

112TH CONGRESS
1ST SESSION

H. R. 1322

To amend title I of the Employee Retirement Income Security Act of 1974
to provide protection for company-provided retiree health benefits.

IN THE HOUSE OF REPRESENTATIVES

APRIL 1, 2011

Mr. TIERNEY (for himself, Mr. GEORGE MILLER of California, Mr. JONES,
and Mr. ANDREWS) introduced the following bill; which was referred to
the Committee on Education and the Workforce

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 to provide protection for company-provided retiree health benefits.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Earned Retiree
5 Healthcare Benefits Protection Act of 2011”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds the following:

8 (1) Retired participants of group health plans
9 regulated by the Employee Retirement Income Secu-

1 rity Act of 1974 (ERISA) have been severely
2 harmed by the virtually unchecked practices of spon-
3 sors of such plans involving the post-retirement can-
4 cellation or reduction of earned health benefits con-
5 trary to assurances retirees received prior to retire-
6 ment that such benefits would be with them for life.

7 (2) Such widespread post-retirement reductions
8 in retiree health benefits has led to a crisis in retiree
9 health care in which retirees—

10 (A) have been unable to substitute indi-
11 vidual coverage for the group coverage they
12 lost, or, in order to obtain individual coverage,
13 have jeopardized their economic security in re-
14 tirement;

15 (B) because of preexisting medical condi-
16 tions cannot obtain substitute coverage that
17 they can afford without depleting their life sav-
18 ings or have been unable to obtain adequate
19 medical care or medical care they had relied on
20 to deal with serious illness;

21 (C) have sustained catastrophic illnesses or
22 injuries or otherwise experienced a marked de-
23 terioration in their medical conditions or health
24 as a result of post-retirement changes to their
25 medical benefits;

1 (D) have been transferred indiscriminately
2 into improperly or inadequately managed health
3 maintenance organizations or other managed
4 care entities, resulting in the worsening rather
5 than improvement of prior medical conditions;
6 and

7 (E) in many instances, have failed to ob-
8 tain adequate relief in the courts due to highly
9 restrictive judicial interpretations which are in-
10 consistent with ERISA's underlying protective
11 purposes.

12 (3) The crisis in retiree healthcare generated by
13 the plan sponsor practice of post-retirement can-
14 cellations or reductions of previously promised
15 earned retiree health benefits has led to a wide-
16 spread loss of confidence in the integrity of ERISA-
17 regulated group health plans and the ability of
18 ERISA itself to adequately protect retiree health
19 benefits.

20 (4) A strong and dependable private sector re-
21 tiree health system is a necessary component to the
22 essential health of our Nation's senior citizens.

23 (b) PURPOSES.—

24 (1) IN GENERAL.—The purposes of this Act are
25 to ensure that the reasonable health benefit expecta-

1 tions of retirees from ERISA-regulated group health
2 plans are fulfilled, to minimize the incidence of pro-
3 longed legal disputes arising out of the post-retire-
4 ment cancellation or reduction of earned retiree
5 health benefits from such plans, and to prevent fur-
6 ther adverse effects on retiree health arising from
7 such post-retirement changes.

8 (2) FUTURE SAFEGUARDS AND ENFORCEABLE
9 OBLIGATIONS.—To carry out the purposes described
10 in paragraph (1):

11 (A) The provisions of this Act safeguard
12 retired participants of group health plans sub-
13 ject to ERISA from loss or reduction of their
14 health benefits from such plans by barring plan
15 sponsors from canceling or reducing such bene-
16 fits after the dates such participants retire and
17 when they no longer are able to absorb such
18 losses or reductions without experiencing ad-
19 verse effects on their health or finances.

20 (B) The provisions of this Act also estab-
21 lish an enforceable obligation on the part of
22 sponsors of such group health plans to restore
23 health benefits previously taken away from re-
24 tired participants of such plans to the extent
25 such benefits were cancelled or altered after the

1 dates such participants retired. The obligation
2 is limited to restoring healthcare benefits only
3 back to specified levels, and the obligation does
4 not apply if the plan sponsor would sustain sub-
5 stantial business hardship by restoring such
6 benefits.

7 **SEC. 3. RETIREE HEALTH BENEFIT PROTECTIONS IN**
8 **GROUP HEALTH PLANS.**

9 (a) IN GENERAL.—Subtitle B of title I of the Em-
10 ployee Retirement Income Security Act of 1974 is amend-
11 ed by adding at the end the following new part:

12 **“PART 8—EMERGENCY RETIREE HEALTH**
13 **BENEFIT PROTECTIONS**

14 **“SEC. 801. PROHIBITION AGAINST POST-RETIREMENT RE-**
15 **DUCTIONS OF RETIREE HEALTH BENEFITS**
16 **BY GROUP HEALTH PLANS.**

17 “(a) IN GENERAL.—Notwithstanding that a group
18 health plan described in subsection (b) may contain a pro-
19 vision reserving the general power to amend or terminate
20 the plan or a provision specifically authorizing the plan
21 to make post-retirement reductions in retiree health bene-
22 fits, the benefits provided to a retired participant or his
23 or her beneficiary under the terms of the plan may not
24 be reduced, whether through amendment or otherwise, if
25 such reduction of benefits occurs after the date the partici-

1 participant has retired for purposes of the plan and reduces ben-
2 efits that were provided to the participant, or his or her
3 beneficiary, as of the date the participant retired. Any
4 group health plan provision which is purported to author-
5 ize the reduction of benefits in a manner inconsistent with
6 the preceding sentence shall be void as against public pol-
7 icy.

8 “(b) GROUP HEALTH PLAN.—For purposes of this
9 Act, the term ‘group health plan’ has the same meaning
10 as in section 607(1).

11 “(c) PROHIBITED REDUCTION OF BENEFITS.—For
12 purposes of this part, any reference to a reduction of bene-
13 fits shall be construed to be a reference to any amendment
14 to a group health plan, or to any other action, which has
15 the effect of—

16 “(1) canceling, decreasing, or limiting the
17 amount, type, or form of any benefit or option pro-
18 vided prior to the amendment or action;

19 “(2) imposing or increasing out-of-pocket costs
20 that a retired participant, or his or her beneficiary,
21 must pay in order for benefits that were provided
22 under the plan to the participant or beneficiary prior
23 to the amendment or action to be provided to the
24 participant or beneficiary after the amendment or
25 action; or

1 “(3) modifying the manner by which medical
2 services are delivered under the plan so that after
3 the amendment or action a retired participant, or
4 his or her beneficiary, has less ready access to the
5 delivery of any such medical services than the partic-
6 ipant or beneficiary had prior to the amendment or
7 action.

8 “(d) TREATMENT OF PLAN TERMINATION.—

9 “(1) IN GENERAL.—Subject to paragraph (2), a
10 termination of a group health plan shall be treated
11 as a reduction in benefits prohibited under sub-
12 section (a) if, after the termination, the plan sponsor
13 of the terminated plan fails to continue to provide
14 to the participants who retired prior to the termi-
15 nation and to their beneficiaries the same retiree
16 health benefits that were provided prior to the termi-
17 nation.

18 “(2) WAIVER.—Paragraph (1) shall not apply
19 in the case of the termination of a group health plan
20 if the Secretary issues a waiver under this para-
21 graph in connection with such termination. The Sec-
22 retary shall issue such a waiver if and only if the
23 plan sponsor demonstrates to the satisfaction of the
24 Secretary, in accordance with regulations prescribed
25 by the Secretary, that such plan sponsor will be un-

1 able to continue in business unless such a waiver is
2 issued.

3 **“SEC. 802. ADOPTION BY GROUP HEALTH PLANS OF PROVI-**
4 **SION BARRING POST-RETIREMENT REDUC-**
5 **TIONS IN RETIREE HEALTH BENEFITS.**

6 “Each group health plan which provides, as of the
7 date of a participant’s retirement under the plan, benefits
8 after such date with respect to such participant or his or
9 her beneficiaries shall contain a provision which expressly
10 bars any reduction in such benefits after such date, either
11 under the terms of the plan or by any fiduciary of the
12 plan.

