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ARTICLES

MODERNIZING DISABILITY INCOME FOR CANCER SURVIVORS

*Ann C. Hodges**

I. INTRODUCTION

The medical progress in cancer treatment is worthy of celebration, as survivors of many cancers are living longer. That is the good news. The bad news is the financial impact of cancer is devastating for many survivors, particularly those who have lengthy periods of unemployment as a result of cancer and its life-saving treatment. Empirical research has demonstrated the adverse effects of cancer on employment.

The law has not kept up with medical developments, to the detriment of cancer survivors. While employment laws provide some protection, as demonstrated in my earlier research changes in the Americans with Disabilities Act (“ADA”) and the Family Medical Leave Act (“FMLA”) could make a real difference for survivors attempting to maintain employment.¹ Yet preventing discrimination and accommodating the limitations of cancer survivors is not enough.²

While the recommended changes will help many survivors remain employed, for some survivors, disability will require a significant period of unemployment or partial employment. Disability income provides some hope for avoiding financial disaster for those survivors unable to

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1. See Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 WASH. L. REV. 1039, 1043 (2015).

2. Professor Bagenstos has made this observation with respect to individuals with disability generally. See SAMUEL BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 136 (2009).

work.³ Like the ADA and the FMLA, however, the disability income system needs revision to accommodate the needs of cancer survivors.⁴ As the second phase of this project, this article will analyze current systems available for disability income, recommending changes to better meet the needs of cancer survivors.

The analysis begins in Section II with the research on the determinants of cancer survivors' employment, looking at the length and scope of survivors' disability. Next, Section III assesses the financial impact of cancer. Section IV looks at the laws providing public disability income, both federal and state. Following the analysis of public disability programs, the article moves to private disability insurance, surveying the prevalence of private disability income coverage, the scope of available disability income, and the laws relating to private disability income. Section V assesses the utility of the existing disability income system for cancer survivors. Finally, Section VI makes recommendations for change in the current system. The ideal solution would reform the Social Security system to expand disability income with an insurance mandate that would come with a less stringent definition of disability than currently applies. The changes would be combined with extensive efforts at rehabilitation and accommodation to try to maintain employment over the long term and shrink disability rolls. Should amending the Social Security system prove impossible, an alternative is for states to adopt public programs that provide temporary total and partial disability benefits, similar to those that exist in five states currently. Both changes would improve current disability income for survivors and reduce the financial stresses and disasters that often accompany a cancer diagnosis

II. CANCER SURVIVORS, EMPLOYMENT, AND DISABILITY

Cancer survivors are more likely to be unemployed than individuals with no history of cancer.⁵ Cancer affects employment more significantly

3. Professor, now Senator, Elizabeth Warren pointed out the importance of disability insurance for cancer survivors in 2004, noting that the combination of medical bills and loss of income could be disastrous for families, often leading to bankruptcy. Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 37-38 (2004).

4. *Id.* at 38.

5. Angela G.E.M. De Boer et al., *Cancer Survivors and Unemployment, a Meta-analysis and Meta-regression*, 301 J. AM. MED. ASS'N 753, 760 (2009) (finding cancer survivors 1.37 times more likely to be unemployed than control group); Anja Mehnert, *Employment and Work-Related Issues in Cancer Survivors*, 77 CRITICAL REV. IN ONCOLOGY/HEMATOLOGY 109, 122 (2011) (discussing meta-analysis of 64 studies finding that cancer survivors had lower rates of employment which increased over time, resulting in, on average, 63.5% of survivors returning to work); Richard J. Butler

than other serious medical issues.⁶ The most severe impact on employment occurs in the year after diagnosis,⁷ but many cancer survivors have some residual disability that affects their ability to work over the long term; some for months and others for years.⁸ Survivors who continue to work, often work fewer hours.⁹ While some reduced employment may

et al., *Economic Burden*, WORK AND CANCER SURVIVORS 25, 59, 67 (Michael Feuerstein ed., 2009) (finding that “cancer survivors on average never fully recover to their pre-cancer levels of employment” and specifically that the employment rate of colon cancer survivors is 20% lower than others of similar age).

6. See INST. OF MED. & NAT’L RES. COUNCIL, FROM CANCER PATIENT TO CANCER SURVIVOR: LOST IN TRANSITION 370-71 (Maria Hewitt et al. eds., 2006) [hereinafter “IOM Report”].

7. See Cathy J. Bradley, *Absenteeism From Work: The Experience of Employed Breast and Prostate Cancer Patients in the Months Following Diagnosis*, 15 PSYCHO-ONCOLOGY 739, 739–40 (2006) [hereinafter *Absenteeism*] (finding thirty percent of breast and prostate cancer patients who were working prior to diagnosis were not working six months after diagnosis and those who continued to work worked fewer hours); Cathy J. Bradley et al., *Employment and Cancer: Findings From a Longitudinal Study of Breast and Prostate Cancer Survivors*, 25 CANCER INVESTIGATION 47, 49–52 (2007) [hereinafter *Employment and Cancer*] (finding breast and prostate cancer survivors were less likely to be employed six months after diagnosis but that at twelve and eighteen months after diagnosis, many had returned to work and employment was not lower than in a control group); Corné A. Roelen et al., *Sickness Absence and Full Return to Work After Cancer: 2-Year Follow-up of Register Data for Different Cancer Sites*, 20 PSYCHO-ONCOLOGY 1001, 1001 (2011) (finding 73% of cancer survivors working before diagnosis fully returned to work after a median duration of 290 days); Pamela Farley Short et al., *Employment Pathways in a Large Cohort of Adult Cancer Survivors*, 103 CANCER 1292, 1296 (2005) (finding that most survivors who stopped working during treatment returned to work within a year of diagnosis).

8. See *Employment and Cancer*, *supra* note 7, at 50 (finding that although many cancer survivors had returned to work at twelve months after diagnosis, cancer interfered with various physical and cognitive work tasks); Cathy J. Bradley & Heather L. Bednarek, *Employment Patterns of Long-Term Cancer Survivors*, 11 PSYCHO-ONCOLOGY 188, 193 (2002) (finding that 67% of survivors working at diagnosis were working five to seven years later but that 24% percent of survivors of lung, colorectal, breast, and prostate cancer who were not working five to seven years later stopped working because of poor health or disability); de Boer et al., *supra* note 5, at 761 (finding in meta-analysis both higher rates of disability among cancer survivors as compared to control group and long term effects on ability to work, capacity to work and earnings); Sung-Hee Jeon, *The Long-Term Effects of Cancer on Employment and Earnings*, 26 HEALTH ECON. 671, 683 (May 2017) (finding that cancer lowers the probability of working by 5% in the third year after diagnosis); Kathleen Oberst et al., *Work Task Disability in Employed Breast and Prostate Cancer Patients*, 4 J. CANCER SURVIVORSHIP 322, 326 (2010) (finding cancer-related disability rates in breast and prostate cancer survivors declining over time but still present for some patients eighteen months after diagnosis and negatively related to employment); Roelen et al., *supra* note 7, at 1001 (finding that within two years of diagnosis, most had returned to work); Yakir Rottenberg et al., *Unemployment Risk 2 Years and 4 Years Following Gastric Cancer Diagnosis*, 11 J. CANCER SURVIVORSHIP 119, 119 (Feb. 2017) (finding increased risk of unemployment for Israeli gastric cancer survivors two years after diagnosis); Short et al., *supra* note 7, at 1293-96 (finding that 20% of survivors in cohort of 1433 reported some residual disability and 11% of survivors who returned to work after treatment left work for cancer-related reasons in the next three years while nine percent of survivors who worked through treatment left work for cancer-related reasons within four years of diagnosis).

9. See *Absenteeism*, *supra* note 7, at 739-40 (finding breast and prostate cancer survivors working six months after diagnosis worked fewer hours); Cathy J. Bradley et al. *Short-Term Effects*

result from choice,¹⁰ it is clear that residual disability also impacts the ability to work.¹¹ There are a variety of effects of cancer and cancer treatment that may limit the ability to work including: the immune suppression effects of certain therapies that require avoiding close contact with people who might carry infectious bacteria; physical limitations, such as difficulty speaking, lifting, walking, or standing; cognitive or other mental limitations due to either brain cancers, metastases, or chemotherapy effects; depression; and fatigue.¹²

Certain demographic factors are associated with reduced

of Breast Cancer on Labor Market Attachment: Results From a Longitudinal Study, 24 J. HEALTH ECON. 137, §§ 139, 153-55 (2005) [hereinafter *Short-Term Effects*] (finding that women with breast cancer who continued to work after diagnosis worked fewer hours than the control group); Mehnert, *supra* note 5, at 124 (finding most studies in meta-analysis that analyzed work hours showed reduction in hours by cancer survivors); John R. Moran et al., *Long-Term Employment Effects of Surviving Cancer*, 30 J. HEALTH ECON. 505, 509-10 (2011) (finding that two to six years after diagnosis cancer survivors of prime working age were less likely to work fulltime and working fewer hours per week than a comparison group with no history of cancer); John F. Steiner, *The Impact of Physical and Psychosocial Factors on Work Characteristics After Cancer*, 17 PSYCHO-ONCOLOGY 138, 140-42 (2008) (finding physical and psychological symptoms caused reduced work hours). *But see* Cathy J. Bradley et al., *Breast Cancer and Women's Labor Supply*, 37 HEALTH SERV. RES. 1309, 1320-23 (2002) [hereinafter *Breast Cancer and Women's Labor*] (finding that women working after a breast cancer diagnosis work more hours per week than those without breast cancer). Researchers hypothesized that the increase in hours might reflect an effort to recover savings depleted by treatment or a renewed commitment to work as a result of the cancer. *Id.* at 1325.

10. As a result of cancer, some survivors change their preferences for work and leisure, preferring more of the latter and less of the former, although this option is only available to those who can afford to reduce work. *See* INST. OF MED., & NAT'L RES. COUNCIL *supra* note 6, at 364; Corine Tiedtke et al., *Experiences and Concerns About 'Returning to Work' for Women Breast Cancer Survivors: A Literature Review*, 19 PSYCHO-ONCOLOGY 677, 681 (2010) (meta-analysis of six studies from three countries).

11. Steiner, *supra* note 9, at 140-41.

12. *See* Donatus U. Ekwueme et al., *Medical Costs and Productivity Losses of Cancer Survivors—United States, 2008–2011*, 63 MORBIDITY & MORTALITY WKLY. REP. 505, 507 (2014); Guy Maytal & John Peteet, *The Meaning of Work* in WORK AND CANCER SURVIVORS 105, 115 (Michael Feuerstein, ed. 2009).

employment for cancer survivors. Low income workers,¹³ rural workers,¹⁴ Latinos,¹⁵ and African-American workers¹⁶ are less likely to continue working after a cancer diagnosis. Some part of the explanation is the prevalence of physical work among these groups, but the type of work does not fully explain the difference in employment.¹⁷

In sum, while many survivors are unemployed for less than a year, others suffer unemployment much longer. And those who do work often

13. Victoria Blinder et al., *Women With Breast Cancer Who Work For Accommodating Employers More Likely To Retain Jobs After Treatment*, 36 HEALTH AFF. 274, 277 (2017) [hereinafter *Women with Breast Cancer*] (finding lower income workers were less likely to have accommodating employers and less likely to retain employment after a breast cancer diagnosis); Reynard R. Bouknight et al., *Correlates of Return to Work for Breast Cancer Survivors*, 24 J. CLINICAL ONCOLOGY 345, 347 (2006); Mehnert, *supra* note 5, at 123 (finding a number of studies showing both lower income and manual labor associated with reduced likelihood of employment); Victoria S. Blinder et al., *Return to Work in Low-Income Latina and Non-Latina White Breast Cancer Survivors: A 3-Year Longitudinal Study*, 118 CANCER 1664, 1671 (2012) [hereinafter *Return to Work*] (finding that low income survivors of various ethnicities did not have the same rates of return to work as higher income white survivors); Steiner, *supra* note 9, at 145. *See also* Jeon, *supra* note 8, at 682 (finding that low income cancer survivors and survivors with less than a high school education are less likely to be working than cancer survivors as a whole).

14. *See* Michelle Sowden et al., *The Impact of Cancer Diagnosis on Employment: Is There a Difference Between Rural and Urban Populations?*, 8 J. CANCER SURVIVORSHIP 213, 216-17 (2014) (finding more rural survivors than urban survivors take early retirement after a cancer diagnosis).

15. *Return to Work*, *supra* note 13, at 1664, 1667 (finding Latinas less likely to be employed at six and eighteen months following a breast cancer diagnosis than non-Latinas of similar income levels); Mahasin S. Mujahid et al., *Racial/Ethnic Differences in Job Loss for Women with Breast Cancer*, 5 J. CANCER SURVIVORSHIP 102, 106 (2009) (finding Latina women more likely to be unemployed than non-Latina white women after a breast cancer diagnosis).

16. Bouknight et al., *supra* note 13, at 348, 351; Cathy J. Bradley & Amber Wilk, *Racial Differences in Quality of Life and Employment Outcomes in Insured Women With Breast Cancer*, 8 J. CANCER SURVIVORSHIP 49, 51, 58 (2014) (finding significant reduced employment among African-American women after a diagnosis of cancer as compared to non-Hispanic white women after controlling for many job characteristics and insurance, leading to supposition that differences in treatment regimen or symptom control might explain the difference); *Employment and Cancer*, *supra* note 7, at 49; Michael J. Hassett et al., *Factors Influencing Changes in Employment Among Women with Newly Diagnosed Breast Cancer*, 115 CANCER 2775, 2775 (2009); Robin L. Whitney, et al., *Work and Financial Disparities Among Adult Cancer Survivors in the United States*, 32 J. CLINICAL ONCOLOGY Abstract 238 (2014), available at <http://meetinglibrary.asco.org/content/137778-153> (finding nonwhite cancer survivors are more likely to require work modifications, defined as changing to a more flexible schedule or a less difficult job; early retirement or delayed retirement; or a prolonged and/or unpaid leave of absence). Another study found no statistically significant difference between white and African-American women in job loss following cancer after controlling for other socio-demographic factors, however. Mujahid, et al., *supra* note 15, at 106-108.

