Order Code 98-1006

Military Health Care: The Issue of "Promised" Benefits

Updated January 19, 2006

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Summary

Many military health care beneficiaries, particularly military retirees, their dependents, and those representing their interests, state that they were promised "free health care for life at military facilities" as part of their "contractual agreement" when they entered the armed forces. Efforts to locate authoritative documentation of such promises have not been successful. Congressional report language and recent court decisions have rejected retiree claims seeking 'free care at military facilities' as a right or entitlement. These have stated that the medical benefit structure made up of military health care facilities, Tricare and Medicare currently provide lifetime health care to military members, retirees and their respective dependents. Nevertheless, claims continue to be made, particularly by those seeking additional benefits from the Department of Defense, or attempting to prevent an actual or perceived reduction in benefits.

Recent changes in the availability of military benefits and eligibility for these benefits have lead to speculation that retiree out-of-pocket costs may be increased. Growth in military health care spending, it has been argued, will lead to increased competition for defense dollars. Groups representing military retirees have stated that it is among their objectives to prevent what they describe as cost-shifting from the military to the beneficiaries. Although military health care is arguably among the most generous health benefit programs available, these groups see potential increases in out-of-pocket beneficiary payments as a part of the "broken promise."

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Introduction

In recent years, numerous efforts have been made to increase, or prevent any decrease, of health care benefits and options available to military retirees. Many military retirees and others seeking these increases, or attempting to prevent any decrease in their benefits, often argue their claims based on assertions that the medical care promised to them is no longer available.[1] These retirees say that the relatively large military medical infrastructure that existed during the cold war provided greater access for retirees. They note that as a result of the reduction of the size of the Department of Defense (DOD), fewer DOD medical facilities are available.[2] In certain instances, organizations representing military retirees have alluded to broken promises. Some individuals have stated that the promised benefits included what they term "free" health care for life; others describe the promise as "free care for life in military health care facilities."

Congressional report language and recent court decisions based on a review of the legislative history of the statutory language related to military health care for retirees and dependents have not supported these assertions. These arguments also have not been supported by authoritative written documentation.

In apparent response, a number of bills have been introduced seeking to expand military health care options. In the 108th Congress, at least two of these bills (H.R. 58 and S. 56) cite a "promise" or "commitment" as the rationale for provisions that would "restore health care coverage to retired members of the uniformed services."[3] More recently, H.R. 602 and S. 407, "Keep Our Promises to America's Military Retirees Act," were introduced in the 109th Congress. These have attracted a relatively large number of co-sponsors. (These bills are discussed in more detail in the "Recent Legislation" section of this report.) Although previous attempts to pass such legislation have failed, Congress substantially expanded the military retiree health care benefits via the FY2001 National Defense Authorization Act.[4]

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[1] "About 365,000 elderly retirees and dependents-a thousand a day-will be seen by military doctors this year, Defense Department officials say." Adde, Nick, "Medical Care Access Not Difficult for All," *Army Times*, February 23, 1998: 22.

[2] CRS Report 95-435, *Military Retiree Health Care: Base Closures and Realignments*, (name redacted) and Elizabeth A. Dunstan.

[3] H.R. 58, Rep. Edwards, January 7, 2003 and S. 56, Sen. Johnson, January 7, 2003.

[4] P.L. 106-398, Oct. 30, 2000.

Background

Under current law, *active duty* personnel are entitled to military health care and have a right or claim to this care. *Active duty dependents* are also entitled to this care, however, this entitlement is limited to space or service availability restrictions. Such an entitlement obligates the military to provide this care (subject to any stated restrictions such as space-availability for active duty dependents). As implemented by the Department of Defense, and interpreted by the courts, *retirees and their dependents*, while eligible for care on a space- or service-available basis, have no statutory entitlement to such care, thereby taking the position that the military services have full discretion determining when and under what circumstances retirees and their dependents will receive care from military treatment facilities or MTFs. Historically, those dependents and retirees (under age 65) who are unable to get care at MTFs can seek care via civilian providers under DOD's Tricare benefit plan or Medicare, if eligible.

Tricare is the name of the health benefit plan for all military beneficiaries. Tricare is composed of three types of coverage: Prime, Extra and Standard. Tricare Prime is comparable to a Health Maintenance Organization (HMO) using the MTF as the base of health care services. Tricare Extra is similar to a Preferred Provider Organization or PPO. Finally, Tricare Standard is a fee-for-service plan (formerly known as the Civilian Health and Medical Program of the Uniformed Services, (CHAMPUS[5])). Active duty personnel and their dependents are automatically enrolled in Tricare Prime. Retirees (under age 65) and their dependents must enroll in Tricare Prime or seek care via Tricare Extra or Standard. Until recently, at age 65, retirees lose eligibility for Tricare and become eligible for Medicare benefits. Thus, military service provides lifetime care from a number of government-sponsored or reimbursable sources.[6]

With the passage of the FY2001 National Defense Authorization Act, beginning in October 2001, eligible military retirees over age 64 were allowed to participate in Tricare provided that they are enrolled in Medicare Part B. This new benefit is known as "Tricare for Life."

"The Promise"

The creation of health care benefits and the rules and regulations pertaining to these benefit are within the authority of Congress. Under the Constitution, Congress has the authority

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[5] P.L. 89-614, 80 Stat. 862, September 30, 1966.

[6] This general benefit structure is not new, nor has its consideration by Congress been a recent phenomenon. For example, see U.S. Congress, House Committee on Armed Services, CHAMPUS and Military Health Care, Subcommittee 2, Hearings, 93rd Cong., 2nd Sess., HASC No. 93-70, October 8, 1974. Interestingly, claims of "free health care for life" did not surface in these hearings.

To make Rules for the Government and Regulation of the land and naval Forces.[7]

Without explicit authorization from Congress, such benefits can not be created nor conferred by the military or others. Searches of the relevant literature and legislative history do not reveal a congressional authorization for "free health care for life at military facilities" for military retirees. Some have asserted that prior to 1956, the lack of legal language to the contrary allowed the military to be contractually obliged to provide "promised" care. However, under our system of government, the military does not have the constitutional authority to create such a contractual obligation. The courts (as discussed below on pages 5, 6, and 7) have held that only Congress has such authority under the Constitution.

