2016

Introduction to Thinking about a Post-ACA World: Litigation, Cost Shifting and Enforcement of Statutory Rights

Maria O'Brien
Boston University School of Law

INTRODUCTION TO THINKING ABOUT A POST-ACA WORLD: LITIGATION, COST SHIFTING AND ENFORCEMENT OF STATUTORY RIGHTS

BY
MARIA O' BRIEN HYLTON*

At its annual gathering in 2016, members of the Employee Benefits and Executive Compensation and Law, Medicine and Healthcare Sections of the Association of American Law Schools (AALS) jointly sponsored a discussion of the future of the Affordable Care Act (ACA) following the Supreme Court's decision in *King v. Burwell*.[1] What follows are the papers generated for the panel discussion. The panelists[2] were asked to evaluate the future of the ACA from a distinct perspective.

Jonathan Adler of Case Western Reserve University School of Law describes the constellation of forces that the ACA brought together which quickly generated enormous amounts of federal litigation.[3] Natalya Shnitser focuses on the ACA's expansion of access to the individual insurance market which has created an important alternative to employer-sponsored health insurance. This, she predicts, will relieve pressure on public employers to continue to fund retiree health insurance.[4] Finally, Colleen Medill of the University of Nebraska College of Law compares and contrasts two options (one recently created by the ACA) for employees to enforce rights to health insurance.[5]

---

* Professor, Boston University School of Law.

1. 135 S. Ct. 2480 (2015).

2. The panel included the three authors whose work is published here as well as an excellent presentation by Nicole Huberfeld of the University of Kentucky College of Law. Professor Huberfeld graciously stepped in at the last minute to cover for a colleague facing a family health emergency and was not, under these circumstances, able to produce a paper. Each of the panelists and I remain extremely grateful for her considerable contributions at the meeting.

3. Jonathan H. Adler, *Of Kings to Come: The Future of Health Care Reform Still Remains in Federal Cour*t, 20 EMP. RTS. & EMP. POL'Y J. 133 (2016).

4. Natalya Shnitser, *Accounting and the ACA: New Choices and Challenges for Public Sector Retiree Health Plans*, 20 EMP. RTS. & EMP. POL'Y J. 147 (2016).

5. Colleen E. Medill, *Comparing ERISA and Fair Labor Standards Act Claims Under the Affordable Care Act*, 20 EMP. RTS. & EMP. POL'Y J. 173 (2016).

As Professor Adler notes the U.S. Supreme Court has already ruled on three major cases challenging various provisions of the ACA and recently agreed to review a fourth. In addition, numerous other cases are pending in lower federal courts. This he argues is not unusual for a major piece of new regulatory legislation. What makes the ACA different however is that it continues to be viewed as the culmination of a *partisan* process that reveals stark party-based differences of the sort that are often resolved *before* a bill becomes law.

Adler notes that the ACA continues to be viewed as illegitimate because of the absence of bipartisan support and the unorthodox use of the reconciliation process. The lack of legitimacy only encourages opponents to litigate as a mechanism to undo legislation that opponents believe is grounded in raw politics and not legislative consensus. Adler's description of the ad hoc (and maybe illegal) implementation of the statute bolsters his prediction that we are likely to see ACA litigation for the foreseeable future.

Professor Shnitser provides a compelling account (and one of the few bright spots in the ongoing saga) of public sector retiree health care benefits and the ACA. She notes that insurance purchased on an exchange (which survived the challenge presented in *King v. Burwell*) will often be less expensive for certain early retirees than insurance provided through employer sponsored plans. And, for retirees who are Medicare eligible, the ACA changes to Medicare (especially the effort to the close the infamous "donut hole") creates an incentive for public employers to move retirees onto exchanges. For public sector employers, already struggling under the weight of increased health care and pension costs for retirees[6], this option should come as welcome news. (Private employers long ago addressed the huge unfunded liabilities presented by these promises to retirees. The public sector has been slow to do so and Shnitser describes the important role that GASB 45 has played in focusing attention on this issue.)

Professor Medill's careful analysis of the two different mechanisms by which an employee may attempt to vindicate rights to

---

6. See, e.g., Paul Fronstin and Nevin Adams, "Employment Based Retiree Health Benefits: Trends in Access and Coverage 1997-2010," <www.ebri.org>, No. 377, October 2012; Jason Richwine, "Nine Fallacies Used to Defend Public Sector Pensions, <www.heritage.org /research/reports>, Backgrounder #2765, February 5, 2013; Robert Clark and Melinda S. Morrill, "The Funding Status of Retiree Health Plans in the Public Sector," <www.nber.org>, working paper no. 16450, October 2010.

health insurance rounds out the work of the panel. She notes that Section 510 of ERISA requires a plaintiff to prove that an employer had *specific intent* to interfere with current or future rights to plan benefits. She notes that section 510 litigation has not always been easy for plaintiffs, in part because of the problem of mixed motives. She suggests that plaintiffs consider Fair Labor Standards Act section 18C as a superior alternative. Unlike ERISA 510, a FLSA section 18C claim begins by placing a high burden of proof *on the employer*; however, it also provides a fairly short statute of limitations as well as other disadvantages that Medill carefully describes.

At the end of the day, as Medill well knows, it is the lived experience of health insurance that matters to insureds. Insurance that is unavailable or which provides few benefits when needed is of no benefit to employees and their dependents. Her paper is a reminder that promised rights that cannot be enforced (either via ERISA or the Fair Labor Standards Act) are essentially meaningless.