17. *See* Oberst et al., *supra* note 8, at 323, 326-327 (finding significant percentages of survivors with physical jobs had physical disabilities at twelve and eighteen months following diagnosis and were less likely to be working than those without such disabilities); *see also* *Return to Work*, *supra* note 13, at 1669, 1672 (finding that physical jobs only partially explained the employment difference between low income Latina and non-Latina survivors); *see also* *Women with Breast Cancer*, *supra* note 13, at 274-75, (positing that less accommodating employers might cause lower employment rates for low income women with breast cancer).

work fewer hours as a result of disability related to cancer. This limited ability to work, leading to reduced income, necessarily creates a financial impact on cancer survivors and their families.

III. THE FINANCIAL IMPACT OF CANCER

Cancer is expensive. The cost of cancer includes not only the cost of care and treatment but also lost productivity and for individuals, lost income.¹⁸ Cancer is among the most expensive health conditions for adults over 18.¹⁹ In 2012, for adults age eighteen to sixty-four, cancer had the highest per person expenditure.²⁰ The estimate for the total direct cost of cancer care for 2014 is \$87.8 billion.²¹ The direct cost of cancer care is estimated to be between \$157.77 and \$172.77 billion in 2020, depending on the rate of health care cost increase.²² According to estimates, the indirect costs, such as lost productivity, significantly exceed the direct costs of cancer.²³

Billions of work days are lost or affected by cancer.²⁴ Additionally, employees may be deterred from job changes because of fears about the impact on health insurance, an economically inefficient result that prevents the best use of employee talents.²⁵ The financial impact on society

18. See *infra* notes 19-24.

19. Anita Soni, Statistical Brief #471, Top Five Most Costly Conditions Among Adults Age 18 and Older, 2012: Estimates for the U.S. Civilian Noninstitutionalized Population, U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR HEALTHCARE RES. & QUALITY (Apr. 2015), https://meps.ahrq.gov/data_files/publications/st471/stat471.shtml.

20. *Id.*

21. U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR HEALTHCARE RES. & QUALITY, *Medical Expenditure Panel Survey: Table 3: Total Expenses and Percent Distribution for Selected Conditions by Type of Service: United States, 2014*, available at https://meps.ahrq.gov/mepsweb/data_stats/tables_compendia_hh_interactive.jsp?_SERVICE=MEPSSocket0&_PROGRAM=MEPSPGM.TC.SAS&File=HCFY2014&Table=HCFY2014_CNDXP_C&_Debug= (last visited Apr. 12, 2018).

22. Angela B. Mariotto et al., *Projections of the Cost of Cancer Care in the United States: 2010-2020*, 103 J. NAT'L CANCER INST. 117, 122 (2011).

23. MICHAEL P. MARKOWSKI, THREE ESSAYS ON CANCER SURVIVORSHIP AND LABOR SUPPLY 7 (Dec. 2010) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with author) (citing National Institutes of Health estimates that place the cost of lost productivity at more than half the total cost of cancer); Richard J. Butler et al., *Economic Burden, WORK AND CANCER SURVIVORS* 25, 69 (Michael Feuerstein ed., 2009) (finding that productivity losses from cancer were twice the direct cost of cancer treatment).

24. MARKOWSKI, *supra* note 23, at 7.

25. STEPHEN F. BERTON & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS 60 (2009) (describing the deterrent effect of fear of loss of health insurance coverage in general as a "market failure that decreases the efficiency of the U.S. economy").

is substantial.²⁶ The financial impact on individuals and their families is often devastating.²⁷ As stated by the Leukemia and Lymphoma Society, “[f]inancial toxicity’ has become as threatening to patient quality of life as the actual diseases and conditions that patients are battling on the clinical front.”²⁸

Loss of income due to illness is a major contributor to bankruptcy in the United States.²⁹ Individuals undergoing cancer treatment exhaust

26. MARKOWSKI, *supra* note 23, at 7.

27. Jessica H. Banthin & Didem M Bernard, *Changes in Financial Burdens for Health Care*, 296 J. AM. MED. ASS’N 2712, 2714 (Dec. 13, 2006) (finding those with cancer more likely to face significant financial burdens for health care costs); Jeon, *supra* note 8, at 683 (finding an average earnings loss for cancer survivors of 12% in the first year after diagnosis); Maurie Markman & Ryan Luce, *Impact of the Cost of Cancer Treatment: An Internet-Based Survey*, 6 J. ONCOLOGY PRAC. 69, 70 (2010) (reporting on survey results of survivors in which 16% said their health plan paid less than expected, 12% said they had paid between \$10,000 and \$25,000 in out of pocket costs, and 4% said they had spent between \$25,000 and \$50,000. Two percent incurred between \$50,000 and \$100,000 and another 2% more than \$100,000 in out of pocket costs); Karyn Schwartz et al., *Spending to Survive: Cancer Patients Confront Holes in the Health Insurance System* (KAISER FAMILY FOUNDATION & AMERICAN CANCER SOCIETY 2009), available at <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7851.pdf> (reporting on survivors, most insured, who have faced high costs in the health care system as a result of cancer, incurring debt, deferring tests and treatment, not taking medications, filing bankruptcy, cashing in retirement accounts, and facing collection lawsuits.) The stories in the Kaiser report preceded the enactment of the Affordable Care Act so some of the gaps identified have been filled, but high health care costs remain a problem for many. Leukemia and Lymphoma Society, *Honoring Our Commitment To Cures and Access: The Leukemia and Lymphoma Society is on the Side of Patients*, http://www.lls.org/cancercost/Position_Statement, (last visited Apr. 12, 2018) (reporting that in 2016 the Leukemia and Lymphoma Society received 26,000 calls to its free information hotline, with the majority reporting financial stress and difficulties accessing treatment); Veena Shankaran et al., *Risk Factors for Financial Hardship in Patients Receiving Adjuvant Chemotherapy for Colon Cancer: A Population-Based Exploratory Analysis*, 30 J. CLINICAL ONCOLOGY 1608, 1610, 1611 (2012) (finding 38% of patients with similar treatment regimens reported at least one financial hardship related to treatment and those not reporting financial hardship had other financial effects such as selling investments, spending savings or retirement funds, or having reduced income of less than 20% because of treatment. Further 31% of respondents indicated the financial burden of cancer was high or very high); S. Yousuf Zafar et al., *The Financial Toxicity of Cancer Treatment: A Pilot Study Assessing Out-of-Pocket Expenses and the Insured Cancer Patient’s Experience*, 18 ONCOLOGIST 381, 383 (2013) (finding 42% of insured patients in study reported significant or catastrophic financial problems from out-of-pocket expenses. They cut spending on leisure activities (68%) and food and clothing (46%), used savings (46%) and sold possessions (17%) to pay cancer-related expenses).

28. Leukemia and Lymphoma Society, *Reducing the Cost of Cancer Care: Policy Recommendations from the Leukemia and Lymphoma Society*, http://www.lls.org/cancercost/Policy_Recommendations (last visited Jan. 17, 2018).

29. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 741-44 (2009), available at <http://www.amjmed.com/article/S0002-9343%2809%2900404-5/fulltext?refuid=S0002-9343%2809%2900525-7&refissn=0002-9343> (finding that sixty-two percent of bankruptcies in 2007 were caused by medical reasons, including significant medical costs, loss of income, and/or mortgaging a home to pay medical bills). The study found that most of the debtors were middle class, well-educated and homeowners and most had health insurance at the beginning of their illness. *Id.* More than a third of the families impacted

savings, incur debt, and soon face bill collectors.³⁰ A cancer diagnosis significantly increases the likelihood of both bankruptcy³¹ and home foreclosure.³² It is not only the individual who is affected, but also families, creditors, neighbors, and communities. And the economic hardships for cancer survivors linger. In one study, almost half of survivors reported difficulties in paying for life's necessities with existing income a year after diagnosis.³³

Additionally, the impact of these financial challenges can create a vicious cycle, impairing the ability to comply with treatment and threatening recovery, which in turn exacerbates financial problems. Financial problems cause anxiety and stress, interfering with the ability to comply with prescribed treatment regimens.³⁴ Patients may delay filling needed

suffered job loss, either the patient or a caregiver. *Id.*

30. Jennifer Mellace, *The Financial Burden of Cancer Care*, SOCIAL WORK TODAY, Vol. 10, No. 2, at p. 14 (Mar./Apr. 2010) (reporting on survey of cancer patients, caregivers and oncology social workers showing that 40% of survivors indicated that they depleted savings and nearly 30% indicated they were contacted by collections agencies); Shankaran, et al., *supra* note 27, at 1610 (indicating 23% of patients in study reported debt resulting from cancer treatment expenses, with average debt of \$26,380).

31. Scott Ramsey et al., *Washington State Cancer Patients Found To Be at Greater Risk of Bankruptcy Than People Without a Cancer Diagnosis*, 32 HEALTH AFF. 1143, 1143 (2013) (finding that cancer patients were 2.65 times more likely to file for bankruptcy than those without cancer and younger patients were more likely to file than older patients, perhaps because the latter had access to Social Security and Medicare benefits). Of course, it is not only cancer that leads to bankruptcy. The Consumer Bankruptcy Project demonstrated that in 2007, almost two-thirds of bankruptcies resulted from medical problems. Himmelstein et al. *supra* note 29, at 741. This was an increase of 48% over medical bankruptcies in 2001. *Id.* at 744. Most of the medical bankruptcy filers were well-educated, middle class and insured. *Id.* at 743. *But see* Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1518 (2005) (criticizing the study's definitions of medical bankruptcy and its conclusions about the scope and increase in medical bankruptcies).

32. Arpit Gupta et al., *Leverage, Default, and Morality: Evidence From Cancer Diagnoses*, (Colum. L. & Econ. Working Paper No. 514, Sept. 12, 2017), available at <http://ssrn.com/abstract=2583975> (finding 65% increase in the likelihood of foreclosure in the five years post-diagnosis). Those with more advanced cancers had an even greater risk of foreclosure. *Id.* The authors found that those with substantial equity in their homes did not have an increase in foreclosure rates, however. *Id.* Like bankruptcy, foreclosures are often caused, at least in part, by medical problems in general. Christopher Tarver Robertson et al., *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 68 (2008) (finding that seven of ten respondents to survey of those facing foreclosure reported a medical cause such as medical bills, lost work due to illness or injury, using home equity to pay medical bills, or caring for an ill family member).

33. Maria Pisu et al., *Economic Hardship of Minority and Non-Minority Cancer Survivors 1 Year After Diagnosis: Another Long-term Effect of Cancer?*, 121 CANCER 1257, 1257 (2015).

34. Kathleen M. Fenn et al., *Impact of Financial Burden of Cancer On Survivors' Quality of Life*, 10 J. ONCOLOGY PRAC. 332 (2014) (finding financial difficulties associated with cancer to be a significant predictor of quality of life); Markman & Luce, *supra* note 27, at 70 (finding that 19% of survivors completing the survey indicated that the cost of treatment had caused significant distress, with 25% of lung and colon cancer survivors and 39% of families with an income of less than \$40,000 so reporting); Mellace, *supra* note 30, at 14 (reporting on survey results indicating that 66% of cancer

prescriptions or skip doses of medication to save money.³⁵ They may delay or avoid other treatment for financial reasons.³⁶

A cross-national study of the relationship between unemployment rates and cancer confirms the significant impact – increasing unemployment in developed countries is associated with higher mortality rates among cancer patients.³⁷ The association persisted for five years after an increase in unemployment.³⁸ Because the association related to treatable cancers and was eliminated with implementation of universal health care coverage, the authors posited that reduced access to health care was a primary explanation.³⁹ Further, the mental health effects of job loss may impact treatment compliance.⁴⁰ While the unemployment rate includes many who were unemployed at diagnosis, a high unemployment rate makes it more difficult for cancer survivors to maintain employment or obtain substitute employment. Additionally, the study provides further evidence of the impact of financial difficulties on cancer survivors.⁴¹

Not surprisingly, studies also show that financial difficulties are more common for younger survivors, nonwhite survivors, lower income

patients with significant financial problems suffered from depression or anxiety and 55% said that stress related to their financial difficulties adversely affected their ability to focus on recovery); Linda Sharp et al., *Associations Between Cancer-Related Financial Stress and Strain and Psychological Well-Being Among Individuals Living with Cancer*, 22 *PSYCHO-ONCOLOGY* 745, 745 (2013) (stating 30% of cancer survivors suffer from a psychological disorder and that financial problems related to cancer were associated with increased depression, anxiety and stress in Irish survivors six and twelve months after diagnosis); Michael A. Zevon et al., *Medically Related Legal Needs and Quality of Life in Cancer Care*, 109 *CANCER* 2600 (2007) (finding survivors identified legal needs relating to finances and employment, including disability, as significantly related to quality of life).

35. Mellace, *supra* note 30, at 14 (reporting survey results showing that 29% of cancer patients delayed filling prescriptions and 22% skipped medication, both for financial reasons); Zafar et al., *supra* note 27, at 383 (reporting on insured survey participants who skipped medications for financial reasons—where 20% took less than prescribed, 19% only partially filled prescriptions, and 24% did not fill prescriptions).

36. Markman & Luce, *supra* note 27, at 70, 71, 72 (indicating that 9% of survivors and 25% of those with incomes less than \$40,000 per year had declined treatment due to cost); Mellace, *supra* note 30, at 14 (indicating 54% of patients in survey with significant financial issues found it more difficult to afford treatment); Kathryn E. Weaver et al., *Forgoing Medical Care Because of Cost*, 116 *CANCER* 3493–3504 (2010) (finding cancer survivors more likely than others to forego all types of medical care because of the cost); Zafar et al., *supra* note 27, at 383 (reporting on insured survey participants who skipped appointments (4%), delayed appointments (7%) and declined procedures (7%) or tests (9%) because of cost).

37. Mahiben Maruthappu et al., *Economic Downturns, Universal Health Coverage and Cancer Mortality in High-Income and Middle-Income Countries, 1990-2010: a Longitudinal Analysis*, 388 *THE LANCET* 684, 687 (2016).

