Real Choices Employers Make; Watching ERISA Work

SouthWest Benefits Association
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The Beginning

Baby Jane was born (emergency C-section) on October 9, 2012.

- She was surprisingly early (25 weeks); no warnings or complications during pregnancy.
- She weighed 1 lb. 9 oz.

Baby Jane spent 3 months in NICU.

- Her brain hemorrhaged.
- Her breathing stopped.

The Players

(1) **Deanna Fei** - mother; wife of AOL employee; dependent in AOL's group health plan; respected author; 1999 graduate of Amherst.

(2) **Peter Goodman** - father; husband; editor at the *Huffington Post*, which was owned by AOL; participant in AOL's group health plan.

(3) **AOL** - employer; sponsor of AOL's self-insured group health plan. AOL generated $36,000,000 in net profits in the 4th quarter of 2013.

(4) **Tim Armstrong** - the president of AOL during 2012-2014; struggling to turn AOL around.

An Unrelated Development

At the end of 2013, AOL published a new SPD for its 401(k) plan. Two changes were announced in the next to last sentence at the bottom of page 5. Both were effective in 2014.

- Matching contributions were going to be contributed “as a one time lump sum after the end of the Plan Year,” instead of each pay period.
- Matching contributions were going to be made only for an “active employee…as of the last day of the Plan Year (Dec. 31),” starting December 31, 2014.

DENTONS

Another Unrelated Development

- AOL apparently went more than $9,000,000 over budget for health plan costs during 2012.
- $7,000,000 of the $9,000,000 was to comply with group health plan changes required by the ACA.

An Explanation

On February 6, 2014, Tim Armstrong was in a company-wide town hall meeting with AOL employees. One of the employees asked about the two 401(k) plan changes. His answer was frank.

> “Two things that happened in 2012. We had AOL-ers that had distressed babies that were born that we paid $1,000,000 each to make sure those babies were okay in general. So when we had the final decision about what benefits to cut because of increased health care costs, we made the decision, and I made the decision, to basically change the 401(k) plan.”

DENTONS

A Cacophony

- Company employees immediately began saying, “I swear I did not have any babies in 2012. Don’t hate me for messing up your 401(k).”
- Deanna Fei said AOL’s president “exposed the most searing experience in our lives for an absurd justification for corporate cost cutting.”
- Other employees were harshly critical. Thousands of news sites got the story. Policy wonks and pundits had a field day. A trending hashtag became *#distressedbabies*.
- Deanna Fei told Baby Jane’s story in an article she wrote for *Slate* on February 9, 2014. The article went viral. She got requests to testify and to be a speaker.

DENTONS

A Step Back

- ERISA will be 45 years old on September 2, 2019.
- Has it worked?
  - We are on the cusp of a great social experiment fostered by ERISA and by later “tweaks” to ERISA.
  - Boomers are reaching age 65 at the rate of 10,000 per day, and the rate is accelerating. (GAO Congressional testimony: 10,700 per day by 2020. (2/6/19))
  - Are we as a society ready for them?
  - Will those boomers have enough retirement income?
  - ERISA was designed to answer only that second question.

What has ERISA accomplished for retirement?

2004: $6.2T was held in employer sponsored plans 30 years later.
$13.3T overall. (EBRI)

2010: 65,000 401(k) plans covered 23 million participants.
$1.5T was paid as benefits payments. (EBRI)

2010: Households ages 75+ have the highest median net worth of any U.S. age bracket for the first time ever. (Federal Reserve's 2010 Survey of Consumer Finance, discussed in EBRI Issue Brief #401 (July 2014))

2011: 500,000 401(k) plans cover 60 million participants.
(IRS's "Section 401(k) Compliance Check Questionnaire Final Report" (March 29, 2013))

2019: $5.7T is in defined contribution plans.
$2.9T is in defined benefit plans.
$8.1T is in IRAs.
$16.7T is held overall. (GAO testimony (Feb. 6, 2019))

Is this the largest investible pool of capital in the world?

What has ERISA accomplished for retirement?

2013: 52% of households aged 55^{+} had no retirement savings.
2016: 48% of households aged 55^{+} had no retirement savings.
(GAO letter to Senator Bernie Sanders, dated March 26, 2019)

80% of retirees say they have enough to “live comfortably.”
(60% of workers say the same.)

75% say they have enough to maintain their standard of living in retirement, up from 61% in 1992.

