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No Good News: Retiree Benefits One Year after Health Reform

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I. INTRODUCTION

Employment-based retiree health benefits provide critical coverage for at least fifteen million individuals in the United States.[1] That coverage, however, has declined sharply over the past two decades[2] as employers have struggled to maintain health insurance for even their active employees.[3] With the passage of health reform legislation in March 2010,[4]

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1. Estimates of the number of retirees and dependents with employment-based health coverage vary considerably, especially with regard to individuals who are not yet Medicare-eligible. The Employee Benefit Research Institute (EBRI) estimated that approximately 13.1 million individuals age 65 or older in 2009 had employment-based supplemental medical coverage either as a retiree or dependent. EMPLOYEE BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS, Tbl. 36.1c (Feb. 2011), http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2036.pdf. The U.S. Census Bureau's Current Population Survey reported that 23,245,000 individuals age 55 to 64 in 2009 had employment-based health coverage, but did not distinguish whether that coverage came from active employment or retiree plans. U.S. CENSUS BUREAU, HEALTH INSURANCE HISTORICAL TABLES, HEALTH INSURANCE COVERAGE STATUS AND TYPE OF COVERAGE ALL PERSONS BY AGE AND SEX: 1999-2009, http://www.census.gov/hhes/www/hlthins/data/historical/index.html. The Agency for Healthcare Research and Quality ("AHRQ") reported that about 24,785,000 individuals age 55 to 64 in the first half of 2009 had some type of private coverage, but again without distinguishing between active employees and retirees. Agency for Healthcare Research & Quality, Health Insurance Coverage of the Civilian Noninstitutionalized Population: First Half of 2009, http://meps.ahrq.gov/mepsweb/data_stats/summ_tables/hc/hlth_insr/2009/t5_e09.pdf. EBRI estimated that 2.7 million early retirees in 2007 had employment-based health coverage from a prior employer either in their own names or as dependents, but could not distinguish between retiree-only plan coverage and continuation coverage under an active plan through COBRA. Paul Fronstin, *Health Insurance Coverage of Individuals Ages 55-64, 1994-2007*, NOTES, Aug. 2009, at 8, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_08-Aug09.InsCvgNr-Eldly1.pdf.

2. Only 28 percent of large employers (those with 200+ employees) offered any form of retiree health benefits in 2010 as compared to 66 percent in 1988. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS ANNUAL SURVEY 163 (2010), *available at* http://ehbs.kff.org/pdf/2010/8085.pdf (hereinafter EMPLOYER HEALTH BENEFITS ANNUAL SURVEY).

3. Although 69 percent of all employers offered some kind of health insurance to their employees in 2010, 30 percent reduced coverage or increased cost-sharing, and 23 percent

the prospects for employment-based health coverage overall looked more positive than in years past, but the same could not be said for retiree plans. Although health reform may eventually improve access to affordable health care for everyone, the near-term impact on retiree health benefits was likely negative.[5] A year later, the situation appeared potentially worse as short-term support for early retirees from health reform neared exhaustion, public sector collective bargaining rights and benefits fell under sustained attack, and budget woes triggered new Medicare reform proposals. This essay briefly discusses the movements of the year after health reform and their ramifications for employment-based health plans for both early and Medicare-eligible retirees.

II. EARLY RETIREE REINSURANCE PROGRAM

A. Overview

One of many provisions introduced by health reform to encourage desired employer behavior,[6] the Early Retiree Reinsurance Program ("ERRP") provides temporary support for existing retiree health plans for retirees aged 55 to 64 who are not Medicare-eligible.[7] Early retirees typically rely on employer-based retiree health coverage as their sole source of benefits. Obtaining individual insurance is difficult and expensive, if even available, for older persons who have left the workforce.[8] Moreover,

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increased employee-paid premiums. *Id.* at 39, 188.

4. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) [hereinafter ACA], and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010) [hereinafter Reconciliation Act], together constitute 2010's major health reform legislation. For convenience, references herein to "health reform" shall mean either or both of the ACA and the Reconciliation Act, as applicable.

5. *See, e.g.*, Susan E. Cancelosi, *The Bell Is Tolling: Retiree Health Benefits Post-Health Reform,* 19 ELDER L.J. 49 (2011); Richard L. Kaplan, *Analyzing the Impact of the New Health Care Reform Legislation on Older Americans,* 18 ELDER L.J. 213 (2011).

