CHILD CARE EMERGES AS ISSUE WHOSE TIME HAS COME

Child Care Emerges as Issue Whose Time Has Come

More than 100 bills dealing with child care have been introduced in the 100th Congress by members on both sides of the aisle. At the same time, child care has emerged as a major issue in the Republican and Democratic presidential campaigns, with the approaches favored by the candidates paralleling those proposed by their party colleagues in Congress.

In general, the plans put forth by the Democrats prescribe establishment and support of day care centers, while the Republicans recommend amending the Internal Revenue Code (IRC) to provide a system of tax credits.

Act for Better Child Care

The proposal that has received the most attention, and is supported in principle by Democratic presidential nominee Michael Dukakis, is the Act for Better Child Care (ABC), introduced in the Senate (S. 1885) by Christopher Dodd (D-CT) and in the House (H.R. 3660) by Rep. Dale Kildee (D-MI). As of late August, S. 1885 had 38 cosponsors (35 Democrats, 3 Republicans), while H.R. 3660 had 170 (155 Democrats, 15 Republicans).

Amended versions of the respective bills passed the Senate Labor and Human Resources Committee on July 27 and the House Education and Labor Committee on Aug. 10 and at press time were awaiting floor action. The legislation would provide grants to states to expand child care services for low- and middle-income families. The disbursement formula would consider per capita income, the number of children under age 5 in the state, and the number poor enough to qualify for the school lunch program. There would be a state matching requirement of 20 percent.

The House voted to subsidize child care for families earning less than 115 percent of a state's median income; the Senate bill was amended to subsidize those earning up to 100 percent of a state's median income. The other major difference between the two versions is age of eligibility: the Senate would cover children to age 15, while the House would cover those age 13 and younger. An eligible child would be one who resides with a parent or parents who are working, seeking employment, or enrolled in a job training or other educational program, or one who is receiving, or in need of, protective services.

Other provisions would establish more child care facilities and a national advisory committee to develop health and safety standards. The cost of each bill is pegged at $2.5 billion, with 75 percent of the money earmarked for the purchase of child care services by parents. Depending on a state's preference, either grants or vouchers could be used. Sliding fee schedules would require copayments from users of day care facilities, based on family income and size. Another 15 percent of spending would be for referral services for parents and provider training programs, to improve the child care infrastructure and increase availability of care, while the remaining 10 percent would be devoted to administrative expenses.

A controversial part of the ABC bill revolves around how to deal with

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church-based programs, since nearly one-third of all children in day care go to centers sponsored or run by churches or located in church facilities. Current wording would make religious-based day care programs eligible to receive federal funds, but would prohibit the teaching of sectarian views and any admission discrimination on the basis of religious beliefs. The complex system of oversight, in particular the requirement for adherence to federal standards of care, is another point of concern.

H.R. 4999, the Child Care and Nutrition Enhancement Act by Rep. Timothy Penny (D-MN), proposes an alternative strategy to the ABC approach, allowing states to structure child care programs and determine licensing standards. The bill would help states fund their choice of projects through matching grants of $350 million a year. An additional $50 million would be available to states over three years on a competitive grant basis for establishing and coordinating child care services targeted to "latchkey" children. The bill encourages the use of existing public school space to house day care facilities.

H.R. 4999 would make an investment tax credit available to businesses that establish on-site child care facilities or off-site shared facilities, along with tax credits for those who make home improvements for the purpose of becoming licensed child care providers. Another provision would place an income cap on the dependent care tax credit and make the credit refundable for low-income families.

**Major Republican Proposals**

The leading Republican proposal, set forth by Vice President George Bush, the Republican presidential nominee, would give low-income families a refundable $1,000-per-child tax credit as part of a $2.2 billion plan. The so-called "children's tax credit" would be available to low-income families in which at least one, but not necessarily both, parents are employed.

Each qualifying family with income of $10,000 or less would be eligible for a tax credit of up to $1,000 for each child under age 4. If the family owes no taxes, they would receive a $1,000 check from the government. The $10,000 earnings limit would rise to $20,000 over four years. The Bush proposal would maintain the existing dependent care tax credit, allowing a low-income family to claim the greater of either the new children's tax credit or the existing dependent care credit.

Other Bush proposals to expand employer-sponsored day care include setting up an insurance pool, expanding Head Start, and providing federal money to help fund innovative programs.

