



## HR and Benefits Update

January – February 2012

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### Key Elements for a Successful Program

Many employers have launched employee wellness programs in recent years with different degrees of success...or failure. What are the factors that differentiate between a successful program and one that never seems to gain traction among employees?

Employee wellness programs have typically been implemented by large employers who have resources to dedicate to a wellness program, but in recent years mid-size and smaller employers have aggressively been implementing wellness programs.

#### Why Wellness?

The number one reason most companies implement wellness programs is to control healthcare costs, but it's not the only reason. