EMPLOYER COSTS AND CONFLICTS UNDER THE AFFORDABLE CARE ACT

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Qualified employers must provide health care coverage under the Patient Protection and Affordable Care Act of 2010 (ACA) or face a fine beginning January 2015. As employers actively attempt to minimize the costs that they will incur, the possibility emerges that employers will retaliate against or harass employees who seek coverage. This Essay discusses the protections for employees under the law and the possible deficiencies in the law. It shows that employers and employees often have contrasting incentives—employers to avoid coverage and employees to take coverage—and these incentives may result in employer harassment and retaliation of employees. Presently, in an analogous context, employees often raise retaliation claims after they have complained of discrimination, and these claims have had significant success. Because of similarities between these situations, comparable retaliation under the ACA is likely, and perhaps it will occur even more due to the significant specific costs that employers face under the ACA.

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We are grateful for discussions with: Sean Anderson, Julian Birnbaum, Paul Caron, David Hyman, Richard Kaplan, Hanan Kolko, James Wasserman, and Robin Wilson.

INTRODUCTION

Under one of the most significant parts of the Patient Protection and Affordable Care Act of 2010[1] (ACA), many employers must provide health care coverage or face financial penalties beginning in January 2015.[2] Likewise, employees must obtain health care coverage or face penalties. Employers have spoken out against this law because it may increase their costs.[3] Such an increase in costs may motivate employers to react by firing or otherwise retaliating against employees.

Recently, the *Wall Street Journal* reported that major employers including Wendy's and Chipotle overestimated their health insurance costs; far fewer employees will take employer-sponsored coverage than the employers first expected.[4] It may be that employees will not want coverage for personal reasons, or it may be that employers will pressure employees not to take coverage by threatening to retaliate if employees do.

The actual text of the ACA, along with provisions of the Employee Retirement Income Security Act (ERISA), partially protect employees from retaliation and harassment. However, given the gaps in protection, the experiences of employees under the discrimination laws who have faced significant retaliation, and the incentives of employers under the ACA, retaliation and harassment under the ACA is likely and thus warrants additional protection.

In this Essay, we show the need for changes in the law. We describe how the ACA places employers and employees at odds. After discussing the responsibilities of employers and employees under the ACA in Part I, in Part II we show the incentive of employers to harass or retaliate against employees who elect coverage. Next, in Part III, we describe existing protections against harassment and retaliation for employees opting for health care coverage. In Part IV, we show how gaps in this protection create a need for additional protection. Part V describes the significant issue

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1 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.), *amended by* Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029 (2010). Throughout the body of this Essay, "ACA" represents the PPACA as amended by HCERA when applicable.

2 *See infra* note 6 and accompanying text.

3 *See* Susan Page, *Obamacare: 3 Years in, It Faces Steep Challenges*, USA TODAY (May 16, 2013, 9:55 AM), http://www.usatoday.com/story/news/politics/2013/05/16/obamacare-challenges/2166189/ (describing results of a Gallup Poll in which approximately four of ten small business owners said they have not hired new employees or grown their businesses because of the ACA).

4 Scott Thurm, *Restaurant Chains Cut Estimates for Health-Law Costs*, WALL ST. J. (Mar. 27, 2013, 7:52 PM), http://online.wsj.com/article/SB10001424127887323361804578386993871436364.html.

of retaliation in the employment discrimination context—the closest analogy to problems under the ACA. In this context, an employee can bring a claim for retaliation when an employer retaliates against the employee for complaining about discrimination. We show that employers' incentives are similar under the discrimination laws and the ACA, and even more apparent under the ACA. As a result, the potential for retaliation and related conduct in the context of the ACA is significant. Finally, in Part VI, we make recommendations for additional protection, given the gaps in protection and the potential for retaliation claims.

I
EMPLOYER AND EMPLOYEE RESPONSIBILITIES UNDER THE ACA

The ACA takes two approaches to further its goal of increasing the number of individuals with health insurance. Large employers who do not make appropriate coverage available to employees are subject to a series of fines, and fines apply to employees who refuse to obtain proper health insurance.