The history of military health care shows that care provided to active duty members was originally paid for by the members as far back as 1799.[8] In that year, Congress enacted legislation for the military establishment to care for the "regimental sick" as well as an act for the "relief of sick and disabled seamen."[9] Later changes provided permissive care to dependents and, later still, to retirees and their dependents. However, at no time were military retirees provided an *entitlement* to care. In 1956, Congress put the permissive nature of this benefit into law:

> ... a member or former member of a uniformed service who is entitled to retired or retainer pay, or equivalent pay **may**, upon request, be given medical and dental care in any facility of any uniformed service, *subject to the availability of space and facilities and the capabilities of the medical and dental staff*.[10] [Emphasis added.]

In 1966, Congress created Medicare which was designed to provide health care for people over age 65 as well as certain disabled individuals. A problem arose in that military personnel tended to retire at a relatively younger age (in most cases, early- to mid-40s) and could be without guaranteed access to health care until age 65. In other words, these retirees were not entitled to military health care and were too young to participate in Medicare. In an effort to address this inability to gain access, as well as provide for those active duty dependents who could not gain access to military medical facilities, Congress created the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Modeled after the Blue Cross/Blue Shield high option, CHAMPUS was a fee-for-service benefit. Although it required no premiums, CHAMPUS did require cost sharing on the part of the beneficiary. Thus, CHAMPUS was not free, nor did it relate to care from MTFs. (As noted above, CHAMPUS later became part of Tricare.)

Numerous assertions have been made concerning "promises" to military personnel and retirees with regard to health care benefits. Many appear to believe

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[7] U.S. Constitution, Art. 1, Sec. 8, cl. 14.

[8] U.S. Congress, House Committee on Armed Services, Subcommittee No. 2, CHAMPUS and Military Health Care, 93d Cong., 2d Sess., December 20, 1974: 6.

[9] 1 Stat. 721 and 1 Stat. 729, March 2, 1799, respectively.

[10] 10 United States Code, sec. 1074(b).

that they were "promised free health care for life at military facilities." Efforts to locate written authoritative documentation of such "promises" have not been successful. However, some military recruiting literature does make general statements about health care. As an example, a recruiting brochure cited by The Retired Officers Association states:

> Health care is provided to you and your family members while you are in the Army, and for the rest of your life if you serve a minimum of 20 years of Federal service to earn your retirement.[11]

This language, of course, does not mention "free" health care. Nor does it mention that such care is to be provided via the military health services system and/or in military facilities. This advertised statement is correct in that military retirees do receive their promised lifetime benefits via MTFs (including space- or service-available care in retirement), Tricare and Medicare — all earned as a result of their federal military service.

The same source quotes a 1991 CRS report as stating that "the 'free health care for life' promise was functionally true and had been used to good advantage for recruiting and retention."[12] The report is much more nuanced, and developed the analysis more deeply than this.[13] It noted that the 1956 legislation did not authorize a legal entitlement for care to be provided to retirees and their dependents, but that the retiree and dependent population, in proportion to the available space in military health care facilities, was so low that as a practical matter, such care was usually available. It also observed that this de facto availability was, without question, a useful tool for recruiters. The end result appears to be that, regardless of the lack of statutory entitlement, many active duty personnel and their dependents, and retirees and their dependents, erroneously came to believe that they were guaranteed free health care in military facilities for life.

Other sources have stated that such promises, whether or not actually made, are groundless. For example, in responding to questions from Congress concerning what benefits were promised, Rear Admiral Harold M. Koenig, Deputy Assistant Secretary of Defense for Health Affairs, sought to clarify a statement made by Vice Admiral Hagen concerning these benefits. Rear Admiral Koenig stated in 1993 that:

> There is a problem here of interpretation. [Vice Admiral Donald Hagen, Medical Corps Surgeon General, U.S. Navy] said medical care for life. That is true. We have a medical care program for the life of our beneficiaries, and it is pretty well defined in the law. That easily gets interpreted to, or reinterpreted into, free

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[11] Army brochure cited and reproduced in *The Retired Officers Association Magazine*, April 1996.

[12] The Retired Officers Association, April 1996. This CRS report was also similarly represented in Roberts, C.R., "Veterans Call It The Big Lie," *The American Legion*, October 1995: 18. The article is based on exerts from *The News Tribune*, Tacoma, WA, by the same author.

[13] Best, Dick, Memorandum to Congress, P*romises of Lifetime Medical Care*, April 21, 1997.

> medical care for the rest of your life. That is a pretty easy transition for people to make in their thinking, and it is pervasive. We spend an incredible amount of effort trying to reeducate people that that is not their benefit.[14]

According to the Department of Defense, "[a]s thus formulated, medical care for retirees in military medical facilities has always been, and to this day remains, a privilege, not an absolute right, as has been assumed by many."[15]

The federal courts have repeatedly held that such claims of a "promise" have no legal standing. In late 1997, a U.S. District Court dismissed a lawsuit by retirees against the U.S. seeking "free health care" from the military. According to the court:

> The court must reject plaintiffs' contention that [10 United States Code sec. 1074(b)] confers authority on the military branches to guarantee free lifetime medical care to retirees and their dependents. First, plaintiffs cite to no regulation under sec. 1074(b) guaranteeing such care, but only cite to recruiting materials that make general representations as to eligibility for continued health care for retirees and their dependents. Even if the military departments had promulgated regulations under sec.1074(b) that make an unequivocal promise of lifetime medical care for retirees and their dependents, the language of sec. 1074(b) itself is clearly conditional. Any regulations purporting to guarantee free and unconditional lifetime health care to retirees and their dependents would be inconsistent with the statute and therefore invalid. *Larionoff*, 431 U.S. at 873 n.13 ("A regulation which ... operates to create a rule out of harmony with the statute ... is a mere nullity.") (citing *Manhatten General Equip. Co. V. Commissioner*, 297 U.S. 129, 134 (1936)).
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> Furthermore, under sec. 1074(b), "a retired member of a uniformed service is not entitled to medical care as a matter of right," *Lord v. United States*, 2 Cl. Ct. 749, 756 (1983), and "retired personnel who fail to receive such care cannot successfully maintain an action for money damages based on such failure." *Id*. At 757; see also *Watt v. United States*, 246 F. Supp. 386, 388 (E.D.N.Y. 1965) ("furnishing [medical care in a military facility] to a retired soldier is discretionary, not mandatory"). Because the law states that retirees are not entitled to health care as a matter of right, the representations upon which plaintiffs rely are to no effect.[16]

With respect to the contention that recruiters and others allegedly made "promises of free care for life," and that such "promises" must be honored by the government, the court notes:

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[14] U.S. Congress, House Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1994, H.R. 2401, Hearings, 103rd Cong., 1st sess., H.Rept. 103-13, April 27, 28, May 10, 11, and 13, 1993: 505.

