SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas Wesleyan Law Review

Volume 11 | Issue 1 Article 11

10-1-2004

Will the Correct Legal Standard Please Step Forward: When Should an Employer's Affirmative Duty under ERISA to Disclose Potential Plan Changes Kick-In?

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Sandra L. Sprott, *Will the Correct Legal Standard Please Step Forward: When Should an Employer's Affirmative Duty under ERISA to Disclose Potential Plan Changes Kick-In?*, 11 Tex. Wesleyan L. Rev. 189 (2004).
Available at: https://doi.org/10.37419/TWLR.V11.I1.9

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DOI: https://doi.org/10.37419/TWLR.V11.I1.9

WILL THE CORRECT LEGAL STANDARD PLEASE STEP FORWARD: WHEN SHOULD AN EMPLOYER'S AFFIRMATIVE DUTY UNDER ERISA TO DISCLOSE POTENTIAL PLAN CHANGES KICK-IN?†

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† The Author would like to thank her family, especially her husband, for their unfailing support during her academic career. The Author would also like to thank her friend and mentor, Christopher Nolland, for suggesting the topic for this article and his continuing support and guidance along the way. Finally, the Author would like to thank her Articles Editor, Michelle Haynes, and her fellow editors on the Texas Wesleyan Law Review for making this Comment worthy of the journal on which we have all worked so hard.

I. Introduction

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) in response to the painful plight of employees losing their anticipated retirement benefits for the simple lack of soundness and stability in their companies' retirement plans.[1] Through ERISA, Congress sought to protect employees by requiring employers to disclose and report to plan participants financial and other information regarding plan benefits.[2] ERISA further established a code of conduct—standards designed to set out the responsibilities and obligations of the employer as a plan fiduciary.[3] At the same time, Congress acknowledged that employers who offer retirement benefits serve in a dual capacity, both as a plan's administrator and as a plan beneficiary's employer (*i.e.*, an employer-fiduciary).[4] Serving in this dual capacity subjects the employer-fiduciary to conflicting loyalties: a fiduciary duty of loyalty to the plan beneficiaries versus the "best interests" loyalty it owes the company.[5] One such type of conflict, to which this Comment is limited, arises in cases where a retired employee believes his or her employer failed to disclose, upon request, potential retirement plan benefit changes.[6]

Consider the following scenario: Company Z has in place a standard retirement plan for its employees. Over the years, it has been company policy that anyone wishing to retire, who meets the plan's requirements, need only file the proper retirement forms with the company's personnel office. Over the last couple of months, because of the downturn in the economy and reduced sales in its widgets, Company Z has been considering ways to reduce its expenses, including the possibility of offering a new early retirement plan to employees with more than 21 years on-the-job. Company Z has narrowed its review of various plan proposals to two likely candidates. At the same time, Employee A, who has worked at Company Z for 24 years, has been thinking about retiring and asks his immediate supervisor if there are any plans to offer early retirement incentives to the existing retirement plan. If so, Employee A would like to take advantage of any such enhanced plan. The supervisor does not know and suggests that Employee A check with the personnel office. Employee A meets with a personnel office representative who tells him that there is no current plan to offer an early retirement incentive. Employee A de-

1. *See* 29 U.S.C. § 1001 (2000).
2. 29 U.S.C. § 1001(b).
3. *See id.*
4. *See* 29 U.S.C. § 1108(c)(3).
5. *See* Melissa Elaine Stover, *Maintaining ERISA's Balance: The Fundamental Business Decisions v. The Affirmative Duty to Disclose Proposed Changes*, 58 Wash. & Lee L. Rev. 689, 690 (2001).
6. *See, e.g.*, Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1157 (6th Cir. 1988) (noting employer failed to disclose second, more lucrative retirement plan to retiring employees).

cides to retire and completes the necessary paperwork. Two weeks after Employee A retires, Company Z offers an early retirement incentive, which includes, in addition to its standard retirement package, an additional year of pay for any employee who agrees to take early retirement.

This scenario brings to mind two important questions. First, does Company Z, if it chooses to speak about prospective plan changes, have a fiduciary duty to truthfully represent (*i.e.*, not to misrepresent) those changes? Second, if such a duty exists, at what point does that duty arise?

In answering the above questions, this Comment examines the current state of the law on these related issues. A review of ERISA will show that securing employee retirement plans was one of Congress's primary concerns in implementing the statute.[7] As to the first issue, those circuit courts that have considered the issue all agree that once an employer-fiduciary chooses to communicate about the future of a participant's plan benefits, the employer-fiduciary has a fiduciary duty to refrain from making misrepresentations.[8] However, the courts are split on the second issue—when does that duty arise?[9] A majority of the circuit courts agree that the duty to speak truthfully arises once the plan is under "serious consideration";[10] while a minority argues that this bright-line test is too rigid and a more fact-specific approach is required.[11] This Comment concludes that the minority's fact-specific approach is the better standard and modestly proposes it should be adopted by the United States Supreme Court as the best test in evaluating breach of employer-fiduciary duties under ERISA because it brings into balance the dual duties of the employer-fiduciary[12] and

7. *See* 29 U.S.C. § 1001.

8. *See* 29 U.S.C. § 1104(a)(1) (2000) (codifying ERISA fiduciary duties under the prudent man standard of care); Varity Corp. v. Howe, 516 U.S. 489, 506 (1996) (citing Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA")); Martinez v. Schlumberger, Ltd., 338 F.3d 407, 424 (5th Cir. 2003).

9. *Compare* Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996) (establishing affirmative duty to tell the truth arises when plan is under serious consideration) *with Martinez*, 338 F.3d at 428 *and* Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997) (rejecting serious consideration standard for a more fact-specific approach).

10. *See* McAuley v. Int'l Bus. Machs. Corp., 165 F.3d 1038, 1043–45 (6th Cir. 1999); Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997); Hockett v. Sun Co., 109 F.3d 1515, 1522 (10th Cir. 1997); *Fischer*, 96 F.3d at 1538–41; Muse v. Int'l Bus. Machs. Corp., 103 F.3d 490, 493 (6th Cir. 1996); Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993); Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992); *Berlin*, 858 F.2d at 1163–64.

11. *See Martinez*, 338 F.3d at 425; *Ballone*, 109 F.3d at 124 (rejecting serious consideration standard for a more fact- specific approach).

12. *See* discussion *infra*, Part V (discussing the dual duties of the employer-fiduciary).

meets Congress's goal of preventing serious abuse in the managing of employee retirement benefit programs.[13]

In sum, this Comment examines whether ERISA imposes an affirmative obligation on employer-fiduciaries to disclose proposed changes in their employee benefits plans and when that duty to disclose arises. Part II provides a historical perspective of ERISA and the duty to disclose. Part III examines when an employer is considered a fiduciary under ERISA. Part IV explains ERISA's reporting and disclosure requirements and its impact on the duty to disclose proposed changes. Part V takes into consideration the duty of loyalty. Part VI analyzes the two conflicting standards. Ultimately, after a detailed analysis, Part VII of this Comment concludes that the minority's fact-specific approach is the better standard in evaluating breach of employer fiduciary duties under ERISA.

II. The History of ERISA

In order to put the conflicting standards concerning an employer's duty to disclose to early retirement plans into perspective, a bit of background appears necessary. This section takes a look at ERISA[14]—prior to and subsequent to its enactment by Congress in 1974.

A. *Pre-ERISA*

As Frank Cummings succinctly remarked, "Why bother with this history? Didn't ERISA wipe it all out? Not quite."[15] To understand why Congress enacted ERISA, it is important to understand the reasons why the statute was enacted in the first place. Prior to Congress's enactment of ERISA, state courts applied common-law trust principles to both trustees and other fiduciaries of pension and welfare benefit plans,[16] resulting in a "mind-boggling" array of "conflicts and choice-of-law questions."[17] As Cummings noted, before ERISA,

> [t]here frequently was no way to accomplish service on or jurisdiction over all the necessary parties to a pension or benefit plan . . . . [T]here were too many parties in too many places: the trustee, insurer, employer, union, beneficiary, administrator, record-keeper,

13. *See* 29 U.S.C. § 1001 (2000).

14. *See generally id.*

15. *See* Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, 1 ALI-ABA Employee Benefits Litigation 1, 7 (2003).

16. *See id.*; *see also* H.R. Rep. No. 93-533, at 4–5 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643 (indicating a few states had codified existing principles of trust law).

17. Cummings, *supra* note 15, at 7. In a pension dispute, commonly the trustee, the company, the plan administrator, the union, the insurance company, "members of the joint board of plan," and the plan actuary were all necessary parties to the dispute. *Id.* at 7, n.23.

> investment advisor, actuary, and accountant all might be (and frequently were) in different states.[18]

Under traditional state law, fiduciary equity standards applied only to a trustee.[19] However, often times it was the employers, unions, plan administrators, and actuaries—those who did not have fiduciary status under state law (but had the real decision making power)—who managed and administered the plan.[20] Undoubtedly, it made such cases both difficult and costly to litigate.

In 1958, based on the theory that by informing plan participants of their rights, plan participants would have the necessary information to police their own plans without further governmental interference,[21] Congress enacted the Welfare and Pension Plans Disclosure Act (WPPDA).[22] Congress adopted the WPPDA "purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans."[23] Under the WPPDA, plan administrators were required to file with the Secretary of Labor and, upon written request, send to plan participants a copy of the plan description and annual report.[24] However, the lack of governmental investigative and remedial powers destined the WPPDA to fail.[25] Congress went back to the drawing board seeking a way to ensure that employers kept their pension promises, while at the same time balancing the needs of plan participants against the costs of administering such plans.[26] In 1974, it delivered ERISA—bringing the issue firmly under federal law.

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18. *Id.* at 7.

19. *Id.* at 8.

20. *Id.* A trustee has a general disclosure requirement "to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest." RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959).

21. *See* H.R. Rep. No. 93-533, at 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.

22. WELFARE AND PENSION PLANS DISCLOSURE ACT, Publ. L. No. 85-836, 72 Stat. 997 (1958) (codified as amended at 29 U.S.C. §§ 301–09) (repealed by ERISA, 1975) (controlling the disclosure requirements of pensions and welfare benefit plans where a company employed more than 25 employees). Prior to ERISA, where a company employed more than 25 employees, the WPPDA controlled disclosure requirements of pension and welfare benefit plans. Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty To Disclose?*, 54 U. PITT. L. REV. 979, 985 at n.21 (1993).

