

Fall 2011

Communicating with Employees on FMLA Leave	2
Partial Plan Termination	3
HIPAA Update	4
10 Common Compensation Mistakes	5
Arbitration	7
Key IRS Benefit Plan Limits For 2012	9



Human Resources Newsletter

HR Focus



What About Those Holiday Parties?

by Steven A. Palazzolo: spalazzolo@wnj.com

I saw a sign on a website the other day that said something like this: *“We will deck the halls in November. We prefer to celebrate one holiday at a time.”* I thought that

was kind of funny, particularly in light of the holiday advertisements already on TV in early October. And while it may be too early to put up the holiday decorations, it is not too early to start thinking about that old office tradition, the Holiday Party. And for HR people that means thinking about how you are going to keep the company out of trouble when one of your valued employees has a bit too much of the old holiday cheer.

TO SERVE OR NOT TO SERVE? THAT IS THE QUESTION.

More employers each year are seriously considering not serving alcohol at holiday parties. Instead, they plan a more family-friendly party without alcohol. (Remember, *Mad Men* is a TV show; not a lifestyle.)

IF YOU ARE GOING TO SERVE.

Don't forget you may be held liable if you serve an employee who then gets in a car accident. Increasingly courts are finding social host liability for a host who

continued on page 6



The Importance of Communicating with Employees on FMLA Leave – Sometimes You Can’t Win for Losing

by Robert A. Dubault: rdubault@wnj.com

No employer would deny the value of regularly communicating with employees on matters affecting the workplace, whether it be changes to insurance benefits, work schedules or policies and procedures. Doing so helps ensure your employees are meeting your expectations and that they know what to expect as it relates to their employment. Often times such communications are funneled through one department, such as Human Resources, to ensure accuracy and consistency. The same benefits that attend to communicating with your active employees also carry over to those who are off work on a leave of absence, including those employees who take leave under the Family and Medical Leave Act (FMLA). Because the FMLA prohibits employers from “interfering” with an employee’s right to take leave under the Act or “retaliating” against an employee who exercises his FMLA rights, employers must carefully manage communications with employees who take or wish to take time off under the Act. Several recent court cases bear this out.

In *Terwilliger v. Howard Memorial Hospital*, 2011 U.S. Dist. LEXIS 8577 (W.D. Ark. Jan. 27, 2011), an employee who received numerous calls from her supervisor while off on FMLA leave was allowed to pursue her claim that the supervisor’s conduct interfered with her right to take leave. The employee took approximately 11 weeks of FMLA leave for a back condition and subsequent surgery. While she was off, her supervisor called her weekly to see when she was going to return to work. During one call, the employee asked if her job was in jeopardy, and the supervisor replied that she should return to work as soon as possible. According to the employee, the supervisor also told her not to tell anyone else that the supervisor had informed the employee of her right to take FMLA leave. The employee returned to work and later was fired for attempted theft from a co-worker’s desk. Although the court dismissed the claim relating to her termination (finding that the employer had a good-faith belief that the employee had engaged in conduct that warranted termination under its work rules) and although there was no evidence that the employee returned to work before being fully released by her doctor, the court found that the supervisor’s weekly calls to the employee could have “chilled” the employee in the exercise of her legally protected right to take leave.

In contrast, in *Hofferica v. St. Mary Medical Center*, No. 10-6026 (E.D. Pa. Sept. 20, 2011), an employee who was terminated after she exhausted her FMLA complained that her supervisor interfered with her right to take FMLA leave by not returning her phone calls. In particular, the employee alleged that her supervisor’s failure to return her calls was evidence of the employer’s “ongoing antagonism” toward her for taking FMLA leave. The court held that the employee should be allowed to



“It is important to remember that the FMLA imposes a number of obligations upon employers to communicate with employees about their rights and obligations both before and during a leave period.”

proceed with her claim and given the opportunity to prove that her supervisor’s refusal to return her calls was evidence of FMLA animus sufficient to support her retaliation claim.

