

Benefits Alert

May 2009

Summertime (Soon) And The Livin' Is Anything But Easy

These are stressful times. *Evidence:* Employees aren't taking vacation, according to a survey conducted by The Hartford Financial Services Group, Inc. The survey results revealed that during 2008, 45% of employees took five or fewer paid time off days. Employees will probably take even fewer days off this year. Inasmuch as stressed employees aren't productive workers, this isn't particularly good news for employers. *Reason:* Employees who don't take a vacation risk burn out, which could result in higher medical costs and turnover. Moreover, a hidden financial liability looms for employers when employees rarely take vacation — state laws that require that employees' pay for unused accrued vacation days be counted as wages for final pay purposes.

VACATION POLICIES

Most companies have vacation policies. The issue is whether they're effective at getting employees to take time off.

- **Create an environment that facilitates vacations.** This should require no big policy change. Managers hold departmental meetings at which tasks are reorganized around employees' vacation plans; employees, therefore, are encouraged to schedule time off. This strategy works best from the top down; executives must set the example. *Key:* Time off must be real time off. Employees must leave their electronic leashes at home. You can help by blocking employees from accessing their e-mail and voice mail while they're away.

- **If employees shun traditional vacation, try champi-**

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oning long weekends. Mondays or Fridays off, or Mondays and Fridays off, appeal to many employees. Long weekends are fine, provided scheduling is done in an orderly way. But even employees who take lots of long weekends can still wind up with unused vacation time. *Idea:* You can amend your 401(k) plan to allow employees to defer the value of those unused days into their 401(k) accounts, up to the statutory limits on pre-tax contributions, of course. *Watch out:* The traditional 401(k) non-discrimination testing rules would apply to these contributions.

- **Take vacation into ac-**



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Final 401(k) Auto-Enrollment Regs Released

The IRS has issued final regulations covering qualified automatic contribution arrangements (QACAs) and eligible automatic contribution arrangements (EACAs). Since these 401(k) plans are auto-enrollment plans, employees must opt out to receive their full pay. *Caution:* The IRS specified that the regs don't affect auto-enrollment plans that aren't intended to be QACAs or EACAs.

QUALIFIED AUTOMATIC CONTRIBUTION ARRANGEMENTS

Key features of QACAs include uniform pre-tax deferrals,

beginning at 3% of compensation through the end of the plan year following the year of initial participation and ending at 6% of compensation; an employer contribution requirement; and two-year vesting for employer contributions. The regs clarify that the uniform deferral requirement isn't violated if an employee's pre-tax deferral amount increases mid-year due to a salary increase.

Employees who didn't participate in the 401(k) plan before it became a QACA must be auto-enrolled into the QACA. The regs also allow QACAs to auto-enroll rehired employees if they terminated in one plan

year, remain terminated for a full plan year, and are rehired in a later plan year. *Who can't be auto-enrolled:* employees who have 401(k) elections in effect (even if the election is for \$0 or 0%) before the plan becomes a QACA, and employees who make an affirmative election to participate in the 401(k) plan after being auto-enrolled. The regs go further, by permitting all employees' elections to participate in the 401(k) plan to expire annually, so that those who fail to reelect must be auto-enrolled.

Before any contribution is made on their behalf, auto-enrollees must be provided with notice at least 30 days (and not longer than 90 days) before the beginning of the plan year. New hires who are eligible to participate upon hire must receive

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Summertime (Soon) And The Livin' Is Anything But Easy (cont.)

count during performance reviews. Employees shouldn't be given glowing performance appraisals because they're always there. Instead, employees should be evaluated on the quality of their work, which includes taking vacation. You can also couch this in terms of time management (e.g., what's wrong with Harry if he can't take his vacation?).

- **Switch to a use-it-or-lose-it policy.** Employees won't be so quick to pass up vacation if they won't be paid for unused time or can't carry over unused time into the next year. You can allow a small amount of time to be carried over. *Caution:* Some states don't allow these types

of vacation policies.

DITCH VACATION POLICIES FOR MORE PRODUCTIVE EMPLOYEES

Having a vacation policy that dictates how many days employees can take off is so, well, 20th century. The latest trend is to allow employees to take as much time off as they want, provided they get their work done beforehand. Companies that have adopted this no-strings-attached policy have seen turnover plummet and productivity increase. In addition, they report no vacation abuse — employees don't take any more time off than under traditional vacation policies, since they wouldn't be able to

meet their performance goals.

Unstructured vacation policies don't mean anything goes, however. The key is establishing clear measurable performance goals for every employee. Measurable performance goals include, for example, billable hours, client retention rates, or projects completed. In addition, employees don't just disappear; they must let their managers know their plans, just as a courtesy. Finally, unstructured vacation policies should apply to all employees, regardless of rank or tenure. That way, employees who remain at work aren't resentful of those who are on vacation, since the shoe will be on the other foot, eventually. ♦

IRS/DOL Shed More Light On COBRA Subsidy

The IRS has issued guidance that clarifies several tricky aspects of the COBRA subsidy, including what constitutes an involuntary termination. The Department of Labor (DOL) has released revised model COBRA notices.

INVOLUNTARY TERMINATIONS

Both the involuntary termination and eligibility for COBRA must occur between September 1, 2008, and December 31, 2009. Involuntary termination is interpreted broadly and applies to almost any termination, provided it occurred at the employer's behest. Employees who are fired or laid off clearly qualify. Early

retirement incentives, layoffs or furloughs with recall rights, and requests for voluntary resignations in anticipation of a layoff meet this standard, as well. Death isn't an involuntary termination, but an employee's death after he/she qualifies for the subsidy won't cut off the subsidy for other recipients.