13 **“SEC. 803. RESTORATION BY GROUP HEALTH PLANS OF**
14 **BENEFITS REDUCED AFTER RETIREMENT.**

15 “(a) IN GENERAL.—The plan sponsor of each group
16 health plan shall provide, in accordance with this section,
17 benefit restoration under this section to each retired par-
18 ticipant that meets the following requirements:

19 “(1) The retired participant is entitled to ben-
20 efit coverage under the plan as of the date of the en-
21 actment of the Earned Retiree Healthcare Benefits
22 Protection Act of 2011.

23 “(2) The participant retired under the plan be-
24 fore the date of the enactment of such Act, and a
25 reduction in benefits, with respect to any benefit or

1 option provided to the retired participant under the
2 plan as of the date the participant retired, took ef-
3 fect after the participant's date of retirement and
4 before the date of the enactment of such Act.

5 “(3) The retired participant has elected to re-
6 store benefits under the plan within the restoration
7 period prescribed pursuant to subsection (b) and in
8 accordance with such procedures as may be estab-
9 lished under the plan pursuant to regulations of the
10 Secretary.

11 “(b) RESTORATION PERIOD.—For purposes of this
12 section, the term ‘restoration period’ means a period which
13 shall be prescribed by the Secretary and which—

14 “(1) begins not later than 1 year after the date
15 of the enactment of the Earned Retiree Healthcare
16 Benefits Protection Act of 2011;

17 “(2) ends before the end of the 2-year period
18 beginning with such date, or such longer period as
19 may result from a suspension of such 2-year period
20 by the Secretary pursuant to section 804(g); and

21 “(3) is of no less than 60 days duration.

22 “(c) APPLICABLE STANDARDS FOR RESTORATION OF
23 BENEFITS.—

1 “(1) IN GENERAL.—For purposes of this sec-
2 tion, reduced benefits shall be deemed restored
3 under this section—

4 “(A) in the case of a participant who re-
5 tired under the plan before the plan year begin-
6 ning with or during 1991, if the benefits which
7 were subjected to reduction are restored to the
8 level of such benefits which was in effect for the
9 plan year beginning with or during 1991, and

10 “(B) in the case of a participant who re-
11 tired under the plan after the plan year begin-
12 ning with or during 1990 and before the date
13 of the enactment of the Earned Retiree
14 Healthcare Benefits Protection Act of 2011, if
15 the benefits which were subjected to reduction
16 are restored to the level of such benefits which
17 was in effect immediately prior to the reduction.

18 “(2) LEVEL OF BENEFITS.—For purposes of
19 paragraph (1), restoration of benefits to a level re-
20 quired under paragraph (1) occurs if—

21 “(A) any cancellation, decrease, or limita-
22 tion with respect to the amount, type, or form
23 of any benefit or option which resulted in the
24 reduction in benefits is rescinded or lessened so
25 as to result in the amount, type, and form of

1 benefits in effect for the plan year beginning
2 with or during 1991 (in the case of a partici-
3 pant described in paragraph (1)(A)) or as of
4 immediately prior to the reduction (in the case
5 of a participant described in paragraph (1)(B));

6 “(B) any imposition or increase in out-of-
7 pocket costs that the participant, or his or her
8 beneficiary, must pay which resulted in the re-
9 duction in benefits is rescinded or lessened so
10 as to result in the level of out-of-pocket costs in
11 effect for the plan year beginning with or dur-
12 ing 1991 (in the case of a participant described
13 in paragraph (1)(A)) or as of immediately prior
14 to the reduction (in the case of a participant
15 described in paragraph (1)(B)); and

16 “(C) any modification in the manner by
17 which medical services are delivered under the
18 plan which resulted in the reduction in benefits
19 is rescinded or amended so as to result in a
20 manner by which medical services are delivered
21 under the plan which is substantially equivalent
22 to the manner by which medical services are de-
23 livered in effect for the plan year beginning
24 with or during 1991 (in the case of a partici-
25 pant described in paragraph (1)(A)) or as of

1 immediately prior to the reduction (in the case
2 of a participant described in paragraph (1)(B)).

