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FOREWORD

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The Sixth Annual Employee Benefits Symposium was held on April 25, 2008. The symposium addressed a wide variety of employee benefits issues ranging from Social Security and pensions to retiree health care. The panelists included leading employee benefits practitioners and academics. The program was well attended with students, professors, practicing attorneys, and employee benefits consultants. This exciting mix of academics and practitioners led to a very stimulating discussion of current and important issues in employee benefits law today. Everyone present expressed a genuine interest in finding ways to provide employees and retirees with adequate health and pension benefits. Each author identified problems, and some even ventured solutions.

As you read the articles in this volume, consider how many of our problems result from us having a "voluntary" benefit system. In the United States, employers are not required to have health care plans or pension plans for their workers, and many do not. In 2006, for example, while 84.2 percent of Americans (249.8 million) had some type of health care coverage, 15.8 percent (47 million) were not covered.[1] Of particular concern, many of those without insurance are workers. Indeed, of the 37.8 million uninsured Americans between 18 and 64 years old in 2006, 27.6 million worked during the year, 22.0 million of these worked full-time.[2]

Similarly, only about half of American workers are covered by an employer-sponsored pension plan, and most of those are at the upper end of the income distribution. For example, of the 157

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1. Carmen DeNavas-Walth, Bernadette D. Proctor, and Jessica Smith, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, U.S. GOVERNMENT PRINTING OFFICE, CURRENT POPULATION REPORT NO. P60-233 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf

2. *Id.* at 21.

million Americans workers in 2006, just 78.6 million (50.0 percent) worked for an employer (or union) that sponsored a retirement plan, and just 62.3 million (39.7 percent) participated in that plan.[3] And while 64.7 percent of workers with annual earnings of $50,000 or more participated in a plan in 2006, only 16.2 percent of workers earning between $10,000 and $14,999 participated that year.

Consider also how the coming retirement of nearly 80 million baby-boomers has and will affect the shape of our health and retirement systems.[4] The United States already has 36 million residents who are age 65 and over and 4.7 million who are age 85 and over.[5] By 2030, however, the United States will have 72 million residents age 65 and over, and it will have 9.6 million residents age 85 and over. As the articles in this volume show, governments and employers are already hard-pressed to pay for health and pension benefits. Fast forward 25 years and imagine the strains when there are twice as many elderly Americans to support.

Kathryn L. Moore started the symposium with a discussion of *The Future of Social Security: Principles to Guide Reform.* Her article begins with an excellent summary of the history and operation of the Social Security system and then explains the principles that should guide reform. She notes that reform must address Social Security's $4.3 trillion unfunded liability, and there is simply no costless way to resolve this shortfall. Effective reform will require tax increases, benefit cuts, or a combination of the two. Professor Moore encourages policymakers to act sooner rather than later to fix the system, and she suggests that the burden of reform should be widely shared over several generations. But whatever we do, we simply must retain Social Security's safety net of benefits. As she points out, for 66 percent of beneficiaries, Social Security provides half or more of their retirement income. Noting that the last time Congress significantly changed the Social Security system was in 1983, Professor Moore closes by stressing that reform will once again require true bipartisan effort.

David Pratt then addressed *Retirement in a Defined Contribution Era: Making the Money Last.* Professor Pratt notes

3. Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends, 2006* (Washington, DC: Employee Benefit Research Institute Issue Brief No. 311, 2007).

4. U.S. CENSUS BUREAU, OLDEST BABY BOOMERS TURN 60, *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html (78.2 million baby boomers as of July 1, 2005).

5. Wan He, Manisha Sengupta, Victoria A. Velkoff, and Kimberly A. DeBarros, U.S. GOVERNMENT PRINTING OFFICE, CURRENT POPULATION REPORT NO. P23-209, 65+ IN THE UNITED STATES 6 (2005).

that because baby-boomers will live longer than their parents, they will need more retirement income. Unfortunately, the recent shift from traditional defined benefit pension plans to I.R.C. § 401(k) plans will leave many with inadequate retirement savings, and the Social Security system will not be able to make up the difference. He points to many problems with the current pension system: inadequate coverage and participation, inadequate benefits, employers that do not offer pension plans, and pre-retirement leakage, to name just a few. The net effect is that millions of Americans will reach retirement age with small or no retirement savings or pension plan beyond Social Security. In that regard, of those that were fortunate enough to have a 401(k) plan at the end of 2006, the median account balance was just $66,650, and that is not nearly enough to provide an adequate retirement annuity, let alone extra money to cover medical expenses or long-term care. Professor Pratt then offers numerous suggestions about how to increase coverage and retirement savings and about how to improve retirement investing and reduce fees. In the end, he suggests that "reforms to enhance retirement security should form part of the overdue reforms to ensure the long-term solvency of Medicare and Social Security."

