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HR Focus

HUMAN RESOURCES NEWSLETTER WINTER 2012

Is Your Harassment Policy Up-To-Date?

BY TARA KENNEDY
tkennedy@wnj.com

When was the last time you looked at your harassment policy or the last time you thought about it? If you can't remember, it's time to dust it off and review it.

Once again, the number of claims filed with the Equal Employment Opportunity Commission (EEOC) rose in 2011. Although the EEOC will not publish the number of claims filed during the 2012 fiscal year until next year, it is likely that the number of claims being filed hasn't lessened.

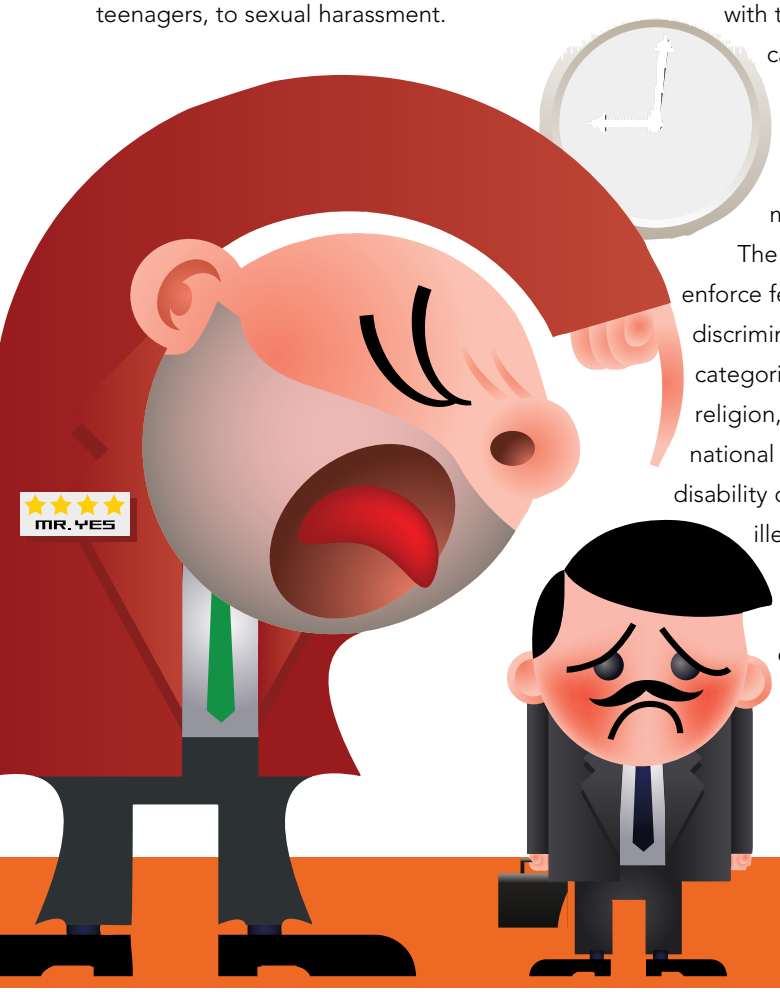
Within the last month, the EEOC has settled two large sexual harassment suits with *Sparks Steak House* and *Albuquerque-Area IHOPs*. In *Sparks Steak House*, the EEOC alleged that 22 male waiters were subjected to sexual harassment by one male manager over an eight-year period. Male-on-male sexual harassment suits are becoming more visible. The alleged conduct included groping, lewd sexual comments and inappropriate touching. The male waiters complained to their managers, but the harassment did not stop. Victims also suffered retaliation for their complaints by being given more difficult work assignments or being suspended. As part of the settlement, the restaurant

...Harassment Policy Up-To-Date?

must pay $600,000 in damages to the victims. Additionally, the restaurant must also establish a reporting hotline for discrimination, distribute an amended policy that prohibits sexual harassment and retaliation to all employees, conduct antidiscrimination training for employees, publish a public notice about the settlement and report all sexual harassment/retaliation complaints to the EEOC.

