Look Before You Leap! The Perils of Providing ERISA-Regulated Benefits To Illegal Aliens

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ERISA plan administrators get the shivers whenever they are forced to consider whether illegal aliens are entitled to the payment of ERISA-regulated benefits. There are good reasons to be nervous. Obtaining employment under false pretenses is a crime.1 The Immigration Reform and Control Act of 1986 (IRCA) is “a comprehensive [law] prohibiting the employment of illegal aliens in the United States.”2 IRCA makes it a crime
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for an unauthorized alien to subvert the employer verification system by knowingly tendering fraudulent documents. Persons who violate IRCA by using or attempting to use fraudulent documents are subject to punishment by civil fines and may be subject to criminal prosecution.

The US Supreme Court in Hoffman concluded that allowing the NLRB to provide back pay to illegal aliens was incompatible with the policies underlying IRCA, stating:

We therefore conclude that allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

The Court explained that awarding back pay ran counter to the policies underlying IRCA because it was for “years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.” The Supreme Court made it clear in Hoffman that although illegal immigrants may be “employees” under the National Labor Relations Act (NLRA), they are not entitled to the remedies of reinstatement or back pay. “Aliens who use or attempt to use such [false] documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b).” The Court further opined that awarding back pay in such a situation, “not only trivializes the immigration laws, it also condones and encourages future violations.”

The Supreme Court's back-pay analysis may apply with equal force to any potential pension benefits owed to illegal aliens. This has been found true for front pay. For example, in Renteria v. Italia Foods, Inc., José Renteria and eight other workers sued their employer, Italia Foods, Inc., a manufacturer of frozen-food products, for failure to pay them overtime under the Fair Labor Standards Act. Some of the workers also claimed that their employer had retaliated against them for making overtime claims. The employer claimed that it discovered certain workers were not entitled to recovery because they were undocumented while they worked for the company. The Court concluded that workers who gained employment under false pretenses were not entitled to the remedies of back pay or front pay after Hoffman.

Hoffman's policy rationale analysis appears to make sense in the ERISA context. Paying ERISA pension benefits to illegal aliens potentially condones past immigration violations by awarding pension benefits for work obtained through criminal fraud. It can also be argued that pension payments to illegal aliens condones future immigration...
Violations by encouraging future illegal immigrants to gain both employment and pension benefits with no negative consequences. As we discuss below, it may also encourage future Tax Code violations because paying pension benefits to individuals who are using false Social Security numbers means these individuals are unlikely to pay income taxes on pension distributions.

**Hoffman Has Been Found to Be ‘Analogous’ in the ERISA Context**

A federal district court in *Garcia v. Am. United Life Ins. Co.* refused to provide ERISA-regulated life insurance benefits to the beneficiary of an illegal alien. The *Garcia* court found Hoffman “analogous” and the Supreme Court’s analysis “instructive” in this context of an ERISA life insurance dispute. Having been applied in one ERISA context, courts may apply the Hoffman Court’s analysis with equal force to an ERISA-regulated pension plan.

In *Garcia*, the American United Life Insurance Company had issued a life insurance policy to Tatum Excavating Company, Inc., effective July 1, 2005. On September 2, 2005, Salvador Garcia signed an enrollment form that included a representation of his date of birth and Social Security number (SSN). Approximately five months later, Mr. Garcia died. His wife, as his designated beneficiary, applied for benefits under the policy. It subsequently came to light that the SSN Mr. Garcia provided did not belong to him. American denied the claim for benefits and voided the policy on the basis that:

“[i]nformation provided . . . indicates the decedent provided invalid information and could not have been legally employed or living in the United States. Because the decedent was not eligible for employment with [Tatum], he was not eligible to apply for coverage under its ERISA-governed group life insurance policy. No information has been provided showing he was legally employed or living in the United States.”

In order to be eligible under American’s plan, Mr. Garcia had to have been an employee of Tatum. The plan’s definition of employee contained no reference to immigration status. It merely stated:

**EMPLOYEE** means an individual:

(1) whose employment with the Group Policyholder constitutes his principal occupation; and

(2) who regularly works at that occupation at the Group Policyholder’s regular place of business a minimum number of hours per week . . . ; and
(3) who is not temporarily or seasonably employed by the Group Policyholder.

