ALL (NOT) ABOARD: THE EIGHTH CIRCUIT SPLITs WITH THE ELEVENTH, FOURTH, AND SEVENTH CIRCUITS BY DETERMINING A SINGLE-PARTICIPANT "PLAN" IS NOT AN ERISA PLAN IN DAKOTA, MINNESOTA & EASTERN RAILROAD CORP. V. SCHIEFFER

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I. INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974, ("ERISA"),† as amended, to establish a comprehensive and uniform regulatory scheme for employee benefits. ERISA regulates employee benefits in a variety of ways, such as by defining an "employee benefit plan" and prescribing disclosure, funding, and fiduciary responsibilities for employee benefit plans that are subject to ERISA. The existence of a "plan," as defined by ERISA, is a precondition to the applicability of ERISA because ERISA applies only to "employee benefit plans." Similarly, courts recognize that the existence of an ERISA plan is a subject matter jurisdiction requirement. As part of its com-

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4. Id.; see also 29 C.F.R. § 2510.3-1(a)(1) (2013) (stating that "under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act . . . .")
5. See, e.g., Bannister v. Sorenson, 103 F.3d 632, 636 (8th Cir. 1996) (stating, "[a] determination that the involved plan is an 'ERISA plan' is a requirement for federal subject matter jurisdiction premised on ERISA, and if the evidence does not show that the plan is an 'ERISA plan,' the court must dismiss the case. Kulinski v. Medtronic Bio-
prehensile regulatory scheme, ERISA defines the terms "employee welfare benefit plan," "welfare plan," "employee pension benefit plan," "pension plan," and "plan." Recognizing these definitions are tautological, in *Fort Halifax Packing Co., Inc. v. Coyne*, the United States Supreme Court determined an ERISA plan exists when an ongoing administrative scheme or program is present, assuming the other ERISA requirements are satisfied.

The definition of a "plan," and the question of whether ERISA applies to a "plan," is particularly challenging when the "plan" provides employee benefits to only one employee. Employers may seek to establish a "plan" to provide certain employee benefits to one employee for a variety of reasons, such as incentivizing the employee to remain in employment with the employer, providing deferred compensation, providing severance benefits if the employer experiences a change of control event, or, prior to the enactment of the Patient Protection and Affordable Care Act, as amended, providing targeted health insurance benefits to an executive. The United States Courts of Appeals for the Eleventh, Fourth, and Seventh Circuits have determined that a "plan" that provides employee benefits to one employee is an ERISA plan.

In contrast, in *Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer*, the United States Court of Appeals for the Eighth Circuit determined a "plan" that provides employee benefits to one employee is not an ERISA plan. Following the decision of the Eighth Circuit in *Schieffer*, a split in authority exists among the federal circuit courts of appeals regarding whether a "plan" that provides benefits to one employee is an ERISA plan and thus subject to ERISA's various requirements.

This Article explores the split in authority among the Eleventh, Fourth, Seventh, and Eighth Circuits regarding whether a "plan" that provides employee benefits to one employee is an ERISA plan and considers certain implications of the split in authority. The Article proceeds in three sections. First, the Article provides background

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*Medicus, Inc.*, 21 F.3d 254, 256 (8th Cir. 1994). Furthermore, subject matter jurisdiction is a nonwaiveable issue that we must consider on appeal, even if the parties have not presented the issue. *Id.* See also *Jader v. Principal Mut. Life Ins. Co.*, 925 F.2d 1075, 1077 (8th Cir. 1991)."

9. See infra notes 57-265 and accompanying text.
10. Williams v. Wright, 927 F.2d 1540, 1545 (11th Cir. 1991); Biggers v. Wittek Indus., Inc., 4 F.3d 291, 297 (4th Cir. 1993); Cvelbar v. CBI Illinois Inc., 106 F.3d 1368, 1376 (7th Cir. 1997).
11. 648 F.3d 935 (8th Cir. 2011).
regarding the importance of determining whether a "plan" is an ERISA plan, the statutory definition of an ERISA plan, judicial interpretations of the term "plan" as used in ERISA, and the reasoning the Eleventh, Fourth, and Seventh Circuits applied to determine that a "plan" may provide employee benefits to only one employee and still be an ERISA plan. The Article then examines the district court and Eighth Circuit opinions in Schieffer and the reasons these courts determined a "plan" that provides employee benefits to only one employee is not an ERISA plan. Finally, this Article examines the implications of the Eighth Circuit's decision in Schieffer, including questions left unresolved by the Eighth Circuit and potential issues practitioners should consider when drafting "plan" documents that provide employee benefits to only one employee.

II. BACKGROUND

A. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED ("ERISA"), IDENTIFIES THE IMPORTANCE OF A "PLAN" BEING AN ERISA PLAN AND DEFINES THE TERM "PLAN"

1. A "Plan" Must Be an ERISA Plan for ERISA and Its Requirements to Apply

Determining whether an employee benefit plan exists under ERISA is important because ERISA only applies to employee benefit plans. When it enacted ERISA, Congress intended to establish a comprehensive and uniform regulatory scheme for employee benefits. As part of its regulatory scheme, ERISA generally preempts state laws relating to "any employee benefit plan." Thus, if an employee benefit plan does not exist, then ERISA's preemption provision does not apply. Unless an exemption or a limitation applies, ERISA imposes a number of requirements with respect to employee benefit plans. For example, ERISA imposes fiduciary duties on persons who

13. ERISA § 4(a), 29 U.S.C. § 1003(a); see also 29 C.F.R. § 2510.3-1(a)(1) (2013) (stating that "under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act . . . .").
16. See, e.g., Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 6 (1986) (determining that a Maine statute was not preempted because the statute did not establish an employee welfare benefit plan or require an employer to maintain such plan); ERISA § 514(a), 29 U.S.C. § 1144(a) (stating that as a general rule, Title I and Title IV of ERISA supersede any state laws that relate to employee benefit plans described in ERISA § 4(a), 29 U.S.C. § 1003(a), and not exempt under ERISA § 4(b), 29 U.S.C. § 1003(b)).
17. For exemptions and limitations, see, for example, ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (providing that Title I of ERISA does not apply to any employee benefit plan that is a governmental plan); ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (providing
are fiduciaries “with respect to a plan,” so the existence of an ERISA plan is necessary to implicate those duties. 18 Fiduciaries of employee benefit plans are generally subject to the fiduciary responsibility provisions set forth in Title I, Subtitle B, Part 4 of ERISA. 19 For example, fiduciaries must discharge their duties with respect to a plan “solely in the interest of the participants and beneficiaries” by applying a prudent person standard of care. 20 Employee benefit plans are also subject to disclosure and reporting obligations under ERISA. 21 ERISA establishes mechanisms for participants and beneficiaries to enforce certain rights under an ERISA plan. 22 If an ERISA plan exists, participants or beneficiaries may bring a civil action to recover benefits due under the terms of a plan. 23 Under ERISA and federal regulations, employee benefit plans must also provide a claims procedure. 24 Therefore, because the substantive provisions of ERISA apply to, or are triggered by, the existence of an “employee benefit plan” (as defined by ERISA), the determination of whether an ERISA employee benefit plan exists is a threshold question. 25

2. ERISA, Its Implementing Regulations, and the United States Department of Labor Define or Interpret Key Terms Relating to ERISA Plans

ERISA defines the term “plan” and establishes a comprehensive scheme of federal regulation for employee benefit plans. 26 Except for certain statutory exceptions, ERISA applies to “any employee benefit

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21. See, e.g., ERISA §§ 101(a)(1), 102(a), 29 U.S.C. §§ 1021(a)(1), 1022(a) (requiring the administrator of an employee benefit plan to furnish participating and beneficiaries with summary plan descriptions); ERISA § 103(a)(1), 29 U.S.C. § 1023(a)(1) (requiring certain employee benefit plans to publish annual reports); ERISA § 104(a)(1), 29 U.S.C. § 1024(a)(1) (requiring the administrator of certain employee benefit plans to file annual reports).
23. Id.
25. Williams v. Wright, 927 F.2d 1540, 1543 (11th Cir. 1991) (citations omitted); see Donovan v. Dillingham, 688 F.2d 1367, 1369-70 (11th Cir. 1982) (stating “[f]iduciary duties under ERISA, however, arise only if there are employee benefit plans as defined by the Act [ERISA].”); Harris v. Arkansas Book Co., 754 F.2d 358, 360 (8th Cir. 1986) (stating that “[t]he existence of a plan is a prerequisite to jurisdiction under ERISA.”).
plan” that is established or maintained “by any employer engaged in commerce or in any industry or activity affecting commerce.” ERISA defines the terms “plan” or an “employee benefit plan” as “an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” An “employee welfare benefit plan” is defined as:

any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Under ERISA, an “employee pension benefit plan” is generally defined as:

any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

United States Department of Labor regulations further define the types of arrangements that constitute an employee benefit plan under ERISA. For purposes of Title I of ERISA, an employee benefit plan generally must have employees who are participants covered under

medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death.”) (citation omitted).

27. ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1). For statutory exclusions, see, for example, ERISA § 4(b), 29 U.S.C. § 1003(b) (excluding certain plans from Title I of ERISA), and ERISA § 301(a), 29 U.S.C. § 1081(a) (excepting certain employee pension benefit plans from Part 3 of ERISA).
the plan.\textsuperscript{31} As an example, the Department of Labor provides that “a Keogh plan under which one or more common law employees . . . are participants covered under the plan, will be covered under Title I [of ERISA].”\textsuperscript{32} United States Department of Labor regulations prescribe the time at which an individual becomes a participant of an employee welfare benefit plan or an employee pension plan.\textsuperscript{33}

3. \textit{In Fort Halifax Packing Co., Inc. v. Coyne, the United States Supreme Court Determined an Ongoing Administrative Scheme Is Required for a “Plan” to Be an ERISA Plan}

In \textit{Fort Halifax Packing Co., Inc. v. Coyne},\textsuperscript{34} the United States Supreme Court established guidance for interpreting the ERISA definition of a “plan.”\textsuperscript{35} The \textit{Fort Halifax} Court considered whether a Maine statute that required employers to make a one-time severance payment to employees if a plant closed was preempted by ERISA or the National Labor Relations Act.\textsuperscript{36} Fort Halifax Packing Company (“Fort Halifax”), located in Winslow, Maine, discontinued operations of a poultry processing and packing plant in 1981 and laid off most of its employees.\textsuperscript{37} Eleven employees, as well as the Maine Director of the Bureau of Labor Standards, filed suit in a Maine state court to obtain benefits under a Maine statute that generally provided that “any employer that terminates operations at a plant with 100 or more employees . . . must provide one week’s pay for each year of employment to all employees who have worked in the plant at least three years.”\textsuperscript{38} A state court ruled that Fort Halifax was liable for severance pay under the Maine statute, and the Maine Supreme Judicial Court affirmed the lower court’s ruling.\textsuperscript{39} The Maine Supreme Judicial Court determined ERISA did not preempt the Maine statute because the severance pay liability the statute created did not implicate a plan created by an employee organization or an employer.\textsuperscript{40}

The \textit{Fort Halifax} Court affirmed the decision of the Maine Supreme Judicial Court, holding that ERISA did not preempt the Maine statute.\textsuperscript{41} The Court rejected Fort Halifax’s argument that ERISA

\begin{itemize}
\item \textsuperscript{31} 29 C.F.R. § 2510.3-3(b) (2013).
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. § 2510.3-3(d)(1).
\item \textsuperscript{34} 482 U.S. 1 (1987).
\item \textsuperscript{35} \textit{Fort Halifax}, 482 U.S. at 11-12, 16, 18.
\item \textsuperscript{36} Id. at 3-4.
\item \textsuperscript{37} Id. at 4.
\item \textsuperscript{38} Id. at 5 (citation omitted).
\item \textsuperscript{39} Id. at 6.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 4, 6-7.
\end{itemize}
preempted the Maine statute because severance benefits are encompassed by the ERISA definition of "employee welfare benefit plan." The Court determined the purpose of the ERISA preemption provision was to provide employers with a uniform set of administrative procedures that were governed by a single regulatory scheme. However, according to the Court, the Congressional intent of providing a uniform set of administrative procedures arises only "with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." Recognizing that ERISA defines "plan" and "employee benefit plan" tautologically, the Court stated that "[o]nly a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." The Court determined the Maine statute did not establish or require "an employer to maintain an employee benefit plan." The Court reasoned that a "one-time, lump-sum payment triggered by a single event" did not require an administrative scheme to satisfy an employer's obligation. The Court noted that under the Maine statute, an employer did not assume responsibility to pay benefits on a regular basis and therefore did not encounter periodic demands on its assets that would create the need for financial control and coordination. The Court stated "[t]he theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." The Court determined the Maine statute did not establish an ERISA plan because an ERISA "plan" involves administrative activities that are potentially subject to being abused by employers, and the Maine statute did not generate administrative activities. The Court held that ERISA did not preempt the Maine statute.

