How the Presidential Candidates View Employee Benefit Issues

That employee benefit issues occupy an increasingly significant role in national policy has been affirmed in recent weeks as the major presidential candidates outlined the agendas they would follow in addressing these issues.

A major philosophical difference between Vice President George Bush, certain to be the Republican nominee, and Democratic challenger Massachusetts Gov. Michael Dukakis and the Rev. Jesse Jackson is in the area of government regulation of the workplace. Bush generally opposes federal government intervention, from required notice of plant closings and layoffs to mandated employer-provided health coverage, while the Democratic candidates support it.

In response to a survey developed by the editor and staff of Employee Benefit Notes and submitted to candidates who were in the race as of mid-March, the following policy statements were received from the campaign organizations of Bush, Dukakis, and Jackson—one of whom will likely be the next president of the United States.

Social Security

Bush—Vice President Bush says he "strongly opposes any proposal that will threaten the solvency of the trust fund or exacerbate the budget deficit. We must not jeopardize the trust fund—either by expanding its commitments without adequate revenues or undermining it by allowing taxpayers to opt out."

"We need to ensure that current beneficiaries receive the benefits to which they are entitled, and that today's workers have confidence that there will be a solvent Social Security system when they retire," Bush says, adding that he also would exempt Social Security from budget cuts and means testing.

Dukakis—Gov. Dukakis opposes making the Social Security Administration an independent agency and using the trust fund to finance other government expenses. Social Security is "a contract between generations," according to Dukakis, who says he would oppose cuts or freezes in cost-of-living adjustments (COLAs).

Dukakis does not believe Social Security should be included in the federal budget, and says he has confidence in the trust fund's solvency for the immediate future. "I believe that the compromise legislation enacted by Congress in 1983 will provide for an adequately funded Social Security system for at least the next half century, and I would do nothing to undermine that solvency (such as cancelling scheduled payroll deduction increases) or to reduce scheduled payments to Social Security recipients. I am also strongly opposed to means tests of any kind."

Jackson—Jackson agrees that Social Security should be kept out of the budget debate. "We must also guarantee annual COLAs and prevent means testing the program in order to maintain its broad appeal," says Jackson, who also would like to "significantly increase" spending for supplemental security income, which provides cash assistance to low-income aged, blind, and disabled adults.

Retirement Income

Bush—"The promotion of private pensions should be a central element in any strategy to prepare for sound retirement income programs in the next century," Bush says. "We must not only encourage greater accumulation of pension funds in our
economy, but also cover a far broader cross-section of our workforce. At the same time, however, we should be cautious of viewing pensions as a substitute for—or a way to ‘take pressure off’—Social Security.”

The vice president adds: “New, innovative thinking is required to develop a pension system that works for today’s mobile workforce and fits the needs of those who will change jobs several times during their working life. . . . Private pensions must serve the needs of those who are currently employed as well as those who are retired.” Bush supported the Pension Benefit Guaranty Corporation (PBGC) funding reforms enacted during the last session of Congress.

Dukakis—He also favored the PBGC premium increase. The governor supports “profit-sharing and stock option plans that give workers a full stake in the success of their companies,” company-sponsored savings plans, and individual retirement accounts (IRAs) and is a proponent of pension portability:

I strongly support the goal of making pension funds portable between places of employment . . . through national legislation that addresses valid concerns over the loss of pension benefits through corporate mergers, leveraged buyouts, and business failures—all areas requiring corrective legislation and the elimination of existing loopholes. Providing for portability of pension funds will also help America compete more effectively in the world economy by facilitating the flow of workers into those new or growing industries that are important for our economic competitiveness.

While he is “sympathetic to the idea of giving people a break in the area of IRAs,” according to his campaign staff, Dukakis believes that “we must balance our desire to make such changes against the need for some stability and predictability in the tax system.”

Jackson—He supports secure pension plan funding and further restriction of asset reversions. “There must be stricter enforcement of employer contributions to ensure adequate funding of pension plans. Corporations cannot be allowed to raid their pension plans to aid their balance sheets by terminating one plan and starting another, usually less generous, one. Current retirees must be assured of continued pension and health benefits, even as employers file for bankruptcy to escape their debts to their employees.” He also supports “minimum benefits, including pensions, on a pro-rated basis” for part-time workers.

Jackson would establish a two-part “national investment program” that would finance small business loans, low-income housing, neighborhood revitalization, and infrastructure investment through federally backed securities marketed to public pension plans. “The federal government can provide a federally guaranteed security—similar to Fannie Mae and Ginnie Mae bonds—to finance a pool of economically viable projects. Pension funds would get both market return and security on their investment. And at no risk to the pensioners, a small portion of their assets would be rebuilding America,” Jackson says, suggesting that 10 percent of public plan assets be so invested.

The second part of Jackson’s program would be the establishment of an American Investment Bank—modeled on the World Bank—to fund large urban and rural development projects. States would contribute the initial capital which, backed by government pledges, would back the bank’s bonds—which, in turn, would be marketed to pension funds. “This would leverage pension fund capital at a low enough cost to allow the bank to re-lend the funds at a low interest rate for development projects,” Jackson states.

Health Coverage

Bush—The vice president “will continue the federal government’s vital role in providing care for the truly needy,” he says:

Several principles must guide this effort. First, the less that government is involved in the day-to-day administration of health care, the more efficiently it will run—which, of course, means that we should shun the various Democrat health care proposals which would involve government bureaucrats in people’s personal health care decisions. Second, more efficient administration of health care must be encouraged—and, in particular, the government health programs such as Medicaid and Medicare should not fund waste and inefficiency. And third, we must limit the incentives and ability for patients to file frivolous malpractice suits which drive health care costs up for all Americans.
Dukakis—He supports current congressional efforts to mandate health care coverage, such as S. 1265 introduced by Sen. Edward Kennedy (D-MA) and H.R. 2508 introduced by Rep. Henry Waxman (D-CA), “with certain modifications to address small-business concerns,” such as are included in legislation Dukakis recently signed into law in his home state. Dukakis has said his legislation should become a model for federal action.