A. What Employers Have to Pay

Employers with fifty or more full-time employees or the equivalent must either offer insurance to full-time employees or pay a fine to the federal government.[5] Employers can trigger the fine in two ways. First, employers can refuse to offer *any* health insurance to employees, in which case the employer must pay $2,000 per full-time employee in excess of thirty employees.[6] Second, employers can offer "inadequate" health insurance (insurance that is either not sufficiently comprehensive or too expensive)[7] to employees. In that case, the employer must pay the lesser of the above fine or $3,000 per eligible employee who opts for, and receives, individual coverage subsidized by the federal government through a state health insurance exchange.[8] Subsidized coverage through a state health

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5 26 U.S.C. §§ 4980H(a), (c)(2)(A) (2006 & Supp. V 2011). Solely for the purpose of determining the number of full-time employees, part-time employees are counted as fractional full-time employees proportional to hours worked. *See id.* § 4980H(c)(2)(E).

6 *See id.* §§ 4980H(a), (c)(1), (c)(2)(D)(i)(I). The fine is triggered as long as one full-time employee obtains individual insurance subsidized by the federal government through a state health exchange. *Id.* at § 4980H(a)(2). Some commentators believe that employers will stop offering health insurance and pay these associated fines because doing so is the least expensive alternative. Scott Thurm, *Will Companies Stop Offering Health Insurance Because of the Affordable Care Act?*, WALL ST. J. (June 16, 2013, 7:22 PM), http://online.wsj.com/article/SB10001424127887323582904578488781195872870.html.

7 *See infra* notes 13–14 and accompanying text.

8 26 U.S.C. § 4980H(b) (2006 & Supp. V 2011). There is some question regarding whether individuals are eligible for subsidies—and hence whether employers are liable for the $3,000 fine per employee—when buying insurance from state exchanges set up by the federal government, exchanges created if a state refuses to develop an exchange itself.

insurance exchange is available to certain lower-income individuals.[9]

B. What Employees Have to Pay

The ACA creates an "individual mandate" requiring individuals, including employees, to obtain health insurance or face a fine.[10] Except for certain very low-income individuals, those who do not obtain health insurance must pay a fine of the greater of $95 or 1% of income over the threshold amount necessary to file a federal income tax return in 2014, growing to the greater of $695 or 2.5% of income over the threshold in 2016 and indexed to the cost of living thereafter.[11]

II
EMPLOYERS AND EMPLOYEES AT ODDS UNDER THE ACA

Assuming for now that the employer maintains its existing employment structure,[12] both employers and employees can minimize the ACA's financial impact, but their ways of doing so push in opposing directions. Employers can eliminate or reduce fines if one of two conditions holds. First, the employer can offer "adequate" coverage to employees: this absolves the employer of fines regardless of whether employees elect employer-provided insurance. Adequate coverage is insurance where the employee's premium contributions do not exceed 9.5% of her salary[13] and where the insurance covers, on balance, 60% of the expenses allowable under the insurance.[14]

Twenty-seven states have purely federal exchanges as of August 2013. *State, Partnership, or Federal Health Insurance Exchange? Where States Stand So Far*, STATEREFORUM, https://www.statereforum.org/where-states-stand-on-exchanges (last visited Sept. 18, 2013); *see also* Robert Pear, *Most Governors Refuse to Set Up Health Exchanges*, N.Y. TIMES (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/us/most-states-miss-deadline-to-set-up-health-exchanges.html?smid=pl-share&_r=0 ("Federal officials said they knew of 17 states that intended to run their own exchanges, as Congress intended."). The IRS, which is tasked with implementing ACA fines and subsidies, has taken the position that subsidies are available in these instances, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 602), and by extension that fines are applicable. Lawsuits have recently been filed challenging this interpretation, and the outcomes could substantially affect future employer and employee behavior. *See* Andrew Zajac, *Obama Healthcare Law Challenged in Suit Over Tax Subsidy*, BLOOMBERG (May 2, 2013, 2:32 PM), http://www.bloomberg.com/news/2013-05-02/obama-healthcare-law-challenged-in-suit-over-tax-subsidy.html.

9 26 U.S.C. § 36B (2006 & Supp. V 2011).

10 The individual mandate was one of the hotly contested provisions of the ACA. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2584–601 (2012) (resolving the constitutional challenges to the ACA's individual mandate).

