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Maintaining ERISA's Balance: The Fundamental Business Decision v. The Affirmative Fiduciary Duty to Disclose Proposed Changes

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Maintaining ERISA's Balance: The Fundamental Business Decision v. The Affirmative Fiduciary Duty to Disclose Proposed Changes

Melissa Elaine Stover*

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I. Introduction

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)¹ to protect employees and to encourage employers to develop employee benefits programs.² To decrease the administrative burdens involved with maintaining benefits plans, ERISA allows an employer to serve the dual role as both company official and plan administrator.³ Serving in this capacity becomes complicated, however, when employers make fundamental business decisions that adversely affect their employees' interests.⁴ This situation subjects employers to conflicting loyalties: A loyalty to do what is in the best interest of the company, and a fiduciary duty of loyalty to do what is in the best interest of the employee benefit beneficiary.⁵

Consider the following hypothetical scenario: In an effort to reduce its workforce, company *X* amends its benefits plan and offers an early retirement package for a three-month window period. Company *X*'s early retirement program provides financial incentives to employees who willingly accept early retirement. Employee *Y* accepts the early retirement package and retires. After the initial window period expires, Company *X* offers a "sweetened" early retirement deal for an additional three-month window period which provides employees with even more financial incentives to retire. At this time, employee *Y* discovers that, while she was deciding whether to retire early, company *X* was considering whether to offer the "sweetened" early

1. 29 U.S.C. §§ 1001-1461 (1994).

2. See 263 CONG. REC. S15, 762 (1974) (adopting ERISA to balance competing goals of protecting employee benefits and setting reasonable limitations for employers).

3. See 29 U.S.C. § 1108(c)(3) (1994) (allowing officer, employee, agent, or other representative to serve as fiduciary); 29 C.F.R. § 2509.75-5 (1999) (stating corporation may act as "named fiduciary" for purposes of act); Frank P. VanderPloeg, *Role-Playing Under ERISA: The Company as "Employer" and "Fiduciary,"* 9 DEPAUL BUS. L.J. 259, 267 (1997) (finding ERISA recognizes "symbiotic relationship" employer has with benefits plans).

4. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) ("There is, in other words, a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.'" (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981))); VanderPloeg, *supra* note 3, at 273 (discussing actions taken by employers that are directly hostile to interests of participants).

5. See *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 500 (2d Cir. 1995) (describing employers divided loyalty situation stating that "[employers] are obliged to act, on the one hand, for the plan's members, so as to secure and make certain that benefits will be available to them and, on the other hand, for the employer, so as to safeguard the business entity's profits").

retirement package. Employee *Y*, ineligible for the "sweetened" early retirement plan, sues employer *X* and asserts that the employer breached its fiduciary duty to her by failing to disclose its intention to offer a more favorable early retirement package.

This Note considers whether company *X* has an affirmative fiduciary duty to employee *Y* to disclose the proposed changes in its employee benefit plan. This question arises out of the current trend in the federal courts to expand a plan administrator's disclosure duties by emphasizing her fiduciary obligation to provide material information to plan participants.⁶ The tension between ERISA's dual goals of protecting employee benefits and containing administrative costs to encourage pension plan formation is at the center of this controversy.⁷ Developing an affirmative fiduciary duty to disclose proposed changes in benefits plans protects an employee's pension benefits by infringing on an employer's ability to make fundamental business decisions.⁸ At this time, the legal community has different opinions regarding how to maintain ERISA's delicate balance between protecting employee benefits and encouraging the development of benefits plans when dealing with fiduciary disclosure responsibilities.⁹

6. See *Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (emphasizing common law trust doctrine and finding ERISA fiduciary maintains affirmative duty to disclose when it knows silence might be harmful); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (finding affirmative duty to disclose when trustee knows that silence might be harmful); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 752 (D.C. Cir. 1990) (basing decision that ERISA fiduciary has affirmative duty to convey complete and accurate material information to beneficiary on development of fiduciary duty through common law of trusts); 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 . . . to incorporate the fiduciary standards of trust law into ERISA . . .").

7. See *supra* note 4 (describing tension between Congress's legislative objectives for ERISA).

8. See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (finding pre-adoption disclosure impairs legitimate business goals); *Siskind*, 47 F.3d at 505 (recognizing that ERISA exempted plan design functions from fiduciary definition to provide employers with flexibility and control over benefits plans).

9. See *Bins v. Exxon Co. U.S.A.*, 189 F.3d 929, 939 (9th Cir. 1999) (holding once employer seriously considers changes it has affirmative duty to disclose proposed changes to plan participants), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000) [hereinafter *Bins I*]; Bryan L. Clobes, *In the Wake of Varsity Corp. v. Howe: An Affirmative Fiduciary Duty to Disclose Under ERISA*, 9 DEPAUL BUS. L.J. 221, 236 (1997) (finding it essential to impose upon plan fiduciaries affirmative duty to disclose material information to protect interests of participants and beneficiaries); Ryan P. Barry, Comment, *ERISA's Purpose: The Conveyance of Information from Trustee to Beneficiary*, 31 CONN. L. REV. 735, 761-64 (1999) (developing affirmative duty to disclose from common law of trusts); Steven Davi, Note, *To Tell the Truth: An Analysis of Fiduciary Disclosure Duties and Employee Standing to Assert Claims Under ERISA*, 10 ST. JOHN'S J. LEGAL COMMENT. 625, 647 (1995) (supporting affirmative fiduciary duty to disclose because

Those who support an affirmative fiduciary duty to disclose proposed changes in benefit plans develop the duty on a foundation of the common law of trusts and ERISA's purpose of protecting the interests of plan participants.¹⁰ To support their position, proponents of the affirmative duty emphasize the extensive development in the federal courts of an ERISA administrator's fiduciary duty to disclose.¹¹ Recognizing that Congress intended for the courts to interpret ERISA's fiduciary duties in accordance with the law of trusts, federal jurisprudence supplemented the disclosure requirements with a fiduciary obligation not to knowingly deceive plan beneficiaries.¹² Various federal courts interpreted this obligation as requiring employers to disclose truthful information, about proposed plan amendments, in response to a plan participant's questions.¹³ Proponents of the affirmative duty to disclose pro-

employees' interests in receiving information about future plan amendments outweigh employers' interests in effectuating business objectives); Mary O. Jensen, Note, *Separating Business Decisions and Fiduciary Duty in ERISA Litigation?*, 10 BYU J. PUB. L. 139, 159 (1996) (supporting continuation of trend toward requiring increased disclosure from ERISA employers and emphasizing that employer silence about material facts should be considered misleading communication). *But see* *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1053 (9th Cir. 2000) ("[A]n employer's serious consideration of a change to a plan does not, in and of itself, implicate ERISA's fiduciary duties.") [hereinafter *Bins II*]; *Bins I*, 189 F.3d at 943 (Fernandez, J., concurring and dissenting) (disagreeing with majority's finding that employers have affirmative fiduciary duty to disclose); Edward E. Bintz, *Fiduciary Responsibility Under ERISA: Is There Ever a Fiduciary Duty to Disclose?*, 54 U. PITT. L. REV. 979, 997 (1993) (arguing affirmative fiduciary duty to disclose would "go well beyond the amount of disclosure needed to protect participants' interests").

10. *See Bins I*, 189 F.3d at 934 (emphasizing that fiduciary maintains undivided duty of loyalty to participants and beneficiaries, and thus employer has affirmative duty to disclose proposed changes in employee benefits plans); Clobes, *supra* note 9, at 227 (describing development of affirmative duty to disclose through common law and primary purpose of ERISA); Barry, *supra* note 9, at 761-64 (developing affirmative duty to disclose from common law of trusts); Jensen, *supra* note 9, at 157-59 (emphasizing trust law principles requiring affirmative duty to disclose information known by fiduciary but unknown to beneficiary).

11. *See infra* Part III (outlining common law development of fiduciary duty to disclose).

12. *See Varsity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (determining that employer's participation in plan to knowingly and significantly deceive plan's beneficiaries constitutes breach of fiduciary duty); *see also* *Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (emphasizing common law trust doctrine and finding ERISA fiduciary maintains an affirmative duty to disclose when it knows silence might be harmful); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (finding affirmative duty to disclose when trustee knows that silence might be harmful); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 752 (D.C. Cir. 1990) (basing decision that ERISA fiduciary has affirmative duty to convey complete and accurate material information to beneficiary on development of fiduciary duty through common law of trusts).

13. *See Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997) (noting that material misrepresentations about future plan offerings constitute breach of fiduciary duties when employer has seriously considered future changes); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117,

posed changes believe this obligation is a logical extension of ERISA's fiduciary duty to disclose jurisprudence.¹⁴

In the alternative, opponents of the affirmative fiduciary duty to disclose proposed changes rely on the well-established "two hats doctrine" to support their position. The two hats doctrine recognizes that employers act as "settlers" and not as "fiduciaries" when amending employee benefits plans.¹⁵ Under ERISA, an employer must act in a fiduciary capacity to expose itself to fiduciary obligations; therefore, the federal courts can not impose an affirmative fiduciary obligation to disclose on an employer when it acts as a settlor and amends its employee benefits plan.¹⁶ In addition, opponents of the affirmative duty to disclose proposed changes emphasize that the two hats doctrine proves that Congress did not intend to sacrifice an employer's ability to make fundamental business decisions to protect employee benefits.¹⁷ Instead, opponents argue that imposing an affirmative fiduciary duty to disclose proposed changes in employee benefits plans will disrupt ERISA's goal of encouraging the development of employee benefits plans by overburdening employers with administrative costs.¹⁸

122 (2d Cir. 1997) (finding affirmative material misrepresentations about proposed future changes to employee benefit plan constitute breach of fiduciary duty); *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) (stating previous case established that plan administrator may not make affirmative material misrepresentations to plan participants about changes to benefits plan); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (concluding that plan administrator may not make affirmative material misrepresentations to plan participants about changes in employee benefits plan); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1993) (determining misleading communications regarding plan administration constitute breach of fiduciary duty); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) (holding that, when seriously considering plan changes, employers have fiduciary duty not to make misrepresentations to plan participants concerning the plan).

14. See *Bins I*, 189 F.3d 929, 939 (9th Cir. 1999) ("We see no reason why the duty to disclose material information . . . should apply in a case involving affirmative misrepresentations about an existing or proposed plan . . . but not in a case involving a participant or beneficiary who fails to ask about a proposed plan."), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000).

15. See *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996) (concluding employer acts as settlor and not as fiduciary when amending pension plan to adopt early retirement incentives); *Amata v. W. Union Int'l, Inc.*, 773 F.3d 1402, 1416-1417 (2d Cir. 1985) (stating ERISA permits employers to wear two hats, as employer and plan administrator, because employers only assume fiduciary status when they function in fiduciary capacity).

16. See *supra* Part IV (developing two hats doctrine).

17. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, Sante Fe Ry. Co.*, 520 U.S. 510, 516 (1997) (emphasizing employer's ability to make fundamental business decisions); *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 507 (2d Cir. 1995) (finding two hats doctrine gives employers flexibility to make important business decisions).

18. See *Bintz*, *supra* note 9, at 997 (presenting scenario in which affirmative duty to disclose greatly compromises employers' business objectives); *VanderPloeg*, *supra* note 3, at 290 (discussing employers' need to control flow of information to perpetuate legitimate business goals).

This Note examines whether ERISA imposes an affirmative obligation on employers to disclose proposed changes in employee benefits plans. Part II provides a brief history of pre-ERISA legislation and describes ERISA's disclosure and fiduciary obligations.¹⁹ Part III shows how the federal courts expanded the scope of the fiduciary duty to disclose.²⁰ Part IV discusses the two hats doctrine and its impact on the affirmative fiduciary duty to disclose proposed changes.²¹ Part V analyzes the problems in the development of an affirmative fiduciary duty to disclose proposed changes.²² Ultimately, this Note concludes that imposing an affirmative fiduciary duty to disclose on employers would violate ERISA and infringe upon Congress's goal of encouraging employers' to offer pension benefits.

II. The Statutory Foundation

A. Pre-ERISA Legislation: Interest in Disclosure

During the early 1950s, Congress began to take a sincere look into the dubious practices surrounding employee benefits plans.²³ In 1958, Congress enacted the Welfare Pension Plans Disclosure Act (WPPDA) based on the theory that providing plan participants with complete information about their benefits plans would allow employees to police the plans themselves without government interference.²⁴ However, the WPPDA's full disclosure concept

19. See *infra* Part II (presenting pre-ERISA legislation and ERISA fiduciary and disclosure obligations).

20. See *infra* Part III (discussing federal case law developing affirmative fiduciary duty to disclose).

21. See *infra* Part IV (presenting federal case law supporting employer's ability to make fundamental business decisions).

22. See *infra* Part V (analyzing affirmative fiduciary duty to disclose proposed changes in employee benefits plans).

23. See Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in U.S. SENATE, SPECIAL COMM. ON AGING, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 6-25 (1984), in JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 67 (2d ed. 1995) (documenting beginning of benefits plan reform in early 1950s).

24. See *id.* at 68 (discussing theory of law behind WPPDA). Gordon stated:

The theory of the law was that full disclosure to participants and beneficiaries of the provisions of their plan and its financial operations would deter abuse ("sunlight being the best disinfectant") and would enable them to police the plans themselves without requiring greater Government regulations or interference.

Id.; see also Lawrence Allen Vranka, Jr., Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607, 612 n.22 (1989) ("[The WPPDA's] method was compulsory disclosure and, initially, policing of practices by those interested in the plans." (quoting M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 47 (1984))).

did not provide the benefit plan beneficiaries with adequate protection because the Secretary of Labor lacked the investigative and remedial powers needed to enforce the WPPDA.²⁵ Thus, a legislative committee investigated the security of employee benefits programs and determined that complete reliance on the full disclosure concept did not prevent serious abuse in the managing of employee benefit funds.²⁶

Another decade of congressional research regarding employee benefits programs culminated in the drafting of the ERISA legislation.²⁷ Once again, one of Congress's primary motivations for drafting the legislation was to ensure that employers fulfill the pension promises made to their employees.²⁸ Additionally, Congress sought to encourage the creation of more benefits

25. See Gordon, *supra* note 23, at 68 ("[T]he WPPDA was a greatly diluted version of the bill that had passed the Senate and deprived the Secretary of Labor of investigatory and enforcement powers.").