Finally, in *Gardner v. Great Lakes Cheese Co.*, No. 1:2010-cv-00183, (N.D. Ohio, Sept. 28, 2011), an employee who exhausted her FMLA leave was terminated for exceeding the maximum number of points allowed under her employer’s attendance policy. She claimed that despite her request, her employer’s failure to provide her with an update on how much FMLA leave she had used (as required by regulation 825.300(d)(6)) interfered with her right to take

Partial Plan Termination...

What's That?



by Lisa B. Zimmer: lzimmer@wnj.com



If you have had a substantial reduction in your workforce *and* sponsor a retirement plan, you need to learn what a partial plan termination is right now. The IRS is actively pursuing employers whose retirement plans may have experienced a partial termination event. It is important to note that the partial termination rules apply to both defined contribution and defined benefit plans.

EMPLOYEE PLANS COMPLIANCE UNIT: CURRENT PROJECT – PARTIAL TERMINATION/PARTIAL VESTING

The IRS Employee Plans Compliance Unit's Partial Termination/Partial Vesting Project focuses on information from employers' Form 5500 (Annual Return/Report of Employee Benefit Plan) filings that indicate a partial termination event might have occurred. The goal of this project is to determine if the employers are following the requirements of the plan document and related law/IRS guidance on partial terminations.

PARTIAL PLAN TERMINATION DETERMINATION

A partial termination occurs when a group of employees who have previously been covered by a retirement plan are involuntarily removed from participation in the plan and the resulting reduction in the participant group is significant. The determination of whether a partial termination has occurred is a fiduciary decision that is generally made by the plan administrator or administrative committee. It is often difficult for the plan fiduciary to determine whether a partial determination has occurred, and if it has, when it occurred. The IRS has issued guidelines for fiduciaries to follow, but it is still an individualized determination that the plan fiduciary must make based on the employer's unique facts and circumstances.

Any of the following events could result in a partial plan termination:

- Plant or facility shutdown;
- Layoffs, downsizing or restructuring; or
- Sale that results in the exclusion of a group of participants from the plan.

The IRS has indicated that if 20% or more of participants turn over during a short period of time, there is a rebuttable presumption that a partial termination has occurred. Depending on the facts and circumstances, a turnover rate of less than 20% could be a partial termination, while a turnover rate greater than 20% may not.

Calculating the Turnover Rate:

The turnover rate is determined by dividing the number of participants with an "employer-initiated severance from employment" during the "applicable period" by the sum of (1) all participants at the start of the applicable period and (2) new participants added during the applicable period. All participants, both vested and non-vested, must be taken into account in calculating the turnover rate. (Remember, for 401(k) plans, an employee is considered to be a participant if he is eligible to make elective deferrals, regardless of whether the employee actually makes them.)

Employer-Initiated Severance from Employment:

The IRS guidance states that an "employer-initiated severance from employment" generally includes any severance from employment other than a severance due to death, disability or retirement on or after normal retirement age. The IRS presumes all other severances from employment are employer-initiated, unless the employer is able to verify otherwise. The IRS further presumes that a severance from employment is employer initiated even if caused by an event outside the employer's control, such as depressed economic conditions. Purely voluntary quits and terminations for

continued on page 10



HIPAA Update: New Regulations in the Works as HHS Ramps Up Enforcement

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ENFORCEMENT ACTIVITY

The Office for Civil Rights (OCR) – the agency within the Department of Health & Human Services (HHS) that enforces the HIPAA privacy and security rules – has been ramping up its enforcement activities. Historically, OCR pursued an informal enforcement strategy. While it would investigate every complaint that it received, it would seek voluntary, confidential compliance agreements from those who violated the law, generally without any financial penalties. In fact, from 2003 through January 2009, OCR only resolved two cases with financial settlements.