6. The ACA uses both carrots and sticks to encourage employers to maintain health insurance for employees. For example, it introduced a tax credit for employers with 25 or fewer employees and relatively low average annual wages if they cover at least 50 percent of employee healthcare premiums. ACA § 1421, as amended by ACA § 10105, adding Internal Revenue Code § 45R. Beginning in 2014, employers face a range of penalties intended to encourage them to maintain a certain level of health coverage. *See, e.g.*, ACA § 1513(a), as amended by ACA § 10106(e)-(f) and Reconciliation Act § 1003, adding new Internal Revenue Code § 4980H.

7. Office of the Press Secretary, White House, Fact Sheet: The Early Retiree Reinsurance Program (May 4, 2010), *available at* http://www.whitehouse.gov/the-press-office/fact-sheet-early-retiree-reinsurance-program [hereinafter ERRP Fact Sheet]. *See* Mark Merlis et al., *Early Retiree Insurance*, HEALTH AFF. HEALTH POL'Y BRIEF, Nov. 23, 2010, *available at* http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=32.

8. According to a White House Fact Sheet published shortly after health reform's passage, "[m]any Americans who retire without employer-sponsored insurance and before

unlike Medicare-eligible retirees, early retirees have historically had no access to government safety net coverage.[9] The ERRP reimburses an employer for 80 percent of an eligible retiree's (or covered dependent's) healthcare claims from $15,000 up to $90,000[10] – a maximum reimbursement of $60,000 per individual per year. The ERRP is intended to bolster early retiree plans until the Patient Protection and Affordable Care Act's ("Affordable Care Act") Health Insurance Exchanges become operational, at which time early retirees – just as other uninsured individuals – should be able to obtain affordable, reasonable coverage.[11] At that point, the reasoning seems to go, there will be less need for employment-based early retiree plans.

Following the above reasoning, the Affordable Care Act provided only $5 billion in funding for the ERRP[12] and specified a January 1, 2014, sunset for the program.[13] In addition, the program was structured to force employers to use ERRP reimbursements only to preserve affordable benefits for covered retirees. Thus, the preamble to the Interim Final Rule implementing the ERRP explained that the Centers for Medicare & Medicaid Services ("CMS"), the part of the U.S. Department of Health & Human Services ("HHS") charged with administering the ERRP, was "requiring sponsors to maintain the level of effort in contributing to support their applicable plan or plans."[14] In order to qualify for reimbursement, employers were required to submit applications to CMS that, among other details, included explanations of how they would apply the subsidy.[15] Both the statute and regulations specified that employers may use reimbursements only to either offset or reduce increases in plan participants' costs or to offset increases in employer costs for providing

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they are eligible for Medicare see their life savings disappear because of exorbitant rates in the individual market." ERRP Fact Sheet, *supra* note 7. *See also* U.S. Dep't. Health & Human Servs. ("HHS"), The Affordable Care Act's Early Retiree Reinsurance Program, http://www.errp.gov/download/TheAffordableCareAct.pdf [hereinafter ACA ERRP].

9. With limited exceptions for individuals with disabilities or certain terminal illnesses (such as Lou Gehrig's disease), Medicare covers only those who are at least age 65. Medicaid eligibility varies by state, but historically has not been available to adults who were not yet at least age 65, disabled, blind, pregnant or caring for dependent children – in other words, most early retirees. The ACA is scheduled to expand Medicaid eligibility by opening it to adults with limited financial resources even if they do not fall into a traditional eligibility category. *See, e.g.*, KAISER FAMILY FOUNDATION, MEDICAID AND CHILDREN'S HEALTH INSURANCE PROGRAM PROVISIONS IN THE NEW HEALTH REFORM LAW (Apr. 7, 2010), *available at* http://www.kff.org/healthreform/upload/7952-03.pdf.

10. ACA § 1102(c)(2-3), as amended by ACA § 10102.

11. *See* ACA ERRP, *supra* note 8.

12. ACA § 1102(e).

13. ACA § 1102(a)(1).

14. 75 Fed. Reg. 24450, 24456 (May 5, 2010).