26. See *id.* at 69-71 (explaining developments leading to "complete rethinking of the full disclosure concept as principal means of directly regulating employee benefit plans"). According to Michael Gordon, three factors brought about the belief that Congress needed to supplement its full disclosure concept with other safeguard provisions. *Id.* at 69. First, a private commission on money and credit examined private pension plans and recommended to President Kennedy that the WPPDA needed to provide greater supervision over the investment of pension plan assets. *Id.* Second, the WPPDA enactment fostered a "torrent of mail" from employees who mistakenly believed that the new legislation afforded them a remedy for their failure to qualify for private pension benefits. *Id.* Finally, the closing of the Studebaker automobile plant in South Bend, Indiana, demonstrated the tragic consequences of maintaining underfunded pension plans. *Id.* at 70. After the Studebaker plant closed, about 4,000 employees between the ages of forty and fifty-nine with at least ten years of service received only fifteen cents on the dollar of their accrued pension benefits. *Id.*; 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) (discussing Studebaker plant closing). These three factors highlighted the deficiencies of the full disclosure concept and eventually motivated Congress to pass the ERISA legislation with additional safeguard provisions. Gordon, *supra* note 23, at 71.

27. See Brauch, *supra* note 26, at 1237 (stating that Congress enacted ERISA following decade of congressional work).

28. See 29 U.S.C. § 1001(a) (1994) (announcing Congressional findings). The Congressional findings and declaration of policy states:

The Congress finds that . . . many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . and that it is therefore desirable in the interests of employees and their beneficiaries . . . that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Id.

plans and to contain the costs of administering those plans.²⁹ To accomplish these goals, Congress created a three-pronged regulatory scheme that: (1) outlined reporting and disclosure duties; (2) created standards of conduct and obligations for fiduciaries of employee benefit plans; and (3) provided avenues for legal remedies and access to the federal courts.³⁰

B. The ERISA Disclosure Rules

Building on the same concerns prompting the WPPDA disclosure requirements, Congress sought to secure employee benefits by providing plan participants with access to information regarding their benefit plans.³¹ Congress created a detailed disclosure regime to facilitate the flow of information from plan administrators³² to plan participants.³³ ERISA requires a plan administrator to provide a summary plan description to each plan participant³⁴

29. See 29 U.S.C. § 1001(c) (1994) ("It is hereby declared to be the policy of this title – to encourage the maintenance and growth of single-employer defined benefit pension plans . . . [and] to maintain the premium costs of such system at a reasonable level . . .").

30. See *id.* § 1001(b) ("It is . . . declared to be the policy . . . to protect . . . the interests of participants in private pension plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries . . . and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."); VanderPloeg, *supra* note 3, at 263 (summarizing three-pronged regulatory approach created by Congress). Unlike the WPPDA which regulated employee benefits plans solely through full disclosure, the ERISA legislation uses full disclosure as a single component of a broad regulatory scheme. 29 U.S.C. § 1001(b) (1994).

31. See Gordon, *supra* note 23, at 87 (finding origin of ERISA disclosure requirements in WPPDA); Mathew S. Rotenberg, Comment, *ERISA – Fischer v. Philadelphia Electric Co.: The Third Circuit "Seriously Considers" the Fiduciary Duty to Disclose Potential Changes to an Employee Benefit Plan Under ERISA*, 42 VILL. L. REV. 1915, 1921 (1997) (stating that disclosure rules provide employees with information necessary to monitor plan administration and enforce rights).

32. See 29 U.S.C. § 1002(16)(A) (1994) (defining "plan administrator"). According to ERISA, a plan administrator is:

- (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
- (ii) if an administrator is not so designated, the plan sponsor, or
- (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

Id. ERISA permits an employer to serve as the plan administrator. *Id.* § 1108(c)(3).

33. See *id.* §§ 1021-1031 (mandating disclosure of information from plan administrator to plan participant).

34. See *id.* § 1002(7) (defining "participant"). A plan participant is:

[A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such

within ninety days of becoming a participant.³⁵ A summary plan description must be "calculated to be understood by the average plan participant" and be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."³⁶ Following the initial disclosure, plan administrators must supply an updated summary plan description to each participant every five years if the plan contains amendments, or every ten years if the plan does not contain amendments.³⁷ A plan administrator also must provide a summary description of material modifications to the plan or other plan related information within seven months after the end of the plan year in which the modification or change was adopted.³⁸

In addition to the mandated periodic disclosures, a plan administrator must keep the latest summary plan description in the principal office of the administrator to enable a plan participant to have constant access to pertinent information.³⁹ If a participant or beneficiary gives a plan administrator a written request, then ERISA requires the plan administrator to provide a copy of an updated summary plan description.⁴⁰ Finally, the Secretary of Labor can require the administrator of an employee benefits plan to furnish a statement of rights to all participants and beneficiaries receiving benefits under the plan.⁴¹ By complying with this disclosure regime, a plan administrator ensures that plan participants have access to information regarding the details of their employee benefits plans. Along with the creation of a disclosure regime, ERISA establishes fiduciary standards that govern some administrative actions.

employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Id.

35. *Id.* § 1024(b)(1)(A).

36. *See id.* § 1022(a)(1) (requiring summary plan description written in language average participant can understand); 29 C.F.R. § 2520.102-2(a) (1999) (requiring plan administrators to exercise "considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan"); *see also* 29 U.S.C. § 1022(b) (1994) (requiring summary plan description to contain specific information); Bintz, *supra* note 9, at 982 & n.7 (listing required disclosure information in summary plan description).

37. 29 U.S.C. § 1024(b)(1) (1994).

38. *Id.* §§ 1024(a)(1)-1024(b)(1)(B).

39. *See id.* § 1024(b)(2) (stating that plan administrator must make summary plan description available for examination by any plan participant or beneficiary).

40. *See id.* § 1024(b)(4) (requiring plan administrator to furnish latest updated summary plan description upon written request of any participant or beneficiary). This provision also allows an administrator to charge a participant or beneficiary a reasonable amount to cover the cost of furnishing complete copies. *Id.*

41. *Id.* § 1024(c).

C. The ERISA Fiduciary Duties

Congress created federal fiduciary provisions to combat the serious abuses of discretion and management it discovered during its committee investigations.⁴² ERISA's provisions accomplish two specific purposes by: (1) defining who is a fiduciary; and (2) establishing fiduciary responsibilities.⁴³ A person is a fiduciary with respect to the plan to the extent that she: (1) exercises control over the management of the plan; (2) renders investment advice; or (3) maintains discretionary authority over the administration of the plan.⁴⁴ Labeling a specific individual a "fiduciary" does not automatically subject her to fiduciary obligations; instead, fiduciary duties attach when an individual acts in one of the three designated functions.⁴⁵

Serving in a fiduciary capacity subjects the individual or company official to the fiduciary responsibilities detailed in ERISA § 404(a).⁴⁶ The "duty

42. See Gordon, *supra* note 23, at 71 (discussing reasons for implementing fiduciary standards). One prime example of benefit plan mismanagement uncovered by a congressional committee concerned George Barasch, the founder of two New Jersey unions. *Id.* Mr. Barasch, acting as the trustee of various pension plans, became a millionaire by diverting funds away from the employee benefit plans associated with the unions into "charitable corporations" in which he was the organizer and primary shareholder. *Id.*

43. See 29 U.S.C. § 1002(21)(A) (1994) (defining fiduciary); *id.* § 1104 (establishing fiduciary responsibilities).

44. *Id.* § 1002(21)(A). According to ERISA, a person is a fiduciary with respect to the plan to the extent that:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
- (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

Id. Noticeably absent from the ERISA definition of a fiduciary is the function of establishing and amending the employee benefit plan. As this Note will discuss, employers do not act as statutory "fiduciaries" when performing these functions. See VanderPloeg, *supra* note 3, at 271 (stating employers who establish and amend plans are not acting as fiduciaries); Part IV (presenting two hats doctrine).

45. See *Hozier v. Midwest Fastners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990) ("Fiduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions."); Brauch, *supra* note 26, at 1239 ("[Fiduciary status] is based upon function rather than title.").

46. 29 U.S.C. § 1104(a)(1) (1994). This section states:

- [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
- (A) for the exclusive purpose of:

of loyalty" is the first of three fiduciary obligations and requires each fiduciary to discharge his duties "solely in the interest of the participants and beneficiaries."⁴⁷ Second, a fiduciary must act "for the exclusive purpose of" providing benefits to plan beneficiaries and defraying administration expenses.⁴⁸ Finally, fiduciaries have an obligation to exercise the "care, skill, prudence, and diligence" of a "prudent man acting in like capacity" when making decisions and exercising authority over the employee benefits plan.⁴⁹

Enlarging the scope of § 404(a) is the notion that Congress expected the courts to use the common law of trusts to define the breadth of ERISA's fiduciary duties.⁵⁰ The legislative history indicates that "[t]he fiduciary responsibility section, in essence, codifies and makes applicable to . . . fiduciaries certain principles developed in the evolution of the law of trusts."⁵¹ In 1984, Justice Brennan used ERISA's legislative history to broaden fiduciary responsibilities by emphasizing that Congress intended to incorporate trust principles into ERISA's fiduciary duty standards.⁵² However, the power to

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

Id.

47. *Id.* § 1104(a)(1); *see also* Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988) (enumerating three components of ERISA's fiduciary requirements).

48. 29 U.S.C. § 1104(a)(1)(A) (1994).

49. *Id.* § 1104(a)(1)(B); *see also* Susan P. Serota, *Overview of ERISA Fiduciary Law*, in ERISA FIDUCIARY LAW 19 (Susan P. Serota ed., 1996) (discussing ERISA imposition of "prudent man standard" of conduct on fiduciaries); Bintz, *supra* note 9, at 984 (same). In addition to the functional definition and fiduciary responsibilities, the ERISA fiduciary duty section requires that plan administrators maintain written instruments outlining the provisions of the employee benefits plans. 29 U.S.C. § 1102(a)(1) (1994). Also, an employee benefits plan must include a procedure for amending the plan and for identifying the persons who have authority to amend the plan. *Id.* § 1102(b)(3).

50. *See* Varity Corp. v. Howe, 516 U.S. 489, 496 (1996) (recognizing that fiduciary duties draw much of their content from common law of trusts); Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985) ("[R]ather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); Bintz, *supra* note 9, at 984-85 (stating ERISA does not enumerate duties of fiduciary, but relies on common law to define fiduciary responsibilities). *But cf.* Mertens v. Hewitt Assocs., 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA, is not the authority to revise the text of the statute." (citation omitted)).

51. H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

52. *See* 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

expand the fiduciary duty provisions through trust law is limited by ERISA's legislative history that emphasizes that Congress did modify the trust principles to fit the employee benefits context.⁵³

D. *The Relationship Between Fiduciary Duty and Disclosure Obligations*

ERISA does not directly address the relationship between the general fiduciary duty and the specific disclosure rules.⁵⁴ Some courts refuse to read an additional disclosure obligation into the fiduciary duty provisions because ERISA deliberately defined the fiduciary and disclosure obligations in separate sections.⁵⁵ In *Porto v. Armco, Inc.*,⁵⁶ the Eighth Circuit Court of Appeals determined that compliance with statutory obligations insulated an employer from a breach of fiduciary duty claim.⁵⁷ By construing the fiduciary and

incorporate the fiduciary standards of trust law into ERISA . . ."). Justice Brennan stated that ERISA's legislative history, which incorporated trust principles, required a fiduciary to exercise a strict duty of loyalty to beneficiaries in the administration and payment of trust benefits. *Id.* at 152-53. As this Note will discuss, it was Justice Brennan's proposition that ERISA incorporated trust law into fiduciary standards that permitted courts to develop fiduciary duties to disclose. See *infra* Part III (presenting case law using trust principles to extend fiduciary duty to disclose).

53. See H.R. REP. NO. 93-533, at 12-13 (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4650-51 ("It is expected that courts will interpret the prudent man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans."); Brauch, *supra* note 26, at 1286 (discussing legislative history argument and finding that Congress modified trust principles to fit employee benefit context).

54. See Bintz, *supra* note 9, at 988 (finding fiduciary duty and disclosure sections do not directly address relationship between two rules).

55. See *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997) (finding Congress intentionally structured disclosure obligations to limit categories of documents that administrators must disclose such that disclosure duties are not extended by general fiduciary duties); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) ("[A]n administrator who complies with the statutory standard for disclosure cannot be said to have breached the fiduciary duty by not providing earlier disclosure."); see also *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (finding precedent does not recognize general fiduciary obligation under ERISA to provide information related to plan on request).

56. 825 F.2d 1274 (8th Cir. 1987).

57. See *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (concluding administrator that complies with statutory disclosure responsibilities cannot be held to have breached fiduciary duty to plan participants by not providing earlier disclosure). Upon his retirement, Porto made an irrevocable decision not to sell his Armco stock, the company's contribution to his retirement fund, for a period of five years. *Id.* at 1275. Before the period expired, Porto's plan administrator rebuffed Porto's attempt to invoke a sale of his depreciating stock because the plan regulations did not permit a participant to change his retirement election. *Id.* Subsequently, a change in the Internal Revenue Code prompted a plan amendment to permit a retired

disclosure sections separately, the court denied the breach of fiduciary duty claim.⁵⁸ In a related case, the Second Circuit Court of Appeals found that Congress intentionally structured disclosure obligations to limit the categories of documents administrators must disclose.⁵⁹ Therefore, the court deemed it "inappropriate" to extend specific disclosure obligations through general fiduciary duties.⁶⁰ A court that reads the disclosure and fiduciary duty provisions separately will not find an affirmative duty to disclose proposed changes in employee benefit plans.

