SAFEGUARDING RETIREE HEALTH BENEFITS

HEARING

BEFORE THE

COMMITTEE ON
EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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C O N T E N T S

	Page
Hearing held on September 25, 2008	1
Statement of Members:	
Altmire, Hon. Jason, a Representative in Congress from the State of Pennsylvania, prepared statement of	69
Kline, Hon. John, Ranking Republican Member, Subcommittee on Health, Employment, Labor, and Pensions	3
Prepared statement of	4
Additional submissions:	
Statement of James A. Klein	66
Statement of the U.S. Chamber of Commerce	67
Shea-Porter, Hon. Carol, a Representative in Congress from the State of New Hampshire, prepared statement of	69
Tierney, Hon. John F., a Representative in Congress from the State of Massachusetts	1
Prepared statement of	2
Statement of William Gabbard, the Flex Retirees Organization (FRO)	59
Statement of Witnesses:	
Jones, C. William, ProtectSeniors.Org	13
Prepared statement of	14
Kadereit, Bill, president, National Retiree Legislative Network	8
Prepared statement of	10
Additional submissions:	
Letter, dated September 29, 2008	12
White paper, "Safeguarding Retiree Health Care Benefits: Protecting Retirees From Fixed-Income Erosion" Internet address	13
Lillie, David E., Raytheon Missile Systems retiree	5
Prepared statement of	7
Macey, Scott J., senior vice president, government affairs, Aon Consulting, on behalf of the ERISA Industry Committee	31
Prepared statement of	33
Responses to questions for the record	60
Stein, Norman P., professor, University of Alabama School of Law	35
Prepared statement of	37
Yamamoto, Dale H., president, Red Quill Consulting, Inc.	19
Prepared statement of	20

SAFEGUARDING RETIREE HEALTH BENEFITS

Thursday, September 25, 2008
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 10:13 a.m., in room 2175, Rayburn House Office Building, Hon. John Tierney presiding.

Present: Representatives Tierney, Kildee, Andrews, Woolsey, Hinojosa, McCarthy, Kucinich, Wu, Holt, Davis of California, Bishop of New York, Sarbanes, Hirono, Altmire, Hare, Courtney, Shea-Porter, Kline, Platts, and Wilson.

Staff Present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, Labor Policy Deputy Director; Lynn Dondis, Senior Policy Advisor, Subcommittee on Workforce Protections; Carlos Fenwick, Policy Advisor, Subcommittee on Health, Employment, Labor and Pensions; Brian Kennedy, General Counsel; Therese Leung, Labor Policy Advisor; Sara Lonardo, Junior Legislative Associate, Labor; Ricardo Martinez, Policy Advisor, Subcommittee on Higher Education, Lifelong Learning and Competitiveness; Kevin McDermott, Legislative Director, Congressman Tierney; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Policy Advisor; Meredith Regine, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; Chris Perry, Minority Legislative Assistant; Molly McLaughlin Salmi, Minority Deputy Director of Workforce Policy; Ken Serafin, Minority Professional Staff Member; Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Minority Professional Staff Member.

Mr. TIERNEY. Good morning. I thank all witness and my colleagues for their patience. As you know, we have got a lot of things going on at one time here and they are all important. So the quorum is present and the committee will come to order.

I am just going to make a brief opening statement and give Mr. Kline an opportunity to do the same, and then we will hear from our witness and have some questions back and forth after that.

Through the years, millions of workers have retired believing that they would be provided with the health care benefits that they

were promised by their employer. These are benefits that they earned. What many of those workers found was that their former employer eventually made a cost-cutting decision to renege on that promise and cut or reduce those health care benefits. As a result, some retirees may have been forced to endure a drastic decline in the standard of living in order to pay for the out-of-pocket health care costs. Others may have been unable to obtain new coverage because of a preexisting condition and many may have opted to go without health care coverage because of its cost, taking a gamble and hoping to get by until they became Medicare-eligible.

I am grateful to be chairing this meeting today. I requested the hearing and like many of my colleagues, I think retirees deserve a better deal. Hard work should not be rewarded with tough times and fairness has to be restored.

Unlike pension plans, the Employee Retiree Income Security Act of 1974, popularly known as ERISA, does not impose mandatory "vesting" requirements with respect to health benefits. Consequently, many courts have upheld that there is no legal protection for employees. I have authored legislation H.R. 1322 to remedy this and ensure that the reasonable health care benefit expectations of retirees from ERISA-sponsored regulated group health plans are fulfilled. Other legislation has also been filed and will be part of this hearing.

But specifically H.R. 1322 prohibits profitable plan sponsors from canceling or reducing promised retiree health benefits. It establishes an enforceable obligation to restore promised health benefits previously taken away from retirees and creates an "Emergency Retiree Health Loan Guarantee Program" to assist with the obligation to restore retiree health benefits. Spurring the need to enact this legislation is the fact that more and more workers are approaching retirement age. According to the Census Bureau, the number of individuals 65 years or older is projected to increase by 73 percent by 2025. The number of individuals between 55 and 64 years old is expected to grow by 36 percent. Today's hearing serves as an important opportunity to discuss how we can better safeguard retiree benefits. I look forward to hearing from all of the witnesses, and now I yield to the ranking member for his opening statement. Mr. Kline.

[The statement of Mr. Tierney follows:]

Prepared Statement of Hon. John F. Tierney, a Representative in Congress From the State of Massachusetts

Good morning.

Through the years, millions of workers have retired believing that they would be provided with the health care benefits that they were promised by their employer, benefits that they earned.

What many of those workers found was their former employer eventually made a cost-cutting decision to renege on that promise and cut or reduce those health care benefits.

As a result, some retirees may have been forced to endure a drastic decline in their standard of living in order to pay for the out-of-pocket health care costs. Others may have been unable to obtain new coverage because of a preexisting condition. And many may have opted to go without health care coverage because of its cost, taking a gamble and hoping to get by until they become Medicare-eligible.

I requested and am grateful to chair today's Education and Labor Committee hearing because—like many of my colleagues—I believe our retirees deserve better; hard work should not be rewarded with tough times; fairness must be restored.

Unlike pension plans, the Employee Retiree Income Security Act of 1974—popularly known as ERISA—does not impose mandatory "vesting" requirements with respect to health benefits. Consequently, many courts have upheld that there is no legal protection for employees.

I have authored legislation—H.R. 1322—to remedy this and ensure that the reasonable health benefit expectations of retirees from ERISA-sponsored regulated group health plans are fulfilled.

Specifically, H.R. 1322:

• Prohibits profitable plan sponsors from canceling or reducing promised retiree health benefits;

• Establishes an enforceable obligation to restore promised health benefits previously taken away from retirees;

• Creates an "Emergency Retiree Health Loan Guarantee Program" to assist with the obligation to restore retiree health benefits.

Spurring the need to enact this legislation is the fact that more and more workers are approaching retirement age. According to the Census Bureau, the number of individuals 65 years or older is projected to increase by 73% by 2025. The number of individuals between 55 and 64 years old is expected to grow by 36%.

Today's hearing serves as an important opportunity to discuss how we can better safeguard retiree benefits, and I look forward to hearing from the witnesses.

I now yield to the Ranking Member for his opening statement.

Mr. KLINE. Thank you, Mr. Chairman. Good morning to everybody. Thank you for participating in this morning's hearing on the critical issues affecting Americans who are retired or planning for retirement. And I find that as my hair gets whiter and whiter and thinner, that becomes ever more in front of my thoughts.

As you know, our health care and retirement systems today are largely based on the voluntarily participation of employers. And this system certainly has some flaws, but for the most part, it has worked well in providing coverage and maintaining freedom from costly mandates. Rather than requiring employers to provide health care benefits, we have designed policies to encourage voluntary employer participation. These policies have succeeded in enabling employers to provide health care benefits to more than 160 million Americans including millions of retirees over the age of 55. These benefits are highly valued by employees, retirees, and their dependents, and companies recognize the value of maintaining generous benefits in order to attract talented workers and remain competitive in the global economy.

Yet despite its many successes, as I said, the system is not without flaws. Yearly health care costs continue to increase at rates that dramatically outpace overall inflation. These cost increases are particularly problematic for retirees who may not be able to afford post-retirement health care benefits. Increasing health care costs also pose unique problems for private employers. Demographic trends indicate a large number of retirees in the coming years. When coupled with rising costs, this fact is forcing many employers to make difficult choices regarding the nature and extent of employee and retiree benefits. In some cases companies are forced to choose between continuing retiree benefits or creating new jobs.

Today, we have the opportunity to learn more about the state of retiree health benefits and various proposals for reform. One proposal we have heard about would bar employers from reducing health benefits after the retirement of a worker. This is a deeply troubling proposal that threatens the very foundation of our voluntary employer-based system. Current law already prohibits employers from reducing or terminating promised benefits unless they

expressly reserve the right to do so and fully disclose the intent under the ERISA benefit plan.

The proposal in question would go much further, declaring that no changes could ever be made to benefits once a worker reaches retirement irrespective of unforeseen circumstances. The outcome of such an unprecedented and inflexible mandate is obvious. Employers will simply stop offering retiree health benefits, and this is clearly not the outcome that anyone desires. Rather than penalizing companies for trying to do the right thing, we should be exploring ways and I hope that we will be today to control the cost of health care benefits and encourage employers to continue voluntarily providing retiree benefits.

As the current financial crisis makes clear, now is not the time to impose government coverage mandates that would serve to increase costs and reduce coverage. I am really looking forward to today to hearing from our distinguished witnesses and the discussion that will follow and I yield back.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Ranking Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good morning. Thank you all for participating in this morning's hearing on the critical issues affecting Americans who are retired or planning for retirement.

As you know, our health care and retirement systems are largely based on the voluntary participation of employers. While this system is not without flaws, it has—for the most part—worked well in providing coverage and maintaining freedom from costly mandates. Rather than requiring employers to provide health care benefits, we have designed policies to encourage voluntary employer participation. These policies have succeeded in enabling employers to provide health care benefits to more than 160 million Americans, including millions of retirees over the age of 55. These benefits are highly valued by employees, retirees, and their dependants—and companies recognize the value of maintaining generous benefits in order to attract talented workers and remain competitive in the global economy.

Yet despite its many successes, the system is not without flaws. Yearly health care costs continue to increase at rates that dramatically outpace overall inflation. These cost increases are particularly problematic for retirees, who may not be able to afford post-retirement health care benefits.

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Today we have the opportunity to learn more about the state of retiree health benefits and various proposals for reform. One proposal we may hear about would bar employers from reducing health benefits after the retirement of a worker. This is a deeply troubling proposal that threatens the very foundation of our voluntary employer-based system.

Current law already prohibits employers from reducing or terminating promised benefits unless they expressly reserve the right to do so and fully disclose this intent under their ERISA benefit plan. The proposal in question would go much further, declaring that no changes could ever be made to benefits once a worker reaches retirement, irrespective of unforeseen circumstances.

The outcome of such an unprecedented and inflexible mandate is obvious—employers will simply stop offering retiree health benefits. This is clearly not the outcome anyone desires.

Rather than penalizing companies for trying to do the right thing, we should be exploring ways to control the cost of health care benefits and encouraging employers to continue voluntarily providing retiree benefits. As the current financial crisis makes clear, now is not the time to impose government coverage mandates that would serve to increase costs and reduce coverage.

I welcome our distinguished witnesses today, and I look forward to everyone's testimony.

Mr. TIERNEY. Thank you, Mr. Kline.

Without objection all members will have 5 days to submit additional materials for the hearing record. Now we will introduce our witnesses. I am going to give a brief introduction right across the panel and then we will start at the beginning with Mr. Lillie again.

David E. Lillie, our first witness, was hired by the Hughes Aircraft Company in Tucson, Arizona, in 1973, which later became Raytheon Missile Systems. Mr. Lillie was a member of his union, Local 933 of the International Association of Machinists and Aerospace Workers. He retired from Raytheon in 1999 and was part of the class action lawsuit against Raytheon in 2004 after the company stopped paying retiree health premiums. Bill Kadereit—did I say that right, Mr. Kadereit.

Mr. KADEREIT. Yes.

Mr. TIERNEY. He is the president of the National Retiree Legislative Network, which represents over 2 million retired workers from Fortune 500 companies. Mr. Kadereit retired from Alcatel Lucent in 1995 after 35 years of service.

C. William Jones is the founder and chairman of Protectseniors.org, a nonprofit organization dedicated to saving corporate sponsored retiree health benefits. In 1996 he founded the Association of Belltell Retirees, Inc., an association dedicated to protecting retiree pensions and benefits.

Dale Yamamoto is the founder and president of Red Quill Consulting, Inc. Mr. Yamamoto also worked for two major benefit consulting firms in Seattle, New York, and Chicago. He has also held positions as the corporate actuary for a Fortune 50 company and is an actuary for two major insurance companies.

Scott Macey is the senior vice president and director of government affairs of Aon Consulting, Inc. Mr. Macey is a former Chair of the ERISA Industry Committee and continues to serve as a member of the executive committee of that organization.

And Norman Stein is the Douglas Arant professor of the University of Alabama School of Law where he teaches benefits and tax law.

We are going to ask each of the witnesses to make a presentation for approximately 5 minutes. I think we will explain the lighting system to you, that little array of lights that come before you. The green is for the beginning of the 5 minutes. When it comes to amber, you have 1 minute remaining. Red, Mr. Kline comes down and hits you with a hammer and that's the end on that. But when it gets to red we would like you to sum up and we will be as lenient as we can be, but members, I am sure, are anxious to ask questions on particular points of interest to them and we really want to hear what you have to say. So with that we appreciate your testimony and we will start with Mr. Lillie, please.

STATEMENT OF DAVID LILLIE, RAYTHEON MISSILE SYSTEMS RETIREE

Mr. LILLIE. Good morning, Mr. Chairman, members of the Committee on Education and Labor. I want to thank you very, very much for giving me the opportunity to speak to you about the problems that retirees in Tucson, Arizona are having with Raytheon Missile Systems. As Mr. Tierney said, my name is Dave Lillie, and

I worked with Hughes Aircraft since 1973. I was there when Raytheon came in and bought Hughes; so I retired from Raytheon Hughes in 1999. And I retired under the 1996 CBA, which is a contract for Hughes Raytheon, negotiated by my union, Local 933 of the International Association of Machinists and Aerospace Workers.

In July of 2004, I received a notice in the mail that my company-paid medical insurance which I had since my retirement would now cost me $310 a month. Over the next 2 years, 2½ years, my premiums increased to $536 a month. This was a clear violation of the retiree health benefit language in the 1996 collective bargaining agreement that was in effect when I retired. After meeting with Local 933's directing business agent, I soon learned that many retirees were paying as much as 55 percent of their fixed retirement income just to pay these premiums they weren't supposed to have to pay.

We held a meeting with all the Raytheon retirees that we could get in touch with who were affected by this violation. We retained legal counsel and found that Raytheon had unilaterally ignored the retiree health benefit language of the applicable collective bargain agreements. A class action lawsuit was filed against Raytheon to regain our company paid health benefits. The despicable action of Raytheon affected approximately a thousand retirees and their dependents who suffered not only monetary losses because of the unplanned premium costs, but also mental anguish and stress due to this unnecessary and drastic change in their lives. Many had to change to a different medical insurance plan sacrificing coverage for cheaper medical payments. Other retirees were forced to sell a large part of their retirement dreams in order to afford the premiums that they now have to pay.

More than a few retirees have had to mortgage their homes that were paid off in order to pay medical expenses that were not covered under a cheaper insurance plan. This has happened to one of my friends who I worked with for many, many years. It has been terrible to witness what it is doing to him mentally as well as physically. Many have depleted their life savings to offset the premium costs. Quite a few planned to travel, visit their children, grandchildren, and great grandchildren or enjoy seeing friends and just traveling around the country.

Now they just stay home or they go to Mexico to seek medical help. Retirees that could not afford even the cheaper plan have had to drop medical coverage altogether and simply pray to stay healthy. Sadly, one of my fellow retirees who could not afford the monthly premiums has incurred a significant out of pocket medical costs after his wife suffered two heart attacks requiring two pacemakers. She also developed pneumonia and diabetes which resulted in additional hospital stays. This sent their medical costs skyrocketing to over $87,000. All of this expense and no insurance, even though he was covered under a jointly negotiated collective bargaining agreement which provided health insurance until he and his wife both reached age 65. This summer our class action suit against Raytheon Missile Systems resulted in a favorable decision for Raytheon retirees.

In his findings, District Judge David Bury said that the collective agreements "unambiguously provide vested medical benefits for retirees until 65 at no cost." Judge Bury has ordered Raytheon to make the affected retirees whole and reinstate them in the company paid medical health insurance. Unfortunately, Raytheon has appealed this decision and the suffering for Raytheon retirees and their dependent continues.

It is important to note that Raytheon is a company that has grown fat on government contracts. According to Raytheon's 2007 annual report, 86 percent of company sales are to U.S. Government and all of the missile systems work is defense related. Since 2005 net income has tripled to nearly 2.6 billion and earnings per share have doubled. It angers me to think that a corporation like Raytheon that shows contempt for the retirees that built the company now benefit so generously from my tax dollars.

Mr. TIERNEY. Mr. Lillie, if I might without being rude, I have read the rest of the statement and I appreciate the sentiments that are in it, but I think you have substantively hit on the high points that you want to and if it is okay with you, we will move on to Mr. Kadereit and come back to questions. Does that work?

Mr. LILLIE. I guess.

Mr. TIERNEY. Thank you very much.

[The statement of Mr. Lillie follows:]

Prepared Statement of David E. Lillie, Raytheon Missile Systems Retiree

Mr. Chairman and Members of the Committee on Education and Labor, I want to thank you very, very much for inviting me to speak to you about the problems the retirees are having with Raytheon Missile Systems in Tucson, Arizona.

My name is Dave Lillie and in 1973 I went to work for Hughes Aircraft Company, which later became Raytheon Missile Systems. I worked as a tool and die maker until my retirement in 1999. As a retiree I was to receive fully paid medical insurance until age 65, a benefit that had been negotiated by my union, Local 933 of the International Association of Machinists and Aerospace Workers.

Then, in July of 2004, I received a notice in the mail that my company paid medical insurance, which I had had since my retirement, would now cost me $309.77 a month. Over the next two and a half years my premiums increased to $535.71 per month, a clear violation of the retiree health benefit language in the 1996 collective bargaining agreement, which was the labor agreement that I retired under.

After meeting with Local 933's Directing Business Representative, I soon learned that many retirees were paying as much as 55 percent of their fixed retirement income on these insurance premiums. We held a meeting with all the Raytheon retirees we could get in touch with who were affected by this violation. We retained legal counsel and found that Raytheon had unilaterally ignored the retiree health benefit language of the applicable collective bargaining agreements. A class action lawsuit was filed against Raytheon to regain our company paid health benefits.

The despicable actions of Raytheon affected approximately 1,000 retirees and their dependents, who suffered not only monetary losses because of unplanned premium costs, but also the mental anguish and stress due to this unnecessary and drastic change in their lives. Many had to change to a different medical insurance plan, sacrificing coverage for cheaper monthly premiums.

Other retirees have been forced to sell a large part of their retirement dreams in order to afford the premiums they now have to pay. More than a few retirees have had to mortgage their homes that were paid off in order to pay medical expenses that were not covered under a cheaper insurance plan. This has happened to one of my friends who I worked with for many years. It has been terrible to witness what it is doing to him mentally, well as physically. Many have depleted their life savings to offset the premium cost. Quite a few planned to travel, visit their children, grandchildren, or great-grandchildren, or enjoy seeing friends and just traveling about this country. Now they just stay home, though some go to Mexico to seek medical treatment.

Retirees that could not even afford a cheaper plan have had to drop medical coverage altogether and simply pray they stay healthy. Sadly, one of my fellow retirees who could not afford the monthly premiums has incurred significant out of pocket medical costs after his wife suffered two heart attacks and required two pacemakers. She also developed pneumonia and diabetes, which resulted in additional hospital stays. This has sent their medical costs skyrocketing to over $87,000. All this expense and no insurance, even though he was covered under a jointly negotiated collective bargaining agreement which provided health insurance until he and his wife both reached age 65.

This summer our class action lawsuit against Raytheon Missile Systems resulted in a favorable decision for Raytheon retirees. In his findings, U.S. District Judge David Bury said that the contract "unambiguously provide vested medical benefits for retirees until age 65 at no cost." Judge Bury has ordered Raytheon to make the affected retirees whole and reinstate them in the company paid medical health insurance.

Unfortunately, Raytheon has appealed this decision and the suffering for Raytheon retirees and their dependents continues. It is important to note that Raytheon is a company that has grown fat on government contracts. According to Raytheon's 2007 Annual Report, 86 percent of company sales are to the U.S. government, and all of the Missile Systems work is defense related. Since 2005 net income has tripled to nearly $2.6 billion and earnings per share have doubled. It angers me to think that a corporation like Raytheon, that shows contempt for the retirees that built the company, now benefits so generously from my tax dollars.

This week there is much talk about bailing out the geniuses of Wall Street whose phony finance schemes threaten our economy, but when will Congress start protecting the people who spent a life time doing the real work that made America great? Although I am not an expert on the technicalities of providing health care, I would like to express my appreciation to Congressman Tierney for addressing this issue in H.R. 1322, the Emergency Retiree Health Benefits Protection Act of 2007. We have to let corporate America know that the theft of retiree health benefits is unacceptable and I believe that

H.R. 1322 will help us do that.

Unfortunately, I do not believe that the current Administration shares Congressman Tierney's concern and I am afraid that we will have to wait for a new President and a new Congress before this legislation will move forward. In the meantime, Raytheon retirees need immediate help from a company that has put greed before justice. I call upon Congress take the necessary actions to make Raytheon fulfill its responsibilities to the people who made the company the success it is today.