3 “(d) EXCEPTION FOR CERTAIN PLANS.—In accord-
4 ance with regulations prescribed by the Secretary, in the
5 case of any group health plan which has less than 100
6 participants as of the date of the enactment of the Earned
7 Retiree Healthcare Benefits Protection Act of 2011, sub-
8 section (a) shall apply to such plan only if, at any time
9 during the period described in subsection (b)(2) (including
10 any extension thereof), such plan has more than 100 par-
11 ticipants.

12 “(e) NOTICE REQUIREMENTS CONCERNING RES-
13 TORATION OF BENEFITS.—In accordance with such regu-
14 lations as may be prescribed by the Secretary, the plan
15 administrator of each group health plan subject to the re-
16 quirements of subsection (a) shall, within 30 days prior
17 to the commencement of the plan’s restoration period, pro-
18 vide written notice to each retired participant of the plan
19 who meets the requirements of subsection (a) of the fol-
20 lowing:

21 “(1) A description of all benefits the retired
22 participant is entitled to have restored.

23 “(2) The administrative procedure established
24 under the plan which may be used to submit a claim
25 for the restoration of any benefits.

1 “(3) An itemization of the value of each benefit
2 the retired participant is entitled to have restored,
3 as determined in accordance with the regulations of
4 the Secretary, and the total value of all such bene-
5 fits.

6 “(4) A description of any post-retirement in-
7 creases in retiree health benefits the retired partici-
8 pant received which the plan sponsor could rescind
9 if the retired participant asserts a claim for the res-
10 toration of benefits.

11 “(5) An itemization of the value of each retiree
12 health benefit that the plan sponsor could rescind,
13 as determined in accordance with the regulations of
14 the Secretary, and the total value of all such bene-
15 fits.

16 “(6) If the plan sponsor has filed an application
17 for a substantial business hardship exemption under
18 section 804, the date on which such application was
19 filed, the date on which notice of such application
20 was given to retired participants entitled to submit
21 a claim for the restoration of benefits, and the sta-
22 tus of such application as of the date of the notice
23 sent pursuant to this subsection.

1 “(7) Such other information in such form and
2 detail as may be prescribed by the Secretary to carry
3 out the purposes of this part.

4 “(f) DEADLINE FOR RESTORATION OF BENEFITS.—
5 All benefits required to be restored under this section shall
6 be restored before the end of the 2-year period beginning
7 with the date of the enactment of the Earned Retiree
8 Healthcare Benefits Protection Act of 2011, subject to
9 any suspension of such period under section 804(g).

10 **“SEC. 804. EXEMPTION FROM RESTORATION OF BENEFITS**
11 **REQUIREMENTS.**

12 “(a) APPLICATION FOR EXEMPTION.—Any plan
13 sponsor of a group health plan that would sustain substan-
14 tial business hardship if required to fulfill, in whole or in
15 part, the restoration of benefits requirements contained in
16 section 803, may file an application for an exemption with
17 the Secretary from any or all of such requirements.

18 “(b) AUTHORITY FOR WAIVER OR VARIANCE.—In re-
19 sponse to an application filed by a plan sponsor pursuant
20 to subsection (a), the Secretary may waive or vary the re-
21 quirements of section 803 with respect to any or all of
22 such requirements, including postponing for reasonable
23 periods of time the obligation of the plan sponsor to re-
24 store reduced benefits, if the Secretary finds that compli-

1 ance by the plan sponsor with the requirements of section
2 803 would—

3 “(1) be adverse to the interests of plan partici-
4 pants in the aggregate;

5 “(2) not be administratively feasible; and

6 “(3) cause substantial business hardship to the
7 plan sponsor.

