2001

Employee Benefits Law: Foreword

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BY
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Over the past twenty or so years, the range of employee benefits offered by employers – both large and small – has expanded dramatically. The old (and relatively short) list of "fringes" typically included health insurance, a pension plan, paid holidays and group life insurance. There was, of course, some variation in this list, especially across industries. But, by and large, employers did not concern themselves in a formal way with "modern" benefits such as elder care, child care, legal assistance, flex time, and parental leaves. As a recent study by the Society for Human Resource Management[1] suggests, employers have begun offering so-called "family friendly" benefits such as job-sharing, long-term care insurance, telecommuting, and emergency child-care in substantial numbers over the past five years.

Everyone is familiar with the conventional account of this expansion in the scope of benefits: the mass exodus of adult women from the home and into the workplace has generated strong demand by both male and female employees for benefits which (partially) duplicate the services previously provided (for free) by women. What this simple account fails to provide, however, is a rich explanation of the many costs to both employers and employees of this expansion. The collection of articles in the symposium issue of the *Journal* seeks to expand our understanding of the growth of both mandated and discretionary benefits and to offer multiple perspectives about the impact of this growth.

In the first article, Alison Sulentic begins by reminding employers and employees of Aristotle's view that "[h]appiness is activity in accordance with virtue". She argues that virtue

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1. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, SHRM 2001 BENEFITS SURVEY (2001), *available at* <http://www.shrm.org/surveys>.

should be brought to bear on all plan design and administration issues, so that employees' well-being and security is advanced. In addition to building on notions of a just or living wage, Sulentic points out the employers have innumerable opportunities to make choices and shape a plan in such a way that ensures just compensation for an employee's labor. Just compensation (wages and value of all benefits) in turn, positively influences the many social contexts in which workers interact with others and live out their lives. Why should an employer/plan sponsor care about virtue and just compensation policies? Sulentic notes that an employer's own search for happiness is advanced by the adoption of policies which, when virtuous and generous, improve the larger network of social relationships in which we are all enmeshed.

The second article investigates the so-called workers' compensation crisis of the 1980's. Martha McCluskey refutes the standard explanation for dramatic increases in premiums and argues that poor insurance management practices and a deliberate policy of cost-control avoidance characterized the crisis. In spite of the conventional wisdom which portrayed insurers as passive victims, McCluskey makes a case for a scenario in which insurers were "active players in benefit systems with ample opportunities to shape, rather than merely reflect rising costs . . . ." Her sure-to-be controversial conclusion is that "rates were excessive, not inadequate, during the period of the crisis . . . ."

The following two articles each address a different aspect of expanding Employee Retirement Income Security Act (ERISA) jurisprudence. Susan Stabile wades into the contentious battle over whether ERISA should be read to imply a cause of action against a non-fiduciary who participates in a breach of fiduciary duty. She examines the Supreme Court's treatment of cases under both Section 404 and Section 406. While admitting that there is ample room for disagreement, Stabile ultimately favors allowing suits against non-fiduciaries, in part because of ERISA's historical connection with the common law of trusts. Lorraine Schmall is likewise concerned with the growing number of frustrated plaintiffs' suits under ERISA. The preemption of common law claims has left employees without adequate remedies, she

argues, in spite of Congress' apparent desire to develop a uniform body of federal common law that would address many of these claims. Schmall believes that Congress ought to guarantee standing and jurisdiction so the participants and beneficiaries may pursue common law claims and remedies.

Many commentators have noted the trend away from defined benefit pension plans and toward defined contribution plans, as employers seek to shift the burden and risks of plan management from the plan to participants. The dramatic growth in 401(k) plans, for example, has taken place alongside a steep decline in the number of workers covered by defined benefit arrangements. Organized labor has been one consistently vocal critic of this trend and Jayne Zanglein, of the National Labor College, makes the case in the next article for enhanced investment education for women and minority participants who are increasingly likely to be covered by risky defined contribution plans. Zanglein argues that white males generally are more successful at managing their DC assets than other groups for "cultural" reasons – *e.g.*, math anxiety and excessive risk aversion on the part of women; and lack of investment experience and education for minorities.

Jane Waldfogel examines the country's experience with the Family and Medical Leave Act (FMLA) and looks at the effect of the unpaid nature of the leave; the much higher rate of leave-taking by female workers relative to males; and the comparative European experience. Waldfogel concludes that the FMLA has increased family leave coverage from pre-statutory levels, but has not affected childcare or adoption programs.

The final two articles in the symposium deal with taxes and a comparison of ERISA with the European Union's (EU) directive on pensions. Jonathan Barry Forman's study focuses on the estimated tax expenditures of Social Security and employee pension plans. He notes that despite the fact that both programs are structurally similar, the government estimates program expenditures differently. This difference in estimation, in turn, accounts for the belief that pension programs are substantially more expensive than the Social

Security pension program. As a result, private pensions are the object of frequent tax reform efforts. Forman notes that the current faulty calculation of Social Security expenditures distorts the need for reform and obscures Social Security as the proper object for change.

Finally, Steven Willborn's comparative piece notes the similarity between the pension reform efforts of the EU (the promotion of market efficiency and the development of cross-national norms) and those of ERISA. While the EU's reporting and disclosure provisions are similar to ERISA's, the Union has departed in several concerning ways from ERISA – pay-as-you-go plans may be the most obvious example. Willborn notes the EU's preference for government enforcement; and, he points out that, to date, ERISA has been more successful at eliminating the multiple sovereign problem.

This special issue concludes with the proceedings of the 2001 Annual Meeting of the Association of American Law Schools Section on Employee Benefits. The section's meeting focused on the future of private pensions, in particular cash balance conversions, ERISA (preemption, remedies, and fiduciary duties) and the outlook for women, racial minorities and the poor. As it does each year, the section seeks to generate discussion about the most pressing concerns facing those of us who work in this field and care deeply about the cost-effective and fair provision of all forms of compensation to employees throughout the economy.

It is not possible to put together a symposium of this size and scope without the assistance of several dedicated individuals. Martin Malin of the Chicago-Kent College of Law and Douglas Scherer of Touro Law School first approached me with the idea of a special symposium issue dedicated exclusively to the subject of employee benefits. Without their encouragement and friendly advice, this project would have remained little more than a promising idea. I would also like to thank each of the authors who exchanged ideas with me from the outset and helped to shape the final collection of articles. Many agreed to work on a piece even before the outlines of the symposium were in place, and without any firm information as to production schedules and deadlines.

In addition, each author graciously agreed to make revisions during the editing process and, in some cases, to do so under tight time constraints. I must also thank Kathryn L. Moore of the University of Kentucky College of Law for permitting the *Journal* access to the Employee Benefits Section proceedings.

The staff of the *Employee Rights and Employment Policy Journal* deserve enormous credit for many hours of hard work and follow-on research. Their diligent efforts can be seen on every page; Chicago-Kent College of Law students, Frances K. Asner; Christopher Collins; Brett Gorovsky; Richard K. Hanft; Leslie J. Johnson; Cathy L. Rath; Peggy Rhiew and Production Editor Sharon Wyatt-Jordan. Finally, William Kaleva provided top-notch secretarial assistance, especially during the months of my maternity leave which coincided with some of our most critical deadlines. I remain grateful for his enthusiasm and attention to detail.