BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ◆ MARCH 2019

MONTHLY PROGRAM & LUNCHEON

TOPIC: Controlling Healthcare Costs is the New Normal: Is There Hope?

WHEN: Thursday, May 2nd, 2019

TIME: 11:30 AM-1:00 PM

WHERE: Philips Event Center
1929 Country Club Drive
Bryan, Texas 77802

COST: $15/ BV-SHRM Member
$20/ non-members or late RSVP

Speaker: Dr. Wilson, CapRock ER

MENU: Sesame Chicken, chef's vegetable, salad, coffee, water and tea

PROGRAM DETAILS

Summary:
BVSHRM 5/2/2019 Discussion Summary
• The cost of healthcare, the nagging problem that just won't seem to go away
• Brief overview of the current status of acute care
• Brief discussion of how we got here
• Current attempts to address the challenges, and a discussion of their successes and failures
• Is there hope for the future, a look forward?

Learning Objectives:

- What affects healthcare cost
- How to manage healthcare cost at an employer level.
- Current attempts to address changes to healthcare process and how that affects us.

SPEAKER'S BIO

Dr. Wilson is the Co-Founder and former CEO of CapRock Health. Dr. Wilson has served as a Medical Director for Traditional Hospital and Freestanding Emergency Departments, The TEEX Paramedic Academy Medical Director, and is the Co-Medical Director for a SWAT Team in Texas. Dr. Wilson also serves as an Assistant Clinical Professor of Emergency Medicine in the Texas A&M College of Medicine.
Dr. Wilson completed his Emergency Medicine Residency Training at the Texas A&M Scott and White Emergency Medicine Program in Temple, Texas, where he served as the Chief Resident.
Prior to his residency training Dr. Wilson attended medical school at the University of Iowa College of Medicine, where he graduated with Research Distinction, was the Student Body President, was nominated for the AMA National Scholar (one of 150 in the nation out of nearly 16,000 medical students) as well as the Hancher-Finkbine Medallion, The University of Iowa's most coveted student award given to only one student annually from the entire University

Through powerful analytics, robust reporting, and intuitive usability, Paylocity provides innovative tools for nearly every aspect of payroll and human capital management. By staying on top of trends and ahead of client needs, we build solutions to address the challenges payroll and HR professionals my face today and in the future.

Our software was built on the belief that clients should have the ability to choose the right vendors for your business-not the other way around. Paylocity's open architecture allows clients to streamline the management of payroll and human resources data across the other important platforms they use. Instead of settling for a mediocre "one stop shop" solution, our integration methodology empowers clients to leverage robust third-party technologies to create a unified solution to meet all of their needs.

Paylocity's unique position in the marketplace, combining technology and service, sets us apart from other vendors in the payroll and HR industry. We provide clients with the tools and technology that automate business processes; develop, engage, and mobilize the modern workplace; and drive strategic decision-making through robust analytics.

Jeff Ellis | Sr. HCM Consultant - Houston

E-mail: jellis@paylocity.com

Would your organization like to be featured here?
Contact:
Toni Steele about sponsorship opportunities at
Toni.Steele@K2Share.com

Board Officers

President
Jessica Lennerton

President Elect
Lauren Pearce, PHR, SPHR-CP

Treasurer
Krystal Broussard, SHRM-CP, PHR

Secretary
Kimberly Williamson, SPHR

VP of Programs
Deborah Couch

VP of Membership
Diana Clendenin, PHR, SPHR-CP

Past President
Kris Lorch, PHR, SPHR-CP

Are you a national SHRM member?

If not, consider it! Great benefits include:

- Tons of resources and tools to help you build and improve your HR function
- Legal updates that affect your business
- Conference information
- Discounted local membership

Upcoming Events

Cleaning out your closet this Spring?

BV-SHRM is collecting business professional clothes and new unopened makeup for Project Unity. Donated items are provided for free to help community members put their best foot forward at job interviews, career fairs, etc.

