A FATAL MISMATCH: EMPLOYER-CENTRIC BENEFITS IN A BOUNDARYLESS WORLD

by
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This Article traces the origins of the uniquely American system of private, employer-centered welfare institutions and argues that the prevailing model must be replaced with an alternative that is both more portable and more affordable for the vast majority of workers. The author shows how the current employer-centric system of benefits originated in the industrial era of the last century when employers sought to secure a stable workforce through internal labor markets. She argues that this employer-centered model of social insurance and welfare benefits has largely outlived its usefulness in the new "boundaryless" workplace of the twenty-first century. In response to the aging of the population and a rapidly changing economy characterized by global competition, shorter production cycles, increased use of contingent and temporary employment and rising health care costs, in the last two decades employers have reduced their benefits coverage, shifted away from risk-pooling plans, such as defined benefits plans, in favor of a personal responsibility approach characterized by more portable but riskier defined contribution plans. She shows that these changes have generally shifted the costs and risks of health care and old age assistance onto their employees. As a result, the U.S. system of employer-centered benefits is irrelevant for large numbers of employees who have no coverage and increasingly inadequate, uncertain and costly for those who are covered.

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I. INTRODUCTION

In sickness and in health; ‘til death do us part. Those words describe the promise that most large and medium sized U.S. employers made to their employees in the past. For the latter half of the twentieth century, U.S. employers promised health insurance to protect workers and their families when they were sick, and pensions to provide for them until death. These promises were part of an elaborate system of private social insurance that mitigated risks and enhanced standards of living for many Americans for over half a century. But that system is now in crisis, and the promises of the past are proving to be as ephemeral as many a marriage vow.

A defining feature of the American-style welfare state is the employer-centric nature of social insurance. In the United States, health insurance, old age assistance, disability insurance, and long-term care are not financed by the state—rather, they are designed by and offered at the discretion of private firms. To be sure, the federal government mandates some insurance through the Social Security program for old age assistance, disability, and accidental death. In addition, state governments require firms to provide insurance against workplace injury through their workers’ compensation systems and insurance against unemployment through their unemployment insurance programs. However, these programs provide bare bones protection at best. They are also employer-centric in that they are built upon and presuppose the existence of an employment relationship.

The employer-centric nature of the American social insurance system contrasts sharply with the social welfare systems of Western Europe. The European welfare states provide residents with a wide range of benefits—family assistance, medical care, parental leave, unemployment insurance, retraining allowances, pensions, and so forth—financed by employer contributions and general tax revenues. The European social welfare system is available to all residents, whether working or not.[1]

[1] Maurizio Ferrera & Anton Hemerijck, *Recalibrating Europe’s Welfare Regimes*, *in* GOVERNING WORK AND WELFARE IN THE NEW ECONOMY 88–128 (Jonathan Zeitlin & David M. Trubek eds., 2003).

The privatized social insurance system in the United States was initially designed to complement job structures of the industrial era. In the early twentieth century, a few large employers developed health insurance and pension plans as part of their embrace of a corporate welfare philosophy. Like the rest of the welfare corporate agenda, the insurance plans were structured to bind the worker to the firm, thus reflecting and contributing to an emerging employment system that valued long-term committed employees. But now, when employers neither desire nor offer long-term commitment to their employees, the design of the insurance plans has become dysfunctional from the worker's point of view. Workers who frequently change jobs risk losing their benefits, yet those who do not change jobs out of a fear of losing their benefits—a condition termed "job lock"—cannot succeed in the labor market.[2]

In recent years it has also become clear that the employer-centric nature of benefits has become dysfunctional for employers. Many firms are saddled with mushrooming costs associated with the earlier era's promises of defined benefit pensions and health insurance. Today, General Motors is the largest consumer of health insurance in America, and its cost of insurance adds nearly $1500 to the price of each car it produces.[3] At the same time, numerous large firms—including United Airlines, U.S. Airways, Delta Airlines, Bethlehem Steel, and other corporate giants—have declared bankruptcy because they cannot afford their pension obligations.[4] If these social insurance costs were borne by the state and spread across all firms, then no single firm would be competitively disadvantaged.

Further, because employers no longer value long-term employees, the job-attachment effect of the insurance plans is no longer important. Thus, many employers question whether it makes sense to offer pensions or health insurance at all. Many employers have terminated their plans, and new firms are reluctant to initiate them.

All these developments bode poorly for the future of the U.S. private welfare state. In Part II below, I describe the origin of the employer-centric system and show how it is linked to a particular era in employment relations—the industrial era. In Part III, I describe the recent changes in the nature of work that are rendering the employer-centric system of social insurance obsolete. In Part IV, I describe strains that are emerging in the system and evaluate some legislative efforts to shore up social insurance in light of the strains. In Part IV, I address the question of why we have not seen any movement toward fundamental changes in the system in light of the severe strains that are coming to light on an almost daily basis. I conclude that our social insurance system

[2] On the problem of "job lock," see Katherine Elizabeth Ulrich, *You Can't Take It With You: An Examination of Employee Benefit Portability and Its Relationship to Job Lock and the New Psychological Contract*, 19 HOFSTRA LAB. & EMP. L. J. 173 (2001).

[3] Jeff Jacoby, *GM's Health Care Dilemma*, BOSTON GLOBE, June 15, 2005.

[4] Charles R. Morris, What Ever Happened To Private Pensions, from Charles R. Morris, *Apart at the Seams: The Collapse of Private Pension and Health Care Protections (Century Foundation, 2006) available at* http://www.socsec.org/commentary.asp?opedid=1210.

must be fundamentally revised if it is to address the risks and vulnerabilities faced by workers today.

II. ORIGINS OF THE EMPLOYER-CENTRIC BENEFIT SYSTEM

Corporate social insurance programs had their origin in the personnel management movement of the early twentieth century. Like its counterpart scientific management,[5] personnel management sought to solve labor problems by restructuring employment practices, management, and administration. However, personnel management was critical of scientific management for creating impersonal industrial conditions and treating employees merely as machines. Its practitioners sought to increase productivity and industrial performance by attending to "the human factor" in industry. They believed that management needed a cadre of committed long-term employees rather than a revolving set of drifters and roamers. Thus personnel managers advocated that employers institute workplace practices that would build employee loyalty, commitment, and morale.[6] They advocated that corporations establish welfare programs, advancement opportunities, suggestion systems, and grievance procedures. They also advocated that employers create hierarchical job ladders for internal promotion, and use internal promotion rather than lateral hiring for all vacancies. They promoted the use of job ladders to address turnover and training, both issues of concern to employers in the post-artisanal era.[7]

One central tenet of personnel management was that firms should establish social insurance and welfare programs. Several prominent firms established elaborate welfare programs in the early twentieth century that served as showcases and inspirations for the personnel management movement. For example, U.S. Steel devised a welfare program in the first years of its existence. In 1903, it established a stock subscription plan for workers and a profit-sharing plan for executives. It also offered its workers old-age pensions and accident insurance. It engaged in a safety and sanitation campaign, and provided community housing, education, and recreation facilities. Because it believed that home ownership would encourage permanency in employment, U.S. Steel also offered low-interest loans to workers who wanted to buy houses. The corporation also built tens of thousands of rental houses, and in

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[5] Scientific management was an employment system designed by Frederick Winslow Taylor at the turn of the twentieth century. For a detailed description of scientific management, see FREDERICK WINSLOW TAYLOR, PRINCIPLES OF SCIENTIFIC MANAGEMENT (1929); ROBERT KANIGEL, THE ONE BEST WAY (1997); Katherine Stone, *The Origins of Job Structures in the Steel Industry*, *in* LABOR MARKET SEGMENTATION 51 (Richard C. Edwards, Michael Reich & David M. Gordon eds., 1973).

[6] BRUCE E. KAUFMAN, THE ORIGINS AND EVOLUTION OF THE FIELD OF INDUSTRIAL RELATIONS IN THE UNITED STATES, 23–27 (1993).

[7] For an overview of the goals, objectives, and teachings of the personnel management school, see SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY 1900–1945 (1985); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 38–88 (2004).

places it built entire towns. Gary, Indiana, for example, was built from scratch by the corporation. With a water purification and sewage system, Gary embodied the latest ideas about planning techniques and modern social services. U.S. Steel hired nurses to visit employees' families, and employed dentists to visit the children's schools. It built hospitals, libraries, public schools, and often supplemented teacher salaries. Every plant had its own glee club, band, or orchestra. Unoccupied company land was turned over to the workers for gardens where, with seed provided by the company, about a million dollars' worth of vegetables were produced each year. For its employees' recreation, by 1924 U.S. Steel built 175 playgrounds, 125 athletic fields, 112 tennis courts, 19 swimming pools, and 21 band stands.[8]

The U.S. Steel welfare programs were designed to encourage attachment between the workers and the firm. For example, the stock subscription plan was structured to give employees an incentive to stay with the corporation for at least five years, and it required them to show "a proper interest" in the company's welfare.[9] Similarly the pension plan, established in 1911, offered retirement benefits after age 60 unless there was "misconduct on the part of the beneficiaries."[10] Likewise, the community service programs were designed to help workers become embedded in the communities, and thus less likely to leave. The purpose of these programs was to discourage turnover, promote a spirit of cooperation, and reduce shop floor opposition.[11]

Soon after the U.S. Steel welfare program was established, other large corporations, such as National Cash Register, International Harvester, General Electric, and Westinghouse, set up similar programs. Welfare work was advocated by those in the personnel management movement as a way to restore a personal relationship to the workplace that was lacking in the impersonal mass-production factory. They advocated company picnics, glee clubs, company magazines, and athletic teams to foster a "one big happy family" feeling. Often welfare department employees visited workers' homes and offered advice on health concerns, sanitary methods, and family relationships.[12]

In part, these corporate welfare programs were animated by a genuine concern for the well being of employees. But at times, they were heavy-handed methods of social control. The most famous, and notorious, of these efforts was the Ford Motor Company's Sociological Department, which conducted intrusive investigations of its workers' home lives, checked their financial stability, monitored for signs of drinking, smoking, or other immoral conduct, and were attentive to any union-related proclivities.[13]

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[8] Stone, *The Origins of Job Structures in the Steel Industry*, *supra* note 5, at 51.

