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TOWARDS THE DEVELOPMENT OF GOVERNANCE PRINCIPLES FOR THE ADMINISTRATION OF SOCIAL PROTECTION BENEFITS: COMPARATIVE LESSONS FROM DUTCH AND AMERICAN EXPERIENCES

Frans Pennings* and Paul M. Secunda**

The purpose of this article is to introduce a new approach to social protection benefit provision through an analysis and comparison of two of the advanced benefit systems in the world. Both the Dutch and American examples teach us that meaningful social benefit protection is possible, consistent, and necessary within market-based societies.

Our recommendation is that advanced-market societies start a discussion on social protection benefits based on the dual principles of federalism/subsidiarity and fiduciary duty. Federalism provides that the national/federal government should provide the principles and minimal framework for benefit provision, while regional authorities, employers, and insurance companies should be given freedom, and the duty, to implement the underlying schemes to meet the challenges of the local situation. However, to constrain the sometime self-interested and conflicted motives of employers and insurance companies in the benefits system, we also suggest that countries adopt, at the national level, fiduciary duties of loyalty and care to protect against abuse, discrimination, and arbitrary action in the provision of such benefits. In addition, these principles should also be applied to employer-sponsored schemes in both countries, to the extent that such duties do not already exist.

We hope, and believe, that through the construction of such a social benefit system, countries can guarantee a minimal level of benefit protection that will help their citizens negotiate difficult times during retirement, disability, sickness and injury, and unemployment. In turn, the "benefit" of such a system will be the recognition of the dignity and self-worth of all individuals, which is a non-ideological goal that we can all embrace.

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TABLE OF CONTENTS

I. INTRODUCTION.....	316
II. SOCIAL PROTECTION BENEFIT SYSTEM IN THE UNITED STATES.....	318
A. OLD AGE AND SURVIVORS.....	323
B. STATE AND EMPLOYER-SPONSORED DISABILITY PROGRAMS (SSDI).....	327
C. UNEMPLOYMENT COMPENSATION.....	330
D. SICKNESS AND FAMILY BENEFITS: THE FAMILY AND MEDICAL LEAVE ACT (FMLA).....	334
E. PUBLIC AND PRIVATE HEALTH INSURANCE IN THE UNITED STATES.....	336
1. Public Health Social Insurance Programs.....	336
2. Government-Regulated Private Health Insurance.....	340
III. SOCIAL PROTECTION BENEFIT SYSTEM IN THE NETHERLANDS.....	344
A. OLD-AGE PENSIONS.....	349
1. The National Old-Age Pension Act.....	349
2. Supplementary Old-Age Pensions.....	350
B. THE NEW DISABILITY BENEFITS ACT OF 2004.....	351
C. UNEMPLOYMENT BENEFITS.....	356
D. PROTECTION IN CASE OF SICKNESS.....	359
E. HEALTHCARE BENEFITS SCHEME.....	364
IV. COMPARISON OF THE DUTCH AND AMERICAN SOCIAL PROTECTIONS SYSTEMS.....	368
A. THE LEVELS OF PROTECTION ENSURED AND THE DISTRIBUTION OF RESPONSIBILITIES.....	369
1. Old Age and Survivors.....	369
a. Pensions Whose Contents are Defined by National Law.....	369

	b. Occupational (Employer-Sponsored or Union-Sponsored) Retirement Plans.....	370
	B. DISABILITY BENEFITS.....	373
	1. Disability Schemes Defined in Legislation	373
	2. Employer-Sponsored Benefits.....	374
	C. UNEMPLOYMENT BENEFITS.....	376
	D. PROTECTION IN CASE OF SICKNESS.....	377
	E. HEALTH CARE BENEFITS.....	379
V.	GENERAL DIFFERENCES IN THE ORGANIZATION OF THE SYSTEMS.....	381
	A. USE OF PRIVATE ACTION.....	381
	B. EXTENT OF OCCUPATIONALLY-BASED BENEFIT SYSTEMS.....	384
	C. IMPLICATIONS OF COUNTRY COMPARISONS.....	385
VI.	OF FEDERALISM AND FIDUCIARY DUTIES: PRELIMINARY PROPOSALS AND RECOMMENDATIONS FOR TWENTY-FIRSTCENTURY SOCIAL PROTECTION.....	386
VII.	CONCLUSION.....	392

I. INTRODUCTION

Social protection benefits include retirement, disability, unemployment, sickness, and healthcare benefits. In Western Europe and the United States, these benefits have developed both symmetrically and asymmetrically. Some historical factors that influenced the systems were basically the same: the Industrial Revolution led to a demand for dependent workers; because of their dependency, protective measures had to be taken, otherwise mass poverty threatened.¹ Another important development was the crisis of the 1930s that led in the next decade to the conviction that society should be free from want and poverty.² This idea was first realized in the United States, with the federal Social Security Act,³ but was also adopted in Europe where, during the Second World War, blueprints were adopted for a better society after war.⁴

There are also important differences. In the Netherlands, as a result of the involvement of Christian Parties in the government and Parliament, there is a general principle that ensuring a sufficient income for living is a public concern,⁵ whereas in the United States, the focus has been much more on individual responsibility.⁶ This difference in approach to social protection systems can still be clearly seen today. At first glance, a comparison of one European and the American system would therefore not appear to be very fruitful, but an initial analysis that the authors completed during a conference three years ago at Gothenburg University in Sweden persuaded them to undertake an in-depth comparison.

In short, Western European and American social protection

1. Abe Bortz, *Historical Development of the Social Security Act*, SOC. SEC. ADMIN. (Sept. 21, 2014), <http://www.ssa.gov/history/bortz.html>; David N. Jones, *International Social Work and Social Welfare: Europe*, ENCYC. OF SOC. WORK (June 2013), <http://socialwork.oxfordre.com/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-568?rskey=EaHAMf&result=1>.

2. Bortz, *supra* note 1.

3. Arthur J. Altmeyer, *Social Welfare in The United States*, SOC. SEC. HISTORY, www.ssa.gov/history/aja964.html (last visited Apr. 21, 2015).

4. *Id.*

5. National Reform Programme: The Netherlands 2013, http://ec.europa.eu/europe2020/pdf/nd/nrp2013_netherlands_en.pdf.

6. *What is Social Security?* NAT'L ACAD. OF SOC. INS., www.nasi.org/book/export/html/159 (last visited Apr. 21, 2015).

benefit systems have important elements in common: (1) the risks against which they seek to provide protection, (2) the benefits provided by the system, and (3) the principles supporting these social protection programs. Similarly, these systems have many challenges in common, specifically the increasing greying of their populations and the need to ensure adequate access to minimum retirement, disability, unemployment, sickness, and healthcare income. There has been a move to include more private actors in the social insurance systems in both Western Europe and the United States, with mixed success being experienced for different reasons.⁷ As a result, the authors believe a more in-depth analysis comparing these different systems would be fruitful in aiding an understanding of the development of these programs, as well as providing important lessons about one another's social protection benefit experiences.

In this comparison, the authors will primarily deal with a major question for organizing social protection by law: Who is responsible for the provision of benefits? This approach enables us to compare different systems because it leaves open whether and how a particular risk should be protected. The answers to this question then allow us to compare how these issues are addressed in Western Europe, specifically in the Netherlands, in contrast to the United States.

We will investigate major parts of the Dutch system with those of the United States, focusing on provisions made for protection of retirement, disability, unemployment, sickness, and healthcare benefits. We conclude that some programs are better provided at the national level, while other programs are more suited for local or regional treatment. Additionally, we conclude that some social protection programs are better provided by public bodies alone, while other programs can benefit through various forms of private actor participation. Finally, we embrace the ideas of federalism and subsidiarity on the one hand, and fiduciary duty on the other.

Federalism provides that the national government should provide the principles and minimal framework for benefit

7. *See generally* FRANS PENNING, THOMAS ERHAG & SARA STENDAHL (EDS.), *NON-PUBLIC ACTORS IN SOCIAL SECURITY ADMINISTRATION, A COMPARATIVE STUDY* (Kluwer Law International, 2013) (discussing in a series of countries, including the United States, whether non-public actors have a role to play in the administration of social protection benefits).

provisions,⁸ while principles of subsidiarity provide that regional authorities, employers, and insurance companies should be given freedom, and the duty, to implement the underlying schemes to meet the challenges of the local situation.⁹ However, to constrain the sometimes self-interested and conflicted motives of employers and insurance companies in the benefits systems in both countries, we suggest that countries adopt, at the national level, fiduciary duties of loyalty and care for benefit administrators to protect against abuse, discrimination, and arbitrary action in the provision of social protection benefits.

This paper is divided into six Parts. Part II discusses the social protection benefit system in the United States. Part III undertakes a similar analysis of the Dutch system. Part IV then draws out some important similarities and differences between the two systems. Part V considers different dimensions through which it is possible to find unifying themes between the Dutch and American social protection systems. Part VI concludes by proposing that retirement, disability, unemployment, sickness, and healthcare benefits be provided based on principles of federalism and subsidiarity and fiduciary duty, or through national governments with local assistance from regional authorities, employers and insurance companies. On the other hand, to combat self-interested motives of private actors, we recommend that national fiduciary standards of loyalty and care be implemented to make benefit provision more consistent with individual self-worth and dignity.

II. SOCIAL PROTECTION BENEFIT SYSTEM IN THE UNITED STATES

Social protection benefits in the United States evolved over time and were shaped by important historical factors. Throughout the colonial period, support for those in need revolved around the concept of community responsibility (where the poor relied on the community itself to help them through difficult times, rather than public institutions).¹⁰ By the mid-1800s, Americans started requesting a form of public welfare;

8. Altmeyer, *supra* note 3.

9. David A. Bosnich, *The Principle of Subsidiarity*, ACTON INST. FOR THE STUDY OF RELIGION AND LIBERTY, <http://www.acton.org/pub/religion-liberty/volume-6-number-4/principle-subsidiarity> (last visited Apr. 21, 2015).

10. Bortz, *supra* note 1. This system worked fairly well at the time given that territories were not expansive and communities were tight knit, making it easy for people to support each other. *Id.*

the response came in the form of “custodial institutions” for the poor, insane, criminals, etc.¹¹

The Industrial Revolution became the most formative and influential factor in the development of modern social protection benefits in the United States.¹² The Industrial Revolution led to income dependence: People now had real responsibilities to both procure and maintain jobs, or face the consequences of not being able to provide enough for their families.¹³ As the number of Americans (or workers) unable to support their families increased, backing for a true public welfare system grew, and the concept of a bureau for public welfare emerged.¹⁴ Public opinion shifted, there was more “recognition that poverty was often attributable to social inequities rather than personal defects.”¹⁵ All of these shifts helped shape the structure of the current American system.

In the United States, the basic social protection programs are run predominantly by the federal (national) government,¹⁶ with some important exceptions for each type of social protection program where states and private actors also play a role.¹⁷ On the other hand, government actors, as opposed to private actors, play the predominant role in the administration and implementation of these programs.¹⁸

11. *Id.*

It appears that the post-Revolutionary War generations were far more prepared than their predecessors to assign a larger share of responsibility for dependent behavior to the structure of society itself rather than to individual idiosyncrasy, choosing to locate in existing social arrangements the essential causes of the problem. As they viewed it, American society was so open and unstructured—filled with limitless opportunities for achievement and vice—and its members so inadequately prepared to cope with it—since neither church nor school, nor, above all else, family provided the necessary discipline—that poverty, crime and insanity threatened the welfare of the new republic. *Id.*

12. *See id.* (examining triggers during the revolution that helped shaped social security policy, such as cities growing too fast with millions living in poverty, exploitation of minorities, and rampant unemployment).

13. *Id.*

14. *See id.* The idea for such a bureau started in Kansas City in 1910.

15. *Id.*; but see generally Colleen E. Medill, *The Individual Responsibility Model of Retirement Plans Today: Conforming ERISA Policy to Reality*, 49 EMORY L.J. 1, 5-9 (2000); Edward Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 471 (2004) (discussing individual responsibility model in employee benefit law context).

16. Altmeyer, *supra* note 3.

17. *Id.*

18. *Organizational Structure of the Social Security Administration*, SOC. SEC.

As an initial matter, it is important to point out that the term “Social Security” in the United States refers to the government-run insurance program for older and disabled Americans.¹⁹ The term was first used when Congress passed the federal Social Security Act in 1935.²⁰ Shortly after World War II, it became popular in Europe, introduced by the *Beveridge Report* that had the term “social security” in its title.²¹ This means—maybe somewhat remarkably—that Europe inherited the term from the United States. Still, it has an entirely different meaning in the United States than in Europe (where it generally refers to all schemes covering social risks).²² In the United States, pension and disability benefits are defined by federal Social Security statutory law, while all states have their own public sector pension statutes and a few states have state-provided disability plans.²³

In addition to Social Security, a large segment of the American populace receives employer-provided retirement and welfare benefits either under collective bargaining agreements or, more likely, through the unilateral and voluntary actions of employers (spurred on by vast tax subsidies for sponsoring such benefit plans).²⁴ The federal Employee Retirement Income

ADMIN., <http://www.ssa.gov/org/orgdco.htm> (last visited Apr. 21, 2015).

19. See *History FAQs*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/hfaq.html> (last visited April 21, 2015) (“The Social Security Act was signed by FDR on 8/14/35. Taxes were collected for the first time in January 1937 and the first onetime, lump-sum payments were made that same month. Regular ongoing monthly benefits started in January 1940.”).

20. See NEVILLE HARRIS, *SOCIAL SECURITY IN CONTEXT* 14 (Oxford University Press, Inc. 2000) (“This term indicated a broad view of the objective of state support: from one which was conditional on insurance, and thereby restricted to workers, to a system of social protection for all in poverty and need.”).

21. See generally WILLIAM BEVERIDGE, *SOCIAL INSURANCE AND ALLIED SERVICES*, BEVERIDGE REPORT, (H.M. Stationery Office 1942), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf (providing a blueprint for post-war social protection system in Europe).

22. See generally *infra* Part III (on the Dutch Social Protection Benefit System in the Netherlands).

23. See, e.g., ST. OF CAL. EMP. DEV. DEP’T, <http://www.edd.ca.gov/disability/> (last visited Apr. 21, 2015) (providing an overview of California’s state-provided disability plan, which acts as a partial wage-replacement insurance plan).

24. See Dustin Mineau, *The 401k is a Government Subsidy for Wall Street*, DAILY KOS (Sept. 27, 2012, 1:32 PM), <http://www.dailykos.com/story/2012/09/17/1132891/The-401k-is-a-Government-Subsidy-for-Wall-Street#>. Employers get tax deductions and or credits for the creation of a 401k plan, as well as additional benefits for matching an employee’s contributions. *Id.*

Security Act of 1974 (ERISA)²⁵ provides rules for the provision of such benefits, including rules for the protection of certain forms of pension funds from forfeiture.²⁶

The American Social Security system is funded on a pay-as-you-go (PAYG) basis and takes the form of a defined benefit plan.²⁷ After employers and employees pay into the program, during the employee's working life, the employee begins to receive a defined retirement benefit after she reaches a designated retirement age (which can vary based on the individual's wishes as to when she or he wishes to start receiving benefits).²⁸ This program in its current form, after some futile attempts to introduce privatization, remains bereft of private actors, and is run completely by the Social Security Administration, which is an independent federal agency.²⁹

The rest of this Part considers the four major American social insurance schemes: (1) the old-age, survivor, and disability insurance program under Social Security; (2) the unemployment compensation system; (3) the Family and Medical Leave Act (FMLA)³⁰ for sickness and family leave; and (4) with regard to healthcare, both the public Medicare and Medicaid health insurance systems, as well as the private health insurance

25. 29 U.S.C. § 1001 et seq. (2012).

26. See *Health Plans & Benefits: Employee Retirement Income Security Act – ERISA*, U.S. DEPT OF LABOR, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited Apr. 21, 2015) (explaining plan requirements that all participants must abide by).

27. See NAT'L ACAD. OF SOC. INS., *supra* note 6 (describing how today's current workers pay into the system with money flowing back out to current beneficiaries knowing they will receive a similar benefit once they reach retirement age).

28. See *Retirement Planner: Benefits By Year Of Birth*, SOC. SEC. ADMIN., <http://www.socialsecurity.gov/retire2/agereduction.htm> (last visited Apr. 21, 2015). A person can start receiving Social Security Benefits as early as 62 or as late as 70. *Id.* But if someone chooses to start receiving payments early, the benefit is reduced fractions of a percent for each month before full retirement age. *Id.*

29. See Kathleen Schlach, *Bush Eyes Privatizing Social Security in Second Term*, NPR (Nov. 11, 2004, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4164384> (stacking up President George W. Bush's three proposed social security reform models, all of which failed to gain any traction); see also James K. Glassman, *Moynihan's Social Security Plan*, WASH. POST A19 (Mar. 24, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/security/stories/oss040898.htm> (outlining Sen. Daniel Patrick Moynihan's (D-N.Y.) proposal to change Social Security by cutting the payroll tax so that Americans could use the money for their own private retirement accounts); *Social Security in the United States*, INFOPLEASE.COM, <http://www.infoplease.com/encyclopedia/society/social-security-in-united-states.html> (last visited Apr. 21, 2015).

30. 29 U.S.C. § 2601 (2012).

system under the Affordable Care Act (ACA). Part A. discusses pensions and disability insurance under the federal Social Security program. More specifically, this section considers why privatization has been unsuccessful, even though such participation might lead to more choice, more efficiency, and more activation. “Activation” is a term generally absent from social insurance discussions in the United States. The term is used here to refer to activation strategies that seek to activate large groups of inactive persons in the labor market, such as recipients of unemployment or disability benefits.³¹ Privatization, and the greater use of private actors in the social insurance context, tends to go hand-in-hand with redirecting resources toward activation strategies.³²

Part B. next explores the federal-state unemployment compensation program and highlights the few places where non-public actors have played a role in this program, primarily in the job search context. Additionally, this Part considers why it is unlikely that unions and employer organizations will play a greater role in the future development of this program, similar to the European Ghent System of unemployment insurance.

Part C. discusses the largely inadequate American version of sickness benefits. Unlike many other countries, the United States does not have a national social insurance scheme that provides for sickness benefits. Instead, under the federal Family and Medical Leave Act (FMLA), qualified employees are entitled to twelve weeks of unpaid, job-protected leave for designated reasons.³³ In addition to the federal FMLA, as discussed in more detail below, many states and municipalities have their own equivalent laws and various types of sickness benefits.

Finally, Part D. is divided into two subparts. The first subpart discusses the public health insurance programs, Medicare (for the elderly and disabled) and Medicaid (for the poor, needy or disabled). The second subpart recognizes that without a true national healthcare system, those not covered by Medicare or Medicaid must find health insurance coverage either through their employer or on their own through the

31. See Werner Eichhorst & Regina Konle-Seidl, *The Interaction of Labor Market Regulation and Labor Market Policies in Welfare State Reform*, 28 COMP. LAB. L. & POL'Y J. 1, 27 (2006).

32. See Robert H. Cox, *From Safety Net to Trampoline: Labor Market Activation in the Netherlands and Denmark*, 11 GOVERNANCE: INTL.J. POLICY & ADMIN. 397, 397 (1998).

33. 29 U.S.C. § 2612.

private market. Consequently, health insurance remains largely an employer-dominated area in the United States, and the Affordable Care Act (ACA) plays a large role in the provisions of healthcare for an increasing number of Americans. So, the second subpart discusses the provision of private health insurance through employer-sponsored plans under ACA and ERISA.

A. OLD-AGE AND SURVIVORS

In the Old-Age, Survivors, and Disability Insurance program (OASDI), the federal system organizes retirement security for elderly and disabled persons, as well as for survivors of elderly couples.³⁴ The Social Security Act was signed into law by President Franklin Delano Roosevelt in 1935 as part of his New Deal Program.³⁵ It now covers some 58 million Americans, with one out of every four American families receiving benefits, and for people aged sixty-five and older, it is the main source of income.³⁶ In addition to the elderly, through the social supplemental insurance (SSI) program, more children receive benefits under Social Security than any other federal program.³⁷ It is also the most efficient social insurance program, costing less than one penny in administrative expenses for every dollar that it metes out.³⁸ Because of its hallowed status after almost eighty

34. See *EBRI Databook on Employee Benefits*, Ch. 1: Employee Benefits in the United States: An Introduction, Employee Benefit Research Institute (March 2001). Additionally, a separate Supplemental Security Income (SSI) program provides monthly cash benefits to certain low-income elderly, disabled or blind Americans [hereinafter *EBRI databook*].

35. Eduard A. Lopez, *Constitutional Background to the Social Security Act of 1935*, 50 SOC. SEC. BULLETIN 5, 6 (Jan. 1987), <http://www.ssa.gov/policy/docs/ssb/v50n1/v50n1p5.pdf>.

36. See Elisa A. Walker, Virginia P. Reno & Thomas N. Bethell, *Social Security Finances: Findings of the 2014 Trustees Report*, NAT'L ACAD. OF SOC. INS. NO. 44, 2 (July 2014), available at http://www.nasi.org/sites/default/files/research/SS_Brief_044.pdf.

37. See *EBRI Databook on Employee Benefits*, *supra* note 34. "In the study, 84% of American's agreed with the following statement: 'I don't mind paying for Social Security taxes because it provides security and stability to millions of retired Americans, disabled individuals, and the children and widowed spouses of deceased workers.'" Nat's Acad. Of Soc. Ins., Video: *Social Security: Americans Agree*, NASI (<http://www.nasi.org/learn/social-security/americansagree?>) (last visited Apr. 21, 2015).

38. *Id.* "Social Security is efficient. Less than a penny of every one dollar is spent on administration, the rest is for the 55 million people who get benefits every month." *Social Security: Americans Agree*, NASI (Aug. 10, 2012), <http://www.nasi.org/learn/social-security/americansagree?>; see also *Social Security:*

years in existence, it is considered to be politically untouchable and the “third rail” of politics in the United States.³⁹

Social Security provides an income base, in the form of a lifetime annuity, to nearly all retired and disabled workers and their surviving spouses.⁴⁰ It was not until 1956, twenty years after the Social Security Act was initially enacted, that the Disability Insurance program was added to the Social Security program, providing income to disabled workers.⁴¹

OASDI benefits are defined by federal statutory law.⁴² Throughout its history, it has been consistently administered exclusively by public authorities, with a complete absence of any role for private actors.⁴³ The program is a pay-as-you-go system (PAYG), meaning today’s workers pay (through payroll taxes matched in amount by their employers) for the benefits of today’s retirees.⁴⁴ Social Security covers more than 95% of Americans, provides half of all retirement benefits, and currently, one in seven, or 58 million Americans, receive such benefits.⁴⁵ Under the OASDI program, benefits are adjusted for

Americans Agree, NASI (Aug. 10, 2012), <http://www.nasi.org/learn/social-security/americansagree?>.

