

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WALID JAMMAL AND DANA LARICHE, *on behalf of themselves and all others similarly situated*,

Plaintiffs

vs.

AMERICAN FAMILY INSURANCE GROUP, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY, AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN

Defendants

Case No. 1:13-cv-437

Judge

**CLASS ACTION COMPLAINT
WITH JURY DEMAND**

Now come Plaintiffs Jammal and LaRiche, through counsel and on behalf of themselves and all others similarly situated, for their complaint against the Defendants state and allege as follows:

SUMMARY OF THE ACTION

1. Congress enacted the Employee Retirement Income Security Act (“ERISA”) to provide basic protections for employees with respect to employee benefits plans offered by their employers. *See* 29 U.S.C. § 1001(a). Congress explicitly found that the protections in ERISA were necessary because many employees, despite years of employment, were losing their anticipated retirement benefits because their employers’ plans lacked vesting provisions. *Id.*

2. The Defendants in this case (collectively referred to as “American Family”) have engaged in a decades-long scheme to undermine ERISA’s protections, including its vesting

requirements, and deny or otherwise limit benefits the law requires. Plaintiffs bring this Class Action Complaint to eliminate American Family's illegal and abusive practices.

3. For decades, American Family has employed a sales force of thousands of captive insurance agents ("Agent-employees") in nineteen states across the country to sell the company's insurance products (including auto, home, life, umbrella, business, health, and farm and ranch insurance policies) and retirement products.

4. American Family promises its Agent-employees that it will treat them as "independent contractors," extolling the virtues of, and the rewards that come with, business ownership.

5. Unfortunately, American Family never honors its promise of independence because it retains a right to exercise control over the manner and means by which the Agent-employees conduct every material aspect of their business.

6. For example, American Family owns the Agent-employees' books of business, requires that its Agent-employees exclusively sell American Family insurance products, and exclusively controls office hours and locations, the hiring and firing of office staff, and the conduct of the Agent-employees and staff in the office. American Family also controls signage, permitted advertising, compensation, production requirements, policy holder information, and provides and closely monitors the Agent-employees' and staffs' use of computer hardware and software.

7. Regardless of how American Family characterizes its relationship with its Agent-employees, it hires them as at-will employees for an unlimited duration, giving both American Family and its Agent-employees the ability to terminate the employment relationship at any time.

8. While calling its Agent-employees “independent contractors,” American Family provides some employee benefits to its agents, called “Termination Benefits” (“the Termination Benefits Plan” or “the Plan”).¹ The Termination Benefits Plan provides death and pension benefits to Agent-employees using a formula based on the Agent-employee’s years of service and the number of in-force policies they sold over their years of service with American Family. The Termination Benefits Plan also provides lifetime retirement benefits in the form of an annuity to Agent-employees who retire from the company at or over age 60. *Compare* 29 U.S.C. § 1002(2)(A) (defining “employee pension benefit plan” and “pension plan” under ERISA to mean any plan, fund, or program established or maintained by an employer that by its express terms or as a result of surrounding circumstances “provides retirement income to employees.”)

9. Moreover, if an Agent-employee dies during his or her employment with American Family prior to becoming eligible under the terms of the Plan, the Termination Benefits Plan also provides a \$50,000 benefit paid to the Agent-employee’s beneficiary. *See* 29 U.S.C. 1002(1) (defining “employee welfare benefit plan” and “welfare plan” under ERISA to “mean any plan, fund, or program which was heretofore or is hereafter 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 ... benefits in the event of ... death...”).

10. Nonetheless, American Family refuses to acknowledge that the Termination Benefits Plan is an employee benefit plan subject to ERISA’s employee protections, including mandatory accrual and vesting.

¹ Prior to 1995, American Family referred to Termination Benefits as “Extended Earnings,” which were, in form and substance, substantially identical to the Termination Benefits described in this complaint.

11. In fact, American Family often terminates the Agent-employees prior to their Termination Benefits vesting (pursuant to American Family's rules, not ERISA vesting dates), or terminates its older Agent-employees prior to their eligibility for lifetime retirement benefits, thereby denying the Agent-employees benefits to which they had non-forfeitable rights under ERISA. Indeed, American Family has a common and systematic practice, in place for years, of terminating its Agent-employees just before they reach eligibility under the terms of the American Family Agreement for Termination Benefits or for lifetime benefits.

12. Also, as a result of improper misclassification and characterization of its Agent-employees as "independent contractors," the company fails to provide its Agent-employees the same retirement and health and other benefits it provides to all its other employees pursuant several employee benefit pension and welfare plans established under ERISA (collectively, the "American Family Plans").

13. By misclassifying its Agent-employee sales force as "independent contractors" rather than employees, American Family has not only unjustly enriched itself (by avoiding the business costs of extending ERISA-protected benefits to its Agent-employees and their staff), but has also evaded and continues to evade compliance with state and federal laws (including ERISA) governing employee benefit plans.

14. This lawsuit seeks:

- (A) a declaration that Plaintiffs and Class Members are legal "employees" for all purposes, including, but not limited to ERISA;
- (B) a declaration that the Termination Benefits Plan is an employee benefit plan subject to ERISA;
- (C) a declaration that the Termination Benefits Plan fails to comply with ERISA's vesting and benefit accrual provisions;

- (D) an order retroactively reforming the Termination Benefits Plan to comply with ERISA's vesting and benefit accrual provisions and requiring Defendants to pay restitution or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the Termination Benefits Plan;
- (E) a declaration that because Defendants excluded Plaintiffs and the Class from participating in the American Family Plans, the American Family Plans are not in compliance with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements;
- (F) an order reforming the American Family Plans to include Plaintiffs and the Class and to comply with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements, and requiring Defendants to pay restitution or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the American Family Plans;
- (G) an order awarding restitution compensating for the reasonable value of the benefits Plaintiffs and the Class provided to Defendants to prevent Defendants' unjust enrichment;
- (H) an injunction barring Defendants from continuing to misclassify the Class as "independent contractors" and to classify them as "employees."