[9] *Id.* at 49–50.

[10] *Id.* at 50.

[11] *Id.*

[12] ROBERT OZANNE, A CENTURY OF LABOR-MANAGEMENT RELATIONS AT MCCORMICK AND INTERNATIONAL HARVESTER (1967); JACOBY, *supra* note 7, at 50–61; EDWIN P. NORWOOD, FORD: MEN AND METHODS (1931).

[13] JACOBY, *supra* note 7, at 118. On Ford Motor Company's Service Department, see Carl Raushenbush, *Fordism*, INDUSTRIAL DEMOCRACY, Oct. 1937, at 7, 13–16.

Corporate welfare work was promoted enthusiastically by the personnel management movement and embraced by corporate leaders. The latter often boasted that their welfare programs were designed not out of altruism, but rather to create loyalty to the company, thereby discouraging turnover and labor unrest.[14] Welfare policies, and particularly social insurance programs, were part of the personnel management program to encourage long-term ties between the employee and the firm.[15]

Business leaders also saw firm-based social insurance as an alternative to both government-sponsored and union- sponsored insurance programs. In the early twentieth century, a number of European countries, including Germany, Austria, Hungary, Denmark, and France, had rudimentary social insurance programs in place for workers. Despite its reputation for conservatism, imperial Germany led the way with its passage of social insurance and industrial accident legislation in the 1880s.[16] In Great Britain, between 1908 and 1911, the Liberal Party enacted a number of workers' insurance programs including unemployment insurance, old age pensions, and workers' health insurance.[17] Progressive social reformers in the United States advocated similar measures. In that era, progressive social reformers also sought to enact unemployment insurance and workers compensation at the state level.

An initial attempt by Maryland in 1902 to implement workers compensation legislation was found unconstitutional by the Supreme Court on the grounds that it violated the principle of separation of powers and denied injured workers the right to a jury trial.[18] Similarly, a 1909 Montana law creating a mandatory workers' compensation fund for coal miners was struck down by that state's supreme court in 1911.[19] In 1908, however, Congress enacted the Workmen's Compensation Act for federal employees. In 1910, New York passed a compulsory workers' compensation that the state's highest court struck down as unconstitutional under the state and federal

[14] Stone, *The Origins of Job Structures in the Steel Industry, supra* note 5, at 51–54; OZANNE, *supra* note 12, at 77–78 (citing a 1904 study by the International Harvester Company suggesting that a mutual benefit association would save the company as much as $10,000 per year from lawsuits by injured workers, and noting that company attorneys justified the program as a way to escape legal liability rather than assisting employees in distress). *See also Industrial Pensions in the United States*, NAT'L INDUSTRIAL CONFERENCE BOARD (National Industrial Conference Board, New York, N.Y.), 1925, at 25 (citing a "large automobile manufacturing concern" which announced that its pension plan was "intended to increase the number of continuous service employees, and to eliminate, so far as possible, the number of transient employees").

[15] Stone, *The Origins of Job Structures in the Steel Industry, supra* note 5, at 51–54.

[16] *See generally* P. Blake Keating, *Historical Origins of Workmen's Compensation Laws in the United States: Implementing the European Social Insurance Idea*, 11 KAN. J.L. & PUB POL'Y 279 (2002); Daniel T. Rodgers, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

[17] JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 20–21 (2003).

[18] *See* Keating, *supra* note 16, at 298.

[19] Cunningham v. Northwestern Improvement Co., 44 Mont. 180 (1911).

constitutions.[20] In 1911, ten states, including California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington and Wisconsin, enacted mandatory workers' compensation laws which survived constitutional challenge in their respective state courts.[21] A few years later, a compulsory workmen's statute was re-enacted in New York, upheld by the New York high court, and then upheld as constitutional by the U.S. Supreme Court.[22] Virtually every state then followed suit, so that between 1910 and 1920, forty-three states adopted workers' compensation legislation. By 1930, only four states—Arkansas, Florida, Mississippi and South Carolina—had yet to enact workers compensation legislation and of these, Florida and South Carolina did so in 1935.[23] Progressives also introduced several bills in state and the federal legislatures to establish old age pensions for widows and disabled workers.[24]

The National Association of Manufacturing (NAM) was vocal in calling upon U.S. manufacturers to adopt a private, voluntary alternative to head off any such statist measures in the U.S.. NAM worked with insurance companies to develop insurance programs to serve as an alternative to a government-based approach. Metropolitan Life Insurance Company (Metropolitan) was one of the first major insurance companies to offer group insurance to firms to cover their employees. In 1919, just after World War I, Metropolitan sold accident and disability policies to General Electric and Westinghouse Electric—two companies that had been in the forefront of the personnel management movement. Soon thereafter, Metropolitan sold policies to several railroads, Eastman Kodak, and a host of smaller firms that had been involved in implementing the policies and practices of personnel management. In keeping with contemporary notions of best management practices, Metropolitan offered employees of its client firms other welfare services, such as health and hygiene advice, visiting nurses and preventive health literature as well as insurance. In 1921 they also developed group pension plans for their corporate clients.[25]

Business leaders saw firm-centered benefits as an alternative not only to state-run insurance programs, but also to union sponsored programs. For example, in 1912 Montgomery Ward & Co. asked the Equitable Life Insurance Company (Equitable) to develop a program of death, disability, and retirement benefits for its rank-and-file employees. Montgomery Ward was interested in a program that would supplant the union-run benefit plan offered by the Clerks' Benefit Society.[26] Later, Equitable added Union Pacific Railroad, B.F.

[20] Ives v. S. Buffalo Ry. Co., 201 N.Y. 271 (1911).

[21] *See e.g.*, State v. Clausen, 65 Wash. 156 (1911); Borgnis v. Falk Co., 147 Wis. 327 (1911).

[22] N. Y. Central Ry. Co. v. White, 243 U.S. 188 (1917).

[23] Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States 1900–1930*, 41 J.L. & ECON. 305, 320 tbl.2 (1998).

[24] KLEIN, *supra* note 17, at 20.

[25] *Id.* at 29–33.

[26] *Id.* at 23.

Goodrich, the American Rolling Mill, Palmolive Co., E.I. DuPont De Nemours, and U.S. Rubber to their client list.[27]

Equitable touted its programs as "an American Plan for Employers."[28] It claimed that "the plan of insurance is within the control of the employer and can be devised to meet his particular needs."[29] As historian Jennifer Klein astutely notes,

> The designation "American Plan" had a double meaning in this context: to emphasize that private insurance was the American alternative to European social insurance and also to preserve the open shop and expunge labor unions. Thus, group insurance could displace two rival sources of workers' security: the state and the unions.[30]

Ironically, the labor movement in the early twentieth century, under the leadership of Sam Gompers, shared the business leaders' opposition to government-run social insurance schemes. At that time, the American Federation of Labor (AFL) adopted an anti-statist philosophy known as voluntarism. They believed that unions should look to the economic arena rather than the state for worker improvement measures.[31] Despite the social reformist tenor of the Progressive Era, Gompers and the national AFL opposed plans to provide legislative protection for workers, such as minimum wages, government-sponsored old age assistance, health and accident insurance for workers, or unemployment compensation.[32] The voluntarism of the early AFL thus prevented the unions from supporting broad-based legislation for medical or old age insurance. Not only were unions reluctant to advocate old age assistance or health insurance from the state—they also did not seek to achieve those items in contract negotiations in the early twentieth century. Even in the 1930s, when the newly formed labor federation, the Congress of Industrial Organizations (CIO), succeeded in organizing basic industry, unions did not demand pensions or health insurance in their collective agreements. Rather,

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27 *Id.* at 26–27.

28 *Id.*

29 *Id.*

30 *Id.* at 25.

31 Katherine V.W. Stone, Rethinking Voluntarism: Labor and the State in the Progressive Era (1998) (unpublished manuscript, on file with author).

