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Pension Protection Act: What Does It Mean to Your Plans?

On August 17, 2006, President Bush signed into law sweeping pension reforms that will touch virtually every retirement program in the country. Many hail the reforms as positive; a few worry about unintended consequences.

BLR discussed the changes with a veteran of the pension business, Sallie Olson, a CPA and the director of 401(k) retirement plans for AKT Retirement Plan Services.

The legislation, she explained, is a reaction to difficulties experienced in recent years by pension plans whose funds have not kept up with projections.

"It was very easy during the 1990s to stay fully funded because the economy was so strong that the earnings within the plan many times made up for the contribution," Olson says.

"Employers who sponsored a defined benefit plan got a false sense of security about it. Then the reality of the economic downturn of the early 21st century really hit. We went from strong positive earnings into negative earning years—three of them in a row. That caused a lot of plans to become underfunded."

Underfunding Sparks Legislation

Many underfunded plans, unable to meet their obligations upon termination, were taken over by the Pension Benefit Guaranty Corporation (PBGC).

"The PBGC ends up getting the biggest plans, the really high-profile plans that are in distress," Olson says. "Congress hears about it because they have to fund the PBGC. That was a big piece of the incentive for this legislation. This legislation is about protecting

participants. It is called the Pension Protection Act of 2006 (PPA), and it is aptly named."

Law May Mean Higher Contributions

So where does the law's dual personality come into play? Olson says it has to do with the funding obligations of a defined benefit plan and how liberal sponsors may be when it comes to "riding out" bad economic times.

"The [PPA] changes the funding rules for defined benefit plans," she says. "It simplifies the rules, but it shortens a couple of the windows, so that can be a detriment," says Olson.

"In defined benefit plans, the funding obligation is calculated actuarially every year," Olson explains. "The actuaries look at what it costs to fund the plan and the benefits that are promised under it on an ongoing basis, then compare that to the assets of the plan.

"Before, you could average plan assets over a period of 5 years, so when you got an economic downturn like we did in the early 21st century, you could smooth it out a little bit over the last good years of the late 1990s.

"The 5-year averaging rule has been narrowed down to 2 years, so the ability to smooth out the economic bumps has been limited a lot. This, along with a change in the length of time over which you can amortize any funding shortfall, can cause greater funding obligations for the employers."

(continued on page 2)

Wake-up Call for Employers

Obviously, the PPA brings pension funding a bit closer to reality. That's the good news for employees, but it may feel like bad news to pension plan sponsors. "For the employer, it can be a wake-up call," says Olson, "and it can be a funding obligation that they may not like."

The ERISA Industry Committee and the American Benefits Council are among the organizations that foresee a record number of defined benefit plan terminations as a result of the PPA. Others are congratulating Congress and the president for bringing more transparency to bear on a pension system that was obviously struggling.

Olson says that the new law brings participant notification requirements with it. "There are annual notice requirements, and there are also special requirements if a plan is unfunded to a certain extent. It can't be a secret from your participants any longer if your plan is underfunded."

Cash Balance Plans May Proliferate

If there is a drop-off in defined benefit plan sponsorship, Olson sees an increase in sponsorships of cash balance plans, due in part to the PPA. "Cash balance plans have been in what I would call 'legal limbo' for quite a while," she says. Cases were pending in court, wherein participants claimed that changing to a cash balance plan would result in lower benefits for older workers—age discrimination.

The PPA set out rules for hybrid, or cash balance, plans. "Then on August 7, 2006, there was a major court decision in the *IBM* case," Olson continues.

"It was a huge case. A district court had held that the replacement of the defined benefit plan with a cash balance plan was indeed age discrimination.

"The 7th Circuit came out on August 7 (*Cooper, et al. v. IBM Personal Pension Plan and IBM Corporation*, [No. 05-3588, U.S. Court of Appeals, 7th Cir., (8/7/06)]) and reversed that decision.

"Therefore, we had the judicial branch and the legislative branch coming to the same conclusion: That cash balance plans, if they play by the rules, are not age discriminatory.

"So employers have the opportunity at this point to reconsider, looking at their own demographics.

"Do we want to continue with our defined benefit plan?"

"Is my workforce getting older, and in 5, 10, or 15 years, will I have huge liabilities with my defined benefit plan?"

"Can I mitigate that a little bit by putting in a cash balance plan?"

"Now we have a lot more certainty that cash balance plans are a viable option."

401(k)s Also Affected

The PPA doesn't limit its reach to defined benefit and hybrid plans. The legislation also affects 401(k) plans, crafting rules by which sponsors can make enrollment into the plan automatic.

"An auto-enrollment plan says that when he becomes eligible, the participant has to make an affirmative election *not* to participate in the plan, or the employer will reduce his salary by a stated percentage and put that into the plan," says Olson.

"The problem was that there are state wage and hour laws that say

a company can't take anything out of an employee's paycheck without his or her approval. So a company with employees in all 50 states has 50 different sets of wage and hour laws to deal with.

