WORKPLACE FLEXIBILITY 2010

Georgetown University Law Center

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Hearing on Phased Retirement

Working Group on Phased Retirement

2008 ERISA Advisory Council

Washington, D.C.

September 9, 2008

Members of the Council, thank you for inviting me to testify before you today.

My name is Chai Feldblum. I am a Professor of Law and Director of the Federal Legislation Clinic at Georgetown Law and the Co-Director of Workplace Flexibility 2010.

The goal of Workplace Flexibility 2010 is to make workplace flexibility a standard of the American workplace. Our definition of workplace flexibility includes flexible work arrangements, various forms of time off, and job maintenance and reentry. Thus, workplace flexibility includes flexible work arrangements that might be used by older workers who are seeking to "phase-retire."

We believe that opportunities offered by workplace flexibility must be part of any policy conversation about the aging workforce and that these issues deserve the focused attention of the Department of Labor. In particular, we believe that the challenges and opportunities presented by offering "phase-retirees" access to distributions from their defined benefit plans need to be fully and carefully explored.

I. History, Activities, and Reports of Workplace Flexibility 2010

Workplace Flexibility 2010 (WF2010) is a research, outreach and consensus-building effort on national workplace flexibility policy based at Georgetown Law.[1] We are the lead policy component of the Alfred P. Sloan Foundation's National Initiative on Workplace Flexibility, which seeks to make workplace flexibility a standard of the American workplace through a combination of voluntary employer efforts and thoughtful public policy.[2]

The goal of Workplace Flexibility 2010 is to facilitate the development of consensus-based public policy solutions that increase access to workplace flexibility in ways that work for employers and employees. We define workplace flexibility as including three categories:

- **Flexible Work Arrangements:** Flexible work arrangements (FWAs) alter the time and/or place that work is conducted on a regular basis, in a manner that is as manageable and predictable as possible for both employees and employers. FWAs provide:

  - Flexibility in the scheduling of hours worked, such as alternative work schedules (e.g., nontraditional start and end times, flex time and compressed workweeks) and breaks;
  - Flexibility in the amount of hours worked, such as part time work, job shares, phased retirement or part year work; and

[1] Workplace Flexibility 2010, Home Page, http://www.law.georgetown.edu/workplaceflexibility2010/index.cfm (last visited on Aug. 22, 2008).
[2] For a description of the Sloan National Initiative on Workplace Flexibility, *see*, Workplace Flexibility 2010, Alfred P. Sloan Foundation National Initiative, http://www.law.georgetown.edu/workplaceflexibility2010/funding.cfm (last visited on Aug. 22, 2008).

- Flexibility in the place of work, such as working at home, at a satellite location or at different locations.[3]

- **Time Off:** Time Off provides leave from work for a defined period of time to address unexpected or ongoing personal and family needs. Time off may be needed in short or long increments.

Time Off in Short Increments includes:

- Short-Term Time Off (STO) -- used to address the ordinary predictable and unpredictable needs of life (e.g., a sick employee, a sick child, a child's school conference, a death in the family, a home repair).
- Episodic Time Off (EPTO) -- used to address a recurring predictable or unpredictable need for time off from work (e.g., an employee who has – or cares for a family member who has – an illness or chronic health condition that flares up sporadically, an employee who volunteers regularly in the community, or an employee who is obtaining advanced training).

Time Off in Long Increments includes Extended Time Off (EXTO). EXTO is used to address a need for time away from work for a single reason for an extended period of time (e.g., caring for a newborn or newly adopted child, having a serious health condition or caring for a family member with a serious health condition, or serving in the military).

- **Job Exit, Maintenance and Reentry:** Job Exit, Maintenance and Reentry addresses the needs of employees who, out of necessity or personal choice, leave the workforce completely for a period of time, but need and/or want to reenter the workforce later.[4]

Over the last five years, Workplace Flexibility 2010 has:

- *Created a body of significant intellectual work that analyzes how existing laws may support, enhance, or impede workplace flexibility as defined by these components.* For example, over an 18-month period, we convened a Legal

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[3] For a more detailed description of FWAs, *see*, WORKPLACE FLEXIBILITY 2010, FLEXIBLE WORK ARRANGEMENTS: THE OVERVIEW MEMO (2006), *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/general/FWA_OverviewMemo.pdf (last visited on Aug. 22, 2008). The type of FWA that an employee needs and utilizes will depend on the type of job the employee holds. The FWAs most studied in research -- including flexibility in the scheduling of hours worked, such as alternative work schedules (e.g., nontraditional start and end times, flex time and compressed workweeks) -- are often utilized by employees in jobs with traditionally long hours and fixed schedules. By contrast, for employees in jobs with traditionally *less* than full time hours and *unpredictable* scheduling, FWAs would be arrangements that provide such workers with *greater* predictability over their work hours, such as receiving advance scheduling of their hours.

[4] *See*: WORKPLACE FLEXIBILITY 2010, DEFINITION OF WORKPLACE FLEXIBILITY, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/index.cfm (last visited on Aug. 22, 2008).

Working Group of seven high-level management litigators and seven high-level employee and union litigators to explore these issues. We systematically worked through the challenges and opportunities posed by existing and proposed laws regarding the various components of workplace flexibility.

- *Assembled a Phased Retirement Working Group of inter-disciplinary experts (including plan and business representatives, consumer groups, academics, and actuaries) to analyze the obstacles and disincentives for private employers who wish to institute phased retirement programs.* Using background materials prepared by Workplace Flexibility 2010, the Phased Retirement Working Group has been discussing a range of policy options to increase access to workplace flexibility, including examining the legal and regulatory barriers regarding distributions from defined benefit plans. WF2010 has not issued any policy positions to date on these issues. Rather, our focus has been on providing a forum for business, consumer, and neutral parties to discuss the legal and policy issues in this arena.[5]

- *Rooted the conversation on workplace flexibility in sound research*. Workplace Flexibility 2010 has engaged in an interactive dialogue with academics and researchers to create accessible summaries of the quantitative and qualitative research documenting the needs for flexibility and the costs of workplace inflexibility.[6]

- *Created forums for meaningful bipartisan dialogue on workplace flexibility.* Through a series of bipartisan briefings on Capitol Hill over the course of three years, we have helped educate Congressional staff and other stakeholders on the need for workplace flexibility. These briefings have been examples of initial partnerships on workplace flexibility across party lines. Three examples are a July 18, 2005 briefing co-sponsored by Senators Kohl and Smith on "What an Aging Workforce Can Teach Us About Workplace Flexibility"; a May 1, 2006 briefing co-sponsored by Senators Alexander and Clinton on "Meeting the Need

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[5] For a range of documents prepared for the Phased Retirement Working Group, *see,* http://www.law.georgetown.edu/workplaceflexibility2010/PhasedRetirement.cfm (last visited on September 3, 2008).