Jackson—Jackson would go a step further and establish a national health care program, financed through increased taxes for the wealthy and cuts in defense spending. Such a program, he says, “...should emphasize disease prevention, not just treatment; cover chronic illness as well as acute needs; be federally funded, not left to the vagaries of the 50 different states; and allow a person the freedom to choose his or her caregivers.”

Medicare, Catastrophic, and Long-Term Care

Bush—Bush favors more comprehensive coverage under Medicare and increased use of health maintenance organizations (HMOs) and preferred provider organizations (PPOs). He supports the prospective payment system and feels that similar payment techniques could be applied to physician and outpatient services, as long as quality of care is not undermined.

Bush has put forth the following proposals for financing long-term care:

Provide incentives in the tax code for the purchase of long-term care insurance and conversion of IRAs, savings accounts, and life insurance to finance long-term care;

For those who cannot afford long-term care insurance, change the “spend-down” provisions that require the elderly to exhaust their assets before qualifying for Medicaid assistance; and

Provide “adequate” funding for research on diseases such as Alzheimer’s and strokes to help eliminate chronic disability.

Dukakis—The Massachusetts governor supports the catastrophic health care legislation currently being reconciled in Congress, although he cautions against requiring Medicare beneficiaries to pay an ever-increasing share of program costs. He also favors the long-term care bill (H.R. 3436) introduced by Rep. Claude Pepper (D-FL), which would expand the Medicare program to cover home care services.

Dukakis would (1) require minimum standards for private long-term care insurance, (2) guarantee Medicaid eligibility for those who have exhausted private long-term care insurance benefits, (3) work with states to develop improved methods for delivering long-term care services (e.g., create federal funding incentives for states to establish social HMOs, congregate living facilities, case management and community care programs, and prepaid HMOs), and (4) launch a national long-term care education campaign.

Dukakis would require Medicare to pay for home health care services already guaranteed by law (“but which this administration has unfairly—and illegally, in my view—refused to pay,” he states). The governor also supports physician payment reform: “We cannot afford to continue to reimburse physicians according to the current fee-for-service schedule. Instead we should have a system which encourages physicians to spend time with patients and not just perform tests and procedures... and a system which encourages physicians to locate their practices in underserved regions.” (Massachusetts prohibits physicians from billing beneficiaries for more than the assigned fee under Medicare and requires physicians to accept Medicare patients.)

Dukakis, an HMO member himself, would “encourage older Americans to seriously consider prepaid health care plans, such as HMOs or physician-based plans, so long as they provide quality care, are strictly regulated, and are kept affordable.”

Jackson—Another supporter of the Medicare catastrophic legislation, Jackson proposes to “roll back the dramatic increases in the hospital deductible (Part A) and the physician premium (Part B) of Medicare.” The nation’s health care priority, Jackson says, should be “the long-term care needs of the elderly... We need services that are community-based, that let the elderly stay independent and in their own homes as long as possible. How? By providing home health care, nutrition assistance, chore service, transportation, whatever help is necessary to ensure that they receive care where they want to be—at home.”

Jackson also believes that “[e]mployers should offer flexible pension,
retirement, and work hour policies that don’t penalize family caregivers and force our elderly into institutions.”

**Acquired Immune Deficiency Syndrome (AIDS)**

**Bush**—Bush supports current levels of federal spending on AIDS research and education. He opposes special benefits for AIDS patients, favors ensured confidentiality for routine blood tests, and supports routine testing of high-risk groups and marriage license applicants.

**Dukakis**—Dukakis opposes mandatory testing for AIDS except for military personnel and certain immigrants. (Massachusetts state law bars insurers from testing insurance applicants for exposure to the AIDS virus.) The governor supports a national AIDS educational effort and increased federal funding for AIDS research.

**Jackson**—Jackson favors voluntary testing and counseling and would increase federal support for AIDS research. He also supports education in the public schools along with greater outreach to blacks and Hispanics.

**Child Care and Family and Medical Leave**

**Bush**—The federal government should not be in the business of providing child care services, Bush says, but “can provide leadership and research in determining what constitutes a good day care environment—and can assist in weeding out of the system individuals whose criminal records make them unfit to take care of our children.” States should take the lead by implementing “the highest quality standards that are responsive to the special needs of their own areas,” he states. The private sector should be encouraged to establish on-site day care or “grant varying degrees of parental leave.”

**Dukakis**—A supporter of the Family and Medical Leave Act (H.R. 925 by Reps. Patricia Schroeder (D-CO) and Bill Clay (D-MO)), which would require employers to provide workers a guaranteed period of unpaid leave with job security, Dukakis would go a step further and explore programs in Canada and a few states in which employer-financed insurance funds have been established to help maintain absent workers’ incomes.

Dukakis favors on-site child care centers at the work place as part of “a commitment to full employment.” He supports federal guidelines for quality child care and would establish a “national day care partnership” that would include the private sector and government at all levels and which would aim to “make quality, affordable day care available to every American family that needs it by the end of the century.” (Child care programs in Massachusetts are state assisted.)

**Jackson**—Jackson also supports H.R. 925 and would work toward establishment of “a comprehensive national child care policy, with an increased federal child care tax credit, increased funding to states to develop and implement quality child care programs, and the establishment of a national child care office to promote long-range planning and implementation.”

**Pension Funds Didn’t Flee Stock Market after Oct. 19**

Contrary to recent speculation that pension funds reacted to the Oct. 19, 1987, stock market decline by fleeing the market, new data from the Employee Benefit Research Institute show otherwise.

Private trusted pension funds sold a net $5 billion worth of directly held equity (1.0 percent of all equity holdings) during the fourth quarter of 1987, compared with a net sale of $14 billion in stock during the prior quarter and $34 billion in stock during the first three quarters of the year.

Even among the largest net sellers of stock—large, single-employer defined benefit plan funds with total assets of $75 million per plan or more—net sales were not unusually large. These funds sold $6.8 billion worth of stock (4 percent) during the fourth quarter of 1987, following net stock sales of $14 billion during the preceding three quarters.

Smaller single-employer defined benefit plan funds sold just $700 million in stock on net during the fourth quarter. Single-employer defined contribution plan funds bought $3 billion in stock on net, while multiemployer plan funds sold $600 million.