11 26 U.S.C. § 5000A (2006 & Supp. V 2011).

12 *But see infra* Part II.B.

13 *See* 26 U.S.C. § 36B(c)(2)(C)(i) (2006 & Supp. V 2011) (triggering a fine if the premium contributions exceed 9.5% of salary).

14 *See id.* § 36B(c)(2)(C)(ii) (triggering a fine if insurance covers less than sixty percent of the expenses allowable under the insurance).

Under this coverage, then, employees who participate in such employer-sponsored coverage cost the employer money because in many cases the employer must pay sizable portions of the employees' premiums.[15] Thus, for each employee who decides not to take the employer's insurance, the employer saves a substantial amount of money.

There is a second option for employers. An employer can eliminate or reduce fines if it offers employees inadequate coverage (but still offers coverage) and then attempts to minimize the number of employees obtaining individual subsidized coverage from an outside state health insurance exchange.[16] Assuming the applicable fine is $3,000 per employee,[17] each employee foregoing subsidized coverage saves the employer $3,000. The statutory fine regime thus pushes employers to minimize the number of employees who take employer-provided health insurance and, if the health insurance is inadequate, to minimize the number of employees obtaining subsidized health insurance through an exchange. Such employer "encouragement" need not be overt or direct: one can imagine an employer warning its employees of impending job cuts if too many employees sign up for the employer's insurance or individual subsidized insurance.[18]

The ACA pushes employees in precisely the opposite direction, towards obtaining insurance. It does so in two ways. First, employees avoid the ACA's individual mandate fine by having health insurance.[19] Second, employees gain whatever incremental value that having health insurance provides them. Subsidies enacted by the ACA that assist low-income individuals give those individuals even more incentive to elect insurance through the exchanges by offsetting some of their premium costs.[20] With that said, employees

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15 To avoid triggering a fine, the employer must pay at least enough of the premiums so that the employee's portion does not exceed 9.5% of the employee's pay.

16 *See supra* note 8 and accompanying text.

17 *See supra* note 8 and accompanying text. The exact amount of the fine depends on the number of employees. *See id.*

18 *See generally* Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, N.Y. TIMES (Oct. 26, 2012), http://www.nytimes.com/2012/10/27/us/politics/bosses-offering-timely-advice-how-to-vote.html?pagewanted=all (quoting the chief executive of a time-share company's letter to employees claiming that reelecting President Obama would raise employer costs and threaten employees' jobs).

19 *See supra* note 11 and accompanying text.

20 26 U.S.C. § 36B (2006 & Supp. V 2011) (premium subsidies for individuals and families earning up to 400% of the federal poverty line); 42 U.S.C. § 18071 (2006 & Supp. V 2011) (cost-sharing subsidies for individuals and families earning up to 400% of the federal poverty line). Professors Monahan and Schwarcz have shown that these employer–employee dynamics could push employers to restructure their insurance offerings to cover only healthy employees, to mutual benefit. Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 174–88 (2011). *But see* David A. Hyman, *PPACA in Theory and Practice: The Perils*

might not take insurance if doing so would jeopardize their jobs. The following example illustrates how these dynamics work.

A. An Example of the Conflict

Assume an employer has 100 full-time employees. The insurance the employer offers costs $5,000 per employee per year, approximating recent estimates of the cost of "adequate" insurance.[21] The employer faces three choices: offer no insurance, offer inadequate insurance, or offer adequate insurance.

If the employer decides to offer no insurance, it must pay a $140,000 fine as long as at least one person obtains subsidized insurance through an exchange: $2,000 per employee in excess of thirty employees. Each employee can then either buy insurance on the individual market, in which case she pays the premiums out of her own pocket (potentially subject to a partial federal subsidy offset), or else pay a $95 fine[22] and go without insurance. Because $95 is less than the employee's cost of obtaining insurance (and significantly less for all but the most heavily-subsidized employees—the employees at the federal poverty line), the employee will go without insurance unless the incremental value from having health insurance is large.