32 HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 132–33 (1978); LOUIS S. REED, THE LABOR PHILOSOPHY OF SAMUEL GOMPERS 112–16 (1930). *See generally*, DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN THE PROGRESSIVE AGE 257–58 (1998). In the Progressive Era, some state labor federations supported social insurance legislation at the state level. Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, *in* THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 37, 55–56 (Margaret Weir, Ann Shola Orloff & Theda Skocpol eds., 1988). In addition, not all leaders of the early AFL shared Gompers's opposition to all forms of social insurance. On the issue of health insurance, the AFL Executive Council and some other AFL leaders supported legislation. PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 249–50 (1982).

they bargained about wages and work rules. As a result, firms that had such insurance programs, initiated and shaped them unilaterally.[33]

The unions' position on social insurance took an about-face during World War II. At that time, unions were prevented from striking or bargaining for increased wages by the wage and price freeze in effect, so instead they bargained for benefits. Bargaining for fringe benefits was lawful because it did not exert the same inflationary impact that increased wages would have. Hence, during and right after the war, unions actively sought to pressure corporations to contribute to social insurance funds on behalf of their employees.[34] However, even then, some unions sought not employer-centered funds, but area-wide funds that would give workers portability and protection even if they changed jobs. In 1949, the most visionary union leader in the area of benefits, the United Auto Workers Union (UAW), developed a proposal for a nonprofit community-based health plan that would provide services not only to union members but to an entire community.

> Public members and labor representatives, as well as health professionals, would have representation on the board. As presented in the UAW's model, groups of physicians, working in cooperation with hospitals, would sign a contract with a board of trustees made up of representatives from both the UAW and the community. For a monthly per capita fee, physicians rendered all services needed by the patient at clinics that had outpatient services, diagnostic labs, X-ray facilities, and specialists all together. In this way the doctors would be forced to contain or self-subsidize costs. . . . According to Nelson Cruikshank, the AFL's leading spokesperson on health insurance, "These progressive programs are going in the direction . . . [of] local consumer-controlled, comprehensive medical services."[35]

The 1940s was a period of rapid growth of employee social insurance programs. Some were the result of unionization and collective bargaining, and some were adopted by firms voluntarily. From 1945 to 1970, the percentage of firms that offered pensions grew from 19% to 45%. The high water mark for private pensions occurred in the late 1970s, when approximately 49% of the private-sector workforce, or approximately 40 million people, had employer-based pensions.[36]

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[33] Some unions set up their own union insurance programs in the 1920s and '30s. These operated in competition with the private sector giants such as Metropolitan, Equitable, Prudential and Travellers. *See* KLEIN, *supra* note 17, at 34–35.

[34] DALE S. BEACH, PERSONNEL: THE MANAGEMENT OF PEOPLE AT WORK 737 (1965).

[35] KLEIN, *supra* note 17, at 214–15.

[36] *Id.* at 258. *See also* JOHN A. TURNER & DANIEL J. BELLER, U.S. DEP'T OF LAB., TRENDS IN PENSIONS 88 tbl.4.12 (1992) (indicating that between 1980 and 1987, the percentage of the private-sector workforce covered by a pension dropped from 38 to 31).

III. CHANGES IN THE NATURE OF THE EMPLOYMENT RELATIONSHIP

A. *The Nature of Work in the Industrial Era*

The history of employer-centric social insurance is instructive because it shows that the system was closely linked to the job structures of the early and mid-twentieth century. For much of the twentieth century, most large firms organized work in ways that have come to be called "internal labor markets." In internal labor markets, jobs are broken down into minute tasks and then are arranged into hierarchical ladders in which each job provides the training for the job on the next rung up. Employers that utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs.[37] These practices were based upon the teachings of the scientific management theories of Frederick Winslow Taylor and those in the personnel management movement. Thus, in the early and mid-twentieth century, management reduced the skill level of jobs, while at the same time encouraging employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefit packages. Because employers wanted employees to stay a long time, they gave them implicit promises of long-term employment and of orderly and predictable patterns of promotion.[38] While these systems had their origins in the blue collar workplace of the smokestack industrial heartland, by the 1960s they were adapted to large, white collar workplaces such as insurance companies and banks.

The era of internal labor markets is what I term the "industrial era" in the organization of work.[39] The industrial era was comprised of large-scale integrated enterprises using mass production and assembly lines to manufacture goods. In the industrial era, the prevailing employment paradigm was that employees had a long-term relationship to a firm and enjoyed a large amount of de facto long-term job security. The firm provided job security, training, social insurance, and orderly advancement opportunities and obtained a loyal and knowledgeable work force in return. The longer employees stayed on the job, the more their wages rose and their benefits vested, giving them a greater stake in the firms over time. While not all employees had the secure and comfortable work life that the model envisioned, many did: particularly, blue collar men in basic industry after the great union drives of the 1930s.

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[37] For a discussion of the operation of internal labor markets, see PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971). On the origin of internal labor markets, see Stone, *The Origins of Job Structures in the Steel Industry*, *supra* note 5, at 29–36. *See also* Paul Osterman, *Introduction* to PAUL OSTERMAN, INTERNAL LABOR MARKETS (1984); Sanford Jacoby, *The Development of Internal Labor Markets in American Manufacturing Firms*, *in* INTERNAL LABOR MARKETS 23, 38–39 (Paul Osterman ed., 1984).

[38] JACOBY, *supra* note 7, at 92–93; STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 46–48.

[39] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 46–48.

B. The Nature of Work in the Digital Era

The industrial era of the twentieth century has come and gone. Job security in the private sector, in the form of long-term attachment between a worker and a single firm for the duration of the worker's career, is rapidly declining.[40] New ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises.[41] Today workers expect to change jobs frequently and employers engage in regular churning of their workplace, combining layoffs with new hiring as production demands and skill requirements shift.[42] In addition, there has been an explosion in the use of atypical workers such as temporary workers, on-call workers, leased workers, and independent contractors.[43] Furthermore, "regular" full-time employment no longer carries the presumption of a long-term attachment between an employee and a single firm with orderly promotion patterns and upwardly rising wage patterns. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently.[44] At the same time, firms now expect a regular amount of churning in their workforces.[45] They encourage employees to manage their own careers and not to expect career-long job security.[46] Indeed, the very concept of the workplace as a *place*, and the concept of employment as involving an *employer*, are becoming out-dated.[47]

A new employment relationship is emerging to replace the industrial era internal labor markets. Today's world of specialty production and knowledge work has spurred the development of new job structures: the job structures of the "digital era." In the new digital era, theoretical and experimental approaches such as total quality management (TQM), competency-based organizations, and high-performance work practice programs, are transforming business practices. The advocates of the competency-based organization emphasize skill development by insisting that employees be paid for the skills

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[40] According to the United States Department of Labor's Current Population Survey, job tenure for men between 55 and 64, measured as the average time with a given employer, declined from 15.3 to 10.2 years between 1983 and 2002. For men between 45 and 54, it declined from 12.8 to 9.1; for men between 35 and 44, it declined from 7.3 to 5.1. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Tenure in 2002 (Sept. 19, 2002), *available at* http://ftp.bls.gov/pub/news.release/history/tenure.09192002.news. Several economists who have analyzed this and other data sources have concluded that since 1980 there has been a significant decline in job tenure. *See* David Jaeger & Ann Huff Stevens, *Is Job Security in the United States Falling?* 17 J. LAB. ECON. S1, S16–S17 (1999); Robert G. Valletta, *Declining Job Security* 17 J. LAB. ECON. S170 (1999) (citing numerous studies).

[41] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 67.

[42] *Id.* at 68–72.

[43] Katherine V.W. Stone, *Legal Protections for Workers in Atypical Employment Relationships*, 27 BERKELEY J. EMP. & LAB. L. 251, 255–56 (2006).

[44] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 70–72.

[45] *Id.* at 116.

[46] *Id.* at 91–94.

[47] For a detailed description of the changing workplace, see *id.* at 87–116.

they have, rather than according to lock-step job evaluation formulas.[48] Skill-based pay, they claim, will give employees an incentive to acquire new skills and also make it incumbent upon employers to provide training and career development opportunities.[49] Advocates of TQM, meanwhile, counsel firms to involve every employee, at every level, in continuous product and service improvement. Some of the specific recommendations of TQM are to provide continuous training and opportunities for individual improvement, and to give workers direct contact with customers, external suppliers, and others who do business with the firm.[50]

Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features.[51] A defining characteristic of the new employment relationship is that employees do not have long-term job security with a particular employer.[52] Employees have episodic jobs, sometimes as regular employees, sometimes as temporary workers, and sometimes as independent contractors. Employment relationships are complex, without any one-size-fits-all model of what it means to be a worker.[53]

When employees are with a firm in an employment relationship, they are given implicit understandings that provide a substitute for the job security of the past. Many employers explicitly or implicitly promise to give employees not job security, but "employability security"—i.e., opportunities to develop their human capital so they can prosper in the external labor market.[54]

Another feature of the new employment relationship is that it places emphasis on the worker's intellectual and cognitive contribution to the firm. Unlike scientific management, which attempted to diminish or eliminate the role of workers' knowledge in the production process, today's management theories attempt to increase employee knowledge and harness their knowledge on behalf of the firm.[55]

The new employment relationship also involves compensation systems that peg salaries and wages to market rates rather than internal institutional

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[48] *See* EDWARD E. LAWLER III, THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION 156 (1992).