[15] U.S. Department of Defense, Office of the Secretary of Defense, Military Compensation Background Papers, Fifth Edition, September 1996: 609.

[16] Coalition of Retired Military Veterans, et al. v. United States of America, U.S. Dist. of South Carolina, C.A.#2:96-3822-23, Dec. 10, 1997: 11-12.

> Federal officials who by act or word generate expectations in the people they employ, and then disappoint them, do not *ipso facto* create a contract liability running from the Federal Government to the employee ....[17]

In a separate case (Schism and Reinlie v. U.S.), another federal judge found military "retirees 65 and older do not have a binding contract with the Pentagon that guarantees them free health care for life at military hospitals."[18]

In 1999, a federal appeals court stated:

> Nothing in these regulations provided for unconditional lifetime free medical care or authorized recruiters to promise such care as an inducement to joining or continuing in the armed forces. While the Retirees argue that the above mentioned section 4132.1 gave those of them who served as officers in the Navy and Marine Corps the right to free unconditional medical care, we cannot agree. The [1922 Manual of the Medical Department of the United States Navy] Manual provided guidelines for the Navy's Medical Department, but did not create any right in such officers to the free unconditional lifetime medical care they claim. It related only to hospital care, not the broader services that these Retirees seek, and covered only the period when it was in effect. In any event, in view of the general pattern of the military regulations that provides medical care to retirees only when facilities and personnel were available, we decline to read into the creation of such an enduring and broad right to unconditional free lifetime medical care.
>
> In sum, we conclude that the Retirees have not shown that they have a right to the health care they say was "taken" by the government. Since the basic premise of their claim fails, their taking claim necessarily also fails.[19]

On December 8, 1999, the Coalition of Retired Military Veterans appealed their case to the Supreme Court.[20] The Supreme Court denied the petition to review the lower court ruling on April 17, 2000.[21]

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[17] Coalition v. U.S.: 15-16.

[18] Adde, Nick, Judge: lifetime care is no guarantee, *Army Times*, Sept. 21, 1998: 10. An appeal in this case is anticipated. Schism and Reinlie v. U.S. No. #:96cv349/RV United States District Court, N.D. Florida, June 10, 1997.

[19] Sebastain v. United States, 185 F.3d 1368, 1372 (Fed. Cir. 1999). An appeal of this decision is pending.

[20] Adde, Nick, Retirees head to Supreme Court, *The Times*, January 10, 2000: 14.

[21] Sebastian v. U.S., 529 U.S. 1065, 120 S.Ct. 1669, 146 L.Ed.2d 479, 68 USLW 3391, 68 USLW 3655 (U.S., Apr. 17, 2000)(NO. 99-977). Summary of Orders: "Neither statutes nor regulations ever authorized armed services to promise free lifetime medical care to enlistees, and thus claim by now-retired members of the armed services that new regulations that diminish medical care previously available for military retirees constitute compensable taking is meritless." Sebastian v. United States, 68 USLW. 3649 (April 18, 2000). Note: citations to this case make reference to different titles including, Coalition of Retired Military Veterans, CORMV, CRMV, or Sebastain and Sebastian, v. U.S. or United States.

On February 8, 2001, the U.S. Court of Appeals for the Federal Circuit reversed the lower court ruling (Schism and Reinlie v. U.S.) declaring "... the government breached its implied-in-fact contract with retirees when it failed to provide them with health care benefits."[22] The appeals court reversed the district court decision and remanded the case for a determination of damages. Despite various claims, this finding applied only to the two named plaintiffs (and not to all military retirees), and no determination of damages was made. (Some have erroneously reported that the ruling "would have required the government to pay to three million retirees, widows and dependents up to $10,000 apiece."[23]) On June 13, 2001, the Appeals Court vacated the judgment, withdrew its opinion, and agreed to rehear the appeal en banc. As stated "[t]he court has determined to rehear this case en banc to resolve the question of whether the promises of free lifetime care made to and accepted by Plaintiffs-Appellants should be afforded binding effect."[24]

On November 18, 2002, the U.S. Court of Appeals (voting 9-4) stated:

> In the end, because no actual authority existed for the recruiters' promises of full free lifetime medical care, the plaintiffs cannot show a valid implied-in-fact contract. Thus, the plaintiffs' claim must fail as a matter of law.[25]

On June 2, 2003, the Supreme Court denied the petition to review this case as well.[26]

The claim of "free" or "promised" care is often reported in the media or by lobbying groups. Some media sources have contradicted the notion of free health care for life.[27] Conversely, others appear to accept or support the existence of such "promises." Although these sources have no legal authority to effect such claims, their repetition of these so-called promises may serve to create or reinforce the notion of the existence of such "promises."[28]

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[22] Schism and Reinlie v. U.S., 2001 U.S. App., 239 F.3d 1280, Feb. 8, 2001.

[23] Armed Forces News, June 22, 2001.

[24] Schism and Reinlie v. U.S. 2001 WL 664440 (Fed. Cir. (Fla)), June 13, 2001.

[25] Schism and Reinlie v. United States, 2002 WL 31549178 (Fed.Cir.(Fla.)), November 18, 2002.

[26] Schism and Reinlie v. United States, 123 S.Ct. 2246; 156 L.Ed.2d 125; 2003 U.S. LEXIS 4404; 71 USLW 3750, June 2, 2003.

[27] Hamby, James E., Jr., "Free Care for Life Is a Myth," *Air Force Times*, September 20, 1993: 18.