23. H.R. Rep. No. 93-533, at 4 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4642.

24. *Id.* In 1962, Congress amended the WPPDA making "theft, embezzlement, bribery, and kickbacks federal crimes" when connected with pension and welfare plans. *Id.*

25. *Id.* The 1962 amendments to the WPPDA further provided "*limited* investigatory and regulatory powers upon the Secretary of Labor." *Id.* (emphasis added).

26. *See* 29 U.S.C. § 1001 (2000); *see also* Jeffrey A. Brauch, *The Danger of Ignoring Plain Meaning: Individual Relief for Breach of Fiduciary Duty Under ERISA*, 41 WAYNE L. REV. 1233, 1238 (1995) (noting 1963 Studebaker plant closing and subse-

B. *ERISA*

After years of redrafting and compromise, Congress finally enacted an extensive regulatory scheme—ERISA.[27] Congress's reasoning for enacting ERISA appears to be two-fold. First and foremost, Congress designed ERISA to protect employee pensions and other benefits by providing insurance (for vested pension rights),[28] specifying certain plan characteristics in detail,[29] and by setting forth certain general fiduciary duties applicable to the management of both pensions and nonpension benefit plans.[30] Second, Congress designed ERISA to encourage employers to voluntarily provide such plans to their employees.[31]

The most important aspect of ERISA from the historical perspective is the fact that "the key decision-makers are all defined, as a matter of federal law, as fiduciaries."[32] In doing so, Congress resolved many of the pre-ERISA procedural problems in litigating employee benefit cases and, in turn, provided new procedural requirements and opportunities.[33]

III. Fiduciary Defined

By legal definition, the term "fiduciary" is a concoction of law and fact.[34] Generally, ERISA states that "a person is a fiduciary with respect to a plan to the extent" that such person or entity: (i) exercises *discretionary*[35] authority or control over the plan, including management or plan asset disposition; (ii) provides plan investment advice for payment; or (iii) has any administrative discretionary authority or re-

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quent failure of auto workers' seriously underfunded pension plan as one of the significant events prompting passage of ERISA).

27. *See* Stover, *supra* note 5, at 715 n.138.

28. *See* 29 U.S.C. § 1001.

29. *See* 29 U.S.C. §§ 1051–60 (specifying when and how pensions vest).

30. *See* 29 U.S.C. § 1104 (2000).

31. *See* 29 U.S.C. § 1001.

32. *See* 29 U.S.C. § 1002(21)(A).

33. *See* Cummings, *supra* note 15, at 8–9; *see, e.g.*, 29 U.S.C. §§ 1024–25 (2000); Kinkead v. Southwestern Bell Corp. Sickness & Accident Disability Benefit Plan, 111 F.3d 67, 68 (8th Cir. 1997) (noting an implicit requirement that all plan administrative remedies be exhausted by plaintiff prior to filing suit).

34. Reich v. Lancaster, 55 F.3d 1034, 1044 (5th Cir. 1995).

35. According to several circuit courts, a close reading of the literal language and structure of ERISA, subsection (i) of § 1002(21)(A), suggests that the term "discretionary" is to be given effect in the first clause and not in the third since discretion is not required of a fiduciary where such person exercises any administrative authority or responsibility over the plan. *See* In re Enron Corp. Sec., 284 F. Supp. 2d 511, 544 (S.D. Tex. 2003) (citing Bd. of Trs. of Bricklayers Local 6 Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 273 (3d Cir. 2001) (quoting IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir. 1997) ("[A]ny control over disposition of plan money makes the person who has control a fiduciary."))).

sponsibility over the plan.[36] In § 3(21)(A) of ERISA, the phrase *fiduciary with respect to a plan* is defined functionally in terms of authority and control.[37] In turn, the phrase *to the extent* narrows the definition of a fiduciary to those parts of the plan "over which the person or entity exercises authority and control."[38] Thus, an employer's "[f]iduciary status [under ERISA] is not an all or nothing proposition,"[39] and should be construed liberally, keeping in mind ERISA's objectives and policies.[40] In contrast, ERISA defines a *formally named fiduciary* as:

> [A] fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary: (i) by a person who is an employer or employee organization with respect to the plan, or (ii) by such an employer and such an employee organization acting jointly.[41]

As such, certain positions are, without question, defined as fiduciary positions under the statute. However, ERISA also permits a plan document to name a fiduciary for a limited function and, as such, will have fiduciary status for that particular function only.[42]

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36. 29 U.S.C. § 1002(21)(A). Thus, under ERISA, § 3(21)(A), fiduciary obligations can apply to managing, advising, and administering an ERISA plan. *See In re Enron Corp. Sec.*, 284 F. Supp. 2d at 550.

37. *See In re Enron Corp. Sec.*, 284 F. Supp. 2d at 544 (quoting Ariz. State Carpenters Pension Trust Fund v. Citibank, 125 F.3d 715, 720 (9th Cir. 1997) (citing John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993) and quoting Mertens v. Hewitt Assoc., 508 U.S. 248, 262 (1993) (indicating fiduciary status is defined "'in functional terms of control and authority over the plan, . . . thus expanding the universe of persons subject to fiduciary duties—and to damages—under § 409(a)'"))); *see also* Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 881 (S.D.N.Y. 1997) (citing, inter alia, Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) ("Unlike the common law definition under which fiduciary status is determined by virtue of the position a person holds, ERISA's definition is functional.")).

38. *In re Enron Corp. Sec.*, 284 F. Supp. 2d at 543 (quoting Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345, 352 (5th Cir. 1989)).

39. *Id.* at 544 (citing Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998)).

40. *Id.* at 544 (quoting *Ariz. State Carpenters Pension Trust Fund*, 125 F.3d at 720); *see also* Martin v. Nat'l Bank of Alaska, 828 F. Supp. 1427, 1436 (D. Alaska 1992) (indicating fiduciary duties established by ERISA should be broadly construed); Blatt v. Marshall & Lassman, 812 F.2d 810, 812 (2d Cir. 1987) (Congress intended ERISA's definition of fiduciary "to be broadly construed.").

41. *See* 29 U.S.C. § 1102(a)(2); *see, e.g.*, Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1299 (3d Cir. 1993) (noting that fiduciary duties articulated in ERISA section governing duties of ERISA fiduciary is not exhaustive; rather, Congress relied upon common law of trusts to define general scope of trustees' and other fiduciaries' authority and responsibility); Martin v. Walton, 773 F. Supp. 1524, 1526 (S.D. Fla. 1991) (noting standards of fiduciary conduct for ERISA fiduciaries are to be governed, interpreted and judicially determined both in light of common-law trusts, and special nature, purpose and intent of employee benefit plans).

42. *See* Daniels v. Nat'l Employee Benefit Servs., Inc., 858 F. Supp. 684, 690 (N.D. Ohio 1994). *But see* Arakelian v. Nat'l Western Life Ins. Co., 680 F. Supp 400, 404

A corollary to this functional approach of determining fiduciary status is that persons may become plan fiduciaries, even though they hold no position in regards to the plan, if they exercise *de facto* control over a fiduciary function.[43] Courts have found such persons to be *de facto* fiduciaries in a number of situations,[44] including: when an officer and owner of a closely held corporation commingled plan assets with corporate assets and, in turn, used such commingled funds to pay corporation creditors;[45] when a controlling shareholder and officer failed to forward participant contributions before the company's failure;[46] when an employer misappropriated employee contributions to a plan;[47] when a person had control over a trustee's decision to sell stock;[48] and when a company's executive board members were responsible for monitoring and supervising the appointed trustee.[49] Beyond the functional and *de facto* methods of determining fiduciary status, a few courts have imposed fiduciary status and, thus, liability on individuals—within a corporation or other entity—that actually perform the functions which make the entity a plan fiduciary.[50]

Thus, an employer may be deemed a fiduciary either by functional and *de facto* methods, or simply by performing the functions of a fiduciary. However, it is important to remember that an employer wears

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(D.D.C. 1987) (holding that where there is only one named fiduciary, that fiduciary is a fiduciary for all purposes).

43. *See* Concha v. London, 62 F.3d 1493, 1501–02 (9th Cir. 1995) (noting no express delegation required when persons performing fiduciary-type duties will be considered fiduciaries); *see also* Mason Tenders Dist. Council Pension Fund v. Messera, 958 F. Supp. 869, 881 (S.D.N.Y. 1997) (citing H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5103:

> While the ordinary functions of consultants and advisors to employee benefit plans . . . may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of such plan or some authority or control regarding its assets,

and thus, such persons may be regarded as fiduciaries.).

44. *See* Robert N. Eccles, *Fiduciary Litigation Under ERISA*, 574 PLI/TAX 637, 645 (2003) (giving a more detailed description of situations where courts have found *de facto* fiduciaries).

45. *See* LoPresti v. Terwillinger, 126 F.3d 34, 40 (2d Cir. 1997).

46. *See* Bannistor v. Ullman, 287 F.3d 394, 402–07 (5th Cir. 2002).

47. *See* United States v. Grizzle, 933 F.2d 943, 948 (11th Cir. 1991).

48. *See* Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., 793 F.2d 1456, 1460 (5th Cir. 1986).

49. *See* Keach v. U.S. Trust Co., N.A., 234 F. Supp. 2d 872, 882–83 (C.D. Ill. 2002).

50. *See* 29 U.S.C. § 1104 (2000); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1156 (9th Cir. 2000) (citing Kay v. Thrift & Profit Sharing Plan for Employees of Boyertown Casket Co., 780 F. Supp. 1447, 1461 (E.D. Pa. 1991) (holding that where "a committee or entity is named as the plan fiduciary, the corporate officers or trustees who carry out the fiduciary functions are themselves fiduciaries and cannot be shielded from liability by the company")). *But see* Confer v. Custom Eng'g Co., 952 F.2d 34, 37 (3d Cir. 1991) (holding that officers of a corporate fiduciary are shielded from fiduciary liability unless they are explicitly or implicitly delegated individual fiduciary roles).

dual hats and will not be considered a fiduciary in every instance. Yet, where an employer is considered a fiduciary, ERISA places upon it certain reporting and disclosure requirements, as well as other fiduciary duties.