I thank you for this opportunity to testify on this important matter and look forward to your questions.

Mr. TIERNEY. Mr. Kadereit, you have 5 minutes. Thank you.

STATEMENT OF BILL KADEREIT, PRESIDENT, NATIONAL RETIREE LEGISLATIVE NETWORK

Mr. KADEREIT. Good morning, Mr. Chairman and members of the committee. My name is Bill Kadereit. I am from Heath, Texas, and I appear before you this morning as president of the National Retiree Legislative Network, or NRLN, an organization that represents more than 2 million retirees across America. I commend the committee and you, Mr. Chairman, for focusing on this vital important topic and I appreciate the opportunity to this morning to say a few words.

Our retiree organizations serve a cross section of the top Fortune 500 companies such as Boeing, IBM, Johns Manville, Quest, Alcatel Lucent, Prudential, Raytheon, Detroit Edison, Pact Bell, GM, Ford, Chrysler, AT&T and a dozen or so others. Our members live in all 50 states and in over 300 congressional districts that are organized on a grassroots basis by congressional district. Although the majority of our membership is retired management employees, over 15 percent are retired union workers. Most of them feel betrayed by their former employers.

At the heart of this betrayal is that so many employees, even retired managers, were unaware that their former companies could break their promises to retirees. For example, many retired managers say they were not aware that the lump sum pension payments offered as inducements to older workers to retire often contain came from workers' own pension plan assets, and that happens today. Nor did they realize that the health care benefits plans contained statements that reserved to the company the right to reduce or cancel health care benefits.

Retiree exit interviews ended with a handshake and the passing of an envelope stuffed with benefit promises. Sandy, a retired IBM manager who saw his own insurance bill triple in 2004 put it this way: I feel I misled a lot of people, that I've lied to people. Then he said, "It does not sit well with me at all." This maybe little known to you, but capping and canceling health care liabilities in the '90's was beginning of a disturbing trend that continues to this day. International Paper used FASB 106 to book health care liabilities and then introduced caps on their health care liability to retirees. The effect was almost 19 million in earnings gains each year through year 2000.

In 2000, 2001, and 2002 they capped benefits of newly acquired companies and through 2004 benefited by another $65 million in profit. Sears implemented caps during the '90's and fed $383 million in earnings since 1997 to their bottom line. IBM implemented caps in 1999 that affected 190,000 retirees. It took 3 years for retiree health care costs to reach the $625 per retiree cap, but in 2002, retiree premiums increased 67 percent and another 29 percent in 2003.

Adding the greatest insult to this injury is the heinous EEOC rule of 2007 which permits companies to discriminate against over-age-65 retirees who can have their benefits eliminated completely with companies claiming necessity in order to maintain benefits for younger workers. There are over 10 million retirees over 65. Over-age-65 General Motors retirees will be forced onto Medicare without catastrophic, dental, vision, or hearing insurance they now have effective January 1, 2009. A GM retiree who must purchase supplemental insurance plus the four elements just cited that they are going to lose will be in the hole over $400 a month starting in January, 2009. A retiree on fixed income pension of $36,000, which would be $72,000 pay, roughly half pay, is going to lose between 18 to 20 percent of his or her fixed income if they replace all this coverage.

Ford, Chrysler, and GM are casting a big shadow over the retirement landscape. Singling out over age 65 retirees sets an example that will lead to more companies targeting them. It is ironic that retirees under age 65 are no better protected now than before the EEOC rule became effective. There are no promises. They have no guarantees they will ever not have their health care cut. I am not blaming the big three. The trend is universal. The EEOC rule and the fact that ERISA does not vest retiree benefits are the real culprits here. For this reason, maintenance of health care benefits in effect on the day of retirement is a top NRLN priority. Congress must address the problem of catastrophic insurance also for all re-

tirees and medical eligible Americans. It's just not the uninsured who are vulnerable.

Robert, a 66-year-old Dallas retiree, has brain cancer. He gets free supplies of a tumor-fighting drugs through a programs for low-income families. His premiums have jumped by $365 a month. His deductible and co-pays and other out-of-pocket expenses are on top of that. It eats up all the pension which is $850 a month, his wife, LaRue, says. They have cashed in his 401(K) and taken out a second mortgage on his home. Therefore, two other NRLN priorities are the inclusion of catastrophic coverage in Medicare and the creation of a Medicare buy-in option at costs for all under age 65 retirees.

Elizabeth Warren, a Harvard Law School professor and one of the authors of Consuming Bankruptcy Project, examined a sampling of noncommercial bankruptcies from 1991 to 2007, and people 65 and up were more than twice as likely to file for bankruptcy at the end of 2007 as opposed to 1991. Those over 75, the rate for those over 75 quadrupled.

Mr. TIERNEY. Mr. Kadereit, might I just ask you to sort of summarize your three recommendations in one sentence or less for each. Thank you.

Mr. KADEREIT. I will. Thank you.

First, we recommend preventing broken promises to retirees and mitigate the harm from the EEOC ruling by offering incentives to companies but requiring them to maintain their existing level of health care contributions for retirees. This incentive could take the form of a tax credit that would offset part of the cost of maintaining these caps. The NRLN calls this Maintenance of Cost Protection.

Second, we recommend you modify ERISA to prohibit the use of defined pension plan assets to make lump sum severance payments and operating expenses to be paid by the corporations. This would ensure that pension funds could be applied to health care through IRS section 420 as long as a cushion of 120 percent of the pension assets is maintained. Third, in 1986, Congress passed the Medicare Catastrophic Act of 1988, provided catastrophic insurance. The bill was attacked because it was declared prohibitively expensive by seniors at the time. The law was repealed in 1989. Now is the right time to work out a new bill that solves this catastrophic dilemma.

Mr. TIERNEY. Thank you, Mr. Kadereit.

[The statement of Mr. Kadereit follows:]

Prepared Statement of Bill Kadereit, President, National Retiree Legislative Network

Good morning, Chairman Miller and Members of the Committee. My name is Bill Kadereit and I am from Heath, Texas. I appear before you this morning as President of the National Retiree Legislative Network or NLRN, an organization that represents more than 2 million retirees across America. I commend you, Mr. Chairman, and the Committee for focusing on this vitally important topic and appreciate this opportunity to spend a few minutes with you this morning.

Our retiree organizations serves a cross section of the top Fortune 500 companies such as Boeing, IBM, Johns Manville, Alcatel Lucent, Prudential, Raytheon, Detroit Edison, Pacific Bell, GM, Ford, Chrysler, AT&T, and a dozen more.

Our members live in all 50 states and over 300 Congressional Districts. Although the majority of our membership is retired management employees, over 15% are retired union workers. Most of them feel betrayed by their former employers.

At the heart of this betrayal is that so many employees, even retired managers, were unaware that their former companies could break their promises to their retirees. For example, many retired managers say they were not aware that the lump sum pension payments offered as inducements to older workers to retire often came from workers' own pension plan assets. Nor did they realize that health care benefit plans contained statements that reserved to the company the right to reduce or cancel health care benefits. Retiree exit interviews ended with a handshake and the passing of an envelope stuffed with benefit promises.

Sandy, a retired IBM Manager who saw his own insurance bill triple in 2004 put it this way: "I feel I misled a lot of people, that I've lied to people;" then he said, "It does not sit well with me at all."

Capping and cancelling health care liabilities in the 90's was the beginning of a disturbing trend that continues to this day. International Paper used FASB 106 to book health care liabilities and then introduced caps. The effect was $18.7 million in earnings gains each year through 2000. In 2000, 2001 and 2002 they capped benefits of newly acquired companies and through 2004 benefited by another $65 million. Sears implemented caps during the 90's and fed $383 million to earnings since 1997.

IBM implemented caps in 1999 that affected 190,000 retirees. It took three years for retiree health care costs to reach the $625 cap but in 2002 retiree premiums increased nearly 67% and another 29% in 2003.

Adding the greatest insult to this injury is the heinous Equal Employment Opportunity Commission, or EEOC rule of 2007 which permits companies to discriminate against over-age-65 retirees who can have their health care benefits eliminated completely with companies claiming necessity in order to maintain benefits for younger workers. There are over 10,000,000 retirees over age 65.

Over-age-65 GM retirees will be forced onto Medicare without the catastrophic, dental, vision, or hearing insurance they now have, effective January 1, 2009. A GM retiree, who must purchase supplemental insurance, plus the four elements just cited, will be in the hole over $400 a month starting in January 2009. A retiree on a fixed income pension of $36,000 is going to lose between 18-20% of his or her after tax income if they replace all lost coverage. Ford, Chrysler and GM are casting a big shadow over the retirement landscape. Singling out over age 65 retirees sets an example that will lead to more companies targeting them. It is ironic that retirees under age 65 are no better protected now than before the EEOC rule became effective.

I am not blaming the Big Three. The trend is universal. The EEOC rule and the fact that ERISA does not vest retiree benefits are the real culprits. For this reason, maintenance of health care benefits in effect on the day of retirement is a top NRLN priority.

Congress must address the problem of catastrophic insurance for all retirees and Medicare eligible Americans. It is not just uninsured people who are vulnerable.

Robert, a 66-year-old Dallas retiree, has brain cancer. He gets free supplies of a tumor-fighting drug through a program for low-income families. His premiums have jumped by $365 a month, his deductible and co-pays and other out of pocket expenses are on top of that; "it eats up all the pension" which is $850 a month his wife, LaRue, says. They have cashed in his 401(k) account and taken out a second mortgage on their home. Two other NRLN priorities are the inclusion of catastrophic coverage in Medicare and the creation of a Medicare buy-in option, at cost, for all under age 65 retirees.

Elizabeth Warren, a Harvard Law School professor and one of the authors of Consumer Bankruptcy Project, examined a sampling of noncommercial bankruptcies from 1991 to 2007, and people 65 and up were more than twice as likely to file and the filing rate for those 75 and older more than quadrupled. This is very real and frightening!

So given all of this, what can Congress do to provide greater safeguards for retiree health benefits? The NLRN has three main recommendations:

First, prevent broken promises to retirees and mitigate the harm from the EEOC ruling by offering incentives to companies but requiring them to maintain their existing level of health care contributions for retirees. This incentive could take the form of tax credits that would offset part of the cost. The NRLN calls this Maintenance of Cost Protection (MCP).

Second, amend ERISA to prohibit the use of defined benefit pension plan assets to make lump-sum severance payments—an operating expense that should be paid from a restructuring reserve or from operating revenues. This will ensure that any pension fund surplus can be applied to retiree health care costs through use of IRS Sec 420 transfers to 401(h) trusts, as long as a cushion of 120% of current assets is maintained in the pension fund.

Third, in 1986, Congress passed the "Medicare Catastrophic Act of 1988" that provided catastrophic insurance that would protect fixed income seniors from devastating health care bills. But it was attacked by seniors who declared it prohibitively expensive at the time. The law was repealed in 1989. Now is the right time to work out a new bill that solves the catastrophic dilemma.

Thank you, Mr. Chairman and members of the Committee. We stand ready to work with you and your staffs on these and other legislative proposals that you may consider. I'd be happy to answer any questions you or the Committee members may have.

[Additional submissions of Mr. Kadereit follow:]

September 29, 2008.

DEAR COMMITTEE MEMBERS: On behalf of the more than 2 million members of the National Retiree Legislative Network, I want to express the NRLN's appreciation for the opportunity to testify at the September 25, 2008 hearing on "Safeguarding Retiree Health Benefits." The Committee is to be commended for its interest in the serious economic and social consequences caused by the erosion or cancellation of employer-sponsored health care benefits and the shifting of health care costs to retirees, most of whom exist on a fixed income. The document accompanying this letter is intended to provide additional support and elaboration on my testimony to the Committee.

The remarks made during the hearing by Representative John F. Tierney reflected his in-depth knowledge of the broken corporate promises to provide health care benefits that have victimized millions of retirees. The sponsorship of H.R. 1322 by Representative Tierney and other members of the Committee demonstrates their belief that legislative action is necessary to protect the health care benefits that retirees have earned through decades of their labor. The NRLN applauds their leadership and effort in this area.

The NRLN supports the concepts of H.R. 1322 and believes now is the time for Congress to integrate the NRLN's ideas and/or those of others and advance legislation as soon as possible. While cost-sharing must be capped, it is imperative that the cancellation of specific coverage and full plans be stopped.

The EEOC rule presumes that Medicare offers the equivalent to company health care plans, but it does not. The rule totally disregards the enormous loss of catastrophic coverage as well as dental, vision, hearing and other unique health care plan coverages that are being taken away from retirees.

The NRLN's proposals that were discussed at the hearing and elaborated upon in this accompanying document would protect over-age-65 retirees from further income erosion. In addition, our proposals stipulate protection for retirees under 65, whereas the EEOC rule leaves the under age 65 protection to the fate of future judgments made by employer plan sponsors.

I sincerely hope my testimony communicated to each of you that this is a huge issue regarding the loss of retiree fixed income that must be addressed now. It would be a grave error to think this issue can wait for national health care reform.

The NRLN firmly stands behind the efforts of this Committee. Marta Bascom, the NRLN's Washington-based Executive Director, is prepared to work with Committee staff to help stem the suffering that millions of retirees and their spouses are experiencing due to the increased cost of health care insurance that is robbing them of their retirement security. She can be reached at 703-863-9611.

Again, the NRLN deeply appreciates the invitation to participate in the hearing. The many emails and letters we have received from retirees across the nation who read my testimony emailed to them—and many viewed the webcast on the Committee's website—considered the hearing to be a glimmer of hope that some members of Congress recognize their plight and will try to help them.

Sincerely,

BILL KADEREIT, *President,*
National Retiree Legislative Network.

[The white paper, "Safeguarding Retiree Health Care Benefits: Protecting Retirees From Fixed-Income Erosion," submitted by Mr. Kadereit, may be accessed at the following Internet address:]

http://nrln.org/BKLETTERS/NRLN%20Whitepaper%20V15%20092908%20PDF.pdf

Mr. TIERNEY. Mr. Jones.

STATEMENT OF C. WILLIAM JONES, CHAIRMAN, PROTECTSENIORS.ORG

Mr. JONES. Good morning, Mr. Chairman, ranking member and members of the committee. My name is Bill Jones and I serve as the Protectseniors.org, a not for profit organization of retired union and management employees formed to tackle the issue of retiree health care. I am here today because we have a serious escalation of retiree health benefits slashed by corporate America. This is why with your help and leadership, Mr. Chairman, legislation in the form of H.R. 1322, the Emergency Retiree Health Benefits Protection Act must be passed. As you know, the original ERISA legislation prior to 1974 included health care insurance as a critical part of the congressional plan to provide retiree income security. In fact, H.R. 1322 is the health care language drafted by Michael Gordon and included in the original ERISA legislation.

The amendment that I am here to support was also drafted by Mr. Gordon in the year 2000 as requested by our association. For those who do not know, Michael Gordon was a very well known labor lawyer who was charged by Senator Jacob Javits and others to draft the original ERISA legislation and he lobbied for years to see it passed.

The reason why I am here today representing millions of retirees is because H.R. 1322, the health insurance portion of the ERISA legislation, was eliminated from the final bill, in order to make it more likely that that legislation would pass. The proponents had every intention to amend ERISA at a later date to add back protections for health care insurance. If Michael Gordon were alive today he would be here to tell you the same thing.

If we look back in time when most of the current retirees were in the workforce, we would see that larger American companies universally offered retiree health care to their employees and retirees as an incentive to retain trained employees. The workers accepted the IOU for retirement health care and other benefits in exchange for lower wages. Employers essentially deducted the cost of providing the insurance from wages and reminded employees that retirement health care and other benefits were part of their overall compensation package.

Therefore, employers on the one hand acknowledged their implied contract yet in the early 1980s added a clause to their benefits package that said that they had the right to amend the plan at any time. The clause was called the Reservation of Rights clause. This clause was never communicated to the employees during their careers. Later, employers added the possibility of termination of benefits to the clause and placed the statement of possible termination of benefits in employees' retirement packages.

Mr. Chairman, let me make this clear here. Employers told their employees annually for 20, 30, or 40 years that their reductions in pay and other perks were in exchange for their lifetime retirement health care and other benefits. It's also very important to understand that corporations benefited greatly by providing health care

benefits in lieu of wages. They did not have to pay Social Security and other payroll taxes on benefits. They could also defer funding those obligations when the earnings were low unlike payroll that had to be paid on time. Further, since the amount of an employee's pension is directly proportional to his or her rate of pay, corporations saved on pension costs as well. General Motors was the first to renege on this implied contract.

GM designed an incentive plan for management employees to retire early. They included free lifetime health care for the employee and spouse as one of the most attractive and beneficial features of the incentive plan. GM cashed in on all the benefits of promising retiree health care instead of paying higher wage only to renege on the obligation and cash in once again by stealing the promise and earned benefits form those who could least afford it. The retirees were presented with a lose-lose outcome while GM benefited with a win-win. The retirees chose to take GM to court and won in a lower court decision. GM then appealed the case and the appellate court found in favor of the company. GM retirees appealed to the Supreme Court and they were stunned by the Court's support of the appellate court decision. The three judges who dissented got it right stating that GM did create a vested right to lifetime health care benefits and criticized GM's corporate short-sightedness.

Pension plans are protected by law, but now employers can cut health care for retirees at any time. The vast majority of retirees live on fixed incomes with nest eggs that have taken big hits during the recent stock market decline. Many don't have a contingency plan because they had no idea they needed one. Mr. Chairman, we are facing a health care crisis in this country and H.R. 1322 should be a part of the overall solution. The Federal Government cannot afford to replace these lost benefits nor can many of these retirees pay more to get the basic health care they need. We are not here asking for a handout. What we want is for companies to live up to the promises they made. Employees earned the benefit and companies promised to deliver. A promise made should be a promise kept.

With your continued help and support, I am confident that we can get H.R. 1322 passed into law. Protectseniors is ready, willing and able to work with all of you in a bipartisan solution that's good for retirees, corporate America and the pocketbook of the Federal Government. With the crisis set off in the financial markets, we can't afford to pass additional taxes and burdens on to the American people and retirees cannot afford to pay more for the health care they earned and require.

A solution to the health care crisis will require everyone to pitch in and we believe H.R. 1322 does just that, and I thank you, the committee members for your attention to this solution to the health care crisis.

Mr. TIERNEY. Thank you very much, Mr. Jones.

[The statement of Mr. Jones follows:]

Prepared Statement of C. William Jones, ProtectSeniors.Org

Mr. Chairman, Ranking Member and members of the Committee, my name is Bill Jones and I serve as Chairman of the Board of ProtectSeniors.Org, a not-for-profit organization formed to tackle the issue of retiree healthcare. Our sole mission is to advocate for passage of H.R. 1322, the Emergency Retiree Health Benefits Protec-

tion Act and save millions of Americans from certain poverty because of the loss of their earned healthcare benefits.

I'm here today because we have seen an escalation of retiree healthcare benefits slashed by corporate America. This is why, with your help and leadership Mr. Chairman, legislation in the form of H.R. 1322, the Emergency Retiree Health Benefits Protection Act, was introduced.

Mr. Chairman, as you know, the original ERISA legislation in 1974 included healthcare insurance as a critical part of the Congressional plan to provide retiree income security. In fact, H.R. 1322 is the original healthcare language drafted by Michael Gordon and included in the ERISA legislation.

As we all know, and the reason I am here today representing millions of retirees, the H.R. 1322 healthcare insurance portion of the original ERISA legislation was eliminated from the final bill in order to lighten the load and make it more likely that the legislation would pass. Those close to the plan's design gave up the healthcare portion temporarily to pass the much needed guaranteed defined benefit pension law. They had every intention to amend ERISA at a later date to add protections for healthcare insurance. If Michael Gordon were alive today he would be here telling you the same thing.

If we look back in time when most of the current retirees were in the workforce, we would see that larger American companies universally offered retiree healthcare to their employees and retirees as an incentive to retain trained employees.

The workers accepted the IOU for retirement healthcare and other benefits in exchange for lower wages, and fewer vacations and holidays. Employers deducted the costs of providing the insurance from wages and reminded employees that the retirement healthcare and other benefits were part of their overall compensation package.

Therefore, employers on the one hand acknowledged their implied contract, yet in the mid to late-1980s added a clause to their benefits practice that said they had the right to amend the plan at any time. This clause was called—the Reservation of Rights Clause."

This change was never communicated to the employees during their careers. In the mid-1990s some employers placed the statement of possible health benefits termination in the Reservation of Rights Clause and in employee's termination packages at retirement. Therefore thousands of employees who had signed their retirement agreement papers were then and only then given the fine print, which many never read, on the insurance plan's possible demise as they walked out the door. Since most never read the fine print or never saw it, they were devastated when they were forced to pay more and more for health insurance they had never planned on having to buy.

Mr. Chairman, let me be clear here, employers told their employees annually for 20-30-40 years that their reductions in pay and other perks were in exchange for their retirement healthcare and other benefits. Yet after they were retired these same employers started to charge retirees for health issuance or stopped paying for it altogether.

It is also very important to understand that corporations benefited greatly by providing healthcare benefits in lieu of wages. They did not have to pay Social Security and other payroll taxes on the benefit. They could also defer funding those obligations when earnings were low, unlike payroll that must be paid on time. Further, since the amount of an employee's pension is directly proportional to his or her rate of pay, corporations saved pension costs as well.

Many of the retirees even took an early retirement program because they were offered a 100% paid healthcare insurance by a human resource or higher-level Vice president.