The Fort Halifax Court relied on the decision of the United States Court of Appeals for the Eleventh Circuit in Donovan v. Dillingham to support the Court's position that the Maine statute did not establish an ERISA plan. The Donovan court stated that an employer's

42. Id. at 7.
43. Id. at 11.
44. Id.
45. Id. at 11-12 (citation omitted).
46. Id. at 12 (emphasis in original).
47. Id.
48. Id.
49. Id.
50. Id. at 16.
51. Id. at 19.
52. 688 F.2d 1367 (11th Cir. 1982).
53. Fort Halifax, 482 U.S. at 12 n.6 (citing Donovan, 688 F.2d at 1373 for the proposition that "[a] decision to extend benefits is not the establishment of a plan or program.").
decision to extend benefits does not establish a plan or program under ERISA. Instead, according to the Donovan court, the existence of a fund, plan, or program under ERISA should be determined based on "whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." Following Donovan, the Fort Halifax Court determined that doing "little more than writ[ing] a check" did not constitute operating an employee benefit plan under ERISA.

B. Under the Jurisprudence of the Eleventh, Fourth, and Seventh Circuit Courts of Appeals, a "Plan" That Covers a Single Employee is an Employee Benefit Plan Under ERISA

I. In Williams v. Wright, the United States Court of Appeals for the Eleventh Circuit Determined an ERISA Plan May Provide Benefits to Only One Employee

In Williams v. Wright, the United States Court of Appeals for the Eleventh Circuit determined an employer established an ERISA employee benefit plan in a letter to a retiring employee even though the plan only covered one employee. In October 1981, the president of Wright Pest Control Co. ("WPCC") sent a letter to James T. Williams ("Williams") outlining the terms of Williams' retirement from WPCC. The letter contemplated Williams would begin receiving certain benefits as of January 1, 1982, including a $500 monthly payment, the payment of all premiums for Williams' and his wife's coverage under the WPCC group medical insurance plan, and the payment of premiums for "the maximum available term life insurance available through the plan for [Williams'] age group." Benefits would continue until Williams' death. In exchange for benefits and payments, Williams was expected to act as a consultant and advisor and attend various social activities.

In September 1984, Williams was notified that certain benefits were being reduced, although the $500 monthly payment and insur-

54. Donovan, 688 F.2d at 1373.
55. Id.
56. Fort Halifax, 482 U.S. at 12.
57. 927 F.2d 1540 (11th Cir. 1991).
59. Williams, 927 F.2d at 1541, 1542.
60. Id. at 1542 n.3.
61. Id.
62. Id.
ance benefits continued. In September 1985, Williams was notified that WPCC was being dissolved and certain assets were being sold to Terminex Service, Inc., so his "retirement benefits" were being terminated. The dissolution and asset sale occurred in December 1985, at which time WPCC terminated Williams' benefits.

Williams filed suit under ERISA § 502, and the district court granted summary judgment in favor of the defendants. The district court determined the "retirement benefits" did not constitute a plan, fund, or program as defined in ERISA §§ 3(1) or 3(2)(A). The district court also viewed the retirement arrangement as an individual employment contract instead of an ERISA plan, fund, or program. The Eleventh Circuit reversed, in part, holding that certain retirement benefits provided to Williams satisfied ERISA's definition of a plan, fund, or program.

Following its earlier decision in Donovan, the Eleventh Circuit considered whether an ERISA plan existed. The court acknowledged that for Williams to invoke the substantive provisions of ERISA, the court was required to address the threshold question of whether the benefit arrangement set forth in the 1981 letter from WPCC to Williams was a plan, fund, or program under ERISA. The court stated that Donovan suggested a flexible analysis that should be used, reciting the Donovan test for determining whether an ERISA plan, fund, or program exists, and applied the test to the benefits provided to Williams.

The Eleventh Circuit concluded the district court erred in holding that the 1981 letter from WPCC to Williams did not establish an ERISA plan. Applying Donovan, the Eleventh Circuit first considered the source of funding for Williams' benefits. The court acknowledged that Williams' benefits were paid out of the general assets of WPCC and the assets used to fund the benefits were not held in trust, but concluded that paying benefits out of WPCC's general assets did not affect the question of ERISA coverage. Next, following Donovan, the court considered whether a procedure existed for Williams to ob-

63. Id. at 1542.
64. Id.
65. Id.
66. Id. at 1541, 1543.
67. Id. at 1541.
68. Id. at 1543-44.
69. Id. at 1541.
70. Id. at 1543 (citing Donovan, 688 F.2d at 1372-73; 29 U.S.C. §§ 1002(1), (2)(A)).
71. Id.
72. Id. at 1543, 1544-45.
73. Id. at 1544.
74. Id.
75. Id. (citations omitted).
tain benefits. The court observed that the procedures for obtaining benefits were simple yet sufficiently ascertainable under Donovan. The court reasoned the statement in the 1981 letter that WPCC would issue a check to Williams each month until Williams’ death, along with the potential of revising the arrangement, created a sufficiently ascertainable procedure for Williams to receive benefits and for the arrangement to satisfy Donovan. The Eleventh Circuit then considered whether an ascertainable class of beneficiaries existed under the 1981 letter. The court acknowledged this issue was troublesome but determined the use of the word “class” by the Donovan court did not absolutely require more than one beneficiary and that a plan designed to meet the needs of a single employee could be covered by ERISA. The court found that ERISA did not exclude plans that covered a single employee. The court noted the Welfare and Pension Plans Disclosure Act, the predecessor to ERISA, expressly excluded plans that covered fewer than twenty-five employees. The Eleventh Circuit reasoned that Congress was aware of the exclusion under the Welfare and Pension Plans Disclosure Act “but apparently decided not to include it in ERISA.” Additionally, the court observed that United States Department of Labor regulations, as well as opinion letters, provided that a plan that otherwise satisfies the requirements of ERISA is not excluded from coverage because the plan only covers one employee. Based on the Donovan analysis, the Eleventh Circuit concluded a plan that covers one employee is an ERISA plan, assuming all other requirements are satisfied. The Eleventh Circuit also concluded the district court erred in determining that the 1981 letter did not establish a “program” or “plan” as defined by ERISA, holding that the insurance and monetary benefits provided to Williams were covered by ERISA.

76. Id. at 1544-45.
77. Id. at 1544.
78. Id. at 1544-45.
79. Id. at 1545.
80. Id.
81. Id.
84. Id. (citation omitted).
85. Id. (citing 29 C.F.R. § 2510.3-3(b) (1988); Op. Ltr. 75-09 (June 24, 1975); Op. Ltr. 79-75 (Oct. 19, 1979); Information Letter to Mr. Joel P. Bennett (Oct. 22, 1985)).
86. Id.
87. Id. at 1548-50.
2. In *Biggers v. Wittek Industries, Inc.*, the United States Court of Appeals for the Fourth Circuit determined an ERISA Plan May Provide Benefits to Only One Employee

In *Biggers v. Wittek Industries, Inc.*, the United States Court of Appeals for the Fourth Circuit determined a plan may cover one employee only and still be subject to ERISA. Wittek Industries, Inc. ("Wittek") closed its automobile parts manufacturing facility in February 1991 and terminated the employment of the individuals working at the plant. Wittek paid each of its former employees severance benefits pursuant to a 1989 written policy that provided for a maximum of three weeks' severance pay. Ronald J. Biggers ("Biggers") and seventeen other employees sued Wittek under ERISA, alleging the 1989 policy had never been adopted and they were entitled to additional severance benefits under a more favorable 1987 policy. The trial court awarded additional severance benefits under the 1987 policy. In a separate action that was consolidated with Biggers' litigation, Glenn Breitwieser ("Breitwieser") sued Wittek for severance benefits under an individual contractual arrangement and was awarded damages under Illinois common law. Wittek appealed the trial court's judgment and the awards of benefits.

On appeal, Wittek contended the district court erred by treating Breitwieser's claim for severance benefits as a breach of contract under Illinois common law instead of a claim under an employee welfare benefit plan covered by ERISA. Wittek also asserted Breitwieser's claim should not have been submitted to a jury because the claim was made under an ERISA employee welfare benefit plan. In contrast, Breitwieser argued his claim was based on an individual contract with Wittek and the contract did not constitute a plan subject to ERISA.

The Fourth Circuit concluded Breitwieser's claim for breach of the severance agreement was covered by ERISA even though the arrangement only covered one employee. The court noted it was "beyond question" that severance benefit plans are employee welfare benefits

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88. 4 F.3d 291 (4th Cir. 1993).
90. Biggers, 4 F.3d at 293.
91. Id.
92. Id.
93. Id.
94. Id. at 293, 296-97.
95. Id. at 293.
96. Id. at 297.
97. Id. (citing Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985)).
98. Id.
99. Id.
plans “within the scope of ERISA.” The court stated it was unaware of “any requirement that a plan must cover more than one employee in order to be controlled by ERISA.” The court reasoned neither the ERISA definitions of “employee benefit” nor “employee welfare benefit plan” suggested “the number of employees covered [was] a limiting factor.” The court observed that United States Department of Labor regulations clarifying the meaning of “employee welfare benefit plan” did not provide “any indication that a plan cannot be established to cover only one employee.” The Fourth Circuit reviewed other United States Department of Labor regulations and noted that if a plan does not have employees that are participants, an “employee benefit plan” does not exist under ERISA, but if the plan has one common law employee who is a participant, the plan is subject to ERISA. The court also relied on an opinion letter from the United States Department of Labor to support its position that ERISA permits a single-employee plan. The Fourth Circuit concluded Breitwieser’s claim was “for a benefit under an employee welfare benefit plan covered by ERISA.” The court determined ERISA preempted Breitwieser’s common law contract claim, so his claim for benefits should have been tried by the district court under ERISA instead of before a jury under Illinois law. Accordingly, the Fourth Circuit affirmed the judgment in favor of Biggers but vacated the judgment in favor of Breitwieser because ERISA preempted his claim and remanded his claim for a new trial.

3. In Cvelbar v. CBI Illinois, Inc., the United States Court of Appeals for the Seventh Circuit Determined an ERISA Plan May Provide Benefits to Only One Employee

In Cvelbar v. CBI Illinois, Inc., the United States Court of Appeals for the Seventh Circuit held that a one-person arrangement qualified as an ERISA plan. Anthony Cvelbar (“Cvelbar”) entered into an “Employer-Employee Agreement” with his employer, The First National Bank of Peoria, the terms of which provided that the bank

100. Id. (citations omitted).
101. Id.
102. Id. (citing ERISA §§ 3(1), (3), 29 U.S.C. §§ 1002(1), (3)) (footnote omitted).
103. Id. (citing 29 C.F.R. § 2510.3-1 (2013)).
104. Id. at 297-98 (citing 29 C.F.R. § 2510.3-3(b) and using Keogh plans as an example). The Fourth Circuit also cited Meredith v. Time Insurance Co., 980 F.2d 352, 356-57 (5th Cir. 1993) (applying 29 C.F.R. § 2510.3-3). Id. at 298.
105. Id. at 298 (citing Op. Ltr. 91-20A (July 2, 1991)).
106. Id.
107. Id.
108. Id. at 293, 298-99.
109. 106 F.3d 1368 (7th Cir. 1997).
would pay Cvelbar severance benefits if he was voluntarily or involuntarily terminated for any reason other than retirement, death, or the commission of fraud or a felony.\textsuperscript{111} Under the agreement, The First National Bank of Peoria would “make available” to Cvelbar and his dependents coverage under the bank’s group medical plan, pay Cvelbar a lump sum severance payment, and pay Cvelbar a monthly payment equal to the deferred pension amount payable pursuant to the First Peoria Corp. Retirement Plan.\textsuperscript{112} Cvelbar’s right to payments under the Employer-Employee Agreement vested at the time of his termination.\textsuperscript{113} If Cvelbar died after termination of employment with benefits remaining, Judith A. Cvelbar was to receive such benefits.\textsuperscript{114} The agreement also provided that Cvelbar would not compete against The First National Bank of Peoria for three years after his termination of employment.\textsuperscript{115} The First National Bank of Peoria executed similar agreements with four other employees.\textsuperscript{116}

In June 1992, The First National Bank of Peoria merged with CBI Illinois Incorporated (“CBI”), which agreed to honor the agreement between Cvelbar and The First National Bank of Peoria.\textsuperscript{117} CBI terminated Cvelbar’s employment in October 1992 because Cvelbar “exhibited a negative attitude toward the new ownership at Commerce Bank after the merger . . . .”\textsuperscript{118} Following Cvelbar’s termination of employment, CBI made payments to Cvelbar pursuant to the agreement until December 1994.\textsuperscript{119} Cvelbar sued CBI in state court,

\footnotesize{\textsuperscript{111}} Cvelbar, 106 F.3d at 1370.
\footnotesize{\textsuperscript{112}} Id. at 1370-71. The contract stated:

(i) The Company shall make available to the Employee and his dependents coverage under the group medical plan on the same terms and conditions as are then available to a retiree of the First Peoria Corp. Retirement Plan in effect at that time. (ii) The Company shall pay the Employee a lump sum severance payment equal to the lesser of (a) 200% of the Employee’s last five-year average annual compensation including any bonuses and director’s fees, or (b) 50% of the number of years, or fraction thereof, remaining until the Employee’s normal retirement date under the First Peoria Corp. Retirement Plan times the Employee’s last five-year average annual compensation including any bonuses and director’s fees. (iii) The Company shall pay the Employee a monthly payment of an amount equal to the deferred pension amount payable under the First Peoria Corp. Retirement Plan at age 65, assuming a life only option, from the date of termination of the Employee’s employment until he attains the age of 65 or until he begins receiving benefits under the First Peoria Corp. Retirement Plan, whichever occurs first.