39. “It was former U.S. House Speaker Thomas ‘Tip’ O’Neill who first called Social Security the ‘third rail of American politics,’ and O’Neill did as much as anyone to make Social Security a deadly political issue.” *See Why Is Social Security Called the Third Rail of American Politics?* SENIOR LIVING, <http://seniorliving.about.com/od/socialsecurity101/a/socialsecurity.htm> (last visited Apr. 21, 2015).

40. Jonathan Barry Forman, *Reforming Social Security to Encourage the Elderly to Work*, 9 STAN. L. & POLY REV. 289, 291–92 (1998).

41. *See* John R. Kearney, *Social Security and the “D” in OASDI: The History of a Federal Program Insuring Earners Against Disability*, SOC. SEC. BULLETIN Vol. 66 No. 3, 2, 9-11 (2005/2006), available at <http://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p1.pdf> (discussing the eventual addition of disability coverage along with operational considerations for its enactment and continued existence).

42. The original Social Security Act was enacted 14 Aug. 1935. The Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620. Private occupational pension plans, a relatively new phenomenon in the United States, are generally governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2012).

43. Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 136 (1998).

44. *See OASDI and SSI Programs Rates & Limits, 2014*, SOC. SEC. ADMIN., http://www.ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2014.html (last visited Apr. 22, 2015). Most people pay 6.2%, while self-employed persons pay 12.4%. *Id.*

45. *See* DAVID A. PRATT & SHARON REECE, *ERISA AND EMPLOYEE BENEFIT LAW: THE ESSENTIALS* 5, 7 (American Bar Association Publishing 2010); *see* Elisa A. Walker, Virginia P. Reno & Thomas N. Bethell, *Social Security Finances: Findings of*

inflation and support the beneficiary's spouse during the beneficiary's life, as well as after the beneficiary's death.⁴⁶

There is some debate about whether Social Security is in financial trouble and in need of reform.⁴⁷ On the one hand, the financial distress of the system stems, in part, from a smaller generation of workers seeking to support a larger generation of workers (i.e., the baby boomers).⁴⁸ Indeed, as a result of increased life expectancies, there has been "a decrease in the ratio of [old age and survivor insurance] OASI-covered workers to OASI beneficiaries from 16.5 in 1950 to 3.7 in 1970 to 3.2 in 2008."⁴⁹ At some point, there will be more beneficiaries than workers, and the PAYG system will falter. In the meantime, in attempt to keep this scenario from coming to fruition, the retirement age for full social security benefits has been raised to sixty-seven for those born after 1960,⁵⁰ and payroll taxes have been raised to help keep the system solvent.⁵¹ Although not exactly optimistic about the future of the Social Security System, the 2014 report by the Trustees of the Social Security System does point out that the system is not in short-term danger of failing, but some immediate legislative action could forestall further difficulties.⁵² The Disability Trust fund faces the largest

the 2014 Trustees Report, NAT'L ACAD. OF SOC. INS. NO. 44, 2 (July 2014), available at http://www.nasi.org/sites/default/files/research/SS_Brief_044.pdf.

46. Forman, *supra* note 40, at 291.

47. See *Status of the Social Security and Medicare Programs, a Summary of the 2012 Annual Reports*, SOC. SEC. ADMIN., <http://www.ssa.gov/OACT/TRSUM/index.html> (last visited Apr. 22, 2015) ("[T]he long-run actuarial deficits of the Social Security and Medicare programs worsened in 2012. The actuarial deficit in Social Security increased largely because of the incorporation of updated economic data and assumptions.").

48. See Amanda Alix, *Are Baby Boomers Going to Drain Social Security Dry?* THE MOTLEY FOOL (May 11, 2014), <http://www.fool.com/investing/general/2014/05/11/are-baby-boomers-going-to-drain-social-security-dr.aspx>. The article states that the Social Security system depends on the "old-age dependency ratio"—the ratio of people sixty-five and older to those ages twenty to sixty-four. *Id.* In 2012, that ratio was 22.8%, but by 2050 that number is expected to rise to 38.4%. *Id.*

49. EBRI *Databook*, *supra* note 34.

50. *Id.*

51. See Moore, *supra* note 43, at 136, 145 (describing how the Social Security system is funded by payroll taxes that are imposed on both employees and employers, and how benefits cannot increase unless payroll taxes are increased, which may be unacceptable to many Americans).

52. Social Security and Medicare Board of Trustees, *The Status of Social Security and Medicare Programs: A Summary of the 2014 Annual Reports* 5, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/tr/> (last visited Apr. 22, 2015) ("While the theoretical combined OASDI Trust Fund fails the long range test of close actuarial

challenges, with its beneficiaries facing benefit cuts starting in 2016 if Congress does not take immediate action.⁵³

Social security alone does not provide adequate retirement income, evidenced by the fact that a large majority of U.S. workers will see about a 40%–50% income replacement ratio from Social Security.⁵⁴ Most experts believe that at least a 70% income replacement ratio is required to have adequate retirement income.⁵⁵ As discussed below employer-provided pension and retirement plans have become so important in the United States as a result of the current state of Social Security benefits and the lack of personal savings.

Supplemental Security Income (SSI) is one system through which eligible people receive retirement income, but it is strictly based on need.⁵⁶ In general, a person can qualify for SSI benefits if he or she meets the following requirements: (1) is at least sixty-five years old, (2) is blind or disabled, (3) has limited income and resources, and (4) is either a U.S. Citizen or national or eligible alien.⁵⁷ For 2014, those eligible individuals who fit the criteria can receive \$721 per month (\$1,082 for an eligible person with an eligible spouse).⁵⁸ The purpose of SSI payments

balance, it does satisfy the test for short-range (10-year) financial adequacy. The Trustees project that the combined trust fund asset reserves at the beginning of each year will exceed that year's projected cost through 2027.”).

53. *Id.* at 3-4 (“Social Security’s Disability Insurance (DI) program satisfies neither the Trustees’ long-range test of close actuarial balance nor their short-range test of financial adequacy and faces the most immediate financing shortfall of any of the separate trust funds.”).

54. See Aon Consulting, *Replacement Ratio Summary: A Measurement Tool for Retirement Planning 2*, AON.COM (2008), <http://www.aon.com/about-aon/intellectual-capital/attachments/human-capital-consulting/RRStudy070308.pdf> (chart illustrating that a person retiring with income of \$60,000 can expect a replacement ratio of 46%). An income replacement ration “is a person’s gross income after retirement, divided by his or her gross income before retirement.” *Id.*

55. See Jack VanDerhei, *Can Social Security and 401(k) Savings Be “Enough”?*, EMP. BENEFIT RES. INST. (Jan. 22, 2014), <http://www.ebri.org/pdf/PR1058.RetAdqcy.22Jan14.pdf> (reiterating that 70% of replacement income is the typical standard for what is believed to be a financially successful retirement).

56. See Beth Laurence, *What Is The Difference Between Social Security Disability (SSDI) and SSI?*, DISABILITYSECRETS.COM, <http://www.disabilitysecrets.com/page5-13.html> (last visited Apr. 22, 2015) (funding for SSI is through a “means-tested program,” which has nothing to do with work history, it is all based on financial need).

57. See *Understanding Supplemental Security Income SSI Eligibility Requirements – 2014 Edition*, SOC. SEC. ADMIN., <http://www.ssa.gov/ssi/text-eligibility-ussi.htm> (last visited Apr. 22, 2015).

58. See *SSI Federal Payment Amounts for 2014*, Annual Report of the

are to help people pay for necessities—food, clothes and housing. Many disabled individuals who get SSI will also be eligible to get Medicaid from the state in which they live.⁵⁹ But because SSI is a federal benefit with specific requirements, the government can be as stringent as it would like in enforcing who receives it. This has even led some to question its effectiveness and whether it actually helps to perpetuate people living near the poverty line.⁶⁰

In addition to the federal SSI payments, forty-six states offer supplementary state SSI payments.⁶¹ As the supplemental programs are state-run, each state can decide on its own how much of a benefit to offer. As of 2013, Wisconsin, for example, would pay up to \$83.78 per month to an eligible individual (\$132.05 per eligible couple).⁶² Critics attack state SSI claiming states have an incentive to get a “welfare-receiving family [i.e. receiving public assistance] with a disabled child, onto the SSI rolls.”⁶³

Supplemental Security Income Program, SOC. SEC. ADMIN., <http://www.ssa.gov/oact/cola/SSI.html> (last visited Apr. 22, 2015).

59. See Laurence, *supra* note 56 (saying many of those on SSI also likely be qualified to receive food stamps).

60. See Julie Turkewitz & Juliet Linderman, *The Disability Trap*, N.Y. TIMES, SR5 (Oct. 20, 2012), <http://www.nytimes.com/2012/10/21/sunday-review/the-trap-of-supplemental-security-income.html> (recounting the story of Brad Crelia, and how SSI is supposed to be his “safety net,” but “is actually the source of the problem, experts say. S.S.I. traps many disabled people by limiting their income to levels just above the poverty line, and taking away their cash benefits if they achieve any level of security.”). Crelia commented, “I’ve been kept financially sort of in this cage. Just basic things that people rely upon, having a normal life, aren’t things that are really accessible. And won’t be.” *Id.*

61. See Laurence, *supra* note 56 (listing Arizona, North Dakota, West Virginia, and Mississippi as the four states who do not offer supplemental SSI); *SSI State Supplementary Payments/Optional State Supplements and Eldercare*, PAYING FOR SENIOR CARE, http://www.payingforseniorcare.com/longtermcare/resources/ssi_state_ssp_oss.html, (last updated Jan. 2014).

62. See *Benefits of Supplemental Security Income (SSI)*, WIS. DEP’T OF HEALTH SERVS, <http://www.dhs.wisconsin.gov/ssi/benefits.htm> (last revised Mar. 27, 2014) (qualifying the specifics for Wisconsin SSI eligibility, including how it operates, who qualifies and payment levels).

63. See Patricia Wen, *Aid to disabled children now outstrips welfare*, BOSTON GLOBE (Aug. 28, 2014), <http://www.bostonglobe.com/metro/2014/08/27/cash-distributed-under-ssi-for-children-now-exceedswelfare/ek0peSWTLJ00YId0CONFYI/story.html> (talking about the massive growth in SSI payments, especially for qualified children and how much strain it is putting on the system).

B. STATE AND EMPLOYER-SPONSORED DISABILITY PROGRAMS (SSDI)

In addition to being eligible for disability benefits under SSDI, many states have different forms of short-term and long-term disability programs, which provide income replacement for qualified disabilities.⁶⁴ Additionally, many employers provide short-term and long-term disability plans as one of the welfare benefits they provide to their employees.⁶⁵

SSDI can best be described as a related but separate component of SSI, with a couple of important distinctions. First, SSDI is an earned benefit provided to people with physical and mental impairments that are severe enough to keep them from carrying on in their regular jobs or from partaking in any other type of work.⁶⁶ For an impairment to be deemed severe enough, it must be believed that it will last for one year at minimum, or that it will inhibit a person throughout his or her life.⁶⁷ Second, there is a distinction in how the two programs receive funds: SSDI is fuelled by Social Security taxes that workers, employers, and the self-employed pay, whereas SSI gets paid out of the Treasury Department's general revenue.⁶⁸ So even though SSI and SSDI use the same definition to classify disabled adults, SSDI focuses on impairment-based need, while SSI is for people with very low income.⁶⁹

Only five states provide short-term disability benefits (sometimes called temporary disability insurance (TDI)): California, Hawaii, New Jersey, New York, and Rhode Island.⁷⁰

64. See 2014 CDA Long Term Disability Claims Review, COUNCIL FOR DISABILITY AWARENESS, 8 (2014), available at http://www.disabilitycanhappen.org/research/CDA_LTD_Claims_Survey_2014.pdf (151 million workers had disability insurance coverage via SSDI at the end of 2013, which represented a 0.2 percent increase from 2012).

65. 2013 *Employee Benefits: An Overview of Employee Benefits Offerings in the U.S.*, SOC. FOR HUMAN RES. MGMT 12 (Feb. 2013) [hereinafter 2013 *Employee Benefits*]. *Id.*

66. See Stan Hinden, *What's the Difference Between SSDI and SSI?*, AARP BULLETIN (June 13, 2012), <http://www.aarp.org/work/social-security/info-06-2012/social-security-disability-insurance-supplemental-securityincome.html> (comparing the key components of both SSDI and SSI).

67. *Id.*

68. *Id.*

69. *Id.*

70. See *State Short-Term Disability Benefits*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/state-short-term-disability-benefits> (last visited Apr. 22, 2015) (providing links to further reading about each state's short-

The purpose of such programs is to give people partial pay replacement if they cannot work for more than three days due to conditions such as injury, illness, or pregnancy.⁷¹ While it is just one example, California administers its program through its Employment Development Department, which requires all employees to contribute to short-term disability via payroll deductions.⁷² Through this structure, if someone cannot work due to disability, that person can then get weekly payments until she or he goes back to work or his or her benefits run out.⁷³

More commonly, however, disability programs (outside of SSDI) are provided by employers. In its 2013 review of claims data, the Council for Disability Awareness, which is comprised of nineteen insurance providers, found that more than 213,000 employers make long-term disability insurance available to their employees.⁷⁴ This is a marginal increase in terms of number of providers, but the number of people who opt-in for coverage declined by about 1.5%.⁷⁵ Despite the decrease in coverage, payment claims increased once again, up to \$9.8 billion in 2013.⁷⁶

The way that long-term disability typically works in the employment context is that it is a voluntary benefit, meaning that the employee pays the full cost of coverage.⁷⁷ In the past, however, many employers took it upon themselves to pay the full cost, or at least pay for coverage up to a certain level.⁷⁸ According to Barry Lundquist, president of the Council for Disability Awareness, there are a few good reasons for the change in how companies approach disability insurance, such as “employers are focused on compliance with the new Affordable

term disability specifics).

71. *Id.*

72. *Id.*

73. *Id.*

74. See Ashlea Ebeling, *Disability Insurance: The Overlooked Employee Benefit*, FORBES (June 19, 2014, 8:51 AM), <http://www.forbes.com/sites/ashleaebeling/2014/06/19/disability-insurance-the-overlooked-employee-benefit/> (discussing recent shifts in long-term disability coverage and offerings, including the impact of voluntary versus involuntary enrollment plans).

75. See *id.* (Only 32.1 million people had long-term disability coverage in 2013 compared to 34 million in 2009). 32 million is 22% of the current employed persons of 146 million. So a little less than one in four working Americans have disability coverage from their employer. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

Care Act's health insurance provisions—so employers and agents/brokers are saying they'll deal with other benefits like disability insurance later."⁷⁹ Another factor is tied back to whether disability is a voluntary versus employer-driven benefit. For voluntary (employee choice) plans, enrollment is about 40%.⁸⁰ Of course for an employer-paid plan, employees are automatically enrolled, but they are sometimes given the choice if they want to increase coverage by making pay check deferrals.⁸¹

C. UNEMPLOYMENT COMPENSATION

The current United States unemployment insurance (UI) system⁸² was enacted in 1935 as part of the New Deal program of President Franklin D. Roosevelt.⁸³ The UI system provides temporary, partial wage replacement for workers who are unemployed through no fault of their own.⁸⁴ The unemployment compensation system is based on a joint federal-state scheme that effectively encourages states to form their own UI programs.⁸⁵ Under this scheme, the federal government does not directly provide UI benefits, but states receive federal subsidies for their own UI programs.⁸⁶ The source of federal funding is a tax, currently set at 6.2% of the first \$7,000⁸⁷ in wages, on every covered employee in the United States.⁸⁸ Under the Federal Unemployment Tax Act,⁸⁹ an employer may offset this federal tax with any state UI taxes it pays, up to 5.4% of the

79. *Id.*

80. *Id.* (quoting Lundquist about enrollment statistics).

81. *Id.* (mentioning various scenarios for people to think about when deciding how much coverage is truly enough to cover expenses, etc.).

82. 42 U.S.C. §§ 501□504, 1101□1108 (2012).

83. *The New Deal*, HISTORY CHANNEL (March 28, 2015), <http://www.history.com/topics/new-deal>.

84. Lisa Lawler Graditor, *Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct*, 37 J. MARSHALL L. REV. 27, 30–31 (2003) (describing the standard qualifications for receiving unemployment insurance).

85. Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340 (2001).

86. *See id.* at 344 (describing how states receive federal administrative funds and tax rebates for establishing UI programs).

87. For the purposes of this article all currency is noted in terms of the US dollar.

88. 26 U.S.C. § 3301 (2012); *see also* 26 U.S.C. § 3306(b)(1) (2012).

89. 26 U.S.C. § 3301 (2012); *see Walker supra* note 45, at 2.

\$7,000 base wage.⁹⁰ Not surprisingly, this incentive has proven very effective, as every state currently has its own UI program.⁹¹ Yet, states have substantial flexibility in setting eligibility criteria once minimum federal requirements have been met.⁹²

The State of Wisconsin, which had the first unemployment compensation system in the country,⁹³ provides a good example of how a “traditional” unemployment compensation system works in the United States.⁹⁴ Generally, Wisconsin bases UI eligibility on a worker’s length of time in the workforce, how the end of the employment relationship occurred, and the extent to which the worker is looking for a new job.⁹⁵ Workers who are eligible for UI benefits frequently must wait a week before receiving their benefit, and the maximum duration of benefit receipt is usually twenty-six weeks.⁹⁶ Benefits consist of payments of up to 50% of the worker’s previous weekly wage, capped by a statutory maximum.⁹⁷

90. See *FUTA Credit Reduction*, IRS (last updated Oct. 24, 2014), <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/FUTA-Credit-Reduction> (explaining the FUTA tax credit for employers).

91. Lester, *supra* note 85, at 340.

92. See Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J. L. REFORM 89, 89 (1996) (describing the American unemployment insurance program as “a federal-state program, where each state determines its own eligibility requirements with only minimal requirements imposed by the federal government”).

93. Graditor, *supra* note 84, at 34 (describing how the Wisconsin legislature rejected unemployment legislation ten times “before becoming the first state to enact such legislation in 1932”).

94. See *History of Unemployment Insurance in the United States*, U.S. DEPT OF LABOR (2010), <http://www.dol.gov/ocia/pdf/75th-Anniversary-Summary-FINAL.pdf> (last visited Apr. 22, 2015).

95. See generally ST. OF WIS. DEPT OF WORKFORCE DEV.: UNEMPLOYMENT INS., https://dwd.wisconsin.gov/uiben/before_menu.htm (last visited Apr. 22, 2015).

96. *Monetary Entitlement*, U.S. DEPT OF LABOR EMPLOYMENT & TRAINING ADMIN., CH. 3 (last visited Apr. 22, 2015) <http://www.ows.doleta.gov/unemploy/pdf/uilawcompar/2010/monetary.pdf>. As a result of the American Recovery and Reinvestment Act, P.L. 111-5, passed by the US Congress in February 2009, many unemployed people can receive up to 99 weeks of unemployment insurance benefits. Still, there are those who run out of eligibility before being able to find a new job. These individuals refer to themselves as “99ers.” See *99ers*, WIKIPEDIA, <http://en.wikipedia.org/wiki/99ers> (last visited Apr. 22, 2015).

97. A typical maximum cap is one-half to one-third of the state’s average weekly wage. Because of the maximum benefit caps, the effective rate of wage replacement for employees receiving unemployment compensation benefits is about one-third of their former salary. See Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 365 (2012) (“In the United States, the average replacement rate is 36%.”); *The Best States for Unemployment Benefits: Would You Work If You Could Make \$1,800 A Month Doing Nothing?*, FINANCIAL SAMURAI (last

The most significant disqualification factors for receiving unemployment compensation are (1) whether the employee voluntarily quit his or her employment,⁹⁸ (2) whether he or she was fired for “wilful misconduct,” (changed as of January 2014 to “substantial misconduct,” a lower standard, at least in Wisconsin),⁹⁹ and (3) whether he or she did not continue to search for work under the job search requirement.¹⁰⁰ If any of the three factors are applicable to the employee, the right to benefits could be partially or completely terminated. As for the job search requirement, a worker must be not only willing and able to work, but must also actively seek a new job in order to continue to receive unemployment compensation.¹⁰¹ Workers must also accept suitable employment when found to be entitled to unemployment compensation.¹⁰²

Established during the New Deal, state job centers, sometimes referred to as “labor exchanges,” help workers meet the job search requirement.¹⁰³ They function through “One-Stop

accessed Apr. 22, 2015) <http://www.financialsamurai.com/best-states-for-unemployment-benefits/>.

98. Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 304 (1995).

99. Daniel R. Schuckers & James K. Bradley, *Trends in Unemployment Compensation Law*, 78 PA. B.A. Q. 40, 42 (2007); *Unemployment Law Changes for Workers*, WIS. DEPT OF WORKFORCE DEV., <http://dwd.wisconsin.gov/uiben/lawchanges.htm> (last visited Apr. 22, 2015).

100. *See id.* (describing the job search requirements for unemployment insurance eligibility in Wisconsin).

101. EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM, U.S. DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 26-13, REQUEST FOR CURRENT LAW ON STATE WORK SEARCH REQUIREMENTS (Apr. 10, 2014), available at http://workforcsecurity.doleta.gov/dmstree/uipl/uipl2k13/uipl_2813.pdf; 26 U.S.C. § 3304 (2012). As far as the work search requirement in Wisconsin, there is a basic requirement that benefit a claimant personally and diligently make a reasonable search for suitable work. In some other instances, claimants are directed to participate in reemployment programs. *See* WIS. STAT. § 108.04(2)(a). To meet this requirement, claimants must file an online work search log, which may be completed online at <http://unemployment.wisconsin.gov>. *See* State of Wisconsin Department of Workforce Development, *Unemployment Insurance: Part 4: Work Search*, WIS. DEPT OF WORKFORCE DEV., <http://www.dwd.wisconsin.gov/uiben/handbook/english/contentspart4.htm> (updated Mar. 9, 2015).

102. *See* Knox v. Unemployment Compensation Board of Review, 315 A. 2d 915, 916 (Pa. Cmwlth Ct. 1974) (denying unemployment compensation where employee lost new job when he told prospective employer that he would go back to old job if recalled from layoff).

103. *See* Thomas Janoski, *Review of Three Cheers for the Unemployed: Government and Unemployment before the New Deal*, CONT. SOC., Vol. 22 No. 3 392-93 (May 1993) <http://www.jstor.org/stable/2074520>.

