Restructuring Medicare Catastrophic: Will Employers Pay More? (p. 1)

Restructuring Medicare Catastrophic: Will Employers Pay More?

Unrelenting pressure from thousands of elderly Americans has forced Congress to consider significantly revising the recently enacted Medicare Catastrophic Coverage Act of 1988 (MCCA). Proposals now under consideration in both houses include allowing seniors to opt out of the payments and coverage if they opt out of all of Medicare Part B (physician services), cutting the surtax, cutting back the hospital and doctor bill benefits, and reducing or eliminating the drug benefit. Furthermore, there are strong indications that a tough battle to repeal the law entirely will be waged on the House and Senate floors.

Media attention thus far has focused on the angry reaction of senior citizens and the subsequent response by congressional leaders to act to appease this powerful voting constituency. However, questions about such proposals could have on the private sector remain unanswered. Specifically, will proposals to repeal the law or to require seniors to opt out of the Medicare Part B program in order to get out of MCCA lead to demand for employers to provide these benefits to retirees?

Funding Proposals

Just last year, Congress overwhelmingly passed MCCA, the most significant health legislation of the 100th Congress. Former President Ronald Reagan hailed it as a "pay-as-you-go program, a program that requires no tax dollars."

The new law represents a sharp departure from the system that finances Social Security and Medicare benefits primarily from Social Security payroll taxes and general revenues: it requires that Medicare beneficiaries pay the entire cost of new catastrophic illness benefits through a combination of a flat catastrophic insurance premium ($4 a month for 1989) and a controversial supplemental premium based on income tax liability.

The new Medicare catastrophic benefits, including the drug benefits and both Part A (hospital benefits) and Part B (physician and outpatient benefits) were designed to protect older Americans and the disabled from the catastrophic costs of extended illnesses but exclude costs associated with long-term custodial care.

Senate Finance —At press time, the Senate Finance Committee was continuing deliberations over a package of major modifications to MCCA. However, committee members had reportedly agreed to negotiate to save the program from repeal by lowering the premiums. According to Chairman Lloyd Bentsen (D-TX), any changes to the program will be revenue neutral; therefore, lost revenue would be offset by paring down some drug and doctor insurance benefits.

The Finance Committee's plan currently under consideration would reduce the supplemental premium from 15 percent to 12 percent of a beneficiary's tax liability. The plan would also reduce the maximum premium for an individual to $585 from $800 in 1989 and for a couple to $1,170 from $1,600, with similar reductions for years 1990–1993.
insurance coverage could apply on a year-to-year basis to be exempt from Part B and the associated premium. They would also have a 60-day option to decline Part B coverage upon terminating the employment under which primary coverage was provided.

The Ways and Means proposal would cut the supplemental premium rate in half, from the current 15 percent of a beneficiary's tax liability to 7.5 percent in 1989, from 25 percent to 12.5 percent in 1990, from 26 percent to 13 percent in 1991, and from 27 percent to 13.5 percent in 1992. The Joint Committee on Taxation estimates that this would provide relief to individuals with incomes between $15,000 and $45,000 and to couples with incomes between $25,000 and $80,000 (table 1).

To make up the lost revenue, the flat premium paid by all beneficiaries would be increased an additional $3.50 per month in 1990. Therefore, the Part B premium, which is scheduled to rise to $34.90 a month in 1990 from the current $31.90 a month, would instead rise to $38.40 a month in 1990 and increase an additional $4 in 1991, $4.10 in 1992, and $4.10 in 1993 under the committee plan. The decrease in

Table 1

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<th>Income (Separate Tax Returns)</th>
<th>Present Law</th>
<th>Ways and Means Proposed Revision</th>
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<td>$0–4,999</td>
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<td>$40,000–44,999</td>
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<td>$45,000 and up</td>
<td>$908.80</td>
<td>$950.80</td>
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Source: Joint Committee on Taxation.

*The charge is based on a surtax plus a premium for catastrophic illness coverage.

The proposal would eliminate MCCA's prescription drug benefit except for immunosuppressive and intravenous drugs and postpone the ceiling on patients' out-of-pocket payments for doctor bills until 1991, when it would increase to $1,780 from $1,370 under current law. The proposal also calls for the restoration of a requirement that patients spend at least three days in a hospital before becoming eligible for 150 days of coverage in a skilled nursing facility.

Under the committee's proposal, the flat premium paid by all Medicare beneficiaries would not be raised, but beneficiaries would be allowed to opt out of Medicare Part B, which includes the catastrophic program as well as other physician services.

House Ways and Means — The House Ways and Means Committee approved a plan to make major revisions to MCCA as part of budget reconciliation legislation. Like their Senate counterparts, the committee also agreed to make the supplemental premium voluntary and permit seniors to opt out of the catastrophic program as long as they also agreed to drop Part B of Medicare.