\footnotesize{\textsuperscript{113}} Id. at 1371.
\footnotesize{\textsuperscript{114}} Id.
\footnotesize{\textsuperscript{115}} Id. at 1370.
\footnotesize{\textsuperscript{116}} Id.
\footnotesize{\textsuperscript{117}} Id. at 1370-71.
\footnotesize{\textsuperscript{118}} Id. at 1371 (internal quotation marks omitted).
\footnotesize{\textsuperscript{119}} Id.
contending he was entitled to benefit payments under ERISA.\textsuperscript{120} The case was removed to federal district court, which entered summary judgment in favor of CBI, holding the decision to terminate benefit payments to Cvelbar was not arbitrary or capricious.\textsuperscript{121} Cvelbar appealed to the Seventh Circuit.\textsuperscript{122}

The Seventh Circuit concluded the district court possessed subject matter jurisdiction and affirmed its judgment.\textsuperscript{123} On appeal, Cvelbar for the first time argued the agreement was not an ERISA plan.\textsuperscript{124} Cvelbar asserted that individual agreements between individual employees and employers that provide "post-termination benefits do not qualify as 'plans' under ERISA."\textsuperscript{125} In contrast, CBI argued the agreement was a "top hat" plan under ERISA that provided benefits to a select group of highly compensated managers.\textsuperscript{126} At the invitation of the court, the United States Secretary of Labor submitted an amicus curiae brief in which the Secretary took the position that the agreement was a plan that satisfied the requirements of \textit{Diak v. Dwyer, Costello & Knox, P.C.},\textsuperscript{127} and \textit{Fort Halifax}\textsuperscript{128}. The Secretary of Labor maintained that a plan may cover a single employee and still be an ERISA plan.\textsuperscript{129} Noting that the "existence of an ERISA-governed plan is an essential precursor to federal jurisdiction," the court stated it was required to first decide whether subject matter jurisdiction existed, based on whether the agreement was a "plan" under ERISA.\textsuperscript{130}

To determine whether the court possessed subject matter jurisdiction, the Seventh Circuit considered whether the agreement between Cvelbar and CBI constituted an ERISA plan.\textsuperscript{131} After reviewing various definitions under ERISA, the Seventh Circuit stated jurisdiction turned on whether the agreement between Cvelbar and CBI constituted a plan, fund, or program.\textsuperscript{132} The court noted that under United States Supreme Court and other jurisprudence, an ERISA plan requires an ongoing administrative scheme and that the terms of a plan

\begin{enumerate}
\item\textsuperscript{120} \textit{Id.} at 1370.
\item\textsuperscript{121} \textit{Id.}
\item\textsuperscript{122} \textit{Id.}
\item\textsuperscript{123} \textit{Id.} at 1370, 1380-81.
\item\textsuperscript{124} \textit{Id.} at 1372.
\item\textsuperscript{125} \textit{Id.}
\item\textsuperscript{126} \textit{Id.}
\item\textsuperscript{127} 33 F.3d 809 (7th Cir. 1994).
\item\textsuperscript{128} \textit{Cvelbar}, 106 F.3d at 1372-73 (citing \textit{Fort Halifax Packing Co. v. Coyne}, 428 U.S. 1 (1987); \textit{Diak v. Dwyer, Costello & Knox, P.C.}, 33 F.3d 809 (7th Cir. 1994)).
\item\textsuperscript{129} \textit{Id.} at 1373.
\item\textsuperscript{130} \textit{Id.} (quoting UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers of Am., 998 F.2d 509, 510 n.2 (7th Cir. 1993)) (internal quotation marks omitted).
\item\textsuperscript{131} \textit{Id.}
\item\textsuperscript{132} \textit{Id.} at 1373-74.
\end{enumerate}
be reasonably ascertainable.\footnote{133} The Seventh Circuit observed that
\textit{Fort Halifax} did not "define comprehensively the precise contours of
an 'ongoing administrative program'" and examined a precedent from
the United States Court of Appeals for the Eighth Circuit to identify
the situations that require an administrative scheme to be imple-
mented.\footnote{134} According to the Eighth Circuit in \textit{Kulinski v. Medtronic
Bio-Medicus, Inc.},\footnote{135}

\begin{quote}
[t]he pivotal inquiry is whether the plan requires the estab-
lishment of a separate, ongoing administrative scheme to ad-
minister the plan's benefits. Simple or mechanical
determinations do not necessarily require the establishment
of such an administrative scheme; rather, an employer's need
to create an administrative system may arise where the em-
ployer, to determine the employee's eligibility for and level of
benefits, must analyze each employee's particular circum-
stances in light of the appropriate criteria.\footnote{136}
\end{quote}

The Seventh Circuit noted severance agreements may at times be
properly characterized as contracts between an employer and an em-
ployee that do not constitute ERISA plans.\footnote{137} However, the Seventh
Circuit determined that in examining the totality of the agreement
between Cvelbar and CBI, the agreement constituted an ERISA plan.\footnote{138}

After acknowledging that arrangements between an employer
and one employee had "been met with a particularly careful scrutiny"
when determining whether an ERISA plan existed, the Seventh Cir-
cuit had "no difficulty" holding it was "possible for a one-person ar-
angement to qualify as an ERISA plan."\footnote{139} Citing \textit{Williams v.
Wright},\footnote{140} the Seventh Circuit reasoned the plain language of ERISA
did not exclude from its coverage situations in which an employer ex-
tends benefits to only one employee.\footnote{141} The court noted the United
States Department of Labor had concluded and asserted in its amicus curiae
brief that an agreement between an employer and one em-
ployee could be an employee benefit plan.\footnote{142} The Seventh Circuit
agreed with other courts that had "decided that, as long as the benefits
program meets the other requirements of an ERISA plan—
namely, an ongoing administrative scheme and reasonably ascertainable terms—the program does not fall outside the ambit of ERISA merely because it covers only a single employee."143 The court concluded the agreement between Cvelbar and CBI satisfied those requirements.144

Once it determined the agreement between Cvelbar and CBI constituted a plan, the Seventh Circuit concluded "the agreement constituted a plan to administer . . . benefits . . . ."145 Following *Fort Halifax Packing Co. v. Coyne*, the court noted the agreement required CBI to provide Cvelbar with severance benefits for three years following his termination of employment, which was not a one-time, lump-sum payment.146 The court stated that under the agreement, CBI was responsible for paying benefits on a regular basis and would face periodic demands on its assets, thereby creating the need for financial coordination and control.147 The court observed that for three years following Cvelbar's termination of employment, CBI was required to process medical benefit claims, pay medical benefits to Cvelbar and his dependents, and make a monthly monetary payment, which the Seventh Circuit determined required an ongoing administrative program and not merely writing a check.148 Additionally, the court determined the agreement required managerial discretion in administering the program because CBI had to initially determine the reason for Cvelbar's termination of employment and then monitor whether Cvelbar competed against CBI within three years thereof.149 Furthermore, according to the court, managerial discretion in administering the program existed because CBI had to monitor the amount it paid to Cvelbar once payments commenced.150 The Seventh Circuit also determined payments to Cvelbar "could not be determined by simple arithmetical computations" because medical benefits could vary over time and Cvelbar's eligibility and level of benefits had to be determined by reference to the terms of the First Peoria Corp. Retirement Plan.151

Upon determining the agreement required the establishment and maintenance of an ongoing administrative scheme, the Seventh Circuit also decided a reasonable person could ascertain the terms of the

143. *Id.* (citations omitted).
144. *Id.*
145. *Id.*
146. *Id.* (citing *Fort Halifax*, 482 U.S. at 12).
147. *Id.* at 1376-77 (citing *Fort Halifax*, 482 U.S. at 12).
148. *Id.* at 1377 (citing *Fort Halifax*, 482 U.S. at 12).
149. *Id.* (citations omitted).
150. *Id.*
151. *Id.* at 1377-78 (citations omitted).
plan. The court noted that every circuit court of appeals had adopted the Donovan test to determine whether an ERISA plan had been created. The court stated a reasonable person could ascertain the benefits and the beneficiaries because they were listed in the agreement. Similarly, the court determined the source of financing under the agreement was CBI's general funds. The court observed the procedures for obtaining benefits were reasonably clear because the agreement set forth the conditions for benefits eligibility, the time at which benefits vested, that certain benefits would be paid in a lump sum, that certain payments would be made each month, and that medical coverage would be made available pursuant to the terms and conditions of the First Peoria Corp. Retirement Plan. Therefore, the Seventh Circuit determined a reasonable person could ascertain the procedures for receiving benefits under the agreement between Cvelbar and CBI. The Seventh Circuit affirmed the judgment of the district court.

III. **IN DAKOTA, MINNESOTA & EASTERN RAILROAD CORP. V. SCHIEFFER, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SPLIT WITH THE ELEVENTH, FOURTH, AND SEVENTH CIRCUIT COURTS OF APPEALS IN DECIDING THAT A ONE-PERSON PLAN IS NOT AN ERISA PLAN**

A. **THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA APPLIED EIGHTH CIRCUIT PRECEDENT AND DETERMINED AN AGREEMENT PROVIDING BENEFITS TO ONE EMPLOYEE WAS NOT AN ERISA PLAN**

The United States Court of Appeals for the Eighth Circuit split with the Eleventh, Fourth, and Seventh Circuit Courts of Appeals in determining that ERISA does not apply to a one-person arrangement that provides benefits to an employee. In *Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer*, the United States District Court for the District of South Dakota determined an employment

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152. *Id.* at 1378-79.
153. *Id.* at 1378 n.14 (citations omitted).
154. *Id.* at 1378.
155. *Id.*
156. *Id.* at 1378-79.
157. *Id.* at 1379.
158. *Id.* at 1370, 1380-81.
159. *See infra* notes 160-265 and accompanying text.
agreement between one employee and his employer did not create an
ERISA plan, thereby denying the court subject matter jurisdiction.\textsuperscript{161}

In September 1994, Kevin Schieffer (“Schieffer”) and Dakota,
Minnesota & Eastern Railroad Corp. (“DM&E”) entered into a consult-
ing agreement under which Schieffer would be available to consult for
DM&E for a period of sixty months in exchange for $1.53 million plus
certain hourly fees.\textsuperscript{162} The consulting agreement permitted DM&E to
pay the $1.53 million in monthly installments or in full.\textsuperscript{163} Under the
consulting agreement, Schieffer would forfeit all of the compensation
if the agreement was terminated for cause or if Schieffer did not honor
the agreement without reason.\textsuperscript{164} The consulting agreement permitted
DM&E to suspend payments if Schieffer experienced an incapaci-
ty, disability, or other circumstance “that would render ‘provision of
such services reasonably beyond Schieffer’s control,’ and payments
were to resume after such disability or circumstance ceased.”\textsuperscript{165} The
consulting agreement did not include an arbitration clause.\textsuperscript{166}

Schieffer became the President and Chief Executive Officer of
DM&E in 1996.\textsuperscript{167} Schieffer argued the consulting agreement was
suspended at the time he became President and Chief Executive Of-
licer, so his subsequent discharge from employment rendered the un-
paid portion of the $1.53 million “retainer” due.\textsuperscript{168} In contrast, DM&E
claimed the consulting agreement was terminated in December 1999
when the DM&E board of directors granted Schieffer cash and bonus
stock.\textsuperscript{169}

In December 2004, Schieffer and DM&E entered into an employ-
ment agreement (the “Employment Agreement”) in anticipation of a
change in control event.\textsuperscript{170} Under the Employment Agreement,
Schieffer would receive “lucrative severance benefits” if his employ-
ment was terminated without cause or if he resigned for good rea-
son.\textsuperscript{171} The “employee benefits” section of the Employment
Agreement provided that Schieffer was eligible to participate in cer-
tain employee benefit plans DM&E made available to other senior ex-


\textsuperscript{162} Schieffer I, 744 F. Supp. 2d at 988.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 988-89.