If the employer instead decides to offer inadequate insurance—such as insurance that is too expensive for employees because the employer does not cover any of the cost—the employer pays a $3,000 fine for any employee who buys insurance individually with a federal

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of Parallelism, 97 VA. L. REV. IN BRIEF 83, 89–91, 96–97 (2011), *available at* http://www.virginialawreview.org/inbrief/2011/11/04/hyman.pdf (arguing that the problem the Monahan & Schwarcz article identifies may not materialize). We consider here the related issue of employers and employees acting in ways that could make each other worse off.

21 The Congressional Budget Office's original figures project that the minimum level of adequate insurance will cost between $4,500 and $5,000. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Olympia Snowe, Senator, U.S. Senate (Jan. 11, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10884/01-11-premiums_for_bronze_plan.pdf. More recently, the IRS used $5,000 in its examples of fines imposed on individuals by the ACA. Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 7314, 7330 (Feb. 1, 2013) (to be codified at 26 C.F.R. pt. 1) (describing proposed regulation IRS Reg. 148500-12). These estimates are below the actual cost of typical employer-provided insurance in 2013, which cost $5,884. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS 2013 ANNUAL SURVEY 13, *available at* http://www.kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf.

22 For certain higher income employees, the fine could instead be based on one percent of income. *See supra* note 11 and accompanying text. For convenience, we assume the fine to be the fixed flat amount for the remainder of this Essay, but to the extent the fine is higher because it is based on income, the employer–employee frictions we identify will be exacerbated.

subsidy.[23] The employee can pay $5,000 for the employer's insurance, obtain insurance at her own expense through the individual market, or pay the $95 fine. As before, the employee will go without insurance unless the incremental value from having health insurance is large. Suppose twenty employees are eligible to buy subsidized individual insurance: the employer then faces at most $60,000 in fines. Each of these twenty employees who ultimately decides against buying subsidized insurance saves the employer $3,000. The employer faces no fines or other costs for those employees who buy unsubsidized or no insurance.

Finally, if the employer offers adequate insurance, the employer must pay the portion of employee premiums exceeding 9.5% of the employee's salary. Suppose the employer is in the restaurant industry, with employee salaries of $25,000.[24] In that case, the employer must cover at least $2,625 of the $5,000 expense per employee (the portion above 9.5% of $25,000), and the employee pays the remaining $2,375.[25] If all employees take up the employer-sponsored insurance, the employer pays $262,500 in health premiums and pays no fines. Each employee who instead decides not to buy the employer's insurance must either buy on the individual market or pay a $95 fine; in either case, the employer saves $2,625 per such employee.

In this example, the employer could try to reduce costs and fines in the following manner. First, the employer could offer adequate insurance but make clear that employees should not take the insurance, such as by threatening their jobs if they elect coverage. Second, the employer could offer inadequate insurance but make clear that employees should not buy subsidized individual insurance, such as by threatening their jobs if they elect subsidized individual coverage. In the employer's ideal scenario, it will face neither costs nor fines because of its ability to induce employees to forego coverage.

B. Changing the Workplace Structure to Avoid or Reduce the Effects of the ACA

Employers could attempt to avoid the ACA completely. They could lay off workers to decrease the size of their full-time workforce

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23 *See supra* note 17 and accompanying text (regarding the assumptions in this example).

24 The average cook's salary in the restaurant industry is $22,030. *Occupational Employment and Wages, May 2012*, U.S. BUREAU OF LABOR STATISTICS (2012), http://www.bls.gov/oes/current/oes352014.htm.

25 This number is the employer's share assuming the employee pays the maximum allowable amount of 9.5% of her salary. The calculation is $5,000–(.095*$25,000).

below fifty so that the ACA does not apply.[26] Employers could also substitute part-time employees for full-time employees even if employers cannot reduce the number of full-time employees below fifty because part-time employees do not count with respect to employer fines.[27] Alternatively, employers could decrease employees' take-home pay to make up for employers' higher insurance costs.[28] Separate from any attempts to avoid the ACA completely, employers may be motivated to employ younger workers, who may be less expensive to insure than older ones.[29]

III
EMPLOYEE PROTECTIONS UNDER THE ACA

Well before the enactment of the ACA, Congress passed ERISA. ERISA protects employees from employer retaliation or harassment in connection with obtaining and using benefits such as employer-provided health insurance.[30] The statute provides that "[i]t shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under . . . an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."[31] 29 U.S.C. § 1140 is "intended to discourage employers from discharging or harassing their employees in an attempt to prevent them from using their pension or medical benefits."[32] Moreover, 29 U.S.C. § 1141 provides that "[i]t shall be unlawful for any person through the use of fraud . . . to restrain, coerce,

