 1992).

Suppose that after an employee's employment terminated, the employee asserts claims that her employer failed to pay out bonuses it awarded to the employee but deferred pursuant to an agreement. The employee might have an ERISA claim if the bonuses were awarded pursuant to an ERISA-governed pension plan. Whether a deferred compensation plan is an ERISA-governed pension plan turns on the purpose of the plan and whether the plan primarily pays benefits upon retirement, as opposed to periods during employment and/or for a short time after the termination of employment. Merely deferring income until after the termination of employment is not enough to create an ERISA-governed pension plan, particularly when the purpose of the payments is to reward job performance (as opposed to paying benefits to retired employees).

III. Claims Seeking Employee Benefits

Section 502(a)(1)(B) of ERISA authorizes a plan participant (an employee or former employee that participates in a plan) or beneficiary to bring a civil action to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan.[15] Typical welfare benefits litigation includes claims for medical and health benefits, disability benefits, life insurance, and death benefits.[16] Most pension benefits disputes involve claims seeking retirement income or deferred income.[17] In an employment dispute, it is not always clear that a claim is a claim for benefits under ERISA.

A. Examples of claims for benefits that arise in employment disputes

Claims seeking unpaid or forfeited deferred compensation are one example of claims that may be asserted by employees against employers (alone or along with other claims, such as claims alleging discriminatory termination or breach of employment contract) that could be ERISA-governed benefit claims. Suppose there is an arrangement by which some part of an em-

[15] *See* 29 U.S.C. § 1132(a)(1)(B).

[16] 29 U.S.C. § 1002(1).

[17] 29 U.S.C. § 1002(2).

ployee's annual discretionary bonus is held back each year and vested and paid in increments in the future, including after termination of employment, provided that the employee has not been terminated for cause or resigned before the vesting date. The employee's employment terminates, and the employer refuses to pay out the deferred amounts. The employee may assert a claim for the unpaid deferred amounts based on a dispute around the termination (that is without cause or a constructive termination). The employee might also assert that the deferred amounts could not be forfeited based on a state labor law that prohibits the forfeiture of "earned wages." Whether the deferred compensation plan is an ERISA-governed pension plan is a significant threshold issue in the litigation or arbitration. The deferred compensation arrangement may be a "top hat" plan. Top hat plans are expressly covered by some of ERISA's provisions. A plan qualifies as a top hat plan if it is unfunded and maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.[18] Top hat plans are exempt from the ERISA fiduciary, funding, participation, and vesting requirements applicable to other employee pension plans. Because minimum vesting requirements do not apply, benefits can be forfeited more easily than for ordinary pension plans. Other ERISA provisions, however, do apply, including the enforcement provisions of ERISA Section 502(a). Therefore, remedies are limited. In addition, if a deferred compensation plan is governed by ERISA, state law claims, such as claims under state labor laws, might be preempted. In the example above, both the breach of contract claim and the claim under the state labor law may be preempted.

Another example of a potential ERISA benefit denial claim that could arise in an employment dispute is a claim for benefits arising from the misclassification of a service provider—for example, as an independent contractor rather than an employee. Such misclassification gives rise to a number well-known claims and liabilities, including claims under wage and hour laws and anti-discrimination statutes. Misclassification can also result in claims

[18] A top-hat plan is defined in Sections 201(2) of Part 2, 301(a)(3) of Part 3, and 401(a)(1) of Part 4 of Title I of ERISA.

for pension or welfare benefits. These claims could be brought in tandem with claims under other statutes, such as anti-discrimination statutes.

B. What if a Claim is an ERISA-Governed Claim for Benefits?

There are significant differences in how a claim for benefits under an ERISA-governed plan are litigated or arbitrated.

- The proper defendants in benefit denial cases are the plan, the plan administrator and the plan's fiduciaries. The employer is not a proper defendant unless it is the plan administrator or fiduciary or is closely intertwined with the plan administrator. Bringing in another party to an arbitration between an employer and former employee may present questions around arbitrability.

- Judicial and arbitral review is generally limited to interpreting the terms of the plan. Questions that would be relevant in a contract dispute, such as the intentions of the parties, may not be relevant.

