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GROUP HEALTH BENEFITS DISCRIMINATION AGAINST AIDS VICTIMS: FALLING THROUGH THE GAPS OF FEDERAL LAW—ERISA, THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

I. INTRODUCTION

Acquired immunodeficiency syndrome (AIDS) is a devastating disease, which has already taken more lives in America than the entire Vietnam war.¹ While AIDS victims fight a physically and emotionally debilitating, incurable illness,² they may also have to wage another battle—to obtain or maintain adequate health insurance coverage. Until recently, most of the conflict has centered upon access to individual health insurance coverage.³ Now, however, skirmishes over coverage for AIDS under group health insurance plans are occurring between AIDS victims and their employers.⁴

To date, there have been several incidents of employers limiting AIDS coverage in their group health insurance plans.⁵ Such practices

1. Compare S. KARNOW, *VIETNAM: A HISTORY* 9 (1983) (nearly 58,000 killed and missing in action in the Vietnam war) with CENTERS FOR DISEASE CONTROL, *HIV/AIDS SURVEILLANCE REP.* 13 (Nov. 1990) (94,375 adult AIDS deaths reported through October 1990).

2. See Hawkins, *Psychological and Social Concerns of Clients with AIDS and Related Conditions*, in *AIDS PRACTICE MANUAL* I-2 to I-3 (2d ed. 1988).

3. See *infra* note 42 and accompanying text.

4. Group health insurance operates by spreading the risk of health care expenses among a group of people, usually among employees of either a single employer or a group of employers. R. FOSTER, *THE MANAGER'S GUIDE TO EMPLOYEE BENEFITS* 30 (1986). Healthy individuals within the group help pay for the health care expenses of those who are ill. *Id.* In theory, this approach applies regardless of the method by which the benefits are funded. See *id.*

5. The first publicly reported case of an employer limiting medical coverage for AIDS occurred in late 1987, when Circle K Corporation informed 8,000 employees that its self-funded medical plan would no longer cover health care claims resulting from "personal lifestyle decisions" for employees hired after January 1, 1988. Huntley, *Firm Suspends Policy Excluding AIDS Claims*, *BUS. INS.*, Aug. 15, 1988, at 2, 2. The policy would have excluded AIDS claims by homosexuals and drug users, but not AIDS claims resulting from blood transfusions. *Id.* Circle K defended the policy as a permissible design to control health care costs based on preemption by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988), even though the policy did not exclude coverage for all medical claims related to lifestyle choices, such as drug and alcohol rehabilitation. Huntley, *supra*, at 2. See *infra* notes 86-158 and accompanying text for a discussion of the ERISA preemption doctrine. Because of public and employee pressure, Circle K dropped the "personal lifestyle" policy in September 1988. *Circle K Drops "Lifestyle" Policy*, *BUS. INS.*, Sept. 26, 1988, at 2, 2. No Circle K employees had been denied coverage under the policy before its elimination. *Id.* For an analysis of the use of employer practices aimed at unhealthy or risk-taking employees

are likely to increase as employers continue to suffer from rapidly escalating health insurance costs and the growing AIDS epidemic.

Most states prohibit AIDS discrimination in employee benefit plans through either employment discrimination laws⁶ or insurance

who are likely to increase group benefits costs, and the possible remedies under section 510 of ERISA, 29 U.S.C. § 1140, see Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024 (1987).

Another example of an AIDS exclusion involved a company in Oregon that excluded AIDS treatment from coverage under its group health insurance plan. Israel & Scott, *AIDS-related Insurance Ceilings Are Risky*, HR MAG., Nov. 1990, at 85, 86. The Oregon Bureau of Labor held that the AIDS exclusion violated a state anti-discrimination law because it had a disparate impact on men. *Id.*

In late 1988, Lincoln Foodservice Products of Fort Wayne, Indiana imposed a lifetime maximum benefit of \$50,000 and an annual maximum of \$25,000 for AIDS coverage under its self-funded group health plan. Locke, *Firm to Appeal Ban on Limits for AIDS Cover*, BUS. INS., Dec. 24, 1990, at 1, 1. The lifetime maximum benefit for most other illnesses was \$1 million. *Id.* The practice was held to violate Indiana state civil rights law by a state civil rights commission hearing officer. *Id.* Lincoln Foodservice Products has appealed the ruling, arguing that the AIDS cap was implemented to hold down health care costs, and that the state law is preempted by ERISA. *Id.* at 4. See *infra* notes 86-158 and accompanying text for a discussion of the ERISA preemption doctrine.

Another employer, Galaxy Carpet Mill of Chatsworth, Georgia, imposed a \$10,000 lifetime maximum on health care benefits for "voluntarily contracted" AIDS and other sexually transmitted diseases under its self-funded health care plan. Bradford, *Cap on AIDS Claims Dropped: Firm Revises Benefit Policy*, BUS. INS., Feb. 19, 1990, at 2, 2. The policy was dropped in early 1990 after strong protests from AIDS activists. *Id.*

The first federal case involving the issue of whether an employer violates ERISA by limiting AIDS coverage in a self-funded group health plan was *McGann v. H & H Music Co.*, 742 F. Supp. 392 (S.D. Tex. 1990), *appeal filed*, No. 90-2672 (5th Cir. July 27, 1990). For a discussion of *McGann*, see *infra* note 56 and accompanying text. It is likely that the terminal nature of AIDS, coupled with the drain on personal finances that results from a lack of health insurance coverage, have contributed to the dearth of lawsuits fighting AIDS group health insurance limitations.

In *Owens v. Storehouse Inc.*, a furniture company modified its self-funded health plan to limit payment for AIDS to \$25,000, from a previous cap of \$1 million, after several employees incurred AIDS-related expenses. 17 Pens. Rep. (BNA) 1985 (N.D. Ga. Oct. 16, 1990). The court refused to grant a temporary restraining order directing the company to continue paying Owens' medical bills, noting that the company had a legitimate business reason to modify the plan. *Id.* at 1986. Storehouse spent more than \$250,000 on caring for Owens. *Id.*

There are probably other unreported examples of employers limiting group health plan coverage for AIDS. In 1990, the first nationwide study of discrimination related to HIV infection was conducted. See AMERICAN CIVIL LIBERTIES UNION, EPIDEMIC OF FEAR (1990) [hereinafter ACLU]. The study found that insurance issues accounted for 13% of the complaints of HIV discrimination. *Id.* at 24.

6. All states, and the District of Columbia, prohibit employment discrimination on the basis of handicap or disability. See ALA. CODE § 21-7-8 (1990) (government and public supported employment only); ALASKA STAT. § 18.80.220 (1986); ARIZ. REV. STAT. ANN. §§ 41-1461, -1463 (1985); ARK. STAT. ANN. § 20-14-301 (1987) (government and public supported employment only); CAL. GOV'T CODE §§ 12940, 19231, 19702 (West 1980); CAL. LAB. CODE § 1735 (West 1989); COLO. REV. STAT. §§ 24-34-401, -402 (1988); CONN. GEN. STAT. §§ 46a-

51, -60, -70 (1991); DEL. CODE ANN. tit. 19, §§ 722-726 (Supp. 1990); D.C. CODE ANN. §§ 1-2502, -2512, 6-1705 (1981); FLA. STAT. ANN. §§ 112.042, 413.08(3), 760.02, 760.10 (West 1986 & Supp. 1991); GA. CODE ANN. §§ 34-6A-2 to -4, 45-19-29 (1988 & Supp. 1990) (excludes communicable diseases, and perhaps HIV infection, from coverage); HAW. REV. STAT. §§ 378-1 to -3 (1985 & Supp. 1990); IDAHO CODE § 56-707 (1976) (employment supported by public funds only); ILL. REV. STAT. ch. 68, paras. 1-103, 2-101 to -104 (1990); IND. CODE §§ 22-9-1-2, -3, -13 (1988) (government and private employment); *id.* § 16-7-5-6 (public employment); IOWA CODE §§ 601A.6, 601D.2 (1989); KAN. STAT. ANN. §§ 44-1002, -1009 (1986); KY. REV. STAT. ANN. §§ 207.130-.160 (Michie/Bobbs-Merrill 1982 & Supp. 1990) (prohibiting HIV employment discrimination); LA. REV. STAT. ANN. §§ 46:2253, :2254(A)-(E) (West 1982); ME. REV. STAT. ANN. tit. 5, §§ 4553, 4571-73 (1989); MD. ANN. CODE art. 49B, §§ 14-16 (1986); MASS. GEN. LAWS ANN. ch. 151B, §§ 1, 4 (West 1982 & Supp. 1990); MICH. COMP. LAWS §§ 37.1102, .1103, .1201-.1209 (1985); MINN. STAT. §§ 256C.01, 363.01-.03 (1990); MISS. CODE ANN. §§ 25-9-103, -149, 43-6-15 (1981 & Supp. 1990) (government or employment supported by public funds only); MO. REV. STAT. §§ 191.665, 213.010, .055 (1986 & Supp. 1990); MONT. CODE ANN. §§ 49-2-101, -2-303, -4-101 (1989); NEB. REV. STAT. §§ 20-131, 20-167 to -169, 48-1115 (1988) (prohibiting disability and HIV employment discrimination); NEV. REV. STAT. §§ 281.370, 613.310-.330, 613.350 (1987); N.H. REV. STAT. ANN. § 354-A:8 (1984 & Supp. 1990); N.J. STAT. ANN. §§ 10:5-5, -12 (West 1976 & Supp. 1990); N.M. STAT. ANN. §§ 28-1-2, -7 (1978); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1982 & Supp. 1991); N.C. GEN. STAT. §§ 168A-3 to -5 (1987); N.D. CENT. CODE §§ 14-02.4-01 to .4-06 (Supp. 1989); OHIO REV. CODE ANN. §§ 4112.01-.02 (Anderson 1991); OKLA. STAT. tit. 25, §§ 1301-1308 (1987); OR. REV. STAT. §§ 659.400, .425 (1989); PA. STAT. ANN. tit. 43, §§ 954-955 (Purdon 1964 & Supp. 1990); R.I. GEN. LAWS §§ 28-5-6, -7 (1986 & Supp. 1990); S.C. CODE ANN. §§ 43-33-510 to -580 (Law. Co-op. 1985) (only if not subject to federal discrimination statutes); S.D. CODIFIED LAWS ANN. §§ 20-13-1, -10 to -13 (1987); TEX. REV. CIV. STAT. ANN. art. 5221k, §§ 5.01-1.0 (Vernon 1987 & Supp. 1991); UTAH CODE ANN. §§ 34-35-2, -6 (1988 & Supp. 1990); VT. STAT. ANN. tit. 21, §§ 495, 495d (1987 & Supp. 1990); VA. CODE ANN. §§ 51.5-3, -41 (1988) (not applicable if employer covered by the federal Rehabilitation Act of 1973); WASH. REV. CODE §§ 49.60.040, .172, .180 (1990) (handicap and HIV infection); W. VA. CODE §§ 5-11-3, -9 (1990); WIS. STAT. §§ 111.321-.322, .34 (1987); WYO. STAT. § 27-9-105 (1987).

A recent survey indicates that most states would interpret their prohibitions on handicap or disability discrimination in employment to cover AIDS. NATIONAL GAY RIGHTS ADVOCATES, PROTECTION AGAINST AIDS-RELATED DISCRIMINATION UNDER STATE HANDICAP LAWS: A FIFTY STATE ANALYSIS 7-9 (1989). A number of states either exclude AIDS or have not explicitly decided whether AIDS is included within the scope of their employment discrimination laws: Alabama, Arkansas, Georgia, Louisiana, New Hampshire, North Carolina, Tennessee, Virginia, Wyoming. *Id.*

Several cities also prohibit AIDS discrimination in employment. *See, e.g.,* LOS ANGELES, CAL., MUN. CODE art. 5.8, §§ 45.80-.82 (1989); WEST HOLLYWOOD, CAL., MUN. CODE art. IV, §§ 4270-4272 (1988).

Employment discrimination laws usually protect employees from employment discrimination based on handicap, race, color, religion, sex, age or national origin. *See, e.g.,* ARIZ. REV. STAT. ANN. § 41-1463(B) (1985) ("It is an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, age, handicap or national origin."). Some states limit the application of such laws to employers with a minimum number of employees. *See, e.g.,* IND. CODE § 22-9-1-3(h) (1988) (limiting

laws.⁷ Employers can avoid these state mandates by taking advantage of

application of private employment discrimination law to employers with six or more employees).

For a comprehensive survey of state handicap discrimination laws governing employment, real estate, public accommodations and other areas, see ACLU, *supra* note 5, at 83-133.

7. See COLO. REV. STAT. § 10-3-1104(1)(f)(IV), (VIII), (IX) (1987 & Supp. 1990) (prohibiting insurance classification based on physical disability, except if based on expected risk of loss different from other individuals; prohibiting use of sexual orientation in underwriting; prohibiting adverse underwriting decisions related to seeking AIDS counseling); CONN. GEN. STAT. § 38a-816(12) (1991) (prohibiting refusal or limitation of insurance based on physical disability, except where based on sound actuarial principles or related to actual or reasonably anticipated experience); D.C. CODE ANN. §§ 35-221 to -230 (1981 & Supp. 1990) (prohibiting insurance discrimination based on HIV infection or AIDS); FLA. STAT. ANN. § 627.429 (West Supp. 1991) (prohibiting HIV/AIDS coverage limitations in group health insurance policies; limiting use of HIV testing for health insurance eligibility; permitting HIV/AIDS exclusions in first policy year if insurer unable to test); *id.* § 627.644 (West 1984) (prohibiting insurance discrimination based on handicap, unless handicap predates application); HAW. REV. STAT. § 431:13-103(a)(7)(G)-(H) (Supp. 1990) (prohibiting refusal to insure or coverage limitations based solely on person taking HIV test before applying for insurance, or without consent of applicant); KY. REV. STAT. ANN. § 304.12-013(5) (Michie/Bobbs-Merrill Supp. 1990) (prohibiting coverage exclusions based on HIV infection in different manner than those that apply to any other health condition; prohibiting cancellation because of HIV infection; prohibiting use of sexual orientation in underwriting); ME. REV. STAT. ANN. tit. 24A, § 2846 (1990) (prohibiting HIV coverage limitations in group health insurance policies more restrictive than for any other sickness or disabling condition); MASS. GEN. LAWS ANN. ch. 175, § 193T (West 1987) (prohibiting insurance discrimination based on handicap, except where based on sound actuarial practice or actual experience); MO. REV. STAT. §§ 191.650, .671 (Supp. 1990) (prohibiting HIV testing and coverage exclusions upon renewal of group health insurance policies); N.C. GEN. STAT. § 168-10 (1987) (prohibiting health insurance discrimination based on handicap, except when based on sound actuarial or underwriting principles); OHIO REV. CODE ANN. § 3901.45(E) (Anderson 1989) (prohibiting HIV coverage limitations in insurance policies); R.I. GEN. LAWS §§ 23-6-22 to -24 (1989 & Supp. 1991) (prohibiting HIV testing and refusal to insure in group insurance plans of more than twenty-five persons); TEX. INS. CODE ANN. art. 3.51-5A (Vernon 1981 & Supp. 1991) (prohibiting public entities from providing group health insurance that limits or excludes HIV coverage); *id.* art. 3.51-6, § 3C (prohibiting HIV coverage limitations in group insurance plans); WASH. REV. CODE § 49.60.178 (1990) (prohibiting cancellation or nonrenewal of insurance based on handicap); W. VA. CODE § 33-16-9 (1988) (prohibiting cancellation or nonrenewal of group health insurance because of HIV infection); WIS. STAT. § 631.93 (Supp. 1990) (prohibiting HIV infection exclusions or limitations in health insurance policies, unless applied generally to other illnesses or medical conditions).

While most states do not statutorily prohibit AIDS discrimination in health insurance coverage and eligibility, all states regulate the underwriting practices of insurance companies doing business in that state. ACLU, *supra* note 5, at 75-76. One commentator has noted:

According to [National Gay Rights Advocates], at least 18 state insurance departments (Arizona, California, Colorado, Delaware, Florida, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee and Wisconsin) have indicated that they will not allow insurance companies to exclude or severely limit health insurance coverage for AIDS.

Scherzer, *Insurance and AIDS-Related Issues*, in AIDS PRACTICE MANUAL, *supra* note 2, at VIII-5 [hereinafter Scherzer, *AIDS-Related Issues*]. The Massachusetts Supreme Court, however, has struck down insurance regulations that would have prohibited HIV testing for under-

the preemptive effect of the Employee Retirement Income Security Act of 1974 (ERISA).⁸ Employee benefits discrimination against AIDS victims is possible because ERISA generally preempts all state laws relating to employer-sponsored group health plans.⁹

If employers self-fund¹⁰ their group health plans, they generally can avoid, through ERISA preemption, all state insurance and employment discrimination laws relating to such plans.¹¹ ERISA also preempts state employment discrimination laws relating to insured employee benefit plans, as long as the laws do not regulate insurance.¹²

This Comment discusses the ERISA preemption doctrine and how some employers legally discriminate against employees with AIDS by limiting coverage for AIDS under group health plans, while continuing to provide full coverage for other catastrophic or chronic illnesses.¹³ The primary focus of this Comment is on the preemptive effect of ERISA with respect to self-funded group health plans.

This Comment's analysis is in two parts. The analysis begins with an examination of various sections of ERISA to discover possible sources

writing of group health plans. *Life Ins. Ass'n v. Commissioner of Ins.*, 403 Mass. 410, 419, 530 N.E.2d 168, 173 (1988). Regulations and statutes aimed at insurance companies doing business in a particular state, and the insured group health plans they market to employers, do not apply to self-funded group health plans. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 409 (1990); ACLU, *supra* note 5, at 76. Thus, employers can avoid these insurance requirements by changing their group health plans from an insured to a self-funded arrangement. See *infra* note 10 and accompanying text for a discussion of self-funding group health plans.

8. 29 U.S.C. §§ 1001-1461 (1988). Some employee benefit plans are excluded from ERISA coverage—for example, governmental employer plans and church plans. See *id.* § 1003(b). Because these plans are not subject to ERISA preemption, state and local protections for AIDS victims would generally be available. See *id.* See *infra* notes 86-158 and accompanying text for a discussion of the ERISA preemption doctrine.

9. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-45 (1987).

10. Self-funding or self-insuring generally refers to an employer assuming total financial responsibility and risk for providing plan benefits, as opposed to an insurance company assuming all or part of the financial responsibility and risk. Harker, *Noninsured Approaches to Funding Welfare Benefits*, in *THE HANDBOOK OF EMPLOYEE BENEFITS* 707, 707 (J. Rosenbloom ed. 1984). For purposes of this Comment, the terms self-funded and self-insured are synonymous. Many employers that self-fund their health care benefits purchase stop-loss insurance, where the employer self-insures its plan expenses up to a certain dollar level for each claim, or up to a specific level of aggregate expenses during the year, but then insures the balance of liabilities over this amount with an independent insurer. Fletcher, *Types of Health Risk Bearers*, in *THE HANDBOOK OF EMPLOYEE BENEFITS*, *supra*, at 131, 137. See *infra* note 47 and accompanying text for a discussion of the growing trend to self-fund group health plans.