[6] *See*, Workplace Flexibility 2010, *Meeting the Needs of Today's Families: The Role of Workplace Flexibility* (2006), *available at* http://www.law.georgetown.edu/workplaceflexibility2010/documents/FF_BW_FI_Fact.pdf (last visited on September 2, 2008) [hereinafter Meeting The Needs Fact Sheet]. *See also,* Workplace Flexibility 2010, *Flexible Work Arrangements: The Fact Sheet*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/general/FWA_FactSheet.pdfhttp://www.law.georgetown.edu/workplaceflexibility2010/definition/general/FWA_FactSheet.pdf (last visited on Sept 2, 2008); Workplace Flexibility 2010, *Fact Sheet on Short Term Time Off*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/general/STO_FactSheet.pdf (last visited on Sept 2, 2008); Workplace Flexibility 2010, *Fact Sheet on Episodic Time Off*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EPTOFactSheet.pdf (last visited on Sept 2, 2008); Workplace Flexibility 2010, *Fact Sheet on Extended Time Off*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/EXTOFactSheet.pdf (last visited on Sept 2, 2008).

of Today's Families: The Role of Workplace Flexibility"; and a September 29, 2006 briefing co-sponsored by Senators Dodd and DeWine on "Promoting Children's Well Being: The Need for Workplace Flexibility."[7]

- *Engaged a diverse range of stakeholders to broaden the commitment to workplace flexibility*. We have reached out to a wide range of groups -- including those representing the interests of disability, health, religion, aging, children and others -- to bring new perspectives to the policy debate and to widen the spectrum of groups interested in moving forward effectively in this arena. Workplace Flexibility 2010 has also been getting outside the Beltway, hosting community policy forums on workplace flexibility in cities across the country. Through these forums, we are hearing directly from local employers and community organizations on how they experience the need for flexibility – and we are committed to bringing those insights back to the national policy conversation on workplace flexibility.

II. Workplace Flexibility and Older Workers: Changing Demographics, Work Patterns and Expectations

At Workplace Flexibility 2010, we believe that workplace flexibility is a compelling national issue. Two converging currents in the American workplace have propelled the need for flexibility to the forefront and have made it a pressing issue for our workforce.

First, we have experienced broad societal change in our communities: most families today have two earners who must try to balance work and personal responsibilities.[8] In 1970, almost two-thirds of married couples had one spouse at home to handle family life needs; by 2000, 60% of married couples had both spouses in the workforce.[9] According to the National Study of the Changing Workforce, nearly 80% of employees—including both men and women—said they would like to have more flexible work options and would use them if there were no consequences at work.[10] But despite the 21st century change in our work patterns, our laws and policies have failed to keep pace.

Second, the demographics of the workforce are necessarily changing as the Baby Boomers are reaching retirement age. The Center on Aging & Work at Boston College has graphically illustrated the demographic effect of the Baby Boomers on American society throughout the years, starting with the structure of American education, and continuing with their impact on the American workplace.[11] Studies indicate that the percentage of workers aged 55-64 in the American workforce will increase by 48% in

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[7] Materials from these events are available at Workplace Flexibility 2010, News and Events, http://www.law.georgetown.edu/workplaceflexibility2010/news.cfm (last visited on Aug. 22, 2008).
[8] *See, Meeting the Needs of Today's Families, supra,* note 6.
[9] *Id.*
[10] *Id.*
[11] *The Aging Workforce: What Does it Mean for Business and the Economy?*: *Hearing Before the Senate Special Committee on Aging*, 110th Congress (Feb. 28, 2007) (statement of Dr. Marcie Pitt-Catsouphes, The Center on Aging & Work/Workplace Flexibility at Boston College) [hereinafter *The Aging Workforce,* Pitt-Catsouphes statement].

the next five years; the percentage of workers aged 65 and older will increase by 40%.[12] In that same time period, the proportion of workers aged 45-54 will decrease by 10%, and the proportion of younger workers will only increase moderately.[13]

Despite the anticipated retirement wave of the Baby Boomers, many older workers need or want to work past traditional retirement age.[14] Some will do so seeking economic security. Many individuals will need to work longer because, among other reasons, the shift from defined benefit to defined contribution plans has left them with fewer retirement assets and poorly prepared for retirement financially.[15] This is particularly true for women in the workforce.[16] Studies indicate that more than one third of 45-54 year olds and one quarter of 55-64 year olds report that they have not set aside money for retirement on a regular basis.[17] In fact, most people over the age of 45 indicate that they plan to, or know that they will need to, work at least part time for financial reasons once they reach retirement age.[18]

Other older workers will want to continue experiencing the social-psychological rewards of work that increased longevity and continued good health make feasible.[19] Some will elect to keep working to stay mentally active and healthy in a job they enjoy.[20] A recent survey entitled, "Attitudes of Individuals 50 and Older Toward Phased Retirement," found that the reasons employees who are at least 66 years old work during "retirement" were the "desire to stay mentally active (72%) and the desire to remain productive and useful (71%)."[21]

Whether an older employee keeps working out of economic necessity or to stay active, many will want or need a more flexible work environment.[22] Regardless of the reasons