Career Centers,” which match unemployed workers with suitable job positions, and also ensure that workers continue to search for work while on unemployment.¹⁰⁴

It is unlikely that participation by unions, such as in the Ghent System where funding for unemployment benefits is handled by trade unions and not governmental actors,¹⁰⁵ will ever happen.¹⁰⁶ The reasons are at least two-fold. First, unions are generally weak in the United States, where they make up less than 7% of the private, non-agricultural workforce.¹⁰⁷ Their ability to push a union-based, Ghent-style system, even in states with higher union density rates, is therefore questionable. Second, and perhaps even more significantly, it is not clear at all whether the federal Social Security Act in the United States would permit a Ghent-style unemployment system in the United States. Sections 303(a)(1) and (2) of the SSA establish that the Secretary of Labor will not certify payments of federal funds to states unless states provide such methods of administration as are “‘found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due’ and ‘[p]ayment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve.’”¹⁰⁸ Thus, to involve unions in

104. Louis S. Jacobson, *Strengthening One-Stop Career Centers: Helping More Unemployed Workers Find Jobs and Build Skills*, THE HAMILTON PROJECT 5, (April, 2009); Cox, *supra* note 32 at 397.

105. See generally Paul M. Secunda, *The Wagner Model of Labour Law is Dead—Long Live Labour Law!*, 38 QUEEN’S L.J. 545, 577-578 (2012-2013). Under the Ghent System, “unions administer government-subsidized unemployment insurance funds,” and the only way to get access to those funds is for a worker to join a union. *Id.* Union density in countries that have this system is unsurprisingly high. *Id.*

106. But see Matthew Dimick, *Paths to Power: Labor Law, Union Density, and the Ghent System*, 90 N.C. L. Rev. 41-49 (2012). Under the federal Social Security Act, by contrast, the federal government leaves states with some discretion to determine conditions for eligibility and the amount and duration of benefits for public unemployment insurance programs. In states where labor unions hold more favor and influence, state-level Ghent systems could be adopted and serve as examples and catalysts for change elsewhere. *Id.*

107. United States Department of Labor, *Union Members Summary*, BUREAU OF LABOR STATISTICS 2010 (Jan. 21, 2009), <http://www.bls.gov/news.release/union2.nr0.htm> (finding that the union membership rate for private sector workers was 6.9% in 2010); United States Department of Labor, *Union Members Summary*, BUREAU OF LABOR STATISTICS 2014 (Apr. 4, 2015), http://www.bls.gov/news.release/archives/union2_01212011.pdf (finding that the union membership rate for private sector workers was 6.6% in 2014).

108. Dimick, *supra* note 97, at 368-69 (quoting Social Security Act § 303(a)(2), 42 U.S.C. § 503(a)(2) (2006)); 42 U.S.C. § 303(a)(2) (2012); 42 U.S.C. § 503(a)(2) (2006)).

unemployment compensation, the SSA would have to be amended to certify payments to unions and to permit unions to make payments when due. Such a scenario is highly unlikely in the anti-union environment of the United States.¹⁰⁹

D. SICKNESS AND FAMILY BENEFITS: THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

As noted above, the United States does not have a true sickness social insurance benefit. Instead, the federal government mandated, via the FMLA enacted in 1993, that all covered employers (with fifty or more employees in a seventy-five-mile radius) provide covered employees (who have worked for the employer for at least one year, and more than 1250 hours in the previous year) twelve weeks of unpaid, job-protected leave for one of four covered situations.¹¹⁰ These situations include (1) one's own "serious health condition," (2) the "serious health condition" of a close family member (child, spouse—including same-sex spouse—or parent), (3) the birth of a child, or (4) the adoption or foster care of a child.¹¹¹ A serious health condition is defined as in-hospital treatment, treatment for chronic conditions, conditions related to pregnancy, or continuing treatment by a doctor for more than a three-day period (which requires one doctor visit with a medical prescription or more than one doctor visit).¹¹²

Although such Family and Medical Leave Act (FMLA) provides sick leave, that leave is presumptively unpaid.¹¹³ Employers can force employees to use other sources of paid time off (e.g., vacation and sick pay) to provide payment during this leave time.¹¹⁴ Employers can also (1) define the twelve-month period in which the worker receives the twelve weeks of leave

109. See Scott Martelle, *Why Americans Support Both Unions and Right-to-Work Laws*, L.A. TIMES (Aug. 29, 2014, 12:50 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-labor-organizing-gallup-wages-benefits-20140829-story.html> (relaying Gallup poll information showing Americans varied feelings about unions – with 53% saying they support them, but 71% saying they support right-to-work laws).

110. See generally *The Family Medical Leave Act*, U.S. DEP'T OF LABOR (last visited Apr. 23, 2015), <http://www.dol.gov/whd/regs/compliance/1421.htm>.

111. *Id.*

112. *Id.*

113. 29 U.S.C. § 2612(c) (2012).

114. *The Family Medical Leave Act*, *supra* note 110.

(usually starting the first day of FMLA leave);¹¹⁵ (2) require notification of the need for leave (though magic words invoking FMLA are not required);¹¹⁶ (3) require medical certification of the need for leave, and in the case of an employee's own serious health condition, require a fitness for duty certification to come back to work;¹¹⁷ and (4) if the FMLA leave is for intermittent or reduced leave, the employer may place the employee in a more appropriate job during that time period.¹¹⁸ Employers are supposed to keep employees on their current health insurance plan during FMLA leave, but if the worker does not return from leave, employers can ask for reimbursement of their insurance contributions¹¹⁹ Finally, an employee cannot be terminated or face adverse employment consequences for exercising his or her rights under the FMLA, but the employer is free to eliminate his or her position for non-FMLA related reasons.¹²⁰

This is the extent of sickness benefits at the federal level in the United States. There is no federally required sick pay or maternity leave.¹²¹ As a result, a number of states and municipalities have enacted their own laws to fill in the gap.¹²² For example, the city of San Francisco has a Paid Sick Leave Ordinance that requires employees to earn one hour of sick leave for every thirty hours worked, generally up to seventy-two hours of accrued paid sick leave saved up at any time.¹²³ Only three states provide for paid maternity/family leave (California, New Jersey, and Rhode Island).¹²⁴ “All three states fund their programs through employee-paid payroll taxes and are

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. See Carol Evans, *Mandated Paid Maternity Leave: It's Time to End the Divide Between the 'Haves' and the 'Have-Nots,'* HUFF. POST (June 24, 2014, 6:42 PM), http://www.huffingtonpost.com/carol-evans/mandated-paid-maternity-leave_b_5525605.html (showing that only 16% of all U.S. companies offer paid maternity leave).

122. *Id.* Only a few states, most notably California and New Jersey, have mandated maternity leave for moms.

123. S.F., CAL., ADMINISTRATIVE CODE § 12W.2(B)(C) (2014), available at <http://sfgsa.org/index.aspx?page=419>; see *Paid Sick Leave Ordinance- Fact Sheet*, CITY AND COUNTY OF SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT, <http://sfgsa.org/index.aspx?page=419> (last visited Sept. 7, 2014).

124. *State Family Medical Leave Laws*, NAT'L CONF. OF STATE LEGIS. (Dec. 31, 2013), <http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx>.

administered through their respective disability programs.”¹²⁵
More specifically, California provides:

Up to [twelve] weeks of unpaid family leave plus 4 months of maternity disability may be combined for a total of [twenty-eight] weeks per year. The California Paid Family Leave insurance program provides up to [six] weeks of paid leave to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child. The benefit amount is approximately 55% of an employee’s weekly wage, from a minimum of \$50 to a maximum of \$1067. The program is funded through employee-paid payroll taxes and is administered through the state’s disability program.¹²⁶

Connecticut is the only state that provides for paid sick leave for private sector employers that have fifty or more employees and requires up to forty hours of paid sick leave annually, depending on the number of hours employees work.¹²⁷ Other states have their own family and medical leave acts that may apply to smaller employers and to more employees, but generally, these acts only provide unpaid leave.¹²⁸

E. PUBLIC AND PRIVATE HEALTH INSURANCE IN THE UNITED STATES

1. Public Health Social Insurance Programs

The two public health insurance programs in the United

125. *Id.*

126. *Id.*

127. *Id.*

128. See, e.g., *Wisconsin Family and Medical Leave Act*, ST. OF WIS. DEP’T OF WORKFORCE DEV., https://dwd.wisconsin.gov/er/family_and_medical_leave/ (last visited Apr. 29, 2015) (providing that “employers with 50 or more permanent employees must allow employees of either sex up to six (6) weeks of leave in a calendar year for the birth or adoption of a child, up to two (2) weeks of leave in a calendar year for the care of a child, spouse, parent, domestic partner, as defined in §§ 40.02(1) or 770.01(1), parent of a domestic partner with a serious health condition and up to two (2) weeks of leave in a calendar year for the employee’s own serious health condition.”); see also *Family and Medical Leave Act (FMLA)*, TEXAS WORKFORCE COMMISSION http://www.twc.state.tx.us/news/efte/family_and_medical_leave_act_fmla.html (last visited Oct. 5, 2014) (operating in a very similar fashion to both the federal standards, as well as other states).

States are Medicare and Medicaid.¹²⁹ Medicare provides approximately 50 million sixty-five-and-older and disabled¹³⁰ Americans with hospital,¹³¹ medical,¹³² and prescription drug¹³³ coverage.¹³⁴ Currently, non-public actors play no role in the administration of the Medicare scheme, but private healthcare providers of all types receive payment for their medical services through this program.¹³⁵ Medicaid, on the other hand, is not

129. Medicare and Medicaid were formally enacted amendments (Titles XVIII and XIX, respectively) to the Social Security Act (1935) and went into effect in 1966. Medicare falls under Title 42 □ The Public Health and Welfare Chapter 7 □ Social Security Subchapter Xviii □ Health Insurance For Aged and Disabled. *See also The Basics of Social Security*, EMPLOYEE BENEFIT RESEARCH INSTITUTE (July 2013), <http://www.ebri.org/pdf/publications/facts/0713fact.pdf>. There really is not a separate sickness benefit program in the United States. Although employees may receive sick leave as part of their employment, they are generally not entitled to sick leave as a matter of federal or most state laws. Instead, they have a right to protected, unpaid job leave for: (1) their own serious health conditions, (2) the serious health condition of an immediate family member, or (3) for the birth or adoption of a child, under the federal Family and Medical Leave Act of 1993 (FMLA); 29 U.S.C. §§ 2601, 2611-2619, 2651- 2653.

130. *See* Sean M. Novak, *How to Create and Maintain a Medicare Set-Aside Trust*, LOS ANGELES LAWYER, March 2012, at 15 (citing Medicare Eligibility Guidelines, SSA Pub. No. 05-1004) (June 2011), <http://www.ssa.gov/pubs/10043.html>). To qualify for Medicare under the disability category, “an individual must submit an application showing that he or she is [eighteen] years old or older, has worked in jobs covered by Social Security, and has a medical condition that has prevented the applicant from working (or is expected to prevent the applicant from working) for at least [twelve] months or end in death.” *Id.*

131. Sandra J. Carnahan, *Medicare’s Coverage with Study Participation Policy: Clinical Trials or Tribulations?*, 7 YALE J. HEALTH POL’Y L. & ETHICS 229, 224 (2007); *see also* Novak, *supra* note 130.

132. *Id.* “Part A, or Hospital Insurance (HI), includes hospital, skilled nursing, home health, and hospice care. Medicare Part B, or the Supplementary Medical Insurance Program (MI), includes physician and other out-patient services. Part C, or Medicare Advantage, is a managed care option added by the Balanced Budget Act of 1997” *Id.* (citing 42 U.S.C. § 1395d (2003) (Part A); 42 U.S.C. § 1395j (2012) (Part B); 42 U.S.C. §§ 1395w-21-28 (2003) (Part C or Medicare Advantage Plans)).

133. In 2003, the Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 111 Stat. 2066 (codified at 42 U.S.C. § 1395w-101), expanded the Medicare program by creating Medicare Part D, a prescription drug benefit that came into full effect in 2006.

134. *See* Carnahan, *supra* note 131, at 234. “[T]here are currently over 47.5 million Americans covered by Medicare, of whom 39.6 million are aged 65 and older, and 7.9 million are disabled. Total benefits paid in 2010 were \$516 billion.” Novak, *supra* note 130. Such coverage is financed through an employer/employee Medicare Tax. This tax has “increased from 0.6 [%] in 1970 on a maximum taxable amount of \$7,800 of annual earnings to 1.45 [%] in 2011 with no cap on the maximum amount of annual earnings subject to the tax.” *See* EBRI *Databook*, *supra* note 34, at 5.

135. Eleanor D. Kinney, *The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint*, 1 ADMIN. L.J. 1, 8-9 (1987).

strictly a social insurance program. It is a federal-state, joint-financed program for low-income, seriously ill and disabled individuals.¹³⁶ At its heart, Medicaid requires states to receive and process all Medicaid applications and to provide medical services to eligible individuals.¹³⁷

Medicaid is not a subsidy scheme for clinics and hospitals, but instead a third-party payment system structured to operate like insurance, paying participating healthcare professionals and institutions for covered services furnished to enrolled persons.¹³⁸ Recently, the federal government began to play a less significant role in its administration, and states are gaining more discretion to keep poor Americans off their Medicaid rolls in order to reign in the spiralling cost of Medicaid coverage.¹³⁹

Private actors, such as employers and unions, play a large role in the private employer-based health insurance system. There historically has been little regulation of employer-based health plans and employers have “great discretion in determining eligibility criteria and what benefits to offer under such plans”, although this is beginning to change with the passage of the Affordable Care Act in 2010.¹⁴⁰ Unions, for their

136. See Sara Rosenbaum, *Medicaid at Forty: Revisiting Structure and Meaning in a Post-Deficit Reduction Act Era*, 9 J. HEALTH CARE L. & POL’Y 6, 9 (2006) (“Medicaid rest[s] on a financial base consisting of a shared federal/state contribution arrangement, with the federal government as the senior partner.”); See also *id.* at 10 (“Medicaid follow[s] the tradition of federal grant-in-aid programs, enacted pursuant to Congress’s spending clause powers, which condition the receipt of federal funds by states that elect to participate on compliance with a series of structural and operation conditions of participation.”).

137. *Id.* at 12.

138. Cf. Peter Ubel, *Why Many Physicians Are Reluctant To See Medicaid Patients*, FORBES (Nov. 7, 2013, 11:02 AM), <http://www.forbes.com/sites/peterubel/2013/11/07/why-many-physicians-are-reluctant-to-see-medicaid-patients/>. Some physicians admit their reluctance in seeing Medicaid patients due to reimbursement payments. On average, Medicaid pays roughly 61% of what Medicare pays for outpatient services. *Id.* “Physicians interviewed in the study explained that they felt it was their duty to see some amount of Medicaid patients in their practice. They recognized the moral need to provide care for this population. But they did not want to commit career suicide—they did not want good deeds to bankrupt their clinical practices.” *Id.*

139. See *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, Henry J. Kaiser Family Found. (Apr. 2, 2014), <http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/> (detailing statistics about which states expanded Medicaid coverage, along with coverage and economic consequences from those decision).

140. See RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 209 (LEXISNEXIS 2007); See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education

part, play a significant role with multi-employer health plans, where health insurance is provided as part of a collective bargaining agreement.¹⁴¹ There is no close linkage between union and employer-provided health insurance and Medicare and Medicaid in the United States, as is sometimes seen in other countries' social insurance programs.¹⁴²

If Americans are not covered by Medicare or Medicaid, there is no national health insurance system to rely on.¹⁴³ Instead, individuals not covered by either Medicare or Medicaid must receive health insurance through their employer or purchase it on the open market, which historically has been prohibitively expensive.¹⁴⁴ Otherwise, the person will be uninsured. Approximately 42 million Americans, or about 13% of the population, currently have no health insurance.¹⁴⁵

Medicare, like Social Security, is facing significant financial troubles. According to the most recent Trustees' Report:

The Trustees project that the Medicare Hospital Insurance (HI) Trust Fund will be the next to face depletion after the DI Trust Fund. The projected date of HI Trust Fund depletion is 2030, four years later than projected in last year's report. At that time dedicated revenues will be sufficient to pay 85 [%] of HI costs.¹⁴⁶

Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029; *See also infra* notes 135–141 and accompanying text.

141. A multiemployer health plan is sponsored by more than one employer under provisions of a collective bargaining agreement for the benefit of union members. *See* 29 U.S.C. § 1002(37) (2012). Under section 302(c)(5) of the Taft Hartley Amendments of 1947, multiemployer benefits plans must be established in trust to provide employee benefits to union employees. Labor Management Relations Act of 1947, 29 U.S.C. section 186(c)(5) (2010). No such multiemployer health plan arrangements currently exist in the Medicare or Medicaid program.

142. *See generally infra* Part III on the social protections benefit system in the Netherlands.

143. *See* Rosenbaum, *supra* note 136, at 7 (“Among industrial democracies, the United States stands alone in relying on voluntary markets to insure most of the population.”).

144. *Id.* (“With the cost of employer-sponsored family coverage hovering at \$10,000 in 2004 □ among employers that elect to offer any coverage □ private insurance is unaffordable to millions of people.”).

145. *See Insurance Coverage Provisions of the Affordable Care Act—CBO's April 2014 Baseline*, Cong. Budget Office (Apr. 14, 2014), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2014-04-ACATables2.pdf> (pulling data from Table 2, “Effects of the Affordable Care Act on Health Insurance Coverage”).

146. Social Security and Medicare Board of Trustees, *A Summary of the 2014 Annual Reports; Status of the Social Security and Medicare Programs*, SOC. SEC.

On the other hand, other Parts of Medicare appear to be in better shape (though the cost of healthcare in the United States continues to grow at a startling pace):

The Trustees project that Part B of Supplementary Medical Insurance (SMI), which pays doctors' bills and other outpatient expenses, and Part D of SMI, which provides access to prescription drug coverage, will remain adequately financed into the indefinite future because current law automatically provides financing each year to meet the next year's expected costs. However, the aging population and rising health care costs cause SMI projected costs to grow steadily from 1.9 [%] of GDP in 2013 to approximately 3.3 [%] of GDP in 2035, and then more slowly to 4.5 [%] of GDP by 2088.¹⁴⁷

2. Government-Regulated Private Health Insurance

In response to this healthcare quandary, President Obama signed into law the Patient Protection and Affordable Care Act (ACA),¹⁴⁸ which hopes to reform the public and private provision of health insurance in the United States and cover an additional 32 million people in public and private programs. More specifically, the ACA will require that an essential health benefits package be offered by qualified health benefit plans, which must include specific categories of benefits, certain cost-sharing standards, and provide certain levels of coverage.¹⁴⁹ However, essential health benefits are contingent upon whether a health benefit plan is grandfathered or non-grandfathered, and insured or self-insured. A self-insured plan is one in which the employer pays for each claim out of pocket compared to an insured plan, where the company would pay a fixed premium to an insurance company.¹⁵⁰ A grandfathered plan allows

ADMIN., available at <http://www.ssa.gov/oact/trsum/> (last visited Apr. 29, 2015).

147. *Id.*

148. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (ACA).

149. Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink*, 21 CORNELL J.L. & PUB. POL'Y 77, 98 (2011) (citing CH EDITORIAL STAFF, CCH'S LAW, EXPLANATION, AND ANALYSIS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT ¶ 2205, at 969 (2010)).

150. See *Self-Insured Group Health Plans*, SELF-INSURANCE INSTITUTE OF AMERICA, INC. (last visited Apr. 29, 2015),

companies who had a health benefit plan in place prior to March 23, 2010 to maintain their plan from that time so long as they do not encounter a trigger event that would force it to lose that status, such as (1) significantly cutting or reducing benefits, (2) significantly raising deductibles or co-pays, or (3) lowering employer contributions.¹⁵¹ A non-grandfathered plan would be one that was instituted after March 23, 2010, or one that faced a status-changing event.¹⁵² The biggest similarities between grandfathered and non-grandfathered plans are that (1) the waiting period before coverage is effective cannot exceed ninety days, (2) there are no dollar limits on essential health benefits, and (3) there are no pre-existing condition limits for participants, no matter their age.¹⁵³ The key differences are that grandfathered plans (1) do not have to cover ten essential health benefits (EHBs) for individuals and insured smaller employers (less than fifty employees starting in 2016), (2) can deny women and children immediate access to gynaecological and pediatric care, and (3) do not have to provide immunizations and preventive care on a first dollar basis.¹⁵⁴

State-based and federal-based American Health Benefit Exchanges (“Exchanges”) were established starting in 2014.¹⁵⁵

<http://www.siaa.org/i4a/pages/Index.cfm?pageID=4546> (answering the “what is a self-insured health plan?” question).

151. See *Grandfathered Status Fact Sheet*, CIGNA, <http://www.cigna.com/assets/docs/about-cigna/informed-on-reform/grandfathered-plan-fact-sheet.pdf> (last visited Oct. 7, 2014) (listing a variety of trigger events that would change an employer’s status).

152. *Id.*

153. The Association for Convenience & Fuel Retailing, *Overview of the Patient Protection and Affordable Care Act: What Small Business NACS Members need to Know About Obamacare*, NACS 4, <http://www.nacsonline.com/advocacy/ComplianceResources/Documents/HealthcareSmallBusinesses.pdf> (last visited Apr. 29, 2015); see also Elizabeth Weeks Leonard, *Can You Really Keep Your Health Plan? The Limits of Grandfathering Under the Affordable Care Act*, 36 J. CORP. L. 753, 766-67 (2011).

154. *Id.*; see also COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 367-68 (4th ed. 2015) (taking each new requirement for non-grandfathered plans in turn, noting that they are additional requirements beyond the scope of grandfathered plans).

155. See *Building the Health Insurance Marketplace*, NAT’L CONF. OF STATE LEGIS., <http://www.ncsl.org/research/health/american-health-benefit-exchanges.aspx> (updated May 19, 2014) (“The Affordable Care Act (ACA) requires that health insurance exchanges be established in every state by January 1, 2014. The central purpose of these new Marketplaces is to enable low and moderate income individuals, and small employers to obtain affordable health coverage. Individuals and small business will be able to purchase private health insurance through a variety of insurance Marketplace models throughout the United States.”)