JURISDICTION AND VENUE

15. This Court has subject matter jurisdiction over the ERISA claims under 29 U.S.C. § 1132(e)(1) and over all other non-ERISA claims asserted in this action under 28 U.S.C. § 1367. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) as the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and at least one member of the class is a citizen of a state different from the American Family Defendants.

16. This Court is a proper venue under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims asserted in this complaint occurred in this judicial district; to wit, the benefits owed under ERISA were due and owing to Plaintiffs in this judicial district, which is where the Plaintiffs were employed. This Court is also a proper venue under 29 U.S.C. § 1332(e)(2) because the breaches of the Plan took place in this judicial district; to wit, the Defendants failed to properly classify the Plaintiffs in this district as

“employees” and refused to extend to them ERISA benefits despite their employment in this district.

PARTIES

17. Plaintiff Walid Jammal was, during the relevant period, an Agent-employee for American Family who resides in North Olmsted, Ohio.

18. Mr. Jammal was employed by American Family as an Agent-employee in 2003 and was terminated from the company in or about December 2011.

19. Plaintiff Dana LaRiche was, during the relevant period, an Agent-employee for American Family who resides in Geneva, Ohio.

20. Ms. LaRiche was employed by American Family as an Agent-employee in October 2006 and was terminated from the company in or about October 2009.

21. Defendant American Family Insurance Company (“AFI”) is an Ohio corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

22. Defendant American Family Mutual Insurance Company (“AFMIC”) is a Wisconsin corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

23. Defendant American Standard Insurance Company of Wisconsin (“ASICW”) is a Wisconsin corporation with its principal place of business located at 6000 American Parkway, Madison, Wisconsin 53783.

24. Defendants AFI, AFMIC, and ASICW are referred to collectively as “American Family” throughout this complaint, unless specifically referred to by name.

25. “AFI,” “AFMIC,” “AICS,” and “American Family,” as used throughout this complaint, are specifically defined to include all successor, predecessor, and subsidiary entities to which these allegations pertain.

26. At all relevant times, American Family was engaged in selling insurance in the United States, including in the state of Ohio.

27. At all relevant times, Defendant AFMIC served as the sponsor, within the meaning of ERISA, 29 U.S.C. § 1002(16), and administrator of the “American Family Plans”).

American Family Treats Its “Agents” as “Employees” and Not “Independent Contractors”

28. American Family employs thousands of Agent-employees to exclusively sell American Family insurance products. Until recently, American Family only sold its insurance products through its Agent-employees (*i.e.* it did not sell directly to customers).

29. Each American Family Agent-employee must sign the American Family Agent Agreement (the “Agreement”) as a mandatory condition of employment. A copy of the Agreement for Plaintiff Jammal is attached hereto as **Exhibit A**. A copy of the Agreement for Plaintiff LaRiche is attached hereto as **Exhibit B**.

30. The terms of the Agreement between each member of the Class and American Family are the same in all material respects, and the Agreements for Plaintiffs Jammal and LaRiche are representative of the Agreements between American Family and each member of the Class.

31. The Agreement contains statements purporting to classify Plaintiffs and Class Members as independent contractors. For example, Section 6 of the Agreement says, “[i]t is the intent of the parties hereto that you are not an employee of the Company for any purposes, but are an independent contractor for all purposes, including federal taxation with full control of

your activities and the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing policyholders and otherwise carrying out the provisions of this agreement. As an independent contractor you are responsible for your self-employment taxes and are not eligible for various employee benefits such as Workers and Unemployment.” Ex. A at 4.

32. The Agreement is, and at all relevant times has been, a contract of adhesion, drafted exclusively by American Family, who gives the Agent-employees no opportunity to negotiate or change any terms and who requires the Agent-employees to sign the Agreement as presented by American Family as a condition of employment.

33. Moreover, not only is the Agreement a contract of adhesion, but American Family refuses to honor the Agreement to treat the agents as “independent contractors” and, instead, reserves to itself the right to control the manner and method of the Agent-employees’ business.

34. Indeed, unbeknownst to the Agent-employees at the time of signing, in addition to the Agreement, American Family has written and unwritten policies and procedures with which Agent-employees are required to comply as a condition of their employment.

35. These policies and procedures permit American Family to exercise almost total control over the Agent-employees’ business.

36. For example, American Family requires its Agent-employees, and their staff members, to adhere to a code of conduct and business ethics standards developed and drafted by American Family. *See* American Family Agent and Staff Code of Conduct and Business Ethics (“Code of Conduct”), attached as **Exhibit C**.

37. The Agreement does not disclose a “code of conduct” or otherwise indicate that there are American Family policies and procedures with which Agent-employees or their staff members must comply or risk termination.

38. When Agent-employees do not follow an American Family policy or procedure, whether disclosed or undisclosed, known or unknown, Agent-employees are subject to discipline by American Family, including termination of the Agreement and forfeiture of Termination Benefits. Indeed, American Family regularly resorts to these written and unwritten policies to avoid paying benefits due to Agent-employees.