The option to drop out of the program would be available to current enrollees on a one-time basis, beginning Oct. 1, 1989, and ending Dec. 31, 1989. New beneficiaries would make the choice at the time they become eligible for Medicare, generally when they reach age 65. Medicare beneficiaries could choose at some later date to re-enter the program but would pay a supplemental premium 15 percent higher than that paid by beneficiaries who did not drop coverage.

Medicare beneficiaries with employer-provided primary health

Dallas L. Salisbury, Publisher
Nora M. Super, Editor
the supplemental rate and the increase in the flat monthly premium would have the effect of shifting costs from middle- and higher-income beneficiaries to lower-income beneficiaries.

The Ways and Means proposal would also increase the annual prescription drug deductible from $600 to $800 in 1991 and from $652 to $950 in 1992.

Many observers believe the "opt-out" provision gives little real choice to the elderly because it would result in so many nonhospital benefits being lost. Part B pays 80 percent of covered doctor and other outpatient bills. Currently about 97 percent of all Medicare beneficiaries opt for Part B coverage. They pay a basic monthly premium, which covers 25 percent of Part B's cost. The rest is paid out of general revenues.

Potential Costs to Employers

The effect of the current Medicare catastrophic law or any modifications to the law on employers who sponsor retiree health insurance will vary widely from plan to plan. Many employers whose health benefit plans currently supplement Medicare considered MCCA as way to save money by eliminating benefits duplicated by the expanded Medicare program. Plan provisions, Medicare assignment rates among the physicians in the areas where retirees live, and many other factors will influence employers' cost savings associated with MCCA.

EBRI estimated in 1988 that the current law would reduce average aggregate employer plan costs by 10 percent in 1990, 40 percent in 1991, 45 percent in 1992, and 50 percent in subsequent years. This assumed reduction leads to approximately a 30 percent reduction in total employer unfunded liability for retiree health benefits.

Table 2 details EBRI's estimate of private and public employer liability for retiree health insurance benefits for 1988, both with and without projected savings associated with MCCA. In recent testimony before Congress, the U.S. General Accounting Office (GAO) estimated that MCCA would reduce employer unfunded liability by 19 percent when fully phased in. These estimates suggest the potential range of unfunded liabilities for retiree health benefits associated with repeal of MCCA. How such changes would affect any given employer that sponsors retiree health insurance could vary widely. Furthermore, if significant numbers

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<th>Worker/Retiree Status</th>
<th>Total (dollars in billions)</th>
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<th>Public Employees</th>
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<td>With Savings Associated with MCCA&lt;sup&gt;b&lt;/sup&gt;</td>
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<td>Total</td>
<td>$279.4</td>
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<td>current retirees</td>
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<td>current workers</td>
<td>188.2</td>
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<tr>
<td>Without Savings Associated with MCCA</td>
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<tr>
<td>Total</td>
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<td>$241.0</td>
<td>$158.1</td>
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<td>current retirees</td>
<td>130.3</td>
<td>97.4</td>
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<tr>
<td>current workers</td>
<td>268.9</td>
<td>143.6</td>
<td>125.3</td>
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</table>

Source: EBRI, preliminary estimates.
<sup>a</sup>Medicare Catastrophic Coverage Act of 1988.
<sup>b</sup>These estimates include reductions in plan cost as a result of MCCA. On average, corporate and public employer liabilities are estimated to decline by approximately 30 percent as a result of new Medicare benefits.

of retirees elect to drop Part B in favor of their former employer’s plan, employers’ liabilities could increase beyond these estimates.

In general, any decrease in the aggregate premium paid by the elderly that results in a subsequent reduction in benefits could represent a potential cost increase to business because those employers that experience savings under the current MCCA may be pressured by their retirees to provide the same level of benefits.

The Ways and Means Committee’s proposal attempts to redistribute the tax burden among the elderly without reducing the aggregate revenue received. The proposal requires higher contributions from lower-income elderly and lower contributions from middle- and higher-income elderly than the tax schedule under the enacted MCCA—although the elderly with incomes over $45,000 will pay more because their surtax liability was previously capped at a lower rate (table 1).

Because lower-income elderly are less likely to have employer-sponsored retiree health coverage than middle- and high-income elderly, employers who currently pay the Part B premium may have to pay less under the Ways and Means proposal than under the initial MCCA schedule. However, if the prescription drug benefits are eliminated or employees are allowed to opt out of Medicare Part B, retirees may ask their former employers to reinstate these benefits in their retiree health package if they were included before MCCA.

The ultimate effect of a repeal or modification on employer costs will depend on any given employer’s provisions before MCCA, and any changes to the plan they may have made in response to MCCA.

White House Response

The administration strongly opposes outright repeal of MCCA. Secretary of Health and Human Services (HHS) Louis Sullivan told the Senate Finance Committee on Sept. 20 that the catastrophic program should be fully implemented and given an opportunity to work before any adjustments are made, although he agreed to compromise to avoid repeal. He said the administration still supports the position that the program should be financed by the elderly because the elderly still get more out of the Medicare system than they put in because 75 percent of Medicare Part B is financed by taxpayers.