\textsuperscript{166} Id. at 990.

\textsuperscript{167} Id. at 989.

\textsuperscript{168} Id.

\textsuperscript{169} Id.

\textsuperscript{170} Id. DM&E’s “stated purpose for the Employment Agreement was ‘to encourage the retention and ongoing employment of the Executive and to enter into an agreement embodying the terms of such employment.’” Id.

\textsuperscript{171} Id.
The Employment Agreement included an arbitration provision.\textsuperscript{173} In 2007, Schieffer and DM&E entered into a gross-up agreement designed to offset Schieffer's excise tax liability under Section 409A of the Internal Revenue Code of 1986, as amended (the "Code").\textsuperscript{174} Under the gross-up agreement, all severance payments to Schieffer would be grossed up so the net amount Schieffer received after excise taxes would equal the amount he would have received if no excise taxes would have been levied.\textsuperscript{175} The gross-up agreement provided that "payments due within six months of Schieffer's 'Separation from Service' . . . were to be 'delayed until the earlier of the end of such six month period and [Schieffer's] death.'"\textsuperscript{176}

On October 7, 2008, DM&E terminated Schieffer's employment for purported insubordination, effective October 22, 2008.\textsuperscript{177} Deloitte Tax LLP opined that the severance payment to Schieffer was not subject to a penalty under Code Section 409A, so the severance payment could be made immediately.\textsuperscript{178} DM&E paid Schieffer a lump sum of $1,391,866.07 in January 2009, which was net applicable withholding and excise taxes.\textsuperscript{179}

Schieffer believed DM&E owed him a greater amount, so in March 2010 he submitted a demand to arbitrate to the American Arbitration Association ("AAA").\textsuperscript{180} Schieffer disputed how DM&E inter-

\textsuperscript{172} Id. Section 3(c) of the Employment Agreement (the "Employee Benefits" subsection) provided:

Executive shall be eligible to participate in all employee health, welfare and retirement benefits and programs made available generally to senior executives of the Company, and to the extent provided in such plans and programs the executive's spouse and other dependents shall be eligible to participate therein. In the event the Executive is not permitted to participate in such plans or programs, whether by law or the terms thereof, the Company shall periodically pay to the Executive, in lieu of such participation, a cash payment equal to the amount the Company would have contributed toward the Executive's participation in the plans or programs.

\textsuperscript{173} Id. at 989, 993-94.

\textsuperscript{174} Id. at 990. The Employment Agreement stated:

Any controversy of claim arising out of, or relating to, this Agreement (or any breach thereof) or the Executive's employment with the Company (or any termination thereof) shall, at the election of either Party, be resolved by binding confidential arbitration, to be held in Sioux Falls, South Dakota, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} Id. (footnote omitted).

\textsuperscript{178} Id. at 990.

\textsuperscript{179} Id. The gross severance payout was $2,966,295.00. Id.

\textsuperscript{180} Id. at 988, 990.
interpreted the Employment Agreement and the consulting agreement. In the arbitration demand, Schieffer asserted South Dakota contract claims and state wage law claims, seeking payments for salary continuation, bonuses, miscalculated benefits or continued employee benefits plan coverage, double damages for wrongfully withheld wages, attorneys' fees, the remaining balance allegedly due under the consulting agreement, and certain statutory interest. In the demand for arbitration, Schieffer contended the broad terms of the Employment Agreement’s arbitration clause rendered his claims under the consulting agreement subject to resolution by arbitration because the claims arose out of or related to his employment with DM&E.

In April 2010, DM&E filed suit against Schieffer seeking injunctive relief to prevent Schieffer from pursuing the demand for arbitration. DM&E asserted the Employment Agreement was covered by ERISA, thereby preempting Schieffer’s state law causes of action and preventing them from being subject to arbitration. DM&E argued the Employment Agreement was an ERISA plan with an ongoing administrative program subject to ERISA, while Schieffer contended a single employment contract could not be an ERISA plan and that an ongoing administrative program did not exist under the Employment Agreement.

Before considering whether to grant a preliminary injunction, the court considered whether it possessed subject matter jurisdiction. The court determined diversity jurisdiction did not exist because Schieffer was a South Dakota resident and the principal place of business of DM&E was in South Dakota. Because diversity jurisdiction did not exist, the court stated subject matter jurisdiction depended on whether a federal question was present. The court acknowledged its subject matter jurisdiction depended on whether the Employment Agreement was or created an ERISA plan. The court noted the “existence of an ERISA plan is a mixed question of law and fact” and that a claim must be dismissed for lack of subject matter jurisdiction if the evidence did not establish the existence of an ERISA plan.

181. Id. at 990.
182. Id.
183. Id.
184. Id. at 988.
185. Id. at 990.
186. Id. at 992.
187. Id. at 990-91.
188. Id. at 990 (citing 28 U.S.C. § 1332).
189. Id. at 990-91 (citing 28 U.S.C. § 1331).
190. Id. at 991 (citation and footnote omitted).
191. Id. (citations omitted).
The court determined the Employment Agreement was not an ERISA plan and that the court did not possess subject matter jurisdiction. Following *Fort Halifax*, the court stated the status of the Employment Agreement as an ERISA plan depended on "whether the employer require[ed] 'an ongoing administrative program' to meet [its] obligations." Citing *Cvelbar*, the court observed that single employee arrangements had been carefully scrutinized to determine whether an ERISA plan existed. The court noted an ongoing administrative program exists when there is a regularity of payment or ongoing benefits to be paid. After reviewing the Employment Agreement provisions relating to employee benefits, termination of employment, and effectiveness and expiration, the court determined the Employment Agreement required the "mechanical application of mathematical calculations" instead of "an ongoing administrative scheme." The court reasoned Schieffer's eligibility to participate in

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192. *Id.* at 996-97.
194. *Id.* at 993 (citation omitted).
195. *Id.* (citations and quotation marks omitted).
196. *Id.* at 993-94. The employee benefits provisions of the Employment Agreement are quoted supra at note 172. Section 5 of the Employment Agreement stated as follows:

In the event that either Party terminates the Executive's employment hereunder, such termination will be communicated by written Notice of Termination to the other Party at least fifteen (15) days prior to the effective date of such termination. In the event of such termination, other than (a) termination by the Company for Cause, or (b) Voluntary Termination by the Executive, the Company shall pay to the Executive the Severance Payment on the day preceding the effective date of such termination, provided however that in the event Company determines to exercise its pre-Change of Control option described below, it may make said Severance Payment in installments provided for below. The Company shall continue to provide Executive the Employee Benefits described in section 3(c) of this Agreement for a period of not less than three years from the date on which the Severance Payment is paid in full (except in the event Company determines to exercise its pre-Change of Control option described below, such Employee Benefits shall continue for three years from the first payment after Company's notice of the same). In the event Company fails to timely make such Severance Payment (or provide notice of its exercise of the pre-Change of Control option), the Executive shall remain on the Company payroll and be paid at an annual salary rate of 33.33% of the Severance Payment until such time as the Severance Payment is paid in full to Executive (or until receipt of proper notice and the first installment is paid in the event Company determines to exercise its pre-Change of Control option described below). Notwithstanding anything to the contrary in this Section 5, in the event of termination of Executive prior to the first Change of Control following the date of this Agreement, the Company shall have the option of paying Executive the Severance Payment in 36 equal monthly installments of the Severance Payment principal amount, plus interest on the unpaid balance of the Severance Payment compounded at LIBOR plus 2% from the date of termination (the "pre-Change of Control option").

*Id.* at 994 (footnote omitted). Section 9(f) of the Employment Agreement stated the effectiveness and expiration provisions as follows: "This Agreement has been approved by
DM&E’s employee benefit plans or programs did not cause the Employment Agreement to create or constitute a plan. The court considered the formula in the Employment Agreement used to calculate severance payments to Schieffer upon termination of his employment prior to a change in control event. The court determined that even though the formula for computing severance payments required “some calculations, it did not constitute an administrative scheme to render the Employment Agreement an ERISA plan.” Finally, the court noted the Employment Agreement included an expiration date and a definition of a change in control event. According to the court, the determination of a change in control event was not nuanced or ambiguous and did not vest in DM&E discretion to determine whether a change in control event occurred. Therefore, the court ruled the Employment Agreement did not establish an administrative scheme under Fort Halifax so as to create an ERISA plan.

The court also supported its decision that the Employment Agreement did not constitute an ERISA plan by applying Eighth Circuit precedents. The court stated the Eighth Circuit followed a four-factor test to evaluate whether a plan included an ongoing administrative scheme and was therefore covered by ERISA:

- (1) whether the payments are one-time lump sum payments or continuous payments;
- (2) whether the employer undertook any long-term obligation with respect to the payments;
- (3) whether the severance payments come due upon the occurrence of a single, unique event or any time that the employer terminates employees;
- (4) whether the severance arrangement under review requires the employer to engage in a case-by-case review of employees.

the Board on December 9, 2004, and is effective as of such date. This Agreement shall expire three (3) years following notice to Executive and actual occurrence of the first Change of Control following the date of this Agreement.” Id. at 994.

197. Id. at 993-94 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).

198. Id. at 995.

199. Id.

200. Id.

201. Id. at 995-96.

202. Id. at 996.

203. Id.

204. Id. (citing Petersen v. E.F. Johnson Co., 366 F.3d 676, 679 (8th Cir. 2004); Crews v. Gen. Am. Life Ins. Co., 274 F.3d 502, 505 (8th Cir. 2001)) (footnote omitted). The court also recited an alternative test. Id. at 996 n.5. “An alternative test for whether an ERISA plan exists under Eighth Circuit precedent is: ‘A plan is established for ERISA purposes when a reasonable person can ascertain (1) the intended benefits, (2) the class of beneficiaries, (3) a source of funding, and (4) the procedures for receiving benefits.’” Id. (quoting Petersen, 366 F.3d at 678 (citation omitted)).
Applying these factors, the court determined the totality of the circumstances indicated the Employment Agreement was not an ERISA plan. The court reasoned that DM&E could have paid Schieffer in one lump sum, the payments were due upon the occurrence of a single event, and the Employment Agreement did not require DM&E to engage in a case-by-case review of employees because the Employment Agreement only related to Schieffer. The court ruled that because the Employment Agreement did not establish an ERISA plan, Schieffer’s state law claims were not preempted by ERISA and the court did not possess subject matter jurisdiction. Therefore, the court granted Schieffer’s motion to dismiss.

After the court granted Schieffer’s motion to dismiss, DM&E filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit. DM&E also filed a motion for an injunction pending its appeal. The court denied DM&E’s motion for injunction pending its appeal to the Eighth Circuit.

B. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DETERMINED A PLAN THAT PROVIDES SEVERANCE BENEFITS TO ONE EMPLOYEE IS NOT AN ERISA EMPLOYEE WELFARE BENEFIT PLAN

The Eighth Circuit considered whether the Employment Agreement between DM&E and Schieffer was a severance plan covered by ERISA and determined the Employment Agreement was not an ERISA plan. On appeal to the Eighth Circuit, DM&E argued the Employment Agreement was a severance plan governed by ERISA. The Eighth Circuit stated the question of whether an agreement is an ERISA plan is a mixed question of law and fact that is reviewed de novo.

The Eighth Circuit concluded an individual contract that provides severance benefits to one executive employee is not an employee wel-

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205. Id. at 996.
206. Id.
207. Id. at 996-97.
208. Id. at 997.
211. Id. at 1058, 1064.
212. Schieffer III, 648 F.3d 935, 936, 939 (8th Cir. 2011) (subsequent history omitted).
213. Schieffer III, 648 F.3d at 936. DM&E argued the employment agreement was a severance plan similar to that at issue in Emmenegger v. Bull Moose Tube Co., 197 F.3d 929, 934-35 (8th Cir. 1999). Id.
214. Id.
fare benefit plan under ERISA. After reviewing *Fort Halifax* and Eighth Circuit precedents regarding the circumstances under which a plan provides severance benefits and is subject to ERISA, the court observed that whether a "one-person contract may be an ERISA plan [was] a question of first impression" for the Eighth Circuit. The court reviewed the ERISA definition of an employee welfare benefit plan. The court acknowledged that severance benefits are "clearly" referred to in the ERISA definition of employee welfare benefit plan. However, the court stated "the words 'plan' and 'program' . . . strongly imply benefits that an employer provides to a class of employees." The court declared that "the plain language of this statute [29 U.S.C. § 1002(1)]—the reference to 'participants or their beneficiaries'—reflects the Congressional intent that a covered 'plan' is one that provides welfare benefits to more than one person." The court noted the Dictionary Act provides that "unless the context indicates otherwise . . . words importing the plural include the singular" but went on to state that the Dictionary Act "is only applied where 'necessary to carry out the evident intent of the statute.'" The court declared that Congress's use of the plural in the ERISA definition of employee welfare benefit plan evidenced Congress's intent that only the plural apply.