15. 45 C.F.R. § 149.40(f)(5) (2010).

coverage or a combination of the foregoing.[16] The statute and regulations also specifically prohibited use of ERRP reimbursements as employer general revenue.[17]

The ERRP began accepting applications from both public and private sector employers in June 2010.[18] By December 2010, HHS had approved 5,452 applications and disbursed $535 million in ERRP funds, reflecting eligible claims by 60,850 individual plan participants.[19] By mid-March 2011, reimbursements had reached almost $1.8 billion;[20] by the end of March 2011, more than $2.4 billion had been disbursed;[21] and three months later the total had reached over $2.7 billion.[22] CMS stopped accepting new applications as of May 5, 2011, citing funding limits.[23]

B. Challenges

The ERRP started life at a disadvantage. Unfunded retiree health liabilities for state government employers alone topped $550 billion in 2008.[24] In the private sector, a 2010 report found that unfunded liabilities among the S&P 500 for other post-employment benefits, which are overwhelmingly retiree health plans, totaled $210 billion.[25] Alongside such

16. ACA § 1102(c)(4); 45 C.F.R. § 149.200 (2010).

17. ACA § 1102(c)(5); 45 C.F.R. § 149.200 (2010).

18. HHS, News Release, Applications for Early Retiree Reinsurance Program Now Being Accepted (June 29, 2010), http://www.hhs.gov/news/press/2010pres/06/20100629a.html.

19. HHS, REPORT ON IMPLEMENTATION AND OPERATION OF THE EARLY RETIREE REINSURANCE PROGRAM DURING CALENDAR YEAR 2010 3-4 , Tbl. 1 (Mar. 2, 2011), http://www.healthcare.gov/center/reports/retirement03022011a.pdf. The majority of approved applications – 47 percent – came from state and local government employers, and they received more than $298 million in reimbursements; for-profit private employers accounted for another 27.5 percent of approved applications and received about $94.6 million in reimbursements; non-profit, non-governmental employers represented 15.1 percent of approved applications and received about $128.8 million in reimbursements; unions, including stand-alone voluntary employees' beneficiary associations (better known as VEBAs), made up another 10 percent of approved applications and received slightly less than $13.5 million in reimbursements; and religious organizations rounded out the picture with 0.4 percent of approved applications and just over $197,000 in ERRP funds received. *Id.* at 4-5.

20. HHS, PROGRESS REPORT ON THE EARLY RETIREE REINSURANCE PROGRAM 2 (Mar. 31, 2011), http://cciio.cms.gov/resources/files/errp_progress_report_3_31_11.pdf.

21. HHS, EARLY RETIREE REINSURANCE PROGRAM: REIMBURSEMENT UPDATE (May 13, 2011), http://cciio.cms.gov/resources/files/errp_reimbursement_update_05132011.pdf.

22. HHS, EARLY RETIREE REINSURANCE PROGRAM: REIMBURSEMENT UPDATE (June 17, 2011), http://cciio.cms.gov/resources/files/errp_reimbursement_update_06172011.pdf.

23. 76 Fed. Reg. 18766 (Apr. 5, 2011).

24. PEW CTR. ON THE STATES, THE TRILLION DOLLAR GAP: UNDERFUNDED STATE RETIREMENT SYSTEMS AND THE ROADS TO REFORM 5 (Feb. 2010), http://downloads.pewcenteronthestates.org/The_Trillion_Dollar_Gap_final.pdf.

25. S&P Indices, Press Release, S&P 500 Pensions, OPEB Remain Severely

numbers, the ERRP's $5 billion could barely qualify as a Band-Aid, certainly not a cure for even the short-term financial problems facing retiree plans. Limited funding was not the only issue, however. The Affordable Care Act placed no restrictions on the types of plan sponsors who could qualify for ERRP reimbursements. Public and private sector employers could apply, as well as unions, multiemployer plans, and voluntary employees' beneficiary associations ("VEBAs").[26] Nothing in the statute required that a plan actually need ERRP funds in order to maintain benefits, nor was there any mechanism to spread ERRP funds across as many plans as possible. Instead, the ERRP is a first-come, first-served program.[27] As a result, whether a particular plan has or will receive reimbursement likely depends not on comparative need, but rather on how proactive that plan's legal counsel was in getting an acceptable application approved by CMS before the program closed to new applications.

The absence of criteria for distinguishing among plan sponsors opened the ERRP to criticism. A March 2011 report from the House Majority Committee on Energy and Commerce complained that the "ERRP acts as another bailout of state and local government" and that "[it] is an inefficient and inappropriate use of funding."[28] As evidence of the latter point, the Committee report noted "that Fortune 500 companies with billions of dollars in revenue and Hollywood unions are among those taking advantage of the taxpayer money being provided by the ERRP."[29] Various conservative blogs adopted similarly critical tones.[30] CMS, however,

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Underfunded; Is Time Running Out For The Baby-Boomers? (May 26, 2011), *available at* http://www.prnewswire.com/news-releases/sp-500-pensions-opeb-remain-severely-under funded-is-time-running-out-for-the-baby-boomers-122658233.html.