We will be collecting items at the May meeting

---

https://annual.shrm.org/

https://hrsouthwest.com/

Students wanting to apply for the HR Southwest Student Sponsorship should email a letter of interest to Jessica Lennerton

Directors

Certification
Katherine Kleeman
Melissa Green

College Relations
Lesley Tomaszewski

Diversity
Ryan Hill

Government Affairs
Kathy Schroeder

SHRM Foundation
Thom Holt, SPHR

Workforce Readiness
Kristi Soria

Visit us and become a Fan of BV-SHRM on facebook

DIVERSITY MATTERS

National Wildfire Awareness Month
National Skin Cancer Awareness Month
National Emergency Medical Services Week: Third Full Week of May

4-Star Wars Day
5-Cinco de Mayo
5-Lemonade Day
6-Nurses Day
12-Mother's Day
15-Peace Officers Memorial Day
17-Bike to work Day
18-National Armed Forces Day
27-Memorial Day

Chairs

Business Seminar
Diana Dean

Historian
Retha Youell, SHRP-CP, SPHR

Hospitality
Bridgette Young

HRSW Ambassador
Kelley Ervin
Darla Guerra,PHR

Newsletter
Angela Alston

Recertification
Michelle Merrit

Social Engagement
Candi Nelson

Sponsors
Toni Steele

Website
Janice Quast

ARE YOU ?

Linked in

1. **Chex Mix –** The failed 2009 Paycheck Fairness Act is back and cleared the first hurdle, the House of Reps. H.R. 7, if enacted, would amend the Equal Pay Act and:
   a. Gut the "any other factor other than sex" exception which allows some pay disparities between male and female workers;
   b. Expand penalties under the Equal Pay Act, to include compensatory and punitive damages;
   c. Protect employees' ability to discuss their wages and other employees' wages from employer retaliation;
   d. Allow an employee to bring a class action under the Federal Rules of Civil Procedure (shifting from only opt-in to opt-out actions); and
   e. Instruct the EEOC to start collecting employee pay data from employers of 100+ employees

2. **Already There –** Guess what? The EEOC is already poised to collect pay data from employers. In 2016, the Office of Management and Budget (OMB) approved the collection of pay data as part of the annual EEO-1 exercise but decided to stay (i.e., put on hold) the process through two annual cycles. The stay was lifted by court order on March 4, 2019 by a judge who said the OMB's reasons for the stay were not good enough. Since the number of data fields for collection will grow from 140 to an additional 3360 fields and the EEOC concedes it cannot modify its processes quickly, it will rely on a data and analytics contractor to do the job, at a cost in excess of $3 million. The EEO-1 filing deadline has been pushed to September 30, 2019 and the idea of collecting wage data for 2017, in addition to data for 2018, has been scrapped. Oddly, the EEOC went live with the 2019 EEO-1 reporting system (without fields for pay data) on March 18. And they have yet to address employers' valid concerns that the exercise will not expose pay discrimination because there is a "garbage in/garbage out" problem with the proposed analysis.

3. **Egg on Your Face if You Say "No Poaching" –** The U.S. Department of Justice (DOJ), states' Attorneys General and plaintiffs' lawyers are all over no-poaching agreements between employers, especially involving franchisees:
   a. On March 12, five fast-food franchises agreed they would stop adding "no poach" clauses to their franchise agreements and would not enforce the ones that are already in place. The Maryland AG explained that these clauses make it difficult for workers to improve their earning potential by moving from one job to another or seeking a higher-paying job at another franchise location.
   b. Several class action lawsuits are pending over no-poach agreements
   c. The DOJ takes the position that "naked" agreements between competitors are *per se* unlawful under federal antitrust law (the Sherman Act). Vertical agreements (between the parent company and a franchisee) will be looked at using a rule of reason (weighing harms against benefits) but could still be seen as *per se* unlawful if either [1] franchisees operating under the same brand make an agreement between themselves, independent from the franchisor; or [2] the agreement is between a franchisor and a franchisee relating to competition in a market where they actually compete and is not part of a legitimate joint venture.