General Motors was the first to renege on this implied contract. GM designed an incentive plan for management employees to retire early. They included free healthcare for the employee and spouse for the rest of their lives as one of the most attractive and beneficial features of the incentive plan. (See Sprague v. GM)

However, in the early 1990s GM started charging for retiree health insurance. Several thousand retirees looked at their early retirement guarantee of 100% paid healthcare for life and consulted an attorney. The retirees chose to take GM to court to try and recover what was, in their mind, a clear case of corporate theft. The case was first settled in a lower court and the finding was in favor of the retirees.

GM then appealed the case and the appellate court found in favor of the company. The retirees were shocked to find that a benefits practice none of the retirees were aware of contained some legalese which the Sixth Circuit Court said favored GM and the retirees were not actually guaranteed healthcare for life as the Vice President's retirement incentive letter stated. The benefits practice contained the previously mentioned—reservation of rights clause."

These courageous GM retirees could not believe it so they anted up hundreds of thousands more of their retirement earnings to carry the case to the US Supreme Court. Unfortunately for retirees all over the country, the Supreme Court agreed with the Sixth Circuit and refused to overturn the ruling. That ruling left all retirees who expected to have health insurance in retirement at the mercy of their former employers.

Three judges dissented, stating that GM did create a vested right to lifetime healthcare benefits and criticizing GM's corporate shortsightedness." "When General Motors was flush with cash and health care costs were low," the dissent stated, "it was easy to promise employees and retirees lifetime healthcare. * * * Rather than pay off those perhaps ill-considered promises, it is easier for the current regime to say those promises were never made. (There is the tricky little matter of the paper trail of written assurances of lifetime healthcare, but General Motors, with the en banc majority's assistance, has managed to escape the ramifications of its now-regretted largesse." According to the dissent, the majority's opinion "is heads, General Motors wins; tails, the employees lose.")

Let us make this situation very clear. General Motors promised to provide lifetime healthcare insurance for no charge to all employees who retired by a certain date. Thousands of dedicated employees agreed to that deal and retired by the deadline. GM later reneged on that commitment and the burden for the healthcare costs fell on the retirees who were living on a fixed income and who upheld their part of the bargain. This unbelievably dishonest act was determined by The Supreme Court to be perfectly legal.

As we have seen in recent years the number of employers dropping health insurance has increased dramatically. With more and more employers claiming to not be able to compete globally, it is only a matter of time before most US corporations who still offer their retirees health insurance stop the practice and force these people who are on fixed incomes to buy expensive health insurance.

The result is that most will become uninsured. They will become only one health problem away from bankruptcy and a ward of the State and Federal Medicaid System. Had they been paid, during their working years, a fair amount instead of a lower amount plus a promise of healthcare coverage in retirement, their pensions would have been significantly higher and they would have been able to afford to pay for their own healthcare insurance.

Instead, GM cashed in on all the benefits of promising the healthcare insurance instead of paying a higher wage only to renege on the obligation and cash in once again by stealing the promised and earned benefits from those who could least afford it. The retirees were presented with a lose-lose outcome while GM benefited with a win-win.

What makes cuts to medical coverage so hard for many retirees to accept is that these cuts are most often perfectly legal. As we have stated above, this is unlike pension plans, which are protected by Federal law. Former employers can cut health coverage at any time for retirees. A few retirees have successfully sued former employers for their benefits in recent years (See Qwest case). But employment lawyers say that can happen only in rare cases where employers didn't specifically reserve the right to change their minds in writing.

"Most company benefits practices contain what we call "weasel' or Reservation of Rights clauses that protect them from any liability," says Norman Stein, a law professor who specializes in employee benefits at the University of Alabama. Stein says studies show few employees ever read the clauses anyway, which are often in fine print and in language that isn't always easy to understand.

Of course, many working Americans are coping with rising health costs. But seniors often find themselves in a particularly difficult spot when their benefits shrink. The vast majority of retirees live on fixed incomes with nest eggs that have taken big hits during the recent stock market decline. Many don't have a contingency plan because they had no idea they needed one. They entered the workforce in a different time and place—employers were more paternalistic and unions were strong.

Mr. Chairman, this is not a Republican or Democrat issue. Nor is it a union versus management issue. This is a retiree issue that needs to be fixed today. We are facing a healthcare crisis in this country and H.R. 1322 should be a part of the overall solution. The Federal government cannot afford to replace these benefits for millions of retirees. Nor can many of these retirees pay more out of their pockets to get the basic healthcare they need. You noticed I didn't say quality healthcare because this in most cases is too costly for them to afford.

We are not here asking for a handout. What we do want is for companies to live up to the promises they made. A promise made should be a promised kept. With your continued help and support I'm confident we can get H.R. 1322 passed into law.

Mr. Chairman and Ranking Member, we are ready, willing and able to work with all of you on a bi-partisan solution that is good for retirees, corporate America and the pocketbook of the Federal government. With the crisis set-off in the financial markets, we cannot afford to pass additional taxes and burdens onto the American people. A solution to the healthcare crisis will require everyone to pitch in. We believe H.R. 1322 does just that.

Thank you and I would be happy to answer any questions at this time.

History of ERISA

The Employee Benefits Security Administration is responsible for administering and enforcing the fiduciary, reporting and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). At the time of its name change in February 2003, EBSA was known as the Pension and Welfare Benefits Administration (PWBA). Prior to January 1986, PWBA was known as the Pension and Welfare Benefits Program. At the time of this name change, the Agency was upgraded to a sub-cabinet position with the establishment of Assistant Secretary and Deputy Assistant Secretary Positions.

The provisions of Title I of ERISA, which are administered by the U.S. Department of Labor, were enacted to address public concern that funds of private pension plans were being mismanaged and abused. ERISA was the culmination of a long line of legislation concerned with the labor and tax aspects of employee benefit plans. Since its enactment in 1974, ERISA has been amended to meet the changing retirement and health care needs of employees and their families. The role of EBSA has also evolved to meet these challenges.

The administration of ERISA is divided among the U.S. Department of Labor, the Internal Revenue Service of the Department of the Treasury (IRS), and the Pension Benefit Guaranty Corporation (PBGC). Title I, which contains rules for reporting and disclosure, vesting, participation, funding, fiduciary conduct, and civil enforcement, is administered by the U.S. Department of Labor. Title II of ERISA, which amended the Internal Revenue Code to parallel many of the Title I rules, is administered by the IRS. Title III is concerned with jurisdictional matters and with coordination of enforcement and regulatory activities by the U.S. Department of Labor and the IRS. Title IV covers the insurance of defined benefit pension plans and is administered by the PBGC.

Prior to a 1978 reorganization, there was overlapping responsibility for administration of the parallel provisions of Title I of ERISA and the tax code by the U.S. Department of Labor and the IRS, respectively. As a result of this reorganization, the U.S. Department of Labor has primary responsibility for reporting, disclosure and fiduciary requirements; and the IRS has primary responsibility for participation, vesting and funding issues. However, the U.S. Department of Labor may intervene in any matters that materially affect the rights of participants, regardless of primary responsibility.

As a result of the enactment of the Federal Employees' Retirement System Act of 1986 (FERSA), EBSA has fiduciary and auditing oversight of the Thrift Savings Plan that was established by this Act.

Pre-ERISA Legislation

Initially, the IRS was the primary regulator of private pension plans. The Revenue Acts of 1921 and 1926 allowed employers to deduct pension contributions from corporate income, and allowed for the income of the pension fund's portfolio to accumulate tax free. The participant in the plan realized no income until monies were distributed to the participant, provided the plan was tax qualified. To qualify for such favorable tax treatment, the plans had to meet certain minimum employee coverage and employer contribution requirements. The Revenue Act of 1942 provided stricter participation requirements and, for the first time, disclosure requirements.

The U.S. Department of Labor became involved in the regulation of employee benefits plans upon passage of the Welfare and Pension Plans Disclosure Act in 1959 (WPPDA). Plan sponsors (e.g., employers and labor unions) were required to file plan descriptions and annual financial reports with the government; these materials were also available to plan participants and beneficiaries. This legislation was intended to provide employees with enough information regarding plans so that they could monitor their plans to prevent mismanagement and abuse of plan funds. The WPPDA was amended in 1962, at which time the Secretary of Labor was given enforcement, interpretative, and investigatory powers over employee benefit plans to prevent mismanagement and abuse of plan funds. Compared to ERISA, the WPPDA had a very limited scope.

ERISA

The goal of Title I of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans. Among other things, ERISA requires that sponsors of private employee benefit plans provide participants and beneficiaries with adequate information regarding their plans. Also, those individuals who manage plans (and other fiduciaries) must meet certain standards of conduct, derived from the common law of trusts and made applicable (with certain modifications) to all fiduciaries. The law also contains detailed provisions for reporting to the government and disclosure to participants. Furthermore, there are civil enforcement provisions aimed at assuring that plan funds are protected and that participants who qualify receive their benefits.

ERISA covers pension plans and welfare benefit plans (e.g., employment based medical and hospitalization benefits, apprenticeship plans, and other plans described in section 3(1) of Title I). Plan sponsors must design and administer their plans in accordance with ERISA. Title II of ERISA contains standards that must be met by employee pension benefit plans in order to qualify for favorable tax treatment. Noncompliance with these tax qualification requirements of ERISA may result in disqualification of a plan and/or other penalties.

Important legislation has amended ERISA and increased the responsibilities of EBSA. For example, the Retirement Equity Act of 1984 reduced the maximum age that an employer may require for participation in a pension plan; lengthened the period of time a participant could be absent from work without losing pension credits; and created spousal rights to pension benefits through qualified domestic relations orders (QDROs) in the event of divorce, and through preretirement survivor annuities. The Omnibus Budget Reconciliation Act of 1986 eliminated the ability of employers to limit participation in their retirement plans for new employees who are close to retirement and the ability to freeze benefits for participants over age 65. The Omnibus Budget Reconciliation Act of 1989 requires the Secretary of Labor to assess a civil penalty equal to 20% of any amount recovered for violations of fiduciary responsibility.

The department's responsibilities under ERISA have also been expanded by health care reform. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) added a new part 6 to Title I of ERISA which provides for the continuation of health care coverage for employees and their beneficiaries (for a limited period of time) if certain events would otherwise result in a reduction in benefits. More recently, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) added a new Part 7 to Title I of ERISA aimed at making health care coverage more portable and secure for employees, and gave the department broad additional responsibilities with respect to private health plans.

Impact of the "After the Fact" removal of Corporate Retiree Health Insurance Shrinking benefits

The following is a sample of large companies who have reduced healthcare benefits of their retirees AFTER they retired. This list represents about 3 million retirees:

Aetna Inc.: Stopped subsidizing health insurance for employees who retire after 2007. In January, they will stop funding all retirees' dental coverage.

Bethlehem Steel Corp.: Filed for bankruptcy protection in 2001. They canceled all health benefits for its 95,000 retirees last year.

Caterpillar Inc.: Starting in January, retirees will pay significantly more of their health insurance premiums, with costs ranging from $180 a month per individual to $370 per family.

DuPont Co.: Now charges pre-Medicare retirees higher health insurance premiums than it charges current employees.

Embarq: The wire line spinoff from Sprint stopped offering Medigap coverage to their Medicare eligible retirees in January 2008

Kodak: Removed healthcare supplemental insurance for Medicare eligible retirees effective

Levi Strauss & Co.: Stopped subsidizing Medigap coverage (private insurance that covers services Medicare does not) for all retirees and raised deductibles on prescription drugs to as much as $50. Company will stop subsidizing benefits for future retirees.

Lucent Technologies: In January, stopped covering dependents of employees who left after May 1990 if they made more than $87,000; level will fall to $65,000 next year.

Sears, Roebuck & Co.: Starting next year, all subsidies for retiree health benefits will be eliminated for new hires and employees younger than 40. Sears is also capping employer contributions to retiree health benefits at 2004 levels.

Tribune Co. (owner of The Times): Has stopped subsidizing retirement health benefits for those hired after March 2003.

Verizon Communications: Stopped all future retiree health benefits for management employees and has dramatically increased the retiree portion of health Insurance from 0 to $800+ per month depending on size of family.

Whirlpool Corp.: Beginning this year, retiring employees are paying 20% of their health insurance costs.

Mr. TIERNEY. Mr. Yamamoto, please.

STATEMENT OF DALE YAMAMOTO, PRESIDENT AND FOUNDER, RED QUILL CONSULTING

Mr. YAMAMOTO. Thank you. Good morning, Mr. Chairman. My name is Dale Yamamoto. I am an independent consultant right now and I just recently retired from the international benefits consulting firm of Hewitt Associates where I served as a their chief health care actuary. I am pleased to be here today to talk about the employers' role in providing retiree health care to their retirees. And I provided a chart pack in your materials I will go through. I certainly don't have enough time to go through every one of them. But the charts provide kind of the key aspects of retiree health care including prevalence of the benefits design changes in employers have made in the past and think about in the future as well as ideas on prefunding and national average cost of the program. And during my 5 minutes I have, I plan to focus primarily on the prevalence and design issues of the benefit program but certainly am prepared to discuss the other elements and aspects of my slides in the Q&A discussion.

So on slide number 3, whenever you talk about retiree health care, it is generally focussed on large employers and slide number 3 shows and demonstrates why. It is because most employers—it is mostly a large employer benefit program as shown by this chart because only about 4 percent of the smaller employers offer retiree health care benefits and it is really focused on larger employers.

Slide number 4 shows the decline and prevalence of the benefits. And you will notice that most of the decline happened in the 1990s. And if you flip again to slide number 5, it is a pretty simple slide that shows you, I think, some of the drivers behind the decline in prevalence of the benefits in the first place.

Some notable legislation I have left out, of course, was Medicare adopted in 1965 and ERISA in 1974. Those were legislation that encouraged the offering of retiree health care benefits and started with DEFRA in 1984, and we start to see some decline, but the biggest impact probably was what the Financial Accounting Standards Board did in 1990 when they adopted FASB 106, which required employers to accrue for the cost in advance of providing the benefits, and they again provided some other limitations or additional accounting requirements upon employers back in 2006, most recently. That moved a lot of the funded status directly on to the balance sheets.

And about the same time, the Governmental Accounting Standards Board adopted GASB 43 and 45 that provided very similar accounting treatments for municipalities and counties; so I think we will see the same phenomena happen in the public sector now.

Moving to slide number 6, one of the things that is not evident when you look at the prevalence of retiree health care offered by employers is what does happen to current retirees and you will notice on slide number 6 the percentage of employer-based coverage has remained relatively stable over the last 15 years. And I would say that is primarily because when employers do eliminate coverage, it is generally for future retirees and future retirees who retire 5 years into the future and generally grandfather, current retirees, and those that are ready to retire in the short-term near future.

So if I jump to slide number 9, this shows—gives you a picture of the design changes that employers have made between 2005 and 2006. This is the latest data that we have from a survey that the Kaiser Family Foundation does in conjunction with Hewitt Associates. You will see that most of the design changes that are up on the top have been geared toward changes in the plan design, cost-sharing changes, increase in the deductibles, increase in co-pays to retirees, perhaps increase in retiree contributions. It isn't until you get down toward the middle that you find 11 percent of the employers did terminate coverage for future retirees between those 2 years. And in fact, if you move your eyes a couple down, you will see that 8 percent actually improved or added some coverage for retirees. And I have to say in the 25 years of my experience consulting with employers and working with them on retiree health care benefits, I have always found that virtually everyone has a very difficult time making decisions on changes to their retiree health care benefits and I am sure when it gets to the senior management level they agonize over even these changes in the cost-sharing provisions and certainly when they are about to terminate coverage for future retirees it's—I am sure they have many sleepless nights trying to make that decision of whether or not to do it.

So it is not a position that is taken lightly. And that is—I will end there. That is my final remarks and I will be certainly happy to answer any questions in the Q&A discussion.

Mr. TIERNEY. Thank you very much.

[The statement of Yamamoto follows:]

Prepared Statement of Dale H. Yamamoto, President, Red Quill Consulting, Inc.

Good morning Mr. Chairman, my name is Dale Yamamoto. I am currently an independent consultant and recently retired from Hewitt Associates where I served as their chief healthcare actuary. I am pleased to be here today to talk about the employers' role in providing health insurance to retirees.

Focus

The chartpack that I have provided to you includes several slides outlining the key aspects of retiree health care including the prevalence of the benefits, discussion of key design features including Medicare Advantage and prescription drugs as well as slides on prefunding, and national costs. I plan to focus on the prevalence and design slides and I am prepared to discuss the other slides as well.

Prevalence

Most of my presentation will focus on the programs offered by larger employers because as you can see on Slide 3, it is that group that primarily has offered the benefits.

Slide 4 shows the declining prevalence of retiree benefits offered by employers. The top two lines are data from Hewitt's SpecBook database of over 1,000 large employers while the bottom shows the results from the latest Kaiser Family Founda-

tion survey. Both show a declining percentage of employers offering the benefit with most of the decline happening during the 1990s.

The key reasons for the decline are shown on Slide 5: In the early 1980s, tax legislation restricted the amount a company could prefund this benefit in a trust fund. Various industry groups, including ERIC, have asked for relief of these limitations since the enactment. And in 1990; the Financial Accounting Standards Board (FASB) adopted a new accounting rule (FAS 106) requiring advance accounting of the benefit—similar to pension plans. These rules were again tightened in 2006 and the Governmental Accounting Standards Board (GASB) adopted similar rules (GASB 43 and 45) for states and municipalities.

A key point to understand is that while the statistics show a decline in the percentage of employers offering retiree health coverage, Slide 6 shows that retirees covered by employer-sponsored plans have remained relatively steady. The reason is that, in most cases, employers "grandfather" existing and soon-to-be retirees in the current plan and do not terminate their benefits.

Design

Skipping to Slide 9 shows you the types of changes that employers made between 2005 and 2006. 11% dropped coverage for future retirees. And 8% actually improved coverage in some fashion.

In my experience, retiree health care plans are one of the few benefit offerings that are difficult for employers to change. Senior management agonize over any decision to reduce these benefits and I know there have been sleepless nights for those trying to decide to terminate coverage—even for future retirees. In short decisions to change benefits in any way because of changing circumstances are not made lightly.

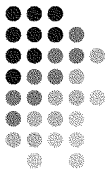
Thank you again for the opportunity to testify and I will be happy to address any questions.

The State of Employer-Sponsored Retiree Health Care Benefits

Dale H. Yamamoto
on behalf of the ERISA Industry Committee

House Committee on Education and Labor
Hearing on "Safeguarding Retiree Health Benefits"

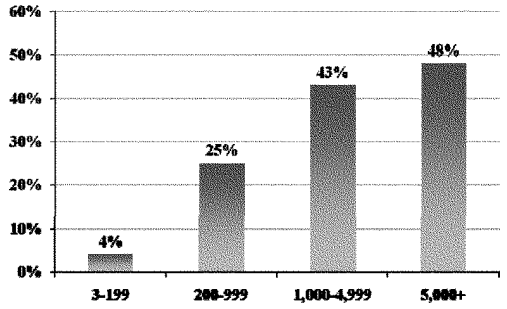
September 25, 2008



Content

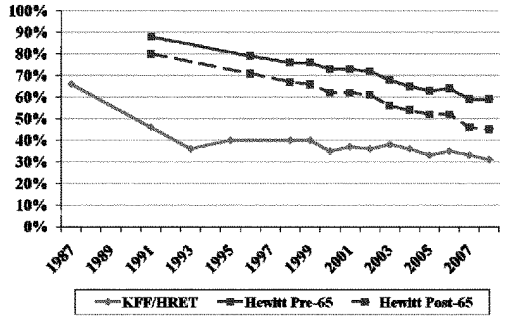
- Prevalence
- Design
  - Key changes
  - Medicare Advantage
  - Prescription Drugs
- Prefunding
- Costs

Private Sector by Size Percentage Offering



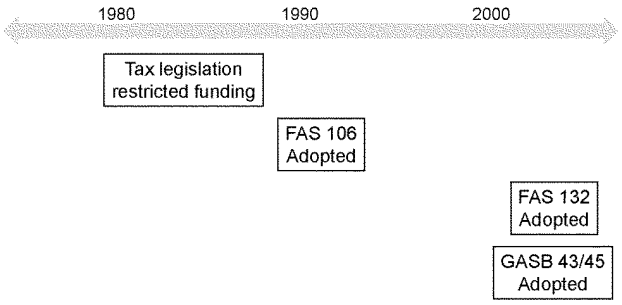
Source: Kaiser/HRET 2008 employer-sponsored health benefit survey.