Private trusted pension funds suffered net losses of $135 billion, or 10.4 percent of total assets, during the fourth quarter of 1987, the largest recorded loss during the last five years. Net capital losses (realized and unrealized) of $152 billion,
resulting primarily from the sharp decline in stock prices that occurred on and around Oct. 19, were partially offset by dividend payments and interest income of $18 billion. EBRI estimates that $112 billion of the capital losses were in equity, whereas bonds enjoyed capital gains of $4 billion. The additional loss of $45 billion was in other asset categories (table 1).

The gains made in the first three quarters of 1987 combined to offset fourth quarter losses, for total 1987 earnings of $71 billion, or 6.6 percent. Even direct stock holdings of private trusted funds, responsible for most of the fourth quarter loss, showed a positive return of 8.7 percent for the year.

Because of the decline in the value of stock holdings during the fourth quarter of 1987, directly held stock in private trusted pension portfolios fell from 40 percent to 36 percent of total assets (table 2).

EBRI’s pension asset data and reports on congressional and regulatory activities related to pension funds are found in the EBRI Quarterly Pension Investment Report.

Sixth Circuit Adopts Broad View of Fiduciary

[Editor’s note: This column, a regular feature of Employee Benefit Notes, was prepared by EBRI’s legal counsel, Arnold & Porter, under the supervision of K. Peter Schmidt.]

In Brock v. Henderschott (1988 U.S. App. LEXIS 2188), the Sixth Circuit upheld an Employee Retirement Income Security Act (ERISA) summary judgment award against two union officials, at least one of whom was clearly not a fiduciary. The officials had received commissions for the use of certain dental care providers by employee benefit plans associated with their union.

The proposition that a nonfiduciary may be liable under ERISA for involvement in the breach of another’s fiduciary responsibilities is now fairly well settled. Based on the facts described in the opinion, however, the Henderschott court seemed to get rather simplistically to the notion that one of the wrongdo-

<table>
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<th>Bonds</th>
<th>Cash</th>
<th>Other</th>
<th>Total</th>
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<td>6.8</td>
</tr>
<tr>
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<td>20.3</td>
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<td>-44.5</td>
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<td>Total</td>
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<td>-9.2</td>
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<td>19.4</td>
<td>7.4</td>
<td>27.6</td>
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<td>Net contributions</td>
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<td>1.4</td>
<td>-4.9</td>
<td>12.8</td>
<td>28.9</td>
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</tbody>
</table>

Source: Data from EBRI Quarterly Pension Investment Report, fourth quarter 1987, and unpublished EBRI data.

*Bank-pooled fund shares are included in "other." Equity, bonds, and cash include directly held assets only.
ers was, in fact, a fiduciary.

Court's Interpretation

The court began its analysis by stating the following: "[A]nyone who exercises authority over an employee benefit plan can properly be held an ERISA fiduciary because that term was intended to be broadly interpreted by Congress." After citing examples of such authority exercised by Henderschott, it concluded that he was, in fact, a fiduciary.

The authority the court cited, however, is that exercised by Henderschott as a union official and collective bargaining representative, not as a trustee or other official of the plans.\(^1\)

The unchallenged facts show that Henderschott wielded considerable influence over the local unions as a high-ranking UPUI [United Paperworkers International Union] representative, and used this influence to direct the locals to choose Southmoor [the dental care provider]. For example, in one instance Henderschott actually took over as bargain- 

it characterized the defense of Henderschott's nonfiduciary codefendant as a claim that "he was unaware that Henderschott was an ERISA trustee . . . ." The court went on to state that it was unclear whether the codefendant was himself "an ERISA trustee, as defined in 29 USC section 1002(2) [sic]." Section 1002 contains no definition of the term "trustee," and it seems likely that the court was using the term interchangeably with "fiduciary," a term which is defined in 29 USC section 1002(21).

According to the court, these actions clearly violated the self-dealing prohibitions of ERISA section 406(b)(1).

The facts described undoubtedly support a conclusion of wrongdoing, and there may, in fact, actually have been an ERISA violation. Henderschott could, for example, have actually had explicit or de facto authority within the plan and, therefore, been a fiduciary. Alternatively, he might properly have been liable as involved in the breach of another (e.g., a trustee authorizing retention of Southmoor by the plan) who was a plan fiduciary. It is far from clear, however, that the responsibility cited by the court, a collective bargaining responsibility, can make

\(^1\)The court did not state whether Henderschott had any official position with the plans. At one point, however, 

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**Table 2**

Quarterly Asset Structure of Private Trusteed Pension Funds (1983–1987)

<table>
<thead>
<tr>
<th>Quarter</th>
<th>Amount of Assets (Billions)</th>
<th>Percent of Assets</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Equity</td>
<td>Bonds</td>
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<td></td>
</tr>
<tr>
<td>83Q4</td>
<td>$275.8</td>
<td>$139.8</td>
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<tr>
<td>84Q4</td>
<td>278.2</td>
<td>152.3</td>
</tr>
<tr>
<td>85Q4</td>
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<td>86Q4</td>
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<td>87Q1</td>
<td>484.1</td>
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<td>87Q2</td>
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<td>87Q3</td>
<td>519.2</td>
<td>184.5</td>
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<tr>
<td>87Q4</td>
<td>405.2</td>
<td>192.7</td>
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</table>

Source: Data from **EBRI Quarterly Pension Investment Report**, fourth quarter 1987.
one a fiduciary. These responsibilities normally involve plan design functions, which many believe are never fiduciary in nature.

The U.S. Department of Labor (DOL) has taken the position in the "excess" asset reversion context, for example, that an employer's decision to terminate a plan does not involve an exercise of fiduciary responsibilities. (If it did, such decisions would arguably violate ERISA in every reversion case, since causing plan assets to inure to the benefit of the employer would not likely be regarded as "solely in the interest of the participants and beneficiaries" or "for the exclusive purpose of providing benefits."

One could hardly argue that a person who terminates a plan so as to produce a reversion of plan assets to the employer does not "exercise authority over" such plan. Under the Henderschott court's approach, such a person would, by virtue of this authority, appear to be a fiduciary. As noted above, however, DOL has taken a contrary view.