In reaching its decision that a severance plan covering one employee is not an ERISA plan, the Eighth Circuit rejected the reasoning of the Fourth, Eleventh, and Seventh Circuits. The Eighth Circuit noted that *Cvelbar*, *Biggers*, and *Williams* stood for the proposition that an employer's agreement with one employee that provides post-termination benefits may be an ERISA plan if an administrative scheme that satisfies *Fort Halifax* is present. However, the court asserted the reasoning in *Cvelbar*, *Biggers*, and *Wil-

215. *Id.* at 938 (citation and footnote omitted).
216. *Id.* at 936-38. The Eighth Circuit did not cite to *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-1216 (8th Cir. 1981), where it had previously determined a severance plan to be an ERISA plan.
217. *Id.* at 938 (quoting 29 U.S.C. § 1002(1)).
218. *Id.* (citation omitted).
219. *Id.*
220. *Id.* (emphasis in original) (citing Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 296 (1995)).
223. *Id.*
224. *Id.*
225. 927 F.3d 1540 (7th Cir. 1991).
226. 4 F.3d 291 (4th Cir. 1993).
227. 106 F.3d 1368 (7th Cir. 1997).
228. *Schieffer III*, 648 F.3d at 938 (citations omitted).
liams “was quite perfunctory,” had not “considered the plain language of § 1002(1) [ERISA § 3(1)],” and the Covelbar, Biggers, and Williams courts had failed to consider the broader context of ERISA preemption. The court stated that Congress had never preempted state laws enforcing and regulating individual employment agreements between executives and employers. According to the Eighth Circuit, the remedial and administrative purposes of ERISA preemption did not apply to resolving contractual disputes between one salaried employee and an employer. Therefore, the Eighth Circuit concluded an individual contract that provides severance benefits to a single executive employee does not constitute an employee welfare benefit plan under ERISA. The Eighth Circuit vacated the judgment of the district court and remanded the case to the district court to determine whether two provisions of the Employment Agreement “related to” an employee benefit plan, thereby establishing ERISA preemption.

C. ON REMAND, THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA DETERMINED IT DID NOT POSSESS SUBJECT MATTER JURISDICTION

On remand from the Eighth Circuit, the United States District Court for the District of South Dakota determined it lacked federal subject matter jurisdiction and dismissed the case. Before addressing the question on remand presented by the Eighth Circuit, the court distinguished between “complete preemption” under ERISA § 502(a) and “express preemption” under ERISA § 514(a). The court stated complete preemption is a jurisdictional, not preemption, doctrine. According to the court, complete preemption confers exclusive federal jurisdiction in cases “where Congress intended the scope of federal law to be so broad as to entirely replace any state-law claim.” The court observed that civil enforcement claims under ERISA § 502(a), such as claims to enforce rights under an ERISA plan or claims to recover benefits, implicate an area of complete preemption. The court noted

229. Id.
230. Id.
231. Id.
232. Id. (citing 29 U.S.C. § 1002(1)) (footnote omitted).
233. Id. at 939.
236. Id. at 890 (quoting Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund, 538 F.3d 594, 596 (7th Cir. 2008)).
237. Id. (quoting Franciscan Skemp Healthcare, 538 F.3d at 596 (internal quotation marks omitted).
238. Id. (quoting Prudential Ins. Co. of Am. v. Nat’l Park Med. Ctr., 413 F.3d 897, 907 (8th Cir. 2005) (citation omitted)).
that a state lawsuit within the scope of ERISA § 502(a) arises under federal law and may be removed to federal court.\textsuperscript{239} In contrast, the court remarked that ERISA § 514(a) preempts any state law that "relate[s] to any employee benefit plan."\textsuperscript{240} The court stated that preemption under ERISA § 514(a) is a defense to a state law cause of action but does not authorize removal to federal court or confer federal jurisdiction.\textsuperscript{241}

The district court determined complete preemption of Schieffer's claim under ERISA § 502(a) did not exist.\textsuperscript{242} The court applied the two-part test established by the United States Supreme Court in \textit{Aetna Health, Inc. v. Davila}\textsuperscript{243} to determine whether Schieffer's state law claims were within the scope of ERISA § 502(a).\textsuperscript{244} The court stated the first factor of the \textit{Davila} test is whether the plaintiff who is asserting a state law claim "at some point in time could have brought [the] claim under ERISA § 502(a)(1)(B)."\textsuperscript{245} The court determined Schieffer could not have brought his arbitration claim under ERISA § 502(a)(1)(B) after his employment with DM&E was terminated and his participation in the DM&E benefit plans was discontinued.\textsuperscript{246} The court recited the second factor of the \textit{Davila} test, which is "whether there is no other independent legal duty that is implicated by the defendant's actions."\textsuperscript{247} The court observed that "[i]f there is an independent legal duty apart from those established by ERISA or an ERISA-governed plan, a claim based on that duty is not completely preempted under [ERISA] § 502(a)(1)(B)."\textsuperscript{248} The court determined Schieffer's claim in his arbitration demand that DM&E breached its obligation under the Employment Agreement to pay Schieffer certain employee benefits for three years following the date his severance payment was paid in full did "not rely on, and [was] independent of, any duty under ERISA or DM&E's ERISA-governed plans."\textsuperscript{249} The court also ruled that Schieffer's complaint that DM&E's failure to keep Schieffer on DM&E's payroll triggered the COBRA period early was based on the terms of the Employment Agreement, not ERISA §§ 502(a)(1)(B), 502(a)(3), or 502(a)(2).\textsuperscript{250} The court determined

\begin{itemize}
  \item \textsuperscript{239} \textit{Id.} (quoting Prudential, 413 F.3d at 907 (citation omitted)).
  \item \textsuperscript{240} \textit{Id.} (quoting 29 U.S.C. § 1144(a)) (internal quotation marks omitted).
  \item \textsuperscript{241} \textit{Id.} (citations omitted).
  \item \textsuperscript{242} \textit{Id.} at 892-95.
  \item \textsuperscript{243} 542 U.S. 200 (2004).
  \item \textsuperscript{244} Schieffer IV, 857 F. Supp. 2d at 892-95 (applying Aetna Health, Inc. v. Davila, 542 U.S. 200, 207 (2004)).
  \item \textsuperscript{245} \textit{Id.} at 892 (quoting Davila, 542 U.S. at 210) (internal quotation marks omitted).
  \item \textsuperscript{246} \textit{Id.}
  \item \textsuperscript{247} \textit{Id.} at 894 (quoting Davila, 542 U.S. at 210).
  \item \textsuperscript{248} \textit{Id.}
  \item \textsuperscript{249} \textit{Id.}
  \item \textsuperscript{250} \textit{Id.}
\end{itemize}
Schieffer’s claims failed to invoke federal jurisdiction under the second factor of the Davila test because his claims for payment of employee benefits arose from an agreement that referenced DM&E’s ERISA plans as a means of fixing the value of the agreement.\(^{251}\) Because the court lacked federal subject matter jurisdiction, it granted Schieffer’s motion to dismiss.\(^{252}\)

D. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DETERMINED SUBJECT MATTER JURISDICTION DID NOT EXIST

DM&E appealed the district court’s granting of Schieffer’s motion to dismiss to the Eighth Circuit, which affirmed the district court’s granting of the motion to dismiss for lack of subject matter jurisdiction.\(^{253}\) The Eighth Circuit identified the issue on appeal as whether federal subject matter jurisdiction existed, not ERISA preemption.\(^{254}\) The court stated “the jurisdiction-determining question is whether Schieffer is seeking to enforce rights under ERISA.”\(^{255}\) The court noted that subject matter jurisdiction depended “on whether Schieffer is seeking to recover ‘benefits due to him under the terms of’ one or more ERISA plans, 29 U.S.C. § 1132(a)(1)(B), rather than under an independent contract that is not an ERISA plan.”\(^{256}\)

After clarifying the issue on appeal, the Eighth Circuit reviewed the district court’s determination that Schieffer’s arbitration demands were made under a single-employee contract.\(^{257}\) The Eighth Circuit agreed with the decision of the district court.\(^{258}\) The court reasoned the Employment Agreement was not an ERISA plan, the Employment Agreement did not amend any ERISA plans DM&E sponsored, and the Employment Agreement was a free-standing agreement and not a promise by DM&E to pay ERISA plan benefits in the future if certain contingencies occurred.\(^{259}\) The court acknowledged the severance benefits under the Employment Agreement were partly measured by referencing benefit levels under ERISA plans.\(^{260}\) However, the court stated DM&E failed to allege that severance benefits were funded

\(^{251}\) Id. at 894-95 (citing Stevenson Bank of N.Y. Co., Inc., 609 F.3d 56, 62 (2nd Cir. 2010)).
\(^{252}\) Id. at 896.
\(^{253}\) Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer (Schieffer V), 711 F.3d 878, 880 (8th Cir. 2013) (subsequent history omitted).
\(^{254}\) Schieffer V, 711 F.3d at 880.
\(^{255}\) Id. at 881.
\(^{256}\) Id.
\(^{257}\) Id. at 881-82.
\(^{258}\) Id. at 882.
\(^{259}\) Id.
\(^{260}\) Id.
other than through its general assets. 261 The court observed that payment of severance benefits would not “threaten ERISA’s goal of uniformity in the administration of plan benefits” or affect how DM&E administered its ERISA plans. 262 The Eighth Circuit agreed with the district court that the benefits Schieffer sought in his arbitration demand “were not claims for benefits due under an ERISA plan.” 263 Therefore, the Eighth Circuit affirmed the decision of the district court that the court lacked federal subject matter jurisdiction to consider issues arising under the Employment Agreement. 264 Although the issue was not before the Eighth Circuit in its second review of the case, the Eighth Circuit has subsequently cited Schieffer for the proposition that “an individual contract providing benefits to a single executive employee is not an ERISA employee welfare benefit plan.” 265

IV. IMPLICATIONS AND UNANSWERED QUESTIONS FOLLOWING THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN DAKOTA, MINNESOTA & EASTER RAILROAD CORP. V SCHIEFFER

The conclusion of the United States Court of Appeals for the Eighth Circuit in Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer 266 that “an individual contract providing severance benefits to a single executive employee is not an ERISA employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1)” raises multiple questions for employers and employees. 267 This section discusses several unanswered questions following the decision of the Eighth Circuit in Schieffer, considers possible implications of Schieffer, and identifies potential methods of addressing these issues. 268

261. Id.
263. Id. (emphasis omitted).
264. Id. at 882-83.
266. 648 F.3d 935 (8th Cir. 2011).
267. Schieffer III, 648 F.3d 935, 938 (8th Cir. 2011) (footnote omitted); see infra notes 269-322 and accompanying text.
268. See infra notes 269-366 and accompanying text. This section is not intended to be an exhaustive review of all potential unanswered questions following Schieffer.
A. **WHAT IS THE SCOPE OF APPLICABILITY OF SCHIEFFER?**

One question the conclusion of the United States Court of Appeals for the Eighth Circuit in *Schieffer*\(^\text{269}\) raises is the types of “plans” to which *Schieffer* applies.\(^\text{270}\) In *Schieffer*, the Eighth Circuit considered whether severance benefits in an employment agreement between an employer and one employee constituted an employee welfare benefit plan under ERISA.\(^\text{271}\) The Eighth Circuit concluded the individual employment agreement that provided severance benefits to one executive employee was not an ERISA employee welfare benefit plan as defined in ERISA § 3(1).\(^\text{272}\)

Although the conclusion of the Eighth Circuit in *Schieffer* specifically referred to “an individual contract providing severance benefits,” it is unclear whether other courts applying *Schieffer* could determine other types of “plans” covering one employee are non-ERISA plans under Eighth Circuit jurisprudence.\(^\text{273}\) This uncertainty exists because of the manner in which the Eighth Circuit framed its inquiry and the reasoning it employed to reach its conclusion in *Schieffer* that a one-person “plan” is not an ERISA plan.