Private Sector Percentage Offering

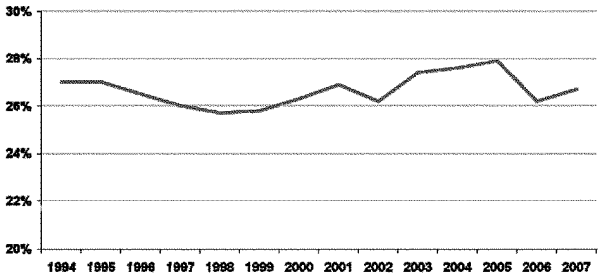


Source: Kaiser/HRET 2008 survey and Hewitt Benefit SpecSelect

History of Retiree Health Care

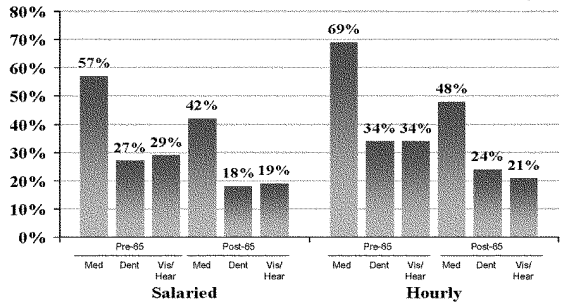


Percentage of Medicare Retirees with Employer Coverage



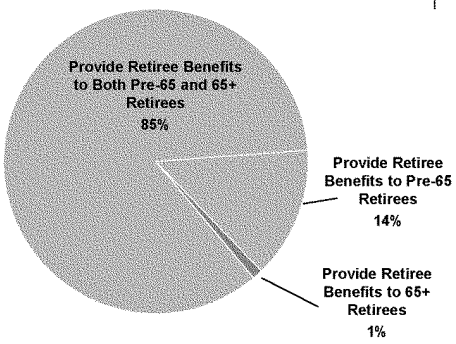
Source: GAO analysis of Current Population Survey, March Supplements 1995-2000; Hewitt analysis of CPS, March Supplements 2001-2007

Benefit Plan Prevalence in 2008



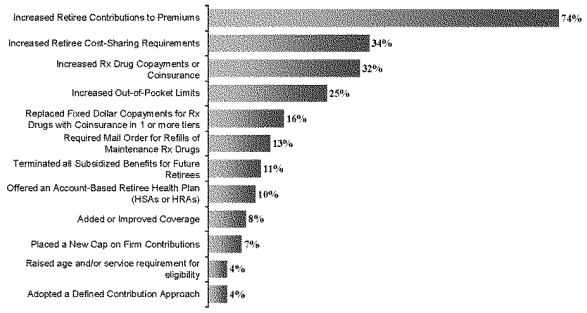
Source: 2008 Hewitt Benefit SpecSelect

Private Sector Employers Percentage Offering



SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

Employers Changes to Pre-65 Benefits between 2005 and 2006

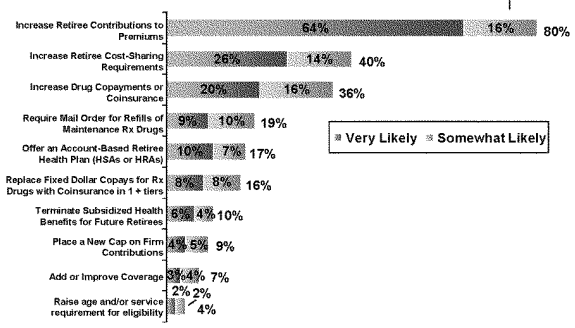


SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

What the 8% Did
(the 8% Who Improved Benefits)

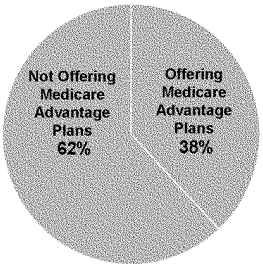
- Added new medical benefits
- Lowered retiree contributions to premiums
- Added retiree health benefits for newly acquired group of employees
- Increased lifetime maximum
- Added domestic partner coverage
- Covers 100% after Medicare vs. 80%
- Improved preventive benefits
- Premier physician network at lower cost

Likelihood of Making Changes to Retiree Health Benefits for 2007



SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

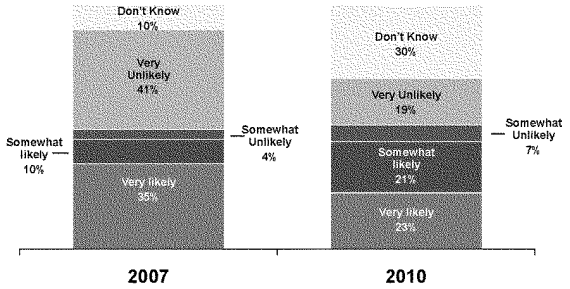
Private-Sector Employers Offering Medicare Advantage Plans



Medicare Advantage plans may include Medicare Health Maintenance Organization (MHO) plans, Medicare Preferred Provider Organization (PPO) plans or Medicare Private Fee-for-Service (PFFS) plans.

SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

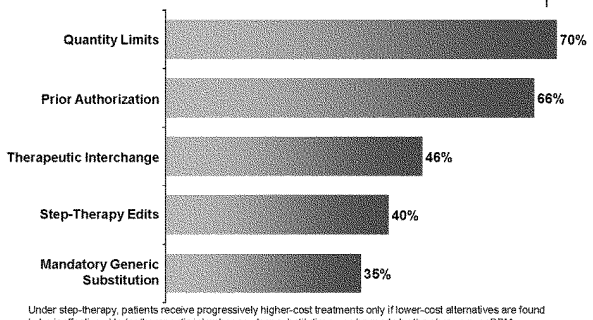
Likelihood of Offering Medicare Advantage Plans



Medicare Advantage plans may include Medicare Health Maintenance Organization (MHO) plans, Medicare Preferred Provider Organization (PPO) plans or Medicare Private Fee-for-Service (PFFS) plans.

SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

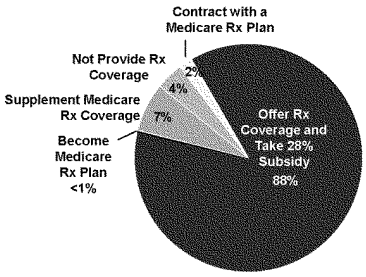
Drug Utilization Management Features for Age 65+ Retirees



Under step-therapy, patients receive progressively higher-cost treatments only if lower-cost alternatives are found to be ineffective. Under therapeutic interchange, drug substitutions can be made by the pharmacy or PBM.

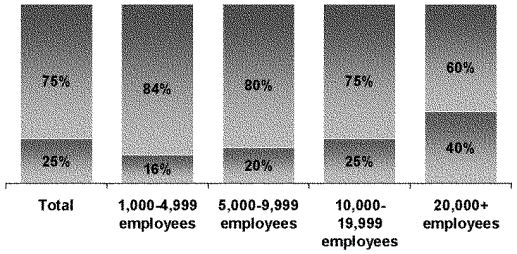
SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

Distribution of Retirees by 2007 Employer Part D Alternatives



SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

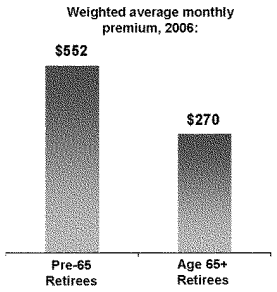
Percentage of Employers Pre-Funding, by Firm Size

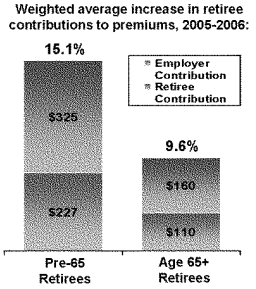


Note: Firms that report pre-funding have made contributions to the fund within the last three years.

SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

Average Monthly Premiums for New Retirees

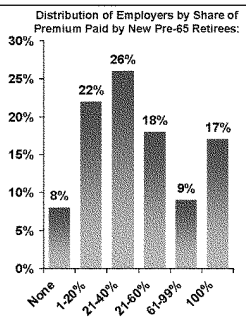


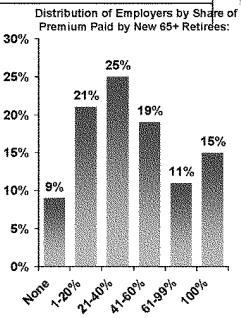


Note: Premiums for retiree-only coverage for full-time employees retiring on or after January 1, 2006 in plans with the largest number of enrolled retirees. Includes firms that do not require retiree contributions.

SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.

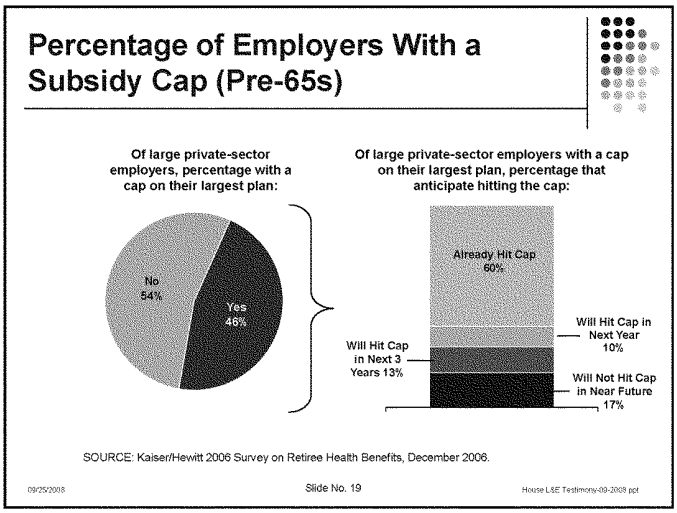
Distribution of Employers by Share of Premium Paid by Retirees





Note: Premiums for retiree-only coverage for full-time employees retiring on or after January 1, 2006, in plans with the largest number of enrolled retirees.

SOURCE: Kaiser/Hewitt 2006 Survey on Retiree Health Benefits, December 2006.



Mr. TIERNEY. Mr. Macey.

STATEMENT OF SCOTT MACEY, SENIOR VICE PRESIDENT AND DIRECTOR OF GOVERNMENT AFFAIRS, AON CONSULTING, INC., ON BEHALF OF THE ERISA INDUSTRY COMMITTEE

Mr. MACEY. Good morning, Mr. Chairman, ranking member, and members of the committee. I very much appreciate the opportunity to appear here today to discuss these very important issues. As the chairman indicated, I am Scott Macey, and I am executive vice president and senior director of government affairs for Aon Consulting and I am appearing here today on behalf of the ERISA Industry Committee commonly known as ERIC. I would like to preface my remarks by the following: These are compelling stories that we have heard this morning, and I think we can all empathize with them. And my testimony certainly isn't intended to denigrate the impact or the reality that various people that have incurred them have to face. We may differ on identifying the source of the problem or the possible solutions, but I think we can all agree this is an important that needs to be addressed by Congress and society.

ERIC commends the committee for its focus on retiree health benefits. Our Nation's senior citizens need and deserve access to quality affordable post-retirement health care. The problem of the lack of such coverage is true especially for workers who retire before they become eligible for Medicare. Employers also feel the pressure of our health care system acutely. ERIC's members share the committee's concern over the loss of health care access and coverage for workers, retirees, and other Americans. Indeed, we and others have warned repeatedly that increasing health care costs, changes to accounting rules, and insufficient funding rules would result in increasing pressure on both active and retiree health care. Although we welcome the committee's attention to this important

national issue even in the midst of a national financial crisis, we are concerned about the approach being proposed.

The bill that is the focus of today's hearing, we believe, misinterprets the underlying reasons for the problem, concluding that employers are the problem and proposes a solution that is likely to have significant unintended adverse consequences. I would like to raise four key points for the committee's consideration:

First, if an employer promises lifetime health benefits to its retirees, that commitment is protected under current law. Second, if an employer has lawfully reserved the right to change retiree benefits and communicated that right and reservation to participants, that legal right should also be protected. Third, if employers are prohibited from changing the benefits in place when a worker retires, this mandate will have the unintended likely consequence of depriving millions of future retirees of these important benefits.

Fourth, the effort to safeguard retiree health benefits will succeed only if it addresses the pervasive problems in the American health care system. These are societal problems that require a comprehensive solution.

Existing law does protect promised benefits. The Act rests on a mistake and assumption that employers are breaking their promises to provide retirees with lifetime post-retirement health benefits. This is simply not the case. If an employer has made an unconditional commitment to provide post-retirement benefits, the courts will uphold that commitment. The bill will penalize employers that voluntarily provide post-retirement benefits. The bill does not seek to just enforce existing promises. Instead, the bill seeks to create new promises where none existed before. The bill would prohibit an employer from reducing post-retirement benefits for workers who have already retired even though the company reserved that right and told employees about it.

If an employer has already exercised its right to reduce post-retirement benefits for example by asking participants to share in the rising cost of medical care, the bill would give each retiree the option to restore prior benefits. In short, the bill would rewrite private benefit plans retroactively in order to convert an employer's voluntary conditional decision to offer post-retirement health benefits into an unconditional lifetime guarantee. The bill will force employers to eliminate the benefits they provide today. The key unintended consequence will be a dramatic decline in the number of employers that are able to provide post-retirement benefits to their employees under the legal straight jacket that the bill would impose. An employer must be able to change its health benefit programs to reflect the changing conditions in which the both employer and its plans operate.

In fact, ERISA recognizes the clear distinctions between pension plans and welfare plans and provides for the vesting of the former but not the latter. The bill's retroactive imposition of new and possibly unaffordable liabilities will have a tremendous chilling effect on the provision of both retiree health benefits and other benefits. It will force employers to deal with a Faustian bargain of either terminating health benefits for future retirees or signing up permanently to an unknown escalation of cost and price volatility.

And, finally, the problem calls for a comprehensive solution. Proposals that would lock in companies to the current benefits fail to address the factors that cause companies to reduce the benefits in the first place. The erosion of retiree health benefits is a symptom of the problem in the American health care system, not the cause. These are societal problems that require societal and more comprehensive solutions. The ERISA Industry Committee has proposed some comprehensive provisions but we would be willing to—very happy to work with the committee and others on more targeted resolutions such as Medicare access for early retirees, access-only group plans, and things like that. Thank you so much for the opportunity to present our views today.

Mr. TIERNEY. Thank you, Mr. Macey.

[The statement of Mr. Macey follows:]

Prepared Statement of Scott J. Macey, Senior Vice President, Government Affairs, Aon Consulting, on Behalf of the ERISA Industry Committee

Good morning, Mr. Chairman and members of the Committee. I very much appreciate the opportunity to speak with you and the Committee today about retiree health benefits.

I am Senior Vice President and Director of Government Affairs of Aon Consulting, a leading human capital and management consulting firm. I am appearing today on behalf of The ERISA Industry Committee, also known as "ERIC." I am also a member of ERIC's Executive Committee and its former Chairman. ERIC is a nonprofit association committed to the advancement of the employee retirement, incentive, and welfare plans of America's largest employers. ERIC's members provide comprehensive benefits directly to some 25 million active and retired workers and their families. Together, ERIC member companies have provided benchmark life security plans directly to more than 10% of the U.S. population.

ERIC commends the Committee for its focus on retiree health benefits. Our nation's senior citizens need and deserve access to quality, affordable postretirement health care. Years of double-digit inflation in medical costs have eaten away at workers' retirement income, making it increasingly difficult for retirees to afford even the most basic post-retirement health benefits. This is true especially for workers who retire before they become eligible for Medicare.

Employers also feel these pressures acutely. As American companies struggle to compete in a global economy, they labor under the burden of a health care system that is among the most expensive in the world. National expenditures on health care now consume 16 percent of our gross domestic product. In the United States, this burden falls much more heavily on private companies than it does in other developed nations, where the government plays a larger role in providing health care and controlling medical costs.

ERIC's members share the Committee's concern over the loss of health care access and coverage for workers, retirees, and other Americans. Indeed, we and others have warned repeatedly that increasing health care costs, changes to accounting rules, and insufficient funding rules would result in increasing pressure on both retiree and active health care coverage.

Although we welcome the Committee's attention to this important national issue even in the midst of a national financial crisis, we are concerned, however, about the approach being proposed. The bill that is the focus of today's hearing misinterprets the underlying reasons for the problem, i.e., that employers are the problem, and proposes a solution that is likely to have significant unintended adverse consequences. The Emergency Retiree Health Benefits Protection Act would single out large employers that have voluntarily provided post-retirement health coverage to their workers, and would require these employers—and only these employers—to preserve for the remainder of a retiree's life the coverage that was in effect at his retirement. The bill would prohibit employers from changing these benefits regardless of future, and unknown, changes in economic conditions, costs of medical care or company financial status, and would ignore potential future changes in the nation's healthcare system.

I would like to raise four key points for the Committee's consideration.

First, if an employer promises lifetime health benefits to its retirees, that commitment is well-protected under current law. There is no need for legislation to safeguard benefit commitments.

Second, if an employer has lawfully reserved the right to change retiree benefits—and employees have been informed of that right, that legal right should also be protected. Employers that have voluntarily offered post-retirement health benefits in the past should not be penalized making a more generous set of compensation promises at one point in time by having those benefits retroactively locked in.

Third, if employers are prohibited from changing the benefits in place when a worker retires, this mandate will have the unintended consequence of depriving millions of future retirees of employer-provided health benefits. Employers will cease to offer retiree health coverage if they do not have the flexibility to modify the coverage as necessary to reflect changing circumstances. Indeed, in spite of earlier warnings to policy makers by employer groups and others, employers have in fact curtailed new retiree health arrangements due to increasing costs and new accounting rules.

Fourth—and most important as it addresses the real root of the problem—the effort to safeguard retiree health benefits will succeed only if it addresses the pervasive problems in the American health care system that force employers to reduce post-retirement health benefits, and that impede access to affordable health coverage by both working and non-working Americans. These are societal problems that require a comprehensive solution. A proposal that subjects a small group of companies to punitive measures will not, in the end, help to resolve the much greater issues and concerns that are at stake.

Existing Law Protects Promised Benefits

The Emergency Retiree Health Benefits Protection Act rests on a mistaken assumption: that employers are breaking their promises to provide retirees with lifetime post-retirement health benefits. This is simply not the case. If an employer has made an unconditional commitment to provide post-retirement benefits, that commitment will be enforced under current law.

Courts have ruled repeatedly that an employer may not change the benefits of a retired worker unless written plan documents reserve the employer's right to amend or terminate post-retirement benefits, and the employer communicates this right to its workers clearly and unequivocally before they retire. Accordingly, under current law, an employer may reduce post-retirement benefits only if the employer can show that it did not commit to provide these benefits permanently.

The Bill Will Penalize Employers That Voluntarily Provided Post-Retirement Benefits

The bill does not seek just to enforce existing promises—those promises are enforceable already under current law, and are routinely protected by the federal courts. Instead, the bill seeks to create new promises where none existed before.

The bill would prohibit an employer from reducing post-retirement benefits for workers who have already retired, even though the employer has included in its retiree health plan "a provision specifically authorizing the plan to make post-retirement reductions in retiree health benefits." The bill would permit an employer to terminate health benefits for current retirees only if the employer can show that the company otherwise will be unable to continue in business.

If an employer has already exercised its right to reduce post-retirement benefits—for example, by asking retirees to share a portion of rising medical costs through increased contributions—the bill would give each retiree the option to restore the benefits to their former level. The bill would apparently even prohibit an employer from implementing health care networks and other arrangements that are responsive to the changing environment of our health care delivery system.

In short, the bill would re-write private benefit plans retroactively in order to convert an employer's voluntary, conditional decision to offer postretirement health benefits into an unconditional lifetime guarantee. Employers that have been less generous, and have provided no post-retirement benefits to their employees, would be rewarded with a decades-long competitive advantage. We also have concerns about constitutional challenges to the retroactive provisions of the bill as well as the fundamental fairness of that approach.

The Bill Will Push Employers to Eliminate The Benefits They Provide Today

If the bill is enacted, the unintended consequence will be a dramatic decline in the number of employers that are able to provide post-retirement benefits to their employees. Few companies will risk offering retiree health benefits if they are confined in the legal straitjacket that the bill would impose.

An employer must be able to change its benefit programs to reflect the changing conditions in which its business operates: it cannot lock in retiree health coverage without regard to escalating costs, increasing pressures from global competition, innovations in health care delivery, development of new government programs, or any of the myriad other factors that cause employers to exercise their right to reduce

post-retirement health benefits or signing up permanently to an unknown escalation of cost and price volatility. In fact, ERISA recognizes the clear distinctions between pension and health and welfare plans and has provided for the vesting of the former, but not the latter. The bill's retroactive imposition of new and possibly unaffordable liabilities will also have a chilling effect on employers' willingness to continue to sponsor other benefit plans that could be subject to similar mandates.

Faced with the prospect of permanent, unalterable retiree benefits, employers that today provide millions of retirees with access to affordable postretirement health care will be presented with the Faustian bargain of either terminating health benefits for future retirees or signing up permanently to an unknown escalation of cost and price volatility. Employers must keep their costs under control in order to remain competitive in a challenging global economy. Accordingly, to the extent that the bill retroactively locks in coverage for current retirees, the inevitable result will be to divert employers' compensation resources from other compensation and benefit programs at the expense of other workers.

The Problem Calls For a Comprehensive Solution

Proposals that would lock-in companies retiree health benefits fail to address the factors that cause companies to reduce or eliminate these benefits in the first place. These proposals do not address the underlying problem of inadequate individual access to affordable health care in our society.

Many companies have gone to great lengths to preserve their postretirement health benefits as long as they can, in the face of mounting pressures that are rapidly making these programs unsustainable. Employers that provide comprehensive health benefits today are under severe stress. They must contend with excessive medical cost increases, complex and inflexible rules governing benefits, burdensome and often unnecessary litigation, shifting accounting standards, inadequate funding mechanisms, and federal and state mandates that constantly impose new obligations on a system that is already terribly overburdened.

The erosion of retiree health benefits is a symptom of the problems in the American health care system, not the cause. These are societal problems that call for a comprehensive solution involving all of the stakeholders. It will take the best efforts of federal and state policymakers, industry leaders, trade associations, and private individuals to address these problems.

I do not come before this Committee seeking to preserve the status quo or to ignore the serious issue that the bill attempts to address. Clearly America's health care system must change in fundamental ways if it is to provide our citizens with the care they deserve. ERIC is committed to working constructively to achieve meaningful and lasting change.

ERIC has proposed a "New Benefit Platform for Life Security" to create a framework for a 21st century life security plan that is more efficient, controls costs, is more transparent, leverages information technology to empower consumers, and ensures the delivery of high quality retirement and health coverage to all Americans. We would welcome an opportunity to work with the Committee to build solutions around this framework.

That completes my prepared statement. I will be pleased to answer any questions the Chairman or any members of the Committee might have. Thank you for your attention.

Mr. TIERNEY. Professor Stein.

STATEMENT OF NORMAN STEIN, DOUGLAS ARANT PROFESSOR OF LAW, UNIVERSITY OF ALABAMA

Mr. STEIN. The clock is still on Scott.

Mr. TIERNEY. Go for it.

