

Legal and research summary sheet: Phased retirement

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LEGAL AND RESEARCH SUMMARY SHEET: PHASED RETIREMENT

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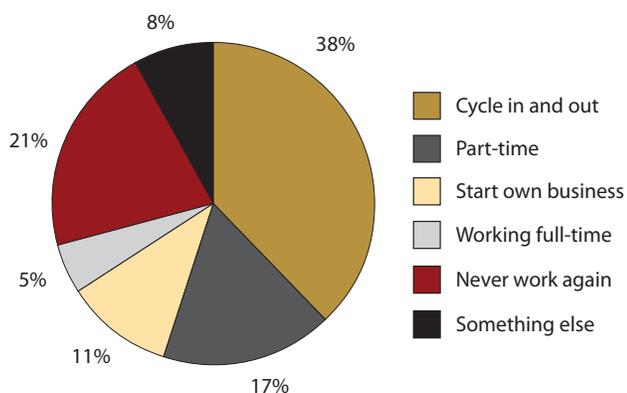
Introduction

During the first decade of the 21st century, significant attention has been paid to the widely anticipated retirement of the Baby Boom generation from the U.S. workforce. Employers and policymakers have considered important questions such as:

- What percentage of older workers are likely to retire on a full-time basis between the ages of 62-65?
- What might the implications of a “mass exodus” of Baby Boomers mean for different types of businesses?
- Which types of policies and practices might encourage some older workers to extend their labor force participation, thereby enabling employers to retain the knowledge and skills of these experienced workers?

Of course, older workers are also engaged in conversations about workplace innovations that might offer them more employment and employment-to-retirement choices. Surveys consistently find that older workers (particularly those aged 50 and older) plan to work past the traditional retirement ages of 62-65 years. However, the majority of older workers indicate that they would prefer not to work on a full-time or year round basis. As indicated by Figure 1 below, a recent Merrill Lynch Survey conducted by Harris Interactive & Dychtwald (2006) found that 38% of Baby Boomers would like to be able to cycle in and out of work.

Figure 1:
 “Next Stage” Preferences Among Older Workers:
 Ideal Plan for Living in Retirement



Source: Harris Interactive & Dychtwald, 2006¹

There is widespread interest in examining options that could enable older workers to move gradually from full-time employment to partial- or full-retirement. However, employers and older workers have raised questions about the opportunities and the constraints associated with the consequences of phased retirement.

This Legal and Research Summary Sheet provides information about the experiences of older workers and employers with phased retirement. The advantages and challenges associated with the use of phased retirement by employees in different types of employment situations are highlighted in summary tables.

**This document is meant as a general overview,
 and it is not meant as legal advice.**

1. What is phased retirement?

Currently, there is no single definition of phased retirement that has been accepted by human resources/employee benefits personnel, researchers, or policy makers. Furthermore, at present, there is no legal definition of phased retirement. However, “[m]ost scholars and practitioners...limit the concept [of phased retirement] to continued work past normal retirement for the same employer or employers within the same system”.²

The following characterizations have been suggested by various groups with an interest in phased retirement:

Human Resources Definition: According to the Society for Human Resource Management, phased retirement is: “A work schedule arrangement that allows employees to gradually reduce their full-time hours over a period of time”.³

Research Definition: “The basic idea of phased (or gradual) retirement is that an older worker remains with his or her employer while gradually reducing work hours and effort”.⁴

Proposed Legal Definition: In a recommendation to the Secretary of Labor, the Advisory Council on Employee Welfare and Pension Plans suggested the following definition: “...phased retirement means a gradual change in a person’s work arrangements as a transition toward full retirement. This may involve a change of employers (including self-employment), a change of career or a reduction in the number of hours worked. As the focus is on how and on what terms people continue working after they are eligible for retirement benefits, the re-employment of retirees, whether or not it was anticipated when they first retired, is also sometimes included in discussions of phased retirement”.⁵

2. Employees’ Experiences

It is anticipated that increased numbers of older workers will want to continue their labor force participation.

- AARP reports that the top three reasons for working during retirement are: needing the money (61%), a desire to stay mentally active (54%), and the need for health benefits (52%).⁶

Phased retirement is an option that appeals to many older workers.

- A majority of workers over the age of 50 indicate that they would like to have a phased retirement arrangement at some point.⁷

Approximately 1 of every 8 older workers between the ages of 63 – 73 could be considered “phasers”.