The Choices in Child Care Act (H.R. 4768), introduced on June 8 by Rep. Tom Tauke (R-IA), with 31 Republican cosponsors is the primary Republican congressional proposal that addresses child care by amending the IRC. A refundable tax credit of up to $400 for each child under the age of 6 would be allowed, regardless of the employment status of the parents. The credit would be reduced by $20 for each $1,000 by which the adjusted gross income (AGI) of the taxpayer exceeded $20,000; beginning in 1991, the allowable AGI would increase to $25,000. The bill would replace the tax credit currently permitted under section 21 of the IRC for children under age 15 whose parents both work or are students.

H.R. 4768 would provide tax incentives to encourage businesses to establish programs to meet employees' child care needs, and would instruct the Secretary of Labor to conduct a study of the barriers that impede employers in their efforts to do so. [Editor's note: See "Survey Highlights" in Notes, 2/88, p. 17, for data on employer-provided child care benefits, including work-schedule policies.]

The bill also addresses quality and availability issues by authorizing block grants to states for planning, developing, establishing, expanding, or improving child care programs. Grants could also be used to provide supplemental child care assistance for low-income working parents through certificates for eligible families to purchase child care.

The Tauke bill initially would cost an estimated $400 million a year, increasing to $500 million over five years.

The Child Care Services Improvement Act (S. 2084/H.R. 4002), sponsored by Sen. Orrin Hatch (R-UT) and Rep. Nancy Johnson (R-CT), is another Republican alternative to the ABC bill, with annual costs pegged at $250 million. Block grants would be provided to states to expand day care programs, provide scholarship assistance for low-income families, and establish and operate training programs.

The bill also addresses employer
flexible benefit, or cafeteria, plans. It would require employers who offer these plans, which typically allow employees to choose from among several benefits, to include dependent care assistance as an option. In addition, the Hatch/Johnson approach would provide grants or loans to fund the start-up costs of employer-sponsored child care programs, offer tax breaks to child care providers, and establish insurance pools to lower liability costs.

H.R. 5107, the Day Care Reduction Tax Credit Act, also sponsored by Johnson, would amend the IRC to allow employers a credit against income tax for a portion of the wages paid to employees permitted to adjust their hours of employment or to work at home to reduce their child care needs.

Other Approaches

Other bills addressing child care through amendment of the IRC were introduced during the summer of 1988 and referred to the Senate Committee on Finance.

S. 2546, the Choices in Child Care Act by Republican vice presidential nominee Dan Quayle (R-IN), and S. 2620, the Family Choice Tax Allowance for Small Children Act by Pete Domenici (R-NM), would provide a refundable credit to parents for dependents under age 6 and 5, respectively.

S. 2714, the Child Care Tax Incentive Act by Bob Packwood (R-OR), would increase the amount of the credit for expenses with respect to child care for dependent children and make such credit refundable.

S. 2741, the Partnership in Child Care Act by John Heinz (R-PA), would increase the child care tax credit from 30 percent to 40 percent for low-income families and make the credit refundable. The bill also would amend the Social Security Act, targeting an additional $300 million each year in Title XX funds for recruiting and training day care workers, establishing referral networks, promoting public-private partnerships, and establishing loan programs to help providers meet state quality standards.

S. 2690, the Family and Community-Centered Child Care Options Act by Dave Durenberger (R-MN), would give an additional exemption for children under age 5 in families in which at least one parent does not work, and would give credit to employers who provide qualified child care facilities.

S. 2730, the Kids in Day-Care Service Act by Pete Wilson (R-CA), would create a refundable children's tax credit for low-income families and give credit to small businesses that provide qualified child care facilities.

S. 2646, the American Partnership for Our Children's Future Act by Chic Hecht (R-NV), would amend the IRC to allow for a refundable credit against tax for dependents who have not attained the age of compulsory school attendance, and would allow an employer to exclude from gross taxable income any amount spent implementing and executing employee child care and/or comprehensive parental medical leave programs.

Prospects

Conventional wisdom now holds that Congress will address child care assistance in some manner. The question of the form is growing less certain as political considerations take over, but action can be expected over the next few years.

Pension Recipiency Rises among Older Americans

An increasing proportion of Americans age 65 and over receive income from public and private employer-sponsored pensions and annuities, according to recently released data from the Social Security Administration. This increase is a result of growth in the number of retirees who spent some or all of their careers with employers who offered pension coverage.

In 1986, 53 percent of married couples with at least one member age 65 or older received retirement benefits other than Social Security—38 percent from private pensions or annuities and 20 percent from public employee retirement systems. Among unmarried elderly individuals, 30 percent received pension income—19 percent from private pensions or annuities and 13 percent from public employee pensions. In 1976, by comparison, 42 percent of married elderly couples had pension income—16 percent from public pensions and 28 percent from private pensions. During the same year, 24 percent of unmarried elderly persons received pension income—11 percent from public plans and 14 percent from private plans. (Among both married couples
and unmarried persons, some received income from both public and private pensions.)