[28] See, for example, Rich, Spencer, "Military Health Care Downsizing Leaves Retirees in a Bind," *Washington Post*, July 30, 1996, p. A11; Editorials, "Veterans Should Not Be Forced to Pay for 'Free' Health Care," *Kerrville Daily Times*, December 8, 1997: 4A; " ... the promise of free health care in their later years was a major enticement to stay for a full career." AFSA Calls for Tricare Reform, Sergeants, November 1995: 9; Kaczor, Bill, AP, "Military Retirees Appealing Benefits Denial," *Miami Herald*, December 12, 1998: "At the heart of the matter is a 1956 law that permits free care for retirees at military hospitals and clinics but only on a space[-]available basis." And, Joyce, Terry, "Network Offers Health

(continued...)

Notably, certain former recruiters claim to have made such promises. They may well have. Nevertheless, as pointed out above, unauthorized promises based on mistakes, fraud, etc., do not constitute a contractual obligation on the part of the government/taxpayer.

In a different vein, others suggest that although no such *legal* entitlement exists, a *moral* obligation or an obligation based on popular opinion is sufficiently compelling to make such a promise a reality. For example, Hon. Stephen Joseph, former Assistant Secretary of Defense (Health Affairs) stated before a congressional subcommittee in 1995:

> The lawyers will tell you that there is no fine print that says free medical care guaranteed for life. I think though it is facetious for anybody to sit up here and say that, that is not what recruits believe when they are talked to by their recruiter. That is a fact of life.[29]

Whether there is or should be a moral obligation is a matter of opinion; as decided by the courts and enforced by the administrators, these claims, like the others, do not create a contractual obligation on the part of the government/taxpayer. The courts, and other analysts, have noted that allowing these claims to create such an obligation would thwart the constitutional role of Congress (i.e., prevent the Congress from determining the compensation and benefits of the armed forces) and create a situation wherein military personnel/retirees (and potentially all other federal employees) could create or expand their own benefits with popular myth or rumor and without review.

Despite extensive documentation, including court decisions, to the contrary, the belief in legally guaranteed "free lifetime care" persists,[30] and such claims continue color debate over the availability of these and other military health care benefits.[31]

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[28] (...continued)
Care Answers For Military Families," *Charleston Post and Courier*, January 9, 2000, "Folks who are upset about care that's no longer available or cash outlays for what was supposed to be free."

[29] U.S. Congress, House National Security Committee, Military Personnel Subcommittee, Hearings, Oversight of Previously Authorized Programs, 104th Cong., 1st sess., H.Rept 104-7, March 28, 1995: 828. The Retired Officer Association also credits Dr. Joseph with testifying (in 1995) "before Congress that DOD has an 'implied moral commitment' to provide health care to all eligible beneficiaries."

[30] See U.S. Congress, House National Security Committee, Military Personnel Subcommittee, Hearings on National Defense Authorization Act for Fiscal Year 1998-H.R. 1119 and Oversight of Previously Authorized Programs. HNSC No. 105-6, 105th Cong., 1st sess., Feb. 27, 1997: 1-162, for a lengthy treatment of this issue.

[31] For example, an insert in *The Retired Officer Magazine*, January 1998, seeking FEHBP benefits for military retirees over 65, is entitled, "FEHBP-65: The fix for broken health care promise." According to the U.S. General Accounting Office, a demonstration project affording military retirees access to FEHBP coverage suffered low enrollment. The demonstration was ultimately terminated. US GAO, GAO-03-547, June 2003.

Recent Legislation

Though Congress has never authorized "free health care for life at military facilities," various congressional reports have commented on the issue, and there have been recent legislative actions on the subject. For example, the Senate, explaining its support of additional benefits for military retirees, included non-binding language in its report on the FY1998 National Defense Authorization Act that reiterated its intention with regard to the promise of lifetime care:

> A longstanding priority of the committee has been the improvement of the military health care system ....
>
> [T]he committee is concerned that the Department of Defense (DOD) faces significant constraints on its ability to meet the entire range of benefits expected by participants in the Military Health Service System ....
>
> The issue of health care for military retirees over age 65 is of special concern to the committee. The nation has incurred a moral obligation to attempt to provide care to military retirees who believe they were promised lifetime health care in exchange for a lifetime of military service. The nation fulfills its obligation through Medicare.[32]

This language expresses the view that a "promise" to military retirees was made — and that existing statutes and institutions do fulfill that promise.

Later, with the enactment of the FY1998 National Defense Authorization Act, Congress included the following language:

> **SEC. 752. SENSE OF CONGRESS REGARDING QUALITY HEALTH CARE FOR RETIREES**
>
> (a) Findings.-Congress makes the follow findings:
>
> (1) Many retired military personnel believe that they were promised lifetime heath care in exchange for 20 or more years of service.
>
> (2) Military retirees are the only Federal Government personnel who have been prevented from using their employer-provided health care at or after 65 years of age.
>
> (3) Military health care has become increasingly difficult to obtain for military retirees as the Department of Defense reduces its health care infrastructure.
>
> (4) Military retirees deserve to have a health care program that is at least comparable with that of retirees from civilian employment by the Federal Government.
>
> (5) The availability of quality, lifetime health care is a critical recruiting incentive for the Armed Forces.
>
> (6) Quality health care is a critical aspect of the quality of life of the men and women serving in the Armed Forces.
>
> (B) SENSE OF THE CONGRESS.- It is the sense of the Congress that-

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[32] U.S. Congress, Senate Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1998, 105th Cong., 1st Sess., S.Rept. 105-29, S. 924, June 17, 1997: 294-5.