President Bush has said he will oppose any efforts to repeal MCCA because such action could automatically trigger across-the-board spending cuts as required under the Gramm-Rudman-Hollings law, unless the revenue is offset elsewhere. The program was at first expected to cost $31 billion through 1993. The Congressional Budget Office now estimates the cost at more than $45 billion, while HHS estimates the cost at about $55 billion.

Impact on Other Proposals

Many senior citizens strongly object to paying the entire cost of the program; they contend that any new medical coverage should be financed by taxing everybody, not just the elderly. At the same time, they complain that their needs for long-term care coverage were not addressed. Yet, the lawmakers feel that the protest against the financing of MCCA may work against any prospects for long-term care assistance. Such a program would be much more expensive—current estimates are at more than $50 billion for one year—and lawmakers are unlikely to address an issue that could result in the same sort of backlash.

Furthermore, several nonelderly groups point to social problems that they believe deserve more attention than the elderly’s health care—such as the large number of uninsured Americans and the health and welfare needs of children.

Nevertheless, some lawmakers maintain that existing sources for financing Medicare are inadequate in the long run because (1) the payroll tax will not be adequate as the number of retirees per worker increases; (2) general tax revenues are under pressure from deficit reduction laws; and (3) many of the elderly cannot afford greater Part B premiums. According to this argument, there is no real alternative to an income-related source of revenue.
The debate over Medicare catastrophic financing has focused attention on retiree health care issues and government-sponsored programs for the elderly in general. At the very least, the debate has highlighted the potential power of a unified constituency. Hopefully—and more importantly—it has forced policymakers and the public to reevaluate who holds the ultimate, primary responsibility of paying for the health care of America’s elderly: government, employers, or individuals?

—Nora Super and Tim Cerino, EBRI

Employer Spending for Benefits Rises 8.6 Percent in 1988

Public and private employer spending for employee benefits increased 8.6 percent in 1988, according to the U.S. Department of Commerce’s National Income and Product Accounts (NIPA). The data show that employers spent more than $2.9 trillion on total employee compensation in 1988, of which $474 billion was spent on employee benefits (table 3). In 1987, by comparison, total compensation outlays were nearly $2.7 trillion, of which nearly $437 billion was spent on benefits. The proportion of total compensation spent on benefits was 16.3 percent in 1988 and has shown little change since 1980, varying between 16 percent and 17 percent.

Total employee compensation increased 8.1 percent between 1987 and 1988 (chart 1). Employer spending for Social Security Old-Age, Survivors, and Disability Insurance (OASDI) payroll taxes grew by 14.3 percent, showing the highest increase for a single expenditure. This increase is due, in part, to an increase in the OASDI payroll

Table 3

Employer Outlays for Employee Compensation, Selected Years, 1960–1988

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<thead>
<tr>
<th></th>
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<tr>
<td>(billions of dollars)</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Total Compensation</td>
<td>$296.8</td>
<td>$618.2</td>
<td>$1,638.1</td>
<td>$2,367.4</td>
<td>$2,511.1</td>
<td>$2,689.9</td>
<td>$2,907.4</td>
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<td>Wages and salaries</td>
<td>272.8</td>
<td>551.5</td>
<td>1372.0</td>
<td>1975.2</td>
<td>2094.8</td>
<td>2249.4</td>
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<td>All benefits</td>
<td>23.7</td>
<td>66.1</td>
<td>264.3</td>
<td>389.0</td>
<td>412.7</td>
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<td>40.3</td>
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<td>213.8</td>
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<td>98.1</td>
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<td>Private employer pension &amp; profit sharing</td>
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<td>135.9</td>
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<td>11.6</td>
<td>22.7</td>
<td>26.0</td>
<td>27.7</td>
<td>29.7</td>
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<tr>
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<td>3.4</td>
<td>12.1</td>
<td>59.6</td>
<td>100.8</td>
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<td>120.1</td>
<td>132.8</td>
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<tr>
<td>Military medical insurance</td>
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<td>0.4</td>
<td>0.8</td>
<td>0.9</td>
<td>1.1</td>
<td>1.2</td>
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(continued)
The only component of employee compensation to decline in 1988 was private employer contributions to pension and profit sharing plans, which fell 3.0 percent. This decline may have been caused by increases in pension assets because of investment gains since the stock market’s recovery from the October 1987 crash, as well as new minimum funding limits imposed by the Omnibus Budget Reconciliation Act of 1987.

The NIPA data on wage and salary compensation implicitly include payment for time not worked, e.g., vacations, holidays, sick leave, and personal leave, but do not separate the amount paid for such leave.