Small Business Health Options Program (SHOP) Exchanges, on the other hand, will only become fully functional in 2015.¹⁵⁶ Through the Exchanges, individuals may purchase qualified health coverage.¹⁵⁷ Even though there are conditions to such programs, they leave open some general flexibility for people when choosing health insurance (including the benefits package itself, along with price variations) because they are not directly mandated by the government.¹⁵⁸ Additionally, effective in full at the beginning of 2016,¹⁵⁹ ACA began operating on a play-or-pay system, meaning that large employers (those with at least fifty full-time employees working thirty or more hours per week) must either provide 95% of their full-time employees “minimum essential coverage” or face a penalty.¹⁶⁰ The penalty is to help employees receive health benefits on federal or state health exchanges (starting in 2016, the penalty will be \$2,000 per employee, for every employee beyond the first thirty, for large employers that fail to offer minimum essential coverage to 95%

156. See Christine Vestal, *Health Law May Benefit More Small Businesses in the Fall*, Kaiser Health News (Aug. 28, 2014), <http://www.kaiserhealthnews.org/Stories/2014/August/28/Health-Law-May-Benefit-More-Small-Businesses-In-The-Fall.aspx> (citing the Obama administration’s decision to postpone Oct. 1, 2014, nationwide launch because it needed to fix “serious technical problems with the exchanges.”).

157. Sam Solomon, *Health Exchange Federalism: Striking the Balance Between State Flexibility and Consumer Protection in ACA Implementation*, 34 CARDOZO 2073, 2074 (2013).

158. See Evi Heilbrunn, *Wisconsin Health Insurance*, U.S. NEWS & WORLD REPORT, <http://health.usnews.com/health-insurance/wisconsin> (last updated June 12, 2014) (using Wisconsin’s system as an example and comparing government-approved plans compared to private market health plans – noting price as the biggest difference).

159. *Employer Mandate Fact Sheet*, CIGNA, http://www.cigna.com/assets/docs/about-cigna/informed-on-reform/employer-mandate-fact-sheet.pdf?WT.z_nav=health-care-reform%2Femployer-mandate%3BBody%3BRead%20the%20Employer%20Mandate%20Fact%20Sheet (last visited May 4, 2015); see *Diving In to the Affordable Care Act’s “Pay or Play” Provisions*, Carr, Riggs & Ingram (last updated July 2013), <http://www.cricpa.com/AffordableCareActsPayOrPlayProvisions.aspx?mobile=1> (citing the updated implementation date of the employer shared-responsibility (“play-or-pay”) provision – moving by one year from Jan. 1, 2014 to Jan. 1, 2015). Transitional relief granted by the federal government in February 2014 will mean that the employer is gradually implemented. See also MEDILL *supra* note 154, at 375 (explaining the structure of the \$2,000 penalty for non-compliance).

160. See *Employer Mandate Fact Sheet*, *supra* note 159; but see Robertson Williams, *Good and Bad News About the ACA Penalty Tax*, FORBES (June 12 2014, 10:02 AM), <http://www.forbes.com/sites/beltway/2014/06/12/good-and-bad-news-about-the-aca-penalty-tax/> (talking about the ramifications of the penalty, but most importantly noting that millions will try to avoid payments altogether).

of their full-time workers).¹⁶¹ There is also a \$3,000 “free rider” penalty per employee if the health insurance offered by employers is not considered “affordable,” which means that employee contributions constitute more than 9.5% of annual household income or the employer does not pay for at least 60% of the cost (minimal actuarial value) of the health insurance provided.¹⁶² Moreover, very large employers, those with more than two hundred employees, will eventually be required to automatically enroll employees into health insurance plans offered by the employer (though employees may opt out of coverage).¹⁶³

The so-called ACA “individual mandate,” which requires all Americans to be covered by some form of health insurance or face tax penalties, recently survived legal constitutional challenges brought against it by conservative opponents.¹⁶⁴ On the other hand, a planned, mandatory expansion of Medicaid was found unconstitutional and individual states have the right to stay in the old Medicaid program without jeopardizing their previous Medicaid funding.¹⁶⁵ Some are also pushing to expand Medicare coverage to all individuals, referred to as the “single

161. See Pub. L. No. 111-146, 124 Stat. 119 (2010); see also MEDILL, *supra* note 154, at 357.

162. See Emily Maltby, What the Health Care Decision Means for Your Small Business, *Wall St. J.* (June 28, 2013), <http://www.wsj.com/news/articles/SB10001424052702303561504577494582381825186> (answering the question about “unaffordable” coverage and \$3,000 per employee penalty); see also MEDILL, *supra* note 154, at 378 (stating that the penalty is in place because if the plan is unaffordable, then an employee would be better served by buying “an individual health insurance policy through the Exchange system using premium assistance tax credits”); see also Paul Secunda, *Employee Benefits Law: Policy and Practice*.

163. See Pub. L. No. 111-148, 124 Stat. 119 (2010); see also MEDILL, *supra* note 154, at 370 (citing the opt-out provision but also that if the employer offers more than one plan, a default plan may be chosen for the auto-enrollment).

164. *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566, 2067 (2012). For the most part, ACA was held to be constitutional by the US Supreme Court in *Sebelius*. Certain provisions which would have required states to spend more on Medicaid were struck down as unconstitutional in violation of the US Constitution’s Spending Power Clause. See *id.* at 2607 (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

165. *Id.* at 2365 (holding that “the threat to withhold a large amount of funds from one program ‘leaves the States with no real option but to acquiesce [in a newly created program],’ The Chief Justice concludes, the Medicaid expansion is unconstitutionally coercive.”).

payer” model.¹⁶⁶ In such a system, Medicare would provide a national baseline of healthcare coverage for all Americans.¹⁶⁷ This proposal has absolutely no chance of passing through Congress, given the polarized environment. On the conservative side, a group of Republican Senators have proposed a plan which would replace “the current open-ended, fee-for-service Medicare with enrollment of seniors in the Federal Employees Health Benefits Plan (FEHBP).”¹⁶⁸ The FEHBP “offers an array of privately-run health insurance plans.”¹⁶⁹ But that plan has gone nowhere in Congress.¹⁷⁰

III. SOCIAL PROTECTION BENEFIT SYSTEM IN THE NETHERLANDS

In this Part, we will describe the development of the Dutch social protection system. Subsequently, the various risks will be outlined in the same order as in Part II.

During World War II, several plans were made for a better world after the war, in reaction to the economic crisis in the 1930s and the effects it had on society. This also was the case in the United Kingdom, where the Dutch government was in exile during the war. In the UK, a commission chaired by the civil servant William Beveridge, developed a blueprint for a future

166. See *What is Single Payer?* PHYSICIANS FOR A NAT'L HEALTH REFORM (2015), <http://www.pnhp.org/facts/what-is-single-payer> (explaining the single payer system of healthcare, and asking for assistance and support in establishing such a system in the United States).

167. See Jacob S. Hacker, *Better Medicine: Fixing the Left's Healthcare Prescription*, SLATE (Oct. 10, 2006), http://www.slate.com/articles/health_and_science/medical_examiner/2006/10/better_medicine.html (“Paul Krugman has written a steady stream of pieces calling for a single public insurer like Medicare. Liberal stalwarts Sen. Ted Kennedy and Rep. John Dingell □ who've each proposed various complicated compromise plans in the past □ have teamed up to introduce the Medicare for All Act, which would, in Kennedy's words, “expand Medicare over the next decade to cover every citizen □ from birth to the end of life.”). In other words, such legislation would do nothing less than enact European-style national health insurance.

168. Tom Curry, *In Risky Election-Year Move Republicans Offer Medicare Alternatives*, NBC NEWS (Mar. 15, 2012), http://nbcpolitics.nbcnews.com/_news/2012/03/15/10704915-in-risky-election-year-move-republicans-offer-medicare-alternatives?chromedomain=usnews.

169. See *id.* Another conservative proposal would “raise the Medicare eligibility age (to 67, not 70) and subsidize seniors so they could purchase private insurance plans.” *Id.*

170. *GOP Plans for Medicare, Health Reform Repeal Draw Scrutiny*, KAISER HEALTH NEWS (Mar. 18, 2012), <http://kaiserhealthnews.org/morning-breakout/medicare-republicans-ryan/>.

social security system titled the *Beveridge Report*.¹⁷¹ It leveraged the term “social security” from the Social Security Act adopted shortly before the war in the United States in 1935.¹⁷² The *Beveridge Report* proposed that the future social security system should be universal in that it would cover all categories of the population.¹⁷³ Inspired by this report, the Dutch government established the Commission Van Rhijn, which had the task of sketching the foundations of the future Dutch social security system.¹⁷⁴ In its report, *Sociale Zekerheid* (Social Security),¹⁷⁵ the Commission proposed a new legal basis for the system, which turned out to be very important for the development of Dutch social security, as we will see below. Under this scheme, the state was responsible for social security and the protection against poverty for all of its members (now replaced by the term “citizen”).¹⁷⁶ The provision of universal social security, in turn, required that individuals do all that they reasonably could to protect themselves against poverty through their own efforts.¹⁷⁷ This was an important change after the previous approach, where the state was reticent in interfering in society and providing income protection. The new approach was widely endorsed, and the responsibility of the state for guaranteeing social welfare was laid down in the Constitution.¹⁷⁸

The text of legal basis accepted by the Dutch government and parliament made it possible to extend the scope of social protection beyond the category of employees, and required the state to be responsible for the whole population, since it now

171. See Beveridge, *supra* note 21.

172. See *infra* at 316.

173. Beveridge, *supra* note 21.

174. The Dutch Commission Van Rhijn, *Commission for Social Security Report*, THE HAGUE NATIONAL ARCHIVES (Mar. 26, 1943) (establishing general guidelines for the future development of social insurance in the Netherlands).

175. *Id.*

176. *Id.*

177. *Id.*

178. In the Constitution of 1814 it was mentioned that the poor were the concern of the government. Currently, Article 20 of the present Constitution gives a broader responsibility:

It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth. 2. Rules concerning entitlement to social security shall be laid down by Act of Parliament. 3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to aid from the authorities. Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815, Stb. 45, zoals deze wet laatstelijk laatstelijk is gewijzigd bij de Wet van 25 februari 1999, Stb. 133, 134 en 135 (Constitution of the Netherlands, hereinafter Gw).

refers to all “members of the society.” This led to the introduction of insurance schemes covering all residents, including the self-employed and persons not working. The first of these schemes was the *Algemene Ouderdomswet* (AOW General Old-Age Pensions Law), which came into force on January 1, 1957.¹⁷⁹ Soon after this date, two national insurance schemes were adopted—widow’s benefits (survivor’s scheme) and family’s benefits.¹⁸⁰ Both the old age scheme and the survivor’s benefit scheme provide for flat-rate benefits.¹⁸¹

Additionally, an Unemployment Benefits Act (called *Werkloosheidswet*) was passed in 1949.¹⁸² The unemployment scheme insured all employees against unemployment, providing a benefit up to 80% of the previous wage (up to a ceiling), payable for six months.¹⁸³ This was administered, as was regulated in this Act, by *bedrijfsverenigingen*, the associations of employees’ and employers’ representatives mentioned earlier.¹⁸⁴ In 1966, Parliament adopted the *Wet op de arbeidsongeschiktheidsverzekering* (WAO Law Relating to Insurance against Incapacity for Work).¹⁸⁵ The WAO, a disability law, was also administered by the *bedrijfsverenigingen*, as was regulated in this Act.¹⁸⁶

As for health care, in the 1970s, Parliament adopted health care regulations limited to employees with an income below the statutory ceiling.¹⁸⁷ In addition, Parliament adopted a national

179. *Algeme Ouderdomswet (AOW)*, HISTORIEK, (Oct. 12, 2009) available at historiek.net/algemene-ouderdomswet-aow/5966/ (in Dutch); see also Art. 20 AOW (May 31, 1956), available at http://wetten.overheid.nl/BWBV0001560/geldigheidsdatum_30-08-2014 (in Dutch); see generally <http://www.overheid.nl> for text of all Acts, in Dutch.

180. Office of Retirement and Disability Policy, *Social Security Programs Throughout the World: Europe 2012*, U.S. SOC. SEC. ADMIN., (last accessed Apr. 29, 2015), <http://www.ssa.gov/policy/docs/progdsc/ssptw/2012-2013/europe/netherlands.html>.

181. *Id.*; Wim van Oorschot and Cees Boos, *Nagelaten betrekkingen in de sociale verzekering. Terug naar af?*, De Gemeenschap is aansprakelijk...’ 100 jaar sociale verzekering 1901-2001, 225 (Vermande, 2001).

182. De Werkloosheidswet Nov. 1949 *Stb.* 1949, 423. A brief description of the law can be found at http://www.stvda.nl/~media/Files/Stvda/Brochures/1950_1959/1952/19520400.ashx.

183. *Id.*

184. *Id.*

185. *Wet op de arbeidsongeschiktheidsverzekering*, *Stb.* 1966, 84 (Law on Disability Insurance), available at <http://www.overheid.nl> (in Dutch).

186. Art. 66 WAO (Disability Act).

187. *Ziekenfondswet*, *Stb.* 1964, 392 (Sickness Fund Act); see also MEASURING UP: IMPROVING HEALTH SYSTEM PERFORMANCE IN OECD COUNTRIES 119 (OECD

insurance scheme for the high medical costs that employees and private insurers were believed to be not able to bear, for example: long-term hospital care or stay in nursing homes.¹⁸⁸

Thus, after World War II, the Dutch system of social protection increased considerably, as economic growth after the war enabled the government to absorb the costs of these schemes. However, when economic growth slowed down in the 1970s (oil crisis) and 1980s (structural problems requiring important enterprise restructuring), the number of benefit recipients grew steadily while the funds decreased.¹⁸⁹

In the 1990s, policy makers became aware that social security acts enabled employers and others to also use them for unintended purposes that were deemed no longer desirable by the legislature.¹⁹⁰ For instance, if an employer had a conflict with an employee, it was a cheap solution to send this employee home “sick” because the wage costs were reimbursed by the sickness benefit fund.¹⁹¹ To some extent, such an employee would indeed often feel ill (i.e., stressed), but such situations could, in principle, be solved by giving the employee other work to do or getting that employee a colleague to assist her or him. However, since the Sickness Benefit Act was bearing the costs, there was no financial incentive for the employer to find a solution.¹⁹² This perpetuated a cycle wherein the employee would remain in the scheme for a long time, believing she or he was really ill until she or he was finally deemed disabled. For this reason, “activation” became the new term: the system was to activate people to make as little use of the benefit as possible by encouraging (and forcing) them to take responsibility for themselves.¹⁹³

Additionally, disability benefits were paid out more generously than intended.¹⁹⁴ In order to find a compensation for

Publications, 2002).

188. *Id.*

189. *See generally* Marcel Einerhand et al., *SICKNESS AND INVALIDITY ARRANGEMENTS* (VUGA, 1995).

190. *See generally* *Belang en Beleid. Naar een verantwoordelijke uitvoering van de werknemersverzekeringen*, (SDU-uitgeverij, 1994) (explaining the distribution of responsibilities of benefit administration; *see also* Sanneke Kuipers, *THE CRISIS IMPERATIVE: CRISIS RHETORIC AND WELFARE STATE REFORM IN BELGIUM AND THE NETHERLANDS IN THE EARLY 1990S*, 131-132 (Amsterdam University Press, 2006).

191. *Id.* at 134.

192. *Id.*

193. *Id.*

194. *Id.*

victims of mass dismissals in Dutch workplaces in the 1970s and 1980s, in a considerable number of cases disability benefits were awarded to persons who became redundant.¹⁹⁵

These examples show that the costs of particular decisions could be shifted to the benefit system. A consensus emerged that responsibilities had to be re-ordered¹⁹⁶ and that those who could influence the risk of becoming disabled should be given incentives to reduce that risk.¹⁹⁷ Also the employers' and employees' associations did not feel the necessary economic incentives to reduce reliance on the benefit system. In order to end the influence by those who do not have to bear the costs of the decisions, the employers' and employees' associations (organized in the *bedrijfsverenigingen*) were completely removed from benefit administration.¹⁹⁸ After a short period in which it was thought that the system should be privatized (i.e. administered by private insurance companies), the government decided that the system should become public, with strict supervision and control by the Minister of Social Affairs.¹⁹⁹ One major reason for coming to this conclusion was that assessing a person's incapacity for work was such an essential element of receiving benefits that public responsibility should be maintained.²⁰⁰ Therefore, the administration could not be left to private companies, especially because they would have a conflict of interest in wanting to reduce benefit costs.²⁰¹ For this reason, the *Uitvoeringsinstituut Werknemersverzekeringen* (UWV) (benefit administration employees' schemes) was established.²⁰²

195. *Id.* at 135.

196. *See Verantwoordelijkheidsverdeling sociale zekerheid*, SER, (Jan. 1994) https://www.ser.nl/~media/files/internet/publicaties/overige/1990_1999/1994/b01080.ashx. The Social Economic Council is a tripartite (i.e. consisting of representatives of employers and employees organizations and independent experts appointed by the minister of social affairs) with the task (inter alia) to advise the government on socio-economic issues. *Id.*

197. *See Belang en beleid*, *supra* note 154.

198. Wet uitvoeringsorganisatie werk en inkomen, *Stb.* 2001, 264 (Act on the administration of work and income).

199. R.J. van der Veen, et al., *L'histoire se répète? Honderd jaar uitvoeringsorganisatie sociale verzekeringen*, De gemeenschap is aansprakelijk...Honderd jaar sociale verzekering, Koninklijke vermande, 2001.

200. *See id.* at 78; *see generally* P.S. Fluit, *Verzekeringen van solidariteit*, Netherlands, Kluwer, 2001; *see also* Frans Pennings, *Dutch Social Security Law in an International Context*, Kluwer Law International, 2002 (providing a general overview of the system)

201. R. J. van der Veen, *supra* note 200.

202. Wet structuur uitvoeringsorganisatie werk en inkomen 29 Nov. 2001, *Stb.* 2001, 624 (SUWI).

Currently, this is a national organization that administers the disability, sickness, and unemployment benefit schemes (as well as a few other minor schemes).²⁰³

In addition to the schemes mentioned above, there is a general public assistance act that provides for a subsistence income, which, for couples, is at the level of the statutory minimum wage.²⁰⁴ As of July 2014, the gross amount is \$ 1,855.²⁰⁵ For single persons, the amount is in principle 70% of this (and for single parents, it is 90%).²⁰⁶ These subsistence benefits take the income of the person concerned and that of a spouse (or equated person) into account, as well as any capital above a certain threshold.²⁰⁷

A. OLD-AGE PENSIONS

1. *The National Old-Age Pension Act*

The *Algemene Ouderdomswet (General Old Age Pension Act)*²⁰⁸ was already mentioned in the previous section; it is the Act, introduced shortly after the Second World War as part of the project to introduce schemes protecting the full population, not only workers.²⁰⁹ Benefits are flat-rate and are at the subsistence level (the same rates as discussed under the Public assistance act, see previous section).²¹⁰ The benefits are financed on the basis of contributions paid by all residents, depending on whether they have an income (those who do not have an income are protected in the same way as contribution payers).²¹¹

This general system also provides protection to those who have never worked, those who have large gaps in their careers, and those who are self-employed. Since the old-age benefit rates and the subsistence benefits are basically the same, pensioners, in principle, do not have to rely on public assistance.

203. Wet uitvoeringsorganisatie werk en inkomen, *supra* note 199. It is regulated by the new Act. See Wet structuur uitvoeringsorganisatie werk en inkomen, *supra* note 202.

204. Art. 3:21 WWB (Public Assistance Act).

205. *Id.*

206. *Id.*

207. Art. 31-34 WWB.

208. Algemene ouderdomswet, *Stb.* 1956, 281 (General Old Age Pension Act).

209. Art. 6 AOW.

210. Art. 9 AOW.

211. Art. 82-83 WFSV (Act on financing of social insurance schemes).

Benefits are financed on a PAYG basis.²¹² Since the greying of the population raised concerns on financing in the future, the pension age was raised in 2014.²¹³ The pension age had been sixty-five for both women and men alike.²¹⁴ In the future, it will gradually rise to sixty-seven; further increases are possible if figures show that life expectancy has increased further.²¹⁵ It is now generally believed that the system is sustainable because of this dynamic increase of pension age, which is not viewed as unreasonable now that people at the age of sixty-five are, in general, much healthier than when the act was adopted in 1957.²¹⁶

Survivors' benefits fall under a separate act, the *Algemene nabestaandenwet* (General Survivors' Benefits Act).²¹⁷ This act provides for benefits comparable to those of the AOW.²¹⁸ Benefits take the income of the survivor into account, and only certain categories of survivors are eligible for benefits (born before 1950, or being partially disabled or having children under eighteen).²¹⁹

2. *Supplementary Old-Age Pensions*

Although the Old Age Benefits Act has an important function to protect all pensioners against poverty (with benefits that are relatively high, compared to other European countries), these benefits only partially compensate the loss of income for those who previously earned higher incomes, since benefits are flat-rate only. For this reason, employers' and employees' organizations made arrangements in many sectors to establish occupational pensions. Because of the minimum level of the statutory pensions and the absence of statutory earnings-related pensions, the expanse of supplementary pensions in the

212. Federation of the Dutch Pension Funds, *Collectivity Solidarity: the evolution and position of collective pensions in the Netherlands*, 22 (The Hague, 2011), www.pensionfederatie.nl?Document/Publicaties/English%20publications/VoorsElkaar_EN.pdf; see also Art. 81-83 WFSV.

213. Joris Beermaert and Corine Hoekstra, *Raising the real retirement age*, THE ACTUARY (May 8, 2014), available at www.theactuary.com/features/2014/05/raising-the-real-retirement-age/; Art. 7 AOW; *Stb.* 2013, 316.

214. Art. 7 AOW.

215. Art. 7a AOW.

216. See Beermaert, *supra* note 213.

217. *Algemene nabestaandenwet*, *Stb.* 1995, 690.

218. Art. 17 ANW.

219. Art. 14 ANW.

Netherlands is relatively large compared to countries that have a statutory earnings-related system.²²⁰

The supplementary pension system is based on the principle that employers and employees have the primary responsibility for the establishment of pension provisions; there is no obligation to make a pension provision. However, once an employer has made a pension commitment to his employees, this commitment must be implemented according to the conditions prescribed in the Pension Act, and is also subject to the protections built into the act.²²¹ The main safeguard is the rule that pension commitments must be financed on the basis of capital funding, and that the reserves must be placed outside the employer's company through one of the following: (1) by joining an industry-wide pension fund; (2) by establishing a company-pension fund; or (3) by entering into an agreement with an insurance provider.²²² The safeguard provides protection in case the company goes bankrupt.²²³

An agreement between the employer (or employers' organization) and employees' organizations defines the portions of the pension contributions that must be paid by the employer and the employee (in some cases the employer pays all contributions). If an employee changes jobs, she or he has the legal right to transfer his or her pension rights to the fund affiliated with the new employer.²²⁴ As a result, there is no gap in the pension record.