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[12] *The Aging Workforce,* Pitt-Catsouphes statement, *supra,* note 11.
[13] *Id.*
[14] *See,* Workplace Flexibility 2010, *Older Workers and the Need for Workplace Flexibility* (2005), *available at http://www.law.georgetown.edu/workplaceflexibility2010/documents/FactSheetonOlderWorkersandFlexibility.pdf* (last visited on Sept. 3, 2008); *see also,* Workplace Flexibility 2010 and Sloan Center on Aging & Work at Boston College, *Legal and Research Summary Sheet: Phased Retirement*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/PhasedRetirement08-07.pdf [hereinafter Phased Retirement Fact Sheet], (last visited on Aug. 22, 2008).
[15] ALICIA A. MUNNELL, & STEVEN A SASS, WORKING LONGER THE SOLUTION TO THE RETIREMENT INCOME CHALLENGE (2008); Chen, Y.P. & Scott, J.C. (January 2006). "Phased Retirement: Who opts for it and toward what end?" Available at http://assets.aarp.org/rgcenter/econ/2006_01_retire.pdf (last visited on August 23, 2008).
[16] *See,* Munnell, *supra* note 15, at 61-91, for a discussion of the various factors surrounding women and continued work.
[17] Sara E. Rix, *Aging and Work: A View from the United States* 23 (2004).
[18] *Id.*
[19] S. Kathi Brown, *Attitudes of Individuals 50 and Older Toward Phased Retirement* (2005), *available at* http://www.aarp.org/research/reference/publicopinions/attitudes_of_individuals_50_and_older_toward_phase.html, (last visited on Aug. 22, 2008).
[20] WF2010 Older Workers Fact Sheet, *supra,* note 14.
[21] AARP, *Attitudes of Individuals 50 and Older Toward Phased Retirement* (2005), *available at* http://assets.aarp.org/rgcenter/post-import/phased_ret.pdf (last visited on Aug. 22, 2008).
[22] WF2010 Older Workers Fact Sheet, *supra,* note 14.

that an older worker remains in the workforce, many do not want to keep working in the *same* way that they have worked in the past. Some workers desire flexibility to provide better care to themselves or to a spouse, sibling, child, or grandchild. Others may desire flexibility to pursue new interests or to engage in volunteer activities.

The availability of a phased retirement option may have an impact on an employee's ultimate retirement age. The majority of older workers who say they do *not* plan to work after conventional retirement age also say that they would consider working past such age if FWAs or phased retirement were an option for them.[23] In a study conducted by Watson Wyatt Worldwide, a majority of workers over the age of 50 surveyed indicate that they would like to have a phased retirement arrangement at some point.[24] And in a survey conducted by the AARP, 78% of the older workers surveyed and interested in phased retirement thought that the availability of a phased retirement program would encourage them to work past their anticipated retirement age.[25]

Not all the evidence, however, points to phased retirement keeping employees working more. For example, a National Bureau of Economic Research working paper found that some people who would have kept working full time reduced their hours when phased retirement was made available.[26] While this finding is not necessarily inconsistent with the findings above (some workers who may prefer phased retirement may simply continue working full-time if it is not available), it does reflect the fact that we do not have hard evidence on whether the option of phased retirement will ultimately be a positive advance in terms of keeping American workers working longer.[27]

In any event, the interest of businesses in creating targeted phased retirement programs appears to be growing. The Cornell Study of Employer Phased Retirement, issued in 2003, reported that a majority (73%) of establishments interviewed responded that "something could be worked out" for white collar employees who wished to shift to part–time employment as some form of an informal phased retirement program, but only 14% said they had a formal policy allowing employees to reduce their hours before official retirement.[28] Similarly, a survey conducted by the Society of Human Resource

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[23] Brown, *supra,* note 19, at 12.

[24] Watson Wyatt Worldwide, *Phased retirement: Aligning employer programs with worker preferences* (2004).

[25] AARP, *supra*, note 21. According to the Employment Policy Foundation, access to phased retirement increases the average retirement age of women by 21 months and increases the retirement age of men by 5 months. Janemarie Mulvey, *Benefits for an aging workforce*. The Balancing Act, Washington, DC: Employment Policy Foundation (2005).

[26] *See,* Martha Hamilton, *Phased Retirement: a Win-Win But a Slow Go*, http://bulletin.aarp.org/yourmoney/retirement/articles/phased_retirement.html (last visited on Sept. 3, 2008) (quoting Alicia Munnell on the NBER working paper).

[27] *See, e.g.,* Munnell, *supra* note 15, at 144- 45, arguing that it is not and that phased retirement may in fact be a diversion. But, note that nearly 25 percent of individuals who define themselves as "phased retirees," indicate that they expect to work past age 65. Watson Wyatt Worldwide, *supra,* note 24.

[28] Robert Hutchens, *The Cornell Study of Employer Phased Retirement Policies: A Report on Key Findings,* Ithaca, NY: School of Industrial and Labor Relations, Cornell University (2003).

Management in 2005 of its membership found that only 10% of the HR respondents stated that their workplaces had formal phased retirement programs.[29]

By contrast, a 2008 survey of more than 140 mid-size and large employers, conducted by Hewitt Associates, revealed that 61% percent of employers surveyed had developed or will develop programs to retain targeted near-retirement employees. While only 21% of the employers surveyed believed that phased retirement was currently necessary for their business needs, 61% of those surveyed believed it would be necessary within 5 years. In addition, 65% of those surveyed thought that offering a flexible work arrangement, such as part-time work, would be effective in retaining near-retirement workers. [30]

The Hewitt Associates survey also found that more than half of the employers surveyed (52%) believed that there were significant legal and regulatory barriers to implementing phased retirement programs.[31]

It is important, however, to focus specifically on where such barriers might exist. Based on the data, the stress point appears to be those workplaces that offer defined benefit plans. This sector includes critical industries such as health care, construction, engineering, and skilled manufacturing.[32] The convergence of the aging of the American workforce, together with the availability of attractive early retirement options in the defined benefit plans offered by many such employers, has forced these industries to focus attention on retaining skilled workers who might otherwise retire.

