

THE TEMPORALLY-FLAWED CONCEPT OF BINDING PROMISES
IN AMERICAN COLLECTIVE BARGAINING AND EMPLOYEE
BENEFITS LAW: A SOURCE OF THE CONCURRENT CRISES
IN THE U.S. INDUSTRIAL RELATIONS, RETIREMENT,
AND HEALTH CARE SYSTEMS

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SUMMARY: I. *Introduction*. II. *The Decline of Collective Bargaining and Deterioration of Employee Benefits Plans*. III. *Flaws and Contradictions Within the U.S. Labor Law, Industrial Relations and Employee Benefits System*. IV. *Implications for Labor Law and Industrial Relations*.

I. INTRODUCTION

The American collective bargaining system is in serious trouble, as is the employee benefits system providing pensions and health care benefits for millions of non-union as well as unionized workers and retirees. The portion of the labor force covered by collective bargaining has dropped so low that one can barely refer to it as a system. Simultaneously, the American private employer-based pension system is moving towards a crisis. Large employers with the finest pension plans, covering thousands of workers and retirees, in industry after industry, are terminating their pension plans, or replacing them with cheaper, weaker retirement programs, often while reorganizing under the American bankruptcy system. Pension benefits upon which retirees and their families have relied are suddenly, often dramatically cut, as the expense and liability are transferred to the federal government pension benefit guaranty program, a back-up scheme which only covers specified portions of the original

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benefits. The health care system, too, largely employer-based, is beginning to stagger under the weight of employer reductions in coverage, for retirees as well as employees. These changes are all in the nature of broken promises, whether or not a contract technically has been breached: broken promises to individual workers and retirees, broken promises to trade unions, and on a grand scale, the broken promise of the American social contract.

This paper will sketch out, in comparative perspective, some flaws in American labor law regarding the nature of the collective bargaining agreement (CBA), trade union representation in negotiating and enforcing CBAs, and treatment of long-term benefits promises to employees and retirees. It will suggest that the cumulative effect of these doctrinal contradictions has made possible the thwarting of the bargained-for, relied upon, expectations of workers and retirees, and has led to massive difficulties in the employee benefits system as well as in the collective bargaining regime. These aspects of both collective labor law and employee benefits law must be reconsidered if the system is to function soundly in the future. The American situation also may have implications for the pensions and health care systems of many other countries.

II. THE DECLINE OF COLLECTIVE BARGAINING AND DETERIORATION OF EMPLOYEE BENEFITS PLANS

The percentage of American labor force participants who are members of a trade union has dropped steadily over the past three decades, with the decline concentrated in the private sector.¹ In 2004, only 12.5% of the total actively employed labor force, or about 15.5 million workers, were members of a union.² Only 8% of private sector, non-agricultural employees were members in 2004, compared to 36% of government employees. The percentage of private sector workers covered by a CBA has dropped from about 35% in the 1950s, to under 9% in 2004. CBA coverage in government employment today is much higher, about 41%.

¹ The U.S. treats for-profit and not-for-profit entities together as composing the private sector; with limited exceptions, neither labor data collection nor labor legislation distinguishes between the two.

² The U.S. union representation data are drawn from "Bureau of Labor Statistics, Union Members" in 2004 (2005), available at http://www.bls.gov/news.release/pdf/uni_on2.pdf. Most fractional percentages have been rounded off.

Union membership rates differ tremendously from state to state, ranging from New York, at 25%, to North Carolina, at under 2%. In the private sector, Hawaii is highest at 16% union membership, followed closely by New York and Michigan. Union density varies greatly by private sector industry and occupation, with CBA coverage ranging from below 2% in some fields to nearly 30% in utilities; 25% in transportation and warehousing; 22-24% in telecommunications; 15% in construction; and 13% in manufacturing. Racial and gender disparities in overall union membership rates are relatively modest, although disaggregation of public and private sectors, as well as separate treatment of full-time and part-time workers, reveals greater differences. Most noteworthy is the fact that 14% of full-time workers are union members, compared to only 6% among the disproportionately female category, part-time workers.

The great extent of variation in union density in different geographical areas, industries, occupations, and labor markets, means that notwithstanding the low overall private sector figures, unionization levels in particular localities and fields may be sufficient to provide real bargaining power for workers. On the other hand, the U.S. is a single, unified market with internal free movement of goods, services, capital, and persons. In the face of historically intense domestic, and now dramatically expanding international competition in the provision of goods and services, U.S. unions have found rebuilding their private sector base to be a daunting task indeed.

The U.S. labor force also suffers from decreasing levels of employer-provided pension benefits and health insurance coverage in the private sector, union and non-union alike.³ The Social Security system promises only a basic level of retirement and disability pension, and after age 65, Medicare as basic medical benefits coverage. Although it is possible to buy individual health insurance and retirement annuities in the open market, the cost is prohibitive, so few persons do this. Absent pooling of risks across broader populations, the likelihood of adverse selection makes such individual policies extremely expensive while affording very low levels of benefit coverage.

