

HUMAN DIGNITY FIRST: JOHN PAUL II, SYSTEMS ANALYSIS AND THE ERISA FIDUCIARY

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I wish to appeal with simplicity and humility to everyone, to all men and women without exception. I wish to ask them to be convinced of the seriousness of the present moment and of each one's individual responsibility, and to implement—by the way they live as individuals and as families, by the use of their resources, by their civic activity, by contributing to economic and political decisions, and by personal commitment to national and international undertakings—the measures inspired by solidarity and love of preference for the poor. This is what is demanded by the present moment and above all by the very dignity of the human person, the indestructible image of God the Creator, which is identical in each one of us.¹

The council exhorts Christians . . . to perform their duties faithfully in the spirit of the Gospel. It is a mistake to think that . . . we are entitled to evade our earthly responsibilities; this is to forget that because of our faith we are all the more bound to fulfill these responsibilities according to each one's vocation. . . . Let Christians follow the example of Christ who worked as a craftsman; let them be proud of the opportunity to carry out their earthly activity in such a way as to integrate human, domestic, professional, scientific and technical enterprises with religious values, under whose supreme direction all things are ordered to the glory of God.²

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¹ JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 47 (1987).

² PAUL VI, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 43 (1965).

The papal encyclicals at the core of Catholic social thought abound with theoretical insights concerning the moral development and economic well-being of a nation and its individual citizens. Yet, the encyclicals speak to the universal church in language that is deliberately general.³ This convention implicitly requires each individual and each community to implement the core values of Catholic social thought in the context of its local economic, legal and cultural norms.⁴ This is an extraordinary challenge: how does a theologically grounded ethical mandate in social relations become workable public policy or a pragmatic business strategy?

Putting Catholic social thought into practice requires the understanding of empirical reality and legal constraints that is the bread and butter of lawyer's work. Articulating a practical plan to implement theoretical insights is not the most glamorous contribution to the perfection of the temporal order. But it is, nonetheless, lawyer's work—pragmatic, purposeful and steeped in the reality of human lives. As legal scholars, then, our potential contribution to the lively discussion between theologians, social scientists and activists is eminently practical. Moreover, the modern legal scholar generally enjoys the benefit of several years' experience in the practice of law. These formative years offer a time to hone the analytical skills particular to lawyering by assisting clients to create and follow

³ See Kenneth R. Himes, *Introduction to MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS* 1, 5 (Kenneth R. Himes ed., 2005) [hereinafter *MODERN CATHOLIC SOCIAL TEACHING*] ("The teaching does not delve into the specifics of proposed solutions but functions more at the level of values and perspectives by which to frame discussion of a problem and understand what is at stake.").

⁴ In *Laborem Exercens*, for example, John Paul II articulates the "special significance" of proposed strategies to correct the imbalance between labor and capital. John Paul II describes a variety of proposals without elaborating or mandating a specific reform:

Whether these various proposals can or cannot be applied concretely, it is clear that recognition of the proper position of labor and the worker in the production process demands various adaptations in the sphere of the right to ownership of the means of production.

JOHN PAUL II, ENCYCLICAL LETTER *LABOREM EXERCENS* ¶ 14 (1981) [hereinafter *LABOREM EXERCENS*].

The Pope's reference to the "concrete application" of proposals suggests his appreciation of the need to test and confirm different methods to put theory into practice. See *id.*; see also Patricia A. Lamoureux, *Commentary on Laborem Exercens (On Human Work)*, in *MODERN CATHOLIC SOCIAL TEACHING*, *supra* note 3, at 389, 394.

business plans, to make arrangements to organize and sustain their family lives and to resolve disputes with their neighbors or business associates.⁵ Like theologians and policy analysts, we may revel in the discussion of why a particular end is desirable or a particular premise flawed, but the lawyer ultimately gravitates to the practical question of how to achieve that end or how to correct the flaw.

This Article considers the challenge to design a workplace compensation structure that maximizes human dignity, a core value of Catholic social thought. In particular, I compare two different compensation systems—first, a compensation arrangement designed to contribute to the overall maximization of the employer's profits and, second, an arrangement grounded in a specifically Catholic concept of human dignity. The particular focus of this comparison is the conditions for fiduciary decision-making with regard to employee benefit plans that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). I argue that an employer's decision to act both as settlor and as fiduciary of an employee benefit plan (a decision that is plainly legitimate under ERISA) may be the first step towards compromising the fiduciary decision-making process and, thus, is potentially at odds with the goal of enhancing human dignity.

Part One of this Article discusses John Paul II's understanding of the role of work in promoting human dignity. Part Two examines the particular role of the fiduciary in light of John Paul II's concept of the "indirect employer." Part Three draws on the systems approach, a methodology borrowed from computer sciences and organizational theory to enable social scientists to describe complex, interlocking systems, in order to convey the differences between a variety of workplace compensation arrangements. Part Four provides a practical example of the manner in which an employer's decision to appoint an independent fiduciary might result in a workplace

⁵ In 1891, Leo XIII's famous encyclical, *Rerum Novarum*, ushered in a renewed awareness of the Church's social teaching. See generally LEO XIII, ENCYCLICAL LETTER *RERUM NOVARUM* (1891) [hereinafter *RERUM NOVARUM*]. Spurred on by the early social encyclicals and the documents of the Second Vatican Council, twentieth-century historians, economists, and sociologists brought their analytical disciplines to bear on our understanding of the Church's response to the "social question."

compensation arrangement better suited to enhancing human dignity in the administration of an employee benefit plan.

I. JOHN PAUL II AND COMPENSATION

John Paul II's vision of a just workplace is rooted in Christian personalism.⁶ John Paul II repeatedly stated that the human person is created in the image and likeness of God.⁷ Call it what you will—premise, insight, truth—this proposition places the well-being of the human person at the center of every system of economic and social relationships.

John Paul II's written works demonstrate a profound and consistent commitment to the dignity of the human person. He consistently presented the human person both as an individual with unique talents and concerns and as a person living in community with others and in proximity to the physical world. The particular importance of the human person in the workplace was a theme dear to the Pope, and he found numerous occasions to speak and write of the role of work in personal development, as well as in the general economy.⁸ His writings capture the importance of the work experience in bringing the worker to the realization of the fullness of his existence and his potential as a human person.⁹ His understanding of work and its psychological, physical and spiritual impact on the human person reflected the extraordinary breadth of his own work experiences. It is well known that the John Paul II's subjective understanding of the worker and workplace relationships was the fruit of an unlikely combination of skills and experiences that included waiting restaurant tables, writing plays and poetry, handling explosives

⁶ For a succinct explanation of personalism, see Judith A. Merkle, *Personalism*, in THE NEW DICTIONARY OF CATHOLIC SOCIAL THOUGHT 737, 737–38 (Judith A. Dwyer ed., 1994) [hereinafter NEW DICTIONARY].

⁷ See *id.* at 4; Lamoureux, *supra* note 4, at 390–91 (noting John Paul II's use of this theme in early trips to Poland and Mexico).

⁸ John Dwyer explains the centrality of this concern as follows:

[H]uman dignity is inseparable from the person, and it does not depend for its reality on being acknowledged by others, whether by individuals or by the state; rather, it demands such recognition and acknowledgment. Human dignity is simply the existence of the individual man or woman, viewed from a certain perspective—viewed, that is, as constituting a task and a challenge for the existing person and as imposing certain obligations on other individuals and communities.

John C. Dwyer, *Dignity of Person*, in NEW DICTIONARY, *supra* note 6, at 724, 729.

⁹ See *LABOREM EXERCENS*, *supra* note 4, ¶ 26.

in a mine quarry and engaging in university life as a pastor, a teacher and a scholar.¹⁰

Although John Paul II certainly did not downplay the toll that an unjust work environment could exact upon an ill-treated laborer, his vision of work was fundamentally positive.¹¹ John Paul II's Eden was a place where people worked. Naming the animals, tilling the soil and subduing the earth were all activities "for man to carry out in the world."¹² The particular privilege of human beings is to share in the creative energy of the Creator by consciously "discover[ing] and us[ing]" the resources of the earth and the visible world.¹³ The universality of work as the "very deepest essence"¹⁴ of human activity extended to Jesus, as the incarnation of God. In *Laborem Exercens*, the Pope described Gospel accounts of Jesus' manual labor as "showing that the basis for determining the value of human work is not primarily the kind of work being done but the fact that the one who is doing it is a person."¹⁵ In John Paul II's view, therefore, the common humanity of workers at all levels of production contradicts any pretense to differentiate the moral value of work by reference to external markers of productivity, market value or cultural prestige.¹⁶

¹⁰ See GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 53–58, 89–108, 112–19, 123–39 (1999); CARL BERNSTEIN & MARCO POLITI, HIS HOLINESS: JOHN PAUL II AND THE HIDDEN HISTORY OF OUR TIME 51, 54–56 (1996); Lamoureux, *supra* note 4, at 392.

¹¹ John Paul II wrote that:

[V]arious ideological or power systems and new relationships which have arisen at various levels of society have allowed flagrant injustices to persist or have created new ones. On the world level, the development of civilization and of communications has made possible a more complete diagnosis of the living and working conditions of man globally, but it has also revealed other forms of injustice much more extensive than those which in the last century stimulated unity between workers for particular solidarity in the working world.

LABOREM EXERCENS, *supra* note 4, ¶ 8; see also Lamoureux, *supra* note 4, at 390.

¹² *LABOREM EXERCENS*, *supra* note 4, ¶ 4.

¹³ *Id.*; see also *id.* ¶ 25.

¹⁴ *Id.* ¶ 4.

¹⁵ *Id.* ¶ 6; see also *id.* ¶ 26.