26. The ACA provides that ERRP reimbursement will be made to "participating employment-based plans for a portion of the cost of providing health insurance coverage to early retirees." ACA § 1102(a)(1). The statute then defines "employment-based plans" for purposes of the ERRP as "a group health benefits plan that . . . (I) is maintained by one or more current or former employers (including without limitation any State or local government or political subdivision thereof), employee organization, a voluntary employees beneficiary association, . . . or (II) a multiemployer plan . . . ." ACA § 1102(a)(2)(B).

27. 75 Fed. Reg. 24450, 24455 (May 5, 2010).

28. House Comm. on Energy & Commerce, Internal Memorandum: Impending Exhaustion of Funding for Early Retiree Reinsurance Program (Mar. 23, 2011), http://energycommerce.house.gov/media/file/PDFws/032311 ERRP.pdf.

29. *Id.*

30. *See, e.g.,* Matthew Boyle, The Daily Caller, Washington Post and CBS Receiving Money from Obamacare "Slush Fund" (Apr. 6, 2011), http://dailycaller.com/2011/04/06/ Washington-post-and-cbs-receiving-money-from-obamacare-slush-fund/; Ross Calloway, The Lunch Counter, Early Retiree Reinsurance Program (Apr. 6, 2011), http://rosscalloway. com/2011/04/06/early-retiree-reinsurance-program/; Peter Suderman, Reason, ObamaCare's Early Retiree Benefits Program: So Awesome the Administration Had to Shut it Down Early (Apr. 1, 2011), http://reason.com/blog/2011/04/01/obamacares-early-retiree-progr; F. Vincent Vernuccio, Big Government, Under Obama, Running Out of Money Is a Success

characterized the program as successful, with one official stating at the end of March 2011 that "[w]e are thrilled with the success of the Early Retiree Reinsurance Program and excited that we are helping maintain coverage and moderate costs for millions of American workers and retirees."[31] At the end of May 2011, a handful of Democratic senators even introduced the Retiree Health Coverage Protection Act to add another $5 billion to ERRP funding.[32] But the nation's overall financial picture remained bleak in mid-2011, and Republican opposition to health reform in general has not abated. Most likely, when the ERRP disburses the last of its original $5 billion, the program will close. Given that only $2.3 billion remained after less than a year of disbursements, that closing date seems destined for mid-2012 at the latest.[33]

C. Consequences

Assuming no additional funds are forthcoming, the ERRP's early demise means that existing retiree health plans will be back on their own sometime in 2012, with at least another year before the Health Insurance Exchanges open for individual retirees. ERRP funding thus will have provided only a temporary respite, stabilizing costs for no more than a year or two. When the offset ends, plans – and participants – will likely experience sudden, sharp cost increases.[34] If and to the extent that retirees grow accustomed to lower premiums and out-of-pocket costs, they may be shocked and struggle

(May 4, 2011), http://biggovernment.com/vmariano/2011/05/04/under-obama-running-out-of-money-is-a-success/#more-264460.

31. Ctrs. for Medicare & Medicaid Servs., Press Release, Early Retiree Reinsurance Program Providing Key Support to Millions of Retirees (Mar. 31, 2011), http://www.cms.gov/apps/media/press/release.asp?Counter=3915&intNumPerPage=10&checkDate=&checkKey=&srchType=1&numDays=3500&srchOpt=0&srchData=&keywordType=All&chkNewsType=1%2C+2%2C+3%2C+4%2C+5&intPage=&showAll=&pYear=&year=&desc=&cboOrder=date.

32. Retiree Health Coverage Protection Act, S. 1088, 112th Cong., *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1088is/pdf/BILLS-112s1088is.pdf. The proposed Act was sponsored by John Kerry with Richard Blumenthal, Sherrod Brown, Benjamin Cardin, Barbara Mikulski, and Debbie Stabenow as co-sponsors. All are Democrats.

33. *See, e.g.*, Jennifer Haberkorn, Politico, Health Reform Initiative Closing Early (Mar. 31, 2011), http://www.politico.com/news/stories/0311/52346.html. The House Committee memorandum on the ERRP predicted an even earlier demise. *See* House Comm. on Energy & Commerce, *supra* note 28.