39. Examples of how American Family reserves the right to exercise, and does exercise, control over the Agent-employees and every material aspect of their business are as follows:

- (A) *Exclusivity.* American Family insists that Agent-employees exclusively represent American Family; an Agent-employee cannot sell insurance for any other insurance company. Ex. A at Section 4(a). This is true even if the product the Agent-employee has an opportunity to sell is not offered by American Family. Ex. C at 8.
- (B) *Ownership of Agents’ Book of Business.* Agent-employees do not own their books of business. The Agent-employee is expected to solicit insurance business, pay for all of the expenses associated with solicitation, place the business with American Family, but yet has no ownership interest in that business asset. If American Family terminates the Agreement, or if the Agent-employee terminates the Agreement, American Family retains a right that it regularly exercises to “reassign” the book to different agents. Ex. A at Section 6(j)
- (C) *Required Code of Conduct and Code of Ethics.* American Family retains the right to terminate Agent-employees or the Agent-employees’ staff for violations of the Code of Conduct. Ex. C at 2. The Code of Conduct can be amended at any time by American Family without any input or consent of the Agent-employees or the Agent-employees’ staff who are bound by it.
- (D) *Control over hiring.*
 - (1) American Family controls who the Agent-employee can appoint or employ as a solicitor, broker or other licensed individual. Ex. A at Section

6(a)-(b). In other words, if an Agent-employee wants to hire a person licensed by the commissioner of insurance, American Family retains a right to bar the Agent-employee from hiring that person in their office. In January 2005, American Family broadened its control over an agent's ability to hire office staff, as it began to require that any office staff employed by its agents who had "any customer contact" become licensed by the state insurance department. *See* March 11, 2004 American Family Memorandum to Agents regarding Agency Staff Licensing Program Guidelines and Agency Staff Appointment Standards, attached as **Exhibit D**. That also meant that all staff employed by American Family's agents had to sign a contract with American Family called an "Agent Licensed Office Employee Contract." *Id.* Agent-employees who did not comply with these requirements were told they were placing their "license and their agency" at risk. *Id.*

- (2) American Family required its Agent-employees to follow American Family's "Agency Appointment Standards" when the Agent-employees selected and hired their office staff. *See* American Family Agency Staff Appointment Standards, attached as **Exhibit E**. Agents had to ensure that any applicants met American Family's Agency Appointment Standards ("the Standards") for that applicant to even remain "eligible to continue through the [application] process." *Id.* After ensuring compliance with the Standards, office staff hiring decisions had to be approved by not only the agent, but by an American Family District Manager ("DM"), Sales Manager ("DX"), and Sales Vice-President ("SVP"), who retained a veto power over any Agency-employee hiring decision. *Id.* The Standards set forth restrictions on office staff in many areas such as education levels, felony convictions, credit history, and driving violations. *Id.* American Family requires its agents to strictly adhere to the Standards.
- (E) *Control over Firing.* American Family also retains the authority to fire an Agent-employee's office staff. Indeed, American Family requires the Agent-employee's office staff to sign an agreement that expressly grants American Family the right to terminate an Agent-employee's office staff "at any time and for any reason." *See* American Family Agreement to License Agent's Office Employee, attached as **Exhibit F**.
- (F) *American Family Dictates Location of Agent's Business.* When an Agent-employee opens an American Family office, the exact location of that office must be approved by American Family and American Family has a right to veto the office location chosen by the Agent-employee. Furthermore, an Agent-employee may not change the location of his or her business without American Family's approval.
- (G) *Required Office Hours.* American Family requires Agent-employees to staff the office from 8:30 or 9:00 in the morning until 5:00 p.m., five days a week, without

exception. If the Agent-employee fails to strictly adhere to this required policy, American Family may reprimand, take adverse employment actions and/or terminate the Agent-employee.

- (H) *Control over compensation rates or method.* American Family retains the right to change the Agent-employee's compensation without prior notice or consent. Ex. A at Section 6(d).
- (I) *Required computer hardware and software.* American Family requires that the Agent-employees use computers provided by American Family, which run the American Family software. Among other things, this policy allows American Family to control all policyholder information, because Agent-employees must maintain the information using this software. It also permits American Family to monitor the Agent-employees' and their staffs' computer usage. American Family provides and installs the hardware and software.
- (J) *Monitoring of all Agent-employee activity.* American Family has complete and absolute control of all information that relates to policyholders and can and does monitor Agent-employees' activities with respect to policyholder information. In fact, American Family retains the ability to monitor every type of report relating to policyholders which Agent-employees view, copy or import to another system. American Family also has the ability to monitor, and does monitor, the email correspondence of its Agent-employees and their office staff.
- (K) *Monitoring and termination for "undesirable performance."* American Family has the right to monitor Agent-employees' daily work and terminate agent for "undesirable performance." Ex. A at Section 6(h).
- (L) *Non-Competes.* American Family requires a one year non-compete in the event the Agreement is terminated by either American Family or the Agent-employee. The non-compete precludes the Agent-employee from trying to solicit any of his/her current customers, no matter how long the Agent-employees have provided services to such customers. Ex. A at Section 6(k). If American Family unilaterally determines that an Agent-employee has violated the non-compete or any other provision of the Agreement, then American Family will deem the Agent-employee to have forfeited all rights to benefits owed under the Termination Benefits Plan regardless of whether those benefits vested under the terms of the Agreement (not to mention applicable law). Ex. A at Section 6(u).
- (M) *Production Requirements and Close Monitoring of Production.* American Family sets production requirements and closely monitors whether Agent-employees are meeting these requirements. See Ex. A at Section 4(h). On information and belief, American Family sets these production requirements on a per Agent-employee basis.