¹⁶ See *id.* ¶ 6.

Given this way of understanding things and presupposing that different sorts of work that people do can have greater or lesser objective value, let us try nevertheless to show that each sort is judged above all by the measure of the dignity of the subject of work, that is to say the person, the individual who carries it out.

John Paul II understood work to include both objective and subjective attributes.¹⁷ In *Laborem Exercens*, he explained that work “embraces all human beings, every generation, every phase of economic and cultural development, and at the same time it is a process that takes place within each human being, in each conscious human subject.”¹⁸ Used in the objective sense, work is “a ‘transitive’ activity, that is to say an activity beginning in the human subject and directed toward an external object.”¹⁹ However, the human person is also the subject of work and experiences the transformative effect of work in his or her personal development. *Laborem Exercens* states:

Man has to subdue the earth and dominate it, because as the ‘image of God’ he is a person, that is to say, a subjective being capable of acting in a planned and rational way, capable of deciding about himself, and with a tendency to self-realization. As a person, man is therefore the subject of work. As a person he works, he performs various actions belonging to the work process; independently of their objective content, these actions must all serve to realize his humanity, to fulfill the calling to be a person that is his by reason of his very humanity.²⁰

In other words, the accomplishment of a particular task fulfills the objective purpose of work (“subduing the earth”), while the subjective process and experience of work similarly transform and enhance the worker.²¹ John Paul II consistently emphasized the transformative impact of work on the human person. As the means to “self-realization” and to “fulfill[ing] the calling to be a person,” the subjective dimension of work is always the most important.²²

John Paul II’s conceptual understanding of work as the primary means to the self-realization of the worker also explains his aversion to the characterization of work as a commodity or “a special kind of ‘merchandise’” available for sale.²³ Likewise, the image of employment as a bargain between labor and capital is a

Id.

¹⁷ *See id.* ¶¶ 5–6.

¹⁸ *Id.* ¶ 4.

¹⁹ *Id.*

²⁰ *Id.* ¶ 6.

²¹ *See id.* ¶¶ 5–6.

²² *Id.* ¶ 6.

²³ *Id.* ¶ 7.

similarly unwise simplification of the dynamic relationship between the human person's work and the earth's resources.

Since the concept of capital includes not only the natural resources placed at man's disposal, but also the whole collection of means by which man appropriates natural resources and transforms them in accordance with his needs, it must immediately be noted that all these means are the result of the historical heritage of human labor.²⁴

Instead, John Paul II looked to a workplace that transcended materialist solutions in pursuit of a way of doing business dedicated to raising both the objective and subjective dimensions of the work experience.²⁵

The right to a "just wage" has been the hallmark of Catholic social teaching on work since Leo XIII's 1891 encyclical, *Rerum Novarum*. The theme of the just wage is also a significant theme of *Laborem Exercens*, as evidenced by John Paul II's decision to address the role of work in the "social question" and to designate

²⁴ *Id.*

²⁵ John Paul II's analysis of the tension between labor and capital is reminiscent of Marx's definition of capital as "objectified labor." It is not surprising, therefore, that the late Pope shared some of Marx's interest in breaking political and social barriers that left workers in a condition that they both perceived as undesirable. The Christian personalism implicit in John Paul II's understanding of worker rights, however, could not be fully realized through the economic and political re-ordering of society along Marx's lines. While it is true that Marx and John Paul II part company on many fundamental points, Marx's understanding of labor shares many characteristics with the late Pope's explanation in *Laborem Exercens*. See GREGORY BAUM, THE PRIORITY OF LABOR: A COMMENTARY ON *LABOREM EXERCENS*, ENCYCLICAL LETTER OF POPE JOHN PAUL II 12–13, 57–58, 80–86 (1982). In *Das Kapital*, Marx wrote:

Labour is, first of all, a process between man and nature, a process by which man, through his own actions, mediates, regulates and controls the metabolism between himself and nature. . . . Through this movement he acts upon external nature and changes it, and in this way he simultaneously changes his own nature. . . . Man not only effects a change of form in the materials of nature; he also realizes [*verwirklicht*] his own purpose in those materials. And this is a purpose he is conscious of, it determines the mode of his activity with the rigidity of a law, and he must subordinate his will to it. This subordination is no mere momentary act. Apart from the exertion of the working organs, a purposeful will is required for the entire duration of the work. This means close attention. The less he is attracted by the nature of the work and the way in which it has to be accomplished, and the less, therefore, he enjoys it as the free play of his own physical and mental powers, the closer his attention is forced to be.

1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 283–84 (Ben Fowkes trans., Vintage Books 1977) (1867); see also *id.* at 992–93 (explaining "capital as objectified labour").

Laborem Exercens as one of a series of papal writings honoring the various anniversaries of *Rerum Novarum*.²⁶ *Rerum Novarum* painted a relatively simple image of a worker who negotiates with his employer for a “just wage,” by which Leo meant a wage sufficient to support the worker and his family in modest comfort.²⁷ John Paul II’s picture of the workplace is far more complex, comprising not only the worker and a “direct employer” but also one or more “indirect employers.”²⁸ This more detailed exposition of workplace relations required a correspondently more nuanced explanation of a “just wage.”

In *Laborem Exercens*, John Paul II identified “[t]he key problem of social ethics” in relation to work as “just remuneration for work done.”²⁹ The just wage, viewed in this context, is one expression of the moral imperative to respect, encourage and facilitate the human person in his or her ability to become “fully human” and thus, fully receptive to the divine.³⁰ John Paul II saw the just wage not only as the fundamental resolution of the relationship between employer and worker, but also as an effective benchmark for assessing “the justice of the whole socioeconomic system.”³¹ The late Pope’s vision of a just workplace was comprehensive, incorporating specific references to the need for health insurance and pensions, as well as work schedules that respect the right to rest, worship and family life.³² In John Paul II’s thought, the human person’s subjective experience of work is essential to his or her well-being and to the preservation of his or her dignity as a human being. Thus, John Paul II’s comprehensive picture of the workplace produces an equally broad depiction of the just wage as a family wage, coupled with a social obligation to provide for health care insurance and pensions.

²⁶ See *LABOREM EXERCENS*, *supra* note 4, ¶ 1.

²⁷ See *RERUM NOVARUM*, *supra* note 5, ¶ 46.

²⁸ See, e.g., *LABOREM EXERCENS*, *supra* note 4, ¶ 17.

²⁹ *Id.* ¶ 19.

³⁰ *Id.*

³¹ *Id.* The term “resolution” is taken from the Pope’s reference to resolving the relationship between employer and worker. See *id.*; see also BAUM, *supra* note 25, at 48.

³² See *LABOREM EXERCENS*, *supra* note 4, ¶ 19.

II. THE FIDUCIARY AS INDIRECT EMPLOYER

Modern compensation systems require at least two active positions of authority. First, the employer must set forth a compensation strategy, a task that is shaped and influenced by external factors such as government regulations, industry standards, market economics and union demands. The overall compensation strategy of a particular employer often involves the design and maintenance of one or more employee benefit plans subject to ERISA. One of the key issues that an employer faces in designing an employee benefit plan is the manner in which the plan will be administered and implemented. In compensation arrangements that are subject to ERISA, the party responsible for the implementation of an employee benefit plan is the plan fiduciary. In designing the plan, the employer may decide the scope of the fiduciary's responsibilities, but it is the fiduciary who is then charged with carrying out these responsibilities and exercising the discretion assigned to the position. Both the employer and the fiduciary therefore exercise two distinct functions in terms of modern employee benefit plans.

The application of Catholic social thought might, in theory, be confined to elements of plan design—issues normally within the purview of the employer in the role of settlor. Moreover, one of the most significant design issues—the amount of authority invested in the plan fiduciary—clearly is a decision that belongs to the employer in the role of plan sponsor. Likewise, the plan sponsor normally is responsible for appointing a fiduciary and, in many cases, elects to appoint itself. The Christian personalism that animates John Paul II's understanding of the workplace has much to say to the employer on both points.

John Paul II's worker-centered vision of the workplace can also illuminate the role of the fiduciary and, in so doing, underscore the importance of the decisions an employer makes concerning the appointment of the plan fiduciary and the extent of the discretionary authority attached to this position. In this section of the paper, I suggest that John Paul II's concept of an "indirect employer" may incorporate the independent ERISA fiduciary and strengthen the understanding of fiduciary

functions, particularly when the interests of the plan sponsor and the plan participant are in conflict.³³

A. *Indirect Employer and Independent Fiduciaries*

John Paul II's call for the establishment of "an ethically correct labor policy"³⁴ was more ambitious than a simple plea for individual employers to pay their employees a "just wage." The term "indirect employer" includes "all the agents at the national and international level that are responsible for the whole orientation of labor policy."³⁵ These agents include "both persons and institutions of various kinds and also collective labor contracts and the principles of conduct which are laid down by these persons and institutions and which determine the whole socioeconomic system or are its result."³⁶

³³ In the vibrant discussion facilitated by St. John's sponsorship of this conference, Professor Stabile pointed out that, in some sense, a fiduciary is in a subsidiary position in relationship to the employer. She therefore takes issue with my premise that one can identify a fiduciary as an "indirect employer." Here, I think it is helpful to turn to John Paul II's explanation of the indirect employer as one who "substantially determines one or other facet of the labor relationship, thus conditioning the conduct of the direct employer when the latter determines in concrete terms the actual work contract and labor relations." *Id.* ¶ 17. Two factors seem to me to support the notion of the fiduciary as an indirect employer. First, the standards of conduct of an independent fiduciary reflect the business practices of banks and insurance companies that devote substantial parts of their activities to providing this service. To the extent that one can view plan administration (which can very well include the performance of fiduciary duties) as a business, it is also possible to conceptualize this industry as an external influence upon the direct employer. While the employer certainly is able to appoint the fiduciary of a plan, an independent fiduciary (for example, a third-party administrator of a health plan who, pursuant to the plan document, assumes responsibility for the discretionary decisions regarding coverage under the plan) plays an extraordinarily powerful role in the interpretation of plan documents in the application of plan terms. Insurance company practices with regard to the meaning of technical medical terms, with respect to the understanding of procedures as experimental and other issues, certainly have influenced the design and administration of plans. While a plan could be designed to restrict a fiduciary's responsibilities to the automatic replication of plan terms, the post-*Firestone* fiduciary who retains discretionary authority of the interpretation of plan terms is a formidable force in determining the nature of the benefits that an employee ultimately receives. Moreover, a two-hatted fiduciary who follows ERISA's fiduciary requirements also has a statutorily-imposed obligation to put the plan participant's interest ahead of the settlor's interest, which seems to me to be strikingly similar to those who set down codes of conduct or are signatories of collective bargaining agreements. This is obviously an area where further research might lead to an interesting re-appraisal of our understanding of the fiduciary's role.