11. *FMC*, 111 S. Ct. at 409.

12. *Pilot Life*, 481 U.S. at 44-45.

13. See *infra* notes 59-60 and accompanying text for a discussion of the discriminatory implications of limiting coverage for AIDS while continuing to provide unreduced coverage for other catastrophic and chronic illnesses.

of relief for employees with AIDS facing group health plan restrictions.¹⁴ This Comment then analyzes the application of two federal statutes¹⁵ that prohibit employment discrimination to AIDS discrimination in group health plans: the Rehabilitation Act of 1973,¹⁶ and the Americans with Disabilities Act of 1990.¹⁷

The Comment concludes that current federal law does not adequately protect an employee with AIDS when his or her employer limits or denies group health plan coverage for AIDS. The author recommends a legislative solution to prohibit certain forms of AIDS discrimination in employee benefit plans. The recommendation attempts to balance the competing interests of persons with AIDS, employers and society.

II. BACKGROUND

A. AIDS and Human Immunodeficiency Virus Infection

AIDS is the final stage in a continuum of infection caused by the Human Immunodeficiency Virus (HIV).¹⁸ The first stage of the illness is asymptomatic HIV infection.¹⁹ During this stage, the infected person has no visible signs of illness.²⁰ In the second stage, symptomatic HIV infection, the HIV-infected person develops symptoms.²¹ It is during this second stage that most infected persons initially seek medical care.²²

14. These sections include vesting, Employee Retirement Income Security Act of 1974, § 203, 29 U.S.C. § 1053; reporting and disclosure, *id.* §§ 101-111, 29 U.S.C. §§ 1021-1031; interference with protected rights, *id.* § 510, 29 U.S.C. § 1140; and fiduciary duties, *id.* §§ 401-414, 29 U.S.C. §§ 1101-1114.

15. Other federal statutes might have application to this area, but are beyond the scope of this Comment. For example, AIDS restrictions in employee benefit plans may violate title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), where such restrictions have a disparate impact on men. See *supra* note 5 for a discussion of an Oregon civil rights case, in which an employee benefit plan AIDS restriction was held to violate a state discrimination law because it had a disparate impact on men.

16. 29 U.S.C. §§ 701-796i (1988).

17. Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327 (to be codified at 42 U.S.C. §§ 12101-12213).

18. Rennert, Parry & Horowitz, *AIDS and Persons with Developmental Disabilities: The Legal Perspective*, 1989 A.B.A. COMM'N ON MENTALLY DISABLED & CENTER ON CHILDREN & L. 8 [hereinafter *AIDS Disabilities*]; see Curran, Jaffe, Hardy, Morgan, Selik & Dondero, *Epidemiology of HIV Infection and AIDS in the United States*, 239 SCI. 610, 615 (1988). HIV is transmitted through sexual contact and blood or blood products, as well as from mother to unborn infant. *Id.* at 614.

19. *AIDS Disabilities*, *supra* note 18, at 8.

20. *Id.* HIV infection can, however, be detected by a simple blood test. *Id.* at 9-10.

21. *Id.* at 8. Symptoms include "swollen lymph nodes[,], weight loss, fever, diarrhea, thrush, general malaise, skin tumors, and other conditions." *Id.*

22. *Cf. id.* (until symptomatic HIV infection, individuals remain healthy and do not have visible symptoms of illness).

The final stage of HIV infection is Acquired Immunodeficiency Syndrome (AIDS).²³ The United States Centers for Disease Control (CDC) defines AIDS as HIV infection in conjunction with certain symptoms or diseases.²⁴ While there are some rare exceptions, virtually all AIDS victims die within five years after being diagnosed with AIDS.²⁵

The AIDS epidemic is growing rapidly in the United States. From December 1988 to October 1990, the total number of AIDS cases in the United States reported to the CDC grew from 82,764²⁶ to 154,917.²⁷ More than half of these cases have already resulted in fatalities.²⁸ In late 1990, the CDC estimated that approximately one million Americans were infected with HIV.²⁹ By some estimates, over half of HIV-positive³⁰ people will develop AIDS within two to ten years of becoming infected.³¹ Therefore, even if HIV infection were to stop today, a large number of people would still develop AIDS during the next decade. At the end of 1989, the CDC projected that between 175,000 and 254,000 new cases of AIDS would be reported in the United States during 1991, 1992 and 1993.³²

23. *Id.* at 8.

24. DEPARTMENT OF HEALTH & HUMAN SERVS., CENTERS FOR DISEASE CONTROL, *Update: Acquired Immunodeficiency Syndrome—United States, 1981-1988*, in REPORTS ON HIV/AIDS: JANUARY-DECEMBER 1989 15, 15 (1990). Some illnesses are considered by the CDC to be presumptive evidence of AIDS, including Kaposi's sarcoma, Pneumocystis carinii pneumonia and esophageal candidiasis. *Id.*; *AIDS Disabilities*, *supra* note 18, at 8. For the purposes of discussion in this Comment related to employer-sponsored group health plans, HIV infection and AIDS will be treated synonymously.

25. DEPARTMENT OF HEALTH & HUMAN SERVS., CENTERS FOR DISEASE CONTROL, *AIDS and Human Immunodeficiency Virus Infection in the United States: 1988 Update*, in REPORTS ON HIV/AIDS: JANUARY-DECEMBER 1989, *supra* note 24, at 41, 43 [hereinafter *1988 AIDS Update*].

26. *Id.* at 42.

27. CENTERS FOR DISEASE CONTROL, *supra* note 1, at 8.

28. *Id.* at 13.

29. *Update: Public Health Surveillance for HIV Infection—United States, 1989 and 1990*, 39 MORBIDITY & MORTALITY WEEKLY REP. 853, 853 (1990).

30. HIV-positive refers to a positive result from one of two tests which are used to detect HIV antibodies in the blood. See *AIDS Disabilities*, *supra* note 18, at 9-10. An antibody is a protein substance that the body produces in response to an infectious agent. *Id.* These tests do not detect the actual presence of HIV, but the presence of HIV antibodies is evidence of exposure to HIV. *Id.* A number of states have recently enacted legislation restricting the use of HIV tests as a condition of employment. *State Labor Law Developments*, 6 LAB. LAW. 497, 540-43 (1990).

31. Zuercher, *A Look at the Latest AIDS Projections for the United States*, HEALTH AFF., Summer 1990, at 163, 164, 169.

32. *Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, Oct. 31-Nov. 1, 1989*, 39 MORBIDITY & MORTALITY WEEKLY REP. 110, 117 table 2 (1989). The CDC also projected that 145,000 to 192,000 deaths from AIDS would be reported during this period. *Id.*

These future AIDS cases will place an increasing burden on health care delivery systems.³³ The CDC has estimated that the cost of providing medical care to AIDS patients in 1992 alone will be between five and thirteen billion dollars.³⁴ About one-third of these expenditures will be paid by private health insurance³⁵—most of which is provided through employer-sponsored group health insurance plans.³⁶

B. Limiting or Excluding Group Health Insurance to AIDS Victims

Health insurance coverage is especially important to a person with AIDS.³⁷ The estimated cost of treating an AIDS case from diagnosis to death ranges from \$23,000³⁸ to \$147,000.³⁹ Inability of an AIDS victim to obtain adequate health insurance coverage can result in financial insolvency and lack of access to medical care.⁴⁰ The primary vehicle through

33. *Id.* at 119.

34. 1988 AIDS Update, *supra* note 25, at 46. These cost estimates may be understated, because many manifestations of AIDS are not reportable to the CDC under the current definition of an AIDS case. *Id.*

35. See Levit, Freeland & Waldo, *National Health Care Spending Trends: 1988*, HEALTH AFF., Summer 1990, at 171, 174 exhibit 3 (32% of national health care expenditures in 1988 paid by private health insurance). In 1989, group health insurers paid approximately \$455 million in AIDS-related health claims. Woolsey, *AIDS Claims Hit \$1 Billion*, BUS. INS., Oct. 29, 1990, at 2, 2.

36. Levit, Freeland & Waldo, *supra* note 35, at 177. Of the 181.4 million Americans covered by private health insurance in 1987, approximately 146.9 million, or 81%, were covered by employer-sponsored group health insurance plans. *Id.* Almost all full-time employees of medium and large companies were covered by such plans. *Id.*

37. For general discussions of insurance coverage and AIDS, see A.B.A. AIDS COORDINATING COMM., AIDS: THE LEGAL ISSUES 116, 116-34 (Discussion Draft 1988) [hereinafter AIDS LEGAL ISSUES]; ACLU, *supra* note 5, at 24-26; R. JARVIS, M. CLOSEN, D. HERMANN & A. LEONARD, AIDS LAW IN A NUTSHELL 129-53 (1991); Curiale & Estreicher, *Communicable Diseases in the Workplace*, 309 PRACTISING L. INST. 325, 325-32 (1986); Dickens, *Legal Rights and Duties in the AIDS Epidemic*, 239 SCI. 580, 582 (1988); Scherzer, *Insurance*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 185, 185-200 (1987) [hereinafter Scherzer, *Insurance*]; Scherzer, *Insurance*, in AIDS LEGAL GUIDE 5-1, 5-1 to 5-8 (2d ed. 1987); Scherzer, *AIDS-Related Issues*, *supra* note 7, at VIII-1 to VIII-16; Wilson, *Health Insurance*, in AIDS AND THE LAW 195, 195-201 & Supp. 65, 65-67 (1987 & Supp. 1990).

38. Andrulis, Beers, Bentley & Gage, *The Provision and Financing of Medical Care for AIDS Patients in U.S. Public and Private Teaching Hospitals*, 258 J. A.M.A. 1343, 1346 (1987).

39. Scherzer, *Insurance*, *supra* note 37, at 189 (reporting cost estimates from \$28,000 to \$147,000); see also Bloom & Carliner, *The Economic Impact of AIDS in the United States*, 239 SCI. 604, 606 (1988) (estimating \$80,000 maximum cost); Hellinger, *National Forecasts of the Medical Care Costs of AIDS: 1988-1992*, 25 INQUIRY 469, 470 (1988) (estimating lifetime costs of \$60,000). Some of these estimates do not include the use of azidothymidine (AZT) (also called zidovudine or Retrovir), currently the only drug approved to treat HIV infection. O'Reilly, *The Inside Story of the AIDS Drug*, FORTUNE, Nov. 5, 1990, at 112, 113. The current annual cost for the drug is approximately \$3000. *Id.* at 129. The most recent studies suggest that the lifetime cost of treating an AIDS patient is declining. Hellinger, *supra*, at 475.

40. AIDS LEGAL ISSUES, *supra* note 37, at 116.

which persons with AIDS obtain health insurance is employer-sponsored group health insurance plans;⁴¹ AIDS victims have a difficult time obtaining individual health insurance coverage.⁴²

41. See *supra* notes 35-36 and accompanying text.

42. An HIV-infected person's access to individual health insurance coverage may be restricted in several ways. First, an insurer may exclude AIDS as a covered condition under the terms of the health insurance policy. Scherzer, *Insurance, supra* note 37, at 190. Some states have outlawed this practice, and require insurers to cover AIDS under individual and group health insurance policies as any other illness. Scherzer, *AIDS-Related Issues, supra* note 7, at VIII-5; see *supra* note 7 and accompanying text.

Second, an insurer may refuse individual health insurance coverage to HIV-infected persons through underwriting practices, by requiring applicants to submit to tests or questions before coverage is accepted, such as: (1) HIV tests, (2) medical tests to detect diminished immune system function, or (3) application questions about HIV infection, AIDS, or lifestyle. AIDS LEGAL ISSUES, *supra* note 37, at 122-28. Some states limit the use of HIV tests in health insurance applications. *Id.* at 127; see, e.g., IOWA CODE § 505.16 (1989) (prohibiting HIV testing for insurance coverage without informed consent of applicant). Some states, however, still permit the use of tests that detect an impaired immune system, but that do not detect the presence of HIV. Curiale & Estreicher, *supra* note 37, at 328-29; see, e.g., MO. REV. STAT. § 191.650 (Supp. 1990). California prohibits the use of HIV tests to determine eligibility for health insurance coverage. CAL. INS. CODE § 799.09 (West Supp. 1991). Many states and health insurers have adopted National Association of Insurance Commissioner guidelines which prohibit the use of lifestyle questions in health insurance underwriting. AIDS LEGAL ISSUES, *supra* note 37, at 126.

California provides an example of a state that restricts insurers' ability to limit coverage for HIV-infected persons through underwriting practices. Recently enacted legislation prohibits life and disability insurers from discriminating in eligibility and rates on the basis of sexual orientation. CAL. INS. CODE § 10140 (West Supp. 1991). Health insurance is considered disability insurance under the California Insurance Code. *Id.* § 106 (West 1972). A life or disability insurer may not:

[C]onsider sexual orientation in its underwriting criteria or [] utilize marital status, living arrangements, occupation, gender, beneficiary designation, zip codes or other territorial classification . . . for the purpose of establishing sexual orientation or determining whether to require a test for the presence of the human immunodeficiency virus or antibodies to that virus, where that testing is otherwise permitted by law.

Id. § 10140(b) (West Supp. 1991); see also CAL. HEALTH & SAFETY CODE § 1365.5 (West Supp. 1991) (health care service plans); CAL. INS. CODE § 799.05 (West Supp. 1991) (prohibiting use of marital status, suspected homosexuality or bisexuality in determining whether to require HIV test, if allowed, of insurance applicant); *id.* § 11512.193 (nonprofit hospital service plans).

Third, even if a policy is issued, policy provisions may restrict coverage. For example, a pre-existing conditions limitation may limit the amount or duration of coverage for medical conditions existing at or before the time the policy takes effect. AIDS LEGAL ISSUES, *supra* note 37, at 129. These restrictions may exist for a limited period of time or may be permanent. Whether asymptomatic HIV infection constitutes a pre-existing condition with respect to AIDS is unclear, see Curiale & Estreicher, *supra* note 37, at 329, especially since many HIV-infected persons may never develop AIDS, see Zuercher, *supra* note 31, at 169. In addition, most individual insurance policies contain a rescission provision, which allows the insurer to rescind the policy if there has been a material misrepresentation of the health qualifications for the insurance. Scherzer, *AIDS-Related Issues, supra* note 7, at VIII-6. During a limited period of time after the coverage takes effect, the contestability period, the insurer can contest and rescind the policy if there has been such a misrepresentation. *Id.* This could occur if an

Even though many employers provide group health insurance to their employees,⁴³ there is increasing concern among employers that the cost of providing these benefits is outpacing their ability to fund them.⁴⁴ Employers have been especially concerned about providing group health insurance coverage to employees with AIDS because of anticipated costs.⁴⁵ Consequently, employers have taken a number of measures to control costs in their group health insurance plans.⁴⁶

Among the group health plan cost containment techniques used by employers, self-funding (or self-insuring) continues to grow in popularity.⁴⁷ One of the primary benefits to the employer of self-funding is the avoidance of state laws relating to employee benefit plans,⁴⁸ such as those which prohibit the exclusion or limitation of health insurance coverage

HIV-positive person, seeking insurance for his or her anticipated medical care, fails to disclose HIV infection on the insurance application. *Id.*

43. See *supra* notes 35-36 and accompanying text.

44. See Geisel, *Employers' Health Costs Rise 17.1%*, BUS. INS., Jan. 28, 1991, at 1, 86 (survey of 1955 employers showed per employee health plan costs, including medical, dental and vision, were \$3217 in 1990 and \$2748 in 1989; total health plan costs increased 17.1% in 1990, 16.7% in 1989, and 18.6% in 1988); Levit, Freeland & Waldo, *supra* note 35, at 177 (employer health care costs grew from 2% of compensation in 1965 to 6% of compensation in 1987). Between 1977 and 1987, health care expenditures grew at an annual rate of 10.8%, compared to 7.8% for the rest of the economy. Fuchs, *The Health Sector's Share of the Gross National Product*, 247 SCI. 534, 535 table 2 (1990). "The health care sector's share of the gross national product [grew from] under 5% in the late 1940s to more than 11% in the late 1980s . . ." *Id.* at 534. In 1989, national health care spending grew 11.1% from 1988, the largest increase in seven years, and accounted for 11.6% of gross national product. Rosenblatt, *U.S. Medical Spending Soars 11% During 1989*, L.A. Times, Dec. 21, 1990, at A4, col. 1.

45. See Woolsey, *supra* note 35, at 2 (survey of health insurers and employers estimated AIDS-related group health and accident claims were \$455 million in 1989, an 83% increase from 1988).

46. Levit, Freeland & Waldo, *supra* note 35, at 177. Common group health plan cost containment measures include: (1) coverage limitations and exclusions, (2) cost sharing through deductibles and coinsurance, (3) coordination of benefits with other plans, (4) pre-existing conditions limitations, (5) waiting periods for coverage, (6) pre-admission testing, (7) hospital utilization review, (8) hospital audits, (9) second surgical opinions, (10) coverage for ambulatory surgical centers, hospices, skilled nursing, and home health care, (11) case management, (12) health education and promotion, (13) health maintenance organizations, (14) preferred provider organizations, (15) cafeteria plans, (16) managed care plans, and (17) self-insuring or self-funding. Sieverts, *Health Cost Containment Strategies*, in EMPLOYEE BENEFITS HANDBOOK 36:1-36:23 (J. Mamorsky ed. 1987); Williams, *Health Care Cost-Containment Techniques*, in THE HANDBOOK OF EMPLOYEE BENEFITS, *supra* note 10, at 251, 251-72.

47. Woolsey, *More Small Firms Self-Fund Benefits*, BUS. INS., Jan. 28, 1991, at 3, 12-14. A survey of 1955 employers showed 59% self-funded their group health plans in 1990 compared to 52% in 1989, the largest annual increase in self-funding since 1986. *Id.* at 3. Of these self-funding employers, 27% were totally self-funded, while 73% purchased some form of stop-loss insurance to limit their liability if health care costs exceeded predetermined self-funded limits. *Id.* Small employers—those with fewer than 500 employees—reported a 23.3% increase in self-funding their group health plans, from 30% in 1989 to 37% in 1990. *Id.*

48. Harker, *supra* note 10, at 707, 708; see Woolsey, *supra* note 47, at 14 (self-funding

for AIDS.⁴⁹ Self-funding may allow an employer to discriminate against an employee on the basis of his or her illness or condition by limiting or denying state-mandated health insurance coverage, while continuing to provide coverage for other illnesses or conditions.⁵⁰ In fact, self-funding is a recommended technique among benefits consultants for employers to save health care expenses.⁵¹ The avoidance of state statutory requirements by employers is possible because ERISA generally preempts state laws relating to self-funded employee benefit plans.⁵²

III. STATEMENT OF THE PROBLEM

Most states prohibit discriminatory practices in employee benefits through insurance or employment discrimination laws;⁵³ however, employers can self-fund⁵⁴ their group health benefits and generally avoid these state mandates through ERISA preemption.⁵⁵ Furthermore, ERISA generally does not prohibit the imposition of coverage limitations on a particular illness or injury in a group health plan.⁵⁶ Through self-fund-

allows employers flexibility in designing and administering health care plans because ERISA exempts such plans from state-imposed benefit requirements).