4. **Labor Pains –** The U.S. Department of Labor (DOL) has been a busy beaver:
    a. On March 7, DOL issued a proposed rule to increase the minimum salary needed to preserve a "white collar" exemption under the FLSA to $679/week ($35,308/year). The current threshold is $23,660/year. The agency is estimating an effective date in January 2020. For a copy of the proposed rule and a link to make comments go here.
    b. On March 25, OFCCP released its list of 3500 companies targeted for potential audit of their affirmative action plans, by posting them on their website; this method replaces sending Corporate Scheduling Announcement List (CSAL) letters to the lucky winners; if you want to know if you're on the list, go here. Or just wait until the Scheduling Letter shows up in your mailbox.
    c. On March 27, OFCCP announced the 2019 VEVRAA hiring benchmark would be 5.9%, a drop from the 2018 benchmark of 6.4% and the fifth consecutive year that the benchmark has declined, since it began in 2014; federal contractors subject to VEVRAA affirmative action reporting, you know what to do!
    d. A March 28 proposal, if finalized, will update the requirements for calculating nonexempt workers' "regular rate" under the FLSA. The existing regulations are 60 years old and do not easily mesh with today's comp and benefits methods. The "regular rate" continues to be all remuneration paid to, or on behalf of an employee, subject to a list of items that can be excluded. Over the years, one of the more difficult exclusions to apply correctly has been "discretionary bonuses." Under the new rule, examples are provided of properly excluded bonuses, such as employee-of-the-month bonus, bonuses paid to employee(s) who made unique or extraordinary efforts and not awarded based on pre-established criteria, severance bonuses and bonuses paid for overcoming stressful or difficult challenges. Other payments that can be excluded from the "regular rate" are things like wellness programs, fitness classes, discounts on retail goods and services, occasional payments for foregoing use of leave, reimbursed travel expense (but don't exceed amounts OK'd under the Federal Travel Regulation System), reimbursement for education debt, other reimbursed expenses and benefit plans. For a copy of the proposed rule and a link to make comments go here.
    e. Staffing agencies and franchisors can exhale a bit, after reading through proposed legislation filed on April 1, to relax the standard by which joint employer liability under the FLSA will be determined. Whether or not the employee is economically dependent on the alleged joint employer is out the window and the new test has four factors to see if the alleged joint employer should be liable: [1] hiring and firing; [2] supervise and control the employee's work schedule or conditions of employment; [3] determine rate and method of payment; and [4] keeps the employment records. A 60-day comment period is open, if you want to chime in. For a copy of the NPRM, Fact Sheet, FAQ, examples and more go here.

5. **Take My Advice –** The NLRB's Office of the General Counsel is in a writing mood, publishing five memos in March. Things employers should take note of:
    a. Do not require that your employee handbook be kept confidential; employees have a protected right to openly discuss what's in that book
    b. Do not say that company email is for company business only; employees have a right to use the system during nonworking time for protected communications
    c. Do not take adverse employment action against an employee who posts workplace safety concerns out via Facebook, even if it appears no other employee is involved in the discourse; the OGC says discussions of health and safety are "inherently concerted"
    d. Do not overreach on limiting use of personal cellphones to work-related or emergency situations; employees have the right to communicate with each other during lunch and break times

6. **#metoo Matters –** The legislative fall-out of the #metoo movement continues:
    a. CA, NJ, NY, TN, VT and WA all passed laws which restrict the use on non-disclosure clauses in various agreements
    b. MD, NJ, NY,VT and WA all passed laws which prevent employers from requiring employees to waive certain substantive and procedural rights and remedies (e.g., jury trial waivers, class action waivers, mandatory pre-dispute arbitration agreements), as a condition of employment
    c. VT passed a law which prohibits employers from putting "no rehire" clauses in settlement agreements resolving claims of sexual harassment
    d. CA expanded the reach of its mandatory harassment training law to include employers of 5+ employees and added mandated training for nonsupervisory employees
    e. ME beefed up the required contents of its mandatory harassment training law
    f. DE, NY and NYC enacted new mandatory harassment training laws and now require employers to distribute written policies/info sheet and/or display a State-issued poster
    g. NJ and IL have proposed legislation which, if passed, will require restaurants to conduct sexual harassment training
    h. MD requires employers of 50+ employees to submit information to the MD Commission on Human Rights identifying [1] the number of sexual harassment settlements made; [2] the number of sexual harassment settlements paid involving the same employee(s) over the last ten years; and [3] the number of sexual harassment settlements containing non-disclosure provisions
    i. NJ has a new law which limits the use of nondisclosure clauses to keep workplace harassment, discrimination and retaliation claims secret; the law also prohibits any agreement that waives any substantive or procedural rights or remedy in cases of harassment, discrimination or retaliation, such as the right to a court and jury trial; effective March 18, 2019
    j. Employers are dropping their mandatory arbitration agreements, as a way to boost employees' confidence in their employer.
    k. The American Bar Association officially took a position against mandatory arbitration agreements. "Big Law" firms are responding by dropping their agreements.
    l. This is not a legislative action but is worth noting . . . seven IHOP franchises settled with the EEOC over claims of sexual harassment. They will pay $700,000.00, eliminate a policy (that required employees who were sexually harassed by a co-employee to report it, in writing, within 72 hours to a national office or waive all rights to recovery), hire an outside monitor and conduct harassment training for all employees, including managers and supervisors
    m. Ending Note – Even if you are in a jurisdiction that does not (yet) require training, you would be wise to do it. If done properly, the message could prevent mishaps and will provide a defense in many instances, especially where the alleged harasser was one of your managers or supervisors. I have two versions (employee and manager) of the training, ready to roll.
7. **Petition to Nix Noncompetes –** The Federal Trade Commission (FTC) Commissioner mused in the fall of 2018 that the FTC should use its rule-making authority to <u>limit</u> noncompete covenants. The FTC mailbox just received a 55-page petition from academics and advocacy groups, asking for that rule-making in the form of a <u>ban</u> on noncompetes. They opine that noncompetes are contracts of adhesion since prospective employees usually can't negotiate terms, they harm employees by reducing their ability to change jobs, and market competition suffers when the powerful and established can corner the market on talent, depriving start-ups of needed staff. It goes on to say that employers do not need noncompetes because they have trade secret and protection of other confidential information clauses in their agreements already. As an aside, there is a LOT of legislative activity at the state level, regulating noncompetes so if yours has not been reviewed lately and/or you are using the same one in several states, it's time to get some legal help.