[49] *See id.* at 144–56. *See generally* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 560–65 (2001).

[50] *See* Joshua G. Rosett & Richard N. Rosett, *Characteristics of TQM* (NBER, Paper No. 7241, 1999); ERIC E. ANSCHUTZ, TQM AMERICA: HOW AMERICA'S MOST SUCCESSFUL COMPANIES PROFIT FROM TOTAL QUALITY MANAGEMENT 53 (1995). *See generally* Stone, *The New Psychological Contract, supra* note 49, at 565–68.

[51] Mark Roehling et al., *The Nature of the New Employment Relationship(s): A Content Analysis of the Practitioner and Academic Literatures* 2 (Ctr. for Advanced Human Res. Studies, Working Paper No. 98-18, 1998).

[52] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 6.

[53] *Id.*

[54] ROSABETH MOSS KANTER, EVOLVE! (2001).

[55] THOMAS A. STEWART, INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS, at ix–xii (1997); THOMAS O. DAVENPORT, HUMAN CAPITAL: WHAT IT IS AND WHY PEOPLE INVEST IN IT 152–56 (1999).

factors. The emphasis is on offering employees differential pay to reflect differential talents and contributions.[56]

As part of the new employment relationship, firms now also provide employees with opportunities to interact with a firm's customers, suppliers, and even competitors.[57] Regular employee contact with the firm's constituents is touted as a way to get employees to be familiar with and focused on the firm's competitive needs, and at the same to raise the employees' social capital so that they can find jobs elsewhere. The new relationship also involves a flattening of hierarchy, the elimination of status-linked perks,[58] and the use of company-specific grievance mechanisms.[59]

As will be explained more fully below, changes in the nature of work have had a twofold impact on employee benefits in the United States. First, because social insurance in the United States is tied to employment, the increased job mobility that characterizes the new employment relationship contributes to the erosion of the social safety net. As employees move from job to job, they typically lose whatever employer-sponsored benefits they once had. Thus, even if one's new employer offers health insurance plans comparable to those of the former employer—an increasingly unlikely event given current cutbacks in benefit offerings—the new plans often impose waiting periods for health coverage and contain exclusions for pre-existing conditions that leave many effectively uninsured. And employees who change jobs often forfeit vested pensions and usually forego opportunities for their pension funds to grow.[60]

Second, employers are restructuring their benefit plans just as they are restructuring their employment practices. In keeping with the ethos of the new workplace, the new benefit plans embody a retreat from the principle of risk-sharing and an adoption of a principle of individual choice. The new plans are designed to shift more risk of uncertainty onto employees, and by doing so, they weaken the social safety net.[61]

Before exploring these consequences of the changing workplace, however, it is important to identify which groups are disadvantaged by the shift in the nature of work. We will see that those same groups are particularly burdened by the shift in the nature of social insurance.

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[56] ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 175 (1997) (reporting that the tide is moving "toward more varied individual compensation based on people's own efforts").

[57] For example, one of the most touted practices of Total Quality Management is that "management should seek to create conditions whereby every worker, at least from time to time, sees and talks with real customers, with actual users of the company's product or service." ANSCHUTZ, *supra* note 50, at 53.

[58] *See* Janice Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control*, *in* THE POST-BUREAUCRATIC ORGANIZATION 178–82 (Charles Heckscher & Anne Donnellon eds., 1994).

[59] *See* JERALD GREENBERG, THE QUEST FOR JUSTICE ON THE JOB 32–39 (1996). *See generally* Jason Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCH. 425, 435–36 (2001).

[60] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 244–45.

[61] *Id.*

C. Risks and Vulnerabilities in the New Workplace

The emerging digital-era employment relationship has two diametrically opposed consequences. On the one hand, it creates a more interesting work environment and offers workers more autonomy and freedom than did the industrial era job structures. Yet on the other hand, for many it creates uncertainty, shifts risk, and fosters vulnerability. Some of the groups that are disadvantaged in the new work regime are easily identified. For example, older workers caught in the transition are heavy losers. Having been led to expect a good job and a secure future, they instead discovered that their expectations were chimeral.[62] Another group that has not fared well is the low-skilled—those who have neither the necessary training nor the ability to reinvent themselves, retool, and adapt to new labor market demands. A third group is the risk-adverse—those who were comfortable in internal labor markets and lack the desire or initiative to seek out opportunities, to network, and to build their own careers.

In addition to the older, the unskilled, and the risk-adverse, all workers now face heightened risks at certain times in their working lives. Given the churning and constant change that characterizes the new workplace, all face a high likelihood that their working lives will be punctuated by occasional periods of unemployment. Therefore every worker requires a reliable safety net to ease the transitions and cushion the fall when they are left behind by the boundaryless workplace.

IV. STRAINS ON THE EMPLOYER-CENTRIC BENEFIT SYSTEM

The employer-centric social safety has become extremely porous in recent years. Almost daily, newspapers and television news shows contain tragic stories that illustrate that our system of health insurance and pension is in a state of crisis.[63] While the problems differ for each type of insurance, the conclusions are the same—our system of employer-centric benefits no longer works and we must rethink our social welfare system to address the real risks that people face today.

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[62] For example, a case study of white-collar workers laid off at IBM and Link Aerospace in Binghamton, New York—two companies known for their paternalistic long-term employment relationships—concluded that "downsizing and displacement change expectations about the relationships among workers and between employers and workers." Charles Koeber, *Corporate Restructuring, Downsizing and the Middle Class: The Process and Meaning of Worker Displacement in the "New" Economy*, 25 QUALITATIVE SOC. 217, 219 (Summer 2002).

[63] *See, e.g.*, Jonathan Peterson, *Employers Chip Away at Retiree Health Benefits*, L.A. TIMES, Sept. 26, 2006, at A1; Daniel Yi, *More U.S. Workers Go Uninsured*, L.A. TIMES, Sept. 27, 2006, at C1.

A. *The Failures of Employer-Centric Health Insurance*

1. *Declining Coverage*

While the overwhelming majority of employees in the United States obtain their health insurance from their employer, the percentage of employees who have coverage has declined sharply in recent decades. Between 1983 and 1997, the number of workers in medium and large establishments in the private sector who had medical care benefits from their employer decreased from 97% to 76%.[64] Furthermore, according to a study by Elise Gould of the Economic Policy Institute, the number of uninsured employees increased from 39.8 million in 2000 to 46.6 million in 2005.[65] According to the Congressional Budget Office (CBO), the number of individuals who are uninsured at any point in time is much larger than these numbers suggest. The CBO found that between 57 and 59 million people lacked health insurance at some point in 1998, a number that amounted to about one quarter of the non-elderly population.[66]

In addition to the declining incidence of coverage, health insurance coverage has become less comprehensive, imposing more exclusions and limitations. Cutbacks in the types of coverage mean that many employees have insurance plans that do not cover basic health care needs.[67]

At the same time, there has been a rapid rise in the cost of insurance and a large share of the increase in insurance premiums has been passed on to employees. Between 1980 and 1998, the total cost of health insurance increased more than 300%—a rate that was three times faster than wages increased.[68] Employers have responded to the escalating costs of insurance by shifting some of the expense to employees, so that today more than 80% of full-time employees who have health plans are required to pay part of the cost.[69]

Plans differ markedly as to the amount an employee is required to pay. The average employee contribution for medical coverage increased from $10.13 per month to $39.14 per month between 1983 and 1997, an increase of nearly 400%.[70] For the past four years, the amount employees are required to pay has increased at double-digit rates each year.[71] In addition, plans have

[64] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Benefits Survey, *available at* http://www.bls.gov/data/home.htm (specific search data on file with the author).

[65] Yi, *supra* note 63.

[66] Robert Pear, *New Study Finds 60 Million Uninsured During a Year*, N.Y. TIMES, May 13, 2003, at A22.

[67] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 246.

[68] Albert E. Schwenk, *Trends in Health Insurance Costs*, COMPENSATION & WORKING CONDITIONS, Spring, 1999, at 24, 26. While the rate of increase slowed in the mid-1990s—from almost 7% a year between 1988 and 1993, to 1% a year between 1993 and 1997—evidence suggests that the rate of increase is rising again. David M. Cutler, *Employee Costs and the Decline in Health Insurance Coverage* (Nat'l Bureau of Econ. Research, Working Paper No. 9036, July 2002), *available at* http://www.nber.org/papers/w9036.

[69] *Id.* at 24.

[70] Cutler, *supra* note 67, at 16–17.