III. Legal Issues Facing Phased Retirement Programs

A. Phased Retirement Programs

The changing work patterns, demographics, and expectations of the American workforce are reasons to focus on workplace flexibility for older employees. Important societal trends are altering how Americans view work and retirement, which might in turn result in changing the structure of the later stages of work.

Over the past several years, WF2010 has focused on phased retirement as a possible flexible work arrangement (FWA) for older employees. We have analyzed existing

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[29] M.E. Burke, *Benefits: Survey Report*. Alexandria, VA: Society for Human Resource Management (2005).

[30] *See, Retiring Boomers Prompt Increased Employer Interest in Phased Retirement Programs According to Hewitt Survey* (2008), *available at* http://www.hewittassociates.com/Intl/NA/en-US/AboutHewitt/Newsroom/PressReleaseDetail.aspx?cid=5451 (last visited Aug. 22, 2008).

[31] *Id.*

[32] *See, Empty Hallways: The Hidden Shortage of Healthcare Workers*, *available at* http://www.aft.org/pubs-reports/healthcare/Empty-Hallways.pdf; Ireland Beck, *Wanted: Skilled Labor, A Robust Economy Strains the Ranks of a Qualified Workforce* (2007), *available at* http://ecmweb.com/mag/electric_wanted_skilled_labor/ (last visited on Aug. 22, 2008); Jonathon Wegner, *Industries Brace for Skilled Labor Shortage* (2005) *available at* http://www.nam.org/s_nam/sec_illumen.asp?CID=201487&DID=233390 (last visited on Aug. 22, 2008).

research and commentary on phased retirement and identified possible legal obstacles to implementing a phased retirement program.[33] We have also convened a Phased Retirement Working Group (PRWG), an inter-disciplinary group of experts to discuss a possible coherent legal policy for FWAs and phased retirement programs.[34]

We use the term "phased retirement" since it is the term that has been coined to describe an alternative to the traditional form of retirement in which workers completely withdraw from the labor force. While there is no formal definition of phased retirement used uniformly by human resource and employee benefits personnel, researchers and policy makers, various groups have suggested the following characterizations of phased retirement:

> **Human Resources Definition:** According to the Society for Human Resource Management, phased retirement is "[a] work schedule arrangement that allows employees to gradually reduce their full-time hours over a period of time."[35]
>
> **Research Definition:** "The basic idea of phased (or gradual) retirement is that an older worker remains with his or her employer while gradually reducing hours and effort."[36]
>
> **Proposed Legal Definition:** In a recommendation to the Secretary of Labor, the Advisory Council on Employee Welfare and Pension Plans suggested the following definition: " . . . phased retirement means a gradual change in a person's work arrangements as a transition to full retirement. This may involve a change of employers (including self-employment), a change of career or a reduction in the number of hours worked. As the focus is on how and on what terms people continue working after they are eligible for retirement benefits, the re-employment of retirees, whether or not it was anticipated when they first retired, is also sometimes included in discussions of phased retirement."[37]

The commonality among these definitions is that it presumes that an employee is not working *as much* or in *the same way* as the employee had been working prior to entering the "phased retirement" stage. However phased retirement is defined, we

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[33] Selected materials that were developed for several "focus groups" on phased retirement in 2006, prior to the establishment of the Phased Retirement Working Group, can be found at http://www.law.georgetown.edu/workplaceflexibility2010/PhasedRetirement.cfm (last visited on September 3, 2008).

[34] Selected materials that were developed for the Phased Retirement Working Group can be found at http://www.law.georgetown.edu/workplaceflexibility2010/PhasedRetirement.cfm (last visited on September 3, 2008).

[35] Society for Human Resource Management, Glossary, *available at* http://www.shrm.org/hrresources/hrglossary_published/p.asp (last visited on Aug. 22, 2008).

[36] Robert Hutchens & Karen Grace-Martin, *Who among white-collar workers has an opportunity for phased retirement? Establishment characteristics* (Discussion paper No. 1155) (2004), *available at* ftp://repec.iza.org/RePEc/Discussionpaper/dp1155.pdf (last visited on Aug. 22, 2008).

[37] ERISA Advisory Council, *Report of the Working Group on Phased Retirement* (2000), *available at* http://www.dol.gov/ebsa/publications/phasedr1.htm (last visited on Aug. 22, 2008).

believe that for it to work as an FWA for older employees, it must operate as a common workplace option that is both feasible for employers and attractive to employees.

For purposes of facilitating a discussion with our Phased Retirement Working Group, we developed an initial description of an optimal phased retirement program for older employees that included eight components:[38]

- It is a common and accepted employee benefit program.[39]
- It is a program that permits employees to adjust their work hours gradually as they transition into retirement.
- It is a program that, when necessary for the employee's income needs, allows the employee to receive part of his or her pension or retirement plan benefit while phasing into retirement, but also adequately secures and protects the employee's future retirement needs.
- It is a program that enables employees to make informed decisions about whether to enter into an FWA.
- It is a program where the duration of the phased retirement may be agreed upon by the employee and the employer.
- It is a program that employers can design to meet their business needs.
- It is a program that has reasonable and predictable costs and minimal, additional administrative burdens for employers.
- It is a program that does not inappropriately expose employers to age discrimination claims.

B. Legal Issues and Challenges in Phased Retirement Programs

The primary challenge to the implementation of phased retirement programs occurs in workplaces where employers offer defined benefit plans, particularly when those plans offer attractive early retirement options.

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[38] This definition is derived from Rudolph Penner, Pamela Perun & Eugene Steuerle, *Legal and Institutional Impediments to Partial Retirement and Part-Time Work by Older Workers* (2007), *available at* http://www.urban.org/UploadedPDF/410587_SloanFinal.pdf (last visited on Aug. 22, 2008), with our modifications. Our definition assumes that the individual will remain an employee and not be classified as an independent contractor.

[39] "Common" does not necessarily mean that there is no employer discretion as to whether to offer a phased retirement program or who may participate in the FWA. Rather, it signifies simply that the program is integrated into the workplace as a general matter.