"What the PPA did is to confirm that ERISA overrides all of those state laws. As long as the employer gives the notice to employees, telling them that this is an auto-enrollment plan, and here's what we're going to do, then the ERISA preemption holds, and those state wage and hour laws are not a barrier to setting up this kind of plan."

What You Need to Do Now

You may notice a common thread running through the new rules: participant notices. Olson says that the challenge of providing the notices will likely fall to Human Resources.

"When you get these notice requirements it usually falls to HR to get them out. They can go out in various ways, but they have to go to all participants. That includes people who aren't working for the company anymore," Olson says.

She advises learning all you can about when notices are required and specifics of what should be included in them right away, so that you are prepared when the rules become effective.

"Effective dates (for this) are all over the board," she says. "They are anywhere from immediately to 2010. I read a summary by one of the Big 4 accounting firms, and at the end there were three pages of effective dates.

"Employers are really going to have to be up to speed on this. There are a lot of notices to send, and notices generate questions. Companies may get a little more interaction from their employees now," Olson concludes.

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CASE Study Study

When Employees Buy into Wellness Program, Employer Reaps Benefits, Increases ROI

Wellness isn't just a buzzword at Gilsbar, Inc.; it's part of the company's culture.

As a third-party administrator and insurance services provider, Gilsbar (www.gilsbar.com) has been focused on employee wellness for decades—offering health risk assessments and blood testing to its employees since the mid-1980s, says Doug Layman, chief sales and marketing officer. About 5 years ago, the Covington, Louisiana-based company decided to move beyond a tactical approach and into a full, comprehensive wellness program for its 330 employees.

Incentives, Management Support Drive Success

Gilsbar provides a variety of incentives to engage employees in its wellness program. For example, it holds a yearly employee contest to re-name the program, currently known as Building Blocks for Better Health. This past year's winner was awarded a bike valued at \$300.

Employees interested in participating in the wellness program take a health risk assessment, have blood tests done, and meet with a physician to review test results and set appropriate, individual-specific goals. Employees who meet their goals can earn up to an extra week of vacation, according to Layman.

Wellness-related programs are offered on company time, including seminars on nutrition, stress management, and healthy cooking, as well as Weight Watchers® meetings.

Currently, 63 Gilsbar employees participate in Weight Watchers. Gilsbar pays all related costs for each employee for the first 12 weeks and pays 50 percent thereafter. That was a conscious company decision, Layman says, because requiring an employee to share the cost gives the employee more ownership. "We think it actually helps keep them in the plan," he says.

Holding Weight Watchers meetings at work during the workday makes

participation convenient. It also creates camaraderie because employees encourage one another and hold one another accountable for reaching goals.

Gilsbar provides a variety of other incentives that promote healthy lifestyles, such as paying entrance fees for employees who run in races and covering the cost of health club memberships for employees and their families, according to Layman. The company also sponsors an annual health fair and some after-hours seminars so that employees' families can participate.

The company promotes wellness on an ongoing basis—weekly e-mails, the company intranet, health-related posters, paycheck stuffers containing healthy recipes, and events and programs throughout the year.

At quarterly, all-employee meetings, a "wellness hero" is awarded an extra day of vacation. For example, one hero was recognized for starting to walk regularly for exercise, and another received a standing ovation for losing 110 pounds, Layman says.

Gilsbar's focus on wellness is a powerful recruiting and retention tool. "People who come to work here know about our approach to wellness," he says. "It becomes an unbelievable retention tool internally."

Five years ago, "we were spending a whole lot on benefits, and no one cared," Layman says, adding that employees felt a sense of entitlement regarding healthcare benefits. "Now, we're spending 6 percent less on health care, yet employees value it three times more."

Layman also reports that the company's prescription drug costs have dropped 32 percent in 3 years, and as of mid-August, employees had lost 1,700 pounds this year. In addition, he credits the wellness program with making employees happier, more focused, and more energetic.

Who: Gilsbar, Inc.

What: Implemented a comprehensive wellness program

Results: Healthcare costs are 6 percent lower than 5 years ago, and prescription drug costs have dropped 32 percent.

He attributed the program's success to a "commitment from the top down and an understanding that it's not a sprint, it's a marathon. It's something that needs to change every year based on our population and the needs of our employees."

Last year, Gilsbar's efforts were recognized when it received the Louisiana Business Group on Health Worksite Wellness Award.

Ongoing, Targeted Program Essential to Success

Layman offers the following advice for strengthening corporate wellness programs:

Keep an open mind. "Stop thinking about why you can't do it, and start thinking about how you can do it," Layman says, noting that employers have an obligation to promote wellness, especially when offering consumer-driven health care, as Gilsbar does.

"You can't have a consumer-driven plan unless you integrate it with a full, comprehensive wellness program," he says. "Teaching, rewarding, motivating, encouraging, and promoting a healthier lifestyle for your employees is the key to developing an educated healthcare consumer. Employers must be committed to the journey, and if they are, they will be rewarded with loyal employees, higher productivity, educated healthcare consumers, and, ultimately, lower costs."

Schedule wellness events and programs throughout the year.

"Get rid of the New Year's resolution mentality," Layman says.