49. Woolsey, *supra* note 47, at 14; *see supra* notes 6-7 and accompanying text.

50. *See FMC Corp. v. Holliday*, 111 S. Ct. 403, 409 (1990).

51. Woolsey, *Most Health Plans Now Self-Funded*, BUS. INS., Jan. 29, 1990, at 3, 10.

52. *FMC*, 111 S. Ct. at 409. *See infra* notes 122-37 for a discussion of *FMC*, which clarified the distinction between insured and self-insured employee benefit plans with respect to ERISA preemption.

53. *See supra* notes 6-7 for a listing of some of these state laws.

54. *See supra* note 10 and accompanying text.

55. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 409 (1990).

56. *See Employee Retirement Income Security Act of 1974*, § 201(1), 29 U.S.C. § 1051(1) (1988) (group health benefits are not subject to ERISA vesting requirements). *See infra* notes 168-71 and accompanying text, describing how ERISA does not create a legally enforceable right to benefits under a group health plan. For example, in *McGann v. H & H Music Co.*, a case of first impression in the federal courts, a Texas district court granted summary judgment for the employer, holding that the imposition of a cap for AIDS coverage in a self-funded group health plan did not constitute illegal discrimination under ERISA. 742 F. Supp. 392, 394 (S.D. Tex. 1990), *appeal filed*, No. 90-2672 (5th Cir. July 27, 1990); *see Geisel, Self-Insurers Can Limit AIDS Benefits*, BUS. INS., Aug. 6, 1990, at 1, 1. In *McGann*, the plaintiff informed the defendant employer that he had been diagnosed with AIDS. 742 F. Supp. at 393. Subsequently, the defendant changed the group health plan from an insured to a self-funded basis, and reduced lifetime benefits for AIDS from \$1 million to \$5,000. *Id.* Shortly thereafter, the plaintiff exhausted the new AIDS lifetime maximum benefit. Brief for Plaintiff-Appellant at 5, *McGann v. H & H Music Co.*, No. 90-2672 (5th Cir. filed July 27, 1990), *appeal from* 742 F. Supp. 392 (S.D. Tex. 1990). Because of his condition, it was highly unlikely that the plaintiff could obtain individual health insurance coverage. *Id.*; *see supra* note 42 and accompanying text. In determining that the reduction in benefits did not violate ERISA, the court noted that the defendant's actions were consistent with the primary purpose of ERISA—to protect the financial solvency of employee benefit plans—and not taken to discriminate against the plaintiff. *McGann*, 742 F. Supp. at 393-94. The court added that the plaintiff “was not

ing, employers can discriminate against employees with AIDS by excluding or limiting coverage for AIDS, while continuing to provide full coverage for other catastrophic or chronic illnesses.

Employers commonly design group health plans with features to help moderate the growth of health insurance costs.⁵⁷ In spite of their strong interest in containing costs, employers rarely target a particular illness or condition for reduced coverage.⁵⁸ Thus, an employer who reduces coverage for AIDS, claiming that the change is motivated by actual or anticipated expenses, but who continues to cover other illnesses at usual levels, may be discriminating against employees with AIDS for reasons other than cost reduction, such as irrational fears about infection or a dislike for groups most at risk for the disease.⁵⁹

entitled [under ERISA] to health benefits whose terms never change." *Id.* at 394. The court did not address the issue of whether the AIDS limitation violated a Texas statute that prohibits employment discrimination based on disability. *See* TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01 (Vernon 1987).

57. Hall, *Designing Medical Care Expense Plans*, in THE HANDBOOK OF EMPLOYEE BENEFITS, *supra* note 10, at 101, 101-03. *See supra* note 46 and accompanying text for a discussion of various cost containment techniques used by employers.

58. *See* Lipton, *Supplemental Major Medical and Comprehensive Plans*, in THE HANDBOOK OF EMPLOYEE BENEFITS, *supra* note 10, at 163, 173. An overwhelming number of group health plans limit coverage for outpatient treatment of mental and nervous disorders, or alcohol and drug dependency, but provide full coverage for inpatient treatment of these conditions. *Id.* These limitations generally operate by requiring the plan participant to share in a greater portion of the costs than other illnesses or conditions covered by the plan. *Id.* The primary rationale, however, for these limitations is not to moderate or reduce employer costs. Instead, participants are asked to have a greater financial stake in their care because of the somewhat more discretionary nature of the treatments for these conditions. *See id.* Most other common limitations and exclusions in group health plans do not limit coverage for specific illnesses or conditions, but limit certain treatments, such as: (1) treatment not required because of illness or accidental injury, (2) cosmetic surgery, (3) custodial care, (4) dental care, (5) routine health examinations, (6) elective items, (7) occupational accidents or sicknesses, (7) eyeglasses, (8) hearing aids, and (9) treatment required because of war. *Id.* at 176-77.

59. One commentator has argued that the ability of employers to deny AIDS coverage in the midst of a serious epidemic exposes the broader problems of our entire health care system. Padgug & Oppenheimer, *AIDS, Health Insurance, and the Crisis of Community*, 5 NOTRE DAME J.L., ETHICS & PUB. POL'Y 35, 47-51 (1990). Employers are self-funding their health insurance plans in increased numbers, and moving away from the traditional role of insurance to spread risks among a large group of individuals, to excluding and narrowing coverage to reduce costs. *Id.* at 38-40. Health insurance coverage has moved towards a policy of exclusion rather than inclusion, and because persons most likely to contract AIDS, gay men and intravenous drug users, are often scorned by American society, persons with AIDS are highly susceptible to having AIDS coverage denied or limited. *Id.* at 37. Even worse, persons with AIDS are often perceived as undeserving of sympathy because they "voluntarily" contracted the disease, or because the behavior which resulted in the disease was "immoral." *See id.* *See* Huntley, *supra* note 5, at 2, for a discussion of an employer that excluded "voluntarily contracted" AIDS from health insurance coverage. Denying health insurance coverage for AIDS because the disease was "voluntarily contracted" is analogous to denying coverage for a skiing accident, because the accident victim voluntarily assumed the risk.

If reducing costs is the primary reason for limiting coverage for a particular illness or condition, an employer should probably also limit coverage for other catastrophic or chronic illnesses or treatments, such as heart attacks and organ transplants.⁶⁰ When these conditions can result in medical expenses far in excess of AIDS⁶¹ and these illnesses continue to be covered at full levels by an employer who has limited coverage for AIDS, there is a strong implication that the AIDS coverage limitation has been motivated by reasons other than reducing expenses.⁶² In addition, there is substantial nationwide evidence that employers discriminate against HIV-infected persons because of a *perception* that costs will increase, whether or not this is substantiated in fact.⁶³ Employers may reduce AIDS coverage for discriminatory reasons⁶⁴ because there is still a high degree of stigma associated with AIDS and HIV disease in the United States.⁶⁵ Finally, if health care costs are rising at levels beyond the ability of an employer to fund, an employer has available a wide range of non-discriminatory measures to help address the problem,⁶⁶ including reducing coverage limits for all illnesses and conditions to the same level.

ERISA provides the vehicle through which this discrimination can

60. One insurance company report noted that the medical costs for AIDS care, estimated at between \$50,000 to \$100,000 (without AZT treatments), were not exceptionally high when compared to the lifetime costs for other serious impairments, such as: (1) myocardial infarction (heart attack)—\$66,837; (2) cancer of the digestive system—\$47,542; (3) leukemia (adult)—\$28,636; and (4) paraplegia (resulting from auto accidents)—\$68,700. EQUICOR-EQUITABLE HCA CORP., AIDS AND EMPLOYEE HEALTH BENEFIT PLANS 6 (1988). Autologous bone marrow transplants, a promising new cancer therapy, cost over \$75,000, N.Y. Times, Mar. 27, 1990, at C1, col. 5, and may cost as much as \$125,000, *id.*, Nov. 12, 1990, at A1, col. 6. Heart transplants generally cost about \$150,000, while liver transplants cost, on average, about \$120,000. *Id.*, Apr. 29, 1990, § 1, at 1, col. 1. One report described an employer's consternation at having been billed \$1.25 million under its self-funded medical plan for an employee's spouse, who was the first person to receive a heart, liver and kidney transplant in the same operation. *Id.*

61. See *supra* notes 38-39 for a discussion of the cost estimates for treating AIDS.

62. ACLU, *supra* note 5, at 2.

63. *Id.* A Los Angeles insurance broker was recently ordered to pay \$646,800 in damages for failing to comply with an agreement to provide health insurance benefits, after receiving a tip that some of the covered employees had AIDS, or had tested positive for HIV. Woolsey, *AIDS Group Wins Jury Award After Cover Is Denied*, BUS. INS., Apr. 8, 1991, at 1, 1. Even if the information had been true, there was no evidence that the AIDS cases would have increased the costs of health insurance, or provided a legitimate reason to deny coverage. See *id.*

64. The reported cases in which employers have reduced coverage for AIDS, see *supra* note 5, support this conclusion, especially where the benefit plans limited coverage for "voluntarily contracted" AIDS or expenses resulting from "lifestyle choices."

65. *Id.* at 1-2.

66. See *supra* note 46 and accompanying text for a listing of common group health plan cost containment measures.

occur.⁶⁷ Thus, a gap in the law exists which permits employers to discriminate against employees with AIDS with respect to their health care benefits.

IV. ANALYSIS

This section analyzes federal and state statutes which appear at first blush to protect employees from having AIDS coverage restricted by an employee benefit plan. ERISA preemption⁶⁸ is first discussed, because it is through this doctrine that employers can avoid state laws that would otherwise prohibit them from reducing AIDS coverage in group health plans.⁶⁹ This section then explores the primary ERISA sections that appear to offer some relief to employees with AIDS facing group insurance restrictions: vesting,⁷⁰ reporting and disclosure,⁷¹ interference with protected rights,⁷² and fiduciary duties.⁷³ It concludes that ERISA is generally ineffective to protect employees with AIDS in this situation. Finally, this section discusses and analyzes two important federal statutes prohibiting employment discrimination in the context of a restrictive AIDS plan provision: the Rehabilitation Act of 1973⁷⁴ and the Americans with Disabilities Act of 1990.⁷⁵

A. *Employee Retirement Income Security Act of 1974 (ERISA)*

Congress passed ERISA,⁷⁶ in substantial part, to protect "the continued well-being and security of millions of employees and their dependents [who are] directly affected by [employee benefit] plans."⁷⁷ Employer-sponsored group health insurance plans are covered by ERISA as employee welfare benefit plans.⁷⁸

67. See *McGann*, 742 F. Supp. 392.

68. Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. § 1144 (1988).

69. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 409 (1990); see *supra* notes 6-7 and accompanying text.

70. Employee Retirement Income Security Act of 1974, § 203, 29 U.S.C. § 1053 (1988).

71. *Id.* §§ 101-111, 29 U.S.C. §§ 1021-1031.

72. *Id.* § 510, 29 U.S.C. § 1140.

73. *Id.* §§ 401-414, 29 U.S.C. §§ 1101-1114.

74. 29 U.S.C. §§ 701-796i (1988).

75. Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327 (to be codified at 42 U.S.C. §§ 12101-12213).

76. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

77. Employee Retirement Income Security Act of 1974, § 2(a), 29 U.S.C. § 1001(a) (1988).

78. *Id.* § 3(1), 29 U.S.C. § 1002(1). ERISA defines an "employee welfare benefit plan" or "welfare plan" as "any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insur-

1. ERISA preempts state laws mandating AIDS coverage in self-funded group health plans

a. *federal preemption in general*

Under the supremacy clause of the United States Constitution,⁷⁹ as interpreted by the United States Supreme Court, federal law preempts state law in three circumstances.⁸⁰ First, Congress can preempt state law to the extent its statutes express this intent.⁸¹ Thus, preemption “fundamentally is a question of congressional intent.”⁸² Second, if Congress does not articulate its intent through express statutory language, state law is preempted if Congress intends to exclusively “occupy the field” of conduct regulated by the law.⁸³ Third, state law is “pre-empted to the extent that it actually conflicts with federal law.”⁸⁴ ERISA meets the first of these three tests: it expressly preempts state laws relating to employee benefit plans.⁸⁵

b. *the broad scope of ERISA preemption*

The avoidance of state insurance and employment discrimination laws by employers is possible because of the broad scope of ERISA pre-

ance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death.” *Id.* A plan participant is defined as “any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer.” *Id.* § 3(7), 29 U.S.C. § 1002(7).

79. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

80. *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990). For additional discussion of the three circumstances in which federal law preempts state law, see *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983).

81. *English*, 110 S. Ct. at 2275.

82. *Id.*

83. *Id.* Congressional intent to occupy a field can be inferred in two situations: (1) where the federal law is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or (2) where a federal law “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congressional intent to preempt state laws, however, must be “‘clear and manifest’” where “‘the field which Congress is said to have pre-empted has been traditionally occupied by the States.’” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

84. *English*, 110 S. Ct. at 2275. A conflict can arise: (1) if a person cannot comply with both state and federal law, or (2) if the state law is an obstacle to accomplishing the objectives of Congress. *Id.*

85. Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. 1144 (1988); see *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732-39 (1985); *Shaw v. Delta Air Lines*, 463 U.S. 85, 95-100 (1983).

emption described in section 514.⁸⁶ This section states that ERISA "shall supersede any and all State laws insofar as they may . . . relate to any employee benefit plan."⁸⁷ An exception to this broad preemption language is contained in the "saving clause" of section 514, which exempts from preemption "any law of any State which regulates insurance, banking, or securities."⁸⁸ An exception to the saving clause is the "deemer clause," which states that "an employee benefit plan . . . shall [not] be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts."⁸⁹ Accordingly, ERISA prevents states from attempting to regulate employee benefit plans by treating plans as insurers. In a series of cases interpreting these provisions, the Supreme Court has gradually defined the breadth of ERISA preemption.

i. relating to an employee benefit plan

In *Shaw v. Delta Air Lines*,⁹⁰ the Supreme Court broadly interpreted the scope of ERISA preemption.⁹¹ The Court stated that ERISA preemption is not limited to state laws purporting to affect employee benefit plans, or even state laws affecting subject matters covered by ERISA.⁹² Instead, the preemptive scope of ERISA is intended to be broad, and applies even if a state law only indirectly affects an employee benefit plan.⁹³ For example, a state law that requires employers to provide certain employee benefits, rather than mandating that benefit plans provide such coverage, is preempted by ERISA because it relates to benefit plans.⁹⁴ Similarly, a state employment discrimination law relating to

86. Employee Retirement Income Security Act of 1974, § 514, 29 U.S.C. § 1144.

87. *Id.* § 514(a), 29 U.S.C. § 1144(a).

88. *Id.* § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

89. *Id.* § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

90. 463 U.S. 85 (1983).

91. *See id.* at 96-97 ("A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan.").

92. *Id.* at 98.

93. *Id.*; *see, e.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981) (state law prohibiting pension plans from offsetting workers' compensation benefits indirectly regulated ERISA plans and was preempted under section 514).

94. *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787, 788 (2d Cir. 1990) (state law requiring employers to continue welfare coverage for employees eligible for workers' compensation benefits preempted by ERISA), *cert. denied*, 111 S. Ct. 1415 (1991); *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760, 766 (9th Cir. 1980) (state law regulating employers and employee benefits they provide relates to employee benefit plans within meaning of ERISA section 514(a)), *aff'd mem.*, 454 U.S. 801 (1981). A New Jersey court recently held that a portion of a state law, requiring employers to provide health care benefits during certain employee

benefits provided under a group health plan would probably be preempted by ERISA.

ii. the saving and deemer clauses

The Supreme Court first interpreted the saving clause of ERISA in *Metropolitan Life Insurance Co. v. Massachusetts*.⁹⁵ The Court held that a state statute, which mandated minimum mental health care benefits in group health insurance policies, regulated insurance within the meaning of the saving clause, and therefore was saved from ERISA preemption.⁹⁶ The Court set forth three primary reasons for its decision. First, the plain language of the statute supported an interpretation that state-mandated benefit laws regulating group insurance contracts regulated insurance.⁹⁷ Second, had Congress intended to preempt state regulation of insurance contracts, "it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied directly to benefit plans."⁹⁸ Third, the Court relied on cases defining insurance under another federal statute.⁹⁹ Under the McCarran-Ferguson Act,¹⁰⁰ state-mandated benefit laws meet the judicially created criteria for determining whether a practice constitutes the "business of insurance."¹⁰¹

By drawing a distinction between employee benefit plans and insurance contracts in the deemer clause, the Court recognized that its holding created a distinction between insured and self-insured plans: insured plans are subject to indirect regulation by the states, while self-insured plans are not.¹⁰² Also, the third element of the McCarran-Ferguson Act's "business of insurance" test—whether the practice is limited to en-

leaves of absence, was preempted by ERISA. *Update: N.J. High Court Strikes Statute Requiring Benefits During Leave*, BUS. INS., Apr. 8, 1991, at 1, 1.

95. 471 U.S. 724 (1985).

96. *Id.* at 758.

97. *Id.* at 739-40. The Massachusetts statute required any health insurance policy that provided hospital and surgical coverage, or any benefit plan that had such coverage, to provide minimum levels of coverage for expenses arising from mental or nervous disorders. *Id.* at 729-30 & 730 n.11.

98. *Id.* at 741.

99. *Id.* at 742-44.

100. 15 U.S.C. §§ 1011-1015 (1982).

101. *Metropolitan Life*, 471 U.S. at 742-44. The three McCarran-Ferguson Act's "business of insurance" criteria are: "[1] whether the practice has the effect of transferring or spreading a policyholder's risk; [2] whether the practice is an integral part of the policy relationship between the insurer and the insured; and [3] whether the practice is limited to entities within the insurance industry." *Id.* at 743 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

102. *Id.* at 747.

tities within the insurance industry—does not apply to self-funded employee welfare plans.¹⁰³ As a result, employers can avoid state insurance laws that would otherwise require coverage for AIDS, by self-funding their group health plans.¹⁰⁴

The Supreme Court further expanded the scope of ERISA preemption in *Pilot Life Insurance Co. v. Dedeaux*.¹⁰⁵ In *Pilot Life*, the Court applied the *Metropolitan Life* saving clause analysis and held that state common-law tort and contract actions asserting improper claims processing under an employee benefit plan were not saved from ERISA preemption.¹⁰⁶ The Court found that the common-law causes of action at issue clearly related to an employee benefit plan and therefore fell under the general preemption clause, section 514(a).¹⁰⁷ These causes of action, however, did not regulate insurance such that they could be saved from ERISA preemption under the saving clause.¹⁰⁸ Importantly, the Court found that allowing state causes of action for improper processing of employee benefit plan claims would violate the congressional intent for ERISA to provide the exclusive enforcement vehicle for such claims under section 502(a).¹⁰⁹ Courts following *Pilot Life* have denied all state

103. *Id.* at 743. (“[M]andated-benefit statutes impose requirements only on insurers, with the intent of affecting the relationship between the insurer and the policyholder.”).