Employers are not required by law to provide any fringe benefits whatsoever. However, if they do, the benefits receive highly tax-favored treat-

³ See Wiatrowski, William J., "Medical and Retirement Plan Coverage: Exploring the Decline in Recent Years", *Monthly Labor Review*, August, 2004, at 29, available at <http://www.bls.gov/pub/mlr/2004/08/art4full.pdf>.

ment, so long as the requirements of the employee benefits law, the Employee Retirement Income Security Act (ERISA),⁴ are fulfilled.⁵ Most employers who provide pension or health care benefits do so through single employer plans.⁶ At unionized firms, the terms of benefits plans are established through collective bargaining and usually are incorporated by reference in the CBA; in non-union establishments, the employer unilaterally establishes the plan and its contents. A much higher percentage of unionized workers are covered by pensions and health care benefits than non-union workers.⁷

Employers have been eliminating decades-old defined benefit pension plans, the type of plan most beneficial for the ordinary, long-term employee, and the type of plan traditionally prescribed by most collective bargaining agreements. Described simply, in a defined benefit plan, the worker is promised a specified monthly retirement benefit, computed based on a formula dependent on years of credited service with the company, and sometimes also the employee's wage or salary rate during the

⁴ Pub. L. No. 93-406, 88 Stat. 829, 1974 (codified as amended at 29 U.S.C. § 1001-1461, 2000).

⁵ On the types of pension plans, the types of health and welfare plans, and the law pertaining thereto, see generally ABA Section of *Labor and Employment Law, Employee Benefits Law*, 2d. ed., 2000 & Cum. Supp., 2004; *Paul J. Schneider & Barbara W. Freedman, ERISA: A Comprehensive Guide*, 2d. ed., 2003. On retiree health care benefits, see also Wolf, Charles B. & Daniels, William T., "Retiree Welfare Benefits", in *ERISA Litigation*, Jayne E. Zanglein & Susan J. Stabile eds., 2003.

⁶ In certain traditionally unionized occupations, particularly in the construction industry with its mobile, transient employment relationships and many small employers, the customary trade union—multi-employer CBA long has been accompanied by a joint trade union—multi-employer pension plan and a joint trade union-multi-employer health and welfare benefits plan. These so-called "Taft-Hartley trust plans" are a unique, longstanding form of pension plan, governed by a special collective bargaining labor law provision, § 302 of the LMRRA, 29 U.S.C. § 186, 2000, as well as special employee benefits law provisions. See Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. §§ 1381-1461). As of 2004, there were over 9.8 million multiemployer plan participants in 1587 plans insured by PBGC; this is about 20% of the total. See PBGC, *Pension Insurance Data Book 2004*, at 2, 2005, available at <http://www.pbgc.gov/docs/2004databook.pdf>. Because of their distinct attributes, they will not be addressed further here.

⁷ See, e.g., Wiatrowski, *supra* note 3, at 31-33; E. Buckley, John & Van Giezen, Robert W., "Federal Statistics on Healthcare Benefits and Cost Trends: An Overview", *Monthly Labor Review*, November 2004, at 43, 44, 46; Barsky, Carl B., "Incidence Benefits Measures in National Compensation Survey", *Monthly Lab. Rev.*, August, 2004, at 21, 25-26.

last several years of employment with the company. A basic formula might be that workers with at least five years of credited service upon retirement would receive a pension of \$20 per month per year of credited service; an employee retiring after thirty years with the company would receive a pension of \$600 per month. In defined benefit plans, the employer pays all of the plan contributions as well as the costs of plan administration. The *employer* bears the investment risk, since the nature of the employer's promise is to contribute annually to the plan's investment trust fund whatever amount the plan actuaries compute is required to amortize the cost of paying the promised pension benefits. Employers who sponsor defined benefit plans pay to the federal Pension Benefit Guaranty Corporation (PBGC) an annual plan termination insurance premium, presently \$19 per plan participant, plus in cases of underfunded plans, an additional variable premium of \$9 per \$1,000 of underfunded plan liabilities for benefits. PBGC, in turn insures the benefits.⁸

Private businesses instead are turning to defined contribution pension plans. In these plans, the employer promises only to contribute a set amount per year, or per hour worked, to an individual account kept on the employer's investment trust books on behalf of the worker; the firm also may shift part or all of the contribution burden to the employee through deductions from the worker's paycheck. In these plans, the *worker* bears the risk of investment loss. No fixed level of benefits is promised to the workers until they actually retire; upon retirement, each worker receives an annuity based on the amount of accumulated contributions and investment earnings (or losses) attributable to the worker's individual account. The employer pays no insurance fee to the PBGC, since no benefits are guaranteed. Some larger employers have terminated defined benefit plans and adopted so-called "cash balance" or "pension equity" plans, the legality of which remains uncertain, and which function as something of a hybrid between defined benefit and defined contribution plans.⁹

In 1980, there were 148,000 defined benefit plans functioning in the U.S., in 1990, there were 113,000; by 1998, there were only 56,000. In 1980, there were a little over twice as many defined contribution plans as

⁸ 29 U.S.C.A. § 1306 (West 2000 & Supp. 2005); See PBGC, *supra* note 6, at 25.

