Americans Contribute More toward Private Health Insurance (p. 1)
Benefit Coverage Relates to Business Characteristics (p. 2)
Requirements for Employer Stock Plans (p. 4)
Legislation & Litigation (p. 5)
In the States (p. 9)
For Your Benefit (p. 11)

DECEMBER 1989 VOLUME 10 NUMBER 12

Americans Contribute More toward Private Health Insurance

Insured Americans are increasingly being required to share the burden of escalating health care costs through various cost-sharing mechanisms, according to a recent nationwide EBRI/Gallup survey.

More insured individuals are required to share the costs of coverage by paying part or all of the premium. In addition, they may have to meet higher deductibles or copayments.

Table 1
Incidence of Changes in Health Insurance Cost-Sharing Provisions Since 1987*

<table>
<thead>
<tr>
<th>Type of Change</th>
<th>Percentage Reporting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Share of Monthly Premium Increased</td>
<td>43%</td>
</tr>
<tr>
<td>Paying Part of Premium for First Time</td>
<td>25%</td>
</tr>
<tr>
<td>Deductible Increased</td>
<td>32%</td>
</tr>
<tr>
<td>Amount Increased for Each Service</td>
<td>42%</td>
</tr>
<tr>
<td>Family Coverage Increased</td>
<td>41%</td>
</tr>
</tbody>
</table>


*Responses of 898 persons with health insurance.

**Service refers to each time the respondent receives health care covered by insurance, such as a visit to the doctor.

Family coverage is considered to be provided under respondent's insurance plan.

Willingness to Pay

A majority of the respondents said they would be willing to pay $50 more per month to improve their coverage. Fifty-nine percent said they would be willing to pay $50 a month to keep their existing benefits if they would otherwise be cut back, and 51 percent would be willing to do so to cover family members. Yet, a smaller percentage (39 percent) said they would pay that amount to restore benefits that are not currently as generous as they once were.

Many respondents would be willing to pay more for health insurance than they currently pay. While 36 percent currently pay as much as $100 per month, fully 52 percent would be willing to pay as much as $100 per month.

Similarly, 13 percent of respondents with insurance pay more than $100 per month, whereas 20 percent would be willing to pay more than $100 per month for coverage.
Thirty-two percent of respondents said they currently pay nothing for health insurance; 7 percent said they would be unwilling to pay anything (table 2).

Family Coverage

Of those with health insurance, most respondents cover family members under their health plan; only 12 percent do not. Workers in their "prime" working years (aged 35 to 54) were more likely to have coverage for family members (90 percent) than respondents aged 18 to 34 (86 percent). Among those who do not cover family members, 40 percent said the family member has his or her own insurance.

While one-third (33 percent) said the family member did not qualify for coverage, only 8 percent stated that they could not afford dependent coverage. Three percent of respondents said their employer does not offer family coverage.

The Uninsured

One out of ten respondents reported they have no health insurance. Forty-four percent of the uninsured respondents said they could not afford coverage. Of that group, 81 percent have annual family income of $20,000 or less. Less than one-tenth (8 percent) of the respondents without insurance said they are healthy and do not see a need for it.

Table 2

<table>
<thead>
<tr>
<th>Amount per Month</th>
<th>Percentage Willing to Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1–$50</td>
<td>29%</td>
</tr>
<tr>
<td>$51–$100</td>
<td>23</td>
</tr>
<tr>
<td>$101–$150</td>
<td>7</td>
</tr>
<tr>
<td>$151–$200</td>
<td>7</td>
</tr>
<tr>
<td>$201 or More</td>
<td>6</td>
</tr>
<tr>
<td>Nothing</td>
<td>7</td>
</tr>
<tr>
<td>Did Not Know</td>
<td>20</td>
</tr>
<tr>
<td>Refused to Answer</td>
<td>1</td>
</tr>
</tbody>
</table>


*Responses of 1,000 persons surveyed.

Only 4 percent said they do not qualify for coverage.

The survey, conducted in August 1989, is a follow-up to EBRI’s June 1989 survey on health care issues, and the third in a series of national public opinion polls EBRI is undertaking on public attitudes toward economic security issues such as health, retirement, child care, savings, Social Security, and long-term care. The polls are conducted for EBRI monthly by The Gallup Organization, Inc., which surveys 1,000 Americans by telephone. The maximum expected error range at the 95 percent confidence level is ± 3.1 percent.

The survey report, Public Attitudes on Health Insurance Provision, is available for the following prices: summary—$75; full report—$275. EBRI members receive a discount. Contact Laura Bos at (202) 775-6318.

—Shannon Braymen, EBRI

Benefit Coverage: Relates to Business Characteristics

Employee benefit coverage is directly related to business size and arrangement, such as whether a firm is a sole proprietorship, a partnership, or a corporation. In general, small businesses are less likely than larger businesses to provide benefits to employees. Similarly, in sole proprietorships health coverage is generally lower than in other forms of business.

The National Federation of Independent Business (NFIB) provides data on coverage in small firms comparable to that provided by the U.S. Department of Labor’s Bureau of Labor Statistics (BLS) on medium-sized and large establishments. Retirement benefits are provided to 91 percent of full-time employees in medium-sized and large establishments but to only 43

This analysis does not account for the age of the business. Firms that have recently been established may be less likely to offer a benefits package than more mature firms, and small firms are more likely to be younger firms. For more information on pensions and small employers, see Emily S. Andrews, Pension Policy and Small Employers: At What Price Coverage? (EBRI, 1989).

Notes

Dallas L. Salisbury, Publisher
Shannon Braymen, Editor

Shannon Braymen, Editor

Shannon Braymen, Editor

Shannon Braymen, Editor

Shannon Braymen, Editor
percent in small firms. Similarly, employees in medium-sized and large establishments are more likely to have health insurance than those in small firms: 96 percent compared with 75 percent, respectively. Similar comparisons exist for most other benefits (table 3).