The issues that arise include the following:

1. **Age of Eligibility**

Current law permits participants in defined benefit plans to receive a distribution upon certain specified conditions -- for example, upon severance from employment, upon retirement, or upon reaching a plan's normal retirement age.[40] In addition, as a result of a change in law made by the Pension Protection Act of 2006 (PPA), a distribution from a defined benefit plan may be made to an employee who reaches the age of 62, even if the employee is still working.[41] The PPA provision has no eligibility requirements for receiving such a distribution other than attaining the age of 62.[42]

The PPA amendments may have limited impact on the impeding labor shortage, however, as evidence suggests that many employees retire prior to age 62. A recent GAO report found that nearly half of all individuals fully retire by age 62, and, for those males who participate in a defined benefit plan, 28 percent of such individuals are more likely to retire before age 62.[43]

As the law is currently structured, therefore, if an employee who has access to a defined benefit plan wishes to receive a distribution from the plan *prior* to age 62, that employee must terminate employment. If the defined benefit plan also has an early retirement option, particularly one with a subsidized benefit, some employees may find that to be an attractive option.

Employers who sponsor such plans would therefore like to offer employees the option to receive distributions from a defined benefit plan at whatever age the plan offers an early retirement benefit. This might be at age 55 or lower, depending on the particular plan

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[40] Treas. Reg. § 1.401-1(b)(1)(i); *See,* Rev. Rul. 56-693, 1956-2 C.B. 282; Rev. Rul. 57-163, 1957-1 C.B. 128; Rev. Rul. 61-157, 1961-2 C.B. 67; Rev. Rul. 65-178, 1965-2 C.B. 94; and Rev. Rul. 69-421, 1969-2 C.B. 59. The Internal Revenue Service (IRS) has ruled that a pension plan may allow for a distribution before severance of employment, but only after an individual has reached the plan's normal retirement age. *See,* Rev. Rul. 71-24, 1971-1 C.B. 114.

[41] The Pension Protection Act of 2006 (P.L. 109-280) amended the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code (Code) of 1986 to allow for distributions from a pension plans to individuals who have reached age 62 (the safe harbor definition of normal retirement age) and who have not yet had a severance of employment. I.R.C. § 401(a)(36); ERISA §3(2)(A). If a plan has a normal retirement age between 55 and 62, all relevant facts and circumstances will be used to determine whether the normal retirement age satisfies the safe harbor. Treas. Reg. § 1. 401(a)-1; IRB 2007-24.

[42] For participants in a defined contribution plan, distributions to employees may begin at age 59 ½, even if the employee is still working.I.R.C. § 401(k)(2)(B). *See also*, Workplace Flexibility 2010, *Distribution Chart*, *available at* http://www.law.georgetown.edu/workplaceflexibility2010/documents/DistributionChartv6.pdf. (last visited on September 3, 2008).

[43] *See, Retirement Decisions: Federal Policies Offer Mixed Signals about When to Retire*, GAO Report to Congressional Committees (2007), *available at* http://www.gao.gov/new.items/d07753.pdf (last visited on Aug. 22, 2008).

design.[44] The purpose of this option, according to such employers, is to entice highly-skilled workers to remain with their employers by receiving some pension distributions to supplement their income, rather than retiring completely, receiving the pension distribution and perhaps going to work for a competitor.[45]

For those concerned with the overall retirement security of American workers, however, allowing employees to receive distributions from defined benefit plans at such early ages raises concerns. From the perspective of these advocates, employers that are eager to retain particular skilled workers should use salary increases or FWAs as inducements to continued work, rather than distributions from pension plans.[46]

The arguments against lowering the age at which distributions from defined benefit plans may be made to an age lower than age 62 (and indeed, the arguments by some that age 62 is itself too low of an age for such distributions) tend to fall into three categories.

First, by not allowing plan distributions until age 62 (or later), employees will be encouraged to work longer. This may result in additional benefit accruals and thus result in more financial security for these employees when they do fully retire. [47]

Second, if distributions are permitted at ages earlier than 62, employers might use the phased retirement option as a mechanism to subtly (or not so subtly) force employees into part time status. Employees in such status will be worse off when they fully retire and would be using their defined benefit distributions at ages earlier than they might have wished.

Third, if employers have the option of encouraging employees to supplement their salaries with distributions from the defined benefit plan, this might create an attractive mechanism for employers to use retirement funds rather than pay increases as a reward system for those reaching phased retirement ages.

As is often the case in policy discussions, each side has a point. Currently, early retirement subsidies in defined benefit plans are an attractive and sometimes irresistible option for employees. Perhaps some employees would stay with their current employers, and work even significantly past age 65, if they were given flexible work arrangements or access to some defined benefit distributions. At the same time, we know that people often do not make rational decisions about their long-term retirement security. One goal of public policy certainly should be to craft a legal retirement framework that enhances retirement security, rather than one that reduces it.

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[44] *See*, Workplace Flexibility 2010, *Summary of Comments on the November 2004 NPRM*, at 2-3, available at http://www.law.georgetown.edu/workplaceflexibility2010/documents/7CommentsonIRSProposedRegulationsSpring2007.pdf, (last visited on September 3, 2008).
[45] *Id.*
[46] For example, the Hewitt survey, *supra,* note 30, found that providing flexible work arrangements was effective in retaining near-retirement employees.
[47] *See, Summary of Comments, supra,* note 44*,* at 3.

It does not seem, however, that these viewpoints are necessarily irreconcilable. At bottom, the issue turns on ensuring adequate retirement security for phased retirees who receive defined benefit plan distributions. Such retirement security will depend, for example, on how the service of phased retirees is calculated during the period of time in which they are working in a FWA, and how the final benefit amount at full retirement is calculated. If employers are seeking to entice highly skilled workers to remain with them past the age that such workers might retire early, presumably such employers can offer options that will not jeopardize such employees' long-term retirement security.

As always, the devil is in the details. Nevertheless, WF2010 believes it is appropriate to continue to consider policy changes that will permit employers to offer attractive FWAs to older workers, as long as such changes will protect workers' retirement security.

2. Distribution Issues

Employers who want to implement phased retirement programs, as a means of enticing highly skilled workers to stay with them, understandably want such programs to be easy to administer. In addition, they want to ensure that phased retirement options are as attractive to these workers as any early retirement options that are available under the plan.