⁹ See generally "Robert L. Clark & Sylvester J. Schieber, An Empirical Analysis of the Transition to Hybrid Pension Plans in the United States", 2002, available at <http://www.watsonwyatt.com/research/whitepapers/wpender.asp?id=wp-02>.

defined benefit plans among private sector employers, but by 1998, there were almost 12 times as many defined contribution plans as defined benefit plans, and about twice as many active participants in defined contribution plans as in defined benefit plans.¹⁰ The proportion of active employees covered by a defined benefit pension plan dropped from 38% in 1980 to 23% in 1995; the proportion of total participants (including retirees) covered by a defined benefit plan declined from 83% to 50% over that same period.¹¹ In 2004, there were 34 million plan participants in government-insured, single employer, defined benefit pension plans.¹²

As growing numbers of employers enter bankruptcy reorganization, and use the bankruptcy process to terminate their defined benefit plans, increasing numbers of those already retired, as well as active workers, have their retirement benefits substantially cut because government pension plan insurance only fully guarantees benefits already in effect five years, and then primarily the basic benefits to which the worker would be entitled if she or he retired at age 65, and only up to a set maximum monthly amount.¹³ In addition, the PBGC insurance system is at risk of future inability to pay all of the guaranteed benefits. The insurance fees have been too low to cover the growing risk of employer bankruptcy filings, and the actuarial accounting for required annual contributions to the plan by employers has been too generous to the employer, understating the amount of contributions necessary in light of realistic investment experience. This permits employers to pass on greater risk of unfunded pension liabilities to PBGC than was originally contemplated under the ERISA statutory scheme.

In a vicious circle, Congress has passed, and as of this writing, is again contemplating, further legislation raising the PBGC insurance fees and strengthening the actuarial accounting standards.¹⁴ However, the effect of increasing plan termination insurance premiums and raising accounting

¹⁰ On the employer shift away from defined benefit plans, see, for example, “Kyle N. Brown & Sylvester J. Schieber, Structural Impediments to Phased Retirement”, 16-17, 2003, available at <http://www.watsonwyatt.com/research/whitepapers/wprender.asp?id=wp-13>.

¹¹ Clark & Schieber, *supra* note 9, at 84 n.1 (citing *Pension Benefit Guaranty Corp., Pension Insurance Data Book 1998* [1999]).

¹² PBGC, *supra* note 6, at 12.

¹³ 29 U.S.C. § 1322 (2000); see PBGC, *supra* note 6.

¹⁴ See, e.g., Williams Walsh, Mary, “Veto Threat as Senators Approve Pension Bill”, *New York Times*, November 17, 2005, at C1; Chao, Elaine L. *et al.*, “Rescuing Your Retirement”, *New York Times*, November 21, 2005, at A23.

standards is to push more employers to reduce these increasing actual and accounting costs by freezing or terminating their existing defined benefit plans.¹⁵ This leaves the PBGC insurance system with an ever-smaller base of more under-funded and riskier defined benefit plans, and insurance premiums which cannot be priced adequately to account for the risk of employer insolvency and plan termination, lest it drive still more employers either to bankruptcy or plan termination or both.

The percentage of workers and their families covered by employer-provided health insurance has been declining, and the percentage of retirees and their families covered by employer-provided health insurance prior to eligibility for, and upon reaching eligible age, supplemental to the federal government Medicare program providing health care for those over age 65, has been falling.¹⁶ Like defined benefit pension plans, these benefits are promises to active or retired employees to provide specified benefits, but unlike defined benefit pension plans, and like defined contribution pension plans, health care benefits, absent a contractual promise to the contrary, may be prospectively changed at will by the employer.¹⁷ More and more employers are doing just that, eliminating health care coverage or reducing benefits to save money. In each of these areas, the quality and scope of benefits provided has been deteriorating. A survey of unionized employers prior to the 2005 round of collective bargaining found that reducing health care and pension-related labor costs was the number one negotiating goal of U.S. employers.¹⁸ Newspapers regularly report of major employers, under severe competitive pressure, reducing or eliminating these benefits, including such titans as General Motors Corporation and its major parts supplier and former subsidiary, Delphi Corporation.¹⁹

¹⁵ Employers who are the sponsor of an underfunded plan, however, face liability to PBGC if they terminate their plan, for the difference between the plan assets and liabilities, up to a maximum of 30% of the employer's net worth, unless they have taken out additional, optional insurance against this contingency; see 29 U.S.C. § 1323, 1362 (2000).

¹⁶ See Wiatrowski, *supra* note 3, at 1.

¹⁷ See *Curtiss Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 1995.

¹⁸ Amber, Michelle & Lekus, Erik, "Health Care, Pensions Most Likely Issues to Complicate 2005 Negotiations", in *Bureau of National Affairs, 2005 Source Book on Collective Bargaining: Wages, Benefits, Other Contract Issues* 67, 2005.

¹⁹ See, e.g., Morgenson, Gretchen, "Oohs and Ahs at Delphi's Circus", *New York Times*, November 13, 2005, § 3, at 1; Freeman, Sholnn, "An Industrial Town Stares Change in the Face", *Washington Post*, November 12, 2005, at A1.

These developments are not primarily the result of an aging population. Although all of the industrialized countries are grappling with a rapidly aging population, the U.S. has a more favorable demographic situation than that of many other developed countries. The percentage of the U.S. population aged sixty and over in 2000 was only slightly over 16%; in 2040, this number is projected to reach 26%. The U.S. is projected to have one of the lowest “aged dependency ratios” among developed countries from 2000 through 2040, a computation based on the ratio of adults aged sixty and over to prime working age adults aged 15-59. This is largely attributable to its high immigration rates, relatively high female labor force participation rate, as well as the tendency of Americans to continue to work until a substantially older age than their counterparts in most other developed countries.²⁰ This trend is facilitated by the statutory prohibition against employment discrimination and compulsory retirement based on age.²¹

Moreover, because the pension and health care benefits covering most employees are single employer benefit plans, the overall aging of the population matters less than the age composition of the employer’s own U.S. employee and retiree cohort, and the ratio of its active to its retired employees. This, in turn, depends on the years the employer has been in business, and the specific periods in which the company opened, operated, expanded, contracted, or closed particular enterprises. The decline of generous employee benefit plans goes hand-in-hand with the decrease in union representation and collective bargaining. It is impelled by some of the same forces, intensifying domestic and international competition by new market entrants not bearing comparable employee benefits costs in their overall labor cost packages. Escape valves in the law have facilitated the transformation of seemingly binding, long-term benefits promises into partially illusory ones.