Constructive voluntary terminations qualify if employees quit due to a material negative change in the employment relationship. For example, an employer closes one office and opens another office in another state. Employees who don't move have been involuntarily terminated. *Also involuntary:* employees who quit in response

to a reduction in work hours, and employees who worked under short-term contracts that their employer didn't renew.

DOMESTIC PARTNERS

Domestic partners don't qualify for the subsidy, so amounts employees paid to cover their domestic partners must be excluded from the subsidy. This is true even if the coverage is provided under a state's similar COBRA law. *IRS:* If the cost of covering domestic partners adds to the cost of covering assistance-eligible individuals, the incremental cost is ineligible for the credit.

Example: Jennifer's health insurance covers herself, her child, and Ben, her significant other. Her monthly cost for self-plus-two coverage is \$800. However, under her former employer's plan, she would only have to

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Final 401(k) Auto-Enrollment Regs Released (cont.)

notice prior to the pay date for the pay period that includes the date they become eligible to participate in the QACA.

ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENTS

EACAs and QACAs are similar but not identical. The deferral percentages for EACAs aren't the same, but the notice requirement that EACAs must fulfill is. EACAs' main feature is that employees may opt out by requesting corrective distributions. Employees who are allowed to elect out of the EACA have 90 days after the

first default contribution to do so. To ensure that these corrective distributions fall within the 90-day window, EACAs can limit the period during which employees may make elections to 30 days. *Key difference from QACAs:* EACAs may specify the employees who must be auto-enrolled in the plan documents. EACAs, therefore, need not apply to all employees who are eligible to participate in the 401(k) plan.

These provisions will test your communication skills in several crucial ways.

- Even though employees want their money back, the

regs clarify that plans need not include a provision that allows default contributions to be returned to employees. Employees, therefore, could only stop future default deferrals.

- Employees may also not get back all of their money. Corrective distributions are adjusted for allocable gains and losses, and are subject to generally applicable fees.

This portion of the final regs will become effective for plan years beginning January 1, 2010. EACAs must operate in good faith prior to the effective date. ❖

IRS/DOL Shed More Light On COBRA Subsidy (cont.)

pay \$600 for self-plus-one coverage. Her subsidy is based on a monthly payment of \$600. She pays \$410 ($\$600 \times 35\% = \$210 + \$200$ for Ben's coverage).

NON-ASSISTANCE-ELIGIBLE INDIVIDUALS

Employees' spouses, ex-spouses, and dependents are qualified beneficiaries, and they have an independent right to elect COBRA at the subsidized rate. However, they aren't eligible for the subsidy if a qualifying event, other than involuntary termination, preceded the involuntary termination (they may elect COBRA at the full 102% rate).

SUBSIDY PERIODS

If a group health plan requires employees to pay a prorated amount of the monthly COBRA premium if they lose coverage on any day other than on the last day of a month, then the subsidy period begins with the first partial month of COBRA coverage, provided they lost coverage after February 17, 2009. On the other hand, for employees electing subsidized COBRA coverage under the special election rules, the first period of subsidized coverage is the month beginning March 1, 2009; the partial-month rule doesn't apply.

The subsidy lasts for nine months. But if the employer picks up some or all of the COBRA tab for a certain amount

of time, the subsidy period may be impacted. *Here's how:* If the plan doesn't extend the COBRA election period, but charges employees at the same rate as active employees for, say, the first 90 days, employees would pay 35% of the full rate for those first three months, then 35% of the full COBRA premium (i.e., 35% of 102%) for the next six months. *Flip side:* If the plan extends employees' election periods by paying for the first 90 days of COBRA at the same rate as active employees, the subsidy doesn't begin until after the 90 days lapse. Employees then make their COBRA elections and have nine months of subsidized coverage. *Twist:* Employees may not be eligible for any subsidy if the employer's payment extends their COBRA election periods beyond December 31, 2009. *Reason:* Employees must be involuntarily terminated and eligible to elect COBRA by December 31, 2009.

NOTICE REQUIREMENTS

The DOL has issued model notices that meet the new notice requirements.

- **General Notice (full version).** Plans subject to federal COBRA must send this notice to *all* qualified beneficiaries, not just to covered employees, who experienced *any* qualifying event at any time from September 1, 2008, through December 31, 2009, **and** who either have

not yet been provided an election notice, or were provided an election notice on or after February 17, 2009, that didn't include the additional information required by the American Recovery and Reinvestment Act (ARRA). This full version includes information on the subsidy, as well as information required in a COBRA election notice.

- **General Notice (abbreviated version).** This notice includes the same information as the full version regarding the availability of the subsidy and other ARRA rights. It doesn't include the COBRA coverage election information. It may be sent in lieu of the full version to individuals who are currently paying COBRA as a result of experiencing a qualifying event on or after September 1, 2008.

- **Alternative Notice.** Group health insurance issuers must send this notice to individuals who became eligible for continuation coverage under a state law (i.e., mini-COBRA).

- **Notice in Connection with Extended Election Periods.** By April 18, 2009, plans subject to federal COBRA should have sent this notice to any subsidy-eligible individual, or any individual who would be a subsidy-eligible individual if he/she had elected COBRA, had a qualifying event at any time from September 1, 2008, through February 16, 2009; and either didn't elect COBRA, or elected it but later dropped it. ❖