TO REMAIN ELIGIBLE FOR PERSONAL INSURANCE AND DEPENDENT INSURANCE, IF ANY, PERSONS MUST CONTINUOUSLY MEET THE ABOVE REQUIREMENTS. 14

Mrs. Garcia argued that American sought to read an immigration status requirement into eligibility that was not there. She also argued that it was the employer that committed an illegal act by hiring her husband. The Magistrate agreed with American and found that Mr. Garcia “cannot meet the policy requirement of ‘employment with the Group Policyholder’ in a lawful manner.” 15 The Magistrate went on to state:

After a detailed investigation, American determined that Salvador was not eligible for employment in the United States. Despite having had the opportunity, Plaintiff failed to provide information establishing or indicating that Salvador was a legal resident or authorized to work in this country. Unable to confirm Salvador’s identity and United States citizenship, American correctly determined that Salvador was not eligible for employment with Tatum and thus not lawfully employed by Tatum, requiring denial of benefits to Plaintiff as beneficiary. Given the facts presented, the Administrative Record establishes that American’s decision was consistent with a “fair reading of the plan.” 16

After analyzing all relevant factors, the Magistrate also concluded that “American applied a legally sound interpretation of the Plan.” 17 Mrs. Garcia objected to the Magistrate’s Report and Recommendation.

The district court adopted the Magistrate’s Report as the findings and conclusions of the court. In its analysis of whether Mr. Garcia had made a material misrepresentation, the district court stated:

Plaintiff would have this Court overlook the fact that Mr. Garcia submitted a false SSN, ostensibly in order to become employed by Tatum, so that she may benefit from a policy for which Mr. Garcia would not otherwise have been eligible. Cf. Hoffman, 535 U.S. at 148–149 (“The Board asks that we overlook this fact and allow it to award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.”). As the Magistrate Judge found, an “applicant’s SSN is a vital piece of information pertinent to the insurer’s accurate identification of the person seeking to be insured.” Dkt. No. 57 at 34. Indeed, it is required by law. See 8 U.S.C. § 1324(a)(1). Simply, as the Magistrate Judge found, “American actually issued coverage to an individual who only secured employment (upon which eligibility was based) by means of tendering fraudulent identification
to the employer,” and “had Tatum known of [Mr. Garcia’s] illegal status, it would not have offered him employment just as American would not have issued coverage had it known of same.” Dkt. No. 57 at 36.18

Mrs. Garcia appealed. She asserted the district court had applied an incorrect standard of review and that the district court erred in finding her husband made a “material” misrepresentation about who he was, thus allowing American to deny the claim. The US Court of Appeals for the Fifth Circuit affirmed. It explained that:

[Salvador’s] “misrepresentations were clearly material and of the type that would have prevented [American] from issuing the policy. A SSN is an integral part of the process by which a party’s identity can be verified. See generally Sherman v. U.S. Dept. of the Army, 244 F.3d 357, 364–66 (5th Cir. 2001) (discussing the significant privacy interest an individual has in her SSN because it could be used to uncover her financial information, as well as other identity-related information). Because Salvador provided a false SSN and inhibited [American’s] ability to verify his identity, he not only placed [American] at risk of severe penalties, but also inhibited [American’s] ability to assess the underwriting risk involved in issuing him the policy.”19

The Fifth Circuit thus ruled that Mr. Garcia never became a plan participant because he used a false SSN. It ruled that American would not have issued a policy to Mr. Garcia had it known of his SSN misrepresentation, which made American vulnerable to civil and criminal penalties. The Garcia cases demonstrate that known material misrepresentations about SSNs may expose pension plan trustees to civil and criminal penalties.