Address employees' needs. "Don't assume you know what your employees need, and don't do something just because it sounds good," he says. Instead, survey employees about what types of programs would be most useful to them.

Court: Cash Balance Plans Are Legal, 'Age Neutral'

A federal appeals court recently found that cash balance pension plans are considered legal and "age neutral"—a decision that the American Benefits Council (www.americanbenefitscouncil.org) praised. Combined with the recent passage of the Pension Protection Act, the decision in *Cooper, et al. v. IBM Personal Pension Plan and IBM Corporation*, [No. 05-3588, U.S. Court of Appeals, 7th Cir. (8/7/06)], "should settle this matter once and for all: cash balance and other hybrid plans are—and always have been—perfectly legal and not age discriminatory," said Council President James A. Klein.

According to the Council, the appeals court found that "the terms of IBM's pension plan are 'age neutral' and 'Removing a feature that gave extra benefits to the old differs from discriminating against them.'"

"The Council is gratified that the court has confirmed what we have

maintained all along, and what the predominant weight of judicial authority had already concluded," said Klein. "... [The appeals court] decision is especially important because the district court opinion that it overrules had sought to invalidate a broad range of pension plans, not just hybrid plans."

"This closely watched case, which challenged the legality of cash balance pension plans, is the first of its kind to reach the federal appeals courts," according to a statement from Covington & Burling LLP, the firm that argued the appeal on behalf of IBM. "The decision reversed a prior trial court ruling that cash balance plans are inherently unlawful.

"The 7th Circuit noted that the decision whether to offer employees a cash balance pension plan 'may again be made freely, governed by private choice rather than legal constraint.'"

Executive Order Increases Healthcare Transparency

Federal agencies that administer or sponsor federal health insurance programs must follow directives included in an executive order recently signed by President Bush. The Executive Order requires the agencies to increase transparency in pricing and quality by providing beneficiaries with information about the amount paid for healthcare procedures and information regarding the quality of services provided by physicians, hospitals, and other healthcare providers, according to a White House press release.

In addition, the Executive Order requires federal agencies to use improved health information technology (IT) systems—with the goal of facilitating the rapid exchange of health information. The agencies also must develop and identify

approaches that support high-quality, efficient health care, according to the White House.

The National Association of Manufacturers (NAM) issued a statement in support of the initiative and urged public, private, and individual collaboration. "NAM has long maintained that a transparent healthcare system is essential to reducing healthcare spending and increasing quality," said NAM President John Engler. "Greater transparency of cost and performance information will help consumers make more informed decisions regarding their healthcare. Additionally, adoption of health IT standards will further improve healthcare quality, streamline inefficient processes, and reduce costs that are burdening our businesses."

Guidance Issued on Supplemental Wage Payments

Final regulations go into effect on January 1, 2007, for employers and others who make supplemental wage payments (e.g., commissions, tips, and bonuses). The Internal Revenue Service (IRS) guidance [TD 9276, *Federal Register*: July 25, 2006, (Volume 71, Number 142)] amends the regulations regarding the amount of income tax that should be withheld from supplemental wages, in accordance with changes in the law under the American Jobs Creation Act of 2004.

Among other things, the final regulations specify that:

- Payments to an employee can be considered supplemental wages even if the employee has not received regular wages from the same employer.
- Employers have the option of treating tips and/or overtime pay as regular wages.
- The mandatory flat rate withholding for supplemental wages that exceed \$1 million in a particular taxable year is 35 percent.
- The optional flat rate withholding for supplemental wages of up to \$1 million is 25 percent.

More Time Available for Complying with 403(b) Regs

Public schools and certain tax-exempt organizations will generally have until January 1, 2008, to comply with proposed regulations related to tax-sheltered annuity arrangements for their employees, IRS recently announced [IR-2006-136].

The regulations, which address updates to Internal Revenue Code Section 403(b), were proposed in 2004 and were supposed to be generally effective for taxable years beginning after December 31, 2005.

However, IRS decided to extend the effective date "in order to provide employers, employees, insurance carriers, and mutual funds involved in Section 403(b) arrangements a reasonable advance period before the regulations go into effect," IRS said.

Sorting Through the HSA Maze

by Tom Hricik, ACS and Buck Consultants

High deductible health plans (HDHP) and health savings accounts (HSA) have shown evidence of providing a partial cure to rapidly rising healthcare costs. Employers are taking notice, with the majority seriously considering offering these new plans. Most employers understand how to access HDHPs; however, gaining access to HSAs is less clear.

HSA Administrator Business Models

The number of HSA administrators has increased sixfold during the past 18 months, with over 300 solutions now available. This includes national financial services companies, which have the expectation that billions of dollars that previously flowed through health plans will be deposited with their organizations. Numerous regional banks and credit unions are also entering the HSA arena.

The business models typically followed by financial services firms to offer HSAs are summarized here. Note that these are not consistent in their maturity—with some proving problematic to consumers and employers.

Wholesale. Financial services firms contract with health plans to offer an integrated HDHP/HSA solution. Under this scenario, individual consumers opt to open an HSA at the time of establishing their employer-sponsored HDHP enrollment. This model is the most popular with employers.