Survey data from the U.S. Department of Labor estimate that the value of paid leave made up 7.0 percent of total compensation in March 1988, up from 6.9 percent in March 1987.¹

Chart 1
Percentage Change in Employer Outlays for Components of Employee Compensation, 1987 to 1988


- Consists primarily of directors' fees.
- Old-Age, Survivors, and Disability Insurance trust fund.
- Includes employer contributions to federal civilian and military retirement, railroad retirement, and state and local employee retirement plans.
- Medicare Hospital Insurance trust fund.

Individuals received nearly $746 billion in employment-related benefits in 1988, up 9.3 percent from 1987 (table 4). Retirement income benefit payments exceeded $440 billion in 1988, including $214 billion in Social Security OASDI payments, $137 billion in private employer pension plans, and nearly $90 billion from public employer plans. Health benefit payments grew to nearly $234 billion in 1988, including nearly $87 billion in spending by Medicare and $146 billion by group health insurance plans. Other employee benefit payments exceeded $71 billion in 1988, the largest portion of which was spent on workers' compensation ($30 billion) and veterans' benefits ($15 billion).

—Charles Betley, EBRI
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†Old-Age, Survivors, and Disability Insurance trust fund.

‡Includes employer contributions to federal civilian and military retirement, railroad retirement, and state and local employer retirement plans.

§Medicare Hospital Insurance and Supplementary Medical Insurance.

More on the "Two Hats" of Employers Who Administer Their Own Pension Plans

Where employers administer their own pension plans, courts in recent years have had a number of occasions to explore the interplay between the employer's nonfiduciary, business-decision responsibilities on the one hand, and its plan-related fiduciary responsibilities on the other. Most courts, for example, have held that "plan design" decisions, e.g., whether, and to whom, to offer an augmented, early retirement window program, are nonfiduciary business decisions. Employers are not answerable for such decisions under the fiduciary responsibility provisions of section 404 of the Employee Retirement Income Security Act of 1974 (ERISA), and therefore cannot generate liability under ERISA section 409.

On the other hand, an employer (or employer representative) is clearly answerable under ERISA for actions taken in a plan fiduciary capacity. Corporate officers have thus been held responsible for decisions to use plan assets in ways designed to benefit the employer, e.g., causing the plan to purchase additional employer stock as part of an effort to fend off a corporate takeover.

Fiduciary versus Nonfiduciary Responsibilities

In some instances, however, the appropriate "bright line" seems harder to draw. The Third Circuit recently dealt with such circumstances in Payonk v. HMW Indus-
ties, Inc. (No. 88-1577, Aug. 23, 1989). As a result of a corporate reorganization at HMW, a number of defined benefit pension plan participants withdrew the contributions they had made and rolled them over into a new plan shortly before the original plan was terminated. The termination of the plan resulted in a distribution of surplus assets, a portion of which the participants would have been entitled to had they not withdrawn their contributions prior to termination.1

The essence of the participant-plaintiffs' complaint was that the employer, as plan administrator, had a fiduciary duty to disclose information, i.e., the contemplated termination of the plan, relevant to their decision regarding withdrawal of their contributions. Although the final decision to terminate the plan, and the effective date of such termination, were not established prior to the participants' withdrawal, there clearly had been, prior to such withdrawal, an employer decision to begin a termination process.

The question squarely at issue was the obligation, if any, that the employer had in its fiduciary capacity to disclose information that it had acquired in the exercise of its nonfiduciary, business responsibility.

1ERISA section 4044(d) now provides that participants who have been "cashed out" within three years of plan termination are eligible to share in any surplus attributable to employee contributions, but the law then applicable covered only those participating as of the date of plan termination.

In affirming the district court's summary judgment in favor of the employer, the majority essentially held that there is no such obligation. It rationalized this conclusion as follows:

HMW, as plan administrator, would not normally be aware of the decision making process until after a decision on termination (or on any other plan change brought about by reason of a business decision) had been made by HMW as employer. . . . Since the statute expressly sanctions an employer wearing "two hats," . . . we can perceive no reason why HMW's decision to terminate its plan should put Payonk in a better position than Payonk would otherwise have been in had someone other than HMW been the plan administrator.

Two Different Brains

In other words, the "two hats" worn by the employer might be viewed as housing two different brains, each of which has only the knowledge acquired when the employer was wearing its hat. A separate concurring opinion stated the rationale in almost precisely that way:

I join in affirming the district court, however, because I believe the information HMW and the other defendants are accused of having withheld was held by them in a fiduciary capacity for the corporation and its stockholders and not in a fiduciary capacity for plan participants. . . . I do not think that Congress, having given sponsors the choice of serving in a dual capacity, intended to penalize those corporations so choosing by requiring greater disclosure of business decisions from them than from corporations acting solely as plan sponsors. And, from the perspective of plan participants, I do not think Congress contemplated that the amount and timing of information available to plan participants would depend on the unrelated, discrete issue of whether the sponsor also serves as administrator.