- Analyses of the Health and Retirement Study found that, in 2004, 12.3% of individuals between the ages of 63-73 years could be considered “phasers” (in phased retirement situations). Of these “phasers”, 39.8% were working part-time for the same employers for whom they had previously worked on a full-time basis, and 44.9% of the “phasers” were working for different employers. Among the study participants who were retired in 2004, nearly half (47.6%) had “phased” into retirement, with 16.4% having gone from full-time to part-time work situations while working for the same employer before transitioning into full-time retirement.⁸

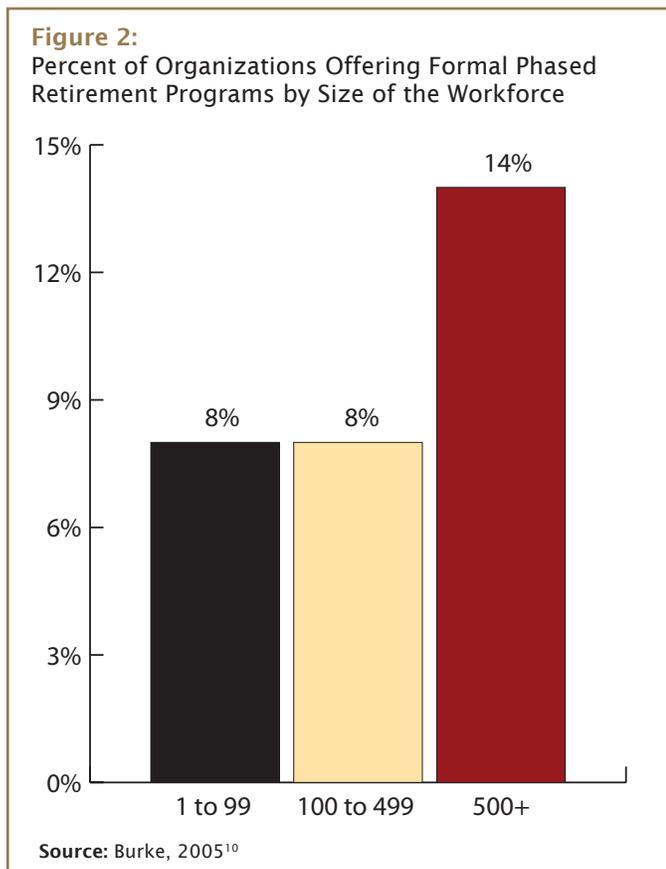
² The Employee Retirement Income Security Act (“ERISA”) established the Advisory Council on Employee Welfare and Pension Plans (“Advisory Council”). The Advisory Council is a bipartisan council consisting of 15 members appointed by the Secretary of Labor to represent specified groups and fields that are involved in the employee benefits world. The Advisory Council meets four times a year, and it makes recommendations to the Secretary of the Department of Labor regarding functions carried out under ERISA. The Advisory Council is not part of the Department of Labor.

3. Employer Policies and Practices

Phased retirement is a relatively new concept; therefore, only a few studies about this flexible work arrangement have been conducted to date.

Although a majority of businesses appear to be confident that some type of phased retirement could be worked out for some of their employees, few employers have any formal phased retirement policies.

- The 2006 National Study of Business Strategy and Workforce Development conducted by the Center on Aging & Work found that 25.6% of the employers reported that “most/all” of their full-time employees had access to some form of phased retirement.⁹



- A recent survey conducted by the Society of Human Resource Management of its membership found that only 10% of the HR respondents stated that their workplaces had formal phased retirement programs.¹⁰
- The Watson Wyatt Worldwide Retirement Survey found that the prevalence of phased retirement varies by industry sector, with this option being most common in the healthcare/social assistance, education and manufacturing industries.⁷

Employers who are interested in retaining the competencies and knowledge of their older workers might be interested to know that access to phased retirement can extend the labor force participation of older workers.

- According to the Employment Policy Foundation, access to phased retirement increases the average retirement age of women by 21 months. For men, the average increase is approximately 5 months.¹¹

4. Legal Perspectives

Introduction

Current law does not explicitly provide for formal phased retirement programs. However, certain federal (and some state) laws and regulations could affect how an employer might structure a phased retirement program. For example, the Internal Revenue Code (“Code”), Social Security laws, the Employment Retirement Income Security Act (“ERISA”), and the Age Discrimination in Employment Act (“ADEA”) could impact:

- whether an employer offers a formal phased retirement program;
- a phased retiree’s employment status;
- the distribution of pension or retirement benefits;

- certain tax deductibility issues for the employer;
- whether an employee may take advantage of a phased retirement program; and
- whether an individual might have access to health care coverage.