Employer-Direct Contracting. Large employers contract directly with HSA administrators, forgoing interfacing with the health plan. This “health plan agnostic” approach is appealing since employers can change health plans without changing HSA administrators.

Retail. Financial services organizations offer the HSA product on a retail basis, enabling accounts to be directly established and then funded by consumers.

Integrated retail and commercial banking. A financial services firm offers the HSA as part of a larger banking service portfolio.

Ownership of a bank by a health plan. Several health plans have created or purchased a bank to assume a “one-stop” model of health plan and custodian integration.

Employer Contracting Options for HSAs

Most employers strive to find the best value in benefits for employees, including the best HSA value. In seeking the best value, employers need to first understand how to contract for HSA services and avoid the risk that the HSA not be considered an employer-sponsored plan covered by ERISA.

The most popular method by which large employers make HSA services available for employees is through the HSA product offered in concert with their health plan. Under this wholesale approach, the employer first utilizes the health plan for HDHP administration. The employer then accesses HSA services through the HSA administrator.

This approach is typically easier to implement since the health plan is responsible for HSA administration and the employer can hold the plan accountable. Further, the HSA product requires extensive communications to gain employee acceptance, and health plans are often best suited to deliver this. However, employers should be cautious, because the plan offering might not be the best value. At a minimum, employers need to understand the HSA fees and service offerings.

The second method gaining in popularity is to contract directly for HSA services—“carving out” the HSA from the health plan. Under the direct contracting approach, employers can evaluate HSA vendors, select the organization that provides the best platform, and keep the health plan

competing with others on its original playing field.

Employers are exploring other alternatives to gain access to an HSA administrator. Some of these include offering the HDHP with no HSA, resulting in individual employees shopping for their HSA or using an HSA administrator tied to other employer services: payroll administrators, spending account administration, retirement plan administration, employer associations, trade groups, and specialty TPAs.

HSA Administrator Selection Criteria

From both an account holder and employer perspective, the principal selection criteria for an HSA administrator are the fees charged for establishing and maintaining accounts. In addition to fees, other selection criteria should include: experience of the vendor, brand strength, account features, administration capabilities, investments, debit card features, employer services, and communications capabilities and reporting.

Critical Success Factors

As happens with any new employee benefit, some employers that have implemented HDHP/HSA programs are more successful than others in realizing adoption by the workforce. Four primary factors are predictive of the degree of success: benefit plan design, premium pricing to employees, employer contributions to HSA accounts, and communications about benefit changes.

A comprehensive communication strategy is critical. Employers must provide early, repeated, and engaging communications to familiarize employees with the potential opportunities of switching to an HDHP/HSA combination.

Human Resources executives may find this list of considerations daunting. However, the savings and workforce satisfaction that may result from a successfully implemented HDHP/HSA program usually make the necessary research effort worthwhile.

Tom Hricik is a principal and national distribution director for the ACS/Mellon HSA Solution (thomas.hricik@acs-inc.com or at 412-394-3278).

Back to the Future: Cash Balance Retirement Plans After *Cooper v. IBM*

by Alden J. Bianchi, Esq.

The fate of “cash balance” plans has been much debated over the last few years, and many of the more contentious issues surrounding their maintenance and operation have been settled prospectively under the recently enacted Pension Protection Act of 2006.

For existing cash balance plans, however, some key legal obstacles remained due in part to the holding in a single U.S. district court case, *Cooper v. IBM Personal Pension Plan*. The appeal in that case has now been decided in a way that is favorable to cash balance plans and their sponsors.

This advisory describes the likely impact of the Act and this new appellate decision on the future of cash balance plans.

The Case: *Cooper v. IBM Personal Pension Plan*

The essential facts of this case are simple: In 1999, IBM converted its traditional defined benefit pension plan to a cash balance plan.

Under the new cash balance formula, IBM credited annually a 5 percent pay credit to each employee’s notional account, together with interest at 100 basis points over the rate of interest on 1-year Treasury bills.

A group of participants challenged the conversion under ERISA Section 204(b)(1)(H)(i), which provides that a defined benefit plan may neither cease an employee’s benefit accrual nor reduce the rate of an employee’s accrual of benefits because the employee has reached a particular age.

The district court, agreeing with the participants, held that the plan’s cash balance formula discriminated on the basis of age.

According to the court, a 49-year-old employee with 20 years of service would have accrued an age-65 annuity of \$8,093 in 2000. In 2001,

she would have accrued an additional \$622, but by 2010 she would only accrue an additional \$282.

Thus, said the court, the employee’s benefit accrual was reduced for each year she aged. The district court’s reasoning, while aimed at the IBM plan, was sufficiently broad to call into question the very nature of the cash balance approach.

The U.S. Court of Appeals for the 7th Circuit (covering Illinois, Indiana, and Wisconsin) held that IBM’s conversion of its pension plan to a cash balance plan did not violate ERISA provisions prohibiting age discrimination.

According to the court, the plan did not stop making allocations or accruals to the plan, nor did it change the rate at which they accrued, on account of age.