- ERISA requires plans to have specific administrative procedures to review benefit denials. Claimants may be required to exhaust their remedies before seeking judicial or arbitral review. An arbitrator or court may remand a dispute back to the plan administrator if the claimant has not exhausted remedies or the plan has not sufficiently specified its decision.[19]

[19] While ERISA does not expressly mandate exhaustion of administrative remedies, most courts agree that before a plan participant may commence a legal action challenging a benefit denial under Section 502(a)(1)(B), he must exhaust the plan's claims procedures. *See, e.g., Angevine v. Anheuser-Busch Companies Pension Plan*, 646 F.3d 1034, 1037 (8th Cir. 2011); *Moyle v. Golden Eagle Ins. Corp.*, 239 F. App'x 362, 363–64 (9th Cir. 2007); *Wert v. Liberty Life Assur. Co. of Bos.*, 447 F.3d 1060, 1062 (8th Cir. 2006); *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006); *Smith v. Local No. 25 Iron Workers' Pension Plan*, 99 F. App'x 695, 699 (6th Cir. 2004); *McGowin v. ManPower Int'l, Inc.*, 363 F.3d 556, 559 (5th Cir. 2004); *Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1190 (10th Cir. 1999); *Morais v. Cent. Beverage Corp. Union Emps.' Supplemental Ret. Plan*, 167 F.3d 709, 712 n.4 (1st Cir. 1999) (noting firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases); *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 873 (7th Cir. 1997).

- The record in the arbitration is generally limited to administrative record.[20] Discovery may, therefore, be substantially limited.

- The standard of review of a plan administrator's decision may be highly deferential—abuse of discretion or arbitrary and capricious—as opposed to de novo, depending on a number of factors, including whether the decision maker is conflicted.[21]

- Communication between fiduciaries and attorneys in connection with the review of benefit claims are not privileged vis-à-vis participants. Matters related to plan administration are not protected by the attorney-client privilege.[22]

- Finally, state law claims arising from benefit denials are generally pre-empted. Claimants cannot seek damages for breach of contract, intentional infliction of emotional distress, negligence, or fraud, for example. Under Section 502(a)(1)(B) of ERISA, a participant or beneficiary only enjoys a right to recover benefits. Claimants can get wrongfully denied benefits restored. Claimants can also recover their attorneys' fees in the arbitrator's or court's discretion if the claimant has some degree of success on the merits.

[20] Most courts of appeals hold that when review under ERISA is deferential, courts are limited to the information submitted to the plan's administrator to decide the participant's claim. *See, e.g., Robinson v. Aetna Life Ins. Co.*, 443 F.3d 389, 394 (5th Cir. 2006); *Jones v. Metro. Life Ins. Co.*, 385 F.3d 654, 660 (6th Cir. 2004); *Finley v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan*, 379 F.3d 1168, 1176 (10th Cir. 2004); *Militello v. Cent. States, Se. & Sw. Areas Pension Fund*, 360 F.3d 681, 686 (7th Cir. 2004); *Vega v. Nat'l Life Ins. Servs.*, 188 F.3d 287, 299-300 (5th Cir. 1999).

[21] In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Supreme Court held that a deferential standard of review was appropriate when the plan administrator or fiduciary was given discretion with respect to the interpretation of the plan. The Supreme Court reinforced the *Firestone* standard in *Conkright v. Frommert,* 559 U.S. 506 (2010). In *Conkright*, the Court held that a court must give deference to a plan administrator's interpretation of plan terms even if the administrator's original interpretation of that language was an abuse of discretion. *Id.* at 512. In *Firestone*, the Court recognized that when a plan fiduciary operates under "a conflict of interest," the conflict is an important "factor" in determining whether discretion has been abused. 489 U.S. at 115.

[22] *Tatum v. R.J. Reynolds Tobacco Co.,* 247 F.R.D. 488 (M.D.N.C. 2008) ("[C]ourts have found that an ERISA plan fiduciary generally may not assert the attorney-client privilege against plan participants with regard to matters of plan administration.")