³⁴ *Id.*

³⁵ *Id.* ¶ 18.

³⁶ *Id.* ¶ 17.

By introducing the picture of the “indirect employer” into our vision of the workplace, John Paul II draws attention to the social nature of the human person and the inevitable connection between human beings in economic relationships. The bonds of employment are sufficiently elastic to connect a worker to factors and influences that are external to the specific relationship that she shares with the employer who pays her for her labor. In combination, this complexity and elasticity suggest that the payment of a just wage is not solely the responsibility of the worker and the direct employer. The obligations of the direct employer also extend to the indirect employer who influences the conditions and manner in which the direct employer makes decisions concerning the workers.

John Paul II introduced the term “indirect employer,” but did not set forth a specific static definition. The key question for the Pope was whether a person or entity “substantially determines one or other facet of the labor relationship, thus conditioning the conduct of the direct employer when the latter determines in concrete terms the actual work contract and labor relations.”³⁷ These “indirect employers” define and condition the relationship between the direct employer and the worker.³⁸ *Laborem Exercens* leaves the discussion of the “indirect employer” at a theoretical level, however, and neither expands nor confines the application of this concept beyond these general sentiments.

Scholars have offered a variety of interpretations of the phrase “indirect employer.” These interpretations, while diverse, find a common beginning point in the theology of solidarity. To quote Patricia Lamoureux, solidarity is:

[T]he primary authentic attitude toward society that signifies a constant readiness to accept one’s share in the community and to serve the common good. It is an attitude of community in which the common good properly initiates participation, and participation in turn properly serves the common good, fosters it, and furthers its realization.³⁹

Solidarity emphasizes the moral rights and responsibilities of living in community. Likewise, the concept of the “indirect employer . . . implies that responsibility for the injustices that mark our world cannot be evaded because there are numerous

³⁷ *Id.*

³⁸ *See id.*

³⁹ Lamoureux, *supra* note 4, at 398–99.

bodies that have some degree of complicity in these injustices.”⁴⁰ Given this recognition of expansive and interactive ties between economic actors in society, Lamoureux notes that the term “refers to many different elements that influence employment and conditions of employment” and “comprises such things as labor legislation, labor unions, transportation systems, child care, job training, and, in particular, government.”⁴¹ Economist Albino Barrera observes an “ever tighter web of indirect employer relationships” in an increasingly globalized world.⁴² While it is possible to think of the indirect employer strictly in terms of its potential to exploit the workplace or to benefit from unjust conditions of the workplace, Barrera points to the positive influence of indirect employers that is evident in the recent success of students in persuading universities to take an active stance concerning the working conditions in the Third World garment factories that manufacture their licensed logo apparel.⁴³ It is therefore important to stress that the influence of an indirect employer is not necessarily negative. Standardization of business practices concerning the amount of wages or the conditions of employment may have a positive effect on workplace relations.

The term “indirect employer” offers an insightful characterization of the independent fiduciary’s relationship to plan participants. Characterizing an independent fiduciary as a subordinate to an employer or as a functionary who carries out the plan sponsor’s will simply does not capture the very real discretion that many independent fiduciaries exercise as a condition of their contractual relationship to the plan and its sponsor. Whether it is a bank acting as trustee of a pension plan or a third-party administrator exercising discretionary authority over health insurance claims, an independent fiduciary brings its own business practices to the disposition of each particular benefit plan. In fact, some health plans are specifically drafted to take into account the standard language utilized by a particular third-party administrator. In some cases, business practices and

⁴⁰ *Id.* at 399.

⁴¹ *Id.*

⁴² Albino Barrera, *Gaudium et Spes and Catholic Ethics in Post-Industrial Economics: Indirect Employers and Globalization*, 3 J. CATH. SOC. THOUGHT 321, 322 (2006).

⁴³ *See id.* at 321.

assumptions external to the plan document have an undeniable effect on the manner in which a particular independent fiduciary deals with claims under a particular plan.

Thinking about the independent fiduciary as an “indirect employer” bolsters understanding of the importance of its relationship to plan participants. If one regards the independent fiduciary as an “indirect employer,” then the obligations of sustaining a just workplace extend to the independent fiduciary as well as to the employer. Writing of the general social obligation to advance a just workplace, Lamoureux summarizes the teaching of *Laborem Exercens* as follows “Establishing an ethically correct labor policy, one that respects workers’ rights to work, to a just wage and to form labor associations, the influences of both direct and indirect employers must be taken into consideration.”⁴⁴ Subject to ERISA’s fiduciary standards, the independent fiduciary thus represents the interests of plan participants not simply as a matter of legal compliance but also because of the moral and ethical obligations imposed upon indirect employers. In matters of potential conflict between the interest of an employer and the interest of a participant, the independent fiduciary has even greater reason to stand up to potential employer abuses when all parties recognize his ultimate responsibility as an indirect employer.

B. Problems Facing Independent and “Two-Hat” Fiduciaries

ERISA requires fiduciaries to manage assets and make decisions “in the exclusive interest of plan participants,” but adds little guidance concerning the meaning of this phrase.⁴⁵

⁴⁴ Lamoureux, *supra* note 4, at 399.

⁴⁵ Section 402(a)(1) of ERISA provides that every employee benefit plan “shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.” 29 U.S.C. § 1102(a)(1) (2000). The “named fiduciary” is “a fiduciary who is named in the plan instrument” or who “is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.” ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2). Despite the requirement of a named fiduciary, ERISA also provides an additional functional test to identify potential fiduciaries. Section 404(a)(1) of ERISA provides that “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries” 29 U.S.C. § 1104(a)(1). Moreover, the fiduciary must act “for the exclusive purpose of . . . providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan.” ERISA § 404(a)(1)(A), 29 U.S.C.

Moreover, courts have interpreted ERISA to permit a plan sponsor to act as the fiduciary of its own plans, thus compounding the burden of the statute's fiduciary requirements to traditional duties of care and loyalty owed by every corporate decision maker to the employer.⁴⁶ While ERISA lawyers light-heartedly refer to this predicament as the "two-hat rule," there is little humor to be found in the fiduciary's struggle to serve both the employee and his or her employer. Those of us who are Christians have it on the best authority that one cannot easily serve two masters.

Using the term "indirect employer" to describe independent fiduciaries illuminates the problems that may arise when a plan sponsor appoints itself to serve as the plan fiduciary. While the obligations of the direct employer are not materially different from those of an indirect employer, the indirect employer has the opportunity to hold the employer accountable because of its familiarity with external practices and its distance from the employer's profit-maximizing goals. If an employer sponsors an employee benefit plan and appoints itself as plan administrator, the mediating role of the indirect employer may be lost in a way that ERISA's fiduciary obligations cannot realistically overcome.

Some statistics serve to illustrate the financial scope of the fiduciary's responsibilities and the significance of its role as decision maker with regard to the individual savings and health benefits of employees. The ERISA fiduciary faces a staggering

§ 1104(a)(1)(A). The ERISA fiduciary must perform these duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). When a person is not acting as a fiduciary, the constraints of fiduciary law are not present. When the constraints of fiduciary law must be observed, they are largely procedural in nature. If the proper procedures are followed at the proper time, then a fiduciary may rest easy in his decisions.

⁴⁶ See, e.g., *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000). Moreover, a 2004 Supreme Court ruling clarified that working owners could also be participants in an employee benefit plan. See *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 23 (2004). The Supreme Court stated:

The purpose of the anti-inurement provision, in common with ERISA's other fiduciary responsibility provisions, is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others. Those concerns are not implicated by paying benefits to working owners who participate on an equal basis with nonowner employees in ERISA-protected plans.

Id. (citation omitted).

financial and social responsibility. In 2003, the total dollar value of assets held in tax-qualified retirement plans reached \$13.3 trillion.⁴⁷ Private-sector defined benefit plans account for \$1.8 trillion of this amount, while private-sector defined contribution plans hold \$2.66 trillion in assets.⁴⁸ In 2004, the administrators of employment-based health insurance plans made decisions affecting the health care of 174.2 million Americans.⁴⁹ The administration of these plans takes place amidst increasing uncertainty over the future delivery of employment-related retirement⁵⁰ and health benefits.⁵¹ The potential impact of this uncertainty is enormous: in 2005, individual Americans received retirement benefit payments of \$1.131 trillion and health benefit payments of \$915.8 billion.⁵²

Designing compensation arrangements is a task that no employer can escape; when the arrangement includes employee benefits, the implementation of benefit plans is the core of every ERISA fiduciary's work. Conventional wisdom suggests that the purpose of compensation arrangements is to attract and retain effective workers who will contribute to the fulfillment of the employer's goals.⁵³ To a serious-minded ERISA fiduciary in

⁴⁷ EMPLOYEE BENEFIT RESEARCH INST., TOTAL U.S. RETIREMENT PLAN ASSETS, 2004, <http://www.ebri.org/publications/benfaq/index.cfm?fa=retfaq4>.