In *Schieffer*, the Eighth Circuit framed its inquiry as whether “a ‘one-person’ contract may be an ERISA plan . . . .”\(^\text{274}\) Quoting *Cvelbar*,\(^\text{275}\) the Eighth Circuit noted that “arrangements that involve a single employee [require] particularly careful scrutiny.”\(^\text{276}\) The Eighth Circuit examined the definition of “employee welfare benefit plan” in ERISA § 3(1) and determined that “[a]lthough severance benefits are clearly among those described . . . the words ‘plan’ and ‘program’ in § 1002(1) [ERISA § 3(1)] strongly imply benefits that an employer provides to a class of employees.”\(^\text{277}\) Additionally, the Eighth Circuit stated it was significant that ERISA § 3(1) referred to “participants or their beneficiaries,” thereby reflecting a legislative intent that a “plan” “provides welfare benefits to more than one person.”\(^\text{278}\) The Eighth Circuit also cited cases from the Eleventh, Fourth, and Seventh Circuits that provided a variety of post-employment benefits. The Eighth Circuit cited *Cvelbar*, which involved an

\(^{269}\) 648 F.3d 935 (8th Cir. 2011).
\(^{270}\) See infra notes 271-306 and accompanying text.
\(^{271}\) *Schieffer III*, 648 F.3d 935, 936, 937-38 (8th Cir. 2011).
\(^{272}\) *Schieffer III*, 648 F.3d at 938 (footnote omitted).
\(^{273}\) Id. (footnote omitted).
\(^{274}\) Id. (footnote omitted).
\(^{275}\) 106 F.3d 1368 (7th Cir. 1997).
\(^{276}\) *Schieffer III*, 648 F.3d at 938 (quoting Cvelbar v. CBI Illinois, Inc., 106 F.3d 1368, 1376 (7th Cir. 1997) (internal quotations omitted).
\(^{277}\) Id. at 938.
\(^{278}\) Id. (citing Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 296 (1995)) (original emphasis omitted).
agreement to provide severance benefits of group medical plan coverage, a lump sum severance payment, and a monthly monetary payment; Biggers, which involved severance benefits; and Williams, which involved, among other things, the payment of monthly monetary benefits and the employer’s payment of group medical insurance plan premiums and term life insurance premiums on behalf of the employee and his spouse.\textsuperscript{279} The Eighth Circuit also noted that DM&E sought to characterize the Employment Agreement as a “top hat” plan under ERISA but noted that “a ‘top hat’ plan must be an ERISA ‘plan’ in the first instance.”\textsuperscript{280}

The broad inquiry the Schieffer court conducted as to whether “a ‘one-person’ contract may be an ERISA plan . . . .”, combined with the determination of the Eighth Circuit that Congress intended for an “employee welfare benefit plan” to provide welfare benefits to more than one person because of the use of “participants” and “beneficiaries” in ERISA § 3(1), suggests one-person arrangements providing pension benefits may not be ERISA plans under Eighth Circuit jurisprudence following Schieffer.\textsuperscript{281} Section 3(2) of ERISA defines a “pension plan” and “employee pension benefit plan” as any plan, fund, or program which was heretofore established or maintained by an employer . . . ., to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.\textsuperscript{282}

Following the reasoning of the Eighth Circuit in Schieffer, a pension plan that only covers one employee may not be an ERISA plan under Eighth Circuit jurisprudence. The ERISA definition of “pension plan” and “employee pension benefit plan” refers to providing retirement income to employees or deferring employees’ income.\textsuperscript{283} According to the Eighth Circuit in Schieffer, the use of the words “program”

\textsuperscript{279} Id. (citations omitted).
\textsuperscript{280} Id. at 938 n.3 (quoting Emmenegger v. Bull Moose Tube Co., 197 F.3d 929, 932 n.6 (8th Cir. 1999) (citation omitted)) (quotations omitted).
\textsuperscript{281} Id. (footnote omitted); see also Minnis v. Baldwin Bros., Inc., 150 F. App’x 118, 119-120 (3rd Cir. 2005) (determining an ERISA plan existed where an employer purportedly promised to pay an employee a “pension” of $400.00 per month until his death and citing Williams for the proposition that an ERISA plan may be tailored to the needs of one employee).
\textsuperscript{283} ERISA § 3(2)(A)(i), (ii), 29 U.S.C. § 1002.
and "plan" in ERISA § 3(1), along with the use of the plural words "participants or their beneficiaries," reflects a Congressional intent for an ERISA employee welfare benefit plan to cover more than one employee.\textsuperscript{284} Similar to the ERISA definition of "employee welfare benefit plan" in ERISA § 3(1), the definition of "pension plan" and "employee pension benefit plan" in ERISA § 3(2) uses the words "plan" and "program," as well as referring to "employees" and not an "employee."\textsuperscript{285} Because the \textit{Schieffer} court determined the use of the plural in the ERISA definition of "employee welfare benefit plan" evidenced a Congressional intent for a "plan" to cover more than one person, it is possible a court applying \textit{Schieffer} could similarly determine the use of the term "employees" in ERISA § 3(2) evidences a Congressional intent that a pension plan cover more than one person for a "plan" to exist.\textsuperscript{286} Therefore, following \textit{Schieffer}, it is unclear whether a "plan" that provides pension benefits to one employee is an ERISA pension plan under Eighth Circuit jurisprudence.\textsuperscript{287}

A similar concern is whether a "top hat" plan that only covers one employee is a "plan" under ERISA.\textsuperscript{288} A "top hat" plan refers to a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.\textsuperscript{289} A "top hat" plan is exempt from the fiduciary responsibility, funding, participation, and vesting requirements of ERISA.\textsuperscript{290} However, "top hat" plans are not exempt from ERISA's civil enforcement provisions.\textsuperscript{291}

The focus of the \textit{Schieffer} court on the use of plural terms in the ERISA definition of "employee welfare benefit plan" raises concerns that a court applying \textit{Schieffer} could similarly examine the use of plural terms in the ERISA provisions upon which "top hat" plans are based and determine "top hat" plans must provide benefits to more than one employee to be an ERISA plan.\textsuperscript{292} The \textit{Schieffer} court stated the use of the words "program" and "plan" in ERISA § 3(1), along with the use of the plural words "participants or their beneficiaries," re-

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\textsuperscript{284} \textit{Schieffer III}, 648 F.3d at 938.


\textsuperscript{286} \textit{Schieffer III}, 648 F.3d at 938.

\textsuperscript{287} See supra notes 269-86 and accompanying text.

\textsuperscript{288} See infra notes 289-306 and accompanying text.


\textsuperscript{291} ERISA § 502(a), 29 U.S.C. § 1132(a); Carr, 816 F. Supp. at 1486 (citations omitted); Rockney, 877 F.2d at 640.

\textsuperscript{292} See infra notes 293-306 and accompanying text.
flected a Congressional intent for an ERISA employee welfare benefit plan to cover more than one employee.293 The Schieffer court determined an agreement providing severance benefits to one employee was not an ERISA employee welfare benefit plan.294 Similar to the ERISA definition of “employee welfare benefit plan,” the ERISA provisions upon which “top hat” plans are based refer to a “group of management or highly compensated employees.”295 Following Schieffer, it is possible a court could determine the reference to a “group” of management employees or highly compensated employees in ERISA requires a “top hat” plan to cover more than one employee.296 At least one court has determined a “top hat” plan may only have one participant, as long as the other statutory requirements for a “top hat” plan are satisfied.297 However, following Schieffer, because the “top hat” provisions of ERISA specifically refer to “a select group of management or highly compensated employees,” it is possible a court applying Schieffer could determine a “top hat” plan must cover more than one employee to be an ERISA plan.298

Since the Eighth Circuit issued its decision in Schieffer, at least one plaintiff has attempted to assert that Schieffer stands for the proposition that an arrangement is not a “top hat” plan if it covers only one person.299 In Van Gent v. Saint Louis Country Club,300 the United States District Court for the Eastern District of Missouri rejected the plaintiff’s argument that Schieffer precluded a “top hat” plan that covered one employee from being an ERISA plan.301 The Van Gent court ruled the Schieffer court “expressly limited its holding to employee welfare benefit plans offering severance benefits” and

293. Schieffer III, 648 F.3d at 938.
294. Id.
295. Compare ERISA § 3(1), 29 U.S.C. § 1002 (referring to “participants” and “beneficiaries”), with ERISA §§ 401(a)(1), 301(a)(1), 201(2), 29 U.S.C. §§ 1101(a)(1), 1081(a)(1), 1051(2) (referring to “a select group of management or highly compensated employees”) (emphasis added).
296. See Schieffer III, 648 F.3d at 938 (stating that “[e]ven more significantly, the plain language of the statute – the reference to ‘participants or their beneficiaries’ – reflects the congressional [sic] intent that a covered ‘plan’ is one that provides welfare benefits to more than one person.”) (citations omitted).
297. See, e.g., Duggan v. Hobbs, 99 F.3d 307, 312-13 (9th Cir. 1996) (only one employee covered by severance agreement was part of a “select group” under ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1)).
298. ERISA §§ 401(a)(1), 301(a)(1), 201(2), 29 U.S.C. §§ 1101(a)(1), 1081(a)(1), 1051(2)) (emphasis added); see Schieffer III, 648 F.3d at 938 (use of plural in ERISA definition of “employee welfare benefit plan” evidenced a Congressional intent that an arrangement that provides benefits to only one employee is not an ERISA plan).
301. Van Gent, 2013 WL 6198122, at *9 (citing Schieffer III, 648 F.3d 935 (8th Cir. 2011) (subsequent history omitted)).
that Schieffer was inapplicable because the Van Gent case involved a dispute “over two employee pension benefit plans offering pension benefits.”

The Van Gent court reasoned that courts analyze pension benefit plans that offer pension benefits differently than employee welfare benefit plans offering severance benefits. The Van Gent court determined the pension plan at issue was a “top hat” plan and rejected the plaintiff’s argument, based on Schieffer, that a one person “plan” was not an employee pension benefit plan under ERISA. Although the Van Gent court did not accept the plaintiff’s argument that an employee pension benefit plan under ERISA did not exist, the Van Gent court did not directly address the question of whether a “top hat” plan covering only one person could be an ERISA plan following Schieffer. Thus, because of the focus of the Eighth Circuit in Schieffer on the use of the plural form of “participant” and “beneficiary” in the ERISA definition of “employee welfare benefit plan,” uncertainty remains regarding whether a court applying Schieffer will determine a “top hat” plan is an ERISA plan if the “top hat” plan covers only one employee.

B. THE SCHIEFFER DECISION CREATES A BARRIER TO THE UNIFORM APPLICATION OF EMPLOYEE BENEFITS LAW UNDER ERISA

The split of the Eighth Circuit in Schieffer from the Eleventh, Fourth, and Seventh Circuits on the issue of whether a “plan” is an ERISA plan if it only covers one employee raises questions regarding how federal common law achieves Congress’s intent that ERISA establish a uniform set of laws governing employee benefit plans. Courts have developed ERISA federal common law with respect to obligations and rights under employee benefit plans. Federal courts recognize that federal common law under ERISA should be consistent to further Congress’s goal of ensuring that plan sponsors and employee benefit plans are subject to a uniform body of employee benefits law.

Although Congress intended ERISA to apply uniformly, the

302. Id.
304. Id. at *9, *15.
305. See id. (discussing Schieffer in terms of welfare benefit plans and employee pension benefit plans and not discussing the implications of the number of employees covered by a “top hat” plan following Schieffer).
306. See supra notes 288-305 and accompanying text.
307. 648 F.3d 935 (8th Cir. 2011).
308. See infra notes 309-22 and accompanying text.
federal common law under ERISA does not always achieve this intent.\textsuperscript{311} For example, federal circuit courts of appeals have reached different conclusions regarding the scope of ERISA's disclosure requirements.\textsuperscript{312} This lack of uniformity in federal common law is problematic for a variety of reasons. Divergence in ERISA federal common law threatens the uniform regulation of employee benefit plans that Congress intended under ERISA.\textsuperscript{313} Differences in federal common law potentially create varying standards of recovery for plan participants depending on the jurisdiction.\textsuperscript{314} Additionally, differences in ERISA federal common law create divergent regulatory environments for employee benefit plans and plan sponsors that operate in multiple jurisdictions.\textsuperscript{315} The lack of uniformity in ERISA federal common law potentially creates problems for employers sponsoring national plans or with operations in multiple states or jurisdictions.\textsuperscript{316}

The potential for divergent regulatory requirements exists following the decision of the Eighth Circuit in \textit{Schieffer}. The conclusion of the Eighth Circuit in \textit{Schieffer} that "an individual contract providing severance benefits to a single executive employee is not an ERISA employee welfare benefit plan" is opposite that of the Eleventh, Fourth, and Seventh Circuits, which determined an ERISA plan may cover only one employee.\textsuperscript{317} This split among the federal circuit courts of appeals regarding whether an ERISA plan exists if the "plan" only covers one employee raises a variety of questions for employers and plan sponsors operating in multiple jurisdictions. For the federal circuit courts of appeals that have not definitively addressed whether an ERISA plan exists if the "plan" covers only one employee, how will such courts resolve the split in authority? Will the circuit courts adopt the rule announced by the \textit{Williams, Biggers, and Cvelbar} courts and recognize a one participant "plan" as an ERISA plan, or will the opposite rule established by the Eighth Circuit in \textit{Schieffer} be adopted?

\textsuperscript{311} \textit{The ERISA Common Law}, supra note 309, at 4-7.

\textsuperscript{312} \textit{Id.} at 4 (citing \textit{Variety v. Howe}, 516 U.S. 489 (1996); \textit{Switzer v. Wal-Mart Stores, Inc.}, 52 F.3d 1294, 1299 (5th Cir. 1995); \textit{Anweiler v. Am. Elec. Power Serv. Corp.}, 3 F.3d 986, 991 (9th Cir. 1993)).