In arriving at this result, the court compared the language of ERISA Section 204(b)(1)(H)(i), which applies to defined benefit plans, with ERISA Section 204(b)(2)(A), which applies to defined contribution plans:

Defined Benefit Plans (ERISA Section 204(b)(1)(H)(i))

“[A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee’s benefit accrual is ceased, or the rate of an employee’s benefit accrual is reduced, because of the attainment of any age.”

Defined Contribution Plans (ERISA Section 204(b)(2)(A))

“A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee’s account are not ceased, and the rate at which amounts are allocated to the employee’s account is not reduced, because of the attainment of any age.”

The court said that these ERISA provisions both say the same thing, i.e., an employer may not stop

making allocations or accruals to the plan or change their rate on account of age.

In holding that the IBM plan violated neither provision, the court asked (rhetorically) why the IBM plan should be treated as unlawful merely because its account balances are book entries instead of cash. In the view of the appellate court, the district court erred by treating the “time value of money” as age discrimination.

Rather, the court held that the term “benefit accrual” should be understood to mean what the employer imputes to the account, noting that the effect of interest is not treated as age discrimination for a defined contribution plan and should not be treated as age discrimination for a defined benefit plan.

Although the 7th Circuit also recognized that the older workers had a legitimate complaint since they were worse off under a cash balance plan as compared to a traditional years-of-service-times-final-salary plan, the court concluded that “removing a feature that gave extra benefits to the old differs from discriminating against them.”

The Act fixes the problem raised in the *Cooper* case, but only on a prospective basis, by treating benefits having equal present value as nondiscriminatory, regardless of the ages of the participants.

For a time, the *Cooper* case had a chilling effect on the adoption of new cash balance plans, and it subjected sponsors of existing plans to a great deal of uncertainty. The combination of the Act and the appellate court’s decision in *Cooper* should remove much of the doubt and uncertainty and pave the way for the adoption of hybrid plans.

Alden J. Bianchi is the group leader of the employee benefits and executive compensation practice at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., and he is a member of the employment, labor, and benefits section of the firm. He can be reached at ajbianchi@mintz.com.

Incentives to Program Participation

Getting employees to take advantage of a wellness program can be challenging. "Some companies are using incentives to encourage people to be engaged in health and wellness programs," says Michael Mulvihill of Leade Health.

"For example, if you participate in a variety of programs over the course of the year, we'll contribute to your health savings account. Some companies even go so far as to have benefit premium differentials based on participation. That's very hot right now. There are a lot of tools to get people involved. You have to get promotions and incentives in the right places, and companies are really starting to do that now," he explains.

"We've learned over the years that getting people to participate is not an easy task," Mulvihill says. He recommends health coaching, which is more hands-on than a traditional wellness program. "It's a collaborative partnership between the coach and the employee, with the major objective of facilitating lifestyle change. The value proposition for an employer is that we need to drill down into what's driving medical costs; that's a lot of what the health coaching approach is."

ABOUT THIS NEWSLETTER

This newsletter is devoted to sharing compensation and benefits ideas that have worked for HR professionals striving to make a strategic difference in their companies. If you have a story you'd like to share, send us a fax at 860-510-7224.

If you have a question about one of the newsletter stories or want more information, call 800-727-5257, ext. 2194, or e-mail equayle@blr.com.

Benefits Corner

'Health Coaching' Helps Wellness Programs Pay Off

For the last few years we've waited, and it seems to be here at last: Disease management and the drive toward consumerism are beginning to work. Rather than another huge increase in premiums, some companies are seeing their premium level for the first time in many years. Wellness, it seems, pays off.

Michael Mulvihill, president and CEO of Leade Health (www.leadehealth.com), is one of many experts in the field who believe that an individualized, intensive approach to wellness is the most effective way to get people healthy. Leade Health calls it "health coaching" and says it involves much more than a blurb in the monthly newsletter about the dangers of smoking and excess weight. Health coaching, he says, is more of a partnership. "Our major objective," he says, "is to facilitate lifestyle change and behavior change."

"We know that individuals who are at high risk, who smoke, and who have diabetes, for example, are driving medical costs," Mulvihill says. "And we know that if we don't help them with their health issues, they are going to move into chronic disease." The goal is to keep people in the low- and medium-risk categories by coaching them long term about healthy living.

Most people understand that they need to exercise and eat healthy foods. The medical model of seeing people once and telling them to go home and get on a diet simply doesn't work for most people, Mulvihill says. Rather, he says, a one-on-one approach incorporating education, encouragement, and accountability is the basis for a successful wellness program.

And while healthcare costs are the main target of this kind of attack, on-the-job productivity benefits, too. "We know that if an individual is in poor health, not only are their medical costs higher, but their productivity is lower," he says. "It's not enough just to have the person at work; we have to have them productive while they're at work. If their health is poor, and they're preoccupied with various symptoms, they're not going to be as productive."

Mulvihill recommends a comprehensive wellness approach that includes four components: a health risk assessment, a health screening, health coaching, and incentives. "Those four components make up what we refer to as a best practices program," he says. "When you institute a best practices program, the return on investment is in the range of \$3 for every dollar invested.