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26 *See* Emily Maltby & Sarah E. Needleman, *Sizing Up Health Costs: How Three Business Owners Are Coping with New Insurance Requirements*, WALL ST. J. (May 29, 2013, 8:25 PM), http://online.wsj.com/article/SB10001424127887324031404578483482290350740.html. More precisely, employers must reduce their workforce to below fifty full-time equivalent employees. *See supra* note 5 and accompanying text.

27 *See* Maltby & Needleman, *supra* note 26; *see also* Joshua Rhett Miller, *Florida Restaurateur to Impose Surcharge for ObamaCare*, FOX NEWS (Nov. 15, 2012), http://www.foxnews.com/us/2012/11/15/florida-restaurateur-to-impose-surcharge-for-obamacare/ (profiling restaurant owner who said he would "slash most of the staff's time to fewer than 30 hours per week" in response to the ACA's penalties).

28 *See* Maltby & Needleman, *supra* note 26.

29 *See* Christopher Weaver & Anne Wilde Mathews, *One Strategy for Health-Law Costs: Self-Insure*, WALL ST. J. (May 27, 2013, 7:58 PM), http://online.wsj.com/article/SB10001424127887323336104578503130037072460.html (indicating that "self-insurance would tend to most benefit employers with younger, healthier workers").

30 *See* 29 U.S.C. § 1140 (2006 & Supp. V 2011).

31 *Id.*

32 Dewitt v. Proctor Hosp., 517 F.3d 944, 949 (7th Cir. 2008); *see also* Kowalski v. L & F Prods., 82 F.3d 1283, 1287 (3d Cir. 1996) (holding that an employer may not terminate an employee "when the termination . . . occurred in retaliation for the employee exercising his or her right to receive ERISA-protected benefits").

intimidate, or attempt to restrain, coerce, or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled . . . ."[33] Under these provisions, a plaintiff may recover benefits, enforce his rights, clarify his rights to future benefits, obtain other equitable relief,[34] and recover attorneys' fees and costs if he prevails.[35]

In addition to ERISA, newly enacted Section 1558 of the ACA protects employees from discrimination for obtaining subsidized individual insurance.[36] It states in part that "[n]o employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee . . . has . . . received . . . a subsidy [for buying individual insurance]."[37] Under this provision of the ACA, if they prevail, plaintiffs may be reinstated and recover back pay, attorneys' fees, and costs.[38]

IV
GAPS IN ACA PROTECTION FOR EMPLOYEES

Are the protections for employees against employer retaliation and harassment adequate? Congress enacted the ACA to "increase the number of Americans covered by health insurance and decrease the cost of health care,"[39] and many of the protections described in Part III support this purpose by punishing various actions by employers against employees such as discharge for using benefits and certain threats against using benefits. Also, employers who opt to provide coverage will not be able to discriminate specifically against

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33 29 U.S.C. § 1141 (2006 & Supp. V 2011).

34 *See id.* § 1132(a)(1)(B), (3)(B).

35 *See id.* § 1132(g)(1).

36 *See id.* § 218c; *see also infra* note 38 (describing applicable regulations). The ACA also provides additional protections not relevant for this analysis. For example, Section 1558 also protects employees against an employer's retaliation for reporting alleged ACA violations. *See* 15 U.S.C. § 2087(b) (2006 & Supp. V 2011).

37 *See id.*

38 *See id.* The remedies, burdens of proof, and statutes of limitations for these claims are the same as those in the Consumer Protection Act. *See* 29 U.S.C. § 218c (2006 & Supp. V 2011). Included in the protection is a prohibition against any waiver, including by agreement, of the rights and remedies provided under the ACA. *Id.* Recently, the Occupational Safety and Health Administration (OSHA) created an Interim Final Rule regarding the procedure to handle complaints under Section 1558. Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. 13,222 (Feb. 27, 2013) (to be codified at 29 CFR pt. 1984). Under the Rule, an employee must complain within 180 days of an alleged violation. *Id.* at 13226. If OSHA decides that "there is reasonable cause to believe that retaliation has occurred," it can order reinstatement. *Id.* at 13224. There are various appeals processes, and an employee has the right to bring an action in federal court. *Id.* at 13224, 13229.