To develop an affirmative duty to disclose proposed changes, a court must expand a plan administrator's disclosure duties through ERISA's fiduciary duty provisions. ERISA's disclosure obligations do not include an express duty to inform plan participants of proposed changes to employee benefits plans.⁶¹ The express provision dealing with the disclosure of amendments requires a plan administrator to disclose a plan change within seven months after the end of the plan year in which the plan adopted the amendment.⁶² Because ERISA does not require pre-adoption disclosure, courts developing an affirmative fiduciary duty to disclose proposed changes must rely on trust law to read ERISA fiduciary duties into the area of disclosure.⁶³

participant to change his retirement election. *Id.* The plan administrator sent a letter to current employees advising them of the change but did not inform retired participants until the following year. *Id.* The court had to determine whether the administrator breached its fiduciary duties by failing to inform the retired plan participants of the revocability amendment when the active participants were informed. *Id.* The district court granted summary judgment to the defendant because the administrator notified Porto of the amendment in accordance with the time limit established in the ERISA disclosure rules. *Id.* The Court of Appeals for the Eighth Circuit found that ERISA deals separately with duties to disclose and fiduciary duties. *Id.* at 1276. Thus, complying with the statutory standard for disclosure insulates an administrator from a breach of fiduciary duty claim. *Id.*

58. *Id.*

59. See *CWA/ITU Negotiated Pension Plan*, 107 F.3d at 147 (explaining reasons behind denial of breach of fiduciary duty claim).

60. See *id.* ("[I]t [is] inappropriate to infer an unlimited disclosure obligation on the basis of general [fiduciary] provisions that say nothing about disclosure."); see also *Faircloth*, 91 F.3d at 657 (finding precedent does not recognize general fiduciary obligation under ERISA to provide information related to plan on request). But see *Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1012 (3d Cir. 1997) ("[F]iduciary duties operate both independently from and in conjunction with ERISA's specifically delineated requirements.").

61. See 29 U.S.C. §§ 1021-1031 (1994) (articulating disclosure provisions).

62. *Id.* § 1024(a)(1).

63. See *id.* §§ 1021-1031 (articulating disclosure provisions); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (finding duty to disclose information to plan participants is "another matter, dealt with separately by ERISA").

III. Developing ERISA Fiduciary Duties Through Trust Principles

During the past twenty years, federal courts have used common law trust principles slowly to enlarge the scope of ERISA's fiduciary obligations. Initially, the courts expanded fiduciary responsibilities to include the trust law duty to provide complete and accurate information to plan beneficiaries in response to employee inquiry.⁶⁴ In *Varity Corp. v. Howe*, the United States Supreme Court characterized ERISA's statutory language requiring fiduciaries to act "solely in the interest of participants" as formulating a duty to deal fairly and honestly with plan participants.⁶⁵ Most recently, the courts have found that *Varity* requires employees to provide information regarding "seriously considered" proposed changes in response to an employee inquiry.⁶⁶ The movement further down the spectrum towards full disclosure culminated in a Ninth Circuit panel opinion upholding an affirmative fiduciary duty to disclose proposed changes in employee benefits plans.⁶⁷

A. Pre-*Varity* Cases: Expounding on Trust Law

The expansion of fiduciary duties into the area of disclosure began when the District of Columbia Court of Appeals held that an ERISA fiduciary has a duty to convey correct and material information to a beneficiary.⁶⁸ In *Eddy*

64. See *Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1261-65 (3d Cir. 1995) (developing duty not to misinform employees through material misrepresentations and incomplete disclosures); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (finding duty to disclose when fiduciary knows that silence might be harmful); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 752 (D.C. Cir. 1990) (looking to common law of trusts to develop fiduciary duty to disclose complete and material information).

65. See *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (relying on ERISA § 404(a) to develop fiduciary duty not to lie to plan participants).

66. See *Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997) (recognizing that material misrepresentations about future plan offerings constitute breach of fiduciary duties when employer has seriously considered future changes); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997) (finding affirmative material misrepresentations about proposed future changes to employee benefit plan constitute breach of fiduciary duty); *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) (finding plan administrator may not make affirmative material misrepresentations to plan participants about changes to benefits plan); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (concluding that plan administrator may not make affirmative material misrepresentations to plan participants about changes in employee benefits plan); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) (determining misleading communications about future changes in benefit plans constitute breach of fiduciary duty).

67. *Bins II*, 220 F.3d 1042 (9th Cir. 2000).

68. See *Eddy*, 919 F.2d at 752 (holding that ERISA fiduciary has affirmative duty to convey complete and accurate material information to beneficiary); see also *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999) (citing *Eddy* as legal foundation for developing affirmative fiduciary duties to disclose); *McAuley v. Int'l Bus. Mach. Corp.*, 165 F.3d 1038,

*v. Colonial Life Insurance Co.*⁶⁹ the D.C. Circuit considered whether the plaintiff's health insurance provider violated its fiduciary duties by neglecting to correctly advise him of his rights under his ERISA benefits plan.⁷⁰ After learning that his employer planned to terminate his group health insurance policy, Eddy, an AIDS patient, contacted a Colonial Life representative to determine whether he could convert his group plan into an individual policy.⁷¹ The Colonial Life representative informed Eddy that he could not "convert" his insurance coverage which left him uninsured.⁷² After discovering that he did, in fact, have a right to convert his insurance coverage, Eddy brought an action under ERISA for breach of fiduciary duty.⁷³ At a bench trial, a witness for Colonial Life testified that Eddy did have the right to "convert" his insurance policy, but he could not "continue," his insurance policy.⁷⁴ The district

1043 (6th Cir. 1999) (quoting *Eddy* to support conclusion that ERISA fiduciary has obligation to disclose relevant information to beneficiary); *Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 174 (3d Cir. 1997) (same); *Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1015 (3d Cir. 1997) (same); *Chojnaki v. Ga.-Pac. Corp.*, 108 F.3d 810, 817 (7th Cir. 1997) (same); *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997) (same); *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993) (same); *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) (same).

69. 919 F.2d 747 (D.C. Cir. 1990).

70. See *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 752 (D.C. Cir. 1990) (holding that ERISA fiduciary has affirmative duty to convey complete and accurate material information to beneficiary). In *Eddy*, the court considered whether the plaintiff's health insurance provider violated its fiduciary duties by neglecting to correctly advise him of his rights under his ERISA benefits plan. *Id.* at 750. Eddy, suffering from the AIDS virus, unknowingly scheduled exploratory surgery for the same day his employer terminated his health insurance coverage. *Id.* at 748. Prior to surgery, Eddy contacted his insurance company to ask about his policy's conversion rights and the insurance company's representative informed him that he did not have the right to convert his employment based coverage to an individual policy. *Id.* at 749. In fact, Eddy did have a right to convert his policy, but the district court denied his claim because it was unclear whether the plaintiff requested to "convert" his policy, which he could do, or whether he asked to "continue" his policy, which he could not do. *Id.* Prior to the appeal, Eddy died from complications related to the AIDS virus. *Id.* at 750. The court of appeals found that the insurance company, an ERISA fiduciary, violated its duty of care to Eddy. *Id.* Relying on the common law of trusts, the court determined that an ERISA fiduciary has a duty not to materially mislead a beneficiary. *Id.* Because a beneficiary can be misled by silence as well as the spoken word, the insurance company violated its fiduciary duty by failing to inform Eddy of his ability to convert his health insurance to an individual policy. *Id.* at 750-51.

71. *Id.* at 748-49.

72. *Id.* at 749.

73. *Id.*

74. *Id.* "Continuing" coverage occurs when the employer's group policy remains effective and the insurance company permits a terminated employee to maintain his health insurance. *Id.* "Converting" coverage from a group policy to an individual policy occurs when the employer's underlying group policy is itself terminated. *Id.*

court found for the defendant because the evidence did not sufficiently prove that Eddy correctly asked to "convert," and not to "continue" his policy.⁷⁵

The court of appeals overturned the district court by holding that Colonial Life had a fiduciary obligation to provide Eddy with correct and complete material information regarding his status and options.⁷⁶ From the outset, the court determined that Congress intended the courts to develop ERISA fiduciary duties from the common law of trusts.⁷⁷ The common law emphasizes that a trustee has a duty to communicate all material facts affecting the interest of the beneficiary that she needs to know regardless of the precision of her questions.⁷⁸ Based on this standard, the court found that once Eddy contacted his fiduciary and presented his predicament, Colonial Life bore an obligation to convey complete and accurate material information on his status and options.⁷⁹

Following *Eddy*, the Third Circuit Court of Appeals articulated the standard emphasized by the federal courts when extending fiduciary duties to include disclosure obligations.⁸⁰ In *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*⁸¹ the court stated, "[The] duty to inform is a constant

75. *Id.* at 749. The court's conclusion found that Colonial Life's liability hinged on whether Eddy asked to "continue" or to "convert" his coverage. *Id.* According to the court, if Eddy asked Colonial Life to continue his coverage, then the company did not mislead him because his policy could not be continued. *Id.* However, if Eddy asked Colonial Life to convert his coverage, then the company did mislead him because he could change his group plan into an individual policy. *Id.* Overlooking the testimony of Eddy and a co-worker who had a similar experience, the court found the evidence insufficient to determine which question Eddy asked, thereby prompting a ruling for the defendant. *Id.*

76. *Id.* at 750.

77. *See id.* ("[T]he duties of an ERISA fiduciary are not limited by that statute's express provisions but instead include duties derived from common law trust principles.")

78. *See id.* ("[The trustee] is under a duty 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." (quoting RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959))).

79. *See id.* at 751 ("Regardless of the precision of his questions, once a beneficiary makes known his predicament, the fiduciary 'is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know.'" (quoting RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959))).

80. *See Bins I*, 189 F.3d 929, 938 (9th Cir. 1999) ("[The fiduciary duty to disclose] entails not only a negative duty not to misinform, but also an affirmative duty to inform when the fiduciary knows that silence might be harmful" (quoting *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993))), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000); *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 548 (6th Cir. 1999) (citing *Bixler* as foundation for affirmative duty to disclose); *Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir. 1997) (same); *Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1262 (3d Cir. 1995) (same).

81. 12 F.3d 1292 (3d Cir. 1993).

thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.⁸² Two years later, another Third Circuit Court of Appeals case elaborated on the *Bixler* holding.⁸³

In *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*,⁸⁴ the Third Circuit found that a plan administrator who affirmatively misrepresented the terms of a plan or failed to provide material information to plan participants violated its fiduciary duties.⁸⁵ The court derived a fiduciary duty not to materially mislead plan participants from ERISA's statutory language requiring a fiduciary to act "solely in the interest of participants and beneficiaries."⁸⁶ Interpreting *Bixler* as imposing a responsibility to correctly inform

82. *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993). The Third Circuit Court of Appeals considered the extent to which alleged misinformation or failure to provide relevant information constituted a breach of fiduciary duty under ERISA § 404(a). *Id.* Following the death of her husband, Mrs. Bixler filed suit against the defendants for failing to provide her with complete information regarding her ability to continue the family's medical coverage through COBRA. *Id.* at 1296. After outlining the duties in ERISA § 404(a), the court followed the lead of Justice Brennan and the Supreme Court and used trust law to define fiduciary responsibilities. *See id.* at 1298-99 (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 152-53 (1985)). Focusing on the *Eddy* holding, and the RESTATEMENT (SECOND) OF TRUSTS, the court concluded that a fiduciary has an affirmative duty to inform when the trustee knows that "silence might be harmful." *Id.* at 1300. After applying this standard, the court of appeals determined that the defendants fulfilled their fiduciary duty to Mrs. Bixler by sending her a written notice regarding the continuation of her husband's medical coverage under COBRA. *Id.* at 1302.

83. *See Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (recognizing that when plan administrator affirmatively misrepresents plan or fails to provide material information plan administrator breaches its fiduciary duty).

84. 57 F.3d 1255 (3d Cir. 1995).

85. *See Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (finding that when plan administrator affirmatively misrepresents or fails to provide material information when it knows its failure to do so may cause harm breaches fiduciary duty). In this interlocutory appeal, the court considered, *inter alia*, whether the plaintiffs could maintain a breach of fiduciary duty claim against their former employer. *Id.* at 1257. Their employer had informed retiring employees that medical benefits were for life, but failed to mention that it reserved the right to terminate the plans for any reason. *Id.* at 1261. The plaintiffs, a group of retired workers, left their employment with the understanding that they would receive post-retirement medical benefits for life. *Id.* at 1259. This class of plaintiffs brought an action for breach of fiduciary duty against their employer after the employer instituted a new medical plan that required the retirees to pay the full cost of their premiums. *Id.* at 1258-59. The court of appeals reaffirmed the *Bixler* holding and emphasized that material misrepresentations aimed at misleading the reasonable employee constitute a breach of fiduciary duty. *Id.* at 1264. Because the defendant knew it could terminate benefits at any time, it breached its fiduciary duty by consistently informing retiring employees that they maintained lifetime medical benefits and by allowing employees to make retirement decisions based on those assurances. *Id.* at 1266.

86. *Id.* at 1261.

employees, the court determined that a fiduciary also had an obligation not to misinform through material misrepresentations or incomplete disclosures.⁸⁷ In addition, the court defined a misrepresentation as "material" if there was a substantial likelihood that the information would prevent an employee from making an "adequately informed retirement decision."⁸⁸ The *Unisys* court firmly expanded an employer's fiduciary duties to include a duty not to misinform through false or incomplete disclosures.⁸⁹ One year later, the United States Supreme Court elaborated on this expansion of ERISA fiduciary duties.

B. *Varity Corp. v. Howe: A Duty to Tell the Truth*

The Supreme Court, in *Varity Corp. v. Howe*,⁹⁰ derived a fiduciary duty not to mislead from ERISA's statutory language requiring a fiduciary to act "solely in the interest of the participants."⁹¹ In this case, the employer, Varity,

87. *Id.* at 1261-63. The defendants argued that the court should not interpret *Bixler* as requiring a broad duty to inform "upon a fiduciary that has satisfied its statutory disclosure obligations." *Id.* at 1263; see also *supra* Part II.D (discussing relationship between fiduciary and disclosure obligations). However, the court dismissed this argument because a fiduciary can misrepresent the terms of a plan while meeting disclosure obligations. *Id.* at 1264. Therefore, fulfilling statutory disclosure obligations does not foreclose the possibility that the ERISA administrator may breach its fiduciary duty by simultaneously or subsequently making material misrepresentations to plan participants. *Id.*

88. See *id.* ("In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision.")

89. See *id.* at 1266-67 (finding that company "actively misinformed its employees by affirmatively representing to them that their medical benefits were guaranteed once they retired, when in fact the company knew this was not true"); see also *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 991 (7th Cir. 1993) (determining fiduciaries breach duties of loyalty when they mislead plan participants). Although it is clear that *Unisys* supports a fiduciary duty not to mislead, it is not clear that this finding extends to an affirmative duty to disclose proposed changes in benefits. See *Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1265 n.15 (3d Cir. 1995) (holding that court did not create obligation to predict and disclose future possibilities or potentialities).