These findings are confirmed by the Health Benefits Data Base of the U.S. Small Business Administration (SBA), Office of Advocacy, which counts the number of firms offering these benefits as opposed to counting the number of employees covered. Fifty-five percent of smaller firms (those with fewer than 100 employees) offer health insurance, compared with 98 percent of larger firms (those with 100 or more employees). Pension plans, including section 401(k) arrangements, are offered by 16 percent of small firms, compared with 69 percent of larger firms.

Health coverage varies widely among forms of business. According to SBA data, 29 percent of sole proprietorships offer health plans compared with 77 percent of corporations. Also, subchapter S corporations3 are less likely (49 percent).

3A subchapter S corporation has 35 or fewer shareholders and is taxed as if the firm were a partnership. Unfortunately, no data are available on partnerships.

---

**Table 3**  
Percentage of Full-Time Employees, by Participation in Employee Benefit Programs, Medium-Sized and Large and Small Firms, 1985

<table>
<thead>
<tr>
<th>Employee Benefit Program</th>
<th>Employeesa in Medium-Sized and Large Firmsb</th>
<th>Employees in Small Firmsc</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retirement</td>
<td>91.0%</td>
<td>43.3%</td>
</tr>
<tr>
<td>Health Insurance</td>
<td>96.0</td>
<td>74.7</td>
</tr>
<tr>
<td>Life Insurance</td>
<td>96.0</td>
<td>58.6</td>
</tr>
<tr>
<td>Vacations</td>
<td>99.0d</td>
<td>80.6</td>
</tr>
<tr>
<td>Paid Lunch Break</td>
<td>10.0</td>
<td>18.6</td>
</tr>
<tr>
<td>Sick Leave</td>
<td>67.0</td>
<td>45.8</td>
</tr>
<tr>
<td>Long-Term Disability Insurance</td>
<td>48.0</td>
<td>25.6</td>
</tr>
<tr>
<td>Child Care</td>
<td>1.0</td>
<td>4.3</td>
</tr>
<tr>
<td>Educational Assistance</td>
<td>76.0</td>
<td>23.0</td>
</tr>
<tr>
<td>Employee Discounts</td>
<td>57.0</td>
<td>34.8</td>
</tr>
</tbody>
</table>


aParticipants are workers covered by paid time off, insurance, retirement, or capital accumulation plans. Employees subject to a minimum service requirement before they are eligible to a benefit are counted as participants even if they had not met the requirement at the time of the survey. If employees are required to pay part of the cost of a benefit, only those who elect the coverage and pay their share are counted as participants. Benefits for which the employee must pay the full premium are outside the scope of the survey. Only current employees are counted as participants; retirees are excluded.

bMedium-sized and large firms are those with at least 50, 100, or 250 employees, depending on the industry.

cSmall firms are those with fewer than 100 employees.

dIncludes 0.7 percent of employees in plans that do not offer family coverage.
than full corporations to offer health insurance. Among all business types, smaller businesses are less likely than larger businesses to offer health insurance (table 4).

If sole proprietorships begin employing a larger percentage of workers, with employees moving from corporations and partnerships to sole proprietorships, overall coverage could erode. However, if sole proprietorships begin employing those who are or would otherwise have been unemployed, the total number of covered workers would increase, although the corresponding percentage of workers covered could decrease.

—Jennifer Davis, EBRI

### Requirements for Employer Stock Plans

One of the Internal Revenue Service (IRS) qualification requirements for an employee stock ownership plan (ESOP) (and any other pension, profit-sharing, or stock bonus plan) is that it be established and maintained for the exclusive benefit of employees and their beneficiaries. Nonetheless, ESOPs and other plans holding employer stock are often regarded as an important component of an employer’s antitakeover defense. This is so because such plans frequently “pass through” voting and tender-offer decision rights to the covered employees, who are generally thought likely to “vote their jobs” and support current management in such a fight.

Plan Fiduciaries

In some circumstances the Internal Revenue Code actually requires voting rights to be passed through, and, under various pronouncements of the Department of Labor (DOL), participant instruction with respect to shares allocated to participants is regarded as consistent with the Employee Retirement Income Security Act of 1974 (ERISA). However, as to unallocated shares, which are likely to predominate in the early years of a leveraged ESOP, and to allocated shares with no instructions, DOL’s position (which has been widely disregarded in drafting plan provisions) is that the plan’s fiduciary must make an independent decision and may not rely on a formula instruction set forth in the plan itself. (A common instruction tells the fiduciary to vote uninstructed and unallocated shares in the same ratio as those allocated shares for which instructions are received.)

DOL has also indicated that a fiduciary may not follow instructions unless they are “proper.” What constitutes a “proper” instruction has, therefore, been the subject of significant pension bar discussion. Most would agree that instructions are not “proper” when given under employer duress or where plan participants have not been provided with the information available to shareholders generally. Some, however, have suggested that a fiduciary must second guess participants on substantive voting and tender decisions even where the participants are adequately informed and free from duress. Under this view, if the fiduciary would

<table>
<thead>
<tr>
<th>Employment Size of Firm</th>
<th>Sole Proprietorship</th>
<th>Corporation</th>
<th>Subchapter S Corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Firms</td>
<td>29%</td>
<td>77%</td>
<td>49%</td>
</tr>
<tr>
<td>1-9</td>
<td>29</td>
<td>70</td>
<td>31</td>
</tr>
<tr>
<td>10-24</td>
<td>30</td>
<td>82</td>
<td>85</td>
</tr>
<tr>
<td>25-99</td>
<td>44</td>
<td>96</td>
<td>88</td>
</tr>
<tr>
<td>100-499</td>
<td>84</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>500+</td>
<td>100</td>
<td>100</td>
<td>93</td>
</tr>
<tr>
<td>&lt;100</td>
<td>29</td>
<td>76</td>
<td>48</td>
</tr>
<tr>
<td>100+</td>
<td>85</td>
<td>100</td>
<td>99</td>
</tr>
</tbody>
</table>

independently come to a conclusion different from that of the participant, he must ignore the participant's instruction and act in accordance with his own conclusion. This view obviously accords little if any weight in any circumstance to the participant's instruction.

