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IMPACT: EMPLOYERS BRACE FOR CHANGE

Allen Roberts on Top 5 Issues Facing Businesses

and . . .

HANK GREENBERG *The AIG Story* Published

Allen Roberts, member of the law firm Epstein, Becker and its former managing partner, provides the Insurance Advocate's readers with a rundown of five topics which will impact employers in 2013 and beyond. In the article that follows, Allen offers an alternative, even contrarian view of each issue in focus. We believe that this material should be understood by agents and brokers and those who advise any one who has employees, runs a business et cetera. We note particularly his focus upon independent contractors as a class and upon the Affordable Care Act. The Insurance Advocate thanks Mr. Roberts and Epstein, Becker and trusts that this will be of value to our readers. **SA**

Affordable Care Act—Will Incentives and Disincentives Change Employer Patterns of Health Insurance Payments for Family Members?

By popular account, the Affordable Care Act ("ACA") would preserve the base of insureds and extend health insurance coverage to as many as another 32 million Americans. That estimate could be wrong if ACA disrupts patterns and experience of spouse and dependent coverage on employer-paid policies. Much of the political and media comment has focused on mandates, exchanges, and reasons that employers may maneuver to satisfy requirements concerning employee coverage, or drop it completely. Left out of the discussion has been the cost of covering family members of employees and the opportunity to shift employer dollars away from spouse and dependent premiums and place more dollars in premiums for individual employees. If that happens, spouses and dependent children will receive insurance coverage under employer-provided plans only if their premiums are paid by the employee, a household member, or some third party. Otherwise, those family members must obtain insurance elsewhere or join the ranks of the uninsured, something that might have been unimaginable for many of them—and perhaps for advocates of ACA who have considered it a move towards universal health care coverage.

Proposed regulations issued by the Internal Revenue Service ("IRS") establish that dependent children up to age 26 must be offered insurance coverage under plans that an employer provides to its employees, but there is no similar requirement for spouses because—intentionally or not—ACA does not include them. If spouses of employees obtain coverage under employer plans, it will not be because federal law requires it. ACA is silent, also, with regard to the source of payment for dependent premiums, and employers may reallocate dollars from voluntarily subsidizing spouse and/or dependent coverage in the pre-ACA era to paying premiums for employee-only coverage now that legal obligations and penalties are being clarified.

Whether total employer costs will rise, fall, or be managed differently to assure ACA compliance and avoid penalties remains to be seen as large and small employers reexamine the realities of attracting and maintaining workforces, while managing total compensation and corporate objectives of employee satisfaction. Total costs will matter as employers decide how to allocate dollars to health care premiums. However, it is not likely that employers will disregard altogether the complexities of important decisions affecting valued employees accustomed to receiving spouse and dependent coverage as part of a comprehensive compensation and benefit package. Corporate philosophy and policy, combined with the practicalities of employee experience and expectations, competitive factors, and a possible trigger to union organizing, are likely to influence how employers respond to ACA's provisions and interpretations concerning spouse and dependent coverage—and payment for it.

The IRS interpretation of dependent coverage also may present an occasion for employers to equalize their costs of employing individuals and those with families and to remove benefit disparities, perhaps by presenting a menu of available benefits and a schedule of costs from which employees register their priorities within the array of selections. If employees with families qualify for the same compensation and paid time off for vacations, sick and personal days, and holidays as single employees, is it irrational for employers to allocate the same amount for medical coverage or invite tradeoffs? It may not be too farfetched for employers to designate the additional cost of health insurance for family members as a cafeteria item of available benefits, paid by the employer until a finite purse is exhausted and then available at the employee's cost. Family health coverage under ACA possibly could trigger a wholesale employer examination of the totality of employee benefits and related costs and conduce a restructuring—from paid time off to medical insurance—that makes employees active stakeholders, as well as beneficiaries.

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Multiemployer Pension Plans—An Imperative to Define the Benefit

It is commonplace for unions to promote the message that the multiemployer defined benefit pension plans included in the contracts that they negotiate provide comfortable retirement security—touted as "superior" to that offered by employer or individual retirement programs—for those they represent and those they wish to organize. That postulate may not withstand current scrutiny or the test of time for several reasons.

