

October 27, 2005

## Can Employers Alter Hiring Policies to Cut Health Costs?

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 Staff Reporters of THE WALL STREET JOURNAL  
 October 27, 2005; Page B1

An internal **Wal-Mart Stores Inc.** memo proposing that the retailer cut its health-care costs by discouraging unhealthy people from applying for jobs raises questions about how far employers can legally go in preferential hiring.

Health-care costs are soaring, and employers are all too aware that relatively few workers are responsible for a significant chunk of those costs. Federal law prohibits not hiring workers because of disabilities, age or race. But whether or not employers can screen out other groups -- say, the obese -- is more of a gray area.

The Wal-Mart memo to the company's board of directors proposes incorporating physical activity in all jobs to discourage the infirm from applying. For example, the memo suggests that Wal-Mart arrange for "all cashiers to do some cart gathering." The memo also promotes health-savings accounts, which are funded by workers' pretax dollars and can be diverted to retirement accounts or rolled over to pay for health care the following year. Health-benefits specialists say these accounts are most appealing to younger, healthier workers.

### Healthy Help Wanted

To date, most actions that employers have taken to avoid high-risk employees involve anti-smoking measures.

- **Seattle's King County:** Health insurance discounts starting in 2007 for employees who do not smoke, are not overweight and don't speed.
- **Union Pacific:** Stopped hiring smokers in states where it's legal to do so.
- **Gannett:** In 2006, will add \$50 to premiums for smokers who don't attend a cessation program.


Source: the employers

"It will be far easier to attract and retain a healthier work force than it will be to change behavior in an existing one," says the memo, which was previously disclosed in the New York Times yesterday. "These moves would also dissuade unhealthy people from coming to work at Wal-Mart."

With health-care costs rising an average of 15% a year since 2002, corporations are increasingly concluding it will be difficult to make headway without addressing the minority of employees who account for the majority of health-care costs.

Health-care company **WellPoint Inc.**, says that of its 29 million customers, 7% account for 63%

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of the company's medical costs.

Companies initially tried to rein in costs by providing incentives to employees to change their lifestyles, including offering free gym memberships and on-site smoking-cessation programs. Recently, however, companies have become more punitive. **General Mills Inc.**, for instance, imposes a \$20 a month surcharge on the health benefits of smokers. **Union Pacific Corp.** weeds out potential high-cost workers by not hiring smokers in states where it is legal to do so. And **Northwest Airlines** recently told employees that next year a surcharge will be assessed "on those employees/spouses/domestic partners who use tobacco products."

The Wal-Mart memo seems to go beyond that by focusing on the hiring process. Susan Chambers, Wal-Mart's executive vice president of benefits and the memo's author, says Wal-Mart isn't trying to discourage the unhealthy from working there but to encourage the work force to be healthier. The shopping-cart example, she says, "is a way to encourage more physical activity."

But some workers' groups don't see it that way. "When you add physical requirements to jobs that don't need them, you begin to weed out a whole pool of people such as the elderly, the obese, people with pre-existing medical conditions," says Andrew Stern, president of the Service Employees International Union, which represents 1.8 million workers, including health-care workers, janitors and security guards. "I think this memo steps over the line of what's legal," he adds.

But employment lawyers and health consultants maintain that exactly what employers can and can't do to insure a healthy work force falls into a legally unsettled area.

"It is a danger zone when you start depending on stereotyping," says Jennifer Rubin, an employment attorney for the firm of Mintz Levin. "If an employer reaches a conclusion that they are not going to hire an applicant because they perceive that the applicant is unhealthy or old, it is a potential violation of federal and state laws."

She says "potential violation" because the law isn't necessarily clear about what incentives an employer can use to minimize health-care outlays. In some situations, she adds, an obese person is considered disabled under the law and thus protected by the Americans With Disabilities Act. State and federal laws are also specific about what kinds of criteria constitute discrimination, such as asking potential applicants to be tested for some specific diseases before taking a job.

Gerry Shea, president for governmental affairs for the AFL-CIO, says some employers are already changing job descriptions to include physical labor so they can weed out unhealthy or older applicants who have the potential to be a larger drain on health benefits in the long run. "It isn't illegal," he says.

There are other potential loopholes. The point of federal and state laws against discrimination is to prevent stereotyping, experts say. But as it stands, an employer can ask what an applicant does during off-work hours on an employment application. People who respond that they love sitting at home reading books could legally receive preference over those who say they enjoy hang gliding or other extreme sports that present more of a risk in terms of health-insurance claims.

With 17% of Wal-Mart's work force age 55 or older, the company has always prided itself on hiring older employees, many of whom are hired on after retiring from other jobs. The internal memo mentions that Wal-Mart's work force is getting sick at a higher rate than the national

average, in part because the retailer's work force is aging faster than the nation as a whole. It cites particular growth in obesity-related diseases, such as heart disease and diabetes.

In addition, the memo says that many Wal-Mart workers, particularly lower-income ones, consume health care inefficiently, overusing emergency-room and hospital care. One result: Wal-Mart's benefit costs grew significantly faster than sales, rising from 1.5% of sales in 2002 to 1.9% in 2005. "With 1.3 million associates, we are no different than the trends we see in the general population," says Wal-Mart spokeswoman Sarah Clark.

If that will change depends on whether Wal-Mart's board approves the memo's proposals when it meets in November.

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