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JUDICIAL DEVELOPMENTS IN EMPLOYEE BENEFITS LAW

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JUDICIAL DEVELOPMENTS IN EMPLOYEE BENEFITS LAWS

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I. <u>SUPREME COURT DECISIONS</u>

A. *Conkright v. Frommert*, Docket No. 08-810, 559 U.S. ___ (April 21, 2010)

1. Facts:

a. Over 100 Xerox Corporation employees received lump sum distributions of their retirement benefits from the Xerox Corporation Retirement Income Guarantee Plan, only to be later rehired by Xerox. The Plan had to determine how to account for such distributions when the employees ultimately retired again.

b. To address the prior distributions, the Plan established a "phantom account" method that calculated the hypothetical growth of the participant's account if there had been no lump sum payment. Then, the Plan used this hypothetical amount to reduce the actual pension benefits at the time of the second retirement.

c. The employees challenged the "phantom account" methodology claiming that, when the fiduciaries added it in 1998, the amendment violated the anti-cutback provisions of Section 204(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1054(g). They also alleged breaches of ERISA's fiduciary duties, 29 U.S.C. §1104.

d. The Second Circuit Court of Appeals held that the "phantom account" methodology impermissibly reduced accrued benefits, and it ordered the District Court for the Western District of New York to determine the correct methodology. *See Frommert v. Conkright*, 433 F.3d 254, 268 (2d Cir. 2006).

e. Before the District Court, the plan administrator offered a new approach to calculate the benefits, but neither the District Court nor the Second Circuit granted deference to this second approach. *See Frommert v. Conkright*, 535 F.3d 111, 119 (2d Cir. 2008). Eventually, the Second Circuit agreed with a methodology selected by the District Court that calculated benefits by deducting the nominal value of the prior distribution from subsequently accrued benefits.

2. Issue: whether the District Court was required to defer to the plan administrator on remand in deciding an appropriate remedy for a failure to correctly apply the plan in accordance with ERISA.

3. Holding: Reversed the Court of Appeals because it failed to defer to the plan administrator in interpreting the plan even though the Court had already rejected the plan administrator's original interpretation.

4. Reasoning:

    a. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), a plan administrator's decision in interpreting the plan is entitled to deference if the benefit plan gives the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

    b. The Court reasoned that a plan administrator should not lose *Firestone* deference merely because a previous plan interpretation failed during judicial review. Instead, the reasons for the *Firestone* deference applied to selecting the appropriate remedy upon remand as they did in interpreting the plan originally.

    c. The Court stated "it is difficult to see why a single honest mistake would require" a court to "strip a plan administrator of deference." Essentially, the Court maintained that "people make mistakes," and such errors do not diminish the appreciation for the fiduciary's expertise in handling administrative matters.

    d. Despite some inconsistency in the state courts, the Court found that trust law generally requires a court to reject discretion for the trustees only if there is reason to believe the trustee will not exercise the discretion fairly.

e. The Court finally concluded that affording the deference to the ERISA fiduciary "promotes predictability" by avoiding unexpected results during judicial review.

5. Other Opinions:

a. Justices Breyer, Stevens, and Ginsburg dissented contending that the plan administrator should be fully responsible for mistaken plan interpretations, including the consequence that establishing the proper plan interpretation should be made under the *de novo* standard.

b. With respect to the trust law precedent, the dissenters concluded that a trustee is not entitled to deference once its original interpretation has been rejected during judicial review. In such situations, the dissenters maintained that a court could choose to again rely on the trustee, but a court was not required to do so.

c. With respect to the policy conclusions, the dissenters contended that a "one free honest mistake" rule is impractical and encourages more litigation about its application.

d. In the end, the dissenters would have relied on the lower court's approach using "the abuse of discretion" standard in fashioning an appropriate remedy. Indeed, the dissenters argue that it is quixotic to disregard the traditional deference for the lower courts so that one could preserve the deference for plan administrators after the lower court already overruled the administrator's plan interpretation.