Since 1962, the first year for which data are available, the percentage of older Americans receiving income from the private pension system has risen steadily (table 1). About 50 million workers, or 56 percent of the civilian nonagricultural work force, had pension coverage in 1983. Of those covered, 36 million were participants in private employer plans (representing 50 percent of all private sector employees), and 13 million were participants in public employer plans (representing 83 percent of all government employees). (See "Questions and Answers about Employee Benefits," EBRI Issue Brief 78, May 1988, pp. 5–6.)

Private pensions contribute significantly to the income security of older Americans at both middle and upper income levels (table 2). Among married couples with a member age 65 or older, 42 percent with incomes of $10,000–$19,999 and 44 percent with incomes of $20,000 or greater received income from private pensions or annuities in 1986. Similarly, among unmarried elderly individuals, 36 percent with incomes of $10,000–$19,999 had private pension income in 1986, compared to 32 percent among those with incomes of at least $20,000.

Although persons with annual incomes below $10,000 are less likely to have a private pension, their Social Security income is more likely to replace a higher proportion of preretirement earnings.

As more current workers covered by pensions reach retirement age, it is likely that the trend toward an increasing number of elderly persons receiving private pension income will continue. Income from private pensions, along with income from Social Security and savings accumulated during their working lives, will continue to ensure that most older Americans have adequate incomes in retirement. The poverty rate among elderly Americans is lower than the average rate for the U.S. population as a whole.

<table>
<thead>
<tr>
<th>Year</th>
<th>Married Couples</th>
<th>Unmarried Individuals</th>
</tr>
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<tbody>
<tr>
<td>1962</td>
<td>16%</td>
<td>5%</td>
</tr>
<tr>
<td>1967</td>
<td>19</td>
<td>7</td>
</tr>
<tr>
<td>1971</td>
<td>23</td>
<td>12</td>
</tr>
<tr>
<td>1976</td>
<td>28</td>
<td>14</td>
</tr>
<tr>
<td>1978</td>
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<td>1980</td>
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<td>1982</td>
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<td>15</td>
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<tr>
<td>1984</td>
<td>35</td>
<td>17</td>
</tr>
<tr>
<td>1986</td>
<td>38</td>
<td>19</td>
</tr>
</tbody>
</table>

Source: Employee Benefit Research Institute tabulations based on data from Susan Grad, Income of the Population 55 or Older (Washington, DC: Social Security Administration, Office of Research and Statistics), various years.
*Couples include at least one member who is age 65 or older. A married couple is counted as a recipient of private pension income if one or both persons are pension recipients.

Eleventh Circuit Reverses Itself on Blessitt

[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 June 1987, a panel of the United States Court of Appeals for the Eleventh Circuit held that, before an employer could receive any surplus pension plan assets, not only accrued but also "unaccrued and forfeitable" benefits must be satisfied.1 (The Employee Retirement Income Security Act of 1974 [ERISA] permits such reversions only after the satisfaction of all plan liabilities to participants and beneficiaries; essentially, the issue before the court was what constituted such liabilities.) However, the Eleventh Circuit recently vacated its earlier panel decision.

1That decision, and continuing confusion as to the meaning of its holding (the term "unaccrued benefit" is hardly self-defining), were discussed in two previous Employee Benefit Notes columns; see Notes, 11/87, pp. 7–8, and Notes, 7/87, pp. 2–4.
Table 2
Percentage of Married Couples* and Unmarried Individuals
Age 65 and Older Receiving Income from Private Pensions or Annuities, by Total Income Level, 1986

<table>
<thead>
<tr>
<th>Total Income Level</th>
<th>All Aged Married Couples and Individuals</th>
<th>Married Couples</th>
<th>Unmarried Individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Income Levels</td>
<td>27%</td>
<td>38%</td>
<td>19%</td>
</tr>
<tr>
<td>Under $5,000</td>
<td>3</td>
<td>10</td>
<td>3</td>
</tr>
<tr>
<td>$5,000–$9,999</td>
<td>15</td>
<td>11</td>
<td>16</td>
</tr>
<tr>
<td>$10,000–$19,999</td>
<td>39</td>
<td>42</td>
<td>36</td>
</tr>
<tr>
<td>$20,000 or more</td>
<td>41</td>
<td>44</td>
<td>32</td>
</tr>
</tbody>
</table>


*Married Couples are counted as a recipient of private pension income if one or both persons are pension recipients.

decision, and has, sitting en banc, affirmed reversing the district court, essentially reversing itself.

