



Fine Print

A Quarterly Publication of The Ohio State Bar Association
and Our Members

Issue 34 • Winter 2008

Auditing Your Employee Benefits

By Jack F. Fuchs

Providing employee benefits to employees and retirees is critical to the success of any company. But while employee benefits are necessary to attract and retain strong employees, they are also one of the fastest growing elements of a company's cost structure. Here are some points you should consider to maximize benefits while reducing costs.

■ *Weigh pension plan vs. 401(k) plan.*

Every day, fewer companies offer traditional defined benefit pensions to employees because the employer bears ongoing cost risks. Most employers, however, offer 401(k) plans to allow employees to prepare for retirement. A 401(k) plan allows an employer to fix its cost, while the employee bears the gains and losses. The employee benefits from a 401(k) account by having a readily portable benefit when moving to a new job.

■ *Shop for health benefits.*

Employers need to "shop the market" to reduce costs to employers and employees. The fees charged for managing self-insured plans need to be weighed against the

costs of buying insurance. Using consultants or participating in chamber-sponsored plans can help employers to obtain better benefits at lower costs.

■ *Structure plans to address health benefit cost increases.*

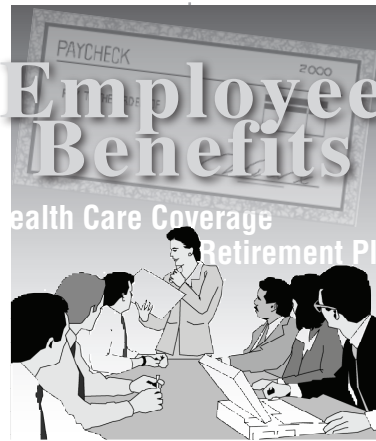
Health care costs have risen faster than inflation generally. Employers need to avoid open-ended promises of health care "for life," either in individual employment agreements or in collectively bargaining. Such promises can result in unsustainable

cost structures. Instead, employers should retain the right to "modify, amend or terminate" benefits plans.

■ *Consider coordinating retiree health costs with Medicare.*

When providing retiree health benefits, employers should consider coordinating benefits with Medicare. The Equal Employment Opportunity Commission recently ruled that this practice is not age discriminatory. Employers can transfer health costs for age 65 and older retirees to the federal government while pro-

Cont. on page 2



Three Keys to Dealing with Litigation

By Jeffrey J. Fanger

As a small business attorney, I often have clients who face litigation for the first time. Sometimes they choose to go to court and sometimes it is an unpleasant surprise. Either way, it is often a frustrating and tense time for a business owner unfamiliar with the process. Armed with a little information, however, a lot of stress can be eliminated.

The Law May Aspire to be Fair and Just, but It Doesn't even Try to be Fast

Recognizing the limits of the litigation process will go a long way to alleviating stress and preventing misunderstandings. Filing a Complaint, obtaining service of process (delivery of your Complaint to the other party, a.k.a., the "defendant") and receiving an Answer from the defendant may take two months and much more if problems with service of process arise.

Once service is obtained, the other side has 28 days to respond to the Complaint you filed. Don't get your hopes up. Extensions to

Cont. on page 2

Employee Benefits, cont. from page 1

viding benefits to younger retirees. Such coordination is not available, however, for active employees.

■ **Update your plan documents.**

Make certain that your plans are regularly updated to remain compliant with the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, the Health Insurance Portability and Account-

ability Act (HIPAA), and other federal laws that apply to many benefits plans.

■ **Review and follow your plans.**

If you are an employer, determine whether the benefit provided is worth the cost. If you are a trustee or fiduciary, read the plan documents; you need to know what your plans provide so you can implement them.

Keep in mind that, although employee benefits involve substantial costs, they are critical to most employees. Controlling and monitoring costs will benefit both you and your employees.

Jack F. Fuchs is a partner in the Cincinnati office of Thompson Hine LLP.

Litigation, cont. from page 1

this deadline are frequently requested and provided. You can reasonably expect to wait two or three months from the Complaint-filing date to obtain service and receive the defendant's Answer. Don't fret; there is more waiting ahead, and you will get used to it.

The Answer is Anything But

You should understand that an Answer is a very specific type of legal document. It generally contains denials of virtually every paragraph in your Complaint and a laundry list of defenses that must be asserted so they will not be waived. This is just how Answers are prepared; it's nothing personal.

When you answer a Complaint, you will do it the same way. If you know that an Answer will be a flat-out denial of what you know is true, it may be easier to accept.

CMC, Discovery, Pre-trials, Hearings, Oh My!

Shortly after the Answer is filed, the court generally holds a case management conference (CMC). This is a quick meeting (sometimes by phone) to select dates for the rest of the case. Your attorney will likely provide you with some or all of those dates, which will include dates for trial and discovery cut-off.

You should know that these are "best-case scenario" dates that likely will change depending on circumstances. For example, if the trial is scheduled for ten months from now, you can expect that it will be held a minimum of ten months from now and maybe significantly later. While you should calendar these dates, always contact your attorney before going to court to confirm that nothing has changed.

The "discovery" process (during which both sides learn information about the case) can take anywhere from a few months to years depending on the complexity of the case. Discovery, however, is the heart of

the case and you, as a business owner, must give prompt attention to discovery requests from your attorney and from the opposing side. Cases are often won or lost based on discovery.

It is essential to provide your attorney with blemishes as well as trophies.

Clients often believe that keeping a negative item from their attorney will benefit their case. Often, however, what you view as bad may not be that harmful to the case (and sometimes is not even relevant), and can easily be addressed if your attorney knows about it in advance.

Relatively small problems, however, can derail the entire case

if your attorney was unaware of them and built the case on a foundation that was not firm. If the opposing party learns about the issue, it inevitably gets exposed at the most inopportune moment. Knowing of problems ahead of time, your attorney can present the strongest possible arguments and prepare for the other side's counter-arguments. Additionally, a business owner who lies during testimony or becomes evasive about a small, simply embarrassing matter can damage the business's credibility and change the outcome of the case in a way that is disproportionate to the embarrassing item's actual importance.

Be Patient, Be Responsive, Be Upfront

When approaching litigation, remember to: be patient, because the legal system moves at its own pace; be responsive, because dragging your feet on discovery requests and inquiries from your attorney needlessly delays your case and can work against you; and be upfront in your communications with your attorney about both the strengths and the weaknesses in your case. By understanding these principles and cooperating with your attorney, you will greatly reduce the stress and frustration that can come from litigation.

Jeffrey J. Fanger is the managing member of the Cleveland law firm of Fanger & Adelman LLC.

What you view as bad may not be that harmful to the case, and can easily be addressed if your attorney knows about it in advance.