A desire for minimal administrative costs and burdens causes employers to want significant discretion in terms of an employee's eligibility for a phased retirement distribution. For example, they would like to be able to provide such distributions without demonstrating that an employee has reduced his or her hours by a certain minimum threshold. Rather, once employees have become eligible for early retirement by virtue of their age (or by virtue of their age and years of service, depending on the plan design), they would like such employees to also be eligible for any phased retirement distributions.[48]

Similarly, employers desire flexibility with respect to any testing and recalculation of a phased retirement benefit.[49] Employers argue that burdensome testing of employees' reduced hours, and recalculating distributions based on such hours, will make providing phased retirement programs too burdensome and unwieldy, and employers will simply choose not to offer them.[50]

Finally, employers would like flexibility in the form of the phased retirement benefit. Specifically, if a plan design permits an early retirement benefit to be distributed in the form of a lump sum, employers would like the phased retirement benefit to be available in that fashion as well.[51]

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[48] *Id.* at 4-5.
[49] The proposed regulations from the IRS required such annual testing and recalculations. *See,* Prop. Treas. Reg. § 1.401(a)-3(d)(4)(v)(E).
[50] *Summary of Comments*, *supra,* note 44, at 7-8.
[51] *Id.* at 6-7.

The desire for flexibility and discretion makes significant sense when one is considering how to run a program easily and with minimal administrative burden. In addition, the desire to allow lump sum distributions makes sense, from an employer's perspective, given that a primary purpose of phased retirement plan is to encourage continued work. If an employee can take an early retirement benefit in a lump sum distribution, but cannot access phased retirement benefits in a lump sum as well, that may encourage employees to in fact terminate employment with that employer.

However, advocacy groups who worry about protecting retirement security more broadly are, understandably, concerned about the impact of such flexibility and discretion. If employees are permitted to receive early defined benefit plan distributions without first reducing the hours they work and their pay (particularly without a guarantee that such distributions would not reduce their final benefit amount), such programs could easily become a means for employers to substitute retirement funds for salary increases. For the same reason, some testing of employees' reduction of hours or pay seems necessary to ensure that the defined benefit distributions will actually be used to compensate for reductions in hours worked and compensation.

With regard to lump sum distributions, many consumer groups view lump sum options as a potential threat to retirement security in general, and hence would rather see fewer such options available as a normative matter. From their perspective, permitting lump sum distributions at the early age that phased retirement benefits might become available simply compounds existing problems of inadequate retirement financial security.

Again, it is not difficult to discern the legitimate concerns driving the positions of each group. On one hand, if phased retirement programs are to become an accepted way of doing business, they need to be relatively easy to administer. On the other hand, it cannot be good if public policy makes changes in the laws governing retirement that will reduce the ultimate retirement security of many Americans.

As noted at the outset of this testimony, Workplace Flexibility 2010 has not yet taken any positions on the various policy questions raised in the phased retirement arena. Nevertheless, based on our review of the issues in this category, we hope that compromise positions might be possible to develop. While such positions might not fully satisfy either employer or employee advocates, perhaps they can ensure that phased retirement programs will be relatively easy to administer and operate in a manner that will not harm the retirement security of those who receive phased retirement distributions.

3. ERISA Disclosure and Fiduciary Issues

As discussed in detail in the testimony of Chantel Sheaks before this Council, ERISA requires plan administrators to inform employees about their benefits, and their rights under employee benefit plans, through a variety of means, including by distributing

summary plan descriptions, summaries of material plan modifications, and plan documents.[52] In addition, both ERISA and the Code require plan administrators to notify employees of the impact of certain events, such as a reduction in hours, retirement or separation from employment, on their employee benefits.[53]

As noted in Ms. Sheak's testimony, if phased retirement programs were implemented, employers (in their capacity as plan administrators) would presumably be required to provide notices to employees that inform them of the ramifications of entering such programs.[54] However, such notices are typically provided to employees at the time of their benefit election. By contrast, in order to adequately inform employees about the potential impact that the election of phased retirement benefits could have on their pension benefits and long-term retirement security, an adequate notice would need to be provided to the employee prior to the election of the phased retirement benefit.[55]

The DOL could facilitate phased retirement disclosure by issuing guidance that resolves outstanding issues regarding the form, content, and timing of phased retirement notices, particularly the amount of detail required in such notices.

The effectiveness of such notices, and perhaps the level of detail ultimately proscribed by such notices, may ultimately turn on the policy decisions that are reached regarding the issues described above -- such as the age of eligibility for phased retirement distributions, the forms of distributions permitted, and the impact that phased retirement will have on the final benefit amount. For example, if the phased retirement program is structured so as not to reduce the ultimate retirement security of the individual in any appreciable manner, the notice simply needs to make that outcome clear. Conversely, if programs are permitted to be structured in a manner that might result in significant adverse impacts on a worker's final retirement security, the phased retirement notice would need to contain a sufficient level of detail to make employees aware of this potential outcome as well.[56]

As outlined in Ms. Sheaks' testimony, there are also additional potential issues under ERISA's fiduciary provisions that employer groups would like to see answered in connection with phased retirement programs. While, as a general matter, a fiduciary is not required to provide individualized information to employees, employers have expressed concern about their obligation to counsel employees individually about the effect that participation in a phased retirement program would have on their benefits. Consumer advocates are generally in favor of increased disclosure to protect plan

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[52] *See,* Testimony Before the ERISA Advisory Council Working Group on Phased Retirement, (July 17, 2008)(statement of Chantel Sheaks, Principal, Buck Consultants). Ms. Sheaks offered a comprehensive discussion of ERISA's disclosure and fiduciary Issues. Therefore, our intent here is to offer a summary, as appropriate, and to supplement it with some discrete offerings based on our work to date.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Although WF2010 does not yet have any positions on the policy questions posed, we highly doubt we would support any legal changes regarding phased retirement programs that would have significant adverse impacts on a worker's final retirement security.

benefits. Ideally, the DOL could issue guidance, in the realm of both ERISA's disclosure and fiduciary provisions, which would ensure that employees are fully and accurately informed about the effect of participation in phased retirement programs without imposing unnecessary additional administrative burdens and fiduciary liability.