> (1) the United States has incurred a moral obligation to provide health care to members and former members of the Armed Forces who are entitled to retired or retainer pay (or its equivalent);
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> (2) it is, therefore, necessary to provide quality, affordable health care to such retirees; and,
>
> (3) Congress and the President should take steps to address the problems associated with the availability of health care for such retirees within two years after the date of the enactment of this Act.[33]

Although this language is also non-binding, it does give a sense of the rationale behind creating additional benefits for retirees.[34]

Some in Congress would like to go further in clarifying the issue. On August 6, 1998, Representative Jo Ann Emerson introduced legislation that would have established a "Medicare eligible military retiree health care consensus task force." Among its proposed duties, this task force would conduct "a comprehensive legal and factual study of ... [p]romises, commitments, or representations made to members of the Uniformed Service by Department of Defense personnel with respect to health care coverage of such members and their families after separation from the Uniformed Services."[35] The twelve-member task force (including representatives of military retiree organizations) would determine what had been promised to military members and to what extent these promises were binding. This legislation was reintroduced in the 107th and 108th Congresses.[36]

One reported response to this proposed legislation by an unidentified representative of a military retiree organization was somewhat muted, suggesting that "... we are really beyond the point of looking at broken promises. We are at the stage now where Congress knows something has to be done and is just trying to decide what to do."[37] The legislation was referred to committee but was not reported out of committee prior to adjournment.

As noted above, H.R. 58 and S. 56 were introduced on January 7, 2003. Among their provisions, H.R. 58 and S. 56 seek to expand military retiree health care options to include access to the Federal Employees Health Benefits Program. In offering these benefits, these bills present a number of "findings" (some of which appear

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[33] P.L. 105-85, Section 752, November 18, 1997.

[34] These additional benefits include the creation of demonstration projects known as Medicare Subvention and a Federal Employees Health Benefits Program option. In addition, Congress has instructed DOD to insure an improved pharmaceutical benefit for eligible beneficiaries. For additional information, see CRS Issue Brief IB93103, *Military Medical Care: Questions and Answers*, by Richard Best.

[35] H.R. 4464, August 6, 1998: 2.

[36] H.R. 67, January 3, 2001, and H.R. 62, January 7, 2003.

[37] Cited as "a representative of a major military organization" lobbying for improved medical care for military retirees; see Maze, Rick, "A Broken Promise," *Navy Times*, August 24, 1998: 24.

inconsistent with the official history of military medical care). For example, H.R. 58 and S. 56 find that:

> Statutes enacted in 1956 entitled those who entered service on or after June 7, 1956, and retired after serving a minimum of 20 years or by reason of a service-connected disability, to medical and dental care in any facility of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff.

In contrast, the Department of Defense has always maintained that military retiree health care is, and always has been, permissive in nature and therefore not an entitlement. These bills were updated and reintroduced as H.R. 3474 and S. 2065 in the 108th Congress.

As noted above, although none of these bills was enacted, Congress substantially expanded the health care benefits available to military retirees via the FY2001 National Defense Authorization Act. Among its provisions, this legislation provides an enhanced pharmacy benefit and, with certain restrictions, it extends Tricare coverage to those age 65 and older (known as "Tricare for Life"). For additional information, see CRS Issue Brief IB93103, *Military Medical Care Services: Questions and Answers*, by Richard Best, updated regularly.

On February 2, 2005, H.R. 602 was introduced in the House of Representatives. Two weeks later, on February 16, 2005, an identical bill, S. 407, was introduced in the Senate.[38] These 109th Congress bills are nearly identical to H.R. 3474/S. 2065, introduced in the 108th Congress. These latter bills have secured a relatively large number of co-sponsors (236 in the House and 11 in the Senate). Opponents of this legislation, however, have maintained that some of the bills' findings and provisions are inconsistent with the official history of military health care. H.R. 602/S. 407 are discussed below on a section-by-section basis. Many of the arguments considered above are analyzed in the context of these proposals.

Section 1 of H.R. 602/S. 407 provides a title for this bill. The short title is "Keep Our Promises to America's Military Retirees Act."

Section 2 provides "Findings." Each Finding is considered separately. The first "Finding" states that "No statutory health care program existed for members of the uniformed services who entered service prior to December 7, 1956, and retired after serving a minimum of 20 years." Both proponents and opponents note that Congress had appropriated funds to afford nonactive duty military medical benefits for many years prior to 1956 with the knowledge that the system provided care, albeit of a permissive nature, to retirees. As noted earlier, on June 7, 1956, P.L. 84-569, became law. This law provided for the first time that the dependents of active duty personnel would be entitled to care in a military facility, subject to space- and service-

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[38] In the 108th Congress, as noted above, S. 56, H.R. 58, S. 2065 and H.R. 3473 were introduced. These bills were not enacted. These bills are almost identical to H.R. 602 and S. 407. For the sake of brevity and because bills in the 109th Congress are still active, these 108th Congress bills are not analyzed here. However, much of the analysis that pertains to H.R. 602 and S. 407 are relevant to these 108th Congress bills.

availability restrictions. In addition, the law authorized care in civilian facilities for the dependents of active duty personnel. "In the final passage a House provision which would allow similar care for retired members and their dependents was rejected."[39] Instead, this law authorized space- and service-available discretionary health care at military medical facilities for military retirees and their dependents, thus putting into statute the previous policy of permissive care for retirees and their dependents.

The second Finding states "Recruiters, re-enlistment counselors, and officers at all levels of the uniformed services, and other government officials, as agents of the United States Government, used recruiting tactics that allowed members who entered the uniformed services prior to December 7, 1956, to believe they would be entitled to fully paid lifetime health care upon retirement." Prior to June 7, 1956 there was no legal authority to make such promises. Opponents of H.R. 602 and S. 407 argue that with the passage of P.L. 84-569, any promises beyond those afforded in law were unsustainable.

Third, the Findings note the decision delivered in the case of Schism v. United States[40] by the United States Court of Appeals for the Federal Circuit rejecting the retirees' claims.

> In the United States Court of Appeals for the Federal Circuit decision of 2002, in Schism v. United States (No. 99-1402), the Court said: 'Accordingly, we must affirm the district court's judgment and can do no more than hope Congress will make good on the promises recruiters made in good faith to plaintiffs and others of the World War II and Korean War era — from 1941 to 1956, when Congress enacted its first health care insurance act for military members, excluding older retirees.... We cannot readily imagine more sympathetic plaintiffs than the retired officers of the World War II and Korean War era involved in this case. They served their country for at least 20 years with the understanding that when they retired they and their dependents would receive full free health care for life. The promise of such health care was made in good faith and relied upon. Again, however, because no authority existed to make such promises in the first place, and because Congress has never ratified or acquiesced to this promise, we have no alternative but to uphold the judgment against the retirees' breach-of-contract claim.... Perhaps Congress will consider using its legal power to address the moral claims raised by Schism and Reinlie on their own behalf, and indirectly for other affected retirees.'.