Court's Decision on Participant Instruction

Although the facts and the court's underlying rationale are somewhat unclear, a recently reported decision from the Southern District of Ohio appears to come fairly close to adopting the view discussed above. In The Central Trust Company, N.A. v. American Aventis Corporation (C.A. No. C-1-88-883), an ESOP trustee brought an action seeking a declaratory judgment to the effect that it should ignore the ESOP's provisions requiring participant instruction and accept an offeror's cash tender offer for all of the employer's stock. The court entered such a judgment.

In so doing, the court reached the following conclusions of law:

Pass-through voting is not improper per se . . . , but is inappropriate when the exercise thereof conflicts with the fiduciary obligations imposed by ERISA.

It is inappropriate for a trustee to put aside personal judgment in favor of carrying out the wishes of the Trust participants.

The court rested its conclusions factually on a finding that participants would likely receive a maximum $5 per share if the $12 per share tender offer was not accepted. Since no instructions had apparently been solicited, it is unclear why the court appeared to assume that the participants themselves would prefer the lesser amount. The court did note, however, that the plan terms purported to require, as a precondition to sale, the approval not only of the participants themselves but also of a plan administrative committee composed of two officers who were themselves substantial shareholders.

The decision could conceivably have rested on the intrinsic conflict for the committee members and the fiduciary breach (and potential participation therein by the trustee) that could be seen to occur if the committee were to block the tender offer in these circumstances. Such a decision would have been relatively noncontroversial and in line with the Second Circuit's decision in the Grumman takeover fight.

The decision in question was issued by a magistrate, and not a regular federal court judge. As such, it may be afforded relatively little weight by other courts. As noted above, however, the permissible contours of participant instruction and plan formulas purporting to control the voting and tender-offer decisions of plan fiduciaries remain unclear.

—This column was prepared by K. Peter Schmidt of EBRI's legal counsel, Arnold & Porter.

Legislation & Litigation

[Editor's note: Notes will feature a wrap-up of the major legislative actions affecting employee benefits during the 101st Congress in the January 1990 issue.]

Congress Approves Budget Reconciliation Legislation

After an all-night session, Congress approved a $14.7 billion deficit reduction bill Nov. 22 and adjourned for the year. The final package (H.R. 3299) contains changes in the deductibility of employee stock ownership plan (ESOP) stock dividends and loan interest, extensions of expiring tax breaks, physician payment reform provisions, and a provision modifying the indexing of the Social Security wage base. The full text of the final budget reconciliation bill was published in the Nov. 21 Congressional Record.

ESOPs—The budget package contains a partial repeal of the 50 percent interest exclusion received on ESOP loans (Notes, 8/89, p. 5). Under the new rule, the interest exclusion is repealed unless the ESOP holds more than 50 percent of the stock in the company, effective July 10, 1989. But for those who would have met the 30 percent threshold under the House version of the budget bill but not the 50 percent threshold in the final bill, the provision would generally be effective Nov. 17, 1989.
A provision that would have repealed the dividend deduction (section 404(k)) for employer securities held by an ESOP was not included in the final budget bill; however, conferees adopted a House provision that, effective Aug. 4, 1989, would allow the dividend deduction only for stock acquired by the ESOP loan.

**Pensions**—The proposed increase in the Pension Benefit Guaranty Corporation (PBGC) premium contained in the Senate budget proposal was stripped from the budget bill and replaced with an Employee Retirement Income Security Act (ERISA) penalty fee provision. The provision requires mandatory Labor Department civil penalties on violations by fiduciaries (the penalties were previously optional). The final bill also includes a tax penalty for substantial overstatement of pension liabilities used in determining deductibility. The pension-related technical corrections that were included in the House Ways and Means budget reconciliation package were also included in the final bill.

A provision that would effectively reverse the Internal Revenue Service (IRS) private letter ruling that allows deductible contributions to a 401(h) plan for retiree health benefits beyond the pension plan's full funding limit was included.

Provisions to permit the limited use of excess pension funds to pay current retiree health benefit liabilities and proposals on asset reversions were not included in the budget bill (*Notes*, 11/89, pp. 9–10).

**Tax Extensions**—Under the agreement reached by House and Senate negotiators and Bush administration officials, several tax provisions—including the income exclusions for employer-provided educational assistance benefits and group legal services—would be extended through Sept. 30, 1990. The tax deduction for health insurance premiums paid by self-employed individuals and certain other expiring provisions would be extended for a nine-month prorated portion of a year (*Notes*, 11/89, p. 10).

Democrats supported a one-year extension, while Republicans and the administration had generally preferred a six-month extension. Several Republicans consider the further extension of these provisions to provide the best legislative vehicle next year for a capital gains cut (see following article on capital gains).

**Physician Payment Reform**—The budget package also includes a provision that would phase in a fee schedule for reimbursing physicians under the Medicare program using a resource-based relative value system, effective Jan. 1, 1992. The provision imposes a complex formula for calculating how much fees will rise each year based on the Senate version of the bill originally authored by Sen. John Rockefeller (D-WV). Under the plan, physicians would not be allowed to charge more than 125 percent of the Medicare-approved fee, beginning in 1992. The ceiling would be gradually lowered to 115 percent by 1995 (*Notes*, 8/89, pp. 3–4).

**Social Security**—The budget bill includes provisions requiring that various forms of deferred compensation—such as applicable contributions to a 401(k) plan, simplified employee pension, or other salary reduction plan—be included in determining average compensation and, in turn, the Social Security taxable wage base. The Social Security Administration, therefore, will have to recalculate the 1990 taxable earnings base, which they recently announced would be $50,400. The bill also includes Social Security provisions that affect such programs as disability benefits and child welfare services.