IV. Other ERISA Claims that Arise in Employment Disputes

A. Claims arising from forfeiture for competition provisions in ERISA plans

Some states are hostile to non-competes and have statutes that prohibit or limit them. *See, e.g.*, California Business & Professions Code Section 16600. Employers have included forfeiture for competition provisions in top hat plans (ERISA-governed deferred compensation plans), and thereby successfully limited the impact of prohibitive state noncompete statutes due to preemption.[23] Specifically, an ERISA-governed plan might say that if the executive competes with the employer, benefits that would otherwise be paid to the executive will be forfeited. This type of provision is not a non-compete. Rather, it is a provision that permits a former employee to decide whether to compete and forfeit compensation—known as a "forfeiture for competition" provision. To determine whether a forfeiture for competition provision in a deferred compensation plan preempts a state law prohibiting limitations or restrictions on post-employment competition, the decision maker needs to determine whether the deferred compensation plan meets the definition of an ERISA-governed pension plan or, specifically, a top hat plan.

B. Retaliation or interference claims

ERISA's anti-retaliation provision, Section 510, makes it unlawful for "any person" to "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary" if the action is taken for any of the following reasons:

1. Because the person exercised any right to which the participant or beneficiary is entitled under an employee benefit plan;

2. To interfere with the attainment of any right to which a participant may become entitled under an employee benefit plan; or

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[23] *See Clark v. Lauren Young Tire Center Profit Sharing Trust*, 816 F.2d 480 (9th Cir. 1987).

3. Because the person has given information or is about to testify in a proceeding or inquiry related to the plan.[24]

A purpose of Section 510 is to "prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining their vested pension rights."[25] Examples of Section 510 claims include claims in which claimants allege that their employment was terminated by employers to avoid paying pension benefits or employer-paid health insurance coverage.

ERISA Section 510's prohibition against interference with protected rights preempts common law wrongful discharge claims to the extent they arise from allegations of interference with rights protected by ERISA. State law claims arising from the same facts as ERISA Section 510 claims are likely to be pre-empted, unless they are independent of the ERISA plan at issue. So, state law wrongful discharge claims, fraud claims, implied covenant of good faith and fair dealing claims, public policy claims, and negligence and misrepresentation claims—and all the money damage remedies that go along with them—may be preempted.[26]

Claims under Section 510 of ERISA work differently than claims under anti-retaliation and interference claims under the federal anti-discrimination statutes, such as Title VII. To demonstrate liability, a claimant needs to prove specific intent to interfere with ERISA benefits, because the termination of benefits is often a consequence of the termination of employment.[27]

Sometimes a Section 510 claim could overlap with other non-preempted claims. Because Section 510 does not require that interference with ERISA rights be the only reason for the employer's allegedly wrongful action, a claimant can proceed simultaneously with a Section 510 claim and an employment discrimination claim. Similarly, most state discrimination and

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[24] 29 U.S.C. § 1140.

[25] *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001).

[26] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (state causes of action for wrongful termination were preempted because they were the "prototypical [claim] Congress intended to cover under § 510." 498 U.S. at 143).

[27] *See, e.g., Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1113 (6th Cir. 2001).

wrongful discharge laws do not require that the employer's discriminatory or other wrongful motive be its only motive. For example, a claimant whose employment is terminated shortly before her pension would have vested may have a claim under ERISA Section 510 and also claims under federal or state age discrimination laws, based on an argument that pension status is a proxy for age.[28] Similarly, a claimant whose employment is terminated to save the company money on health insurance premiums (perhaps because the employee was diagnosed with a serious health condition) could assert a Section 510 claim and also a claim under the disability discrimination laws.

Remedies for ERISA Section 510 claims are limited to equitable relief. Thus, if a claimant's employment is terminated wrongfully by the employer to avoid paying out benefits due under a plan, the claimant may seek the payment of those benefits.[29] Claimants may also seek equitable relief such as back pay and reinstatement or front pay in lieu of reinstatement.[30] Compensatory and punitive damages are not allowed.[31]

C. Claims arising from communications regarding benefits

ERISA Section 502(a)(2) allows employees and former employees who are plan participants, and others, to bring claims against plan fiduciaries for breaches of fiduciary duty for relief under ERISA Section 409. Employees often claim that their employers misled them or failed to properly inform them as to the benefits available to them under an ERISA plan. These claims are premised on fiduciary misrepresentations or omissions that result in plan participant decisions that go wrong. An employee who agreed to retire early may claim that that had he been provided with correct information, he would have delayed retirement until a better benefit package was offered by the employer. Misrepresentation claims may also arise when

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[28] *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993).