90. 516 U.S. 489 (1993).

91. See *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (finding that defendant participating in plan to knowingly and significantly deceive plan's beneficiaries violates fiduciary duty to act "solely in the interest of the participants and beneficiaries"). In *Varity*, the Supreme Court decided, *inter alia*, (1) whether Varity acted in a fiduciary capacity when it misled beneficiaries, and (2) whether directly misleading beneficiaries regarding the security of their benefits plans violated the fiduciary obligations that ERISA § 404 imposes on administrators. *Id.* at 492. Varity instituted a deliberate and elaborate scheme that caused thousands of employees to forfeit their nonpension benefits. *Id.* at 493-94. The affected employees brought an action in federal court against Varity for breach of fiduciary duty. *Id.* at 494. Looking to trust law for guidance, the Supreme Court determined that employers act as plan administrators with fiduciary responsibilities when they exercise powers that the trust document conferred. *Id.* at 502. Therefore, Varity

created an elaborate scheme to convince its employees working in its failing divisions to transfer to a newly incorporated and insolvent subsidiary.⁹² Two years after the transfer, the subsidiary declared bankruptcy; as a result, thousands of Varity's former employees lost their nonpension benefits.⁹³

The Supreme Court considered, *inter alia*, whether Varity acted as a fiduciary when it deceived its employees and whether this misrepresentation constituted a breach of fiduciary duty.⁹⁴ Initially, the Court had to determine whether Varity acted as an employer, not constrained by fiduciary obligations, or as a benefits plan administrator, subject to fiduciary duties, when it enticed its employees to forfeit their benefits.⁹⁵ According to the Court, trust law provides an administrator with the authority to exercise the powers "appropriate for the carrying out of the purposes" of the trust document.⁹⁶ The Court concluded that Varity acted as an administrator when it deceived employees because conveying information to plan participants about the future of plan

acted as a fiduciary when it deceived the beneficiaries because providing information about the future is an exercise of power "appropriate" to carrying out the plan purpose. *Id.* Also, the Supreme Court concluded that a fiduciary has an obligation to discharge its duties solely in the interest of its beneficiaries. *Id.* at 506. Hence, Varity violated that obligation by knowingly deceiving the plan's beneficiaries. *Id.*

92. *Id.* at 493-94. Later in the opinion, the Supreme Court discussed the details of "Project Sunshine." The project included: (1) a ninety-second videotaped message from a Varity vice president assuring the newly created subsidiary's future viability and the security of the employee pay levels and benefits programs; (2) a document containing a side-by-side benefits comparison of the companies' benefit plans; (3) a question and answer sheet including information regarding what will happen to an employee's ERISA welfare or pension benefits; (4) a transcript of the ninety-second videotaped message; and (5) a cover letter assuring employees that pension and benefits levels will remain unchanged if they accept employment at the new company. *Id.* at 499-501. The Supreme Court agreed with the district court that Varity conveyed a message that "transferring . . . would not significantly undermine the security of their benefits." *Id.* at 501.

93. *Id.* at 494.

94. *Id.* at 492.

95. *Id.* at 498; *see also infra* notes 141-49 and accompanying text (discussing ERISA and ability of company to serve as both "employer" and "fiduciary").

96. *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (quoting 3 AUSTIN W. SCOTT & WILLIAM H. FRATCHER, *LAW OF TRUSTS* § 186, at 6 (4th ed. 1998)). According to the Court, trust law is a starting point in interpreting ERISA's fiduciary duties, but it does not provide a dispositive definition. *Id.* at 497. In addition, the Supreme Court suggested that, when defining fiduciary duties, courts should take account of

competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.

Id.

benefits is a power "appropriate" for carrying out the purposes of an employee benefits plan.⁹⁷

After determining that Varity acted as a fiduciary, the Court quickly found that its flagrant deceptions constituted a breach of its fiduciary duty of loyalty.⁹⁸ ERISA § 404(a) states that a fiduciary is to "discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries."⁹⁹ Using this standard, the Court found that knowingly participating in a scheme to deceive the company's plan participants for monetary gain was not acting in the plan participants' best interests.¹⁰⁰ Therefore, by grossly misrepresenting the security of its employees' benefits, Varity committed a breach of fiduciary duty.¹⁰¹ The *Varity* decision firmly expanded ERISA's fiduciary duties to include an obligation to deal fairly and honestly with all plan members. However, the Court specifically declined to consider whether ERISA imposed a fiduciary duty to disclose "truthful information on their own initiative or in response to employee inquiries." Because the Supreme Court refused to comment on these issues, the lower federal courts maintained the freedom to continue to extend the fiduciary duty to disclose.

C. Post-Varity: The "Serious Consideration" Cases

Following *Varity*, the federal circuits expanded the fiduciary duty to disclose by emphasizing the plan administrator's obligation to deal honestly with plan participants. At first, the courts emphasized the importance of providing plan participants with current plan information. In *Krohn v. Huron Memorial Hospital*,¹⁰² the Sixth Circuit Court of Appeals found that an ERISA fiduciary has an obligation to respond fully and accurately to employees' inquiries

97. See *id.* at 503 ("We conclude . . . that the factual context in which the statements were made, combined with the plan-related nature of the activity, engaged in by the those who had plan-related authority to do so, together provide sufficient support for the District Court's legal conclusion that Varity was acting as a fiduciary."). Elaborating on its holding, the Court stated that although amending the plan may not be an act of a plan administrator, it does not follow that communicating with beneficiaries about the future of the plan is beyond the scope of plan administration. *Id.* at 505. Employers act as plan administrators when they inform beneficiaries about the likely future of plan benefits. *Id.* This distinction becomes important when considering whether companies have an affirmative duty to disclose proposed changes in employee benefit plans. See *infra* notes 167-89 and accompanying text (presenting two hats doctrine).

98. *Id.* at 506.

99. *Id.* (quoting ERISA § 404(a)).

100. *Id.*

101. *Id.* The Supreme Court's decision emphasized that fiduciaries have an obligation to deal fairly and honestly with all plan members. *Id.*

102. 173 F.3d 542 (6th Cir. 1999).

regarding their rights under a current benefits plan.¹⁰³ Moreover, in *Jordan v. Federal Express Corp.*,¹⁰⁴ the Third Circuit Court of Appeals concluded that, absent employee inquiry, employers have an affirmative fiduciary duty to disclose material information about *current* employee benefit plans.¹⁰⁵ With each case, the federal courts expanded employers' disclosure obligations.¹⁰⁶ Ulti-

103. See *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 552 (6th Cir. 1999) (holding defendant breached fiduciary duties by not responding fully and adequately to inquiries about employee benefits). The *Huron* plaintiff sustained injuries in an automobile accident and sent her husband to obtain information from her employer regarding disability benefits. *Id.* at 545. According to the plaintiff, the employer's failure to provide her with complete information concerning her disability benefits caused her to forfeit her right to receive long-term disability benefits. *Id.* at 546. The district court disregarded this argument and granted the defendant's motion for summary judgment on the plaintiff's breach of fiduciary duty claims. *Id.* Disagreeing with the district court's analysis, the court of appeals determined that the defendant did violate its fiduciary duty to disclose material information to the plaintiff regarding her long-term disability benefits. *Id.* at 552. In conjunction with prior affirmative duty cases, the court utilized the ERISA statutory provisions to determine that fiduciaries have an affirmative obligation to disclose vital information to plan participants. *Id.* at 547-51. Finding for the plaintiff, the court concluded that once the plaintiff inquired into her rights under her benefit plan, the defendant had the responsibility to disclose the availability of the long-term disability benefits. *Id.* at 551.

104. 116 F.3d 1005 (3d Cir. 1997).

105. See *Jordan v. Fed. Express Corp.*, 116 F.3d 1005, 1007 (3d Cir. 1997) (finding that administrator breached duty to disclose material information even though participant made no inquiry). In *Jordan*, the Third Circuit Court of Appeals considered whether a plan administrator's failure to disclose the irrevocability of a retirement benefit election constituted a breach of fiduciary duty. *Id.* at 1008. In this case, the company maintained the irrevocability function in its summary plan description but did not emphasize the prohibition against post-retirement changes in a letter to the plaintiff discussing the available types of retirement benefits. *Id.* at 1007. The district court granted the defendant's motion for summary judgment because the plaintiff failed to state valid claims under ERISA. *Id.* at 1009.

On appeal, the court considered whether, absent employee inquiry, the plan administrator maintained an affirmative fiduciary obligation to disclose vital retirement information. *Id.* at 1014. After enumerating ERISA's fiduciary duties, the court discussed federal disclosure jurisprudence establishing an affirmative duty for fiduciaries to inform participants of material information. *Id.* at 1013-16. Reaffirming the *Unisys* standard, the court emphasized that a misrepresentation is material if it precludes a prospective retiree from making an "adequately informed retirement decision." *Id.* at 1015-16. Because an omission may rise to the level of materiality, the court concluded that the defendant had an affirmative fiduciary duty, irrespective of whether the plaintiff inquired into irrevocability, to disclose all material information regarding his retirement options. *Id.* at 1015; see also *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir. 1997) (finding that ERISA fiduciary has duty to speak when silence might be harmful).

106. See *Krohn*, 173 F.3d at 550 (concluding that plan administrator has "affirmative duty to inform when [it] knows that silence might be harmful" (quoting *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993))); *Jordan*, 116 F.3d at 1015 (emphasizing fiduciary has affirmative duty to disclose material information); *Shea v. Esensten*, 107 F.3d 625, 629 (8th Cir. 1997) (finding that HMO must disclose financial incentive structure to ERISA beneficiaries).

mately, the affirmative duty to give *current* plan information to plan participants provided the foundation for the courts to develop a fiduciary obligation to inform participants of *proposed* plan changes.

For the past decade, federal courts consistently have required employers to respond honestly and completely to employees' inquiries regarding proposed plan benefits.¹⁰⁷ Employee inquiries into proposed benefits plans often arise in an early retirement context.¹⁰⁸ For the lower courts, the primary difficulty in applying *Varity's* material misrepresentation test to the early retirement context was defining the point in time at which failing to disclose a proposed early retirement plan constituted a deceitful misrepresentation.¹⁰⁹ In response to this question, the federal courts developed the "serious consideration" test.

In 1996, the Third Circuit Court of Appeals developed the "serious consideration" standard to define the point in time when misrepresentations regarding potential plan amendments rise to the level of materiality.¹¹⁰ Accord-

107. See *Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997) (recognizing previous holding that material misrepresentations about future plan offerings constitute breach of fiduciary duties when employer has seriously considered future changes); *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122 (2d Cir. 1997) (finding affirmative material misrepresentations about proposed future changes to employee benefit plan constitute breach of fiduciary duty); *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir. 1996) (finding plan administrator may not make affirmative material misrepresentations to plan participants about changes to benefits plan); *Mullins v. Pfizer*, 23 F.3d 663, 669 (2d Cir. 1994) (concluding that plan administrator may not make affirmative material misrepresentations to plan participants about changes in employee benefits plan); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) (determining misleading communications about future changes in benefit plans constitute breach of fiduciary duty); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988) (holding that when seriously considering plan change employers have fiduciary duty not to make misrepresentations to plan participants concerning the plan offering).

108. Many employers, seeking to reduce their workforce, offer groups of employees special early retirement benefits if they retire within a specified time period, called "the window period." For a discussion of early retirement window benefits, see JOHN H. LANGBEIN & BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* 327 (3d ed. 2000).

109. See Ethan Lipsig et al., *Fiduciary Disclosure Obligations, in ERISA FIDUCIARY LAW* 162 (Susan P. Serota ed., Supp. 1998) (stating that duty to avoid affirmative misrepresentations poses "thorny legal and practical issues" like determining when duty arises).

110. See *Fischer v. Phila. Elec. Co.*, 96 F.3d 1533, 1539 (3d Cir. 1996) (articulating three part test for determining when benefit proposal is under "serious consideration"). Serious consideration provides guidance to employers when communicating with employees, but is not applicable to the affirmative duty scenario that requires employers to disclose proposed changes to benefits plans without employee inquiry. Regardless of whether an employer is seriously considering a proposed amendment, employers are not subject to an affirmative fiduciary duty to disclose because they are not acting as fiduciaries when they amend employee benefits plans. See *infra* Part IV.A.-C (discussing employers acting as settlors when amending employee benefits plans).

ing to the Third Circuit, employers have an obligation not to misrepresent the status of proposed changes when: "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."¹¹¹ Based on this standard, once an employer begins "seriously considering" proposed changes in benefits plans it must disclose the existence of the changes upon employee inquiry.¹¹²

The cases defining the "serious consideration" standard applied in conjunction with the federal jurisprudence emphasizing the affirmative duty to disclose current plan information provide a foundation for the affirmative duty to disclose proposed changes. The affirmative duty cases rely on the common law of trusts that require a trustee to affirmatively disclose material information that is harmful to a beneficiary's interests.¹¹³ Because the "serious consideration" standard defined a point when information becomes "material," the courts could combine the two legal standards to require an employer "seriously considering" proposed changes to voluntarily provide the information to its employees.¹¹⁴

D. The Affirmative Fiduciary Duty to Disclose Proposed Changes

Some practitioners and judges argue that an affirmative fiduciary duty to disclose proposed changes in employee benefits plans is the next logical step in the common law development of ERISA fiduciary duties.¹¹⁵ A panel of the Ninth Circuit Court of Appeals is the only court to impose an affirmative duty to disclose proposed changes in employee benefit programs. Even though an en banc court later reversed the decision, *Bins v. Exxon Company*

111. See *Fischer*, 96 F.3d at 1539 (defining "serious consideration" standard). *But see* *Balzone v. Eastman Kodak Co.*, 109 F.3d 117, 125 (2d Cir. 1997) (disregarding "serious consideration" standard and developing multiple factor test to determine whether employer affirmatively misrepresented status of proposed changes).

112. See *Vartanian v. Monsanto Co.*, 131 F.3d 264, 272 (1st Cir. 1997) (applying "serious consideration" test and finding that no early retirement plan under consideration when plaintiff retired; therefore, defendant did not affirmatively mislead plaintiff by telling him that "no material changes affecting his benefits plan were being considered").

113. See *supra* Part III.C.1 (presenting cases discussing affirmative duty to disclose).

114. See *infra* Part III.D (discussing Ninth Circuit opinion deriving affirmative duty to disclose out of common law of trusts and prior federal precedent).