²⁰ Jackson, Richard & Howe, Neil, “Ctr. for Strategic & Int’l Studies & Watson Wyatt Worldwide, The 2003 Aging Vulnerability Index”, at 1, 14, 33, 2003, available at http://www.csis.org/media/csis/pubs/aging_index.pdf.

²¹ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 (codified at 29 U.S.C. § 621-634), as amended by Pub. L. 95-256 (April 6, 1978), Pub. L. 99-272 (April 7, 1986), Pub. L. No. 101-433 (October 16, 1990), Pub. L. No. 104-208 (September 3, 1996). The law covers workers aged forty and over, with no upper age limit.

III. FLAWS AND CONTRADICTIONS WITHIN THE U.S. LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE BENEFITS SYSTEM

1. *Fundamental Elements of the Industrial Relations System*

The American private sector collective bargaining system may be characterized as a single channel, exclusive representation system. Under the National Labor Relations Act (NLRA),²² the trade union designated as collective bargaining agent typically bargains and enforces binding, precise terms of employment for all represented employees, whether or not they are union members. Procedural rules about the duty of employer and trade union to bargain in good faith govern the negotiation of the CBA, and require the observance of its terms for the duration of the agreement. A separate but related law, the Labor Management Relations Act of 1947 (LMRA),²³ governs enforcement of CBAs while they are in force.²⁴

The vast majority of private sector workers, of course, have no union representative and no collective bargaining agreement. For them, the system is based on unilateral employer control of all terms and conditions of employment, with little scope for meaningful individual bargaining, minimal government regulation, and a large space for the operation of labor market forces. In the non-union sector, wholly unilateral decision-making by management determines wages, hours, and employee benefits such as pensions and health care coverage. Fringe benefits for all employees, union or non-union, are subject to regulatory constraints under ERISA. For collectively-bargained employee benefit plans, overlapping bodies of NLRA, LMRA, and ERISA law apply.

²² National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-169).

²³ Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, amending 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 141-187).

²⁴ See NLRA § 9, 29 U.S.C. § 159 (2000). On the NLRA and LMRA, see generally *ABA Section of Labor and Employment Law, How to Take a Case Before the NLRB*, Brent Garren *et al.* eds., 7th ed., 2000; *ABA Section of Labor and Employment Law, Developing Labor Law*, Patrick Hardin & John E. Higgins, Jr., eds., 4th ed., 2001 [hereinafter *Developing Labor Law*]; *ABA Section of Labor and Employment Law, Developing Labor Law*, Peter A. Janus *et al.* eds., Cum. Supp., 2004 [hereinafter 2004 *Developing Labor Law Cum. Supp.*]; Gorman, Robert A. & Finkin, Matthew W., *Basic Text on Labor Law: Unionization and Collective Bargaining*, 2d. ed., 2004.

Key components of the U.S. industrial relations system include: 1) the bargaining unit-based, exclusive collective bargaining representation structure of worker organization and union representation; 2) the trade union's workplace role as exclusive representative in administering and enforcing the CBA; 3) the nature and subject matter scope of collective bargaining, as structured by the duty to bargain in good faith; 4) distinctive and contradictory legal treatment of those with less than full attachment to the workplace, particularly retirees; 5) the uncertain and partial nature of legal regulation of bargaining over capital mobility and restructuring situations; and 6) the inter-related, twin premises of government regulatory abstinence and broad managerial prerogatives in both individual and collective labor relations.

The contours of the bargaining unit are specified by the National Labor Relations Board (NLRB), or by mutual agreement of trade union and employer. The bargaining unit is specified in terms of a set of job classifications in a particular workplace, a geographically-bounded set of workplaces, an entire company, or, less commonly, within an industrial sector-based, multi-employer organization, typically in a local labor market.

The bargaining unit initially defines the group in which a majority of workers may choose to select a union representative or to have none. If the workers unionize, the bargaining unit thereafter defines those employees on whose behalf the selected union will bargain collectively, who will be covered and bound by the terms of the CBA. It also defines those to whom the union will owe a duty of fair representation in negotiating, implementing, and enforcing the CBA, whether or not the employees join the union. "Representativity" in this system is "all-or-nothing": if the union has majority status, it becomes the exclusive representative for everyone; short of that, it has no legally enforceable right to represent anyone.²⁵ The union is granted the authority to negotiate exact terms of employment, rather than minimums above which employees can negotiate individually; the employer no longer may negotiate with individual employees, groups of workers, or rival trade unions with minority membership status.²⁶

²⁵ See NLRA § 9, 29 U.S.C. § 159 (2000).