⁴⁸ EMPLOYEE BENEFIT RESEARCH INST., ASSETS IN PRIVATE SECTOR DEFINED BENEFIT, DEFINED CONTRIBUTION, AND INDIVIDUAL RETIREMENT ACCOUNTS, 1985–2004, <http://www.ebri.org/publications/benfaq/index.cfm?fa=retfaq13>.

⁴⁹ Paul Fronstin, *Uninsured Unchanged in 2004, but Employment-Based Health Coverage Declined*, EBRI NOTES, Oct. 2005, at 2, 2, available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_10-20051.pdf.

⁵⁰ In the fifteen years between 1988 and 2003, retirement plan participants reported a dramatic shift in the primary type of private retirement plan participation. See EMPLOYEE BENEFIT RESEARCH INST., PRIMARY TYPE OF RETIREMENT PLAN, BY SECTOR, 1988, 1998, & 2003, <http://www.ebri.org/publications/benfaq/index.cfm?fa=retfaqt13>. In 1988, 53.7% of retirement plan participants reported that their primary plan was a defined benefit plan, while only 27.4% reported that a defined contribution plan was their primary savings vehicle. *Id.* By 2003 only 27.4% of plan participants reported a defined benefit plan as their primary plan, while 71.1% relied primarily on defined contribution savings. *Id.*

⁵¹ See Fronstin, *supra* note 49, at 2–3, 7.

⁵² EMPLOYEE BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS, CHAPTER 2: FINANCES OF THE EMPLOYEE BENEFIT SYSTEM, <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2002.pdf>.

⁵³ See generally JOHN H. LANGBEIN, SUSAN J. STABILE & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 30–31 (4th ed. 2006) (describing employee benefit plans as “bonding to the firm”). But see COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 17–18 (2004) (noting increasing portability of benefits).

pursuit of the “exclusive interest of plan participants,” however, such a goal poses a challenge. If the workplace compensation arrangement serves a principle of profit-maximization, then what is in the best interest of the plan participants? Is it a thriving profitable workplace or the generous administration of benefit plans? One need only scan newspaper headlines to note the termination of employee benefit plans or the freezing of benefit accruals—evidence of both real and perceived conflicts between the employer’s profitability and the employee’s financial well-being.⁵⁴

An independent fiduciary whose business objective is to service the plan in accordance with its terms may attach some value to the employer’s ability to sustain its profitability and to meet obligations to its creditors, including plan participants. Yet the independent fiduciary is, by definition, less deeply implicated in the ups and downs of an employer’s financial fortune than the employer itself. The independent fiduciary must comply with ERISA’s mandate to act in the best interest of participants. The concept of the indirect employer supports this legal requirement with the moral weight of the indirect employer’s own obligation to correct inequities in the workplace. It can serve as a useful way of determining just what the “best interest of the participant” might mean.

Greater uncertainty and anxiety plague the fiduciary who wears “two hats.” If a “two-hatted” fiduciary resolves an ambiguity in favor of a plan participant, is he or she failing to observe the loyalty due to the employer? If the decision goes the other way, has the fiduciary violated the obligation to act in the best interest of the participant? To a fiduciary who “wears two hats,” the line between benevolence in the treatment of plan participants and foolhardiness in neglecting the employer’s financial goals can seem very thin indeed.⁵⁵ A beleaguered

⁵⁴ See, e.g., Press Release, Gen. Motors Corp., GM Announces Restructuring of Its U.S. Salaried Ret. Benefits (Mar. 7, 2006), available at <http://www.prdomain.com/companies/G/GeneralMotors/newsreleases/20063829769.htm>; see also Jack VanDerhei, *Defined Benefit Plan Freezes: Who’s Affected, How Much, and Replacing Lost Accrual*, EBRI ISSUE BRIEF, Mar. 2006, at 1, available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_03-20063.pdf.

⁵⁵ See *In re Cardinal Health, Inc. ERISA Litig.*, 424 F. Supp. 2d 1002, 1019–20 (S.D. Ohio 2006).

[I]n every case charging a defendant with the breach of an ERISA fiduciary duty, the threshold question is not whether the actions of some person employed to provide

fiduciary may find some consolation in the tendency of courts to measure compliance with ERISA's fiduciary standards by reference to procedural safeguards.⁵⁶ A prudent ERISA fiduciary reads the plan document, gathers data, consults experts, and documents decision making in an effort to show that his or her decision was neither arbitrary nor capricious.⁵⁷ These procedures can and do produce results that are acceptable to both employer and employee. Yet not all decisions are equally palatable to the affected parties. Court dockets are replete with claims that an ERISA fiduciary has breached the duty to act in the best interest of the participant. Adherence to decision making standards that are procedurally compliant but fail to produce a result that makes a participant whole seems ironic.

John Paul II's understanding of work and the central importance of human dignity guides an answer to this question. Both the direct and indirect employers are charged with the responsibility to oversee a just workplace that facilitates both the objective and subjective dimensions of work. Moreover, the extent to which they succeed in this task is measurable by reference to their ability to maintain a just wage relationship. The focus on justice collapses the potential conflict between the interest of the plan participants and the interest of the direct and indirect employers. In such a workplace, the emphasis on human dignity—measurable by the just wage—is the prime motivation of all parties. The employer's interest in making a profit or

services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to the complaint.

Id.

⁵⁶ *See id.* at 1018 (stating that fiduciaries are charged with proper management, administration and investment of plan assets, maintenance of proper records, disclosures of specified information and avoidance of conflict of interest); *see also* Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc., 173 F.3d 313, 317 (5th Cir. 1999) (stating that the test of prudence is one of conduct and not performance and that the focus of the inquiry is how the fiduciary acted, not the performance of the investment selected).

⁵⁷ *See In re Cardinal Health*, 424 F. Supp. 2d at 1020.

Because the 'prudent person' standard focuses on whether the fiduciary utilized appropriate methods to investigate and evaluate the merits of a particular investment, what is considered 'appropriate' in a particular case depends upon the 'character' and 'aim' of the particular plan and decisions at issue and the 'circumstances prevailing' at the time a particular course of action must be investigated and undertaken.

Id. (citing *In re Dynegy Inc. ERISA Litig.*, 309 F. Supp. 2d 861, 875 (S.D. Tex. 2004)).

creating a product is compatible with but subordinate to the necessity of establishing a workplace that facilitates human dignity. Thus, where conflict might arise because of a fiduciary action that is in the best interest of the participant in a profit-maximizing workplace, a shared commitment to human dignity lends a predictable hierarchy to the response of employer, fiduciary, and worker in a workplace dedicated to the just wage, where all parties recognize the obligations of the direct and indirect employer.

While the use of Catholic social thought to explain and encourage the reform of employee benefits is admittedly outside the mainstream, this article is not unique in proposing that the independent fiduciary model is more attuned to ERISA's fundamental purposes and to advancing the rights of workers. There are clearly situations in which the appointment of an independent fiduciary is beyond the financial or practical capacity of a small employer that sponsors a particular plan. However, even in these cases, Catholic social thought can offer a heightened sense of responsibility to the "two-hat" fiduciary.

III. GRAPHICAL REPRESENTATIONS OF WORKPLACE COMPENSATION AND FIDUCIARY OPERATIONS THROUGH THE SYSTEMS APPROACH

These normative assertions—that human dignity is the greatest value in the workplace and that the plan fiduciary may be characterized as an indirect employer—beg to be placed in the context of the real problems that plan sponsors and plan fiduciaries face on a daily basis. This section of the article offers a series of graphical depictions that demonstrate the differences between a workplace compensation arrangement that is seriously dedicated to the achievement of dignity in the workplace and a workplace that has financial viability as its major goal. These graphics reveal the extraordinary pressures that work upon the "two-hat" fiduciary and illustrate the independent fiduciary's comparative freedom to resist similar constraints.

In order to convey the complex empirical and legal aspects of the modern American compensation scheme, I have turned to the "systems approach."⁵⁸ Intensely fact-based, the systems

⁵⁸ See generally Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1997) (describing the methods of systems analysis and how they are

approach emphasizes the complexity and the connectivity of relationships between and among components of a system.⁵⁹ According to Lynn LoPucki, a leading proponent of this methodology:

Systems analysis proceeds by identifying systems, discovering their goals or attributing goals to them, mapping their subsystems and the functions each performs, determining their internal structures, depicting them with attention paid to efficiency of presentation, and searching for internal inconsistencies. These methods generate analytical power by increasing the number of goals, elements, and circumstances that the analyst can take into account simultaneously.⁶⁰

The purpose of systems analysis is to increase understanding by “accommodat[ing] as much complexity as possible.”⁶¹ Systems analysis maps the dynamic and static relationships between components of a system in order to shed light on the extent to which these relationships facilitate, frustrate or impede systemic goals.⁶² In this sense, systems analysis does not require or, to use LoPucki’s phrase, “commit the researcher to [the] improvement” of systems; neither does it stop the analyst from doing so.⁶³ The purpose of systems analysis is fundamentally descriptive and the description that it offers is by definition intricate, complex and multi-faceted.⁶⁴

being applied in the field of law); Lynn M. LoPucki, *Twerski and Cohen’s Second Revolution: A Systems/Strategic Perspective*, 94 NW. U. L. REV. 55 (1999) (applying principles of systems analysis in order to analyze the effect that imposing a duty on health care providers to inform clients that other providers might be able to perform services better or more safely would have on the medical care delivery system); R. C. Tomlinson, *Operational Research and Systems Analysis: From Practice to Precept*, 287 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON 355 (1977) (tracing the development of systems analysis in the United Kingdom).