115. See *Bins I*, 189 F.3d 929, 939 (9th Cir. 1999) (holding once employer seriously considers changes it has affirmative duty to disclose proposed changes in employee benefits plans), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000); *Clobes*, *supra* note 9, at 236 ("It is essential that courts heed the lessons of *Vanity* and impose upon plan fiduciaries an affirmative duty to disclose material information."); *Barry*, *supra* note 9, at 761-64 (developing affirmative duty to disclose from common law of trusts); *Jensen*, *supra* note 9, at 159 (supporting continuation of trend toward requiring increased disclosure from ERISA employers emphasizing that employer silence about material facts should be considered misleading communication).

U.S.A. (*Bins I*)¹¹⁶ serves as an example of the legal argument supporting an affirmative fiduciary duty to disclose proposed changes.¹¹⁷ After working for Exxon U.S.A. (EUSA) for fifteen years, the *Bins I* plaintiff decided to retire.¹¹⁸ Prior to retiring, the plaintiff inquired into rumors that the company, in an effort to reduce its workforce, might institute a lump sum retirement incentive to supplement regular retirement benefits under its Special Program of Severance Allowances (SPOSA).¹¹⁹ Six different individuals within the company all denied having any knowledge of a SPOSA offering.¹²⁰ Relying on this information, the plaintiff retired, and within two weeks of his retirement, EUSA publicly announced the availability of a lump sum retirement incentive.¹²¹ After the announcement, the plaintiff filed suit contending that EUSA breached its duties as an ERISA fiduciary.¹²²

The court of appeals found that once EUSA began "seriously considering" a proposal to offer an enhanced severance package, it not only had a duty to answer the plaintiff's questions in a straightforward manner, but also had an affirmative duty to provide information regardless of whether ERISA beneficiaries ask specific questions.¹²³ The court emphasized that "[t]he core obligation of an ERISA fiduciary is to 'discharge [its] duties with respect to

116. 189 F.3d 929 (9th Cir. 1999).

117. See *Bins I*, 189 F.3d 929, 939 (9th Cir. 1999) (holding that once employer-fiduciary seriously considers proposal to change ERISA benefits, it has affirmative duty to disclose information about plan), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000). In *Bins I*, the court addressed whether an employer had a duty to tell a retiring employee that the company was seriously considering a proposal that contained enhanced retirement opportunities. *Id.* at 931. While considering retirement, six company officials informed an ERISA beneficiary that the company was not considering offering an enhanced retirement plan. *Id.* at 932-33. However, two weeks after the plaintiff's retirement, the company did offer a sweetened retirement package. *Id.* at 933. According to the court, the company violated its fiduciary duty to disclose proposed changes in employee benefits programs because ERISA fiduciaries must always act in the best interest of the beneficiaries. *Id.* at 934. When an employer seriously considers offering a more generous retirement package, it knows that such information is extremely important to any beneficiaries considering retirement. *Id.* at 939. Therefore, the court found that once an employer-fiduciary seriously considers a proposal to change a benefits program, it has an affirmative duty to disclose information about that plan to all individuals for whom the employer knows, or has reason to know, that the information is material. *Id.* But see *Bins v. Exxon Co.*, 198 F.3d 1191 (9th Cir. 2000) (ordering case to be reheard *en banc*).

118. *Bins I*, 189 F.3d at 932.

119. See *id.* (discussing SPOSA ERISA benefit plan permitting EUSA to pay special severance benefits to employees as means of reducing its workforce).

120. See *id.* (finding plaintiff questioned his two immediate supervisors, assigned benefits counselor, human resources advisor, Exxon attorney, and his supervisor's supervisor about possible impending SPOSA offering).

121. *Id.* at 933.

122. *Id.*

123. *Id.* at 934.

a plan solely in the interest of the participants and beneficiaries."¹²⁴ According to the court, an ERISA fiduciary does not suspend its duty of loyalty to a beneficiary when amending an employee benefits plan.¹²⁵ Therefore, the duty of loyalty requires an employer-fiduciary to provide information about potential changes to benefit programs to enable beneficiaries to make informed decisions about continued employment.¹²⁶

Based on the duty of loyalty, the court determined that once ERISA fiduciaries have material information regarding a benefit plan, they have an affirmative obligation to provide beneficiaries with the information regardless of whether employees inquire into proposed changes.¹²⁷ The court emphasized that other federal circuits found an affirmative duty to disclose current plan information¹²⁸ and a fiduciary duty to disclose seriously considered proposed changes when asked about the plan.¹²⁹ Not wanting to penalize the individual who fails to ask the right questions, the court extended an affirmative duty to disclose proposed changes.¹³⁰

The court supported an affirmative duty by stating that "[a]n employer seriously considering a proposal to offer more generous retirement or severance benefits knows that such information is material to plan participants who are making plans to retire."¹³¹ Because the fundamental duty of ERISA fiduciaries is to protect the beneficiary's interests, the court found it necessary to

124. *Id.* (quoting ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1994)).

125. *See id.* at 936 ("The employer, when acting as a fiduciary, has an undivided duty of loyalty to the participants and beneficiaries of the plan. The employer's need to operate efficiently as a business should play no role in determining when the employer has an obligation to communicate with employees about a proposed change in benefits."). The "when acting as a fiduciary" language is the critical fallacy in the Ninth Circuit's opinion. Employers do not act as fiduciaries when amending employee benefits plans to develop early retirement programs. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996) (finding employers amending pension plans act as settlors and not as fiduciaries). The Ninth Circuit failed to determine whether the defendant acted in a fiduciary capacity before imposing an affirmative fiduciary duty to disclose. *See infra* Part IV.A (discussing distinction found in ERISA between acting as fiduciary and acting as settlor).

126. *See Bins I*, 189 F.3d 929, 934 (9th Cir. 1999) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 502-03 (1996) (stating that information regarding future of benefit plans falls within ERISA's statutory definition of fiduciary act)), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000).

127. *Id.* at 939.

128. *See id.* (citing *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997) (stating when ERISA fiduciaries make false stipulations regarding future benefits and beneficiaries rely on guarantees to their detriment employer breaches fiduciary duty)).

129. *See id.* (citing *Fischer v. Phila. Elec. Co.*, 94 F.3d 1533, 1537 (3d Cir. 1996) (finding once ERISA fiduciary is seriously considering proposed changes to employee benefit program it has duty to answer accurately participant inquiries into prospective plan)).

130. *See id.* (finding rule would penalize employees who work far away from corporate headquarters because they do not have access to informal sources of information).

131. *Id.*

enforce a blanket disclosure rule to ensure that employees have access to information they need to make important decisions.¹³² Thus, the court held that once an employer reaches the serious consideration threshold, ERISA fiduciaries have an affirmative duty to disclose proposed changes in the employment benefits program to all beneficiaries to whom the employer knows that the information is material.¹³³ Although the Ninth Circuit panel's opinion is the first to extend an affirmative duty to disclose, many practitioners also support this position. However, other practitioners do not agree that ERISA permits the development of an affirmative duty to disclose proposed changes.¹³⁴

IV. The Two Hats Doctrine

The development of an affirmative duty to disclose proposed changes is problematic because it imposes fiduciary duties on an employer when not acting in a fiduciary capacity. An affirmative duty to disclose proposed changes requires employers to act in a fiduciary capacity with the responsibility to "act solely in the interest of plan participants" when amending employee benefits plans.¹³⁵ This assumption ignores the well-established two hats doctrine that maintains that employers do not act as fiduciaries when amending employee benefits plans.¹³⁶ An employer does not serve as a fiduciary when it amends a retirement plan; therefore, courts cannot impose an affirmative fiduciary duty on employers to disclose proposed changes to benefits plans.

132. See *id.* ("In its role as a business, the employer may wish to keep such information from the employees who are about to retire, in the hope that they will retire without the lure (and the expense) of the more generous financial package. But in its role as a fiduciary, the employer is forbidden to keep that information to itself once it becomes material.")

133. See *id.* (identifying fiduciary duty as requiring employer-fiduciary to inform employees to whom information is material and to describe proposed changes and how they might affect beneficiary); see also *Wayne v. Pac. Bell*, 189 F.3d 982, 988 (9th Cir. 1999) (stating that employer-fiduciary that seriously considers proposal to change retirement benefits has affirmative duty to disclose information about ERISA plan).

134. See *Clobes*, *supra* note 9, at 236 (finding it essential to impose upon plan fiduciaries affirmative duty to disclose material information to protect interests of participants and beneficiaries); *Barry*, *supra* note 9, at 761-64 (developing affirmative duty to disclose from common law of trusts); *Davi*, *supra* note 9, at 647 (supporting affirmative fiduciary duty to disclose because employees' interests in receiving information about future plan amendments outweigh employers' interests in effectuating business objectives); *Jensen*, *supra* note 9, at 159 (supporting continuation of trend toward requiring increased disclosure from ERISA employers and emphasizing that employer silence about material facts should be considered misleading communication).

135. See *Bins I*, 189 F.3d 929, 936 (9th Cir. 1999) (arguing employer does not suspend fiduciary responsibilities when amending employee benefits plans), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000).

136. See *infra* Part IV.A (discussing fiduciary and settlor distinction).

A. *The Legislative Foundation: Settlor v. Fiduciary Distinction*

Congress drafted ERISA after a decade of congressional research and legislative compromise. Although protecting employees' interests was the primary incentive driving ERISA, Congress had to consider the voluntary nature of benefits plans when drafting the legislation.¹³⁷ As a result, Congress balanced ERISA's primary goal of securing plan benefits with a desire to encourage the development of employee benefit programs by minimizing plan costs.¹³⁸ This congressional compromise is inherent in all of ERISA's provisions – especially the fiduciary duty sections.

The fiduciary duty provisions are grounded in trust law; however, to protect the balance established between the competing interests of employers and employees, Congress specifically modified trust law to fit the employee benefit context.¹³⁹ Trust law requires a trustee to have an undivided duty of loyalty to its beneficiaries.¹⁴⁰ This type of undivided loyalty does not apply to the em-

137. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262-63 (1993) ("There is, in other words, a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.'" (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981))); H.R. REP. NO. 93-533, at 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans.").

138. See 263 CONG. REC. S15,762 (1974) ("Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping within reasonable limits for employers."); *Bintz*, supra note 9, at 988-89 (finding that ERISA legislative purpose to protect employees' rights must be balanced by desire to encourage employers to offer employee benefits plans); *Brauch*, supra note 26, at 1289 ("Congress acted carefully to ensure that administrative burdens and costs imposed on employee benefit plans by ERISA were not so great that they would deter employers from creating or continuing employee benefit plans."); see also H.R. CONF. REP. NO. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5167 (discussing ERISA balancing). Representative Ullmann, a ranking majority member of the House Ways and Means Committee, characterized the dual purposes of ERISA in the following speech:

I want to emphasize that these new requirements have been carefully designed to provide adequate protection for employees and, at the same time, provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed. For this reason, we have been extremely careful to keep the additional costs very moderate.

Id.

139. See *Brauch*, supra note 26, at 1286 (finding Congress modified trust principles to fit employee benefits context); Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1117 (1988) (same).

140. 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 170 (4th ed. 1988).

ployee benefit context because ERISA's prohibited transaction rules allow a fiduciary also to serve as an officer, employee, agent, or other representative of a party in interest.¹⁴¹ This exception permits a company, when not acting as a fiduciary, to consider its other legitimate business concerns.¹⁴² To distinguish between fiduciary and non-fiduciary activities, Congress defined the specific instances in which employers are expected to act as fiduciaries.¹⁴³ ERISA expressly states that an employer acts as a fiduciary only "to the extent" that it acts in one of the three fiduciary capacities.¹⁴⁴ The explicit list of fiduciary functions fails to mention any acts relating to the establishment and amendment of the employee benefits plan itself.¹⁴⁵ This omission provides the foundation for the two hats doctrine.

The two hats doctrine recognizes the separation between employer functions – to which no fiduciary duties attach – and plan administrator functions – to which fiduciary duties do attach.¹⁴⁶ Using another trust law analogy, courts

141. See 29 U.S.C. § 1108(c)(3) (1994) ("Nothing . . . shall be construed to prohibit any fiduciary from – serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest."); Fischel & Langbein, *supra* note 139, at 1128 (describing § 408(c)(3) as counterbalancing provision to notion that plans are only drafted for exclusive benefit of employees). According to Fischel, Congress perpetuated its goal of encouraging the development of pension plans by giving employers the authority to serve as the plan fiduciary. *Id.* at 1127. The alternative, forcing employers to allow employees to choose their own plan fiduciaries, deprived employers of investment and design authority. *Id.*; see also Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986) (finding ERISA "envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer"); VanderPloeg, *supra* note 3, at 263 (discussing ERISA provisions overriding traditional trust law).

142. See VanderPloeg, *supra* note 3, at 272-73 (maintaining that statute cannot mandate that every employer action be for "exclusive benefit" of plan participants). VanderPloeg pointed out that employers sometimes have to take actions, like terminating benefits plans, that are directly hostile to the interests of the plan beneficiaries. *Id.* at 273.

143. See *supra* note 44 (articulating ERISA's definition of fiduciary).

144. See 29 U.S.C. § 1002(21)(A) (1994) (defining when person is ERISA fiduciary). The statute provides a functional definition of fiduciary stating that a person acts as a fiduciary to the extent that he or she: (1) exercises any discretionary authority respecting management of plan assets; (2) renders investment advice; or (3) maintains discretionary authority or responsibility in the administration of plan. *Id.* The "to the extent" language in the statute greatly limits the scope of an employer's fiduciary responsibilities. In general, employers do not owe a duty of loyalty to participants unless they act in one of the three specified capacities. See Barnes v. Lacy, 927 F.2d 539, 544 (11th Cir. 1991) (emphasizing employers assume fiduciary status "only when and to the extent" that they function in capacity as plan administrators); VanderPloeg, *supra* note 3, at 267 (finding ERISA provisions recognize and accommodate employers fiduciary and non-fiduciary roles).

145. See VanderPloeg, *supra* note 3, at 272 (recognizing fiduciary definition missing functions of establishing and amending plan); see also Johnson v. Ga.-Pac. Corp., 19 F.3d 1184, 1188 (7th Cir. 1994) ("One subject conspicuously missing from [ERISA's definition of fiduciary in § 3(21)(A)] is the establishment and amendment of the plan itself.").