34. Healthcare costs have continued their upward march since health reform passed although at a somewhat lower rate than in the prior year. According to one estimate, healthcare costs covered by private insurers and Medicare rose by 5.58 percent on a per capita basis for the 12 months ending in May 2011, down from an 8.74 percent increase for the immediately preceding 12-month period. S&P Indices, Press Release: U.S. Healthcare Costs Rose 5.58% Over the 12-Months Ending May 2011 According to the S& P Healthcare Economic Indices (Jul. 21, 2011), *available at* http://www.standardandpoors.com/indices/sp-healthcare-economic-indices/en/us/?indexId=sp-healthcare-economic-indices.

to accommodate the additional expenses.[35] Employers and other plan sponsors, all of whom have experienced rising healthcare costs for decades, more likely viewed the subsidy as no more than breathing room to evaluate their retiree benefit packages, always recognizing that the assistance would be brief.[36] Understanding that relief was transient would not make help any less welcome, of course, but perhaps does ease the transition back to paying the full freight for benefits.

On the positive side, if health reform survives political attack and the Health Insurance Exchanges open as scheduled in 2014, early retirees should find themselves able to obtain affordable individual insurance then. The ERRP will have helped them on their way. Even if the Health Insurance Exchanges do not commence as scheduled, extending the life of early retiree health benefits for any amount of time moves covered participants closer to Medicare eligibility at age 65, and that alone is valuable to individuals who have left the workforce and have no other source of health insurance.

III. PUBLIC SECTOR COLLECTIVE BARGAINING AND BENEFITS

A. Overview and Challenges

Unlike their private sector counterparts, retiree health plans remain pervasive in the public sector. Fully 87 percent of all state and government employers with 200 or more employees maintained some level of retiree health benefits in 2010.[37] Public sector employers historically have justified generous benefits – including retiree health insurance – on the grounds that they need to offset lower government pay rates, as compared to the private sector, in order to attract and retain talented employees.[38] This perspective has persisted even in the face of rising benefit expenses

35. Americans generally do not understand or plan for healthcare expenses in retirement. *See, e.g.,* Sun Life Financial, Flying Blind: How Working Americans View Healthcare Costs in Retirement: A Sun Life Financial Unretirement Survey (May 4, 2011), http://cdn.sunlife.com/static/unitedstates/Announcements/Press%20releases/2011/Sun%20Life%20Financial%20-%20Flying%20Blind%20Survey%20Results%2005042011.pdf.

36. *See, e.g.,* HighRoads, Early Retirees Face One More Financial Squeeze When Feds End Employer Retiree Health Care Subsidies (June 30, 2011), http://eon.businesswire.com/news/eon/20110630006194/en/early-retiree-reinsurance-program/benefits-management/health-care-compliance.

37. EMPLOYER HEALTH BENEFITS ANNUAL SURVEY, *supra* note 2, at 164.

38. *See* DENNIS M. DALEY & JERRELL D. COGGBURN, CTR. FOR STATE & LOCAL GOV'T EXCELLENCE, RETIREE HEALTH CARE IN THE AMERICAN STATES 4 (Dec. 2008), http://www.slge.org/vertical/Sites/%7BA260E1DF-5AEE-459D-84C4-876EFE1E4032%7D/uploads/%7B8B5A1C24-BF7D-4AEE-9135-EC2DDAB98A6F%7D.PDF (observing that "[g]enerally, retiree health care is recognized as being important to key organizational HR goals").

and a difficult economy. In addition, public sector employees are highly unionized. In 2010, 36.2 percent of state and local government employees belonged to a union as compared to only 6.9 percent of the private sector workforce.[39] High unionization rates tend to correlate with the presence of retiree health plans. In 2010, 41 percent of larger employers who sponsored a retiree health plan employed at least some collectively bargained employees.[40]

Despite the prevalence of public sector retiree health benefits, the plans are financially in trouble. Most states fund the benefits on a pay-as-you-go basis – in other words, out of each year's current operating budget. In 2006, approximately 97 percent of state post-employment retiree health and other non-pension benefit liabilities was unfunded.[41] Two years later, only one state had set aside sufficient funds to cover its current and future retiree health obligations.[42] By the end of fiscal year 2009, states' total liability for retiree health and other non-pension retiree benefits had reached $638 billion, with a mere $31 billion saved to fund those promises.[43] Unfunded liabilities at such levels would seem overwhelming in almost any situation, much less in the faltering economy of recent years. The Government Accountability Office in 2010 estimated that state and local governments combined faced operating budget deficits of approximately $39 billion in 2010 and $124 billion in 2011.[44]

This depressing fiscal picture set the stage for the November 2010 elections. The wave of Republican politicians who rolled into state offices and legislatures in early 2011[45] quickly organized into an avalanche aimed directly at the generous benefits enjoyed by public sector employees along with the collective bargaining rights that help preserve such benefit packages.[46] "Public employees can't be haves, while private sector employees are have-nots," said Scott Walker as governor-elect of

39. U.S. Dep't of Labor, Bureau of Labor Statistics, News Release: Union Members – 2010, 7 (Jan. 21, 2011), http://www.bls.gov/news.release/pdf/union2.pdf.