[71] Milt Freudenheim, *Employees Paying Ever-Bigger Share for Health Care*, N.Y. TIMES, September 10, 2003, at A1.

imposed co-payments and raised deductibles, further raising the cost of insurance to employees.[72] According to the a 2002 report by the Kaiser Foundation, workers with employer-sponsored health plans were paying 48% more than they were just three years prior in employee contributions, co-payments and other out-of-pocket expenses combined. As a result, the report found that many workers decline coverage because it has become too expensive.[73] According to health economist William Waitrowski, "Between 1992–93 and 2003, the percentage of private sector workers participating in employer-provided medical care plans steadily declined. Medical care covered 63 percent of workers in 1992–93, compared with 45 percent in 2003."[74] Similarly, the U.S. government's Agency for Healthcare Research and Quality found that the number of employees who sign up for their employer's coverage had declined from 87.7% in 1996, to 81% in 2004, a decline it attributed to the increasing costs that employees were required to bear.[75] The decline in coverage is also a result of a decline in eligibility. As the amount of part-time, contingent, temporary and other atypical types of work has increased, more and more workers are not eligible for employer-sponsored insurance.[76] Also, workers who change jobs frequently may decline coverage because of waiting periods and exclusions for pre-existing conditions that render the insurance less valuable to them.[77]

2. Redefining the Insurance Concept

The changes in scope and cost of coverage are related to changes in the very concept of health insurance. In the past, health insurance plans consisted of large risk pools that combined the healthy with the unhealthy, thereby spreading the risks and costs amongst numerous heterogeneous individuals. The large pool approach reflected the view that insurance was about risk-spreading and cross-subsidies in which the healthy help subsidize the infirm. Today's trend is to the contrary: the trend is to decrease the size of pools and subdivide covered workers into discrete risk sub-groups—skimming off the healthy, increasing the price for the less healthy, and denying coverage altogether for those deemed to be high risk.

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[72] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 246.

[73] *Underinsured in America: Is Health Coverage Adequate?* KAISER COMMISSION ON MEDICAID AND THE UNINSURED (Kaiser Family Foundation, Washington D.C., July 2002). The Kaiser Report also found that two-thirds of employers had increased the amounts employees are required to contribute in 2003, and 97% said they will do so again in 2004.

[74] William J. Wiatrowski, *Medical and Retirement Plan Coverage: Exploring the Decline in Recent Years*, MONTHLY LAB. REV. 29, (August 2004).

[75] Yi, *supra* note 63, at C1.

[76] Wiatrowski, *supra* note 74, at 31. Wiatrowski also observes that the employees most likely to have employer-offered medical insurance are full-time employees working in those sectors of the economy most likely to be unionized, and coincidently, those sectors, such as manufacturing, have seen the greatest overall decline in employment in recent years. *Id.*

[77] *See* Diane E. Herz, Joseph R. Meisenheimer II & Harriet G. Weinstein, *Health and Retiremenet Benefits: Data from Two BLS Surveys*, MONTHLY LAB. REV., March 2000, at 3, 6 (giving data on the dramatic difference between full-time and part-time worker participation in employer-sponsored health insurance plans).

One reflection of the new trend is the flexible benefit plan, sometimes called the "cafeteria plan," that employers frequently offer. In such plans, employees can choose to allocate a certain sum to whichever programs they select.[78] They can often choose between a wide array of benefits, such as different levels of health coverage, dental benefits, short-term disability, long-term disability, child care, additional vacations, and even cash. According to the American Compensation Association, "[a]s the employer role in employee benefits changes from 'provider' to 'facilitator,' many employers are finding flexible benefit plans to be a valuable tool."[79]

The cafeteria plans are touted because they increase employee choice while limiting employers' costs. However, such plans also foster adverse selection, as younger and healthier individuals opt for health clubs, fertility treatment, and child care rather than long-term health coverage. This leaves the older and less healthy employees in the risk pool, raising the cost of health insurance for them. While cafeteria plans appear to optimize choice, they also undermine the risk spreading idea that lies at the heart of the concept of insurance.[80]

Recently the IRS has approved the use of defined contribution approach plans for health insurance.[81] Under this approach, employers give employees a determined amount toward their insurance, and then employees would spend it as they choose in the private insurance market. Employees could tailor their plans themselves and even supplement the employer contributions to buy the type of insurance that best suits their individual and family needs.[82]

Cafeteria plans and defined contribution health plans are part of a paradigm shift in the conception of benefits that has been implicit in benefit discussions for the past several years. Instead of seeing health insurance as a benefit conferred on employees by employers—whether for paternalistic reasons, the result of union bargaining, or as part of a larger human resource strategy—the new paradigm views health insurance as the individual's responsibility. In this new paradigm, the rationale for employer contributions to employees' health insurance emphasizes not its employee welfare or morale-building effects, but simply the fact that an employer can provide more coverage at less expense than an individual can. The employer's access to group rates as well as special tax provisions available to employers for health insurance expenses mean that the employer can provide coverage more cheaply than can the employee. In the new paradigm, the employer provides insurance

[78] Daniel C. Schaffer & Daniel M. Fox, *Tax Law as Health Policy: A History of Cafeteria Plans 1978–1985*, 8 AM. J. OF TAX POL'Y 1 (1989).

[79] RICHARD SANES & JOSEPH L. LINEBERRY, JR., IMPLEMENTING FLEXIBLE BENEFITS: AN APPROACH TO FACILITATING EMPLOYEE CHOICE (1st ed. 1995), at 1.

[80] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 247.

[81] Greg Scandlen, *MSA's Can Be a Windfall for the Rest of Us*, 49 CATH. U. L. REV. 679 (2000). *See* 42 U.S.C.§§ 300gg–300gg-92 (1996 & Supp. 2001).

[82] *See generally* Wendy K. Mariner, *Can Consumer-Choice Plans Satisfy Patients?*, 69 BROOK. L. REV. 485 (2004) (describing and analyzing consumer choice and defined contribution health plans).

as the least cost provider and provides it as a form of in-kind salary to its employees.

The Bush administration approach to health insurance would extend the individual responsibility paradigm to the breaking point. President Bush has advocated policies to expand the use of health savings accounts combined with high deductible insurance for medical disasters.[83] The concept of health savings accounts had its origin in 1996, when Congress enacted a program of medical reimbursement accounts that permit employees to set aside a certain amount of pre-tax dollars to pay for health needs. This program, a part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), permits individuals to enjoy some of the tax benefits for health insurance that previously were reserved to employers.[84] These accounts are essentially defined contribution plans without the employer contribution. Recently there have been changes to the program to increase the amount an individual can set aside.[85] In addition, there is an effort in Congress to eliminate the "use it or lose it" feature of the program.[86]

Health reimbursement accounts further move health policy discussions away from a group-based cross-subsidy approach toward an individual responsibility approach. Individuals become responsible for deciding how much to put into the accounts, and what types of coverage to purchase, thus placing responsibility for health insurance squarely on the individual's shoulders. But they also go further: by giving employees the ability to purchase insurance with the same tax advantages as employers, the least-cost provider rationale for employer-based insurance would vanish.

The Bush administration contends that the use of health savings accounts empowers consumers to make their own health care decisions.[87] However, individual decisions about medical care and insurance purchases are not always in the best interest of patients or society as a whole. There are at least five serious flaws in the new individual responsibility and employee choice paradigm for health insurance.

First, the Bush plan purports to make employees master of their health fates by enabling them to pick their levels of coverage and treatment options. However, how is one to choose between a smorgasbord of treatments, drugs, medical tests, chemotherapy regimes, and other puzzling options? While the plan might foster a free market for medical treatment, it could also trigger an open season for charlatans and frauds making pseudo-scientific claims of

[83] *See* Richard L. Kaplan, *Who's Afraid of Personal Responsibility? Health Savings Accounts and the Future of American Health Care*, 36 MCGEORGE L. REV. 535, 549–56 (2005) (explaining health savings accounts with high deductible insurance). *See also* Amy B. Monahan, *The Promise and Peril of Ownership Society Health Care Policy*, 80 TUL. L. REV. 777, 791–806 (2006) (describing and critiquing ownership society health care proposals).

[84] 42 U.S.C. §§ 300gg–300gg-92 (Supp. 2001).

[85] Monahan, *supra* note 83, at 793–800.

[86] H.R. 4279, 108th Cong. (2004).

[87] Monahan, *supra* note 83, at 778, 795.

miracle cure-alls. In essence, this is a problem of incomplete and unequal access to information by individual health care consumers.

Second, there is the problem of unequal power between individual consumers and the health care industry. While the plan purports to control costs indirectly through the infusion of competition in the market for medical services, the costs of drugs and treatments will remain high so long as drug companies retain their monopoly power and their stronghold on regulatory agencies. Without group plans to pool consumer buying power and to bargain with drug companies, their market power could run out of control. The 2004 shortage of flu vaccine, which drove up the price of the vaccine to ten times its "normal" price in some areas, is a grim reminder of how individuals have no power in the face of the pharmaceutical "market."[88]

Third, employees are unlikely to adequately insure against the risk because individual rationality is tainted by wishful thinking and hindsight bias. Most people find it difficult to contemplate, no less plan for, debilitating illness. Even if they could, employees who lose their employer-sponsored coverage when they change jobs can rarely afford the expense of COBRA or self-insurance. Even workers who are employed often lack the extra income at the end of each week to set aside some for something as hypothetical as health insurance. Rather, most individuals on tight budgets, if forced to choose between paying for a child's wedding or putting money into a health savings account for an uncertain gain at an uncertain date, will almost certainly forego the health insurance.

Fourth, the health savings account approach is regressive because it gives tax deductions for medical expenses to those who least need it. These deductions are only valuable to people who pay taxes. The higher one's tax bracket, the more valuable the deductions are. Individuals at the lower ends of the income distribution have health care costs that are no less than those at the upper ends, yet they will get a substantially smaller tax benefit from having such an account.