104. *See, e.g.,* Mullenix v. Aetna Life & Casualty Ins. Co., 912 F.2d 1406 (11th Cir. 1990) (state insurance law purporting to mandate chiropractic coverage in self-insured employee benefit plan preempted by ERISA); Gonzales v. Prudential Ins. Co. of Am., 901 F.2d 446 (5th Cir. 1990) (self-insured ERISA plans not directly or indirectly subject to state insurance regulation); Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989) (self-insured benefits fund not subject even to indirect state regulation); Reilly v. Blue Cross & Blue Shield United of Wis., 846 F.2d 416 (7th Cir. 1988) (self-insured medical plan not subject to state law claims), *cert. denied*, 488 U.S. 856 (1988); United Food & Commercial Workers v. Pacyga, 801 F.2d 1157 (9th Cir. 1986) (self-insured welfare plan not subject to state anti-subrogation law).

105. 481 U.S. 41 (1987).

106. *Id.* at 57.

107. *Id.* at 47.

108. *Id.* at 47-52. The Court stated that under a “common-sense” view the state law did not regulate insurance because, in order to regulate insurance, a law must be specifically directed toward the insurance industry rather than “just have an impact on the insurance industry.” *Id.* at 50. The state law also failed to meet two of the McCarran-Ferguson Act’s “business of insurance” criteria, because the law did not have the effect of spreading policyholder risk and did “not define the terms of the relationship between the insurer and the insured.” *Id.* at 50-51. For a discussion of the three elements of the McCarran-Ferguson Act’s “business of insurance” test see *supra* note 101.

109. *Pilot Life*, 481 U.S. at 52-54; see 29 U.S.C. 1132(a) (1988). “[T]he inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants . . . were free to obtain remedies under state law that Congress rejected in ERISA.” *Pilot Life*, 481 U.S. at 54. The Court, in *Pilot Life*, described section 502(a) of ERISA as a “comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.” *Id.* See *infra* notes 159-61

causes of action brought against ERISA employee benefit plans.¹¹⁰

iii. preemption of state causes of action explained

Despite the Supreme Court's expansive view of ERISA preemption, some limits have been placed on that preemption by the Court's decision in *Mackey v. Lanier Collection Agency & Service*.¹¹¹ There, the Court held that a state general garnishment statute, which could be used to collect judgments against employee welfare benefit plan participants, was not preempted by ERISA.¹¹² In finding that Congress did not intend "to forbid the use of state-law mechanisms of executing [creditor] judgments against ERISA welfare benefit plans,"¹¹³ the Court concluded that the state general garnishment law did not "relate to" such plans.¹¹⁴ There-

and accompanying text for the pertinent language of section 502(a). In a companion case to *Pilot Life*, the Court described section 502(a) as "provid[ing] an exclusive federal cause of action for resolution of [employee benefit plan] disputes." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). These interpretations of section 502(a) as an exclusive remedy are consistent with the rationale underlying section 514 preemption, discussed *infra* at notes 143-44 and accompanying text, and strongly suggest that state employment discrimination laws that relate to an employee benefits plan would not be available as remedies separate from ERISA.

110. See, e.g., *Mullenix*, 912 F.2d 1406 (breach of contract and statutory bad faith claims denial); *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709 (9th Cir. 1990) (wrongful discharge based on age); *Gonzales*, 901 F.2d 446 (state law claims); *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990) (tortious breach of contract); *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Cir. 1989) (statutory unfair methods of competition, unfair and deceptive acts or practices in business of insurance); *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426 (6th Cir. 1989) (breach of contract); *Farlow v. Union Cent. Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989) (fraudulent misrepresentation and negligence); *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989) (breach of covenant of good faith and fair dealing, and wrongful denial of existence of health policy); *Makar v. Health Care Corp.*, 872 F.2d 80 (4th Cir. 1989) (state common law claims); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (breach of contract); *Davidian v. Southern Cal. Meat Cutters Union*, 859 F.2d 134 (9th Cir. 1988) (fraud, deceit, breach of fiduciary duty, and bad faith); *Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 96 (9th Cir. 1988) (breach of contract, breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, statutory delay of claims payment), *cert. denied*, 109 S. Ct. 3216 (1989); *Johnson v. District 2 Marine Eng'rs Beneficial Ass'n*, 857 F.2d 514 (9th Cir. 1988) (fraud and intentional infliction of emotional distress); *Reilly*, 846 F.2d 416 (breach of fiduciary duty, conspiracy, fraud, and bad faith); *Belasco v. W.K.P. Wilson & Sons*, 833 F.2d 277 (11th Cir. 1987) (fraud and bad faith); *Cathey v. Metropolitan Life Ins. Co.*, No. C-8323 (Tex. Jan. 30, 1991) (LEXIS, States library, Tex file) (misrepresentation, common law and statutory causes of action). *But see* *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (claim of deceptive practice under state insurance code not preempted by ERISA).

111. 486 U.S. 825 (1988).

112. *Id.* at 841. The Court found, however, that a state garnishment statute which was specifically directed at ERISA welfare benefit plans was preempted. *Id.* at 830.

113. *Id.* at 831. According to the Court, this congressional intent applies even when state laws "prevent plan participants from receiving their benefits." *Id.* at 831-32.

114. *Id.* at 831.

fore, *Mackey* somewhat weakens the expansive interpretation of "relates to" as described in *Shaw* and *Pilot Life*.¹¹⁵

Notwithstanding *Mackey*, however, a recent case, *Ingersoll-Rand Co. v. McClendon*,¹¹⁶ reinforced the rule that state causes of action relating to employee benefit plans are preempted by ERISA.¹¹⁷ In *Ingersoll-Rand*, the Texas Supreme Court had created a public policy exception to the employment at-will doctrine by holding that a plaintiff could recover in a wrongful discharge action when the employer's primary reason for the discharge was to avoid benefit obligations.¹¹⁸ The United States Supreme Court, however, held that this common-law cause of action was preempted by ERISA on two grounds: (1) it related to ERISA employee benefit plans;¹¹⁹ and, (2) it conflicted with section 502(a), the exclusive remedy for rights guaranteed under ERISA.¹²⁰

Consequently, *Ingersoll-Rand* illustrates that state discrimination laws governing the employment relationship,¹²¹ which apply to employee benefit plans, are preempted by ERISA. Employees afflicted with AIDS who are saddled with AIDS limitations in self-funded group health plans probably cannot rely on these state laws to offer protection from their employers' denial of coverage.

iv. *FMC Corp. v. Holliday* strengthens ERISA preemption of state laws purporting to regulate self-insured employee benefit plans

In *FMC Corp. v. Holliday*,¹²² the Supreme Court further clarified and strengthened the ERISA preemption distinction between insured and self-insured employee welfare benefit plans earlier addressed in *Metropolitan Life*. FMC Corporation maintained a self-funded employee welfare benefit plan.¹²³ The plan contained a subrogation provision, under which plan participants agreed to reimburse the plan for any expenses paid by the plan which were later paid by a third party in a liabil-

115. See *id.* at 841-43 (Kennedy, J., dissenting).

116. 111 S. Ct. 478 (1990).

117. See *id.* at 483. State causes of action are also preempted when they conflict with an ERISA remedy. *Id.* at 484-85.

118. *Id.* at 481 (citing *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989)).

119. *Id.* at 483.

120. *Id.* at 484-86. The Court reiterated its finding in *Pilot Life* that section 502(a) of ERISA was intended to be an exclusive remedy for ERISA rights. *Id.* at 485. For a discussion of the Court's interpretation of section 502(a) as an exclusive remedy, see *supra* note 109. See *infra* notes 159-61 and accompanying text for the pertinent language of section 502(a).

121. See *supra* note 6 and accompanying text.

122. 111 S. Ct. 403 (1990).

123. *Id.* at 405.

ity action.¹²⁴ Holliday was injured in an automobile accident, and she recovered benefits from both the FMC medical plan and the driver of the automobile.¹²⁵ FMC sought reimbursement for the plan expenses, but Holliday asserted that state law precluded subrogation or reimbursement of a tort recovery under any "program, group contract or other arrangement."¹²⁶ Holliday obtained a declaratory judgment in federal district court that the state law prohibited FMC from exercising its subrogation rights, and the Third Circuit affirmed.¹²⁷ The Supreme Court reversed, however, holding that the state law was preempted by ERISA.¹²⁸

The Supreme Court first found that, because the state law related to an employee welfare benefit plan, the law fell under the ERISA preemption clause.¹²⁹ The Court thus reinforced *Shaw's* expansive interpretation of when a state law relates to an employee benefit plan.¹³⁰ The Court also determined that the law fell within the meaning of the saving clause, and would only be excluded from ERISA preemption if it met the terms of the deemer clause.¹³¹

In its first direct affirmation of the distinction between self-insured and insured employee benefit plans, the Court held that the deemer clause exempts self-insured ERISA plans from state regulation relating to such plans.¹³² The Court noted that the deemer clause relieves plans from state laws purporting to regulate insurance because it forbids states to deem employee benefit plans to be insurance companies or in the business of insurance.¹³³ The Court added that its interpretation of the

124. *Id.* at 405-06.

125. *Id.* at 406.

126. *Id.* (referring to Pennsylvania Motor Vehicle Financial Responsibility Law, 75 PA. CONS. STAT. § 1720 (1987)).

127. *Id.*

128. *Id.* at 411.

129. *Id.* at 407.

130. *Id.* at 407-08. For a discussion of *Shaw*, see *supra* notes 90-94 and accompanying text.

131. *Id.* at 409.

132. *Id.*

133. *Id.* The Court described in detail the application of the saving and deemer clauses to self-funded and insured employee benefit plans:

[S]elf-funded ERISA plans are exempt from state regulation insofar as that regulation "relate[s] to" the plans. State laws directed toward the plans are pre-empted because they relate to an employee benefit plan but are not "saved" because they do not regulate insurance. State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is conse-

deemer clause was consistent with both *Metropolitan Life*¹³⁴ and the congressional intent behind ERISA preemption.¹³⁵

FMC strengthens the ERISA preemption doctrine by making clear that any state law which purports to regulate, or has any connection with or reference to, a self-funded employee welfare benefit plan is preempted by ERISA.¹³⁶ Consequently, state insurance or employment laws which attempt to prohibit discriminatory AIDS coverage limitations in self-funded health care plans,¹³⁷ even indirectly, would probably be preempted, and thus, ineffective as remedies for employees with AIDS facing AIDS coverage restrictions.

Under the Supreme Court's decisions, even insured employee benefit plans can avoid state employment discrimination laws through ERISA preemption, as long as the laws are not interpreted to regulate insurance.¹³⁸ A state employment discrimination law that prohibits discrimination in benefits based on disability arguably relates to an employee benefit plan and is preempted by ERISA.¹³⁹ Furthermore, such a law probably does not regulate insurance and is, therefore, not saved from preemption under the saving clause.¹⁴⁰ Thus, ERISA preempts both: (1) state insurance laws purporting to regulate self-insured employee benefit plans;¹⁴¹ and (2) state employment discrimination laws relating to employee benefit plans that do not regulate insurance, whether such plans are insured or self-insured.¹⁴²

quently bound by state insurance regulations insofar as they apply to the plan's insurer.

Id.

This decision still does not reach the question of whether a self-funded plan that carries stop-loss coverage is subject to indirect state insurance regulation. *But see* *Drexelbrook Eng'g Co. v. Travelers Ins. Co.*, 710 F. Supp. 590, 598 (E.D. Pa.) (state law claims preempted where employer self-funded group health plan and included stop-loss coverage), *aff'd*, 891 F.2d 280 (3d Cir. 1989). See *supra* note 10 for a discussion of stop-loss coverage.

134. *FMC*, 111 S. Ct. at 409.

135. *Id.* at 410.

136. *See id.* at 411.

137. See *supra* notes 6-7 for a listing of state insurance and employment discrimination laws potentially affecting AIDS discrimination.

138. See, e.g., *Pilot Life*, 481 U.S. at 47-51.

139. *See id.* at 47-48.

140. *See id.* at 50-51. See *supra* notes 101, 108 and accompanying text for discussions of when a state law regulates insurance.

141. *See FMC*, 111 S. Ct. at 409.

142. *See Pilot Life*, 481 U.S. at 47-51.

c. *ERISA's legislative history does not support preemption when an employer is only subject to one state's mandates*

The legislative history of ERISA describes the rationale underlying the broad reading of preemption under section 514. In debate surrounding passage of the Act, Representative Dent stated, "With the preemption of the field [of employee benefit plans], we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation."¹⁴³ Senator Williams proposed that "the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans."¹⁴⁴ This legislative purpose was reiterated in *Shaw*, in which the Court discussed the importance of ERISA's preemption scheme in minimizing "interference with the administration of employee benefit plans" when the employer had employees in many states.¹⁴⁵

In *Fort Halifax Packing Co. v. Coyne*,¹⁴⁶ the Supreme Court relied on legislative intent to support its finding that a state statute which mandated a one-time severance payment to terminated employees was not preempted by ERISA, because the employer was not required to establish "an ongoing administrative program" to comply with the law.¹⁴⁷ The Court reasoned that, in the absence of administrative practices necessary to provide a state-mandated employee benefit, ERISA's purpose of alleviating conflicting and inconsistent state regulations does not apply.¹⁴⁸ In addition, the Court found that a state-mandated benefit that does not require the establishment of ongoing administrative practices does not constitute an employee benefit plan,¹⁴⁹ thereby removing the

143. 120 CONG. REC. 29,197 (1974).

144. *Id.* at 29,933.

145. *Shaw*, 463 U.S. at 105 n.25 ("Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state . . . laws . . . would make administration of a uniform nationwide [benefit] plan more difficult."). In *FMC*, the Court reiterated this rationale which underlies ERISA preemption:

To require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. Thus, where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations.

111 S. Ct. at 408 (citations omitted) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)).

146. 482 U.S. 1 (1987).

147. *Id.* at 11-12.

148. *Id.* at 14-15.

149. *Id.* at 11-12. ERISA does not cover group insurance programs that are not funded and administered through employers or employee organizations; therefore, these programs can

state law from section 514 preemption.¹⁵⁰

The Court's holding that no employee benefit plan exists if a state-mandated benefits law does not require administrative practices to provide the benefits creates an exception to the section 514(a) general preemption rule.¹⁵¹ This exception, however, would not assist an employee with AIDS attempting to secure benefits under an employer-sponsored group health plan, because administrative practices are usually necessary for the employer to have such a plan.¹⁵² Yet, this reasoning could support an argument that an employer does not establish an employee benefit plan if it provides a benefit without setting up accompanying administrative practices, regardless of whether the benefit is mandated by state law. For example, a benefit provided out of the general assets of the company, rather than through an insurance plan, presumably would be outside the scope of ERISA protection.¹⁵³ Therefore, an employee with AIDS who has been denied a benefit should look beyond the substance of the benefit to the form of its delivery.

Fort Halifax Packing seems to imply another exception to ERISA preemption. The legislative purpose of ERISA preemption was not directed at employee benefit plans that cover employees in only one state or municipality, because these plans may not be subject to conflicting state and local laws that preemption is intended to alleviate.¹⁵⁴ Thus, preemption is not necessary. An employer with employees in only one state or municipality does not fall within this ERISA preemption legislative pur-

be regulated by state laws. 29 C.F.R. § 2510.3-1(j) (1990). ERISA regulations set forth four criteria to determine when a group insurance program is not covered by ERISA: (1) no contributions are made by an employer or employee organization; (2) employee participation is voluntary; (3) the employer's or employee organization's functions, without endorsing the program, are limited to publicity, collecting premiums through payroll deductions, and remitting them to the insurer; and (4) the employer or employee organization does not receive consideration, other than reasonable compensation, excluding profit, for administrative services to collect premiums. *Id.* For example, a payroll deduction program to purchase individual automobile insurance would probably meet these criteria.

150. *Fort Halifax Packing*, 482 U.S. at 7-8 (section 514(a) preempts state insurance laws relating to employee benefit plans, not to employee benefits).

151. *Id.* at 7-8, 11-12. In dissent, Justice White described the majority's holding as creating a loophole in the ERISA preemption scheme and as inconsistent with congressional intent and prior precedent. *Id.* at 23-26 (White, J., dissenting).

152. See R. FOSTER, *supra* note 4, at 29-32.

153. See *Massachusetts v. Morash*, 490 U.S. 107 (1989) (company policy of paying unused vacation benefits from general assets did not constitute an ERISA employee welfare benefit plan and criminal action to enforce such policy not preempted).

154. *Fort Halifax Packing*, 482 U.S. at 11 ("Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations."). This argument is only relevant with respect to self-funded plans, as insured plans are usually subject to state regulation under the saving clause. *Metropolitan Life*, 471 U.S. at 746-47.

pose merely by changing the funding mechanism of its group health insurance plans from insured to self-funded.¹⁵⁵ Consequently, *Fort Halifax Packing*, by focusing on ERISA's intent to alleviate conflicting state laws,¹⁵⁶ appears to weaken the insured/uninsured distinction described in *FMC*. An employee with AIDS who faces a denial of AIDS benefits under a self-funded group health insurance plan could use this argument to undercut an employer's ERISA preemption argument. Nevertheless, given both Representative Dent's comment that ERISA preemption was intended to occupy the field of federal regulation of employee benefits,¹⁵⁷ and the broad scope of ERISA preemption described in *Pilot Life* as "deliberately expansive,"¹⁵⁸ it is unlikely that a court would accept this argument without a legislative change in ERISA.

2. ERISA remedies are generally ineffective for an AIDS victim denied coverage under a group health plan

Because of ERISA's broad preemption of state laws relating to employee benefit plans, an employee who has had AIDS coverage withdrawn from a group health plan probably must rely primarily on ERISA and other federal statutes for possible relief. ERISA's protections, however, are generally narrow for an employee in this situation. This section discusses the areas of ERISA that an AIDS coverage restriction might violate.