IV. Reporting Requirements, Disclosure Requirements, and Fiduciary Duties Under ERISA

It is well established that Congress enacted ERISA with the intent to protect employees' pension benefit rights.[51] To meet this goal, ERISA provides a detailed regulatory scheme,[52] two crucial components being (1) the disclosure and reporting requirements and (2) the fiduciary duty.[53]

A. *Reporting and Disclosure Requirements*

ERISA provides specific rules regarding the type of information that must be furnished to participants and beneficiaries and reported to certain government agencies.[54] ERISA requires that plan administrators file certain informational returns with the Department of Labor (DOL) and the Internal Revenue Service,[55] including a summary plan description that describes the coverage levels and claims procedures of the plan.[56] Plans are also required to report when modifications to the plan have been made.[57] Of the numerous forms required under ERISA, the summary plan description, the summary of material modifications, and the annual report are the most relevant reporting documents ERISA requires to be available for disclosure to both plan participants and/or the Secretary of Labor.[58]

The *Summary Plan Description* (SPD) is central to the ERISA disclosure requirements.[59] The SPD is a summary of provisions of the plan, including a statement of ERISA rights.[60] It is written in language understandable to the average plan participant.[61] A plan administrator is required to provide the SPD to participants, but is not

51. *See* 29 U.S.C. § 1001 (2000); Stover *supra* note 5, at 690 (citing 263 Cong. Rec. S15, 762 (1974)).

52. Bintz, *supra* note 22, at 980.

53. *See* 29 U.S.C. §§ 1101–05, 1021–31 (2000); Bintz, *supra* note 22, at 980.

54. *See* 29 U.S.C. §§ 1021–24 (specifying filing and other noticing requirements under ERISA).

55. *See id. See also* U.S. Dep't of Labor, Reporting and Disclosure Guide for Employee Benefit Plans (April 2004) (providing additional information relating to a plan administrator's disclosure and reporting requirements under ERISA), *available at* http://www.dol.gov/ebsa/pdf/rdguide.pdf (on file with the Texas Wesleyan Law Review).

56. *See* 29 U.S.C. § 1022 (summary plan description).

57. 29 U.S.C. § 1024(b) (2000).

58. *See* §§ 1022–29.

59. *See* §§ 1022, 1024.

60. *Id.*

61. *Id.*

required to file it with the DOL.[62] The plan administrator must provide a SPD for new plans within 120 days after the plan becomes subject to ERISA.[63] ERISA requires updates every fifth year for amended plans; otherwise, the plan administrator is required to redistribute the SPD every ten years.[64] The plan administrator must provide a copy of the SPD to new participants within 90 days of participation or benefit commencement (for beneficiaries).[65] Should any material modifications to the plan occur or if there is any change in formation, the plan administrator is required to provide participants, within 210 days after the close of the plan year in which the modification was adopted, a *Summary of Material Modifications* (SSM),[66] unless described in a timely distributed SPD.[67]

The plan administrator or plan sponsor is also required to provide to participants a copy of the *Summary of Annual Report* within nine months after the close of the plan year, or within two months after the close of the extension period for filing an annual return.[68] The plan administrator is required to file an annual return within the last day of the seventh month after the close of the plan year and make the return available to participants upon written request.[69]

ERISA, by requiring that plan administrators share a wide array of information ranging from coverage levels to financial information with the plan participants and the DOL, protects plan participants' disclosure rights. Penalties for failure to meet the reporting and disclosure requirements under ERISA are severe.[70] For example, part 1 of Title I of ERISA provides that, upon conviction, a fiduciary may be fined up to $5,000 ($100,000 maximum if the violator is an entity other than an individual) and/or imprisoned for up to one year.[71]

B. *Fiduciary Duties Under ERISA*

In addition to ERISA's reporting and disclosure rules, plan administrators have certain fiduciary duties.[72] Under ERISA, a plan fiduciary's obligations were designed to protect a plan participant's interests against the historical abuses in the discretion and management of such plans by the employer.[73] In determining whether an employer is act-

62. *See* § 1022.
63. 29 U.S.C. § 1024(b)(1)(B).
64. § 1024(b).
65. *See* § 1024(b)(1)(A).
66. *See* §§ 1022(a), 1024(b)(1).
67. *See* § 1024(b).
68. §§ 1023(a)(1)(A), 1024(a)(1), 1024(b)(3).
69. § 1024(a)(1).
70. *See generally* §§ 1131–32 (criminal and civil penalties under ERISA).
71. § 1131.
72. *See generally* §§ 1101–14.
73. *See* Justice v. Bankers Trust Co., 607 F. Supp. 527, 533 (N.D. Ala. 1985); Stover, *supra* note 5, at 698.

ing in its fiduciary capacity, courts look back to the common law of trusts as a "starting point" for ERISA analysis.[74] The ERISA language itself does not explicitly set forth all of the fiduciary duties;[75] rather, Congress invoked the common law of trusts to define the general scope of its authority and responsibility.[76] However, ERISA's own legislative history invokes this limitation, providing that "the principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans."[77]

In Section 404(a), ERISA describes three areas of fiduciary responsibility under which employers, when executing their fiduciary duties, will be subject to liability if they fail to live up to the statute's standards.[78] The first and most fundamental duty of an ERISA plan fiduciary is a *duty of loyalty*, which requires fiduciaries to discharge their duties in regards to a plan "solely in the interest of participants and beneficiaries."[79] Second, fiduciaries must discharge their duties for "the *exclusive* purpose of providing benefits to participants and their beneficiaries," while at the same time "defraying reasonable expenses of administering the plan."[80] Thus, avoiding conflicts of interests is one of the responsibilities and duties imposed on fiduciaries by ERISA.[81] Finally, fiduciaries are required to meet a "prudent man" standard by discharging their fiduciary duties 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."[82] Consequently, when an employer is acting in its capacity

74. *See, e.g.*, Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 447 (1999) (citing Varity Corp. v. Howe, 516 U.S. 489, 496 (1996)).

75. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 412 (5th Cir. 2003).

76. *See Varity*, 516 U.S. at 496 (quoting Cent. States, Southwest and Southwest Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)); *see also* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 152 (1985) (Brennan, J., concurring) ("The legislative history demonstrates that Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA."); Acosta v. Pacific Enters., 950 F.2d 611, 618 (9th Cir. 1991) ("[T]he common law of trusts informs duties of an ERISA fiduciary; at the same time, . . . fiduciary's duties are circumscribed by Congress' overriding goal of ensuring 'the soundness and stability of plans with respect to adequate funds to pay promised benefits.'" (citing 29 U.S.C. § 10001 (1988))).

77. *See* H.R. Rep. No. 93-533, at 13 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651.

78. 29 U.S.C. § 1104(a) (2000).

79. *Id.* § 1104(a)(1).

80. *Id.* § 1104(a)(1)(A)(i)–(ii) (emphasis added); *see Martinez*, 338 F.3d at 412.

81. *See* Mertens v. Hewitt Assoc., 508 U.S. 248, 251–52 (1993).

82. 29 U.S.C. § 1104(a)(1)(B) (2000) (emphasis added). In other words, the *prudent man standard* is nothing more than a practical person who carefully and cautiously makes decisions based upon the circumstances. In the case of an employer-fiduciary, this rule requires a higher standard of honesty and good faith towards those to whom the employer-fiduciary owes such duties. For example, under ERISA the prudent man rule governs investment of pension funds. *See* BLACK'S LAW DICTIONARY 1294 (8th ed. 1999). This may consist of requiring the employer-fiduciary to invest the trust's or fund's money in certain listed securities designated by the state or

as a fiduciary under ERISA, it must meet the prudent man standard or possibly incur liability for breach of its fiduciary duties.[83] Further, as the Sixth Circuit points out, "[T]he duties charged to an ERISA fiduciary are 'the highest known to the law.'"[84]

V. The Duty of Loyalty and Its Effect on the Duty to Disclose: The Two Hats Doctrine

By integrating hard-and-fast standards of trustee conduct into ERISA, Congress has incorporated the strict common-law standard of loyalty that the courts consider to be the first and most fundamental duty of an ERISA plan fiduciary.[85] Under the *duty of loyalty*, which requires a fiduciary to discharge his duties in regard to a plan "solely in the interest of participants and beneficiaries,"[86] disclosure is required only when there are "material facts affecting the interest of the beneficiary which [the fiduciary] knows the beneficiary does not know, [but] needs to know for his protection."[87] For instance, in *Varity Corp. v. Howe*,[88] the Supreme Court found that a plan fiduciary who "participate[s] knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not [ ] act[ing] 'solely in the interest of the participants and beneficiaries,'"[89] and thus breaches its fiduciary duty of loyalty to the

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federal government, or simply require the employer-fiduciary to seek reasonable means of preserving the fund's capital and/or wisely investing the funds to prevent losses. *See id.* at 1264.

83. *See, e.g.,* Varity Corp. v. Howe, 516 U.S. 489, 503 (1996) (holding that the employer-fiduciary was acting in its fiduciary capacity under ERISA when it misrepresented employee benefits would remain secure provided the employees voluntarily transferred to newly incorporated subsidiary); Keach v. U.S. Trust Co., N.A., 240 F. Supp. 2d 832, 836 (C.D. Ill. 2002) (defining a *fiduciary* under ERISA to be "a person who exercises any power of control, management, or disposition with respect to monies or other property of an employee benefit fund, or has the authority or responsibility to do so" and "[u]nder this definition, a showing of authority or control requires 'actual decision-making power' rather than the type of influence that a professional advisor may have with respect to decisions to be made by the trustees or fiduciaries that it advises").

84. Chao v. Hall Holding Co., Inc., 285 F.3d 415, 426 (6th Cir. 2002). When enforcing these important responsibilities, we "focus[ ] not only on the merits of the transaction, but also on the thoroughness of the investigation into the merits of the transaction." *Id.* (citing Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996)).

85. *See* 29 U.S.C. § 1104(a)(1) (2000); *see also Enron Litig.*, 284 F. Supp. 2d 511, 546 (S.D. Tex. 2003) (noting that "[t]he most fundamental duty of ERISA plan fiduciaries is duty of complete loyalty").

86. § 1104(a)(1).

87. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 412 (5th Cir. 2003) (quoting Bintz, *supra* note 22, at 985 (quoting Restatement (Second) of Trusts § 173 cmt. 3 (1959))).

88. 516 U.S. 489 (1996).

89. *Varity*, 516 U.S. at 506; *see* Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983) ("Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA, 29 U.S.C.

plan beneficiary.[90] However, whether an employer-fiduciary has to disclose *potential* changes to benefit plan provisions is a more complicated issue. As noted above, since ERISA allows employers to act as a plan's administrator, the employer is in a precarious position of potentially conflicting loyalties and must balance its duty of loyalty to the plan participants against the loyalty it owes the company.[91] The Supreme Court developed its "two hats" doctrine to assist in resolving this potential conflict.[92]

Unlike traditional trust law that prohibits or severely restricts the actions of conflicted fiduciaries,[93] the Supreme Court has explicitly accepted the argument that ERISA permits plan sponsors to act both as plan fiduciaries and as nonfiduciaries (*i.e.*, employers).[94] This acceptance of such dual roles for employer-fiduciaries, dubbed the "two hats" doctrine,[95] shields an employer—while wearing its nonfiduciary/employer hat—from fiduciary liability when it is making fundamental business decisions.[96]

Under § 3(21)(A) of ERISA, an employer wears its "fiduciary" hat only "to the extent" it performs one of the defined fiduciary functions.[97] In *Pegram v. Hendrich*,[98] the Supreme Court agreed, stating that:

> In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary . . . when taking on the action subject to complaint.[99]

Courts, in interpreting this language, have held that a person who accepts only limited fiduciary duties is not a fiduciary for all purposes.[100]

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§ 1104(a)(1)."); *see also* Cent. States v. Cent. Transp., 472 U.S. 570, 570–71 (noting ERISA fiduciary duty includes common-law duty of loyalty).