It should also be kept in mind that laws and regulations applicable to pension and retirement plans (particularly defined benefit plans) frame choices and decisions about phased retirement. However, because these laws and regulations do not explicitly provide for formal phased retirement programs, many questions about phased retirement are either not “answered” or there is ambiguity regarding interpretation.

This section of the *Legal and Research Summary Sheet* describes some of the different approaches to phased retirement that employers may allow right now, within the constraints of current law. This section highlights the advantages of each approach for employers and employees and outlines challenges for both employers and employees to consider. The focus of this discussion is on private pension and retirement plans, and it does not address any Social Security implications or the federal government retirement plan.*

Current Federal Laws

The Code and ERISA are the two main laws that regulate private employer employee benefit plans.

- The Code contains various requirements that a pension or retirement plan must meet to retain its tax qualification status. If a pension or retirement plan does not meet the Code’s qualification requirements, the employer is not entitled to a tax deduction for its contributions, the pension or retirement trust is taxed on its earnings, and participants immediately are taxed on their vested benefits under the plan.
- ERISA contains, among other provisions, reporting and disclosure requirements, pension funding rules, fiduciary requirements, and various health care provisions.

One of the main legal issues relating to phased retirement is under what circumstances an individual may access pension or retirement funds to supplement part-time income. Under the Code, whether an individual may have access to pension or retirement income before full retirement will depend on the type of pension or retirement plan.

There are two types of pension and retirement plans: defined benefit plans and defined contribution plans.** For many years, the Internal Revenue Service (“IRS”) interpreted the Code and applicable regulations to preclude an individual from receiving a distribution from a defined benefit plan before an individual reaches the plan’s normal retirement age (which varies from plan to plan, but often is age 65) or terminates employment.*** This meant that if an employee was younger the plan’s normal retirement age, the individual must completely terminate employment to be able to draw part (or all) of the individual’s pension benefit. This rule often resulted in an employee who wanted to phase into retirement and receive partial (or full) pension distributions either fully terminating and going to work for a different employer or returning to the prior employer as an independent contractor (which also has its own challenges as described in the charts below).

The Pension Protection Act of 2006 amended both ERISA and the Code to provide that a distribution from a plan, fund or program will be treated as being made from a pension or retirement plan even if the distribution is before

* It is worth noting that if an employee is below Social Security’s normal retirement age (currently 65 and 6 months) and elects to begin early Social Security retirement benefits, in addition to the early commencement reduction, the Social Security retirement benefits may be reduced if the individual earns more than a certain amount of money per year (\$12,960 for 2007).

** A defined benefit plan makes a promise as to the final benefit (based on a set formula) that will be paid to an individual upon retirement. Defined benefit plans are often referred to as pension plans. Under a defined contribution plan, a separate account is established for each individual participant. Defined contribution plans often are referred to as retirement plans. Types of defined contribution plans include profit sharing plans and Code Section 401(k) plans, which may include an employer matching contribution. Both employers and employees often contribute to defined contribution plans.

*** The IRS considers when pension funds may be distributed to be a qualification requirement. Therefore, if amounts are distributed before normal retirement age without an individual terminating employment, the plan could be disqualified.

termination of employment to an individual who is at least age 62 and who is not separated from employment at the time of the distribution.¹² This amendment allows distributions from defined benefit plans to individuals who may want to phase into retirement before the plan's normal retirement age without formally terminating employment. In January 2007, the IRS issued Notice 2007-8 in which the IRS requested comments on several issues presented by the age 62 in-service distributions under the PPA, including whether the IRS should finalize the 2004 proposed phased retirement regulations (see the following section for a discussion of these proposed regulations).

In May 2007, the IRS issued final regulations defining "normal retirement age."¹³ Although the main focus of these regulations was the definition of normal retirement age, the regulations also impact phased retirement programs in defined benefit plans. First, the regulations explicitly state that age 62 in-service distributions do not constitute "retirement". Secondly, under these regulations, a defined benefit plan may not provide for distributions before normal retirement age solely based on an employee's reducing his or her hours. Effectively, these regulations preclude any formal phased retirement programs within a defined benefit plan either before an individual reaches age 62 or the plan's normal retirement age.