4. Employer Discretion

The primary reason that employers seek to establish phased retirement programs is to entice certain workers to remain with them past the age that such workers might choose to retire or otherwise sever the employment relationship. Hence, it is important to such employers that they have discretion to determine which employees will be given a flexible work arrangement and will be offered the opportunity to receive a phased retirement benefit. Consumer groups, however, are concerned that FWAs will be offered disproportionately in favor of highly compensated employees.

Employer discretion in terms of whether to offer employee benefits in the first place is, of course, a cornerstone in today's American system of benefits. Nevertheless, once an employer offers a pension plan, the tax code tempers some of the employer's discretion through various non-discrimination rules.[57] Thus, under current law, an employer who sponsors a phased retirement plan would likely be required to demonstrate that the plan is currently and effectively available to a nondiscriminatory group of employees.[58] If phased retirement plans were offered primarily to highly compensated employees, as some groups posit, that would presumably raise problems under current law.[59]

The non-discrimination rules of the tax code are designed to ensure that plans are not designed and operated in manner that favor highly compensated employees. It is unclear whether such rules apply with equal force to an employers' initial decision to offer FWAs (and thus the opportunity to receive phased retirement distributions) to only certain employees. While Workplace Flexibility 2010 has not taken a position on this policy question yet, we believe it deserves careful consideration.

Employers are also subject to non-discrimination rules under the Age Discrimination in Employment Act (ADEA). While some employers have expressed concern that phased retirement plans offered to select groups of employee might result in charges of discrimination under the ADEA, a recent Interagency Task Force led by the Department of Labor has opined that "a well-crafted phased retirement plan that is voluntary and has no age cap will not violate the ADEA."[60]

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[57] *See*, Treas. Reg. § 1.401(a)(4)-4.

[58] *See*, Workplace Flexibility 2010, *Phased Retirement Programs: Benefits, Rights and Features Nondiscrimination Testing* (2007), *available at* http://www.law.georgetown.edu/workplaceflexibility2010/documents/8BenefitsRightsandFeaturesMemoSpring2007.pdf (last visited on September 3, 2008).

[59] *Id.*

[60] United States Department of Labor, Report of the Taskforce on the Aging of the American Workforce (2008), 21, *at* http://www.doleta.gov/reports/FINAL_Taskforce_Report_2-11-08.pdf.

Workplace Flexibility 2010 concurs that, under the current state of the law, a well-crafted and voluntary phased retirement plan that has no age cap should not generate ADEA liability on the part of employers. However, what constitutes a "well-crafted plan" and what "voluntary" means needs to be addressed with greater clarity.

C. Issues Regarding Health Insurance Coverage for Employees on FWAs

In America today, any employee who is on an FWA that consists of working less than full-time faces the potential of losing employer-provided health insurance. While some employers provide health insurance to employees who work part-time, most do not.[61]

The same challenge faces older workers who seek to work less than full-time as they phase into retirement. Based on focus groups that Workplace Flexibility 2010 held in 2006, it was clear from both employee and employer groups that maintaining employer-provided health insurance would be an essential element in making a phased retirement arrangement attractive to employees.

There are no legal obstacles to providing employer-provided health insurance to part-time workers, as evidenced by the 12.6 million part-time workers in the private sector who received such health insurance in 2006.[62] Rather, many employers cite to financial difficulties in providing health care coverage to this pool of workers.

For workers who do not have access to health insurance when they move to part-time status, current laws are of limited help. For example, the health care provisions of COBRA require employers to permit employees who lose their employer-provided health insurance because of a reduction in hours to continue their health care coverage by paying his or her own premiums. However, this coverage is limited (with certain exceptions) to eighteen months.[63] This will often not be sufficient for phased-retirees.

WF2010 recognizes that the dominant practice of employers offering health insurance only to full-time workers poses a challenge to any employee who is working an FWA of reduced hours, including phase-retirees. We have not yet explored these issues in any depth, although we may do so in the future. In the meantime, in light of the strong desire of employers to retain highly-skilled workers who might be eligible for phased-retirement arrangements, it will be interesting to see if the trend shifts to employees on FWAs becoming eligible for employer-provided coverage.

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[61] *See,* EBRI Data Book, Health Insurance Coverage by Work Status and Firm Size, *available at* http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2027.pdf (last visited on September 3, 2008).

[62] *Id.* at 2.

[63] ERISA § 602(2)(A)(i), 29 U.S.C. §1162(2)(A)(i). Under other qualifying events, the individual may continue health care coverage for either 29 or 36 months, depending on the type of qualifying event. *See* ERISA §§ 602(2)(A)(i)-(v), 29 U.S.C. §1162(2)(A)(i)-(v). The cost for this coverage is 102 percent of the applicable premium. The applicable premium generally is the cost to the plan for coverage for similarly situated individuals for whom a COBRA qualifying event has not occurred. ERISA § 602(3), 29 U.S.C. §1162(3).

IV. Role of the ERISA Advisory Council and the Department of Labor

The role of the Advisory Council on Employee Welfare and Pension Benefit Plans (the ERISA Advisory Council) is "to advise the Secretary" with respect to carrying out his or her functions under ERISA, and to "submit to the Secretary recommendations with regard thereto."[64]

The Department of Treasury has primary responsibility for implementing the tax and qualification provisions contained in Title II of ERISA, such as the participation, vesting and funding standards, while the Labor Department has primary responsibility for implementing the reporting, disclosure, fiduciary standards and prohibited transactions provisions.[65]

Most of the policy issues discussed above, such as the age at which distributions may be made from a defined benefit plan and any restrictions on how final retirement benefits may be calculated, relate to the qualification standards for plans. Hence, to the extent that such changes do not require legislative action, these issues fall within the jurisdiction of the Department of Treasury.