Although employers are not obligated to make pension commitments to their employees, the vast majority of employees—about 90%—are now covered by an occupational pension scheme.²²⁵ The Minister of Social Affairs has the power to impose mandatory participation in a pension fund within a given industry at the request of employers' and employees'

220. See Mies Westerveld, *Keuzes van gisteren...een blauwdruk voor morgen?: Honderd jaar socialeverzekeringpensioenen in de Bondsrepubliek Duitsland, Groot-Brittannië en Nederland* (SDU, 1994).

221. Pensioenwet, *Stb.* 2006, 705 (Pension Act).

222. *Id.*

223. *Id.*

224. Sibylle J.M. Reichert, *The Dutch Pension System: an overview of the key aspects*, 11, 29, DUTCH ASSOCIATION OF INDUSTRY-WIDE PENSION FUNDS, available at http://www.pensioenfederatie.nl/Document/Publicaties/English%20publications/Nederlandse_pensioensysteem_Engelstalige_versie.pdf.

225. See generally Rijksoverheid, 'Opbouw pensioenstelsel,' *Pensioen*, <http://www.rijksoverheid.nl/onderwerpen/pensioen/opbouw-pensioenstelsel> (last accessed Apr. 15, 2015); Reichert, *supra* note 224.

organizations that have jointly set up a pension fund for that branch.²²⁶

Since the contents of the pensions are defined in agreements between the employers' and employees' representatives, there are no general rules on the level of pensions applicable to all schemes. However, the tax rules define limits for the contributions that can be deducted from taxes, which is extremely influential on the pension rules that are made. Most schemes are defined benefit schemes, in which the employee is promised a pension that is a ratio of the wage earned during his or her lifetime. However, more recently, due to the financial crisis and problems with the pension funds, the pension promise does not mention the exact amount of the pension anymore.

In the 1990s, pension funds ran into trouble because pension obligations and costs increased, while fewer contributions were being paid and capital market interest rates and returns on investments dropped sharply.²²⁷ Consequently, the reserves of the funds decreased, and their solvency eroded.²²⁸ In order to deal with this situation, the then supervisory body tightened up the regulations for pension funds and intensified its supervision.²²⁹ The funds had to take measures to increase their reserves.²³⁰ One such measure was the shift in most funds from pensions calculated on the final wage to pensions based on the average wage earned during the career (although they are still defined benefit plans).²³¹

226. On the basis of the *Wet verplichte deelname bedrijfstakpensioenfonds*, *Stb.* 2000, 628 (Act on compulsory participation in a pension fund).

227. Federation of the Dutch Pension Funds, *supra* note 213, at 30-31; see Igor Guardiancich, *The Netherlands: current pension system: first assessment of reform outcomes and output*, (OSE, 2010), available at www.ose.be/Filed/publication/2010/country_reports_pension/OSE_2010_CRpension_TheNetherlands.pdf.

228. See Robbert van het Kaar, *Dutch pension funds face serious challenges*, EURWORK), <http://www.eurofound.europa.eu/eiro/2011/01/articles/nl1101039i.htm> (last updated May 2, 2011) (stating "Rising premiums and the option of supplementary deposit obligations are increasingly prompting employers to make employees responsible for pension risks, in part or in full").

229. See Mark den Hollander and Tjitsger Hulshoff, *Hogere buffereisen voor pensioenfondsen kunnen knellen*, MEJUDICE (Dec. 28, 2011), <http://www.mejudice.nl/artikelen/detail/hogere-buffereisen-voor-pensioenfondsen-kunnen-knellen>; *Besluit financieel toetsingskader pensioenfondsen*, *Stb.* 2006, 710.

230. Hollander, *supra* note 229.

231. Guardiancich, *supra* note 227. Independent pension experts are already for a long time in favor of average wage systems. J.C.N. Kennis, Lex Meijdam, & Harrie Verbon, *Van eindloon naar middelloon*, 82 (4128) 861-864 (Economisch Statistische

In July 2014, the government finally came up with a proposal that allowed pension funds to take more time to acquire the necessary capital, but the reserves have to be bigger than what was required before.²³² Whether this solution will be sufficient to shore up the pension system, as well as what effects it will ultimately have, remains to be seen.²³³ Defined contribution plans are sometimes proposed, but there is little popularity.

B. THE NEW DISABILITY BENEFITS ACT OF 2004

The introductory section discussed how the continuous increase of new disability benefit claimants was a big problem for the government.²³⁴ Measures like redefining the concept of disability and amending the level did not change this situation.²³⁵ As a result, a new structural approach was introduced via the *Wet Werk en Inkomen Naar Arbeidsvermogen* (WIA), the new Disability Benefits Act, adopted in 2004.²³⁶ This approach stressed the priority of work over receiving benefits, and for this purpose, the act introduced several new instruments.²³⁷ In addition, the changes to the Sickness Benefits Act were seen as vital in reducing the number of new disability claimants, since the longer people remain ill, the more likely it is that they will become a disability benefit claimant; we will discuss the sickness benefits below (under C).

The new Disability Benefits Act makes a distinction between persons who are permanently disabled to at least 80% (the permanently fully disabled) and those who are not permanently disabled, or who are permanently disabled to a

Berichten, 1997), available at <http://pure.uvt.nl/portal/files/200922/vaniend1.pdf>.

232. *Legal Alert: New bill to amend financial assessment framework for pension funds*, DE BRAUW, BLACKSTONE, WESTBROEK (July 9, 2014), <http://www.debrauw.com/wp-content/uploads/NEWS%20-%20LEGAL%20ALERTS/Pensions/2014/New-bill-to-amend-financial-assessment-framework-for-pension-funds.pdf>.

233. *Wet aanpassing financieel toetsingskader*, *Stb.* 2014, 567 (Act on adjusting the financial framework for pensions).

234. *See infra* section III.

235. *De wegwijzer naar informatie en diensten van alle overheden*, 22.730, 1992-1993.

236. The Act was preceded by the report of Adviescommissie arbeidsongeschiktheid, *Werk maken van arbeidsgeschiktheid* (2001) available at http://docs.szw.nl/pdf/35/2002/35_2002_3_2406.pdf.

237. Barend Barentsen, *Arbeidsongeschiktheid: aansprakelijkheid, bescherming en compensatie* (Kluwer, 2003).

lesser extent than 80% (the partially disabled).²³⁸ The assessment of incapacity of work is done by assessing what a person can still earn with the remaining capacities in *any* work available on the labor market. This (theoretical) income is compared with the previous income, and thus the level of incapacity is calculated. Thus, a very broad range of possible work is taken into account (not only suitable work). As a result, the system is very strict.

According to the new act, the permanently fully disabled have the right to a generous disability benefit because measures for getting them back to work are not considered relevant.²³⁹ The level of this benefit is 75% of their previous wage.²⁴⁰

The partially disabled are subject to conditions and rules meant to reinforce their re-integration back into work.²⁴¹ In order to be eligible for disability benefits, they have to be more than 35% disabled.²⁴² They receive a wage-related benefit if they satisfy certain conditions relating to their employment history; the duration of the benefit is contingent on the duration of their employment history.²⁴³ This benefit is 70% of their previous wages.²⁴⁴ After the right to this benefit has expired (or if the claimant is not entitled to this benefit because of an insufficient work record), a so-called “wage supplement benefit” is payable, on condition that the claimant actually earns an income of at least half the residual earning capacity.²⁴⁵ The latter capacity is calculated by looking at the income the person can earn with any kind of work that he or she can still do (so not only their own previous work or suitable work).²⁴⁶ This is a theoretical assessment, so it is not relevant whether there are

238. The assessment is done by comparing the physical and psychological deficiencies due to medical reasons and a database of job descriptions (regardless of whether there are vacancies) with the purpose to determine how much a person can still earn. The more a person can earn, the lower the disability rate. See more on this method at *Schattingsbesluit arbeidsongeschiktheidswetten*, *Stb.* 2000, 307 (Decree on Assessment for Disability Acts).

239. These are often called re-integration measures.

240. Up to a ceiling, which is currently 4137 euro a month. The maximum benefit is 75% of this amount (which is gross income), see Art. 17 WFSV.

241. Art. 29 WIA (The New Disability Act).

242. Art. 54 WIA (The New Disability Act).

243. Art. 59 WIA (The New Disability Act). The rules for entitlement and duration of this benefit follow those of the Unemployment Benefits Act, which is discussed in more detail below.

244. See *id*; see also Art. 81-83 WFSV.

245. Art. 59-101 WIA (The New Disability Act).

246. Art. 59 WIA (The New Disability Act).

employment vacancies.²⁴⁷ What is relevant is that the claimant realizes at least half the income she or he can theoretically earn.²⁴⁸ Until this point, disability schemes did not have a connection with the actual income a person earns. The resulting benefit in this case is 70% of the difference between the individual's previous earnings and his residual earning capacity.²⁴⁹ Actual income is received in addition to this.²⁵⁰ Thus, increases in income do not lead to a lower benefit, making it attractive to work as much as one can. In other words, it is attractive to work as much as possible, since income is not deducted from the benefit received.

The claimant who, upon expiration of his or her wage-related benefit, does not satisfy the condition that he or she earns at least 50% of the person's remaining earning capacity is instead eligible for a low benefit.²⁵¹ In the case of full disability, this is 70% of the statutory minimum wage.²⁵² In cases of partial disability, the benefit depends on the incapacity rate.²⁵³ Persons who are incapacitated to a level of less than 35% are not eligible for a benefit.²⁵⁴ It was the view of the legislature that their incapacity rate is so low that they should be able to work.²⁵⁵

Currently, this constitutes a consistent approach, elaborated upon via new specific rules aimed at reducing sickness and disability claims. Under this approach, during the sickness period, employer and employee must do everything possible for the latter to stay at or return to work. The hope is that most workers can still do adjusted or other types of work in a modified workplace, if necessary. If the employee is not able to earn at least 65% of the previously earned wage after two years, the disability benefit scheme encourages the beneficiary to keep

247. *See id.*

248. Thus, if a person is supposed to have an earning capacity of 1,000 euro per month, he or she must have an income from work of at least 500 euro per month in order to be eligible for the wage supplement. The idea behind this rule is that it must be made as attractive as possible for the person concerned to (re)start working or remain in work. *Parliamentary Papers* II 2004-2005, 30.034, section 3.1, available at <http://www.overheid.nl> (Explanatory Memorandum to The New Disability Benefit Act).

249. *See* Art. 59 WIA (The New Disability Act); *see also* Art. 63 WIA.

250. Art. 52-60 WIA.

251. Art. 61 WIA.

252. *Id.*

253. *Id.*

254. Art. 61:6 WIA (The New Disability Act).

255. *See* Barentsen, *supra* note 237.

working, and/or seek more work, as this leads to a higher benefit, as has been explained *supra*. In evaluating reports of this act, it appears that the number of new entrants for benefits has been much lower than under the old disability act, although whether those who are disqualified ultimately find work is not so clear.²⁵⁶

Employers have the discretion to opt out of the disability scheme, but are not obligated to do so.²⁵⁷ “Opting out” might not be an optimal term, since opting out here is limited to no longer having to pay contributions to the scheme. Therefore, the term “own risk bearer” is generally used.²⁵⁸ Instead of paying contributions, the employer bears the financial risks of the disability benefits (for the partially disabled and non-permanently disabled - Group B mentioned above) for the first ten years of disability.²⁵⁹ The decision on granting and terminating the right to benefits is still in the hands of the public benefits administration, and the statutory rules for benefits also apply.²⁶⁰ Since the employer pays the benefit, he or she has the advantage of paying less social security contributions.²⁶¹ After the first ten years of benefit payments to a beneficiary, the benefits administration bears the responsibility of the costs for that person.²⁶²

Employers may buy private insurance to bear the risk of the first ten years of benefit payments, and they usually do so.²⁶³ These insurance policies are often adjusted to the individual enterprise concerned, and little is shared with the public about the conditions, prices, and uses. This also means that the risk bearers are responsible for reintegration activities of the persons for whom they bear the risk.²⁶⁴ Thus, they can directly impact their risk, and if they succeed in getting a person back to work, they see the benefits of their efforts.

256. See Boukje Cuelenaere, *et al.*, *Onderzoek evaluatie WIA* (Astri, 2011), <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2011/03/28/onderzoek-evaluatie-wia/onderzoek-evaluatie-wia.pdf>.

257. Art. 82-87 WIA.

258. See, *e.g.*, *id.*

259. Art. 82 WIA (The New Disability Act).

260. See Frans Pennings, *Kunnen eigenrisicodragers wel hun eigen risico beïnvloeden?*, *Tijdschrift recht en arbeid*, 2014.

261. Art. 40 WFSV.

262. Art. 82 WIA (The New Disability Act).

263. Cuelenaere, *supra* note 256.

264. Art. 27:6 WIA (The New Disability Act).

In conclusion, disability benefits give strong financial incentives for beneficiaries to return to work. Employers are not directly involved, except when a claim is made, but they can be involved by deciding to bear their own risk. In that case, the decisions on benefits are still made by the public benefits administration.

C. UNEMPLOYMENT BENEFITS

The current Unemployment Benefits Act was adopted in 1986.²⁶⁵ It provides claimants who have lost at least five working hours per week with an unemployment benefit.²⁶⁶ In other words, claimants do not have to be completely out of work in order to be considered unemployed.²⁶⁷

In order to satisfy the conditions regarding previous employment, the claimant must have worked at least one hour a week as an employee in at least twenty-six of the thirty-six weeks immediately preceding the first day of unemployment.²⁶⁸ For persons satisfying this condition, the duration of the benefit is three months.²⁶⁹ If additional conditions are fulfilled, a longer benefit is paid. These rules are simply put: For each year of work, the benefit is prolonged for one month.²⁷⁰ The maximum period for which a benefit can be received is thirty-eight months.²⁷¹ However, the law was changed in June 2014, and the maximum period during which benefits can be received will be reduced to twenty-four months beginning in 2015, because the government wants to encourage people to find work, which has the tangential benefit of reducing expenditures.²⁷²

The Act imposes an obligation on the benefit administration (not merely a discretionary power) to sanction the beneficiary if she or he did not satisfy his or her obligations as defined under the law.²⁷³ Until this law came into force in 2006, the benefit

265. Werkloosheidswet, *Stb.* 1986, 567 (Unemployment Benefits Act).

266. Art. 16:1 WW.

267. *See generally* Pennings, *supra* note 200.

268. Art. 17 WW (Unemployment Benefits Act).

269. Art. 42:1 WW (Unemployment Benefits Act).

270. Art. 42:2 WW (Unemployment Benefits Act).

271. *Id.*

272. During the first ten years, one still acquires one month per year; after the ten years, it is half a month per year. Wet werk en zekerheid, *Stb.* 2014, 216 (Work and Security Act),

273. Art. 27 WW (Unemployment Benefits Act).

administration had discretionary powers to impose a sanction.²⁷⁴

During the first two months, the benefit, in cases of full unemployment, is 75% of the daily wage.²⁷⁵ After this period, the level is 70% of the daily wage.²⁷⁶ A person whose benefit is below the applicable subsistence income²⁷⁷ may be eligible for a supplement under a subsistence benefit act.²⁷⁸

Unemployment benefits can be reduced or withdrawn if a person is considered to have become culpably unemployed (i.e. can be blamed for the situation).²⁷⁹ Grounds for such dismissal include theft from the employer or violence against the employer and fellow employees.²⁸⁰ While those are just a few examples, they are representative of the seriousness of the offenses in question. In addition, the employee is also considered culpably unemployed if the employment relationship has ended by, or on the request of, the employee, whereas continuation of the employment relationship would not have resulted in such difficulties for the employee that this continuation could not, in all fairness, have been demanded of her or him.²⁸¹ This makes it clear that if an employee took the initiative to end the employment relationship without a good reason that person is culpably unemployed and benefits will be refused completely. Generally, if the employer took the initiative to terminate the employment relationship, the employee is able to obtain benefits.²⁸² This approach was adopted in 2006 so that the mobility of workers was not blocked.²⁸³ Prior to the change, employees had to fight their dismissal in any case where the employer took the initiative since such attempt could lead, in theory, to continuation of the employment contract or reinstatement of the employee, and then no benefits had to be

274. See generally Frans Pennings and Anita Damsteegt, *De Werkloosheidswet* (Kluwer, 2009).

275. Art. 45 WW (Unemployment Benefits Act).

276. See Art. 17 WFSV.

277. Subsistence income is closely related to the amounts mentioned for the old age benefits in Art. 9 AOW.

278. See Part I, See *infra* Part III.

279. Art. 27 WW (Unemployment Benefits Act).

280. Art. 24 WW (Unemployment Benefits Act).

281. *Id.*

282. *Id.*

283. Baker & McKenzie, *The Netherlands* 361, available at http://www.bakermckenzie.com/files/Uploads/Documents/Supporting%20Your%20Business/Global%20Markets%20QRGs/Termination,%20Discrimination%20and%20Harassment/qr_netherlands_terminationdiscriminationharassmentguide_2009.pdf.

paid.²⁸⁴

If an employee is culpably unemployed, the UWV (the benefit administration) must refuse any form of unemployment benefit.²⁸⁵ It is not only in cases of culpable unemployment that the *Werkloosheidswet* provides what measures have to be taken. The same rules apply if the claimant does not prevent becoming or staying unemployed as a result of neglecting to accept suitable work, or by failing to obtain or to keep suitable work through his own fault.²⁸⁶ Suitable work is any work that fits a given employee's strengths and skill set, unless acceptance of that job poses physical, mental, or social demands on that person that cannot be met.²⁸⁷ If an employee neglects to accept suitable work or if she or he fails to obtain suitable work through his or her own fault, the benefit must permanently be refused for the time period in which the person could have worked, if not for that person's refusal to accept the work in question.²⁸⁸ The act also obligates the claimant to actively apply for work and not intentionally hinder the possibility of getting such work.²⁸⁹ The employee is, moreover, required to cooperate in obtaining the education or training deemed necessary for his or her future employment, or for other activities that are beneficial to his or her reintegration.²⁹⁰

D. PROTECTION IN CASE OF SICKNESS

In the area of sickness benefits, a new approach materialized with the introduction of the statutory obligation for employers to continue to pay wages when an employee gets sick. This new approach began in 1994 with the introduction of the rule that employers had to continue to pay wages during the first six weeks of illness (for small enterprises, defined by the law as having fewer than fifteen employees, the period was two weeks).²⁹¹ The assumption underlying the new act was that if employers were responsible for income provision during sickness, they would check more carefully whether an employee

284. Art. 24 WW; Art. 27 WW.

285. *Id.*

286. *Id.*

287. *Id.*

288. Art. 27 WW (Unemployment Benefits Act).

289. Art. 24 WW (Unemployment Benefits Act).

290. Art. 26 WW (Unemployment Benefits Act).

291. Wet Terugdringing Ziekteverzuim, *Stb.* 1993, 750 (Sickness Absence (Reduction) Act).

was rightfully absent.²⁹² Another anticipated effect of the new law was that employers would take measures to reduce the risk of injury or sickness caused by dangerous working conditions.²⁹³ The construction sector, in particular, was one in which many measures could be taken to reduce the number, and drastic effects, of accidents.²⁹⁴ So even though there was a separate Health and Safety Act, the new sickness provisions encouraged additional efforts to prevent accidents and sickness.

Although it is not clear whether the obligation for employers to pay wages in case of sickness really had the desired effect, two years later, the employer's responsibility to pay wages to ill employees was extended to a period of fifty-two weeks.²⁹⁵ This extension occurred through a law that amended, *inter alia*, the Civil Code in order to give ill employees the legal right to 70% of their wages for that 52-week period.²⁹⁶ In 2004, the period was extended to 104 weeks.²⁹⁷ In collective agreements, which cover 90% of the Dutch workforce, the statutory required wage is often supplemented to cover the full wage.²⁹⁸ This additional coverage varies from agreement to agreement.²⁹⁹

This process of replacing the right to sickness benefits with a statutory obligation for employers to pay wages to ill employees (henceforth "sick pay") is sometimes called the privatization of the Sickness Benefits Act, although it is not actually a privatization.³⁰⁰ Still, the employer is entirely responsible for the costs, and although the Civil Code provides strict rules, an employer can adopt supplementary obligations for the employee, such as the timeframe within which the

292. Babara Hofman & Frans Pennings, *Privatisering en activering in de Nederlandse sociale zekerheid en solidariteit – een internationale perspectief*, (Deventer, 2013).

293. *Id.*

294. This could be accomplished with stronger rules such as the enforcement helmets, enforced shoes and protection barriers for workers at high-level sites. Additionally, a policy to avoid sickness caused by stress or conflicts at work could contribute to lower costs.

295. Wet Verlenging loondoorbetaling bij ziekte, *Stb.* 1996, 142 (Sickness Act).

296. *Id.*

297. Art. 7:629 BW.

298. See Fase W. *et al*, *Sociale zekerheid: privaat of publiek?* (Kluwer, 1994) (describing the privatization principles that apply to the Sickness Benefit Act).

299. Because of these variations, it is difficult to say how many workers were thus guaranteed 100% of their former wage.

300. For a description of the various dimensions of the privatization of the social security benefit, see Becker, U. and Pennings, F., *International Standard-Setting and Innovations in Social Security*, Wolters Kluwer, 2013), p. 381.

employee has to contact the employer when he or she is ill.³⁰¹ However, these rules must fit within the framework of the statutory obligations, and can be challenged in court, as it is part of labor law.

Employers can buy private insurance to cover their risk, but they are not obligated to do so. In an effort to make adoption of the act easier, and to get access to this large market, the association of insurance companies decided that the companies would make no assessment of employees' health conditions when an employer took out insurance (this insurance covered all employees, so an employer could not choose who to insure).³⁰² Previously, when employers only had to pay benefits for six weeks, they often shouldered the responsibility themselves, but when the fifty-two-week period was introduced, they more frequently bought insurance.³⁰³ However, even in the insurance coverage context, there is still often a risk period borne by the employer, (e.g., for the first six weeks, or when the absence for leave is for longer than a certain period ("stop loss insurance")).³⁰⁴

To this day, the Sickness Benefit Act has not been abolished and still applies to those who do not currently, or no longer, have an employer. Flexible workers are an example of those who do not currently have an employer, while those who no longer have an employer are the unemployed.³⁰⁵ For them, the act serves as a safety net. Since the new rules can have the potentially adverse effect of employers being unwilling to employ high-risk persons, the Act on Medical Examinations was introduced in

301. See Art. 7:629 BW (Civil Code).

302. Sociaal Economische Raad, *Advies kabinetsvoornemens ZW, AWW en WAO*, 267 (April 1995, SER 95/05), http://www.ser.nl/~media/db_adviezen/1990_1999/1995/b13146.ashx.