39 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

workers ages forty and older, such as by not hiring them, to minimize their costs.[40] Yet, holes remain.

While Section 1558 of the ACA protects against "discrimination," it does not on its face protect against interference with a right as do 29 U.S.C. §§ 1140 and 1141. Thus, an employer who retaliates against an employee who has already purchased subsidized individual insurance would be liable. But under the language of the section, an employer might be able to pressure employees not to obtain subsidized individual coverage by stating that they will lose their jobs if they take coverage, without facing liability. Additionally, one could argue that liability does not clearly attach under the language of Section 1558 where an employer fires an employee to prevent the employee from taking a subsidy or makes a generalized implicit threat of job insecurity ("I'll have to cut jobs if too many employees buy or opt for insurance").

Nor is protection clear under ACA Section 1558 or ERISA Sections 510 and 511 when an employer restructures the workforce to fewer than fifty full-time employees, substitutes part-time employees for full-time employees, or decreases pay to account for health care costs, because arguably there is no employee right to health insurance that is being interfered with, even though the purpose of the act suggests Congress may want employee protection in these circumstances. Additionally, employees do not appear to be protected from a seemingly innocuous polling to ask whether they will take coverage if offered in the future,[41] again because arguably there is no employee right to health insurance being interfered with. Finally, job applicants do not appear to be protected from being asked about their present coverage.[42] These last two examples could place targets upon the backs of workers and help employers target employees or potential employees.

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40 Age Discrimination in Employment Act, 29 U.S.C. §§ 623(a)–631(a) (2006 & Supp. V 2011).

41 *See* Emily Maltby, *Will New Health Insurance Be Too Expensive for America's Lowest-Paid?: Bosses, Workers Struggle to Gauge Hit to Paychecks*, WALL ST. J. (June 6, 2013, 8:14 PM), http://online.wsj.com/article/SB10001424127887324069104578529073783556046.html (indicating that at least one business is engaging in this polling).

42 First, applicants do not appear to be protected under ERISA because they are neither "participants" nor "beneficiaries" under the text of ERISA. *See* 29 U.S.C. § 1002(7) (defining participant); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989) ("In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits.") (internal citations omitted). Second, applicants do not appear to be protected under the ACA. Even though they are employees under the OSHA regulations, 29 C.F.R. § 1984.101(e)(3) (2013), the ACA requires an employee to have first received subsidized health insurance via a state exchange to be protected against employer action, *see* 29 U.S.C. § 218c(a) (2006 & Supp. V 2011).

V
AN ANALOGY TO DISCRIMINATION

As discussed above, several large employers recently cut their estimates of the ACA's costs on their operations (at least one by eighty percent) "primarily because they expect many employees to decline the [employer-sponsored] insurance offering."[43] These cuts could reflect employers' ability to pressure employees in the ways described in Part II or employees' preference to pay the fine rather than the premiums for insurance coverage.

Similar to some of the protection for retaliation against an employee electing health insurance coverage, the protection under the employment discrimination laws provides that if an employer retaliates against an employee for complaining about discrimination, the employer is liable for monetary damages. Title VII, which contains the main employment discrimination laws, states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . . ."[44] Also, similar to the retaliation protection in the health insurance context, attorneys' fees and costs are recoverable in successful employment discrimination retaliation actions.[45] These protections have been deemed invaluable to discrimination law as adding necessary protection for employees alleging discrimination and likewise should be valuable in the health care context. Because the laws are very similar,[46] the discrimination area is likely a predictor of actions that employers may take under the ACA.

Although the protections against retaliation in the employment discrimination context are significant, the number of successful retaliation claims made by employees has been surprising. Indeed, retaliation claims constitute the highest percentage of employment discrimination claims presently brought—almost forty percent—more than, for example, claims of race and sex discrimination,[47] and employment discrimination claims more generally constitute a

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43 Thurm, *supra* note 4.