- (N) *Mandatory Document Retention Policy.* American Family has a document retention policy to which Agent-employees are required to adhere. Ex. C at 5.
- (O) *Monitoring of Computer Use.* American Family monitors its Agent-employees' and their staffs' use of electronic resources, including what information is stored in, sent through, or deleted from the American Family provided and installed system. Ex. C at 5. In fact, on information and belief, American Family recently attempted to block its Agent-employees' access to the website for the United States Court of Appeals for the Eighth Circuit so that the Agent-employees could not view an opinion holding that Termination Benefits owed to a former American Family Agent-employee constituted wages under the Iowa Wage Payment Collection Law. *See Am. Family Mut. Ins. Co. v. Hollander*, 8th Cir. No. 11-2719, 2013 WL 375704 (Feb. 1, 2013).
- (P) *Email Policy.* American Family bars Agent-employees and their staffs from accessing personal email accounts using equipment issued by company. Ex. C at 6.
- (Q) *Regulates In-Office Behavior.* American Family regulates the conduct of Agent-employees and their staff in offices. For example, off-color jokes are prohibited and are grounds for American Family to terminate the Agent-employee or staff member. Ex. C at 7.
- (R) *Advertising Approval.* American Family controls all Agent-employee advertising and must approve all advertising. Ex. C at 9.
- (S) *Required Training.* American Family requires all Agent-employees and their staff to complete online training on the Code of Conduct. Ex. C at 11.
- (T) *Mandatory District Meetings.* Agent-employees are required to attend district meetings, and failure to comply with this requirement triggers the "undesirable performance" flag and can be a basis for termination.

40. At all times relevant, American Family asserted control over virtually all aspects of Plaintiffs' and Class members' businesses.

41. At all times relevant, American Family and its Agent-employees enjoyed a continuing employment relationship unlimited in time period where both American Family and its Agent-employees had the right to terminate the employment relationship. Ex. A at Section 6(h).

42. At all times relevant, American Family provided employee benefits to its Agent-employees in the form of its Termination Benefits Plan.

43. At all times relevant, American Family Agent-employees were integrated into American Family's business of selling insurance.

44. Nonetheless, American Family misclassified and continues to misclassify Agent-employees as independent contractors.

45. As a result of American Family's misclassification of all Agent-employees as independent contractors, Plaintiffs Jammal and LaRiche and the Class members were deprived of the rights and protections guaranteed by state and federal law to employees, including their rights under ERISA.

The Termination Benefits Plan Is an ERISA Plan

46. American Family promises its Agent-employees that they will qualify for a benefit plan, *viz.*, the Termination Benefits Plan, that initially vests after 10 years of employment (or longer if an agent participates in American Family's Advance Compensation Program)² and that provides Agent-employees with benefits after their relationships with American Family end.

47. The Termination Benefit Plan is designed to provide benefits to employees whose relationship with American Family ends for any reason, including retirement. Indeed, the Termination Benefits Plan is the mechanism by which American Family provides lifetime benefits to its Agent-employees who retire from the company at or after the age of 60 in the form of an annuity.

² In determining years of service for eligibility for Termination Benefits, American Family excludes the time period an Agent-employee participates in American Family's Advance Compensation Program. As a result, many Agent-employees are deemed ineligible for Termination Benefits even if they have 10 years of employment, as set forth in the Agreement.

48. The Termination Benefits Plan provides benefits to Agent-employees based on age, years of service, and the size of the in-force books of business the Agent-employees created during their career at American Family.

49. In the event of a former Agent-employee's death, his/her Termination Benefits are paid to that Agent-employee's designated beneficiary or legal representative. *See, e.g.,* Ex. A at Sections 6(s) and (t).

50. Moreover, if an Agent-employee dies before eligibility for Termination Benefits, American Family will pay the Agent-employee's legal representative a lump sum death benefit of \$50,000. Ex. A at Section 6(v).

51. The Termination Benefits American Family offers increase commensurate with the Agent-employees' years of employment with American Family and reward the company's long-time agents with greater benefits when they retire or leave the company for any reason.

52. At all times relevant, American Family promised to pay Termination Benefits to its Agent-employees when the Agent-employees entered into the Agreement they signed to become employed by American Family. For example, the Agreement in place during the 1990s set the Termination Benefits for renewal fees on policies sold for American Family Mutual Insurance Company ("Mutual") as follows:

The percentage of such Mutual renewal service fees payable under this section shall be based on the total years in the period set forth in Sec. 6.l. 2) as shown in the following table:

Total Years	Percentage
At least 10 years but less than 11 years	50%
At least 11 years but less than 12 years	70%
At least 12 years but less than 13 years	90%
At least 13 years but less than 14 years	110%
At least 14 years but less than 15 years	130%
15 years or more	150%

53. Termination Benefits for renewal fees on policies sold for American Family Standard Insurance Company of Wisconsin (“Standard”) were:

The percentage of such Standard renewal service fees payable under this section shall be based on the total years in the period set forth in Sec. 6.I. 2) as shown in the following table:

Total Years	Percentage
At least 10 years but less than 11 years	25%
At least 11 years but less than 12 years	40%
At least 12 years but less than 13 years	55%
At least 13 years but less than 14 years	70%
At least 14 years but less than 15 years	85%
15 years or more	100%

54. Termination Benefits due on policies sold for American Family Life Insurance Company (“Life”) were:

- t. When this agreement is terminated, Life will pay any remaining compensation applicable to the first policy year of any policy written by you. In addition, if you have represented the Company for at least 24 consecutive months immediately preceding termination, you will be paid extended earnings in the same manner and at the same time as otherwise would have been payable in compensation had this agreement remained in effect according to the following schedule:

In-force Paid for Premium (except annuity premiums) Computed on an Annualized Basis	Number of Years Payable
\$ 5,000 to \$24,999	3
\$25,000 to \$49,999	7
\$50,000 or more	11

If Mutual and Standard extended earnings are paid for your lifetime and you qualify for 11 years of Life extended earnings, you shall be paid Life extended earnings for your lifetime.