Multiemployer defined benefit pension plans are designed to provide a defined monthly benefit at retirement based on a formula taking account of years of employer contributions and employee service. Since enactment of the Pension Protection Act of 2006, annual certifications are required based on standardized funding and liquidity measures for determining the financial health of those plans. According to a January 2013 report to Congress by the Pension Benefit Guaranty Corporation ("PBGC"), data available through late 2012 indicate that 52 percent of participants are in moderately or severely distressed plans. The report identifies several triggers for "critical" status, including a funded percentage of less than 65% and projected insolvency during the next 7 years, or a projected accumulated funding deficiency or insolvency within 4 years. Plans with a funded percentage of less than 80% or with a projected funding deficiency within the next 7 years are in "endangered" status; plans that have both are "seriously endangered." Plans that are in neither endangered nor critical status are in [non-distressed] "green" status.

The PBGC report shows that legislation has allowed some plans to:

- defer actions that their status should require;
- extend the time for demonstrating progress under their funding improvement or rehabilitation plans, amortizing investment losses incurred in the 2008 market crisis over a period nearly twice as long as otherwise required; and
- lessen the impact of investment losses on the actuarial value of plan assets used to determine their future funding requirements and funding status.

While economic performance may have deteriorated, the optics could indicate that funds are performing acceptably relative to previously set goals. There is nothing insidious in a grace period to recover from financial market turmoil. But reliance on a legislated window should not mask fundamental problems of importance to stakeholders.

Funds will fulfill their promise—and participant expectations—only through a combination of positive portfolio performance relative to assumptions made by fund trustees, guided by actuaries they engage, and a contribution base nourished by new entrants into the plans. Dollars contributed for employees support amounts currently unfunded as well as the credits active participants earn during their own employment. But, for many plans, the realities of investment experience and revenue from new participants fall short of funding needs.

In the optimal pyramidal model, retirees would be supported by a broad base of new and younger employees who continue as plan participants until reaching their own retirement or who depart, leaving contributions made for them to accumulate for any benefit in which they have vested and a surplus to be shared by others. If employer expansion or union organizing does not add new bargaining unit members as participants, the pyramid is likely to become recontoured to silo or inversion, and there may be no refreshing supply of contributions to fulfill actuarial expectations and assumptions on which current and future commitments and benefit levels are set.

The current circumstances of multiemployer defined benefit pension plans pose issues for current stakeholders as well as employers and employees who are not subject to collective bargaining agreements requiring contributions. For employers and employees operating outside the sphere of multiemployer defined benefit pension plans, union enticements and the merit of entry should be assessed thoughtfully. Circumstances of even currently stable funds in stable industries can change. Conditions in business sectors that are predominantly unionized may change because of technology, new competitors in a market, geographic relocations, outsourcing, or imports. Furthermore, outside the control of an employer contributing to a healthy fund, mergers with currently or prospectively weaker funds, or funds having less favorable demographics or characteristics, can alter financial soundness.

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An employer contributing to a multiemployer plan also must assess the value of its total benefit package absolutely and relative to the needs and expectations of its own unionized workforce in the context of overall compensation and benefits, weighing its philosophy with respect to a menu and array of benefits and experience with transfers and promotions to positions outside of bargaining units, as well as nor-

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mal attrition and turnover. Those considerations are further impacted by the complexities of a withdrawal liability that could be assessed for the employer's proportionate share of a plan's unfunded liability when its contributions cease.

Employees also may have their own preferences for retirement benefits that are different from those available in the context of a multiemployer defined benefit pension plan. Young employees may have financial priorities and an interest in controlling retirement investment in a way that matches their own career ambitions and mobility and is portable as employment and other circumstances change—a view sometimes criticized as not sufficiently objective and thoughtful. Such individuals also may be concerned that contributions on their behalf would do less to secure a benefit for themselves than pay off the unfunded liability attributable to current retirees and long-term participants, possibly because of a credit formula giving less than full value for their employer's contributions for current service and considered disadvantageous to new participants.