**Fiduciaries of a Pension Plan Have a Duty to Investigate**

ERISA mandates that a fiduciary discharge his or her 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.”20 ERISA fiduciaries also must discharge their duties with respect to a plan “solely in the interest of the participants and beneficiaries and … for the exclusive purpose of … providing benefits to participants and their beneficiaries…”21

In Barker v. Am. Mobil Power Corp.,22 the US Court of Appeals for the Ninth Circuit held that a retirement plan fiduciary breached his fiduciary duties by failing to investigate and by failing to inform plan participants of his suspicions with respect to mismanagement
of plan funds. Upon discovering that their retirement plan had no money left to pay their benefits, American Mobil retiree plaintiffs sued. They alleged the plan fiduciary breached his fiduciary duties by mismanaging plan funds. The district court found that the fiduciary, Ayres, suspected individual accounts had not been established for plan participants and suspected plan benefits were not paid out of the plans assets. He also signed yearly profit-sharing certificates that indicated that plan funds were being held on plaintiffs' behalf and were accruing interest. Despite these suspicions, Ayres did not perform any investigation. Nor did he alert plan participants to his suspicions. The district court ruled that this was not a breach of fiduciary duty and the Ninth Circuit reversed. The Ninth Circuit ruled that Ayres had a duty to investigate and “had a duty to inform the participants of any and all circumstances that threatened the funding of their pensions.”

The Ninth Circuit opined:

Ayres suspected that there were problems with the maintenance of the Plan. Any prudent individual who had a retirement account and who possessed the same suspicions that his own account was not being properly maintained would make inquiries to ascertain with certainty that the account was being properly funded. A fiduciary has a duty to act in the best interests of the plan participants and beneficiaries. Not to investigate suspicions that one has with respect to the funding and maintenance of the plan constitutes a breach of that duty. See Fink v. National Sav. & Trust Co., 249 U.S. App. D.C. 33, 772 F.2d 951, 955 (D.C. Cir. 1985) (discussing general standards for fiduciaries).

The Ninth Circuit further explained:

Moreover, fiduciaries breach their duties if they mislead plan participants or misrepresent the terms or administration of a plan. See Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993) (as amended). An “ERISA fiduciary has an affirmative duty to inform beneficiaries of circumstances that threaten the funding of benefits.” Acosta v. Pacific Enters., 950 F.2d 611, 619 (9th Cir. 1991) (as amended). A fiduciary has an obligation to convey complete and accurate information material to the beneficiary’s circumstance, even when a beneficiary has not specifically asked for the information. See Bixler v. Central Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993).

Pension plan trustees have a duty to take action to prevent the diversion of plan assets to other improper uses. Pension plan trustees who fail to investigate whether “participants” are illegal aliens or fail to notify trust fund participants that the trustees are on notice
that some “participants” may be illegal aliens face potential fiduciary breach liability. As the US Court of Appeals for the Second Circuit explained in a seminal case involving fiduciary malfeasance, “Luck or good fortune is no substitute for a trustee’s duty of inquiry.”

The reach of the duty of inquiry is potentially quite broad. In *Chamber of Commerce of the United States v. Whiting*, the US Supreme Court upheld an Arizona law requiring employers to use E-Verify, a federal electronic verification system, to check the work authorization of their employees. IRCA does not trump state laws that further IRCA’s goals. ERISA fiduciaries should consider asking employers to verify that they have complied with both federal and state immigration laws.

Similarly, pension plan fiduciaries have a duty to protect the pension plan and trust assets by ensuring that only eligible plan participants receive benefits. ERISA Section 403(c)(1); 29 U.S.C. Section 1103(c)(1) mandates that “the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.”

In *Ellenburg v. Brockway, Inc.*, Leroy Ellenburg brought suit under ERISA to recover early retirement benefits. In order to be eligible for early retirement benefits, Mr. Ellenburg had to have worked for a certain length of time for the company and have attained the age of 55. When Mr. Ellenburg applied for early retirement benefits, he listed his birth date as December 26, 1923. However, on previous employment documents, Mr. Ellenburg used the birth date of December 26, 1926. A computer print-out of retirement benefits calculations listed this later date as his birth date, and Mr. Ellenburg’s employer informed him that he was ineligible to retire.

At that point, Mr. Ellenburg produced a Delayed Birth Certificate dated December 26, 1923. He had obtained the Delayed Birth Certificate by having a family friend, who was also a notary public, certify that she had examined a family bible and life insurance policy that contained Mr. Ellenburg’s age. The State of Georgia issued the Delayed Birth Certificate based solely on that certification.