"The research on that is very strong and compelling. Not everyone agrees on exactly what is 'comprehensive,' but there is mostly a consensus that you have to have the initial assessment of risk, then some follow-up to that which includes measurement of your biometrics—blood pressure and cholesterol—an intervention, which we call health coaching; and an incentive of some kind to get involved and stay involved."

have a lot of money to throw at employees.

The company's 300 employees have their own 403(b) retirement plans, and the company wants to encourage them to use them. But they also want to do something more. "BHS has some terrific employees," says Resnick.

"They're underpaid (when compared to the private sector), but they're performing a valuable service. They can't get more money, but the company wants to keep the employees there. So we devised a formula based on how much money employees were putting into their 403(b) plans themselves, and how long they were with the company.

"We set up our plan to encourage employees to save for their own retirement and also to compensate longer-term employees," Cannon says. "We have a 1-year waiting period, but after employees are in the plan, if employees don't have their own

403(b) plan that they contribute to, we contribute \$100 a year for them.

"If they contribute to a 403(b), we match that up to \$300. When they've been at BHS 10 years, if they still are not contributing to their own 403(b), we contribute \$200 per year.

"However, if they are contributing to a 403(b) of their own, we will match that up to 5% of their salary. So for long-term employees, they get rewarded very generously. Most of the people who have been here over 10 years take advantage of that."

Resnick believes this arrangement encourages long-term employment. "This has worked out quite well for BHS," he says. "The plan has grown tremendously and is providing proportionately higher contributions for those employees who stay, even though they may not be making as much money as they could in the outside world. Substantial money is being put away for them."

Avoid Discrimination

This targeting approach may make you wary about discrimination, but Resnick says you can easily structure things to keep the plan nondiscriminatory using his recommendations.

- Put the tiering criteria in writing, either in the plan document or as a separate document created by the plan's administrative committee.
- Make sure the criteria themselves are nondiscriminatory. They must be based on specific jobs or goals, not the people in the jobs.
- Make sure the plan can pass the nondiscrimination tests. "You are allowed to test contributions under a defined contribution plan as if it were a defined benefit plan."

"The idea of multiple tiered profit-sharing plans has been used for a number of years for smaller plans," Resnick says. "Larger plans are beginning to use it now because they recognize that this is a phenomenal tool."



Q. We received a letter from the Social Security Administration (SSA) stating that three of our employees' names and Social Security numbers don't match. What steps should we take?

A. This 'mismatch letter' is intended to secure your cooperation in looking into the discrepancy and fixing any errors. In June 2006, the Bureau of Immigration and Customs Enforcement issued proposed safe harbor rules for cases like yours.

According to the safe harbor rules, the first thing to do is verify your employee's information to make sure there

wasn't a transposition or other input error. If there was an error, you should correct it and notify the SSA that it has been resolved. Make sure you document the date, time, and manner of the correction and verification.

If the problem is not clerical, you should next go to the employee to confirm the records.

If the employee says the records are wrong, you should correct the record, again informing the SSA and maintaining a record.

If the employee says the record is correct, you should ask him or her to deal directly with the SSA. And be sure to take care of the problem within 14 days of your receipt of the SSA's mismatch letter.

Q. What is a company's responsibility for paying employees when they are not working due to an external emergency such as a power failure?

A. There are no laws that require employers to pay employees when the plant is closed, even if the closing is caused by an emergency. Employers are only required to pay nonexempt employees for actual hours worked.

However, employers may not dock the pay of exempt employees for a partial day's work.

If the office is closed for a full day and the employer has a policy in place that provides for docking the pay of exempts for full-day absences, then deductions may be made when employees are unable to work.

If exempt employees are working from home (taking phone calls, responding to e-mails), they should be paid for the day, says Catherine L. Moreton, J.D., BLR legal editor.

INDUSTRY TRENDS

The Connection Between Company Results and CEO Pay

In its 2006 “Tech100 Compensation Study,” compensation consultancy DolmatConnell & Partners, Inc. (DC&P) found that the connection between CEO pay and corporate results are not always in sync. The study showed that CEO direct pay increased again in 2005 (+8.9%).

For those companies in the top third based on financial performance, CEO pay increased at a higher rate (+15.7%) than did CEO pay in the middle third (+13.1%) tier. For the lowest-performing third of companies, CEO pay actually fell in 2005 by 12.0%, according to the study.

“Overall, the major finding of the study illustrates that year over year, changes for long-term incentive and total direct compensation seem well connected to performance,” said Jack Dolmat-Connell, president of DC&P.

“This is very good news because it means that boards are now moving CEO pay in the right direction. However, many companies are still off the mark in relation to paying for performance because the starting point of CEO pay is wrong. Lower performing firms are still paying CEOs far too much,” Dolmat-Connell adds.

Connecticut to Corporate Boards: Review Your CEO Pay

In an open letter sent to 8,500 corporate boards of directors nationwide, Connecticut state treasurer (and keeper of the state’s \$23 billion retirement fund) Denise L. Napier urged boards to prepare now for what is sure to come soon.