B. *Hardt v. Reliance Standard Life Insur. Co.*, Docket No. 09-448, 559 U.S. ___ (May 24, 2010)

1. Facts:

a. The participant worked as an administrative assistant before being diagnosed with carpal tunnel syndrome. When surgeries failed to relieve her injuries, she ceased working. Then, she filed a claim for long term disability benefits from the insurance company administering the ERISA covered welfare plan offered by her employer.

b. The insurance company initially denied her claim for disability benefits following a medical examination that concluded she could continue to perform some amount of sedentary work. During the internal appeal of this denied benefit claim, the insurance company partially reversed itself concluding that the participant was entitled to 24 months of temporary disability benefits.

c. During the temporary disability period, the participant received additional medical attention, and the other physicians diagnosed the participant with small-fiber neuropathy. In accordance with the supplemental medical documentation, the Social Security Administration awarded the participant full disability benefits.

d. When the insurance company learned of the Social Security Administration's determination, the insurer reacted by declaring the participant ineligible for the temporary disability benefits as of the date of the Social Security award. In fact, the insurance company sought to offset her benefits to collect $14,913.23 paid after the Social Security award.

e. The participant appealed again concerning the offset attempt by submitting supplemental medical evidence demonstrating that the insurance company erred with the original temporary disability determination. Although she requested that the insurance company categorize her disability as a permanent one, the insurance company declined to revise its initial determination. In denying the appeal, the insurance company terminated the participant's benefits.

f. Having exhausted the claims and appeals procedure, the participant commenced an ERISA action in the United States District Court for the Eastern District of Virginia asserting that the denial of permanent disability benefits was mistaken as it was based on incomplete medical information.

g. The District Court denied the insurance company's motion for summary judgment holding that the company failed to consider all of the expert opinions. Instead of granting judgment to the participant, however, the District Court remanded the case to the insurer to review the additional documents. *See Hardt v. Reliance Std. Insur. Co*., 540 F. Supp. 2d 656 (E.D. Va. 2008).

h. Based on the additional medical evidence, the insurer granted the claim for permanent disability benefits, but this did not end the litigation. The participant then filed a motion for summary judgment related to the attorneys' fees and costs incurred in bringing the action that ultimately led to receiving her benefits. *See* 29 U.S.C. §1132(g)(1)(stating in pertinent part that the court "in its discretion may allow a reasonable attorney fee and costs of action to the either party").

i. The District Court awarded $39,149.00 in attorneys' fees, but the Court of Appeals for the Fourth Circuit reversed. The appellate court ruled that the participant was not a "prevailing party" because the participant did not obtain a judgment or consent order in the litigation. *See Hardt v. Reliance Std. Insur. Co.*, 336 Fed. Appx. 332 (4th Cir. 2009).

j. The Courts of Appeals were split on whether a participant needed to "prevail" in the litigation in order for the District Court to award attorneys' fees under this ERISA Section. *Compare Tate v. Long Term Disability Plan for Salaried Employees of Champion Int'l Corp. #506*, 545 F.3d 555 (7th Cir. 2008) and *Miller v. United Welfare Fund*, 72 F.3d 1066 (2d Cir. 1995)

2. Issue: whether a District Court may award attorneys' fees and costs under ERISA Section 502(g)(1) to a party that has not obtained an enforceable judgment or court-ordered consent decree.

3. Holding: Reversed the Court of Appeals because the participant had considerable success on the merits. The Court of Appeals erred by failing to up-holding the District Court's award of attorneys' fees and costs regardless of entry of judgment on the merits in the case.

4. Reasoning:

a. The "American Rule" is that each side bears its own legal expenses unless there is a statute or contract that provides otherwise. *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983).

b. While ERISA Section 502(g)(1) abridges the "American Rule," it does not require a "prevailing" party like other fee shifting statutes. This ERISA section authorizes the award of attorneys' fees to "either" party, and it does not explicit require the entry of a judgment.

c. Congressional intent is also gleaned by comparison to ERISA Section 502(g)(2), the fee shifting statute related to delinquent multiemployer contributions. As Section 502(g)(1) does contain an explicit judgment requirement like Section 502(g)(2), the courts cannot insist on the "prevailing party" standard before granting an attorneys' fee award.

d. To provide guidance to the District Courts, the Supreme Court stated that "absent some degree of success on the merits by the claimant, it is not appropriate for a federal court to award attorneys fees." On the other hand, it is not necessary for the party to succeed at trial or on a motion for summary judgment in order for the Court to award attorneys' fees.

e. In this case, because the insurance company failed to comply with ERISA's claims processing guidelines by considering all of the available medical evidence, the District Court correctly awarded attorneys' fees and costs to the participant who eventually obtained the benefits that were the subject of the suit in the first place.