⁵⁹ See LoPucki, *The Systems Approach to Law*, *supra* note 58, at 481–83, 485–87.

⁶⁰ *Id.* at 481.

⁶¹ *Id.*

⁶² See *id.* at 487.

⁶³ See *id.* at 488.

⁶⁴ See *id.* at 521–22. John Paul II’s understanding of the human person begins with a similar appreciation of complexity and connectivity, a sociological perspective uniquely suited to analysis by the systems approach. See generally *LABOREM EXERCENS*, *supra* note 4, ¶¶ 17–18 (describing the influence of the indirect employer).

A. The Workplace Compensation System

Systems analysis should enable us to examine the workplace system within which a particular company creates its compensation and retirement arrangements. Assume that a manufacturer establishes a workplace compensation arrangement that includes several employee benefit plans in addition to normal wage and salary payments. If we can identify the normative goals of this system, we can examine whether the legally permissible choices offered to an employer effectively permit the employer to reach this goal. In addition, this mode of analysis should also permit us to examine the potential effect of changing either the goal of the system or, through legislative or judicial interpretation, the range of legally permissible choices.

Assume, for example, that we first analyze the manufacturer's workplace compensation system with the idea that "profit-maximization" is the normative goal of the corporation. Once this goal is identified, we can then look to the range of choices that would be legally permissible within the scope of ERISA and determine whether the choice an employer has made is effectively achieving that goal.

Figures 1 and 2 illustrate the workplace compensation arrangements of a manufacturer that produces and sells a product to the public. Figures 1 and 2 assume that the employer appoints an independent fiduciary to administer the plans and that the employer's goal is profit-maximization. Figure 2 adds an additional layer of complexity by including external forces such as government-mandated benefits, market forces, and the integration of the delivery and financing of health care that is typical of many managed care networks.

- The employer sponsors a defined contribution plan and a health plan for the benefit of eligible employees. The employer designs each plan and appoints an independent fiduciary to administer the plan. The employer makes contributions to each plan as provided in the plan documents. The employer also complies with and contributes to federal- and state-mandated benefit programs. In addition, the employer sets the price point for its product, which is reflective of costs and market conditions.
- The employee performs services for the employer in exchange for wage compensation and the benefits provided under the plan. To the extent permitted or

required by the plan, the employee makes contributions to the defined contribution plan from his or her wages and pays premiums, deductibles and co-payments in connection with the benefits provided by the health plan.

- The independent fiduciary receives compensation for his or her services to the plan. In exchange, the fiduciary exercises all powers designated under the plan, including the power to interpret the plan document and to exercise discretionary authority over questions of eligibility or coverage.

Figure 3 illustrates workplace compensation arrangements that are identical to those in Figures 1 and 2 with one exception. In Figure 3, the employer serves as the plan fiduciary, a practice commonly known as “wearing two hats.”

The employer makes contributions to each plan as provided in the plan documents. The employer also complies with and contributes to federal- and state-mandated benefit programs. In addition, the employer sets the price point for its product, which is reflective of costs and market conditions. In his or her capacity as fiduciary, the employer now exercises all powers designated under the plan, including the power to interpret the plan document and to exercise discretionary authority over questions of eligibility or coverage.

The employee’s situation remains unchanged.

In Figures 1, 2 and 3, the employer’s discretion over the financial arrangements among the parties is dominant. The employer sets the price point of the product, designs the employee benefit plan structure, and is likely the dominant force in setting the amount of wages that are paid to the employee. The employer’s authority and discretion are even greater in Figure 3, where the employer has chosen to exercise authority as plan fiduciary as well.

Assuming that the purpose of the workplace compensation system is to facilitate profit-maximization, the opportunities for the employer to manipulate the costs of benefit care greatly outweigh the ability of the employee to maximize the compensation he or she receives in exchange for services. In Figures 1 and 2, the independent fiduciary may temper the employer’s relationship with employees by virtue of its fiduciary duty to act in the exclusive interest of plan participants. In Figure 3, however, the employer also serves as plan fiduciary. Without the mediating influence of the independent fiduciary,

the employer has even more control over the manner in which benefits are administered. While it does not necessarily follow that the employer will place corporate goals ahead of the execution of the fiduciary requirements of ERISA, it is clear that there are fewer checks on the employer's capacity to arrange plan administration to the corporation's benefit and to the detriment of the participants.

Figure 4 assumes that the normative goal of the compensation and retirement arrangement is "emphasizing the dignity of the human person." This assumption dramatically changes the depiction of the workplace compensation system. As described above, John Paul II's understanding of work comprised both subjective and objective elements. Since the subjective experience of work directly transforms the worker's self-awareness and defines his or her self-realization, the importance of subjective considerations is at least as important as the objective considerations and, in cases of conflict, is always the dominant role. Thus, a compensation arrangement designed to maximize human dignity cannot limit its consideration to the production of goods and the remuneration of employees. The decision-making process must also acknowledge the overwhelming significance of the worker's subjective experience.

Figure 4 therefore depicts the relationship between employer and employee as having two significant components—the subjective component and the objective component. The objective component of work is the production and distribution of a product, which I have depicted as encompassing the compensation arrangement. The less tangible component of work—the subjective growth and satisfaction of the employee—is at least equal to and potentially greater than the objective element of work. Even if the objective component of work is at risk, the subjective element cannot be diminished. This workplace cannot be sustained by maximizing profits at the expense of the subjective experience of the human person.

B. Fiduciary Dilemmas

The difference between the depiction of the profit-maximizing employment system in Figures 1 and 2 and Figure 3 and the subjective/objective perspective in Figure 4 is the relative importance placed on profits. It is important to understand that the actions of the employer and the fiduciary in Figures 1, 2 and

3 are not illegal and do not challenge any of the conventional norms established by ERISA or by common practice in the administration of employee benefits in the United States. The employer and the fiduciary in Figures 1, 2 and 3 are very likely to be decent, law-abiding citizens who undertake their responsibilities in a serious and business-like fashion.

The employer in Figure 4 also strives for legal compliance and competitive performance in the market place. Yet, because this employer's goal is defined in terms of enhancing both the subjective and objective dimensions of work, the decision-making process may be different for the fiduciary of the employer's plans. Does the range of choices that are legally permissible under ERISA remain available to an employer committed to an approach that resembles Figure 4 and the fiduciary who administers that plan? The answer is yes, of course, the legally permissible options are always available. The more interesting question, in my opinion, is whether the least burdensome of the legal approaches is consistent with a commitment to administer a plan that in a manner that places prime value on human dignity in the workplace.

IV. WORKPLACE COMPENSATION WITH A COMMITMENT TO HUMAN DIGNITY: WHAT DIFFERENCE MIGHT CATHOLIC SOCIAL THOUGHT MAKE?

What possible contribution to ERISA jurisprudence might one find in John Paul II's understanding of work, as set forth in *Laborem Exercens*? The relevance of Catholic social thought to Catholic, church-related corporations may be apparent, but do these ideas have any value to decision-makers who are neither Catholic nor the custodians of corporations that identify with the Catholic Church?

In *Laborem Exercens*, John Paul II provided a new framework for thinking about the manner in which an employer might calculate a just wage. The Pope's appreciation of the subjective and objective dimensions of work encourages employers to reappraise their compensation strategies. By reframing the discussion concerning a just wage to recognize the importance of the subjective dimension of work to the full development of the human person, the Pope's work suggests two challenges for employers who incorporate employee benefit plans as part of their compensation strategies. The first question,

which is addressed in Part III, above, is whether the appointment of an independent fiduciary might enhance the subjective experience of work and the validation of the human person by adding an independent voice to the administration of the plan. The second question, which is applicable regardless of whether the plan sponsor appoints an independent fiduciary or decides to don two hats and administer a plan through its own employees, is whether a fiduciary's strict adherence to procedural safeguards is sufficient to protect and validate the dignity of plan participants.

This second challenge is a topic familiar to lawyers who follow the courts' on-going struggle with ERISA and its application. ERISA jurisprudence has wrestled for many years with the parameters of fiduciary decision-making. How do we know when a fiduciary's decision concerning the investment of defined benefit plan assets is correct? Are we confident in a fiduciary's decision to interpret a health plan's exclusion of "experimental procedures" as the basis for denying coverage for an autologous bone marrow transplant requested by a participant who is battling breast cancer? In some cases, courts are able to identify both substantive and procedural flaws that are plainly at odds with the language of a given plan or with the fiduciary obligations set forth in ERISA by Congress. In others, however, the court reaches its decision concerning the legality of a particular decision by evaluating the process (sometimes flagrantly abused) by which a decision is reached. While I do not take issue with the strict procedural safeguards encouraged by this approach, a single-minded focus on process suggests the disheartening lesson that substantive mistakes are excusable if the fiduciary follows procedural rules.

This final section sets forth several well-known cases to illustrate the problems that may arise from a strict focus on the procedural merits of a decision. In *Donovan v. Mazzola*,⁶⁵ the Ninth Circuit set forth procedural guidelines for fiduciary decision-making under ERISA. A brief examination of the decision in *Fischer v. Philadelphia Electric Co.*⁶⁶ sets forth the Third Circuit's explanation of the manner in which a plan fiduciary should communicate information concerning early

⁶⁵ 716 F.2d 1226 (9th Cir. 1983), *rev'd on other grounds*, 761 F.2d 1411 (9th Cir. 1985).

