

The Role of Benefits Legislation in Shaping the Future: A Perspective

As much as we may dislike the mandates, rules and obligations Congress imposes on employers and their advisors, members of the benefits community often look to Congress to “fix” things—such as addressing gaps faced by employees and challenges faced by employers. This article argues for realistic expectations of the role of benefits legislation versus employer action in shaping the future. The author reviews past legislation that has facilitated employer provision of employee benefits and where legislation has fallen short of expectations. He urges a balanced perspective on the role of legislation and of the benefits community in addressing current and future challenges.

by **Allen T. Steinberg** | *Law Offices of Allen T. Steinberg*

The benefits community has a love/hate relationship with Congress. We hate the mandates, rules and obligations imposed on employers and their advisors. On the other hand, we often look to Congress to “fix” things—such as addressing gaps faced by employees and challenges faced by employers. For example, a recent *New York Times* op-ed piece suggested addressing retirement income shortfalls by creating a new government-managed retirement annuity account for all Americans.¹

This article will focus on the “love” aspect of this love/hate relationship and the fact that this is unrequited love. Indeed, without reasonable expectations, it is bound to lead to disappointment.

(Limited) Praise for Legislation

Laws in the benefits arena do certain things well. For example:

- Legislation to protect employees from deceptive practices (in effect, to require “truth in benefits”) has been valuable in protecting the integrity of the system and setting “guardrails” within which employers must operate. Fiduciary rules protect participant savings from the predations of sticky-fingered employers and trustees. Reporting and disclosure requirements provide important information and hold employers accountable for their benefits promises, and eligibility, vesting and service-crediting rules

help ensure that employees can actually earn and collect their accumulated benefits.

- Employment-related legislation also can help individuals who are out of the workforce. For example, before the enactment of the Affordable Care Act (ACA), the Consolidated Omnibus Budget Reconciliation Act (COBRA) represented a health insurance lifeline for individuals between jobs and those forced into early retirement prior to Medicare eligibility.
- Bold employers willing to take some risks to accomplish key objectives adopt many significant innovations. But it often requires legislative or regulatory action to provide a legal imprimatur for these new ideas and to assure a broader group of employers that these innovations are permitted. Consider cash balance plans, automatic 401(k) enrollment and target-date investments as examples of this phenomenon—all adopted by innovative employers and ultimately sanctioned by legislation.

Framing Expectations

However, there are certain things that legislation simply does not do well. And we must recognize that legislative efforts can have unintended (and undesired) consequences—as evidenced by employer efforts to limit their exposure to the employer mandate under ACA by managing employee hours or by employer responses to congressional

efforts to “protect” the defined benefit system.

As we consider the challenges facing employers—and employees—in the years to come, we need to recognize these limitations and that responses to the key employee benefits challenges must come from within—from employers and their advisors.

Following are some of the key areas where innovation should come from the private sector and where waiting for government intervention would represent a mistake.

Changing Employee Behaviors to Meet Key Retirement and Health Care Challenges

The federal government has been exhorting employees to save more for retirement for many years. Yet when we consider the innovations that have, arguably, had the greatest impact on employee savings, top honors go to features such as payroll deduction (after all, how much would employees save if they had to write checks every two weeks?) and automatic enrollment—features that emerged from the creativity of employers and their advisors (with help from academia).

Government exhortations (and the limited financial incentives that often accompany them) simply do not move the needle. Yet employers need employee behaviors to change in order to address key issues such as retirement income adequacy and health care costs.

In addressing retirement income adequacy needs, we are starting to see the beginnings of necessary changes. Changes to employment patterns—

such as working past the (traditional) retirement age of 65 and phased retirement—and new features such as the availability of deferred annuities offer the possibility that market-led innovations can address significant challenges without reliance on new legislative directives.

In addressing health care costs, with the enactment of the recent budget reconciliation bill (and the delay of ACA’s “Cadillac tax”), employers no longer have the threat of excise taxes as the rationale for capping health care costs. Rather, employers must find ways to bend the arc of health care costs—to meet business imperatives—through experimentation and innovation.

And employers need to find ways to change an array of employee behaviors—including the use of different delivery models, employees’ health care purchasing decisions and wellness and lifestyle choices. We have seen much energy and innovation focused on reducing health care costs—from more aggressive use of wellness and lifestyle incentives to telemedicine to increased consumer awareness of costs through consumer-directed health plans. Government mandates direct that employees must be covered by health care plans meeting minimum acceptable levels of coverage. It is up to employers and their advisors to find ways to control costs and ensure that health care is affordable.