8 “(c) FACTORS TAKEN INTO ACCOUNT.—For pur-
9 poses of this section, the factors to be taken into account
10 in determining substantial business hardship shall include
11 (but shall not be limited to) whether—

12 “(1) the plan sponsor is operating at an eco-
13 nomic loss;

14 “(2) compliance with the restoration of benefits
15 requirements would necessitate substantial future re-
16 ductions in health benefits provided to participants
17 under the plan or cause a substantial decline in em-
18 ployment with the plan sponsor; and

19 “(3) it is reasonable to expect that the plan will
20 be continued only if a waiver or appropriate variance
21 is granted.

22 “(d) REQUIREMENT OF SATISFACTORY EVIDENCE.—

23 “(1) IN GENERAL.—The Secretary shall, before
24 granting a waiver or variance under this section, re-
25 quire each applicant to provide evidence satisfactory

1 to the Secretary that the applicant has provided
2 timely written notice of the filing of an application
3 for such waiver or variance to each retired partici-
4 pant entitled to submit a claim for the restoration
5 of benefits under the applicant’s plan.

6 “(2) TIMELINESS.—For purposes of paragraph
7 (1), a written notice shall be considered timely if it
8 is provided not later than 60 days prior to the date
9 the plan sponsor files an application for a waiver or
10 variance under this section.

11 “(3) INFORMATION REQUIRED.—The notice re-
12 ferred to in paragraph (1) shall include information
13 with respect to the specific relief that will be sought
14 by the plan sponsor’s application, the period of time
15 for which relief is sought, and such other relevant
16 information as the Secretary may prescribe.

17 “(e) PARTICIPATION IN PROCEEDINGS BY RETIRED
18 PLAN PARTICIPANTS.—Each retired participant entitled
19 to submit a claim for the restoration of benefits within
20 the meaning of this section shall be provided a reasonable
21 opportunity to submit comments or otherwise participate
22 in any proceeding established by the Secretary to deter-
23 mine whether to grant or deny an application for a waiver
24 or variance filed by the retired participant’s plan sponsor.

1 “(f) EXCEPTIONS FOR CERTAIN APPLICATIONS.—In
2 any case in which the plan sponsor of the group health
3 plan also maintains a pension plan which provides pension
4 benefits with respect to any retired participant entitled to
5 submit a claim for the restoration of benefits within the
6 meaning of this section, the Secretary may not grant any
7 application for a waiver or variance purporting to satisfy
8 the requirements of subsection (b) if the requirements of
9 paragraph (1) or (2) of this subsection are met.

10 “(1) FAILURE TO TRANSFER EXCESS PENSION
11 ASSETS.—The requirements of this paragraph are
12 met if—

13 “(A) within the 5-year period preceding
14 the date of the plan sponsor’s application for
15 the waiver or variance, the plan sponsor could
16 have transferred excess assets of such pension
17 plan to a health benefits account in accordance
18 with section 420 of the Internal Revenue Code
19 of 1986 (as in effect on the date of the enact-
20 ment of the Tax Relief Extension Act of 1999)
21 but did not do so; and

22 “(B) such health benefits account forms a
23 part of the group health plan with respect to
24 which the plan sponsor is submitting the appli-
25 cation.

1 “(2) NO AD HOC COLAS PROVIDED UNDER
2 WELL-FUNDED PENSION PLAN PROVIDING FOR SUCH
3 COLAS.—

4 “(A) IN GENERAL.—The requirements of
5 this paragraph are met if—

6 “(i)(I) no employer contributions were
7 made to such pension plan during any of
8 the 5 plan years preceding the date of the
9 application for the waiver or variance, and

10 “(II) despite such lack of employer
11 contributions, the minimum funding stand-
12 ard under section 302 of this Act and sec-
13 tion 412 of the Internal Revenue Code of
14 1986 was satisfied with respect to such
15 pension plan for each of such 5 plan years
16 and the average funded ratio of the plan
17 for such 5 plan years was greater than 120
18 percent; and

19 “(ii)(I) the pension plan provided for
20 ad hoc cost-of-living adjustments in bene-
21 fits throughout such 5 plan years, and

22 “(II) no such ad hoc cost-of-living ad-
23 justment in benefits was provided under
24 such pension plan during such 5 plan
25 years.