Mr. STEIN. Mr. Chairman and members of the committee, thank you for the opportunity to address you today on this really very important subject. My statement this morning focuses on the state of the law with respect to an employee's promise to repay retiree health benefits. The law begins with a statute. The relevant statute here, ERISA, does not provide for mandatory vesting of health benefits the way it does for retirement benefits. ERISA does, however, hold employers responsible for the contractual promises they make to their employees.

In retiree health plans, then the relevant statutory question is whether the employer has made a binding promise to its employees to pay them health benefits after they retire. Federal judges are often called upon to determine whether an employer has, in fact, made such a promise. The legal question is one of contract. Courts, for the most part, have not been sympathetic to employee claims. Indeed, some of the opinions seem to channel the surrealism of a Franz Kafka novel. I want to focus up on a case that is a paradigmatic example of judges stretching neutral-sounding concepts to favor an employer's right to break a promise over an employee's to rely on a promise. The case is Sprague versus General Motors, which Mr. Jones briefly summarized earlier. Sprague involved former employees receiving benefits under a General Motors retiree health plan. General Motors had repeatedly told its employees that retiree health benefits were lifetime benefits and that GM would pay their full cost, but eventually GM changed its corporate mind and amended the plan to include expensive deductibles and copays. GM's former employees sued to compel GM to keep its promises. About 50,000 of the retirees had retired early and I will focus on their story.

During the 1970s and 1980s, GM offered incentives to older employees to take early retirement. The benefits to which such employees were entitled included, quote, "lifetime health benefits." Here is how GM typically described those benefits: "Full, basic health care coverage for life at no cost." That's a quote. Most people would understand that statement to mean what it seemed to say, that if you retire, you can count on GM providing you with health benefits for your life.

Moreover, over the years, GM had distributed to its employees official plan summaries, other written documents, and, in some cases, wrote individualized letters to particular employees that made representations identical to or similar to the one I just read. The actual GM retiree health plan, however, was a legal document with boilerplate language giving GM the right to modify or terminate the plan. It is unlikely that very many, if any, employees actually ever saw that plan document. And even if they had they might have reasonably concluded that the explicit representations GM made about lifetime benefits trumped any reserved employer rights.

The trial court and a three-judge appeals court ruled for the employees but the entire court of appeals reheard the case and reversed. Here is the essence of what it held: The only document that counts is the formal plan document. None of the other GM communications could be consulted unless the formal plan document itself was ambiguous about whether the benefits had vested, but according to the court, the plan document was not ambiguous since the document expressly reserved GM's right to modify or terminate the plan.

So the employees, including the early retirees who signed away very various rights to accept what they thought were actually benefits rather than temporary gifts, were left with what most Americans, with the exception of a handful of Federal judges, might call a broken promise.

Does this mean employees always lose? No. Employees with collective bargaining agreements can sometimes win their cases based on a negotiated agreement, especially if their case is heard by judges whose world view does not predispose them to favor employer prerogative over worker financial security. In other cases, the plan document might be ambiguous and other employer communications might be considered, although here the Sixth Circuit seemed to say that a plan that includes a reservation of rights clause is crystal clear evidence that the employer has made no binding promise no matter what else the employer said.

So what should Congress do? Several people have suggested that it do nothing, but doing nothing means that retirees cannot rely on what appear to be clear promises and courts will occasionally rule for employees but more often will not. As Bill Payne, a lawyer who has litigated many retiree health care cases has observed, the outcome is often foreordained by the ideological predisposition of the judges hearing a case rather than by the actual facts of the case, not that the facts are irrelevant.

Congress could try to level the playing field for employees with clear, reasonable and consistent rules to guide judges who must determine whether the employer has made a binding promise to its employees. Or Congress might say that clear, written and oral representations from the employer become part of the plan even if not embodied in the actual written formal plan document. Or Congress might consider legislation such as that introduced by Congressman Tierney that would make it difficult for an employer to terminate retiree health benefits once an employee has retired. Or Congress might try to help all older Americans have access to decent and affordable health care, not just those who were fortunate enough to have an employer who promised such benefits and then fortunate enough to have their case assigned to a Federal judge who believes that promises made should be promises kept even if those promises were made to an employee.

Mr. TIERNEY. Thank you, Professor.

[The statement of Mr. Stein follows:]

Prepared Statement of Norman P. Stein, Professor, University of Alabama School of Law

Mr. Chairman, Members of the Committee, I am Norman Stein, a professor at the University of Alabama School of Law, where I am privileged to hold the Douglas Arant Professorship. This semester, I am also working at the Pension Rights Center here in Washington, D.C. The Pension Rights Center is the nation's only consumer organization dedicated solely to promoting and protecting the pension rights of workers, retirees and their families. Today, however, the views expressed in my testimony are mine alone and do not necessarily represent the views of either the Pension Rights Center or the University of Alabama.

My statement this morning focuses on the state of the law with respect to an employer's promise to pay retiree health benefits. I will show that the law is hostile to reasonable employee expectations about retiree health benefits—expectations created by the employer and from which the employer benefited in terms of increased employee loyalty and productivity.

The law begins with the statute. ERISA does not provide for mandatory vesting of health benefits the way it does for retirement benefits, regardless of how long an employee worked. ERISA does, however, hold employers responsible for the contractual promises they make to their employees. In retiree health care plans, then, the relevant statutory question is whether the employer has made a binding promise to its employees to pay them health benefits after they retire. Federal judges are

often called upon to determine whether an employer has made such a promise to its employees. The legal question is one of contract.

As I have suggested, courts have not, for the most part, been sympathetic to employee claims. Indeed, some of the opinions seem to channel the surrealism of a Franz Kafka novel. I want to focus on a case that is generally regarded as the paradigmatic example of judges stretching neutral-sounding concepts to elevate an employer's right to break a promise over an employees' right to rely on a promise. The case is Sprague v. General Motors.

Sprague involved over 80,000 former salaried employees who were receiving benefits under a General Motors retiree health plan. General Motors repeatedly told its employees that the retiree health benefits were lifetime benefits and that General Motors would pay their full cost. But eventually, General Motors changed its corporate mind and amended the plan to introduce expensive deductibles and co-pays and to eliminate outright valuable benefits. I think from the vantage point of the retiree, there was a frightening aspect to GM's actions that went beyond the immediate changes to the plan. By amending the plan, GM signaled to the employees that it might make further changes to the plan and could, if it chose, eliminate the plan altogether.

GM's former employees sued to compel GM to keep its promises. About 50,000 of the retirees had retired early and I will focus on their story.

During the 1970s and 1980s, GM offered incentives to many of its older employees to retiree early. The benefits to which the employees were entitled included "lifetime" health benefits. Here is how GM typically described the healthy benefits to people trying to decide whether to take early retirement: "full basic health care coverage for life at no cost to the retirees." Most people would understand that statement to mean what it seemed to say: that if you retire, you can count of GM providing you with lifetime health benefits for your life. The employees who opted for early retirement, partly on the basis of these lifetime health benefits, waived legal rights that they might have had against GM.

Moreover, over the years, GM had distributed to its employees official plan summaries, other written documents and, in some case, individualized letters to particular employees, that made similar representations to the one I just read, and GM managers often stressed to the employees the value of the lifetime medical benefits they would receive when they retired.

The actual GM retiree health plan, however, was a legal document that included boilerplate language reserving to GM the rights to modify or terminate the plan. It is unlikely that very many, if any, employees actually read the actual formal plan document (and it is likely that few employees ever even received it). Moreover, an employee might well have thought the explicit representations about lifetime benefits—made many times in many forms over many years—would have trumped any reserved employer rights.

Both the trial court and a three-judge panel of the Sixth Circuit Court of Appeals ruled for the employees under these circumstances. The gist of their rulings was that GM promised lifetime benefits to its early retirees and could not unilaterally break that promise.

The entire Sixth Circuit Court of Appeals, however, heard the case and reversed. Here is the essence of what it held: the only document that counted was the formal plan document. None of the other GM communications—not the summary plan descriptions, not the letters, not the other communications—could be consulted unless the formal plan itself was ambiguous about GM's right to modify the plan. But the plan document was not ambiguous, according to the Court, since that document expressly reserved GM's right to modify or terminate the plan. So the employees, including the early retirees who signed away various rights to accept what they thought were actual benefits rather than temporary gifts, were left with what most Americans, with the exception of a handful of judges, might call a broken promise.

Does this mean employees always lose? No. Employees with collective bargaining agreements can sometimes win their cases based on the negotiated agreement, especially if their cases are heard by judges whose world view does not predispose them to favor employer autonomy over worker financial security. In other cases, the plan document might be ambiguous and other employer communications might be considered, although here the Sixth Circuit seemed to say that a plan that includes a reservation of rights clause is crystal-clear evidence that the employer has not made a binding promise. And in some cases, some judges might treat the summary plan description as a plan document and find it significant that the description did not alert employees to the fact that the employer could change the plan, or drop the plan. And in other cases, some judges might hold that the employer violated fiduciary rules if it lied about benefits and employees reasonably relied upon the employer's misrepresentations.

We know that in a real work environment, rather than the imagined work environment conjured up by the judges in Sprague, employees tend to believe communications—oral and written—that they receive from their managers. They do not hire sophisticated lawyers to review plan documents and render opinions to them at $500 per hour on whether incomprehensible legalese buried deep within a plan trumps what otherwise appear to be clear promises.

So what should Congress do? Several people have suggested that it do nothing, but doing nothing means that retirees cannot rely on what appear to be clear promises and courts will occasionally rule for employees but more often will not. As Bill Payne, a lawyer who has litigated many retiree health care cases, has suggested, the outcome will often be foreordained by the ideological predisposition of the judges hearing a case rather than by the actual facts of the case.

Congress could try to level the playing field for employees with clear, reasonable, and consistent rules to guide judges who must determine whether the employer has made a promise to its employees. Or Congress might say that plans can be modified by clear written and oral representations even if not embodied in the actual written formal plan document. Or Congress might consider legislation such as that introduced by Congressman Tierney that would make it difficult or perhaps impossible for an employer to terminate retiree health benefits after an employee has retired. Or Congress might try to help all older Americans have access to decent and affordable health care, not just those who were fortunate enough to have an employer who promised such benefits and fortunate enough to be assigned a federal judge who believes that promises made should be promises kept.

Mr. TIERNEY. I thank all of you for your testimony. We appreciate it. It gives us plenty of food for thought. We are going to go into our questions here and we will give each member 5 minutes for the questions and responses and try to give people an opportunity to go again if we have time.

I understand, Mr. Lillie, if there were any questions concerning the contract or some legal matters that you would like to consult your attorney before answering those. Mr. Kline has said that if that's the case, you can certainly turn and get some clarification from your counsel if you want. I am not sure anyone is going to ask you any particular legal questions. They might ask you some particulars about your personal experience on that.

Mr. Macey, you raised the objections that we hear to this remedy from time to time, but after hearing Mr. Lillie and listening to Professor Stein and Mr. Jones, how can you continue to say that employers are not breaking their promise, that we have targeted the wrong remedy here? We all understand that the health care system at large needs some attention. This is a situation where clearly there at least seems some evidence where employers have indicated a coverage, and then at some point, taken a different path. How do you still maintain that this is a situation where employers are keeping their promises?

Mr. MACEY. Well, I agree with Professor Stein's statement that this is primarily a matter of contract law, so I would want to understand what the contract does. And ERISA also provides that you need to communicate things in a summary plan description and in other documents. And in fact, some of the cases have—more recent cases not necessarily with retiree health but with benefits in general have involved that the courts say if there is a conflict between what you tell people and the plan, what you tell people will be enforced. So if you have an SD that says one thing and a plan that says another you can't—an employer can't just rely on the plan document. Also you have to look at the SPD. I would also——

Mr. TIERNEY. Excuse me. But that hasn't worked out too well, though, has it? Professor Stein, isn't that exactly what happened to GM? They had one document and then a series of other documents that said exactly the opposite, and the court said it doesn't matter what they told you most recently, we are going back to the original thing you saw when you were hired 26 years ago and why didn't you remember it?

Mr. STEIN. Yes. In some ways I agree with Scott that it is not necessarily a problem with the statute; it is a problem with the way the statute is being interpreted by judges. And there is a lot of scholarly literature on this on a variety of topic but judges sometimes provide very different contract principles when dealing with employer-employee relations then when they are dealing with other types of contractual relationships. And I think what we are seeing in this area is an example of that kind of an approach to looking at contracts.

Mr. TIERNEY. As much as we are looking at contracts, I think we are also looking at equity, in that there are estoppel principles that flow in and otherwise. But let me ask some of the other witnesses their response to a point that Mr. Macey raises, that if you require employers who are profitable, who have made this promise to maintain it during the lifetime of somebody's retirement, then all hell is going to break loose, everybody is going to loose their health insurance and it is going to be the end of the picture.

Mr. Jones, what do you say that to that argument?

Mr. JONES. I think history tells you that this hasn't happened, that people who did not know about the reservation of rights clause, especially the part of termination of benefits or reductions of benefits have not been protected. Time and time again, Mr. Kadereit came from Lucent and you know what happened to the Lucent people. I came from Nynex and now Verizon. I know what has happened there. It goes on and on. I don't understand. In fact, this is news to me that if you have a document that says one thing and you have been told something else, that is exactly what happened to all of us, and we are all suffering the consequences. So this is a problem with the legal system.

Mr. TIERNEY. Mr. Kadereit.

Mr. KADEREIT. First of all, I believe that all the damage occurred between 1990 and '93 and not in the '90s, as I believe someone said earlier, because FASB was announced in '90 to be effective in '93. Between that period of time companies raced like the devil to put caps in so they could profit from that and those caps limited at that period of time benefits.

As to the question of the interpretation agreements, I think the classic case we have before us is the EEOC rule. The EEOC rule was wedged in on the promise that retirees under age 65 would lose their benefits if they weren't able to dump everyone else under the bus over age 65. However, if you examine the construct of that rule or any other verbal or written agreement, you will find there are absolutely no guarantees for anyone under age 65. So the test will be—and it has already begun to happen. Lucent has already taken advantage of the EEOC rule and reduced its health care benefits for prescription drugs for people under 65.

The point I would make, sir, is that there are no guarantees and in the absence of any guarantees there will—the behavior will run toward profitability and not toward what our people are being told, and that is that they are legacy.

Mr. TIERNEY. Thank you.

Mr. Kline.

Mr. MACEY. Mr. Chairman, can I possibly comment upon a few of these?

Mr. TIERNEY. If Mr. Kline would like you to do so, certainly.

Mr. KLINE. Thank you, Mr. Chairman.

Yes, you may, Mr. Macey.

Mr. MACEY. Thank you so much. Some of the companies we talk about they are verged on financial failure. So it is not like they are wreaking huge profits and returning some great return to shareholders. One of the companies you mentioned has been in significant financial difficulties probably, as you know, for many years. And what happened was when some of these—when decisions were made to offer these benefits many years ago, they were very—the cost of the benefits and the treatments and technologies available were much different than they are now.

So I don't think any company made an unconditional promise. I am not aware of companies that made these unconditional promises that they would provide for life, whatever health care evolved into. I would want to look and see with each company, each one of the ones that have been mentioned either in the testimony or otherwise or that we all know about, and I do hope these decisions have been taken very seriously by companies and the ones I have worked with they certainly have been—have not been taken lightly. But was a commitment made, for instance, to provide health coverage based upon what the costs were in 1985? Well, if that is the case the costs might be $1,000 per person or $2,000 per person and not $12,000 or $10,000 per person. So these are very, very complicated issues, and I actually have anecdotally in my own family—my brother has incurred exactly what the other witnesses have testified about today, but this bill wouldn't have helped him at all. He worked for a company, actually headed up a very small landscaping and tree surgery company for many years, 40 years, and he sold it off to one of his employees. He was a great employee, but turned out to be a bad business person and ran the company into the ground.

And my brother was supposed to get health insurance until he was Medicare eligible. Well, he lost that insurance at age 62, and at age 63 he had a massive heart attack and cardiac arrest and was in a coma for approximately a month. Now thank God he is in great shape now physically and we have managed to work ourselves through $500,000 of uninsured health costs. First of all, we negotiated down to $100,000 with some family help and with his own personal retirement savings he was able to pull that off and not lose his house. But this bill wouldn't help him at all. That is why among other reasons we are saying this is a societal more comprehensive problem, not one just to impose a focus or a select tax on a few companies that are trying to do the right thing.

Mr. KLINE. Thank you.

Mr. KADEREIT. May I make a comment?

Mr. KLINE. No. Sorry. I am rapidly running out of time here and while it was demonstrated that I would not come down there and rap you with a hammer, I am not so comfortable sitting next to the chairman if I run overtime.

Let me just say very briefly that I think what Professor Stein has said and Mr. Macey about what and how benefits are communicated is extremely important, and I would also say that it is extremely important that when we write law, when we make statute, that we write it as clearly and unambiguously as we can and not rely on, as one of my colleagues famously said, attorney world to sort it out. We need to make it clear. And in this case, it seems to me that, leaving out the legal matters in front of us, that we have a case where something was communicated, went to court, the court ruled in favor of the employees and now it is under appeal and the attorneys are staying busy.

So Professor Stein, you had a pretty interesting suggestion I thought that if Congress were going to do something, we might want to clarify what prevails over what in terms of the communications that have been put forward and I would hope that would be one of the things that we would look at. I still remain very concerned and this is the reason I am sorry I cut you off. The light was about to turn red. I really did want to hear about some of the concerns from Mr. Yamamoto and Mr. Macey about what would happen if you put a mandate in, what would happen potentially to the voluntary retirement system, but I see that my time is about gone and you still have—then let me ask that of Mr. Macey. If we put this mandate in, Mr. Tierney's 1322, what do you suspect would happen with this voluntary system?

Mr. MACEY. I think companies when they look at an unknown future cost and price volatility that they would be—that would be imposed upon them, I think a lot of them, the overwhelming majority, will terminate their plans for future retirees, for the active employees now. So we will be creating a worse situation that we are going to have to deal with in the future for all of those employees.

Mr. KLINE. Thank you very much, Mr. Chairman.

Mr. LILLIE. Mr. Chairman, could I say something, please?

Mr. TIERNEY. Actually you may, but with the chairman's prerogative, you have 1 minute. Go ahead.

Mr. LILLIE. I am not an attorney. I am just a plain old retired tool and die maker.

Mr. TIERNEY. You are chewing up your 1 minute.

Mr. LILLIE. And I have seen a lot of people suffer. Raytheon is not in any state of duress. Believe me. There are billions and billions of dollars of contracts, and yet they are reneging on their contractual language with that they bought into when they bought Hughes, and they are reneging on that, and we have got an awful of people that are really suffering. Their whole lives they have worked towards their retirement to enjoy it and now it is going down the tubes.

Mr. TIERNEY. That is a point well taken, Mr. Lillie, and I do note that 1322 at least deals with profitable companies.

Mr. LILLIE. Yes.

Mr. TIERNEY. And provides for a waiver if a situation is in distress, and provides for a guarantee for loans if they need to have some assistance in maintaining their promise.

Mr. LILLIE. Could I ask one more thing, sir? I am witnessing something here that I mean—like I say, I don't know anything about how things are done up here, but I understand Democrats are over here, Republicans are over here. Is that correct?

Mr. TIERNEY. So far so good.

Mr. LILLIE. So am I to believe that the Republicans that haven't showed up don't care about us retirees?

Mr. TIERNEY. Not at all. Not at all.

Mr. KLINE. Mr. Chairman.

Mr. TIERNEY. Mr. Kline, I will take care of this. Any members not being here is not indicative of lack of interest at all. Everybody has an opportunity to read all the testimony, and will read all of your written testimony and the results here today. We have a lot going on down here. Members have multiple subcommittees and committees and action on the floor. They have a whole host of responsibilities. They have staff members here monitoring the hearings as well.

We have a big financial crisis that Mr. Macey referred to earlier that we are all involved with right now. We have continuing resolutions to try to carry our financing through the end of the year and the next election. We have a stimulus issue going forward. There is a lot going on, and all these members have multiple responsibilities, and whether they are here or not—and some will come, stay as long as they can and leave, and may come back. It is not at all an indication of lack of interest. That would be unfair to even indicate that.

Mr. LILLIE. Thank you.

Mr. TIERNEY. Okay, Mr. Andrews, you are recognized for 5 minutes.

Mr. ANDREWS. Thank you, Mr. Chairman. Thank you, ladies and gentlemen. I find this hearing to be fraught with irony. The issue that is riveting this Capitol today is the value of keeping a promise. Last night, the President of the United States went on television and talked about the promise that we receive when we put our money in a bank, that we ought to be sure that it is honored. And he said, talking about the FDIC, the keeper of that promise, the guarantor of that promise, the FDIC has been in existence for 75 years, and no one has ever lost a penny on an insured deposit, and this will not change.

I agree with the President on that. But tens of thousands of people at Raytheon and General Motors and other companies relied on a promise that if they went to work and if they followed the rules when they went to work that they would have great health care for the rest of their lives. And we are having a hearing about whether that promise means something under the law or whether it doesn't. I think it needs to mean a lot under the law. I want to, Mr. Macey, welcome you back to the committee and ask you about this. On page 4 of your statement, you say that courts have ruled repeatedly that an employer may not change the benefits of a retired worker unless written plan documents reserve the employer's right to amend or terminate the post-retirement benefits, and, the employer

communicates these rights to its workers clearly and unequivocally before they retire.

How do you reconcile that, though, with the Sprague v. General Motors case where, in fact, General Motors not only didn't warn workers that they could be losing these benefits after they retired, they said exactly the opposite. In communication after communication, they said these are lifetime retirement benefits. So is your description of the law inaccurate?