After hearing a rumor among employees that Mr. Ellenburg had provided an incorrect birth date on his application, the manager of employee benefits investigated further. He learned that the records that supposedly supported the Delayed Birth Certificate did not list Mr. Ellenburg’s birth year as 1923. The manager wrote to Mr. Ellenburg and informed him that the 1923 year might be incorrect. He informed Mr. Ellenburg that his benefits were suspended until the issue was resolved and requested additional documents to verify Mr. Ellenburg’s birth date, including: a copy of the life insurance policy, name and address of the hospital where Mr. Ellenburg was born, and a copy
of his military discharge papers. Mr. Ellenburg claimed the family Bible and the insurance policy had disappeared. The employer denied Mr. Ellenburg's benefits after the manager received copies of school records and the application for the life insurance policy listing Mr. Ellenburg's birth year as 1926. Mr. Ellenburg sued.

The Ninth Circuit opined:

Brockway's and Cunningham's consideration of evidence of Ellenburg's age, obtained after Ellenburg retired, in determining eligibility was not arbitrary and capricious. The discrepancy in Ellenburg's date of birth was apparent prior to his retirement, and such discrepancy was sufficient to cause Brockway and Cunningham suspicion as to Ellenburg's eligibility. As fiduciaries, Brockway and Cunningham were under a duty to protect the pension plan and trust assets by assuring that only eligible employees received benefits. The decision to resolve the discrepancy in Ellenburg's date of birth prior to payment of benefits was reasonable and prudent, rather than arbitrary and capricious.30

Most pension plans require participants to provide SSNs for tax reporting purposes. Fiduciaries who fail to require participants to provide correct SSNs open themselves up to a potential fiduciary breach lawsuit if plan benefits are provided to individuals who are not eligible participants.

It Is a Crime to Willfully Aid or Assist an Illegal Alien in Submitting a Fraudulent or False Tax Document

It is a crime under the Internal Revenue Code for an illegal alien to submit a tax document "which is fraudulent or false as to any material matter."31 It is also a crime to willfully aid or assist that individual in doing so.32 Trustees who make pension payments to individuals who have used a fraudulent SSN risk violating this law. Pension payments are generally distributed as taxable income. Pension plans often rely upon the matching of an SSN to a participant as part of their identification and disbursement procedure. Fiduciaries who are on notice that a "participant" has used a false SSN risk condoning or even committing a criminal violation of the Code when they make a taxable distribution to these individuals.

Salas Does Not Change This Cautionary Warning

The California Supreme Court recently ruled in Salas v. Sierra Chemical Co.33 that employers cannot violate California employment laws when they find evidence, after being sued, that their former employee did not have the legal right to work in the United States. After Mr. Salas injured his back on the job, he filed a workers' compensation claim. When Mr. Salas wanted to return to work, Sierra
refused to reinstate him until he could prove that he no longer needed an accommodation for his back injury. Mr. Salas then sued Sierra for discriminating and retaliating against him for filing a workers’ compensation claim in violation of the California Fair Employment and Housing Act.

Some two years later, and just before the case was set to go to trial, Sierra found evidence that Mr. Salas had used someone else’s SSN to obtain his job at Sierra. Sierra argued that Salas, as an illegal alien, could not maintain an employment discrimination lawsuit because Salas never had the right to work in the United States. The California Supreme Court disagreed. It ruled that Sierra could not completely escape from liability under California discrimination law just because it found evidence, after the lawsuit was filed, that Salas was undocumented. The court explained that employers would otherwise have a powerful incentive to hire undocumented workers. In fact, employers would be tempted to “look the other way” when hiring employees they suspect to be undocumented, because they would be able to violate any number of California’s employment laws (including minimum wage laws, child labor laws, and antidiscrimination laws) and get away with it if any of their undocumented employees ever sued to enforce the law.