The landscape for multiemployer defined benefit pension plans has its share of obstructions and craters to be navigated. For employers committed by collective bargaining relationships with unions, options may be explored to find a negotiated course that realizes the best value for the good of the current and anticipated workforce and for the future of the enterprise. For employees, it is important that realistic preferences and needs be considered in the bargaining that is conducted between their employers and the union representing them. A large group of employers not yet committed to such funds may opt to circumnavigate the multiemployer defined benefit pension plan road altogether.

The NLRB—Organizing by Pop-Up Unions in Break-Out Units

Despite some perceptions of cohesiveness and political acumen, influence and wherewithal following the 2012 election cycle, labor unions represent only about 7.3 percent of the private sector workforce in the United States, and only 6.6 percent of workers are actually union members. When concentrations in certain industries and geographic areas are factored, that leaves entire swaths entirely union-free, or substantially so.

Foreseeably for the next four years, unions will continue to benefit from a National Labor Relations Board ("NLRB") that has innovated changes in substantive law and introduced procedures during the past four years that facilitate organizing and restrict the time for responsive employer communications. That advantage has not yet translated into material membership gains by "Big Labor"—although it may still.

However, together with other breakthroughs by way of social media and electronic and physical access to employer premises and communications systems, expanded interpretations of protected concerted activity, and such movements as Occupy Wall Street and grass roots organizations, conventional unions may be eclipsed, if not displaced, by one-off, special purpose organizations formed solely to serve discrete affinity groupings of employees in new bargaining units. If this occurs, it will be enabled by two bedrock principles of the National Labor Relations Act ("NLRA"), aided by a recent interpretation in case law.

First, notwithstanding the attention given by supporters and critics alike to large, well-financed conventional unions with institutionalized structures and processes, the NLRA defines a "labor organization," capable of winning certification as the exclusive representative of employees, to mean any body that exists, in whole or in part, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This means that an outside force, planning and funding offsite meetings and campaigns, is not necessary; something as simple as a home-grown pairing or grouping of workers having common interests or worries could qualify as a labor organization.

Second, with respect to the NLRB's formulation of a unit appropriate for collective bargaining purposes, it is not necessary that the unit be the most appropriate or that it conform to management's organizational structure. Historically, the NLRB has been mindful of its authority to make

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determinations of the unit appropriate for purposes of collective bargaining, consistent with legislative policy assuring that employees have the "fullest freedom" in exercising statutory rights to organize. If it survives Circuit Court of Appeals challenge on review, an NLRB standard adopted in 2011 could lead to a proliferation of small, fractionated bargaining units; it would place the burden on an employer contesting the appropriateness of a labor organization's preferred bargaining unit to show that employees excluded from the unit sought by the petitioning labor organization share an "overwhelming community of interest" with another readily identifiable group. If a readily identifiable group exists based on such factors as job classification, department, function, work location, and skills, and the NLRB finds that the employees in the group share a community of interest, the petitioned-for unit will be an appropriate unit, despite an employer's contention that employees in the unit could be placed in a larger unit that also would be appropriate—or even more appropriate.

Much as the NLRB's approach has been perceived to benefit large, established unions, it may not be surprising if employee groups, newly aware of the NLRB's outreach and enlargement of rights to engage in protected concerted activity through social media and other means, realize also that they are capable of becoming homegrown, single-purpose labor organizations with authorization from the NLRB to define a bargaining unit by its lowest common denominator—or to invade and fractionate existing bargaining units currently represented by Big Labor.

Independent Contractors—A Convenient Classification Until Challenged by Personal Interest or Government Audit

For reasons of economic and/or lifestyle choices, a significant segment of the U.S. population has elected to earn a living classified as independent contractors. No single legal definition of the term "independent contractor" exists within various federal tax and labor laws, their state law counterparts, or workers' compensation and unemployment insurance laws and regulations. Nevertheless, the report currently available from the Bureau of Labor Statistics indicates that 10.3 million individuals were considered independent contractors, having no direct employer as of 2005. By way of comparison, there were 7.85 million union-represented workers in the private sector in 2012 and approximately 12.3 million classified as unemployed as of January 2013.