Mr. MACEY. No, I don't think it is. One, that case, if I recall correctly, dates from about 10 years ago. And it had kind of a torturous history up and down the court system. And I apologize, but I don't recall all the details, the factual details of——

Mr. ANDREWS. Well, isn't the important detail that General Motors won, that the retirees didn't get their benefits?

Mr. MACEY. I want to go back and read the final decision. I think there were several appellate court decisions and two or three district court decisions.

Mr. ANDREWS. But the final en banc decision was that General Motors won and the employees lost.

Mr. MACEY. No, I know the result. I don't know—I haven't read the case recently to know the reasoning behind it. I know there are lots of cases out there, and the Federal courts are strewn with cases both for participants and for employers that generally are very factual specific cases. It depends on the specific facts. But I think you are raising, regardless of all these cases and whether or not judges are making decisions ideologically instead of based on the law and the facts, which they should, you are raising an important issue. And that is communications. What have participants been told and what can they reasonably, what are reasonable expectations based upon what they have been told? And Professor Stein and I were talking before the hearing this morning about maybe the Department of Labor, which does have a project underway as to statements that are supposed to be made to participants in 401(k) plans about the fees that their accounts are paying, maybe they should have a project underway on this issue. If a company says——

Mr. ANDREWS. Yeah.

Mr. MACEY [continuing]. We have a reserved right——

Mr. ANDREWS. If I may, though, I don't think the problem here has been the ambiguity of the statements made by employers to retirees and workers. I think it has been their disregard of those statements. I think that the common thread throughout these cases is that there is not a factual dispute as to whether or not the employer promised lifetime health benefits.

There is a legal dispute over whether that promise is overridden by a unilateral decision in the plan documents. So isn't Mr. Tierney's legislation headed in the right direction where it resolves that dispute and essentially says as a matter of public policy you can't do that? You can't make a series of representations which are contrary to the legal position that you later take? Isn't that sort of a basic in contract law?

Mr. MACEY. I agree with that final statement, but I guess I respectfully disagree with your characterization of what the issue is. I think it does come down to, one, contract, and two, what you tell

people. And if an SPD says here is the benefit we currently provide, but we reserve the right to change it or terminate the plan entirely, to me that is—they have a legal right that this bill would——

Mr. ANDREWS. My time is almost up, but I would just like to close with two things. I would invite Mr. Macey, with the record being left open, for you to submit to the committee any cases where the statements by the employer were ambiguous with respect to this where the employer won. And second, echoing something the chairman said, the chairman's bill specifically provides a waiver for a company that would meet financial distress because of honoring this promise to apply to the Department of Labor and be relieved of its obligation. So this argument that somehow this would impair the solvency of corporations if they had to honor these promises is dealt with in the underlying legislation. Thank you.

Mr. TIERNEY. Thank you, Mr. Andrews. Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman, and thank you all for being here today on the very important issue of safeguarding retiree health benefits. Mr. Yamamoto, in reviewing your testimony, I have a concern about the restrictions on company prefunding of retiree health benefits. Can you tell us are there any proposals that would responsibly change these rules to encourage the offering of retiree benefits?

Mr. YAMAMOTO. Yeah, back in 1984, like I mentioned, the Deficit Reduction Act of 1984 limited the amount of money that an employer can put into what is called a Voluntary Employees Beneficiary Association, a 501(c)9 trust fund. What that did is there is the mismatch between the accounting requirements now that was adopted a little bit later, in 1990, versus what can be funded into a trust fund. So there is not a lot of incentive for an employer to match the accounting requirement that they have to expense on their financial statements to what they can actually set aside on a tax effective basis.

So that is probably the key limitation there. I have worked—I have to admit, I have worked with several employers that have tried to come up with that through different funding vehicles, you know, beyond just this one trust vehicle that is out there. But it is difficult to do.

Mr. WILSON. Well, in the legislation before us is there a way to amend it in such a way that this could be helpful?

Mr. YAMAMOTO. It would be eliminating a lot of limitations that are currently in the laws for VEBAs.

Mr. WILSON. Well, as we all share an interest in this, I hope we can look at that potential. Mr. Macey, in your experience, what specific types of changes have employers made post-retirement to retiree benefit plans? Have these changes permitted employers to continue to offer retiree benefits?

Mr. MACEY. I think, you know, other than very financially distressed or bankrupt companies, the ones that I am familiar with and have dealt with have not terminated the plans outright. I think developing networks so that people get a better deal on copayments and deductibles if they use a network operation rather than just a total free standing, free choice program. Additional copays and some rise in deductibles. I can remember back in the

1970s, I think I had a very rich plan for a while, and I had a deductible of $100. And it seems like that would be extremely unrealistic to have $100 deductible in today's environment.

So changes like that increases in the premium. Sometimes the caps that were mentioned so that the employer says we will cover the premium cost, the coverage cost up to some level, and then above that the increases, meaning what really happens is they usually set that level somewhat below the current cost, and then as health care inflation continues, it rises above that cost and the employees and retirees then are assuming the burden of health care inflation. And one of the points I was making in my testimony is that if you have health care inflation at 10 or 12 or 15 percent year after year, no company can assume that type of burden and doesn't assume it with respect to anything else it does business with.

Mr. WILSON. And I appreciate that explanation. Additionally, I am really hopeful that employers can find out what duties they have, also employees, what rights they have. Can you elaborate in your testimony how current law adequately protects retirees?

Mr. MACEY. Well, I think the cases basically say if a company has promised to employees a lifetime unchanged benefit, and I say both lifetime and unchanged, and hasn't also clearly said that that is what you get now, but we have the right to change that in the future, the courts uphold that promise.

Now, I think the cases where companies have made that type of unconditional promise you will see much more frequently in collectively bargained plans, where they are dealing with a union and the union is pushing back on them. And so the courts, especially in the sixth circuit, where a lot of these cases came out of Ohio and Michigan and places like that, a lot of the old manufacturing companies, the courts have upheld those type of commitments and told the companies they had to continue to provide the benefit.

Mr. WILSON. Thank you all very much.

Mr. TIERNEY. Thank you, Mr. Wilson. Mr. Sarbanes?

Mr. SARBANES. Thank you, Mr. Chairman. I think it is a terrific bill that you have authored. I don't think I have heard any meaningful objection to it offered. And I also want to endorse the comments of Representative Andrews. I am kind of curious about the whole FASB thing. You talked about between 1990 and 1993, as people rushed to get these obligations off their books. Well, let me ask you, Mr. Stein, Professor Stein, do you think that attorneys for these companies would have been advising the companies that if they went ahead and in compliance with the new FASB rules showed the obligations on their balance sheets that that would have been a concession of some sort of contractual obligation to actually follow through with those, or do you think that is, in effect, what was operating to make them pull these things off the books?

Mr. STEIN. I think it was complex, and a lot of things were going on. But I think the change in FASB really affected employers that were saying, you know, gosh, I now have to show these benefits as if—you know, at their value, as if they are real.

Mr. SARBANES. As if they are real, meaning all along maybe they never thought they were real, right?

Mr. STEIN. Well, I think what Scott said is true. I think they thought they were real. I think they didn't appreciate what the

promise might mean in a changed kind of medical environment, where health costs have outpaced inflation. But you know, generally we don't tell people that you can change your contract because the world didn't turn out the way the parties had thought when they negotiated the contract. And I also think that Scott's right, I mean, this is a very serious problem with respect to individual employees, and in particular companies, but the problem is a societal one.

In some ways I don't think whether you get decent care should sort of depend on whether your employer happened to be generous, and then whether you find a judge who is willing to enforce the promise that the employer made that—I mean this is a global problem. This is a subset of a very large problem.

Mr. SARBANES. Well, the hearing obviously points up the overall defects in the——

Mr. STEIN. Yeah, one of the real problems, and this may be unfair because I am using your question to make a different point, but you know there is a provision in ERISA which courts like the Sprague court really latched on to, which said that there has to be a written plan. That was put in ERISA to protect employees to make sure there was a written plan. And what courts have done is sort of turned that around and said if it is not in the written plan document itself, which few employees ever get their hands on, it doesn't matter.

And that essentially gives employers—I mean I hate to say license to lie—maybe it is license to embellish. But it does. It means anything you say to the employee outside the plan is irrelevant in terms of what happens when a judge actually looks at the plan document itself. And most employees get their information from their managers. They believe it when somebody says, in writing especially, but also orally, these are really valuable benefits. They will last for your life. They can't be taken away. The employer is going to pay for them. That is the way employees really get information. But the courts pretend that the way the employees are getting their information is from this legalese-laden plan document that they never even see, or hardly ever see.

Mr. SARBANES. And Mr. Macey, that is all this bill is trying to do, right, is restore what a reasonable person would expect the bargain to have been in their interactions with the employer. Right?

Mr. MACEY. Well, I guess it is based upon an assumption of what reasonable expectations are. But that is so individualized, both with respect to the milieu of the company and what it said and the plan and so forth, the conditions and the environment, as well as what, you know, what the individual knew. And I do agree with what Professor Stein mentioned, some people do get their information on plans from managers rather than from benefit personnel or from the plan documents and the summary plan descriptions and things like that.

Many companies put in their communications documents that if you have issues or questions or communications about the plan, please come to the benefit department, not your manager, because the manager doesn't speak for the plan itself. They are not involved in the administration or interpretation of the plan.

Mr. STEIN. Of course in GM, you had documents that were being prepared by the Human Resources Department that made the same statements that were being made by managers. And those didn't really mean anything either because, you know, you had this thing in the plan which nobody saw saying the employer can change the program if it wants.

Mr. SARBANES. Right. A good place to end. Thank you.

Mr. TIERNEY. Mr. Kildee.

Mr. KILDEE. Thank you very much, Mr. Chairman. First of all, under full disclosure, I have to admit that I am cosponsor of this bill, so I am not exactly impartial. Mr. Lillie, your pension and your health care benefits, to my mind, belong to you. Like my dad, when he went to work and you went to work, he agreed to take so much money each week for his labors there and then defer some of his earnings for later in life, for a pension or for health care. And that was considered absolutely an absolute, that he took immediate wages and deferred wages. So the health care benefits and the pension are not a gift from the corporation. It is really your money.

It is money you worked for. You know, for a wedding you send a thank you note for a gift. You never send a thank you note to the company for their retirement benefits or for their health care. And I think we have to really institutionalize in our society, as long as we have the health care systems, and they are systems we have now, we have to institutionalize the fact that these things are really earnings that you agreed to defer rather than take home in your weekly paycheck. Would you agree to that concept?

Mr. LILLIE. Absolutely.

Mr. KILDEE. And that was pretty well your thought as you worked every day when you went in and did your work as a tool and die maker, right?

Mr. LILLIE. Absolutely.

Mr. KILDEE. Took so much home and so much later.

Mr. LILLIE. It was negotiated as part of your wages.

Mr. KILDEE. And I believe that. I believe that strongly. My dad worked for General Motors from 1916 to 1950. And he took money home regularly, but also had deferred wages. And that was true of most everyone in Flint, Michigan. I come from Flint, Michigan, where General Motors was established, where D.D. Buick and Louis Chevrolet and Walter Chrysler. He was chief engineer for Buick before he founded his own company. But the people there pretty well, they didn't think this was a gift, they never sent a thank you note, you know, to Harlow Curtis or any of the presidents or the CEO for the nice gift you sent me. They figured this was my money. And you feel this was your earnings, did you not?

Mr. LILLIE. I agree wholeheartedly.

Mr. KILDEE. And I think, Mr. Chairman, that is why I am cosponsor of this bill. Somehow we have to institutionalize that concept. And I yield back the balance of my time.

Mr. TIERNEY. Thank you, Mr. Kildee.

Mr. LILLIE. Mr. Chairman, as part of my answer to Mr. Kildee——

Mr. TIERNEY. Sure. You are better than most at this. I have to hand it to you.

Mr. LILLIE. I tell you what, my heart is so much into this. I have to say my piece. I am sorry.

Mr. TIERNEY. I understand, but the way we usually do it here is people ask questions and the members on the panel answer, so I am going to give you 1 minute again, sir.

Mr. LILLIE. Okay. All I am asking now, in light of Mr. Macey's comment about how case law requires that employers honor their promises, why is it that the employees of Raytheon, we have had to file suit to get ours?

Mr. TIERNEY. Thank you. Mrs. McCarthy.

Mrs. MCCARTHY. Thank you, Mr. Chairman, and thank you for having this hearing. I want to go back to Professor Stein. My colleague, Mr. Andrews, started to hit upon with you on an explanation. And I am not a lawyer, so this is going to be a little bit more out of my league. But in your testimony, I remember hearing you say that, you know, maybe we need to look at how we can modify by clear written oral representation. And yet with my small knowledge of law, I thought that there has been a clear precedent in most court cases that there is a legal precedent, that is the word, to include oral statements when looking at terms that are part of a binding contract. Because one of the things that bothers me, and I see this in corporations unfortunately all over the country now, Mr. Lillie worked for the company for a lot of years. 40 years?

Mr. LILLIE. 36.

Mrs. MCCARTHY. And a promise was made to him. And yes, health care costs have gone up, we understand that. So it has become more and more difficult. But when you are talking about our seniors that have put their years into a company, they knew how much money they had for a pension, they probably figured out what they were going to be getting for Social Security, and adding those things up, what else he might have saved. And then to have his health care insurance go up to $500 a month, to be very honest with you, that is not right. And that to me, if anything, that should be a criminal charge to a certain extent to the company that promised him something. But if you could answer my first part of my question, I would appreciate that.

Mr. STEIN. Well, the law has been around for a long time. And it has never been—the one thing you can say about it is it has never been really clear. All right. Everything about the law is almost always on the table. And in the area of contracts, there are doctrines that say you don't go outside the contract, the terms of the contract unless it is—unless the contract itself is ambiguous.

But you also have other cases, other rules that say if you have a contract that somebody then suggests that, you know, we will go beyond it, and they say it in a way that you are going to rely on, that they have to now, you know, go ahead and do what they said they are going to do because you relied on it. Under ERISA, the law that developed in this area, which is sometimes called estoppel, has been very unfavorable to the employee.

Most of the law, at least in my view, and I know Scott would probably disagree with this, but in my view most of the law that has developed, not all of it, but most of it has reflected a view, essentially, that somehow a contract between an employer and em-

ployee is different than other kinds of contracts, and that the employer needs to be given prerogatives that wouldn't be given to other contracting parties in different contexts. And I think this that has been a very serious problem.

And one of the areas I think that is true is this idea that this written plan requirement, which was done to protect employees, has become a shield for employers to use against employees trying to enforce clear promises that the employer benefited from. All right? The employer gets loyal employees who work harder because they think that their employer is giving them benefits. And you know, I cut this out of my testimony even though I like the sentence, but, you know, if you read the Sprague case, what an employee should do when they take a job is get all the documents, hire a lawyer at $500 an hour, and then have the lawyer write a written opinion about whether they could rely on the statement that the employer made that these are lifetime benefits.

And I will tell you it would take a lawyer like Scott or me a number of hours to give an opinion, and we would probably hedge a little bit. And there was a book in 1928, I think, by this guy Alfred Conant, who wrote about pensions and health care, and he called these clauses back then, I mean, he didn't make up the name, back then these reservation of rights clauses were referred to as weasel clauses. And I think that is a pretty accurate description.

Mr. JONES. Mr. Chairman, can I also respond to Mrs. McCarthy?

Mrs. MCCARTHY. Sure.

Mr. TIERNEY. It is Mrs. McCarthy's time, sure.

Mr. JONES. I think what we have to understand here is this isn't just one commitment that was made to employees. When you decide to join a company, you listen to the benefits that you would get, your salary that you would get, and all the other things, and then possible chances for promotion or whatever. And you make a decision based upon what you are told. And you would decide one company over another based upon this package, whatever it is. I have done that. Somewhere along your career you look out there and you see some things that maybe look very attractive to you, and you start getting into them, and you have to make another decision, am I going to stay here or am I going to move onto another company?

You say well, wait a minute now, I have got these lifetime health care benefits. You can't forget those. If I jump ship now, I am going to lose all of that. So we stay. Now it comes to am I going to retire or not early? As you know, many, many people are retiring earlier and earlier. And you have that decision again. And you look at it and say, well, can I afford to retire now? I can figure out what my pension is, I can figure out pretty close what my Social Security will be, I know what I have in savings, and I know I am going to have lifetime health care, I can afford to leave. And you leave. And then a year or 2 later you lose your health care component.

Now, this is unconscionable, frankly, in my opinion. And however we attack this problem, we have to know when a person retires what they are entitled to. They should know exactly what they are entitled to, whatever it is. And frankly, if the answer is I am sorry, Mr. Jones, but——

Mrs. MCCARTHY. It is called transparency.

Mr. JONES [continuing]. We may just have to terminate your plan downstream here, so you better not count on it, at least I know when I walk out the door if I can count on it or not. And I think that is an extremely important point that I wanted to make.

Mr. TIERNEY. Thank you, Mr. Jones. Thank you, Ms. McCarthy. Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman. I just, in listening to this, I am amazed. You know, I was brought up that a promise is a promise, if you gave somebody your word, your word was your bond. I am just taken back. I am just wondering if the CEOs of these corporations that are taking away the health care benefits, these are some people who probably make as much in 2 weeks as their employees make in a year. The other problem that I have is these employees whose health care is being taken away from them, they made the money for this company. They made the company what the company is. Without them, you know, these are the people who go to work every single day.

And I have to tell you, when—you can go to court and do all these other things, but if you promise somebody that they are going to have health care, and that health care is going to cover them, people like Mr. Lillie and the people that he represents, ordinary people, to pull the rug out from underneath them, if it is not illegal, it is certainly immoral from my perspective. They count on this. And to have to go hat in hand, I am, you know, amazed.

I think that is why—and I totally support the chairman's bill on this. And you know, we can go to court and we can tie this thing up, but either you care about the people who put their lives in and their families for the corporation or you don't. Don't make it if you are not going to keep it. I want to ask Mr. Jones this: How many retirees have been affected by cuts and terminations of company-sponsored health care benefits? Do you have any idea how many people we are talking about?

Mr. JONES. Well, there are about 20 million retirees out there who would be subject to cuts. And I would say that probably most of them have suffered some reduction in their health care benefits since they retired. But probably about—estimate is about 4 million of them have had very serious consequences, either total termination of the plan or very serious cuts.

Mr. HARE. Four million.

Mr. JONES. Four million.

Mr. HARE. And that is not including affecting their families, so that 4 million is really——

Mr. JONES. Absolutely. And all their beneficiaries. But you know, there is also more retirees retiring every day, and there are more companies reducing or terminating health care every day. So eventually, if nothing is done about that, I would say the whole 20 million will be on the block.

Mr. HARE. Do you have any idea how many companies have reduced or terminated health care benefits for their employees?

Mr. JONES. Well, of course, we have heard about General Motors and we have heard about Embarq recently. We have heard about what has happened to Lucent and others. There are plenty of large companies that have terminated those plans.

Mr. HARE. Maybe just for the panel, I have John Deere's corporate headquarters in my district. And the management retirees, they changed the health care plan. They showed me a paragraph. And in the paragraph it said you are going to get this voucher to get health care. And you will have every single thing that you have now, you will be able to purchase. So management retirees are thinking not a bad deal here. They went out and found out that they could not purchase prescription drug medicines and things of that nature because it was cost prohibitive for them to do it.

Now, I am not the sharpest knife in the box here, but if it says we are going to give you a voucher that will give you what you had, exactly what you had before we terminated this, and you can't go out and purchase the policy that you had, can somebody explain to me where they went wrong here? Because I have these folks coming into my office saying my wife has got diabetes, or we have these different problems, we need these prescription drugs, we used to get them under our health care plan, I worked 34 years for Deere, and now I can't get them.

Mr. JONES. It sounds like theft to me.

Mr. MACEY. I guess I don't know the specific situation, but there is a rule in ERISA that has been endorsed by the Supreme Court. That is, under the fiduciary provisions of ERISA, communications are considered, when you talk about the plan, they are considered in general terms to be a fiduciary function. And the Supreme Court says you can't lie to your employees. So companies have been held liable at the Supreme Court level for making intentional misstatements and misleading representations to employees. And that is under current law. The biggest thing about this bill is all the employers that—forget—I mean, I know you can't forget, I know individuals can't forget, and I am empathetic with it, I think something needs to be done about it, I am certainly sympathetic to the Raytheon and General Motors and Deere retirees and employees, and I agree with the statements that these are the people that built the company.

And one of the written statements mentioned that these are the people that made America great. And I agree with all of that. I think we all agree there is a real problem here. It is trying to—we can bash a bunch of companies and say, you know—and regardless of what they said, there is a lot of good actors out there that were trying to do the right thing, that were providing retiree health benefits all these years and either ran into financial problems and they had to start charging some premiums. They didn't go out and terminate their plans.

They had to start charging some premiums or copayments or things like that. You know, if we are focused—not necessarily, I don't know enough about these specific companies to know whether they are bad actors or not. But this bill here throws everybody into a single pot, says you are all bad actors, and regardless of whether or not you tried to live within the rules and you made some changes along the way, we are going to retroactively go back and change the deal that you might have made with your employees.

Mr. HARE. My time is up, but let me just say, with all due respect, that is not what this bill does. What this bill does from my perspective, and I commend again the chairman, what this bill does

is it makes people accountable for the promises that they make if that company is profitable. And let me tell you, I want to see Deere do well. They have had record profits. But when they take a form and hand it to their employees and tell them you are going to get this and you don't get it, then somebody ought to be held accountable for it.

And so I commend the chairman. So I couldn't disagree with you more on what this bill does. I think it is a fair bill. And I think for companies that make the money, they ought to live up to the promises that they make.