²⁶ See *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Emporium Capwell Co. v. Western Addition Cmty. Org.*, 420 U.S. 50 (1975). See also *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

Upon selection of the union as representative, § 8(d) of the NLRA imposes on employer and union alike, a duty to bargain collectively in good faith with each other as to mandatory subjects of bargaining.²⁷ The scope of mandatory collective bargaining to which the duty to bargain applies, is defined as encompassing “wages, hours, and other terms or conditions of employment”.²⁸ This phrase has been construed to apply to everything from the prices in vending machines in factories where no time is provided for off-premises meals,²⁹ to discipline and discharge of employees, all types of remuneration and fringe benefits, work schedules, paid and unpaid time off work. It also includes selection criteria governing internal transfers and promotion, prohibitions against strikes during the term of the agreement, and regulation of the method of interpreting and applying the terms of the CBA, which is usually established in the form of a binding grievance and arbitration procedure. Provisions covering these topics are included in most CBAs.³⁰

Perhaps the most important provisions address job security. Nearly every CBA ensures protection of workers against ordinary or extraordinary termination of employment by the employer, by prohibiting their firing without “just cause”. The great majority of CBAs also provide a seniority-based rule for determining priority for job retention among workers in the event that some must lose their jobs, temporarily or permanently, in a reduction-in-force.³¹

The NLRA governs unfair labor practices committed in the course of collective bargaining and union organizing, such as a refusal to bargain in good faith over mandatory subjects of bargaining. Section 301 of the LMRA, on the other hand, provides federal court jurisdiction for lawsuits to enforce CBAs. Section 301 has been construed by the Supreme Court as a mandate to incrementally develop a common law of the CBA

²⁷ NLRA § 8(a)(5), 8(d), 29 U.S.C. § 158(a)(5), 158(d) (2000).

²⁸ NLRA § 8(d), 29 U.S.C. § 158(d) (2000). See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

²⁹ *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

³⁰ On the range of terms and conditions of employment falling within the scope of mandatory bargaining subjects, see generally *1 Developing Labor Law*, *supra* at 1155-254; *2004 Developing Labor Law Cum. Supp.*, *supra* at 333-57; Gorman & Finkin, *supra* at 661-96. For typical CBA provisions, and statistics regarding the rate at which each type of clause is included in CBAs, see, e.g., *Bureau of National Affairs, Basic Patterns in Union Contracts* (14th ed. 1995).

³¹ See, e.g., *Bureau of National Affairs*, *supra* at 7, 85.

through judicial and arbitral caselaw.³² An award resulting from a labor arbitration proceeding is subject to judicial enforcement with only a narrow scope possible for judicial review.³³

The employee, however, has little or no control over the grievance and arbitration process, in which the trade union, as exclusive bargaining agent, is free to exercise a wide range of discretion. The union is permitted to reconcile competing interests among workers it represents, as often happens, for example, when two or more workers compete for a single promotion. Moreover, a union may pursue the interests of the workforce as a whole to the detriment of the individual. For example, it may choose to arbitrate only the strongest wrongful termination cases with the aim of building a body of arbitral interpretative precedent which will strengthen the position of employees terminated in the future. The only limit on the union's discretion, whether negotiating a new agreement, or implementing an existing one, is its duty of fair representation: the union is legally prohibited from acting arbitrarily, discriminatorily or in bad faith vis-à-vis any of the employees in the bargaining unit it represents. This rule applies whether the employee is a member of the trade union, a member of a rival union, or not a union member at all. It is based on the worker's membership in the bargaining unit rather than in the trade union.³⁴

The American system combines in one representative entity, bargaining authority over an extremely broad range of workplace practices, and the determinative role within the workplace for on-site enforcement purposes. Because most CBAs leave no room for individual negotiation of terms and conditions of employment, the CBA fills the space occupied by both collective agreements and individual labor contracts in many other industrial relations systems. Because collective bargaining in the U.S. operates against a backdrop of less extensive labor legislation than

³² See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

³³ An arbitral award is to be enforced unless it fails to draw its essence from the collective bargaining agreement, contradicts specific terms of the agreement, or reflects bias, corruption or other lack of impartiality on the part of the arbitrator. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

³⁴ See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

in most industrialized countries, the CBA sets standards for the workplace that elsewhere are established by law or regulation. The American system remains one with very few legislated labor standards constraining employer flexibility. Counterbalancing this, American CBAs are far more constraining of employers not only on economic terms of employment well above general labor market rates, but on a wide range of rules regarding workplace practices.³⁵

The parties to the CBA are free to negotiate contract provisions which cover matters not mandatorily subject to bargaining, so long as the provision is not itself illegal under the NLRA or other law. Such subjects are labeled “permissive” bargaining subjects.³⁶ It is illegal for either side to exert economic pressure on the other to induce agreement on a permissive bargaining subject. Once the parties reach impasse on the terms of an agreement, and prepare to exercise economic weaponry to coerce a settlement, proposals addressing permissive subjects must be withdrawn from the bargaining table. Neither party may be compelled by the other to bargain over a permissive subject, but they nevertheless often find it in their mutual interest to do so, agreeing to permissive provisions through a tacit trade-off of interests on other, mandatorily bargainable subjects.

2. *The Collective Labor Law Quagmire Over Retirees*

There is a very long history of union negotiation of CBAs whose main provisions, covering active employee’s wages, hours, and present working conditions and rules, expire after a fixed term, but incorporating certain accrued or accumulated benefits promises which, as a form of deferred compensation, remain contractually binding thereafter. Some of the terms raising post-expiration “survival” issues are strictly applicable to active employees, such as vacation pay, severance pay, and steelworker EEP benefits, while others may cover both active workers (as future retirees) and retirees, such as pensions, health care coverage, permanent disability and life insurance benefit entitlements. As early as 1960, the Supreme Court observed, “It is a commonplace of modern industrial rela-

³⁵ See, e.g., Weiler, Paul C., *Governing the Workplace: The Future of Labor and Employment Law* (1990) (arguing that intense U.S. employer avoidance of unionization stems from this high degree of constraint imposed by American CBAs).