44 42 U.S.C. § 2000e-3(a) (2006 & Supp. V 2011).

45 *See id.* §§ 2000e-5(g), (k). Additional damages are also recoverable. *See infra* note 57 and accompanying text.

46 There are other ways in which the laws are similar. Like employment discrimination, the ACA is relevant to employers. Also, like employment discrimination claims, complaints about subsidized coverage must be filed within a shortened statute of limitations. *See* 42 U.S.C. 2000e-5(e) (2006 & Supp. V 2011); 29 C.F.R. § 1984.103(d) (2013).

47 *Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL OPPORTUNITY EMP'T COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sep. 20, 2013).

considerable portion of the federal docket.[48] Generous interpretations of the retaliation statutes by courts have aided retaliation claims.[49] The plethora of successful retaliation claims in the discrimination context[50] suggests that employer retaliation persists—that employers retaliate against employees who complain about discrimination—despite penalties for doing so, and that employers will also retaliate against employees who seek ACA coverage. Because the ACA actually requires employers to pay money to provide health care insurance, retaliation may be even more likely to occur under the ACA because employers will want to avoid these specific costs.[51]

VI
RECOMMENDATIONS FOR THE FUTURE

The opposing incentives created by the ACA, the gaps in employee protection, and the tension in analogous discrimination cases show the need for expanded employee protection.

First, to prevent employers from improperly keeping employees from obtaining subsidized individual coverage, additional protection beyond the current ACA Section 1558 is necessary. Expanding

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[48] Employment discrimination cases accounted for between five and six percent of the federal docket. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103 (2009).

[49] *See generally* Alex B. Long & Sandra F. Sperino, *Diminishing Retaliation Liability*, 88 N.Y.U. L. REV. ONLINE 7, 7–13 (2013) (discussing favorable case law but arguing that recent cases may diminish retaliation protection). *But see* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S.Ct. 2517, 2534 (2013) (interpreting the retaliation statute to require but for causation).

[50] *See* John M. Husband, Steven T. Collis & Ken Broda-Bahm, *Trying Discrimination and Retaliation Claims in Tandem—How Jurors React*, 41 COLO. LAW. 43, 45–46 (2012) (indicating that filings of retaliation claims have increased in the past few years and that those retaliation claims are "more likely to prevail at trial and recover significant damages than an employee filing a typical discrimination claim"). Many retaliation cases are reported on Westlaw each week. *See, e.g.*, Mahoney v. Donovan, No. 12-5016, 2013 WL 3239663 (D.C. Cir. June 28, 2013); Howard v. Office of Chief Admin. Officer, Nos. 12-5119, 12-5120, 2013 WL 3242113 (D.C. Cir. June 28, 2013); White v. Standard Ins. Co., No. 12-1287, 2013 WL 3242297 (6th Cir. June 28, 2013); Smith v. Hebert, No. 12-30054, 2013 WL 3243535 (5th Cir. June 28, 2013); Daugherty v. Warehouse Home Furnishings Distrib., No. 1:12–CV–883–VEH, 2013 WL 3243561 (N.D. Ala. June 28, 2013); U.S. v. Machado-Erazo, No. 10-256-08,-09,-20, 2013 WL 3244823 (D.D.C. June 28, 2013).

[51] In some circumstances, there may also be costs for an employer not to retaliate in the discrimination context. For example, in order not to retaliate, they may need to give a person a raise. Additionally, nonfinancial motivation to retaliate may be stronger in the discrimination context if employers are motivated because they believe an employee should not have made an accusation of discrimination.

An analogy could be made between harassment regarding possible ACA or ERISA benefits and harassment in discrimination litigation. Harassment in discrimination litigation is actionable under the employment discrimination laws. However, as seen above, employer harassment in the health insurance context is not adequately protected against.

Section 1558's protection to encompass employer actions such as firing, fraud, or generalized threats that are undertaken for the purpose of preventing or interfering with employees' rights to obtain subsidized individual health insurance could be a way of providing necessary safeguards similar to the protections under ERISA Sections 510 and 511.

