

## Health Care Industry

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# Employee communications: truth or consequences - employee benefit communication - Column

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## Business & Health, Nov, 1996 by Helen Lippman

Every manager knows it's wrong to lie to workers, but is it also wrong not to mention possibilities you don't know about? Could be, given a cluster of court decisions handed down this year.

The U.S. Supreme Court's decision in *Varity Corp. v Howe* helped put benefits managers in that somewhat precarious position. Varity executives encouraged employees to transfer to a new subsidiary with assurances that benefits would remain intact, even though they knew the entity was a risky venture saddled with \$46 million in debts at its launch. When it went bust, employees lost their benefits and sued Varity.

The top court ruled on two important issues. First, it said that enrollees in a self-insured plan have a right to sue solely on their own behalf, not just to recover losses the plan may have suffered. Furthermore, said the court, representatives of self-insured firms often fulfill the dual roles of employer and plan fiduciary simultaneously. When that happens, the firm cedes its protection against the liability that ERISA imposes only on plan fiduciaries.

Joe Walsh, a principal of Coopers & Lybrand's HR advisory group, is among the experts who predict firms will face "increased benefits litigation, both meritorious and frivolous" in the wake of *Varity*. To protect themselves, Walsh asserts, companies should subject employee communications that "even tangentially relate to benefits" to vigilant risk management.

Consultant Judy Bauserman at William M. Mercer goes a step further. She says *Varity's* lesson, that a sponsor or administrator communicating about benefits must "act solely in the interest of participants," is likely to convince some employers to replace self-administration with an independent, third-party administrator.

No matter who administers a company's health plan, deliberately misleading employees is a likely route to liability. The facts are not so clear cut in *Unisys Corp. v Pickering*.

Unisys' plan descriptions stated clearly that the employer could alter the health plan at any time and for any reason. But that caveat was omitted from other employee communications, both written and verbal, which retirees later claimed amounted to a promise of lifetime coverage. When Unisys dropped its retiree benefits, they sued. The Third Circuit Court of Appeals (and the Supreme Court, in its March 1996 refusal to review it) upheld their right to do so, and sent the case back to district court.

The Unisys omission does not appear to be a deliberate deception, as the company did not anticipate a change in retiree benefits when it issued the employee communications. Still, the case is disturbing to those who have the job of communicating benefit options and fielding workers' questions. It suggests, Walsh observes, that plan sponsors or administrators "must disclose eventualities they may not even be considering at the time." Other recent court decisions, Bauserman adds, have held that "benefit counselors who were not even aware of 'serious' corporate discussions nonetheless had a duty to discover and disclose their existence" to inquiring employees.

The cases she refers to, which involve the Philadelphia Electric Co., can actually help clarify benefits managers' responsibilities. A group of potential retirees had asked the company whether it was considering an early retirement offering. Told no such incentive was on the horizon, they'd gone ahead with their plans. When Philadelphia Electric announced an early retirement window soon after, the former employees took the company to court.

In 1993, the Third Circuit Court of Appeals affirmed the retirees' right to sue. A trial court then determined that employees had a right to be informed of benefit changes under "serious consideration," but never explained what that meant. In revisiting the issue this fall, the circuit court found that serious consideration means an employer has options on the table and is holding meetings to discuss implementation.

The court did not set a timetable for bringing benefits administrators into the loop, but Bauserman doubts that line managers' ignorance of proposed changes would insulate a firm from liability. What companies can do to protect themselves is scrutinize their written and oral communications for clarity and uniformity. For consistency, it's also a good idea to have the same few people handle all employee communications. Another seemingly obvious but important tip: Refrain from promising lifetime, or unchanging, benefits.

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