On the equities of the Henderschott facts, as set forth by the court, it is difficult to argue with the result. As precedent for the definition of the term "fiduciary," however, the court's rather facile analysis may cause difficulties in future cases.

Number of Pension Plans Continues Growing through 1986

New data from the Internal Revenue Service (IRS) indicate that a net 53,000 new pension plans were formed during 1986, bringing the total number of plans to 875,000 at year-end 1986 (table 3). This growth represents a 6.4 percent increase from the year-end 1985 total of 822,000 plans.

Although the net number of defined benefit plans increased 5.5 percent during 1986 to 249,000 plans, defined benefit plans as a proportion of all plans decreased slightly to 28.4 percent (from 28.7 percent at year-end 1985).

The growth in the number of defined benefit plans is an issue that has received increased attention since enactment of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA imposed minimum funding standards for defined benefit plans and mandates that employers insure a portion of the vested benefits through the Pension Benefit Guaranty Corporation. Some observers anticipated that these requirements would make the administrative costs of defined benefit plans prohibitive and cause employers to substitute less expensive defined contribution plans.

These new data show that, although defined benefit plans as a proportion of all plans decreased gradually from 1975 through 1977, the proportion has remained fairly stable since then, suggesting that early concerns about potentially negative effects of ERISA may have been overstated. (See "Growth in Number of Pension Plans Since ERISA," December 1987 Employee Benefit Notes, pp. 4-7.)

This ratio trend, however, is not a complete indicator of general retirement income security because it does not reflect the number of participants in each type of plan and does not provide insight into the average level of benefits provided by either defined benefit or defined contribution plans.

The figures also do not provide information about the impact of the

<table>
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<tr>
<th>Year End</th>
<th>Total Plans (thousands)</th>
<th>Percent Growth</th>
<th>Percent Defined Benefit</th>
<th>Percent Defined Contribution</th>
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<tr>
<td>1975</td>
<td>381</td>
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<td>32.8%</td>
<td>67.2%</td>
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<td>590</td>
<td>—</td>
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<td>729</td>
<td>9.9%</td>
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<td>737</td>
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<td>1984</td>
<td>748</td>
<td>1.6%</td>
<td>28.8%</td>
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<td>1985</td>
<td>822</td>
<td>9.8%</td>
<td>28.7%</td>
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<td>1986</td>
<td>875</td>
<td>6.4%</td>
<td>28.4%</td>
<td>71.6</td>
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</table>

Source: U.S. Department of Labor tabulations of 5500 forms and Employee Benefit Research Institute tabulations of Internal Revenue Service determination letter data.

May 1988
Tax Reform Act of 1986 and subsequent legislation on the types of plans employers offer. The trend may indicate, however, that through 1986 employers appear to have adapted to ERISA's requirements and reached a level of stability regarding the types of pension plans offered to employees.

Legislation & Litigation

Technical Corrections Bills Introduced

Identical bills have been introduced in both houses of Congress to make technical corrections to the 1986 Tax Reform Act, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and budget reconciliation legislation enacted in 1986 and 1987. Earlier versions of some provisions were proposed last year in budget legislation but were ultimately dropped.

Congressional predictions of the measure's chances of passage are mixed. Due to the need for the clarifications it contains, however, some form of the legislation is likely to pass during 1988.

An outline of the bills' (H.R. 4333 and S. 2238) major benefits provisions follows.

Pension Plans—The bills would require actuarial valuations for defined benefit plans subject to the minimum funding provisions of the Employee Retirement Income Security Act (ERISA) each year rather than every three years. They also clarify that employer contributions to defined benefit plans are made quarterly.

The bills also would (1) amend the rules relating to distribution of excess contributions, taking into account the fact that nondeductible contributions may be made to an individual retirement account (IRA); (2) clarify nondiscrimination rules as they apply to nonhighly compensated employees; (3) clarify the basis recovery rules with regard to defined contribution plans; (4) rescind the right of participants in employee stock ownership plans to demand payment of benefits in the form of employer securities; and (5) exclude contributions required to meet the minimum funding rules from the 10 percent excise tax on nondeductible contributions.

Welfare Benefit Plans—The bills do not contain the modifications to the COBRA noncompliance penalties that were proposed last year, but new language is being developed for possible inclusion.

The bill includes a potentially expensive provision related to COBRA. It would delete the language that states that an employee or other qualified beneficiary who elects to continue coverage under COBRA would lose it upon gaining coverage under another employer plan. The intent presumably is to allow people with preexisting conditions or those who move to a less generous plan to keep their old coverage. Language is being drafted that would provide for coordination of such double coverage.

The bills include proposed interim valuation rules for employers to use in complying with the section 89 welfare benefit nondiscrimination requirements. These interim rules would be in effect until the first plan year beginning six months after formal regulations are issued or until a later date specified by the Treasury Department. Employers could use their cost of providing COBRA coverage (less the 2 percent administrative charge) or any other actuarially reasonable method as the basis for plan valuation, but an employer would have to use the same method for all plans. Treasury has indicated that it may soon issue guidance on section 89 that may incorporate the interim rules.

The bills also would require employers to pay a new excise tax if a plan funded through a voluntary employee beneficiary association (VEBA) violated the section 89 nondiscrimination rules. Under current law, the employer's VEBA would lose its tax-exempt status. The bills also provide that the $200,000 limit on compensation that may be taken into account under a qualified plan would be extended to plans involving VEBAs.

Jeffords Portability Bill Clears Committee

The House Education and Labor Committee on April 28 reported H.R. 1961, the Pension Portability Act of 1987 sponsored by Rep. James Jeffords (R-VT). The bill next must be approved by the Ways and Means Committee, which has jurisdiction over legislation involving taxation.

The Education and Labor Committee approved a substitute for the original bill, which was included in last year's House budget legislation but was later dropped in conference.
Supporters of the bill say they hope it can be included in the technical corrections legislation, but it is unlikely that these changes would be viewed as "technical."