40. EMPLOYER HEALTH BENEFITS ANNUAL SURVEY, *supra* note 2, at 165.

41. PEW CTR. ON THE STATES, PROMISES WITH A PRICE: PUBLIC SECTOR RETIREMENT BENEFITS 7 (Dec. 17, 2007), http://www.pewcenteronthestates.org/uploadedfiles/Promises%20with%20a%20Price.pdf.

42. Daley & Coggburn, *supra* note 38, at 5.

43. PEW CTR. ON THE STATES, THE WIDENING GAP: THE GREAT RECESSION'S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS 5 (Apr. 2011), http://www.pewcenteronthestates.org/uploadedFiles/Pew_pensions_retiree_benefits.pdf.

44. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO REPT. GAO-10-899, STATE AND LOCAL GOVERNMENTS: FISCAL PRESSURES COULD HAVE IMPLICATIONS FOR FUTURE DELIVERY OF INTERGOVERNMENTAL PROGRAMS 4 (July 2010), http://www.gao.gov/new.items/d10899.pdf.

45. *See* Michael Cooper, *Decisive Gains at State Level Could Give Republicans a Boost for Years*, N.Y. TIMES, Nov. 4, 2010, at P6.

46. *See* Monica Davey & Michael Luo, *Now in Power, G.O.P. Vows Cuts in State Budgets*, N.Y. TIMES, Nov. 8, 2010, at A1.

Wisconsin.[47] Even before the 2010 elections, questions had surfaced about the validity of the traditional reasoning that public sector benefits are needed to compete against better private sector pay.[48] As the economy failed to improve in 2011 and private sector employers continued to eliminate jobs and reduce pay, perceptions that government employees enjoy more than they are due[49] fueled the attack.

Perhaps the most-publicized assault occurred in Wisconsin where Governor Scott Walker signed Wisconsin Act 10 in mid-March 2011 despite massive protests.[50] The Wisconsin law curtails collective bargaining rights for most public sector employees, eliminating the right to bargain for employee benefits.[51] Despite Governor Walker's signature, the law spent the next few months in court, with a circuit court judge issuing a permanent injunction against it in late May,[52] but the Wisconsin Supreme Court upheld the law a month later.[53] At the end of March 2011, Ohio passed Senate Bill 5,[54] a similar law to Wisconsin's and one that bars public sector employees from, among other things, bargaining over health benefits and pensions.[55] Notwithstanding what is considered a generally liberal electorate and state government, Massachusetts in July 2011 enacted new legislation intended to allow municipal employers to change health insurance provisions without collectively bargaining the changes.[56] Other

47. *Id.*

48. *See, e.g.,* Dennis Cauchon, *Public, Private Pay Gap Widens – Government Workers' Benefits Rise in Slump,* USA TODAY, Apr. 10, 2009, at 1A.

49. *See, e.g.,* Dennis Cauchon, *In Wisconsin Private Sector Pays Less – Public Workers Earn More in 41 States,* USA TODAY, Mar. 1, 2011, at 1A. A Congressional Research Service report issued in mid-2011 noted that, "[t]o deal with budget deficits, many policymakers are looking at the pay and benefits of public sector employees as a way to reduce government spending." GERALD MAYER, CONGRESSIONAL RESEARCH SERVICE, SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS 1 (July 1, 2011), http://www.govexec.com/pdfs/071911kl1.pdf. Although the CRS report did not dispute that public sector overall pay may be higher than in the private sector, it also noted that full-time public sector workers tend to be older, more educated, unionized, and in "management, professional, and related occupations," all of which characteristics translate to higher pay rates. *Id.*

50. *See, e.g.,* Monica Davey & A.G. Sulzberger, *Wisconsin Curbs Public Unions, But Democrats Predict Backlash,* N.Y. TIMES, Mar. 11, 2011, at A1.

51. 2011 Wis. Act 10 (Mar. 11, 2011).