5. Other Opinions:

a. Justice Stevens filed a one paragraph concurring opinion maintaining that it is not sufficient to rely on the plain language of a statute, and the Court should also have considered the structure and history of the law before deciding how to interpret it. Nevertheless, Justice Stevens ultimately agreed with the Court's conclusion.

C. *Perdu v. Kenny A*, Docket No. 08-970, 559 U.S. ___ (April 21, 2010)

1. Facts:

a. The litigation began on June 6, 2002 as a class action on behalf of approximately 3,000 children in the Georgia foster care system claiming that the care provided in two counties near Atlanta violated their constitutional rights. On December 12, 2002, the District Court recognized numerous major deficiencies, and the parties began the time consuming process of remediating the unlawful conduct. Following mediation, Georgia ultimately entered into a consent decree to correct the violations.

b. With the substantive issues resolved, the District Court responded to the claim for attorneys' fees and costs under the Civil Rights Laws, 42 U.S.C. §1988, and Rule 23(h) of the Federal Rules of Civil Procedure. *See Kenny A. v. Perdue*, 454 F. Supp. 2d 1260, 1296 (N.D. Ga. 2006).

c. The District Court used the "Lodestar Analysis" to determine the reasonable attorneys' fees and costs by taking the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for the attorneys' services." *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

d. The Court was not satisfied that this method adequately compensated plaintiffs' counsel, and it granted an upward "adjustment" to reward these attorneys "for their exceptional work and the exceptional results they achieved in the case."

e. Considering the over 30,000 hours spent on the case by attorneys billing between $200 and $495 per hour, the District Court awarded $10,522,405.08 in attorneys' fees and $739,958.67 in expenses for a total award of $11,262,363.75. Of this amount, $4,509,602.18 represented the "upward adjustment" to the attorneys' fees.

f. On appeal, the judges splintered on whether the enhancement could be justified under the Lodestar analysis, but they ultimately affirmed the District Court's determination in consideration of the discretion shown to the trial judge in such instances. *See Kenny A. v. Perdue*, 532 F.3d 1209, 1242 (11th Cir. 2008).

2. Issue: whether a District Court may increase an attorneys' fees award beyond the product of the hours worked and the appropriate rate based on the superior performance and results of the legal counsel.

3. Holding: Reversed the Court of Appeals for insufficient evidence. While a District Court may enhance that attorneys' fee award for exceptional services, the Court of Appeals erred by failing to fully describe the basis for enhancing the award in this case.

4. Reasoning:

   a. The Lodestar method uses prevailing market conditions to roughly approximate how clients would have been billed for handling the case. Therefore, the "objective" criteria "cabins the discretion of trial judges, permits meaningful review, and produces reasonably predictable results."

   b. The Lodestar method is presumptively sufficient to induce capable attorneys to undertake the representation and any "enhancements" are reserved for "rare" and "exceptional" circumstances where the method fails to account for all relevant factors. Novelty or complexity of the case should not affect the use of the enhancement.

   c. The enhancement is only available if (i) the hourly rate does not adequately measure the true market rate for involvement with the particular case; (ii) the exceptionally protracted nature of the litigation requires an extraordinary outlay of resources; or (iii) the case involves an extraordinary delay in the payment of fees.

   d. In this case, there was insufficient evidence in the record to justify effectively increasing the hourly rate to $866 per hour. And, the "impressionistic basis" of the award frustrated meaningful judicial review by failing to provide specific evidence for the enhancement.

5. Other Opinions:

   a. Justices Breyer, Stevens, Ginsburg, and Sotomayor dissented maintaining that the fee award should be affirmed because exceptional success should be justly rewarded by the Court.

   b. To the dissenters, the District Court is better suited to judge the performance of counsel and the services provided. While objective criteria are necessary, they cannot substitute for the element of judgment from the person adjudicating the actual proceeding.

   c. The dissenters reviewed the arduous efforts of the plaintiffs' counsel as well as the scope of their success. The dissenters also noted that the State of Georgia spent over $2.4 million on outside counsel fees to oppose the class action in addition to the 5,200 hours spent by its own legal department.

d. The dissenters also take issue with the Court's math contending that when the average hourly rates are considered the enhancement only produces an hourly rate of $249 per hour, which is less than the average rate in Georgia of $268 per hour.

e. Justices Kennedy and Thomas filed their own concurring opinions explaining their agreement with the Court's decision and maintaining that fee enhancements should be awarded in the rarest of cases.