The court began by noting that the Dixie Engine Company plan had two benefit formulas: one applicable on or after a participant’s normal retirement date (Formula 1), which prorated the maximum benefit on the basis of years of service (up to 20), and one applicable prior to such date (Formula 2), which prorated the maximum benefit on the ratio of the participant’s actual years of service to those he or she would have had at normal retirement age.

George Blessitt, a former Dixie Engine Company employee who opted for early retirement, argued that Formula 1 should be applied and that not only his 11 actual years of service but also the additional 18 years he would have had at normal retirement age should be counted. Thus, he was entitled to 20/20 (counting the maximum 20 of his 29 years) of the maximum benefit. The employer argued that Formula 2 applied, and that Blessitt was, therefore, entitled only to 11/29 of the maximum benefit.

The Court’s Analysis

The court analyzed the issue on several levels, noting as a preliminary matter that the views of the relevant administrative agencies were entitled to great weight. It saw as relevant in this context not only the amicus brief filed by the Pension Benefit Guaranty Corporation (PBGC), but also regulations and pronouncements of that agency and those of the Internal Revenue Service (IRS) and the U.S. Department of Labor (DOL), all of which were inconsistent with Blessitt’s argument that he was entitled to benefits based on years of service which he did not then have.

Next the court examined the relevant statutory provision, ERISA section 4044, and its six-tier procedure for allocating assets upon plan termination. Blessitt and the earlier panel had made much of the fact that the fifth category of benefits to which assets are allocated under that section covers “all other nonforfeitable benefits,” whereas the sixth category includes “all other benefits” under the plan. Since, to the extent then funded, accrued benefits vest on termination of the plan, Blessitt argued that all accrued benefits would be covered by category five and that the sixth category, therefore, had to cover benefits that were not yet accrued, i.e., those based on future expected service.

The court rejected this argument on grounds that both categories five and six clearly referred only to benefits “under the plan.” In the court’s view, Blessitt clearly did not qualify under the plan for Formula 1:

Attainment of normal retirement age (65) is the plan’s unambiguous prerequisite for qualifying for Formula 1 benefits . . . Consequently, to award Blessitt benefits based on his anticipated future years of service would exceed the unambiguous terms of the plan and, therefore, would contradict the plain language of the Section [4044] allocation provisions of ERISA.

The court noted that its conclusion was in accord with longstanding IRS
and PBGC regulations, and specifically discussed the joint implementation guidelines issued in May 1984 by PBGC, the Treasury Department, and DOL. (These guidelines cover the termination of defined benefit plans and preclude reversions until the employer has, among other things, "purchased and distributed annuity contracts to protect participants against the risk that their accrued benefits may be jeopardized . . . ." [Emphasis added.])

The court also noted that under no prior court holding must retirement benefits be paid based on future years of service not yet worked. It properly distinguished the Amato and Tilley decisions relied on by Blessitt. Although the Second Circuit's Amato decision was the source of the earlier panel's "unaccrued benefit" notion, that case and Tilley dealt with entitlement to early retirement or retirement subsidy type benefits and neither awarded benefits based on expected future years of service.3

Legislation, Public Policy Cited

The court also noted recent legislative change to section 411(d)(6) of the Internal Revenue Code, which prohibits the retroactive reduction of accrued benefits. These changes restricted the elimination of early retirement and other subsidies, a protection the court noted would be unnecessary in plan termination situations if Blessitt's interpretation of section 4044 were correct. Since Congress explicitly contemplated the application of these changes in plan termination contexts, the statute itself was seen as inconsistent with Blessitt's position.

Finally, the court considered the policy implications of this issue. It noted that Blessitt's interpretation could actually result in dilution of what participants would otherwise get with respect to accrued benefits. Where assets were insufficient to pay 100 cents on the dollar on category six benefits, unaccrued benefits counted along with those accrued but not vested would dilute the assets available for such accrued benefits. The court also considered the fact that employers bear the downside shortfall risk in funding defined benefit plans, as well as the possibility that employers would attempt to minimally fund plans if they were not entitled to recover excess assets in this way.

The court also considered the purpose of ERISA's funding, vesting, and termination insurance provisions and concluded, rather colorfully, that overall congressional intent supported the view of the court:

Rather than enabling employees to get "something for nothing"—i.e., to receive present benefits for anticipated future years of employment which have not actually been and may never be worked—which is the inescapable result of Blessitt's approach, the essential purpose of ERISA is to prevent employees from getting "nothing for something"—to prevent them from receiving fewer benefits than those they accrue through years of service.

There seems little doubt that reconsideration of its earlier decision was the proper course for the Eleventh Circuit. The carefully considered en banc decision seems destined to relegate this entire controversy to an historical footnote.