8. **IRS to Employers: Let Them Eat Cake –** A Sept. 2018 IRS Technical Guidance Memorandum (TAM)(read it here) released on January 18,2019 narrows the scenarios where employers can offer free meals to their workers (without treating it as imputed income to the employee) but also says "snacks" get a tax-free pass as a *de minimis* fringe benefit. Pass the popcorn!

9. **Family Matters –** Republicans in the House and Senate introduced the New Parents Act (H.R. 1940) which, if enacted, would allow parents of newborn or newly adopted kids to draw upon their SSA benefits for up to three months, to be repaid via either delayed retirement or collecting a reduced benefit during retirement. An earlier bill, the Child Rearing and Developmental Leave Empowerment (CRADLE) Act, would offer up to three months of paid leave to qualifying new parents, also paid by SSA in exchange for deferring retirement benefit eligibility. The Democrats' Healthy Families Act would allow employees to earn one hour of paid sick leave for every 30 hours worked, up to a capped amount of 56 hours, for more broad use including the employee's illness, a family member's illness, meetings related to the health of a child or to seek assistance due to domestic violence, stalking or sexual assault. The push is on for the U.S. to join the rest of the industrialized world in offering new parents some sort of paid time off to use when that bouncing baby arrives.

10. **Down Goes Scabby the Rat –** The 7th Circuit upheld a WI district court ruling that a town ordinance banning placement of private signs in town right-of-ways was content neutral and did not offend First Amendment rights. Labor unions like to place the giant inflatable rat in conspicuous locations as part of union organizing efforts, but it's not gonna happen in Grand Chute, WI.

11. **Whistlin' All the Way to the Bank –** The SEC's whistleblower program began in 2011 and has awarded about $376 million to 61 individuals, out of 22,000 tips provided. The latest "winners" were announced on March 29. One was awarded $37 million (the third-highest amount awarded to date) and the other received $13 million. For the press release go to https://www.sec.gov/news/press-release/2019-42. The incentives are sweet, to turn your employer in to the SEC, so do some spring cleaning and make sure you are running a clean shop.

12. **Match Game –** Remember "no match" letters sent to employers by the SSA? After a seven-year hiatus, they're back, as part of the Trump administration's efforts to enforce immigration laws. Instead of receiving a list of employee names and suspect SSNs by mail, employers will receive instructions to log onto SSA's Business Services Online to obtain the info. The drill to respond is the same as before. First, check your employment records for a clerical error. If that's not the issue, notify the employee of the SSA mismatch (SSA is providing a sample letter for you to use here) and give the employee an reasonable amount of time to correct the error. Do not knee jerk and fire an employee in response to a letter, unless you want a claim for citizenship discrimination.