In the event you die while receiving extended earnings, your legal representative shall be entitled to those payments which you would have received had you not died but in no event shall such payments continue beyond a period of 11 years following termination of this agreement.

55. The Agreement was later amended to provide to provide even greater Termination Benefits to Agent-employees who had long careers with American Family:

**AMENDMENT TO AMERICAN FAMILY AGENT AGREEMENT
AMERICAN FAMILY MUTUAL - TERMINATION BENEFITS**

This amendment is an agreement between the Company and you and becomes a part of the American Family Agent Agreement (Edition: January 1993) or the Corporate Agent Agreement (Edition: April 1995).

It is agreed between the parties of the American Family Agent Agreement that:

The table in Section 6. m. (paragraph 2) of the Agent Agreement (Edition: January 1993) or the Corporate Agent Agreement (Edition: April 1995) is amended as follows. All other terms and conditions of the American Family Agent Agreement remain unchanged.

Total Years	Percentage	Total Years	Percentage
At least 10 years but less than 11 years	50%	At least 20 years but less than 21 years	150%
At least 11 years but less than 12 years	60%	At least 21 years but less than 22 years	155%
At least 12 years but less than 13 years	70%	At least 22 years but less than 23 years	160%
At least 13 years but less than 14 years	80%	At least 23 years but less than 24 years	165%
At least 14 years but less than 15 years	90%	At least 24 years but less than 25 years	170%
At least 15 years but less than 16 years	100%	At least 25 years but less than 26 years	175%
At least 16 years but less than 17 years	110%	At least 26 years but less than 27 years	180%
At least 17 years but less than 18 years	120%	At least 27 years but less than 28 years	185%
At least 18 years but less than 19 years	130%	At least 28 years but less than 29 years	190%
At least 19 years but less than 20 years	140%	At least 29 years but less than 30 years	195%
		30 years or more	200%

56. Not only does American Family increase Termination Benefits with years of service, but the Termination Benefit Plan provides an annuity lifetime retirement benefit for Agent-employees who retire or end their employment with American Family at or after the age of 65:

- q. If at the time of termination you are 65 years of age or older, extended earnings shall be paid in the following monthly installments:

Months After Termination	Applicable Percentage of Sec. 6.o. Monthly Installment
1 through 60	66.7%
61 through 120	33.3%
121 and thereafter for your life	33.3%

57. The Termination Benefit Plan also provides an annuity lifetime retirement benefit for Agent-employees who retire or otherwise terminate their employment with American Family when they are between 60 and 65 years old:

- p. If at the time of termination you are between ages 60 and 65, you shall be entitled to payments set forth in Sec. 6.q. except that monthly installments payable 121 months after termination and thereafter shall be the following percentage of the payment that you would have received under Sec. 6.q. 121 months after termination and thereafter if you had terminated at age 65.

Age at Last Birthday Prior to Termination	Applicable Percentage of Monthly Installments
64	96.1%
63	92.4%
62	88.9%
61	85.7%
60	82.7%

58. The Termination Benefits Plan provides real and meaningful benefits to Agent-employees who spend their careers working for American Family.

59. Using real world examples, a 58-year-old Agent-employee who was employed by American Family for 32 years earned benefits that American Family was obligated to pay over a period of years in one of the following ways: (1) an initial payment of \$10,297.86 and 35 subsequent monthly payments of \$10,298.04; (2) an initial payment of \$7,723.35 and 47 subsequent monthly payments of \$7,723.53; or (3) an initial payment of \$6,178.88 and 59 subsequent monthly payments of \$6,178.82. *See Exhibit G.* American Family calculated the lump sum equivalent of these benefits at \$370,729.26. *Id.*

60. Another 58-year-old Agent-employee who was employed by American Family for 26 years earned benefits that American Family was obligated to pay over a period of 60 months as follows: an initial payment of \$5,632.72 and 59 subsequent monthly payments of \$5,632.60. *See Exhibit H.* American Family calculated the lump sum equivalent of these benefits at \$337,956.12. *Id.*

61. An Agent-employee who was employed by American Family for 10 years earned benefits of \$819 per month for 60 months. *See Exhibit I.* American Family calculated the lump sum equivalent of these benefits at \$49,153.43. *Id.*

62. By its terms, and regardless of American Family's misclassification of its Agent-employees as independent contractors, the American Family Termination Benefits Plan is an employee benefit plan as defined by ERISA. *See* 29 U.S.C. § 1002(2)(A) (defining "employee pension benefit plan" and "pension plan" under ERISA to mean any plan, fund, or program established or maintained by an employer that by its express terms or as a result of surrounding circumstances "provides retirement income to employees").

63. In fact, had Plaintiffs died prior to their termination by American Family, their legal representatives would have received a lump sum benefit of \$50,000 under the Termination Benefit Plan, thereby demonstrating that the Plan is an employee benefit plan under ERISA. *See* 29 U.S.C. 1002(1) (defining "employee welfare benefit plan" and "welfare plan" under ERISA to "mean any plan, fund, or program which was heretofore or is hereafter 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 ... benefits in the event of ... death...").

64. Yet by its misclassification, American Family avoids the mandatory requirements of ERISA and has been allowed to create and maintain a Plan with benefits that do not accrue or vest in compliance with ERISA. Indeed, benefits under the Termination Benefits Plan at a minimum do not vest until 10 years of employment, and often 12 or 13 years based on an Agent-employee's participation in the Advanced Compensation Program, instead of vesting at 3 or 5 years as ERISA requires. 29 U.S.C. § 1053.

65. American Family has created a benefit plan under which it can avoid paying its Agent-employees benefits altogether in direct contravention of ERISA's employee protections.

66. Had American Family complied with ERISA, Plaintiffs would have been provided vested, non-forfeitable rights to benefits under the Termination Benefits Plan.