Extending this principle to its logical conclusion, one might even contend that an employer could, in its fiduciary capacity, make what amounted to an active misrepresentation, as long as any information contrary to the representation resided only in the employer's "nonfiduciary brain." The HMW court, however, would apparently not go this far. In fact, it distinguished a recent Sixth Circuit decision, Berlin v. Michigan Bell Telephone Co. (858 F.2d 1154 [1988]), on the very ground that that case involved a misrepresentation.

ERISA's Intrinsic Contradictions

The employer in Berlin had, in its nonfiduciary, business capacity, decided to implement an augmented early retirement window program similar to ones that had been offered at various times in the past. However, in its capacity as administrator of the plan, it had allegedly urged employees to retire prior to the effective date of the new, but as yet unannounced, program. The HMW
court saw this as involving misrepresentation and presenting an entirely different situation. It stated its holding as follows: “An employer’s lawful termination decision, absent affirmative misrepresentations designed to mislead plan participants, is not governed by ERISA’s standards of fiduciary duties.”

One judge on the Third Circuit panel dissented, concluding that HMW had a duty under ERISA and the terms of the plan to inform those participants facing a decision on withdrawal about the impending plan termination. His opinion did not, however, deal effectively with the “two-hat” rationale of the majority.

The HMW decision is a good exposition of some of the intrinsic contradictions in ERISA’s explicit sanctioning of employers as fiduciaries on the one hand, and its “solely-in-the-interest” requirement on the other. An HMW-type approach to resolving this contradiction—essentially that two separable roles are involved, and that the “solely-in-the-interest” and other fiduciary requirements apply only where one is wearing one’s fiduciary hat—makes sense in many, if not most, circumstances. As the HMW court itself recognized, however, this principle cannot be extended to its logical conclusion in all cases and still remain sensible. Undoubtedly this contradiction will continue to be explored on other fact patterns.

—This column was prepared by EBRI’s legal counsel, Arnold & Porter, under the supervision of K. Peter Schmidt.

 Legislation & Litigation

House Votes to Repeal Section 89

By a 390-36 margin, the House on Sept. 27 approved an amendment to the 1990 budget reconciliation package (H.R. 3299) that would repeal current-law section 89 welfare plan nondiscrimination and testing rules and reinstate the law in existence prior to the Tax Reform Act of 1986.

At press time, it was unknown whether the Senate would include a repeal measure in its budget reconciliation package, but Senate Finance Chairman Lloyd Bentsen (D-TX) had reportedly indicated that he would support repeal.

The amendment to H.R. 3299 was offered by Rep. Byron Dorgan (R-ND). The House budget package, approved by the Budget Committee on Sept. 19, comprises budget proposals from the Ways and Means Committee and nine other committees. The bill also includes a capital gains tax cut, an extension of the 25 percent deduction for health insurance plans purchased by the self-employed, various pension provisions, changes to the Medicare catastrophic law, and child care.

[Editor’s note: See the first item under “Regulations” concerning further delay of the section 89 effective date.]

Visclosky Amendment Stripped from Budget Reconciliation Bill

The House voted 250-173 on Sept. 27 to exclude an amendment from budget reconciliation legislation that would require the assets of single-employer pension plans to be held in trust by a joint board of trustees (Notes, 8/89, pp. 4–5). Rep. Marge Roukema (R-NJ) led the movement to drop the amendment, which had been offered by Rep. Peter Visclosky (D-IN).

The Bush administration has voiced strong opposition to the Visclosky amendment and other pension and welfare benefit provisions as proposed in the House Education and Labor Committee’s budget reconciliation bill. Labor Secretary Elizabeth Dole and Treasury Secretary Nicholas Brady said in a September letter to Rep. Bill Goodling (R-PA) that the package of pension provisions—including the Visclosky amendment, asset reversion legislation, and user fees—“would radically alter the private, voluntary pension system” and urged Congress to retain current law.

Bentsen Proposes Restoring IRA Deduction

Senate Finance Committee Chairman Lloyd Bentsen (D-TX) unveiled a proposal on Sept. 12 to restore a 50 percent deduction for contributions to individual retirement accounts (IRAs). Bentsen said the proposal will be introduced in the Senate version of budget reconciliation legislation as a substitute for a capital gains tax cut.

Under Bentsen’s plan, individuals
not currently eligible for fully deductible IRAs would be allowed to deduct 50 percent of their contribution, up to $2,000. Furthermore, the proposal would permit penalty-free withdrawals from IRAs to finance college tuition or a down payment on a first home.

The proposal would be phased in gradually, with cost estimates by the Joint Committee on Taxation at $1.2 billion in 1991 and up to $4 billion in 1994.

Sen. William V. Roth (R-DE) is promoting his “IRA-Plus” proposal as another alternative. Under Roth’s “back-ended IRA” proposal, contributions to IRAs would not be tax deductible, but all contributions and interest buildup would be tax exempt upon withdrawal. Penalty-free withdrawals before age 59 1/2 for a home purchase, education, and health care would be allowed.