Mr. MACEY. Well, I am sympathetic with what you are saying, but the bill itself says——

Mr. TIERNEY. Mr. Macey, I am going to just answer you, you can talk about my bill all you want, but I would prefer that you get it right.

Mr. MACEY. Well, Mr. Chairman, with all due respect, the bill says regardless of what the plan and communications said, they have to restore the benefits. That to me seems to say it doesn't matter——

Mr. TIERNEY. It also indicates they have to be profitable, and there is a way for a waiver if they have any of the difficulties that you portend, let some of these people to do it. Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman. Actually, we do need to do something about it. And it is, I think, the unconscionable act here is this wealthy Nation does not provide health care coverage to our entire population. I mean, we have 47 million uninsured. Six million of those uninsured are children. And from your testimony, increasingly the uninsured are retired workers who have their entire life worked to ensure that they will have long-term health care—I mean, not long-term coverage, but health care for their entire lives. We have to do something about that.

We need a universal health care system, Mr. Chairman. We need to get started on this as soon as possible for the young and for the old, and then bring everybody else in as soon as possible. I would do it all tomorrow if I had my way. Mr. Kadereit, I have a question for you and your organization. We were talking about what happens to a worker who is given the golden handcuff. I mean, we are used to that for executives. But this is our working—the good working stiffs in this country who stay in their jobs because—and they don't take an opportunity to go someplace else where there might be more money, but they have been promised long health care benefits for life, so they stay in their job.

Has your organization done any studies, can you report to us, can anybody, of the lost opportunities, what this has cost workers not only because they didn't get their promised benefits in the end, but what they gave up waiting for those, to have those benefits?

Mr. KADEREIT. Yes. I think there are numerous cases I could cite where that is the case. We are more concerned prospectively. We are more concerned that when you examine the history of this, there are three levels of what we would call take backs. One, there are the caps that were in place. You would think a cap would be a cap forever, but it is not. When prescription drugs, for example, are cancelled, the cap is reduced. Companies now say, oh, you don't

have as many benefits as you had before we took some away, so we are lowering that cap from 500 to 700 to $400.

And so there is an erosion of the foundation that is occurring that is unconscionable. It is happening purposely. The second level is take backs. It is the actual take back of that prescription drug program, or in Lucent's case, the Alcatel Lucent's case, they literally cancelled all dependent coverage because they just didn't pay dependent coverage, forcing every retiree out there over age 65—and keep in mind when we talk about retirees, it is not the one that has left yesterday, it is the one that has been out there for 20 years. And they left at $20,000 a year, which is worth about 5,000 and you take——

Ms. WOOLSEY. Okay, I want to get to my question, so finish number three.

Mr. KADEREIT. So number three is when they take all the benefits away, which is what GM is doing.

Ms. WOOLSEY. Right.

Mr. KADEREIT. When they invoke the EEOC rule, which is the end of the——

Ms. WOOLSEY. Okay. And it is very clear these VEBAs that are voluntary are useless if the promises are cancelled.

Mr. KADEREIT. If there are no rules in place to limit the behavior, then you are not going to have any change.

Ms. WOOLSEY. Okay. Mr. Lillie and Mr. Jones, Mr. Jones, you really answered my question about lost opportunity, but do you know of any way we can—I mean, that has to be used in the arguments against taking away benefits. Do they use this argument? I mean, look what each individual gave up for waiting for secure benefits.

Mr. JONES. Well, I do not have a study to back this up, but I have to think that during a person's working lifetime of 20, 30, or 40 years, they have given up a certain percentage of their pay in order to fund the benefit plans that they have been promised. And whatever that——

Ms. WOOLSEY. That is one piece of it. The other thing is they may have been offered a job at another company where they would earn more money, but they wouldn't have had those benefits, so they didn't go.

Mr. JONES. That is correct.

Ms. WOOLSEY. Or they didn't have the benefits anyway, because what they were staying in their original company for disappeared.

Mr. JONES. Well, I don't know how that would be able to be quantified, but I would think that it would be a substantial amount. We know that now when retirees now have to pay for their health care, we are talking even part of it, we are talking now 20 or 30 percent of their income now is going to fund this in today's market. So I can imagine over the lifetime of someone's career like Mr. Lillie that he has given up a significant portion of his money and maybe opportunity to go someplace elsewhere he could have made more money.

Mr. TIERNEY. Thank you, Ms. Woolsey.

Mr. KADEREIT. I might add people with transferable skills are more likely to be affected by this. For example, a tool maker is in demand, is going to be able to go across the street. They are more

likely to say I am not giving up the benefits package and start with a three-man company for higher wages.

Ms. WOOLSEY. Right. So you miss the opportunity of a start-up.

Mr. TIERNEY. Thank you, Ms. Woolsey.

Ms. WOOLSEY. Thank you.

Mr. TIERNEY. Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman, for holding this hearing. And would note coming from the State of Connecticut, Aetna retirees got a pretty bitter pill when they were told that their dental coverage was being cancelled. And obviously these are people who worked in the health industry. The ironies of it are almost too great to even get your mind around. But I just want to follow up, Congressman Woolsey, talked about the fact that this issue is sort of in the context of a health care system that is in great need of reform.

We are about 40 days away from election. One of the candidates, Senator McCain, has a proposal to actually make employer-based health benefits taxable, coupled with tax credits to supposedly incentivize people into the individual market. And one of the things the American Benefits Council by the way, which is a private sector trade group that evaluated the two candidates' positions actually came down in favor of Senator Obama's approach, the McCain approach being so incredibly disruptive in their estimation to our employment-based system, which I thought was an interesting development. But I mean, has anyone looked at the McCain approach in terms of at least pre-65 retirees and the impact that it would have on people's retirement benefits if, again, those benefits were made taxable? Mr. Jones, Mr. Kadereit, I don't know if you had any comment in terms of that plan.

Mr. JONES. Well, it certainly seems to me that we are heading in the wrong direction by taxing people's health care. People are already struggling financially. And just add a tax on top of a problem that we already have seems to be the wrong approach. I would think that you would want to incent companies to continue providing the health care benefits rather than tax those meager benefits that are still in place.

Mr. KADEREIT. You know, we prefer that companies be incented, if necessary, with a tax credit while we attack the cost, the health care cost problem. It is true that these plans exist, but like they say, the devil is in the details. And I don't know the details of either of these plans. And when you begin to look at the details, then you can make a better assumption. But a major issue is something has to be done now, and that the retiree universe is not the society. Our retiree universe is unique in that this is going to happen to them. They are going to lose 10 to 12 percent in disposable income every year. And there is a study that Kaiser Foundation just released that shows in 2000—year 2000, the cost for a family health care plan was $6,400, in 2007, $12,100.

If caps were in place in 2000, that person would be paying 47 percent of the health care bill in 7 years. Translate that, it is 39 percent erosion in disposable income. And that is the problem. We can't wait until Congress decides to promulgate 3 years' worth of discussions and end up with a bill that somehow attacks all of society. Something has to be done to fix the problem for retirees. It is

a unique problem. It is not a societal problem, except as cost is involved.

Mr. COURTNEY. Well, clearly, if the Congress were to adopt a plan that made employment-based benefits taxable, I think that, you know, certainly is an issue that people need to be aware of, as I said, as 40 days is approaching. Another approach was Congressman Stark's proposal which the staff here circulated as part of the memo today, the Medicare Early Access Act, which would allow 55- to 65-year-olds buy into the Medicare system. Again, I just wonder if you had any comment on that approach.

Mr. KADEREIT. It is very important to us. As I mentioned in my talk, we are very supportive of Medicare access at cost even for people under 65. They are the people that hurt the most because they don't have Medicare access yet. If you retire at age 55 and the company pulls the rug out from under you, you have nothing. You must foot the whole bill, $12,000 a year. That is, after tax money, $12,000 a year. And if you look at the average retiree out there who has been out there for any number of years, that is over 50 percent of their income. It is disastrous.

Mr. MACEY. Congressman, I think that we also feel that that is an appropriate vehicle to look at to provide care.

Mr. COURTNEY. So you don't support taxing employment-based benefits?

Mr. MACEY. Well, I think the issue that they are trying to get at is tax equity. And I believe in tax equity. I don't know what the right way to achieve it is in this. If you go buy a policy on your own——

Mr. COURTNEY. It is that and decoupling health care from employment. That is the philosophical ideological thrust to this plan.

Mr. MACEY. I can tell you, though, I have personally thought a great deal about the issue of the individual market and the group market, and I do not think it is possible to resolve these problems or improve the health care system through the individual market. Okay?

Mr. STEIN. Can I just——

Mr. COURTNEY. Quickly, briefly.

Mr. STEIN. I served on the ERISA Advisory Council at the Department of Labor for 3 years. I was in the last kind of class appointed by President Clinton's Secretary of Labor. And that group is bipartisan. And there can't be more than eight members from any political party. And we looked at, one of the projects we looked at my first year was employer-provided health care, and the group made a recommendation, unanimous recommendation that serious consideration be given to universal catastrophic health care as something that simplifies everything. All right.

It would be a lot easier for General Motors to keep retiree health care if they knew they weren't going to be responsible for catastrophic expenses, which tend to be a problem for older people. And about 7 or 8 months ago, former Secretary O'Neill, former Secretary of the Treasury wrote an op-ed, I think it was in The New York Times which made the same proposal. And I think that is something that is worth very serious consideration. It doesn't solve any issue completely, but it makes dealing with almost every issue in the health care area a lot easier.

Mr. COURTNEY. Thank you.

Mr. TIERNEY. Thank you, Mr. Courtney. Mr. Kline, you have been very patient. Would you care to ask any further questions?

Mr. KLINE. No, Mr. Chairman, just a closing comment when it is time.

Mr. TIERNEY. Thank you. Okay. Without objection, then I would like to ask just a couple questions and go on from that. On the FASB rule change, Mr. Yamamoto, it seems to me that before the FASB rule changes people were providing the health care to retirees, and when they retired they weren't changing it necessarily afterwards.

Then the series of rules and regulations changed, and they had to record it on their books, and all of a sudden they decided they weren't going to maintain it. Nothing really changed except the rule and the fact they had to be more transparent about what their financial is, so I guess it affected stock price, essentially. So they decided to take that out. Instead of on dividends being reduced or on executive salaries, they decided to take it out on retirees. You want to correct me on that?

Mr. YAMAMOTO. I guess I am not sure if it is necessarily taken out of retirees. I had actually consulted and worked on similar types of calculations probably 10 years before the FASB adopted the rules. And for a lot of them it is more awareness, if anything, of the commitments or kind of the design that was put together. And it makes them think a little bit more about the promises being made.

Mr. TIERNEY. Well, your record is a lot of people thought about it and decided to make a change, but they grandfathered in existing retirees.

Mr. YAMAMOTO. I am sorry?

Mr. TIERNEY. Your records indicated that a lot of people thought about this, they made changes, but they grandfathered in existing retirees.

Mr. YAMAMOTO. Right.

Mr. TIERNEY. So that brings me to the thought that the right thing can be done. It is just that some profitable companies thought about it and said to heck with them and went ahead and did what the majority—the majority of companies did grandfather, and some decided that they were just going to be a bit more profitable for themselves and their shareholders and other stakeholders at the expense of the retirees. And I think that is what this bill gets at. We are not talking about troubled companies financially. We are not talking about not being able to get a waiver if you have some situation that comes up or whatever.

We are talking about some public policy that when people retire with the reasonable expectation that they have got certain coverage, that not change on them afterwards. I think it is good public policy on that so that we know that people are covered on that basis or whatever.

So that is the final point I will make on this. As a matter of public policy, I think this bill or something like it would be appropriate. I would hope my colleagues are willing to work with me on that. I do not think it will have the effect that Mr. Macey portends, that all hell is going to break loose and everybody is going to stop

covering everybody. I think it can be done and people can make a reasonable expectation of what their responsibility is going to be, make that transparently known to people, and at least do that.

I would be very curious at some point, Mr. Macey, to hear—and I don't expect it here—but to hear what ERIC has to offer for these people. What would they do for the GM representative who had a direct representation that they were going to get this? What would it do for the person that has BellTel? What would it do for the other people around here? Nobody is arguing with you that the plan might have said what the plan said, which gave them the weasel language, whatever Professor Stein said, but what do you think about the people who were told something else and reasonably relied upon it, but these courts decided they are just not going to go there.

I would like to have the discussion with you some time. I don't think we have time for it here today. But I have not heard ERIC come up with a solution and say what they are going to do for those people. I have heard about, oh, we have got to do something about health care writ large, and yeah, we all recognize there is a problem, but we would accept, and the record is going to be kept open for 5 days, if ERIC wants to submit some concrete suggestions of what would you do for those very people that we heard the testimony about today.

Mr. MACEY. We would love to have that dialogue.

Mr. TIERNEY. I will leave the record open for you.

Mr. MACEY. Please don't take my criticism of the bill as any indication of how we feel about your ultimate objectives of making sure people are covered by good care.

Mr. TIERNEY. No, I understand that. Thank you. Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. I want to thank the witnesses for their knowledge and their passion and deep concern on the issue. It is evident I think to all of us, frankly on both sides of the aisle, that there is a problem in health care in general in this country. And we are probably going to see a paradigm shift in how we do this. It is very important that we work together as we go forward. And clearly there are retirees who are suffering in large part—for a lot of reasons, not the least of which is the cost of health care. Medical care has gone through the roof. The costs have gone out of control.

So I appreciate everybody's interests today. I regret that we got a little partisan in here today. We try very hard not to do that. I appreciate the chairman's comments about why some members are here and some are not. I would just offer that I think most people in the room here, most people in America understand that there is a crisis, certainly a perceived crisis in all of our financial markets which may be affecting all of us very deeply.

And so the fact that some of us may be here instead of working on that, I hope that doesn't imply that we are somehow less interested in that. As the chairman said, we are sometimes divided in many different directions. And I know that there are groups of 2 and 3 and 5 and 10 and 100 around these buildings trying to grapple with that very difficult situation. So thank you very much, Mr. Chairman. Thank you, witnesses.

Mr. TIERNEY. Thank you, Mr. Kline. Thank our colleagues and witnesses. As previously ordered, members have 10 days to submit additional materials for the hearing record. Any member who wishes to submit follow-up questions to the witnesses should coordinate that with the majority staff within 10 days, 10 business days. And I appreciate the willingness of all of the members of the panel to respond to those within a reasonable time. Thank you again for sharing your expertise and insight into this hearing today. And I just want you to know how much we really do appreciate it, and wish you all well. Thank you, and the meeting is adjourned.

[Additional submissions of Mr. Tierney follow:]

Silvis, IL, September 28, 2008.

Hon. JOHN TIERNEY, *Rayburn House Office Bldg., Washington, DC.*

DEAR CONGRESSMAN TIERNEY: Due to short notice of the hearing, I was unable to attend in person. I understand that the period for submission for the record has also been shortened to five days after the hearing. Consequently, I am resorting to the FAX machine.

The FRO organization supports HR 1322 sponsored by you. We worked extensively with Tim Casey in lining up Congressmen Boswell, Loebsack, and Braley to be co-sponsors. We also made many contacts with others in an attempt to rally additional support for your bill.

Our short statement is self-explanatory and we ask you to encourage Chairman Miller to include it in the record of the above-mentioned hearing. A signed hard copy will follow.

Sincerely yours,

WILLIAM GABBARD, *President,*
Flex Retirees Organization (FRO).

Statement of William Gabbard, the Flex Retirees Organization (FRO)

On January 1, 2008, Deere & Co. (John Deere) made major changes in health benefits for 5000 salaried non-union retirees, plus their spouses, who retired after 1993. (These numbers will increase as current employees work their way into retirement.) These changes were not mere "modifications" to employ the term Deere & Co. used in meetings with retirees. Certain benefits have been eliminated. Out of pocket maximums have been significantly increased. Other benefits have been cut and/or drastically restructured. This was done in spite of a promise made in the summary plan description (required by ERISA) that retirees would receive benefits "comparable to those they had when working." This promise was also made to many prospective retirees in letters and other communications. In reliance thereon, the employees entered into retirement believing that Deere & Co. would honor that pledge. How mistaken they were!

As a result of Deere & Co.'s betrayal, the Flex Retiree Organization (FRO) was formed and incorporated under the laws of Iowa. A Board of Directors was chosen and officers elected. Membership meetings were held in all communities where Deere & Co. has a concentration of retirees and other meetings are planned for the future. FRO has worked with Congressmen from the area. Iowa Congressmen Loebsack, Braley, Boswell, and Illinois Congressman Hare have signed on as co-sponsors of HR 1322. In short order members of FRO contributed to a legal defense fund, a law firm was retained, and a lawsuit was recently filed.

Perversely, Deere & Co. attacked the health benefits at a time when Deere & Co.'s profits and executive compensation were at all-time highs. For example, the Wall Street Journal reported that CEO Robert Lane's total compensation for 2007 was $52.4 million. Deere & Co. selected these retirees, not because the company could not afford to keep its promises, but simply because they were vulnerable without the protection of a union contract. Deere & Co. will not share any information about its plans for the future. Our biggest fear is that over time the entire cost of retiree health benefits will be shifted to these retirees on fixed incomes. These savings will then drop to the bottom line and become available for even higher profitability and higher executive compensation.

[Questions and their respective responses from Mr. Macey follow:]

U.S. CONGRESS,
Washington, DC, September 26, 2008.

SCOTT E. MACEY, *Senior Vice President and Director of Government Affairs, Aon Consulting, Inc., Davidson Avenue, Somerset, NJ.*

DEAR MR. MACEY: Thank you for testifying at the Thursday, September 25, 2008, Committee on Education and Labor Hearing on Safeguarding Retiree Health Benefits.

Committee Members had additional questions for which they would like written responses from you for the hearing record.

Congressman Tierney asks the following question:

1. What ideas does ERIC (ERISA Industry Committee) have to offer for people who lose their retiree health benefits when they are promised them?

Congressman Andrews asks the following question:

1. In what court cases were the employers' statement on retiree benefits ambiguous and then the court decided in favor of the employer?

Please send your written response to the Committee on Education and Labor staff by COB on Monday, October 13, 2008—the date on which the hearing record will close. If you have any questions, please contact us at 202-225-3725. Once again, we greatly appreciate your testimony at this hearing.

Sincerely,

GEORGE MILLER,
Chairman.

THE
ERISA
INDUSTRY
COMMITTEE

via facsimile (202) 226-5398 & (202) 225-5609

October 10, 2008

The Honorable George Miller
Chairman, Committee on Education and Labor
U. S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515-6100

Dear Chairman Miller:

This is in response to your letter of September 26 regarding several questions that were asked during my testimony at the September 25 hearing on Safeguarding Retiree Health Benefits. ERIC (on whose behalf I was testifying) and I certainly appreciate the opportunity to express our views at the hearing and we will try to supplement below our answers to the two questions asked by Representative Tierney and Representative Andrews, respectively.

What ideas does ERIC (ERISA Industry Committee) have to offer for people who lose their retiree benefits when they are promised them?

Representative Tierney asked what ideas ERIC has to offer for people who lose their retiree health benefits when they are promised them. First and perhaps most important, although we may disagree with the framework of a solution proposed under the bill, we commend Representative Tierney for focusing on an important issue of national concern and do agree that we need to develop a workable solution for a difficult problem.

We believe that the problem is a societal one and a solution needs to be found that addresses the larger issues of which modification or termination of employer provided healthcare is a subset. Of course, one initial question in framing a solution is what an employer's plan actually provides—what has been "promised," and how was the plan communicated to participants?

If a plan actually did promise, without reservation, lifetime unconditional retiree health benefits, we believe such commitments are protected under existing law assuming the company is still in existence and is not bankrupt or otherwise financially unable to satisfy this obligation. We address the protections under existing law in the response to the second question regarding case law related to that issue.

We also believe there is a difference between changing retiree plans and terminating them. Moreover, the question appears to equate vesting in retirement plans with vesting in health plans. We do not believe that, under current practice, the two are comparable. Retirement plans are fixed obligations whereas the cost of health plans changes from year to year. The only means an employer can use to protect itself from unacceptable liabilities is to reserve the right to change the plan or, alternatively, to promise a fixed amount and to never increase that amount during the employee's tenure.

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The ERISA Industry Committee is a non-profit association committed to the advancement of employee benefit and compensation plans of America's major employers.

Retirees who continue to participate in a plan, albeit with greater cost sharing, are certainly in a better situation than those whose plan has been totally terminated and probably better off than an employee whose benefit was fixed at the time of hire.

ERIC and other employers and stakeholders are reviewing a number of possible public policy changes to address these concerns and the impact on retirees. Without endorsing a specific approach at this time, some possible changes include the following:

1. Permitting post age 55 early retirees to buy into Medicare, with or without a government subsidy based on the circumstances.
2. Enhancing the availability of affordable coverage by allowing the development and marketing of uniform national insurance plans not subject to state or local mandates.
3. Allowing employees to use part of their pension and 401(k) distributions on a pre-tax basis to purchase healthcare coverage.
4. Fostering the development of regional healthcare purchasing cooperatives that would provide coverage on a group, community-rated basis and to which employers could contribute.
5. Expanding the tax effective opportunities for employers and employees to pre-fund for future retiree healthcare costs.
6. Requesting the Department of Labor to develop model communications notices for companies to provide employees with clear information about plan provisions that allow for cancellation or modification of plans.
7. Allowing for tax deductible premiums for retirees who acquire coverage on their own.