With respect to defined contribution plans, under the Code, an individual cannot receive the individual's own contributions before termination of employment or reaching age 59 & ½. Again, this rule may result in a person who is below age 59 & ½ and who would like to phase into retirement and receive distributions of the person's own contributions terminating employment and going to work for a different employer.*

Current Policy Proposals

Over the past years, there have been several policy proposals on phased retirement. To date, federal proposals have focused on the distribution of pension benefits under defined benefit plans. Highlights of these proposals include:

IRS - In 2004, the IRS issued proposed regulations explicitly providing for phased retirement programs for defined benefit plans.^{14,15} One of the major issues that the proposed regulations address is to allow an individual to receive a partial distribution from a defined benefit plan before reaching the plan's normal retirement age and without terminating employment. Even if the proposed regulations were finalized, similar to many other plan design options, such as the final benefit formula, the employer, as plan sponsor, would have the discretion of whether to offer phased retirement benefits under a defined benefit plan.

The IRS has not finalized the proposed regulations, so some of the legal issues relating to phased retirement for those who have access to defined benefit plans are still in question. Furthermore, it is unclear what impact age 62 in service distributions will have on the IRS' willingness to issue such regulations.

Finally, the proposed regulations do not (and cannot) address issues outside of the IRS' jurisdiction, such as the ADEA, which likely would be violated if an employer placed an upper age limit on eligibility to participate in a phased retirement program.

Federal Government Retirement Plan - In President Bush's 2007 budget proposal, the President requested approval of legislation that would allow individuals covered by the Civil Service Retirement System to work part-time in the latter stages of their careers without facing a reduction in their final retirement benefits.

* In addition, both distributions may be subject to an early withdrawal penalty.

5. Current Implementation of Phased Retirement Programs: Key Issues for Employees and Employers

Employees who consider whether to phase into retirement may have concerns about questions such as:

- If the individual continues to work for the same employer on a reduced schedule, would the individual have access to pension or retirement benefits to act as replacement income due to the reduced hours?
- If the individual begins working a reduced schedule (e.g. part-time), would the individual remain eligible to participate in employer-sponsored employee benefit plans (especially the health care plan)?
- What impact might the reduced schedule (and pay) have on final, full retirement benefits from the pension or retirement plan?

Employers who might want to consider offering a formal phased retirement program may have concerns such as:

- Ensuring that a pension plan remains qualified if it allows individuals to receive partial distributions before full retirement or age 62.
- Limiting administrative burdens for both the pension or retirement plan and general human resources functions.
- Limiting the employer's exposure to potential lawsuits that may result from a formal phased retirement program.

Selected Phased Retirement Employment Statuses -Advantages and Challenges to Consider-

Tables 1 and 2 below summarize information about two basic phased retirement situations:

Table 1: outlines phased retirement employment situations where the employee fully retires and then goes back to work.

Table 2: outlines phased retirement employment situations where the employee partially retires and works a reduced work schedule.

Each table highlights the advantages and challenges of each approach, including identifying the legal, policy and practical issues to consider when implementing a phased retirement program.

Table 1: Full Retirement ⇌ Phased Retirement

Employment STATUS	Advantages for EMPLOYEE	Advantages for the EMPLOYER	Challenges
Employee fully retires and returns as a part-time employee for prior employer.	<ul style="list-style-type: none"> ▪ Allows an employee to receive supplemental income during retirement. ▪ Gives employee flexibility in work schedule. ▪ Employee earns extra income during retirement. 	<ul style="list-style-type: none"> ▪ Employer retains the experience and knowledge of the employee. ▪ Employer may postpone search for and training of new employees. ▪ Cost savings to employer for hiring part-time employees who may not be eligible for any employee benefits. 	<ul style="list-style-type: none"> ▪ Because of part-time status, an employee may not be eligible for any employer-sponsored benefits, including health insurance, pension accruals or profit sharing contributions. ▪ COBRA continuation coverage may not bridge the employee's health care coverage to Medicare eligibility. ▪ If the employee is eligible for the employer's active employee health care plan and is over age 65, the employer's plan is primary and Medicare is secondary. ▪ If the employee works too many hours, defined benefit pension payments may be suspended.* ▪ If the employee is eligible to participate in a pension plan, computation of final benefit is more complicated.

* Under both ERISA and the Code, if an individual fully retires and returns to the employee's prior employment, if the individual works more than 40 hours in a calendar month, the plan may provide that any pension payments are suspended until the individual fully retires. It is within the plan sponsor's discretion to include such a provision in the plan.