In *Albuquerque-Area IHOPs*, the EEOC alleged that one male manager subjected a class of women, including teenagers, to sexual harassment. The conduct included sexual comments, innuendo and unwanted touching. Some women were driven to quit their jobs because of the sexual harassment. The settlement includes $1,000,000 in damages and *IHOP* must not discriminate or retaliate against its employees. Additionally, *IHOP* must implement policies and practices that will provide a workplace that is free of sex discrimination and retaliation and *IHOP* must provide antidiscrimination training and notice of the settlement.

It is likely that 2013 will be another year of increasing discrimination claims. However, with this knowledge, you can prepare an ongoing defense by reviewing your harassment policies, procedures and management training. The EEOC is responsible to enforce federal laws that make discrimination against protected categories (such as race, color, religion, sex including pregnancy, national origin, age 40 or older, disability or genetic information) illegal. Retaliation against an individual for reporting harassment or discrimination based on a protected category is also illegal. In addition to federal laws, you should also be aware of state and local laws. For example, in Michigan marital status and height/weight are also protected categories. These categories should be incorporated into your harassment policy.



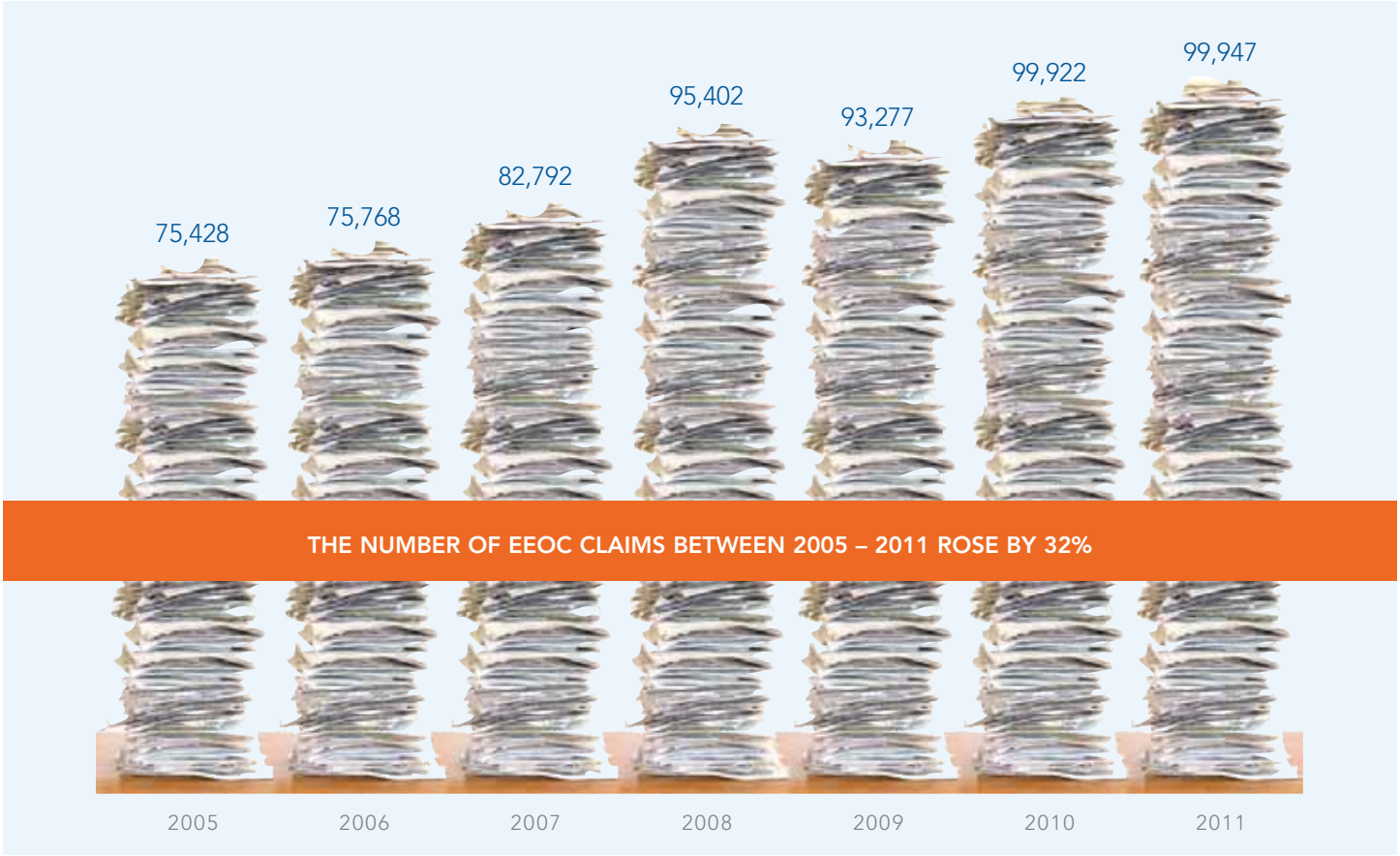
In addition to the protected categories, there are several other components that should be included in a harassment policy. A harassment policy should include:

- To whom the policy applies;
- A prohibition of harassment;
- A definition of harassment;
- Complaint procedures (including multiple people to whom the victim can report);
- Investigation procedures; and
- Prohibition against retaliation.

Once you review your policies to make sure they are current, look at your procedures for handling an investigation. Complaints should be handled in a timely manner and by an investigator who has no stake in the outcome. You will receive the best information and evidence if you respond early. You should treat every investigation

YOU SHOULD TREAT EVERY INVESTIGATION AS THOUGH IT MIGHT END UP IN COURT. THIS MEANS YOU NEED TO DOCUMENT EVERYTHING.

EEOC Claims



as though it might end up in court. This means you need to document everything.

As you begin your investigation, talk to the victim; explain that the investigation will be as confidential as possible, but that by necessity some information will be shared with the accused and the potential witnesses. Next, create a witness list. As you talk to the witnesses, you should inform them that they will not be retaliated against for participating in the investigation. As you conduct your interviews, look for inconsistencies. If inconsistencies develop, you may have to make credibility determinations. Once you complete your investigation, there are several more steps to take, including:

- Make a decision (if it is a tough one, consult counsel);
- Inform the parties of the outcome;
- Take corrective action; and
- Summarize the results of the investigation.

If you find that some sort of harassment did occur, you should follow up with the victim later to determine how things are going and to make sure that no retaliation occurred. Finally, you should consider whether to provide training to your employees to make sure that they understand your harassment policy and that harassment or discrimination of any kind will not be tolerated.

Whenever you do an investigation you should talk to us. In addition, we recommend that you review and distribute your harassment policy annually. If your policy needs to be updated or you would like harassment training, we can help.

Sixth Circuit Holds Severance Payments Are Not Taxable FICA Wages

BY LISA ZIMMER
lzimmer@wnj.com

Employers that made severance payments after 2008 as part of an involuntary reduction in their workforce might want to consider filing a claim for refund on the taxes paid and withheld under the Federal Insurance Contributions Act (FICA). (The FICA tax funds the Social Security and Medicare programs.) Earlier this fall, in *U.S. v. Quality Stores, Inc.*, the Sixth Circuit held that severance payments that meet the Internal Revenue Code (Code) definition of supplemental unemployment compensation benefits (SUB) payments are not taxable as wages under FICA.

FACTS OF THE CASE

In connection with a bankruptcy reorganization, Quality Stores closed all of its stores and distribution centers and terminated all of its employees. Quality Stores made severance payments to those whose employment was involuntarily terminated. Because the severance payments were gross income to the employees for federal income tax purposes, Quality Stores reported the payments as wages and withheld income tax. Quality Stores also withheld each employee's share of FICA tax and paid the employer's share.

Although Quality Stores collected and paid the FICA tax, it did not agree with the Internal Revenue Service (IRS) that the severance payments were wages for FICA purposes. Quality Stores took the position that the payments made to its employees were not wages but instead were SUB payments not taxable under FICA.

> Because SUB payments are not wages for federal income tax withholding purposes, even though they are subject to withholding, they are not wages for FICA taxation.