90. *Varity*, 516 U.S. at 506.

91. Pegram v. Hendrich, 530 U.S. 211, 225 (2000).

92. *See Martinez*, 338 F.3d at 412.

93. *See, e.g.*, *Varity*, 516 U.S. at 498 (citing NLRB v. Amax Coal Co., 453 U.S. 322, 329–30 (1981) (indicating traditional trust law prohibits conflict of interest created by fiduciaries holding certain types of positions)).

94. *See Varity*, 516 U.S. at 498.

95. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 412 (5th Cir. 2003) (noting the Supreme Court created the "two hats" doctrine).

96. *See* In re Enron Corp. Sec., 284 F. Supp. 2d 511, 551 (S.D. Tex. 2003) (noting fundamental business decisions such as the decision to establish a plan, how to design or amend a plan, or when to terminate a plan are not within the scope of fiduciary obligations of a fiduciary-employer).

97. *See* Stover, *supra* note 5, at 698 n.44, 714–19.

98. 530 U.S. 211 (2000).

99. *Id.* at 226.

100. *See, e.g.*, Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 18 (1st Cir. 1998) (stating that "fiduciary status is not an all or nothing proposition"); Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1188 (7th Cir. 1994) ("A person 'is a fiduciary to the extent that' he performs one of the described duties."); *see also* Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990) ("Fiduciary duties under ERISA

In this light, courts have ruled that corporations or their directors are not performing fiduciary roles even when their actions affect a plan;[101] that insurers, while incurring fiduciary status by adjudicating claims, will not necessarily obtain fiduciary capacity for other administrative aspects of the plan;[102] and that employers who make certain plan decisions, such as plan amendments, in their "employer" or "settlor" functions will not be held to be wearing their "fiduciary" hat.[103] In such cases, courts use the "to the extent" limitation language found in § 3(21)(A) to anchor their lack of fiduciary responsibility decisions.[104] The courts reason this limiting language is intended to prevent the "eros[ion] of the well-established principle that employers are free to make decisions that modify, amend, or even terminate their employees' unvested welfare benefits."[105] Thus, in order to state a claim for breach of a fiduciary duty under ERISA, a plaintiff must allege that the defendants were fiduciaries and that they breached their fiduciary obligations.

attach not just to particular persons, but to particular persons performing particular functions.").

101. *See* Sengpiel v. B.F. Goodrich Co., 156 F.3d 660, 666 (6th Cir. 1998) ("[T]he fact that an action taken by an employer to implement a business decision may ultimately affect the security of employees' welfare benefits does not automatically render the action subject to ERISA's fiduciary duties.").

102. *See* Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (holding that Plan sponsors who alter terms of welfare benefit or pension plans do not fall into category of "fiduciaries" under ERISA); Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992); *see also* Srien v. Soft Drink Workers Union Local 812, 93 F.3d 1088, 1096 (2d Cir. 1996) (holding insurer not fiduciary when negotiating for premium rates with trust); Walker v. Nat'l City Bank of Minneapolis, 18 F.3d 630, 633 (8th Cir. 1994) (noting no duty on part of trustee bank to notify participants of employer's failure to make promised contributions). *But see* Lasser v. Reliance Standard Life Ins. Co., 344 F.3d 381, 385 (2003) (finding a higher standard of review required because there is a structural or inherent conflict of interest where insurer of an ERISA plan also acts as claims administrator).

103. *See, e.g.*, Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999) (applying rule to amendment of an employee contribution plan); *Spink*, 517 U.S. at 890 (noting an employer is not engaged in plan administration and thus not acting as a fiduciary when it decides to create, amend, or terminate its pension plans); Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (finding the same as to employee welfare or benefit plans); Akers v. Palmer, 71 F.3d 226, 230 (6th Cir. 1996) (holding "a company is only subject to fiduciary restrictions when managing a plan according to its terms, but not when it decides what those terms are to be"); Schulist v. Blue Cross of Iowa, 717 F.2d 1127, 1131–32 (7th Cir. 1983) (holding health insurers were not fiduciaries under ERISA with respect to the setting of the rates charged to the union when they did not exercise discretionary authority with respect to the setting of such rates and, therefore, owed no fiduciary duty to the trust with respect to premium charges).

104. *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 527 (1996) (Thomas, J., dissenting) ("[U]nder ERISA [§ 3(21)(A)(iii)], a person 'is a fiduciary with respect to a plan' only 'to the extent' that 'he has any discretionary authority or discretionary responsibility in the administration of such plan.'").

105. *Sengpiel*, 156 F.3d at 666.

VI. Fiduciary Obligations of the Employer-Fiduciary

A. *Varity and the Duty to Tell the Truth*

The Supreme Court has not spoken directly on when a plan fiduciary has a duty to tell the truth,[106] and the various circuit courts' decisions are, as one commentator has noted, in a "continuum of disarray" on the issue.[107] However, the Supreme Court, in *Varity Corp. v. Howe*, has generally defined when an employer is required to tell the truth in connection with proposed changes to plan benefits.[108]

In *Varity*, subsidiary employees sued Varity Corporation (Varity), their employer and plan administrator, alleging that the company affirmatively misled its employees by tricking them into losing their nonpension benefits.[109] In order to consolidate its various debts, Varity transferred its money-losing divisions into a single subsidiary, Massey Combines, with a forward-looking business plan under which Massey Combines would likely fail.[110] Thus, Varity would eliminate the consolidated debts for which its other divisions would have been responsible.[111] Part of the debt Varity sought to rid itself of was the obligation to pay nonpension benefits (including medical benefits) to the employees of Massey-Ferguson's money-losing divisions.[112] With these goals in mind, Varity held a meeting with the employees of those money-losing divisions to encourage them to move to Massey Combines and change benefit plans.[113] Varity, through its plan administrator (Massey-Ferguson) conveyed the basic promise that the employees' plans would remain secure if they transferred to the new subsidiary.[114] Based on these assurances, approximately 1,500 Massey-Ferguson employees transferred to Massey Combines, which within two years went into receivership, causing the employees to lose their nonpension benefits.[115]

The Supreme Court, in determining whether Varity breached any fiduciary duty it may have owed plaintiffs, first recognized that ERISA does set forth certain fiduciary duties to the management of such plans.[116] At the same time, the Supreme Court also acknowledged the twin aims of Congress in enacting ERISA, admonishing the courts to begin their analysis with "trust law . . . only [as] a starting point, after which courts must go on to ask whether, or to what extent, the lan-

106. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 413 (5th Cir. 2003).
107. Daniel M. Nimtz, *ERISA Plan Changes*, 75 Denv. U. L. Rev. 891, 894 (1998).
108. *See generally* Varity Corp. v. Howe, 516 U.S. 489 (1996).
109. *Id.* at 492.
110. *Id.* at 493.
111. *Id.* at 492.
112. *Id.*
113. *Id.* at 493–94.
114. *Id.* at 494.
115. *Id.*
116. *Id.* at 496.

guage of the statute, its structure, or its purposes require departing from common-law trust requirements."[117]

After determining ERISA's applicability,[118] the *Varity* Court explained that the next step in the analysis is to determine when an employer is wearing its fiduciary hat under ERISA.[119] Varity argued that its communications with the Massey-Ferguson employees about transferring to Massey Combine was strictly in the capacity as an employer and not as a plan administrator.[120] Unconvinced, the Court found that the purpose behind the meeting was to assure the employees that the transfer would not harm the employees' benefits and, as such, Varity was acting as the plan's administrator (*i.e.*, wearing its fiduciary hat).[121] The Court explained that in making this determination, "we must interpret the statutory terms which limit the scope of fiduciary activity to discretionary acts of plan 'management' and 'administration,'" as "[t]hese words are not self-defining" in this instance.[122] Turning to the common law of trusts to explain its reasoning, the Court noted:

> The ordinary trust law understanding of fiduciary "administration" of a trust is that to act as an administrator is to perform the duties imposed, or exercise the power conferred, by the trust documents. The law of trusts also understands a trust document to implicitly confer "such powers as are necessary or appropriate for the carrying out of the purposes" of the trust.[123]

Thus, when an employer communicates to plan beneficiaries about the future of plan benefits, which allows those beneficiaries to make informed decisions, the Court concluded that this seems "to be an exercise of a power 'appropriate' to carrying out an important plan purpose."[124]

The Court noted that by voluntarily calling the meeting in which Varity reassured employees about the security of their future benefits, Varity exercised its discretionary authority with respect to the plan's administration or management when it made those misrepresentations.[125] The Court refused to accept Varity's argument that it was not acting in a fiduciary capacity since neither ERISA's specific disclosure requirements, nor the plan instruments required it to make these

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117. *Id.* at 497.
118. *Id.* at 496.
119. *Id.* at 498. The *Varity* Court, quoting ERISA § 3(21)(A), noted that ERISA raises an employer to the status of fiduciary "'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Id.*
120. *Id.*
121. *Id.* at 501.
122. *Id.* at 502.
123. *Id.* at 502 (internal citations omitted).
124. *Id.*
125. *Id.* at 498.

statements.[126] The Court explained that the primary function of fiduciary duty was "to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime"; otherwise, "it would serve no purpose."[127]

In finding that Varity was acting in its fiduciary capacity during the meeting, the Court held that Varity willfully misrepresented material facts and, as such, the company affirmatively breached its fiduciary duty[128] and violated the duty of loyalty it owed the plaintiffs under ERISA.[129] The Court concluded by noting that in light of the facts, there was nothing that would insulate Varity from the legal consequences for the intentional breach of its fiduciary duties.[130]

For our purposes, the important point to take from *Varity* is the acknowledgment that ERISA's disclosure requirements do not, in and of themselves, require that an employer disclose information regarding the future of a plan benefit.[131] This is a purely *discretionary* act.[132] However, once an employer chooses to inform its employees of the future status of a benefit plan, it is acting as a fiduciary and thereby is under a fiduciary duty[133] to speak truthfully.[134]

B. *Development of the Serious Consideration Doctrine*

Employers brought away from the *Varity* decision the knowledge that should they voluntarily communicate in their fiduciary capacity with plan participants, they must do so truthfully.[135] However, the *Varity* decision left open the issue of when does the duty to speak truthfully arise in such cases?