Table 1: Full Retirement ⇨ Phased Retirement (Continued)

Employment STATUS	Advantages for EMPLOYEE	Advantages for the EMPLOYER	Challenges
Employee fully retires and returns as an independent contractor or consultant for prior employer.	<ul style="list-style-type: none"> ▪ Employee's pension benefit <i>most likely</i> would not be suspended because of employment status. 	<ul style="list-style-type: none"> ▪ Employer is not responsible for employee's employment taxes or benefits because of independent contractor status. ▪ Employer retains talent on an as needed basis. 	<ul style="list-style-type: none"> ▪ Employee will not be eligible for any employer-sponsored employee benefit plan because of employment status. ▪ COBRA may not bridge health insurance coverage until Medicare entitlement. ▪ Employee will be responsible for all employment taxes. ▪ Tax laws are unclear as to when or whether such arrangement is a termination of employment for purposes of receiving a pension or retirement benefit.* ▪ Actual work arrangement may not be that of an independent contractor, but rather an employee if the Darden test is met.**
Employee fully retires and returns as a full-time employee for prior employer.	<ul style="list-style-type: none"> ▪ Employee is eligible for all employee benefits available to other full-time employees. 	<ul style="list-style-type: none"> ▪ Employer retains talent without the expense of training. 	<ul style="list-style-type: none"> ▪ Less flexible arrangement. ▪ Pension benefits may be suspended while working full-time. ▪ If the individual is over 65, the employer's active employee health care plan will be primary over Medicare.
Employee fully retires and goes to work for a new employer as either a part-time or full-time employee or independent contractor or consultant.	<ul style="list-style-type: none"> ▪ Employee does not risk suspending defined benefit pension benefit from prior employer. 	<ul style="list-style-type: none"> ▪ Prior employer not subject to adverse tax consequences to pension plan or subject to ADEA claims. 	<ul style="list-style-type: none"> ▪ Employee may not be able to find a comparable position (pay, title, etc.) as with prior employer. ▪ Prior employer loses talent and experience of retiree. ▪ New employer must pay the cost of training (if necessary).

* Because of this uncertainty, an employer may require an individual to wait a set number of months before returning as an independent contractor to show that the initial termination was a valid retirement. This is necessary to maintain the plan's tax qualification status.

** See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) [holding that in determining whether an individual is an employee for purposes of ERISA, courts should apply the master-servant relationship under common law which considers the hiring party's right to control the manner and means by which the product is accomplished, and, in determining this, must take equally into consideration all of the following factors: "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989))]. See also Rev. Rul. 87-41, 1987-1 Cum. Bull. 296, 298-299 (setting forth 20 factors as guides in determining whether an individual qualifies as a common-law "employee" in various tax law contexts.)

Table 2: Partial Retirement ⇌ Phased Retirement

Employment STATUS	Advantages for EMPLOYEE	Advantages for the EMPLOYER	Challenges
<p>Employee partially retires and reduces schedule, receives partial distribution from pension or retirement plan.</p>	<ul style="list-style-type: none"> ▪ Employee reduces schedule but replaces lost earnings with partial retirement distribution. ▪ Employee may continue to participate in employer sponsored employee benefit plans, depending on the amount of the reduction of schedule. 	<ul style="list-style-type: none"> ▪ Employer retains talent and experience and may mitigate labor shortage. ▪ Employer postpones search for and training of new employees. 	<ul style="list-style-type: none"> ▪ Employee may lose eligibility for employer-sponsored health care and other employee benefit plans, depending on the amount of the reduction of hours. ▪ The Medicare as Secondary Payor rules are unclear as to whether the employer sponsored health care plan or Medicare would be primary for individuals over age 65, if the individual is eligible for retiree health care coverage versus active health care coverage. ▪ Employer sponsored life and disability insurance based on compensation would be reduced. ▪ Current tax laws do not permit a distribution from a pension plan before full termination, age 62 or reaching the plan's normal retirement age. ▪ Employee elective deferrals under Code Section 401(k) may not be distributed before termination of employment or age 59 & 1/2. ▪ Reduction in hours could result in reduction in final pension benefits for final average pay plans.* ▪ Reduction in hours could result in loss of benefit accruals in a defined benefit plan or eligibility for employer contributions in a profit sharing plan. ▪ Spousal survivor benefits may be reduced upon full retirement. ▪ Calculating the final full retirement benefit would be more complicated for defined benefit plans.
<p>Employee partially retires and reduces schedule without access to pension or retirement plan distributions.</p>	<ul style="list-style-type: none"> ▪ Reduces salary but secures pension and retirement benefits for actual, full retirement (if covered by such a plan). 	<ul style="list-style-type: none"> ▪ Less administrative complications for employers. 	<ul style="list-style-type: none"> ▪ Reduced pay may not be enough for the employee. ▪ Reduced hours may result in loss of eligibility for any employer-sponsored health and welfare plans, and limit the benefit accruals and contributions to pension and retirement plans without receiving distributions from such plans.
<p>Employee takes an extended leave of absence.</p>	<ul style="list-style-type: none"> ▪ Allows an employee to “try out” retirement. 	<ul style="list-style-type: none"> ▪ Less administrative complications for employers. 	<ul style="list-style-type: none"> ▪ Employee may not have enough savings to take an unpaid leave of absence. ▪ Employer may not have a replacement for the employee during the leave.