⁶⁶ 96 F.3d 1533 (3d Cir. 1996).

retirement windows to employees. Finally, the decision in *Mushalla v. Teamsters Local No. 863 Pension Fund*⁶⁷ offers facts that can be used to illustrate the difference between decision-making guided by technical adherence to procedural rules that do not lead to decisions that sustain the subjective dimension of work or respect the human person and those that might.

A. *Donovan v. Mazzola: Setting Out the Basics of Fiduciary Decisionmaking Under ERISA*

In *Mazzola*, the Ninth Circuit addressed fiduciary concerns raised by the activities of the trustees of a union-sponsored pension fund during the years immediately following ERISA's effective date.⁶⁸ Although the *Mazzola* opinion dates from 1983 (more than eight years after ERISA became effective), the decision belongs to an early generation of appellate decisions that thrashed out the parameters of ERISA jurisprudence. While the *Mazzola* court ultimately ruled that the defendant trustees had violated ERISA's fiduciary requirements, the opinion focused on the trustees' procedural gaffes. The *Mazzola* court, in effect, provided procedural instructions to trustees who were disinclined to share the trustees' fate.

In the mid-1950s, Local Union 38 and the employers of its members established a pension plan "to provide retirement benefits to union members and their beneficiaries."⁶⁹ Several years later the union and the employers established the Convalescent Fund of Local Union 38, which eventually owned a hotel (which charged discounted rates to fund participants), a summer camp, and a retirement housing project.⁷⁰ The trustees of the pension fund served as an "Advisory Committee" to the fiduciary of the Convalescent Fund.⁷¹ Although the eligibility requirements for participation in each fund were different, the membership was "substantially the same."⁷²

The *Mazzola* story, a favorite old chestnut of ERISA casebooks, displays an astonishing entanglement of the plan sponsor, the self-interest of the trustees, and a bizarre

⁶⁷ 300 F.3d 391 (3d Cir. 2002).

⁶⁸ 716 F.2d at 1228.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

appointment of an unqualified crony to advise the trustees on the management of plan assets. In 1975, shortly after ERISA became effective, the trustees of the pension plan authorized the disbursement of \$1.5 million in plan assets as a loan to the Convalescent Fund.⁷³ Within a short time, however, the trustees no longer required payment on this loan and permitted the Convalescent Fund to take an extension on another loan without providing additional security or agreeing to contractual terms that would enhance the likelihood of repayment.⁷⁴

Indeed, 1975 proved to be a banner year for those who aspired to borrow funds from the pension plan. The trustees also approved a \$2.25 million construction loan for the purpose of constructing a spa on the Fund's property, secured by the property itself.⁷⁵ The trustees then loaned \$650,000 in plan assets to S&F Spas, a limited partnership whose investors included Dr. Ernest Schwartz.⁷⁶ Dr. Schwartz was quite familiar to the trustees, claiming a friendship with one of the trustees and having served as personal physician to another.⁷⁷ The purpose of the S&F loan, which occurred after the approval of the construction loan, was ostensibly to convert a hotel to a health spa.⁷⁸ Moreover, in 1977, the trustees paid Dr. Schwartz \$250,000 to conduct "a feasibility study to determine the most profitable use of the Convalescent Fund's Konocti Harbor Inn."⁷⁹ The soap-opera quality of the *Mazzola* facts rises a notch higher when one learns that Dr. Schwartz was a medical doctor who had no training in real estate appraisal or the construction of spas.⁸⁰

The Ninth Circuit's opinion in *Mazzola* provides several important insights into the development of jurisprudential thinking with regard to ERISA's fiduciary provisions. The court clarified that ERISA's prudent person test differed from the more common "business judgment rule."⁸¹ Describing the prudent person test as "more exacting,"⁸² the court examined whether the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1229.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at 1233.

⁸¹ *Id.* at 1231.

⁸² *Id.*

trustees “employed the appropriate methods to investigate the merits of the investment and to structure the investment.”⁸³

The *Mazzola* trustees presented a textbook example of how to violate ERISA’s fiduciary provisions. The obvious conflict of interest clearly troubled the court. The opinion notes that the trustees served “on both sides of the loan transactions; and . . . consistently transacted business with and for the Convalescent Fund at all relevant times for the purpose of aiding the Convalescent Fund at the expense of the Pension Fund.”⁸⁴ The court chided the fiduciaries for failing to identify or appraise the property that the Convalescent Fund offered as security, as well as neglecting to search for prior encumbrances on the property and charging a below-market interest rate.⁸⁵ Similar problems haunted the feasibility study. The fiduciaries did not consider whether Dr. Schwartz was qualified to provide a feasibility study or compare his proposed services and fees to that of other consultants.⁸⁶ Moreover, the fiduciaries did not hold Dr. Schwartz to deadlines or require him to provide follow-up consultations.⁸⁷

While the Ninth Circuit’s contempt for the behavior of the *Mazzola* trustees illustrated quite clearly what fiduciaries should not do, the procedural focus of this decision yielded only procedural answers concerning the proper method of resolving fiduciary problems under ERISA. If, on the one hand, it is improper for a trustee to act on both sides of a transaction, to neglect standard practices for evaluating security for loans, and to hire buddies to perform feasibility studies outside their sphere of professional competence, simple logic leads to the conclusion that the prudent fiduciary will do none of the above. A prudent fiduciary, therefore, would insure that he or she did not harbor a potential conflict of interest with a prospective borrower, would meet industry standards for determining the terms of a loan of plan assets, and would only commission feasibility studies from the best of a field of expert providers.

Certainly, admonishing fiduciaries to observe procedural prudence is always very good advice. However, the *Mazzola*

⁸³ *Id.* at 1232.

⁸⁴ *Id.*

⁸⁵ *See id.* at 1232–33.

⁸⁶ *Id.* at 1233.

⁸⁷ *Id.*

opinion leaves at least one glaring omission. The *Mazzola* decision tells the fiduciary *how* to act in the exclusive interest of plan participants, but leaves no substantive criteria to measure *what* that interest might be. *Mazzola* fails to provide the plan participant with a meaningful vision of what this exclusive interest is, other than the vague assurance that decisions concerning his or her assets should be made fairly. If one looks to the moral consequences of the *Mazzola* method of decision-making, there is no guarantee that adherence to the *Mazzola* principles will lead to a decision that advances the subjective dimension of work or the dignity of the plan participant. Observing procedural safeguards simply eliminates one way in which fiduciary decision-making may violate the human dignity of the plan participants; it does not orient the fiduciary in a direction that will necessarily lead to the enhancement of the plan participant's subjective experience of work.

B. Mushalla: The Conventional Way and the JPII Way

Communications concerning early-retirement windows are often the basis for litigation, as the objectives of employers, plan fiduciaries and plan participants are often at odds because unspoken assumptions based on these communications can lead to volatile and impulsive decision-making on the part of plan participants. Its 1996 opinion attempted to rectify this problem by offering a three-factor test to establish whether a change in benefits was under serious consideration. Although adamantly denying the suggestion that it was creating a bright-line test, the court explained that serious consideration could be found when "(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." Thus, in theory, the concept of "serious consideration" mediates between "an employee's right to information and an employer's need to operate on a day-to-day basis."

In *Fischer v. Philadelphia Electric Co. ("Fischer II")*,⁸⁸ the Third Circuit explored the responsibility of a plan administrator to employees who might become eligible for a potential early retirement window. In its earlier, 1993 opinion in *Fischer v.*

⁸⁸ 96 F.3d 1533, 1536, 1538 (3d Cir. 1996).

Philadelphia Electric Co. ("Fischer I"),⁸⁹ the Third Circuit instructed the lower court to determine whether a plan administrator had materially misled participants when it stated that no change in benefits was under consideration at the time the participants were considering retirement. The court explained that the materiality of any misrepresentation hinged upon the seriousness with which any change was in fact under consideration.⁹⁰ By the time the case returned to the Third Circuit in 1996, the court recognized that "serious consideration" was an "amorphous concept."⁹¹ The court set forth a three-factor test to permit administrators to determine whether a change in benefits was under "serious consideration" and, thus, necessitated the disclosure of this information to potentially eligible participants who were considering retirement.⁹² According to *Fischer II*, "serious consideration . . . exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."⁹³

An affirmative statement of the holding in *Fischer II* seems quite simple. A plan administrator's duty to communicate truthfully would therefore be discharged if he offered information concerning potential plan amendments that had reached the level of serious consideration. However, this simple affirmative statement belies the complexity of the *Fischer II* test and its slippery hold on the truths which it requires a plan administrator to disclose. A negative statement of the *Fischer II* test is more revealing. A plan administrator's duty to communicate truthfully is also discharged if he does not offer information concerning plan amendments that have failed the three-factor test for serious consideration. Stated differently, *Fischer II* also offers a road map to a safe zone in which employers may consider significant plan changes without

⁸⁹ 994 F.2d 130 (3d Cir. 1993).

⁹⁰ *Id.* at 135–36.

⁹¹ *Fischer II*, 96 F.3d at 1539.

