No aspect of business has changed more in recent years than employee benefits. The balancing act between offering benefits that help recruit and retain talent, while balancing levels of coverage and cost, has become increasingly difficult. Rising costs, on top of increased regulatory restrictions, coupled with the adoption of the Affordable Care Act (ACA), have created a new era of employee benefit design.

Clark Hill attorneys Nancy Farnam and Steve Girard spend much of their days helping clients find effective methods to balance these dynamics. As legal counsel to private and public employers, they understand the new realities of providing fair, affordable coverage while maintaining costs.

Farnam and Girard sat down recently to talk about the trends they see and advice they give to clients facing common benefit challenges.

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Q: With all of the changes in health care, employers are under pressure to contain cost and retain talent. What are you hearing from clients about how they overcome this tough situation?

FARNAM: Increasingly, employers are trying to find employee benefit structures to offer and afford benefits. This is particularly challenging for some industries that typically employ a significant number of seasonal, temporary or part-time employees who traditionally have not received health coverage. We are seeing more employers offer a very limited coverage plan that meets ACA coverage guidelines and offers an attractive option for lower wage earners, as well as offer richer plans.

GIRARD: Employers need to be able to retain their talent and recruit new talent. Maintaining a competitive level of benefits is crucial. Most employers are not willing or able to forego a benefits package altogether. However, most public and private sector entities are becoming much smarter about what benefits they offer and how they offer them. Competition is the key factor. Business leaders are looking at what competitors are offering and trying to emulate those packages. The situation is certainly heightened in Michigan, where many employees have an expectation of rich benefit packages — low deductibles and no copays — because that has been the case historically. Many employees have struggled to embrace the new realities of health care coverage, resisting the fact that they are going to have to share in the cost.

Q: What expectations need to change in respect to employers and employees?

FARNAM: Employees need to understand that they need to have a stake in benefits, and expect to pay more. Also, in terms of retiree benefits, employees need to readjust their expectations and realize that comprehensive retiree medical benefits are a thing of the past.

GIRARD: Employers should accept that they no longer have total control over the benefits process and can no longer dictate level of coverage to the same extent they did prior to health care reform.

On the employee side, they need to recalibrate their perspective. Many individuals were accustomed to a system that resulted in a minimal or no copay. Now, it is common for coverage plans to have a $1,000 or $2,000 single deductible. The notion that benefit cost increases are going to be solely absorbed by employers is gone.

Q: What are some examples of new solutions that show how employers are trying to be creative in this new environment?

FARNAM: More employers are offering high deductible health plans and health savings accounts, along with tiered plans, so employees can select their desired level of coverage and realize that comprehensive retiree medical benefits are a thing of the past. Wellness programs are also becoming more popular, with the goal of creating a healthier workforce, ultimately reducing benefit costs.

GIRARD: You both have experience representing government entities in their negotiations with work groups. It used to be that governments had “the best benefits” by reputation but do you think that will be the case in the future?

GIRARD: Public sector employees still enjoy a higher level of benefits than any other faction of the workforce.

“Most employers are not willing or able to forego a benefits package altogether. However, most public and private sector entities are becoming much smarter about what benefits they offer and how they offer them.”
However, that’s changing over time. Particularly in Michigan, where Public Act 152, passed in 2011, set a maximum amount an employer can pay for health care for its employees. The legislation is having a dramatic effect on public sector health care benefits and costs.

Looking to the future, I see a time where PA 152 and the ACA will come into conflict. PA 152 sets a maximum cap on the amount an employer can pay for health coverage for its employees.

For employers that offered domestic partner benefits, it may no longer make sense to offer that type of coverage when same sex couples can marry, because many employers limited domestic partnerships to same sex couples who previously could not marry.

We will be working with clients to help them amend their plans in light of the Supreme Court ruling and to address the administrative issues related to changes in election restrictions under cafeteria plans and special enrollment periods to add same sex spouses.

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Health care is increasingly becoming consumer driven. ‘Shopping’ for the best rates is part of the new paradigm of health care coverage.

Yet, the ACA indicates you have to offer a minimum level of coverage and it must be “affordable.” It will be interesting to see how, at some point, the two intersect. That is going to pose an interesting challenge for public sector employers in Michigan.

Q: What do you think the future is for family benefits provided by employers, beyond employees themselves, especially as the definition of marriage continues to change?

FARNAM: The level of spousal coverage my clients offer currently is quite varied. With the Supreme Court’s historic decision regarding same sex marriage, benefit plans that cover spouses will have to address coverage for same-sex spouses. For companies that offer self-insured plans, it’s more complex, because nothing in ERISA or the IRS code indicates companies have to offer spousal coverage. That could pave the way for some employers to define “spouse,” which could open them up to discrimination claims if they choose to solely define “spouse” as opposite sex marriage.

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GIRARD: As Nancy indicated, employers will likely eliminate domestic partnership benefits. In my opinion, the intense political pressure to cover domestic partners is over, in the wake of the Supreme Court decision.

Q: Many employers are pushing health savings accounts for their employees. It’s an idea that makes sense on paper but do you see employees adopting them?