A few of the policy issues noted above, such as those concerning the form and type of notices to be provided and those concerning fiduciary responsibility and liability, fall within the jurisdiction of the Department of Labor. However, as noted above, many of those issues are necessarily intertwined with policy decisions that first need to be made on the broader question of how to meet employer workforce needs while ensuring adequate retirement security for American workers.

Hence, while there are limited actions on issues relating to matters of ERISA disclosure and fiduciary responsibility that the ERISA Advisory Council can advise the Secretary on at the present time,[66] the larger issue on which the Council might consider offering recommendations is the extent to which phased retirement programs should be supported and encouraged as a matter of national policy, including a clear-eyed assessment of the challenges and opportunities represented by such programs.

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[64] *See,* ERISA, § 512(b), 29 U.S.C. § 1142(b). *See also,* Description of ERISA Advisory Council, http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html, (last visited on Aug. 22, 2008).

[65] Title II of ERISA contains the Code provisions relating to employee benefit plans. Title II contains the plan qualification provisions and deals primarily with 1) participation, vesting and funding, 2) benefit accrual and payment of benefits, and 3) nondiscrimination in the provision of benefits. The Department of Treasury enforces Title II of ERISA. The ERISA Reorganization Plan of 1978 provides that the Treasury Department will have primary responsibility for the tax and qualification provisions of ERISA, such as the participation, vesting and funding standards, and the Labor Department for reporting and disclosure, fiduciary standards and prohibited transactions. The only areas that the DOL would have direct authority over are those in Title I dealing with reporting and disclosure, for example, what to include in a summary of material modifications, or the form and content of notices required for election in conjunction with phased retirement pre-election programs. Reorg. Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978), *reprinted in*, 29 U.S.C.A. § 1001 app. at 56 (West 1985).

[66] *See, e.g.,* Sheaks Testimony, *supra,* note 52.

Offering such recommendations seems squarely within the mandate of the Department of Labor, which is foster and promote:

> the welfare of the job seekers, wage earners, and retirees of the United States by improving their working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits, helping employers find workers, strengthening free collective bargaining, and tracking changes in employment, prices, and other national economic measurements.[67]

Indeed, the *rationale* for providing preferred *tax* treatment to qualified pension plans, which the Department of Treasury is certainly well-situated to implement, is to carry out a *labor* purpose. That is, Congress has made a policy judgment that such preferred tax treatment advances the welfare of American workers. The Department of Labor is obviously a critical source of information on what actually advances the welfare of workers.

The Department of Labor is already taking a lead with regard to the implications of the aging workforce. In May 2006, in response to a request from the Senate Special Committee on Aging, as well as a Government Accountability Office recommendation, the Department of Labor launched an Interagency Taskforce to develop strategies to address the impact of the retirement of the Baby Boomer generation.[68] Nine government and independent agencies participated with the Department in this effort.[69] In February 2008, the Interagency Taskforce issued its Report of the Taskforce on the Aging of the American Workforce.[70]

The Interagency Report identified barriers to the implementation of arrangements that could extend employee work life past traditional retirement and identified phased retirement as a potential innovative and effective solution.[71] The Report did not, however, offer any specifics on the legal barriers to phased retirement programs nor propose any particular solutions.[72]

Ultimately, Congress may have to establish a coherent policy in this area -- one that will intelligently take into account the legitimate needs of employers, while still ensuring the adequate retirement security of American workers. If Congress chooses to take up this task in earnest, it will look to the Department of Labor, the Department of Treasury, and many of the other agencies involved in the Interagency Taskforce, for reaction and

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[67] DOL Mission Statement, *available at* http://www.dol.gov/opa/aboutdol/mission.htm (last visited on September 3, 2008).
[68] *See*, *Report of Taskforce*, *supra,* note 60, at 5.
[69] The participating agencies were the Departments of Commerce, Education, Health and Human Services, Labor, Transportation, and Treasury; the Equal Employment Opportunity Commission, Small Business Administration, and Social Security Administration. *See*, *Report of Taskforce*, *supra*, note 60, at 5.
[70] *Report* of Taskforce*, supra,* note 60, at 17-21.
[71] *Id.*
[72] *Id.*

recommendations. We believe the Department of Labor should stand ready to respond with well-crafted recommendations whenever such time may come.

Regardless of Congressional action, the Department of Labor should also be playing a key role in educating the American people about retirement, including phased retirement. The Department has already established a Retirement Savings Education Campaign, which provides information to employees, small businesses, and employers about saving for retirement and offers tools to get started.[73] FWAs and phased retirement may have an impact on the age of retirement, the amount of retirement benefits available, and on other ancillary benefits such as health care, life, and disability benefits. The Department can play an important role in educating both employers and workers about how to structure, implement and ultimately successfully use such programs, while still maintaining an eye towards employee benefit security.

V. Conclusion

The aging of the American workforce, together with changing work patterns and expectations of the American workforce, make the issue of workplace flexibility a compelling one for our nation. At the same time, the aging of our population makes the protection, and indeed enhancement, of solid financial retirement security for our elderly citizens even more important.

These issues converge in the consideration of possible changes in law to facilitate the retention of workers who are nearing retirement age and who may wish to continue working while on a flexible work arrangement of reduced hours. In particular, the legal policy question is whether such workers should be allowed to supplement their perhaps reduced incomes by accessing funds from their defined benefit plans. While Congress has answered that policy question with regard to workers who have attained the age of 62 – by permitting distributions from defined benefit plans while such individuals continue working -- it has not answered that policy question for workers below age 62.

These issues raise questions that are relevant to a range of agencies, including the Department of Labor, the Department of Treasury, the Equal Employment Opportunity Commission and others. But, at bottom, the question goes to the *welfare* of the American *worker* – what public policy will best ensure a strong workforce, supported by a strong retirement base?

Workplace Flexibility 2010 believes that these issues deserve the focused attention of the Department of Labor. We hope our testimony and background materials will prove useful to the ERISA Advisory Council as it continues to navigate these issues.

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[73] *See,* Retirement Savings Education Campaign, *available at* http://www.dol.gov/ebsa/savingmatters.html (last visited on Aug. 22, 2008).