In amending HIPAA, however, Congress sent a message to OCR that it has not been tough enough in enforcing HIPAA. The HITECH amendments require OCR to proactively conduct compliance audits and dramatically increase the maximum penalties for HIPAA violations from a maximum of \$25,000 per violation per year to a maximum of \$1.5 million per violation per year. HITECH now also allows OCR to keep monetary settlements and penalties to help fund its enforcement activities. OCR has responded by creating a new, high-level office for HIPAA enforcement and has become more aggressive in seeking monetary penalties. Beginning in July 2010, OCR's enforcement activities have included the following:

- \$4.3 million penalty against a medical clinic that ignored numerous requests from patients seeking to exercise their individual rights of access to their medical records;

- \$1 million financial settlement with a hospital following the loss of patient records by an employee on the subway, after OCR determined that the hospital did not have policies and procedures governing removal of records from the hospital's premises;
- \$865,500 financial settlement with a medical school hospital relating to improper access of patient records by nosy employees;
- \$35,000 financial settlement with a healthcare company that used patient information for improper marketing purposes; and
- \$1 million financial settlement with a pharmacy chain for improper disposal of patient information (for violations occurring before HITECH's new enforcement scheme applied.)

To make sure that the word gets out when OCR resolves a case with a financial settlement, it issues press releases and detailed allegations of the HIPAA violations involved. Where OCR seemed reluctant in the past to publicize its enforcement activities, it now seems eager to make high-profile examples of organizations that have not adequately implemented HIPAA. The stakes have never been higher for organizations with incomplete or outdated HIPAA policies and procedures.

NEW REGULATIONS

Since Congress passed the HITECH amendments to HIPAA back in 2009, HHS has been working on updating its HIPAA privacy and security rule regulations. Progress has been interrupted by health care reform, but HHS officials have stated that their goal is to get new HIPAA regulations out by the end of the year. If they succeed, these revised regulations will go into effect in the middle of 2012. Some of these revised regulations will impact employers who sponsor group health plans, such as new requirements for business associate agreements, revisions to the Notice of Privacy Practices and possibly some changes



“The stakes have never been higher for organizations with incomplete or outdated HIPAA policies and procedures.”

continued on page 8

10 Common Plan Compensation Mistakes



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Calculating compensation doesn't seem like something that should trouble retirement plan administrators and sponsors. Yet, it is one of the most common errors made in administering retirement plans and doing it accurately requires significant attention to detail. Below is a list of ten common mistakes made when calculating plan compensation for defined contributions plans.

1. Using Box 1 or Box 5 Wages. If your plan document says you use a W-2 or FICA definition of compensation, that does not mean you can automatically use a participant's W-2 box 1 or box 5 wages for compensation. Usually these definitions require you to add or subtract additional items. For example, a participant's 401(k) elective deferrals (other than Roth deferrals) generally must be added back to the participant's W-2 box 1 wages to calculate plan compensation.

2. Deferrals of Severance Pay. Pay related to an individual's employment termination cannot be included in compensation for 401(k), 457(b) or 403(b) deferral purposes. The IRS has indicated severance pay is not pay to an employee and only employees may make tax-free deferrals. This also means an individual cannot elect to defer payments made after employment terminates, except that the individual may defer regular pay, vacation pay and sick leave pay if it is paid before the end of the year employment terminates or, if later, within 2 1/2 months of termination.

3. Failure to Follow Plan Terms. Every retirement plan document must define compensation. It is necessary to know how your plan document defines it and follow that definition. You can be penalized for using a definition that is inconsistent with the terms of the plan document and you may end up giving employees incorrect contributions if you are using the wrong definition.

4. Inconsistent Payroll Practices. If you have one plan document covering employees at multiple locations, each location should be calculating compensation the same way. Plan documents generally do not address how each specific item of pay should be handled, and some types of pay could arguably fall in more than one category (e.g., one location may classify a gift card as a fringe benefit and another as a bonus.) Compensation must be calculated uniformly with respect to all employees covered by a plan unless the plan document requires otherwise.

5. Discriminatory Definition. A compensation definition will not be discriminatory if it falls within one of the safe harbor definitions based on W-2 pay, FICA pay or pay under Code Section 415. Any deviation from a safe harbor definition must not discriminate in favor of highly compensated employees and must be tested annually to ensure no discrimination is occurring. For example, a plan that excludes bonuses from compensation must test its definition annually because all of the safe harbor definitions require the inclusion of bonuses.

6. Incorrect Period of Compensation. It is common to use the wrong time period for calculating compensation. Some situations require looking at plan year rather than calendar year compensation. Other situations require using only compensation for the period an individual is eligible to participate in the plan as opposed to the individual's compensation for the whole year. For example, in determining compensation for a top heavy contribution, it is necessary to calculate compensation for the entire year.