13. **Fun With FMLA –** The DOL issued a rare FMLA Opinion Letter to answer the question - can an employer delay in designating FMLA leave, where either the employer or the employee wants to? The answer is "no." Also, FMLA leave cannot be extended by stacking on use of PTO or sick pay. Use of paid time off, if any, should run concurrently with the FMLA leave . . . except in the 9th Circuit (AK, AZ, CA, HI, ID, MT, NV, OR, WA) where the appeals court held that an employee CAN decline use of FMLA in order to use up paid time off first. *Escriba v. Foster Poultry Farms* (9th Cir. Feb. 2015). The FMLA Opinion letter can be found here.

14. **Professor Mross –** I'm delighted to share that I've been named as one of twelve 2019 Fellows for Kansas State University. As Fellow for the College of Business Administration (CBA), I will be on campus for three days next week to interact with students, faculty and staff and will be teaching five classes in the CBA focusing on HR and employment law. And good luck to my Red Raider friends tonight, in the Final Four! Guns up!

STATED DIFFERENTLY – Tidbits for you multi-state employers:

- **California –** Effective January 1, 2019 the general release language in Civil Code sec. 1542 was modified. If you are using settlement or severance agreements in CA and want to be sure the release covers unknown claims, you must include the sec. 1542 clause.
- **Kentucky –** Effective June 26, 2019, employers in KY can require employees to agree to arbitration of their employment disputes as a condition of employment. This new law guts a Sept. 2018 KY Supreme Court decision which held such agreement were not enforceable.
- **Maryland –** The state minimum wage will increase to $15/hour effective January 1, 2025, after the legislature overrode the governor's veto; MD joins CA, IL, NJ, NY and MA who also have $15 minimum wage rates
- **Massachusetts –** Beginning July 1, 2019, employers with 25+ employees must begin contributing 0.63% of each employees' wage or salary to the state, to fund new paid family and medical leave benefits which take effect in 2020. Part of this contribution can be deducted from employees' pay. For smaller employers (less than 25 employees), the entire contribution can be deducted from employees' pay. For more info go here.
- **New Jersey –** Effective March 1, employers of 20+ employees must offer their employees (who are not covered by a collective bargaining agreement) pre-tax transportation fringe benefits.
- **New Jersey –** The New Jersey Law Against Discrimination may require an employer to provide an accommodation to a medical marijuana user, even though the New Jersey Compassionate Use Medical Marijuana Act says employers are not required to accommodate the use of medical marijuana in any workplace. *Wild v. Carriage Funeral Holdings, Inc*. (NJ App Div March 2019).
- **New York (New York City) –** Effective February 19, 2019, the NYC Human Rights Law prohibition against race discrimination includes conduct based on "natural hair or hairstyles." For the complete enforcement guidance go here.
- **New York (New York City) –** Effective March 17, 2019, the prior lactation law was amended to require a "designated lactation room" (not just a private location) and employees must be provided a written policy that explains their rights
- **New York (New York City) –** Effective April 1, 2019, employers of 15+ employees must conduct annual interactive sexual harassment training by March 31, 2020 (but note that the harassment training required under NY law must be completed by October 9, 2019.
- **New York (New York City) –** Effective May 20, 2109 employers of 4+ employees may not discriminate against an employee on the basis of sexual and reproductive health decisions. With fines of up to $250,000, hiring/reinstatement, back/front pay and both compensatory and punitive damages, modify your policies and train your supervisors now. Examples of sexual and reproductive health decisions are family planning, sterilization, abortion, testing for pregnancy or HIV, fertility procedures and more.
- **Ohio (Cincinnati) –** Effective March 2020, employers of 15+ employees may not ask job applicants for wage or salary history information or rely on that information when making hiring decisions or setting starting pay. This type of ban is already in place in CA, CT, DE, HI, MA, OR and VT plus NYC, Philadelphia (legal challenge pending), San Francisco, Puerto Rico and several counties in NY state.

Until next time,

Audrey E. Mross

Labor & Employment Attorney

Munck Wilson Mandala, LLP

amross@munckwilson.com www.munckwilson.com

972.628.3661 (direct) 972.628.3616 (fax) 214.868.3033 (cell)

12770 Coit Road, Suite 600 Dallas, TX 75251

Follow me on Twitter @amross