FARNAM: Health Savings Accounts (HSA) work well in certain industries. Employers with higher wage earners will often couple an HSA with a high deductible plan and that makes sense because workers have the discretionary dollars to fund an HSA. In situations with lower income workers, employers typically help fund the HSA, so employees aren’t overly burdened with out-of-pocket expenses.

GIRARD: HSAs are an attractive option for higher income workers because it is a way to set aside pre-tax income to fund future health care needs. It is ideal for higher wage earners who can afford to fund it. For lower wage employees, health savings accounts work because employers save money (by purchasing higher deductible plans), and, ultimately, it makes employees better consumers of their health care. Employees have “skin in the game” and become more conscious of the costs associated with health care when they are paying for their medical costs with their own funds. Everyone in the system benefits when employees make better choices because they are more informed consumers. Lower usage rates equate to lower premiums.

FARNAM: Health care is increasingly becoming consumer driven. Third party administrators are developing products and applications to compare health care cost rates between hospitals. “Shopping” for the best rates is part of the new paradigm of health care coverage.

More employers are offering high deductible health plans and health savings accounts, along with tiered plans, so employees can select their desired level of coverage and investment.
Insurance companies are putting big pressure on employers to increase wellness. What are some examples that smaller companies can use to improve the wellness of their workforce?

FARNAM: Wellness programs come in all shapes and sizes. Companies of all sizes can implement wellness competitions and games for prizes or offer other fun incentives to promote a healthier workforce. Some employers offer a full-blown wellness program where employees are paying lower premiums and co-pays, reflective of biometrics screens and health risk assessments. These more comprehensive wellness plans are available for smaller employers. However, the verdict is still out on whether or not wellness programs are saving employers money.

GIRARD: It can be a real struggle for employers to attempt to dictate personal behavior via wellness programs. Employees don’t like employers telling them how to live their lives outside the workplace, which is often how wellness programs are viewed from the employee’s perspective. Employees can be particularly reticent when unhealthy habits or lifestyles result in higher health care costs. Wellness programs do make sense in the public sector where having a physically fit workforce is important for execution of the job – for example: in law enforcement, firefighting, etc. In some instances, employers I have worked with have had to roll back “healthy lifestyle” programs because of staff resistance.

The Equal Employment Opportunity Commission (EEOC) recently issued proposed regulations regarding wellness programs in relation to employees with disabilities, collection of genetic and health information and beyond. Under many wellness programs, employees are required to undergo health risk assessments that measure body weight, cholesterol, blood glucose, and blood pressure levels. Some wellness programs offer employees financial and other incentives to encourage them to participate. The proposed rules limit the circumstances in which employers may ask employees about their health or require them to undergo medical examinations. Workers can’t be required to participate in such programs, and they can’t be denied health coverage or disciplined if they refuse to participate. Employers need to proceed with caution to ensure wellness initiatives do not result in discrimination.

Q: Since so many chronic diseases are tied to smoking and those are the diseases that impact costs the most, how do employers legally get around hiring smokers or get their smokers to quit?

GIRARD: Smoking is not a protected class or activity, under the law. There are employers who have put measures in place to specifically hire non-smokers. In those instances, they will ask job candidates about smoking in an initial interview. The public sector is largely trying to eradicate smoking from the workplace. Many public entities now will not allow smoking on site. Some have even taken it a step further and implemented a “smoke free” workplace, which means employees can not smoke on unpaid breaks and meal times, even off site. These aggressive non-smoking policies are most prevalent in the health care industry where secondhand smoke and employees smelling like smoke could impact patient care.

The increasing cost of health coverage is putting pressure on other areas of benefits. Depending on the size of the employer and their level of sophistication, employers are exploring other ways to enhance benefit packages, outside of health care coverage.
**Quick Tips:**

From Nancy Farnam and Steve Girard, attorneys at Clark Hill PLC, a full-service, entrepreneurial legal and business solutions provider with 12 offices nationwide.

- **Hire a Professional.** The legislative and compliance stipulation surrounding benefits continues to change and evolve. Having experienced and trained professionals assisting with your benefits administration can save you money and headaches in the long term. Experienced insurance agents, benefits consultants and legal counsel are paramount in navigating the new challenges of employee benefits.

- **Reporting is Paramount.** The Affordable Care Act (ACA) reporting requirements are extensive. Data collection and review is a significant undertaking for most businesses. Start by understanding your company’s reporting obligations and implement processes to track the necessary data points. Investing the time and resources to put monitoring measures in place now will pay off exponentially at year’s end.

**Resources:**

- **United States Department of Labor – Employee Benefits Security Administration** - The agency provides oversight of private-sector retirement plans, health plans and benefits. The website provides regulatory and compliance guidance for benefit plans.
  
  http://www.dol.gov/ebsa

- **HealthCare.gov** - Information on coverage options and details on how to enroll and/or change coverage as part of the federal exchange.
  
  https://www.healthcare.gov

- **Kaiser Family Foundation** - Guided by the mission of “filling the need for trusted information on national health issues,” the website offers extensive, unbiased data and analysis on health care issues, including the individual insurance market, Medicare and Medicaid.
  
  http://www.kff.org

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