Finally, employers also lose when employees do not have adequate medical insurance. Employees who have insurance are more likely to get health care when they are sick and therefore have fewer and shorter absences from work. Some insurance plans also provide preventative programs for heart ailments, back injuries, and other potentially chronic conditions. Even though today's employers do not value long-term attachment from their employees, they also do not want sporadic and unpredictable absences of indeterminate duration. So, having insured employees helps employers maintain steady production schedules with reliable employees.

[88] Charles P. Schade & Karen L. Hannah, *Impact of the 2004 Influenza Vaccine Shortage on Repeat Immunization Rates*, 4 ANNALS OF FAMILY MEDICINE 541 (2006) (analyzing effects of 2004 flu vaccine shortage in the United States); Mary Pat Flaherty, *Some Suppliers Jack up Flu Vaccine Price*, WASH. POST, Oct. 14, 2004, at A2 (reporting that small suppliers are demanding as much as ten times the usual price for vaccines due to the shortage).

Furthermore, as suggested above, the Bush proposals to expand the use of health savings accounts could well trigger the demise of employer-centered health insurance altogether. Under the Bush plan, employers would no longer be the least cost provider of health insurance because employees would have the same access to tax savings for medical expenditures. At the same time, employers no longer get savings from pooling risk because the use of cafeteria plans has undermined the concept of large pool risk sharing. Thus, there would be no advantage for an employer rather than an employee to purchase insurance. As discussed above, health insurance plans were often constructed in order to secure employee long-term attachment—something businesses no longer want to encourage. Some plans were negotiated by labor unions when unions were strong enough to insist on health coverage as part of the compensation package. Thus the dynamics that created the employer-centered system of health insurance are already on the decline. Moving from group insurance to individual health savings accounts hastens the demise of employer-centered health insurance without providing a viable alternative.

3. Legislating Health Insurance Reforms

Any reform agenda for health insurance has to address two goals that are not altogether compatible. First, health insurance has to be *portable* if it is to be meaningful for employees in the boundaryless workplace. Second, it must be *affordable*. Both goals would be met if there were a national single-payer scheme as found in most of Western Europe and Canada. Health insurance would not be linked to employment, so workers would have coverage even as they moved from job to job, and it would be affordable for individuals because it would be financed from general tax revenues. But in the absence of such universal coverage, other reforms are necessary in the United States if individuals are to retain health coverage as they move in the new flexible labor market.

In the past two decades, there has been some movement toward greater portability in the area of health insurance. In 1986, Congress put a provision into the Consolidated Omnibus Budget Reconciliation Act that requires employers who have health insurance plans to offer departing employees the option of continuing coverage if they pay for it themselves. This provision for continuation of benefits, known as COBRA, has been amended, modified, and expanded several times since. In 1996, Congress further expanded portability in HIPAA, which requires group plans to reduce waiting periods for pre-existing conditions when employees move from one health plan to another. HIPPA also raised the tax deductibility of health insurance premiums for individuals who are self-employed. These provisions make it easier for an individual to retain health coverage as they move between workplaces, but at their own expense. While employees are generally required to pay for their COBRA coverage themselves, it nonetheless means that if they had insurance with a former employer, they do not automatically lose their health insurance when their employment terminates.[89]

There are other proposals to expand health insurance portability currently under consideration. Proposals discussed above to expand medical reimbursement accounts by permitting individuals to get tax deductions for health insurance coverage would further de-link health insurance from employment. Another measure that would enhance portability would be to permit individuals to exclude the full cost of health insurance premiums from their income for tax purposes. This change would permit individuals to select their own health insurance plan and thus sidestep employer-sponsored plans altogether.[90]

Although COBRA, medical reimbursement accounts, and the proposed tax deductions for health insurance would enhance portability for individuals who can pay the cost of health insurance, they would not address the problem of affordability. As the costs of health insurance go up and up, and as incomes at the middle and bottom of the income distribution stagnate, health insurance becomes a luxury many cannot afford. So while there are viable proposals for portability, they must be combined with a program to make health insurance affordable if it is to have an effect on the incidence of health insurance coverage.

B. The Failures of Employer-Centric Pensions

In addition to the declining scope and adequacy of health insurance protection over the past two decades, there has been a decline in the incidence and adequacy of old age insurance. In recent years, the number of workers in large and medium establishments in the private sector who have pension plan coverage of any type has declined significantly. The number of workers in private sector establishments who have pension coverage of any type declined from 53% in 1993, to 49% in 2003. [91] The percentage of full time private sector workers with no pension at all increased from 38% in 1989, to 42% in 2003.[92] Furthermore, the nature of pensions is changing in ways that shift risk onto employees and transform pensions from old-age insurance into savings vehicles. In addition, the same movement from a paternalistic, collectivist approach, to an individual responsibility approach to benefits that we saw with health benefits, has affected pensions. Thus in the past two decades, there has

[89] Sharona Hoffman, *Unmanaged Care: Towards Moral Fairness in Health Care Coverage*, 78 IND. L.J. 659, 677–78 (2003).

[90] This proposal is put forward by MARINA V.N. WHITMAN, NEW WORLD, NEW RULES: THE CHANGING ROLE OF THE AMERICAN CORPORATION 174–75 (1999).

[91] Wiatrowski, *supra* note 74, at 29.

[92] William J. Wiatrowski, *Documenting Benefits Coverage for All Workers*, U.S. DEP'T OF LABOR, COMPENSATION AND WORKING CONDITIONS ONLINE (July 14, 2006), http://www.bls.gov/opub/cwc/cm20040518ar01p1.htm. *See also* Olivia S. Mitchell with Erica L. Dykes, *New Trends in Pension Benefit and Retirement Provisions, in* BENEFITS FOR THE WORKPLACE OF THE FUTURE 110, 128–30 (Olivia Mitchell et al. eds., 2003).

been a dramatic shift in the nature of pensions, a shift that has moved risk and responsibility away from the firm and placed it on the employee.

1. Defined Benefit Plans

In the past, most private pensions were "defined benefit" plans. In a defined benefit plan, each employee is guaranteed a specified benefit level at the time of retirement. The actual benefit usually varies with length of service and final salary upon termination of employment, but it is part of a fixed schedule on which the worker can rely. The benefits are paid from a fund to which employers contribute on behalf of its covered employees, sometimes with employee contributions as well. The federal Pension Benefit Guarantee Corporation (PBGC) regulates employer contributions to defined benefit plans in order to ensure that employer contributions are sufficient to cover future plan liabilities. The PBGC also insures the plans and pays benefits to beneficiaries if a fund becomes insolvent.[93]

Most defined benefit plans are structured so that an individual's pay-out is a function of their final years' earnings and their length of service. That is, the pay-out amounts are back-loaded to provide greater benefits to long-term employees. This structure means that employees who depart before reaching their highest-earning-rate forfeit significant pension benefits.

Mobile employees not only lose the back-loaded benefits of their plans, they lose all their benefits if they change jobs before their benefits vest. The Employee Retirement Income Security Act of 1974 (ERISA) requires that defined benefit plans must either vest gradually over a three to seven year period, or vest all at once (known as "cliff vesting") within five years of employment under the plan.[94] Workers in defined benefit pension plans who leave their employment before becoming fully vested lose whatever contributions they accrued while on a job. Those who depart after their benefits have vested also stand to lose investment value because vested benefits in a defined benefit plan remain frozen in amount until the individual reaches retirement age. They do not grow and they are not protected from inflation. Also, as mentioned above, departing workers lose the benefit of the back-loading. A study by the Pensions Institute of the University of London found that a typical individual in Great Britain loses almost 30% of their benefits from a defined benefit plan due to job mobility.[95]

At present, defined benefit plans are under siege.[96] Because most pension assets are invested in stocks, the long bear stock market of the early 2000s

[93] STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 251–52.

[94] I.R.C. § 411(a)(2)(A)–(B). Employer contributions to defined contribution plans have similar vesting requirements. I.R.C. § 411.

[95] David Blake & J. Michael Orszag, *Portability and Preservation of Pension Rights in the United Kingdom, in* 3 REPORT OF THE DIRECTOR GENERAL'S INQUIRY INTO PENSIONS 9–10 (1997).

[96] *See, e.g.*, Ross Kerber, *Fidelity to End Employee Pension Plan: Change Reflects Push for 401(k)s*, BOSTON GLOBE, Mar. 29, 2007, at 1A (reporting that Fidelity Investments, Goodyear Tire & Rubber, and Hewlett-Packard are terminating their defined pension plans this year).

devastated defined benefit plans. There is also another dynamic at work. In a detailed account of the woes of today's pension plans, Malcolm Gladwell, in a *New Yorker* article, shows how simple demographics can help explain many of the problems facing large pension plans. Because the plans were instituted at a time when manufacturing firms had large workforces, and because they were financed on a pay-as-you-go basis, they were only able to keep their resources in balance with their obligations if the number of employees stayed roughly the same or grew. But as firms modernized, stream-lined and down-sized their operations, they no longer had enough current workers to support the large number of retirees they had promised to support.[97] That is, they were designed for a stable or expanding manufacturing world that no longer exists. Thus, as a result of flaws in the traditional defined benefit plans' structure, the aging population, the decline of U.S. manufacturing, and changing production techniques, as well as stock market fluctuations, defined benefit plans are in big trouble.