If ERISA rights of a plan participant are violated, section 502(a)¹⁵⁹ permits the participant to bring a civil action to "recover benefits due . . . , to enforce . . . rights . . . , or to clarify . . . rights to future benefits under the terms of the plan."¹⁶⁰ This section also permits a participant to seek "appropriate equitable relief . . . to enforce . . . the terms of the plan."¹⁶¹ These remedies are intended to be exclusive for rights guaran-

155. Employers that have employees in only one state or municipality do not subject themselves to "conflicting or inconsistent" state laws merely because their group health benefits are self-funded rather than insured. For an explanation of self-funding, see *supra* note 10 and accompanying text. Therefore, they do not need the protection of ERISA preemption to relieve their employee benefit plans from such laws. See *supra* notes 143-44 and accompanying text. Even so, small employers, that are most likely to have employees in only one state or municipality, are self-funding their group health plans at a rapid rate, see *supra* note 47 and accompanying text, and thus, avoiding state and local laws through ERISA preemption.

156. See *supra* notes 143-44 and accompanying text.

157. See 120 CONG. REC., *supra* note 143, at 29,197.

158. *Pilot Life*, 481 U.S. at 45-46.

159. Employee Retirement Income Security Act of 1974, § 502(a), 29 U.S.C. § 1132(a) (1988).

160. *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

161. *Id.* § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B).

teed under ERISA.¹⁶²

A court must review a denial of benefits challenged under section 502(a)(1)(B) under a *de novo* standard.¹⁶³ If, however, the plan administrator¹⁶⁴ or the plan fiduciary¹⁶⁵ has "discretionary authority [under the plan] to determine eligibility for benefits or to construe the terms of the plan," a more deferential, arbitrary and capricious standard of review applies.¹⁶⁶

The ability of an employer to reduce or eliminate a benefit under an employee benefit plan depends on the scope of ERISA protection covering the particular benefit. If an employer denies a benefit due under the terms of the plan, a right of action is triggered under section 502(a)(1)(B).¹⁶⁷ If, however, an employer merely amends the terms of the plan to withdraw AIDS coverage from participants, rather than denying a benefit due under the plan, ERISA remedies are generally ineffective.

a. section 203: vesting requirements

One of ERISA's primary protections is vesting, "an employee's [nonforfeitable] right to his [or her] normal retirement benefit . . . upon the attainment of normal retirement age" in a pension plan.¹⁶⁸ The defi-

162. *Pilot Life*, 481 U.S. at 54. For a discussion of the *Pilot Life* reading of section 502(a) as an exclusive remedy for ERISA rights, see *supra* note 109.

163. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In the appellate decision, the Third Circuit described the *de novo* standard as applying the principles of contract construction, "steering a middle course between the [plaintiff's and defendant's] constructions of the [plan] document." *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 145 (3d Cir. 1987), *aff'd*, 489 U.S. 101 (1989). The court also noted that industry practice and past practice under the plan would aid in interpretation. *Id.* "[T]he *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded [i.e., welfare plan] and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest." *Firestone*, 489 U.S. at 115.

164. See *infra* note 174.

165. See *infra* notes 211-15 and accompanying text.

166. *Firestone*, 489 U.S. at 115. Under this standard, a benefit claim denial is proper as long as it is based on a good faith reasonable interpretation of the terms of the plan. *Johnson v. District 2 Marine Eng'rs Beneficial Ass'n*, 857 F.2d 514, 516 (9th Cir. 1988) (denial of liver transplant as experimental surgery was not arbitrary or capricious). For a detailed discussion of the arbitrary and capricious standard of review prior to *Firestone*, see Turza, *The Judicial Standard of Review of Benefit Denials by Fiduciaries of ERISA Welfare Plans*, 1 BENEFITS L.J. 55 (1988).

167. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

168. *Id.* § 203(a), 29 U.S.C. § 1053(a). A pension plan "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.* § 3(2)(A)(i), (ii), 29 U.S.C. § 1002(2)(A)(i), (ii).

nition of the term "nonforfeitable" limits its use to pension plans.¹⁶⁹ Also, ERISA states that minimum vesting standards do not apply to employee welfare benefit plans.¹⁷⁰ Consequently, ERISA's vesting requirements do not entitle a participant to a legally enforceable nonforfeitable right to benefits under a group health plan. As a result, in the absence of any implicit or explicit contrary agreement between an employer and its employees, an employer is free to amend, alter or eliminate group health plan benefits.¹⁷¹

169. *Id.* § 3(19), 29 U.S.C. § 1002(19). "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of [a] . . . benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." *Id.* Only accrued benefits must be nonforfeitable. *Id.* § 203(a), 29 U.S.C. § 1053(a). An accrued benefit is "an annual benefit commencing at normal retirement age, or in the case . . . of an individual account plan, the balance of the individual's account." *Id.* § 3(23), 29 U.S.C. § 1002(23).

170. *Id.* § 201(1), 29 U.S.C. § 1051(1). See *supra* note 78 for a definition of "employee welfare benefit plan."

171. See, e.g., *Metropolitan Life*, 471 U.S. at 732 (ERISA does not regulate substantive content of employee welfare plans); *Shaw*, 463 U.S. at 91 (ERISA imposes vesting requirements only on pension plans); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (vesting of welfare plans rejected by Congress); *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.) (employer may unilaterally amend or eliminate employee welfare benefit plan under ERISA), *cert. denied*, 488 U.S. 981 (1988); *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512, 1516 (8th Cir. 1988) (welfare benefits do not automatically vest as matter of law), *cert. denied*, 489 U.S. 1051 (1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987) (employee welfare benefits expressly excluded from ERISA vesting provisions); *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986) (rights to welfare benefits do not automatically vest under law); *Hansen v. White Motor Corp.*, 788 F.2d 1186, 1193 (6th Cir. 1986) (Congress exempted employee welfare benefit plans from vesting requirements); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983) (only pension benefits vest), *cert. denied*, 467 U.S. 1205 (1984); *UAW v. Roblin Indus.*, 561 F. Supp. 288, 299-300 (W.D. Mich. 1983) (ERISA vesting principle does not apply to health and life insurance benefits).

The court in *Moore* explained the rationale behind the lack of a vesting requirement in welfare benefit plans:

Automatic vesting was rejected [by Congress] because the costs of such plans are subject to fluctuating and unpredictable variables. . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs. . . . [To sanction the vesting of welfare benefits] would not only fly in the face of ERISA's plain language but would also decrease protection for future employees and retirees.

Moore, 856 F.2d at 492.

This rationale supports an employer's ability to amend welfare plans under ERISA and is consistent with the reasons cited by the employer for reducing coverage for AIDS in *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393-94 (S.D. Tex.), *appeal filed*, No. 90-2672 (5th Cir. July 27, 1990).

In *Sutton*, the court further described the intent of Congress that ERISA vesting requirements do not apply to unfunded retirement benefits and welfare plans:

The Act was not designed to prohibit modification of these ancillary [welfare] benefits. Rather, Congress believed that the "vesting of these ancillary benefits would

b. sections 101-111: reporting and disclosure

Even though employee welfare benefit plans are not subject to ERISA vesting requirements, an employer can create a legally enforceable right to benefits, either through a written obligation,¹⁷² or by failing to reserve the right to amend or change the benefits.¹⁷³ Therefore, an employee who has been denied AIDS coverage under an employer-sponsored group health plan should review the documents that describe the plan.

ERISA requires employers to use a summary plan description (SPD) to describe benefits programs to their employees.¹⁷⁴ An SPD must be written in a "manner calculated to be understood by the average plan participant, and . . . sufficiently accurate and comprehensive to reasonably apprise such participants . . . of their rights and obligations under the plan."¹⁷⁵ An SPD must contain certain information, including "the plan's requirements respecting eligibility for participation and bene-

seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." An employer may change such benefits without violating ERISA.

Sutton, 724 F.2d at 410 (citations omitted) (quoting H.R. REP. NO. 807, 93d Cong., 2d Sess. 60, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4935).

172. See *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (statements in employee benefit summary plan description may be binding).

173. See *Moore*, 856 F.2d at 492 (employer may alter employee welfare benefit plan when summary plan description disclaimer reserves right to amend or terminate benefits). *But cf.* *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (disallowing disclaimer in summary plan description proclaiming inconsistencies will be governed by plan document). Because some courts have held that disclaimers in summary plan descriptions have no effect, see, e.g., *id.*; *Zittrouer v. UARCO Inc. Group Benefit Plan*, 582 F. Supp. 1471, 1475 (N.D. Ga. 1984) (disclaimers in plan summary invalid), an employer may not be able to rely on a disclaimer to avoid liability for a change in benefits or a discrepancy with the plan document. Therefore, failure by an employer to reserve the right to amend, modify, or terminate the plan may be irrelevant. Because other courts, however, have upheld disclaimers, see, e.g., *Moore*, 856 F.2d at 492; *Henne v. Allis-Chalmers Corp.*, 660 F. Supp. 1464, 1475 (E.D. Wis. 1987), employers are likely to reserve these rights in summary plan descriptions.

174. Employee Retirement Income Security Act of 1974, § 101(a)(1), 29 U.S.C. § 1021(a)(1) (1988). Employee benefit plan administrators must provide each plan participant with an SPD. *Id.* An "employee benefit plan [must] be established and maintained pursuant to a written instrument." *Id.* § 402(a)(1), 29 U.S.C. § 1102(a)(1). Either the plan administrator is designated by the plan document or, if there is no designation, the plan sponsor is the plan administrator. *Id.* § 3(16)(A)(i)-(ii), 29 U.S.C. § 1002(16)(A)(i)-(ii). In the case of a single employer who establishes and maintains an employee benefit plan, the employer is the plan sponsor. *Id.* § 3(16)(B)(i), 29 U.S.C. § 1002(16)(B)(i). An SPD must be filed with the Secretary of Labor. *Id.* §§ 101(b), 104(a)(1), 29 U.S.C. §§ 1021(b), 1024(a)(1). For regulations governing general ERISA reporting and disclosure requirements, see 29 C.F.R. §§ 2520.101-1 to 2520.104b-30 (1990).

175. Employee Retirement Income Security Act of 1974, § 102(a)(1), 29 U.S.C. § 1022(a)(1) (1988).

fits . . . [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."¹⁷⁶ In addition to the SPD, the plan administrator also may write a more complete plan description.¹⁷⁷

Failure to comply with ERISA reporting and disclosure requirements due to a procedural error usually is not sufficient to create employer liability.¹⁷⁸ If, however, a benefit is described in the plan description or SPD, a participant generally may enforce his or her rights to that benefit under ERISA.¹⁷⁹

If an SPD contains inaccurate language, or if there is an omission, and the SPD is inconsistent with other plan documents, an employee may be able to enforce the SPD if he or she reasonably relied upon it and some prejudice or harm resulted from that reliance.¹⁸⁰ This assumes, however, that any disclaimer in the SPD has not been given effect.¹⁸¹

An employee who seeks to enforce a benefits obligation to provide unreduced AIDS coverage in a group health plan should review the plan documents and the employer's compliance with ERISA reporting and disclosure requirements. As long as these requirements have been met, and the employer has accurately described the coverage limitation, it is unlikely that an employee would be able to rely on these ERISA provisions, or the interpretive case law, for assistance in obtaining full coverage.¹⁸²

176. *Id.* § 102(b), 29 U.S.C. § 1022(b).

177. *Id.* §§ 101(b)(2), 102(a)(2), 29 U.S.C. §§ 1021(b)(2), 1022(a)(2). The plan description required by section 102 consists of an SPD. *See* 29 U.S.C. § 1022; 29 C.F.R. § 2520.102-1.

178. *Henne*, 660 F. Supp. at 1474 ("[F]ailure to comply with ERISA's procedural requirements warrants no substantive remedy unless there has been flagrant and wholesale flouting of ERISA disclosure provisions." (citation omitted)); *Freund v. Gerson*, 610 F. Supp. 69, 71 (S.D. Fla. 1985) ("technical" breach of SPD requirements does not create private cause of action).

179. Employee Retirement Income Security Act of 1974, § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (1988); *see* *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (court has authority to provide remedy for misleading summary plan description under ERISA section 502(a)(3)(B)).

180. *Edwards*, 851 F.2d at 137 (employee misled by summary plan description need not prove detrimental reliance); *Bachelor v. Communications Satellite Corp.*, 837 F.2d 519, 522-23 (1st Cir. 1988) (reasonable or significant reliance on summary plan description required for relief); *Lee v. Union Elec. Co.*, 789 F.2d 1303, 1308 (8th Cir.), *cert. denied*, 479 U.S. 962 (1986); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union*, 732 F.2d 250, 252 (1st Cir. 1984) ("[plaintiff] must show some significant reliance upon, or possible prejudice flowing from, the faulty [summary] plan description"); *Freund*, 610 F. Supp. at 71 (plaintiff must show significant reliance upon, or prejudice from summary plan description).

181. *See supra* note 173 and accompanying text for a discussion of SPD disclaimers.

182. *McGann*, 742 F. Supp. at 394.

c. section 510: interference with protected rights

i. statutory language

On its face, section 510 of ERISA appears to assist an employee who is denied coverage for AIDS under a group health plan because of an amendment. Nevertheless, amending a group health plan to limit or exclude AIDS coverage probably does not constitute section 510 discrimination. Section 510 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he [or she] is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan¹⁸³

The primary purpose of section 510 is to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights,"¹⁸⁴ or other "statutory or plan-based rights."¹⁸⁵ While not necessarily indicative of the weight of section 510 arguments, virtually all section 510 cases involve a claim that an employee's termination is pretextual and that the real purpose is to deny benefits to which an employee or an employee's beneficiary is entitled.¹⁸⁶

183. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140 (1988).

184. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). The Supreme Court has noted that the prototypical claim Congress intended to cover under section 510 is one in which an employee's "termination [is] motivated by an employer's desire to prevent a pension from vesting." *Ingersoll-Rand*, 111 S. Ct. at 485.

185. *Zipf v. American Tel. & Tel. Co.*, 799 F.2d 889, 891 (3d Cir. 1986).

186. See, e.g., *McLendon v. Continental Can Co.*, 908 F.2d 1171, 1183 (3d Cir. 1990) (employer's program to lay off employees prior to benefits eligibility violated section 510); *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 390 (3d Cir. 1990) (terminated employee failed to show employer intended to interfere with pension rights); *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 588 (1st Cir. 1989) (alleging wrongful termination to avoid medical plan payments to employee's former spouse); *Dister v. Continental Group*, 859 F.2d 1108, 1117-18 (2d Cir. 1988) (employer's reasons for discharge were not pretext for interfering with attainment of pension benefits); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.) (employer's program to lay off employees prior to benefits eligibility violated section 510), *cert. denied*, 484 U.S. 979 (1987); *Zipf*, 799 F.2d at 890 (alleging discharge to prevent payment of disability benefits); *Kross v. Western Elec. Co.*, 701 F.2d 1238, 1239 (7th Cir. 1983) (alleging discharge to avoid payment of medical and life insurance); *Silverman v. Barbizon School of Modeling & Fashion*, 720 F. Supp. 966, 973 (S.D. Fla. 1989) (alleging discharge to avoid payment of bonuses and options); *Bradley v. Capital Eng'g & Mfg. Co.*, 678 F. Supp. 1330, 1336 (N.D. Ill. 1988) (alleging termination to prevent payment of medical benefits); *Furcini v. Equibank*, 660 F. Supp. 1436, 1445 (W.D. Pa. 1987) (employer's reasons for discharge were not pretext for avoiding payment of severance benefits); *Rose v. Intelogic Trace*, 652 F. Supp. 1328, 1330 (W.D. Tex. 1987) (alleging termination to avoid vesting of retirement benefits, payment of vacation and

- ii. section 510 does not support claim when group health plan is merely amended

To support a section 510 claim, a plaintiff must establish that the employer intended to interfere with the participant's or beneficiary's benefits.¹⁸⁷ A loss of benefits incidental to the employer's action does not violate section 510.¹⁸⁸ It may be difficult, though, for a plaintiff to establish through direct evidence that the employer intended to interfere with benefit rights, especially if the employer claims the benefits were denied for another reason.¹⁸⁹ Therefore, courts have analogized the elements of a discrimination claim under title VII of the Civil Rights Act of 1964,¹⁹⁰ first articulated in *McDonnell Douglas Corp. v. Green*,¹⁹¹ to those required under ERISA section 510.¹⁹²

The *McDonnell Douglas* discrimination test permits a plaintiff to indirectly prove employer intent to discriminate through shifting burdens of proof.¹⁹³ First, the plaintiff has the burden of making out a prima facie case of discrimination by demonstrating: "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment

other benefits); *Economu v. Borg-Warner Corp.*, 662 F. Supp. 1047, 1052 (D. Conn. 1986) (alleging termination to prevent vesting of pension benefits), *aff'd*, 824 F.2d 181 (2d Cir. 1987); *Ferguson v. Freedom Forge Corp.*, 604 F. Supp. 1157, 1161-62 (W.D. Pa. 1985) (alleging discharge caused loss of pension rights); *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015 (W.D. Mo. 1984) (employee's discharge intended to deny advantages of employee benefit plans); *Ursic v. Bethlehem Mines*, 556 F. Supp. 571, 575 (W.D. Pa.) (employer's reasons for employee's discharge were pretextual, true purpose being to deprive employee of impending pension rights), *aff'd*, 719 F.2d 670 (3d Cir. 1983). In one of the few section 510 cases when the plaintiffs were not discharged from their employment, they alleged that a retirement plan amendment amounted to constructive discharge. See *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991).

187. *Hendricks*, 898 F.2d at 389; *Dister*, 859 F.2d at 1111; *Varhola v. Doe*, 820 F.2d 809, 816-17 (6th Cir. 1987); *Gavalik*, 812 F.2d at 851 ("essential element of proof under [section] 510 is specific intent to engage in proscribed activity").

188. *Dister*, 859 F.2d at 1111; *Gavalik*, 812 F.2d at 851.

189. See, e.g., *Dister*, 859 F.2d at 1111 (proof of specific intent is critical in section 510 cases, but it is seldom proved by direct evidence); *Young v. Standard Oil*, 660 F. Supp. 587, 597 (S.D. Ind. 1987) (plaintiff failed to show requisite discrimination in form of constructive discharge), *aff'd on other grounds*, 849 F.2d 1039 (7th Cir. 1988).

190. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

191. 411 U.S. 792, 802-04 (1973).

192. *Dister*, 859 F.2d at 1111-12; *Gavalik*, 812 F.2d at 852-53; *Furcini*, 660 F. Supp. at 1439-40. If the plaintiff has direct evidence of specific intent to interfere with benefit rights, the *McDonnell Douglas* test does not apply. *Gavalik*, 812 F.2d at 853. For a detailed discussion of the application of the *McDonnell Douglas* title VII discrimination test to ERISA section 510, see Collingsworth, *ERISA Section 510—A Further Limitation on Arbitrary Discharges*, 10 INDUS. REL. L.J. 319, 330-43 (1988).