\textsuperscript{313} Brauch, supra note 309, at 568.

\textsuperscript{314} \textit{The ERISA Common Law}, supra note 309, at 6-7.

\textsuperscript{315} Brauch, supra note 309, at 568.

\textsuperscript{316} \textit{Singer}, 964 F.2d at 1453 (Wilkinson, J., concurring).

\textsuperscript{317} \textit{Compare Schieffer III}, 648 F.3d 935, 938 (8th Cir. 2011) (footnote omitted) (plan that provides severance benefits to one executive employee is not an ERISA employee welfare benefit plan), \textit{with Williams v. Wright}, 927 F.2d 1540, 1541-42, 1544, 1545 (11th Cir. 1991) (employer established an ERISA plan even though the plan only covered one participant), \textit{Biggers v. Wittek Indus., Inc.}, 4 F.3d 291, 297-98 (4th Cir. 1993) (determining a plan may only cover one employee and still be subject to ERISA), and \textit{Cvelbar v. CBI Illinois, Inc.}, 106 F.3d 1368, 1376 (7th Cir. 1997) (determining a one-person arrangement qualifies as an ERISA plan).
The split in authority among the Eleventh, Fourth, Seventh, and Eighth Circuits creates an opportunity for other circuit courts of appeals to recognize the split in authority and then either adopt the rule the Williams, Biggers, and Cvelbar courts announced, adopt the rule the Schieffer court announced, or articulate a new rule. The uncertainty regarding how other circuit courts of appeals will rule on the issue of whether an ERISA plan exists when the “plan” only provides employee benefits to one employee creates potential planning difficulties for employers, as they cannot predict with confidence whether a one-employee “plan” will be enforced as an ERISA plan.

A similar unresolved question following Schieffer is how courts will treat one-employee “plans” when the employee is highly mobile and performs services for an employer at multiple business locations throughout the United States. If an employer operates in multiple jurisdictions, the employer maintains one or more “plans” with different terms that each cover only one employee, the employees are highly mobile (i.e., the employees perform services for the employer at multiple business locations throughout the United States and relocate frequently), litigation arises between the employer and employee regarding benefits due under the “plan,” and a threshold issue in the litigation is whether a federal court possesses subject matter jurisdiction over the case under ERISA, how will a court resolve the situation? The following example illustrates this question.

Suppose an employer has its headquarters and principal place of business in Chicago, Illinois. The employer maintains other offices, production facilities, and employees in Omaha, Nebraska; Denver, Colorado; Richmond, Virginia; and Atlanta, Georgia. The employer’s human resources department is decentralized, with each business location maintaining personnel who perform various human resources and employee benefit functions. The employer hires an executive employee who lives in Omaha. The employer and employee enter into an agreement to provide the employee with severance benefits upon the occurrence of certain events, such as the employer experiencing a change in control event or the employee being terminated from employment without cause. Among other things, the agreement recites that it is intended to be an ERISA plan and is intended to be subject to applicable provisions of ERISA. As the parties intend the agreement to be subject to ERISA, it is silent as to choice of law or venue.

Over the course of her employment, the executive travels frequently between Omaha, Chicago, Denver, Richmond, Atlanta, and other business locations throughout the United States. Although her legal residence is in Omaha, the executive spends nearly every week working at her employer’s other business locations. A few years after
entering into the agreement, the executive’s employment is terminated. A dispute arises between the executive and her former employer regarding whether she was terminated with or without cause, and the former employer refuses to pay benefits under the agreement. The employee files a lawsuit in a Nebraska state court, alleging, among other things, a cause of action for unpaid wages, costs, and attorney’s fees.\textsuperscript{318} The employer attempts to remove the cause of action to federal court, arguing the agreement is an ERISA welfare benefit plan and that jurisdiction is proper in federal court.\textsuperscript{319} In response, the employee asserts that an ERISA plan does not exist, as the agreement only provides benefits to one employee and, following Schieffer, such an agreement does not constitute an ERISA plan in the Eighth Circuit, so federal subject matter jurisdiction does not exist under ERISA.\textsuperscript{320} Even though the parties intended the agreement to be an ERISA plan and the written agreement clearly recites such intentions, applying Schieffer, a federal court in Nebraska could determine the agreement is not an ERISA plan because it only provides employee benefits to one employee.\textsuperscript{321} The split in authority regarding whether a “plan” providing benefits to one employee is an ERISA plan creates numerous administrative and planning difficulties for plan sponsors, even though Congress intended the enactment of ERISA to establish uniform federal law governing employee benefits to avoid such vagaries where the law and administrative requirements depend upon the jurisdiction.\textsuperscript{322}

C. Potential Methods of Addressing Uncertainty Following Schieffer

The split in authority among the federal circuit courts of appeals regarding whether a “plan” that provides employee benefits to one


\textsuperscript{319} See ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (stating that “Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.”).

\textsuperscript{320} Schieffer III, 648 F.3d at 938 (footnote omitted) (assuming there is no federal jurisdiction under 28 U.S.C. §§ 1331 or 1332).

\textsuperscript{321} See, e.g., id. at 938 (footnote omitted); Cochran v. AT&T Techs., Inc., 753 F. Supp. 284, 288 (E.D. Mo. 1991) (stating that “[t]he Court must apply federal common law in the adjudication of claims under the ERISA.”) (citation omitted); Courtney v. Zurich Am. Ins. Co., No. 8:07CV12, 2006 WL 189836, at *3 (D. Neb. 2008) (stating that “on questions of federal common law, this court is actually bound by the precedent of only the United States Supreme Court and the Eighth Circuit Court of Appeals.”).

\textsuperscript{322} See supra notes 307-21 and accompanying notes.
person is an ERISA plan raises a number of unanswered questions. For example, following Schieffer, it is unclear whether a single participant pension plan or a "top hat" plan that only covers one employee will be considered an ERISA plan under Eighth Circuit jurisprudence. Similarly, the split in authority creates concerns for employers operating in multiple jurisdictions as to whether a "plan" offering employee benefits to one employee that performs services at multiple business locations throughout the United States will be recognized as an ERISA plan. Assuming the parties desire the "plan" to be an ERISA plan, to help address these uncertainties, practitioners should consider the following issues when drafting "plan" documents that provide employee benefits to one employee.

1. The "Plan" Document Should Include the Factors Courts Consider When Determining Whether an ERISA Plan Has Been Established

When drafting a "plan" document that provides employee benefits to one employee, practitioners should ensure the document includes the four factors the Eighth Circuit considers when determining whether an ERISA plan has been established. According to the Eighth Circuit, "[a] plan is established for ERISA purposes when a reasonable person can ascertain (1) the intended benefits, (2) the class of beneficiaries, (3) the source of funding, and (4) the procedures for receiving benefits." Following the Eighth Circuit, the "plan" document should specifically identify the benefits the plan intends to provide, as well as the circumstances under which benefits will be paid. The "plan" should explicitly state the type of benefits being provided, the amount(s) of each benefit, and the event(s) that trigger benefit payments. Second, the "plan" document should identify the individual(s) who will receive the benefits. Third, the "plan" document should state the manner in which benefits will be funded. For example, depending on the type of benefits being provided, the "plan" document could state benefits will be paid through insurance. Finally, the "plan" document should set forth a procedure for a person covered by the "plan" to claim benefits. The "plan" document should identify whom a participant or beneficiary should contact to apply for benefits, the manner in which a participant or beneficiary may apply for benefits, when benefit applications may be submitted, and where benefit applications may be made. The "plan" should also incorporate a

323. 648 F.3d 935 (8th Cir. 2011).
324. See supra notes 269-306 and accompanying text.
325. See infra notes 326-27 and accompanying text.
claims procedure that conforms to ERISA § 503 and related United States Department of Labor regulations.\textsuperscript{327}

2. The “Plan” Document Should Establish an Ongoing Administrative Scheme

When designing a “plan” that provides employee benefits to one employee, practitioners should also consider how the “plan” will provide an ongoing administrative scheme.\textsuperscript{328} The district court in Schieffer focused on whether an ongoing administrative program existed to determine whether an ERISA plan was present.\textsuperscript{329} The district court determined the agreement at issue did not reference ERISA or create “an ongoing administrative plan,” so an ERISA plan was not established.\textsuperscript{330} The Eighth Circuit concluded the individual employment agreement that provided severance benefits to one executive employee was not an ERISA employee welfare benefit plan as defined in ERISA § 3(1).\textsuperscript{331}

To help avoid this result, a “plan” that provides employee benefits to only one employee should specifically acknowledge that the employer and employee intend for the “plan” to be an employee benefit plan as defined in ERISA § 3(3). Additionally, the “plan” should be designed to satisfy the factors the Eighth Circuit examines to determine whether an ongoing administrative scheme, and thus an ERISA plan, exists.\textsuperscript{332} The Eighth Circuit examines four factors to determine “whether a plan is part of an ongoing administrative scheme . . . .”\textsuperscript{333} These factors are:

(1) whether the payments are continual and ongoing rather than a one-time lump-sum payment; (2) whether the employer undertook any long-term obligation with respect to the payments; (3) whether the severance payments come due any time the employer terminates an employee rather than upon the occurrence of a single, unique event; and (4) whether the severance arrangement under review requires the employer to engage in a case-by-case review of employees.\textsuperscript{334}

\begin{itemize}
\item \textsuperscript{327} See, e.g., 29 C.F.R. § 2560.503-1 (2013) (establishing “minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries . . . .” under ERISA §§ 503, 505, 29 U.S.C. §§ 1133, 1135).
\item \textsuperscript{328} See infra notes 329-43 and accompanying text.
\item \textsuperscript{329} Schieffer I, 744 F. Supp. 2d 987, 996 (D.S.D. 2010) (subsequent history omitted).
\item \textsuperscript{330} Schieffer I, 744 F. Supp. 2d at 996-97.
\item \textsuperscript{331} Schieffer III, 648 F.3d 935, 938 (8th Cir. 2011) (subsequent history omitted) (footnote omitted).
\item \textsuperscript{332} Schieffer I, 744 F. Supp. at 996 (citing Petersen, 366 F.3d at 679; Crews v. Gen’l Am. Life Ins. Co., 274 F.3d 502, 505 (8th Cir. 2001)).
\item \textsuperscript{333} Petersen, 366 F.3d at 679 (citation omitted).
\item \textsuperscript{334} Id. (citation omitted).
\end{itemize}
These factors are instructive for designing "plans" that provide employee benefits to one employee. First, the "plan" should be structured to provide several or ongoing benefit payments instead of one lump-sum payment. Benefits payments could be structured to be paid periodically, such as monthly or quarterly. In addition to being paid periodically, the amount of benefits payments could be indexed for inflation, thereby requiring periodic calculations by the person administering the "plan." Second, the employer sponsoring the "plan" should undertake some long-term obligations with respect to the payments. For example, if the "plan" document establishes a maximum lifetime payment for a certain benefit under the "plan," the employer would undertake the long-term obligation of monitoring the amount of benefit payments to determine whether the maximum payment amount has been reached, a process endorsed by the Eighth Circuit. Third, the employer should carefully consider the events that trigger benefit payments. Under Eighth Circuit precedent, the occurrence of a one-time event that triggers benefit payments, such as a plant closure or the termination of a contract, militates against the existence of an ongoing administrative scheme. In contrast, benefit payments that are triggered because an individual's employment is terminated with or without cause because of a change in control event requires the administrator of the "plan" to "engage in a case-by-case review of employees to determine eligibility for benefits," thereby supporting the existence of an ongoing administrative scheme. Finally, the "plan" document should require "the employer to engage in a case-by-case review of employees" to determine eligibility for benefits. For example, if benefits are payable under the "plan" because an employee's duties are substantially reduced, the need for a case-by-case review may be present. Similarly, the "plan" document could require a periodic review of eligibility for benefits. Therefore, when