**COBRA Provisions**—The final budget reconciliation bill contains changes to continuation of coverage rules enacted under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The bill would allow COBRA continuers who become covered under another plan to continue their former employer coverage for a capital gains cut (see following article on capital gains).

The bill also would extend the continuation period from 18 months to 29 months for individuals who are disabled at the time of a qualifying event, and it would increase the maximum COBRA premium for months 19–29 to 150 percent of the applicable premium.
Child Care Provisions—Democratic congressional leaders postponed action on child care legislation until next year, after failing to reach agreement on various provisions including earned-income tax credit, dependent care credit, and children's health insurance credit contained in the House and Senate budget bills. Conference from the Senate Labor and Human Resources and House Education and Labor committees had approved the nontax provisions of a $1.75 billion child care bill on Nov. 9, but dispute over how money should be funneled to the states and what, if any, restrictions should be placed on religiously affiliated child care providers halted further negotiations (Notes, 11/89, pp. 10–11).

Congress Repeals Medicare Catastrophic Law

Congress voted to repeal the Medicare catastrophic insurance law (except for a few Medicaid benefit improvements) in the early hours of Nov. 22, after sending proposals to repeal or modify the law back and forth between the House and Senate for several days.

Dispute continued until the final hour between the House and Senate on whether the program should be repealed outright or scaled back sharply. Early Nov. 21, the House voted for the fourth time to repeal the law; the Senate responded by attaching a compromise agreement that would have retained some hospital benefits, but the House ultimately rejected the compromise (Notes, 11/89, p. 10).

Under the repeal provision, employers will be required to comply with the maintenance-of-effort provisions (included in the Medicare Catastrophic Coverage Act) for 1989 only.

Section 89 Repealed

President Bush signed into law Nov. 8 legislation repealing section 89 nondiscrimination and qualification rules. The repeal language was added as an amendment to legislation to raise the federal debt limit (H.J.Res. 280) passed by Congress on Nov. 7.

The provision repeals present-law section 89 and generally reinstates the nondiscrimination rules applicable before section 89, related to employer-provided self-insured medical reimbursement plans (section 105(h)), cafeteria plans (section 125), dependent care assistance plans (section 129), and group-term life insurance plans (section 79(d)).

The repeal includes a provision stipulating that plans that would have been considered nondiscriminatory under section 89 for the 1989 plan year will be considered to be in compliance with the reinstated rules under section 105(h). Regarding separate lines of business, the amendment provides that until guidelines and determinations under section 414(r) are issued, employers will be treated as operating separate lines of business if they reasonably determine that they meet the requirements of section 414(r).

The repeal provision does not repeal or amend the following provisions enacted under the Tax Reform Act of 1986:

- the 55 percent dependent care utilization test (however, the test has been delayed until plan years beginning Jan. 1, 1990); and
- increased employer exposure for health care spending accounts and other provisions of the proposed cafeteria plan regulations issued with section 89 regulations in 1989. The regulations require that the maximum amount of reimbursement elected under a health care flexible spending arrangement (FSA) be available at all times during the coverage period, regardless of how much salary reduction may have occurred to date. Currently, many employees limit FSA reimbursements to a participant’s existing account.

Capital Gains/IRA Proposals Fail in 1989

The Senate failed to break a Democratic filibuster on a capital gains tax cut in two separate votes Nov. 14 and Nov. 15, falling just short of the necessary 60 votes. The failed Senate proposal replaced the House-passed capital gains language with a plan offered by Sens. Bob Packwood (R-OR) and William Roth (R-DE) that would have provided a preferential tax rate on capital gains depending on how long the asset was held, coupled with a backloaded individual retirement account (IRA) plan that provides for tax-free withdrawals rather than deductible contributions (Notes, 11/89, p. 12).
Minimum Wage Increase
Signed into Law

President Bush signed into law a compromise measure (H.R. 2710) Nov. 17 to raise the minimum wage to $4.25 an hour from $3.35 by April 1, 1991, and to introduce the first subminimum training wage for teen-agers. The compromise, worked out by Bush and congressional leaders, allows employers to pay a subminimum training wage for up to six months (under certain conditions) to workers between the ages of 16 and 19.

Bills to Exempt Social Security Trust Funds from Deficit Gain Momentum

Legislation that would exempt the Social Security trust funds from deficit calculations is expected to be taken up by Congress shortly after it reconvenes in January. Sen. Daniel Moynihan (D-NY) introduced a bill (S. 1785) Oct. 24 that would exempt the trust funds from the Gramm-Rudman-Hollings (GRH) deficit reduction law and extend the budget deficit targets to fiscal 1997. Rep. Bill Frenzel (R-MN) introduced a bill (H.R. 3573) Nov. 1 that would exempt the trust funds from GRH after fiscal 1993, regardless of whether or not GRH is extended beyond that date.

Sen. John Heinz (R-PA) tried unsuccessfully Nov. 7 to attach a provision to the debt ceiling bill (H.J.Res. 280) that would have taken the Social Security trust fund off budget. Heinz agreed to drop the amendment after appeals from both Democratic and Republican senators and a “warranty” from Senate Majority Leader George Mitchell (D-ME) that he would strive to bring a legislative vehicle for budget reform to the Senate floor.

In response to these congressional efforts, the House Ways and Means Committee held a hearing Nov. 2 on legislation introduced by Chairman Dan Rostenkowski (D-IL) that would require any legislation that would increase Social Security benefits or reduce taxes to include commensurate changes in Social Security spending and/or revenues (H.R. 3505). Rostenkowski said that he does not support the removal of trust funds from budget reconciliation, but he anticipates that legislation will be passed and wants to protect the trust funds from “misguided congressional attempts to expand benefits.”