146. See Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1416-17 (2d Cir. 1985) (creating

and regulators deem actions such as designing, establishing, amending, and terminating plans as "settlor" functions.¹⁴⁷ A settlor of a trust does not have the duty to act solely in the interest of the beneficiaries; therefore, an employer, acting as a settlor when amending an employee benefit plan, does not have to act in the best interest of benefit plan beneficiaries.¹⁴⁸ Instead, an employer, acting in a settlor capacity, can act in the best interest of the company. The two hats doctrine permits the employer to act in its own self interest when adopting, amending, or terminating an ERISA plan, but requires the employer to act as a fiduciary, "in the interests of the beneficiaries," when administering an ERISA plan.¹⁴⁹

B. Supreme Court's Discussion of the Two Hats Doctrine

In 1995, the Supreme Court adopted the two hats doctrine. In *Curtiss-Wright Corp. v. Schoonejongen*,¹⁵⁰ a unanimous United States Supreme Court stated that a company does not act in a fiduciary capacity when amending welfare plans¹⁵¹ and an employer retains a general ability to amend or terminate welfare plans at any time and for any reason.¹⁵² Then, in *Lockheed Corp.*

"two hats" metaphor). Giving credit to the district court for its genesis, the Second Circuit Court of Appeals created the two hats doctrine by stating,

Judge Spizzo concluded that ERISA permits employers to wear "two hats," and they assume that they assume fiduciary status "only when and to the extent" that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA. We agree. [Western Union's] officers acted on behalf of a corporate employer and not as Plan fiduciaries in amending its pension plan.

Id. (citations omitted).

147. See RESTATEMENT (SECOND) OF TRUSTS § 3(1) (1959) (defining settlor as individual who creates trust).

148. See LANGBEIN & WOLK, *supra* note 108, at 673-74.

149. See Alfred W. Blumrosen et al., *Downsizing – Employee Rights or Employer Prerogative?*, 2 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 1, 83 (1998) (discussing two hats doctrine).

150. 514 U.S. 73 (1995).

151. See 29 U.S.C. § 1002(1) (1994) (defining welfare plan). A welfare plan is a plan that provides: "[A] medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident disability, death or unemployment, or vacation benefits . . ." *Id.* The other type of employee benefits plan is a pension plan, which "provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." *Id.* § 1002(2)(A).

152. See *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (stating that company is free to adopt, amend, or terminate welfare plans for any reason at any time). In *Curtiss-Wright*, the Court considered whether a reservation of rights provision satisfied ERISA's requirement to maintain a procedure for amending a welfare benefits plan. *Id.* at 75. The plaintiffs instituted the action in federal district court after *Curtiss-Wright* terminated their post-retirement health care benefits. *Id.* at 76. Disregarding all of the substantive claims, the district court found for the plaintiffs because the defendant's summary plan description did not include

v. Spink,¹⁵³ the Supreme Court extended its *Curtiss-Wright* holding to pension plans.¹⁵⁴ In an effort to reduce its workforce, Lockheed amended its benefits plan to offer increased pension benefits to employees who would take early retirement.¹⁵⁵ However, to participate in the early retirement program, an employee had to release any employment related claims he or she might have against the company.¹⁵⁶ Because he refused to waive his right to future claims, the plaintiff retired without taking any extra benefits and instituted an

an amendment procedure. *Id.* *Curtiss-Wright* argued on appeal that its reservation of rights clause constituted a valid amendment procedure, but the court of appeals confirmed the district court's decision by declaring the clause void for vagueness. *Id.* at 76-77.

Writing for an unanimous Court, Justice O'Connor determined that the reservation of rights clause satisfied the ERISA requirements. *Id.* at 81. Justice O'Connor argued from the premise that ERISA did not create substantive rights to employer-provided health benefits; therefore, employers retained the ability to adopt, modify, or terminate welfare plans at any time and for any reason. *See id.* at 78 (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)). According to the Court, ERISA requires plan administrators to establish a procedure for amending the benefits plan and to identify the persons with the authority to amend the plan. *Id.* Because the ERISA definition of "person" includes companies, stating that "the company" retained the authority to amend the plan satisfied the identification requirement. *Id.* at 78-79. The Court also derived an amendment procedure from the reservation of rights clause by relying on corporate law principles to supplement the brief statement. *Id.* at 79-80. By satisfying both ERISA requirements, the Court determined *Curtiss-Wright's* reservation of rights clause did serve as an adequate amendment procedure. *Id.* at 81.

153. 517 U.S. 882 (1996).

154. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("We see no reason why the rule of *Curtiss-Wright* should not be extended to pension benefit plans."). In *Lockheed*, the Court considered, *inter alia*, whether the defendant acted as a fiduciary when it amended its benefit plans to create early retirement incentives. *Id.* at 889-90. This issue arose after the Lockheed Corp. amended its employee benefit plan to create early retirement incentives but conditioned acceptance on waiving employment-related claims against the company. *Id.* at 885. Because of the litigation condition, the plaintiff did not take early retirement and instituted an action against the company claiming the amendments violated an ERISA provision prohibiting a fiduciary from using plan assets for the benefit of a party in interest. *Id.* at 885-86. The district court dismissed the lawsuit, but the Court of Appeals for the Ninth Circuit reversed that decision, finding that the defendant breached its fiduciary duties when it "purchased" a benefit for the company by conditioning early retirement benefits on the release of potential claims. *Id.* Disagreeing with this outcome, the Supreme Court believed the court of appeals erred by not initially determining whether fiduciary status existed in the case before it found a breach of fiduciary duty. *Id.* at 889. The Court recounted its decision in *Curtis-Wright* that employers do not assume fiduciary status when adopting, amending, or terminating welfare benefits plans. *Id.* at 890. Because ERISA provides a functional definition of fiduciary that does not include plan design, the *Curtiss-Wright* legal rule should apply to pension plans. *Id.* at 890-91. Therefore, the Court found that the defendant acted as a settlor, and not as a fiduciary, when it amended the pension plan to adopt early retirement incentives and could not be held to fiduciary standards of conduct. *Id.* at 891.

155. *Id.* at 885.

156. *Id.*

action against the company for breaching ERISA's duty of care and prohibited transaction provisions.¹⁵⁷

After the district court granted the defendant's motion to dismiss, the court of appeals reversed the judgment by finding that the plaintiff successfully proved his breach of fiduciary duty claim.¹⁵⁸ The Supreme Court reversed the judgement of the court of appeals because the defendant was not acting as a "fiduciary" when it amended the employee benefits plan.¹⁵⁹ Writing for the Court, Justice Thomas concluded that the court of appeals erred by not determining whether the defendant acted in a fiduciary capacity before it found a breach of fiduciary duty.¹⁶⁰

Crediting *Curtiss-Wright* for establishing the legal standard, the Court found that when employers amend welfare benefits plans they act as "settlers" and not as "fiduciaries."¹⁶¹ According to the Court, ERISA's definition of fiduciary compels this conclusion because the defined functions do not include acts pertaining to plan design.¹⁶² Because ERISA's fiduciary provisions do not distinguish between welfare or pension plans, the Court decided to extend *Curtiss-Wright's* holding to the amendment of pension plans.¹⁶³ The Court found that the defendant acted as a settlor, and not as a fiduciary, when

157. *Id.* at 885-86. Specifically, the plaintiff accused the defendant of violating ERISA § 406(a)(1)(D), which prohibits a fiduciary from using the plan in transactions that use plan assets to benefit a party in interest. *Id.* at 886. Because the prohibited transaction rules govern fiduciary actions, the court must find that the defendant acted as a fiduciary before these applied.

158. *Id.* The Ninth Circuit Court of Appeals found the plan amendments unlawful because ERISA prohibits a fiduciary from using a benefits plan to benefit another party in interest. *Id.* Because the defendant provided financial incentives in exchange for a waiver of employment claims, the company used "[p]lan assets to 'purchase' a significant benefit for Lockheed." *Id.*

159. *See id.* at 891 (finding defendant acted as settlor, and not fiduciary, when it amended retirement plan).

160. *Id.* at 889. ERISA § 406(a)(1)(D) governs fiduciary actions; therefore, to recover under this provision the plaintiff must prove that the defendant acted as a fiduciary when it entered into the prohibited transaction. *Id.* at 888.

161. *See id.* at 890 (finding that employers act as settlers of trust when adopting, amending, or terminating benefits plans (citing *Johnson v. Ga.-Pac. Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994))).

162. *See id.* (determining fiduciary definition does not include plan design thereby finding amending actions not subject to fiduciary review (quoting *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995))).

163. *See id.* at 891 ("Given ERISA's definition of fiduciary and the applicability of the duties that attend that status, we think the rules regarding fiduciary capacity – including the settlor-fiduciary distinction – should apply to pension and welfare plans alike."). ERISA requires welfare plan administrators to abide by the reporting and disclosure requirements, fiduciary duty provisions, and the enforcement and remedial sections, but excludes them from complying with vesting and funding requirements. *See LANGBEN & WOLK, supra* note 108, at 176 (discussing ERISA's requirements regarding welfare benefit plans).

it amended its employee benefits plan, therefore the plaintiff could not recover damages under ERISA fiduciary obligations.¹⁶⁴ Thus, under *Lockheed*, an employer is not subject to fiduciary provisions when amending employee benefits plans.

C. *The Application of Two Hats Doctrine*

The two hats doctrine supports two arguments against an affirmative fiduciary duty on employers to disclose proposed changes in employee benefits plans. First, courts can not impose an affirmative fiduciary duty on employers to disclose proposed changes because they are acting as settlors, and not as fiduciaries, when they amend benefit plans.¹⁶⁵ Second, an affirmative fiduciary duty disturbs ERISA's legislative balance by interfering with an employer's ability to make fundamental business decisions.¹⁶⁶

1. *Employer Acting as Settlor*

Because an employer acts as a settlor and not as a fiduciary when it amends a benefit plan, courts cannot subject an employer to an affirmative fiduciary duty to disclose proposed plan amendments. An affirmative fiduciary duty to disclose proposed changes ignores ERISA's distinction between acting as an employer and acting as a plan administrator.¹⁶⁷ In the *Varity* decision, the Supreme Court, in dictum, recognized this distinction.¹⁶⁸ Relying on the *Curtiss-Wright* holding, *Varity* attempted to argue that amending its employee benefits plan was not an act of plan administration to which fiduciary duties attach.¹⁶⁹ The Court recognized the validity of the defendant's argument, but acknowledged a distinction between amending a plan and making statements about the future of the plan.¹⁷⁰ Although fiduciary duties may not attach when

164. *Id.*

165. *See infra* Part IV.C.1 (recognizing inherent fallacy of imposing fiduciary duties on employer acting as settlor).

166. *See infra* Part IV.C.2 (discussing employer's ability to make fundamental business decisions).

167. *See supra* note 125 (emphasizing that critical fallacy in Ninth Circuit's panel opinion in *Bins I*, 189 F.3d 929 (9th Cir. 1999), was its failure to recognize that employers do not act as fiduciaries when amending benefits plans).

168. *See Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("While it may be true that amending or terminating a plan . . . is beyond the power of a plan administrator . . . and, therefore, cannot be an act of plan 'management' or 'administration' -- it does not follow that making statements about the likely future of the plan is also beyond the scope of plan administration.").

169. *Id.* The Supreme Court decided *Varity* after deciding *Curtiss-Wright*, but before it handed down its *Lockheed* decision.

170. *Id.*

an employer amends a plan, the *Varity* Court emphasized that when a plan administrator speaks, she must speak truthfully.¹⁷¹

It is this distinction between amending a plan and speaking about a plan that led the en banc Ninth Circuit Court of Appeals to reverse the panel's *Bins I* decision that an employer has an affirmative duty to disclose proposed changes in employee benefits programs.¹⁷² The en banc court held that an employer does not have an affirmative duty to disclose proposed changes in employee benefit plans.¹⁷³ Looking at the detailed definition of a fiduciary, the *Bins II* court found that the act of amending a plan is not an act of plan management or administration; therefore, an employer's "serious consideration" of a plan amendment does not implicate ERISA's fiduciary duties.¹⁷⁴ Drawing a firm distinction between settlor and fiduciary functions, the en banc court emphasized that when an employee inquires about prospective plan changes, the employer has a duty to respond accurately and completely.¹⁷⁵ Under this standard, the en banc court emphasized that it was an employer's communication, and not consideration, that triggered the fiduciary duty to disclose proposed changes in employee benefit plans.

Courts have recognized the distinction discussed by the en banc *Bins II* court throughout the development of the two hats doctrine. In *Berlin v. Michigan Bell Telephone Co.*¹⁷⁶ the Sixth Circuit Court of Appeals became the first court to distinguish between acting as an employer when amending a plan and acting a fiduciary when discussing the future of a plan.¹⁷⁷ In *Berlin*, the

171. *See id.* (holding intentional misrepresentations about future of plan benefits is act of plan administration).

172. *Bins II*, 220 F.3d 1042, 1054 (9th Cir. 2000).

173. *Id.* at 1045 ("In the absence of an employee inquiry, however, the employer-fiduciary does not have an affirmative duty to volunteer information about any changes prior to their final adoption.").

174. *See id.* at 1053 ("The act of amending, or considering the amending of, a plan is beyond the power of a plan administrator and thus is not an act of plan management or administration." (citing *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996))).

175. *Id.*

176. 858 F.2d 1154 (6th Cir. 1988).