The measure would relax the current restrictions on simplified employee pensions (SEP’s) by extending the salary reduction feature to plans of all sizes (currently it is available only to those businesses with 25 or fewer employees) and permitting all employees to elect salary reduction (currently one-half of eligible employees must choose salary reduction for it to be an option).

The bill also would emphasize individual retirement accounts as a portability instrument by permitting direct trustee-to-trustee transfers of pension benefits— including nondeductible employee contributions—among qualified plans and IRAs.

Pension portability has attracted considerable congressional attention. The Ways and Means Oversight Subcommittee is slated to hold hearings soon on pension portability and preservation. In addition to Jeffords, Rep. Rod Chandler (R-WA) and Sen. John McCain (R-AZ) have introduced identical bills (H.R. 2643 and S. 1349, respectively) aimed at facilitating portability, as have Reps. Robert Matsui (D-CA) and Ed Feighan (D-OH), cosponsors of H.R. 1992. There also is interest in the subject within the executive branch; see "Council Advises DOL on Portability," this issue.

Long-Term Care Subject of Congressional Activity

Long-term care financing will be one of the key issues the next Congress will debate, with a number of members reportedly having new bills in the works. An innovative bill that may provide the starting point for future legislative action was recently introduced in the Senate, while a House subcommittee convened a hearing on long-term care insurance.

**Bill Would Expand Medicare**—The Long-Term Care Assistance Act of 1988 (S. 2305), introduced April 21 by Sen. George Mitchell (D-ME), chairman of the Senate Finance Health Subcommittee, would expand Medicare coverage to include long-term home health care and nursing home expenses. The bill, which was referred to the full committee, is considered unique in that it establishes a partnership between the private sector and government by providing stop-loss coverage through the expansion of public programs and encouraging a private insurance market.

Mitchell’s bill would amend the Social Security Act to provide the following changes in Medicare.

Medicare would pay 80 percent of home health care expenses after satisfaction of a $500 annual deductible.

Beginning in 1990, Medicare would pay 50 percent of up to $2,000 a year in expenses for "respite" services, in which relief is provided to persons who care for the chronically ill (in subsequent years the amount would be increased by the percentage change in the consumer price index during the preceding 12 months).

After a beneficiary pays for the first two years of nursing home care, Medicare would finance 70 percent of the remaining costs indefinitely.

The proposal would cost an estimated $16 billion to $18 billion a year and would be financed in a variety of ways, including: (1) removal of the cap on annual wages subject to the Medicare payroll tax (currently $45,000 a year); (2) charging Medicare beneficiaries an extra $2 monthly premium, along with an income-based premium charged to wealthier beneficiaries; (3) application of savings realized by the Medicaid program, which now finances a major portion of nursing home expenses; and (4) a 5 percent surtax on gifts or inheritance of assets in excess of $200,000.

Mitchell’s bill also would provide tax incentives to insurers that develop private long-term care insurance policies to supplement the Medicare coverage.

**Insurance Topic of Hearing**—Private long-term care insurance was the focus of an April 20 hearing of the House Energy and Commerce Subcommittee on Commerce, Consumer Protection, and Competitiveness.

The key point of agreement between insurance industry representatives who testified and subcommittee members was that a serious problem exists regarding the financing and provision of long-term care, particularly given the aging of the population. Witnesses generally agreed that the private insurance industry should be the major provider of coverage, with the following types of government assistance.

Government should take an active...
role in educating the public about the need for long-term care coverage and the extent, or lack, of coverage available through existing programs such as Medicare and Medicaid.

Witnesses suggested a number of tax code changes to stimulate the market for long-term care insurance, including: (1) tax breaks for long-term care insurance company reserves and investment earnings; (2) allowing individuals to deduct amounts spent on long-term care insurance and services; (3) permitting employers to prefund retiree health coverage on a tax-favored basis; (4) allowing the inclusion of long-term care coverage in flexible benefit plans on a tax-favored basis; and (5) granting tax credits to elderly individuals who buy long-term care insurance.

Witnesses suggested that the federal government act as a safety net by improving public programs for individuals to whom private insurance may be inaccessible, such as those over 85 years old, suffering from chronic disease, or unable to pay for private insurance.

Those testifying included representatives from the American Association of Homes for the Aging, the American Health Care Association, the Blue Cross/Blue Shield Association, the Health Insurance Association of America, the National Association for Home Care, the National Association of Insurance Commissioners, and the Washington Business Group on Health.

Mandatory Health Coverage Debated at Hearings

At April 14 and 15 hearings by the House Energy and Commerce Health and Environment Subcommittee, representatives of the business community spoke out against H.R. 2508, the Minimum Health Benefits for All Workers Act, while representatives of small business, organized labor, and the uninsured urged its passage.

The bill, sponsored by Rep. Henry Waxman (D-CA), is basically identical to S. 1265, which passed the Senate Committee on Labor and Human Resources under the sponsorship of Sen. Edward Kennedy (D-MA), its chairman. The version passed by the Senate committee, however, includes mandated coverage of mental health care and a modification of the small-employer exclusion.

The U.S. Chamber of Commerce and National Association of Manufacturers strongly opposed the bill, warning of layoffs and unemployment in response to the increased labor costs. The Washington Business Group on Health (WBGH), whose member companies are divided on the issue of mandated employer health coverage, offered recommendations for making the bill more palatable to the business community. WBGH President Willis Goldbeck suggested that part-time employees not be covered under the bill and that the employee share of the cost be increased from 20 percent to around 40 percent.

It is unlikely that either bill will pass Congress this session, but the issue is likely to reemerge during the 101st Congress—particularly if the next U.S. president is an advocate of universal health coverage.

Meanwhile, Rep. Pete Stark (D-CA) is reportedly drafting a bill that would require employers to cover employees' health care expenses after a $1,500 deductible and pay 80 percent of the premium.

Catastrophic Bill in Conference

At press time, the conference committee on the catastrophic health care legislation (H.R. 2470, the Medicare Catastrophic Loss Prevention Act of 1987) was continuing its attempts to arrive at a compromise bill. Although conference members missed their April 29 deadline for completing the conference, reports indicate they expect to resolve their differences before the Memorial Day recess.