Professor Yves Stevens from Belgium then took us across the pond with his talk on *The Comparison of the European Issues in Pension and Employee Benefits Law with the U.S. Federal Law Regulating Employee Benefits.* With an almost encyclopedic mastery of both European and American pension laws, Professor Stevens' article entertains comparisons and contrasts both within the European Union and between the 27 European Union Member States and the United States. Similar aging and demographic issues face all these industrialized countries, and few have social security systems that will provide adequate retirement incomes to beneficiaries. As for "occupational" pensions, the legal reality in Europe is a pension patchwork. Every country has its own laws and customs, and there are almost no unified European rules. Except for a few vague treaty provisions, EU Member States retain full "competence" and tend to "reform their systems irrespective of one another." To be sure, virtually all the EU States have universal health care coverage, and many have achieved nearly universal occupational pension plan coverage, as well. Still, Professor Stevens admits that European pension disparity is a curse. On the other hand, when he looks at the United States, he sees a voluntary pension system that fails to provide adequate, if any, benefits to low-income workers. In the end, he concludes that "it might be better to have a working (but clearly annoying) disparity than a non-working unity when it

comes to social protection."[6]

Next, John Sanchez brought us back to the United States with his talk on *The Vesting, Modification, and Financing of Public Retiree Health Benefits in Light of New Accounting Rules.* In this ground-breaking paper, Professor Sanchez explained how financial pressures are pushing state and local governments to cut back on their generous promises to provide health benefits to their retired workers. He notes that the vast majority of public employers finance their retiree health care benefits on a pay-as-you-go basis—that is, no money has been set aside. Starting in 2007, Government Accounting Standards Board Statement No. 45 requires state and local governments to compile data about their retiree health benefits and report the liabilities that will accrue for retirees in future years. Professor Sanchez notes the 50 states will owe some $381 billion for public retiree health benefits over the next 30 years, and he believes that the new accounting rules will put pressure on public employers to prefund or abandon their retiree health benefits. In that regard, he notes that public employers can reduce or eliminate retirement benefits for new employees, but they face "daunting" legal hurdles where the vested benefits of current workers are at stake. He hopes that the next President will have the political will and clout to enact universal health care, as that could relieve public employers of some measure of their growing unfunded liabilities.

Debra A. Davis then addressed *How Much is Enough? Giving Fiduciaries and Participants Adequate Information about Plan Expenses.* At the outset, Ms. Davis notes that investment fees can have a significant adverse impact on the amount of money 401(k) plan participants will have at retirement. In that regard, it is critical that plan fiduciaries and participants get the information that they need to make decisions about their plans and investments. So far, however, Wall Street money managers and service providers have not been very forthcoming with the details about how they rake off their billions, and the information that is made available to fiduciaries and participants is often indecipherable. Ms. Davis suggests that a uniform method of disclosure is needed to provide plan fiduciaries with the information that they need to select and monitor plan investments and fees. Similarly, plan participants should be given enough information, in plain English, to enable them to make their individual investment decisions.

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6. Perhaps we in the United States should relax ERISA's § 514(a) preemption rule and let our states become laboratories of democracy that could experiment with alternative approaches for providing universal health care and pension coverage. *See, e.g.,* Jon Forman, *Uncle Sam should let the states be laboratories for health care reform,* WASHINGTON EXAMINER, March 2, 2007, at 21.

Finally, Craig C. Martin, Matthew J. Renaud, and Douglas A. Sondgeroth's article addresses, *Baby Ka-Boom: Coming Developments in ERISA Litigation Due To Social, Demographic, and Financial Pressures from the Baby Boom Generation.* At the outset, this article discusses the history of ERISA litigation, most of which is the result of financially-pressed private employers cutting promised benefits. With mixed results, workers have sued to protect their rights to promised early retirement benefits and to guaranteed retiree health care. Workers have also sued to prevent employers from replacing their traditional defined benefit pension plans with less generous cash balance plans. Pertinent here, the Pension Protection Act of 2006 clarifies—prospectively, at least—that cash balance plans are not inherently age discriminatory. More recently, as some companies have spiraled into bankruptcy, their workers have sometimes sued for a breach of fiduciary duties when the plan continued to hold employer stock even as that stock significantly dropped in value. With the impending retirement of the baby-boom generation, even more litigation is foreseeable. In that regard, the recent U.S. Supreme Court decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*,[7] is sure to encourage more suits to recover for fiduciary breaches and mistakes that reduce the value of the assets held in individual accounts. Looking ahead, the authors believe that the financial losses that resulted from the collapse of the subprime mortgage market may also result in fiduciary breach suits. Plan fiduciaries are just going to have to be more careful about how they operate, what investments they select, the fees they pay, and how they communicate with plan participants.

Collectively, the articles in this volume have reinforced my belief that our voluntary health and pension systems are failing us and that we need to move towards more universal coverage. For example, we might require that all employers at least offer health insurance, although we could pay for it with a combination of employer contributions, employee contributions, and government subsidies.[8] We might also move toward a mandatory universal pension system. For example, we could piggyback a system of individual retirement savings accounts (IRSAs) on top of the existing Social Security withholding system.[9] These individual accounts could be held by the government, invested in a broadly diversified portfolio of stocks, bonds, and government notes, and

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7. 128 S. Ct. 1020 (2008).

8. *See, e.g.*, Jonathan Barry Forman, *Making Universal Health Care Work*, 19 (1) ST. THOMAS L. REV. 137 (2006).

9. *See, e.g.*, Jonathan Barry Forman, MAKING AMERICA WORK, at 213-242 (2006); Adam Carasso & Jonathan Barry Forman, *Tax Considerations in a Universal Pension System*, 118 TAX NOTES 837 (Report in Brief, February 18, 2008).

annuitized on retirement.[10]

All in all, the articles in this symposium provide lots of insights about how to improve and expand our employee benefits system. Whether we improve our employee benefits system incrementally through modest legislative changes and litigation or make sweeping universal changes, this is surely an exciting time to be an employee benefits professional.

10. Of course, we would probably need to provide targeted subsidies to help low-income workers achieve anything close to 10-percent-of-earnings contribution levels. We might, for example, use a refundable version of the current saver's tax credit to provide matching contributions to low-income workers. I.R.C. § 25B.