[29] *See Zimmerman v. Sloss Equip., Inc.*, 72 F.3d 822, 827 (10th Cir. 1995).

[30] *See Schwartz v. Gregori*, 45 F.3d 1017, 1021-22, 264 (6th Cir. 1995).

[31] *See, e.g., Montanile v. Board of Trustees of Nat'l Elevator Industry Health Benefit Plan,* 136 S. Ct. 651 (2016); *Senese v. Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 825 (7th Cir. 2001); *McLeod v. Oregon Lithoprint Inc.,* 102 F.3d 376, 378 n.2 (9th Cir. 1996).

an employee seeks medical care, makes a benefit election, or transfers to an affiliated company, based on alleged misrepresentations by the employer. Employees have also sued to recover investment losses based on allegations that the plan fiduciaries misrepresented or failed to disclose material information affecting the value of the employer's stock ("stock drop" cases). Questions of arbitrability may come up in these types of cases. Arbitration agreements between employers and employees may not specifically reference disputes about employee benefits or cover disputes between employees and plan fiduciaries or service providers.[32] ERISA generally preempts state law claims based on alleged misrepresentations or failures to disclose related to employee benefits.

Relief under ERISA Section 409 (and, therefore, under ERISA Section 502(a)(2)) must flow to the plan, rather than to a participant, beneficiary, or other party.[33] In *Varity Corp v. Howe*,[34] the Supreme Court addressed whether, under ERISA, employees can recover individually for misrepresentations made by the employer. The Court held that a plaintiff is entitled to equitable relief for breach of fiduciary duty under Section 502(a)(3) when no relief is provided under any other subsections of 502(a) because 502(a)(3) and (a)(5) are "catchall" provisions that provide "'appropriate equitable relief' for 'any' statutory violation [and] act as a safety net, offering appropriate equitable relief for injuries caused by violations that Section 502 does not elsewhere adequately remedy."

V. Settling claims involving employee benefits

In several respects, settlement agreements involving employee benefits are no different than other settlement agreements. Employers may condition the payment of employee benefits on the execution of a general release of claims, including employment related rights and claims.[35] Releases must be knowing and voluntary. Releases of future claims are not enforceable. Court approval is not required.

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[32] *See, e.g., Cooper v. Ruane Cunniff & Goldfarb*, 990 F.3d 173 (2d Cir. 2021).

[33] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985).

[34] 516 U.S. 489 (1996).

[35] *Lockheed Corp. v. Spink*, 517 U.S. 882, 894 (1996).

Practitioners should, nonetheless, proceed cautiously when settlement terms involve employee benefits. It is common, for example, for former employees to ask for continued health insurance coverage for some period of time as part of a settlement agreement. This is a common employee request that often accompanies post-employment salary continuation. While an employer is free to agree to pay for a former employee's health insurance coverage (including continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"),[36] they are not necessarily free to agree to allow a former employee to continue to participate in the employer's plan as if the employee's employment had not ended. To participate in a plan, the participant must be "eligible" to do so. Health plans have eligibility requirements that former employees may not meet, regardless of whether they are being paid salary continuation or severance. A common eligibility requirement is that participants must be "active" employees for at least a specified number of weekly hours. Likewise, with pension plans, in addition to statutory limitations, employers may not be able to provide vesting credits, accelerate vesting, increase benefit payments, make or permit additional contributions, and the like as part of a settlement with a former employee. An employee may also ask to have a benefit claim determined in his favor in connection with a settlement with his employer. Unless the employer is the plan administrator with the power to deny and approve claims made under the plan, the employer cannot decide or compromise the claim.

VI. Conclusion

Issues involving employee benefits may sneak into employment disputes in a variety of ways. The basic premises of ERISA—especially preemption and ERISA's unique remedial scheme—are important for employment law practitioners to know about and to understand, whether they are neutrals or advocates, because the impact of ERISA on particular claims is always significant.

[36] 29 U.S.C. § 1161.