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EMPLOYEE WELLNESS

Lack of employee health is real, costly problem

U.S. employers may be underestimating the overall costs of poor employee health, and they may not even understand what is driving these costs. One such driver is obesity. Thirty-eight percent of new hires in 2006 were medically defined to be "obese," up from 29 percent in 2000, representing a 36 percent increase in the obese population. If this trend continues, one-in-two new hire applicants in the U.S. will be obese by 2010. Thirty-two million working females are overweight, as are 26 million of their male counterparts. Add to this an approximate 80 percent increase in healthcare costs and a company with just 500 employees will spend nearly one million dollars more in added healthcare costs in 2010 compared with 2005. Imagine if your company employs 50,000 people: the added costs would approach $200 million in 2010. It is clear that overweight employees cost employers...alot!

Obesity is not the only workplace wellness "problem," but it is the most common and many of an employer's health-related costs are the result of employee obesity, which, if left untreated, can result in other, severe health problems. Some common consequences of obesity include: Diabetes; Hypertension; Blood Lipid Disease; Colon or Breast Cancer; and Heart Disease.

The cost to employers. Employers are increasingly bearing the costs of diet-related chronic disease and obesity through employer-provided healthcare plans and indirectly through higher rates of absenteeism. Obesity alone costs employers approximately $33 billion in healthcare and other indirect costs. Employer spending on health promotion and chronic disease prevention is a good investment. Studies have reported a proven rate of return ranging from $2 to $10 for each dollar invested.

According to Senator Tom Harkin (D-IA) who recently introduced legislation that would encourage workplace wellness programs, "Preventing these chronic diseases and unhealthy lifestyles not only helps individuals live longer and more fulfilling lives, it saves money. For example, proactive treatment of hypertension costs about $1,000 per year whereas treatment for a heart attack—which hypertension is often a cause of—costs a minimum of $50,000, not including time off and loss of productivity. It simply makes sense to partner with employers and leverage the place where Americans spend the majority of their waking hours: the workplace."

Employee wellness, or the lack thereof, is a real and growing problem for American organizations. Poor employee health, be it the result of obesity or other health issues, can have a debilitating effect on the workplace. Therefore, this issue of *Ideas & Trends* is devoted entirely to employee wellness and all of the issues that fall under such a broad umbrella. ❑

CONFERENCE COVERAGE

Retiree health benefits are a growing area of employment litigation

Healthcare and healthcare benefits are an increasing preoccupation of U.S. policymakers and the media. For employers, grappling with the skyrocketing costs of providing health insurance benefits in a highly competitive global environment is an ongoing challenge. For labor and employment attorneys, a mounting percentage of their workload is taken up resolving disputes that arise when employers try to rein in these costs.

One of the key growth areas for practitioners is in retiree benefits. Stanley Weiner, a labor attorney in the Cleveland, Ohio office of management law firm Jones Day, spoke of the challenges employers face when they seek to alter retiree health benefits in the face of rising healthcare costs and dwindling resources. Much of the challenge, from a litigation perspective, lies in the very human dimension of the problem. While cutting these costs is painful but, very often, a do-or-die necessity for companies in today's business climate, the prospect of elderly retirees left without health insurance understandably does not sit well with judges or juries.

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RETIREE BENEFITS

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The problem is reduced benefits

Healthcare costs have risen steadily at a rate of 9.9 percent each year, Weiner noted, speaking on "Employee Benefits in a Changing Global Economy" at the National Employment Law Institute's Human Resources Conference, held May 10 and 11 in Chicago. Of course, life expectancy has risen, expanding the pool of retirees in need of coverage and exacerbating the crisis. The number of employers that provide retiree healthcare has dropped from 66 percent to 35 percent, no doubt in part as a result.

Another important factor in the reduction in employer-sponsored retiree healthcare is the adoption in 1990 by the Financial Accounting Standards Board (FASB) of reporting requirements (FAS 106). According to Weiner, adoption of these standards meant the costs associated with retiree healthcare hit the balance sheets for the first time. Greater accountability for these costs led inevitably to increased belt-tightening.

Employers have utilized several strategies to stem the rise in healthcare expenditures, including offering a more modest retirement deal going forward to new employees, lengthening years-of-service requirements for eligibility, increasing deductibles, bargaining to roll defined contributions into voluntary employee benefits associations (VEBA) that their employees' union would then administer and related measures. Still more difficult, employers have been compelled to reduce or altogether terminate benefits for current retirees.

Have the benefits vested?

The ability of employers to eliminate or restrict retiree benefits generally hinges on one key question: "Did you promise lifetime benefits?" That's the essential legal issue, Weiner said. Moreover, he cautioned, "courts will bend over backwards to find a promise in light of the human pain" involved. It comes down to whether these benefits are found to have vested.

The Employee Retirement Income Security Act (ERISA) is the key statute that regulates retiree benefits in the non-union sector. The Labor Management Relations Act is the controlling legislation in the union environment. Regardless of the applicable statute, however, courts typically apply the same standards in determining whether benefits have vested:

- Did the applicable plan summary or bargaining agreement have a reservation of rights clause? Such a provision is one of the most important defenses an employer has against legal claims that follow a unilateral change in benefits. Moreover, reiteration of those reserved rights serves to remind employees of the employer's prerogative to alter its benefits offerings, Weiner advised.
- Was there durational language, a termination of coverage provision, which defined the time limits in which the benefit would expire? In contrast, does the summary plan description or union contract include "lifetime" language or terms tying health benefits to pension benefits? In certain jurisdictions, such language can be interpreted as an intent to vest.
- Are the terms of the summary plan description or bargaining agreement ambiguous? It's essential for employers to avoid ambiguity in summary plan descriptions or bargaining agreement terms. "Otherwise, the court will go against you," Weiner warned. Ambiguity means extrinsic evidence comes in—including the potential testimony of sympathetic retirees struggling to pay for healthcare in the wake of employer's alleged breach of a promise to provide coverage.

The courts. Various federal circuits apply different evidentiary burdens to the question of whether healthcare benefits have vested, Weiner explained. In some courts, retiree benefits are presumed to have vested; in others, express language is required. Certain jurisdictions place the burden of proving an intent to vest squarely on the plaintiff; others put the onus on the employer to show otherwise. This means that retiree benefits litigation is characterized by a healthy dose of forum-shopping.

"The Sixth Circuit is the key locale," Weiner noted. "Plaintiffs rush to file cases there. In this circuit, there is a clearly a presumption that the retiree benefits are vested—at least in the union context." Alternatively, the First Circuit is among the best for employers on the retiree benefits issue. "This circuit employs basic contract principles," he said. Other circuits vary on their approach to the issue. The Third Circuit, for example, is one of several courts that require a showing by the plaintiff of a clear statement of intent to vest.

Other emerging benefits issues

Next up, in benefits litigation? Weiner says to watch for an increase in the following types of claims:

- stock-drop litigation, or claims of breach of fiduciary duty against 401(k) plan administrators;
- 401(k) fee litigation; and
- the emerging trend of offering healthcare incentive pay creating wage and hour issues: must such pay be included in an employee's regular hourly rate? ❑

Additional benefits issues and trends are located in the HR Practices Guide. For a look at other current trends, check out ¶4300 through ¶4303.

Human Resources Management Ideas & Trends

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