³⁶ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

tions for employers to provide security for employees and their families to enable them to meet problems arising from unemployment, illness, old age or death”.³⁷ This mismatch in time frame among the promises contained in a single, unified CBA, has never been addressed adequately by U.S. collective labor law. The problem now has become acute as to retiree benefits.

The Supreme Court thirty-five years ago, in *Allied Chemical Workers of America v. Pittsburgh Plate Glass Co.*,³⁸ held that CBA coverage of retirement benefits for those no longer actively employed constitutes a permissive subject of bargaining. The Court reasoned that once a worker has retired, she or he falls outside the scope of NLRA “employee” status. The retiree is therefore outside the bargaining unit for which the trade union is the exclusive bargaining representative. In addition, the Court reasoned, the interests of retirees do not “vitally affect” the interests of those in active employment. The Court also noted the potential for conflict of interest between active workers and retirees. However, it seemingly ignored the fact that without trade union representation, the retirees would be without economic leverage to deal with their former employer. The decision means that once a worker has retired, the employer may change their benefits without the consent of the union, without committing an unfair labor practice in violation of the NLRA.

The Court did recognize that during the typical three-year duration of a CBA, some workers start out as active employees, and then retire. It held that retirement benefits covering those who retire during the term of the CBA, like accrual of benefits for those still actively employed, constitutes a mandatory subject of bargaining. Simultaneously, the Court acknowledged that whether mandatory or permissive, once a provision governing benefits for retirees is included in a CBA, it remains contractually enforceable under § 301 of the LMRA in the event the employer breaches its commitments, explaining: “[u]nder established contract principles, vested retirement rights may not be altered without the promisee’s consent. The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed”.³⁹

³⁷ *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 468 (1960).

³⁸ 404 U.S. 157 (1971).

³⁹ *Ibidem*, at 181 n.20.

This holding has created a legal quagmire which has divided the courts and led to confusion over collective labor law rules regarding benefits for present and future retirees. The nature of the employees' rights created by the CBA fall somewhere between the rights —interests dichotomy conventional in many other countries; this dichotomy is standard as well in non-labor law-related American contract law settings. The CBA has been characterized by the Supreme Court as “more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . It calls into being a new common law—the common law of a particular industry or of a particular plant”.⁴⁰ Supreme Court cases embody the understanding that CBAs will be interpreted not as literal contracts but as living documents, with aspects in the nature of a legislative code governing the workplace, aspects in the nature of third party beneficiary agreements, and aspects of a living agreement “in a continuous collective bargaining process”,⁴¹ subject to flexible interpretation and application by the parties and the arbitrator or court charged with interpreting the agreement. Although this understanding is settled as to CBA provisions covering those actively employed, it fits poorly with Supreme Court caselaw regarding retirees.

Since retirees were held in *Pittsburgh Plate Glass*, upon retirement, no longer to be in the bargaining unit, the union has no exclusive representation rights as to them, and owes them no duty of fair representation. Active workers normally are not free to represent themselves in enforcing CBA rights, and usually are required to file a grievance and request that their exclusive bargaining representative, the trade union, pursue their claim under the CBA grievance and arbitration dispute resolution procedure. However, the Supreme Court suggested in *Pittsburgh Plate Glass* that upon retirement, the retirees would be free individually to enforce their collectively bargained benefits rights. This implies that in the Court's view, retiree benefits rights derived from the CBA would vest as individually enforceable rights at the point where the worker retires. The Court's language on the other hand also can be read to permit the union which negotiated the CBA to initiate proceedings to enforce it, including as to retirees. Thirty-five years after *Pittsburgh Plate Glass* was decided, the case law remains unsettled as to whether the union may voluntarily

⁴⁰ *Warrior & Gulf*, 363 U.S. at 578-79.

⁴¹ *Enterprise Wheel*, 363 U.S. at 596.

enforce retiree rights under the CBA, whether a retiree must utilize the CBA grievance and arbitration machinery, with or without union representation, or whether the retiree may proceed into court under § 301 of the LMRA with a claim for breach of contract arising under the CBA.

It is common for trade unions to bargain improved retiree benefits in subsequent CBAs after the worker has already retired, even though the subject is permissive and the employer is free to refuse to negotiate over them. In such cases, there remain open questions of law regarding whether the retiree becomes vested in his or her rights arising under the post-retirement CBA, under which the retiree was never actively employed. In traditional contract terms, the issue might be put as whether the new CBA constitutes a novation of the prior one as to the retiree's benefits, with the retiree as a purely third party beneficiary of the agreement.

Finally, a trade union ordinarily may, in later CBAs, modify provisions in ways that disadvantage some or all employees compared to their accumulated, seemingly vested rights under prior agreements. For example, changes in seniority systems often have such consequences. This is within the scope of the trade union's broad authority as exclusive bargaining agent. However, if retiree benefits vest upon retirement, since the union is no longer the retiree's exclusive representative, it is questionable whether the union may bargain reductions in the benefits of those already retired with the employer to the extent that the benefits are deemed to be vested for life.

