

Louisiana Employment Law Letter

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PENSION AND RETIREMENT BENEFITS

Trick or treat? How treats turned into nightmarish trick on employer

Many employers offer retirement benefits to their employees to reward them for long and loyal service. Retirement benefits and other incentives can also go a long way in raising employee morale. But when you offer benefits and incentives to your employees, are you always clear in terms of what you're offering, for how long, and who is eligible to receive the product of your generosity? Do you convey what benefits and incentives are available verbally or in writing? And, most important, do you know whether what you're offering is regulated or subject to any requirements under applicable federal or state laws?

If you're beginning to get a little nervous because you haven't thought of these questions before, keep reading. It may not be too late for you, but it is for one very generous, but unfortunate, employer. In this case, you'll discover how good intentions and generosity toward your employees can become a nightmare that would scare away even Freddy Krueger, the reigning king of nightmares.

Grocery vouchers flow like candy on Halloween

In 1869, the Schwegmann family started a "mom and pop" grocery store in New Orleans. Over a century later, they had grown their family business into a chain of more than 40 stores and "superstores," employing more than 5,000 people throughout South Louisiana.

In the 1980s, the company established a grocery voucher program for certain retirees. The vouchers could be used in lieu of cash to purchase groceries at any of the company's stores. According to a memo from the human resources director, the criteria for the program were as follows:

- 20 years of service;
- 60 years of age; and
- employment in the position of supervisor or a position of greater responsibility for at least one year at the time of retirement.

Other than the memo, Schwegmann's had no formal procedure for giving employees information or handling employee inquiries about the voucher program. Questions usually were fielded by supervisors up through the chain of command until they could be answered.

Schwegmann's "draft" employee handbook, which apparently was never distributed to employees, included descriptions of other benefits, such as the 401(k) plan and medical insurance, but not the voucher program. Aside from the director's memo, the company had no written guidelines or rules for the program. It offered no training or instructions to the personnel responsible for administering the voucher program. Nevertheless, the program was "common knowledge" among employees, who learned about it from their supervisors and at events honoring qualified retirees.

Each voucher had a face value of \$54, and qualified retirees received \$216 worth of vouchers each month, an amount Schwegmann's thought would meet the basic nutritional requirements of each qualified retiree and his or her spouse. Although vouchers were not intended to be redeemable for cash, some store employees and managers were unaware of that restriction and retirees often received change in cash when they purchased groceries with their vouchers.

The program was funded out of the company's general revenues, and the total face value of the vouchers issued in any year was deducted as a business expense under the category "retirement plans" on the company's tax return. The face value of the vouchers distributed to a retiree was reported on a form 1099-R, the IRS form used to report pension and retirement benefits.

R.I.P. -- ghoulish competition leads to untimely death of voucher program

In the 1990s, Schwegmann's began to feel the pinch in competition from larger national chains. In 1997, the company sold its stores, and the voucher program ended. All retirees who had benefited from the program received letters informing them that they would no longer receive vouchers or cash because of the sale.

Employer takes haunted courtroom tour

At the time the program ended, approximately 40 retirees were receiving vouchers, approximately 20 current employees met all of the eligibility criteria except retirement, and approximately 70 others satisfied all of the criteria except retirement and age. All of those individuals combined to file a class-action lawsuit, alleging that Schwegmann's termination of the voucher program violated the Employee Retirement Income Security Act of 1974 (ERISA). After a trial without a jury, the judge ruled in favor of the retirees and former employees.

ERISA spooks employer

Whether Schwegmann's had the right to end the voucher program depended on whether the program was subject to ERISA and, if so, whether the vouchers constituted (1) an ERISA "welfare benefit plan" or (2) an ERISA "pension benefit plan." The difference is significant because welfare benefit plans generally may be terminated at will and without any vesting or funding obligations, while pension benefit plans generally cannot be terminated at will and are subject to ERISA's vesting and funding requirements.

Welfare benefit plans can include a variety of benefits that aren't necessarily tied to age or length of service -- *e.g.*, medical, disability, vacation, and severance. But eligibility for the benefits at issue in this case -- the grocery vouchers -- was triggered by attainment of a certain age and job status, conditioned on length of service, and paid until death. According to the court, those factors are the "hallmarks" of a pension benefit plan, not a welfare benefit plan.

Schwegmann's argued that the vouchers were "gifts" that weren't covered by ERISA. The court decided otherwise. The court found it "telling" that the company treated the vouchers as a "business expense" for tax purposes and reported them as retirement benefits on 1099-R forms rather than classifying them as business gifts. Moreover, the human resources director's memo setting out the eligibility criteria was captioned "Retirement/Compensation Policy," and the company referred to the vouchers as "retirement type income" in a letter to the Social Security Administration.

The court then addressed whether Schwegmann's had "established" a pension plan when it implemented the voucher program. ERISA does not require a pension plan to be formal or even in writing. An employer "establishes" a pension plan within the meaning of the Act if the intended benefits, class of beneficiaries, source of funding, and procedures for disbursing the benefits are reasonably ascertainable by employees from all the surrounding circumstances.

In this case, the voucher program clearly identified the intended benefits (\$216 monthly in vouchers) and the class of beneficiaries (retirees who met the age, length of service, and managerial responsibility requirements). Employees also were aware that the company funded the vouchers from its general assets and established procedures for disbursing the benefits and administering the program.

Schwegmann's argued that the voucher program was a gratuity extended to its employees that could be terminated at any time. The company also pointed out that the program was terminated not because of any selfish motive but because of financial hardship. While the court recognized the employer's generosity in establishing the program, it decided the program was not a mere gratuity but instead was offered to employees in return for their long and loyal service (*i.e.*, the benefit the company received in exchange for the vouchers). The court cautioned that an employer's "well-meaning intentions are without legal significance" where ERISA is concerned.

Grocery vouchers haunt employer

ERISA violations offer plan participants and beneficiaries a "panoply of remedial devices," including benefits due under the plan and the right to seek clarification of future benefits available under the plan. The plan itself, not the employer, is liable for ERISA violations, except when the plan and the employer are "closely intertwined" or, as in this case, when the plan is

unfunded and administered by the company rather than by a separate plan administrator. *John Musmeci, et al. v. Schwegmann Giant Super Markets, et al.*, 2001 U.S. Dist. LEXIS 13157 (E.D.La. 8/23/01).

Don't get tricked: Get advice and avoid a litigation nightmare

Significantly, Schwegmann's did not seek legal advice about whether its voucher program was covered by ERISA before it terminated the program. Had it done so, this nightmare probably could have been avoided.

This case is a classic example of how the best intentions can come back to haunt employers if they are uninformed. Review your benefits plans and seek legal advice to make sure you understand your obligations and your employees' rights. Most important, don't terminate any benefits without first finding out if you have the legal right to do so.

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