Legislation & Litigation

Technical Corrections Update

Congress went into recess on Aug. 11, leaving technical corrections legislation and a number of other areas—including the welfare reform conference—unfinished for the time being. After the House and Senate reconvened on Sept. 7, the full Senate was expected to take up S. 2238, the Senate Finance Committee technical corrections bill; the House passed its bill (H.R. 4333) in August (Notes, 8/88, pp. 9–10).

Treasury Department officials have indicated that they probably will adopt many of the proposed technical corrections as regulations, regardless of whether Congress passes a bill, particularly those affecting section 89 welfare plan nondiscrimination rules.

On Aug. 10, the House Education and Labor Committee ordered reported a bipartisan version of pension-related technical corrections (H.R. 4845), which incorporates the Pension Portability Act (H.R. 1961) as approved by the same committee.
in April. Committee staff have indicated that differences between Education and Labor's version of H.R. 4845 and the version reported by the Ways and Means Committee on July 14, including the pension portability provision, probably will be resolved before the full House considers the bills.

Under the Education and Labor bill, multiemployer defined benefit plans would be exempt from the full funding limitation enacted in the Omnibus Budget Reconciliation Act of 1987. The bill includes the Ways and Means-passed rule exempting employers who reach the full funding limitation (and who, therefore, cannot make further deductible contributions to their plans) from paying additional premiums to the Pension Benefit Guaranty Corporation in the following plan year.

The Education and Labor bill also would ease the administrative burden for multiemployer plans in complying with the group health coverage continuation provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). Group health plans could treat the date a qualified beneficiary actually loses coverage as the date of a qualifying event. The bill also would impose a discretionary civil sanction (excise tax), paralleling that in H.R. 4333.

The Education and Labor bill includes a provision allowing qualified beneficiaries to elect continuation coverage under the prior employer's plan only if, within one year, their claims under the new plan are denied as a result of a preexisting condition exclusion. The Ways and Means provision reducing COBRA's current maximum period of coverage if a qualified beneficiary experiences multiple employment-related qualifying events was dropped.

Long-Term Care Bills Introduced

Congress has begun to focus more attention on the issue of long-term care after enacting the Medicare catastrophic health care legislation, which does not provide for long-term care coverage. A number of bills have been introduced in recent months, including proposals by two Senate committee leaders.

Kennedy Proposes "Lifecare"—

Senate Labor and Human Resources Committee Chairman Edward Kennedy (D-MA) introduced a bill on Aug. 3 that would create a federal program of nursing home and home care coverage based on physical need.

Kennedy’s “Lifecare” proposal (S. 2681) would cover impaired elderly persons, disabled children, and disabled Medicare-eligible adults under age 65. Part A of the program, which would be financed through a number of tax options, would cover home- and community-based care and the first six months of nursing home care. Part B, financed by premiums and tax revenues, would establish an optional public insurance program to cover nursing facility stays that exceed six months.

Part A nursing home coverage could be extended if, after six months, a medical assessment indicated that a beneficiary had a “reasonable possibility” of returning home. All persons age 45 and over would be eligible to enroll in Part B, with premiums adjusted for age. Part B would cover 65 percent of the cost of a nursing home stay exceeding six months, with the beneficiary being responsible for paying the room-and-board portion of the cost. The bill also would create grant programs to help increase the availability of long-term care services.

Kennedy estimates the program would cost $20.5 billion a year, net of any Medicaid offsets. He suggested several financing options, including raising the cap on income subject to the Medicare payroll tax from $45,000 to $75,000 and increasing the alcohol and cigarette excise taxes.

Melcher Offers HEALTH Care Act—

On July 29, Sen. John Melcher (D-MT), chairman of the Special Committee on Aging, introduced the Helping Expand Access to Long-Term Health (HEALTH) Care Act (S. 2671), a bill that would provide federal funding for state-run home care, adult day care, and respite care programs.

Melcher estimated the program would cost about $25 billion over five years. As with Kennedy's proposal, it would be financed by lifting the cap on the Medicare payroll tax and through new copayment requirements. A companion bill (H.R. 5236) was introduced in the House by Don Bonker (D-WA) on Aug. 11.

Other Bills—The Long-Term Care Insurance Promotion Act (H.R. 5145), introduced on Aug. 3 by Rep. Bill Gradison (R-OH), would (1) afford long-term care insurance the same favorable tax treatment as
Two bills would establish federal standards for private long-term care insurance policies. The Long-Term Care Insurance Consumer Protection Act (S. 2636), introduced on July 13 by Sen. Dave Durenberger (R-MN), would establish a voluntary federal certification program, while the Long-Term Care Insurance Standards Act (H.R. 5085), introduced by Rep. Pete Stark (D-CA) on July 14, would establish federal and state standards similar to those for Medicare supplement insurance.