7. One Definition for Multiple Purposes. Plans require administrators to calculate compensation for multiple purposes, including deducting salary deferrals, figuring employer contributions, determining compensation or deferral limits, running non-discrimination tests and calculating top heavy contributions. The definitions for each purpose may differ, so it is important to know how many ways compensation must be calculated for a particular plan. Further, plans sometimes can be drafted to minimize the number of calculations required and simplify administration if there is flexibility on what should be included or excluded.

continued on page 6

8. Exclusion of Non-Cash Benefits. Sometimes a plan document's definition of compensation will require inclusion of the value of non-cash benefits an employee receives. These amounts are often overlooked when calculating compensation to determine percentage salary deferrals and/or the amount of employer contributions for participants.

9. Failure to Deduct Deferrals From Extra Payrolls. It is frequently forgotten that elective deferrals must be deducted from extra payrolls or special payments to employees where the pay falls within a plan's compensation definition. For example, problems often arise when running extra payrolls to pay bonuses that should be included in compensation. Every time compensation is paid, regardless of the process, payroll processors should be trained to consider whether deferrals must be deducted from the compensation.

10. Earned Income of Self-Employed Individuals. Special rules apply to the calculation of compensation for self-employed individuals. Compensation must be based on the individual's earned income. Complicated formulas are then applied to

adjust that income based on things like the individual's FICA liability and any "employer" contributions the individual is eligible to receive. These issues tend to arise in plans sponsored by employers that are taxed as S corporations or partnerships.

If you suspect you are making a mistake in calculating compensation, you do not have to wait for your auditor, the IRS or a participant to discover it. We can review your compensation definition when your plan is amended or through a preventative audit. If we find an issue before someone else does, correction will be less painful and costly. Please contact Heidi Lyon or any other member of the Employee Benefits Practice Group for more information.

HOLIDAY PARTIES continued

serves excessive alcohol at a social event. Don't forget that most likely you are not going to be protected by workers' compensation if an employee gets hurt. The exclusive remedy provision of the Workers' Disability Compensation Act will not be available if the injury occurs at a social event that was not a required part of work. You also want to be careful who you serve. Remember, it is not legal to serve alcohol to underage employees.

TAKE CHARGE.

As you plan this year's holiday party, take proactive steps to protect yourself:

- Distribute free taxi passes for rides home that evening and back to work the next day.
- Reward employees who make plans to ride with a sober designated driver.

- Limit the number of alcoholic beverages an employee consumes by providing each employee with a set number of beverage tickets and ensure that tickets are the only means of obtaining alcoholic beverages.
- Designate a member of management who may be called upon to "monitor" employee drinking and assist anyone who has a need for special transportation that evening.

If you have any other questions, give us a call.
Happy Holidays!





If You Want Your Employees to Arbitrate, Be Sure to Tell Them

by Steven A. Palazzolo: spalazzolo@wnj.com

We are going to do something in this newsletter that I try not to do very often.

We are going to reprint something that I wrote for my blog. What blog you say? Well, my blog. Yes, I write a blog. It's called Zo's Michigan Employment Law Blog and you can find it on our firm's website at: <http://zomichiganemploymentlaw.wnj.com/>.



“If you want your employees to be required to arbitrate disputes, don't bury that requirement in your employee handbook.”

BLOG POST – SEPTEMBER 1, 2011

I'm not sure how many of you have arbitration agreements tucked away in your employee handbooks, but if you do, you might want to take a look at an opinion from the 6th Circuit issued Tuesday .

In *Hergenreder v. Bickford Senior Living Group, LLC*, which was decided on August 30, 2011, the 6th Circuit found that a reference to an arbitration requirement contained in an employee handbook did not bind an employee who sued Bickford for violation of the Americans with Disabilities Act. The court stated: “Because there is no indication that Hergenreder was notified of the existence of the arbitration agreement, much less that she manifested an intent to agree to its terms,” Ms. Hergenreder could not be held to its terms and she was allowed to sue in federal court rather than arbitrate.