193. *Gavalik*, 812 F.2d at 852-53.

of any right to which the employee may become entitled."¹⁹⁴ If the plaintiff establishes this prima facie case, "the burden of production shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions."¹⁹⁵ If the employer carries its burden, there is no presumption of discrimination, but the plaintiff can "demonstrate that the employer's articulated reason is pretextual 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"¹⁹⁶ Throughout these shifting burdens, the plaintiff bears the ultimate burden of proving specific intent of the employer to interfere with benefit rights.¹⁹⁷

An employee whose employer has limited AIDS coverage by amending the group health plan would have difficulty meeting the prima facie burden under the *McDonnell Douglas* test as applied to section 510. The employee's obstacle is ERISA, under which an employer is free to amend or even terminate an employee welfare benefit plan.¹⁹⁸ Consequently, the first element of the prima facie test—that the employer engaged in conduct prohibited by ERISA by amending the plan—is nearly impossible to prove.¹⁹⁹

Even if an employee could establish that an employer engaged in prohibited conduct by interfering with benefits rights, the employee still must show that he or she is, or may become, entitled to the right under ERISA.²⁰⁰ This may prove difficult, though, because specific levels of benefits under a group health plan are not protected by ERISA,²⁰¹ nor does ERISA provide for vesting of welfare benefits.²⁰² Therefore, ER-

194. *Id.* at 852. In *Furcini*, the court described the plaintiff's prima facie case as demonstrating: "(i) that he was a candidate for a benefit protected by ERISA; (ii) that he was denied that benefit; and (iii) that he satisfied the conditions for receiving that benefit." *Furcini*, 660 F. Supp. at 1442. The court, however, added that this test was limited to the facts of the case and should not be applied to other factual situations. *Id.* The court also noted that the evidence required to establish the plaintiff's prima facie case was much less than the evidence necessary to prove that section 510 had been violated. *Id.* at 1440-42.

195. *Gavalik*, 812 F.2d at 853.

196. *Id.* at 853 (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

197. *Id.* at 852.

198. *See supra* note 171 and accompanying text.

199. The alleged employer conduct in most section 510 cases is termination of employment. *See supra* note 186 and accompanying text.

200. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140 (1988).

201. *See supra* notes 169-71 and accompanying text.

202. *See supra* notes 169-70 and accompanying text.

ISA does not create a protected group health insurance benefit that cannot be amended by an employer.

This interpretation is consistent with the language of section 510, which protects the rights a participant is or may be "entitled [to] under the provisions of an employee benefit plan."²⁰³ If the plan does not provide coverage for AIDS, or provides severely limited coverage compared with other catastrophic illnesses, then the plan has failed to create a right to full AIDS coverage. An employer cannot interfere with or discriminate against an employee for exercising a right that does not exist. Whether the employer has actual intent to discriminate against a plan participant by amending the plan to limit AIDS coverage is, therefore, irrelevant under this analysis.

Arguably, however, it is the discriminatory intent of the employer that converts a lawful action, such as discharge of the employee or amendment of the plan, into a violation of section 510. A plan participant can state a section 510 claim without evidence of a continued entitlement to the benefits because evidence of entitlement at the time of the employer's action is sufficient.²⁰⁴ Even so, mere amendment of a plan does not violate section 510 although the result may be a deprivation of benefits.

When an employer discharges an employee to deprive the employee of benefits, the employer takes affirmative steps to interfere with a benefit right to which the employee is or may be entitled at the time of the action. The benefit plan provisions have not changed as the result of the discharge. Regardless of the discharge, the employee may or may not have been entitled to continue receiving the benefits.

In contrast, when the plan is merely amended and no discharge occurs, the employer has not impermissibly interfered with a benefit right to which the employee is or may be entitled. This is true even if such entitlement no longer exists because, under ERISA, an employer may amend or alter an employee welfare benefit plan in the absence of a contrary agreement between the employer and its employees.²⁰⁵ To find

203. Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140 (1988).

204. See *Zipf*, 799 F.2d at 893 (employee need not show entitlement to benefit but for employer interference); cf. *Kross*, 701 F.2d at 1242-43 (rejecting restrictive interpretation of section 510 as only protecting the attainment of benefits right, which removed participant who already attained right from claiming section 510 violation). In *Zipf*, the Third Circuit stated that whether an employer's interference is successful, or whether a participant actually would have received the benefit in the absence of the interference, is irrelevant in a section 510 analysis. *Zipf*, 799 F.2d at 893. A participant must show, however, that he or she had the potential of receiving the benefits at the time of the employer's alleged interference. *Id.*

205. See *supra* note 171 and accompanying text.

otherwise would beg the question of whether the employer has interfered impermissibly with a right to which the employee is or may become entitled under the plan. This is one of the issues that the Fifth Circuit should address in the appeal in *McGann v. H & H Music Co.*²⁰⁶

If a plan participant makes out a prima facie case under the *McDonnell Douglas* test, and proves discriminatory intent, an employer can rebut the inference with evidence of a nondiscriminatory, legitimate business reason for the change.²⁰⁷ Courts will not, however, blindly defer to employers' claims. For example, the Third Circuit in *Gavalik v. Continental Can Co.*²⁰⁸ rejected an employer's argument that saving pension costs was a legitimate business reason to avoid pension obligations. The court explained that section 510 was intended to prevent this type of employer interference.²⁰⁹

If the employer meets its burden of showing a nondiscriminatory, legitimate business reason for amending its benefit plan, a participant can still prevail if he or she shows that the reason was pretextual, because either a discriminatory reason more likely motivated the employer or the proffered reasons are unworthy of credence.²¹⁰

d. sections 401-414: fiduciary duties

Another possible avenue for an employee who is denied AIDS coverage under an employee welfare benefit plan is to claim that the employer breached a fiduciary duty. A fiduciary is a person who, with respect to an employee benefit plan: (1) "exercises any discretionary authority or . . . control [in managing] such plan," (2) "exercises any au-

206. Brief Amicus Curiae of Am. Assoc. of Retired Persons in Support of Plaintiff-Appellant at 9-11, *McGann v. H & H Music Co.*, No. 90-2672 (5th Cir. filed July 27, 1990), *appeal from* 742 F. Supp. 392 (S.D. Tex. 1990).

207. *McDonnell Douglas*, 411 U.S. at 802.

208. 812 F.2d 834 (3d Cir. 1987).

209. *Id.* at 857 n.39. A closer look at the legislative history, however, reveals that section 510 was primarily intended to protect pension benefits, which are subject to ERISA vesting requirements, and not welfare benefits, which do not vest under ERISA. *See supra* note 171 and accompanying text. Therefore, an employer's cost justification for a welfare benefit reduction is probably a legitimate business reason under section 510 and should be sufficient to meet the employer's burden of proof. *See Dister*, 859 F.2d at 1112 (employer does not need to prove that nondiscriminatory legitimate reasons actually motivated its actions, only articulate them).

To find otherwise could allow section 510 to swallow up other parts of ERISA by providing broader protections than those delineated under the vesting, fiduciary, and reporting and disclosure requirements. Also, most group health plan benefit levels are designed with cost as the primary consideration, and plan changes are often made because of cost. Hall, *supra* note 57, at 101-03. Some group of employees is likely to be disadvantaged because of these designs or changes.

210. *See supra* note 196 and accompanying text.

thority or control respecting management or disposition of [plan] assets," (3) "renders investment advice for a fee or other compensation . . . with respect to . . . such plan, or has any authority or responsibility to do so," or (4) "has any discretionary authority or . . . responsibility in the administration of [the] plan."²¹¹ ERISA requires employee benefit plans to name one or more fiduciaries, who "have authority to control and manage the operation and administration of the plan."²¹²

A fiduciary has the responsibility to "discharge his [or her] duties with respect to a plan solely in the interest of the participants . . . for the exclusive purpose of . . . providing benefits to participants."²¹³ A fiduciary must administer a plan consistently in accordance with the terms of the plan documents.²¹⁴ The standard of care for a fiduciary is one of a prudent person, acting in like circumstances.²¹⁵

Breach of a fiduciary duty allows a participant to seek enforcement of benefit rights.²¹⁶ A breach of fiduciary duty also makes the fiduciary personally liable for any losses incurred by the plan.²¹⁷ A court may order other equitable or remedial relief as it deems appropriate.²¹⁸

Whether an employer violates a fiduciary duty by limiting AIDS medical coverage in a group health plan depends on two factors.²¹⁹ First, the employer must be a fiduciary.²²⁰ Second, the employer must have failed to discharge its fiduciary duties under the appropriate standard of review.²²¹

An employer who administers a self-funded group health plan is a

211. Employee Retirement Income Security Act of 1974, § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988).

212. *Id.* § 402, 29 U.S.C. § 1102.

213. *Id.* § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i).

214. *Id.* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

215. *Id.* § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

216. *Id.* § 502(a), 29 U.S.C. § 1132(a).

217. *Id.* § 409(a), 29 U.S.C. § 1109(a).

218. *Id.*

219. The threshold question in determining whether an employer's action violates a fiduciary duty is whether the "action fall[s] within the fiduciary functions delineated by ERISA." *Payonk v. HMW Indus.*, 883 F.2d 221, 225 (3d Cir. 1989).

220. *See id.* A fiduciary, or any other person who knowingly participates in a fiduciary violation, is subject to a twenty percent penalty of the amount recovered by the Department of Labor in a settlement or suit. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2101, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 2106, 2123 (to be codified at 29 U.S.C. § 1132(l)). Thus, an employer who is not a fiduciary may still be subject to civil penalties. Non-fiduciaries who may be subject to civil penalties generally include accountants, actuaries, attorneys, consultants, or persons who perform only "ministerial" plan functions. *See Koss, Discharging Fiduciary Responsibilities: New Rules Mean New Vigilance*, 3 BENEFITS L.J. 213, 216-17 (1990).

221. *Payonk*, 883 F.2d at 225; *see supra* notes 163-66 and accompanying text.

fiduciary under ERISA.²²² The employer, not an insurance carrier, has total control and authority of the disposition of plan assets.²²³ The employer usually has discretionary authority or responsibility to administer the plan, especially since the employer controls the funds of the plan and must direct the activities of the claims payor.²²⁴

The more difficult question is whether an employer violates its fiduciary duty to a plan participant when it limits AIDS coverage in a group health plan. If the denial or limitation occurs because of a plan amendment, as in *McGann*,²²⁵ the employer has probably not breached a fiduciary duty in the absence of any other ERISA violation.²²⁶ If, however, an employer denies a benefit to which the participant is entitled under the terms of the plan, as amended, the employer may breach the fiduciary duty to act "solely in the interest of the participants . . . for the exclusive purpose of . . . providing benefits to participants,"²²⁷ or the duty to administer the plan consistently in accordance with its terms.²²⁸ Nevertheless, an employer does not act in a fiduciary capacity when deciding to amend or terminate an employee welfare benefit plan.²²⁹ An employer, however, can breach a fiduciary duty if it fails to communicate material information to a plan participant that could affect the participant's rights

222. See *Payonk*, 883 F.2d at 225 (when plan administrator "decides matters required in plan administration or involving obligations imposed upon the administrator by the plan" ERISA fiduciary duties attach). An employer, however, is not a fiduciary when the employer merely makes business decisions not regulated by ERISA. *Id.*

223. See Harker, *supra* note 10, at 707-08 (under self-funding, insurer provides only administrative services and does not assume responsibility for claims liabilities).

224. See *Payonk*, 883 F.2d at 225 (employers are fiduciaries when they act as plan administrators); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1184-85 (3d Cir. 1985) (employer administrator of life insurance plan a fiduciary); *Austin v. General Am. Life Ins. Co.*, 498 F. Supp. 844, 846 (N.D. Ala. 1980) (whether insurer a fiduciary depends on plan and agreement with employer); see also Harker, *supra* note 10, at 709 (employers may be concerned over the administrative responsibilities involved in self-funding).

225. 742 F. Supp. at 393; see *supra* notes 5, 56 and accompanying text.

226. *Young*, 849 F.2d at 1045 (employer does not breach fiduciary duty when it amends employee welfare benefit plan); *Witmeyer v. Kilroy*, 788 F.2d 1021, 1024-25 (4th Cir. 1986) (trustees did not breach fiduciary duty when retirement plan amendments met general ERISA requirements); *Sutton*, 724 F.2d at 410-11 (employer did not violate fiduciary duty when it amended plan not subject to ERISA vesting requirements).

227. Employee Retirement Income Security Act of 1974, § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i) (1988).

228. *Id.* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). A participant whose benefit claim has been denied must be afforded a reasonable opportunity to have a full and fair review of the denial by the named plan fiduciary. *Id.* § 503(2), 29 U.S.C. § 1133(2).

229. *Adams v. Avondale Indus.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 111 S. Ct. 517 (1990). The court in *Adams* found that the employer had not acted in a fiduciary capacity when amending its severance pay plan, an employee welfare benefits plan, in spite of the fact that the employer had failed to reserve a right to amend the plan and had failed to comply with ERISA reporting and disclosure requirements. *Id.* at 949-50.

under the plan.²³⁰

From the foregoing, it is apparent that the various provisions of ERISA designed to protect the security of employee welfare plan benefits do not provide adequate protection to an employee who has AIDS coverage restricted by a group health plan. Federal discrimination statutes, designed specifically to protect handicapped and disabled persons from discrimination, are equally ineffective.

B. Federal Employment Discrimination Statutes

Two important pieces of federal legislation, designed to protect disabled or handicapped employees from employment discrimination, may apply to an employee suffering from inadequate AIDS coverage: the Rehabilitation Act of 1973 (the Rehabilitation Act)²³¹ and the Americans with Disabilities Act of 1990.²³² Nevertheless, while these statutes broadly protect handicapped persons from employment discrimination, they provide little assistance to an employee to fight an employer who restricts AIDS in an employee group health plan.

1. The Rehabilitation Act of 1973

a. applying the statutory language to AIDS

The Rehabilitation Act prohibits discrimination against individuals with handicaps in federally funded programs.²³³ Sections 503 and 504 of the Rehabilitation Act prohibit handicap discrimination relating to employee welfare benefit plans.²³⁴

Section 503 and its implementing regulations require federal contractors with government contracts exceeding \$2,500 annually to take affirmative action to employ and advance "qualified individuals with handicaps."²³⁵ The federal contractor must include an affirmative action clause in each contract, under which the contractor agrees to "treat qualified handicapped individuals without discrimination based upon their physical or mental handicap *in all employment practices* such as . . . rates

230. *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990) (failure to inform AIDS patient of conversion rights upon termination of group policy breached ERISA fiduciary duty). Compliance with ERISA's reporting and disclosure requirements does not necessarily discharge a fiduciary duty to convey material information affecting rights of participants. *Id.*

231. 29 U.S.C. §§ 701-796i (1988).

232. Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327 (to be codified at 42 U.S.C. §§ 12101-12213).

233. 29 U.S.C. §§ 793, 794.

234. *Id.*

235. *Id.* § 793(a); 41 C.F.R. § 60-741.6(a) (1990).

of pay or other forms of compensation."²³⁶ Employee welfare benefit plans constitute "other forms of compensation."²³⁷

Section 504 is broader than section 503, and requires that an "otherwise qualified individual with handicaps . . . shall [not], solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."²³⁸ An individual is handicapped if the person: (1) "has a physical or mental impairment which substantially limits one or more . . . major life activities," (2) "has a record of such an impairment," or (3) "is regarded as having such an impairment."²³⁹ "Major life activities" are defined by regulations promulgated by the Department of Health and Human Services.²⁴⁰

AIDS is not specifically defined by the Rehabilitation Act as a handicap,²⁴¹ however, some courts and commentators have asserted that AIDS should be considered a handicap under the Act.²⁴² In *School Board v. Arline*,²⁴³ the United States Supreme Court held that a person with a contagious disease and a "physical impairment" is handicapped within the meaning of section 504.²⁴⁴ The Court, however, specifically reserved the question of whether HIV infection in the absence of physical impairment was sufficient for a person to be handicapped under section 504.²⁴⁵ Some federal courts have relied on *Arline* to find that AIDS

236. 41 C.F.R. § 60-741.4 (1990) (emphasis added).

237. See *id.*

238. 29 U.S.C. § 794; see also 45 C.F.R. § 84.4(a) (1990).

239. 29 U.S.C. § 706(8)(B); see also 45 C.F.R. § 84.3(j) (1990).

240. See 45 C.F.R. § 84.3(j)(2)(ii) (major life activities include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

241. The Rehabilitation Act regulations, promulgated by the Department of Health and Human Services, do not identify specific handicaps. However, they define "physical impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i).

242. *Chalk v. United States Dist. Court*, 840 F.2d 701, 704-09 (9th Cir. 1988); *Doe v. Dolton Elementary School Dist.*, 694 F. Supp. 440, 443-45 (N.D. Ill. 1988); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1987); Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988) (arguing that asymptomatic HIV carriers are protected by the Rehabilitation Act). For the purposes of this discussion, it is assumed that an employee with HIV infection qualifies as an "individual with handicaps" under the Rehabilitation Act.

243. 480 U.S. 273 (1987).

244. *Id.* at 285-86.

245. *Id.* at 282 n.7. The Court clarified that in the case before it the individual suffered from both physical impairment and contagiousness, and that it would not decide "whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a

should be a handicap under the Rehabilitation Act.²⁴⁶ Subsequent federal legislation codified the holding in *Arline* that an otherwise qualified person with a contagious disease is protected under section 504.²⁴⁷ The United States Department of Justice has interpreted this legislation to include HIV infection as a protected handicap.²⁴⁸

b. section 504 permits nondiscriminatory coverage limitations

The Rehabilitation Act prohibits employers from discriminating regarding fringe benefits against "otherwise qualified" handicapped persons on the basis of their handicaps, whether or not the employer administers the benefits.²⁴⁹ Generally, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his [or her] handicap."²⁵⁰ In the employment relationship, an "otherwise qualified" handicapped person is one who "with reasonable accommodation, can perform the essential functions of the job in question."²⁵¹ Therefore, in order to establish a claim of benefits discrimination under the Rehabilitation Act, an employee must not only establish that the plan has in fact discriminated on the basis of handicap, but that the person is "otherwise qualified" to receive the benefits.

Outright denial of the opportunity to participate in an employee benefit plan on the basis of a person's handicap, that the person would otherwise qualify for, violates section 504.²⁵² A plan requirement that denies benefit plan eligibility only to employees with AIDS is an example

handicapped person as defined by the Act." *Id.* The Court, however, did reaffirm the congressional intent of the "handicapped individual" definition to preclude discrimination against individuals who are "regarded as having an impairment," but who do not exhibit a physical or mental incapacity. *Id.* at 282-86.

246. *See, e.g., Chalk*, 840 F.2d at 701; *Doe*, 694 F. Supp. at 444; *Thomas*, 662 F. Supp. at 383.

247. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988) (to be codified at 29 U.S.C. § 706(8)(C)).

248. Justice Department Memorandum on Application of Section 504 of the Rehabilitation Act to HIV-Infected Persons, *reprinted in* Daily Lab. Rep. (BNA) No. 195, at D-1 (Oct. 7, 1988). HIV infection is also now covered under section 503 of the Rehabilitation Act. OFCCP Directive on AIDS *reprinted in* Daily Lab. Rep. (BNA) No. 53, at A-9 (Mar. 21, 1989).