1. The Sixth Circuit

In 1988, the Sixth Circuit first addressed the issue of an employer's fiduciary obligations when it is considering implementing an enhanced benefits plan.[136] In *Berlin v. Michigan Bell Telephone Co.*,[137] the Sixth Circuit established a limited duty under which an employer-fiduciary, if they chose to speak about prospective plans, had to avoid misrepre-

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126. *Id.* The Court further noted that reasonable employees "could have thought that Varity was communicating with them *both* in its capacity as employer *and* in its capacity as plan administrator." *Id.* at 503.

127. *Id.* at 504.

128. *Id.* at 506.

129. *Id.*

130. *Id.*

131. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 416 (5th Cir. 2003).

132. *Id.*

133. *See* 29 U.S.C. 1104(a)(1) (2000) (stating that fiduciary duty is the duty to act "solely in the interests of the participants and beneficiaries").

134. *See Martinez*, 338 F.3d at 416.

135. *See generally* Varity Corp. v. Howe, 516 U.S. 489 (1996).

136. *See* Berlin v. Mich. Bell Tele. Co., 855 F.2d 1154, 1164 (6th Cir. 1988).

137. 855 F.2d 1154 (6th Cir. 1988).

sentations about the availability of those future incentive plans.[138] In *Berlin*, employees who retired before a second offering of severance plan benefits brought a class action against Michigan Bell Telephone (MBT).[139] Plaintiffs complained that MBT, in its capacity as an employer-fiduciary, materially misrepresented the existence of a second offer and, as such, denied them retirement benefits under the better, second plan.[140] Briefly, MBT offered an initial early retirement incentive package and later a second, more generous plan to management level employees.[141] To discourage employees from delaying acceptance of the first plan with hope of a better second offering, MBT sent out bulletins and made statements during meetings advising that no additional offers of the enhanced retirement incentive program would be made.[142] Some MBT employees, based upon these representations, took the first offer and retired.[143]

The *Berlin* court began its analysis with a review of ERISA's fiduciary duties[144] to determine whether MBT violated a fiduciary duty to the plan participants in making those misleading statements.[145] While acknowledging that an exclusion from such fiduciary duties does exist for the employer-fiduciary making business decisions,[146] the *Berlin* court noted that several courts have "held that misleading communications to plan participants regarding plan administration," such as "eligibility under a plan . . . [or] . . . the extent of benefits under a plan," likely "support[s] a claim for breach of fiduciary duty."[147] The *Berlin* court extracted from these holdings the standard that under ERISA "a fiduciary may not materially mislead those to whom the duties of loyalty and prudence are owed"[148] by reasoning that "when serious consideration was given" to the implementation of the second offering, the plan administrator "had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering."[149] The court dismissed MBT's defense that no misrepresentations were possible prior to its final decision to make the second offering since "any pre-deci-

138. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 417 (5th Cir. 2003).
139. *See Berlin*, 858 F.2d at 1156.
140. *Id.* at 1158.
141. *Id.* at 1157.
142. *Id.* at 1158–59.
143. *Id.* at 1158.
144. *See id.* at 1162.
145. *Id.* (noting the three essential components of the fiduciary requirements under ERISA to be (1) the duty of loyalty, (2) the "prudent man" fiduciary duty, and (3) "for the exclusive purpose" requirement).
146. *Id.* at 1163 (indicating employer is not acting as fiduciary when as plan administrator seeking to reduce unaccrued plan benefits, terminating a pension plan, or establishing a plan).
147. *Id.*
148. *Id.*
149. *Id.* at 1163–64.

sion communications [would] be nothing more than predictions." They concluded that "this distinction goes to materiality rather than to the definition of 'misrepresentation'"[150] and found that the company could be held liable for breach of fiduciary duty because of its alleged misrepresentations.[151]

The *Berlin* court, however, limited its ruling to "those instances where employers are accused with affirmatively misrepresenting the possibility of future benefits,"[152] while at the same time refusing to hold that an employer-fiduciary has "an affirmative duty to communicate any information about future plans to its employees, either before or after it gave serious consideration to those potential programs."[153] The *Berlin* court further failed to define "serious consideration" or explain why it drew the line at this point.[154] Yet, it was the first court to voice the serious consideration test, and this test would later become the test of choice by the majority of the circuit courts dealing with this issue.[155]

Three years later, in *Drennan v. General Motors Corp.*,[156] the Sixth Circuit expanded the serious consideration test, essentially morphing the duty not to misrepresent material facts into an affirmative duty to tell the truth.[157] The *Drennan* court held that not only does an employer have a duty to avoid material misrepresentations about future plan changes,[158] the employer also a duty to inform a plan participant or beneficiary of "any new and relevant information as it arises."[159] As one commentator noted, it appears that the Sixth Circuit would likely not require an employer-fiduciary to disclose the exact details of the decision-making process, but could be required to disclose that changes to a plan are being considered.[160]

In later cases, the Sixth Circuit established a test for determining serious consideration.[161] In *Muse v. International Business Machines*

150. *Id.* at 1164 n.7.

151. *See id.* at 1163–64.

152. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 417 (5th Cir. 2003).

153. *See id.*

154. *Id.*

155. *See supra* note 10 (circuit court decisions supporting the serious consideration test).

156. Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992).

157. *See Martinez*, 338 F.3d at 418.

158. *Drennan*, 977 F.2d at 251 (citing Berlin v. Mich. Bell Tele. Co., 858 F.2d 1154, 1164 (6th Cir. 1988) ("[T]he duty to avoid material representations does not require the employers to predict an ultimate decision to offer a plan so long as it fairly discloses the progress of its serious considerations to make a plan available to affected employees.").

159. *Drennan*, 977 F.2d at 251 (citing Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990) (noting that not only does a fiduciary "ha[ve] a duty to inform a beneficiary of new and relevant information as it arises, but also to advise him of circumstances that threaten interests relevant to the relationship")).

160. Bintz, *supra* note 22, at 995.

161. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 421 (5th Cir. 2003).

Corp.,[162] the Sixth Circuit held that the employees' complaint failed because of their failure to show that IBM (their employer) was seriously considering a better plan and purposely deceived them about its intentions.[163] The *Muse* court reasoned that serious consideration will only apply once the company "focuses on a particular plan for a particular purpose."[164] In 1999, the Sixth Circuit, in *McAuley v. International Business Machines Corp.*,[165] combined its "particular plan for a particular purpose" standard with the *Fischer II* "three-part serious consideration test."[166]

2. The Third Circuit

The Third Circuit followed *Berlin*, but expanded on the *Drennan* decision, holding in *Fischer v. Philadelphia Electric Co.* (*Fischer I*)[167] that an employer has *both* a duty to provide correct information regarding potential plans under serious consideration and an affirmative duty to disclose, if asked, the terms of such a plan provided it is being seriously considered.[168] Later, when the Third Circuit took up the case once again on appeal in *Fischer II*,[169] it created a three-part test noting that there is serious consideration of a plan when there exists: "(1) a specific proposal (2) [ ] being discussed for purposes of implementation (3) by senior management with the authority to implement the change."[170]

In the *Fischer* cases, the plaintiffs sued their former employer, Philadelphia Electric Co. (PECo) alleging that the utility had breached its fiduciary duty under ERISA, as "PECo had denied, or failed to disclose when asked, that it was seriously considering an early retirement program."[171] The plaintiffs testified that prior to retiring they inquired whether the utility was considering implementing a new early retirement incentive plan, but that the benefit counselors said no such plan was being considered, despite the rumors circulating about such a

162. 103 F.3d 490 (6th Cir. 1996).

163. *Id.* at 495.

164. *Id.* at 494. This standard is often referred to as the "particular plan for a particular purpose" test. *See Martinez*, 338 F.3d at 422.

165. 165 F.3d 1038 (6th Cir. 1999).

166. *Id.* at 1043–45.

167. 994 F.2d 130 (3d Cir. 1993).

168. *See id.* at 135. Expanding upon *Drennan*, the *Fischer I* court defined "material misrepresentation" to mean that "a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire." *Id.*

169. *See* Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1536 (3d Cir. 1996).

170. *See id.* at 1539.

171. *Id.* at 1536. Plaintiffs were past employees who retired just before PECo implemented its early retirement incentive program. *Id.*

possible plan being implemented.[172] Shortly after the plaintiffs retired, PECo implemented its early retirement program.[173]

The district court granted summary judgment in PECo's favor and the plaintiffs appealed.[174] In *Fischer I*, the Third Circuit—relying on the decision in *Drennan*—concluded that while an ERISA fiduciary has no duty to provide "precise predictions" as to future plan changes, it must still candidly answer participants' questions without making affirmative material misrepresentations.[175] At the same time, the *Fischer I* court noted that this duty of disclosure, however, does not necessitate the employer-fiduciary "to disclose its internal deliberations nor interfere with the substantive aspects of the [collective] bargaining process."[176] It went on to develop the *Drennan* definition of "material misrepresentation" by providing that a misrepresentation would be considered material where there was a "substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire."[177] The Third Circuit reasoned that serious consideration was a relevant factor and that "all else equal, the more seriously a plan is being considered, the more likely a misrepresentation."[178] The court remanded the case to consider how seriously PECo had been considering its early retirement package at the time plaintiffs made their inquiries.[179]

On remand, the district court found that PECo had started to seriously consider the early retirement plan during the time plaintiffs were making their inquiries and entered judgment in plaintiffs' favor.[180] On appeal, the Third Circuit reversed, explaining that the district court had failed to properly apply the serious consideration standard.[181] Once again, the Third Circuit turned its attention to the serious consideration issue.[182] The court explained that where the question is one of misrepresentation relating to proposed plan

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172. *See Fischer*, 994 F.2d at 132.

173. *Id.* Between July 1989 and April 1990, PECo began looking for ways to reduce its costs. *Id.* at 131. In a December 1989 speech on the "state of the company," PECo's CEO alluded to the possibility of offering an early retirement plan. *Id.* at 131–32. In April 1990, PECo's CEO, although not yet voted on by PECo's Board of Directors, stated that recommendations would be made for implementing an early retirement plan. *Id.* The recommendation was approved on May 25, 1990 and affected those who would elect to retire between July 15 and September 15, 1990. *Id.* The plaintiffs included those employees who asked about the rumors of an early retirement incentive and who were told no retirement plan was being considered. *Id.* Each of the plaintiffs retired prior to the May 25, 1990 announcement. *Id.*

174. *Id.* at 131.