II. <u>COURT OF APPEALS DECISIONS</u>

A. *Line Construction Benefit Fund v. Allied Electrical Contractors, Inc*., 591 F.3d 576 (7th Cir. 2010)

1. Facts:

a. Allied Electrical Contractors, Inc. first applied for membership in NECA on August 28, 2002, and it first remitted contributions to the plaintiff multiemployer welfare fund in November 2002 based on hours worked by its employees in October 2002.

b. Effective December 1, 2005, I.B.E.W. Local No. 474 and the Southeastern Line Constructors Chapter of N.E.C.A. adopted a collective bargaining agreement that increased the contribution rate from $4.50 to $4.75 per hour for the multiemployer welfare fund.

c. Although it did not execute a letter of assent until December 7, 2006, Allied remitted contributions at the $4.75 rate for hours worked by its employees during the period December 1, 2005 through July 31, 2006.

d. In October 2006, Local 474 barred Allied's representatives from negotiation sessions until it executed the letter of assent, which Allied did on December 7, 2006. There is no evidence that Allied ever tried to withdraw from NECA prior to the lawsuit.

e. When Allied refused to remit the contributions for the eight months during this dispute, the fund commenced a civil action under ERISA.

f. The District Court held that Allied was liable for the contributions (plus interest, liquidated damages, attorneys' fees, and costs) related to hours worked before Allied signed the letter of assent, during the period August 1, 2006 through December 7, 2006, based on the employer's course of conduct with respect to the plan. *See Line Construction Benefit Fund v. Allied Electrical Contractors, Inc.*, 46 E.B.C. (BNA) 1330 (N.D. Ill. 2008).

2. Issue: whether an employer is bound to contribute to a multiemployer plan based on a course of conduct evidencing an intent to abide by the trust agreement.

3. Holding: Affirming the District Court because the employer owed contributions for the period prior to execution of the letter of assent based on the course of conduct in remitting contributions.

4. Reasoning:

a. Multiemployer plan trustees have standing to commence an action for contributions despite arguments about the employer's obligation to contribute. Arguments about the merits could not undermine the procedural capacity of the trustees to pursue the employer.

b. Where there is no signed agreement, the requirement to contribute to a multiemployer plan can be established through evidence manifesting such agreement, including, but not limited to, paying union wages, remitting union dues, remitting contributions, executing other similar agreements, submitting to the union's jurisdiction over grievances, or other labor relations matters.

c. Ignoring commercial realities in business operations would "create a loophole for parties seeking to escape responsibilities that they acknowledged through their behavior." The Court of Appeals would not permit such a loophole.

B. *Battoni v. I.B.E.W. Local Union No. 102 Employee Pension Fund*, 594 F.3d 230 (3rd Cir. 2010)

1. Facts:

a. During a merger of two local unions, the parties also sought to combine their pension and welfare plans. However, one pension plan allowed for lump sum distributions and the other plan did not. To accommodate the difference, the lump sums were only available for pre-merger accruals related to the merging plan.

b. In addition, as part of the merger, the welfare plan conditioned the receipt of retiree health benefits on a participant electing the monthly benefits from the pension plan instead of a lump sum distribution of the pre-merger accruals.

c. Although welfare benefits are typically exempt from ERISA's anti-cutback rules, the District Court concluded that the welfare plan amendment in this case actually caused the pension plan to violate ERISA's anti-cutback rules. *See Battoni v. I.B.E.W. Local Union No. 102 Employee Pension Fund*, 569 F. Supp. 2d 480 (D.N.J. 2008)(relying on 29 U.S.C. §1054(g)(1)).

2. Issue: whether a welfare plan amendment disturbing a participant's right to a lump sum distribution from a related pension plan could effectively diminish an accrued pension benefit.