How bad is the trouble? Presently most defined benefit plans do not have sufficient assets to cover their estimated pension liabilities. As of September, 2003, it is estimated that of the Standard & Poor's 500 companies, 353 offer defined benefit plans, of which 322 of them are in debt. The total debt of those companies was estimated at $226 billion.[98] The Pension Benefit Guarantee Corporation (PBGC) estimates that, as of May, 2003, total U.S. corporate pension deficits amounted to $300 billion.[99] In just the past two years, some of the country's biggest corporations—United Airlines, Delta Airlines, Delphi Auto Parts and Kaiser Aluminum—have gone into bankruptcy and asked the PBGC to alleviate their crushing underfunded pension obligations.[100]

Today, firms with defined benefit pension funds view them as a serious problem that needs to be addressed. A survey by the management consulting firm, Towers Perrin, recently asked over 100 senior and finance executives detailed questions about their views of defined benefit plans. They conclude that "the plans are now viewed as a growing source of risk." It reported that 32% of the companies surveyed had closed their plans to new entrants, and all were searching for a solution to the problem of ballooning liabilities.[101]

The result is that the number of defined benefit pension plans and their coverage is shrinking rapidly. Between 1985 and 1998, 113,000 plans defined benefit plans were either terminated or frozen, and very few firms are establishing new ones.[102]

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97 Malcolm Gladwell, *The Risk Pool*, NEW YORKER, August 28, 2006, at 30, 32–35.

98 David R. Francis, *Pension Funds Pinched, Stirring Calls for Reform,* CHRISTIAN SCI. MONITOR, Sept. 3, 2003 at 1.

99 *Nest Eggs Without the Yolk—Corporate Pensions*, THE ECONOMIST, May 10, 2003, at 61.

100 Katherine V.W. Stone, *The Retirement You Weren't Banking On*, WASH. POST, May 15, 2005, at B2.

101 TOWERS PERRIN, A PROBLEM IN SEARCH OF SOLUTIONS: A STUDY OF DEFINED BENEFIT PENSIONS (2006).

102 David Rajnes, *An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans,* EMP. BENEFIT RES. INST. ISSUE BRIEF 249 (Sept. 2002). *See also* Olivia

2. Defined Contribution Plans

In the 1980s, many employers began to shift from defined benefit plans to defined contribution plans where the employer contributes a fixed amount into an account for each worker based on the number of person-hours worked. In some cases, the worker makes a contribution as well. Usually the worker is given some choice about how the funds in his/her account shall be invested. Upon retirement, the amount of the worker's pension is determined by the value of her account at that time. If the funds were invested well or if the market did well overall, the worker's pension might be ample. But if the funds were invested poorly or if retirement occurred amidst a market downturn, the pension could be small. In a defined contribution plan, the twin risks of market decline and of bad investment decisions fall on the individual employee.[103]

In the past twenty years, defined contribution plans have overtaken defined benefit plans as the dominant form of employer-provided pension in the United States. Defined benefit plans covered almost 85% of workers who had pensions in the private sector in 1980, but by 2000 that number had declined to less than 40%.[104] Today more than half of workers who have pension plans have defined contribution plans. Further, today 90% of all employer plans are now defined contribution plans. One commentator writes:

> Defined contribution pensions are said to reflect an employer's desire to limit long-term financial exposure, and a shift in employers' priorities away from retaining workers with eroding industrial skills to attracting new workers with up-to-the-minute skills. Defined contribution arrangements tend to attract mobile workers because they are more adaptable to the needs of workers who change jobs or follow varied career paths.[105]

Defined contribution plans are attractive to employers for the obvious reason that they shift the risk of stock market fluctuations onto the employee. Defined contribution plans are also attractive to mobile workers because the benefits generally vest sooner than in defined benefit plans, and because such plans usually pay a lump sum distribution to departing employees. Furthermore, even if employees do not take a lump sum at the time of departure, the benefits in their accounts continue to grow during their working

S. Mitchell with Erica L. Dykes, *New Trends in Pension Benefit and Retirement Provisions, in* BENEFITS FOR THE WORKPLACE OF THE FUTURE, 110, 128–30 (Olivia Mitchell et al. eds., 2003).

[103] *See* Edward A. Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX REV. 683, 692–93 (2000).

[104] Richard A. Ippolito, *Tenuous Property Rights: The Unraveling of Defined Benefit Pension Contracts in the United States, in* PENSION POLICY IN AN INTEGRATING EUROPE (Onorato Castillino & Elsa Fornero eds., 2003); Bureau of Labor Statistics, *supra* note 64. Similarly, the Current Population Survey found that whereas 56.7 % of employees surveyed reported they had defined benefit plans in 1988, only 35.1 % reported to have such plans in 1998. Craig Copeland, *An Analysis of the Retirement and Pension Plan Coverage Topical Module of SIPP*, EMP. BENEFITS RES. INST. ISSUE BRIEF 245 (May 2002).

[105] Katherine Elizabeth Ulrich, *You Can't Take It With You: An Examination of Employee Benefit Portability and Its Relationship to Job Lock and the New Psychological Contract*, 19 HOFSTRA LAB & EMP. L. J. 173, 186 (2001).

careers. Thus, while defined contribution plans impose a new level of risk on employees, they are in many respects more adaptive than defined benefit plans for today's mobile workforce. Yet, despite their attractiveness, defined contribution plans leave many vulnerable to stock market downturns and Enron-style pension malfeasance.[106]

One type of defined contribution plan that has enjoyed increasing popularity in recent years is the 401(k) plan.[107] These plans are employer-sponsored arrangements by which employees can purchase stock using pre-tax dollars. Some plans provide for matching employer contributions up to a fixed maximum amount. Many employers offer 401(k) plans as a supplement to, or as a substitute for, a conventional pension plan. The popularity of 401(k) plans has increased steadily, so that in 1997, 55% of all full-time employees in medium and large companies participate in such plans.[108] One benefit of a 401(k) is that the employee's money grows in the stock market and all taxes are deferred until the time of retirement. Because both the contributions and the fund's earnings are tax-deferred, many employees use these devices as a substitute for individual retirement savings. However, many 401(k) plans place limits on the types of stock investments individuals can make and impose limits on when funds can be withdrawn. Thus, a plan that requires investment of a substantial part of each employee's 401(k) funds in the company's own stock puts that employee at great risk from business downturn. If a firm becomes insolvent, the employees will lose both their job and their retirement savings. Indeed, this form of investment runs afoul of modern portfolio theory, which counsels investors to diversify their investments. As the Enron bankruptcy tragically demonstrated, defined contribution plans channel employees' investments into the very same company where their human capital is already invested, thereby accentuating their exposure to risk.[109]

The current trends in defined contribution plans are for employers to reduce their contributions and at the same time to permit employees more options about how the funds are invested. While the latter change appears to maximize individual choice and control over their retirement funds, it can also become a trap for the unwary. Most workers have little or no knowledge about investment strategy, and often make bad decisions.[110]

Increasingly, defined contribution plans are permitting employees to take out loans from their accounts, a trend that undercuts the potential of a defined contribution plan to ensure retirement security. Additionally, many plans are

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[106] *See* Susan Stabile, *I Believed My Employer And Didn't Sell Company Stock: Is There an Erisa (Or '34 Act) Remedy for Me?,* 36 CONN. L. REV. 385, 386 & n.4 (2004) (citing articles about Enron pension fraud allegations).

[107] *See* Zelinsky, *supra* note 103 (describing growth and operation of § 401(1) plans).

[108] Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Benefits in Medium and Large Private Establishments (Jan. 7, 1999), *available at* http://www.bls.gov/news.release/ebs3.nws.htm.

[109] *See* Susan Stabile, *Is It Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 313 (2007).

[110] *Id.*; *see also*, Susan Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U. L. REV. 71 (2002).

declining to offer employees a lifetime annuity at retirement age, offering a lump sum payment instead. A mandatory lump sum distribution plan does not provide lifelong retirement security. Rather, it shifts the plan from an employer-provided benefit to a personal savings plan.[111]

3. Cash Balance Plans and Other Hybrid Plans

In the 1990s, many corporations adopted a new type of pension plan that is a hybrid of a defined benefit and defined contribution plan. These plans, called cash balance plans, have multiplied quickly in recent years, often resulting from a conversion of defined benefit plans.[112] In a cash balance plan, each employee has a hypothetical account to which the employer contributes a percentage of the worker's compensation (the work credit) and an interest payment (the interest credit) that compounds until the worker's retirement date or when the worker leaves the plan. When an employee leaves employment, she can either take her accumulated account as a lump sum or leave it to continue to compound by additions of the interest credit (but not the work credit) until withdrawal at a later date.

The distinctive feature of a cash balance plan is that it is not back-loaded, but instead enables employees to accrue benefits at an even rate. When an employee departs, she can take the full value of the contribution made on her behalf either as a lump sum or freeze it in an account that will continue to grow. Thus, cash balance plans offer portability for younger and mobile workers because they do not penalize job changes.