175. *Id.* at 135.

176. *Id.* (alteration in original) (citations omitted).

177. *Id.*

178. *Id.*

179. *Id.*

180. Fischer v. Phila. Elec. Co., 96 F.3d 1533, 1536 (3d Cir. 1996).

181. *See id.* at 1536.

182. *See id.* at 1538.

changes, "the only factor at issue is the degree of seriousness with which the change was in fact being considered."[183] The court further explained that this factor controls the materiality test: "[T]he more seriously a plan change is being considered, the more likely a misrepresentation . . . will pass the threshold of materiality."[184] Thus, serious consideration forms the crux of the inquiry.

The *Fischer II* court clarified that the holding in *Fischer I* only requires disclosure when proposed benefit changes are under *serious* consideration.[185] The court sought to explain the dueling policies behind the concept of "serious consideration" by noting that the concept acknowledges and tones down the tensions that exist between the rights of an employee to information and an employer's day-to-day operational needs.[186] The court noted the essential need of a business to be free to make day-to-day decisions by effectively informing itself, and strategizing and evaluating options would be severely hampered by the requirement of full disclosure at every stage of its operations.[187] In the same breath, the court noted that serious consideration establishes a standard that is not too low or too high and protects employees by providing them with material information they can rely on in making employment decisions.[188]

As stated above, the *Fischer II* court set out three factors for determining whether serious consideration of a plan existed: "(1) a specific proposal (2) [which] is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."[189] However, the court also observed that consistent with its prior decision in *Kurz v. Philadelphia Electric Co.*,[190] "this formulation does not turn on any single factor; the determination is inherently fact-specific[,]"[191] and "[l]ikewise, the factors themselves are not isolated criteria; the three interact and coalesce to form a composite picture of serious consideration."[192]

The court, in turn, explained each of the test's three elements.[193]

> The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information, developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that

183. *Id.*
184. *Id.*
185. *Id.* at 1539.
186. *Id.*
187. *See id.*
188. *See id.*
189. *Id.*
190. *See* 994 F.2d 136, 139 (3d Cir. 1993).
191. *Fischer*, 96 F.3d at 1539.
192. *Id.*
193. *Id.* at 1539–40.

the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages may also require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or ongoing reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration. These activities are merely the ordinary duties of the employees. Until senior management[194] addresses the issue, the company has not yet seriously considered a change.[195]

194. "Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change. This focus on authority can be used to identify the proper cadre of senior management, but it should not limit serious consideration to deliberations by a quorum of the Board of Directors, typically the only corporate body that in a literal sense has the power to implement changes in benefits packages. It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations." *Id.* at 1540.

195. *Id.* at 1539–40 (internal footnote added).

3. The Tenth Circuit

In 1997, the Tenth Circuit also adopted the *Fischer II* serious consideration doctrine. In *Hockett v. Sun Co.*,[196] a retired employee sued his former employer for breach of fiduciary duty under ERISA after a new early retirement plan was announced less than two months after the employee had retired.[197] The plaintiff complained that Sun Co. breached its fiduciary duty to him by failing to disclose, despite several inquiries, the possibility of a new, enhanced retirement plan.[198] The court applied the *Fischer II* elements to this case and concluded that Sun Co. had not seriously considered a future plan offering until sometime after the plaintiff had decided to retire.[199] Because the three elements of the *Fischer II* test did not connect during the crucial period,[200] no fiduciary duty to disclose existed.[201] The *Hockett* court concluded that "the proper point on this continuum has already been identified by the Third Circuit in *Fischer II* . . . [and that] . . . formulation appropriately narrows the range of instances in which an employer must disclose, in response to employees' inquiries, its tentative intentions regarding an ERISA plan."[202]

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196. 109 F.3d 1515, 1524 (10th Cir. 1997) (holding that serious consideration of a severance plan did not occur until a meeting was convened that "gathered together the heads of all departments related to employee benefits" to discuss a specific proposal).

197. *Id.* at 1518.

198. *Id.* at 1521. Specifically, Hockett argued that company representatives knew he was interested in retiring early and that he felt compelled to take the existing early retirement package before he became ineligible; yet, they failed to inform him that a new, better package was being considered at the time he made his inquiries. *Id.*

199. *Id.*

200. *Id.* at 1524. The crucial period for the court in determining material breach was when the three serious consideration factors intersected—sometime in late July or early August 1991. *Id.* Under the court's analysis, any statements made by company representatives concerning the availability of a package were immaterial prior to July 1, 1991, the date plaintiff retired. *Id.* at 1519. Thus, for the majority, it is when the company begins to seriously consider a specific plan that controls the materiality issue, not necessarily the time frame between the employee's retirement and the announcement/implementation of the new plan. *Id.* at 1525.

201. *Id.* The Tenth Circuit reasoned that:

> As a practical matter, an employer's "consideration" of an ERISA plan can fall anywhere along a continuum, beginning with the most casual mention of a possible plan change and ending, perhaps, with a formal vote by the Board of Directors. Between these two extremes are many stages of research, analysis, and debate, which only some proposals will survive. "Serious consideration" marks the point on the continuum at which imposing fiduciary-related duties will best serve the competing congressional purposes.

Id. at 1522.

202. *Id.* at 1523. However, the Tenth Circuit did note the same concerns voiced by the *Fischer* courts that:

> Employers frequently review retirement and benefit plans as part of ongoing efforts to succeed in a competitive and volatile marketplace. If any discussion by management regarding possible change to an ERISA plan triggered disclosure duties, the employer could be burdened with providing a constant, ever-changing stream of information to inquisitive plan participants . . . .

4. The First Circuit

The First Circuit also adopted the *Fischer II* test in *Vartanian v. Monsanto Co.*.[203] In *Vartanian*, the plaintiff, a former employee of Monsanto Chemical Company (Monsanto), alleged that Monsanto misled him by failing to adequately respond to his inquiries, prior to his retirement, concerning a potential severance package that was being considered by the company.[204] As a question of first impression for the First Circuit, the court turned to its sister circuits for guidance and adopted the *Fischer II* standard, but modified the test by changing the first element to include that a specific proposal would have to "affect a person in the position of the plaintiff" in order to meet the test.[205] The First Circuit acknowledged concern over the standard by stating, "It seems reasonable that where an allegation of positive misrepresentation is involved, that 'aspect of the assurance can render it material regardless of whether future changes are under consideration at the time the misstatement is made.'"[206]

5. Materiality Under the Serious Consideration Standard

At the center in each of these cases is the issue of when misrepresented facts are considered "material" because where the materiality factor is found, courts will generally hold an employer-fiduciary liable for misrepresenting facts.[207] As noted above, for the majority circuits, a misrepresentation is material and, thus, actionable only when a company begins to seriously consider the plan change.[208] For the majority, serious consideration becomes important only during that crucial period when the three serious consideration factors intersect.[209] Thus, for the majority, it is when the company begins to seriously consider a specific plan that controls the materiality issue, not necessarily the time frame between the employee's retirement and the announcement/implementation of the new plan.

> And, most of such information actually would be useless, if not misleading, to employees, considering that many corporate ideas and strategies never reach maturity, or else metamorphose so dramatically along the way, that early disclosure would be of little value . . . . Furthermore, requiring employers to reveal too soon their internal deliberations to inquiring beneficiaries could seriously "impair the achievement of legitimate business goals" by allowing competitors to know that the employer is considering a labor reduction, a site-change, a merger, or some other strategic move.

Id.

203. *See* 131 F.3d 264, 268 (1st Cir. 1997) (adopting with modification the *Fischer II* court's standard).

204. *See id.*

205. *Id.* at 272.

206. *Id.* at 269.

207. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 425 (5th Cir. 2003).

208. *See id.*

209. Hockett v. Sun Co., 109 F.3d 1515, 1524 (10th Cir. 1997).

In total, the Third Circuit, along with its sister courts, the First, Sixth, Eighth, and Tenth all agree that the *Fischer II* court's "serious consideration" standard is the best test for determining when an employer-fiduciary has an affirmative duty to disclose material information related to proposed plan changes.[210] However, a minority of the circuit courts have broken from the pack to hold that serious consideration, while an important factor, is but one of a number of factors to consider in determining whether an employer-fiduciary has materially breached its fiduciary duty to a plan participant.[211]

C. *The Fact-Specific Approach*

1. The Second Circuit

Unlike the majority of its sister courts, the Second Circuit decided to take another approach to the materiality issue in *Ballone v. Eastman Kodak Co.*,[212] by holding that "serious consideration" is but one factor the courts should look at in determining whether an employer can be held responsible for affirmatively misrepresenting potential enhancements to retirement plans.[213] In *Ballone*, the plaintiffs claimed that Eastman Kodak Co. (Kodak) made affirmative misrepresentations that led them to believe that no enhanced pension plan would be forthcoming in the months following their retirement.[214] Shortly after plaintiffs retired, Kodak implemented a pension plan with benefits exceeding those of plaintiffs' retirement plan.[215] The district court granted judgment to Kodak on plaintiffs' claims under § 1104(a)[216] and other related claims, concluding that because Kodak had not "seriously considered" changes to the retirement plan before plaintiffs retired, Kodak's statements about future plan changes were neither material nor misleading.[217]

On appeal, the Second Circuit rejected the *Fischer II* standard, concluding that "because Kodak allegedly assured [p]laintiffs that it had ruled out plan changes for the immediate future, when in fact it had not, the district court erred in determining that the absence of 'serious consideration' of plan changes warranted judgment in Kodak's

210. *See* McAuley v. Int'l Bus. Machs. Corp., 165 F.3d 1038, 1043–45 (6th Cir. 1999); Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997); *Hockett*, 109 F.3d at 1522; Fisher v. Phila. Elec. Co., 96 F.3d 1533, 1538–41 (3d Cir. 1996); Muse v. Int'l Bus. Machs. Corp., 103 F.3d 490, 493 (6th Cir. 1996); Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993); Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992); Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1163–64 (6th Cir. 1988).

211. *See Martinez*, 338 F.3d at 422–24.

212. 109 F.3d 117 (2d Cir. 1997).

213. *Id.* at 123.

214. *Id.* at 120.

215. *Id.*

216. 29 U.S.C. § 1104(a) (2000).