52. Ozanne v. Fitzgerald, 2011 WL 2176815 (Wis. Cir. May 26, 2011) (Trial Order).

53. State ex rel. Ozanne v. Fitsgerald, 798 N.W.2d 436 (Wis. June 14, 2011).

54. Ohio Am. Sub. S.B. 5 (Mar. 31, 2011).

55. *See* OHIO LEGIS. SERV. COMMISSION, FINAL ANALYSIS: AM. SUB. S.B. 5 (July 1, 2011), http://www.lsc.state.oh.us/analyses129/11-sb5-129.pdf.

56. Mass. H.B. 3580 (July 12, 2011). *See* Murphy Hesse Toomey and Lehane LLP, Municipal Client Advisory: Governor Patrick Signs Emergency Law That Significantly Reforms Municipal Health Care (July 2011), http://www.jdsupra.com/post/documentViewer.aspx?fid=729ac1d8-b44f-4771-a2b3-479a049bda8f.

similar efforts are underway in a wide range of states across the country.[57]

B. Consequences

For retiree health plans, the attack on public employee collective bargaining rights does not bode well. Government employers face frightening financial numbers, but have limited options for raising money. Retiree health insurance commitments represent expensive yet unfunded future promises to people who will no longer be in the workforce when the promises come due. Confronted with too many demands for too little money, employers tend to see retiree health liabilities as an easy cutback. The strength of public sector unions and the tradition of generous benefits have preserved government retiree health benefits in the past, but these protections are now losing ground.

If public sector retiree health benefits crumble, that deterioration may be felt in the private sector also. Employers naturally consider their competitive position when they evaluate the components of their employee benefit packages. In other words, an employer will tend to offer approximately the same kinds and levels of benefits as other employers who seek to attract and retain the same workers. The situation is an employment variation on "keeping up with the Joneses." When a particular type of benefit ceases to be commonplace, that benefit loses its place as a perceived standard component of a basic employee benefits package. As long as retiree health plans remain pervasive in the public sector, they maintain a position as a traditional core benefit. If public sector retiree health plans drop down to the same level as the private sector, retiree health insurance overall may lose its perceived relevance as a significant benefit.

IV. MEDICARE REFORM

A. Overview and Challenges

Despite numerous reform efforts and considerable change over the decades, Medicare continues to lumber toward fiscal disaster. According to the 2011 Medicare Trustees' Report, the trust fund that pays for Medicare Part A hospitalization and certain other inpatient care expenses will run out of money in 2024, and beneficiary premiums for Part B (physician and most outpatient expenses) and Part D (prescription drugs) are likely to increase 7.5 percent and 9.7 percent, respectively, each year for at least the next five

57. *See, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATURES, 2011 LEGISLATION ON UNIONS AND COLLECTIVE BARGAINING (Feb. 15, 2011), http://www.ncsl.org/documents /employ/Unions2-15-11.pdf.

years.[58] Similar predictions prompted a new set of reform proposals in the first half of 2011. Representative Paul Ryan's Path to Prosperity proposal,[59] which included shifting traditional Medicare from its defined benefit approach to a defined contribution system (called variously a "premium support" or "voucher" model),[60] gained surprising traction at the outset.[61] Although the proposal failed in the end,[62] the alarm over Medicare spending has not quieted. The need to rein in Medicare spending reverberated through the debt ceiling debate of the summer of 2011.[63] Eventually, changes that in effect shift more costs to Medicare beneficiaries seem inevitable, whether in the form of increasing beneficiary premiums and/or co-payments, limiting eligibility (for example, by raising the age at which one becomes entitled to Medicare), reducing types of coverage, or shifting to a premium support/voucher model for future retirees.

B. Consequences

Virtually anything that reduces Medicare coverage by shifting costs to beneficiaries will ripple into increased employer costs under retiree health programs. Employer-based retiree health insurance supplements Medicare – in other words, it wraps around the government benefits and covers, to varying degrees, what Medicare does not. Limiting what Medicare pays or to whom it pays pushes costs over to the supplemental plans. The federal government saves money, but at the expense of employers – and eventually retirees. Given current economic challenges, employers in most cases can barely afford to maintain existing levels of retiree coverage. When possible, they already manage the financial burden by shifting costs to beneficiaries through increased premiums and co-insurance obligations.[64]

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58. 2011 ANNUAL REPORT OF THE BD. OF TRUSTEES OF THE FED. HOSPITAL INS.& FED. SUPPLEMENTARY MED. INS. TRUST FUNDS 4-5 (May 13, 2011), https://www.cms.gov /ReportsTrustFunds/downloads/tr2011.pdf.