Companion legislation to Sen. George Mitchell’s long-term care bill (Notes, 7/88, pp. 11-12; 6/88, p. 12; and 5/88, p. 9) was introduced in the House on June 8 by Wisconsin Democrat David Obey (H.R. 4599, the Long-Term Care Assistance Act).

In addition, Rep. D. French Slaughter (R-VA) on Aug. 4 introduced the Federal Employee Long-Term Care Protection Act (H.R. 5167), which would make long-term care insurance available to civilian federal employees; an identical bill (S. 1738) was introduced in the Senate by Pete Wilson (R-CA).

HMO Amendments Clear Senate

On Aug. 11, the Senate passed its version of H.R. 3235, the Health Maintenance Organization (HMO) Amendments Act, which the House approved last November. Both versions of the bill would (1) ease the equal contribution requirement, under which employers must contribute at least as much to HMO coverage as they do to other health plans, and (2) permit HMOs to tailor rates to the insured group instead of using community rating.

The Senate added a provision under which the ability of an HMO to require employers to offer HMO coverage would sunset five years after the bill is passed. A conference committee will meet to resolve differences in the two versions.

Full Health Coverage Deduction Proposed for Self Employed

On Aug. 4, Rep. Pete Stark (D-CA) introduced H.R. 5169, which would amend the Internal Revenue Code to make permanent and extend to 100 percent—from the current 25 percent—the health insurance deduction for the self employed.

Regulations

IRS Issues Long-Awaited Final, Proposed 401(k) Regs

On Aug. 5, the Internal Revenue Service (IRS) issued final and proposed regulations for section 401(k) of the Internal Revenue Code (IRC) implementing certain amendments made as a result of the 1978, 1984, and 1986 tax laws.

The final regulations, which affect section 401(k), define “hardship” for purposes of making plan withdrawals. IRS retains the two-part definition of hardship included in earlier proposed rules—that there must be an immediate and heavy financial need for which no other resources are reasonably available. IRS lists certain expenses that are deemed to meet the “immediate and heavy” definition, including medical expenses, purchase of an employee’s principal residence, post-secondary tuition for employees, spouses, or children, and payments necessary to prevent an employee from being evicted from his or her principal residence or foreclosure on the mortgage of said residence. IRS has indicated that it may expand the list.

The final regulations suggest that an employee may have to liquidate other assets or borrow funds elsewhere to qualify for the “no other resources” provision. However, IRS will allow a plan to adopt a special rule under which employees may be deemed to lack other resources.

The regulations also cover the definition of compensation and the timing of contributions for the actual deferral percentage test and recharacterization of excess elective contributions.

The final regulations generally are effective for plan years beginning after Dec. 31, 1979; provisions relating to changes made by the Tax Reform Act of 1986 (TRA) are effective for plan years beginning after Dec. 31, 1986. (See the Aug. 8, 1988, Federal Register, pp. 29658–29674.)

The proposed regulations apply to changes TRA made to sections 401(k) and 401(m), as well as other sections affecting cash or deferred arrangements. They contain new nondiscrimination rules for employee and matching contributions, new limits on the ability of state and...
local governments and tax-exempt organizations to establish 401(k) plans, additional rules on recharacterization of excess elective contributions, and a safe harbor income rule.

The proposed regulations generally are effective for plan years beginning after Dec. 31, 1986, although some are effective for plan years beginning after Dec. 31, 1988. Comments and requests for a public hearing must be delivered or mailed by Oct. 7, 1988, to Commissioner of Internal Revenue, Attention: CC:LR:T (EE-1), 1111 Constitution Ave., NW, Washington, DC 20224. (See the Aug. 8, 1988, Federal Register, pp. 29719–29745.)

**IRS Issues Final Regs on Annuities**

IRS recently published final regulations relating to qualified joint and survivor annuities and qualified preretirement survivor annuities, including the notice, election, and consent rules enacted by the Retirement Equity Act of 1984 (REA). The regulations relate to the effective dates, transitional rules, restrictions on distributions from employee plans, and other issues arising under REA, and also reflect certain provisions of TRA that affect the REA provisions. (See the Aug. 22, 1988, Federal Register, pp. 31837–31856.)

