Best Practices for Negotiating Employee Benefits with a Union in a Rapidly Changing Landscape

Kenneth F. Sparks

Employers face increasingly diverse legal and practical problems when designing and administering benefit plans. Uncertainty regarding the direction of legislation and the need to respond to changing benefit markets only compounds the problem.

Unfortunately, employers with labor unions are expected to negotiate collective bargaining agreements (CBAs) that last three years or longer, and they cannot take a wait-and-see approach. In today's rapidly changing benefits landscape, that is problematic:

(1) A current contractual benefit could become unlawful or unavailable.
(2) A benefit's existing design could unexpectedly trigger excise or other taxes or penalties, or balloon in cost even if not unlawful to offer.
(3) A benefit provided through a multi-employer benefit fund not controlled by the employer could fail to meet the employer's legal obligations and trigger the same result.
(4) A new benefit could be required by operation of law.
(5) The employer could seek to offer new or improved benefit plans.

The Best Solution for Most Unionized Employers—a Benefits 'Management Rights Clause'

Although benefits professionals do their best to forecast, it is impossible to predict future employee and employer needs with confidence and accuracy in all cases. The ideal bargaining solution is to retain the right to make changes to benefits over the life of the agreement. This is the benefits equivalent of a management rights clause.

These clauses need to be carefully drafted. They should not only provide that unionized employees will participate in the existing plans, but also make clear that the employer can add to, modify, replace, or discontinue plans during the term of the CBA without further negotiations.

In negotiations, employers should emphasize that such clauses allow employers to remain competitive and to respond to rapidly changing healthcare and other benefits. Unions are not likely to be receptive if they simply see such clauses as a path to cutting benefits. For that reason, employers are more likely to have success when they can point to a track record of offering employees strong and improving benefits.

As part of negotiations, unions may seek some measure of protection from the harsh impact of such clauses, such as non-discrimination language, an agreement to discuss the "effects" of any significant change, or language allowing a union to reopen the CBA terms if a class of plans is eliminated and not replaced. The details matter, and some of these may or may not be acceptable depending on the specifics. Employers should keep an open mind, but not agree to language that can hold company-wide changes hostage to an open-ended union discussion process.

Even if the broadest possible waiver proves impossible, employers should consider more limited waivers, for example, a waiver only for health insurance, where the current political debate could lead to profound and rapid change. Alternatively, a waiver could allow the establishment of new supplemental plans at the discretion of the employer (adding a health saving account-based medical plan is an example) so long as other plans remain in place.

Finally, always seek to incorporate waiver language that allows employers to address routine administrative matters. This includes routine changes to fiduciaries or administrators and changes to ensure regulatory compliance. In the absence of such language, such matters may have to be negotiated according to many decisions.

Other Bargaining Solutions: the Reopener

Though second best, one alternative to the broad waivers outlined previously that may be easier to achieve is a "reopener clause." Reopener clauses come into play when certain enumerated conditions are met. Such clauses tend to track the issues outlined at the beginning of this article. For example, they may come into play if:

- An existing contractual benefit is made illegal or would result in the imposition of additional taxes or penalties;
- A carrier ceases offering a benefit in its current form;
- The cost of one or more benefit plans increases by a defined amount; or
- A new benefit becomes mandated by applicable law during the term of the CBA such that the economic assumptions of the CBA are no longer true.

Negotiating Cost Sharing

Employers must also be mindful when negotiating benefits cost-sharing. Again, the problem is that a CBA will remain in place for years. As such, employers must ensure they remain competitive in the labor market while not overpaying and hurting their cost structure. Negotiators must also balance the need for a deal against obtaining protections from ballooning premiums.

As noted previously, the best approach is making cost part of the benefits management rights clause by agreeing that represented employees will pay the same portion of benefit cost as other employees. Simply put, this allows employers to right-size benefits cost and react to the changing market, while ensuring represented employees do not fall behind or pull ahead of peers.

When that is not achievable, there is a long-standing debate regarding whether to set the share of cost employees will pay in dollar terms or as a percentage of the employer's overall benefits cost. (Of course, employers should take a page out of the union playbook and always seek to have employees pay something. Even if you start with small contributions, putting the structure in place for future increases can prove important.)

As to the percentages vs. dollar contribution debate, in most cases, percentages prove to be the better option for both sides, particularly if there is uncertainty regarding rates. When CBAs set out hard dollar contributions that will be paid for several years, the parties often guess wrong. That leaves one side bearing a disproportionate share of premiums. Indeed, in some cases, only one medical plan or a particular plan tier becomes less competitive than other plans or tiers being offered. When that happens, it can cause employees to behave irrationally as they flee plans that have become disproportionally expensive or select those that have become unreasonably cheap. It also can lead to confrontation in future negotiations when employers try to rationalize plan cost.

One final option to be considered is a reopener clause under which employers and unions negotiate benefits cost annually. Although such clauses are attractive on their face, reopening comes with risk. A union may want the right to strike if no agreement is reached or insist on interest arbitration. Proceed with caution.

What about Employers in Multi-Employer Plans?

The general advice to employers is not to enter multi-employer health and welfare or pension plans during negotiations if they can be avoided. There are many risks. The plans have the ability to change participation rules and benefits after the fact. Costs often go up more rapidly than expected. Employers can be charged for audits and other unplanned expenses. And there is the risk of unfunded liability that can make pension plans in particular prohibitively expensive and difficult to exit.

For employers without a choice, there are a few things to consider proposing putting into your CBA. As to multi-employer health plans, seek language ensuring that the plans will comply with applicable laws and regulations and not act in a manner that will result in excise or other taxes, penalties, or expenses being imposed on the employer by operation of law. If they do, reserve the right to offset any such costs against wages or future wage increases.

There is also the risk that plan trustees will raise contribution rates even if lower rates are negotiated in a CBA, something permitted by some plan documents and by legislation in some circumstances. Again, these risks can be mitigated with language providing that any costs imposed by the plan or operation of law over and above those negotiated in the agreement will be offset against employee wages unless other agreement is reached by the parties.

What if You Find Yourself Stuck During the Term of a CBA?

Despite the best planning and efforts, employers do sometimes find themselves facing adversity with respect to their benefits plan during the term of a CBA. When this occurs, don't assume that there is nothing you can do. Sometimes that is not the case.

If a benefit cannot legally be offered or is no longer offered by the third-party provider, the law may allow either side to reopen to negotiate. This can occur for myriad reasons, from regulatory changes to cancellation of a policy by an outside carrier.

There are also circumstances in which employers have been allowed to make changes because a CBA incorporates plan documents that themselves reserve to the employer the right to change the plan.

Even if an employer does not have the legal ability to reopen, the parties may have a mutual interest in doing so. Consider approaching the union for a midterm modification rather than allowing issues to fester.

So long as there is something for both sides, there is often a reasonable solution.

Final Thoughts

It is possible to successfully manage benefits for employees in a union environment. It simply takes more planning and patience.

Kenneth F. Sparks is a shareholder in the Chicago office of Vedder Price P.C. and chair of its Traditional Labor Practice. He regularly negotiates collective bargaining agreements and advises healthcare, transportation and logistics, and manufacturing employers on labor disputes across the United States. He can be reached at *ksparks@vedderprice.com*.