Second, the purpose of the ACA also appears to support that an employer should be prohibited from restructuring its workforce for the sole purpose of avoiding health coverage under the ACA, for example, by hiring part-time workers to replace full-time employees. To achieve this purpose, Congress may wish to prohibit such restructurings in certain circumstances.[52] With that said, if the employer has legitimate concerns—perhaps the employer truly would have to fire employees if they elected employer-offered health insurance or subsidized individual insurance—notifying employees of the situation and allowing them to make an informed choice may be something the law could value. Under Section 1140, an employer may act properly if it acts for the purpose of a "fundamental business decision."[53] This type of protection that gives the employer an ability to make sound business decisions but protects employees against nefarious motivations would be ideal. Determining when a decision was made for legitimate business decisions is a question for the future because more case law needs to be developed around this issue.[54]

Third, coverage under ACA Section 1558 and ERISA Section 511 should be expanded to account for activities like polling of employees or questioning of potential employees about their health care intentions when these activities are undertaken to help employers target employees. It may be that coverage inspired by

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52 *See supra* Part II.B. A Third Circuit case potentially supports some protection against restructuring under 29 U.S.C. § 1140 (2006 & Supp. V 2011). *See* McLendon v. Cont'l Can Co., 908 F.2d 1171, 1174 (3d Cir. 1990); *see also* Gavalik v. Cont'l Can Co., 812 F.2d 834 (3d Cir. 1987) (addressing similar facts). In this case, Continental Can established a plan to shift production among plants and lay off workers to prevent them from obtaining richer pension benefits. *McLendon*, 908 F.2d at 1174–75. Because of these changes, Continental Can faced liability under Section 1140 for these actions. *Id.* at 1177. However, if Continental Can had fewer than fifty full-time employees, it would not face penalties for not offering health insurance. *See supra* note 26 and accompanying text.

53 Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 516 (1997).

54 The question of whether employers should be able to pass along to employees all their increased costs of providing health insurance (or the cost of their fines for failing to provide health insurance) is more difficult. On the one hand, restricting employers from doing so over the long term may be impossible from a practical perspective, and safeguards like freezing employee pay may merely result in undesirable layoffs or business closings. On the other hand, provisions in the ACA such as the requirement that employers pay enough of employee premiums so the resulting costs to employees does not exceed 9.5% of their income suggest that Congress did not intend the incremental costs to be borne solely by employees.

Section 8(a)(1) of the National Labor Relations Act,[55] which protects against questioning employees regarding union activity including how they will vote, should be added to ERISA and the ACA to protect against polling and other health care questioning actions by employers.[56]

Finally, additional security for employees may be warranted because of the significant potential for harassment and retaliation and the importance of jobs to individuals' well-being. Currently, neither ERISA nor the ACA include compensatory or punitive damages (or similar remedies), both of which are available in the analogous employment discrimination context.[57] In the past, concerns have been raised that ERISA remedies do not make plaintiffs whole,[58] so this may be an appropriate time for Congress to consider the merits and weaknesses of strengthening ERISA and ACA by including additional remedies.

CONCLUSION

The Affordable Care Act presents some contrasting incentives for employers and employees, and employers face significant costs. Because of these costs, employers may take several different actions, many of which could hurt employees but some of which may be necessary. Currently, the ACA and ERISA provide valuable protections to employees seeking to take advantage of the coverage available under the ACA, but a substantial number of claims of retaliation under the ACA are likely given the significant number of claims in the analogous setting of employment discrimination retaliation. Additional employee protection is needed, including against threats for taking subsidies and against illegitimate restructuring by employers.

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55 29 U.S.C. § 158(a)(1) (2006 & Supp. V 2011).

56 Several actions are prohibited under this section, including an employer's "interrogation of employees, solicitation of spying, solicitation of grievances and promises of benefits, and threats of plant closures . . . ." NLRB v. McClain of Georgia, Inc., 138 F.3d 1418, 1422–23 (3d Cir. 1998).

57 *See* 42 U.S.C. § 1981a (2006 & Supp. V 2011).

58 *See* Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 HOFSTRA LAB. & EMP. L.J. 387, 388–90 (2009); *see also* Aetna Health Inc. v. Davila, 542 U.S. 200, 222 (2004) (Ginsburg, J., concurring) (expressing concern that injured persons are not made whole given federal preemption of state ERISA laws and limited remedies under federal law and advocating congressional action).