217. *Ballone*, 109 F.3d at 120.

favor."[218] Instead, the *Ballone* court reasoned that no prerequisite bright-line rule exists, but rather "[w]hether a plan is under serious consideration is but one factor in the materiality inquiry."[219] In its place, the Second Circuit adopted a fact-specific approach.[220] The court stated that

> [d]etermining the materiality of false assurances like those here alleged is fact-specific and will turn on a number of factors, including: how significantly the statement misrepresents the present status of internal deliberations regarding future plan changes, the special relationship of trust and confidence between the plan fiduciary and beneficiary, whether the employee was aware of other information or statements from the company tending to minimize the importance of the misrepresentation or should have been so aware, taking into consideration the broad trust responsibilities owed by the plan administrator to the employee and the employee's reliance on the plan administrator for *truthful* information, and the specificity of the assurance[221] [as well as, of course, whether the employer is seriously considering altering its retirement plan.][222]

As such, these statements are "material if they would induce reasonable reliance."[223] Thus, the *Ballone* court concluded that, based upon the principles of trust-law, Kodak "has a duty to deal fairly and honestly with its beneficiaries" and may not, regardless of whether or not it is seriously considering future plan changes, actively misinform its plan beneficiaries about the availability of future plan benefits in order to induce them into retiring earlier.[224]

In defining the "materiality standard," the Second Circuit found guidance in the securities laws.[225] Based on this definition, the *Ballone* court found that "an assurance about the future that by necessary implication misrepresents present facts is clearly actionable."[226] Thus, the court instructed that should, upon remand, the district court "determine[ ] that Kodak made misrepresentations regarding future benefits, the availability to [p]laintiffs of truthful information countering the misrepresentations will be relevant in determining if they reasona-

218. *Id.*
219. *Id.* at 123.
220. *Id.* at 125.
221. *Id.* (internal citations omitted) (emphasis added).
222. *Id.* at 124.
223. *Id.*
224. *Id.*
225. *Id.* at 125 (citing Brown v. E.F. Hutton Group, Inc. 991 F.2d 1020, 1032 (2d Cir. 1993) (noting "that courts have [through securities law] been guided by the following factors: (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of longstanding business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) . . .; and (8) the generality or specificity of the misrepresentations")).
226. *Id.* at 124.

bly relied on the misrepresentations," and, hence, whether the misrepresentations were material.[227]

2. The Ninth Circuit

Three years later, the Ninth Circuit, faced with the issue of when an employer-fiduciary has the duty to inform plan participants regarding potential retirement incentive benefits, turned to its sister courts for guidance.[228] In *Bins v. Exxon Co.*,[229] the plaintiff worked for Exxon, U.S.A. (EUSA), a division of Exxon Corporation (Exxon) for 15 years.[230] Before retiring, Bins asked whether EUSA planned on enhancing its retirement package as rumored, but never received a confirmation from the company.[231] Shortly after Bins retired, EUSA offered the rumored retirement incentive.[232] Bins sued EUSA for breach of its fiduciary duties.[233] The district court entered summary judgment for EUSA and Bins appealed.[234]

On appeal, the Ninth Circuit concluded that the *Fisher II* test best accomplished the goal set out in *Varity*.[235] The *Bins* court echoed *Fischer II* by emphasizing that the test "should not be applied so rigidly as to distract attention from the core inquiry, which must always be whether the employer-fiduciary has violated its fiduciary duty of loyalty to plan participants by failing to disclose material information."[236]

The Ninth Circuit once again took up the issue in *Wayne v. Pacific Bell*,[237] wherein it narrowed the holding in *Bins* by noting that the serious consideration test applied only to claims where employers breached their fiduciary duties not to disclose their consideration of a plan change.[238] The *Bins* court found the *Ballone* rule to be more appropriate.[239] Thus, the Ninth Circuit ended up utilizing a "two-tiered approach" in regard to an employer's fiduciary duty to disclose.[240]

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227. *Id.* at 126.
228. *See* Bins v. Exxon Co. U.S.A., 220 F.3d 1042, 1045 (9th Cir. 2000) (en banc).
229. *Id.* at 1042.
230. *Id.* at 1045.
231. *Id.*
232. *Id.*
233. *Id.* at 1047.
234. *Id.*
235. *Id.* at 1049. Under *Varity*, an employer has a fiduciary duty to communicate information about the future of plan benefits, while at the same time balancing the employer's interest by not unduly burdening it with the responsibility of constant progress reports regarding its consideration of potential plans and plan changes. *Id.* at 1048.
236. *Id.* at 1049.
237. 238 F.3d 1048 (9th Cir. 2001).
238. *Id.* at 1050–51.
239. *Id.* at 1055–56.
240. *See* Martinez v. Schlumberger, Ltd., 338 F.3d 407, 424 (5th Cir. 2003) (noting the two-tiered approach used by the 9th Circuit derived from its adoption of the

3. The Fifth Circuit

In 2003, the Fifth Circuit became the newest court to consider the issue of whether an employer-fiduciary has an affirmative duty to truthfully disclose potential plan changes.[241] The Fifth Circuit rejected the bright-line "serious consideration" test used by the majority of circuits in determining whether an employer has a duty, upon inquiry, under ERISA to disclose future plan changes.[242] Instead, the Fifth Circuit adopted the Second Circuit's "fact-specific" approach which takes into account whether employees would consider the information material in making benefit-related decisions.[243]

In *Martinez v. Schlumberger, Ltd.*,[244] long-time employees of Schlumberger Ltd. and Schlumberger Technology Corp. (Schlumberger) sued the company for fraud, fraudulent inducement, and negligence/gross negligence, alleging that Schlumberger breached the fiduciary duty it owed them as plan participants.[245] The plaintiffs argued that, despite direct inquiry as to whether the company planned on offering an enhanced voluntary early retirement plan (VERP), the company and its employees denied any knowledge of such a plan.[246] In a matter of weeks after the plaintiffs retired, Schlumberger announced a new enhanced VERP.[247] The trial court applied the serious consideration test to find that the employer was not seriously considering the VERP until after the plaintiff retired.[248] As a result, the court granted summary judgment in favor of the employer.[249]

On appeal, the Fifth Circuit adopted the *Ballone* court's "fact-specific" standard for materiality.[250] The *Martinez* court took a two-step approach to determine whether an employer-fiduciary has "a duty to truthfully disclose, upon inquiry from plan participants or beneficiaries, [when] it is considering amending the benefit plan."[251] First, the court considered whether an employer, when it freely chooses to speak about potential plans changes, has a fiduciary duty to speak truthfully (and, if so, when does that duty arise).[252] Second, the court

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Fischer II serious consideration test in Bins v. Exxon Co., U.S.A., 220 F.3d 1042, 1055 (9th Cir. 2000) (en banc), and its clarification of *Bins* in Wayne v. Pacific Bell, 238 F.3d 1048, 1050 (9th Cir. 2001), wherein it narrowed the test to apply only to claims in which employers breach their fiduciary duties not to disclose consideration of a plan change).

241. *Id.*
242. *Id.* at 425.
243. *See id.*
244. 338 F.3d 407 (5th Cir. 2003).
245. *Id.* at 409.
246. *Id.*
247. *Id.*
248. *Id.* at 410.
249. *Id.*
250. *See id.* at 425.
251. *Id.* at 409.
252. *Id.* at 424.

considered whether it should impose an affirmative duty upon the employer to disclose future plan changes (and, if so, at what point).[253] As to the first issue, the Fifth Circuit agreed with the other circuit courts that under ERISA an employer has "a fiduciary duty to refrain from misrepresentations . . . when an employer chooses, in its discretion, to communicate about future plan benefits."[254] In response to the second issue, the court held that "no such duty exists."[255] The court concluded by reasoning:

> We believe the two views we have promulgated—that an employer has no affirmative duty to disclose the status of its internal deliberations on future plan changes even if it is seriously considering such changes, but if it chooses in its discretion to speak it must do so truthfully—coalesce to form a scheme that accomplishes Congress's dual purposes in enacting ERISA of protecting employees' rights to their benefits and encouraging employers to create benefit plans.[256]

Based on its analysis, the Fifth Circuit affirmed the judgment of the district court, holding that under the court's analysis Schlumberger had no affirmative duty to communicate the status of its internal deliberations regarding a possible plan enhancement when responding to the inquiries of the three about-to-retire employees.[257] The court concluded that the employer did not materially misrepresent the possibility of a change, even though a plan enhancement was to be rolled out less than a month after the three plaintiffs had retired.[258]

4. Materiality Under the Minority's Fact-Specific Approach

Unlike the majority circuits which consider a misrepresentation to be material only when a company begins to seriously consider the plan change,[259] the minority circuits follow the Supreme Court's holding in *Basic Inc. v. Levinson*.[260] In *Basic*, the Court rejected a bright-line materiality standard such as the one used in the serious consideration test.[261] In shunning the idea that materiality was amenable to an easy formula, the Court explicitly rejected the standard for materiality created by the Third Circuit, a standard very similar in many respects to

253. *Id.*
254. *Id.* at 424–25.
255. *Id.* at 428.
256. *Id.* at 430.
257. *Id.* at 431.
258. *Id.*
259. *See id.*
260. 485 U.S. 224 (1988). The plaintiffs in *Basic* complained that they were injured when they sold their Basic shares at artificially depressed prices, relying on the defendants' misleading statements that the company was not engaged in merger negotiations when, in fact, it had been in talks with another company and accepted a tender offer for all of its outstanding shares.
261. *See* Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997) (citing Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994) (citing *Basic*, 485 U.S. at 238)); *Martinez*, 338 F.3d at 426, n.136.

the *Fischer II's* definition of the "serious consideration" rule.[262] The Court acknowledged that several reasonable rationales existed to support the Third Circuit's materiality standard,[263] but concluded that none of them "purports to explain why drawing the line at agreement-in-principle reflects the significance of the information upon the investor's decision."[264] The Court reasoned that, in contrast to the Third Circuit's test, any determination of materiality requires "delicate assessments of inferences" a reasonable person would draw "from a given set of facts and the significance of those inferences to him."[265] The Court concluded that it could not find valid justification "for artificially excluding from the definition of materiality information . . . merely because agreement-in-principle . . . has not yet been reached."[266] The Court further noted that "it is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."[267]

In contrast, the Supreme Court in *Basic* concurred with the Second Circuit in its approach to materiality.[268] The Second Circuit recognized that "it was a fact-based inquiry and depended 'upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.'"[269] At its center, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information."[270] Thus, as the *Martinez* court notes, "*Basic* suggests that we are not to rely on a bright-line test to determine whether a company's alleged misrepresentations are material."[271]

The above review of the evolution of the scope of an employer-fiduciary's duties regarding future plan changes brings us back to the state of affairs as it exists today. It is obvious that the circuit courts are unevenly split on the materiality issue. On the one side, a majority of circuits holds to a bright-line "serious consideration" standard while, on the other side, a minority of circuits holds to a "fact-specific" approach in deciding the issue of an employer-fiduciary's duty to

262. *See Basic*, 485 U.S. at 237.