Although we do agree that the loss or significant reduction of retiree coverage is a serious matter, we respectfully disagree with an aspect of the underlying premise behind HR 1322. That disagreement relates to two elements of the issue— first, that all reductions or terminations are a breach of promise and second, that plan and communications that clearly set forth the sponsor's right to change or eliminate the benefit are somehow inherently inoperable (or should be). As mentioned at the hearing, if those positions are set forth in a statute, we believe that most companies will eliminate retiree health care benefits entirely for future retirees, thereby making an already difficult situation worse. We believe that the Committee should work with employers and others to develop incentives for employers to maintain and start new retiree health plans and to assist employees and retirees in having access to effective and affordable coverage. As mentioned at the hearing, we would be pleased to meet with you, Representative Andrews, Representative Tierney and other Members and their staffs in order to develop an appropriate solution to the issues discussed at the hearing.

In what court cases were the employer's statements on retiree benefits ambiguous and then the court decided in favor of the employer?

To assist the Committee in evaluating the existing law in this area, we are submitting for the hearing record the following brief summary of the principles that courts have applied in recent cases to determine whether an employer has made an enforceable promise to provide retiree health and other welfare benefits. We have included the case citations requested by members of the Committee. In order to present a complete picture, the summary includes cases in which the retirees have won and cases in which the employers have won. Please note that we are not presenting the case summaries below as a formal legal analysis or on a basis that the Committee should specifically rely upon nor is the summary intended as a comprehensive review of the case law.

I. Conflicting Plan Provisions

Federal law does not impose any vesting requirement on retiree welfare benefits. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). The Supreme Court has explained the policy behind this decision:

> The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that "requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans." S. Rep. No. 93-383, at 51 (1973). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, "they would err initially on the side of omission." *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995).

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510, 515 (1997).

In the absence of a statutory vesting provision, courts apply principles of contract interpretation to determine whether welfare benefits vest when an employee retires. *Filiatrault v. Comverse Tech., Inc.*, 275 F.3d 131, 135 (1st Cir. 2001). If a retiree welfare plan's governing documents clearly state that the benefits are vested, a court will enforce this provision. Similarly, if the plan's governing documents clearly reserve the employer's right to amend or terminate the benefits, a court will generally enforce this right unless the court concludes that the employer has misrepresented the status of the benefits. We present examples below of cases illustrating both points.

In some cases, however, the retirees allege that provisions in the plan document, summary plan description, or collective bargaining agreement are not clear, or that they conflict. In these cases, the courts must decide whether the documents are ambiguous. Under ordinary principles of contract interpretation, courts read the governing documents as an integrated whole and seek an interpretation that reconciles conflicting provisions. *See, e.g., UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 704 (7th Cir. 2003) ("We must resolve the tension between the lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them."); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996).

If the court determines that the documents are ambiguous, it will admit extrinsic evidence, such as an employer's oral statements or informal written descriptions, to determine whether the parties intended that the benefits vest at retirement. *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 230-31 (1st Cir. 2006) ("Under ordinary rules of ERISA plan interpretation, if a party demonstrates ambiguity in a plan on a particular question, reference may be made to extrinsic evidence to determine the parties' intended meaning."); *Bill Gray Enterprises, Inc. Employee Health and Welfare Plan v. Gourley*, 248 F.3d 206, 218 (3d Cir. 2001) ("In determining whether a particular clause in a plan document is ambiguous, courts must first look to the plain language of document. If the plain language of the document is clear, courts must not look to other evidence. But if the plain language leads to two reasonable interpretations, courts may look to extrinsic evidence to resolve any ambiguities in the plan document.") (internal citations omitted).

Cases involving conflicting plan provisions generally turn on two questions. The first question is whether an apparent conflict in plan provisions is sufficient to create an ambiguity, or whether the conflict can be reconciled by reading the document in a way that gives meaning to all of its provisions. The second question is whether, if an ambiguity exists, extrinsic evidence shows that the benefits were vested. Employers prevail in some cases, and retirees prevail in others, depending on the facts. Several examples of each outcome appear below.

A. Cases in Which the Employer Prevailed

- *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224 (1st Cir. 2006) ("The individualized plan summaries and program brochures that plaintiffs claim created the new ERISA plan clearly state that the plan documents are governing. The oral statements made by the company representatives which omitted the reservation are similarly insufficient to overcome the unambiguous reservation of rights in the plan documents.")

- *Vallone v. CNA Financial Corp.*, 375 F.3d 623 (7th Cir. 2004) ("The 'lifetime' nature of a welfare benefit does not operate to vest that benefit if the employer reserved the right to amend or terminate the benefit, given 'what it takes to overcome the presumption that welfare benefits do not vest, combined with [our] reluctance to interpret a contract as being at war with itself.'" (quoting *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307(7th Cir. 1996)).

- *In re Unisys Corp. Retiree Medical Benefit ERISA Litigation*, 58 F.3d 896 (3d Cir. 1995) ("An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits provided the plan continues to exist.")

B. Cases in Which the Retirees Prevailed

- *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008) ("Because the durational clauses relied on by PolyOne do not preclude a finding that Plaintiffs' health benefits have vested, we look to other provisions of the EBAs ["Agreements on Employee Benefit Programs"] to determine whether the parties intended Plaintiffs' health benefits to vest. Contrary to the district court's holding, several provisions in the EBAs and decisions of this court support Plaintiffs' argument that their health benefits have vested.")

- *Diehl v. Twin Disc*, Inc., 102 F.3d 301 (7th Cir. 1996) ("[W]e see no reason why the 'change or discontinue' language in the insurance booklets should take precedence over the Shutdown Agreement's clear provision for lifetime benefits. To the contrary, the promise of lifetime benefits abrogated whatever right Twin Disc may have had to terminate coverage.")

- *Alday v. Raytheon Co.*, No. CV 06-32, 2008 WL 3200774 (D. Ariz. Aug. 5, 2008) ("To the extent that Raytheon suggests that an ERISA document can override a provision in a [collective bargaining agreement], the Court rejects this argument and notes that the Plan document provisions relied on by Raytheon expressly provide exceptions in the anti-vesting and reservation of rights provisions for benefit programs provided under a [collective bargaining agreement].")

II. Representations Outside the Governing Documents

Even in cases where the governing documents clearly reserve the employer's right to amend or terminate the plan, a court can enforce the employer's oral statements or informal written communications promising lifetime retiree health benefits. These cases turn on the question whether the employer has breached a fiduciary duty to the retirees by misrepresenting that their benefits were vested.

If the court concludes that there was no misrepresentation, the court enforces the employer's reservation of the right to amend or terminate the benefits. If the court concludes that there was a misrepresentation, the court awards continued health benefits as equitable relief for the misrepresentation, even though the retirees did not have a vested right to these benefits under the governing documents. Thus, employer communications with employees regarding retiree health benefits is an important, if not critical, matter in determining the outcome of cases. Several examples of each outcome appear below.

A. Cases in Which the Court Found No Misrepresentation

- *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224 (1st Cir. 2006) ("The plaintiffs' . . . argument is that the company was in breach of its fiduciary obligation as administrator of the retirement plans when it 'misrepresented' the terms of that plan to the employees. We do not think that there is enough evidence to create a misrepresentation case here. The plaintiffs only claim that the company omitted the fact that the dental benefits could be terminated or amended during meetings prior to their participation in the [early

retirement program]. But the plaintiffs were put on notice of the company's right to modify, amend, and terminate the plan by the individualized benefits summaries and program brochures, which pointed to the underlying plan documents that contained the reservation of rights.").

- *Vallone v. CNA Financial Corp.*, 375 F.3d 623 (7th Cir. 2004) ("There is simply no evidence that Continental set out to deceive its employees by its actions, and the district court therefore correctly found that the plaintiffs' claimed breach of fiduciary duty fails . . . . In fact, it is not even clear that the information provided was inaccurate. As we found earlier, the general retirement plan documents containing reservation of rights clauses were made part of the [Voluntary Special Retirement Program] by the documents setting out the VSRP's enhancements. There was no evidence that any employee ever specifically asked about the irrevocability of the [Health Care Allowance] benefit, that Continental falsely indicated to any employee that the HCA benefit was irrevocable or that Continental was aware that the early retirees were coming to the mistaken conclusion that 'lifetime' equated to 'vested.'").

- *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) ("[T]here is no competent evidence which suggests that the company made any affirmative misrepresentations concerning the duration of retiree benefits. At best, the evidence indicates that there may have been an historical assumption, perhaps by both sides, that retirement benefits would be for life. . . . Moreover, there is no evidence that suggests that the company stood silent and failed to properly advise employees when specifically asked about the duration of retiree benefits. There is no indication that the company created the belief in the minds of the employees that the retiree benefits could never be changed or terminated. If they did not create this understanding, then the case law discussed above suggests that the company was under no obligation, as far as ERISA is concerned, to correct what turns out to have been a mistaken assumption on the part of the employees.").

- *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc) ("Had an early retiree asked about the possibility of the plan changing, and had he received a misleading answer, or had GM on its own initiative provided misleading information about the future of the plan, or had GM been required by ERISA or its implementing regulations to forecast the future, a different case would have been presented. But we do not think that GM's accurate representations of its current program can reasonably be deemed misleading. GM having given out no inaccurate information, there was no breach of fiduciary duty."). This is a case that was much discussed at the hearing. Its impact was significantly limited in a subsequent decision by the same court. See, *James v. Pirelli Armstrong Tire Corp.* below. It should be noted that despite testimony at the hearing apparently to the contrary, the GM summary plan description distributed to employees did contain reservation of rights language according to the Sixth Circuit *en banc* decision.

B. Cases in Which the Court Enforced an Informal Promise

- *Jones v. American General Life & Accident Ins. Co.*, 370 F.3d 1065 (11th Cir. 2004) ("Appellants allege that Independent Life and American General breached their fiduciary obligations, not by withholding a vested benefit, but by engaging in a systematic pattern of misrepresentation that caused the Appellants to believe that their insurance benefit would not be changed during their retirement. . . . [W]e [have] recognized that an ERISA participant has a right to accurate information, and that an ERISA plan administrator's withholding of information may give rise to a cause of action for breach of fiduciary duty. Our sister circuits have reached the same conclusion, consistently holding that ERISA plan participants may state a cause of action for breach of fiduciary duty based on a plan administrator's material misrepresentations or omissions. . . . [P]articipants in an ERISA-governed plan that rely to their detriment on a fiduciary's misrepresentations of the plan's terms may state a claim for 'appropriate equitable relief' under Section 502(a)(3) if they have no adequate remedy elsewhere in ERISA's statutory framework." (citations omitted)).

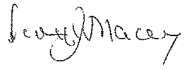
- *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439 (6th Cir. 2002) ("*Sprague* does not stand for the proposition that a reservation of rights provision insulates an employer from liability for a breach of its fiduciary duty under ERISA when the employer disseminates materially false or misleading information on its own initiative about the future benefits of a plan. In short, an employer or plan administrator fails to discharge its fiduciary duty to act solely in the interest of the plan participants and beneficiaries when it provides, on its own initiative, materially false or inaccurate information to employees about the future benefits of a plan. Under these circumstances, it is not necessary that employees ask specific questions about future benefits or that they take the affirmative step of asking questions about the plan to trigger the fiduciary duty.")

- *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, Civ. No. 03-3924, 2007 WL 2071876 (E.D. Pa. July 16, 2007) ("Since [retirees] were assured that their benefits would not be terminated or reduced, Unisys will be enjoined from reducing or terminating their reinstated benefits. This remedy is within the equitable powers of the Court pursuant to ERISA § 502(a)(3).")

- *McMann v. Pirelli Tire, LLC*, 161 F. Supp. 2d 97 (D. Conn. 2001) ("[T]he particular context in which representations are made is crucial to assessing whether a representation about the duration of benefits is accurate or misleading. Where, as in *Sprague* and *Byrnes*, clear reservations of rights are used consistently in the plan documents, employees reasonably should have been aware that their retiree benefits were subject to change, and a company is not required to 'begin every communication . . . by restating the caveat that it had reserved the right to change the . . . plan.' However, where a company has deliberately fostered the belief that retirement benefits are lifetime benefits, and is aware that its employees incorrectly - if understandably - believe that their medical benefits will continue unchanged for the duration of their retirement, this Court agrees with the Third Circuit that a reservation of rights in an SPD does not insulate the company from its obligation to provide 'complete and accurate information.'"

We hope that the Committee will find this information helpful. I appreciate the opportunity to testify on behalf of ERIC concerning this important issue and would be pleased to answer any additional questions or provide other assistance to the Committee.

Sincerely,



Scott J. Macey
Senior Vice President, Aon Consulting
&
Board of Diirectors, The ERISA Industry Committee

cc: The Honorable Robert Andrews (D-NJ)
The Honorable John Tierny (D-MA)

[Additional submissions of Mr. Kline follow:]
[Statement of James A. Klein follow:]

October 2, 2008.

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: I am writing on behalf of the member companies of the American Benefits Council (the "Council") to correct a statement made by a member of the Committee concerning the Council's position on health care reform and to share our views with you on the Emergency Retiree Health Benefits Protection Act of 2007 (H.R. 1322). I respectfully request that this letter be included as part of the Committee's record for the September 25, 2008 hearing on H.R. 1322.

The Council's approximately 275 members are primarily major U.S. employers that provide employee benefits to active and retired workers, and do business in most, if not all, states. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs.

Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

Correction of the Council's Position on Presidential Candidates' Health Reform Proposals

During the September 25 hearing on retiree health care coverage, Representative Joseph Courtney (D-CT) incorrectly implied that the American Benefits Council had evaluated the health reform proposals of the two Presidential candidates and favors Senator Obama's approach because Senator McCain's approach would be disruptive to the employer-based health care system.

We wish to correct the record on this point because, in fact, the Council has not endorsed the overall reform proposals of either candidate. There are elements of each candidate's proposals that we support and aspects of each proposal that we oppose. We assume that Rep. Courtney's reference to the Council's position was based on an incorrect media account of the results of a survey we recently conducted.

The Council recently released a survey of our members' and other corporate executives' views on health care policy that we conducted in partnership with Miller and Chevalier, Chartered. By wide margins—and regardless of their personal political affiliation—the responses to the survey indicate that corporate benefits professionals have serious concerns with aspects of both Presidential candidates' proposals. Respondents noted that Senator McCain's proposal to repeal the tax exemption for employer-sponsored health coverage and Senator Obama's proposal to compel employers to "pay or play" would both have a negative impact on American workers.

The Council looks forward to working with the next President, as well as both Republicans and Democrats in Congress, to craft health reform proposals consistent with the Council's views. These include, among many other features, retention of the federal framework for employer-sponsored health coverage as well as a much stronger emphasis on strategies to contain costs and promote better quality health care in conjunction with addressing gaps in health care coverage.

Concerns Regarding H.R. 1322

The Council and its members feel strongly about the importance of health care coverage for this nation's retirees. Older Americans need health care coverage to ensure that they can retire with dignity and security.

H.R. 1322 would create a new guaranteed benefit that, in many instances, was never promised by the employer and that would have a retroactive effect. Additionally, the bill would punish employers who had continued to provide retiree health benefits when other employers had either terminated such programs or never offered such benefits.

In short H.R. 1322 would have unintended negative consequences. A better solution lies in a broader approach that addresses the causes of the retiree health care problem. Further, we must reform the health care system so that employers can afford to provide retiree health coverage. This means:

- Curbing the increase in health care costs and increasing the quality of care,
- Providing efficient funding mechanisms to pay for retiree health care (such as permitting retirement plan assets to be used on a pre-tax basis for retiree health coverage) and
- Allowing all retirees to have a deduction for the cost of health coverage when they have no access to an employer plan.

In addition, the Department of Labor could create a model notice stating clearly that employers may retain the right to change or terminate retiree health care benefits. Such notice could provide clarity with respect to the rights of employers and retirees, and could thereby serve to improve the ability of all parties to plan for the future.

Thank you for your consideration of our views.

Sincerely,

JAMES A. KLEIN.
American Benefits Council.

[Statement of the U.S. Chamber of Commerce follows:]

Prepared Statement of the U.S. Chamber of Commerce

Chairman Miller, Ranking Member McKeon, and Members of the Committee, the U.S. Chamber of Commerce thanks you for holding this hearing on retiree health

care and for providing us the opportunity to comment on this important issue. We ask that this statement be included in the record of the hearing.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

The Chamber shares this Committee's interest in ensuring that seniors have access to quality medical coverage and continues to work on proposals and ideas with this goal in mind. However, we urge Congress to reject proposals that will lead to increased costs and fewer benefits. Mandating retiree health benefits or prohibiting employers from making changes to future benefits will only discourage new employers from offering benefits and could lead to financial catastrophe for employers that currently offer these benefits. As such, we offer the following the guidelines.

Proposals on Retiree Health Care Benefits Should Maintain the ERISA Framework. The employer-provided pension system is a critical piece of retirement security for many Americans. The Chamber believes that the key element to the private retirement system is the voluntary nature of the system. For employers that choose to implement retirement programs, flexibility and choice are key considerations. Consequently, it is increasingly important to ensure that there are no statutory, practical, or political barriers to innovation that would discourage participation in the private retirement system.

Employers voluntarily offer health benefits to both current employees and retirees in response to their workforce needs. Current law prohibits employers from reducing or terminating promised benefits unless: (a) an employer expressly reserves that right in a plan document and (b) the employer fully discloses—in accordance with the requirements of ERISA—its right to reduce or terminate retiree health coverage. Without this provision to account for exigencies, employers will have to weigh the benefit of providing retiree health benefits at all against the potential liability of offering a benefit plan that could result in the loss of thousands of American jobs.

Employers Need Flexibility in the Provision of Benefits. It is extremely difficult to predict future costs for health care benefits. Given the advances in medical technology, medical cost trends and patient demand, it is almost impossible to forecast health care expenses over the long-term. Therefore, employers require the flexibility in place today to respond to increasing costs and changing demands within their workforce in order to continue offering retiree health benefits.

Congress Should Focus on Encouraging Employers to Participate in the Health System. We believe that there are other ways to reach our common goals that will not impact the health care benefits that workers receive today. Instead, Congress should focus its attention on addressing the underlying cost drivers within our health system by promoting health information technology, wellness and prevention, coordination of care, and value-based purchasing.

In addition, Congress should provide opportunities for employers to offer retiree health benefits without imposing an untenable burden. As such, the Chamber applauds the introduction of H.R. 6288, the Retiree Health Accounts Act by Representative McHugh. H.R. 6288 creates new tax-free savings accounts that can help workers afford retiree health care. The bill also creates a refundable tax credit for individuals who contribute to their RHAs, thereby, incentivizing responsible saving for health care expenses. Chamber members are excited about this concept and look forward to working with Representative McHugh to further develop this proposal.

The Chamber Opposes H.R. 1322 and Similar Proposals. H.R. 1322, the Emergency Retiree Health Benefits Protection Act of 2007, would prohibit changes, reductions, or terminations of retiree health plans once employees have retired. This intrusion upon the right of employers and employees to freely associate and make contracts would also force employers to retroactively rollback past changes in retiree health plans. In addition, the retroactive provisions within H.R. 1322 will increase the strain on employer-sponsored health plans that are already combating sky-

rocketing increases in costs. If plans that had to limit retiree coverage due to economic pressure were subsequently compelled to reassume that liability, the cost of that new unanticipated liability would be borne by employees in the form of additional cost sharing and reduced benefits, and, potentially, unemployment.

In either case, whether prospective or retroactive, H.R. 1322 would significantly increase both the cost and risk to the employer of voluntarily providing retiree health plans at all and would be a major incentive to discontinue benefits for new employees or for new businesses to not offer benefits at all. These costs and risks will have to be paid for by reduced benefits, wages, or jobs.

Conclusion

As we look at health care reform in the upcoming year, health care options for retirees will require careful consideration. We hope that Congress will take this opportunity to provide encouragement to employers currently providing health care benefits and provide rules that will incentivize these employers and not punish them. Thank you for your consideration and we look forward to further discussions with you.

[The statement of Mr. Altmire follows:]

Prepared Statement of Hon. Jason Altmire, a Representative in Congress From the State of Pennsylvania

Thank you, Chairman Tierney, for holding this important hearing on safeguarding retiree health benefits.

More and more companies are looking to cut expenses by rolling back or eliminating retiree health benefits that they promised to their employees. The Kaiser Family Foundation estimated that between 1988 and 2005, the number of large firms offering retiree health coverage was cut in half, from 66 percent to 33 percent. For years, millions of workers believed that if they worked hard they would be taken care of during their retirement through the benefits that were promised to them by their employers.

Now, many of these retirees are forced to find another way to obtain and pay for health coverage because their employer made a decision to renege on their promise as a cost saving measure. Today we will discuss how this happened and what can be done to prevent this from happening in the future.

Thank you again, Mr. Chairman, for holding this hearing. I yield back the balance of my time.

[The statement of Ms. Shea-Porter follows:]

Prepared Statement of Hon. Carol Shea-Porter, a Representative in Congress From the State of New Hampshire

I thank Chairman Miller for this hearing today, and I thank Congressman Tierney for his leadership on this issue.

We have all read the news reports of companies making cuts to their retiree benefits. Skyrocketing health care costs and shrinking profit margins leave these companies looking for places to trim costs. Sadly, these costs savings are all too often being found by cutting back, or eliminating altogether, retiree health benefits. I have heard from a number of my constituents who are not only concerned about this growing trend, but they are rightfully outraged.

This not only highlights the need for real and significant reform to the way health care is provided in our country, but it shines a spotlight on the increasing financial burden being faced by working and middle-class families. The burden of increasing health care, food, and fuel costs is only intensified for those among us living on a fixed income—many of whom are retirees who are also counting on the benefit plans promised to them by their employers in exchange for their years of hard work. These retirees held up their end of the agreement, it is outrageous to expect any less of the companies that they devoted themselves to for so many years.

I look forward to examining this issue further during this hearing today and it is my hope that we can work together to protect the benefits of retirees so that they can be confident that they will receive the benefits that were promised them in exchange for their hard work.

[Whereupon, at 12:06 p.m., the committee was adjourned.]

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