There is also complicated and contradictory caselaw under both the NLRA and the LMRA about how to tell when a CBA provision regarding retiree benefits is intended to survive past the general expiration of the CBA. Pension plans usually make post-CBA survival self-evident, but retiree health care benefits pose subtler problems. Many other forms of deferred compensation, such as vacation pay, sales commissions, and severance pay, raise similar sorts of questions, being earned during the period when the CBA was in force, but sometimes falling payable thereafter. In all cases, post-CBA survival of an employee benefits promise is a question of contractual interpretation of the CBA.⁴² In a few cases, employers even have been held liable, even after closure of the firm's plant

⁴² See, *e.g.*, *Nolde Bros. v. Bakery Workers*, 430 U.S. 243 (1977); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). See also *Litton Financial Printing Div'n, Litton Bus. Sys., Inc.*, 501 U.S. 190 (1991).

subsequent to expiration of the CBA, to continue to provide retired workers with retiree life insurance promised under the CBA.⁴³

Retiree health care benefits, as well as certain types of pension benefits, sometimes include a promise of lifetime retirement benefits for the retiree and spouse, which can be extremely costly to the employer. The period over which the deferred compensation is payable may last the combined lifetime of the retiree and spouse. Such an obligation implicitly incorporates a very long-term obligation, rather than one just to provide benefits during the two or three year term of the CBA. Benefits promises which appeared to be modest and inexpensive in their origin have become considerably more expensive over the years, and employers are now seeking every legal possibility to jettison such obligations.⁴⁴ There is a growing, contradictory body of federal court caselaw attempting to discern when the trade union and employer intended to create lifelong employee benefits as opposed to when the promise of lifetime benefits was intended only to last as long as the CBA, and to be subject to negotiation for renewal in every subsequent CBA.

3. *Contradictory Tendencies in Employee Benefits Law*

Judicial interpretation of ERISA, the employee benefits law, has only made this situation more complicated. In the area of pensions, the law makes clear that promises of retirement benefits derived from employer contributions covering periods already worked, hence accrued, become irrevocable as to vested benefits. The law requires that in most cases, tax-qualified pension plans must fully vest accrued benefits within either five or seven years after commencement of employment. Benefits derived from the employee's own contributions are immediately vested.⁴⁵ As to other retiree benefits, such as health insurance, dental insurance, disability insurance, life insurance, and severance pay schemes, however, along with similar insurance benefits covering active employees

⁴³ See, e.g., *Roxbury Carpet Co.*, 73-2 Lab. Arb. (CCH) 8521 (1973).

⁴⁴ See, e.g., *Source Book 2005*, *supra* (a survey of unionized employers in advance of the 2005 round of collective bargaining found that reducing health care and pension-related benefit costs was the number one collective bargaining objective of employers, even if they had to provide higher wage increases in return).

⁴⁵ 29 U.S.C.A. § 1053; 1054(g) (West 1999 & Supp. 2005). See *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004).

and family members, the Supreme Court has noted that ERISA provides no pension-like rules about vesting or prohibiting cut-backs in promised benefits. As a result, the Court has held that absent a contractually binding promise not to modify such health and welfare benefits, ERISA permits employers to include a reservation of rights clause in their plans reserving the right to modify or terminate the plans at will.⁴⁶

Because there is no collective partner with whom the employer can negotiate over such changes, and because these plans are required to be fairly uniform across large groupings of employees, absent a CBA, it is effectively impossible to contractually bind an employer unless the employer does so unilaterally and voluntarily, in recent years, a very rare occurrence. The trend among courts to hold such benefits to be “non-vested”, meaning alterable at the will of the employer, upon notice to the employees or retirees, in the non-union environment has been spilling over to cases involving contracted-for benefits negotiated under CBAs. ERISA itself, however, says that “[n]othing in this [law] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States...”,⁴⁷ which category includes the NLRA and the LMRA. Courts are divided about how to interpret in harmony the NLRA, LMRA and ERISA in this area in cases in which the retiree benefits are derived from a CBA.

4. Other Escape Hatches for Employers Evading Long-Term Promises: Bankruptcy Reorganization and Business Restructuring

The nature and ease of use of the U.S. Chapter 11 bankruptcy reorganization scheme as a vehicle for corporations to escape prospective obligations to employees and retirees, exacerbates these difficulties of ensuring enforceable promises as to pensions, health care and other types of benefits which are forms of deferred compensation expected to be provided over many years. In contrast to the role of bankruptcy in many countries, corporate bankruptcy in the U.S. does not force the employer to face liquidation; it permits the business entity to operate while under bankruptcy court jurisdiction, while jettisoning all pre-bankruptcy, incompletely performed, hence “executory”, contracts. After a Supreme

⁴⁶ Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995).

⁴⁷ 29 U.S.C. § 1144(d) (2000).

Court decision holding that the executory contract rule applied to permit employers in bankruptcy unilaterally to set aside a CBA which would otherwise be in force,⁴⁸ Congress amended the law to compel the employer to bargain in good faith before a bankruptcy judge could set aside the CBA, required permission of the court absent agreement with the trade union, and provided for representation by trade union and by retirees in the bankruptcy reorganization process.⁴⁹ Nevertheless, most observers regard the bankruptcy process as heavily tilted in favor of the interests of lenders and general creditors, and against the interests of the employees unless they have sufficient economic leverage to exercise their right to strike upon abrogation of the CBA in the bankruptcy proceeding. Not only bankruptcy itself, but the threat that the employer may pursue a bankruptcy reorganization, has put great pressure on trade unions who seek to maintain benefits for active workers and retirees.