3. Holding: Affirming the District Court because the welfare plan amendment constructively amended the pension plan in violation of the anti-cutback rules. The Court decided that the amendment created an impermissible onerous condition on the receipt of the lump sum distributions.

4. Reasoning:

a. The Court stated that the anti-cutback rule "cannot be employed in an overly simplistic, robotic fashion." As the welfare plan amendment added a condition on the receipt of a benefit accrued under the pension plan, it effectively resulted in a pension plan amendment. The function of the welfare plan amendment was to limit or impede the ability of participants to receive a lump sum distribution from the pension plan.

b. Unlawful reductions include benefit options as well as the dollar value of the benefits themselves. *See Cent. Laborers Pension Fund v. Heinz*, 541 U.S. 739, 741 (2004); 26 C.F.R. §1.411(d)-4, Q&A 7. To the extent the welfare plan amendment reduced a pension option, it fell under the anti-cutback arena.

c. Prior to the merger, participants were entitled to retiree health benefit regardless of whether they selected the lump sum distribution from the pension fund. The Court of Appeals would not allow the reduction in the value of the lump sum distribution by tying it to the loss of retiree health benefits.

C. *Overby v. National Association of Letter Carriers*, 595 F.3d 1290 (D.C. Cir. 2010)

1. Facts:

a. The National Association of Letter Carriers maintains an annuity plan for its officers and employees, and this plan includes a provision that, before amendments are effective, the trustees "must first submit the proposed amendment to the Fund's actuaries for an evaluation and estimate of its cost."

b. The plan also provides a survivor benefit of 60% of the benefits payable to the deceased participant. Originally, the plan defined the surviving spouse as "one to whom the participant was married for at least one year immediately preceding the participant's death" or the "one-year-to-death" rule.

c. In 1985, the plan trustees attempted to revise this rule to define a spouse as "one to whom the participant was married for at least the year immediately preceding and ending on the participant's annuity commencement date" or the "marriage-at-commencement" rule.

d. After exhausting internal appeals related to a determination about the available survivor benefits, the plaintiff brought a civil action seeking a declaratory judgment that the "marriage-at-commencement" rule was invalid.

e. The District Court ruled that because the Trustees did not obtain the actuarial evaluation before adopting the amendment, the amendment was invalid. *See Overby v. National Association of Letter Carriers*, 601 F. Supp. 2d 101 (D.D.C. 2009).

2. Issue: whether a procedural defect can invalidate the amendment to an ERISA pension plan

3. Holding: Affirmed the District Court's determination that the trustees' failure to follow plan procedure rendered the proposed amendment ineffective.

4. Reasoning:

   a. Whatever level of specificity an employer chooses for the amendment procedure of ERISA pension plans, the employer is bound to follow those procedures. *See* 29 U.S.C. §1102(b)(3); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 85 (1995).

   b. Although there was no direct evidence related to the actuarial report, the failure to produce the report or mention it in the minutes persuaded the Court of Appeals that no actuarial evaluation was done.

   c. The Court rejected the argument that procedural irregularities should prevent the implementation of the amendment. After citing nine cases from other circuits refuting this argument, the Court distinguished one case from the Eleventh Circuit that held bad faith was necessary to invalidate an ERISA plan amendment. *See Loskill v. Barnett Banks Inc. Severance Pay Plan*, 289 F.3d 734 (11th Cir. 2002). The Court reasoned that the Eleventh Circuit failed to follow the *Loskill* at its next opportunity. *See Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276 (11th Cir. 2003).

   d. The requirement to adopt the "marriage-at-commencement" rule from the Retirement Equity Act of 1984, 98 Pub. L. 397, 98 Stat. 1426, §205 (August 23, 1984), did not obviate the need for the trustees to follow the plan's amendment procedures.

   e. Meeting Internal Revenue Service plan qualification requirements could not serve as a defense to allegations of ERISA violations.