38. *Id.* at 689.

39. *Id.* at 693.

40. *Id.*

41. *See id.* at 685; *see also* Shankaran et al., *supra* note 27, at 1612.

survivors, survivors with either Medicaid or no health insurance, those with more advanced cancers, and those who have some period of unemployment.⁴² As noted above, low income and nonwhite survivors are less likely to work post-diagnosis, making financial difficulties more probable.

One way to minimize the impact of financial stress is to provide some replacement income for individuals disabled by cancer.⁴³ In addition to paid leave,⁴⁴ disability income offers an alternative for individuals unable to work. The following section reviews the currently available sources of disability income.

IV. CURRENT DISABILITY INCOME⁴⁵

Disability income may be provided through a public program, federal or state, or a private plan. The latter might be provided through employment or purchased individually in the open market.

A. Public Disability Income

1. Federal Disability Income

Federal disability income is provided through two programs.⁴⁶ One

42. Shankaran et al., *supra* note 27, at 1610 (finding financial difficulties associated with younger age, unemployment, lower income, nonwhite race, and Medicaid or no health insurance); Ramsey et al., *supra* note 31, at 1145-46 (finding younger survivors more likely to file bankruptcy than older ones); Whitney et al., *supra* note 16 (finding active treatment, absence of insurance, nonwhite race/ethnicity and an age younger than sixty-five predicted financial difficulties among cancer survivors); Weaver et al., *supra* note 36, at 3495, 3498 (finding Hispanic and African-American cancer survivors more likely to forego prescription medications and dental care due to cost while Hispanics were more likely to go without all types of medical care than non-Hispanic whites); Pisu et al., *supra* note 33, at 1264 (finding African-Americans and Hispanics more likely to report economic burdens than non-Hispanic whites, with some of the difference explained by general economic status).

43. See Alena Allen, *State-Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglia*, 2011 B.Y.U.L. REV. 1327, 1359-60 (showing that states with mandatory disability insurance are lower than the national average in bankruptcy filings).

44. See Hodges, *supra* note 1, at 1078-79, 1104-06 (detailing existing laws providing for paid leave and recommending changes to increase the availability of paid leave).

45. The Social Security disability program officially denominates the payments as income, not benefits. See Umar Moulta-Ali, CONG. RESEARCH SERV., RL32279, Primer on Disability Benefits: Social Security Disability Benefits (SSDI) and Social Security Income (SSI), at 1 (2011). (using the Supplemental Security Income program to describe benefits as income). I will use the term income because benefits suggest a gift while income suggests that the funds were earned or at least deserved by virtue of the disability status. See *id.* (finding the goal of disability insurance is to replace part of a worker's income if he or she is prevented from working due to a disability).

46. SOC. SEC. ADMIN., SOCIAL SECURITY DISABILITY BENEFITS 4 (2017),

is Social Security Disability Insurance (SSDI), which is based on credits earned through participation in covered employment.⁴⁷ As of November 2017, 8.71 million workers and 1.71 million dependents were receiving benefits through the SSDI program.⁴⁸ The other program is Supplemental Security Income (SSI), which is paid based on income and assets regardless of prior employment.⁴⁹ As of November 2017, 8.22 million individuals were receiving income under the program, with 4.8 million between the ages of eighteen and sixty-four.⁵⁰ Disability income under both programs is paid to individuals who cannot work at any job because of a condition that is expected to last at least a year or result in death.⁵¹ To determine ability to work, the Social Security Administration (SSA) looks at whether the person can work at his/her old job and whether the individual can do any other job, considering qualifications and disability limitations.⁵²

Income is available only for long-term and complete disability.⁵³ Short-term disability lasting less than a year is not covered.⁵⁴ These requirements for SSDI reflect the underlying purpose of the payments: They are a replacement of anticipated income from work for those unable to work and not an alternative to employment.⁵⁵ Further they do not support an employee who is unable to work at the prior employment level, whether in terms of hours, income or qualifications.⁵⁶ Only complete inability to work garners benefits.⁵⁷ “[T]hose who can work must work.”⁵⁸ Individuals with cancer that meet these requirements can get disability benefits if they meet the other eligibility requirements for either program.

<http://www.ssa.gov/pubs/EN-05-10029.pdf> (hereinafter “DISABILITY BENEFITS”).

47. Moulta-Ali, *supra* note 45, at 1.

48. SOC. SEC. ADMIN., SOCIAL SECURITY BENEFITS: MONTHLY STATISTICAL SNAPSHOT, NOV. 2017, tbl.2, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html?qs#table2 (last visited Apr. 12, 2018).

49. Moulta-Ali, *supra* note 45, at 1.

50. SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME RECIPIENTS: MONTHLY STATISTICAL SNAPSHOT, NOV. 2017, tbl.3, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html?qs-table3 (last visited Apr. 12, 2018).

51. DISABILITY BENEFITS, *supra* note 46, at 1.

52. The actual determination is complex and involves multiple steps, slowing the process of decisions on disability claims. Ken Matheny, *The Social Security Disability Appeals Backlog Crisis and the Necessity of Radical Reform*, 45 CAP. U. L. REV. 361, 361-70 (2017).

53. DISABILITY BENEFITS, *supra* note 46, at 1.

54. *Id.*

55. Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 843 (1976).

56. *See id.* at 847-48.

57. *Id.*

58. *Id.* at 843.

Eligibility for SSDI benefits is based on recent work and duration of work, and the requirements depend on the age at which an individual meets the definition of disability. Young workers, age 24 or less, must have worked 1.5 of the three previous years.⁵⁹ Between ages twenty-four and thirty-one, an individual must have worked half the time between the quarter after turning twenty-one and the quarter in which the person became disabled.⁶⁰ Those over thirty-one must have worked five of the previous ten years.⁶¹ The duration of work requirement ranges from 1.5 to 9.5 years depending on the age of disability.⁶² There is a five month waiting period before income begins and a twenty-four month waiting period before the recipient is eligible for public health insurance through Medicare.⁶³

The benefits are based on prior earnings and are adjusted annually for inflation.⁶⁴ The average monthly benefit for a disabled worker in November 2017 was \$1173.15.⁶⁵ These benefits may be offset if a worker is receiving workers' compensation or other public disability benefits.⁶⁶ In addition to the disabled worker, dependents may get benefits as well, although there are family maximums that cap the total.⁶⁷ The average payments for workers and families are barely above the poverty level.⁶⁸

Eligibility for SSI is based on income and assets rather than previous work history. There are federal provisions that govern what counts as income and assets.⁶⁹ For example, SNAP benefits and shelter from private nonprofits are not income⁷⁰ and a home, car, burial plots and life insurance

59. DISABILITY BENEFITS, *supra* note 46, at 2.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 4, 12.

64. Moulta-Ali, *supra* note 45, at 2.

65. SOC. SEC. ADMIN., MONTHLY STATISTICAL SNAPSHOT, NOV. 2017, tbl.2, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html?qs#table2 (last visited Apr. 12, 2018).

66. Moulta-Ali, *supra* note 45, at 2.

67. SOC. SEC. ADMIN., *supra* note 65, tbl. 2 (explaining that as of November 2017, average monthly benefit for spouses was \$328.67 and for children, \$358.53), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html?qs#table2 (last visited Apr. 12, 2018).

68. Paul O'Leary et al., *Social Security Disability Insurance at Age 60: Does It Still Reflect Congress' Original Intent?* (2015), available at <https://www.ssa.gov/policy/docs/issuepapers/ip2015-01.html>.

69. SOC. SEC. ADMIN., *Understanding Supplemental Security Income SSI Income – 2018 Edition*, <https://www.ssa.gov/ssi/text-income-ussi.htm> (last visited Apr. 12, 2018) [hereinafter SOC. SEC. ADMIN., *SSI Income*]; SOC. SEC. ADMIN., *Understanding Supplemental Security Income SSI Resources – 2017 Edition*, <https://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited Apr. 12, 2018) [hereinafter SOC. SEC. ADMIN., *SSI Resources*].

70. SOC. SEC. ADMIN., *SSI Resources*, *supra* note 69.

worth less than \$1,500 do not count in determining assets.⁷¹ The asset limit is \$2,000 for an individual and \$3,000 per couple.⁷²

The average monthly payment for federal SSI recipients age eighteen to sixty-four is \$564.18, well below the poverty level.⁷³ In addition, some states pay a supplement to federal SSI.⁷⁴

Obtaining an award of disability income can be a lengthy process, especially if the initial application is denied and appeals are required.⁷⁵ The Social Security Administration has a Compassionate Allowances Program that provides benefits more quickly to individuals with conditions that clearly meet the definition of disability.⁷⁶ “Compassionate Allowances allow Social Security to target the most obviously disabled individuals for allowances based on objective medical information that [it] can obtain quickly.”⁷⁷ A number of cancers are on the list of conditions identified as “obviously” disabling.⁷⁸ Individuals with these conditions get expedited consideration of their applications for benefits. As described by Social Security, the decisions are made in weeks rather than months or years.⁷⁹ The Compassionate Allowances program has reduced the backlog of decisions.⁸⁰

Social Security also has a number of work incentive programs

71. SOC. SEC. ADMIN., *SSI Resources*, *supra* note 69.

72. SOC. SEC. ADMIN., *SSI Resources*, *supra* note 69.

73. SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME RECIPIENTS: MONTHLY STATISTICAL SNAPSHOT, NOV. 2017, tbl.3, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html?qs=table3 (last visited Apr. 12, 2018).

74. SOC. SEC. ADMIN., *Understanding Supplemental Security Income SSI Benefits – 2018 Edition*, <https://www.ssa.gov/ssi/text-benefits-ussi.htm> (last visited Mar. 23, 2018) [hereinafter SOC. SEC. ADMIN., *SSI Benefits*].

75. See MOLLY DAHL & NOAH MEYERSON, CONG. BUDGET OFFICE, SOC. SEC. DISABILITY INS.: PARTICIPATION TRENDS AND THEIR FISCAL IMPLICATIONS 2, 3 (2010) <https://www.cbo.gov/publication/21638?index=11673> (describing the application and appeals process); Hannah Weinberger-Divack, *Redefining Disability: Increasing Efficiency and Fairness in SSDI*, 21 ELDER L.J. 263, 273-75 (2013); David H. Autor & Mark Duggan, *Supporting Work: A Proposal for Modernizing the U.S. Disability Insurance System* 10-12 (CTR. FOR AM. PROGRESS 2010) [hereinafter Autor & Duggan, *Proposal for Modernizing*] (describing process and average wait times including two years and three months from application to ALJ decision, where 75% of earlier denials are overturned); Matheny, *supra* note 52, at 381 (noting that over a million individuals have disability determinations pending before ALJs and that the average waiting time for such a decision is 530 days).

76. SOC. SEC. ADMIN., *Compassionate Allowances FAQs*, <https://faq.ssa.gov/link/portal/34011/34019/Article/3716/What-are-compassionate-allowances> (last visited Apr. 12, 2018).

77. *Id.*

78. *Id.*

79. *Id.*

80. Michael Boyd, *Social Security's Compassionate Allowances: Innovative Initiative or Deceptive Smokescreen*, 30 J. NAT'L ASS'N L. JUD. 717, 748-49 (2010) (describing the program).

designed to encourage individuals with disabilities to return to the workplace if possible.⁸¹ The Ticket to Work program allows individuals to take advantage of programs designed to facilitate working without immediately losing disability benefits or health insurance benefits.⁸² This incentivizes individuals to try to return to work by removing the risks of benefit loss that deter such efforts.⁸³ Evaluation of the program shows that it does affect employment by recipients of disability income, but the impact is limited.⁸⁴

2. State Disability Income

Five states, along with Puerto Rico, have public disability income programs.⁸⁵ The first of these, in Rhode Island, was enacted in 1942, while the latest, in Hawaii, was enacted in 1969.⁸⁶ While the number of states is small, employers in these six jurisdictions employ more than one quarter of the country's civilian workforce.⁸⁷ These programs provide temporary disability benefits partially replacing wages of workers who are unable to work as a result of non-work-related illness or injury.⁸⁸

These state income programs are funded by employers and employees. In California and Rhode Island, employees pay into the fund through

81. See SOC. SEC. ADMIN., *The Redbook: A Guide to Work Incentives*, <https://www.ssa.gov/redbook/> (last visited Apr. 15, 2018).

82. SOC. SEC. ADMIN., *Ticket to Work Program Overview*, TICKET OVERVIEW, <https://www.ssa.gov/work/overview.html#&a0=1> (last visited Apr. 15, 2018).

83. Individuals receiving SSDI or SSI can return to work for a trial period of nine months without losing benefits. *Id.* They can continue Medicare eligibility for eight years after returning to work and if their earnings dip below a specified amount, they are guaranteed three more years of SSI or SSDI. *Id.*

84. GINA LIVERMORE ET AL., CTR. FOR STUDYING DISABILITY POLICY, EXECUTIVE SUMMARY OF THE SEVENTH TICKET TO WORK EVALUATION REPORT 21 (2013); Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 15 (showing very limited success of ticket to work program). See also Yonatan Ben-Shalom & Arif A. Mamun, *Return to Work Outcomes Among Social Security Disability Insurance Program Beneficiaries*, 26 J. DISABILITY POLICY STUD. 100, 100, 103-05 (2015) (reviewing studies showing low rate of work among beneficiaries using various work incentive programs). For a success story of a cancer survivor who used the ticket to work program, see SOC. SEC. ADMIN., *Marty's Success Story*, TICKET TO WORK, <https://www.choosework.net/library/marty-success-story> (last visited Apr. 15, 2018).