COURT'S ANALYSIS

Definition of SUB Payments: The court looked to the Code and corresponding IRS regulations for the definition of SUB payments.

A SUB payment is defined as:

1. an amount paid to an employee;
2. pursuant to an employer's plan;
3. because of an employee's involuntary separation from employment, whether temporary or permanent;
4. resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions;
5. included in the employee's gross income.

The court determined that all the payments Quality Stores made to its former employees satisfied this five-part statutory test and qualified as SUB payments.

Taxable FICA Wages: The court noted that neither the FICA statute nor regulations address whether SUB payments are taxable FICA wages. Therefore, the court looked elsewhere to determine Congress's intent and found it in the Code's rules for federal income tax withholding. Those rules provide SUB payments are subject to withholding as "other than wages." The court concluded that even though SUB payments are subject to federal income tax withholding, they are not wages for that purpose.

The court then looked to a prior U.S. Supreme Court decision that concluded Congress intended the term "wages" to have the same meaning for both federal income tax withholding and FICA purposes. Although Congress later amended the

Social Security Act to allow the IRS to issue regulations to provide for different exclusions from wages under FICA than under the income tax laws, the IRS has never issued any. Accordingly, the Sixth Circuit concluded that the statutory exemption from the definition of wages for SUB payments must be deemed extended to FICA taxes as well, until the IRS changes the rule by regulation.

COURT'S DECISION

The Sixth Circuit concluded that the payments Quality Stores made to its employees qualify as SUB payments. Because SUB payments are not wages for federal income tax withholding purposes, even though they are subject to withholding, they are not wages for FICA taxation.

NEXT STEPS

This decision gives employers and their former employees who paid FICA taxes on severance payments made pursuant to an involuntary reduction in the workforce a potential claim for refund. Although the Treasury and IRS likely will continue to deny refund claims for SUB payments and are expected to continue to litigate this matter, the final resolution may take several years.

All employers, not just those in the Sixth Circuit (Michigan, Ohio, Kentucky and Tennessee), should consider filing refund claims for open years for both the employer and employee portions of FICA taxes paid on severance payments that satisfy the Code's definition of a SUB payment. This filing will preserve the right to recover FICA taxes if *U.S. v. Quality Stores, Inc.* is ultimately upheld. These claims generally must be filed within three years of filing IRS Form 941. The statute of limitations for filing a claim for SUB payments made during 2009 ends on April 15, 2013.

A Quick Guide to Leased Employees for Qualified Benefit Plans

BY JENNIFER WATKINS
jwatkins@wnj.com

A leased employee is an individual who:

• works for your company through an agreement with a leasing organization	*employee of another employer but under your direction or control*
• on a substantially full-time basis	*works 1,500 hours or more in a 12-month period (or 75% of the customary hours in that job position, if fewer, but at least 500)*
• for at least one year	*if formerly your common law employee, the common law service counts toward the one year*

You must treat a leased employee like a regular employee for qualified plan purposes, including:

• coverage and participation	*explicitly exclude leased employees if you do not want them to participate*
• nondiscrimination testing and limits	*such as coverage testing and, if not excluded from the plan, ADP/ACP testing and limits on contributions and benefits*
• service crediting for eligibility and vesting	*all service counts, even before meeting the one-year requirement*

Watch out for an individual changing status:

• from leased employee to common law employee	*count all substantially full-time service even if the services were not performed for at least one year*
• from common law employee to leased employee	*generally no severance from employment, so no plan distributions based on severance from employment*

Incorrect handling of leased employees can have an unpleasant ripple effect on your qualified plans. This guide simplifies a complicated set of rules. If you think you may have an issue with leased employees, or you would like to discuss whether you are handling these matters correctly, please contact us.

Yes, Virginia, You May Fire a Workers' Compensation Claimant

BY GERI DROZDOWSKI
gdrozdowski@wnj.com

Michigan's legislature enacted significant changes to our Workers' Disability Compensation Act (the Act) in 2011. The amendments, which became effective on December 19, 2011, include a provision disentitling an injured worker from receiving wage loss benefits when terminated for cause or "for fault of the employee." This is in sharp contrast to previous language which protected a worker losing his or her job "for whatever reason" (while on restricted work for less than 100 weeks).