House Democratic leaders offered an amendment to the budget reconciliation bill on Sept. 27 that would have raised the top income tax rate and extended the tax deduction for IRAs (similar to Bentsen’s proposal) as an alternative to the Ways and Means Committee’s capital gains tax cut. The alternative was defeated by a 239 to 190 vote, thereby endorsing the capital gains proposal.

**Tax on Short-Term Pension Investments Proposed**

A bill (S. 1654) that would impose an excise tax on gain from the sale of assets held for 180 days or less to encourage long-term investments by pension funds was introduced by Sen. Nancy Kassebaum (R-KS) and Minority Leader Robert Dole (R-KS) on Sept. 21. The legislation would place a 10 percent tax on gains from assets held less than 30 days and a 5 percent tax on assets held for less than 180 days.

Staff to Kassebaum and Dole reportedly met with Treasury officials in September to discuss the proposal. This kind of tax has the potential to raise a large amount of revenue and could be highly attractive to legislators.

Also, Senate Finance Committee Chairman Lloyd Bentsen (D-TX) said in a Sept. 20 *Wall Street Journal* article that he is considering levying a tax on short-term trades by pension funds—one of many proposals he is considering to raise the revenue needed to meet deficit reduction targets.

**House Holds Hearings on Age Discrimination**

The House subcommittees on Labor-Management Relations and on Employment Opportunities and the House Select Committee on Aging held a joint hearing on Sept. 21 to examine legislative proposals that would overturn the Supreme Court’s ruling in *Public Employees Retirement System v. Betts*. The Betts ruling virtually exempts employee benefit plans from challenges under the Age Discrimination in Employment Act of 1967 (ADEA) (Notes, 9/89, p. 6).

Representatives from the Equal Employment Opportunity Commis-

sion testified in support of legislation that would amend ADEA “to codify regulations which have been in place for 20 years and which business and industry have adhered to, with only a few exceptions.” On the other hand, business representatives told the committee the proposed legislation could undermine early retirement incentives and severance pay benefits, thereby hindering rather than helping older workers.

**COBRA Amendments Included in House Budget Bill**

The House Ways and Means Committee has included several amendments to continuation of coverage rules enacted under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) in its budget reconciliation package (H.R. 3299). The proposal would allow COBRA continuers who become covered under another plan to continue their former employer coverage for a health problem considered to be a preexisting condition under the new plan.

The proposal also would include independent contractors and leased employees in the definition of “qualified beneficiaries,” and would clarify that a plan could not require premium payment sooner than 45 days after a beneficiary makes the election to continue in the plan.

The committee also voted to extend the continuation period from 18 months to 29 months for individuals who are disabled at the time of a qualifying event. The bill
In the States

**Medicaid**—At its annual convention, the National Governors Association overwhelmingly urged Congress to impose a two-year freeze on new Medicaid mandates. State expenditures for Medicaid are expected to quadruple from about $12.5 billion nationally in 1970 to $50 billion in 1994. Governors say they are tired of picking up the check for expensive federally mandated programs.

The New York State Department of Social Services plans to limit the number of times a Medicaid client may use outpatient medical services beginning Oct. 1. The plan has drawn sharp criticism from health care advocates.

**Family Leave**—Oklahoma has adopted a law allowing state employees to take family leave to care for a newborn, newly adopted, or seriously ill child or dependent adult. Under the law, family leave would include the use of annual leave, enforced leave, unpaid leave, and sick leave. The state would be required to maintain health and life insurance coverage for employees on leave, provided the employees pay the premiums.

**AIDS**—Pennsylvania has issued an executive order which prohibits discrimination against state employees who either have AIDS or have tested positive for exposure to the virus. State employees with AIDS will be allowed to remain in their jobs for as long as their health permits and then be given the same consideration as other employees whose illness prevents them from performing their duties.

**Antitakeover Measures**—Massachusetts has passed a law that includes mandatory severance pay for workers laid off after a takeover battle and requires hostile bidders to acquire 90 percent of the target company's stock to complete a takeover. The law applies to companies that employ more than 50 full-time workers even if the companies are not incorporated in Massachusetts.

would also increase the maximum COBRA premium for months 19–29 to 150 percent of the applicable premium.

**Ways and Means Approves Child Care Bill**

The House Ways and Means Committee approved an amendment to the Early Child Development and Education Act (H.R. 3) on Sept. 7 that would increase the earned income tax credit, adjust the credit for family size, and permanently increase block grant funds.

The committee generally main-

tained all of H.R. 3 as previously approved by the House Education and Labor Committee except for the funding mechanisms under Title III, which were replaced with an expansion of the earned income tax credit program and a permanent increase in block grant funds earmarked for child care (Notes, 8/89, pp. 5–6).

**Senate Passes Disability Bill**

The Senate overwhelmingly (76-8) approved the Americans with Disabilities Act (S. 933) on Sept. 7. The bill would prohibit discrimination against disabled persons in employment, all public services, public accommodations, transportation, and telecommunications. It would require employers with 25 or more workers to provide "reasonable accommodations" to disabled persons (Notes, 8/89, p. 6).