When she was hired, Ms. Hergenreder was asked to sign a bunch of documents, including an acknowledgment that she had read and understood the employee handbook. According to the court: “The Handbook is divided into sixteen different sections, covering a wide variety of topics relevant to Hergenreder's employment. It begins by stating in Section I that “[i]t will acquaint you with the policies and procedures that apply to your employment,” but also that “[t]his handbook is intended as a summary only and is not a contract between Bickford Cottage and its employees. A full copy of Bickford Cottage's Personnel Policies is located in the Director's office and may be viewed by any employee.” Both parties to the suit agreed that the handbook was not a contract of employment.

“What the parties did not agree on, however, is the significance of one sentence within Section XII, which is entitled “Employee Actions,” and which provides, in full, as follows: “Dispute Resolution Process: Please refer to the Eby Companies Dispute Resolution Procedure (DRP) for details.”

Bickford argued that this sentence in the handbook, which referred to a policy that was not in the handbook, compelled Ms. Hergenreder to arbitrate any employment dispute she had with Bickford, including her ADA claim.

The court agreed with Hergenreder and basically held that an agreement to arbitrate was not formed because there was neither an offer to enter into an arbitration agreement nor an acceptance of that offer. The language in the handbook and the handbook acknowledgment simply did not, according to the court, amount to a valid contract to arbitrate.

So, what is the moral of this story? If you want your employees to be required to arbitrate disputes, don't bury that requirement in your employee handbook. Instead, have a separate agreement to arbitrate and make sure the employee signs that agreement.

FMLA leave. According to the plaintiff, she had asked for such updates on multiple occasions. Although her employer responded to those requests on previous occasions, it failed to do so only a few weeks before she was terminated. The employee thus claimed that she was prejudiced by not receiving the requested information. While not necessarily agreeing with the employee's argument, the court nevertheless allowed her to proceed with her FMLA interference claim.

So what's an employer to do? If you call an employee on leave too often, you might be found to have interfered with the employee's right to take leave and if you don't call, that might be used as evidence that you harbored some animus toward the employee for taking leave. Quite simply, someone at the company (preferably Human Resources) who understands the FMLA should be responsible for coordinating all communications with an employee who is off work on leave. That can help prevent an employee from receiving too many calls from a supervisor (or multiple supervisors) and it can help prevent the conversations from straying too far into work issues. After all, the employee is supposed to be "off work," and if he is getting repeated calls from the office on work-related issues, can you permissibly count that time as "leave time"? Also, coordinating the communications through Human Resources can help ensure that impermissible statements are not made or improper questions asked.

Finally, it is important to remember that the FMLA imposes a number of obligations upon employers to communicate with employees about their rights and obligations both before and during a leave period. Failure to comply with those obligations can, under the wrong circumstances, constitute interference with the employee's right to take leave. While not legally required, we think it advisable to communicate with an employee who is about to exhaust his or her FMLA leave as to how much leave remains and what will happen after the FMLA leave is exhausted. If the employee wants to ask for additional leave

under your internal policies or under the Americans with Disabilities Act (ADA), this should prompt him to do so and the issue can be appropriately resolved beforehand. That is certainly much less likely to result in a surprise to the employee or a lawsuit for the employer than might be the case when the employee receives an after-the-fact letter telling him that he was terminated two weeks ago for failure to return from leave or violation of your attendance policy.

"Often times such communications are funneled through one department, such as Human Resources, to ensure accuracy and consistency."

Leaves of absence under the FMLA and ADA can be extremely complicated. If you have questions about these situations, or about FMLA or ADA compliance in general, please let us know.

HIPAA UPDATE continued

to breach notification procedures. Once the new rules come out, employers will likely have six months to implement changes to policies and procedures and an extra year to amend business associate agreements.

If revised HIPAA regulations come out by year end, employers who sponsor self-insured health plans should plan to take the time in the Spring of 2012 to review their HIPAA policies and procedures, business associate agreements and other related documents to determine whether they need to be updated. As part of this review, consider whether company policies contain any gaps or outdated practices that are no longer followed. Also consider whether the policies:

- set conditions on how and when an employee can take health information from the office;
- establish parameters on access of health information from smartphones, tablets and other portable and easily lost devices; or
- place restrictions on use of health information with public cloud computing services.