263. *Id.* at 233. The court rationalized that the standard answered the concern "that an investor not be overwhelmed by excessively detailed and trivial information," assisted in "preserv[ing] the confidentiality of discussions," and "provide[d] a usable, bright-line rule for determining when disclosure must be made." *Id.*

264. *Id.* at 234.

265. *Id.* at 236 (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976)).

266. *Id.*

267. *Id.* at 238.

268. *Id.*

269. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 428 (5th Cir. 2003) (referring to *Basic*, 485 U.S. at 238).

270. *Id.*

271. *Id.*

truthfully disclose potential ERISA plan changes.[272] But, which is the better standard?

VII. The Fact-Specific Approach is the Better Standard

This Comment modestly proposes that the minority fact-specific approach is the better standard for evaluating the material breach of employer-fiduciary duties under ERISA in the context of voluntary communications regarding changes in retirement benefits. The majority's serious consideration standard is a bright-line test[273] which leaves the door open for continuing abuse by employer-fiduciaries seeking to advance the interests of the company over the interests of plan beneficiaries. While Congress originally sought to balance the conflicting interests of the employer-fiduciary, its primary goal remains the protection of the plan participant.[274] Yet, under the doctrine of serious consideration, that balance swings in favor of the employer-fiduciary and away from the plan participant.

Arguably, under the *Fischer II* serious consideration test, the trio of factors remains "relatively flexible."[275] In some situations, this "relative flexibility" may be enough to keep the delicate balance between the employer-fiduciary's duties of loyalty to the plan beneficiaries and the "best interests" loyalty the employer-fiduciary owes the company.[276] However, the point remains that employers need only show that a plan was not being seriously considered at the time it misrepresented facts (whether material or not) to retiring employees in order to prove lack of materiality.[277] Under the majority's standard, the employer is then freed from liability under the fiduciary duties imposed on all ERISA plan administrators. Thus, as long as the serious consideration test cannot be met, employers may lie with impunity.

However, the minority's fact-specific approach, in viewing the situation as a whole rather than from a set point in time, minimizes that

272. *Compare* Fischer v. Phila. Elec. Co., 96 F.3d 1533 (3d Cir. 1996) (establishing affirmative duty to tell the truth arises when plan is under serious consideration) *with Martinez*, 338 F.3d at 428 *and* Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 (2d Cir. 1997) (rejecting serious consideration standard for a more fact specific approach).

273. *See* Kristy Wrigley, *Reconsidering "Serious Consideration": The Materiality Debate Under ERISA*, 23 St. Louis U. Pub. L. Rev. 733, 742–45 (2004) [hereinafter Wrigley] (arguing that the serious consideration is not a "bright-line" test and that the three factors provide relative flexibility). *But see Martinez*, 338 F.3d at 425–28 (describing the *Fisher II* serious consideration standard as a "bright-line" test).

274. *See* 29 U.S.C. § 1001 (2000).

275. Wrigley, *supra* note 268, at 752.

276. *See* Stover, *supra* note 5, at 690.

277. *See, e.g.*, McAuley v. Int'l Bus. Machs. Corp., 165 F.3d 1038, 1043–45 (6th Cir. 1999); Vartanian v. Monsanto Co., 131 F.3d 264, 268 (1st Cir. 1997); Hockett v. Sun Co., 109 F.3d 1515, 1522 (10th Cir. 1997); *Fischer*, 96 F.3d at 1541–43; Muse v. Int'l Bus. Machs. Corp., 103 F.3d 490, 494 (6th Cir. 1996); Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 405 (8th Cir. 1995); Fischer v. Phila. Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993); Drennan v. Gen. Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992); Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1163–64 (6th Cir. 1988).

hole. As the Fifth Circuit succinctly points out, there is "no reasoned justification for drawing the line at that point and time."[278] The courts, by incorporating the serious consideration standard as merely one of several factors to look to in determining an employer-fiduciary's breach of its duty of loyalty to plan participants and beneficiaries,[279] force the employer-fiduciary to carefully consider its voluntary communications to plan participants. It places the duty to speak truthfully squarely back in the employer's lap and, as such, meets Congress's *first and foremost goal* under ERISA—*protecting* employee pensions and other benefits.[280]

It has been argued that the minority's fact-specific approach may not be practical because it could be considered "amorphous and excessively flexible"[281] and could "be stretched in favor of employers."[282] Yet, it is this very flexibility which provides the minority standard its strength. Under the serious consideration standard, the courts need not look at all or even a majority of the relevant factors which make up the allegations of the case, but merely decide whether a plan was being "seriously considered" by the highest echelons of the company's management at the time of the misrepresentation.[283] Such diminutive telescoping of the facts to this limited time-frame, while it eases the burden on the employer, defeats the policy ERISA sought to embrace: the protection of plan participants and their retirement benefits.[284] Moreover, under the principles of trust law, an employer-fiduciary "has a duty to deal fairly and honestly with its beneficiaries" and therefore may not, regardless of whether it is seriously considering future plan changes, actively misinform its plan beneficiaries about the availability of future plan benefits in order to induce them into retiring earlier.[285] However, under the serious consideration stan-

278. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 425 (5th Cir. 2003).

279. *Id.*

280. *See* 29 U.S.C. § 1104 (2000).

281. Wrigley, *supra* note 268, at 751.

282. *Id.* (citing Joseph E. Czerniawski, *Bins v. Exxon: Affirmative Duties To Disclose Proposed Benefit Changes in the Absence of Employee Inquiry*, 76 NOTRE DAME L. REV. 783, 811 (2001)). In turn, it should be noted that a court which finds itself sympathetic to business can find a way to favorably "stretch" the facts to find that a company had not been "seriously considering" a plan and, thus, find in favor of the employer.

283. *See* Berlin v. Mich. Bell Tel. Co., 855 F.2d 1154, 1164 (6th Cir. 1988).

284. 29 U.S.C. § 1001 (2000).

285. Martinez v. Schlumberger, Ltd., 338 F.3d 407, 423 (5th Cir. 2003). One commentator, noting that the minority relies on *Basic*, a securities case, in defining the materiality standard stated that "[f]ortunately for employers, the concerns set forth by the court in *Basic* are irrelevant in the ERISA context" as ERISA is based on the law of trusts. *See* Wrigley, *supra* note 268, at 749. This is a fallacy. The Second Circuit in *Ballone* fully acknowledged the difference "between the duty of full disclosure under the securities laws and the disclosure obligations imposed on employers under ERISA . . . [noting courts should] refer . . . to securities law precedent only insofar as it is relevant to determining the materiality of affirmative misrepresentations." Ballone v. Eastman Kodak Co., 109 F.3d 117, 124 n.2 (2d Cir. 1997). The *Ballone* court's use of

dard, employer-fiduciaries may actively misinform their plan beneficiaries up and to that bright point in time where a court determines a specific plan is being "seriously considered."

It is true employer-fiduciaries find themselves in a difficult position, stretched between their duty of loyalty to the company and their fiduciary duties to plan participants.[286] It is the nature of business to seek profit. Thus, it is only natural for employers to seek ways to increase their profit margins. As Sophocles remarked, "Profit is sweet, even if it comes from deception."[287] It is this very deception Congress, through ERISA, seeks to dispel.[288] The often told Bible story of "David and Goliath"[289] appears apropos in this instance. David, without his stones, would have had no chance of defeating Goliath, for an empty sling is a useless weapon. Before ERISA, plan participants had little in way of protection against employers who, at best through negligence, or at worst through willful deceit, cost employees their retirement plans.[290] ERISA, with its reporting and disclosure requirements and fiduciary duties, provides plan participants with protection when and if they need it. The minority's standard is just another "stone" providing the plan participant added security, by requiring the duty bound employer-fiduciary at all times to adhere to a policy of honesty and fair dealing when it voluntarily communicates about potential plan changes.

VIII. Conclusion

Congress drafted ERISA to protect the interests of employees like Employee A from employers who place their financial duty to the company over their fiduciary duty of loyalty owed plan participants.[291] When courts apply the serious consideration test to ERISA pension cases, they furnish employer-fiduciaries such as Employer Z continuing opportunities to situate the company's welfare over that of the plan participants. Because employers are not required to inform plan participants of potential changes to their retirement benefits until that plan is under "serious consideration," the company often saves money at their employees' expense.[292] Employers take advantage of the seri-

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analogy is a time honored legal tool that courts and attorneys have used *in memoriam* and does not, *per se*, make it "irrelevant."

286. *See* discussion *supra*, Part V (discussing the dual duties of the employer-fiduciary).

287. Sophocles, *Sophocles Collection*, in The Columbia World of Quotations, 54781 (Columbia University Press 1996) *available at* http://www.bartleby.com/66/81/54781 (on file with the Texas Wesleyan Law Review).

288. *See generally* 29 U.S.C. § 1001.

289. 1 *Samuel* 17 (King James).

290. *See* discussion *supra*, Part II.A–II.B (discussing the history of ERISA).

291. *See* 29 U.S.C. § 1001; *see* discussion *supra*, Part V (discussing the dual duties of the employer-fiduciary).

292. *See* discussion *supra*, Part VI.B (discussing the "serious consideration" cases).

ous consideration requirement by delaying decisions to the last minute, even lying about what stage a proposed plan may be in, to deny retiring employees the opportunity to partake in future plan changes.[293]

The minority's standard, on the other hand, closes the gap left open under the *Fisher II* "serious consideration" standard by making serious consideration just one of a number of factors courts look to in making a decision of whether an employer-fiduciary breached its duty of loyalty to plan participants.[294] The result is the return of equilibrium in the balance between the dual duties and the satisfying of ERISA's primary goal of preventing serious abuse in the managing of employee retirement benefits.[295] Yet, until the Supreme Court speaks, the circuit courts remain split and the courts and commentators will continue their spirited discourse over when an employer-fiduciary violates its fiduciary duty to be truthful in disclosing proposed plan changes.

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293. *Id.*

294. *See* Ballone v. Eastman Kodak Co., 109 F.3d 117, 124–25 (2d Cir. 1997) (listing factors a court should look to in determining whether an employer-fiduciary breached its fiduciary duties to plan participants).

295. *See* 29 U.S.C. § 1001; *see also* discussion *supra*, Part V (discussing the dual duties of the fiduciary-employer).