6.7% of those over age 65 have annual income below poverty line, down from 9.7% in 1990.
(“Phony Retirement Crisis,” Wall Street Journal opinion article, March 1, 2019)

Retirement Policy Goals of ERISA

- Provide an adequate retirement income.
  - We are not supposed to live only on Social Security paid to us by the government.
  - We asked the private sector to contribute to the solution.
- Keep the pension promise.
  - ERISA guaranteed minimum participation and broad-based access.
  - ERISA mandated vesting so that retirement benefits would actually become nonforfeitable.
  - ERISA created minimum funding requirements to avoid unfunded promises and an insurance system for the pension plan of 1974.
  - Did the promise change - at the insistence of the boomers - in 1978 when section 401(k) of the Code was enacted?

Retirement Policy Goals of ERISA

- Manage accumulated funds safely and properly.
  - ERISA fiduciaries were created - to be sort of like trust-law-based fiduciaries but with important differences.
  - New statutory prohibited transactions were imposed, along with dual enforcement rights, a testament to their importance.
- Promote voluntary adoption by employers.
  - This was not a stated policy goal.
  - This is obvious from the changes made by Title II of ERISA, but eroded somewhat by the mandatory aspects of Title I of ERISA.

Suggested New Retirement Policy Goals

Gene L. Dodaro, Comptroller General of the U.S., spoke for the Government Accountability Office ("GAO") when he gave Congressional testimony on February 6, 2019, giving the GAO's assessment of ERISA 40^{+} years later. Drawing on multiple reports and solicited opinions, the GAO testimony suggested these as new retirement policy goals for ERISA:

- "Promote universal access to a retirement savings vehicle"
- "Ensure greater retirement income adequacy"
- "Improve options for the spend down phase of retirement"
- "Reduce complexity and risk for… participants and… sponsors"
- "Stabilize fiscal exposure to the federal government"

How do these change ERISA's original policies? Are they good changes?

DENTONS

Reflections on Retiring

- ERISA has worked - for retirement.
  - Unparalleled amounts have been accumulated - only to provide retirement. Your parents and I have never had better security.
  - Accessibility has never been wider.
  - IRAs - what an unexpectedly successful result of ERISA!
  - Promised benefits have actually been funded and paid.
  - It has fed my family and yours.

DENTONS

Reflections on Retiring

- Can it do better? Of course!
    - Seek universal access by addressing gaps in employer-sponsored coverage.
    - Make employers sponsor plans? Can you prove this would not do more harm than good?
    - Allow bigger benefits or continue the government's fiscal restraint? The balance will never be perfect.
    - Control "spend-downs"? This is not an ERISA failure. Should government regulation of lump sums (and how we spend them) be expanded?
    - Make it a simpler and safer system. Amen!
    - Impose less flexibility on employers? Bad idea. AOL should keep the freedoms it tried to use.

What has ERISA accomplished for your health?

- We spent $2.8T on healthcare in 2012.
- Spending nears $3.7T in 2019.
  - 1965: 70% was private spending; 30% was public. (This was before Medicare and Medicaid.) By 2013: 50% private; 50% public. (EBRI Issue Brief #401 (July 2014))
  - 2007: 70% of employers expected to sponsor group health plans in 2017. (EBRI Issue Brief #401 (July 2014))
  - 2009: Employers spent $559,000,000 on employer-based medical coverage. (8.3% of compensation)
  - 2010: 58% of nonelderly population had employer-based health benefits. (Approximately 156,000,000).
  - 2011: 23% expected to sponsor group health plans in 2021. (EBRI Issue Brief #401 (July 2014)) (This was immediately after the ACA.)

What has ERISA accomplished for your health?

- Health care is about 20% of U.S. gross domestic product.
- Five of Houston’s top ten employers are hospitals.

Health Plan Policy Goals of ERISA

- Employer-sponsored group health plans are not very old.
  - They were created during the early 1940s as a way to differentiate employers and recruit workers during the wage freezes imposed for World War II.
  - They are now the primary source of assistance with medical bills from birth to age 65.

DENTONS

Health Plan Policy Goals of ERISA

- ERISA appears to have regulated group health plans (“GHPs”) as almost an afterthought.
  - The legislation was structured to rely almost exclusively on voluntary adoption by employers.
  - Reporting to the federal government was required.
  - Disclosures to covered participants and dependents were expanded.
  - Fiduciary oversight and enforcement rights were added.
  - No requirements for minimum participation, vesting, or funding were imposed.
  - ERISA’s federal web of requirements was made expressly subject to traditional state regulation of insurance carriers, the primary sources of GHPs at the time.