85. John G. Kilgour, *California's State Disability and Paid Family Leave Program With a Review of Other State Actions*, 43 COMPENSATION & BENEFITS REV. 282, 282 (2011). The five states are California, Hawaii, Rhode Island, New Jersey and New York. *Id.*

86. *Id.*

87. *Id.*

88. Jenna Stearns, *The Effects of Paid Maternity Leave: Evidence From Temporary Disability Insurance*, 43 J. HEALTH ECON. 85, 86 (2015).

payroll deduction by their employers.⁸⁹ New Jersey benefits are funded by both employers and employees, while New York and Hawaii benefits are funded by employers, with cost-sharing with employees permitted.⁹⁰ Unlike unemployment compensation and workers' compensation, the insurance is not experience-rated so the number of employees collecting benefits does not change the cost.⁹¹

Eligibility for benefits varies by state but in none is it tied to work for a particular employer. Instead, it is tied to work for any covered employer in the state during an eligibility period, similar to unemployment insurance.⁹² In each state the work requirement is far less than the eligibility requirement for Family Medical Leave Act leave.⁹³ All plans cover private employers.⁹⁴ Only Hawaii requires government employees to participate in the plan, while the other states either provide disability benefits directly to government employees or allow government employers to either provide benefits directly or to opt into the state plan.⁹⁵ In California,

89. *Id.* See CAL. UNEMP. INS. CODE § 2901 (2015); see also R.I. GEN. LAWS § 28-40-1 (2015).

90. Stearns, *supra* note 88, at 86; see N.J. STAT. ANN. § 43:21-46 (2015); N.Y. WORKERS' COMP. LAW §§ 209-210 (2015); HAW. REV. STAT. § 392-43 (2015). Notably, research on mandated benefits suggests that in actuality employees pay for such benefits through reduced wages even where they are ostensibly employer-funded. See Patricia M. Anderson & Bruce D. Meyer, *The Effects of the Unemployment Insurance Payroll Tax on Wages, Employment, Claims and Denials*, 78 J. PUB. ECON. 81, 95, 102 (2000) and authorities cited therein.

91. Stearns, *supra* note 88, at 86.

92. *Id.*

93. *Id.* California requires \$300 in earnings from covered employment during the one year base period, while Hawaii requires \$400. *Id.* at 86 n.4; see also CAL. UNEMP. INS. CODE § 2652; HAW. REV. STAT. § 392-25. New York requires only four consecutive weeks of covered employment, while New Jersey requires twenty weeks of employment in covered employment with earnings of at least \$168 per week. Stearns, *supra* note 88, at 86 n.4; see also N.Y. WORKERS' COMP. LAW §§ 203, 209; N.J. STAT. ANN. § 43:21-27; *Wage Requirements – State Plan Employer*, N.J. DEP'T OF LAB. & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/tdi/empstate/sp_emp_wage_requirements.html (last visited Apr. 12, 2018). Rhode Island requires earnings of 400 times the minimum wage during the base period, with additional requirements for particular quarters of the base period. R.I. GEN. LAWS § 28-41-11. By way of contrast, the FMLA requires that the employee worked for the specific employer for at least one year in total and worked at least 1250 hours in the last year. 29 U.S.C. § 2611(2)(A).

94. U.S. DEP'T OF LABOR, *FMLA (Family & Medical Leave)*, <https://www.dol.gov/general/topic/benefits-leave/fmla> (last visited Apr. 12, 2018).

95. Stearns, *supra* note 88, at 86 n.4; see also HAW. REV. STAT. § 392-3 (defining employer as "any individual or type of organization, including the State, any of its political subdivisions, any instrumentality of the State or its political subdivisions"); N.Y. WORKERS' COMP. LAW § 212(2) (stating "[n]otwithstanding the definition of 'employer' and 'employment' in section two hundred one of this article, a public authority, a municipal corporation or a fire district or other political subdivision may become a covered employer for the purpose of providing disability benefits under this article by complying with the provisions of subdivision one of this section."); N.J. STAT. ANN. § 43:21-27(a)(2) (stating "[a]ny governmental entity or instrumentality which is an employer under [N.J. STAT. ANN. § 43:21-19] may . . . elect to become a 'covered employer'"); R.I. GEN. LAWS § 28-39-3.1 (" . . . a

state employees represented by the Service Employees International Union have obtained the right to participate in the plan through collective bargaining.⁹⁶ California also allows business owners and self-employed individuals to opt in to the plan although they must pay into the plan for two years before collecting benefits.⁹⁷

The non-taxable benefits replace fifty to sixty-six percent of the employee's average weekly wage up to a maximum set by each state.⁹⁸ As a result of the maximums, the benefits for higher paid employees replace a smaller percentage of their wages than for lower paid employees. The disability income is payable for a maximum of 26 weeks to one year, depending on the state.⁹⁹ California and Rhode Island also cover partial disability so long as the employee was fully disabled for at least seven days.¹⁰⁰

Some states allow employers and employees to substitute private disability benefits for the state plan so long as the benefits are at least equivalent and the cost to the employee is no higher than the state plan.¹⁰¹ In California, the employer often pays for the private plan, although employees pay for the public plan.¹⁰² The employer in California that chooses a private plan must also pay a tax into the state plan which goes into a fund that pays benefits to workers who are unemployed or employed in non-

governmental entity which is a political subdivision or instrumentality of a political subdivision, or an instrumentality of more than one of them or any instrumentality of them and one or more other political subdivisions, may become subject to those chapters by election.”)

96. Kilgour, *supra* note 85, at 283.

97. *Id.*

98. Stearns, *supra* note 88, at 86-87. In 2018, California will increase the benefits for low wage workers to 70% of average weekly wages for low wage workers and 60% for higher wage workers. Sarah Jane Glynn, Alexandra L. Bradley, & Benjamin W. Veghte, *Paid Family and Medical Leave Programs: State Pathways And Design Options*, NAT'L ACAD. OF SOCIAL INS. 12 (2017). California and Rhode Island adjust the maximum each year. *Id.*

99. See CAL. UNEMP. INS. CODE § 2653 (up to fifty-two weeks); HAW. REV. STAT. § 392-23 (up to twenty-six weeks); N.J. STAT. ANN. § 43:21-39(b) (up to twenty-six weeks); N.Y. WORKERS' COMP. LAW § 205(a) (up to twenty-six weeks); R.I. GEN. LAWS §-§ 28-41-7 (up to thirty weeks).

100. CAL. UNEMP. INS. CODE § 2627(b)(1); R.I. GEN. LAWS § 28-41-5(d).

101. Stearns, *supra* note 88, at 86-87 (describing this option in New York and Hawaii); Kilgour, *supra* note 85, at 283 (describing California's option for voluntary plans); SOC. SEC. ADMIN., *Social Security Programs in the United States*, 47 (1997), <https://www.ssa.gov/policy/docs/progdesc/sspus/tempdib.pdf> (stating “In California, before a private insurance plan can be substituted for the State plan, it must afford benefit rights greater than those under the State-operated plan. In Hawaii, New Jersey, and Puerto Rico, private plan benefits must be at least as favorable as those under the government plans. Hawaii permits deviation from statutory benefits if the aggregate benefits provided under the private plan are actuarially equal or better.”); CAL. UNEMP. INS. CODE § 3254 (a); HAW. REV. STAT. § 392-41 (a)(4), (a)(5), (d); N.J. STAT. ANN. § 43:21-32; N.Y. WORKERS' COMP. LAW § 211.

102. Kilgour, *supra* note 85, at 283, 289.

covered employment when the disability occurs.¹⁰³ As of 2010, 3.9% of employees were covered by voluntary plans rather than the state plan, a reduction from 4.9% in 2007.¹⁰⁴

Two additional jurisdictions, the state of Washington and the District of Columbia, passed paid family and medical leave laws in 2017.¹⁰⁵ Both programs will begin paying benefits in 2020.¹⁰⁶ The District of Columbia program is funded by a tax on employers while Washington state's program is funded jointly by employers and employees.¹⁰⁷ Neither is comparable to the disability systems described above, however, as the District of Columbia program offers only two weeks of paid leave for the worker's own illness and Washington offers only 12 weeks of paid leave for that purpose.¹⁰⁸ Based on the leave time, these laws are closer to paid leave laws than temporary disability benefits, but their funding mechanism makes them similar to the disability laws described above. Most paid leave laws simply require the covered employers to provide paid leave.¹⁰⁹ Both new laws have income formulas which vary based on the pre-disability wages and are capped at \$1000 per week.¹¹⁰

The various state disability income programs have been classified into four categories: 1) pure social insurance; 2) social insurance with limited private options; 3) state fund with private alternatives; and 4) an employer mandate.¹¹¹ Pure social insurance, such as the Rhode Island disability income program, requires employer and/or employee payments into a government fund which pays benefits according to specified criteria.¹¹²

103. *Id.* at 283. Taxes on employers that select private plans also pay for administrative costs of the state. *See* SOC. SEC. ADMIN., *Social Security Programs in the United States*, 56 SOC. SEC. BULL. 39 (1993) (stating "California, New Jersey, New York, and Puerto Rico levy assessments on private plans to cover the added administrative costs to the States of supervising these plans").

104. Kilgour, *supra* note 85, at 283. The author of the study attributes this reduction to the recessionary economy. *Id.* However, the use of voluntary plans has dropped significantly since the passage of the law, from as many as one half of workers covered in the early years to less than 5% in recent years. Molly Weston Williamson, *Structuring Paid Family and Medical Leave: Lessons from Temporary Disability Insurance*, 17 CONN. PUB. INT. L. J. 1, 19-20 (2017). Holdovers from voluntary plans in effect at the time of passage, increasing cost, and the addition of family leave benefits are likely explanations for the reduction. *Id.* at 19-21. New Jersey's law is more favorable to private plans than California's and while use of private plans has also declined there, it has done so far less precipitously. *Id.* at 23-27 (describing differences in the two states' laws and decline in the use of private plans, attributable to similar factors as California's, from about 60% to about 20%).

105. Glynn et al., *supra* note 98, at 9.

106. *Id.* at 9-10, 12.

107. *Id.* at 9-10.

108. *Id.* at 11-12.

109. *Id.* at 2-3.

110. Williamson, *supra* note 104, at 42-46.

111. Glynn et al., *supra* note 98, at 7, 13.

112. *Id.* at 7. This program format also has been described as a monopolistic state fund.

Such a program provides universal disability income at a relatively low cost per worker, pooling both risk and resources over a large number of individuals, subsidizing those who need more extensive leave with the contributions of those who need little or no leave.¹¹³ A pure social insurance program with no private option is cheaper to administer and has more predictable premium costs because of the large pool of workers.¹¹⁴ Moreover, overhead expenses are typically low.¹¹⁵

When private options are added, as in California and New Jersey, regulatory costs increase because staff is required to insure that the private options provide adequate protection.¹¹⁶ Further if employers with low risk populations of workers opt out of the state system, the state system might experience increased costs.¹¹⁷ Where the options are limited, however, they may have little overall impact.¹¹⁸

New York provides an example of a state fund with private options.¹¹⁹ New York built its system onto its Workers' Compensation program, reducing the otherwise costly development of the extensive regulatory structure needed to insure program enforcement.¹²⁰

The employer mandate, used in Hawaii, differs from social insurance in several ways that might reduce the coverage of workers. Under a mandate system, the law could require the employer to provide insurance to pay for disability income or allow the option to self-insure.¹²¹ A mandate is less portable than social insurance and would not cover workers who become disabled between jobs.¹²² Employers paying the benefits might discourage workers from claiming them or more strictly interpret

Williamson, *supra* note 104, at 8.

113. Glynn et al., *supra* note 98, at 13.

114. *Id.*

115. *Id.* at 14.

116. *Id.* at 14. Williamson categorizes this type of program as a default state fund; the state fund is the norm but private options complying with state requirements are an alternative. Williamson, *supra* note 104, at 13. State requirements can make it harder or easier to choose alternatives to the default. *Id.* California makes it more difficult to use the private options, thereby encouraging employers to use the default state fund, while New Jersey makes it comparatively easier to choose private alternatives. *Id.*

117. Glynn et al., *supra* note 98, at 14.

118. *Id.*

119. *Id.* Williamson describes New York's law as an employer mandate with a strong state fund as an option. Williamson, *supra* note 104, at 8.

120. Glynn et al., *supra* note 98, at 14.

121. *Id.* at 15.

122. *Id.* The Hawaii statute, however, does establish a state fund to cover employees who are disabled while unemployed or whose employers fail to provide the required coverage. Williamson, *supra* note 104, at 36.

eligibility criteria to disqualify them from collecting.¹²³ Finally, an employer mandate might discourage employers from hiring workers it deems more likely to have temporary disabilities; older workers, for example, or workers with preexisting conditions.¹²⁴

B. Private Disability Income

Private disability benefits come in two forms, employer plans and individual plans. Employer plans, like other employee benefits, are offered by employers to their employees, while individual plans are purchased by individuals directly from insurers.¹²⁵

The Bureau of Labor Statistics maintains data on coverage of employer plans,¹²⁶ which may be provided by the employer to employees at no cost to the employee or offered to the employees as an optional benefit for purchase by the employee.¹²⁷ Forty-one percent of workers have access to short-term disability benefits with forty percent actually selecting coverage.¹²⁸ Similarly, thirty-three percent have access to long-term disability benefits with thirty-two percent actually participating in the program.¹²⁹ Not surprisingly, higher paid employees have greater access to disability benefits than lower paid employees and employees of larger employers are more likely to have access to such benefits than those of smaller employers.¹³⁰

The low rate of coverage is driven by multiple factors. Insurers do not aggressively market disability coverage.¹³¹ Further, many employees

123. Glynn et al., *supra* note 98, at 15. Of course, some have criticized social insurance systems, such as Social Security, as being too generous in awarding disability income. See Weinberger-Divack, *supra* note 75, at 265-66 (detailing criticisms of Administrative Law Judges who approve too many applicants, as well as inconsistencies in the determination process); Jacob Bender, *Torn Between Two Masters: Flaws in the Social Security Disability Process*, 45 U. TOL. L. REV. 619 (2014) (detailing a number of criticisms of the system).

124. *Id.* Such conduct would not be legal, but hiring discrimination is difficult to prove. See BAGENSTOS, *supra* note 2, at 127-28.

125. *Disability Insurance*, DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/benefits-other/disabilityins> (last visited March 24, 2018).