⁹² *Id.*

⁹³ *Id.* The *Fischer II* test has not been adopted in all circuits. *See, e.g.*, *Ballone v. Eastman Kodak*, 109 F.3d 117, 125 (2d Cir. 1997) (stating that an employer may be liable for misrepresentations before "serious consideration" occurs); *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 425 (5th Cir. 2003) (rejecting *Fischer II*'s serious consideration approach).

triggering the duty to disclose the potential plan changes to employees.⁹⁴

Consider, for example, the Third Circuit's recent opinion in *Mushalla v. Teamsters Local No. 863 Pension Fund*.⁹⁵ Russell Mushalla and the other plaintiffs participated in a multiemployer pension fund that was administered by their union and management representatives.⁹⁶ The plan calculated benefits by multiplying the participant's years of service by his rate of contribution. At the time of Mushalla's retirement, the plan provided that the maximum number of years of service that could be taken into consideration was thirty.⁹⁷ In December 1997, Mushalla attended a union meeting during which the union representative who served as a plan trustee reported that "the Fund was considering an increase in the cap on years of service."⁹⁸ Since the same trustee reported on concerns that were specific to employees of Pathmark, Mushalla formed the impression that any revision to the cap on years of service would apply only to Pathmark employees.⁹⁹ Over the next several weeks, Mushalla and several of the other plaintiffs asked another plan trustee whether the benefit levels would be increased, and each received a negative answer.¹⁰⁰ The latest of these conversations took place on December 20, 1997, and the response was still negative. Mushalla and the other plaintiffs eventually retired between December 19, 1997 and January 30, 1998.¹⁰¹ In fact, on December 9, the trustees had directed the plan actuary to prepare a cost analysis and actuarial study of the impact of the proposed change on the plan. The actuary prepared the report during January 1998. On January 20, 1998, the plan trustees reviewed the actuarial analysis and voted unanimously to increase benefits effective April 1, 1998.¹⁰² The plan administrator informed the participants of the change by letter dated February 1, 2002.¹⁰³

⁹⁴ *Fischer II*, 96 F.3d at 1539–40.

⁹⁵ 300 F.3d 391 (3d Cir. 2002).

⁹⁶ *Id.* at 393.

⁹⁷ *Id.*

⁹⁸ *Id.* at 394.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 394–95.

¹⁰¹ *Id.* at 393.

¹⁰² *Id.* at 395.

¹⁰³ *Id.* at 393–95.

Did the plan trustee breach a fiduciary duty to communicate truthfully with Mushalla when he said, as late as December 20, that increased benefits were not under consideration? The court, applying the *Fischer II* serious consideration test, said that he had not. The court conceded Mushalla's observation that specific "cost-analysis and actuarial work are not always necessary prerequisites to serious consideration."¹⁰⁴ However, in the *Mushalla* facts, the court concluded that in the absence of an analysis of "the financial viability of the increase, there could be no specific proposal" and, therefore, the first of the *Fischer II* factors had not been met.¹⁰⁵ Moreover, the second of the *Fischer II* factors required consideration of the "practicalities of implementation" and, in the opinion of the court, this factor had not been met at the time Mushalla engaged the plan trustee in conversation. For the Third Circuit, then, the plan trustee complied with his fiduciary obligation to answer Mushalla's questions truthfully when he stated that no benefit increases were under consideration.

Yet, was this compliant answer also a truthful answer? Mushalla had asked in plain English whether any changes to benefits were under consideration. In fact, although the plan actuary had not yet completed his cost analysis regarding the proposal, the board had certainly ordered this appraisal by the time Mushalla posed his questions concerning future benefit increases. Moreover, the proposed increase in plan benefits motivated the preparation of the cost analysis, rather than the reverse. The bald facts of the case suggest that by any plain interpretation of the English language, the board was indeed considering a change in benefits and was actively pursuing steps to determine whether that change should take place. Had truth been the measure of the fiduciary's duty, the only response to Mushalla's question would be an unequivocal yes.

Yet, complying with *Fischer II*'s serious consideration test only required the plan fiduciaries to reveal this when the *Fischer II* factors had been met. The *Fischer II* test suggests that the difference between a discussion of the increase in benefits and a "*serious consideration*" of a potential plan amendment is primarily a difference of degree. The *Fischer II* test, as applied in

¹⁰⁴ *Id.* at 399.

¹⁰⁵ *Id.* at 399–400.

Mushalla, gauges the duty of the fiduciary to respond affirmatively to questions concerning changes in benefits according to the extent to which the proposal has traveled on a continuum from discussion to enactment. While it might be pragmatic to program the fiduciary's duty to respond as a function of where the proposal is when the employee asks a question, this is a very different exercise from determining what is the truthful answer. *Fischer II* and its progeny teach that the fiduciary's duty is to communicate affirmatively regarding benefit proposals that have traveled far enough along this road to meet the three factors suggesting "serious consideration." Given the Third Circuit's interpretation of a fiduciary's duty under ERISA, it is difficult to fault the *Mushalla* court for supporting the fiduciary in his negative response.

What might *Mushalla* look like if the plan fiduciaries had aspired to a decision that gave human dignity priority over the employer's profit-maximizing goals? An independent fiduciary might have been sufficiently distant from the discussions concerning early retirement windows to be able to separate the employer's needs for stable staffing against the probability that the plans concerning the retirement window would be implemented. Moreover, if the normative goals of *Laborem Exercens* had weighed upon an independent fiduciary (or, possibly, even by a fiduciary with ties to the union or management), the importance of the subjective dimension of the participant's work experience might have encouraged the fiduciaries to give a more fulsome answer even if that answer exceeded the minimum required by the *Fischer II* test. Surely, human dignity is best served by permitting employees to comprehend and act upon the possibility that their jobs might be eliminated.

CONCLUSION

ERISA includes many excellent features to safeguard the interest of participants in an employee benefit plan. It is true that the design of a plan document is a settlor function, rather than a fiduciary task, and that fiduciaries are constrained to act in accordance with the plan documents. Likewise, it does not necessarily follow that an employer's decision to act as the fiduciary of his own plan will force him to violate ERISA's requirements for the conduct of fiduciary business. However, an

employer's decision to serve as the fiduciary of its own plan may also cast an impermissibly heavy burden on his fiduciary actions. True, the two-hat rule does reduce the expenditures associated with appointing an independent fiduciary; but allowing an employer to appoint himself as a fiduciary is not the only way to reduce the costs of plan administration.¹⁰⁶ But the decision to wear both hats leaves open the possibility that an employer either mistakenly or intentionally will conflate his responsibilities when he undertakes the fiduciary responsibilities inherent in the investment of plan assets or the task of communicating to employees. Such confusion may prove costly to the participants and, if challenged through litigation, may likewise prove costly to the employer, both in terms of financial considerations and in terms of the human investment in his relationship with his employees. The appointment of an independent fiduciary permits a clear delineation between settlor interests and fiduciary functions.

Consider an image that, with respect to John Paul II, is not at all improbable. What if a man such as the late Pope worked in a quarry with the sincere desire to fulfill the objective dimension of work by complying with the employer's production goals? What if he also was attentive to and affirmed by his subjective experience of this work as a means of enhancing his knowledge of himself as a human person and of his relationship to God. Does a man like this deserve to have his retirement savings administered by trustees who use his pension funds to build a hotel in a place recommended by a physician who had no experience in construction or the hotel industry? Does a man like this deserve to hear a plan fiduciary lie about the future prospects for his employment or benefits?

No, he doesn't. And it's not because he's the Pope. It might be because ERISA says that these fiduciaries should act in his sole interest, as he is the plan participant. But, the reasons emerge in a much more basic and much less ambiguous sense if we go back to John Paul II's understanding of workplace relations: "[T]he basis for determining the value of human work

¹⁰⁶ I am indebted to the panelists and audience members at the March 2006 Employee Benefits Symposium sponsored by the John Marshall Law Review for pointing out that, for example, the pooling of resources by small employers might permit one independent fiduciary to provide cost-effective service to a variety of small employer plans.

is not primarily the kind of work being done, but the fact that the one who is doing it is a person.”¹⁰⁷ This man, like each of us, deserves a fiduciary who acts in an upright manner because the value of his work comes from the fact that he is a person, created in the image and likeness of God.

¹⁰⁷ *LABOREM EXERCENS*, *supra* note 4, ¶ 6; *see also id.* ¶ 26.

APPENDIX

FIGURE 1 - WORKPLACE COMPENSATION SYSTEM
(INDEPENDENT FIDUCIARY, PROFIT-MAXIMIZING)

Employer sets wages, appoints fiduciaries, determines plan contributions, sets product pricing.

Employee performs services, determines plan contributions (if permitted or required).