1 “(B) FUNDED RATIO.—For purposes of
2 subparagraph (A)(i)(II), the funded ratio of a
3 pension plan for a plan year is the ratio, ex-
4 pressed as a percentage, of—

5 “(i) the assets of the plan as of the
6 end of such plan year, to

7 “(ii) the liabilities of the plan as of
8 the end of such plan year.

9 “(g) RUNNING OF 2-YEAR DEADLINE PERIOD SUS-
10 PENDED.—The submission of an application for a waiver
11 or variance pursuant to this section during the 2-year pe-
12 riod referred to in section 803(f) shall suspend the run-
13 ning of such period. If determined appropriate by the Sec-
14 retary, the Secretary may direct that the running of such
15 period be resumed upon the final conclusion of proceedings
16 to determine whether an application should be granted or
17 denied.

18 **“SEC. 805. EFFECT ON OTHER CLAIMS.**

19 “(a) OTHER CLAIMS UNAFFECTED.—Nothing in this
20 part shall be construed to alter, impair, or eliminate any
21 claim for retiree health benefits based on conduct alleged
22 to violate the terms of a group health plan, any provision
23 of this Act (other than this part), or both, regardless of
24 whether such conduct occurred prior to, on, or after the

1 date of the enactment of the Earned Retiree Healthcare
2 Benefits Protection Act of 2011.

3 “(b) OTHER CAUSES OF ACTION NOT AUTHOR-
4 IZED.—Nothing contained in this part shall be construed
5 to authorize any action for recovery of retiree health bene-
6 fits unless the conduct giving rise to the claim for recovery
7 is alleged to violate the provisions of this part.

8 **“SEC. 806. REGULATIONS.**

9 “The Secretary may promulgate such regulations as
10 may be necessary to carry out the provisions of this part.
11 The Secretary may promulgate any interim final rules as
12 the Secretary deems are appropriate to carry out this
13 part.”.

14 (b) CIVIL PENALTY.—Section 502(c) of the Em-
15 ployee Retirement Income Security Act of 1974 (29
16 U.S.C. 1132(c)) is amended—

17 (1) by redesignating the second paragraph (10)
18 (relating to consultation between the Secretary of
19 Labor and the Secretary of Health and Human
20 Services) as paragraph (12); and

21 (2) by inserting after the first paragraph (10)
22 the following new paragraph:

23 “(11) The Secretary may assess any person a civil
24 penalty of not more than \$20,000 with respect to each
25 failure by such person to meet the requirements of section

1 801, 802, or 803 with respect to each participant or bene-
 2 ficiary aggrieved by such failure.”.

3 (c) CONFORMING AMENDMENT.—The table of con-
 4 tents in section 1 of such Act is amended by inserting
 5 after the item relating to section 734 the following new
 6 items:

“PART 8—EMERGENCY RETIREE HEALTH BENEFIT PROTECTIONS

“Sec. 801. Prohibition against post-retirement reductions of retiree health ben-
 efits by group health plans.

“Sec. 802. Adoption by group health plans of provision barring post-retirement
 reductions in retiree health benefits.

“Sec. 803. Restoration by group health plans of benefits reduced after retire-
 ment.

“Sec. 804. Exemption from restoration of benefits requirements.

“Sec. 805. Effect on other claims.

“Sec. 806. Regulations.”.

7 **SEC. 4. EFFECTIVE DATE.**

8 The amendments made by this Act shall take effect
 9 on the date of the enactment of this Act, except that sec-
 10 tion 802 of the Employee Retirement Income Security Act
 11 of 1974 (as added by section 3 of this Act) shall apply
 12 with respect to plan years beginning after 180 days after
 13 the date of the enactment of this Act. Compliance with
 14 the requirements of part 8 of subtitle B of title I of the
 15 Employee Retirement Income Security Act of 1974 with
 16 respect to a group health plan shall not be treated as a
 17 failure to comply with the terms of such plan.

○