126. Bureau of Labor Statistics, *Employee Benefits Survey, Insurance Benefits: Access, Participation and Take-up Rates, March 2017 Table 16*, <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table16a.htm> (last visited Jan. 17, 2018) [hereinafter "*Employee Benefits Survey*"].

127. Kelly L. Knudson, *California State Disability Insurance: Privatization Is the Answer to Employee Woes*, 40 U.S.F. L. REV. 539, 545, 547 (2006).

128. *Employee Benefits Survey*, *supra* note 126.

129. *Id.*

130. *Id.*

131. Allen, *supra* note 43, at 1345-46. Theorists offer two explanations for this phenomenon, concerns about adverse selection and moral hazard. *Id.* (citing Kenneth S. Abraham & Lance

do not appreciate the risk of disability and accordingly do not opt to purchase disability insurance when available.¹³² Even those who do recognize the risk often do not have the opportunity to purchase affordable insurance.¹³³

The two types of plans are regulated differently. Employer-provided disability benefits plans, like other employer welfare benefit plans, are covered by ERISA, the federal Employment Income Retirement Security Act.¹³⁴ Individual plans are regulated by state insurance law.¹³⁵ As might be expected, state law varies and additionally plans vary.

There are, however, commonalities among disability insurance plans. Disability benefits commonly replace only part of an employee's prior compensation.¹³⁶ Plans may cover short-term disabilities, long-term disabilities or both and the plan will define these terms.¹³⁷ Plans usually distinguish between total disability and partial disability, defining those terms as well. Total disability typically is based on the inability to do the individual's own job or, like public disability benefits, the inability to do any job for which the employee is qualified.¹³⁸ A plan might pay benefits for one or the other or both depending on the timing.¹³⁹ Some plans may cover partial disability also which is often defined as the inability to do all job tasks, disability that causes a reduction in work time, or disability that causes a reduction in income.¹⁴⁰ Some policies cover only disability from accident not illness.¹⁴¹

Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 101 (1993)).

132. *Id.* at 1346.

133. *Id.* at 1346-47.

134. See 29 U.S.C. § 1002(1)(A) (defining a welfare benefit plan as "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer" for the purpose of providing "benefits in the event of sickness, accident, disability. . .").

135. *Health Insurance Regulations*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/health-insurance/health-insurance-regulations.aspx> (last visited Mar. 25, 2018).

136. *Individual Disability Income Insurance*, VERMONT DEP'T OF FIN. REG., <http://www.dfr.vermont.gov/insurance/insurance-consumer/individual-disability-income-insurance> (last visited Jan. 17, 2018) [hereinafter "VERMONT DEP'T"].

137. *Id.*

138. *Id.*; FRANKLIN L. BEST, JR., 1 LIFE & HEALTH INS. L. § 15:1 (2d ed. 2014); Hammond v. Fidelity & Guar. Life Ins. Co., 965 F.2d 428, 430-31 (7th Cir. 1992).

139. For example, a plan might pay benefits for a specified time period if the individual cannot work at her own job and then after that only if the individual cannot work at any job. VERMONT DEP'T, *supra* note 136.

140. *Id.*

141. AMERICA'S HEALTH INSURANCE PLANS, GUIDE TO DISABILITY INCOME INSURANCE 12, available at https://www.ahip.org/wp-content/uploads/2016/03/PRO_113_14_Guide-to-DI-2013_F.pdf (last visited Jan. 17, 2018).

Short-term disability plans are most commonly provided through employers or other groups.¹⁴² Individual short-term disability policies are not common except for accidental injury policies.¹⁴³ The average premium was \$214 per year in 2013 and cancer was the sixth most common reason for collecting short term disability benefits.¹⁴⁴

Long-term disability policies take over when short-term disability policies reach their limits and are available on an individual or group basis.¹⁴⁵ The average premium for a group policy was \$226 per year in 2013,¹⁴⁶ while premiums for an individual policy are far more expensive, typically well over \$1000 per year.¹⁴⁷ Cancer was the second leading cause for collecting long-term benefits from a private plan in 2013.¹⁴⁸

Private disability benefits generally replace about 60% of pre-disability income at time of purchase.¹⁴⁹ Most contain an offset for other income such as SSDI or workers' compensation benefits.¹⁵⁰ They may have waiting periods before payments start and will have a specified time period for payments which might be a number of years or until retirement.¹⁵¹ The policy may contain an inflation adjustment or an option to purchase additional insurance without a medical examination to keep up with increased cost of living.¹⁵² In addition, there are a variety of provisions relating to continuation of the policy, ranging from non-cancelable, meaning the policy cannot be cancelled and the premium cannot be increased except for failure to pay the premiums, to optionally renewable which allows the insurance company to decide each year whether to continue the policy.¹⁵³ Depending on the choice of features, the policy will be more or less expensive.

142. *The Basics of Short-Term Disability Insurance*, INSURE.COM, <http://www.insure.com/articles/disabilityinsurance/short-term-disability.html> (last updated Oct. 3, 2017).

143. *Id.*

144. *Id.*; see also *Group Disability and Group Term Life Market Survey Summary of 2013 Results*, GEN. RE, <http://media.genre.com/documents/surveyylhgdgtmarketsum1404-en.pdf> (last visited Mar. 27, 2018).

145. *The Basics of Long-Term Disability Insurance*, INSURE.COM, <http://www.insure.com/disability-insurance/long-term-disability.html> (last updated June 3, 2016).

146. *Id.*

147. Allen, *supra* note 43, at 1345 (citing average cost and providing example showing individual insurance purchased on the open market would cost 7.5 times the cost of group insurance offered by an employer for the same employee).

148. *The Basics of Long-Term Disability Insurance*, INSURE.COM, <http://www.insure.com/disability-insurance/long-term-disability.html> (last updated June 3, 2016).

149. AMERICA'S HEALTH INSURANCE PLANS, *supra* note 141, at 12.

150. *Id.*

151. *Id.* at 14.

152. *Id.*

153. *Id.*

As for the definition of disability, it will depend on the plan's language and, if necessary, the court's construction of that language. Total disability is generally construed as substantial disability and does not require complete inability to engage in the activities of daily life.¹⁵⁴ Private plans are not required to follow the definition of disability in the Social Security Act or any decision under that statute as to disability.¹⁵⁵ Nevertheless, the Supreme Court, applying ERISA, upheld a decision by the Sixth Circuit Court of Appeals finding an insurer abused its discretion in denying benefits to an employee who was awarded disability income under the Social Security Act.¹⁵⁶ The Court concluded that the Sixth Circuit properly weighed the insurer's conflict of interest as a factor where the company urged the employee to apply for SSDI and to represent to them her complete inability to work and when she was successful in obtaining retroactive payments, benefited from the offset to its own obligation.¹⁵⁷ The insurer then determined that she was able to work, ignoring the agency's finding.¹⁵⁸ These facts, along with others, justified finding an abuse of discretion.¹⁵⁹ In cases since, other courts have reached similar decisions on similar facts, often where the insurer failed to address the determination under the Social Security Act.¹⁶⁰ Thus, while not conclusive, the determination of disability under the Social Security Act will be influential, particularly where there is an offset provision that benefits the insurer who is also determining disability under the plan.

As in the case of public disability, the courts have construed disability under private plans to be limited by the fitness of the individual to the job.¹⁶¹ Thus, an individual will typically be found disabled if unable to perform any job for which he or she is suited by education, training and experience in which he or she can earn a living.¹⁶²

For occupational disability plans, the plan's definition of disability will also be important. Some plans contain language limiting the definition of disability to circumstances where the participant cannot perform

154. Best, *supra* note 138, at §15.2.

155. Best, *supra* note 138, at §15.2.

156. See *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 124 (2008).

157. *Id.* at 118.

158. *Id.*

159. *Id.*

160. See, e.g., *Raybourne v. Cigna Life Ins. Co. of New York*, 700 F.3d 1076 (7th Cir. 2012); *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 679 (9th Cir. 2011); *Schexnayder v. Hartford Life & Acc. Ins. Co.*, 600 F.3d 465, 471 (5th Cir. 2010); *Brown v. Hartford Life Ins. Co.*, 301 F. App'x 772, 775-76 (10th Cir. 2008).

161. Best, *supra* note 138, at § 15:1.

162. Best, *supra* note 138, at § 15:1. See, e.g., *Demirovic v. Building Serv. 32 B-J Pension Fund*, 467 F.3d 208, 215 (2d Cir. 2006).

any of the duties of the occupation.¹⁶³ Most courts interpret this language as the inability to perform the significant duties of the job.¹⁶⁴ Where a plan's language indicated that an applicant unable to "perform each of the material duties" would qualify as disabled, however, the Fifth Circuit found that the attorney applicant need only show that she could not perform one of the material duties of her job.¹⁶⁵

With the exception of government plans and church plans,¹⁶⁶ employer-provided disability benefits are regulated by ERISA. ERISA's broad preemption provision largely ousts the states of any regulatory authority over employer-provided disability plans.¹⁶⁷ While there is an exception for plans "maintained solely for the purpose of complying with applicable . . . disability insurance laws", the Supreme Court has held that ERISA preempts state efforts to force ERISA plans to include mandatory state disability benefits.¹⁶⁸ The only option for the state is to force the employer to establish a separate plan "solely" for the purpose of complying with state law.¹⁶⁹

ERISA's requirements for welfare benefit plans such as disability income plans are limited. Essentially, the employer has broad discretion in designing its plan. ERISA requires the employer to follow its plan,¹⁷⁰ but does not limit plan changes so long as notice is provided to participants.¹⁷¹ Individuals may litigate application of the plan in order to claim benefits denied, but first must exhaust reasonable ERISA-mandated claims review procedures.¹⁷² Detailed regulatory requirements mandate "full and fair review."¹⁷³

163. ABA SECTION OF LABOR AND EMPLOYMENT LAW, *EMPLOYEE BENEFITS LAW* § 14-47 (3d ed. Jeffrey Lewis et al., Eds. 2012) (hereinafter "EMPLOYEE BENEFITS LAW").

164. *Id.*

165. *Lain v. Unum Life Ins. Co. of Am.*, 279 F.3d 337, 345 (5th Cir. 2002).

166. ERISA, 29 U.S.C. §§ 1003 (b) (1), (2).

167. ERISA, § 514(a), 29 U.S.C. § 1144(a) (stating that, with certain exceptions, ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.").

168. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

169. *Id.* at 108.

170. ERISA, 29 U.S.C. § 1132(a) (authorizing civil actions to enforce the terms of an ERISA plan).

171. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (stating that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans"); ERISA, 29 U.S.C. § 1022(a), § 1024(b)(1) (establishing that employers must notify beneficiaries of changes made to the plan); *CIGNA Corp. v. Amara*, 563 U.S. 421, 425, 432-33 (2011) (remanding for a determination of the appropriate relief for CIGNA's failure to give proper notice of changes to beneficiaries as required by ERISA).

172. *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1.

173. For a description of the review requirements see *EMPLOYEE BENEFITS LAW*, *supra* note

The courts review these cases de novo unless the plan provides discretionary authority to the decision-maker under the plan, in which case the review is for abuse of discretion.¹⁷⁴ Not surprisingly, plan drafters typically include language granting discretion in order to take advantage of the more deferential review.¹⁷⁵ A recent study of ERISA benefits litigation found that disability claims were by far the most commonly litigated as compared to other benefit plans, although fewer employees are covered by such plans.¹⁷⁶ Disability cases were more likely than other cases to contain allegations that the plan administrator had a conflict of interest.¹⁷⁷

In December 2016, the Department of Labor issued final regulations regarding the processing of disability claims which expand on the requirements for full and fair review.¹⁷⁸ The new rules, which apply to claims for benefits filed after January 1, 2018, were based on the Department's concerns about conflicts of interest of those considering disability claims and the motivation of plans to "aggressively dispute disability claims" to contain costs.¹⁷⁹ The rules, designed to provide more protection to those filing claims, require impartial, though not external, determination of claims,¹⁸⁰ and require plans to provide more transparency to plan participants about the claims process and denials.¹⁸¹ The plan participant must be given an opportunity to respond to any new information or reasoning on appeal.¹⁸² And if the plan does not follow its own rules, the participant will be deemed to have exhausted administrative remedies and can file suit.¹⁸³ In addition, the court will not be required to defer to the plan's determination if the rules are not followed.¹⁸⁴

Individual disability plans purchased in the market are governed by state law, as are group plans not established or maintained by employers

163, at §§ 13-3–13-26.

174. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

175. EMPLOYEE BENEFITS LAW, *supra* note 163, at § 13-46. For discussion of interpretation and application of such language, see *id.* at §§ 13-46– 13-54.

176. Sean M. Anderson, *ERISA Benefits Litigation: An Empirical Picture*, 28 ABA J. LAB. & EMP. L. 1, 6-7 (2012).

177. *Id.* at 11.

178. U.S. Dep't of Labor, *Claims Procedure for Plans Providing Disability Benefits*, 81 FED. REG. 92316, Dec. 19, 2016, codified at 29 C.F.R. Part 2560.

179. *Id.* at Summary, 81 FED. REG. 92316, 92318.

180. See 81 FED. REG. 92341, 29 C.F.R. §2560.503-1(b)(7).

181. See 29 C.F.R. §2560.503-1(g)(1), (j) (1980), 29 C.F.R. §2560.503-1 (o) (2017).

182. See 29 C.F.R. § 2560.503-1(h)(4)(i),(ii) (1980).

183. See 29 C.F.R. § 2560.503-1(l)(1) (2017).

184. See 29 C.F.R. § 2560.503-1(l)(2) (2017).

or unions.¹⁸⁵ Each state establishes its own requirements for such plans.¹⁸⁶

C. Other Disability Income

Some employers, including many government employers, provide long-term disability income through retirement plans.¹⁸⁷ Most require total and permanent disability in order to qualify for benefits although some may pay benefits for a temporary disability.¹⁸⁸ If the plan is a defined contribution plan rather than a defined benefit plan,¹⁸⁹ any payments taken for disability will reduce the amount available to the plan participant in retirement, which may exacerbate, or at least not solve, the financial problems resulting from disability.¹⁹⁰

There is a system of disability income for railroad employees initially established in the 1930s as a separate system from Social Security.¹⁹¹ Employees with a minimum ten years of service and total, permanent disability from any job are eligible for disability payments.¹⁹² Railroad employees are also eligible for temporary disability payments from a system that is combined with the railroad employees unemployment compensation system and funded by employer contributions based on employee earnings.¹⁹³

Disability benefits for veterans come in three main types: disability compensation, dependency and indemnity compensation (DIC), and special monthly compensation (SMC).¹⁹⁴ Disability compensation can be

185. See 29 C.F.R. 2510.3-1(j) (1980) (exempting from ERISA voluntary plans offered by insurers to employees or union members without endorsement or contribution by the employer or union).