I would be remiss here if I did not mention the biggest loophole of all in American labor law: its approach to capital redeployment, corporate reorganization, subcontracting, and successorship which facilitates a variety of mechanisms for employers to escape from unionization and collectively bargained obligations, in part because of the lack of a principle akin to European rules on transfers of undertakings. As I have suggested elsewhere,⁵⁰ free mobility of U.S. capital and jobs, both domestically within the U.S. and transferring them overseas, along with the absence of any statutory prohibition against termination of employment, however long term, has played a major role in the decline of union membership and representation in the U.S. I would here add that employer mobility is simultaneously both directly and indirectly undermining the employee benefits system. Indirectly, as unions decline, the power of workers to bargain for these benefits decreases and their prevalence falls. Directly, many of these benefits increase with longevity on the job, or with the employer, and are conditioned on employees having completed a preliminary period of employment. Moving the workplace across the country elimi-

⁴⁸ NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

⁴⁹ Bankruptcy Amendments and Federal Judgeship Act of 1984 § 541(a), 11 U.S.C. § 1113 (2000); Retiree Benefits Bankruptcy Protection Act of 1988 § 2(a), 11 U.S.C. § 1114 (2000) [and amended in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 447 and sec. 1403].

⁵⁰ See Weiss, Marley S., "Transnational Capital Mobility and Domestic Collective Labor Relations: U.S., German, and Japanese Comparisons", forthcoming, <http://www.ssrn.com>.

nates most incumbent employees, replacing them with new ones. Hiring a subcontractor means the employer is itself no longer employing the workers hence they are not covered by its benefit programs. Sending the work offshore means U.S. benefit plans and law relating thereto are mostly inapplicable.

IV. IMPLICATIONS FOR LABOR LAW AND INDUSTRIAL RELATIONS

At present, retirement in the U.S., as in many other countries, is based on a three-legged stool approach. Social Security provides a minimum living standard retirement benefit for workers. Employment-based retirement programs, usually wholly or partially employer-funded, provide a substantial monthly income on top of the Social Security benefit, and personal savings provides the third branch of the retirement support system. For the poorest workers, Social Security provides nearly all of their retirement income. However, those in the middle and upper earnings brackets, below the very top executives, depend heavily on pension benefits for income during retirement. The rapidly rising cost of health insurance makes employer-provided retiree health care benefits a key motivator in early retirement programs; even after the employee attains age sixty-five eligibility for government-provided Medicare health benefits, employer-provided supplemental benefits are extremely valuable and difficult to replace. Continued erosion of the stability of these forms of retirement benefit threatens the economic security of the middle class in retirement.

American demographic developments, that is, the increasing ratio of retired workers to active labor force members caused by the overall aging of the population, only partially account for the growing burden on health care and retirement schemes, and have little to do with the dropping levels of collective bargaining coverage. Other, interrelated factors account for a large share of these changes, which are gradually destroying the standard of living for working families and retirees in the U.S.: the shifting to overseas facilities of an ever-growing portion of manufacturing work as well as certain services, previously performed in the U.S. by predominantly unionized employees; the elimination of collectively-bargained pension and health care obligations through Chapter 11 bankruptcy reorganization; reductions in established retiree and active employee

benefits by employers acting unilaterally; reductions in established employee and retiree fringe benefits negotiated in concessionary collective bargaining between union and employer conducted under the threat of relocation of the work abroad, a Chapter 11 bankruptcy filing, or unilateral employer action.

In the early years of employee benefit plans, there were many more active workers than retirees. Shrinkage of many important industries has since, over time, substantially lowered the ratio of active to retired workers, concomitantly increasing the labor cost impact of retiree benefits. For example, at present, shrinking market share of the traditional, hub-and-spoke, major U.S. air carriers like United, Delta, and American Airlines under intense competition from low-fare, point-to-point upstarts such as Southwest and Jet Blue, is forcing down wages and benefits in the older “legacy” carriers. A similar phenomenon has been developing more slowly, over three decades, for the “legacy” U.S. automobile manufacturers, General Motors, Ford, and the Chrysler portion of Daimler Chrysler, in competing with Japanese, Korean and other foreign-based manufacturers, when they produce vehicles in the U.S.

The new entrants start, at least, with a new, younger labor force, no existing pension benefits to amortize, no retirees to whom continued health care benefits were promised, and a zero ratio of retirees to active employees. Even if the new entrants paid identical wages and employee benefits as the established firms, their labor costs would be substantially lower. The low-cost air carriers have in less than ten years driven the major, “legacy” carriers to drastic restructuring and in several cases, bankruptcy reorganization. This process has taken two or three times as long in automobile manufacturing, most likely because labor costs are a much lower, and declining portion of the cost of manufacturing a car, as opposed to providing air transportation.

Voices have begun to call for the U.S. to adopt an industrial strategy, or to alter its Social Security and health care system to de-couple pension and health care benefits from provision by the employer, hence from corporate labor costs. Yet it should be clear that a problem parallel to that afflicting American employers would arise upon a shift of the full burden of providing retirement and health care benefits from American business to society as a whole and the taxpaying public. The new entrants into the modern market to provide goods and services, such as

China and India, are only in the early stages of full development, have a large reserve labor force, little or no existing obligation to provide pension, medical, or other benefits undertaken by either government or employers, and a relatively much younger labor force. Just as it is difficult for Ford Motor Company to compete with Hyundai because of Hyundai's lack of accrued employee and retiree benefits provide it with lower labor costs, it may prove difficult for whole societies full of aging and retired workers, who have earned and are owed societally-provided benefits, to compete with businesses in developing countries where social benefits are in their infancy, and the younger labor force would in any event require proportionately lower expense to provide the same level of benefits.

This is a growing problem in nearly every mature, developed country, as much as that of the U.S., and one to which more attention should be given.