Of course, the Act still prohibits an employer from discharging, discriminating or retaliating against an individual making a claim for workers' compensation benefits.

To minimize the potential for allegations of discrimination, an employer should assess three critical factors prior to finalizing the termination of employment:

1. documentation;
2. past practices; and
3. consistency.

Documentation is important with all disciplinary action and becomes crucial when severing ties with a workers' compensation claimant. The file needs to include clear documentation of the transgressions and policy violation(s), communication of the action to the employee and measures taken to assist the worker in improving his or her performance. Written confirmation of the steps in the disciplinary process and/or performance improvement plans provides insulation from accusations of disparate treatment or unfairness.

A workers' compensation claimant who violates company policy is not necessarily entitled to special treatment. The standard for an injured employee's behavior, however, cannot be more stringent than what is imposed on the rest of the workforce. Assess the company's historical response to similar transgressions. Look at comparable situations involving noninjured individuals and apply the same response. Terminating a workers' compensation claimant shortly after a return to work, particularly while on medical restrictions, raises a red flag in terms of timing. Being able to show the company acted consistently in the same manner, irrespective of the worker's injury status, offers another layer of protection from post-termination litigation.

If an employee is terminated from reasonable employment for fault of the employee, the employee is considered to have voluntarily removed himself or herself from the work- force and is not entitled to any wage loss benefits under the Act.

NLRB Takes Aim at Common Employer Policies & Practices

BY ROBERT DUBAULT
rdubault@wnj.com

The unionized portion of the private-sector workforce has been steadily declining for decades. As such, many employers have given little thought to the National Labor Relations Act (NLRA) and what it means for their workplace. Over the past several years, however, the National Labor Relations Board (NLRB) has issued a number of opinions and other guidance which serve to remind nonunion employers and their employees that the NLRA covers nearly all private sector employees and provides them with numerous rights and protections. Among these is the right under Section 7 of the NLRA for employees to engage in concerted activity relative to employment issues for mutual aid and protection. Given the results of November's election, there is no reason to believe that the Board will change course any time soon.

Following is a brief summary of some of the areas where the NLRB has taken on, and in some cases invalidated, common employment policies.