249. 45 C.F.R. § 84.11(b)(6) (1990).

250. *Arline*, 480 U.S. at 287 n.17 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)). An "otherwise qualified employee is a person who can perform 'the essential functions' of the job in question." *Id.* (quoting 45 C.F.R. § 84.3(k) (1985)). The "otherwise qualified" determination is made based on reasonable medical judgments, normally by a public health official, about the nature, duration and severity of the risk, and the probability the disease will be transmitted. *Id.* at 288.

251. 45 C.F.R. § 84.3(k) (1990).

252. *Id.* § 84.4(b)(1)(i).

of such a provision. An employee benefit plan also discriminates on the basis of handicap if it does not afford an "otherwise qualified" handicapped person the same opportunity to obtain the benefit as someone who is not handicapped.²⁵³ For example, a plan that imposes a three-month eligibility waiting period only for employees with AIDS probably violates section 504.

c. common group health plan provisions do not violate section 504

Rather than containing provisions that limit only handicapped persons' access to coverage, group health plans more commonly contain provisions that have the effect of limiting coverage for all participants, whether or not they are handicapped.²⁵⁴ These provisions are nondiscriminatory and permissible under the Rehabilitation Act, because they do not limit coverage for handicapped persons, as defined, any more than they limit coverage to persons who are not handicapped.²⁵⁵ For example, a pre-existing conditions limitation,²⁵⁶ which limits coverage for all medical conditions existing at or before the time the employee becomes eligible for the plan, does not violate section 504.²⁵⁷ An evidence of insurability provision,²⁵⁸ which applies equally to all employees, is also permissible.²⁵⁹

To make out a claim under the Rehabilitation Act, a handicapped employee must show that he or she is qualified to receive the benefit in spite of the handicap.²⁶⁰ The employee must also show that the plan

253. *Doe v. Devine*, 545 F. Supp. 576, 585 (D.D.C. 1982) (section 504 "disallows a federal [employer] from withholding from a handicapped individual a benefit that is made available to others"), *aff'd on other grounds*, 703 F.2d 1319 (1983); 45 C.F.R. § 84.4(b)(2) (1990).

254. *See supra* note 46 and accompanying text.

255. *Alexander v. Choate*, 469 U.S. 287, 301-02 (1985) (neutral benefit reduction that does not distinguish on basis of handicap does not violate section 504, which requires that an otherwise qualified handicapped individual be provided meaningful access to benefit employer offers); *Doe*, 545 F. Supp. at 585; 45 C.F.R. § 84.4(b)(1), (2).

256. *See supra* note 46 and accompanying text for a discussion of common group health plan cost containment measures, including pre-existing conditions limitations.

257. *See Alexander*, 469 U.S. at 302; 45 C.F.R. § 84.4(b)(1), (2).

258. An evidence of insurability provision applies to a prospective plan participant who seeks coverage outside of the usual enrollment periods. Thomas, *Group Underwriting and Reinsurance*, in LIFE AND HEALTH INSURANCE HANDBOOK 433, 436-37 (3d ed. 1973). Before the insurance company or plan administrator will extend coverage, the applicant must show evidence of good health (insurability), usually by obtaining a physical examination at the applicant's cost. *Id.* Failure to prove good health results in coverage being denied. *See id.*

259. *See Alexander*, 469 U.S. at 302; 45 C.F.R. § 84.4(b)(1), (2).

260. *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 773 (8th Cir. 1987) (employee who could not perform essential job functions was not "otherwise qualified," and thus, not entitled to section 504 protection for denial of employee benefits), *cert. denied*, 485 U.S. 938 (1988).

provision discriminates against him or her. Providing a lesser benefit for treatment of a mental or nervous disorder than is provided for other conditions is acceptable, however, because a mentally ill person is not entitled to a full benefit in spite of his or her handicap.²⁶¹ Such a limitation also does not discriminate against handicapped persons, because it applies equally to all employees whether or not they are defined as handicapped under section 504.²⁶² Similarly, a provision in an employee benefit plan that limits the dollar amount of coverage for AIDS treatment probably does not violate section 504.

If a handicapped employee is not "otherwise qualified" to receive a full benefit, the employer must make "reasonable accommodations" to enable the employee to meet the program's requirements.²⁶³ An employer is excused from making an accommodation if it would impose an undue hardship.²⁶⁴ An accommodation is unreasonable if it would impose "undue financial and administrative burdens" on the employer, or would require "fundamental alteration[s] in the . . . program."²⁶⁵ An employer with a self-funded group health plan that limits coverage for AIDS could argue that providing full AIDS coverage would impose an undue financial burden. Providing full coverage could also fundamentally alter the nature of the program because it would require changing the provisions of the plan.²⁶⁶ Therefore, even if the Rehabilitation Act

261. *Alexander*, 469 U.S. at 304 (Rehabilitation Act does not guarantee handicapped persons equal results under state insurance program); *Bernard B. v. Blue Cross & Blue Shield*, 528 F. Supp. 125, 132-33 (1981) (reduction of mental health benefits in state insurance plan did not violate section 504—plan did not discriminate solely because of handicap and Congress did not intend to protect entitlement to full medical benefits), *aff'd*, 679 F.2d 7 (1982).

262. *Bernard B.*, 528 F. Supp. at 132-33. If this were not so, most group health insurance plans of employers subject to the Rehabilitation Act would violate the Act, because group health plans commonly provide less coverage for treatment of mental and nervous disorders, or alcohol and drug dependency, than for other illnesses or conditions. Lipton, *supra* note 58, at 173. See *supra* note 58 and accompanying text for a discussion of illnesses and conditions commonly limited under group health insurance plans.

263. 29 U.S.C. § 794; 45 C.F.R. §§ 84.3(k)(1), 84.12 (1990).

264. 45 C.F.R. § 84.12(a) (1990). Factors to be considered in determining whether an accommodation would impose an undue hardship include: (1) "[t]he overall size of the . . . program with respect to the number of employees, number and type of facilities, and size of budget;" (2) "the type of . . . operation, including the composition and structure of the . . . workforce;" and (3) "the nature and cost of the accommodation needed." *Id.* § 84.12(c).

265. *Arline*, 480 U.S. at 287 n.17 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)).

266. *Alexander*, 469 U.S. at 303 (section 504 does not require employers to design and offer insurance benefits just to meet greater medical needs of handicapped individuals). As described above, however, the provision is probably not discriminatory in the first place. See *supra* notes 255-62 and accompanying text.

applies to an employer, it does not offer much protection to an employee who finds AIDS coverage restricted by a group health plan.

2. The Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990 (ADA)²⁶⁷ was passed primarily as a national mandate aimed at eliminating discrimination against the some forty-three million Americans who have one or more physical or mental disabilities.²⁶⁸ The ADA was designed to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."²⁶⁹ The ADA was intended to protect persons with AIDS, as the legislative history discusses HIV infection as a disability covered by the ADA, whether asymptomatic or AIDS.²⁷⁰

Title I of the ADA²⁷¹ prohibits employment discrimination²⁷² on the basis of disability against a "qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other

267. Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327 (to be codified at 42 U.S.C. §§ 12101-12213).

268. Americans with Disabilities Act of 1990, § 2(a)(1), (b)(1), 42 U.S.C.A. § 12101(a)(1), (b)(1) (West Supp. 1990).

269. *Id.* § 2(b)(2), 42 U.S.C.A. § 12101(b)(2).

270. HOUSE COMM. ON EDUCATION & LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 52, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 334 [hereinafter HOUSE EDUCATION & LABOR REP.]; 136 CONG. REC. H2442 (daily ed. May 17, 1990) (statement of Rep. Weiss); see Americans with Disabilities Act of 1990, § 3(2), 42 U.S.C.A. § 12102(2).

271. Title I becomes effective on July 26, 1992. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327, 337. Many of the title I provisions were adopted from section 504 of the Rehabilitation Act and its implementing regulations. HOUSE COMM. ON JUDICIARY, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485(III), 101st Cong., 2d Sess. 31-35, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 454-58 [hereinafter HOUSE JUDICIARY REP.]. The Equal Employment Opportunity Commission (EEOC) has proposed regulations implementing title I of the ADA. 56 Fed. Reg. 8578-8603 (1991) (to be codified at 29 C.F.R. § 1630) (proposed Feb. 28, 1991).

272. Section 102(b) of the ADA describes definitions of "discrimination." The following would include discrimination in employee benefit plans:

(1) limiting, segregating, or classifying a[n] . . . employee in a way that adversely affects the opportunities or status of such . . . employee because of the disability of such . . . employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting [an employer's] qualified . . . employee with a disability to the discrimination prohibited [and] includes . . . providing fringe benefits to an employee of the [employer]; [and]

(3) utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability.

Americans with Disabilities Act of 1990, § 102(b), 42 U.S.C.A. § 12112(b) (West Supp. 1990); see 56 Fed. Reg. 8589 (1991) (to be codified at 29 C.F.R. § 1630.4) (proposed Feb. 28, 1991).

terms, conditions, and privileges of employment."²⁷³ Fringe benefits, such as employee welfare benefit plans, are included within the scope of "other terms, conditions, and privileges of employment."²⁷⁴

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the [job]."²⁷⁵ An employer must make reasonable accommodations for a qualified disabled individual unless such accommodations would create an undue hardship on the employer.²⁷⁶

Unlike the Rehabilitation Act, the ADA specifically addresses the issue of employer-sponsored insurance programs.²⁷⁷ Section 501(c) of the ADA states that an employer or insurer is not prohibited from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law . . . or that is not subject to State laws that regulate insurance."²⁷⁸ An employer, however, cannot take any of these actions to evade the

273. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

274. SENATE COMM. ON LABOR AND HUMAN RESOURCES, AMERICANS WITH DISABILITIES ACT OF 1990, S. REP. NO. 116, 101st Cong., 2d Sess. 25, reprinted in AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 713 (1990) [hereinafter SENATE REP.]; see 56 Fed. Reg. 8589 (1991) (to be codified at 29 C.F.R. § 1630.4) (proposed Feb. 28, 1991).

275. Americans with Disabilities Act of 1990, § 101(8), 42 U.S.C.A. § 12111(8) (West Supp. 1990); see 56 Fed. Reg. 8588 (1991) (to be codified at 29 C.F.R. § 1630.2(m)-(n)) (proposed Feb. 28, 1991).

276. Americans with Disabilities Act of 1990, § 102(b)(5)(A), 42 U.S.C.A. § 12112(b)(5)(A); see 56 Fed. Reg. 8589 (1991) (to be codified at 29 C.F.R. § 1630.9) (proposed Feb. 28, 1991). An "undue hardship" is an action which requires significant difficulty or expense, considered in light of various factors. Americans with Disabilities Act of 1990, § 101(10)(A), 42 U.S.C.A. § 12111(10)(A); see 56 Fed. Reg. 8588 (1991) (to be codified at 29 C.F.R. § 1630.2(p)) (proposed Feb. 28, 1991). The definition and factors are based on and to be interpreted consistently with the implementing regulations of sections 501 and 504 of the Rehabilitation Act. SENATE REP., *supra* note 274, at 36, reprinted in AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 712.

277. The ADA is not to be construed to apply a lesser standard than standards under the Rehabilitation Act and its implementing regulations, except where otherwise noted. Americans with Disabilities Act of 1990, § 501(a), 42 U.S.C.A. § 12201(a) (West Supp. 1990). The Rehabilitation Act does not contain an express provision dealing with its effect on insurance plans. Congress added section 501(c), *id.* § 501(c), 42 U.S.C.A. § 12201(c), to the ADA to clarify that it will not disrupt current insurance practices, whether insured or self-insured. HOUSE EDUCATION & LABOR REP., *supra* note 270, at 136, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 419.

278. Americans with Disabilities Act of 1990, § 501(c)(2)-(3), 42 U.S.C.A. § 12201(c)(2)-(3) (West Supp. 1990); see 56 Fed. Reg. 8591 (1991) (to be codified at 29 C.F.R. § 1630.16(f)) (proposed Feb. 28, 1991). Section 501(c) reads:

(c) Insurance.—Titles I through IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations

purposes of the ADA.²⁷⁹

Section 501 makes clear that the ADA does not disrupt current state laws that regulate insurance, or employer practices that are consistent with insurance risk classification.²⁸⁰ Additionally, the ADA does not affect the administration of self-funded employee benefit plans, nor does it affect ERISA preemption.²⁸¹ The ADA does not, therefore, appear to protect an employee from AIDS coverage restrictions under a self-

from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1),(2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

Americans with Disabilities Act of 1990, § 501(c)(1)-(3), 42 U.S.C.A. § 12201(c)(1)-(3).

279. Americans with Disabilities Act of 1990 § 501(c)(1)-(3), 42 U.S.C.A. § 12201(c)(1)-(3).

280. HOUSE EDUCATION & LABOR REP., *supra* note 270, at 136-38, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 419-21. The report states:

[T]his legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks as regulated by the States.

....

In sum, section 501(c) is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of this legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. Without such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.

Id.

The report further states:

The Committee does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated.

Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts tis [sic] prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

Id. at 136, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 419.

281. 135 CONG. REC. S10,776 (daily ed. Sept. 8, 1989) (statement of Sen. Harkin). Senator Harkin stated:

There was some concern raised on the part of those who administer self-insurance plans that the language of [ADA] sectin [sic] 501(c)92 [sic] could be read to affect the preemption doctrine of the Employee Retirement Income Security Act of 1974.

funded group health plan by adding protections not available under ERISA.

The ADA, similar to the Rehabilitation Act, prohibits an employer from providing unequal access to group health plan coverage based on disability.²⁸² A disabled person cannot be denied the opportunity to participate in an employee benefit plan on the basis of disability.²⁸³ Also, a qualified job applicant cannot be denied a job merely because the employee benefit plan does not cover AIDS treatment, or because the employer anticipates increased expenditures for such treatment.²⁸⁴

The ADA also prohibits an employer from denying coverage to a disabled person independent of "underwriting risks, classifying risks, or administering such risks."²⁸⁵ For example, an employee benefit plan can-

Congress does not intend in this bill to affect in any way such preemption doctrine

....

Id.

The House Committee on Education and Labor report states: "[S]elf-insured plans, which are currently governed by the preemption provisions of the Employment [sic] Retirement Income Security [Act] (ERISA), are still governed by that preemption provision and . . . are subject to state law only to the extent determined by the courts in their interpretation of ERISA's preemption provision." HOUSE EDUCATION & LABOR REP., *supra* note 270, at 137, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 420.

282. Americans with Disabilities Act of 1990, § 102(b)(1), 42 U.S.C.A. § 12112(b)(1) (West Supp. 1990) (defining discrimination as limiting, segregating or classifying employee because of disability in way that adversely affects opportunities); *see* 56 Fed. Reg. 8597 (1991) (to be codified at 29 C.F.R. § 1630 app. A) (proposed Feb. 28, 1991); *see supra* notes 254-62 and accompanying text for a discussion of similar Rehabilitation Act provisions.

283. HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494.

284. *See* SENATE REP., *supra* note 274, at 84-86, *reprinted in* AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 1102; HOUSE EDUCATION & LABOR REP., *supra* note 270, at 136, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 419.

285. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c) (West Supp. 1990). In the context of a group medical plan, risk refers to the probability that an employee will become ill or have an accident, and incur medical expenses that will be reimbursed by the plan.

The EEOC has requested comments about insurance and risk to help develop a compliance manual for the ADA:

1. What are the current risk assessment or classification practices with respect to health and life insurance coverage in the area of employment?
2. Must risk assessment or classification be based on actuarial statistics?
3. What is the relationship between "risk" and "cost?"
4. Must an employer or insurance company consider the effect on individuals with disabilities before making cost saving changes in its insurance coverage?

56 Fed. Reg. 8579 (1991).

If the EEOC agrees that the last of these questions must be answered in the affirmative in order to comply with the ADA, it could provide additional protection to AIDS victims who are denied group health coverage because of cost saving measures by an employer. *See supra* note 56 for a discussion of a case in which the employer's proffered rationale for limiting AIDS coverage in a group health plan was to reduce costs.

not limit coverage for AIDS in the absence of an actuarial or underwriting risk classification.²⁸⁶ If the coverage restriction is based on sound actuarial principles, or related to actual or anticipated costs, the employer probably can limit AIDS coverage.²⁸⁷ Under this standard, it would not be difficult for an employer to use actual or expected cost increases to justify an AIDS coverage restriction in a group health plan.²⁸⁸ Other examples of group health plan provisions that usually have a disproportionate impact on disabled individuals, yet are permissible under the ADA include: pre-existing conditions limitations, evidence of insurability provisions, and lower coverage for mental or nervous disorders.²⁸⁹

Even if an employer denies coverage to a disabled person consistent

286. HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494; SENATE REP., *supra* note 274, at 84-86, *reprinted in* AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 1102. It is not entirely clear from the legislative history and the proposed regulations whether the ADA, in addition to prohibiting an employee from being denied all coverage under a plan because of disability, also prohibits the employee, once covered under the plan, from being denied all coverage for that disability. A plan clearly may limit coverage for certain procedures or treatments, such as AZT for an AIDS patient, if the limitation is based on risk classification and applied equally to individuals with or without disabilities. HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494; 56 Fed. Reg. 8597-98 (1991) (to be codified at 29 C.F.R. § 1630 app. A) (proposed Feb. 28, 1991). The House Judiciary report states, however, that while a plan can limit procedures or treatments, "coverage cannot be denied entirely to a person [sic] with a disability." HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494. One interpretation of this language is that, once covered under the plan, a disabled person cannot be entirely denied coverage for that disability. The better interpretation is that the ADA prohibits an employer from denying *all* coverage under a plan based on a particular disability, but once the employee is covered under the plan, the plan may entirely deny coverage for that disability if based on actuarial or risk classification. In other words, the ADA guarantees equal access to a group health plan provided by an employer, regardless of disability. This interpretation is supported by the example of a blind person, who may not be denied coverage for blindness *independent of* actuarial classification. *Id.* Conversely, coverage for blindness may be denied under a plan if related to actuarial classification. A reduction of group health plan coverage that merely has a greater impact on disabled persons does not violate the ADA, unless the reduction is adopted for discriminatory reasons. 56 Fed. Reg. 8598 (1991) (to be codified at 29 C.F.R. § 1630 app. A) (proposed Feb. 28, 1991).

287. HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494; SENATE REP., *supra* note 274, at 84-86, *reprinted in* AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 1102.

288. *See* HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494 (coverage limitations because of physical or mental impairment permissible where related to actual or reasonably anticipated claims experience).