186. See, e.g., REV. CODE WASH. § 48.21.050 (specifying required provisions for disability insurance); Dep't of Consumer and Bus. Serv., Or. Division of Fin. Reg., *Standard Provisions for Long and Short Term Disability, Group or Individual*, <http://dfr.oregon.gov/rates-forms/Documents/2447.pdf>.

187. Allen, *supra* note 43, at 1357.

188. *Id.*

189. Most retirement plans are now defined contribution plans rather than defined benefit plans. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Employee Benefits Survey, Retirement Benefits: Access, Participation and Take-up Rates, Table 2*, <https://www.bls.gov/ncs/ebs/benefits/2016/ownership/private/table02a.htm> (last visited Jan. 17, 2018).

190. Allen, *supra* note 43, at 1357-58.

191. SOC. SEC. ADMIN., *Social Security Programs in the United States*, 78 (1997), <https://www.ssa.gov/policy/docs/progdesc/ssp/railroad.pdf> (last visited Jan. 17, 2018).

192. *Id.* at 80.

193. *Id.* at 82.

194. *Compensation*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation> (last visited Mar. 29, 2018).

obtained by any Veteran who is at least 10% disabled.¹⁹⁵ Mental and physical disabilities qualify as long as they are attributable to active duty, active duty for training, or inactive duty training.¹⁹⁶ The benefit recipient must not have been discharged dishonorably.¹⁹⁷ Additionally, evidence must show a relationship between the disability and an injury, disease, or event that occurred while serving in the military.¹⁹⁸ Cancer may be covered if the service connection is established.¹⁹⁹ Compensation is calculated in increments of ten percent.²⁰⁰

DIC is paid to surviving spouses or surviving children of military service members who were killed in the line of duty or because of an injury or disease incurred while serving.²⁰¹ To receive this benefit, the veteran must have either died while on active duty, active duty for training, or inactive duty training; died from an injury or disease related to his or her military service; or died from a non-service related injury or disease while receiving or entitled to receive VA Compensation for a disability rated as “totally disabling.”²⁰²

SMC is paid to veterans, spouses, surviving spouses, or surviving parents.²⁰³ This benefit provides a higher rate of compensation that veterans and their families can obtain in special circumstances.²⁰⁴ These circumstances include specific disabilities, like losing a hand, or the need for the aid of another person.²⁰⁵ Compensation rates are calculated by a determination of how severe the disability is, starting from ten percent to one hundred percent, in ten percent increments.²⁰⁶ Additional amounts can be obtained for severe disabilities, dependent spouses, children, or

195. *Compensation: Disability Compensation*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/COMPENSATION/types-disability.asp> (last visited Mar. 29, 2018).

196. *Id.*

197. *Id.*

198. *Id.*

199. *See, e.g., Exposure to Contaminated Drinking Water at Camp Lejeune*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/COMPENSATION/claims-postservice-exposures-camp-lejeune-water.asp> (last visited Mar. 29, 2018) (discussing cancers presumed compensable for veterans who served at Camp Lejeune, NC during certain time periods).

200. *Id.*

201. *Compensation: Dependency and Indemnity Compensation*, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/COMPENSATION/types-dependency_and_indemnity.asp (last visited Jan. 17, 2018).

202. *Id.*

203. *Compensation*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/> (last visited Jan. 17, 2018).

204. *Id.*

205. *Id.*

206. *Compensation: Benefit Rates*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.benefits.va.gov/compensation/rates-index.asp> (last visited Jan. 17, 2018).

parents, or a severely disabled spouse.²⁰⁷ If a veteran has multiple disabilities, the disabilities can be combined to obtain a combined disability rating.²⁰⁸ Combining disabilities is done by using the Combined Ratings Table on the U.S. Department of Veteran Affairs website, and then rounding the number up to the nearest ten percent.²⁰⁹

Finally, if an employee can prove a sufficient causal connection between cancer and work, the employee will be entitled to workers' compensation benefits for cancer.²¹⁰ It is often difficult to prove that causation, however.²¹¹ Many states have legal presumptions that certain cancers were caused by work for employees in particular jobs.²¹² The burden is then on the employer to disprove causation.²¹³

Workers' compensation benefits, which are provided through mandatory insurance purchased by employers, include medical treatment, and compensation for lost wages for temporary and permanent disability.²¹⁴ Workers compensation benefits also include compensation for partial disability, including payments to compensate for reduced wages caused by the cancer.²¹⁵ Additionally, workers' compensation programs provide both vocational and physical rehabilitation.²¹⁶ A comparison chart of the various elements of the disability income programs described in this section is included in Appendix A.

207. *Id.*

208. *Id.*

209. *Id.*

210. Vitauts M. Gulbis, Annotation, *Cancer as Compensable Under Workers' Compensation Acts*, 19 A.L.R. 4th 639, §2(a) (originally published in 1983).

211. *Id.*

212. Louisa Esola, *Firefighter Cancer Presumption a Hot Issue for Workers' Comp in 2017*, *Bus. Insider* (Jan. 18, 2017) <http://www.businessinsurance.com/article/20170118/NEWS08/912311446/Firefighter-cancer-presumption-a-hot-issue-for-workers-comp-in-2017>.

213. *See, e.g., City of Long Beach v. Workers' Comp. Appeals Bd.*, 23 Cal. Rptr. 3d 782, 793 (Cal. Ct. App. 2005) (imposing burden on employer to rebut presumption that police officer's cancer arose out of and in the course of employment).

214. Virginia Reno et al., *Social Security Bulletin, Workers' Compensation, Social Security Disability Insurance, and the Offset: A Fact Sheet*, SOC. SEC. ADMIN. (2003), <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p3.html>; *see also* 1-1 LARSON'S WORKERS' COMPENSATION LAW § 1.01 (2017).

215. *See Reno, supra* note 214; *see also* 6-90 LARSON'S WORKERS' COMPENSATION LAW § 80.03 (2017).

216. *See* 8-95 LARSON'S WORKERS' COMPENSATION LAW § 95.01 (2017).

V. CURRENT DISABILITY INCOME: WHAT WORKS FOR CANCER SURVIVORS AND WHAT DOESN'T

Reviewing the data regarding work disability for cancer survivors reveals that there is no universal pattern of disability because cancers are different, work is different, and patient response to the disease and treatment is different. But cancer itself is ubiquitous and many individuals will be affected by cancer during their work lives. A comprehensive disability income system would provide benefits for those temporarily disabled from work, both fully and partially, and for those permanently disabled from work, both fully and partially. Additionally, it would provide both physical and vocational rehabilitation benefits and work incentives as a part of a system designed to encourage return to work where possible.

A. *The Almost Universal System: Social Security*

As evidenced by the review of disability income payments above, the only almost universal disability program is the Social Security program.²¹⁷ For patients with advanced cancers, the program, whether through SSI or SSDI, provides benefits to those individuals whose cancer will prevent them from working at all for at least one year.²¹⁸ Its coverage is limited to those who have a substantial work history, however, with the exception of the very poor, so some individuals with cancer will remain outside the system.²¹⁹ And while the adequacy of the payments in terms of replacement income can be debated, the payments do provide some support for many individuals with cancer during long periods of complete inability to work.²²⁰ For the many cancer patients whose inability to work lasts less than a year,²²¹ however, these programs provide no assistance. Nor do the programs provide income to those who must work reduced hours as a result of cancer.²²²

The compassionate allowances process is a significant development for many individuals with serious cancers, allowing them to receive their payments much more quickly than would otherwise be the case given the lengthy process.²²³ From all accounts, the program enables these individuals to obtain income support when it is much needed.²²⁴ For individuals with terminal conditions, the payments may come while they are still living, alleviating the additional stress that would accompany financial hardship in the final months of their lives.²²⁵ For those with lengthy treatment and recovery, the payments will facilitate better compliance with treatment and also relieve stress, both of which will assist in recovery.²²⁶ Nevertheless for those whose conditions do not meet the requirements for compassionate allowances, the delays in determination will cause

217. Of course, some individuals will not be eligible for Social Security income if they have not earned sufficient work credits and are not sufficiently indigent. *See supra* notes 69-72 and accompanying text. Also, some public employees are not covered by the system and railroad employees have their own similar system which, unlike Social Security, includes coverage for temporary disability.

218. *See supra* notes 51-54 and accompanying text.

219. *See supra* notes 59-63, 69-72 and accompanying text.

220. *See supra* notes 51-65 and accompanying text.

221. *See supra* note 54 and accompanying text.

222. *See supra* note 56 and accompanying text.

223. *See supra* notes 76-80 and accompanying text.

224. *Id.*

225. *See id.*

226. *See id.*

significant financial hardship.

The Social Security program provides incentives designed to help individuals return to the workforce.²²⁷ These incentives are certainly beneficial efforts but for many cancer survivors, eligibility will be an issue. If the cancer does not completely disable them from any work for at least a year, they will not obtain disability income under the program and thus will not be able to take advantage of the work incentives.²²⁸ These programs are only for the most seriously disabled who are the least likely to recover enough to return to employment. Additionally, evaluations suggest that the programs do not return significant numbers of individuals to work, perhaps because of their structure.²²⁹

Thus, the one nearly universal system has substantial gaps in protection, leaving those with temporary or partial disability completely without protection.

B. Temporary or Partial Disability and Return to Work

Individuals with disability of less than one year will have disability income only if they live in one of the five states (or Puerto Rico) with government programs and meet the requirements of those programs,²³⁰ or have disability insurance through their employer or through a private plan. Railroad employees,²³¹ veterans, employees whose cancer can be attributed to their job, and some employees of state and local government also have temporary disability coverage.²³² Paid leave laws are inadequate for virtually all cancers as they typically require only a few days of leave each year.²³³

Slightly over a third of employees have short-term disability coverage while about one-third have long-term coverage.²³⁴ Typically, it is higher-paid employees, those less likely to need the income, that have

227. See REDBOOK, *supra* note 81, at 1.

228. See *supra* notes 81-84 and accompanying text.

229. See *supra* note 84 and accompanying text.

230. SOC. SEC. ADMIN., *Social Insurance Programs* 44, available at <https://www.ssa.gov/policy/docs/progdesc/sspus/tempdib.pdf>.

231. *Id.*

232. *Id.*

233. See Hodges, *supra* note 1, at 1078-79. The exception is the newly enacted law in the state of Washington, which will provide up to twelve weeks of paid leave beginning in 2020. See *supra* notes 105-10 and accompanying text. While that will not be adequate for treatment for many cancers, it is significantly better than other paid leave laws.

234. *Supra* notes 128-29 and accompanying text. Long-term coverage, depending on the plan may cover disabilities that are too short to qualify for Social Security benefits, i.e., lasting less than one year. See *supra* note 137, 154-155 and accompanying text.

access to it.²³⁵

Employers are free to change their plans at will and litigation over eligibility is common, with determinations as to disability frequently made by individuals with conflicts of interest. Further individually purchased plans are expensive, out of the reach of many.

In addition, depending on the definition of disability, the plan, whether provided by the employer or purchased by the individual, may not pay.²³⁶ If the employee is disabled from her own job but not all jobs, a plan requiring total disability from any job will not pay.²³⁷ Imagine the prospective employer response to an applicant who explains that she is temporarily disabled from doing her previous job as a result of cancer treatment. A job offer is highly unlikely and proof of discrimination will be difficult.²³⁸

Partial disability coverage is even rarer. While veterans can obtain partial disability, many private plans require total disability, as do the public plans in three states. Yet for many cancer patients, some residual disability impacts their ability to work fulltime or their ability to work in particular jobs long after treatment ends.

With the exception of Social Security, none of the public disability programs are structured to provide any rehabilitation or incentive to attempt return to work. And the Social Security return to work program has had limited success. Given the importance of work to cancer survivors and the evidence that suggests that many can and do return to work, such a program will be an important element of any disability program for cancer survivors.

VI. MAKING DISABILITY INCOME WORK FOR CANCER SURVIVORS

A. Uniting the Patchwork

As is evident from the above discussion, disability income is a patchwork of private and public systems, without comprehensive coverage for temporary and permanent as well as partial and total disability or programs that promote and assist in efforts to return to work. How then to modernize the disability income system in the United States so that it will work for cancer survivors, as well as other individuals with disabilities?

The ideal solution is one comprehensive system that includes all of

235. *Supra* note 130 and accompanying text.

236. *Supra* notes 138-41 and accompanying text.

237. *Supra* notes 138-39 and accompanying text.

238. *See* Hodges, *supra* note 1, at 1075-76.

the necessary elements. Workers' compensation systems provide a model. They provide coverage for total and partial disability, temporary and permanent disability and include physical and vocational rehabilitation programs to assist employees to return to work.²³⁹ To build a similar system, it would make sense to start with the one existing comprehensive program, Social Security. While amending Social Security to provide additional income for individuals with disabilities seems politically unlikely,²⁴⁰ it is worth considering what a modernization of the program might look like. The program is faced with increasing and perhaps unsustainable costs, partly as a result of disability benefits.²⁴¹ And cancer is the fourth largest category of disability awards.²⁴² But some of these costs might be mitigated by an effective program that returned individuals with disabilities to work.