The U.S. Securities and Exchange Commission (SEC) is expected to issue its final rules covering disclosure of executive pay packages in the near

future, and Napier is urging corporate boards to begin preparing.

“Members of Compensation Committees are about to receive a hand-off from the SEC,” she wrote, “and how far downfield the ball will travel is—literally and figuratively—in the hands of corporate directors, especially those serving on comp committees. What investors don’t want, and what our economy can’t afford, is a fumble.”

Football analogies aside, in her letter Napier urged corporate boards to use the draft rules issued by the SEC earlier in 2006 as a framework for greater disclosure of pay packages to top executives.

The proposed rules would, for the first time, require that all types of executive compensation be disclosed in one document and in plain English. The rules are expected to take effect for proxy statements issued in 2007.

Disaster Management Salaries on the Rise

The havoc wreaked by Hurricanes Katrina and Rita a little over a year ago have focused renewed interest on the field of disaster management and emergency response. According to Dr. Gwen Hall of the American Public University System, a distance learning institution that serves more than 13,000 students around the world, “There is a critical and growing need for emergency response and disaster management professionals with the right education and skills.”

As department chair for the University System’s homeland security and emergency and disaster management programs, Hall is in a good position to identify exactly what those skills consist of.

“Emergency management is much more than being trained in first response or even evacuation,” she explains. “Emergency managers need a strong background in critical

thinking, logistics, financial management, urban planning, and more.”

The U.S. Department of Labor has estimated that job opportunities in the field will increase 22.8 percent by 2012. Salaries are on the rise as well: The Bureau of Labor Statistics says that average pay for a disaster management professional is currently \$49,730.

Women Fundraisers Fail to Crack Glass Ceiling

While it’s not uncommon for wives and mothers to be in charge of the family checkbook, women who work as professional fundraisers for nonprofit organizations are paid an average of \$19,000—or 22 percent—less than their male counterparts, according to a survey conducted last year by the Center for Gender in Organizations at the Simmons School of Management.

What’s worse, the salary gap is actually increasing: It has grown nearly 80 percent since 1988, when men in the fundraising field earned about \$10,600 more than women.

The average salary for women in the field was \$67,271 in 2005, while men earned \$86,265. The difference is in part explained by the fact that women tend to work in smaller organizations, where salaries are lower.

The survey of more than 970 fundraising professionals in New England and metropolitan New York found that while there are slightly more women than men at the “director” level, they trail men at the vice president and chief development officer level.

The Simmons School of Management, part of Simmons College in Boston, offers the only MBA program in the country designed specifically for women. For more information, go to www.simmons.edu/som/cgo.

Employers Have Heavy Burden of Proof When Denying Job Restoration

The lack of job security for employees with serious health conditions was one of the reasons Congress, in 1993, enacted the Family and Medical Leave Act (FMLA). Prior to FMLA, employees had no right under federal law to take reasonable leave for medical reasons with the assurance that their jobs would be waiting for them upon their return to work.

To remedy this situation, FMLA gives employees the right to take a total of 12 workweeks of leave for family or medical reasons every year. Furthermore, FMLA provides that any person who takes FMLA leave:

“shall be entitled, on return from such leave—(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment (See 29 USC.A s. 2614(a)(1)).

According to FMLA regs, an equivalent position must, among other things, “involve the same or substantially similar duties and responsibilities” and must “entail substantially equivalent skill, effort, responsibility, and authority” (see 29 CFR s. 825.215).

Limitations on Employee Rights

There is a limit on the employee's right to job restoration after taking leave. FMLA provides that “nothing in this section shall be construed to entitle any restored employee to ... any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave” (see 29 USCA s. 2614(a)(3)(B)). The federal courts have interpreted this to mean that an employer who fires an employee upon return from leave can

avoid liability under FMLA if it can prove that it would have fired the employee even if the employee not been on FMLA leave.

For instance, if the employer can prove that, while the employee was on FMLA leave, business conditions required discontinuation of a department in which the employee worked—then the employer would not be required to restore that employee to a discontinued position upon the employee's return to work. In other words, the employee would have been discharged even if he had stayed at his desk and had never taken any leave.

The interpretation of the federal courts is validated by the Secretary of Labor's regulation to FMLA, which addresses the issue of whether there are limitations on an employer's obligation to reinstate an employee. The regulation states that “[a]n employee [returning from FMLA leave] has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.”

The regulation goes on, however, to require that the employer who seeks to deny the returning employee restoration of his job must “show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment” (see 29 CFR s. 825.216).

In other words, the employer must offer persuasive proof that, for legitimate reasons, it would have discharged the employee even if the employee had remained at his desk and had never taken FMLA leave.

For instance, if, pursuant to a reorganization, the employee's position was eliminated while he was on leave, the

employer must offer proof that the reorganization was legitimate and not a pretext for not rehiring the employee. In the case of a litigious employee, this proof will have to be provided at trial and be convincing enough to persuade a jury.