303. See Theo Veerman and Jan Besseling, *Prikkels en privatisering*, (Elsevier, 2001), p. 27. (describing the system of incentives created by privatization).

304. Similarly, stop-loss insurance is commonly utilized in the United States to allow smaller employers to self-fund their health insurance plans and thereby, through ERISA preemption, avoid state insurance regulation. See MEDILL, *supra* note 154, at 330 ("Stop-loss insurance policies provide that the stop-loss insurer will pay for claims made by participants in the selfinsured plan that exceed a specified dollar amount. This dollar amount is known as the policy's *attachment point*." (emphasis in original)).

305. Unemployed persons are *also* covered for sickness, even though that may not lead to a different income, since they may be disqualified for unemployment benefit during sickness. In addition, for persons suffering from long-term sickness and unable to return to work, these persons may qualify for disability benefits. These benefits are financed by contributions paid to the sickness and disability funds.

1997. The Act prohibits medical examinations as a standard practice, only allowing them if the job had specific health requirements (e.g. pilots).³⁰⁶ The purpose of this Act is to reduce the risk that chronically ill persons would never be able to find employment.

In addition to this change in benefit rules, the Law on Conditions at the Workplace was amended in order to introduce more stringent obligations on the part of employers to improve working conditions.³⁰⁷ Better working conditions were meant to reduce the number of accidents. In addition, the employer had to develop a policy with the aim of reducing sickness in the workplace.³⁰⁸ To this end, employers are obligated to make an analysis of all situations that could potentially endanger the health and safety of their employees.³⁰⁹

The mere employer obligation to continue to pay the wages of his or her ill employees did not, in the view of the government, result in sufficient reintegration efforts by employers.³¹⁰ One reason was that private insurance offset the financial burdens of the employer's obligation to pay wages. Another reason was that employers sometimes considered undertaking reintegration measures more expensive or burdensome than having to continue to pay an ill employee's wages. This led to the *Wet Verbetering Poortwachter* (Gatekeepers Act).³¹¹

The Gatekeepers Act's purpose was to narrow access to the Disability Benefits Act.³¹² This act requires employers and ill employees to undertake reintegration efforts if illness is expected to last for a long period (of course, in most cases of illness, such as colds, no measures are necessary).³¹³ Thus, if an

306. See de E.L. Vos, et. al., *Evaluatie wet op de medische keuringen Zon*, (Den Haag, 2001); see c.f., Netherlands Committee of Jurists for Human Rights, *Medical Data of Dutch Patients Exchanged Without Consent*, EUROPEAN LIBERTIES PLATFORM, <http://www.liberties.eu/en/news/exchange-of-medical-data-netherlands> (pointing out protective measures concerning medical privacy in the Netherlands that equate to HIPAA laws in the United States) (Nov. 10, 2014).

307. Art. 7:685 BW (Civil Code).

308. Arbeidsomstandighedenwet, *Stb.* 1999, 184 (Health and Safety Act).

309. Art. 5 Arbeidsomstandighedenwet *Stb.* 1999, 184.

310. *Parliamentary Papers II* 2000-2001, 27.678, nr. 3, (Explanatory Memorandum to *Wet Verbetering poortwachter*).

311. *Wet verbetering poortwachter*, *Stb.* 2001, 628.

312. See *Besluit SUWI*, *Stb.* 2001, 688; see also *FAQs Gatekeeper*, DELFT UNIVERSITY OF TECH., <https://intranet.tudelft.nl/en/health-and-well-being/illness-and-recovery/disability/gatekeeper-improvement-act/faqs/> (last accessed Apr. 30, 2015).

313. Art. 7:658a BW

employee is expected to be ill for more than six weeks, the employee and the employer are required to make a reintegration plan.³¹⁴ The plan can entail, for instance, that the employee's work area be adjusted to meet his or her impairments, and/or training the employee to get him or her experience in another job within the organization. Subsequently, the employer and employee have to meet on a regular basis to see how the reintegration efforts are progressing, and make adjustments to the plan if necessary.³¹⁵ Each party can also require the other to cooperate; and if necessary, cooperation can also be enforced through legal means.³¹⁶

Three months before an employee applies for a disability benefit, the UWV (benefit administration) assesses whether the reintegration activities have been sufficient.³¹⁷ For this purpose, the employee has to produce a report on the reintegration activities undertaken.³¹⁸ If the employer's actions are considered insufficient by UWV, it extends the employer's obligation to pay wages for a maximum of twelve months.³¹⁹ So, in total, the employer may have to pay wages for three years. Conversely, if the employee has not cooperated satisfactorily, she or he can be refused a disability benefit for a certain period, which is regulated in the present Disability Benefits Act.³²⁰

In assessing the effectiveness of this scheme, only a few problems have been reported related to sick pay by employers. In addition, strict labor and dismissal laws minimize the ability of employers to escape the obligation to pay. This is the previously-mentioned Act concerning medical assessment that was meant to reduce risk selection. Another example is the dismissal law, which includes, a rule that a person who is ill can, in principle, not be given notice (dismissed) during the first two years of sickness.³²¹ Still, employers can try to reduce their risks

314. See *Regeling procesgang eerste en tweede ziektejaar*, *Stcrt.* 2002, no. 60.

315. *Id.*

316. See Art. 658a BW (A similar mechanism exists under the reasonable accommodation provisions of the American with Disabilities Act (ADA)); See generally EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html#N_20.

317. Art. 6 AOW.

318. *Id.*

319. See Art. 7:629(11) BW (Civil Code).

320. Art. 30 *Wet werk en inkomen naar arbeidsvermogen*, *Stb.* 2005, 572 (The New Disability Act).

321. See Art. 7:670 BW (Civil Code).

by carefully selecting employees and dismissing persons who are often ill, as long as the dismissal is given during a period when the person is not ill. To what extent this happens is difficult to say, as it is hard to prove that in a particular situation the treatment was grounded on disability. However, such behavior would amount to discrimination, which is forbidden by provisions limiting that type of discrimination.³²²

Employers facing the risk of having to continue to pay wages to sick employees often offer contracts for a definite period, since the obligation to pay sick pay ends as soon as the contract expires; after all, it is a continuation of payment of wages, so for this purpose the existence of a labor contract is essential. Alternatively, employers make use of agencies for temporary work; in such cases, the worker is not employed by them and thus they do not have to pay sick pay benefits and the agency can end the employment relationship on the first day of sickness.³²³

As a result of the Gatekeepers Act, larger firms especially developed comprehensive policies for sick employees that enabled the firm to utilize them in other areas of the enterprise.³²⁴ Still, many of these employers are obligated by the benefits administration to pay an extended period of sick pay after the first two years, since they were considered to have undertaken insufficient activities to reintegrate a sick employee.³²⁵

Generally, this new system strongly encourages sick employees and their employers to undertake reintegration efforts, and the sanctions in failing to do so are quite severe in cases of negligence; as we have seen the sanction is that the employer has to continue to pay wage for another period of (maximum) twelve months. Since the success of reintegration is highest when an employee is still employed by his or her employer (which is the case during the first two years of

322. Wet gelijke behandeling op grond van handicap of chronische ziekte, *Stb.* 2003, 206 (Act on equal treatment on ground of disability or chronic disease).

323. A new law since 2014 requires employers, whose former employees become ill or disabled, to pay a contribution based on the costs of the benefits for these employees. This was introduced to make it less attractive to make use of flexible workers. See *Parliamentary Papers II 2011-2012*, no. 33.241, 3 (referencing *Wet beperking ziekteverzuim en arbeidsongeschiktheid vangnetters* (Act to restrict sick leave and disability of persons in the Sickness Benefits Act)).

324. See Femke Reijenga, et al., *Evaluatie wet verbetering poortwachter*, (Astri, 2006).

325. See *id.*

sickness, when labor law prohibits, in principal, dismissal of the ill employee), this form of “activation” has become a cornerstone of present day Dutch social security policy.³²⁶

In Part II of this article, we discussed, as part of sickness benefits, family benefits: benefits that allow one to care for a sick family member.³²⁷ Such benefits are not part of the Dutch Sick Pay or Sickness Benefit Act; instead the employer has to continue to pay wages, as in case of short-term leave, for this purpose, or the employer has to grant unpaid leave.³²⁸ For pregnancy and maternity leave, there is a special benefit (at the rate of 100% of the previous wage, during sixteen weeks).³²⁹

E. HEALTHCARE BENEFITS SCHEME

Until 2006, the healthcare system was a dual system where the compulsory Law on Health Care covered employees if they earned a wage below a certain level, while others could buy voluntary insurance.³³⁰ This dual system was criticized because of the differences between the two parts, often resulting in more generous conditions for private insurance, and a lack of compulsory insurance for everybody.³³¹ The Care Insurance Act replaced the old system in 2005,³³² which now requires all Netherlands residents to take out private healthcare insurance.³³³

The main reason for implementing the new act was that new mechanisms were deemed necessary to reassert control over healthcare expenses.³³⁴ The costs for medical care had been rising for several years due to the aging population and rapid medical-technological developments.³³⁵ These trends resulted in new and expensive tools, machines, and treatment methods, and

326. See Becker, *supra* note 300, at 443-56 (noting that committees supervising international instruments—like ILO convention 121 and the European Social Charter—have been very critical of this paradigm shift from general solidarity to the individual responsibility of the employer).

327. In Western European systems the term “family benefits” refers to benefits paid for the maintenance of children.

328. See Wet Arbeid en Zorg, *Stb.* 2001, 567.

329. *Id.*

330. Ziekenfondswet, *Stb.* 1964, 392 (Healthcare Act).

331. Hofman, *supra* note 292.

332. Zorgverzekeringswet, *Stb.* 2005, 358 (Care Insurance Act).

333. *Id.*

334. See *Parliamentary Papers II 2003-2004*, no. 29763.3, 2.

335. *Id.*

the costs were expected to grow even further.³³⁶

Economic approaches have become very influential in Dutch healthcare. The main idea behind the new act was to have a system of controlled competition between insurance companies, signaling a massive shift from the old healthcare act, which was much more centrally regulated by the state.³³⁷

The objective of the new act is to ensure that insurance companies, care providers, and the insured are encouraged to organize and make use of healthcare more efficiently.³³⁸ For this purpose, the act mandates that each resident choose a care insurance company from which to buy insurance.³³⁹ This leads to competition between insurance companies, with the hope that insurance companies will focus more on the preferences of the insured. At the same time, people will hopefully make more efficient arrangements when buying insurance from providers, since otherwise the contributions for which they have to pay will be too high (or the losses will become too great).³⁴⁰ In addition to competition, the act also contains important solidarity elements: since all residents are compulsorily insured, insurance companies have to provide all applicants with insurance under the same conditions, regardless of their personal characteristics and situations.³⁴¹ The act also guarantees that an insurance company can only ask for the same contribution from its insured for basic insurance coverage (i.e. the insurance regulated by the act), so it cannot differentiate between risks.³⁴² The act defines the elements of basic insurance, such as what care is available and under what conditions.³⁴³ Examples include medical care by general practitioners, medical specialists and midwives; hospital stays; medicines; specialist mental healthcare, including treatment by a psychiatrist; basic mental healthcare, including primary care psychologists and an internet treatment process; tools for treatment, care, rehabilitation, nursing, or a specific limitation; physiotherapy for persons up to eighteen years old; limited physical therapy and exercise therapy after the 21st treatment for certain chronic diseases; pelvic physiotherapy for

336. *Id.*

337. *Id.*

338. *Id.*

339. *Zorgverzekeringswet, Stb. 2005, 358 (Care Insurance Act).*

340. *See Parliamentary Papers II, 2003/2004, 29763.*

341. *Zorgverzekeringswet Stb. 2005, 358. (Care Insurance Act).*

342. *Zorgverzekeringswet Stb. 2005, 358 (Care Insurance Act).*

343. *Zorgverzekeringswet Stb. 2005, 358 (Care Insurance Act).*

urinary incontinence up to the ninth treatment; speech therapy and occupational therapy; dental care (control and treatment) for children up to eighteen years old; dental surgical care and dentures; patient transport; maternity care; up to three hours of treatment for dietary advice; fee of three IVF treatments; dyslexia care; and a stop-smoking program.³⁴⁴

Insurance companies have choices in how they implement the health insurance act for the insured. For instance, they can decide whether the costs get reimbursed or care providers get paid directly by the company, as well as whether they reduce contributions if the insured bears the risk of the costs (in addition to the statutory defined own risk).³⁴⁵ In this way, they can compete with other companies, and are also allowed to profit from their insurance schemes.³⁴⁶

Strictly speaking though, under the act there are no longer “insured persons;” instead people have the obligation to buy insurance.³⁴⁷ If a person does not buy such insurance, that person is simply not insured. In addition, in the case of non-insurance or no coverage, a fine can be imposed.³⁴⁸

Persons under eighteen years of age do not have to pay contributions, and persons on a low income can receive a compensation, paid by the Tax Office, for paying the contribution.³⁴⁹ Insurance coverage starts on the day on which the company receives an insurance application, and the insurance can even have retroactive effect up to four months after the obligation to be insured arises.³⁵⁰ The purpose of this provision is to ensure the comprehensiveness of the system, so there is continuous coverage for those who are slow in making a choice or for those who change companies at the end of the calendar year.³⁵¹ This is atypical for insurance because, in general, “burning houses are no longer insured.”³⁵²

344. See Rijksoverheid, *Health Insurance*, <http://www.rijksoverheid.nl/onderwerpen/zorgverzekering/vraag-en-antwoord/wat-zit-er-in-het-basispakket-van-de-zorgverzekering.html> (last visited Nov. 14, 2014).

345. *Parliamentary Papers II* 2003-2004, no. 29.763.

346. *Parliamentary Papers II* 2003-2004, no. 29.763.

347. Zorgverzekeringswet, *Stb.* 2014, 494 (Care Insurance Act).

348. The fine is \$410. After a second fine of the same amount, the insurance is bought by the public insurances and the contribution is deducted from the income of the person concerned (most often a benefit).

349. Zorgverzekeringswet, *Stb.* 2011, 111 (Care Insurance Act).

350. Art. 5 Zorgverzekeringswet, *Stb.* 2006, 629 (Care Insurance Act).

351. *Parliamentary Papers II* 2003-2004, no. 29.763.

352. *Id.*

An insured person is allowed to give notice of termination for the insurance contract to the insurance company each year.³⁵³ The idea is that it gives people the freedom to make their own insurance decisions each year, giving them the flexibility to choose. In the case of a carrier change, the new company must accept all applications, regardless of the “risk profile” of the applicant.³⁵⁴

In addition to the statutory insurance offerings, healthcare companies can offer supplementary insurance to cover services not included in the basic plans. These supplementary plans are not compulsory for the patients, but they are attractive for the companies because they are often much more profitable than the statutory insurance. Furthermore, insurance companies can refuse applicants for supplementary insurance since these are private insurance schemes, which are not governed by the *Zorgverzekeringswet*, but fall under insurance law. They can also slightly force the hand of insurance applicants because many insurance companies require that a person purchase the basic insurance from the company before being allowed to select the supplementary insurance.³⁵⁵

The contribution of insurance contracts vary per insurance company (and companies may offer a choice of contracts), but the contribution is the same for all those who have bought the same insurance.³⁵⁶ This means that no differences are allowed, e.g., for risk level or for age. It follows from this, however, that contribution rates may vary from company to company.

The contribution is a flat-rate one, so it does not depend on income.³⁵⁷ Claimants have to bear part of the healthcare costs per year themselves (435 dollars a year).³⁵⁸ If one opts to bear an additional share of the costs (up to 622 dollars a year), contributions are lower.

Some insurance companies provide for a so-called collective contract for groups such as members of a football club, trade union, an association of patients, or employees of a particular

353. Art. 7 *Zorgverzekeringswet*, *Stb.* 2008, 271 (Care Insurance Act).

354. *Parliamentary Papers* II 2003/2004, 29.763.

355. Margreet Reitsma-van Rooijen, *Aanvullende zorgverzekering zonderbasisverzekering niet altijd mogelijk*, NIVEL (Dec. 12, 2012), available at <http://www.nivel.nl/nieuws/aanvullende-zorgverzekering-zonder-basisverzekering-niet-altijd-mogelijk-3>.

356. Art. 17 *Zvw* (Care Insurance Act).

357. Art. 16 *Zvw* (Care Insurance Act).

358. Art. 19 *Zvw* (Care Insurance Act).

enterprise; there is no limit to the type of group with which an insurance company can make an agreement.³⁵⁹ On the basis of the contract, reductions to the contribution can be offered to the members of the collective contract, up to a 10% maximum.³⁶⁰

In addition, employers pay a wage-related contribution to a risk equalization fund.³⁶¹ This fund compensates an insurance company if it insures persons of higher-than-average risk.³⁶² This was put into place to minimize the possibility that particular insurance companies would try to discourage persons of high risk, such as the chronically ill, from buying insurance.³⁶³ However, it appears as though this does not sufficiently encourage insurance companies to buy care efficiently, since they are compensated anyway.³⁶⁴ For this reason, in the future, the equalization will take place *ex ante* only; meaning on the basis of specified characteristics of the clients.³⁶⁵

Healthcare coverage is defined by statutory rules,³⁶⁶ but, as we have seen, private organizations (insurance companies) administer the health benefits. Thus, this system maintains a tight balance between solidarity and room for making a profit. The main goal of this structure was to introduce efficiencies into the system (with market instruments) and still realize a sufficient and affordable system for all residents.

IV. COMPARISON OF THE DUTCH AND AMERICAN SOCIAL PROTECTION SYSTEMS

At first blush, the American and Dutch social protection systems seem quite different, but the picture changes if we do not limit ourselves to statutory benefits and also take into account benefits provided by employers (whether or not such arrangements involve collective bargaining agreements).

In order to address the issue posed in the first section, we will compare the systems in terms of the levels of protection that are ensured. In Part A, we will describe, for each of the risks

359. Art. 18 Zvw (Care Insurance Act).

360. Art. 18 Zvw (Care Insurance Act).

361. Art. 42 Zvw (Care Insurance Act).

362. Art. 39 Zvw (Care Insurance Act).

363. *Parliamentary Papers II 2003/2004*, 29.763.

364. See Hofman and Pennings, *supra* n. 292 (describing the system in more detail).

365. *Id.*

366. See, e.g., *Zorgverzekeringswet, Stb.* 2006, 660 (Care Insurance Act).

selected in this contribution, the levels of protection that are ensured. We will then compare the distribution of responsibilities over the public and non-public actors. We will also mention the effects in the countries of the approach chosen. In Part B, we will then describe the policy options following from this analysis.

A. THE LEVELS OF PROTECTIONS ENSURED AND THE DISTRIBUTION OF RESPONSIBILITIES

1. Old Age and Survivors

As an initial point with regard to old age and survivor benefits, the greying of the population is a common phenomenon, including the rising of pension age, in both the United States and the Netherlands.³⁶⁷ Additional comparisons are divided between pensions defined by laws and occupational pensions.

a. Pensions Whose Contents are Defined by National Law

Both in the United States and the Netherlands, old-age and survivor benefits are governed by statutory rules, and the systems are also similar to the extent that the statutory protection provides for only a relatively low income replacement ratio. In the United States, Social Security only replaces about 40% to 50% of the previous wage;³⁶⁸ in the Netherlands, the benefit is flat-rate (\$1367 for a single person, \$1888 for a couple per month).³⁶⁹ This means that pensioners who previously earned a low income (e.g., the minimum wage) receive a relatively high replacement rate, while higher income individuals receive a lower income replacement rate. Based on 2012 figures, this means that for those Dutch workers earning the average income of about \$61,200, the replacement ratio is about 27% of the average earnings of an individual, much less

367. See e.g., Leen Pressman, *Dutch retirement age increase to reduce pensioners by half million*, INVESTMENT & PENSIONS EUROPE (July 18, 2012), <http://www.ipe.com/dutch-retirement-age-increase-to-reduce-pensioners-by-half-million/46614.fullarticle> (“The Dutch government’s recent decision to raise the official retirement age from 65 to 67 in 2023 will reduce the number of pensioners by half a million by 2025, according to Statistics Netherlands (CBS)”).

368. See Aon Consulting, *supra* note 54.

369. See *infra* Section III.

than even the American replacement rate.³⁷⁰

b. Occupational (Employer-Sponsored or Union-Sponsored) Retirement Plans

Because pension benefits regulated by laws are generally low in both the United States and the Netherlands, there are also employer-based (in the Netherlands) and employer—and union-based—supplementary schemes (in the United States). In the United States, these types of benefits are voluntary;³⁷¹ in the Netherlands, pension plans are also voluntary, but plans made between employers and unions in a sector can be declared legally binding by the minister on their request.³⁷²

Although both countries promote occupational pensions by means of tax subsidies or deductions from tax, the Dutch government has, over time, had a more active policy to encourage employers to offer these types of pensions, and the fact that industry-wide pension agreements are legally binding is an important element to extending the coverage of pension schemes. However, since the costs of the pension tax subsidies have been increasing, the Dutch tax rules have been amended, and thus the Dutch legislature has indirectly had a very large impact on the contents of these schemes.³⁷³ For instance, the government determines such matters as the starting age for receiving a pension, the benefit paid by the pension, and the conditions under which pensions may be maintained.³⁷⁴ Only if the schemes meet these legal standards are pension contributions considered tax deductible.³⁷⁵ Still, at the end of the day, it is the responsibility of the fund to have sufficient reserves for being able to meet the promised pensions, and in case of a deficit, the government does not provide

370. OECD, *Pensions at a Glance 2013: OECD and G20 Indicators*: OECD PUBLISHING, http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/pensions-at-a-glance-2013/key-indicators-netherlands_pension_glance-2013-table162-en#page1 (last updated Oct. 16, 2013).

371. See Scott Mayland, Note, *Ratcheting Up the Duty: The Department of Labor's Misguided Attempt to Impose a Paternalistic Model Upon Defined Contribution Plans Through ERISA*, 75 OHIO ST. L.J. 645, 649 (2014) (explaining how ERISA does not require employers to establish pension plans for their employees, but does regulate plans that are established).

372. See *infra* III(2)(a).

373. *Id.*

374. *Id.*

375. *Id.*

compensation.³⁷⁶

In both countries, tax deductibility of occupational pensions plays a large role. Although this type of tax incentive may be seen as an alternative to making a scheme compulsory, the problem remains that persons who are not offered such occupational pensions still have to, in a sense, contribute to those covered by occupational pensions, since they have to pay more taxes to help make up for the lost tax revenue.