* Traditional defined benefit plans generally contain one of the following formulas used in calculating a benefit: final average pay, career average pay, or multiplier. Under a final average pay formula, a participant's benefit is based on the average compensation of a participant's final years of service (usually the last five or ten years) times all years of service. A career average formula is based on the average amount of compensation over a participant's total years of service under the plan times each year of service. Finally, a multiplier formula is a flat dollar amount multiplied by each year of service.

Table 2: Partial Retirement ⇨ Phased Retirement (*Continued*)

Employment STATUS	Advantages for EMPLOYEE	Advantages for the EMPLOYER	Challenges
<p>Employee reduces schedule, begins distribution from pension plan with distributions contributed to a separate account with full-retirement required within a set # of years. Often referred to as DROPs (deferred retirement option plans).*</p>	<ul style="list-style-type: none"> ▪ Employee continues to receive a salary. ▪ Advantageous for individuals who have reached the plan's maximum service credit level. ▪ The DROP provides for additional funds upon full retirement. ▪ The interest on these funds might be greater than additional accruals. 	<ul style="list-style-type: none"> ▪ Employer can better plan for hiring needs. ▪ Employer retains experienced employees. ▪ DROP account may be paid in a lump sum, partial lump sum or to purchase an annuity. 	<ul style="list-style-type: none"> ▪ The DROP may encourage employees to keep working who would have otherwise fully retired and who may not be critical to the employer's business needs. ▪ Individuals who have not reached the plan's maximum service limit may be harmed because benefit accruals generally stop upon entrance into the DROP. ▪ The amount contributed to the DROP may not equal future accruals. ▪ Administration and communication may be complicated.

Conclusion

This Legal and Research Summary Sheet has provided information about the experiences of older workers and employers with phased retirement. We have highlighted the advantages and challenges associated with employees' use of phased retirement in different types of employment situations. It is clear that this is a time of transition in the area of phased retirement. Older employees are changing their views of work and retirement; employers are seeking a range of strategies for recruiting and retaining experienced workers; policymakers are assessing the impact of regulatory and statutory changes on the options available for employers and employees. We have outlined the complex context of phased retirement to assist members of all three communities (employees, employers, and policymakers).

- ▶ **Workplace Flexibility 2010** is a campaign to support the development of a comprehensive national policy on workplace flexibility at the federal, state and local levels. The vision of Workplace Flexibility 2010 is an American workplace where viable flexibility options, benefiting employers and employees alike, are the standard. Workplace Flexibility 2010 believes that social change occurs best through a combination of voluntary action and government action. The American workplace is a complex, constantly changing, and rich human environment. We believe the best policy approach to workplace flexibility must therefore combine thoughtful and careful government regulation, robust voluntary and individualized efforts by employers, and governmental support of innovative voluntary efforts.
- ▶ **The Center on Aging & Work/Workplace Flexibility at Boston College**, funded by the Alfred P. Sloan Foundation, is a unique research center established in 2005. The Center works in partnership with decision-makers at the workplace to design and implement rigorous investigations that will help the American business community to prepare for the opportunities and challenges associated with the aging workforce. The Center focuses on flexible work options because these are a particularly important element of innovative employer responses to the aging workforce. The studies conducted by the Center are examining employers' adoption of a range of flexible work options, the implementation of them at the workplace, their use by older workers, and their impact on business and older workers.

The Center's multi-disciplinary core research team is comprised of more than 20 social scientists from disciplines including economics, social work, psychology, and sociology. The investigators have strong expertise in the field of aging research. In addition, the Center has a workplace advisory group (SENIOR Advisors) to ensure that the priorities and perspectives of business leaders frame the Center's activities and a Research Advisory Committee that provides advice and consultation on the Center's individual research projects and strategic direction.

* Generally only available to public employers who are not subject to ERISA or the Code's pension and retirement qualification requirements, such as coverage and nondiscrimination rules.

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