In the recent *Yashenko* case, a federal appeals court found that the employer had successfully offered such proof (see *Yashenko v. Harrah's NC Casino Company*, U.S. Court of Appeals for the 4th Circuit, No. 05-1256, 4/27/06).

The Yashenko Case

Harrah's NC Casino Company hired Edward Yashenko in 1997 and in 1999 promoted him to the position of manager-employee relations. During the next 4 years, Yashenko requested and was granted several medical leaves of absence, most of which were taken under FMLA. He received approximately 10 weeks of leave from December 19, 2000 until February 26, 2001; approximately 15 weeks of leave from May 1 until August 23, 2001; 6 weeks of leave from March 13 until April 23, 2002; and 14 weeks' leave from May 1 until August 12, 2002. After each leave, Yashenko returned to the same job, with no reduction in pay or benefits.

In early May 2003, Yashenko was granted another FMLA leave for serious health problems related to heart surgery and stayed out for 11 weeks. While he was on leave, the employer informed him that the company was reorganizing in a way that eliminated his job. He was invited to apply for various new jobs, but, on the advice of his doctors, he declined to do this.

Upon his return on July 21, 2003, the employer discharged him. Yashenko alleged in federal court that the employer had violated his FMLA right to be restored to his job. The federal appeals court affirmed the district court's grant of summary judgment for the employer.

(continued on page 12)

The Employer Proved Its Case

First, the appeals court noted that Yashenko had no evidence that disputed the employer's contention that Yashenko's job was eliminated as part of a legitimate reorganization. The employer, however, offered considerable evidence that its reorganization was legitimate, and that it would have discharged the employee pursuant to this reorganization even if the employee had not taken leave.

This evidence included "affidavits, deposition testimony, internal memos, emails, letters, and other documents" establishing several

facts in its favor, such as the fact that, almost a year before Yashenko requested his last FMLA leave, the finance department had suggested a reorganization that would eliminate Yashenko's position.

The evidence also revealed that, pursuant to a reorganization implemented by the employer's Human Resources department, Yashenko's department had been restructured several times and positions of other employees had been eliminated. So, the lesson to be learned by employers is to keep good records of what you're doing in case your decisions are challenged in court.

What Everyone Should Know About 401(k) Savings Plans

Want to reinforce essential planning and saving habits and encourage employee participation in plans?

Need help to meet your obligations to educate workers about making decisions regarding their 401(k) plans?

BLR's booklet, "What Everyone Should Know About 401(k) Savings Plans" discusses eligibility, investing, withdrawals, and more.

For more information, call 800-727-5257.

By the numbers...

Latest	Current Period	Prior	A Year Report	12-Month Ago	% Change
CPI-U	Aug/06	203.9	203.5	196.4	3.8%
CPI-W	Aug/06	199.2	199.2	192.1	3.9%
ECI EMPLOYMENT COST INDEX†					
Total Compensation	2Q/06	101.7	100.8	98.9	2.8%
Wages and Salaries—Metro	2Q/06	101.7	100.7	—	—
Wages and Salaries—Nonmetro	2Q/06	101.6	100.9	—	—
Benefits	2Q/06	101.7	101.0	99.0	3.4%
Average Weekly Gross Wages*	Aug/06	\$567.50	\$568.50	\$544.59	4.2%
Average Hourly Wage					
All*	Aug/06	\$16.79	\$16.77	\$16.16	3.9%
Construction	Aug/06	\$20.19	\$20.12	\$19.59	3.1%
Manufacturing	Aug/06	\$16.76	\$16.72	\$16.60	1.0%
Trade/Transp./Utilities	Aug/06	\$15.41	\$15.53	\$14.93	3.2%
Wholesale Trade	Aug/06	\$18.87	\$19.06	\$18.13	4.1%
Retail	Aug/06	\$12.63	\$12.71	\$12.37	2.1%
Financial Activities	Aug/06	\$18.78	\$18.84	\$17.90	4.9%
Other Services	Aug/06	\$14.52	\$14.49	\$14.29	1.7%
Unemployment Rate*	Aug/06	4.7%	4.8%	4.9%	-0.2%

*seasonally adjusted

† The Bureau of Labor Statistics (BLS) is using a new classification system for its quarterly Employment Cost Index (ECI) statistics.

For an explanation of the new system, visit the BLS site at <http://stats.bls.gov/ncs/ect>. (Source: Bureau of Labor Statistics, Washington, D.C.) All figures are national.

CPI-U: Consumer Price Index for all urban consumers; the newer index representative of the buying habits of about 87% of the total U.S. population. (1982–84=100)

CPI-W: Consumer Price Index for urban wage earners and clerical workers; the older index covering only about 32% of the U.S. urban population.

ECI: Measures change in compensation per hour worked, including wages, salaries, and employer costs of benefits. (6/89=100)

Average Weekly Gross Wages and Average Hourly Wages: Data relate to production workers in manufacturing and mining; construction workers; nonsupervisory workers in transportation, public utilities, and wholesale/retail trade; also finance, insurance, real estate, and other services. Accounts for approximately 80% of the total employees on private, nonfarm payrolls.