Evolving Health Coverage Policy Goals

- ERISA left GHP benefits largely to the marketplace.
- Starting with COBRA in 1986, that policy began to change. Between COBRA and the ACA, there have been almost too many benefits mandated for GHPs to count.
- In March 2010, the ACA changed everything.
  - The shared responsibility penalties were imposed on employers in 2015, and the “Cadillac” health tax looms in the wings.
  - Individuals faced pressure from the “individual mandate” to get coverage.
  - The so-called “insurance provisions” were imposed on GHPs almost immediately as new federal mandates.
  - Essential health benefits were defined and mandatory.
  - It became practically impossible to continue the old way of providing health benefits.

Evolving Health Coverage Policy Goals

- Now, the ACA is threatened.
  - In *Texas v. United States*, a U.S. District Court in Texas granted partial summary judgment last December, ruling that the ACA's individual mandate is unconstitutional and the individual mandate cannot be severed from the rest of the ACA, which made continuing the ACA impossible. An immediate appeal followed.
  - On March 25, 2019, the Department of Justice announced it would not continue its arguments in the U.S. Court of Appeals for the Fifth Circuit that the individual mandate was severable from the bulk of the ACA.
  - The Fifth Circuit invalidated the investment advice fiduciary regulations on June 21, 2018, when it issued its mandate in *Chamber of Commerce v. U.S*. Will it dare to reject the entire ACA as well?
  - A single payor system ("Medicare-for-all") has never been seriously debated in Congress, but its political popularity is growing in some sections.
  - What will the policy goals for health coverage become?

The Next 40 Years

"Every year, we gain 21 days of life expectancy." (EBRI Issue Brief #401 (July 2014))

2020: 56,100,000 will be 65 or older.

2025: 11,600 will be turning age 65 every day.

2027: 75,000,000 will be enrolled in Medicare.
(GAO testimony (Feb. 6, 2019))

We will have to consider important demographic changes beginning now.

- The number of working women will equal or exceed the men.
- The workplace will be older and have a lot more color.
- Both genders will demand responsibility *equally;* first time ever.
- Working men's behavior will orient more to family.
- Men will experience more work-family conflict than women.
- No one will admit to having enough time.
- We will be retiring in order to work; the new normal. (National Study of the Changing Workforce, discussed in EBRI Issue Brief #401 (July 2014))

DENTONS

Reflections on Getting Well

- ERISA did not devote enough to the problems of caring for America's workers who got sick.
  - It has done a commendable job in overseeing group health plans employers choose to adopt, but its GHP rules have not been as successful before retirement as its other half has been after.
  - It tried to let employers balance costs while maintaining their competitive advantages.
  - It relied on state regulation, which has waned with the growth of self-insured health plans.
- After the ACA, smaller employers saw the ACA's changes as an opportunity to shed the expense and the hassle.
  - As the labor market gets progressively tighter now, however, medical benefits get more popular.
  - For the first time, we have four generations in the workplace. (Boomers, Gen Xers, Millennials and Gen Zers.) The needs of each are very different from the other three.

Reflections on Getting Well

- Corporate innovation, fueled by self-interest, is a vital incubator that cannot be lost. The need is too big for a single solution.
- Other solutions intended to supplement the employer-provided system need to be developed. Making group health plans carry more and more of the burden is not the answer. Conversely, the system is too successful to abandon completely.
- Increasing regulatory control over the traditional defined benefit employer-sponsored group health plan threatens to make it join its aging brother, the defined benefit pension plan.
- AOL's health plan exceeded budget. AOL should be allowed to manage to a budget. AOL should not be required to cut coverage when expenses, especially those required by a government-imposed unfunded mandate, get out of hand. That's bad policy. Was AOL's looking elsewhere to find those last dollars not a socially preferable response?

The Ending

- Baby Jane took her first steps in early February, 2014, days before the now infamous town hall. Today, she would be 7 years old.
- The 401(k) plan changes were reversed in February, 2014.
- AOL went out of existence as a separate entity on June 23, 2015. It was bought by Verizon. Tim Armstrong engineered the sale. Baby Jane’s plight had nothing to do with it.
- Tim Armstrong publicly apologized on February 8, 2014. He lost his position with AOL’s successor in September 2018. Hailed as a savior of AOL, he is reportedly getting more than $60,000,000 as he exits, according to a Wall Street Journal article published March 20, 2019.

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