This language appears to accept the retirees' claims that an understanding existed that Schism and his dependents "would receive full free health care for life." Lawyers representing Schism argued to the court that Schism was promised "free lifetime care at military facilities." Under questioning, government lawyers were asked if "promises were made." In response, the government lawyers affirmed that "promises were made." However, the government lawyers did not affirm that the specific promise of "free lifetime care at military facilities" was made. Recruiting and

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[39] U.S. Congress, House Committee on Armed Services, Subcommittee No. 2, HASC No. 93-78, 93 Cong., 2nd sess., December 20, 1974.

[40] 316 F.3d 1259, Fed. Cir. 2002.

other official literature promises lifetime care based on a military career, but a review of the literature indicates that it did not promise that retirees were entitled to "*free*" lifetime care "*at military facilities.*" The court in the Schism case and other courts have rejected this type of retiree claim, not based on the existence, or lack thereof of any such specific promise of "free lifetime care at military facilities," but rather based on the lack of authority on the part of such individuals to make any such binding promises.

The fourth Finding indicates "Only the United States Congress can make good on the promises recruiters made in good faith to plaintiffs and others of the World War II and Korean War era." This finding reflects the fact that under the Constitution,[41] Congress has the power "To make Rules for the Government and Regulation of the land and naval Forces"and thereby to afford military retirees the benefits they seek. Implicitly acknowledged here is the fact that any such promise of benefits without this congressional authority does not create a contractual obligation on the part of the Federal government.

The fifth Finding states "Statutes enacted in 1956 allowed those who entered service on or after December 7, 1956, and retired after serving a minimum of 20 years or by reason of a service-connected disability to medical and dental care in any facility of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff." The June 7, 1956 statute officially put into law the space- and service-available provisions that had existed prior to that date for all eligible retirees, service-connected disabilities notwithstanding.

The sixth Finding indicates "Recruiters, re-enlistment counselors, and officers at all levels of the uniformed services, and other government officials, as agents of the United States Government, continued to allow members who entered the uniformed services to believe they would be entitled to fully paid lifetime health care upon retirement, despite enactment of statutes in 1956, subsequent statutes, and the issuance of regulations that defined and limited the availability of medical care to retired members of the uniformed services." Opponents counter that recruiting brochures and other documents produced by the plaintiffs in the above mentioned cases do not promise "fully paid" or "free lifetime" medical benefits at military facilities.

The seventh Finding states "After 4 rounds of base closures between 1988 and 1995 and further drawdowns of remaining military medical treatment facilities, access to `space available' health care in a military medical treatment facility is difficult or virtually nonexistent for many military retirees." Critics and proponents of the proposed legislation note that there is no doubt that with the reduction in the number of facilities available, the amount of space-available health care for military retirees decreased. However, critics point out that that is not to say that these retirees were completely denied care (see footnote 1). Additionally, they note that under law military retirees remain eligible for other government-sponsored health care benefits

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[41] Art. 1, sec. 8, cl. 14.

including TRICARE, TRICARE for Life, Medicare and Veterans Affairs benefits, all earned as a result of military service.

Eighth, "The failure to provide adequate health care upon retirement is preventing the retired members of the uniformed services from recommending, without reservation, that young men and women make a career of any military service." Critics, however, are likely to note that military recruitment remained robust until early 2005, despite the hazards posed by Operations Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), and most analysts view recruiting difficulties encountered by the Army beginning in January 2005 as related to these post-9/11 wars rather than about compensation and benefits. Critics counter there is little if any indication that young people considering joining the armed forces are focused on retirement benefits, particularly retirement health care benefits, decades into the future. From their perspective, such concerns might ultimately affect career retention — but career retention has been at or substantially above goals since 9/11.

Ninth, "Although provisions in the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001[42] extended coverage under the TRICARE program to medicare eligible military retirees age 65 and older, those provisions did not address the health care needs of military retirees under the age of 65." Proponents and critics note that the provisions of Public Law 106-398 expanded health care coverage for Medicare-eligible retirees. Some have claimed that these are the most generous health care benefits offered by the Federal government. They assert that this law did not decrease any benefits for those retirees who are under age 65 which are already established in law.

Tenth, "The United States should make good on the promises recruiters made in good faith in the World War II and Korean War era and reestablish high quality health care for all retired members of the uniformed services." Critics are likely to argue that this Finding suggests that the quality of health care previously available to retirees has since been diminished and maintain that health care benefits have significantly increased in recent decades. From their perspective, the United States has made good on those benefits afforded military retirees under law.

Section 3 of this legislation is entitled "Coverage of Military Retirees Under the Federal Employees Health Benefits Program." As written, H.R. 602/S. 407 would provide all military members and retirees with access to FEHBP in the following manner.

Section 3 of the bill would amend section 1108 of title 10 United States Code, which currently describes a now-expired demonstration project. The Secretary of Defense (in consultation with the Secretaries of other relevant departments) was authorized to enter an agreement with OPM to enroll up to 66,000 eligible beneficiaries in the Federal Employees Health Benefits Program (FEHBP) for a three-year period. The bill essentially proposes to broaden this program to all "eligible beneficiaries" effective October 1, 2005.

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[42] Public Law 106-398; 11 Stat. 1654; October 30, 2000.

Under the bill, "eligible beneficiaries" would include

- a member or former member of the uniformed services entitled to retired or retainer pay or equivalent pay. The demonstration project limited eligibility to those members who were entitled to hospital benefits under Part A of Medicare; this bill does limit the definition in that fashion. The uniformed services includes not only the armed forces (which includes the Army, Navy, Air Force, Marine Corps and Coast Guard) but also the Commissioned Corps of the National Oceanic and Atmospheric Administration and of the Public Health Services.

- certain unremarried former spouses of members and former members who are not covered by an employer-sponsored health plan.