177. *See Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988) (noting defendant did not have to disclose anything about future availability of proposed benefits, but when choosing to communicate defendant must do so in straightforward manner). The Sixth Circuit Court of Appeals considered whether a company served in a fiduciary capacity when it allegedly made material misrepresentations regarding the future of its early retirement program. *Id.* at 1162. In 1980 and 1982, the defendant offered early retirement incentives to management employees to reduce its workforce. *Id.* at 1157. During the interim period between offerings, the plaintiffs maintain that the defendant made intentional misrepresentations that the company would not offer a second early retirement program to encourage employees to voluntarily retire without extra financial incentives. *Id.* at 1158-59. Excusing the defendant of liability, the district court found that deciding to offer an early retirement option was a business decision that

defendant offered an early retirement option for individuals retiring within a three-month period and then repeated the same option two years later for a two-month period.¹⁷⁸ The plaintiffs, employees who retired in the years between the two offerings, brought an action against the defendant for breaching its fiduciary duty by making material misrepresentations about the future availability of the early retirement option.¹⁷⁹ According to the district court, no fiduciary duties applied because the company acted in a business capacity when it made the decision to offer early retirement benefits.¹⁸⁰

Reversing the district court, the court of appeals distinguished the non-fiduciary act of making business decisions from the fiduciary act of communicating information to plan participants.¹⁸¹ The court of appeals recognized that an employer maintains an ability to make purely business decisions without complying with a duty of loyalty to plan participants because it is not acting in a fiduciary capacity.¹⁸² Then, the court qualified this standard by asserting that fiduciaries always have a duty of loyalty not to mislead plan participants through material communications.¹⁸³

According to the court, the duty not to mislead does not impose a "duty of clairvoyance" on employers to predict the future of employee benefits plans, nor do employers have an affirmative duty to communicate anything

employers make without fiduciary duty responsibilities. *Id.* at 1160-61. The court of appeals reversed the district court opinion by distinguishing between making business decisions and communicating to employees about the future of their employee benefit programs. *Id.* at 1163-64. Although employers have the freedom to make business decisions, they must comply with fiduciary duties of loyalty when discussing the potential outcome of those decisions with plan participants. *Id.*

178. *Id.* at 1157-59. During a time of financial difficulty, the company sought to decrease its expenses by creating an early retirement incentives to downsize management personnel. *Id.* at 1157.

179. *Id.* at 1156. The plaintiffs alleged that, between early retirement offerings, the plan administrator made several statements aimed at intentionally misleading them into believing that the company would not offer another early retirement plan. *Id.* at 1158. The standard response to employees' inquiries was that "a general [early retirement] application was unlikely and those who were ready to retire should retire" and should not delay decisions based on the possibility of a second offering. *Id.* at 1159. According to the plaintiffs, the plan administrator made these statements with the intent to induce its employees to act on the material misrepresentations and voluntarily retire. *Id.* at 1160.

180. *Id.* at 1161. The plaintiffs attempted to argue that the court should draw a distinction between "the actual corporate decision to offer benefits and communications made by fiduciaries to potential plan participants about the likelihood of a second implementation or offering." *Id.* However, the district court rejected this assertion as illogical. *Id.*

181. *Id.* at 1164.

182. *See id.* at 1163 ("ERISA employers may wear two hats and assume fiduciary status only when functioning in their capacity as plan administrators, not when conducting business." (quoting *Amato v. W. Union Int'l*, 773 F.2d 1402, 1416-1417 (2d Cir. 1985))).

183. *Id.* at 1163.

about the future availability of early retirement programs.¹⁸⁴ However, when the employer decides to communicate material information to plan participants about an early retirement program, the plan administrator has a duty to represent the situation accurately.¹⁸⁵ This decision provided the foundation for federal jurisprudence that addressed the duty to disclose within the early retirement context and distinguished between an employer who makes misrepresentations and an employer who does not disclose information on his own initiative.¹⁸⁶

The two hats distinction recognized in *Bins II* and *Berlin* between communicating about proposed changes and considering proposed changes is supported by ERISA's textual provisions. Because ERISA has a functional definition of fiduciary, a court must conclude that an employer acts in a fiduciary capacity before holding it to fiduciary standards.¹⁸⁷ Although communicating about a plan is an act of administration, the Supreme Court specifically has stated that amending a plan is not a fiduciary function.¹⁸⁸ Therefore, a court may not impose an affirmative fiduciary duty to disclose proposed changes on an employer while it amends its benefits plan.¹⁸⁹ Imposing such a

184. *Id.* at 1164.

185. *See id.* ("[I]f the plan administrator . . . does communicate with potential plan participants *after serious consideration* has been given concerning a future implementation or offering under the plan, then any material misrepresentations may constitute a breach of their fiduciary duties.").

186. *See Pocchia v. Nynex Corp.*, 81 F.3d 275, 279 (2d Cir. 1996) ("While Nynex had a fiduciary duty not to make affirmative misrepresentations or omissions, it did not have a duty to disclose proposed changes in the absence of inquiry by Pocchia."); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995) ("Plan fiduciaries are not obligated under ERISA to provide information to potential plan beneficiaries about possible future [early retirement] offerings If a fiduciary chooses to provide such information about the future . . . it has a duty not to make misrepresentations about any future offering."); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (concluding fiduciaries do not have to disclose internal business operations but they must speak truthfully); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993) (noting that plaintiffs concede that business "had the right as an employer to make the business decision of how much and when to enhance pension benefits, but . . . also . . . an obligation under ERISA to tell the truth about such decisions when asked by plan participants"); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992) ("A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process."); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) ("Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards.").

187. *See supra* notes 137-49 and accompanying text (explaining functional definition of fiduciary).

188. *See supra* Part IV.B (discussing Supreme Court's application of two hats doctrine).

189. *See supra* Part IV.C.1 (discussing distinction between fiduciary act of communicating about plan and non-fiduciary act of amending plan).

duty not only violates ERISA's fiduciary provisions, but also disrupts the statute's goal of encouraging employers to develop pension plans.

2. *Protecting The Fundamental Business Decision*

Because of the voluntary nature of the private pension system, Congress drafted ERISA by balancing the primary goal of protecting employees' interests with the subsidiary goal of containing pension costs.¹⁹⁰ The two hats doctrine is a prime example of the compromise that Congress drafted into ERISA.¹⁹¹ To protect employee benefits, Congress required employers to serve as fiduciaries while acting in three specific capacities; however, to encourage the development of employee benefits plans, Congress permitted an employer to shed its fiduciary hat and wear its settlor hat when amending or terminating benefits plans.¹⁹² Congress realized that imposing a fiduciary duty of loyalty on employers at all times would discourage the development of pension plans by making the costs of maintaining the program too burdensome.¹⁹³ Likewise, an affirmative duty to disclose proposed changes in benefits programs would frustrate the normal decision making processes of a business and impede a company's ability to achieve legitimate business goals.¹⁹⁴

190. See H.R. REP. NO. 533, 93d Cong., 2d Sess. 1, reprinted in 1977 U.S.C.A.N. 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans."); Brauch, *supra* note 26, at 1291 (describing outcome of legislative process as ERISA "bargain").

191. Two weeks after President Ford signed ERISA into law, Senator Jacob K. Javits described the legislative balance:

The problem, as perceived by those who were with me on the this issue in Congress, was how to maintain the voluntary growth of private pension plans while at the same time making needed structural reforms . . . so as to safeguard workers against loss of their earned or anticipated benefits. . . . [The] new law represents an overall effort to strike a balance between the clearly-demonstrated needs of workers for greater protection and the desirability of avoiding the homogenization of pension plans into a federally-dictated structure that would discourage voluntary initiatives for further expansion and improvement.

Gordon, *supra* note 23, at 77.

192. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) ("The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident . . .").

193. See *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) ("The exemption of an employer's plan design decisions from fiduciary review is a necessary part of ERISA's legislative balance."); 120 CONG. REC. S15, 758 (1974) ("[I]t is important to recognize that if minimum standards are set too high we would discourage the creation of new plans."); *supra* Part IV.A (discussing Congress's goal of containing pension costs).

194. See *Bins I*, 189 F.3d 929, 943 (9th Cir. 1999) (Fernandez, J., dissenting) ("Today we move further from the policy of 'encouraging the formation of employee benefits plans.'")

In *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*,¹⁹⁵ a unanimous Supreme Court, in dicta, emphasized an employer's right to make fundamental business decisions.¹⁹⁶ After discussing the freedom employers maintain to amend and eliminate benefit programs,¹⁹⁷ the Court asserted that ERISA provided employers with the flexibility to make fundamental business decisions.¹⁹⁸ This conclusion justifies many federal

(quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000); Bintz, *supra* note 9, at 997-98 (arguing affirmative duties to disclose proposed changes in employee benefits programs unduly burden plan sponsors). Bintz effectively argued that deriving an affirmative duty to disclose from trust law unduly burdens employers, discourages the adoption and amendment of benefit plans, and "go[es] well beyond the amount of disclosure needed to protect participants' interests." *Id.* at 997. According to Bintz, an affirmative duty to disclose proposed changes would disrupt an employer's decision making process and frustrate its ability to achieve legitimate business goals. *Id.* He argued that this disruption may deter employers from offering employee benefit plans. *Id.* at 998.

195. 520 U.S. 510 (1997).

196. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997) (finding that fundamental business decisions affecting employee benefits plans do not give rise to § 510 cause of action). In *Inter-Modal*, the Supreme Court considered whether ERISA § 510 precluded a cause of action for interference with welfare benefits because they do not vest like pension benefits. *Id.* at 512. *Inter-Modal* defendant, Santa Fe Terminal Services, Inc. (SFTS), a wholly owned subsidiary of the defendant Atchison, Topeka and Santa Fe Railway Company (ATSF), employed the plaintiffs to transfer cargo from railcars to trucks. *Id.* After fifteen years of service, ATSF decided to contract out the "inter-modal" work to In-Terminal Services (ITS) and gave the plaintiffs the option of working for the new company or terminating their employment. *Id.* Because transferring from SFTS to ITS meant accepting a deduction in pension and welfare benefits, the plaintiffs brought a claim against its employer under ERISA § 510 for discharging participants with the intent to interfere with the attainment of employee benefit rights. *Id.* at 513.

The district court dismissed the action, but the court of appeals reinstated the plaintiffs' claim regarding pension benefits, but not welfare benefits. *Id.* Distinguishing the two types of plans, the court of appeals noted that employers maintain the ability to amend welfare plans, therefore plan participants do not have a future right to welfare benefits which is a prerequisite to § 510 relief. *Id.* at 513-14. The Supreme Court disregarded the distinction between the two types of employee benefits because the ERISA definition of "plan" included in § 510 refers to both welfare and pension benefit plans. *Id.* at 514-15. In addition, the Court emphasized the flexibility an employer maintains to amend or eliminate benefit plans. *Id.* at 515. Finally, the Court emphasized an employer's ability to make fundamental business decisions. *Id.* at 516.

197. See *id.* at 515 ("Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, 'they would err initially on the side of omission.'" (quoting *Heath v. Varsity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995))).

198. *Id.* at 516. The Court qualified an employer's ability to make fundamental business decisions by requiring that they follow amendment procedures and that they not be motivated by a desire to harm plan participants for the purpose of interfering with their rights under the plan. *Id.*

decisions supporting an employer's ability to make important business decisions without fiduciary restraint.¹⁹⁹

In *Siskind v. Sperry Retirement Program, Unisys*,²⁰⁰ the Second Circuit Court of Appeals addressed how ERISA's two hats doctrine provided employers with the latitude to make fundamental business decisions.²⁰¹ Following a corporate merger, the defendant offered early retirement incentives to some of its benefits plan participants in an effort to streamline certain company divisions.²⁰² Some of the excluded participants brought an action against the company for breaching its fiduciary duties by delegating amendment authority to the new corporate management.²⁰³ The district court granted the plaintiff's motion for summary judgment finding that the defendant breached its fiduciary duties.²⁰⁴

The court of appeals reversed the decision, because the district court overlooked Congress's goal of affording employers a degree of control when designing pension plans.²⁰⁵ The court determined that Congress purposefully

199. See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (finding pre-adoption disclosure impairs achievement of legitimate business goals); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1993) ("A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process."); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) ("Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards."); see also *Bins I*, 189 F.3d 929, 942 (9th Cir. 1999) (Fernandez, J., dissenting) ("Today we move further from the policy of 'encouraging the formation of employee benefit plans.'" (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987))), *rev'd en banc*, 220 F.3d 1042 (9th Cir. 2000); *Siskind v. Sperry Ret. Program*, 47 F.3d 498, 504 (2d Cir. 1995) (emphasizing employers' abilities to make fundamental business decisions); 120 CONG. REC. S15,758 (1974) ("[I]t is important to recognize that if minimum standards are set too high we would discourage the creation of new plans."); *infra* notes 200-54 and accompanying text (presenting cases refusing to expand fiduciary duties to limit employer's ability to make fundamental business decisions).

200. 47 F.3d 498 (2d Cir. 1995).

201. See *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) ("The exemption of an employer's plan design decisions from fiduciary review is a necessary part of ERISA's legislative balance.").

202. *Id.* at 501.

203. *Id.* at 502. The plan documents designated the Sperry Corporation Employee Benefits Executive Committee (the Committee) with the sole authority to amend the employee benefits plan. *Id.* at 501. According to the plaintiffs, the Committee wrongfully delegated the authority to determine the eligibility of early retirement benefits to corporate management, thereby breaching its fiduciary duties. *Id.* at 502. According to the district court, the new management proposed the exclusions and the Committee adopted the amendments. *Id.* This constituted a breach of fiduciary duty because the Committee had a fiduciary duty to design as well as adopt amendments to the plan. *Id.*

204. *Id.*

205. See *id.* at 501 ("[T]he trial court overlooked one of Congress' aims in enacting ERISA—

excluded plan design from ERISA's functional definition of a fiduciary to preserve ERISA's legislative balance between securing pension rights and encouraging employers to offer private retirement plans.²⁰⁶ Because single employer plans require company officers to act in the interest of both plan participants and the employer,²⁰⁷ the court found that ERISA permitted company officials to make business decisions regarding employee benefits plans without breaching their fiduciary responsibilities to plan participants.²⁰⁸ Thus, the court concluded that the defendant was not acting in a fiduciary capacity and, therefore, had the right to act in the best interest of the company when amending its pension plan.²⁰⁹

Consistent with the holding in *Siskind*, many federal courts have found that an affirmative duty to disclose proposed changes in benefits programs would frustrate an employer's ability to make fundamental business decisions regarding early retirement incentives.²¹⁰ In *Pocchia v. Nynex Corp.*²¹¹ the Court of Appeals for the Second Circuit confronted the typical early retirement scenario.²¹² Seven months after the *Pocchia* plaintiff retired, the defendant

that is, to afford employers designing pension plans a degree of flexibility and control.").