67. Upon information and belief, American Family routinely and systemically employs Agent-employees, uses them for years to build a book of business that belongs to American Family, and then terminates the Agent-employees either before their eligibility for Termination Benefits or for lifetime benefits under the Termination Benefits Plan.

Agent-Employees Are Excluded from All Other American Family Benefits Plans

68. American Family also provides benefits to current employees through the American Family Plans. Specifically, American Family provides a retirement plan, a 401(k) plan, a group health care plan, a group dental plan, a group life plan, and a long term disability plan to current employees, all of which are employee benefit plans subject to ERISA. *See Exhibits J to N.*

69. All of Defendants' employees are eligible to participate in American Family's 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

70. By their mischaracterization of Plaintiffs and Class members as "independent contractors," however, Defendants have systematically excluded Plaintiffs and Class members from the definition of an "employee" covered by the American Family retirement plan or eligible to participate in the American Family 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan, thereby denying Plaintiff and Class members benefits they are entitled to receive.

71. American Family's conduct is exactly the type of conduct Congress intended to remedy by enacting ERISA and the Agent-employees are the individuals entitled to ERISA's protections.

CLASS ALLEGATIONS

72. Plaintiffs bring this action as an individual case and as a class action pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The Class is defined as *all signatories to the American Family Agent Agreement as "the Agent" during the Class Period*, as further defined and limited below (the "Class").

73. The "Class Period" is the time period beginning on the date established by the Court's determination of any applicable statute of limitations, after consideration of any tolling and accrual issues, and ending on the date of entry of judgment.

74. Subject to additional information obtained through further investigation and discovery, the Class definition may be expanded or narrowed by amendment or amended complaint. Specifically excluded from the Class are Defendants and their officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint-venturers, or entities controlled by Defendants, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendants and/or their officers and/or directors, or any of them, the Judge assigned to this action, and any member of the Judge's immediate family.

75. **Numerosity.** The Class is so numerous that joinder of all members in this action is impracticable. Plaintiffs are informed and believe, and on that basis allege, that the proposed Class contains hundreds, if not thousands, of similarly situated current and former American Family Agent-employees scattered throughout at least nineteen states. Upon information and

belief, these Agent-employees were parties to substantially similar, if not identical, American Family Agent Agreements and were also subject to the same common scheme depriving them of employee benefits, including, but not limited to Termination Benefits.

76. Existence and Predominance of Common Questions of Law and Fact.

Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions, each of which yield a common answer, include, but are not limited to, the following:

- (A) Whether Plaintiffs and Class Members have the requisite independence and discretion of independent contractors;
- (B) Whether, based on the conduct of Defendants, Plaintiffs and the Class are, as a matter of law, employees;
- (C) Whether Plaintiffs and the Class are entitled to American Family's benefits plans because they are, in fact, employees;
- (D) Whether Plaintiffs and the Class are entitled to reimbursement for benefits they should have been receiving as employees during their terms of employment, but which they were improperly denied based on Defendants' misclassification of the Class as independent contractors and not employees;
- (E) Whether the Termination Benefits Plan is a qualified employee pension benefit plan under ERISA, 29 U.S.C. §1002(1) & (2)(A);
- (F) Whether benefits owed under the Termination Benefits Plan have been improperly denied based on the failure of American Family to comply with ERISA's vesting and accrual provisions;
- (G) Whether Plaintiffs and Class Members are entitled to reformation of the Termination Benefits Plan under ERISA § 502(a)(3) and corresponding recalculation and restitution of benefits improperly withheld by American Family, in order to comply with ERISA's requirements;
- (H) Whether the terms of the Termination Benefits Plan complies with the applicable laws and regulations, including but not limited to laws and regulations that prevent impermissible backloading plan benefits. *See* 29 U.S.C § 1054 (setting forth rules to prevent impermissible "backloading");

- (I) Whether Plaintiffs and Class members are entitled to benefits under the various benefit plans American Family extends to all other employees;
- (J) Whether, if Plaintiffs and the Class are “employees,” that these employees represent a significant percentage of the total workforce such that American Family would be required to include them within any employee benefit plan subject to ERISA and offered to all other employees;
- (K) Whether the actions of American Family are applicable to the Class as a whole, entitling Class Members to injunctive relief;
- (L) Whether Plaintiffs and Class Members are entitled to reformation of American Family’s various benefits plans under ERISA § 502(a)(3) and corresponding recalculation and restitution of benefits improperly withheld by American Family, in order to comply with ERISA’s requirements.

77. **Typicality.** Plaintiffs’ claims are typical of the claims of the Class members in that Plaintiffs and each member of the Class all are or have been “agents” pursuant to an American Family Agent Agreement, and they have suffered and will continue to suffer financial hardship and other damages as a result of Defendants’ conduct.

78. **Adequacy of Representation.** Plaintiffs will fairly and adequately protect the interests of the Class members. Plaintiffs have retained counsel experienced in complex class action litigation, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests to those of the Class.

79. **Superiority.** A class action is superior to all other available means for the fair and efficient adjudication of this controversy. Given the investments that Class members made to become American Family Agent-employees, it would now be virtually impossible for the members of the Class, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not sustain it. Individualized claims brought by members of the Class would create the danger of inconsistent or contradictory judgments arising from the same set of facts.

Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

FIRST CAUSE OF ACTION

DECLARATORY RELIEF UNDER ERISA

80. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

81. Plaintiffs, for themselves and on behalf of all Class members, seek a declaration pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and 28 U.S.C. §§ 2201 and 2202, of their rights under federal law and Defendants' Agreements and plans and the rights and liabilities of the parties herein. Specifically, Plaintiffs, for themselves and on behalf of all Class members, seek a declaration:

- (A) That they are "employees";
- (B) That Defendants' Termination Benefits Plan is a "plan" under ERISA subject to, among other things, ERISA's vesting and benefit accrual requirements;
- (C) That Plaintiffs and Class members are "employees" eligible for benefits under the plan or plans Defendants offer to other employees;
- (D) That certain Plan provisions violate ERISA; and
- (E) That Plaintiffs and the Class are entitled to reformation of the contracts and restitution of benefits improperly withheld by American Family, in order to comply with ERISA's requirements.

82. In conformity with 29 U.S.C. § 1132 (h), Plaintiffs are contemporaneously serving this complaint, by certified mail, on the secretaries of Labor and Treasury.

SECOND CAUSE OF ACTION

INJUNCTIVE RELIEF

83. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

84. American Family has been withholding benefits properly due to its Agent-employees for decades.

85. That practice continues today and has damaged, and is currently damaging, Plaintiffs and Class members.

86. Plaintiffs and Class members therefore request that this Court issue an injunction prohibiting American Family from continuing to misclassify its Agent-employees as independent contractors; prohibiting American Family from continuing to withhold employee benefits from its Agent-employees; prohibiting American Family from implementing benefits plans which do not comply with ERISA; ordering American Family to comply with ERISA requirements governing the company's Termination Benefit Plan; and ordering American Family to recalculate and pay benefits under the proper calculation of benefits as provided by ERISA.

THIRD CAUSE OF ACTION

**CLAIM FOR BENEFITS UNDER ERISA § 503(a)(3)
REFORMATION OF TERMINATION BENEFITS PLAN
TO COMPLY WITH VESTING PROVISIONS, AND RESTITUTION**

87. Plaintiffs restate and re-allege the foregoing paragraphs as if fully set forth in this cause of action.

88. ERISA Section 502(a)(3) empowers a plan participant or beneficiary to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132(a)(3).

89. ERISA defines an “employee pension benefit plan” and “pension plan” as “any plan, fund, or program which was heretofore or is hereafter 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.” 29 U.S.C. §1002(2)(A).

90. The Termination Benefits Plan that American Family offered to all agents in their Agreement meets the definition of an “employee pension benefit plan” under ERISA.

91. Beginning in 2002, ERISA plan benefits vest either: 100% after at least five years of service; or 20% after three years of service, and 20% each year thereafter, fully vesting after seven years. 29 U.S.C. § 1053. In either case, ERISA plan benefits vest and are non-forfeitable prior to the ten years or more years set forth by American Family in the Termination Benefits Plan.

92. Defendants’ refusal to recognize the benefits as vested and non-forfeitable for Plaintiffs and those Class members whose Agreements were terminated prior to ten years or more of service, and the Defendants’ refusal to follow ERISA’s accrual and vesting requirements, were unlawful.

93. Defendants’ refusal to pay vested and non-forfeitable Termination Benefits to those Class members Defendants’ deemed to be in breach of the Agent Agreement after termination was also a violation of ERISA.

94. The Plaintiffs and Class members are entitled to equitable relief under ERISA § 502(a)(3), including restitution for all benefits due and payable during the applicable class period and retroactive reformation of the Termination Benefits Plan to bring it into compliance with 29 U.S.C. § 1053, together with a corresponding recalculation of benefits, thereby placing Plaintiffs and the Class in the same financial position in which they would have been be if the Defendants had complied with the vesting provisions of ERISA and preventing the Defendants' unjust enrichment.

95. Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

EQUITABLE RELIEF UNDER ERISA § 502(a)(3) REFORMATION OF TERMINATION BENEFITS PLAN TO COMPLY WITH ANTI-BACKLOADING PROVISIONS, AND RESTITUTION

96. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

97. ERISA Section 502(a)(3) empowers a plan participant or beneficiary to bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan” 29 U.S.C. § 1132(a)(3).

98. The Termination Benefits Plan that American Family offered to all agents in their Agreement meets the definition of an “employee pension benefit plan” under ERISA.

99. ERISA requires an employee benefit plan to satisfy at least one of three rules designed to prevent backloading of benefit accrual rates, which occurs when a plan awards

benefits to employees in later years of service at a rate disproportionately higher than the rate for employees in earlier years of service. 29 U.S.C. § 1054. The three rules are the 3% rule, the fractional rule, and the 133 1/3% rule. *Id.*

100. The Termination Benefit Plan accrues 0% for 10 years, 50% in year 11, 10% per year for years 11-20, and 5% per year for year 20 onward.

101. Accordingly, the Termination Benefit Plan fails to satisfy any of the three rules designed to prevent anti-backloading of benefit accrual rates and violates 29 U.S.C. § 1054.

102. Defendants' refusal to implement benefit accrual provision in compliance with ERISA was unlawful.

103. The Plaintiffs and Class members are entitled to equitable relief under ERISA § 502(a)(3), including restitution for any and all benefits due and payable during the applicable class period and retroactive reformation of the Termination Benefits Plan to bring it into compliance with 29 U.S.C. § 1054, as well as a corresponding recalculation of benefits, thereby placing Plaintiffs and the Class in the same financial position in which they would have been if Defendants had complied with the accrual provisions of ERISA and preventing the Defendants' unjust enrichment.

104. Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

OTHER RELIEF UNDER ERISA § 503(a)(3) REFORMATION OF DEFENDANTS' BENEFITS PLANS OFFERED TO OTHER EMPLOYEES, AND RESTITUTION

105. Plaintiffs restate and re-allege the above paragraphs as if fully set forth in this cause of action.

106. ERISA Section 502(a)(3) empowers a plan participant or beneficiary to bring a civil action “(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan” 29 U.S.C. § 1132(a)(3).