Senate Passes Trade Bill

On April 27 the Senate passed the trade bill (H.R. 3, introduced by Rep. Richard Gephardt (D-MO)), which includes a provision that requires employers to give workers 60 days' advance notification of a plant closing or a layoff affecting more than 500 employees. The House had passed the bill the week before. At press time, President Reagan was expected to veto the bill and it was uncertain whether supporters could summon the votes needed to override a veto.

Welfare Reform Bill Clears Senate Committee

On April 20 the Finance Committee approved the Family Security Act of 1987 (S. 1511) sponsored by Sen. Daniel Moynihan (D-NY), which would make numerous revisions to the nation's welfare system. The bill would subsidize child care for nine months after a welfare recipient becomes employed. Medicaid
coverage would be provided for the first six months of employment, with an additional six months available upon payment of an income-related premium.

Support Sought for Reversion Bill

A "Dear Colleague" letter dated April 13 was circulated to members of Congress by six prime sponsors of H.R. 4111, the Employer Reversion Moratorium Act of 1988. The legislation would temporarily prevent employers from receiving excess pension plan assets in the event of plan termination. (See the March 1988 Employee Benefit Notes, p. 9.)

The letter was signed by Rep. Bill Clay (D-MO), who introduced the bill, and Reps. Claude Pepper (D-FL), Edward Roybal (D-CA), Silvio Conte (R-MA), Jack Davis (R-IL), and Bob Davis (R-MI).

The bill would "temporarily eliminate the strong incentives under current law for employers to terminate underfunded pension plans solely to gain access to so-called excess assets," the letter reads. "The purpose of this suspension of employer reversions is to enable Congress to fashion a permanent solution to this threat to worker and retiree benefit security."

The moratorium on employer reversions would be from March 8, 1988, to Oct. 1, 1989, during which period employers would be required to hold the excess assets in escrow.

An identical bill (S. 2284) was introduced April 14 by Sen. Howard Metzenbaum (D-OH).

Dukakis Signs Health Bill

At an April 21 ceremony attended by some 2,000 people, Massachusetts Gov. Michael Dukakis signed into law a bill he introduced to bring health coverage to the state's 600,000 uninsured residents.

Estimates of the measure's cost by the time it is fully phased in in 1992 are wide ranging. Dukakis puts the cost at $622 million and the Senate Ways and Means Committee at about $660 million, while the House Ways and Means Committee estimates the cost will range from $890 million to $1.3 billion (all estimates include a hospital financing provision). No estimates have yet been made about the bill's annual cost once it is fully phased in.

The Massachusetts law would sunset if similar federal legislation is passed. Employers that do not provide coverage would pay $1,680 per employee into a state fund which would sell insurance to the remaining uninsured, including any dependents. Employers that pay a lesser average amount per employee would have to pay the difference into the fund.

The bill does not mandate coverage of dependents, but the amount of the surcharge—which in many cases will exceed the cost of individual coverage—may induce employers to provide additional coverage up to the surcharge amount. (See the April and March 1988 Employee Benefit Notes.)

Regulations

IRS Issues Guidance on ESOP Investment Diversification

issued an advance notice April 22 providing guidance on provisions of the Tax Reform Act of 1986 that permit certain employees to diversify their investments in employee stock ownership plans (ESOPs).

Under tax reform, an ESOP participant who has attained age 55 and participated in the plan for at least 10 years may invest up to one-fourth of his or her ESOP account balance in one of three alternatives to the employer securities held by the plan. The notice (Notice 88-56) clarifies which employer securities are subject to the diversification requirement.

IRS to Lift Suspension on Excess Asset Determination Letters

IRS announced April 27 that it will lift its suspension on determination letters on transfers of excess assets from defined benefit to defined contribution plans. The notice will appear in Notice 88-58, which is to be published in the May 16 Internal Revenue Bulletin.

HCFA Revises Hospital Payment Formula

The Health Care Financing Administration (HCFA) is revising the regulations governing application of the "lesser of costs or charges" provision used for computing Medicare payment to some hospitals, skilled nursing facilities, home health agencies, and outpatient physical therapy and speech pathology clinics.

Effective with cost reporting periods beginning on or after Oct. 1, 1984, the aggregation method of calculating the lesser of costs or charges, which compares total reasonable cost and customary charges for serv-
ices without regard to whether the services were furnished under parts A or B of Medicare, is eliminated.

Beginning on or after April 28, 1988, the carryover provisions permitting a provider to accumulate and carry forward costs that previously went unreimbursed because the provider's charges were lower than its costs are also eliminated. (See the March 29, 1988, Federal Register, pp. 10077–10085.)

HIV Test Confidentiality

To further protect the confidentiality of human immunodeficiency virus (HIV) test results and to encourage voluntary testing, HCFAS is proposing a rule that would eliminate the requirement that a laboratory maintain the name and other identification of individuals undergoing HIV tests if the laboratory is not seeking Medicare or Medicaid payment for these tests. However, it would not excuse a laboratory from keeping this information if it is required by state law. Laboratories or entities seeking Medicare or Medicaid payment would continue to maintain the name or other identification of persons undergoing these tests to assure proper payment. (See the March 31, 1988, Federal Register, pp. 10404–10405.)

PBGC Amends Interest Rate

The Pension Benefit Guaranty Corporation (PBGC) has raised to 10 percent the interest rate applicable to late premium payments and employer liability under- and overpayments. The previous rate for unpaid premiums and underpayments of liabilities, or amounts credited to overpayments of liabilities, was the sum of the short-term federal rate (the average interest rate on federal securities with a maturity of three years or less) plus three percentage points. The new rate is effective with the calendar quarter starting April 1, 1988. (See the April 1, 1988, Federal Register, pp. 10530–10531.)

IRS Issues New Distribution Rules for Multiple IRAs

Holders of multiple IRAs will have more latitude in choosing how to take distributions from their accounts upon reaching retirement age under new rules announced in IRS Notice 88-38.

The new rules allow holders of several IRAs who have reached age 70 1/2 to choose the account or accounts from which they wish to take their required distribution. Owners of multiple IRAs previously had to calculate the required minimum distribution separately for each account and receive a distribution from each.