In reaching its decision, the California Supreme Court examined both federal immigration law and California employment law. The Court determined that because employers are not allowed to intentionally hire undocumented workers under federal law, the state cannot require an employer to pay lost wages to the employee for the time period after it learns of the employee’s undocumented status. (The state also cannot force an employer to reinstate an undocumented employee.) However, in order to help police and enforce California’s employment laws, the state can require employers to pay for other financial damages incurred as a result of its unlawful acts, including back pay for the time period before it finds evidence of an employee’s undocumented status.

Salas supports the notion that when a fiduciary is on notice that an undocumented worker is using a mismatched SSN, the status of that individual as a “participant” is in question.

**The DOL Is Silent about ERISA-Regulated Benefits**

Although the Department of Labor (DOL) has taken the position that illegal immigrants are “employees” under the Fair Labor Standards Act (FLSA) and Migrant Seasonal Agricultural Worker Protection Act (MSPA), it has not done so in the ERISA context. The DOL issued Fact Sheet #48 to distinguish two areas within its enforcement from the holding of Hoffman: the FLSA and the MSPA. The DOL states, in relevant part:
The Supreme Court’s decision does not mean that undocumented workers do not have rights under other U.S. labor laws. In *Hoffman Plastics*, the Supreme Court interpreted only one law, the NLRA. The Department of Labor does not enforce that law. The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. The FLSA requires employers to pay covered employees a minimum wage and, in general, time and a half an employee’s regular rate of pay for overtime hours. The MSPA requires employers and farm labor contractors to pay the wages owed to migrant or seasonal agricultural workers when the payments are due. The Department’s Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA…. The Department of Labor is still considering the effect of *Hoffman Plastics* on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.

Even though *Hoffman* was decided in 2002 and Fact Sheet #48 was last revised in July 2008, the DOL has not issued an opinion about ERISA and undocumented workers. Had the DOL wanted to opine that illegal aliens were eligible for ERISA plan benefits, it could have done so. It did not.

Paying pension benefits to illegal aliens arguably violates the policies underlying immigration laws in a way that payment of minimum wages does not. Pension plan contributions are made above and beyond, and in no way subtract from, an individual’s wages. Just because an illegal alien is paid wages does not entitle him or her to additional benefits. For example, illegal aliens are ineligible for federal public benefits. “Federal public benefits” are defined as:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

The federal government has taken the position that Social Security benefits earned under false pretenses will not be paid. *The New York Times* recently reported that President Obama’s 2015 budget
proposes to save at least $67 million over five years by “involuntarily disenroll[ing]” illegal aliens from Medicare.38

Even the DOL has recognized that ERISA is different. “ERISA does not require any employer to establish a retirement plan. It only requires that those who establish plans must meet certain minimum standards.”39

Indeed, the Supreme Court has found that “employee” means different things in the FLSA and ERISA contexts:

The definition of “employee” in the FLSA evidently derives from the child labor statutes and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). This latter definition, whose striking breadth we have previously noted, Rutherford Food, supra, at 728, stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA’s concept of “employee.”40

In the 12 years since the Supreme Court’s decision in Hoffman, the DOL’s position with respect to undocumented workers in the ERISA context remains unknown.

**What to Do**

Paying ERISA-regulated pension benefits to employees who never had the right to work in the United States may be a fool’s errand. ERISA fiduciaries must take precautions to protect the ERISA plan’s interests if they discover eligible “employees” have gained employment under false pretenses.

**Notes**

3. Id. citing 8 U.S.C. § 1324c.
4. Id. at 148 (citations omitted) citing 8 U.S.C. § 1324a(e)(4)(A).
5. Id. at 151–152.
6. Id. at 149.
7. Id. at 148.
8. Id. at 150.

10. *Id.* at *18.


12. *Id.* at **48, 51.

13. *Id.* at *10.


15. *Id.* at *29.

16. *Id.* at **29–30 (internal citations omitted).

17. *Id.* at *32.


22. *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1404 (9th Cir. 1995).

23. *Id.* at 1403.

24. *Id.*

25. *Id.*

26. *Id.*


30. *Id.* at 1096–1097.


35. See *Hoffman Plastic*, supra n.2 at 149.


37. 8 U.S.C. § 1611(c)(1)(A), (B).