- dependents of deceased members or of certain former members or of members who died on while on active duty for a period of more than 30 days who meet the definition "member of family" for purposes of the FEHBP. The terms "dependent" and "member of family" do not cover all the same individuals. This could potentially create some confusion. While the term "dependent" includes spouses, unremarried widows/widowers, children under 21, children under 23 who are full-time students at an approved "institution of higher learning" actually dependent on the member or former member, among others, for purposes of title 10, the term"member of the family" for purposes of title 5 section 8901(5) only includes the spouse, an unremarried dependent child under 22 years of age (including adopted, recognized natural, step- or foster-child(ren) who actually live in a parent-child relationship) or unremarried dependent children incapable of self-support.

- individuals (1) who are dependents of a living member or former member who is, was (at the time of death), or would have been (but for the fact that the member was under 60 years of age) entitled to retired or retainer pay (2) who meet the "member of the family" definition. The demonstration project limited eligible beneficiaries to those member or former members who were entitled to benefits under Part A of Medicare; these bills do limit the definition in that fashion.

This definition may raise questions about coverage of 21 year old children not enrolled in institutions of higher learning. Presumably since children 22 years of age and older enrolled in institutions of higher learning are not "family members" for purposes of the Federal health plan, they would not be covered, even though the current title 10 definition permits coverage of such 22 year olds.

Under the bill, "eligible beneficiaries" could enroll in a Federal Employees Health Benefit Plan for either self-only or self and family coverage which would include any dependent of the member or former member who is a "family member

for purposes of chapter 89 of title 5." For purposes of determining eligibility as a family member, chapter 89 of title 5 would be read as if the member or former member was an employee, and the only requirement for eligibility would be those contained in the bill.

Under the bill, eligible beneficiaries who enroll in the FEHBP would not be eligible to participate in military-provided health care plans such as TRICARE. They could receive care in military medical treatment facilities, but that care would be billed to the FEHBP. Eligible beneficiaries could participate in the open season and change plans in the same manner as any other participants in the FEHBP. The government would contribute the same amount toward FEHBP coverage as if the electing beneficiary were an employee. Premiums for electing beneficiaries would be determined as if they were a separate risk pool. The Department of Defense would be required to develop and implement a system to reimburse those participating in the FEHBP for health care costs which are not paid for under FEHBP but would be paid for under TRICARE Standard.

The idea of extending FEHBP benefits to military retirees is not new. Indeed, a demonstration project to allow military retirees to partake in these benefits was created (see Public Law 105-261, October 17, 1998) and ran for three years. Following evaluations by the Department of Defense and the then-General Accounting Office, it was reported that relatively few military retirees opted for FEHBP coverage. The demonstration project expired on December 31, 2002.[43]

Section 4 is entitled "Reimbursement for TRICARE Pharmacy Benefits at TRICARE Network Pharmacy Levels to Certain Military Retirees and Dependents in Hardship Cases." This section of the bill does not provide for codification of this provision in title 10. It would provide that eligible beneficiaries who have another insurance plan or program that provides primary coverage for health benefits (presumably the FEHBP, but it is not so limited) who receive certification from their physicians that "due to physical or medical constraints" they do not have access to a TRICARE network pharmacy and who meet criteria specified by the Secretary of Defense could receive reimbursement for pharmacy benefits received from a non-TRICARE network pharmacy in the same manner and same amount as the Secretary would reimburse such benefits received from a network pharmacy. This language appears to allow eligible beneficiaries to receive TRICARE pharmacy benefits without participating in TRICARE.

Lastly, section 5 of the bill would amend section 1839 of Social Security Act[44] to provide that the monthly premium for eligible individuals to participate in Medicare Part B would be $0. That is, for individuals whose service in the uniformed services began before December 7, 1956 who are entitled to retired or retainer pay, the spouses of those individuals, and widows and widowers of such individuals would receive Medicare Part B for free. According to this bill, the fact that this group of individuals would receive Medicare Part B for free would not raise

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[43] U.S. GAO, *Military Retiree Health Benefits: Enrollment Low in the Federal Employee Health Plans under DOD Demonstration*, May 2003, GAO-03-547.

[44] 42 U.S.C., sec. 1395r.

the premium paid by other Part B participants, and this group of individuals would not be subjected to income-based premium adjustments in the future. Such a change, however, would arguably increase Federal expenditures. (Part B of Medicare provides for non-hospital physician services). The bill proposes a January 2005 effective date for this provision, and would require that the Secretary of Health and Human Services provide rebates to eligible individuals of any premiums paid beginning on or after January 1, 2005.

Section 625 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, (P.L. 108-173) waived the Part B *enrollment penalties* for military retirees, age 65 and over, who enrolled in the TRICARE for Life program from 2001-2004, and the Secretary of Health and Human Services was to provide a rebate for any *penalties* paid after January 1, 2004. This bill would waive not only the penalties but also the premiums for participating in Part B.

Opponents of the legislation are likely to point out that the recent addition of new benefits, the expansion of the numbers of beneficiaries, and other factors (including the general increase in the cost of care) have brought about increases in the costs to the government of providing military medical care, in general, and for retirees, in particular. According to a recent article in the New York Times,

> The cost of the main health care plan, has doubled since 2001 and will soon reach $50 billion a year, more than a tenth of the Pentagon's budget. At least 75 percent of the benefits will go to veterans and retirees. Over the next decade, a new plan for military retirees, TRICARE for Life, will cost at least $100 billion, according to confidential budget documents, rivaling the costs of the biggest weapons systems the Pentagon is building.... The Pentagon, said William Winkenwerder Jr., the assistant secretary of defense for health affairs, faces "a growing, and serious, long-term problem."[45]

Efforts appear to be underway to raise Tricare fees and copayments over the next few years for retirees under the age of 65 and their families. At issue is what some see as rising medical costs becoming a readiness concern:

> In spite of our efforts to manage more efficiently, total spending for the Military Health System, including Retiree Accrual Fund, will reach $37 billion in 2005. Spending has essentially doubled in just the past four years! Our program growth is very rapid. Additionally, if current trends continue, over 75 to 80 percent of that spending will be for individuals no longer on active duty or their family members. The expansion of Tricare for Life, contributes to the growing size of our budget, as do other program elements. For example, our total pharmacy program has increased five-fold, that's 500 percent since 2001 and now stands at over $5 billion.[46]

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[45] Weiner, Tim, "A New Call To Arms: Military Health Care," *New York Times*, April 14, 2005.