59. HOUSE COMM. ON THE BUDGET, THE PATH TO PROSPERITY: RESTORING AMERICA'S PROMISE FISCAL YEAR 2012 BUDGET RESOLUTION (Apr. 5, 2011), http://budget.house.gov/ UploadedFiles/PathToProsperityFY2012.pdf.

60. *See* KAISER FAMILY FOUND., PROPOSED CHANGES TO MEDICARE IN THE "PATH TO PROSPERITY" (Apr. 2011), http://www.kff.org/medicare/upload/8179.pdf.

61. *See, e.g.*, Jeff Zeleny, *Making Case for G.O.P. Budget Plan, and Fending Off Talk of Higher Office*, N.Y. TIMES, Apr. 21, 2011, at A18, and Carl Hulse, *House Approves Republican Plan to Cut Trillions*, N.Y. TIMES, Apr. 16, 2011, at A1.

62. *See* Jennifer Steinhauer, *Democrats Force a Medicare Vote, Pressuring G.O.P.*, N.Y. TIMES, May 26, 2011, at A1.

63. *See, e.g.*, Robert Pear, *Some Rare Agreement on Debt Talks: Health Groups Dislike Proposals*, N.Y. TIMES, July 13, 2011, at A15.

64. *See, e.g.*, KAISER FAMILY FOUND. & HEWITT ASSOC., RETIREE HEALTH BENEFITS EXAMINED: FINDINGS FROM THE KAISER/HEWITT 2006 SURVEY ON RETIREE HEALTH BENEFITS (Dec. 2006), http://www.kff.org/medicare/upload/7587.pdf. For example, between 2005 and 2006, 74 percent of surveyed private sector employers with at least 1,000 employees who

Reducing Medicare coverage thus will create a cascade of shifting burdens – first to Medicare beneficiaries, then to retiree plans for those Medicare beneficiaries with such supplemental coverage, then back to the beneficiaries as the retiree plans limit their coverage to reflect the new expenses. Of course, some retiree plans have less flexibility to shift expenses – generally because of contractual obligations under collective bargaining agreements. The additional costs resulting from Medicare reductions may threaten the long-term sustainability of such plans. Whichever the case, in the end, retirees bear the burden.

V. CONCLUSION

With the exception of the ERRP, health reform did little to help retiree health plans. Congress apparently assumed that employment-based retiree health benefits no longer needed protection after the advent of Health Insurance Exchanges in 2014. Not only does the ERRP terminate no later than January 1, 2014, no matter what its funding status, but the Affordable Care Act's pay-or-play provisions aimed at prompting employer health plan sponsorship after 2013 do not apply to plans for retirees.[65] In addition, health reform provisions that improved Medicare coverage – such as closing the Part D donut hole[66] – inherently lessened the value to retirees of their employment-based supplemental coverage. The more Medicare covers, the less need for retiree plan coverage to fill in the gaps. Employers who seek rationales to justify elimination or reduction of benefits may find partial justification through Medicare's improvements.[67] By mid-2011, it appeared clear that the ERRP will exhaust its allocation long before 2014; and the nation's fiscal problems moved Medicare cutbacks squarely into range, threatening to undo the gains made only a year ago. Meanwhile, public sector employees' unions and benefits have come under sustained assault, weakening the last stronghold of retiree health benefits.

Both for early retirees and for those who are Medicare-eligible, employment-based retiree health plans provide critical insurance coverage for individuals who have left the workplace and have limited ability to

offer retiree health benefits (covering 5.2 million retirees and dependents) increased early retiree premiums, and 58 percent increased the beneficiary share of premiums for Medicare-eligible retirees. Similarly, 34 percent of surveyed employers increased retiree cost-sharing requirements for early retirees, and 24 percent increased cost-sharing requirements for Medicare-eligible retirees. *Id. at* 19.

65. *See* ACA §1513(a).

66. Reconciliation Act § 1101.

67. Admittedly, I have made an assumption that most employers would prefer to rid themselves of their retiree health obligations. Otherwise, one could reasonably expect employer-sponsored supplemental Medicare plans to grow in numbers with Medicare improvements because the cost of the supplemental insurance would decrease as Medicare's coverage increases.

adjust to increased healthcare expenses. Health reform may eventually protect these people. In the meantime, however, there remain employer plans, and these are quite possibly at greater risk now than a year ago. No one can foretell the future, but certainly today's news is not good.