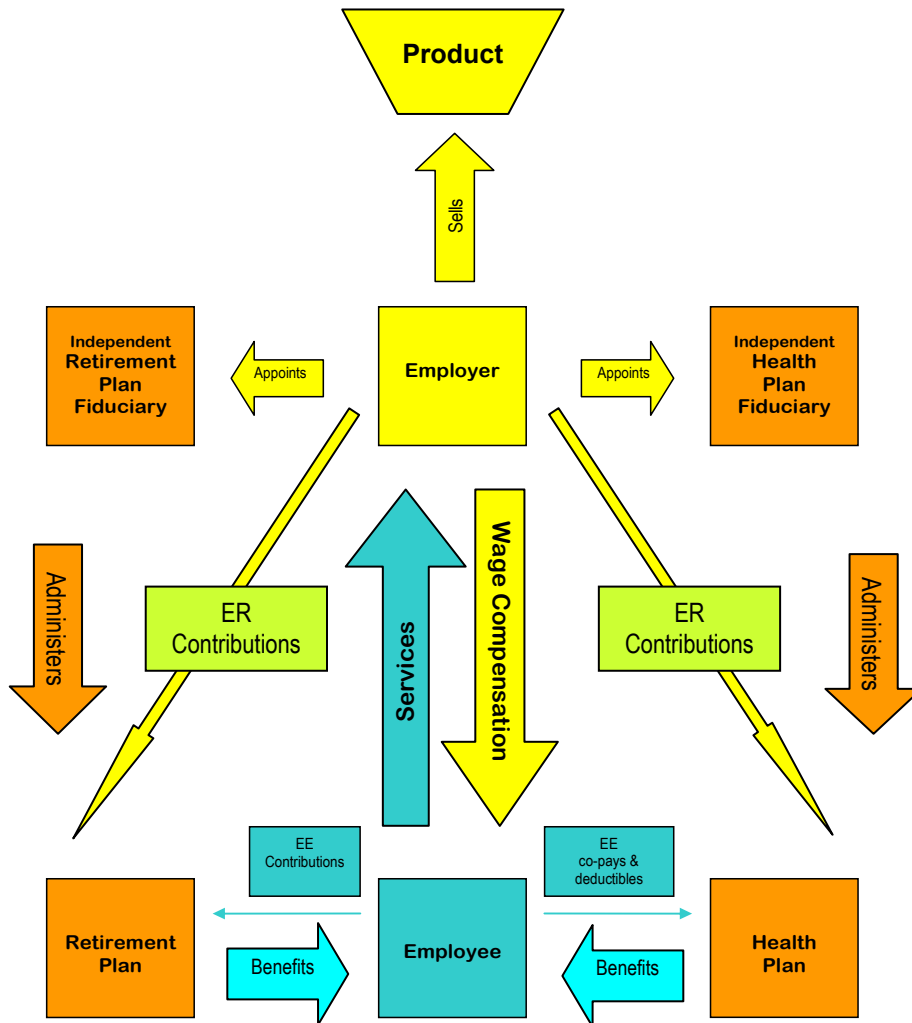


FIGURE 2 - WORKPLACE COMPENSATION SYSTEM
(INDEPENDENT FIDUCIARY, PROFIT-MAXIMIZING)

Employer sets wages, appoints fiduciaries, determines plan contributions, sets product pricing.

Employee performs services, determines plan contributions (if permitted or required)

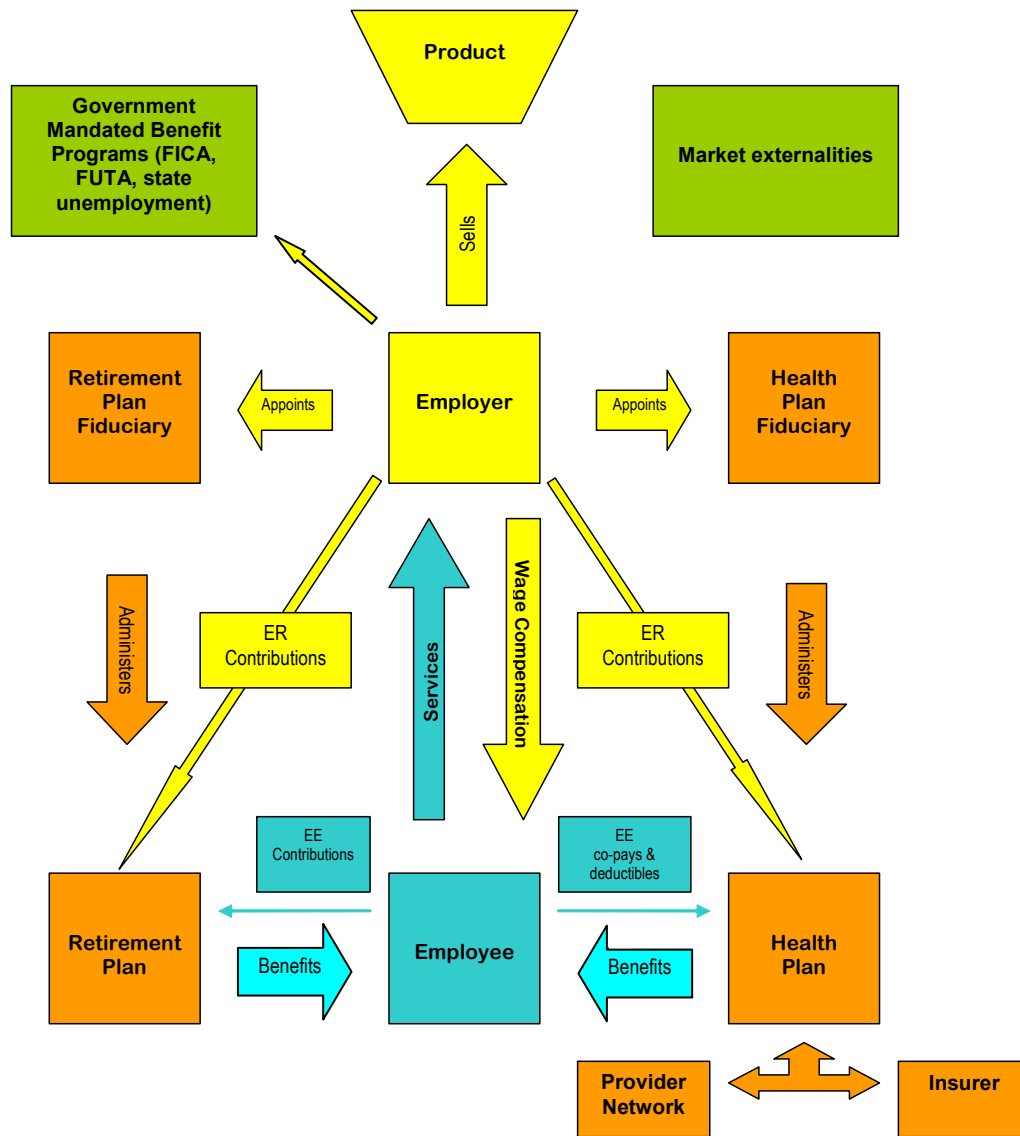


FIGURE 3 - WORKPLACE COMPENSATION SYSTEM
(TWO-HAT FIDUCIARY, PROFIT-MAXIMIZING)

Employer sets wages, appoints self (or employee) as fiduciary, determines plan contributions, sets product pricing, administers plans.

Employee performs services, determines plan contributions (if permitted or required)

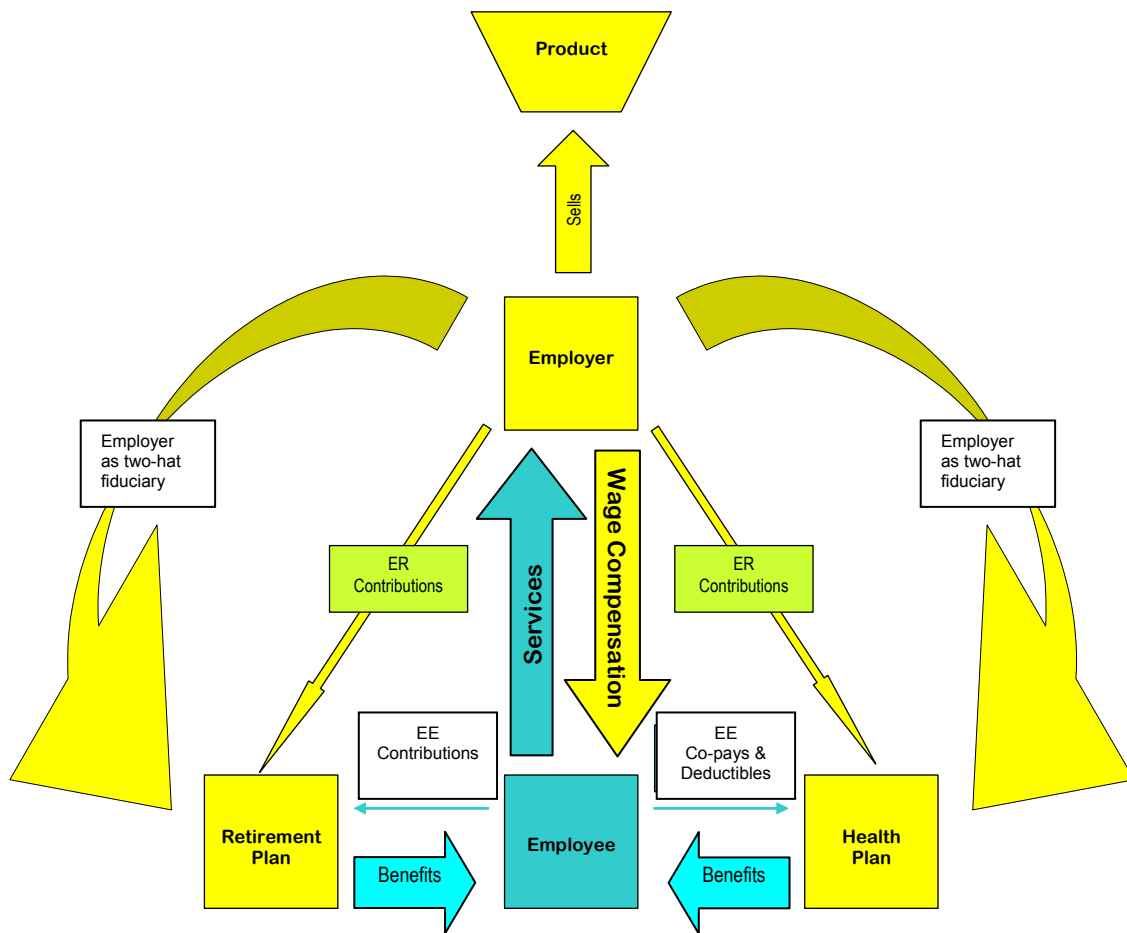


FIGURE 4 - WORKPLACE COMPENSATION IN VIEW OF SUBJECTIVE / OBJECTIVE DIMENSIONS OF WORK; SHARED UNDERSTANDING OF IMPORTANCE OF SUBJECTIVE DIMENSION OF WORK