[46] U.S. Congress, House Armed Services Committee, Subcommittee on Military Personnel, Overview Statement by The Honorable William Winkenwerder, Jr., Assistant Secretary of Defense for Health Affairs, October 19, 2005.

In an effort to control this growth in costs, it has been reported that the Department of Defense is considering raising out-of-pocket costs for many of its beneficiaries:

> ...[D]efense officials want annual enrollment fees for Tricare Prime, the military's managed-care plan, to more than triple by October 2008 for working-age retired officers. They would go from $230 for an individual - and $460 for family coverage - to $750 and $1,500, respectively. The fees would double - to $450 and $900, respectively - for under-65 enlisted retirees. Retirees who use Tricare Standard, the military's traditional fee-for-service health insurance, would also see their annual deductibles raised. They also would pay - for the first time - an annual enrollment fee. Beyond 2008, all Tricare fees and co-payments would be indexed to medical inflation.... In October, the Congressional Budget Office released an updated report on "The Long-Term Implications of Current Defense Plans." It presented the kind of kudzu-like cost projections for military health care that have persuaded the Joint Chiefs of Staff to back [Assistant Secretary of Defense (Health Affairs)] Winkenwerder's plan. By 2024, the office reported, military medical cost will grow "by about 80 percent in real terms ... from $37 billion in 2006 to $66 billion." That's 37 percent of total budget growth expected across military operations, maintenance and personnel accounts. And those represent 60 percent of the defense budget. Other than the cost of war and contingency operations, the office reported, the greatest budget risk facing the military is health care costs. The report encouraged an increase in fees. But it suggested that a "transformational" set of higher fees and co-payments boost out-of-pocket user costs to the level at civilian HMOs.[47]

In addition, the co-payments for many pharmaceuticals, under the above proposal would also be increased.

By comparison, the annual cost of Blue Cross/Blue Shield coverage (for example, for a 47 year old individual or family of four, 80 percent coverage, $300 annual deductible, PPO) is $3,168 and $8,520, respectively.[48] Even with the above increases, military retirees would still pay a fraction of the annual costs that many civilians pay.

The Military Officers Association of America (MOAA), a leading voice in The Military Coalition[49] announced, among its goals for 2006:

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[47] Philpott, Tom, "Joint Chiefs To Back Higher TRICARE Fees," *Newport Daily News*, January 1, 2006.

[48] Monthly premiums can vary by age, family size, location, type of coverage selected, level of deductibles, copayments, etc. For the purposes of this example, the location chosen was Northern Virginia. Rates were obtained at [http://www.carefirst.com/eSales/index.jsp]

[49] According to its website [http://www.themilitarycoalition.org/WhoWeAre.htm], "The Military Coalition is a group of 36 military, veterans and uniformed services organizations.... The philosophy of the Coalition is that by working together on issues of mutual agreement, the participating organizations can harness the grassroots support of more

(continued...)

- oppose health care cost-shifting from the government to military beneficiaries.
- increase health care access by reducing deterrents to provider participation....
- remain vigilant in protecting against reductions in Medicare/Tricare reimbursement rates...
- eliminate preauthorization and referral hassles and other inconveniences....
- eliminate the 115 percent billing limit when Tricare Standard (CHAMPUS) is the second payer to other health insurance.
- reinstate Tricare benefits for remarried widows when the second marriage ends.
- codify requirements to continue Prime benefits in localities affected by base reduction and closure actions.
- extend the Tricare Extended Care Health Option program (for severely disabled family members of active duty personnel) eligibility to three years for enrolled family members after the death of a servicemember, to allow time for the family to transition to other support services.
- seek increased funding for mental health and family counseling for deployed families.

In justifying the achievement of the first of these goals MOAA claims that "Shifting health costs to beneficiaries ignores that the government has a higher obligation to military people than civilian employers have to their employees. Unique health and retirement benefits are an essential offset to unique arduous service conditions."[50]

On the face of it, many of these MOAA goals would likely increase Federal costs of providing military health care and more acutely increase the competition for dollars among Defense programs. Given the above, military medical care will remain a topic of congressional consideration in 2006.

Another source of potential increase in Federal spending occurs when those who employ military retirees encourage them to remain on Tricare rather then join the employer's sponsored health plan. Traditionally, Tricare is the second payer to other health care. When military retirees are employed, they are often covered by the civilian employer's health plan, thus saving Federal spending on health care. However, certain companies and State governments are encouraging military retirees

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[49] (...continued)
than 5.5 million members, plus their families and accomplish more that by working on these initiatives separately. When one or more of the Coalition organizations is invited to testify before Congress, we frequently coordinate the testimony with the other Coalition associations and present it on behalf of the entire Coalition. This lends greater weight and unanimity to the testimony than if it were presented by any individual association."

[50] *Military Officer*, January 2006: 33. MOAA was formerly called The Retired Officers Association or TROA.

to remain on Tricare by offering Tricare Supplemental coverage. For example, teachers and other employees in North Carolina have received the following offer:

> Under a new law signed by North Carolina Governor Michael F. Easley on July 20, 2004, in lieu of the Teachers' and State Employees' Comprehensive Major Medical Plan eligible state employees may elect to instead be covered through the TRICARE Supplemental Health Insurance.
>
> Eligible employees who choose the TRICARE Supplement drop their employer-sponsored Teacher's and State Comprehensive Major Medical health plan coverage to enroll in the TRICARE Supplement. The eligible employee may receive full health benefits coverage from TRICARE and the TRICARE Supplement (no deductibles, no co-pays, and no out-of-pocket costs). In addition, TRICARE and the TRICARE Supplement are fully portable - meaning the coverage follows the employee if they leave UNC Health Care.[51]

Such arrangements allow states and other employers to minimize their health care costs while encouraging military retirees to remain under Tricare as their primary providers. This potentially represents an increase in Federal spending since in the past, military retirees joined the employer's health plan and Tricare acted only as a second payer

[51] [http://www.unchealthcare.org/site/humanresources/benefits/health_ins] For an example of Tricare Supplements offered to private employers, see [http://www.corporatetricaresupp.com/program.asp]