107. The Defendants provide a retirement plan, a 401(k) plan, a group health care plan, a group dental plan, and group life plan, and a long term disability plan to current employees, all of which are employee benefit plans subject to ERISA. See Exs. J to N.

108. The sponsor for each of the plans listed in the previous paragraph is Defendant AFMIC.

109. American Family’s retirement plan covers substantially all of the Defendants’ employees who have attained age 21 and completed one year of service.

110. All of Defendants’ employees are eligible to participate in American Family’s 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

111. As employee benefit plans subject to ERISA, the American Family retirement plan, 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan must comply with 26 U.S.C. § 410(b), including the minimum coverage requirements. *See also* 29 U.S.C. § 1202(c) (explicitly incorporating Treasury regulations promulgated under 26 U.S.C. §§ 410(a), 411 & 412).

112. A plan that fails to comply with the requirements of 26 U.S.C. § 410(b), including the minimum coverage requirements, must be brought into retroactive compliance. *See e.g.*, 26 C.F.R. § 1.410(b)-8(a)(1) (“A plan must satisfy section 410(b) for a plan year... [A]mendments

retroactively correcting a plan in accordance with § 1.401(a)(4)-11(g) are taken into account as plan provisions in effect as of the last day of the plan year.”).

113. Relying on their mischaracterization of Plaintiffs and Class members as “independent contractors,” however, Defendants have systematically excluded Plaintiffs and Class members from the definition of an “employee” covered by the American Family retirement plan or eligible to participate in the American Family 401(k) plan, group health care plan, group dental plan, group life plan, and long term disability plan.

114. Plaintiffs and Class members are “employees” under ERISA and the Class represents a significant percentage of Defendants’ workforce that Defendants had to cover under the terms of the American Family Plans to comply with 26 U.S.C. § 410(b), including the minimum coverage requirements.

115. By excluding Plaintiffs and Class members from the definition of an “employee” covered by the American Family Plans, Defendants have, upon information and belief, violated 26 U.S.C. § 410(b), including the minimum coverage requirements. Indeed, upon information and belief, the Class represents at least 25% of Defendants workforce.

116. Defendants’ refusal to implement American Family Plans in compliance with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements, was unlawful.

117. The Plaintiffs and Class members are entitled to equitable relief under ERISA § 502(a)(3), including restitution for all benefits due and payable during the applicable class period and retroactive reformation of the American Family Plans to bring them into compliance with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements, together with a corresponding recalculation of benefits, thereby placing Plaintiffs and the Class in the same

financial position in which they would have been if the Defendants had complied with the law and preventing the Defendants' unjust enrichment.

118. Defendants' conduct has caused actual harm to Plaintiffs and Class members in an amount to be proven at trial.

SIXTH CAUSE OF ACTION

UNJUST ENRICHMENT

119. Plaintiffs and Class Members restate and re-allege the above paragraphs as if fully set forth in this cause of action.

120. Each of the Defendants participated in the scheme described in this Complaint to avoid paying ERISA benefits to its Agents-employees in violation of ERISA and applicable state and federal laws by misclassifying its Agent-employees as independent contractors.

121. By avoiding paying benefits the law required them to pay, Defendants were unjustly enriched.

122. It is inequitable for Defendants to retain the money it has as a result of its schemes to avoid paying benefits the law required it to pay to its Agent-employees.

123. As a direct and proximate result of Defendants' wrongful, unlawful and/or inequitable conduct, Plaintiffs and Class Members are damaged in the amount by which Defendants were unjustly enriched. Under the circumstances, it would be inequitable and unjust to allow the Defendants to retain the benefits of their wrongful and/or unlawful conduct.

124. Plaintiffs ask that this Court order Defendants to pay restitution of the amounts by which Defendants were unjustly enriched and to disgorge the profits reaped by Defendants as a result of their schemes to avoid paying employee benefits to Plaintiffs and Class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs individually, and on behalf of all other similarly situated, demand judgment against the Defendants and relief from this Court as follows:

- A. An order certifying the Class as described with the named Plaintiffs as Class Representative(s) and appointing undersigned counsel as Lead Counsel for the Class;
- B. A declaration that Plaintiffs and Class Members are legal “employees,” for all purposes, including, but not limited to, ERISA;
- C. A declaration that the Termination Benefits Plan is an employee benefit plan subject to ERISA;
- D. A declaration that the Termination Benefits Plan fails to comply with ERISA’s vesting and benefit accrual provisions;
- E. An order retroactively reforming the Termination Benefits Plan to comply with ERISA’s vesting and benefit accrual provisions and requiring Defendants to pay restitution or otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the Termination Benefits Plan;
- F. A declaration that because Defendants excluded Plaintiffs and the Class from participating in the American Family Plans, the American Family Plans are not in compliance with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements;
- G. An order reforming the American Family Plans to include Plaintiffs and the Class and to comply with ERISA and 26 U.S.C. § 410(b), including the minimum coverage requirements, and requiring Defendants to pay restitution otherwise credit Plaintiffs and Class Members for all ERISA benefits to which they are retroactively entitled under the American Family Plans;
- H. An order of restitution for the reasonable value of the benefits Plaintiffs and the Class provided to Defendants and to prevent Defendants’ unjust enrichment;
- I. An injunction barring Defendants from continuing to misclassify the Class as “independent contractors” and to classify them as “employees”;
- J. An award of attorneys’ fees, plus the costs and expenses of this action;
- K. Pre- and post-judgment interest, as afforded by law;

L. All such other legal and equitable relief to which Plaintiffs and Class are entitled.

JURY DEMAND

Plaintiffs hereby demand a trial by jury for all issues so triable.

Respectfully submitted,

/s/Jack Landskroner

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