335. Id. However, practitioners should consider the application of 26 U.S.C. § 409A and the Treasury Regulations promulgated thereunder when structuring the timing of benefit payments.
336. Id.
337. See Petersen, 366 F.3d at 679 (stating, "[t]his plan had all the earmarks of one governed by ERISA. For example, the benefits were not one-time lump-sum payments, but included such things as the continuation of medical and dental benefits which were to be paid out over time. In addition, because the maximum amount of certain benefits was $5000, the company had to monitor payment of those benefits on an ongoing basis to ensure the total did not exceed $5000. Thus, it undertook long-term obligations with respect to the payment of certain severance benefits.").
338. Id. at 679-80; Crews, 274 F.3d at 506.
339. Petersen, 366 F.3d at 679-80.
340. Schieffer 7, 744 F. Supp. 2d at 996 (citing Petersen, 366 F.3d at 679; Crews, 274 F.3d at 505).
341. Crews, 274 F.3d at 506 (citing Collins v. Ralston Purina Co., 147 F.3d 592, 597 (7th Cir. 1998)).
drafting a “plan” that provides benefits to one employee, practitioners should carefully consider the four-factor test the Eighth Circuit applies to determine “whether a plan is part of an ongoing administrative scheme” and thus governed by ERISA.\footnote{Schieffer I, 744 F. Supp. 2d at 996. The Eighth Circuit has also applied an alternative test to determine whether an ERISA plan exists. Id. n.5. “A plan is established for ERISA purposes when a reasonable person can ascertain (1) the intended benefits, (2) the class of beneficiaries, (3) a source of funding, and (4) the procedures for receiving benefits.” Id. (quoting Petersen, 366 F.3d at 678 (citing Bannister v. Sorenson, 103 F.3d 632, 636 (8th Cir. 1996)). Because the Eighth Circuit applies this alternative test, its factors should also be considered and incorporated in a “plan” that provides employee benefits to one employee.}{\textsuperscript{342}} The “plan” documents should be drafted to clearly satisfy each of the four factors.\footnote{\textit{See supra} notes 328-42 and accompanying text.}{\textsuperscript{343}}

3. Practitioners Should Consider Including an Appropriate Forum Selection Clause in the “Plan” Document

Not only should practitioners consider incorporating the factors the Eighth Circuit considers when determining whether an administrative scheme exists, practitioners should also consider incorporating a valid forum selection clause when drafting a “plan” that provides employee benefits to one employee.\footnote{\textit{See infra} notes 345-66 and accompanying text.}{\textsuperscript{344}} Although federal common law under ERISA is supposed to be uniform, following the decision of the Eighth Circuit in \textit{Schieffer}, a split in federal common law exists regarding whether a “plan” is an ERISA plan when the “plan” covers only one employee.\footnote{\textit{See supra} notes 57-265 and accompanying text; see, \textit{e.g.}, Shipley v. Arkansas Blue Cross & Blue Shield, 393 F.3d 898, 903-04 (8th Cir. 2003) (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 156 (1985) (Brennan, J., concurring), for the proposition that federal courts possess “authority under ERISA to create a uniform body of federal common law”).}{\textsuperscript{345}} Given the split in federal common law, employers operating in multiple jurisdictions and that employ individuals who frequently perform services at multiple business locations or relocate frequently may face uncertainty regarding whether a “plan” that provides benefits to one employee will be recognized as an ERISA plan. To help address this uncertainty, employers could include a forum selection clause in the “plan” document that identifies a federal district court in the Eleventh, Fourth, or Seventh Circuit as the proper forum for resolving lawsuits arising out of or relating to the “plan.” The “plan” document could also include a statement that the “plan” shall be administered and construed as an ERISA plan in all jurisdictions. A valid forum selection clause may help a court determine that a one-person “plan” is an ERISA plan following the decision of the Eighth Circuit in \textit{Schieffer}. 
ERISA provides that federal courts possess subject matter jurisdiction over certain claims involving employee benefit plans and identifies where such actions may be brought. Under ERISA,

[except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1). State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.]

ERISA also identifies the district courts in which an action under Title I of ERISA may be brought. ERISA provides that

[where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.]

Courts refer to this provision as ERISA’s venue provision. Courts typically describe clauses in employee benefit plan documents that limit the venue in which an action may be brought as a forum selection clause.

Courts interpret ERISA’s venue provision as permitting an employee benefit plan to limit the venue in which actions under the plan may be brought if certain conditions are satisfied. Federal courts determine the enforceability of forum selection clauses by applying federal law. Under federal law, “forum selection clauses are prima facie valid and are enforced unless they are unjust or unrea-

346. ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) (2010). Section 502(a)(1)(B) of ERISA provides that a civil action may be brought by a beneficiary or participant “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” Section 502(a)(7) provides that a civil action may be brought “by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A)).”


350. Laasko, 566 F. Supp. 2d at 1021 (citations omitted).
sonable or invalid for reasons such as fraud or overreaching.351 Courts examine forum selection clauses for fundamental fairness.352 Several courts have determined that forum selection clauses in employee benefit plans that limit the venues in which actions may be brought under ERISA § 502(e)(2) are valid and enforceable.353

Courts enforce forum selection clauses in ERISA plan documents for a variety of reasons. In reviewing forum selection clauses in employee benefit plan documents, courts acknowledge that the United States Supreme Court “has consistently recognized forum selection clauses as legitimate and has required deference in their enforcement.”354 Courts note that the inclusion of a forum selection clause in an employee benefit plan document may help conserve the resources of the plan administrator and help “assure some predictability in the interpretation of its plans.”355 Importantly, courts recognize that enforcing forum selection clauses “may advance ERISA’s goal of establishing a uniform administrative scheme” and “bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state.”356 Similarly, by limiting claims to one federal district, an ERISA venue selection clause in a plan document encourages “uniformity in the decisions interpreting that plan, which furthers ERISA's goal of enabling employers to establish a uniform administrative scheme so that plans are not subject to different legal obligations in different States.”357

352. Laasko, 566 F. Supp. 2d at 1021 (citation omitted).
353. See infra notes 354-66 and accompanying text. See also Smith II, 2014 WL 5125633, at *6 observing that, “[a] majority of courts that have considered this question [whether ERISA precludes venue selection clauses] have upheld the validity of venue selection clauses in ERISA-governed plans.” (citations omitted). But see, e.g., Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006) (stating that “[t]his Court can not allow the Plan’s forum selection clause to override a Congressionally enacted statutory framework aimed at assisting employees. If this Court were to do so, it would encourage a flood of new, non-negotiated ‘plans’ containing forum selection clauses. This floodgate of new plans would severely limit any potential plaintiffs from having ready access to the federal courts and thereby vitiate the congressional intent of enacting ERISA.”).
355. Schoemann, 447 F. Supp. 2d at 1007; see also Smith II, 2014 WL 5125633, at *7 (stating that “[t]he cost to employees of one plan’s being subject to the varying pronouncements of federal district courts around the country would also undermine ERISA’s goal of providing a low-cost administration of employee benefit plans.”) (citation omitted).
356. Smith v. AEGON USA, LLC (Smith I), 770 F. Supp. 2d 809, 812 (W.D. Va. 2011) (citation omitted); Laasko, 566 F. Supp. 2d at 1023 (quoting Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116 (2d Cir. 1991) (citations omitted)).
Courts have enforced forum selection clauses in ERISA employee benefit plan documents. For example, in an action involving a coverage question under an employer-sponsored health plan, the United States District Court for the District of Minnesota enforced a forum selection clause in a preferred provider organization group certificate of coverage that required disputes under the plan to be litigated in the State of New York when the insurer was headquartered in the State of New York, the employer had offices in the States of New York, Florida, and Kansas, the treatment at issue was provided in Minnesota, the employee lived in Kansas, and insurance billings were submitted to the insurer in Minnesota and New York. 358 Similarly, the United States District Court for the Central District of California upheld a forum selection clause in a long-term disability income plan that provided the federal district court in Monroe County, New York, was the sole venue for bringing an action relating to the plan when the employee was located in California. 359 The United States District Court for the Western District of Virginia enforced a forum selection clause in an insurance policy providing disability benefits that required actions regarding the policy to be brought in Cedar Rapids, Iowa, even though the plaintiff claimed the alleged breach occurred in Illinois. 360 The United States District Court for the District of Columbia determined a forum selection clause in a 401(k) pension plan was valid and enforceable. 361 Although not all courts enforce forum selection clauses in employee benefit plan documents, courts acknowledge that the general consensus is that such forum selection clauses are valid. 362

Following the decision of the Eighth Circuit in Schieffer, practitioners should consider incorporating a forum selection clause in a “plan” document that provides employee benefits to one employee. Under ERISA, an action may be brought in a federal district court in the district where a plan is administered, where a breach takes place, where a defendant may be found, or where a defendant resides. 363 If the plan is administered in a state located in the Eleventh, Fourth, or Seventh Circuits, the employer and employee could agree that an action arising out of or relating to the “plan” may only be brought in a

359. Laasko, 566 F. Supp. 2d at 1020, 1024.
federal district court located in such state.364 The “plan” could recite that the parties agree to the forum selection clause because they desire to establish uniform administration and interpretation of the “plan” that is consistent with the Fourth, Seventh, and Eleventh Circuit courts’ interpretation of ERISA that permits a one-person “plan” to be an ERISA plan.365 Although it does not appear a court has considered whether a forum selection clause is enforceable in a one-person “plan,” the inclusion of a valid forum selection clause that selects a district court in a federal circuit that recognizes one-person “plans” as ERISA plans may be one mechanism for employers and employees to help ensure that such plans are subject to ERISA.366

V. CONCLUSION

Congress enacted the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), to establish a comprehensive and uniform regulatory scheme for employee benefits.367 As part of this scheme, ERISA defines an “employee benefit plan.”368 The existence of a “plan,” as defined by ERISA, is important for a variety of reasons. For example, unless an exemption or limitation applies, ERISA imposes a number of requirements with respect to employee benefit plans, such as funding, reporting, and disclosure requirements.369 The existence of an ERISA plan is also a subject matter jurisdiction requirement.370

Following the decision of the United States Court of Appeals for the Eighth Circuit in Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer,371 plan sponsors and practitioners face a split in authority regarding whether an ERISA plan exists if the “plan” only covers, and

364. See Laasko, 566 F. Supp. 2d at 1023 (emphasizing importance of using the word “only” in a forum selection clause).
365. Smith I, 770 F. Supp. 2d at 812 (citation omitted); Laasko, 566 F. Supp. 2d at 1023 (quoting Bird, 926 F.2d 116 (citations omitted)).
369. See supra notes 17, 27, and accompanying text.
370. See, e.g., Bannister v. Sorensen, 103 F.3d 632, 636 (8th Cir. 1996) (stating “[a] determination that the involved plan is an ‘ERISA plan’ is a requirement for federal subject matter jurisdiction premised on ERISA, and if the evidence does not show that the plan is an ‘ERISA plan,’ the court must dismiss the case. Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254, 256 (8th Cir.1994). Furthermore, subject matter jurisdiction is a nonwaivable issue that we must consider on appeal, even if the parties have not presented the issue. Id. See also Jader v. Principal Mut. Life Ins. Co., 925 F.2d 1075, 1077 (8th Cir. 1991).”).
371. 648 F.3d 935 (8th Cir. 2011).
provides benefits to, one employee.\footnote{372} Although the United States Courts of Appeals for the Eleventh, Fourth, and Seventh Circuits determined an ERISA plan may cover only one employee (assuming the other ERISA requirements are satisfied), the Eighth Circuit in Schieffer reached the opposite conclusion.\footnote{373} This split in authority creates a variety of potential issues for plan sponsors, such as whether a "plan" that provides pension benefits to one employee is an ERISA plan under Eighth Circuit jurisprudence and whether a "top hat" plan may cover one employee and still be an ERISA plan.\footnote{374}

This Article identifies potential methods for addressing the uncertainties created by the split in authority following Schieffer.\footnote{375} When drafting "plan" documents that provide benefits to only one employee, practitioners should incorporate the factors the Eight Circuit examines to determine whether an ERISA plan has been established, as well as an ERISA claims procedure.\footnote{376} This "plan" should identify the intended benefits, beneficiaries, funding source, and procedures for receiving benefits.\footnote{377} The "plan" document should also establish an ongoing administrative scheme that satisfies applicable law.\footnote{378} To provide an ongoing administrative scheme, the "plan" should provide for several or ongoing benefit payments, the employer should undertake long-term obligations regarding benefit payments, benefit payments should be triggered by unique events, and the employer should engage in a case-by-case review of employees.\footnote{379} Practitioners should also consider incorporating a valid forum selection clause in the "plan" document.\footnote{380} Including these elements in a "plan" document may help address inconsistent ERISA federal common law among the Eleventh, Fourth, Seventh, and Eighth Circuits following the Schieffer decision.

\footnote{372} Schieffer III, 648 F.3d 935, 936, 939 (8th Cir. 2011) (subsequent history omitted); see supra notes 57-265 and accompanying text.
\footnote{373} See supra notes 57-265 and accompanying text.
\footnote{374} See supra notes 269-322 and accompanying text.
\footnote{375} See supra notes 325-66 and accompanying text. The United States Department of Labor could also consider amending the definition of "employee benefit plan" in 29 C.F.R. \S\ 2510.3-3 to clarify that a "plan" that provides employee benefits to one employee is an ERISA plan, assuming all other requirements for such a plan are satisfied.
\footnote{376} See supra notes 325-27 and accompanying text.
\footnote{377} See supra notes 320-27 and accompanying text.
\footnote{378} See supra notes 328-43 and accompanying text.
\footnote{379} See supra notes 327-43 and accompanying text.
\footnote{380} See supra notes 344-66 and accompanying text.