IRA holders will still calculate the required minimum distribution separately for each account but may then elect to receive the total required amount from any one or more of the IRAs. IRA holders who reached age 70 1/2 during 1987 were required to receive minimum distributions by April 1, 1988. IRA holders who have already received distributions and want to take advantage of the new rules may be able to return the distributions under existing rollover provisions.

Litigation

J.C. Penney Wins Health Bias Suit; EEOC Seeks Reconsideration

In a decision that may have an impact on the future design of corporate health plans, a federal appeals court upheld a J.C. Penney Company health plan provision that extends health and dental coverage to the spouse of a covered employee only if the spouse earns less than the employee.

The 6th U.S. Circuit Court of Appeals in Cincinnati upheld a lower court's ruling that the provision does not violate the Civil Rights Act of 1964 since it is based on compensation rather than on sex. The original suit, filed by the Equal Employment Opportunity Commission (EEOC), claimed the policy discriminates against female employees because women earn less money, on average, than men and their spouses would more than likely be denied coverage.

EEOC has asked the Cincinnati court to reconsider its decision.

PBGC Reaches Settlement with Wheeling-Pittsburgh

In what it called the largest settlement of pension insurance claims in its 13-year history, PBGC entered into an agreement with Wheeling-Pittsburgh Steel Corporation requiring payment of $85 million to resolve all claims against the company.

Under the settlement, announced April 14, PBGC will receive $60 million in cash and a secured note for $25 million upon confirmation of Wheeling-Pittsburgh's reorganization plan. The settlement is subject to approval by the U.S. Bankruptcy Court for the Western District of Pennsylvania.

PBGC said the settlement grants it full recovery of its priority claims against Wheeling-Pittsburgh for unpaid contributions due the pension plans for the period after the
company filed for bankruptcy. It also grants recovery of a "substantial" portion of PBGC’s original employer liability claim. Since the time the suit was filed, such claims have been limited by statute to 30 percent of an employer’s net worth.

PBGC originally filed claims in the bankruptcy court totalling more than $600 million, based on the November 1985 termination of seven Wheeling-Pittsburgh pension plans, which provided retirement benefits to about 21,500 employees. (See the September/October 1985 Employee Benefit Notes.)

For Your Benefit

DOL Releases Child Care Study

Labor Secretary Ann McLaughlin released the findings of a Department of Labor (DOL) task force on child care April 15 in a report titled Child Care: A Workforce Issue.

McLaughlin said she hoped the report would “bring a healthy dose of reality to the table” as policymakers address the issues of child care availability, affordability, and quality. The report examines the child care needs of working parents and how they are being met. Its four key findings, according to McLaughlin, are that

- the federal government already spends nearly $7 billion for child care and Head Start programs;
- activity at the state and local government levels is increasing;
- more employers are addressing the child care concerns of employees, as are community groups and unions; and
- an across-the-board availability crisis of national proportions does not currently exist, but there are spot shortages of certain kinds of care and of a sufficient variety of options that meet the needs and preferences of working parents.

The report includes a survey of current activities at the federal, state, and local levels as well as on the part of employers and labor negotiators; an examination of work-related trends and needs; and an analysis of potential problems in the areas of availability, affordability, and quality of child care. Copies of the study are available from DOL, 200 Constitution Ave., NW, Room S-1032, Washington, DC 20210. (202) 523-7316. Free.

Council Advises DOL on Pension Portability, Preservation

Acting on findings developed by its internal work group, the ERISA Advisory Council on Portability and Preservation of Pensions recently issued its recommendations to DOL.

Pension portability can be viewed in several ways: (1) transferring service credits and dollars between defined benefit plans; (2) crediting service of many employers to one plan and contributing funds to that single plan as an individual moves from employer to employer; and (3) paying the cash value of the pension to an employee who terminates employment.

Employer Plan Rollovers—The council advised DOL to support a change in the law to require employers that provide lump-sum distributions to make the distributions to financial intermediaries. These intermediaries, however, should be prohibited from charging excessive fees, said the council. This recommendation is based on the belief that a lump sum rolled over into another plan is more likely to be saved for retirement than a lump sum paid directly to an individual.

Treatment of Distributions before Age 59 1/2—The council advised DOL to support a requirement that individuals under age 59 1/2 have access to retirement plan funds only when a severe financial hardship occurs, unless the funds are taken as a life annuity. Older individuals, however, should have access to distributions or rolled-over amounts.

Tax Treatment of Retirement Distributions—All distributions to individuals over age 59 1/2 should be taxed in the same manner, the council advised—eliminating ten-year and five-year forward averaging, special capital gains treatment, and any other tax law provisions that provide more favorable tax treatment for a lump-sum distribution than for an annuity payment.

Employer Plan Rollovers—The council advised DOL to support portability and additional study of the transfer of funds from plan to plan. The council acknowledged that individual retirement accounts would serve the same purpose, however, and said there could be significant administrative costs and feasibility problems with requiring employer plans to accept rollovers.

Simplified Employee Pensions—Regardless of its size, an employer that does not sponsor a qualified retirement plan should be required to establish a simplified employee pension upon request and provide...
for payroll deduction, the council recommended. Any law changes needed to facilitate this requirement should be implemented.

Expansion of Coverage—The council advised DOL to state its commitment to expanded pension coverage and its intent to study options for achieving same.

NIH Creates Top AIDS Post

Dr. Anthony S. Fauci has been named associate director for AIDS research at the National Institutes of Health (NIH). His appointment to head the new Office of AIDS Research marks the first time a top-level position has been established at NIH to coordinate research on a single disease.

Retiree Health Update

At its March 30 and April 20 meetings, the Financial Accounting Standards Board (FASB) continued its consideration of possible employer accounting requirements for retiree health benefit liabilities. According to the April 6, 1988, FASB Action Alert (No. 88-14):

[FASB] readdressed the issue of whether the attribution approach and period to be prescribed in accounting for postretirement benefits other than pensions should be conditioned on whether the benefits are defined in terms of individual years of service. [FASB] also reconsidered its previous tentative conclusion regarding measurement and recognition of the obligation for postretirement health care benefits that are not defined in terms of individual years of service. [FASB] tentatively concluded that a benefit/years-of-service approach should be prescribed that attributes benefits in accordance with the plan benefit formula if the plan defines benefits in terms of individual years of service. In the absence of a benefit formula defining benefits in terms of individual years of service, the benefit obligation should be ratably allocated to service to the date of first eligibility for benefit coverage. The issue of whether the obligation attributed to employee service should be the vested benefit obligation or the expected benefit obligation was not resolved.