House Aging Committee Holds Hearings on Health, Retirement

The House Select Committee on Aging held a hearing Nov. 9 on competing proposals for comprehensive reform of health and long-term care in the United States. Proposals included reforming the current Medicare, Medicaid, and private insurance systems; instituting more of a state-based, nationwide system incorporating the experience of both Canada and the United States; and establishing a national health insurance system building upon the Medicare program, with additional cost containment and quality assurance.

The House Aging Subcommittee on Retirement Income and Employment held a hearing Nov. 15 entitled “Who’s Minding Your Pension?”, at which it reviewed the Department of Labor’s (DOL) efforts to prevent fraud and abuse in the nation’s private pension plans.

Witnesses included Raymond Maria, acting inspector general for DOL, and David Ball, DOL assistant secretary for the Pension and Welfare Benefits Administration. Both addressed the DOL inspector general’s report, which said that greater enforcement provisions are needed to adequately protect private pension assets from being illegally siphoned off or embezzled. Ball told the subcommittee that workers and retirees should not be worried about the pension system because it is sound and “has never been healthier” (Notes, 7/89, p. 16).

House Labor Committee Approves Disability Bill

The House Education and Labor Committee approved Nov. 14 a modified version of the Americans with Disabilities Act (ADA, H.R. 2273). The bill, passed by the Senate on Sept. 7, would prohibit discrimination against disabled persons in employment, all public services, public accommodations, transportation, and telecommunications (Notes, 10/89, p. 12).

None of the three other House committees with jurisdiction over ADA (Judiciary, Energy and Commerce, and Public Works and
In the States

Takeovers—The U.S. Supreme Court has declined to hear a challenge to Wisconsin’s corporate takeover law, potentially leaving states free to regulate tender offers. Wisconsin law requires a bidder that acquires at least 10 percent of a company’s shares to either have approval of that company’s directors or wait three years to complete the merger.

Labor Law—Employers in New York must comply with a new amendment to a New York State labor law that requires employers to issue written notice when terminating New York resident employees. The notice must be provided no later than five working days after the date of termination and must include the exact date of termination and the date on which employee benefits will be canceled.

Health Coverage—As the end of the decade draws near, expansion of health insurance coverage is still being discussed in several states. Only one state has fully implemented an employer mandated health insurance plan—Hawaii, which did so in the 1970s. Massachusetts has a mandatory, employer-based plan that is currently in the transition stage. Recently, New York, California, Washington, and the District of Columbia have discussed the issue and could take action next year. The New York plan, UNY*Care (Universal New York Health Care), would rely on a combination of employer-based insurance and expanded public programs to cover the state’s 2.5 million uninsured. The plan would create a single payment authority for all services and require all physicians to accept assignment.

Transportation) have scheduled a markup of the bill, but floor action is anticipated in early 1990.

Joint Economic Committee Addresses Corporate Time Horizons

The Joint Economic Committee held a hearing Nov. 14 to address institutional investors and the influence of capital markets on short-term investments. The hearing, entitled “Corporate Time Horizons: The Power of Pension Funds,” featured witnesses Ira Millstein, chairman of the New York State Task Force on Pension Fund Investment; David Feldman, corporate vice president of investment management for AT&T; and Roland Machold, director of the investment division for the State of New Jersey. Millstein told the committee that pension funds tend to focus on short-term gains, while Feldman said they generally invest with a long-term view. All of the witnesses agreed that corporate boards and pensions need to communicate intentions more clearly.

The committee also held a hearing on the “eclipse of the public corpo-

ration” Nov. 8 and is scheduled to hold a hearing to address “public policy and corporate time” early next year.

—Nora Super, EBRI

Regulations

Regulatory Agendas Released

The Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) published their regulatory agendas in the October 30, 1989, Federal Register (pp. 45083, 44828, and 45454, respectively).

The IRS’ forthcoming regulations on separate lines-of-business under section 414(r) will require firms to establish that a business is independently viable and operated and organized separately for a “bona fide” reason, according to Thomas Schendt, an attorney-advisor in IRS’ office of Employee Benefits and Exempt Organizations. The regulations are scheduled to be proposed by the end of 1989.

One of DOL’s regs will provide guidance as to what constitutes a “top hat” plan, an unfunded employee benefit plan maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

Scheduled PBGC regs will address transfers from multiemployer plans to single-employer plans, payment
of benefits in PBGC-trusteed plans, and payments by PBGC of unfunded, nonguaranteed benefits, among other related issues.

IRS Extends Deadline for 401(k) Opinion Letters

IRS has postponed the deadline for adopting master and prototype plan amendments under section 401(k) of the Internal Revenue Code from Oct. 31, 1989, to March 31, 1990—as stated in Announcement 89-128 DER G-2, SpSupp, 7/6/89. Notice 89-110 postpones the effective date of that provision until further notice.

The announcement extends the amendment period for IRS acceptance of applications for an opinion letter with respect to a master or prototype plan's adoption of the Sec. 401(k) model amendments.

Regulations Released on Medicare as Secondary Payer

The U.S. Department of Health and Human Services released regulations related to Medicare's role as a secondary payer on Oct. 11 (see Federal Register, pp. 41716–41733). The rules primarily target health care providers, the self-employed, and multemployer plans, and include a provision that the Health Care Financing Administration may recover payments that had been mistakenly paid by Medicare to third-party administrators.

Guidance on Reporting Requirements Released

IRS issued regulations on Nov. 17 providing guidance on the 1989 recordkeeping and reporting requirements for certain fringe benefit items in an advance copy of Notice 89-110.

Under IRS temporary and final regulations (TD 8256) issued in July, the cost of employer-provided group-term life insurance on the life of an employee's spouse or dependent is not excludable from gross income as a de minimis fringe benefit (128 DER G-2, SpSupp, 7/6/89). Notice 89-110 postpones the effective date of that provision until further notice.