Evidence from both the United States and other developed countries indicates that once employees have received disability income for a few months, they rarely return to work.²⁴³ Considering this fact, David Autor and Mark Duggan have proposed modifications to the disability income system designed to focus on the front end, when employees with disability limitations are considering whether to continue working.²⁴⁴ Their proposal would provide private disability insurance to workers through their employers at a relatively modest cost.²⁴⁵ The insurance would provide partial disability income for up to two years, replacing sixty percent of

239. See 6-80 LARSON'S WORKERS' COMPENSATION LAW § 80.03(1) (2017); 8-95 LARSON'S WORKERS' COMPENSATION LAW § 95.01D (2017).

240. Social Security has been called the third rail of politics. William Safire, *Third Rail*, N.Y. TIMES MAG. (Feb. 18, 2007), <http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html>. Further, while there is some political pressure to expand Social Security, the predominant concern seems to be shoring up the system financially and even that is politically problematic. Russ Wiles, *Changes may be ahead for Social Security, observers say*, USA TODAY (Oct. 23, 2017 12:08 PM), <https://www.usatoday.com/story/money/personalfinance/2017/10/23/changes-may-ahead-social-security-observers-say/790666001>.

241. Richard V. Burkhauser et al., *Disability Benefit Growth and Disability Reform in the U.S.: Lessons from Other OECD Nations*, FEDERAL RESERVE BANK OF SAN FRANCISCO, 2 (Dec. 13, 2013), <http://www.frbsf.org/economic-research/files/wp2013-40.pdf> (stating that since 2009 the Disability Income program has been paying out more than it is taking in). See also Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 2 (noting that expenditures for disability have increased from 10% to 18% of Social Security payments); David H. Autor & Mark Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSP. 71, 71 (2006) [hereinafter Autor & Duggan, *A Fiscal Crisis Unfolding*] (describing increase in individuals collecting disability over time and explanations for the increase).

242. Autor & Duggan, *A Fiscal Crisis Unfolding*, *supra* note 241, at 79.

243. Burkhauser et al., *supra* note 241, at 40.

244. Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 5.

245. *Id.* at 6, 23.

wages up to a maximum of \$2,500 per month.²⁴⁶ In addition, the program would provide vocational rehabilitation and accommodations required by the Americans with Disabilities Act (“ADA”) to enable the employee to continue working.²⁴⁷ At the conclusion of the two year period workers unable to work could apply for SSDI.²⁴⁸ The program would not change for employees with conditions that qualify for Compassionate Allowances, who could immediately apply for SSDI.²⁴⁹

The authors of the proposal envision that the disability insurance would be obtained and paid for by the employer.²⁵⁰ The employer could charge employees up to forty percent of the cost, which they estimate, based on the current costs of private disability insurance, to be about twenty dollars per month.²⁵¹ For larger employers, the insurance would be experience-rated, providing an incentive to the employer to accommodate the employee to enable the employee to continue to work.²⁵² Experience ratings for smaller employers would be industry, rather than employer, based.²⁵³ Employers that currently provide private disability insurance would not be required to participate, and would be free to offer more generous coverage to their workers.²⁵⁴

This proposal would address many of the needs of cancer survivors. First, it would provide some income for two years for those who are unable to work or unable to work fulltime.²⁵⁵ Further, the eligibility criteria would be less stringent so individuals unable to work for less than twelve months would be entitled to disability income.²⁵⁶ Because the program payments commence ninety days after disability onset, the program avoids the long delays that accompany qualification for SSDI and SSI applicants who do not have a condition that qualifies for a Compassionate Allowance.²⁵⁷ Employers are free to offer short-term disability coverage

246. *Id.* at 6.

247. *Id.* The ADA requires the employer to make reasonable accommodations to qualified individuals with disabilities unless the employer can show that the accommodation causes undue hardship. See 42 U.S.C. § 12112(b)(5)(A).

248. Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 7.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 23. The experience of other countries that have reformed their disability systems shows the importance of incentivizing employers to accommodate and rehabilitate workers. Burkhauser et al., *supra* note 241, at 38-40. Currently in the U.S., employers bear none of the direct cost of payments if employees move into the SSDI system. *Id.* at 39.

253. *Id.* at 7.

254. *Id.* at 7, 14.

255. *Id.* at 7.

256. *Id.* at 18.

257. *Id.* at 6, 18.

for the ninety-day waiting period as well.²⁵⁸ This early income support is particularly important for those who do not have employer-provided or state-provided disability insurance. Survivors without disability insurance are more likely to be lower income workers, who are also less likely to remain employed during and after treatment.²⁵⁹ This quick income support will allay some of the financial hardship and accompanying stress, while also employing interventions to keep these individuals in the workforce.

The second benefit of the program for cancer survivors is the incentive for employers to accommodate those workers disabled by cancer or its residual effects and provide them with vocational rehabilitation.²⁶⁰ The program thus dovetails with the accommodation requirements of the Americans with Disabilities Act.²⁶¹ The private insurer would assist the employer with implementation of accommodations and pay the cost of those accommodations, making compliance with the ADA requirements more likely.²⁶² Also vocational rehabilitation might improve the chances of remaining employed in the existing job or another more suited to current limitations.

Further, because the disability insurance would remain in effect for a year post-termination, the employer would have a reduced incentive to terminate a disabled worker.²⁶³ Enabling a worker with cancer to keep his or her job allows continuation of coverage by the same health insurance plan. Maintenance of insurance avoids any treatment effects that may arise from changing plans, such as a need to change providers or a delay in obtaining new coverage.²⁶⁴ Further if opponents of the Affordable Care Act are successful in eliminating or severely damaging it, staying employed may provide the difference between health insurance coverage and none.²⁶⁵ At least under current law, even those who obtain SSDI are not eligible for Medicare for the first twenty-four months that they receive income payments.²⁶⁶ Only those who are both asset and income poor will

258. *Id.* at 18.

259. *See supra* notes 13-17, 130-133 and accompanying text. The exception, of course, is workers in states with public disability income laws.

260. Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 6, 18-19.

261. *See supra* note 247 and accompanying text.

262. Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 17.

263. *Id.*

264. *Id.* at 12, 17.

265. CONG. BUDGET OFFICE, REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE (2017) (stating estimate of the Congressional Budget Office and the Joint Committee on Taxation that if a repeal of the ACA began in 2019, four million fewer people would have health insurance in 2019 and thirteen million fewer would have health insurance by 2027).

266. 42 U.S.C. § 426(f) (2018).

have insurance through Medicaid.²⁶⁷

A third benefit for cancer survivors arises from the fact that many of the residual limitations involve conditions like cognitive limitations, depression, and fatigue.²⁶⁸ As the report notes, these conditions are among the most difficult to assess and adjudicate under current disability law.²⁶⁹ Thus, awards of benefits for these conditions are long-delayed, exacerbating the financial impact of cancer.²⁷⁰ Yet these conditions may, in some cases, be easily accommodated.²⁷¹ This program has the advantage of encouraging both employers and employees to maintain the employment relationship, with accommodations that improve the prospects for long-term employment. Under the existing program, both parties have an incentive to end the relationship, for employees cannot get benefits if they are able to work at all and employers bear the cost of accommodations.²⁷²

Although the program only lasts for two years and some cancer survivors have residual limitations for longer, if the employer can see the benefit of accommodation, it may continue to accommodate beyond the requisite two years and indeed the ADA may require it.²⁷³ Additionally, the program would allow insurers to provide a longer income period, for example, if employees are able to work part-time and thus collect a lower monthly income payment.²⁷⁴ Requiring, rather than merely allowing extension of reduced income payments for workers who can work part-time would be even better. Further, in some cases, vocational rehabilitation may enable a job change that better suits the employee's new limitations.²⁷⁵ Individuals who cannot work with a reasonable accommodation

267. *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility> (last visited Jan. 15, 2018); *Medicaid Expansion & What It Means for You*, DEP'T OF HEALTH AND HUMAN SERVICES <https://www.healthcare.gov/medicaid-chip/medicaid-expansion-and-you> (last visited Jan. 15, 2018); See The Henry J. Kaiser Family Foundation, *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults*, KFF (Jan. 19, 2017) <https://www.kff.org/medicaid/fact-sheet/where-are-states-today-medicaid-and-chip> ("32 states cover parents and other adults with incomes up to 138% FPL [Federal Poverty Level] in Medicaid [and]. . . three states (AK, DC, and CT) extend eligibility for parents and/or other adults to levels higher than 138% FPL").

268. See *supra* note 12 and accompanying text.

269. See Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 12.

270. See *id.*

271. See *id.*

272. See *id.* at 1, 5, 12, 13, 17.

273. Merely providing the accommodation for a period of time does not conclusively establish that it is reasonable, but it will be evidence to support that conclusion. See *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 542, 545-46 (7th Cir.1995).

274. See Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 21, 22.

275. See *id.* at 6, 17, 18, 20.

can move to permanent SSDI.²⁷⁶

The program would reduce reliance on private disability insurance, although employees could still purchase such insurance and employers could still provide additional coverage. Some employers might desire to do so to recruit and retain employees. Combining the program with expanded paid leave, which would precede any period of disability income, would also ease financial hardship for many survivors.

Because of the financial challenges in the federal disability program, the time may be right for a proposal for change to have the chance for success, particularly one that aims to encourage retention of employment for those individuals who are able to return to work or continue to work after some period of total or partial disability. The Autor and Duggan proposal fits best with the needs of cancer survivors, although there are others. One proposal recommends experience rating for SSDI payments to encourage employers to accommodate and rehabilitate employees, as well as incentivizing them to provide short term disability insurance.²⁷⁷ Management incentives, however, seem less likely than government requirements to provide the necessary benefits to those who need them, particularly for lower wage workers who are easily replaced. Liebman and Smalligan propose a variety of demonstration projects to test innovations.²⁷⁸ Of those they recommend, the one most helpful to cancer survivors is Autor and Duggan's proposal. As suggested, a pilot program could help demonstrate the benefits of the proposed changes.

Given the challenges of Social Security reform, it is worth considering other alternatives that would benefit cancer survivors. The second best option is expansion of state public disability benefits.

B. A Partial Fix

If a comprehensive Social Security revision along the lines described above is not politically feasible, an alternative would be an expansion of state temporary disability programs similar to those currently existing in five states.²⁷⁹ This could be done through a social insurance program with

276. See *id.* at 7, 24.

277. See Richard V. Burkhauser & Mary C. Daly, *Social Security Disability Insurance: Time for A Fundamental Change*, 31 J. POL'Y ANALYSIS & MGMT. 454, 459 (2012).

278. See Jeffrey B. Liebman & Jack A. Smalligan, *Proposal 4: An Evidence-Based Path to Disability Insurance Reform*, THE HAMILTON PROJECT (2013), https://www.brookings.edu/wp-content/uploads/2016/06/THP_15WaysFedBudget_Prop4.pdf.

279. Professor Aleta Allen advocates such expansion to assist with the problem of medical bankruptcies. Allen, *supra* note 43, at 1361. Of course, these programs are not perfect and have been subject to criticism for administrative inefficiency and inadequacy of benefits. See, e.g., Knudson,

a state administered fund, such as Rhode Island uses,²⁸⁰ a program that allows private alternatives like California and New Jersey,²⁸¹ or a mandate to employers to purchase private insurance with a state reserve fund for those who are unemployed at the time of disability, similar to Hawaii.²⁸²

None of these existing programs cover a time period as extensive as the proposed Social Security revision and any new program that is politically feasible would likely be similar. But a temporary disability program with payments for six months to a year would mitigate some of the financial hardship that accompanies cancer treatment. Ideally the program should provide job protection for employees accessing it so that those able to return to work at the expiration of disability could return to their prior employment. No state law currently contains such protection, but the shorter time period of disability coverage makes job protection more feasible.²⁸³ Given the challenges of proving disability discrimination in hiring,²⁸⁴ and the tendency for employees on disability rolls to remain on disability rolls,²⁸⁵ providing job protection is one of the best ways to keep employees in the workforce. And keeping employees in the workforce if possible is beneficial to the employees who will earn more than on disability, as well society, which will benefit from their productivity, their increased spending, and the fact that they are not drawing on disability funds.

Another way to keep employees in the workforce is to ensure that the temporary disability programs include vocational rehabilitation. Private disability insurance typically includes coverage for vocational rehabilitation.²⁸⁶ Vocational rehabilitation, which includes services such as aptitude testing, counseling, assistive technology and skills training, would help employees return to prior jobs or, if unable to work in the prior position, obtain a new one.²⁸⁷

Like California and Rhode Island,²⁸⁸ the law should cover partial disability that follows total disability, as many cancer survivors have residual

supra note 127, at 549-51.

280. Allen, *supra* note 43, at 1368.

281. *Id.*

282. *Id.* at 1362.

283. The law could provide exceptions for very small employers or employers with jobs that are difficult to fill on a temporary basis. The law could also permit permanent replacement of employees who obtain permanent disability benefits from another source.

284. BAGENSTOS, *supra* note 2, at 127-28.

285. See *supra* note 243 and accompanying text.

286. Autor & Duggan, *Proposal for Modernizing*, *supra* note 75, at 18.

287. *Id.* at 18-20.

288. See *supra* note 100 and accompanying text.

partial disability. Workers with partial disability should be eligible for reduced benefits. Covering partial disability is another vehicle for encouraging employees to remain in the workforce.