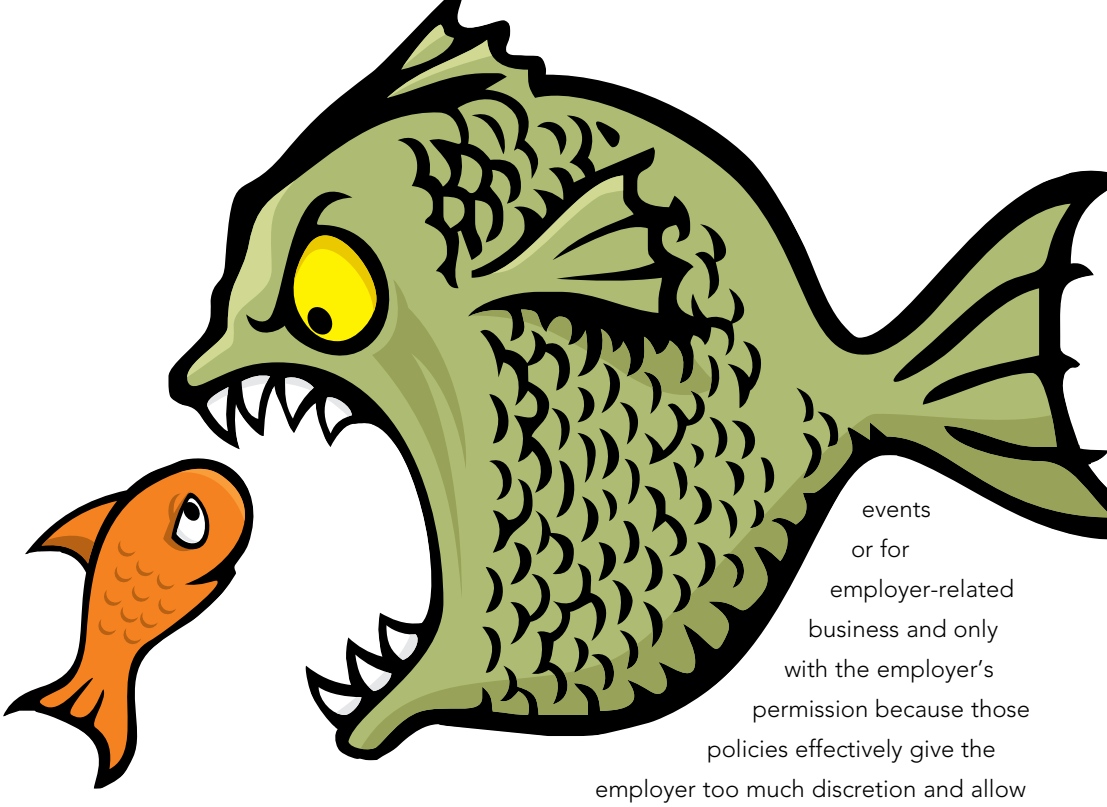
EMPLOYMENT AT-WILL

Virtually every nonunion employer considers the employment relationship to be "at will," meaning the relationship can be terminated by either the employer or the employee at any time for any legal reason or even for no reason. The at-will relationship is often memorialized in employment applications and employee handbooks. Based on recent cases in which the Board alleged that an employer's at-will policy interfered with employees' Section 7 rights, the NLRB's General Counsel has clarified how these at-will disclaimers can be phrased to avoid issues under the NLRA. As explained by the General Counsel, merely stating your at-will policy and requiring employees to acknowledge it is not unlawful nor is stating that the at-will policy cannot be modified except in writing by a particular employer representative. However, when the employer requires its employees to agree or affirm that the at-will policy cannot be modified by anyone in the organization, such an agreement or affirmation could interfere with the employees' right to engage in Section 7 protected activity by signaling to those employees that they cannot band together (with or without a union) to attempt to modify their at-will relationship.

Every nonunion employer considers the employment relationship to be "at will," meaning the relationship can be terminated by either the employer or the employee at any time for any legal reason or even for no reason.

CONFIDENTIALITY POLICIES AND EMPLOYER INVESTIGATIONS

As with employment at-will, almost every employer has a policy prohibiting the disclosure of confidential information. In addition, when investigating complaints of discrimination or harassment, many employers have a blanket policy requiring the involved employees/witnesses to maintain the confidentiality of the information discovered or disclosed so as to preserve the integrity of the investigation process. The NLRB has recently found that when such policies are not carefully tailored to the specific situation, they also can violate Section 7. For example, when confidentiality policies broadly prohibit employees from disclosing employment-related information to others, including discussions of wages, benefits or employment terms/conditions, employees may not be able to exercise their Section 7 rights to discuss wage or employment



conditions among themselves or lawfully disclose such information to others. As for employers who require or merely request that employees who make complaints or participate in the investigation of discrimination or harassment not discuss the matter with coworkers or others, such a policy may violate Section 7 because it prevents employees from joining together to discuss and address issues associated with discrimination in the workplace. The Board indicated that an investigation-related confidentiality requirement might be appropriate if the employer makes a specific finding that:

1. witnesses need protection;
2. evidence is in danger of being tampered with;
3. testimony may be fabricated; or
4. there is otherwise a need to prevent a "cover-up."

Following the Board's decision, an EEOC field office opined that broadly worded confidentiality policies regarding harassment/discrimination complaints or investigations may also violate Title VII of the Civil Rights Act of 1964 which allows employees to oppose unlawful discrimination by, for example, complaining to employer representatives or government agencies.

OFF-DUTY ACCESS TO EMPLOYER PROPERTY

For safety and security reasons, many employers prohibit off-duty employees from re-entering employer property without legitimate business reason or the employer's permission. Once again, the NLRB recently found that when not carefully written or enforced, such a policy could violate the NLRA. According to the Board, a no-access policy will be upheld if:

1. it applies only to the interior of the employer's facility or other work areas;
2. it is clearly disseminated to employees; and
3. it applies to off-duty employees seeking access to the premises for any employment-related purpose and not just to employees engaging in union-related activities.