IRS Issues Dependent Care Assistance Reporting Requirements

Requirements for reporting employer-provided dependent care assistance using cash reimbursement and in-kind assistance programs was issued by IRS Nov. 17 in an advance copy of Notice 89-111. The notice clarifies Form W-2 reporting requirements for qualified dependent care assistance programs under IRC section 129.

Group-Term Insurance Rates Released

IRS has issued a notice of proposed rulemaking (EE-3-89) and temporary and final regulations (TD 8273) that add new rates for employees 65 or over to the uniform premium table used to calculate the cost of employer-provided group-term insurance coverage. For employees aged 65 to 69, the cost per $1,000 of protection for a one-month period is $2.10; for employees aged 70 or above, the rate is $3.76.

Litigation

PBGC Obtains Court Review

The U.S. Supreme Court agreed on Oct. 30 to review whether the Pension Benefit Guaranty Corporation (PBGC) has the authority to order corporations to restore terminated pension plans. At issue is whether the LTV Corporation will be required to resume funding responsibility for a $2.3 billion shortfall in its pension funds.

In May 1989, the Second Circuit ruled that PBGC's decision to restore terminated and underfunded pension plans to LTV was "arbitrary and capricious" because the agency failed to consider the goals of federal bankruptcy and labor laws (Notes, 7/89, p. 8.).

DOL Sues over Insurance Plans

The U.S. Department of Labor (DOL) has filed a complaint against the CNA Insurance Companies (CNA) and trustees of the Hotel Employees and Restaurant Employees Union for violating the Employee Retirement Income Security Act of 1974 (ERISA).

The trustees violated ERISA, according to DOL, by purchasing a fiduciary liability insurance policy through CNA which provided $1 million in coverage at an unreasonable cost to the plans. The suit seeks recovery of all improper payments received by CNA, assurance that the plans will not pay an excessive amount for coverage, and an end to the alleged violation of ERISA.
Pregnant Woman Granted Benefits for Preexisting Condition

A female employee is not barred under the plan's exclusion for preexisting conditions from being covered by her employer's health insurance plan because she obtained treatment for pregnancy before becoming covered, the U.S. Court of Appeals in Kentucky has ruled. In the case, Aubrey v. Aetna Life Insurance, Aetna contended that the Pregnancy Discrimination Act of 1978 (PDA) does not permit more beneficial treatment of pregnancy than other conditions covered by an employer's health plan.

The court disagreed, citing the Supreme Court's statement that PDA was passed to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."

Wrongful Discharge Verdict Overturned by Supreme Court

An employee of the Ingersoll-Rand Co. was granted an appeal from the Texas Supreme Court because he should have the opportunity to prove that the employer fired him to avoid paying benefits under the employer's pension fund, according to the court ruling.

The lower court in McClendon v. Ingersoll-Rand Co. had dismissed the complaint under the employment-at-will doctrine, which states that employment for an indefinite term may be terminated for any reason at any time. The appellate court stated that McClendon may be able to prove the employer violated the law because ERISA "underscores the great significance attached to income security for retirement purposes."

Officers Not Liable for Unfunded Pensions

The U.S. Court of Appeals for the Eight Circuit held that officers of a bankrupt corporation may not be held liable for unfunded retirement plans. The court said the officers never assumed personal responsibility for the corporation's unfunded deferred compensation and pension plans through any form of endorsement, guarantee, or express undertaking (Rockney v. Blohorn).

The case was brought against the employer for benefits due under the corporation's "top hat" plans, which are nonfunded plans maintained by an employer to provide retirement income to its highly compensated employees, usually a select group of management. Top hat plans are regulated under ERISA.

Plan Not in Violation of ADEA

The California Supreme Court has held that a pension plan that provided higher benefits to younger employees is not in violation of the Age Discrimination in Employment Act (ADEA). In Robinson v. County of Fresno and Fresno County Board of Retirement, the plan's benefit formula provided workers who retired at a later age with fewer benefits than workers with the same amount of service who retired at an earlier age.

The retirement plan was amended in 1975 by adopting a new formula for computing service and disability retirement benefits. The court held that, in this case, the plan did not discriminate on the basis of age because it was not established that the employer intended to discriminate in a nonfringe-benefit area, such as wages and salaries.

For Your Benefit

FASB Holds Hearings

The Financial Accounting Standards Board (FASB) held hearings in New York and Washington, DC, Oct. 10–12 and Nov. 2–3, respectively, on proposed accounting rules for retiree medical benefits. There were generally three areas of contention addressed by the commentators: (1) identifying the attribution period over which the cost of the benefits should be recognized; (2) measuring the retiree health care benefits expected to be paid in the future; and (3) identifying the transition obligation (i.e., how the unfunded and unrecognized accumulated postretirement benefit obligation measured when the new accounting method is adopted should be recognized).

Medicare Premium Will Rise

The elderly's premium for Medicare Part B will increase from $27.90 to $29 a month in 1990, the U.S. Department of Health and Human
Services has announced. Medicare Part B pays 80 percent of a beneficiary's doctor charges after an annual deductible of $75.

Social Security Benefits, Payroll Tax, Wage Base Increase

Effective January 1990, Social Security benefits, the payroll tax and taxable wage base will increase.

Recipients of Social Security benefits will receive a 4.7 percent cost-of-living-adjustment (COLA). Some 39 million people will be affected, including those receiving Supplemental Security Income, former federal employees receiving pensions, and those receiving military retirement benefits. With this increase, the highest COLA in more than seven years, the average benefit check will rise from $541 to $566 a month.

The Social Security payroll tax, which is paid by 130 million workers and employers, will also rise from 7.51 percent to 7.65 percent. Thus, a person earning $10,000 per year would see his or her annual Social Security pay deduction increase from $751 to $765.

As a result of the budget bill passed by Congress on Nov. 22, the Social Security taxable wage base for 1990 will rise to $51,300—$900 higher than recently announced by the U.S. Department of Health and Human Services. The bill requires that salary reduction amounts be included in determining average compensation, which is used in calculating the wage base.