The staff was directed to explore literature on measurement and to develop materials focusing on which post-balance-sheet events should be anticipated in the measurement of the obligation for postretirement health care benefits at the date of first eligibility for benefit coverage.

In the April 27, 1988, FASB Action Alert (No. 88-17), it was reported that at an April 20 meeting

[FASB] discussed the extent to which future events should be considered in measuring an obligation for postretirement health care benefits and whether the vested or expected benefit obligation for [those] benefits should be attributed to service to the date of first eligibility for benefit coverage. [FASB] tentatively concluded that, in the absence of a benefit formula defining benefits in terms of individual years of service, the expected benefit obligation ... should be allocated ratably to service to the date of first eligibility for benefit coverage.

FERS Deadline Extended

Federal employees who were not able to meet the Dec. 31, 1987, deadline for switching to the new Federal Employees Retirement System (FERS) have until the end of June to enroll in the new plan.

Last year, workers covered by the Civil Service Retirement System had the option to switch, but just two percent of the two million who were eligible did so. Ten days before the deadline, Congress passed two changes in FERS that made the program more attractive to some federal employees, many of whom may not have known of the changes in time to switch.

Government Publications

Report to Congress and the Secretary by the Task Force on Technology-Dependent Children (2 vols.). U.S. Department of Health and Human Services, Health Care Financing Administration (HCFA)

This report, developed in accordance with Section 9520 of the Consolidated Omnibus Budget Reconciliation Act, discusses alternatives to institutional care for technology-dependent children. Beginning by defining the terms "technology-dependent child" and "appropriate care," the report identifies barriers to home- or community-based care, recommends changes in the way health care is financed in private and public programs, and discusses joint public-private initiatives that can lead to the development of practical alternatives to institutionalization. Contact HCFA, Room 435-H, 200 Independence Ave., SW, Washington, DC 20201. (202) 245-6145. Free.

In most states, hospitals that want to undertake capital expenditures or offer new services must obtain regulatory approval under a certificate-of-need (CON) program. Such regulation may have raised hospital costs instead of producing the intended resource savings, according to this report by FTC's Bureau of Economics. CON laws discourage competition, the study concludes, by serving as market-entry barriers to new health care providers, who must first prove that a need exists for their services. Contact FTC, Public Reference Branch, Room 130, 6th St. and Pennsylvania Ave., NW, Washington, DC 20410. (202) 326-2222. Free.

Survey of Employee Benefits in State and Local Governments, U.S. Department of Labor (DOL)

Ninety-eight percent of full time workers in state and local governments had retirement plans in 1987, according to DOL's first comprehensive look at government employee benefits. The survey provides representative data for 10.3 million full time workers in state and local governments employing 50 workers or more; Alaska and Hawaii are excluded. Detailed tabulations will be published this summer; preliminary results are reported in release USDL-88-79. Contact DOL, Bureau of Labor Statistics, Washington, DC 20212. (202) 523-1913. Free.

Nongovernment Publications

Employers and Eldercare: A New Benefit Coming of Age, Bureau of National Affairs, Inc. (BNA)

The responsibilities involved in caring for aging parents can interfere with an employee's work performance and result in increased stress, lower productivity, and absenteeism. This report describes corporate programs designed to alleviate this conflict, summarizes major research in the field and includes examples of corporate programs and a feature report, "A Day at an Adult Care Center." Contact BNA Customer Service Center, 9435 Key West Ave., Rockville, MD 20850. (800) 372-1033. Cost $35; quantity discounts.

AIDS in the Workplace, William F. Banta

This book is intended to help managers, personnel and human service staff, legal counsel, and supervisors who must protect the health and business interests of their organizations while supporting and protecting the rights of employees and job applicants. Information on federal, state, and local laws; court judgments; and pending cases is included. Contact Lexington Books, D.C. Heath and Company, 125 Spring St., Lexington, MA 02173. (800) 235-3565. Cost $27.95.

Incentives, Cooperation, and Risk Sharing, Haig R. Nalbantian, ed.

To meet the challenge of increasing foreign competition, many U.S. firms are entering into incentive contracts with their employees, basing a portion of compensation on some measure of the firm's performance. In this volume economists, industrial psychologists, and business and human relations professionals examine the merits of alternative forms of remuneration, exploring issues relating to such incentive plans as profit sharing, productivity sharing, bonus systems, and employee stock ownership. They also discuss public policy issues involved in shifting from a standard fixed-wage system. Contact Order Department, Littlefield-Adams, 81 Adams Drive, Totowa, NJ 07512. (201) 256-8600. Cost $45 plus shipping.

Surveys

Flexible Compensation Programs and Practices, Hewitt Associates

A recent survey of more than 200 employers with flexible compensation programs indicates that 70 percent of flexible programs offer a choice of benefits and a flexible spending account, rather than only a spending account (19 percent) or only a choice of benefits (11 percent). This report on the survey includes responses to questions concerning practices in the design, communication, and administration of flexible benefit programs. Contact Cathy Schmidt, Hewitt Associates, 100 Half Day Road, Lincolnshire, IL 60015. (312) 295-5000. Cost $100.

Videos

Access to Health Care: The Search for Solutions, Washington Business Group on Health (WBGH) and National Association of Manufacturers

This video features Sens. Edward Kennedy (D-MA) and John Chafee (R-RI), along with representatives of the National Governors' Association, U.S. Small Business Administration, and Robert Wood Johnson Foundation, discussing how health coverage can best be provided to the uninsured. Contact WBGH, 229 1/2 Pennsylvania Ave., SE, Washington, DC 20003. Attn: Video Sales. (202) 547-6644. Cost $43.
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