**House Panels Votes to Raise Minimum Wage**

The House Education and Labor Committee voted Sept. 19 to raise the minimum wage to $4.25 an hour by 1991, despite a warning from Labor Secretary Elizabeth Dole that President Bush would veto the bill (Notes, 8/89, p. 6).

Dole said Bush would reject the bill (H.R. 2710) because it includes an increase of 90 cents over two years instead of three and because it would institute a subminimum wage for new workers for 60 days rather than six months. However, Rep. William Goodling (R-PA), the ranking Republican on the House
Education and Labor Committee, said recently that Bush is prepared to accept certain modifications to his proposal.

**Regulations**

**IRS Delays Section 89 Testing, Notice Requirements**

The Internal Revenue Service (IRS) issued a notice on Aug. 31 that postpones the effective date for section 89 compliance from Oct. 1 to Dec. 1. The delay applies to both the section 89(a) nondiscrimination testing rules and section 89(k) notification requirements. Notice 89-100 was published in the Sept. 18 Internal Revenue Bulletin 1989-38.

**PBGC Waives Penalty on Late Premium Payments**

The Pension Benefit Guaranty Corporation (PBGC) announced on Sept. 7 that it will waive the late penalty charge for 1989 premium filings due on Sept. 15 that are postmarked or hand-delivered on or before Oct. 2. Unexpected delays in delivering the 1989 premium forms and instructions to some plan administrators and pension practitioners led to PBGC's decision.

**HCFA Releases Guidance on Maintenance of Effort**

The Health Care Financing Administration (HCFA) released clarification and additional guidance for employers on the maintenance of effort provisions of the Medicare Catastrophic Coverage Act of 1988. The notice, published in the Aug. 25 Federal Register, includes guidance on the treatment of dependents, the prorating of refunds for partial years, and calculating the actuarial value of duplicative benefits. For further information, contact Kenneth Leong, HCFA, (301) 966-7908.

**HCFA Releases Rules on Catastrophic Drug Benefits**

HCFA has released proposed regulations that would implement, in part, section 202 of the Medicare Catastrophic Coverage Act of 1988 (MCCA), which establishes a new catastrophic drug benefit under Medicare Part B. The proposed rules were published in the Sept. 7 Federal Register, pp. 37190–37208.

MCCA provides for payment of a catastrophic level of beneficiary expenditures for "covered outpatient drugs" on a broader scope than is now available under Part B. The proposed regulations describe that new benefit. [Editor's note: See the feature story, "Restructuring Medicare Catastrophic: Will Employers Pay More?", for information on recent developments.]

**Litigation**

**Trustee Found Liable for Tax on Prohibited Transactions**

The U.S. Tax Court has ruled that a pension plan trustee was liable for the 100 percent excise tax on prohibited transactions because of failure to repay plan loans prior to the date on which a notice of deficiency was mailed to him (Kadi-vari v. Commissioner).

Internal Revenue Code section 4975(a) imposes an excise tax equal to 5 percent of the amount involved in a prohibited transaction for each year in the taxable period. If the prohibited transaction is not corrected within the taxable period, an additional excise tax equal to 100 percent of the value of the prohibited transaction is imposed. The court found the defendant liable for the 100 percent excise tax because of failure to timely repay the loans.

**Court Finds Extended Leave for Pregnancy Not Discriminatory**

An employer's leave policy that allowed workers on maternity leave to extend their leave for up to 12 months but restricted other disability leaves to 90 days was not discriminatory, according to the U.S. Sixth Circuit Court of Appeals in Harness v. Hartz Mountain Corp. The court acknowledged that the company's leave policy gave preferential treatment to pregnant employees, but held that such treatment is permissible under the Pregnancy Discrimination Act.

**Eastern Agrees to Settle Pilots' Pension Dispute**

Eastern Air Lines has agreed to pay $32 million in past and current contributions to the company pilots' defined benefit pension plan. The settlement, subject to federal bankruptcy court approval, resolves a complaint filed by the Air Line Pilots Association contesting
Eastern's alleged failure to make pension plan contributions in accordance with plan terms and federal law.

For Your Benefit

Pepper Commission Requests Comments

The Pepper Commission is seeking comments on what should be done to improve access to health care and/or long-term care. In each of the two areas, the commission staff is analyzing a series of broad options.

Regarding access to health care, options being considered include: (1) expanding public programs for the poor and the near poor; (2) enhancing availability of private insurance; and (3) replacing the current public/private financing system.

On the subject of access to long-term care, options being considered include: (1) enhancing existing welfare programs; (2) promoting private long-term care insurance; and (3) establishing a new social insurance program for long-term care.

The commission is also seeking comments on the effect of these proposals on other issues, such as containing the costs of health care, assuring quality of care, and addressing special access problems (e.g., in inner cities or in rural areas).