Traditionally, in the Netherlands, occupational pensions were expected to realize a pension (including the AOW pension) of 70% of the last earned wages after forty years, although this was not often reached.³⁷⁷ This changed to 70% of the average lifetime income, and since the economic crisis of 2008, funds have made clear that they cannot make promises for a specific pension anymore.³⁷⁸ In 2008, 49% of the households had an income replacement rate below 70% of the total average income.³⁷⁹

One important difference between the Dutch and the American systems is the growing American reliance on participant-directed 401(k) defined contribution plans, with or without employer contributions.³⁸⁰ It does not appear that such salary deferral plans have had the same impact in the Netherlands.³⁸¹ Another difference is that Netherlands pension laws mandate that workers' 401(k)-type plans be changed into lifetime annuities to "ensure they do not spend down all their

376. *Id.*

377. *Id.*

378. *See* Art. 9 AOW.

379. Marike Knoef et al., *Measuring Retirement Savings Adequacy; developing a multi-pillar approach in the Netherlands*, J. OF PENSIONS AND ECON. FIN., available at <http://media.leidenuniv.nl/legacy/mk-2014-04.pdf> (last visited on May 4, 2015).

380. *See* PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2012 FORM 5500 ANNUAL REPORTS, U.S. DEPARTMENT OF LABOR EMPLOYEE BENEFITS SECURITY ADMINISTRATION, p. 1 (Oct. 2014), available at <http://www.dol.gov/ebsa/pdf/2012pensionplanbulletin.pdf> (highlighting that when 401(k)-type plans were brought into existence in 1978, participants contributed just 29% of the total for all defined contribution plans, but that number rose to about 60% in 1999, where it remains now). Recent data reiterates that trend—401(k) participation increased from 513,000 to 516,000 in 2012. *Id.*

381. *See* Fieke van der Lecq & Adri van de Wurff, *The Price of Pension Risk*, 13.3 Journal of Risk 83, 92 (2011), <http://people.few.eur.nl/vanderlecq/Publications/The%20price%20of%20pension%20risks.pdf> (last visited Nov. 14, 2014) ("The simulations show that DC schemes have disadvantages for participants, because participants bear a high investment risk in such schemes").

savings before they turn 75 or 80.”³⁸² That is in stark contrast to the growing trend of Americans who withdraw large sums from their 401(k)’s before retirement, though there has been recent efforts by the U.S. Department of Labor to increase lifetime income options in the 401(k) context.³⁸³ One more important distinction is that in the Netherlands, if a pension fund cannot finance its long-term pension obligations, in a move to keep the fund from crumbling, the central bank (*De Nederlandsche Bank*) can mandate that the fund pay reduced benefits for both current and future retirees.³⁸⁴ On the other hand, United States law does not permit companies to reduce accrued benefits under ERISA’s anti-cutback rule.³⁸⁵ If a defined benefit plan (traditional pension) becomes sufficiently underfunded, the employer or PBGC can terminate the plan and the participants will be insured under a federal pension insurance scheme.³⁸⁶ In such instances, pensioners will receive less than the initially promised benefit.³⁸⁷

There are also real differences in the particular role played by occupational pensions in the Dutch and American schemes. Although both countries place heavy reliance on occupational pensions as part of overall retirement security, in the Netherlands, the major part has been made compulsory by the government based on the request by employers’ organizations and trade unions that adopted such pension plans.³⁸⁸ Thus, sector-wide or company pension plans exist in the Netherlands, whereas “multiemployer plans” or “multiple employer plans” are less utilized, though not completely absent, from the American landscape.³⁸⁹ A disadvantage of the compulsory system is that

382. See Steven Greenhouse, *How They Do It Elsewhere*, N.Y. TIMES (May 14, 2013), <http://www.nytimes.com/2013/05/15/business/retirementspecial/international-retirement-plans-offer-insight-to-aid-american-system.html>.

383. See *id.*

384. See generally DENEDERLANDSCHEBANK, *DNB rondt beoordeling evaluatie herstelplannen*, DNB, <http://www.dnb.nl/nieuws/nieuwsoverzicht-en-archieff/persberichten-2014/dnb307075.jsp> (last visited May 4, 2015).

385. See 29 U.S.C. §1054(g) (2012).

386. Daniel Keating, *Chapter 11’s New Ten-Ton Monster: the PBGC and Bankruptcy*, 77 MINN. L. REV. 803, 806–07 (1993).

387. See *id.* at 807.

388. See *The Netherlands*, PENSION FUNDS ONLINE, <http://www.pensionfundsonline.co.uk/content/country-profiles/the-netherlands/96> (last visited May 4, 2015) (citing that many industry pension schemes direct people toward “compulsory membership,” which the Ministry of Social Affairs and Employment can approve upon request).

389. Harriet Weinstein & William J. Wiatrowski, *Multiemployer Pension Plans*,

individuals have no choice whether to participate in occupational pension plans, and might be better off in investing their retirement funds in individual retirement accounts outside of their employer.³⁹⁰ On the other hand, an advantage is that from this system of high compulsory coverage it follows that the number of employees without an occupational pension is very low.

Finally, the predicament of non-employees is unique, but the two countries do not seem to differ much from the perspective on how such social protection schemes protect the unemployed when it comes to retirement income, health coverage, and the like.

B. DISABILITY BENEFITS

1. Disability Schemes Defined in Legislation

With disability benefits, the differences between the United States and the Netherlands are more significant than in old-age schemes. In the United States, disability benefits are provided at a minimum level by the federal government through Social Security, although disability is also provided under a few state insurance programs and through employer-sponsored plans.³⁹¹ The general level varies widely by state depending on work history and nature of disability. In the Netherlands, the benefits are more generous (up to 75% of \$5214/month), but only in case of the fully and permanently disabled.³⁹² Probably because of

COMPENSATION AND WORKING CONDITIONS 19, 21, 23 (Spring 1999) <http://www.bls.gov/opub/mlr/cwc/multiemployer-pension-plans.pdf>; See Lauren Foster, *Should Retirement Savings Be Mandatory? (Forum)*, ENTERPRISING INVESTOR (Oct. 8, 2013), <http://blogs.cfainstitute.org/investor/2013/10/08/should-retirement-savings-be-mandatory-forum-2/> (questioning if it would make sense for the United States to try out more mandatory retirements savings programs).

390. See Scott Holsopple, *How to Take Control of Your 401(k)*, U.S. NEWS & WORLD REPORT (Aug. 27, 2013), <http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2013/08/27/how-to-take-control-of-your-401k> (last visited May 4, 2015) (talking about the flexibility that a 401(k) offers and how people are able to take charge of their plans and make their own investment decisions).

391. See Hinden, *supra* note 66 (describing the federal government's involvement in disability payments via Social Security); See also Ebeling, *supra* note 74 (noting employer involvement in disability plans); See also *State Short-term Disability Benefits*, NOLO.COM, (Mar. 22, 2015, 2:35 PM), <http://www.nolo.com/legal-encyclopedia/state-short-term-disability-benefits>.

392. See Swiss Life Network, *Netherlands: Employee Benefits Reference Manual*, SWISSLIFE, https://www.swisslife.com/content/dam/id_corporateclients/downloads/ebrm/Netherla

the relatively high benefits, the Dutch scheme needs many more policy measures to regulate the influx and outflow of beneficiaries than the equivalent U.S. scheme. However, the Social Security disability scheme in the United States (SSDI) is highly regulated, partially because the system is in financial distress and there is a need to cut back on awarding benefits as generously as they were in the past. So we think the Dutch and American systems are more similar in this regard than it might first appear to most people.

In the United States, the disability benefit system involves the cooperation of federal and state schemes, supplemented by employers' schemes. As discussed above, these combined benefits are still quite low. That also explains the difference between the U.S. and the Netherlands with regard to the conditions under which such benefits are awarded. The Dutch requirements are very strict, supplying disability benefits only for that part of the income loss that is due to medical reasons.³⁹³ So if a person is (in theory) able to do other work, she or he is not awarded disability benefits to the extent of the income that can be received from that other work, thus providing not much protection to those with reduced health who are still able to do some work. Although there are also positive aspects to this approach—e.g., being part of the labor market supports the integration of persons into society—the problem remains that it is often difficult to find work if you are disabled, both because of employer prejudices and not having the necessary ability to perform certain forms of work.

Compared to the Dutch disability eligibility rules, the United States' rules are much more loosely defined. For instance, the impairments must be severe enough (i.e., last for at least one year), to keep the person from carrying on in the regular job or any other type of work.³⁹⁴ There is also a considerable amount of time that it takes before eligible individuals are able to receive their disability Social Security benefits through the system.³⁹⁵

nds.pdf (last visited May 4, 2015) (providing that permanently/fully disabled people get 75% of their last full daily wage that is "maximized to a salary ceiling").

393. See *infra* III(b).

394. Hinden, *supra* note 66 (explaining how SSDI is a benefit that people can become eligible for if they have impairments that are severe enough to keep them from engaging in normal occupations at their place of work or any place of work).

395. See *id.* (explaining how it might be a longer process for one to begin to receive benefits if they do not have one of the serious medical conditions named on Social Security's Compassionate Allowance List).

2. *Employer-Sponsored Benefits*

Because federal and state government disability benefits are generally low, a number of employers have sought to provide additional disability benefits through short-term and long-term disability policies.³⁹⁶ One of the biggest issues is that many employers—especially smaller employers—do not provide such coverage.³⁹⁷ Even if an employee is covered by such an employer-sponsored policy, eligibility can be sometimes difficult to establish. This is because of two main reasons. First, many disabled workers pursue their social security disability claim first, and then only pursue their long-term disability claim under their employer policy once their eligibility for federal benefits has been determined. Although the determination of disability for Social Security purposes will certainly help long-term disability claims, if too much time passes before long-term disability benefits are sought, the employee may have forfeited the right to receive under the applicable statute of limitations in the plan document. Second, plan administrators strictly construe eligibility requirements, and it is not unusual for such claims to be denied for finding lack of disability based on the submitted medical evidence.

Because of the level of disability benefits in the Netherlands, there is no general need to supplement the benefit defined in the WIA, although it sometimes happens. In some situations, collective agreements apply a more generous definition of disability so that the worker receives a higher benefit. Generally, however, it can be said that employers support the general approach of getting persons back to, or into, work, and the purpose of the government disability benefit rules are not undermined. Instead, the collective agreements support the “activating” element by, for example, providing that in some sectors, collective agreement employees who are disabled receive additional protections (e.g., more than 35% cannot be dismissed). Disabled workers’ employers must find suitable work for them. This being said, there is still a substantial challenge to meet in helping disabled workers find jobs in the first place.

396. 2013 *Employee Benefits*, *supra* note 65, at 12 (demonstrating the percentage of employers surveyed in 2013 who offer either long-term or short-term disability insurance to their employees).

397. Michelle Andrews, *Employers Increasingly Trimming or Cutting Disability Benefits*, KAISER HEALTH NEWS (Sept. 20, 2011), <http://kaiserhealthnews.org/news/michelle-andrews-on-disability-coverage/>.

C. UNEMPLOYMENT BENEFITS

There are also significant differences in the unemployment insurance programs in the two countries. While both countries have primarily a public/government-run system, the American system is decentralized throughout individual states, whereas the Dutch system is a uniform national one. Additionally, whereas the Dutch system uses more private actors, the American system only uses private actors marginally in running their system.

For the U.S., every state has a separate unemployment insurance program, but federal law establishes the rules not only on benefit funding based on an employer tax (only three states have employee contributions play a role), but also provides the general set of standards state unemployment compensation systems must follow to merit favorable tax treatment under federal tax law.³⁹⁸ The typical length that someone can receive benefits is around twenty-six weeks, with extensions provided during times of extremely heavy unemployment.³⁹⁹ Furthermore, people only receive, on average, between 25% and 40% of their previously earned wage.⁴⁰⁰ Employees can be disqualified from eligibility if they do not look for new work, voluntarily quit, or are discharged for “willful” misconduct.⁴⁰¹

By comparison, in the Netherlands, the UWV handles the unemployment scheme (on a national basis). The Unemployment Benefits Act provides the applicable rules. Consequently, there are no variations in the legal position of beneficiaries in relation to the region where they live or the sector in which they work. The level of benefit is also the same for everyone, i.e., 75% in the first two months and then 70%. Additionally, a minimum income is guaranteed by a subsistence benefit.

Neither employers nor trade unions play a role in the

398. See *State Unemployment Insurance Benefits*, U.S. DEPT. OF LABOR EMP. & TRAINING ADMIN., <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last updated May 23, 2013).

399. *Id.*

400. See Douglas McIntyre, *The 10 Best States for Unemployment Benefits – and the 10 Worst*, DAILY FINANCE, <http://www.dailyfinance.com/2011/05/12/unemployment-benefits-best-worst-states/> (last updated May 13, 2011), (providing slightly dated figures, but nonetheless indicative of the typical unemployment benefits across the country).

401. See Maranville, *supra* note 98, at 304; see also Schuckers & Bradley, *supra* note 99, at 42.

administration of the U.S. or Dutch unemployment compensation systems, and in both countries, the law has to be changed before such a role is possible (if desirable). For both countries, involving trade unions in the administration of the scheme in order to make membership more attractive does not fit into the political and cultural traditions. In the Netherlands, it is currently being investigated whether the joint participation of employers and employees in the administration of benefits would be useful in helping unemployed workers or those threatened by unemployment, or workers who are not capable to perform the job anymore, to get another job, preferably through a direct job to job transfer.

In the United States, the major problem of the unemployment benefits system is the low level of income replacement. The increased involvement of employers or unions would probably not provide a better solution, unless the system is modified to require considerably more contributions from these actors. On the other hand, important progress has been made with regard to the American unemployment compensation system in states that have utilized a more active approach to their job search requirements. It is also hoped that the increased use of technology will streamline some of the more time-consuming bureaucratic processes in the system and permit unemployed workers to access their benefits more quickly.

D. PROTECTION IN CASE OF SICKNESS

Because the United States lacks a federal *paid* sickness leave policy under the current version of the Family and Medical Leave Act (FMLA), states and municipalities across the country have had to fill in the gap by enacting their own paid sickness and leave bills and ordinances. Needless to say, this lack of uniformity in treatment with regard to sickness and other related forms of leave has led to significant disparities in treatment of sick employees across the country. Moreover, because the FMLA currently only provides job-protected, unpaid sick leave for twelve weeks per year only for employers with fifty or more employees,⁴⁰² there is a large number of workers at smaller American employers who may be entitled to no sickness benefits at all as a matter of law, and must depend instead on the benevolence of their employer.

402. See generally *The Family and Medical Leave Act*, *supra* note 110.

The other way in which American employees may be eligible for a “sickness” benefit is through Workers Compensation state laws or through the reasonable accommodation provisions of the American with Disabilities Act of 1990 (ADA). Workers compensation laws provide ex post compensation for those who become sick or injured as a result of their employment.⁴⁰³ The ADA, on the other hand, provides that qualified individuals with a disability must receive reasonable accommodations to allow them to continue to work, as long as it does not cause an undue burden on the employer.⁴⁰⁴ Thus, the ADA and worker compensation laws might provide additional protections for sick or injured workers in the American Workplace.

Such concerns do not impact the Dutch sickness benefits scheme, where all workers are entitled to compensation according to a uniform, national Act. However, unlike other schemes in Western Europe, this compensation is not paid on the basis of a benefit scheme. Instead, Dutch employers are required by statute to pay for 104 weeks (two years) of 70% of the wages for their sick employees.⁴⁰⁵ In other countries, such period, if any, is much shorter.⁴⁰⁶ Many Dutch employees actually receive a higher compensation for some time (e.g., the first fifty-two weeks) on the basis of their collective agreement or individual contract of employment.⁴⁰⁷

To cover this sickness pay obligation, employers can purchase private insurance to cover this risk and insurance companies offer policies without any underwriting taking place.⁴⁰⁸ Most of these sickness insurance policies provide for a

403. Lee Anne Neumann, Comment, *Workers’ Compensation and High Stress Occupations: Application of Wisconsin’s Unusual Stress Test to Law Enforcement Post-Traumatic Stress Disorder*, 77 MARQ. L. REV. 147, 162 (1993).

404. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1129–30 (2010).

405. *Social Security Programs throughout the World: Europe, 2010 Netherlands*, SSA, <http://www.ssa.gov/policy/docs/progdsc/ssptw/2010-2011/Europe/Netherlands> (last visited Apr. 4, 2015).

406. See, e.g., *Statutory Sick Pay (SSP): Employer Guide*, GOV.UK, <https://www.gov.uk/employers-sick-pay/eligibility-and-form-ssp1> (last visited Mar. 22, 2015).

407. EurWORK, *Collective Bargaining Developments Marked by Stability*, EUROFOUND, <http://www.eurofound.europa.eu/de/observatories/eurwork/articles/industrial-relations-working-conditions-other/collective-bargaining-developments-marked-by-stability> (last visited Apr. 4, 2015).

408. Philip R. de Jong, *Recent Changes in Dutch Disability Policy*, APE 1, 10, (July 2012) <http://www.ape.nl/include/downloadFile.asp?id=322>.

type of stop-loss insurance, meaning that the employer pays for the first six weeks of sickness before the insurance coverage becomes operable.⁴⁰⁹ The obligation to pay sick pay also applies to those who are employed on a part-time basis;⁴¹⁰ in addition the Sickness Benefits Act provides for public benefits for the unemployed and some other specified categories. Finally, through the Dutch Gatekeepers Act, employers must work to reintegrate sick or injured employees back into the workforce, much like the ADA requires in the United States, although the Dutch obligations and fines in case of non-compliances are more uniformly specified (e.g. extension of the sick pay period by a maximum of twelve months).⁴¹¹ The combined effect of these provisions are seen as improving both safety and health in the Dutch workplace and the integration of ill and disabled persons in society.

We will not go deep into the protection of women in case of pregnancy and maternity, but the differences in this area are significant. Whereas the protection deemed necessary for mother and child means that women receive 100% of their full wage during four months in the Netherlands,⁴¹² such protection is lacking in the United States. Also for self-employed women, there is now a public benefit (at subsistence level).⁴¹³ It is seen as important that women take the rest to have the child and that employers do not feel the costs of having employees who become pregnant.

E. HEALTH CARE BENEFITS

It is interesting that for their healthcare systems, the United States and the Netherlands have comparable dynamics. This is especially so since most of the industrialized world

409. *See id.*

410. Zorgverzekeringswet, *Stb.* 2005, 358.

411. Wet Verlenging loondoorbetaling bij ziekte, *Stb.* 1996, 142 (Sickness Act).

412. Due to EU law, this protection applies generally to all EU states, though the EU Parliament is currently attempting to lengthen the period of maternity leave. *See* European Trade Union Committee for Education, *Maternity Leave Directive Back in European Parliament* (Oct. 8, 2014), <http://www.csee-etuice.org/news/archive/273-maternity-leave-directive-back-in-european-parliament> (last visited Jan. 12, 2015) (describing lengthening of EU minimum law from 14 to 20 weeks).

413. Simone Cusack, *Decision to Deny Certain Self-Employed Women Maternity Benefits Violated CEDAW (Elisabeth de Blok et al. v. the Netherlands)*, OPCEDAW (Sept. 1, 2014), <http://opcedaw.wordpress.com/2014/09/01/decision-to-deny-certain-self-employed-women-maternity-benefits-violated-cedaw-elisabeth-de-blok-et-al-v-the-netherlands/>.

operates with single-payer, national health systems providing most health care benefits.⁴¹⁴ The Dutch Health Care Act now obliges individuals to buy insurance from a private company.⁴¹⁵ Likewise, under the ACA, Americans who do not have health insurance through Medicare, Medicaid, their employer, or through an individually-bought policy, are obliged under the individual mandate to have “minimum essential coverage.”⁴¹⁶ Such insurance policies can be bought on state exchanges, where individuals live in states that have set up such exchanges, or on the federal exchange, if the state has not developed a state exchange.⁴¹⁷ Additionally, under the ACA’s employer mandate, employers with at least fifty full-time equivalent employees must provide the opportunity for 95% of their full-time employees to receive minimum essential coverage through an employer-based health insurance policy.⁴¹⁸ If the employer does not provide such coverage or does not provide statutorily-determined “affordable” coverage, the employer must pay a penalty per employee which helps to finance the tax subsidies lower-income Americans receive to purchase policies on a federal or state health exchange.⁴¹⁹

In both countries, there are requirements as far as what health costs must be covered by the statutorily required scheme. However, there is much room for individual choice between companies, and within a company, there are some choices between policies, whereas the statutorily required benefit package can be extended by extra coverage only minimally. That being said, American health plans vary considerably on what benefits they offer depending on if they are insured or self-insured, large plans or small plans, or grandfathered or non-grandfathered.⁴²⁰ Although there is a risk of substantial

414. See True Cost, *List of Countries with Universal Healthcare*, TRUE COST BLOG (Aug. 9, 2009, 9:25 PM), <http://www.truecostblog.com/2009/08/09/countries-with-universal-healthcare-by-date>.

415. Claire Daley & James Gubb, *Healthcare Systems: The Netherlands*, CIVITAS, <http://www.civitas.org.uk/nhs/download/netherlands.pdf> (last updated Jan. 2013).

416. Annie L. Mach, *Individual Mandate Under ACA*, CONG. RES. SERV. 1 (Aug. 12, 2014), <https://www.fas.org/sgp/crs/misc/R41331.pdf>.

417. See Richard Cauchi, *State Actions to Address Health Insurance Exchanges*, NAT’L CONF. OF ST. LEGIS. (Jan. 22, 2015), <http://www.ncsl.org/research/health/state-actions-to-implement-the-health-benefit.aspx>.

418. See *Employer Mandate Fact Sheet*, *supra* note 159, at 1.

419. Affordable Care Act, Pub. L. No. 111-148, § 4980H, 124 Stat. 235 (2013).

420. See *Grandfathered v. Non-Grandfathered Plans Under ObamaCare*, UPMC (Mar. 24, 2014), <http://www.yourhealthcaresimplified.org/news/grandfathered-vs-non-grandfathered-plans-under-obamacare/> (explaining the key differences between

differences between the types of health insurance employees receive with different employers, there is still more choice than in government-run schemes like those found in most countries with national health plans. This increased choice fits well within the consumer-driven benefit plans of present-day American society, whether 401(k) plans on the pension side or high-deductible health plans coupled with health saving accounts on the health side.⁴²¹

In the Dutch system, the focus is more on the legislature's wish that insurance companies require more efficient health care by making arrangements with the care providers. The limits of such flexibility are, however, still subject to strict political discussion and supervision by government and parliament. In December 2014, for instance, a bill was discussed in parliament to allow insurance companies to offer a policy that obliges patients to go to specific care providers contracted by the care provider, thus limiting their choice for a health care provider.⁴²² By such contracts, it is possible to have cheaper and more efficient health care. In addition, more expensive policies allowing free choice remain available. Parliament, however, did not agree with this restriction on choice.⁴²³

V. GENERAL DIFFERENCES IN THE ORGANIZATION OF THE SYSTEMS

A. USE OF PRIVATE ACTORS

In the Netherlands, where private actors are statutorily involved in the administration of benefits (like employers with

the various health plans in existence—with the main stipulation being that grandfathered plans do not have to comply with all of the ACA changes, such as cover preventive care with no cost sharing or guarantee a right to appeal denial decisions).