Meeting Changing Employee Needs

There are many opportunities for employers to help employees fill key

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needs. Employers should not wait for legislative mandates to identify and address those needs. For example, college affordability has become a hot political topic recently, yet for many years employers have been developing a range of programs to support employees' educational aspirations such as tuition reimbursement plans, Section 529 plans and discounted tuition programs. Similarly, over the years, innovative employers have taken the initiative in addressing key needs around family leave and benefits coverage for same-sex partners, long before these issues gained political traction.

Employers' experience with taking the lead in addressing key employee needs gives rise to some key lessons:

- Employers can experiment and innovate in ways that legislative initiatives will never match.
- Employers can assess cost/benefit trade-offs in ways that are sensitive to business needs and will help ensure that innovative programs are sustainable.
- Employers should consider the needs of a broad swath of their

employees; programs for top managers are likely to be viewed with suspicion both from employees and legislators. In effect, new ways to compensate executives should be viewed as executive compensation—and the only legislative response that new executive compensation devices attract is, generally, unwelcomed.

Meeting Changing Business Conditions

Employers are constantly confronted by the need to address business challenges and reconcile those challenges with the need to provide meaningful, competitive and effective benefit packages to employees. Benefits-related legislation is, typically, not a part of meeting those needs.

For example, many factors have been blamed for the employer withdrawal from defined benefit plans and lifelong retiree medical benefits. However, the decades-long financial commitment associated with these plans is no longer consistent with employers'


business challenges and is at the core of this retreat. Employers needed to shift to defined contribution plans for the flexibility these plans provide. Employers have accepted retiree medical exchanges because they simply cannot bear the risks associated with retiree medical plans (such as medical inflation and longevity) for individuals no longer in the workforce.

Changes to retirement and retiree medical plans over the past few decades have been wrenching. But I maintain that these changes were based on business imperatives, and no legislative action would have enabled employers—and employees—to avoid this transition.

While these changes were necessary, one should not underestimate the challenges inherent in these dramatic shifts. In response, employers and their advisors have worked hard to help employees address the gaps created by the new do-it-yourself (DIY) retirement model—in ways that are sustainable and responsive to business imperatives. New developments such as the ability to offer deferred annuity contracts under new

qualified longevity annuity contract (QLAC) rules² and continuing employer efforts to increase employee deferrals offer some cause for optimism that employers can help employees make the transition to the DIY retirement model.


Looking in the Mirror

The focus on some employers as the source of solutions to significant challenges does not represent a Panglossian³ view of employers overall. Simply because some innovative employers have led the way in meeting employer and employee needs over the past few decades does not mean that all employers have embraced these ideas or that the benefits of these new ideas are widely spread across the U.S. labor force. Instead, it means that as we consider the key forces that have shaped the benefits world—and that will shape the benefits landscape in the years to come—we must have a balanced perspective on the role of legislation and of the benefits community in addressing past challenges. An unbalanced perspective, relying unrealistically on one or the other, will leave us ill-equipped to face current and future challenges. 

Endnotes

1. “A Smarter Plan to Make Retirement Savings Last,” the *New York Times*, January 2, 2016.
2. Under general retirement plan “minimum distribution” rules, benefit payments must begin no later than (the later of) attainment of the age of

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70½ or termination of employment. These minimum distribution rules make it difficult to extend the payment of defined contribution plan assets to reflect increases in longevity. *Qualified longevity annuity contracts (QLACs)* are deferred annuity contracts that allow a participant to invest a portion of his or her defined contribution plan account balance in an annuity contract that will not commence until many years after retirement (and after the required payment commencement date under the minimum distribution rules). QLACs are now permitted under final regulations issued in 2014 (TD 9673, 79 *Fed. Reg.* 37633, July 2, 2014) and may represent a vehicle for converting capital accumulation assets into more meaningful lifetime retirement income. On the surface, QLACs look like a government-led innovation. However, the benefits community has been asking for this sort of relief from the minimum distribution rules for years. Accordingly, the author views QLACs as an example of a government action to listen to industry requests for ways to better meet employer and employee needs.

3. Meaning someone who is excessively (or even blindly) optimistic. The term is a reference to a character in Voltaire’s *Candide* who was relentlessly optimistic even in the face of adversity and always considered himself to be living in the best of all possible worlds.

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