On Sept. 21, the commission held the first of several scheduled hearings to discuss issues concerning the uninsured and access to long-term care. Witnesses included Health and Human Services Secretary Louis Sullivan, John Sweeney, chair of the AFL-CIO Health Committee, and Deborah Steelman, chair of the Social Security Advisory Council.

Corporate Spotlight

In January 1990, The Travelers Companies will introduce an expanded flexible benefits program for its employees, which will include an array of child and elder care benefits. The "Family Care" program consists of three basic components: financial assistance, time off, and information and referral services.

Specifically, the plan will offer:

A subsidy for child care and elder care expenses. The subsidy will be greatest for lower-salaried employees, covering up to 30 percent of the costs up to an annual maximum of $1,200, and will be offered in conjunction with an Internal Revenue Service approved, tax-free Dependent Care Spending Account.

Up to one year of unpaid family care leave. Medical, dental, and life insurance coverage will be continued throughout the leave period on the same basis as during active employment. Employees will also be allowed three paid days off per year to care for a sick family member.

A nationwide child and elder care information and referral service for employees and retirees. In addition, Travelers will continue to offer seminars and support groups on family care issues.

Pilots Buyout of United Airlines Could Become Largest U.S. Employee-Owned Company

UAL Corporation's board recently approved a $300-a-share, $6.75 billion joint offer to acquire United Airlines submitted by the pilots' union, UAL senior managers, and British Airways. If successful, the transaction would make UAL the largest employee-owned company in the nation—with 75 percent of the company owned by its 68,000 workers through an employee stock ownership plan. UAL management would own 10 percent of the company and British Airways would own the remaining 15 percent under the buyout plan.

Government Publications

Leveraged Buy-Out Funds: Investments by Selected Pension Plans, U.S. General Accounting Office (GAO)

This report, prepared for the House
Committee on Education and Labor, reviews the role of private and public pension funds in leveraged buyouts (LBOs). The study focuses on pension plan investments in limited partnerships, called LBO funds, that pool capital for LBOs. The study found that pension plan sponsors appear to be selective in choosing LBO funds in which to invest, and most have diversified among different funds. Request pub. no. GAO/HRD-89-121 from GAO, P.O. Box 6015 Gaithersburg, MD 20877. (202) 275-6241. First five copies free.

**Nongovernment Publications**


The third edition of this book is a comprehensive reference tool intended for attorneys, actuaries, accountants, administrators, and trustees. The authors outline a suggested problem-solving approach and include as resource materials annotated provisions of the Employee Retirement Income Security Act of 1974 (ERISA). ERISA-related texts such as conference reports, regulations, interpretive bulletins, prohibited transaction class exemptions and exemption procedures, and reorganization plans are also included. Contact Publications Department, International Foundation, P.O. Box 69, Brookfield, WI 53008-0069. (414) 786-6700. Cost $45.


This report addresses key problems faced by companies attempting to implement compensation strategies based on incentive reward systems, such as identifying proper performance measures and choosing contingent compensation plans that can be tied to corporate goals. The report also explores exempt and executive compensation practices in the industrial and financial sectors, nonexempt compensation practices by geography, and benefit trends in seven areas. Contact Susan Hale, Report Administrator, Center for Management Research, Wellesley Executive Park, 55 William St., Wellesley, MA 02181. (617) 239-1111. Cost $345.

**Surveys**


Nearly 8 out of 10 U.S. men and women would sacrifice rapid career advancement to spend more time with their families, according to this survey. Given a choice of two career paths—one with flexible full-time work hours and more family time but slower career advancement, the other with inflexible hours but faster advancement—78 percent of the men and women chose the slower, family-oriented career track. Contact Robert Half International, Inc., 111 Pine St., San Francisco, CA 94111. (415) 362-4253. Free.


Designed to discover what human resources practices southern California companies consider important in building a competitive employment advantage, this survey revealed that only 11 percent of the 440 respondents felt it worthwhile to develop a special career path for employees who want to take time off to be at home with their children. Respondents listed protecting against discrimination and wrongful discharge suits first, building a team orientation among employees second, and designing performance appraisals systems to achieve business goals third. Contact William M. Mercer-Meidinger-Hansen, 1211 Avenue of the Americas, New York, NY 10036-8855. (213) 480-5339. Free.


The Omnibus Budget Reconciliation Act of 1987 (OBRA '87) dramatically raised the level of the Pension Benefit Guaranty Corporation (PBGC) single-employer premium and reduced the full funding limitation for many defined benefit plans. This study, which focuses on these changes, found that 53.3 percent of the plans surveyed exceeded the full funding limitation in 1988. Also, 20.9 percent of the plans surveyed paid additional PBGC premiums in excess of the $16 per participant premium for 1988. Contact Buck Consultants, Inc., 500 Plaza Dr., Secaucus, NJ 07096-1533. (201) 902-2566. Cost $25.
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