206. See *id.* at 505 ("Had ERISA subjected employer's amendments to stringent review, employers would have been less willing to create retirement plans."). The court's analysis began by recognizing that employers who design, amend, or terminate benefits plans do not come within ERISA's definition of fiduciary. *Id.* According to the court, exempting design functions from the fiduciary definition perpetuated ERISA's legislative balance. *Id.* When adopting ERISA, Congress's twin goals were furthering the formation of retirement plans and protecting individual pension rights. *Id.* Therefore, the court determined that placing excessive fiduciary duties on business decisions would decrease employers' interest in maintaining benefits plans. *Id.*

207. *Id.* at 506-07. In single employer plans, like the defendant's benefits plan, the plan administrators are also corporate officers. *Id.* at 506. Viewing the employer as a plan participant, the court argued the employer and plan participants have similar interests in protecting future benefits and using the benefits plan to contribute to business profitability. *Id.* Ultimately, the court concluded that corporate officers, serving as administrators, have duties to the corporation as well as duties to plaintiffs as beneficiaries. *Id.* at 507.

208. See *id.* at 507 (discussing employers' ability to make business decisions).

[T]he trustees of a single employer pension plan may conduct business on behalf of the employer in their capacities as corporate officers, and to the extent that such business is not regulated by ERISA, they may act without invoking their fiduciary duties to plan beneficiaries. For purposes of enacting an amendment regarding plan design, the plan trustees stand in the shoes of the employer.

Id.

209. *Id.*

210. See *supra* Part I (describing early retirement context in hypothetical); see also Bintz, *supra* note 9, at 997 (showing how affirmative duty to disclose proposed changes is problematic).

211. 81 F.3d 275 (2d Cir. 1996).

212. See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 277 (2d Cir. 1996) (summarizing background of dispute). In *Pocchia*, the court determined whether, absent employee inquiry,

offered an early retirement plan that entitled participants to enhanced retirement benefits.²¹³ Ineligible for the early retirement benefits, the plaintiff brought an action against the defendant for breach of fiduciary duty for failing to disclose that the company planned to implement an early retirement plan.²¹⁴ After the district court granted the defendant's motion for summary judgement, the court of appeals considered whether fiduciaries have a duty to volunteer information about proposed amendments to employee benefits plans.²¹⁵

The court of appeals affirmed the district court's decision not to support an affirmative duty to disclose by emphasizing an employer's ability to make business decisions.²¹⁶ First, the court determined that voluntary disclosure prior to adoption would confuse beneficiaries and unduly burden management with the responsibility of determining exactly when the duty to disclose arose.²¹⁷ Next, the court emphasized that pre-adoption disclosure impairs legitimate business objectives.²¹⁸ Finally, the court found that maintaining the secrecy of internal discussions and deliberations regarding prospective business decisions does not frustrate ERISA's purpose of ensuring that employees have sufficient information.²¹⁹ Because ERISA allows employers to make fundamental business decisions, the court found that they do not have an obligation to disclose proposed changes to retirement programs before they are adopted.²²⁰ Like the court in *Pocchia*, many federal courts rejected an

employers had a duty voluntarily to disclose proposed changes in employee benefits. *Id.* After *Pocchia* voluntarily resigned from his position, his former employer offered an early retirement plan. *Id.* Ineligible to participate in the plan, *Pocchia* brought a breach of fiduciary duty action against his former employer for failing to inform him of the proposed plan. *Id.* at 278. The district court granted the defendant's summary judgment motion and the court of appeals affirmed, concluding that an employer is not required to disclose proposed changes in employee benefits on its own initiative. *Id.* The court refrained from developing an affirmative fiduciary duty to disclose because it infringed on the defendant's ability to make legitimate business decisions. *Id.* at 278-79.

213. *Id.* at 277.

214. *Id.*

215. *Id.* at 278.

216. *Id.*

217. *Id.*

218. *Id.* at 278-79. The court posited a scenario in which a business, seeking to reduce its workforce, considers whether to offer an enhanced early retirement plan if necessary reductions do not occur through voluntary resignations. However, if fiduciaries maintained a duty to disclose the business strategy, it would fail because employees would not voluntarily retire if they knew that improved benefits were planned if workforce reductions did not succeed. *See id.* at 279 (articulating early retirement scenario (citing *Bintz*, *supra* note 9, at 997)).

219. *See id.* at 279 ("[A] bright line rule protects the interests of beneficiaries, who will receive information at the earliest point at which their rights can possibly be affected.").

220. *Id.* at 278; *see also* *Bettis v. J.J. Thompson*, 932 F. Supp. 173, 176 (S.D. Tex. 1996) (denying fiduciary duty to disclose in early retirement context by stating that "[t]he only duty

affirmative duty to disclose proposed changes in employee benefits plans because they recognized the importance of giving employers the freedom to make business decisions related to workforce reductions.²²¹ These federal courts recognized the relationship between containing pension costs and ERISA's goal of encouraging employers to provide pension plans.

The courts in *Siskind* and *Pocchia* recognized that Congress's goal of protecting pension benefits was balanced by a desire to contain administrative costs to encourage employers to develop pension plans.²²² In *Inter-Modal*, the Supreme Court emphasized that ERISA's two hats doctrine contains administrative costs by outlining when an employer must serve as a fiduciary and when it can act in its own interests.²²³ More specifically, federal jurisprudence supports the conclusion that ERISA provides employers with the flexibility to make fundamental business decisions such as whether to amend their employee benefits plans.²²⁴ An affirmative duty to disclose proposed changes protects employee benefits by infringing on an employer's ability to make important business decisions.²²⁵ Consequently, courts should not impose this type of obligation because it is not in accordance with the goal of ERISA to promote the development of employee benefit plans.

V. Analysis

Requiring employers to provide information to plan participants regarding proposed plan amendments on their own initiative: (1) violates ERISA

a corporation has to employees is accurately to explain the current state of affairs about the pensions plan then in effect.").

221. See *Pocchia v. Nynex Corp.*, 81 F.3d 275, 278 (2d Cir. 1996) (finding pre-adoption disclosure impairs legitimate business goals); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 406 (8th Cir. 1995) (determining employers are not required to provide general business information to plan participants); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994) (concluding fiduciaries do not have to disclose internal business operations but they must speak truthfully); *Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 133 (3d Cir. 1993) (conceding that business "had the right as an employer to make the business decision of how much and when to enhance pension benefits but . . . also . . . an obligation under ERISA to tell the truth about such decisions when asked by plan participants"); *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1993) ("A fiduciary must give complete and accurate information in response to participants' questions, a duty that does not require the fiduciary to disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process."); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988) ("Under ERISA, purely business decisions by an ERISA employer are not governed by section 1104's fiduciary standards.").

222. See *supra* notes 200-21 and accompanying text (discussing *Siskind* and *Pocchia* decisions).

223. See *supra* notes 195-99 and accompanying text (presenting *Inter-Modal* decision).

224. See *supra* Part IV.C.2 (discussing ability of employers to make fundamental business decisions).

225. See *supra* notes 210-21 (presenting cases refusing to infringe on employer's ability to make fundamental business decisions).

because it imposes fiduciary duties on an employer who does not act in a fiduciary capacity, and (2) disrupts ERISA's legislative balance by unreasonably infringing on an employer's ability to make fundamental business decisions. Like all statutes, ERISA is the product of legislative compromise.²²⁶ In this case, Congress wanted to protect employee benefits and to contain administrative costs.²²⁷ This balance not only protects current benefits, but also encourages employers to offer pension and welfare benefits to more employees, consequently increasing the amount of people with additional retirement income and health insurance. This legislative compromise is inherent in all of ERISA's provisions.

ERISA's disclosure provisions aim to provide employees with information so they can fully understand their rights under their benefits plan.²²⁸ The disclosure provisions are very specific and do not require an employer to disclose proposed amendments to employee benefits programs.²²⁹ The fiduciary duty provisions seek to prevent plan administrators from abusing their discretion by requiring them to act solely in the interest of the plan participants.²³⁰ However, Congress did not intend to require an employer, who may also serve as a plan administrator, always to act in the best interest of the plan beneficiaries.²³¹ To ease the administrative burdens of employers, Congress required an individual to abide by fiduciary responsibilities "to the extent" that she serves in one of the three fiduciary capacities.²³² This is an important limitation to the fiduciary provisions that the federal courts can not ignore.

Congress did intend the federal courts to interpret ERISA's fiduciary duty provisions in accordance with the common law of trusts.²³³ Moreover, the federal courts have used trust law to require plan administrators to provide complete and accurate *current* plan information on their own initiative and to provide truthful information regarding "seriously considered" potential plan amendments in response to employee inquiry.²³⁴ Yet, courts can not use trust law to require employers to provide information regarding "seriously consid-

226. See *supra* notes 190-94 and accompanying text (discussing legislative compromise).

227. See *supra* notes 190-94 and accompanying text (discussing legislative compromise).

228. See *supra* notes 23-41 and accompanying text (discussing pre-ERISA interest in disclosure and ERISA's disclosure rules).

229. See *supra* Part II.B (outlining ERISA's disclosure provisions).

230. See *supra* Part II.C (presenting ERISA's fiduciary provisions).

231. See *supra* notes 135-49 and accompanying text (describing two hats doctrine).

232. See *supra* notes 143-45 (discussing "to the extent" limitation on ERISA's fiduciary definition).

233. See *supra* notes 50-53 and accompanying text (discussing Congress's intention for courts to interpret fiduciary duties through common law of trusts).

234. See *supra* Part III (presenting development of ERISA fiduciary duties through trust principles).

ered" proposed plan amendments on their own volition because employers do not act as fiduciaries when amending employee benefits plans.²³⁵

Before a court can impose fiduciary duties on an employer, it must ensure that the employer is acting in a fiduciary capacity.²³⁶ ERISA's functional definition of "fiduciary" prevents a court from extending its fiduciary duty to disclose to an employer in the act of amending its benefit plan.²³⁷ Communicating to an employee about her benefits plan is an act of plan administration; therefore, fiduciary duties attach when an administrator speaks.²³⁸ Considering whether to amend an employee benefits plan is not an act of plan administration, but an act of plan design.²³⁹ Because ERISA's functional definition of a fiduciary does not include designing a plan, fiduciary duties do not attach to an employer when it acts in this capacity.²⁴⁰ A court that requires an employer to provide information regarding seriously considered proposed plan amendments of its own volition ignores ERISA's functional fiduciary definition, ERISA's legislative history, and the Supreme Court's conclusion that fiduciary duties do not attach when an employer amends a benefits plan.

As discussed above, ERISA's legislative history emphasizes that Congress balanced the primary purpose of protecting employee benefits with the goal of containing pension costs.²⁴¹ Congress recognized the high costs of requiring employers to act "solely in the interest" of plan beneficiaries when designing and amending benefits plans and specifically excluded those functions from the fiduciary provisions. Deciding whether to amend an employee benefits plan is a fundamental business decision that requires employers to consider a variety of factors.²⁴² A court that imposes an affirmative duty to disclose proposed changes on employers must maintain that the act of amending a benefits plan is a fiduciary function.²⁴³ If amending a plan is a fiduciary function, then the

235. See *supra* Part IV (developing two hats doctrine).

236. See *supra* Part IV.B (discussing Supreme Court jurisprudence requiring lower courts to determine whether employer acts as fiduciary before attaching fiduciary duties).

237. See *supra* Part IV.C.1 (discussing application of two hats doctrine).

238. See *supra* notes 167-86 and accompanying text (presenting cases that distinguish between fiduciary act of communicating about plan and non-fiduciary act of amending plan).

239. See *supra* notes 167-86 and accompanying text (presenting cases that distinguish between fiduciary act of communicating about plan and non-fiduciary act of amending plan).

240. See *supra* notes 167-86 and accompanying text (presenting cases that distinguish between fiduciary act of communicating about plan and non-fiduciary act of amending plan).

241. See *supra* Part IV.C.2 (discussing how to protect employer's ability to make fundamental business decisions).

242. See *supra* notes 200-25 and accompanying text (presenting cases that preserve employer's ability to make fundamental business decisions).

243. See *supra* notes 200-25 and accompanying text (presenting cases that preserve employer's ability to make fundamental business decisions).

secondary costs of maintaining a pension plan greatly increase because employers will have to make all decisions regarding plan design solely in the interests of the beneficiaries.²⁴⁴ Hence, an affirmative duty to disclose proposed changes disrupts ERISA's legislative goal of containing pension costs by greatly inhibiting an employer's ability to make fundamental business decisions.²⁴⁵ Consequently, courts should not extend fiduciary duties to include an affirmative obligation to disclose proposed changes because it violates ERISA and destroys its legislative balance.

VI. Conclusion

The federal courts must recognize that their authority to interpret ERISA's fiduciary provisions through the law of trusts is not absolute, but limited by the text of the statute.²⁴⁶ Congress spent more than two decades researching, drafting, and redrafting the legislation that federalized pension law; therefore, the courts should perpetuate the goals Congress sought to achieve and decide legal controversies in accordance with ERISA's provisions. To abide by these principles, the federal courts can not impose on employers an affirmative duty to disclose proposed changes in employee benefits programs.

ERISA permits a company to serve in a dual capacity as both employer and plan administrator. When an employer chooses to communicate with an employee regarding potential plan benefits, ERISA's fiduciary standards require her to provide complete and accurate material information about the current plan and seriously considered proposed amendments. However, when an employer makes a fundamental business decision to amend its employee benefits plan it is serving in a fiduciary capacity and is therefore not subject to a fiduciary duty of disclosure.

It is plain to see why the *Bins I* panel and various practitioners feel compelled to develop an affirmative fiduciary duty to disclose proposed changes in benefits programs. It is natural to feel sympathy for the employee who retired "one month too soon" to reap the financial benefits of a subsequent early retirement program.²⁴⁷ However, a court does not have the authority to

244. See *supra* notes 200-25 and accompanying text (presenting cases that preserve employer's ability to make fundamental business decisions).

245. See *supra* notes 200-25 and accompanying text (presenting cases that preserve employer's ability to make fundamental business decisions).

246. See *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990))).

247. See VanderPloeg, *supra* note 3, at 292 (discussing understandable pain felt by employee who terminated employment only to discover that "if they had only known" they could have left with better benefits).

redraft federal pension legislation. An affirmative duty to disclose proposed changes in benefits programs directly contradicts ERISA's statutory language and completely upsets ERISA's legislative balance of protecting employee benefits and containing pension costs.²⁴⁸ Therefore, the federal courts should refrain from imposing an affirmative fiduciary duty on employers to disclose proposed changes in employee benefits programs.

248. See *supra* Part IV (discussing fallacies inherent in affirmative fiduciary duty to disclose proposed changes).

ARTICLES