Applying this standard, the Board has invalidated policies that prohibit off-duty employees from reentering the employer's facility except for employer-sponsored events or for employer-related business and only with the employer's permission because those policies effectively give the employer too much discretion and allow for inconsistent application. However, where the employer's business is one that is open to the public, such as a bank, nursing home, hospital, restaurant, etc., an employer may not limit off-duty employee access to those "public" purposes since the employees are doing so for reasons unrelated to their employment (e.g., conducting banking business, seeking treatment, visiting patients, etc.).

This summary clearly shows that the NLRB is more than willing to flyspeck and set aside common employer policies where they could interfere with employee rights under the NLRA even if the policy has never been enforced in such a manner. Therefore, we recommend that employers review their policies and carefully tailor them to their specific situation, enforce their policies in a consistent manner and seek guidance where the situation is unclear.

Key Benefit Plan Limits for 2013

The IRS recently released its 2013 employee benefits limitations for retirement plans. Earlier this year the IRS issued the 2013 HSA/HDHP adjustments and the Social Security Administration issued the 2013 taxable wage base. The following chart lists common limitations relevant for many employers.

Limitation	2013	2012
Retirement Plans		
Qualified Retirement Plans		
• Annual compensation limit	$255,000	$250,000
Defined Benefit Plans		
• Annual benefit limit	$205,000	$200,000
Defined Contribution Plans		
• Annual additions limit	$51,000	$50,000
Catch-Up Contribution Limits		
• 401(k), 403(b), 457(b)	$5,500	$5,000
• SIMPLE plan	$2,500	$2,500
Highly Compensated Employee	$115,000	$115,000
Annual Deferral Limits		
• 401(k), 403(b), 457(b)	$17,500	$17,000
• SIMPLE plan	$12,000	$11,500
IRA Contribution Limit	$5,500	$5,000
Social Security		
Social Security Wage Base	$113,700	$110,100
HSA/HDHP		
Annual Minimum Deductible		
• Single	$1,250	$1,200
• Family	$2,500	$2,400
Annual Out-of-Pocket Maximum		
• Single	$6,250	$6,050
• Family	$12,500	$12,100
Annual Contribution Limit		
• Single	$3,250	$3,100
• Family	$6,450	$6,250
Catch-Up Contribution Limit	$1,000	$1,000

Human Resources Attorneys

LABOR AND EMPLOYMENT

Edward Bardelli *	(616) 752.2165	Gregory Kilby *	(616) 752.2181
Andrea Bernard *	(616) 752.2199	Jane Kogan *	(248) 784.5193
Scott Carvo *	(616) 752.2759	Jonathan Kok	(616) 752.2487
Robert Chovanec	(616) 752.2120	Matthew Nelson *	(616) 752.2539
Gerardyne Drozdowski	(616) 752.2110	Dean Pacific *	(616) 752.2424
Robert Dubault	(231) 727.2638	Steven Palazzolo	(616) 752.2191
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Amanda Fielder *	(616) 752.2404	Karen VanderWerff	(616) 752.2183
Kathleen Hanenburg	(616) 752.2151	Donald Veldman	(231) 727.2603
Angela Jenkins	(616) 752.2480	Douglas Van Zanten *	(616) 752.2729
Tara Kennedy	(616) 752.2717	Elisabeth Von Eitzen *	(616) 752.2418

EMPLOYEE BENEFITS

Sue Conway	(616) 752.2153	John McKendry, Jr.	(231) 727.2637
April Goff	(616) 752.2154	Vernon Saper	(616) 752.2116
Anthony Kolenic, Jr.	(616) 752.2412	Justin Stemple	(616) 752.2375
Norbert Kugele	(616) 752.2186	Jennifer Watkins	(248) 784.5192
Mary Jo Larson	(248) 784.5183	George Whitfield	(616) 752.2102
Heidi Lyon	(616) 752.2496	Lisa Zimmer	(248) 784.5191

* Litigators

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Warner Norcross&Judd LLP
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