POST-RETIREMENT MEDICAL BENEFITS UNDER SIEGE

Employers' Advisor Blog Archives
September 29, 2014

A recent spike in retiree benefit litigation is evidence of a growing interest among employers in strategies designed to contain, reduce, and eliminate the current costs and balance sheet liabilities associated with post-retirement medical obligations. In fact, one such case – *M&G Polymers USA, LLC v. Tackett* – has reached the Supreme Court of the United States. The causes of this renewed focus ostensibly include the protracted economic recession and the fact that pre-65 (pre-Medicare eligible retirees) have the option to purchase individual medical coverage through the Obamacare Exchanges, potentially on a subsidized basis.

Unlike pension benefits, post-retirement medical benefits offered by private sector employers do not vest by operation of law. As a general rule, this means that an employer whose plan is governed by ERISA may reduce or eliminate these benefits at any time (upon advance notice) and for any reason, subject only to any restrictions in the plan document terms that were in effect at the time of retirement. Governing plan documents include collective bargaining agreements and SPDs. Employee communications, including verbal representations, regarding the amount and duration of retiree medical coverage can also restrict an employer's ability to reduce or terminate these benefits, even if the plan documents reserve the employer's right to do so.

Federal appeals courts have developed different interpretational standards for determining whether retiree medical benefits in collective bargaining agreements are vested. For example, in a recent case – *Windstream Corporation v. Da Gragnano* – the employer agreed "to provide retiree medical benefits for eligible employees who retire between March 1, 2005, and February 28, 2008… and their beneficiaries." The collective bargaining agreement also specified the amount the employer "will" contribute toward the cost of coverage. In ruling that this language did not create a vested right to lifetime medical benefits, the United States Court of Appeals for the Eighth Circuit (located in Missouri) said the following:

The only vesting language [the retiree] points to in the plan documents here is the word "will" before the words "pay a percentage/amount of the premium" in the 2005 MOA. [The retiree] and the CWA assert that this word shows that the company intended to provide the retiree benefit subsidy for the lifetimes of the retirees. When placed in front of a verb like "pay," the word "will" indicates "simple futurity," "likelihood or certainty," "requirement or command," "intention," "customary or habitual action," "capacity or ability," and "probability or expectation." Webster's II New College Dictionary 1293 (3d ed. 2005). *None of these definitions promise that the verb will be performed permanently. Actions that are likely, certain, required, commanded, customary, or habitual may be expected one day to end* [emphasis added]."

It is very possible that a federal appeals court sitting in New York or Ohio, for example, would have ruled that such language, without more, is sufficient to create a vested right to retiree medical benefits.

The Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, expected in the first few months of 2015, will resolve at least some of the differences in the interpretational standards that the federal appeals courts in the various circuits apply in determining whether an employer has the right to unilaterally reduce or terminate retiree medical obligations in

collective bargaining agreements.

As *Windstream* instructs, employers that maintain collectively bargained retiree medical benefits should not assume these benefits cannot be unilaterally modified or terminated. It is possible, based on the language of the collective bargaining agreement and related health care documents, that they can be. However, because litigation can ensue, a decision to unilaterally modify or terminate retiree health benefits should be implemented only after all relevant facts and circumstances have been carefully evaluated with the assistance of counsel.