"... employers will likely have six months to implement changes to policies and procedures."

Timely review may prevent a HIPAA nightmare if OCR ever comes to investigate an incident.

If you need assistance with HIPAA compliance, Warner's Employee Benefits Practice Group can help. We have extensive experience with HIPAA compliance issues and can assist you in updating your HIPAA policies and procedures.

Key IRS Benefit Plan Limits For 2012

The IRS recently released its 2012 employee benefits limitations for retirement plans. Earlier this year the IRS issued the 2012 HSA/HDHP adjustments. The following chart lists common limitations relevant for many employers.

LIMITATION	2012	2011
Retirement Plans		
Qualified Retirement Plans - Annual Compensation Limit	\$250,000	\$245,000
Defined Benefit Plans - Annual Benefit Limit	\$200,000	\$195,000
Defined Contribution Plans - Annual Additions Limit	\$50,000	\$49,000
Catch-Up Contribution Limit	\$5,500	\$5,500
Highly Compensated Employee	\$115,000	\$110,000
Annual Deferral Limits		
• 401(k), 403(b), 457(b)	\$17,000	\$11,500
• SIMPLE plan	\$16,500	\$11,500
Social Security		
Social Security Wage Base	\$110,100	\$106,800
HSA/HDHP		
Annual Minimum Deductible		
• Single	\$1,200	\$1,200
• Family	\$2,400	\$2,400
Annual Out-of-Pocket Maximum		
• Single	\$6,050	\$5,950
• Family	\$12,100	\$11,900
Annual Contribution Limit		
• Single	\$3,100	\$3,050
• Family	\$6,250	\$6,150
Catch-Up Contribution Limit	\$1,000	\$1,000

cause, however, may be excluded from the turnover calculation, according to the IRS, based on information from personnel files, employee statements and other corporate records (which means it is extremely important to retain this type of supporting information, particularly in the event of an IRS audit).

The IRS has also indicated that an employer's normal turnover rate is another factor to be considered in determining whether a partial termination has occurred for an applicable period. For example, if an employer's historical turnover rate is 10% and the current year's turnover rate is 22%, the employer may be able to argue that no partial termination has occurred during the current year because the "true" turnover rate for purposes of the partial termination analysis is 12%. Information relevant to this determination includes the extent to which terminated employees were actually replaced and whether the new employees performed the same functions, had the same job classification or title and received comparable compensation.

Applicable Period:

The applicable period used in calculating the turnover rate is generally the plan year, but depending on the circumstances, may be less or more. If the plan year is less than 12 months, the current and immediately preceding plan year must be used. If there are a series of related employer-initiated severances from employment in different years, then the turnover rate must be calculated over the entire period.

AFFECTED PARTICIPANTS MUST BE VESTED

When a plan experiences a partial termination, all "affected participants" must be 100% vested in their benefits. There is no other consequence to a partial termination (i.e., a partial termination generally is not a distributable event, although the participants may be eligible for a distribution due to their termination of employment). Participants not affected by the partial termination remain subject to the plan's vesting schedule.

There is some debate about who is considered "affected" by a partial termination arising from a significant reduction in the participant group. The law says that upon a partial termination, the rights of all affected employees to benefits earned to the date of the partial termination must be fully vested. The IRS has interpreted this rule to mean that all participants who had a severance from employment during the applicable period, even those whose separation was voluntary, must be fully vested. While the IRS' position about who vests seems contrary to the intent of the partial termination rules (as is stated in both the statute and regulations) as well as the understanding of most employee benefits practitioners, the IRS' position has not yet been successfully challenged. And, the IRS is actively enforcing this position as part of the IRS Employee Plans Compliance Unit's Partial Termination/Partial Vesting Project.

RECOMMENDATIONS

It is important to remember that a partial plan termination can be triggered by a single significant event, such as a plant shutdown, or by a series of reductions in force throughout the year or over several years. When there is a good possibility that a partial termination has occurred, the best course of action is to deem a partial termination to have occurred and vest the affected participants.



“A partial termination occurs when a group of employees who have previously been covered by a retirement plan are involuntarily removed from participation in the plan and the resulting reduction in the participant group is significant.”



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