PBGC Guarantees Monthly Maximum

The Pension Benefit Guaranty Corporation (PBGC) has announced that $2,130.68 is the maximum monthly benefit it will guarantee for participants in single-employer defined benefit pension plans terminating in 1990.

This amount is adjusted annually according to a formula prescribed in the Employee Retirement Income Security Act of 1974 (ERISA); the adjustment is based on changes in Social Security contributions and benefit base. The maximum guarantee in 1989 is $2,028.14.

Agreement Reached at NYNEX

NYNEX Corp. and its two unions ended a 100-day strike on Nov. 14, after the company agreed to pay for the employees' health care benefits. The dispute began when the company asked its workers to share the costs.

The two sides agreed tentatively that NYNEX would pay the full cost of health insurance for employees in exchange for a reduction of approximately 25 percent in a three-year wage and benefit package that was proposed earlier.

PBGC Names Deputy Executive Director

Diane E. Burkley has been appointed deputy executive director and chief negotiator at PBGC. She will have responsibility for policy and insurance programs and will represent PBGC's interest with financially troubled corporations. Burkley was a partner with a law firm in Washington, DC.

Health Cost Increases Negatively Affect Small Business, Says GAO

Small firms are facing difficulties offering health insurance to their employees due to rapidly rising health care costs, the U.S. General Accounting Office (GAO) recently announced. Health care costs were responsible for a more than eightfold increase in employer health spending from 1970 to 1987.

Small firms do not have the ability to spread risk over a large number of employees, and insurance companies offer coverage more readily to those with little risk. "Greater competition in the marketplace has led to the erosion of community rating," said Mark Nadel, GAO's associate director for national and public health issues, at a hearing on the small business health insurance market.

Government Publications


Reducing poverty has become an increasingly important public policy issue. This report, which presents data on the income and poverty status of households, families, and people in the U.S., is somewhat
controversial because some in the public and private sectors argue that it is difficult to measure poverty.

The measurement of poverty, defined by Millie Orshansky of the Social Security Administration in the early 1960s, subjectively, is not a calculation of the minimum needed for existence, but is an estimate of the minimum needed for a reasonably adequate but low-level standard of living. Contact Superintendent of Documents, U.S. Gov- ernment Printing Office, Washington, DC 20402. (202) 783-3238. Cost $4.

[Editor's note: Also see the November 1989 EBRI Issue Brief, "The Economic Well-Being of the Elderly: Past, Present, and Future."]

Nongovernment Publications


Employee benefit and pension laws have been affected by recent legislative changes. This book reviews all such changes, including minimum funding standards, transition rules for ERISA, and single-employer pension plan termination insurance. Contact BNA, 300 Raritan Center Parkway, Edison, NJ 08818-7616. (201) 225-1900. Cost $3.


This report summarizes recent changes in state retirement systems and provides a comparative analysis of 85 state pension plans nation-wide, including at least one per state. Contact NCSL, 1050 17th St., Suite 2100, Denver, CO 80265. Cost $10.

The Medically Uninsured, Urban Institute Press

The lack of insurance for medical care is an important issue in the employee benefit field because health care providers shift the payment burden of the uninsured to others, according to this report.

This study discusses legislative proposals and examines three different groups: those who receive no group health insurance from their employers, those who receive insurance from another source, and the self-employed. Contact the Urban Institute Press, 4720 Boston Way, Lanham, MD 20706. (301) 459-3366. Cost $7.95.

Buck Mortality Table, Buck Consultants

Life expectancy has increased for the 65-year-old male and female, according to this study. During the last five years, the life expectancy for males has increased 8 1/2 months and it has increased for females almost 8 months. However, women still can expect to live longer than men. The study covered approximately 510,000 active employees and 255,000 retirees at 21 large companies. Contact Buck Consultants, 500 Plaza Drive, Secaucus, NJ 07096-1533, or call Carolee Martin, (210) 902-2555. Cost $50.

Surveys

Wyatt WorkAmerica, Wyatt Company

According to this survey, American businesses have been changing in different ways over the last several years. Some of the ways include a slower growth rate of our labor force, a shift from a manufacturing oriented work force to a service oriented work force, and work organization. The survey looks at business trends and workers' attitudes in America. Contact the Wyatt Company, 1850 M Street, NW, Suite 400, Washington, DC 20036-5801. (202) 778-2626. Free.

Employers' Responses to the Department of Labor's Loan Regulations, Kwasha Lipton

Employer reaction to the Department of Labor's regulations released July 20 on loans from employee benefit plans to participants was surveyed by Kwasha Lipton. These regulations have the greatest impact on loans from defined contribution plans to nonactive participants of the pension plan, or those who are not currently employed. Another significant finding was that most employers have decided to base the interest rate charges for the loans on the prime rate. Contact Kwasha Lipton, P.O. Box 1400, Fort Lee, NJ, 07024, or call Barbara Hubert, (201) 529-1300. Free.
Learn more about the issues with
the Employee Benefit Research Institute-Education and
Research Fund's complete library of books and periodicals

EBRI Issue Briefs provide extensive detail for considered judgment of the issues you
care about most. Recent topics included the following:

- Individual Saving for Retirement—The 401(k) and IRA Experience #95, October 1989
- Pension Coverage and Benefit Entitlement: New Findings from 1988 #94, September 1989
- The Evolution of Alternative Health Care Delivery Systems #93, August 1989
- Japan Copes with Its "Honorable Elders": Retirement and Health Benefit Systems in Japan #92, July 1989
- Pension Funds and Financial Markets #91, June 1989
- Canada's Health Care System: Lessons for the United States? #90, May 1989
- Questions and Answers about Employee Benefits #89, April 1989
- Pension Plan "Surplus": Revert, Transfer, or Hold? #88, March 1989
- Managing Health Care Costs and Quality #87, February 1989
- Issues Concerning the Financing and Delivery of Long-Term Care #86, January 1989
- Dependent Care: Meeting the Needs of a Dynamic Work Force #85, December 1988
- Issues and Trends in Retiree Health Insurance Benefits #84, November 1988
- Employers' Accounting for Pensions and Other Post-Employment Benefits #83, October 1988
- The Tax Treatment of Pension and Capital Accumulation Plans #82, September 1988
- Pension Policy and Small Employers: Costs and Benefits in a Voluntary System #81, August 1988
- Pension Investments and Financial Markets #80, July 1988
- Public and Private Issues in Financing Health Care for Children #79, June 1988
- Questions and Answers about Employee Benefits #78, May 1988
- Shifts in the Tide: The Impact of Changing Demographics on Employers, Employees, and Retirees #77, April 1988
- Reforming Physician Payments: Medicare's Next Agenda #76, March 1988
- Earnings as an Employee Benefit: Growth and Distribution #75, February 1988
- Employee Stock Ownership Plans: Impact on Retirement Income and Corporate Performance #74, January 1988
- The Impact of Government Regulation on the Labor Market: A Survey of Research Findings #73, December 1987
- After Tax Reform: Revisiting 401(k)s #72, November 1987
- Financing Catastrophic Health Care Costs Among the Nonelderly Population #71, October 1987
- Voting Private Pension Proxies: Some New Evidence and Some Old Questions #70, September 1987
- International Trends in Corporate and Individual Retirement Plans #69, August 1987
- International Trends in Social Security Reform #68, July 1987
- Public Policy Options to Expand Health Insurance Coverage among the Nonelderly Population #67, June 1987
- A Profile of the Nonelderly Population without Health Insurance #66, May 1987
- Pension Portability and What It Can Do for Retirement Income: A Simulation Approach #65, April 1987
- Long Term Effects of Tax Reform on Retirement Income: Many Unanswered Questions #64, March 1987

To complete your library of EBRI Issue Briefs or to become a subscriber,
Write: EBRI, P.O. Box 4866, Hampden Station, Baltimore, MD 21211
or call (301) 338-6946
Where Coverage Ends: Catastrophic Illness and Long-Term Health Care Costs

We are all at risk of incurring major medical expenses or needing long-term care at some time in our lives. Learn how we define “catastrophic” and long-term costs, how we currently pay for these expenses, what roles individuals and the public and private sectors play, and what kind of approach to insure against these expenses is optimal.

Measuring and Funding Corporate Liabilities for Retiree Health Benefits

"... As individuals and as a profession, we should use this book as a foundation for continued efforts."—John Bertko, Coopers & Lybrand

The unfunded liabilities associated with retiree health benefits for companies that provide them may be as high as $2 trillion! These expenses must soon be reflected on the corporate balance sheet. Gain an understanding of the magnitude of these liabilities for your own firm, and of what type of funding option, if any, would be compatible with your corporation’s financial situation. The study illustrates a range of liabilities using three hypothetical companies and indicates the annual costs to finance the benefits over employees’ working careers.

Pension Policy and Small Employers: At What Price Coverage?

A comprehensive analysis of the reasons why only 43 percent of small-business employees are covered by a retirement plan, this study, by Emily S. Andrews, Ph.D., examines options for encouraging more small businesses to offer pension coverage to their employees.

The Changing Health Care Market

Anticipate changes and prevent costly benefit mistakes. Find out how the experts view the current forces in the health care market and their predictions for the future in this comprehensive work. This book covers everything from alternative delivery mechanisms and competition in the health care field, to cost management programs and the individual's role in health care. Other topics include recent trends in physician practice, for-profits vs. nonprofits, case management, retiree health benefits, indigent care, long-term care, and more.

Business, Work, and Benefits: Adjusting to Change

Benefits experts agree that the 1990s will be a decade requiring difficult and gut-wrenching decisions by American businesses, both large and small. This study looks at how your corporation can cope with demographic shifts, global competition, and legislative change. It shows you how to apply the current demographic trends, legislative proposals, and policy changes to the employee benefits area and plans your company needs to make now.
The Employee Benefit Research Institute (EBRI) is a nonprofit, nonpartisan public policy research organization based in Washington, DC. Established in 1978, EBRI provides educational and research materials to employers, employees, retirees, public officials, members of the press, academics, and the general public. The Employee Benefit Research Institute Education and Research Fund (EBRI-ERF) is a nonprofit, nonpartisan education and research organization established by EBRI in 1979. EBRI-ERF produces and distributes a wide range of educational publications concerning health, welfare, and retirement policies. Through their books, policy forums, and monthly subscription service, EBRI and EBRI-ERF contribute to the formulation of effective and responsible health, welfare, and retirement policies. EBRI and EBRI-ERF have—and seek—a broad base of support among interested individuals and organizations, as well as among private-sector companies with interests in employee benefits education, research, and public policy.

Employee Benefit Notes and EBRI Issue Brief (a monthly periodical devoted to expert evaluations of a single benefit issue) are published by the Employee Benefit Research Institute Education and Research Fund with the assistance of the staff of the Employee Benefit Research Institute. Editorial inquiries may be directed to EBRI, 2121 K Street, NW, Suite 600, Washington, DC 20037-2121, (202) 659-0670. Orders, payments, inquiries, and all other correspondence relating to subscriptions should be sent to EBRI's distribution agent, The Johns Hopkins University Press, 701 W. 40th Street, Suite 275, Baltimore, MD 21211, USA, (301) 338-6964.

Nothing herein is to be construed as necessarily reflecting the views of the Employee Benefit Research Institute or the Employee Benefit Research Institute Education and Research Fund or as an attempt to aid or hinder the passage of any bill pending before Congress.

© 1989. Employee Benefit Research Institute. All rights reserved.
ISSN: 0887-1388 0887-1388/89 $.50 + .50

is registered in the U.S. Patent and Trademark Office.