And finally, the maximum length of eligibility, and the amount of income provided should be set to provide adequate support. California's fifty-two-week eligibility period would cover many cancer survivors.²⁸⁹ New Jersey's wage replacement rate of two-thirds of the individual's average weekly wage²⁹⁰ is similar to many other disability systems, designed to provide reduced income to encourage return to work but sufficient for basic needs. California's law provides for a higher wage replacement rate for lower wage workers, which is a provision worth emulating to help lower income workers cover basic needs.²⁹¹ The maximum income payment should be similar to Rhode Island's, which is eighty-five percent of the state's average weekly wage,²⁹² or California's, which is approximately one hundred percent of the state's average weekly wage.²⁹³

The major challenge for implementing this proposal is funding. Several of the existing state programs were initially funded using mechanisms not currently available. Rhode Island, California, and New Jersey established their programs at a time when employees in those states contributed to unemployment insurance.²⁹⁴ Each state substituted contributions to the state's disability fund for the employee contributions to the unemployment insurance fund and pursuant to a federal law enacted in 1947, transferred prior employee contributions from the unemployment trust fund to the disability trust fund.²⁹⁵ Thus the state funds were able to pay out benefits relatively soon after establishment of the program. This existing source of funding from employees made the creation of the programs more politically palatable.²⁹⁶ There is no similar funding mechanism today. Indeed, unemployment insurance funds tend to be underfunded because of legislators' disincentives to allocate money to such funds when the economy is strong in order to be prepared when the economy weakens

289. Williamson, *supra* note 104, at 18.

290. N.J. STAT. ANN. § 43:21-40 (West).

291. See CAL. UNEMP. INS. CODE § 2655(d)(2). Effective in 2018, lower wage workers receive 70% of pre-disability income while higher wage workers received 60%. *Id.*

292. R.I. GEN. LAWS § 28-41-5(a)(1). New York's limit of \$170 per week is far too low. Williamson, *supra* note 104, at 35.

293. Williamson, *supra* note 104, at 35.

294. *Id.* at 10-11, 15-16, 24.

295. *Id.*

296. *Id.* at 10, 14-15, 24. New Jersey also required employer contributions, feasible at the time because of other changes to the unemployment insurance program which balanced out the cost. *Id.* at 24.

and unemployment is higher.²⁹⁷ The existing incentives in the unemployment insurance system encourage benefit reductions rather than increased funding.²⁹⁸

A system reliant on a state fund would have to delay income payments to allow for time to build up the fund through employee and/or employer contributions,²⁹⁹ unless, as is unlikely, the state appropriated initial funding. Existing systems vary in terms of funding sources, but with a new system, funding should be shared between employers and employees or allocated to employers who have greater resources in most cases and benefit from the insurance.³⁰⁰

An insurance mandate avoids some of the funding issues by requiring employers to purchase insurance instead of, or in addition to, establishing a state fund.³⁰¹ The cost is not substantial, and allowing employers to charge part of the cost to employees might reduce some of the organized political opposition. A mandate system would not cover workers between jobs, however, unless, like Hawaii and New York, the state establishes a fund for such a purpose.³⁰²

Any system that requires or allows private insurance, however, imposes an administrative cost of enforcement to insure compliance.³⁰³ Effective enforcement with substantial fines and penalties for failure to

297. Brian D. Galle, *How to Save Unemployment Insurance* 20-25 (August 21, 2017), ARIZ. ST. L.J., (forthcoming), available at SSRN: <https://ssrn.com/abstract=3023430>.

298. *Id.* at 4.

299. *See supra* notes 105-06 and accompanying text (describing newly enacted paid leave laws with payments beginning in 2020).

300. Allen, *supra* note 43, at 1367-68.

301. As evidenced by the Patient Protection and Affordable Care Act, however, insurance mandates can be controversial. *Id.* at 1369.

302. These funds also pay benefits to employees whose employer fails to carry insurance. Williamson, *supra* note 104, at 36. In addition to substantial fines and penalties, New York law allows the state to seek reimbursement for benefits paid to employees if the employer fails to carry insurance. *Id.* at 36. Hawaii law does not contain similar protections or enforcement mechanisms. *Id.* at 36-37. New York established this state fund through a temporary payroll deduction for employees and continues to support it with periodic assessments on insurers. *Id.* at 33.

303. *See supra* notes 115-16 and accompanying text. Professor Allen suggests that using a state fund insures better quality control in claim processing as well. Allen, *supra* note 43, at 1368-69. Knudson, in contrast, argues that monitoring compliance with a mandate could be easily handled by state insurance regulators and would be further enhanced by employee monitoring based on their self-interest. Knudson, *supra* note 127, at 553-54. Relying on employee monitoring, however, runs the risk that the most vulnerable workers will be left out as they are unlikely to blow the whistle on their employer. Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 568-69, 582-91(2010). Professor Gleeson found through interviews of immigrant workers in northern California and Texas that these workers chose not to report instances of discrimination for multiple reasons, including avoiding problems with their employers and the lack of knowledge legal protections extended to them. *Id.*

maintain insurance, like the New York law,³⁰⁴ would be an essential component of a successful system. The more effective the enforcement, the greater the enforcement cost, although significant fines and/or a small tax on employers or insurers could fund the enforcement cost.³⁰⁵

Building on existing systems could also reduce the cost. While the early state disability systems were modeled on unemployment insurance, the unemployment insurance administrative apparatus cannot be used to administer other laws absent a change in federal law.³⁰⁶ New York's disability law is administered by its workers' compensation agency,³⁰⁷ a model that might work for other states as well. Workers' compensation laws, like disability laws, require a determination of whether an injury or medical condition is partially or totally disabling, as well as whether the disability is temporary or permanent.³⁰⁸ They also impose an insurance mandate on employers.³⁰⁹ The systems vary so each state would have to determine whether the existing system could be used effectively for disabling non-work-related injuries and illnesses.³¹⁰ Where possible, however, adding administration of the new law to the existing agency with similar responsibilities would reduce costs.

An insurance mandate has other implications. Where the employer bears the cost, as in an insurance mandate, the employer might be inclined to discourage collection of benefits or discriminate in hiring against individuals perceived to be more likely to qualify for such benefits in the future.³¹¹ At the same time, however, the employer and insurer might have a greater incentive to accommodate the employee and provide rehabilitative services in order to accelerate a return to work.³¹² Additionally using a mandate would permit employers to purchase insurance with a longer period of benefits if they chose.

States might vary in how they meet the funding challenges of

304. Williamson, *supra* note 104, at 33-34.

305. *See supra* note 103.

306. Williamson, *supra* note 104, at 9-10, 14-15, 21-22, 48-49.

307. *Id.* at 33.

308. *Id.* at 32-33.

309. *Id.* at 32.

310. Williamson suggests that states use this model to provide for paid family and medical leave. *Id.* at 50-57.

311. *See supra* notes 123-24 and accompanying text.

312. Employers may get a premium reduction if employees return to work. Knudson, *supra* note 127, at 558-59. *See also* Jeffrey Smith, *3 things to consider when implementing a disability management program*, EMP. BENEFIT NEWS, Jan. 2, 2018, <https://www.benefitnews.com/opinion/3-things-to-consider-when-implementing-a-disability-management-program>, (noting that many disability insurers have consultants and experts to work with employers to help with accommodations and support to help employees with disabilities remain productively at work).

establishing a program. But whether a mandate alone, an exclusive state fund, or a state fund with private options, the program should contain the essential elements set forth above and if there are private alternatives, an adequate enforcement mechanism. While mandatory state disability insurance will not fill all the gaps in the current system, it would provide substantial added protection for cancer survivors with disabilities lasting less than a year.

C. Remaining Gaps

Neither of these two proposals resolves all of the issues facing cancer survivors with disability. Neither addresses the adequacy of disability income and survivors may still have financial problems depending on their own particular financial situation. In addition, the proposals do not deal with problems within the systems, such as delays in processing applications, insurers who act in bad faith or recklessly,³¹³ or the difficulty of establishing disability on the basis of some of the common conditions of cancer survivors such as fatigue and cognitive limitations.³¹⁴ These issues need to be addressed as well to improve the disability system for cancer survivors.

Nevertheless, each proposal would be a significant improvement over the current system, which leaves many cancer survivors without income during their treatment and recovery, leading to financial difficulties that exacerbate health issues. Given the current trend of expanding paid leave, the disability income systems will need to be integrated with available paid leave. Paid leave is preferable as it typically provides 100 percent of pre-cancer income, but it is unlikely that paid leave will expand to cover the time away from work that many need for treatment and recovery. Thus, a combination of expanded paid leave and effective disability income, along with accommodations for disabilities, will be necessary to

313. See, e.g., *Salomaa v. Honda Long Term Disability Plan*, 642 F.3d 666, 678 (9th Cir. 2011) (finding plan's explanation of denial of benefits "shifting," "inconsistent," and "illogical") and further stating that "failing to pay out money owed based on a false statement of reasons for denying is cheating, every bit as much as making a false claim."); *Lauder v. First Unum Life Ins. Co.*, 76 Fed. App'x 348, 350 (2d Cir. 2003) (finding insurer acted in bad faith and took frivolous positions in litigation); *Curtin v. Unum Life Ins. Co. of Am.*, 298 F. Supp. 2d 149, 159 (D. Me. 2004) (awarding the plaintiff attorney's fees as a deterrent because the insurance company acted with "a low level of care to avoid improper denial of claims at great human expense.").

314. See, e.g., *Salomaa*, 642 F.3d at 678 (overturning plan's denial of plaintiff's disability claim based on chronic fatigue syndrome, finding plan abused its discretion but noting that "[o]ne can understand the frustration of disability plan administrators with claims based on such diseases as chronic fatigue syndrome and fibromyalgia. Absence of objective proof through x-rays or blood tests of the existence or nonexistence of the disease creates a risk of false claims.").

relieve the financial stress of cancer.

VII. CONCLUSION

While the divided political climate in the United States creates little hope for major change, cancer is so ubiquitous that it affects nearly everyone, either directly or through a close friend or family member. That effect might create a vehicle that would generate support for modernizing the disability income system in the United States. Modernization would benefit not only cancer survivors, but also others who suffer from loss of income as a result of temporary or permanent disability.

Reducing financial stress would increase prospects for treatment compliance and recovery, while improving the lives of cancer survivors and their families. A modern disability income system also might reduce some of the cost of cancer for society by enabling some survivors to remain in or return to the workforce. Unfortunately, medical developments, while promising, are unlikely to eliminate cancer in the near future. As a result, almost everyone will be impacted by the disease. Improvements in treatment, medical, legal and financial, will bring widespread benefits to Americans with cancer and their families.

Appendix A*

*The data in the chart comes from the article if there is no citation in the chart.

Program	Coverage	Eligibility	Disability	Waiting Period	Amount of Benefits	Duration of Benefits	Vocational Rehab
SSDI	Worked in covered employment	Recent work of sufficient duration and complete inability to work	Total for at least one year	Five months	Based on earnings Average \$1173	So long as disabled	Work incentive programs
SSI	Low income and assets	Complete inability to work and meet income and asset requirements	Total	None	Average \$564	Same as SSDI	Work incentive programs
Private Short Term	Provided by employer to 40% of workers	Depends on plan	Defined by plan	Depends on plan	Usually 60% of income	Depends on plan	Depends on plan
Private Longterm	Individual and/or employer purchase; usually higher paid employees; 32% of employees have employer-provided coverage	Depends on plan	Defined by plan	Depends on plan	Usually 60% of income with offsets for other disability income	Depends on plan	Depends on plan but often included
Rhode Island	Work for covered employer in state	Earn 400 times the minimum wage during the base period	Temporary total and partial following total	7 days 28 R.I. GEN. LAWS § 28-41-11 (c), 2012 R.I. Pub. Ch. 42 § 3.	4.62% of the wages paid in the highest calendar quarter of the base period with max of 85% of the statewide average weekly wage R.I. GEN. LAWS § 28-41-5(a)(1).	Up to 30 weeks	No
New Jersey	Work for covered employer in state	Earn \$168/week during twenty weeks	Temporary total	First week paid if worker will qualify for benefits for at least three consecutive weeks thereafter. N.J. STAT. § 43:21-38.	2/3 of average weekly wage with max of 53% of the statewide average weekly wage N.J. STAT. § 43:21-40.	Up to 26 weeks	No
Hawaii	Work for covered employer in state	Earn \$400 during one year eligibility period	Temporary total	7 days HAW. REV. STAT. § 392-24	58% of the average weekly wage rounded off with a max HAW. REV. STAT. § 392-22	Up to 26 weeks	No
New York	Work for covered employer in state	Four consecutive weeks of employment	Temporary total	7 days N.Y. WORKERS' COMP. L. § 12.	50% of average weekly wage with max N.Y. WORKERS' COMP. L. § 204(2)(b)	Up to 26 weeks	No
California	Work for covered employer in state	Earn \$300 during one year eligibility period	Temporary total and partial following total	7 days. CAL. UNEMP. INS. CODE § 2627(b)(1)	60% of wages with max; 70% for low wage workers	Up to 52 weeks	No
Railroad	Railroad employees	Ten years of service and total and permanent disability or occupational disability	Total and permanent but also a temporary disability program	Five months	Average \$2920 per month	So long as disabled	No
Veterans Disability	Vets	At least 10% disabled from service and no dishonorable discharge	At least 10% permanent	Effective date determined by VA	Based on extent of disability	So long as disabled	Yes*
Veterans DIC	Surviving spouses or children	Service member died from service connected disabling condition	Total	Payable as of first day of the month when the death occurred	Depends on severity of disability and dependency status Minimum is \$3,700.43 ^b	Spouse can lose by remarriage under certain circumstances and children age out at 18 or 23 if still in school	N/A
Veterans SMC	Vets and families	Specific disabilities or needs	Service connected	Effective date determined by VA	Basic Monthly Rate = \$ 1,154 with additional allowances available (38 U.S.C. §1311(a)(1)) ^c	Duration of disability	Veteran gets with Disability
Workers Comp	Most employees though depends on the state	Work-related injury or illness	Total and partial, temporary and permanent	Depends on state but short	About 2/3 of income with cap	Duration of disability	Yes

^a U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF PUBLIC AND INTERGOVERNMENTAL AFFAIRS, *Federal Benefits for Veterans, Dependents and Survivors, Chapter 3, Vocational Rehabilitation and Employment*, https://www.va.gov/opa/publications/benefits_book/benefits_chap03.asp.

^b U.S. DEP'T OF VETERANS AFFAIRS, *Compensation, Special Monthly Compensation (SMC) Rate Table, Effective Dec. 1, 2017*, https://www.benefits.va.gov/COMPENSATION/resources_comp02.asp.

^c U.S. DEP'T OF VETERANS AFFAIRS, *Compensation, Dependency and Indemnity Compensation, Effective Dec. 1, 2017*, https://benefits.va.gov/Compensation/current_rates_dic.asp#BM01.