D. *Boeing Co. v. International Union of United Automobile Workers*, 600 F.3d 722 (7th Cir. 2010)

1. Facts:

   a. Boeing sold its union operations in Oklahoma to Spirit Aerosystems, which hired many of Boeing's former employees. Boeing transferred pension assets and liabilities to Spirit's plans as part of the transaction, 29 U.S.C. §1058, and it treated the workers who were not hired by Spirit as having resigned.

   b. The union filed a grievance charging that the lay-offs violated the collective bargaining agreement with Boeing. The arbitrator agreed that Boeing violated the labor contract by treating these non-hired employees as resignations.

   c. As part of the remedy, the arbitrator awarded the affected workers the right to pension and lifetime health benefits from Boeing despite the plant closures. If the employee benefit plans would not provide these benefits, the arbitrator ordered Boeing to directly assume the costs related to the pension and other liabilities for the 150 to 200 employees who were not hired by Spirit.

   d. The District Court denied Boeing's challenge to the award finding that the arbitrator had authority to remedy the labor contract violations, including orders that Boeing compensate employees directly for their losses. *Boeing Co. v. International Union of United Automobile Workers*, 2009 U.S. DIST. LEXIS 85896 (N.D. Ill. September 16, 2009)(noting that Boeing's arguments "would leave the employees with no effective remedy, a result that is wholly unreasonable and that leaves the arbitrator's decision illusory").

2. Issue: whether an arbitration award is invalid because it requires an employer to provide employee benefits as part of the remedy even though the employee benefit plans may not comply with the award.

3. Holding: Affirmed the District Court's order that Boeing is liable to the employees for the value of the missed benefits if the employee benefit plans will not honor these obligations.

4. Reasoning:

   a. Because the benefit plans are not a party to the arbitration proceeding, the plan administrator need not comply with the arbitration award. However, the administrator's reaction to the award does not relieve Boeing of its responsibility to correct the contractual violations.

   b. Recognizing the distinction between the employee benefit plan and the plan sponsor does not relieve the plan sponsor of liabilities to employees concerning contractual breaches.

   c. The Court stated, "one imagines that Boeing's concern in making these desperate arguments is with having to pay lifetime health benefits to early retirees. . . But Boeing is stuck with the commitments that it negotiated with the union unless it can renegotiate them."

E. *Teamsters Joint Council No. 83 of The Virginia Pension Fund V. Empire Beef Company Realty Assoc.*, 48 E.B.C. (BNA) 2929, 2010 U.S. APP. LEXIS 9015 (4th Cir. April 30, 2010)

1. Facts:

   a. the 1930s a general partnership operated a slaughterhouse in Rochester, New York. In 2002, the partnership opened a terminal to distribute its products in Richmond, Virginia.

   b. The partnership hired Teamster drivers and remitted contributions to the multiemployer pension plan until 2005 when it permanently ceased covered operations. As a result of the closure, the partnership incurring approximately $500,000 in withdrawal liability. The partnership did not dispute the obligation and began to make the required payments.

   c. In September 2007, the partnership filed bankruptcy without any assets available to satisfy the outstanding withdrawal liability.

   d. In February 2008, the Fund notified Weidner Realty Associates that as a related business it was responsible for the outstanding withdrawal liability under the partnership's controlled group from the Treasury Regulations. *See* 29 U.S.C. §1301(b)(1).

e. The District Court declined to hold Weidner Realty Associates liable because the pension failed to offer sufficient proof of the common control. *Teamsters Joint Council No. 83 of the Virginia Pension Fund v. Empire Beef Company Realty Assoc.*, 47 E.B.C. (BNA) 1162 (E.D. Va. June 18, 2009).

2. Issue: whether a related business was jointly and severally liable for an employer's withdrawal liability.

3. Holding: Affirmed the District Court because the person who held interests in the withdrawn employer and the related business did not hold sufficient control of the related business to make it liable for the withdrawal liability.

4. Reasoning:

a. To establish control group liability, the pension plan must show that five or fewer persons owned a controlling interest in both businesses with those people effectively controlling the organizations. *See* 26 C.F.R. §1.414(c)-2(c). And, effective control for a partnership is ownership of an aggregate of ***more than*** 50 percent of the profits interest or "capital interest" of the partnership, defined as the assets distributable to the owner upon liquidation. *See* 26 C.F.R. §1.414(c)-2(c)(2)(iii).

b. Here, the common owner possessed ***only*** 50% of the capital interest of Weidner Realty Associates, so the related business was not under common control with the withdrawn employer.

c. The Court rejected arguments that contrary language in the partnership agreement superseded the numeric standards required by the Treasury Regulations. The Court also declined to revisit determinations from the bankruptcy case that might have altered the ownership interests.