**IRS Temporarily Exempts Some Nonqualified Plans from Section 457**

In Notice 88-98, IRS recently announced that it will delay until 1991 application of section 457 of the IRC to certain nonqualified plans that were in existence prior to 1987. The exemption applies to nonelective deferred compensation plans that were maintained under a collective bargaining agreement for employees of state and local governments and tax-exempt organizations.

**DOL Indefinitely Exempts Cafeteria Plans from Asset Rules**

In a recent technical release, the U.S. Department of Labor (DOL) indicated that, for an indefinite time, it will not enforce plan asset regulations with regard to cafeteria plans. The regulations require that participant contributions be held in trust. DOL indicated in the release that it will not enforce a violation for failure to comply with the regulations pending consideration of an exemption for certain types of welfare plans.

**Litigation**

**Westinghouse Agrees to Age Discrimination Settlement**

A $35 million settlement reached by the Equal Employment Opportunity Commission (EEOC) in litigation against Westinghouse, Inc., is the largest age discrimination agreement in EEOC’s history, the agency said. On Aug. 18, Westinghouse agreed to settle two suits brought by EEOC in 1981, when the company refused to award both severance pay and pension benefits to laid-off employees who were eligible for retirement benefits.

**For Your Benefit**

**Call (800) 937-2000 for Social Security Benefit Estimates**

Employees can call a new toll-free number established by the Social Security Administration (SSA) to request estimates of their retirement benefits. SSA will send a form asking for current earnings information and estimated future earnings. Upon receiving and processing the completed form, SSA will mail a statement providing the benefits estimate.

**Medicare Defines “Employee” for Purposes of Disability Coverage**

The Omnibus Budget Reconciliation Act of 1986 made Medicare a secondary payer for services provided on or after Jan. 1, 1987, to disabled Medicare beneficiaries who qualify as “active individuals” and are enrolled in large group health plans. The Health Care Financing Administration (HCFA) recently clarified its definition of “employee” in an effort to eliminate confusion in the employer and insurer communities regarding such coverage.

For purposes of the disability provision, HCFA defines “employee” as follows.

1. An individual who actively is working for an employer or,
2. because disabled persons are not usually working, a person whose relationship to an employer is indicative of employee status. Whether or not such a person is an employee is established by the unique facts applicable to the person’s relationship to the employer. The question to be decided is whether the employer treats a disabled individual who is not working actively as an employee, in light of commonly accepted indicators of employee status, rather than whether the...
person is categorized in any particular way by the employer. In general, an individual who is not actively working will be considered an employee if any of the following factors is present:

The individual is receiving payments from an employer that are subject to taxes under the Federal Insurance Contributions Act (FICA) or would be subject to such taxes except that the employer is one that is not required to pay such taxes under the Internal Revenue Code.

The individual is termed an employee under state or federal law or in accordance with a court decision.

The employer pays the same taxes for the individual as he or she pays for actively working employees.

The individual continues to accrue vacation time or receives vacation pay.

The individual accrues seniority for pension purposes, i.e., his/her age-based pension rights continue to increase over time.

The individual, upon reaching retirement age, is or will be entitled to a pension even though he/she had not qualified for one before becoming disabled.

The individual has a right to return to duty if his/her condition improves.

The individual continues to accrue sick leave.

HCFA indicated that the above list is not meant to be exhaustive and that, in some situations, other factors may need to be considered.

For more information, contact Frank D. Derville, deputy director, HCFA Bureau of Program Operations, 6325 Security Blvd., Baltimore, MD 21207.

ESOP Growth Continues

The number of employees covered by employee stock ownership plans (ESOPs) grew by 1 million during 1987, the National Center for Employee Ownership recently estimated, representing establishment of 730 new plans.

Last year's growth brings the total number of ESOPs to about 8,800 as of year-end 1987, and the number of covered employees to nearly 9 million.

Government Publications

Study of the Federal Employees Health Benefits Program, U.S. Office of Personnel Management (OPM)

This study identifies major problems in the structure and operation of the federal employees' health insurance program, which is the single largest employer-sponsored health benefit program in the United States. It finds that the program poorly serves the needs of many enrollees and estimates that it costs upwards of $500 million a year more than would be necessary under a more efficiently designed system. A major problem is erosion of the group insurance principle by adverse risk selection. Contact OPM, P.O. Box 707, Washington, DC 20415. (202) 632-4670. Free.

Nongovernment Publications

National HMO Firms, 1988, InterStudy

This new release, based on interviews with the top executives of 41 national health maintenance organization (HMO) firms, describes the strategies the firms are adopting to compete in today's health care market. Many HMOs are experiencing a marked slowdown in expansion and are shifting their focus to internal management concerns. They also report an increase in requests for products tailored to the needs of specific companies. Contact Maureen Shadle or Lynn Gruber, InterStudy, 5715 Christmas Lake Road, P.O. Box 458, Excelsior, MN 55331. (612) 474-1176. Cost $40.