421. See *High Deductible Health Plan*, HUMANA, <https://www.humana.com/insurance-throughemployer/products-and-services/medical-plans/hdhp> (last visited Oct. 11, 2014) (noting how using both a high deductible health plan (HDHP) and health savings account (HSA) allows a person to set aside a pre-planned amount of tax-free money (just like for a 401(k)) to cover health costs).

422. *Kamerstukken 2014/15, 33.362, Wijziging van de Wet marktordening gezondheidszorg en enkele andere wetten, teneinde te voorkomen dat zorgverzekeraars zelf zorg verlenen of zorg laten aanbieden door zorgaanbieders waarin zij zelf zeggenschap hebben*.

423. Sam de Voogt, *Senaat verwerpt plan beperking vrije zorgkeuze, PvdA-fractie wil praten*, NRC.NL, (Dec. 16, 2014), <http://www.nrc.nl/nieuws/2014/12/16/plan-nieuwe-zorgpolis-niet-door-de-eerste-kamer>.

sick pay and private insurance companies with healthcare), their responsibilities are regulated to a large extent. In the United States, there is very little use of private actors in the social protection benefits schemes defined by legislation; in those areas where states and employers are presumed to organize protection, requirements on the contents of the protection (especially in the healthcare context) can vary significantly.⁴²⁴

The difference between the two countries can also be seen in the legal protections offered to those receiving benefits, the level of benefits offered, and the grounds for excluding individuals from receiving benefits. For instance, with health care, the Dutch system provides a minimum package of benefits in high detail.⁴²⁵ The Dutch Health Care Act also gives detailed rules on the role insurance companies play in the system.⁴²⁶

In the Netherlands, there is attachment to the idea that giving the private actors a role in the social protection benefit system will encourage more efficient and effective administration of the benefit rules and will encourage individuals to go back to work. Such reforms will also invest private actors, like employers, with an interest in reducing the expense of the social protection system. But the government also has an interest in keeping people employed. So the choice for individuals, for a health care package, is not an independent aim but is instrumental in giving insurance companies incentives to work more efficiently.

In the United States, the ACA gives much space for employers and insurance companies to design important elements of how healthcare is delivered to employees. The federal government provides the underlying scheme for health benefits to be received by most Americans, but significant latitude remains for insurance companies and employers to operate within that system. Individual states have taken different tactics regarding their involvement with the ACA scheme. Some states have set up their own health insurance marketplaces, while others have not. Also, some states have accepted the Medicaid expansion contemplated by the ACA,

424. See *The At-Will Presumption And Exceptions To The Rule*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last visited Oct. 12, 2014) (intimating that employment is "presumed" to be at-will everywhere in the United States except Montana, which is in stark contrast to almost everywhere else in the world where employers can only fire people for cause).

425. See *infra* Part III(e).

426. See *id.*

while others have not. So there is significant variability as far as the health care benefits offered to Americans in different parts of the country. So whereas the minimum package of health benefits is defined by the statute in the Netherlands, statutory obligations to provide essential health benefits under the ACA vary greatly based on the status of the plan (grandfathered vs. non-grandfathered), size of the employer (large or small), and the manner in which the health plan is funded (self-funded or insured). Apart from all these differences, health care does provide an important role for private actors in both countries, especially beyond what minimum duties are defined by statute.

The American system is not completely without rules for how private actors like employers engage in the benefit system, but such involvement is through more indirect means such as through the reasonable accommodation provisions of the ADA or application of unpaid sick leave through the FMLA.⁴²⁷ These indirect means include prohibitions on risk selection through outlawing preexisting conditions exclusions,⁴²⁸ the possibility that health insurance works retroactively for a person, the definition of basic provisions of the package, controlled contributions, and subsidies for lower income individuals for healthcare insurance. So the private market has been heavily regulated, but still there are incentives for the actors to take their responsibilities seriously.

With regard to occupational pensions, employers and employee organizations play a sizable role in both countries. They have significant latitude in how to design their retirement plan schemes. However, the Dutch authorities supervise the funds more strictly in order to avoid employer bankruptcy or the situation where funds can no longer meet promised obligations. Dutch supervisory bodies even require funds to cut back on benefits to right the pension ship. Although the United States

427. See *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/laws/types/disability.cfm> (last visited Oct. 12, 2014) (outlining the various protections U.S. workers have when it comes to work reinstatement under the disability law); see also *The Family and Medical Leave Act*, *supra* note 110 (specifying that it is only in very rare circumstances that someone with taking leave for medical reasons would be denied reinstatement by an employer under the FMLA).

428. See *The Health Insurance Portability and Accountability Act (HIPAA)*, U.S. DEP'T OF LABOR (last visited Oct. 12, 2014), <http://www.dol.gov/ebsa/newsroom/fshipaa.html> (curbing risk selection concerns by severely limiting the possibilities of people being screened out for pre-existing medical conditions).

has pension insurance for defined benefit plans that become financially distressed under the scheme set up by the federal PBGC, there is no protection for private-sector defined contribution plans (like 401(k) plans), nor for public employee pension plans on the state level. As a result, there are significant continuing problems with assuring adequate retirement security for employees with these types of pension plans. And even for those employees covered by the PBGC, because so many plans became distressed during the global recession, the PBGC is significantly underfunded given all of the terminated single and multiemployer pension plans.

B. EXTENT OF OCCUPATIONALLY-BASED BENEFIT SYSTEMS

A second important difference between the Dutch and American social protection benefit systems is the extent of the two countries' protection of workers through non-government actors. Taking employer-based benefit systems into account, the picture changes considerably. Although the Netherlands has an important occupational-based benefit scheme for retirement security, the relative significance of the voluntarily-adopted, employer-sponsored schemes for all types of benefits (pensions and welfare) in the United States is much larger. This is because meaningful national sickness and health programs are mostly lacking in the United States as described above. Sick pay, retirement, health insurance, and disability are regulated to a much larger extent in the Netherlands.

In the Netherlands, private actors (in particular the employers' and employees' organizations) were removed from the administration of the public schemes. Insofar as private actors are involved, in particular the insurance companies in health care and employers in sick pay, they have to bear the costs of the decisions themselves; in that, the statutory acts specifically define the rights and obligations of the covered persons and of the private actors. By these rules, the legislature maintains its constitutional responsibility for the basic protection in these areas. For occupational pensions, there is more room for the non-public actors to organize protection, but even here there is public responsibility present as witnessed by the promotion of development of these schemes, the protections against fund deficits, and the influence on the contents of schemes by the rules on tax deductions. Unlike the Netherlands, tax subsidies are largely unconditional in the United States, so long as plan qualification requirements are met.

A voluntary occupational scheme necessarily entails inequalities and exclusions of particular groups, gaps in coverage, and prohibitively expensive coverage for some.⁴²⁹ We see this phenomenon in both countries.⁴³⁰ In the Netherlands, there are, however, mechanisms that exist for extending the occupational system, as we have seen in the section on the retirement pensions. For example, employers and employees can ask the minister to extend a scheme for the whole sector, thus including all employers. In the United States, similar benefit mechanisms exist under the ACA for the provisions of health care with regard to how the federal government intervenes in shaping how employer-sponsored health insurance schemes must operate.

C. IMPLICATIONS OF COUNTRY COMPARISONS

Taking all of these comparisons into account can enlarge the domain of the discussion. What type of social protection benefits should a country provide and to what extent should they be organized and regulated by the federal government, state, or non-governmental actor? Does the chosen approach provide for sufficient coverage for most of the population? If not, should existing social protection be supplemented by additional employer-based or private schemes?

If such benefits are to be defined by legislation, how is it best to ensure that dedicated funds are used adequately, and is this possible to do by giving particular actors (e.g., private vs. public actors or national vs. local actors) responsibility? To some extent, this limits their freedom, but since some of the schemes are subsidized by taxes, there may be justification for this approach.

A final set of questions is that if social protection schemes are to be increasingly organized by employers, what then is the role of the various levels of government, especially if the government subsidizes these provisions (e.g., by tax subsidies) or requires certain minimal conditions by statute? Shouldn't such

429. For instance, not everyone is covered. Some pension funds are more fully-funded than others and have more generous pensions. Self-employed persons do not have an employer who takes the employer's share of the contributions; for them pension plans are difficult to afford.

430. Thus some Dutch pension funds had to reduce the pensions, whereas others did not, <http://www.ft.com/intl/cms/s/0/5b480ba4-0ee7-11e2-9343-00144feabdc0.html#axzz3J3JqFFIS> (last visited 14 November 2014) (“454: Total number of Dutch pension funds; 81: Number of Dutch funds likely to cut pensions.”).

financial involvement mean that inequalities are diminished and access guaranteed as a condition of receiving such subsidies as opposed to promoting additional income inequality among citizens?⁴³¹ Shouldn't federal and local laws be written to require universal access and equal economic opportunity?

**VI. OF FEDERALISM AND FIDUCIARY DUTIES:
PRELIMINARY PROPOSALS AND RECOMMENDATIONS
FOR TWENTY-FIRST CENTURY SOCIAL PROTECTION
SYSTEMS**

Although the United States introduced the term “social security,” it did not really influence the meaning that this term has since acquired in European countries. In the United States, the term is limited to old age, survivors and disability benefits; in the Dutch system it covers, like in other European countries, many more risks; there is no strict definition of the term, but usually commentators mention the list of risks covered by ILO Convention 102.⁴³² The different approach reflects the responsibility various countries have taken upon their shoulders for social protection benefits. In the Netherlands, the government has a constitutional responsibility for the welfare of the population;⁴³³ in the United States, no such express constitutional provision exists⁴³⁴ and such social protection is considered more of a moral imperative than a legal one.

Of course, countries are free to design their own benefit systems how they see fit and, moreover, systems have to fit into the particular country's culture, so copying foreign systems is often not possible or recommended. However, based on the foregoing analysis, we can propose a non-ideological discussion

431. See *Qualified Retirement Plans*, RAYMOND JAMES, http://www.raymondjames.com/personal_investing/solutions_small_business_qualified_retirement_plans.htm (last visited Oct. 12, 2014) (analyzing a variety of plan choices and how easy it is for highly compensated employees to skirt the system and favor themselves—using the SIMPLE IRA example because it is not subject to non-discrimination tests or top-heavy rules, which allows highly compensated people unfettered ability to defer as much as they want).

432. *The ILO Social Security (Minimum Standards) Convention 1952 (No. 102)*, ILO (Aug. 12, 2012), http://www.ilo.org/secsoc/areasofwork/legaladvice/WCMS_205340/langen/index.htm.

433. Art. 20 Gw.

434. See *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (refusing to apply notion of welfare benefits as a form of constitutional property right to Social Security disability insurance benefits).

by the relevant policymakers and academics over whether social protection schemes provided to the American and Dutch populations are objectively sufficient.

The term “sufficient” is, of course, a difficult one. However, the Committee of Social Rights, supervising the European Social Charter, has developed a definition that may be very useful for this purpose. According to this Committee, a subsistence income should, in principle, amount to at least 50% of the country’s net median equalized household income per adult.⁴³⁵ Of course, the United States is not bound by the European Social Charter, but because there is no other general basic global minimum standard, it is very useful to take this standard as our departure point.

It should not be surprising to any knowledgeable observer that the United States system does not guarantee this minimal subsistence income. After all, for those benefits where there is federal protection—old age, survivors, disability, and healthcare for some—there are significant gaps in the persons protected and the level of benefit is generally low. For instance, consider that American Social Security only provides less than 50% replacement income and people who live on Social Security alone for retirement income are generally living at or near the poverty level.⁴³⁶ For disability benefits under Social Security, sickness benefits, and unemployment compensation, it is even much clearer that a comprehensive protection is lacking for most American citizens and that the recommended benefits protection is not nearly reached.

In the Netherlands, on the other hand, the general benefit rate is—unless in case of partial disability—70% of the previous wage.⁴³⁷ For those having a wage at or slightly above the minimum wage state subsistence, benefits provide for a guaranteed subsistence income. This is around \$20,000 a year, whereas the median income is \$41,490.⁴³⁸

435. EUROPEAN COMMITTEE OF SOCIAL RIGHTS, EUROPEAN SOCIAL CHARTER: CONCLUSIONS XVII-1, 177 (Strasbourg: Council of Europe Publishing, 2004). The Committee used this definition in its assessment of country schemes without publishing underlying papers discussing how the standard was developed.

436. See Stephen Gross et al, *Actuarial Note Number 155, Replacement Rates for Retirees: What Makes Sense for Planning and Evaluation?*, SSA, 3-5 (July 2014), http://www.ssa.gov/oact/NOTES/.../note_155.pdf; see also *Economic Security for Seniors: Fact Sheet*, NCOA (Feb. 19, 2015, 3:30PM), <http://www.ncoa.org/press-room/fact-sheets/economic-security-for>.

437. Art. 59 WIA (The New Disability Act).

438. *Hoe Hoog is het minimumloon?*, RIJKSOVERHEID

The preceding analysis shows that within the United States, a discussion must be started as to whether the present social protection scheme is satisfactory for most Americans. At the very least, we can conclude based on this analysis that additional social protection benefits in the United States would alleviate the financial uncertainty that many retired, sick, and unemployed Americans face on a daily basis.

The question of a sufficiently high benefit should not focus only at the subsistence level, but also on whether it is an adequate replacement of lost income. After all, risks may materialize at any moment and for any person. Isn't it, therefore, a more modern and humane approach that persons are given, in cases of such uncertainty, benefit compensation through which they can maintain their standard of living and find a way to adjust to their new situation? For this purpose, a certain income replacement ratio is desirable. Of course, this idea has already been generally accepted in the United States, but mainly to the extent that employers voluntarily make such arrangements based on their own perceived self-interest and perhaps in a manner that is beyond their core competencies. It seems unacceptable to us that an individual's fate depends so much on the choice of his or her employer when that employer does not have a fiduciary duty to do what is the best interest of the employee in most situations. We believe strongly that there should be a general, public interest in ensuring a minimum level of benefit replacement ratio for uncertain times in a person's life. We base this conclusion on the fundamental human rights notion that all individuals have equal worth and dignity, and the government respects individual dignity by making sufficient provision for their well-being in vulnerable times.

The necessary social protection benefit standards have already been developed by the International Labour Organization and the Council of Europe. These vary, according to the instrument used, and there is some variation in the instrument. The lowest post Second World War standards can be found in ILO Convention 102, and these start from 40% of the previous income, depending on the benefit concerned. Note that these standards have been raised in later instruments and have a global meaning. Developing countries should also be able to ratify this instrument.

Taking as a standard that 50% of the average individual income has to be compensated through social protection benefits is a reasonable starting point.⁴³⁹ After all, this proposed standard still means an important reduction for the income of most individuals. In the American system, such income replacement by benefit schemes is currently not guaranteed, though Social Security provides such benefits for most citizens. However, for sickness, disability, and unemployment benefits, such guarantee is lacking in the United States and must be addressed.

For its part, the Netherlands has a problem with reaching this level of income replacement for the partially disabled, since the Act's approach in which persons are activated to go back to work has led to levels of benefit that do not meet these standards. As we have seen in Section III.B, the claimant who, upon expiration of his wage-related benefit, does not satisfy the condition that she earns at least 50% of the person's remaining earning capacity is eligible for a low benefit. In the case of full disability, this is 70% of the statutory minimum wage.⁴⁴⁰ In cases of partial disability, the level depends on the incapacity rate.⁴⁴¹ Persons who are incapacitated to a level of less than 35% are not eligible for a benefit.⁴⁴²

In both countries, we see that levels below the national government (i.e., regional authorities, state or local level governments, employers, or insurance companies) are granted responsibility to arrange social protection. In the United States, this dynamic has been in place for many years, and especially since the enactment of ERISA in 1974, which provides tax incentives for the voluntary creation of employer-sponsored pension and welfare benefit plans. Moreover, in the area of healthcare, new obligations introduced under the ACA have placed additional regulatory burdens on states, employers, and insurance companies.

In the Netherlands, the shift of responsibilities to actors others than public authorities is a more recent development.⁴⁴³

439. See European Committee of Social Rights, *European Social Charter: Conclusions 2004*, Vol. 1 at 107 (July 2004), available at http://www.coe.int/t/dghl/monitoring/socialcharter/conclusions/Year/2004Vol1_en.pdf (discussing poverty threshold).

440. Art. 62 WIA (The New Disability Act).

441. *Id.*

442. Art. 61(6) WIA (The New Disability Act).

443. Although in the past they were involved in the benefit administration, so it is not so new development. However, having the full responsibility by bearing the

Indeed, important and interesting differences exist between the American and Dutch approaches. There appears to be more distrust in the Netherlands in providing subsidies/benefits to lower level public authorities or organizations, as it is feared that funds are spent not as efficiently as possible if the organization that makes the decisions does not bear the expense for these. Instead, there is indeed a tendency to decentralize benefit administration since lower level bodies, whether employers or insurance companies, know better the local conditions and problems of their specific part of the country. Under this approach, these actors have to bear the costs themselves (local governments receive a lump sum for their tasks) and can keep the money they gain by employing efficient measures. However, the national legislation defines the basic principles and the framework for such benefit spending, and thus ensures that the claims of beneficiaries are dealt with according to the national legislation.

When the law gives employers responsibilities for compensation, as is the case with sick pay in the Netherlands, the law defines the obligations in a general sense and makes such benefits compulsory for all employers. So the role of the employers and sickness insurance companies is to take over public tasks in the way the government wants. In addition to this, they can still provide voluntary benefits.

In sum, in both the United States and the Netherlands, regional authorities (the states and municipalities), employers, and insurance companies are given a responsibility that traditionally has been a public one. To ensure consistency and uniformity of benefit provisions through both countries, it is critical that legislation provides for the basic rules and principles in order to realize a minimum income, a decent income replacement, and adequate health, disability, and sickness benefits.

It makes good sense to give regional authorities, employers, and insurance companies the task of benefit provision, as they are closer to the persons concerned, and can better adjust conditions, benefits, and supervision of such benefits to have the maximum impact. Insofar as there is concern regarding ensuring minimum benefit standards, however, statutory federal/national provisions are necessary to ensure equal treatment, access, uniform coverage, and sufficient level of

benefits for all individuals.

We now recommend that future discussions regarding the responsibilities for, and the contents of, social protection benefit systems take place in the light of the division of tasks between the federal/national state and others (local government, private companies, and employers). We recommend first that national legislation define the minimum protection to be guaranteed to all and that the federal/national level undertakes the burden of enforcing these protections. Above, we mentioned subsistence for all at the level of 50% of the median wage and, as a second, higher ambition, 50% of the individual's last, previous wage. Both are minimum benefits only and, of course, more generous benefits can always be contemplated.

Secondly, it is relevant to decide which public or private actors should arrange this minimum provision of benefits. The minimal benefit level should be regulated at the national/federal level and applicable for all workers (and residents, in any case where health care is concerned). However, applying principles of federalism or subsidiarity,⁴⁴⁴ implementation should be done by those most in touch with the persons being covered. That means that we suggest that benefit implementation, depending on the type of benefit, be done at the regional and local level by regional authorities, municipalities, employers, and insurance companies. So this may mean that more benefit-related statutory duties become applicable to private actors in the United States, where they have to realize the minimum protection deemed necessary by the federal government.

Apart from the behavior of non-public actors, benefit schemes must be better regulated in order to protect the interests of the insured. For this purpose, we propose that a fiduciary duty be applied to benefit administrators' conduct.⁴⁴⁵ Employers and insurance companies tend to be self-interested and conflicted when providing benefits.⁴⁴⁶ For this reason, we recommend that national legislation be passed in both countries that requires employers and insurance companies that provide benefits to workers and individuals to follow fiduciary standards

444. For the Netherlands, the term "federalism" is less appropriate; however, the concept is still very applicable.

445. This fiduciary standard is borrowed from ERISA law. *See* 29 U.S.C. 1104 (2012) (setting out fiduciary standards of loyalty and care for ERISA fiduciaries).

446. The U.S. Supreme Court has discussed these structural conflicts of interest in denial of benefit cases. *See* *Metropolitan Life v. Glenn*, 128 S. Ct. 2343, 2348 (2008) (noting the inherently conflicted nature of an employer fiduciary who both decides benefit claims and pays for granted benefit claims).

of loyalty and care. Such a system is already in place with regard to ERISA plans in the United States, and so we seek the expansion of such fiduciary duties to the provision of all social protection benefits to all persons. This approach recognizes the dignity and worth of all individuals, especially during times of uncertainty, and will lead to important protections against abuse, discrimination, and insolvency. The concept of fiduciary standard does not replace current law, but supplements these standards. This is appropriate, as even when statutory rules and concepts apply, the self-interest of organizations or employers can conflict with individual interests. As we have seen, eliminating self-interest is explicitly desired by the Dutch legislature, but overall criteria are still missing. The concept of fiduciary standards may be very useful to improve Dutch social protection law in this regard.

VII. CONCLUSION

The purpose of this article has been to introduce a new approach to social protection benefit provision through an analysis and comparison of two of the advanced benefit systems in the world. Both the Dutch and American examples teach us that meaningful social benefit protection is possible, consistent, and necessary within market-based societies.

Our recommendation is that advanced-market societies start a discussion on social protection benefits based on the dual principles of subsidiarity and fiduciary duty. Subsidiarity provides that the national/federal government should provide the principles and minimal framework for benefit provision, while regional authorities, employers, and insurance companies should be given freedom, and the duty, to implement the underlying schemes to meet the challenges of the local situation. However, to constrain the sometime self-interested and conflicted motives of employers and insurance companies in the benefits system, we also suggest that countries adopt, at the national level, fiduciary duties of loyalty and care to protect against abuse, discrimination, and arbitrary action in the provision of such benefits. In addition, these principles should also be applied to employer-sponsored schemes in both countries, to the extent that such duties do not already exist.

We hope, and believe, that through the construction of such a social benefit system, countries can guarantee a minimal level of benefit protection that will help their citizens negotiate difficult times during retirement, disability, sickness, injury, and

unemployment. In turn, the “benefit” of such a system will be the recognition of the dignity and self-worth of all individuals, which is a non-ideological goal that we can all embrace.