289. *Id.*; SENATE REP., *supra* note 274, at 84-86, *reprinted in* AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 1102. Pre-existing conditions limitations are specifically noted by the proposed regulations as permissible, so long as they are not a subterfuge to evade the purposes of the regulations. 56 Fed. Reg. 8597 (1991) (to be codified at 29 C.F.R. § 1630 app. A) (proposed Feb. 28, 1991).

with "basic principles of insurance risk classification,"²⁹⁰ the employer violates the ADA if its actions are a subterfuge to avoid the purposes of the ADA.²⁹¹ Exactly what constitutes a subterfuge to avoid the purposes of the ADA is not defined, although the legislative history of the ADA does shed some light on this question.²⁹²

The subterfuge language in the ADA is very similar to the subterfuge language in the Age Discrimination in Employment Act of 1967 (ADEA).²⁹³ In *Public Employees Retirement System v. Betts*,²⁹⁴ the Supreme Court noted that the term "subterfuge," interpreted in light of the ADEA, should be given its ordinary meaning as "'a scheme, plan, stratagem, or artifice of evasion.'"²⁹⁵ The Court ruled that an employee benefit plan could not be a subterfuge to evade the purposes of the ADEA "unless it discriminates in a manner forbidden by the substantive provisions of the [ADEA]."²⁹⁶ Based on this interpretation of subterfuge, a court would be likely to hold that an AIDS coverage limitation in an employee benefit plan does not evade the purposes of the ADA unless the provision violates the substantive provisions of the ADA. In other words, if there is no risk classification violation based on sound actuarial principles, or actual or reasonably anticipated costs, the AIDS limitation does not constitute a subterfuge to avoid the purposes of the ADA.²⁹⁷

A subterfuge does occur, however, if an employer denies employment or eligibility in a benefit plan based on a person's disability, or be-

290. HOUSE EDUCATION & LABOR REP., *supra* note 270, at 138, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 303, 421; SENATE REP., *supra* note 274, at 84-86, *reprinted in* AMERICANS WITH DISABILITIES ACT OF 1990 (CCH) ¶ 1102.

291. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c) (West Supp. 1990); *see* 56 Fed. Reg. 8603 (1991) (to be codified at 29 C.F.R. § 1630 app. A) (proposed Feb. 28, 1991).

292. *See infra* notes 297-98 and accompanying text.

293. 29 U.S.C. §§ 621-634 (1988). The ADEA states that an employer may "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter." *Id.* § 623(f)(2).

294. 109 S. Ct. 2854 (1989).

295. *Id.* at 2861 (quoting *United Air Lines v. McMann*, 434 U.S. 192, 203 (1977)).

296. *Id.* at 2865-66. The Court further held that section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), exempted employee benefit plans from the purview of ADEA as long as the plans were not a subterfuge for discrimination in other non-benefit aspects of employment. *Id.* at 2866. Based on this interpretation of subterfuge, the Court held that Equal Employment Opportunity Commission regulations construing section 4(f)(2) were invalid. *Id.* at 2865. These regulations were restored by Congress in 1990. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 978 (to be codified at 29 U.S.C. §§ 621-630). The Court's interpretation, however, of the term "subterfuge" still has merit in construing the ADA.

297. *See* HOUSE JUDICIARY REP., *supra* note 271, at 71, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 445, 494.

cause the employer anticipates increased insurance costs.²⁹⁸ As noted above, however, once an employee is covered by the plan, an employer can provide coverage that discriminates against disabilities if based on sound actuarial principles or experience. If employers violated the ADA merely by providing different levels of coverage for different disabling conditions, the overall effect on group health insurance plans would be significant.²⁹⁹

On the other hand, limiting AIDS coverage in a group health plan can have devastating consequences for a person with AIDS. An employee with AIDS could argue that such limitations are a subterfuge, even though based on actuarial or underwriting risk classification, if the plan continues to provide full coverage for other illnesses that pose a greater risk to the financial stability of the plan.³⁰⁰ The ADA does not, however, go far enough in providing adequate protection against these actions.

V. PROPOSAL

A. Current Federal Legislation Generally Is Ineffective

Current federal legislation generally is ineffective to protect an employee who loses health coverage for AIDS in an employee benefit plan.

The ERISA preemption doctrine is stronger than ever,³⁰¹ and state laws prohibiting AIDS discrimination in employee benefit plans have little chance of avoiding federal preemption.³⁰² In addition, an AIDS coverage limitation probably does not violate ERISA vesting, reporting and disclosure, interference with protected rights, and fiduciary duty provisions.³⁰³

The Rehabilitation Act of 1973 only prohibits discrimination in federally funded programs or by federal contractors.³⁰⁴ Even if an employer fell within the Act's coverage, employee benefit plan provisions that limit

298. *Id.*

299. *See supra* note 286 and accompanying text.

300. A plaintiff could analogize this situation to cases interpreting title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988); *see, e.g.*, *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083-86 (1983) (employee pension plan, paying women lower benefits than men for like contributions, violated title VII, in spite of actuarial basis for benefits differentials); *City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978) (employee pension plan, requiring higher contributions from women than men to receive like benefits, violated title VII, in spite of actuarial basis for contribution differentials).

301. *See supra* notes 86-158 and accompanying text.

302. *See supra* notes 132-42 and accompanying text.

303. *See supra* notes 168-230 and accompanying text.

304. *See supra* notes 233-37 and accompanying text.

coverage for particular disabilities do not violate the Rehabilitation Act.³⁰⁵

Relief for employees with AIDS facing group health coverage restrictions, especially in self-funded employee benefit plans, could come in the form of court-made law, regulations or legislative activity. The ADA is likely to provide a federal source of legal arguments to fight AIDS restrictions in employee welfare benefit plans. Litigation challenging AIDS restrictions as a subterfuge to evade the purposes of the ADA is likely to occur.³⁰⁶ It is not clear, however, whether and how the ADA will protect persons with AIDS in this situation.³⁰⁷ Furthermore, final regulations implementing title I of the ADA,³⁰⁸ governing employment discrimination, will be issued by the Equal Employment Opportunity Commission (the EEOC).³⁰⁹ The final regulations could clarify how the ADA will be implemented with respect to AIDS restrictions in employee benefit plans, and specifically whether these coverage restrictions constitute a subterfuge.

The simplest solution to this problem would be for employers to voluntarily cover AIDS as any other illness under their employee benefit plans.³¹⁰ Given the rapidly escalating cost of health care benefits,³¹¹ and employers' concerns over the AIDS epidemic,³¹² however, it is likely that employers will continue to use self-funding, and the resulting ERISA preemption, to restrict group health coverage for AIDS. Therefore, unless employers can voluntarily restrain themselves from discriminating on the basis of HIV infection in their employee benefit plans, federal legislation should address this problem.

305. *See supra* notes 249-66 and accompanying text.

306. Such conduct could not be challenged until July 26, 1992, the effective date of the prohibitions on employment discrimination under the ADA. *See supra* note 271 and accompanying text.

307. *See supra* notes 290-99 and accompanying text.

308. Americans with Disabilities Act of 1990, §§ 101-108, 42 U.S.C.A. §§ 12111-12117 (West Supp. 1990).

309. *Id.* § 106, 42 U.S.C.A. § 12116. Proposed regulations implementing title I of the ADA were recently issued by the EEOC. 56 Fed. Reg. 8578-8603 (1991) (to be codified at 29 C.F.R. § 1630) (proposed Feb. 28, 1991). The final regulations are not likely to provide greater protections to AIDS victims than the ADA because the ADA leaves little room for regulatory discretion. *Id.* at 8579.

310. In fact, over 400 employers have endorsed the principles of an AIDS "bill of rights," which calls for the nondiscriminatory treatment of persons with AIDS in employment. Bradford, *supra* note 5, at 2. Employers who fail to heed these guidelines by imposing AIDS coverage restrictions in their group health plans may subject themselves to intense public and employee scrutiny. *See supra* note 5 and accompanying text.

311. *See supra* notes 44-45 and accompanying text.

312. *See supra* notes 26-36 and accompanying text.

B. Considerations for Change

Congress should enact federal legislation aimed at AIDS restrictions in employee welfare benefit plans. Such legislation should balance many competing interests: (1) AIDS patients' interest in obtaining funding for their health care; (2) employees' and the public's interests in prohibiting employment discrimination on the basis of handicap; (3) employees' and the public's interests in encouraging employers to provide group health insurance benefits; and, (4) employers' interest in avoiding multiple state mandates and conflicting laws, which would increase costs, complicate administration, and discourage them from providing group health benefits.

AIDS victims have a strong interest in obtaining health insurance coverage, and the primary vehicle for such coverage is employee benefit plans. The public has a strong interest in eliminating discrimination against disabled individuals, eloquently expressed as a national mandate by the ADA.³¹³ The public also has a strong desire to increase the availability of health insurance coverage.³¹⁴

Ultimately, the issue of whether employers should be able to restrict AIDS coverage in health benefit plans rests on the question of who should pay for AIDS treatment. The public has a strong interest in guaranteeing that AIDS victims are able to access privately funded health insurance coverage, because if such coverage is not available, these persons may need to rely on public sources of funding for their health care.³¹⁵

313. See *supra* notes 267-69 and accompanying text.

314. The United States Department of Labor has estimated that 30 million Americans do not have health insurance coverage. *Mandated Benefits Would Increase Costs While Reducing Number of Uninsured Persons*, 17 Pens. Rep. (BNA) 1812, 1812 (Oct. 22, 1990). Mandating employers to provide health insurance coverage to their employees could reduce this number to 8.7 million. *Id.*

A number of bills have been introduced in Congress which would require employers, in some form, to provide health insurance coverage to their employees. See H.R. 5300, 101st Cong., 2d Sess. (1990) (sponsored by Rep. Stark); H.R. 1845, 101st Cong., 1st Sess. (1989) (sponsored by Rep. Waxman); S. 768, 101st Cong., 1st Sess. (1989) (sponsored by Sen. Kennedy). One of the broadest proposals for reform came from the Pepper Commission, and would require employers to provide either health insurance to their employees or contribute to a public plan for all employees. U.S. BIPARTISAN COMMISSION ON COMPREHENSIVE HEALTH CARE, RECOMMENDATIONS TO THE CONGRESS BY THE PEPPER COMMISSION: ACCESS TO HEALTH CARE AND LONG-TERM CARE FOR ALL AMERICANS (1990); see *Pepper Commission Releases Report, Declines to Recommend Financing Source*, 17 Pens. Rep. (BNA) 1666 (Oct. 1, 1990). While Congress is interested in expanding access to health insurance coverage, there is currently a lack of consensus as to the appropriate mechanism for doing so. *Upcoming Reforms Incremental Due to Lack of Consensus, Aides Say*, 17 Pens. Rep. (BNA) 2041 (Dec. 10, 1990).

315. See ACLU, *supra* note 5, at 26 ("government is becoming the primary insurer of a

Employers have a number of interests that should be considered. First, employers should continue to have the flexibility to design and amend employee welfare benefit plans to allow for their financial security. Employers need financial resources to provide health care plans. As a result, as health care costs continue to rise at a rapid rate, employers can only expend more resources, reduce benefits, or ask employees to share in the cost of providing the benefits.³¹⁶ The proposal should be consistent with the ERISA purpose of protecting the financial solvency of employee welfare benefit plans.³¹⁷

Employers operating in more than one state should have the ability to maintain uniform employee benefit plans, without having to comply with overlapping and conflicting state mandates.³¹⁸ Subjecting employers to multiple state mandates would complicate employee benefit plan administration and funnel employer expenses into administration rather than funding benefits. It would also discourage employers from providing employee benefit programs. The public has a strong interest in encouraging employers to provide health care benefits,³¹⁹ therefore, Congress should not weaken the current ERISA preemption doctrine.

Given the strong public interest in eliminating discrimination based upon disability, employers should not be permitted to discriminate on the basis of one illness, namely AIDS, while continuing to provide full coverage for other catastrophic or chronic illnesses. Any solution to this problem, though, whether legislative or court-made, must weigh the protections afforded to employers under ERISA to design and modify their employee benefit plans with the individual protections from discrimination set forth in the ADA.

C. *Proposal To Amend the Americans with Disabilities Act of 1990*

The ADA provides a mechanism to prohibit AIDS discrimination in employee welfare benefit plans. The ADA currently allows AIDS discrimination in employee benefit plans so long as the coverage restriction

growing number of people with HIV-related illness" (citing J. Green & P. Arno, The "Medicaidization" of AIDS: Implications of the AIDS Payor Mix for Access and Quality (Nov. 3, 1989) (paper presented to the National Commission on AIDS)).

316. Even if an employer does not directly increase the cost of benefits to employees through benefit reductions, for example, coverage exclusions, coverage limitations, higher deductibles or higher coinsurance levels, higher employer costs may indirectly affect employees in the form of reduced salaries or other benefits. *See supra* note 46 and accompanying text.

317. *See supra* note 56 and accompanying text.

318. The Supreme Court has made it clear that avoiding overlapping and conflicting state mandates is a fundamental purpose of the ERISA preemption doctrine. *See supra* notes 143-44 and accompanying text.

319. *See supra* note 314 and accompanying text.

is consistent with an actuarial or underwriting risk classification.³²⁰ A restriction would meet this test if it was related to actual or anticipated costs.³²¹ Therefore, an employer's argument that AIDS would increase health care expenses would probably satisfy this test, and the coverage restriction would be nondiscriminatory.³²²

Even if an employer's cost argument is effective, that employer violates the ADA if the coverage restriction is a subterfuge to evade the purposes of the ADA.³²³ The meaning of "subterfuge" and how it applies to different factual situations is best left to the courts, and undoubtedly there will be litigation in this area. Courts should address whether AIDS coverage limitations in group health plans, that continue to provide full coverage for other catastrophic or chronic disabilities, are a subterfuge to evade the purposes of the ADA. An AIDS victim could argue that such limitations are a subterfuge, even though based on actuarial or underwriting risk classification, because of the employer's continuation of unreduced coverage for other illnesses that pose a greater risk to the financial stability of the plan.³²⁴ By defining a situation in which an employer engages in a subterfuge to evade the purposes of the ADA, however, discriminatory coverage restrictions in employee benefit plans could be prohibited.

Congress should amend section 501(c) of the ADA³²⁵ by clarifying that an employer evades the purposes of the ADA as a subterfuge when it: (1) restricts coverage in an employee welfare benefit plan based on an actuarial or underwriting risk classification, including actual or anticipated experience, (2) by limiting or excluding coverage for a catastrophic or chronic disability (as defined), (3) to the extent that such coverage is less than that provided for other catastrophic or chronic disabilities covered by the plan.³²⁶ In other words, an employer should not be permitted to reduce AIDS coverage while continuing to cover other catastrophic or chronic disabilities at normal levels. This proposal has a number of advantages over current laws. First, it protects employees with AIDS and other catastrophic illnesses from arbitrary discrimination that targets a particular illness for limitation or exclusion. Second, it

320. See *supra* notes 285-89 and accompanying text.

321. *Id.*

322. *Id.*

323. See *supra* notes 290-91 and accompanying text.

324. See *supra* note 60 and accompanying text.

325. Americans with Disabilities Act of 1990, § 501(c), 42 U.S.C.A. § 12201(c) (West Supp. 1990).

326. See *supra* note 60 and accompanying text for a discussion of the estimated costs of medical care for catastrophic and chronic illnesses other than AIDS.

serves the purposes of the ADA without disturbing ERISA preemption. Third, an employer would still be able to design its health insurance plans to meet its needs and the needs of employees, including traditional limitations on mental or nervous disorders. Fourth, the proposal is consistent with recent congressional attempts to improve access to health insurance through private employer mandates.

The proposal does have some drawbacks. First, it gives employers less flexibility in designing group health insurance plans and responding to higher health care costs. Second, the proposal could have a discriminatory effect, in that non²catastrophic disabilities may still be subject to separate limitations or exclusions. Finally, employers could impose coverage limitations on AIDS so long as they also reduce coverage for other catastrophic illnesses. An employer may have little incentive to reduce coverage for all catastrophic illnesses, however, because the employer would likely subject itself to severe employee dissatisfaction. In summary, the proposal prohibits AIDS discrimination in employee welfare benefit plans, while balancing the interests of employees with AIDS, employers, and the public.

VI. CONCLUSION

AIDS victims may have difficulty maintaining adequate group health insurance coverage because some employers limit AIDS coverage to hold down benefits costs. Additionally, current federal law does not adequately protect an employee with AIDS who has group health coverage limited or denied by an employer.

Employers are avoiding state laws which purport to prohibit AIDS discrimination in employment or employee benefits by self-funding their group health benefits. Self-funded employee benefit plans are exempt from state regulation that relates to such plans, through ERISA preemption. Self-funding allows employers to discriminate against employees with AIDS by excluding or limiting coverage for AIDS, while continuing to cover other catastrophic illnesses.

An employer who limits AIDS coverage in a group health plan does not violate the substantive provisions of ERISA by taking such action. ERISA's vesting rules do not entitle a plan participant to a nonforfeitable right to certain levels of AIDS coverage. The reporting and disclosure rules do not provide a source of relief, as long as the employer has met the various requirements prior to and at the time of the plan restriction. The most likely source of an ERISA remedy is the provision which prohibits employer interference with protected rights. Employee welfare benefit plans are not, however, protected from change under ERISA.

Absent an independent agreement, a plaintiff would have difficulty establishing that he or she is entitled to a certain level of benefits under a group health plan. Finally, an employer does not violate a fiduciary duty under ERISA by amending a welfare plan and reducing coverage.

The Rehabilitation Act and the ADA, both of which prohibit employment discrimination against handicapped persons, do not provide effective sources of relief for an AIDS victim denied group health plan coverage. A person with AIDS is generally not "otherwise qualified" to receive unchanged levels of benefits under the Rehabilitation Act. Under the ADA, a plan with reduced AIDS coverage could probably be justified because of actual or anticipated claims costs, and would probably not be a subterfuge to evade the purposes of the ADA.

Employers have a strong and legitimate interest in holding down health insurance costs, especially when the rapidly rising costs of medical care are preventing many Americans from receiving adequate health care. Employers fund a majority of health care in the United States, and are viewed by Congress as a vehicle through which health care access can be expanded in the future. Therefore, legislative solutions to the AIDS coverage problem should not discourage employers from maintaining group health plans, or subject them to multiple state mandates by weakening the ERISA preemption doctrine.

The ADA provides a mechanism through which AIDS discrimination in employee welfare benefit plans can be limited. Essentially, the proposal would restrict the ability of an employer to limit coverage for AIDS while continuing to provide unreduced coverage for other catastrophic or chronic disabilities. The proposal is consistent with the ERISA purpose of protecting the financial solvency of employee welfare benefit plans. If an employer attempts to justify an AIDS restriction on the basis of cost, but still continues to provide full coverage for other catastrophic or chronic disabilities, its actions would be deemed a subterfuge to evade the purposes of the ADA. Ultimately, any legislative response to AIDS discrimination restrictions in employee benefit plans must wrestle with the larger issue of who should fund AIDS treatment, and balance the interests of persons with AIDS with those of employers and society as a whole.

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