Old and Poor: A Critical Assessment of the Low-Income Elderly, William F. Clark, Anabel O. Pelham, and Marileen L. Clark

Nearly 3.5 million people in the United States are old and poor. This book offers a comprehensive analysis of their situation and reviews general questions of planning, policies, and social and overall expenses. Vignettes are included to personalize the information and put it into the context of everyday life. The authors conclude with a policy proposal for eliminating poverty among the elderly. Contact D.C. Heath and Co., 2700 N. Richardt Ave., Indianapolis, IN 46219. (800) 334-3284. Cost $32.

AIDS and Your Company: A Report for Employers, American Business Publishing

The Public Health Service estimates
that the cumulative total of acquired immunodeficiency syndrome (AIDS) cases in the United States will exceed 270,000 by 1991, with an estimated 1 million to 1.5 million persons currently infected with the virus. This report is designed to provide employers with general information about the disease and includes sections exploring how the AIDS epidemic affects insurers, associated legal issues, work place policies, the employer’s role in AIDS education, related cost-saving strategies for employers, and government AIDS personnel policy guidelines. A list of resources and a bibliography also are included. Contact Robert K. Jenkins, American Business Publishing, 3100 Highway 38, P.O. Box 1442, Wall Township, NJ 07719. (201) 681-1133. Cost $39.50 postpaid.

_Tax Policy in the Twenty-First Century_, Herbert Stein, ed.

Based primarily on speakers’ presentations at a conference of the same name, this book is a discussion of how tax policy might develop and change in the coming century, and includes sections on tax reform, the legislative climate affecting tax policy, the effects of changing demographics, and international tax law. Authors include Treasury Secretary James A. Baker III, Rep. Bill Gradison (R-OH), EBRI President Dallas Salisbury, and tax experts from the United States academic community and Canada, Japan, the Netherlands, Argentina, Great Britain, and Germany. Contact John Wiley & Sons, Inc., Business/Law/General Books Division, 605 Third Ave., New York, NY 10158-0012. (212) 850-6000. Cost $24.95.

_Driving Down Health Care Costs_, Panel Publishers, Inc.

Despite widespread efforts to control health care costs, they have continued to rise. The book’s authors, health benefit experts, evaluate quality and cost factors in health care benefit programs, policies, and delivery systems, including the pros and cons of preferred provider organizations, health maintenance organizations, employee assistance programs, wellness and employee education programs, utilization review, cost containment audits, and retiree medical benefits. Contact Panel Publishers, 14 Plaza Road, Greenvale, NY 11548. (516) 484-0006. Cost $59 plus postage and handling.

_Work and Family: Managing the Changing Dynamics_, Spring Hill Center

This workbook is designed to assist employers in developing strategies for managing a rapidly changing work force. The book looks at national demographics, family issues, productivity, and model benefit and leave programs, and includes worksheets and a list of resource organizations. Contact Lee Bradford, Spring Hill Center, P.O. Box 288, Wayzata, MN 55391. (612) 473-0221. Cost $22.50 single copies; multiple copies, $19.50 each.

_Surveys_

_Salaried Employee Benefits Provided by Major U.S. Employers_, Hewitt Associates

Ninety percent of the 802 major employers responding to this 1987 survey reported that they offered some type of pension plan. Typical benefit packages provided to salaried employees included a defined benefit pension plan supplemented by a capital accumulation plan and medical insurance. Contact Cathy Schmidt, Hewitt Associates, 100 Half Day Road, Lincolnshire, IL 60015. (312) 295-5000. Cost $45.


More than 12 percent of all employees and dependents eligible for continuation of health coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) actually took the coverage, according to this survey of employers and plan administrators. Respondents reported a number of difficulties in complying with COBRA, particularly in collecting premium payments, notifying employees and being notified of eligibility and changes, and keeping up with associated recordkeeping requirements. Request report number 329.04.-5 from Charles D. Spencer & Associates, Inc., 222 W. Adams St., Chicago, IL 60606. (312) 236-2615.

_Corporate Benefit Communication... Today and Tomorrow_, TPF&C

This report presents the findings of a survey on benefit communication practices among the Fortune 500 industrial and service companies. The 269 respondents represent a cross section of business in terms of size, geographic location, and industry categories. The survey revealed significant differences in communication practices between companies that have flexible benefit programs and those that do not. Contact Julie Foehrenbach, TPF&C, 245 Park Ave., New York, NY 10167-0128. (212) 309-3885. Free.
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