In a truest form, an independent contractor arrangement enables an individual to control personal activity and profit or loss in arrangements with one or more businesses. Companies engaging independent contractors typically are not responsible for withholding taxes from payments or deducting and making their own contributions for such employment-related items as Social Security, Medicare, or unemployment insurance or for providing workers' compensation insurance. Independent contractors are not considered employees for purposes of inclusion in the medical or pension plans that employers provide.

When properly structured and implemented, independent contractor status can afford freedom, flexibility, opportunities, and incentives for the mutual benefit of individuals and businesses engaging their services. A breakdown can come when an independent contractor feels disadvantaged relative to employees of the business or when the relationship ends, especially if the termination is initiated by the business. At that point, the individual may claim a regular or overtime wage entitlement or benefits that the business makes available to its employees, or unemployment, disability, or workers' compensation insurance benefits. Alternatively, a federal or state enforcement agency may conduct a general audit or a specific, targeted audit that is initiated by an individual during the time that services are performed or after the termination of a relationship.

Even a limited government audit may be expanded to additional individuals, arrangements, and facilities. Also, formal and informal programs and protocols for governmental agencies or enforcement authorities to share information can expose businesses to a comprehensive review of the practice of classifying individuals as independent contractors. When such audits determine that independent contractors have been misclassified, the outcome may subject businesses to remediation for the full term of the applicable statute of limitations—in some states, six years from the date of an initial claim or audit.

The increased scrutiny of independent contractor status and the risks of misclassification warrant self-assessment to assure compliance and minimize exposure to claims.

Will "Unemployment Status" Become the Next Employment Protection?

The list of protections against discrimination will grow to include those who have been unemployed if a bill (Intro 814-A), which was passed by New York's City Council, survives mayoral veto and gains traction elsewhere. The bill amends New York City's Human Rights Law to prohibit an employer or employment agency, or an agent of either, from:

- basing an employment decision with regard to hiring, termination, promotion, demotion, discipline, or compensation or the terms, conditions, or privileges of employment on the "unemployment status" of the applicant or employee without a bona fide reason that is substantially job-related; or
- publishing or posting an advertisement for a job vacancy in New York City stating or indicating that current employment is a job qualification or requirement or that unemployed applicants will not be considered for employment.

Individuals alleging discrimination would be allowed to pursue claims by filing a complaint with the New York City Commission on Human Rights or bringing an action in court. The remedy available for meritorious claims could include conventional make-whole relief, compensatory damages, and penalties, in addition to injunctive relief.

The applicant will have little difficulty showing that he or she was unemployed—with the term "unemployment status" defined to mean "an individual's current or recent unemployment." Most résumés and completed application forms are likely to reveal periods of unemployment. An employer should be able to defend a discrimination claim by showing that its denial of an employment opportunity was not based on unemployment status or that its reasons were bona fide and "substantially job-related." Examples of permissible reasons that employers could consider are suggested in a City Council press release: "whether an applicant has a current or valid professional license; a certificate, permit, or other credential; or a minimum level of education or training."

The bill does not indicate whether an inquiry into reasons for prior denials of employment would be permissible, but it is permissible to inquire into circumstances of a previous employment termination or demotion and the basis for it. However, as a matter of policy, many employers decline to provide detailed responses to inquiries from prospective employers. Also, an applicant may not share—or even know—all the reasons for a prior adverse employment action or denial of opportunity.

Under a New York City law enacted over mayoral veto—or others modeled on it—employers would have to address the extent to which previous unemployment or a history or pattern of unemployment may be considered with respect to decisions to hire applicants or change the status of current employees. Expansion of discrimination laws to protect those who have been unemployed would occasion review of interview and selection criteria that could indicate impermissible considerations and expose employers to new claims. [IA]