Cash balance plans have been challenged in court on the ground that they discriminate against older employees in the rate of benefit accrual.[113] Under a cash balance plan, as an individual approaches retirement, the even rate of accrual of benefits means that the annuity value amount of the benefit accrual declines. At least one court of appeals has rejected the argument that the decline in annuity value constitutes discrimination,[114] but there are other cases pending.

The process of converting defined benefit plans into cash balance plans has had catastrophic effects on older, long-term workers. Companies often underestimate the value of existing accrued pension rights and utilize formulas for future pensions that prevent older employees from accumulating new pension benefits for a substantial period of time (a time period termed the "wearaway").[115] However, some have proposed methods of converting to cash

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[111] Mitchell, *supra* note 102, at 128–30.

[112] For a detailed analysis of the role of tax policy in fostering the growth of cash balance plans, see Ippolito, *supra* note 103.

[113] *See, e.g.*, Register v. PNC Financial Services Group, Inc., 477 F.3d 56 (3d Cir. Jan. 30, 2007); Campbell v. BankBoston, N.A., 327 F.3d 1 (1st Cir. 2003); Wheeler v. Pension Value Plan for Employees of Boeing Co., 2007 WL 781908 (S.D. Ill. Mar. 13, 2007); Sunder v. U.S. Bank Pension Plan, 2007 WL 541595 (E.D. Mo. Feb. 16, 2007); *In Re* Citigroup Pension Plan ERISA Litigation, 470 F. Supp. 2d 323 (S.D.N.Y. 2006).

[114] Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006).

[115] For an excellent discussion of the barriers to portability in pension and health insurance plans, and recent changes to make plans more portable, see Ulrich, *supra* note 2.

balance plans that do not involve significant wearaway periods by grandfathering accrued and vested benefits of existing employees without putting them at a disadvantage.[116] These proposals hold out some promise of protecting existing pension rights, but because they would be implemented on a firm-by-firm basis, they are too haphazard to provide broad pension coverage to the majority of workers.

C. *Recent Efforts to Achieve Benefit Portability and Continuity*

If the pension system is to provide genuine old age assistance, it must provide both portability and security. Presently, the system does not offer either to workers who move between firms and in and out of the labor market. Hence, pensions need to be restructured to provide a cushion against the risk of the digital era workplace. There have been some modifications to the laws and practices governing pensions and health insurance in the past two decades that move in this direction, but for reasons that will be explained below, they are insufficient.

On several occasions in the past decades, Congress has amended the laws governing pensions to enhance their portability. In 1986, and again in 2001, Congress amended the Employee Retirement Security Act of 1974 (ERISA) to decrease the vesting periods for defined benefit and defined contribution plans, thereby enhancing their portability. For example, the 2001 amendments lowered the maximum vesting periods for employer contributions to defined contribution plans to three years for cliff vesting and three to seven years for gradual vesting. For defined benefit plans, the maximum vesting period was lowered from ten years to five. In addition, in 1992 Congress expanded the situations in which employees who change jobs could "rollover" assets accumulated in their pension accounts to a new plan without incurring taxes or penalty liability. This change was applicable to defined contribution plans, enhancing their portability.[117]

One approach to retirement favored by employers is to encourage employees to use tax-deferred retirement savings devices, such as IRAs, 401(k)'s, 403(b)'s, and 457 accounts instead of company-sponsored pensions. These devices operate like defined contribution plans in that employees may select their own investments and bear the risk of gain or loss. Congress has made these devices more attractive recently through expanding the use of IRAs, providing for 401(k) plans, and providing for medical and Roth IRAs (for educational savings).[118] They embody the individual responsibility approach: they permit individuals to enjoy some of the tax benefits that employers previously enjoyed, thereby giving individuals freedom to structure their own

[116] Deana Saxinger, *Cash Balance Plans: They Work For Employers But Do They Work for Employees?*, 34 J. MARSHALL L. REV. 345 (2000).

[117] Economic Growth and Tax Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 641–49, 115 Stat. 118.

[118] *See* Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 341–48 (2007).

retirement arrangements. And because the IRAs are established by individuals, they are entirely portable. Some 401(k) plans also have that feature, but some do not.

However, the individual responsibility approach to old age planning suffers from many of the problems of defined contribution health insurance plans—it shifts the risk of investment policy to individuals. Individuals are notoriously bad at making retirement investments, so that while an individualized approach to pension investment may sound good in principle, it is usually ill-advised in operation.[119] Also, these tax-advantaged accounts are only a good deal for those who can afford to invest in them. Unfortunately, the ability of many Americans to save has gone down, rather than up, in the last twenty years. While the income of those at the top of the income distribution has increased dramatically, the income of those in the bottom half has stagnated or fallen.[120] Low-income workers have neither the disposable income nor the incentive to put money into individual tax preferred retirement accounts. Because their incomes are low, their income tax benefit is negligible.

Another danger of the move to individualized retirement savings is that it will further encourage employers to cease offering retirement plans altogether. As we saw in Part II, pension plans were initially set up as a means for employers to bind employees to their firms, thereby promoting long-term attachment between the employee and the firm. Because employers no longer need that kind of attachment, they have less reason than ever to offer retirement plans. As defined benefit plans become increasingly expensive and debt-laden, employers are converting them to money purchase annuities, defined contribution plans, and cash balance plans. The next logical step, advocated by some management consultants, is to terminate the employer's role in pensions altogether, permitting each individual to choose for himself or herself whether to invest salary dollars into present consumption or a tax preferred savings vehicle.[121] Where unions are present, they usually demand and bargain for pension plans as part of their wage packages, but with unions declining and job structures transforming, some are predicting that private pensions will become a vestige of that earlier era.[122]

If private employers get out of the pension business, it will become necessary to use public funds to provide old-age assistance because not all individuals will do so on their own. At present, it is not conceivable that Congress would restructure the endangered Social Security Fund to provide *increased* protection for the aging workforce. So, without major Social Security reform it is necessary to devise reforms in private pensions that increase portability and income security. While shortening vesting periods and increasing rollover opportunities contribute to pension portability, these reforms to not go far enough. Defined contribution plans are inherently risky for employees, so that the shift away from defined benefit plans may promise

119 *See* Stabile, *supra* note 109 at 312–13 (citing studies).

120 STONE, FROM WIDGETS TO DIGITS, *supra* note 7, at 258–61.

121 *Nest Eggs Without the Yolk–Corporate Pensions*, *supra* note 98, at 61.

122 *Id.*

illusory benefits at best. A better solution would be to foster portability within defined benefit plans by requiring immediate vesting and 100% rollover. However, the trend away from defined benefit plans altogether does not bode well for old-age security.

V. BUSINESS ATTITUDES TOWARD BENEFIT REFORM: THE TRIUMPH OF IDEOLOGY OVER SELF-INTEREST

Big business today adamantly refuses to support government-funded health and old-age insurance for the same reasons it eschewed such plans 100 years ago. Yet the private system it erected in their stead is rapidly unraveling. Most firms today would be better served by publicly-funded social welfare programs that relieved individual firms of the cost, thereby leveling the field of international competition. So why don't they demand it?

In the area of benefits, we see the triumph of ideology over self-interest. The power of contemporary neo-liberal anti-government ideology makes it nigh impossible for big business groups to openly support expanded government insurance measures. The Clinton Health Care initiative is a case in point. Despite some initial business support, the insurance industry and small business associations, in conjunction with the conservative Republicans in Congress, mounted a powerful campaign against it in the media and in the political process. The business assault defeated the Clinton Health Plan before the public even had the benefit of a serious debate.[123]

At the same time the private benefit system no longer serves the human resource goals that it once did, so that employer support for employer-centric policies is also waning. We are left, then, with a policy vacuum at the same time we have a powerful social need.

VI. CONCLUSION

The sustainability of today's boundaryless workplace depends on the existence of a social safety net that can effectively ease worker transitions when they change jobs or move in and out of the workplace. At present, the private safety net that has been in place in the United States since the 1940s is not only unsuitable to the emerging era, it is also unraveling. Thus it is necessary to reinvent the benefit system, both for health insurance and for old-age assistance. In the area of health insurance, that means providing portability and at the same time, affordability. In the area of pensions, it means providing portability while ensuring that pay-outs are adequate. Neither health insurance

[123] On the history of the Clinton health plan and the efforts by conservative and business groups to defeat it, *see* HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM (1996); THEDA SKOCPOL, BOOMERANG: HEALTH CARE REFORM AND THE TURN AGAINST GOVERNMENT (1997); Darrell M. West, Diane Heath & Chris Goodwin, *Harry and Louise Go to Washington: Political Advertising and Health Care Reform*, 21 J. HEALTH POL. POL'Y & L. 35 (1996); Manish C. Shah & Judith M. Rosenberg, *Health Care Reform in the 103d Congress—A Congressional Analysis*, 33 HARV. J. ON LEGIS. 585 (1996); Uwe E. Reinhardt, *The Clinton Plan: A Salute to American Pluralism*, 13 HEALTH AFFAIRS 161 (1994).

nor pension programs can function to meet the needs of today's work force so long as they are tied to individual employers. Boundaryless workers need benefits that travel with them and provide insurance against the risks they face in transition as well as while employed.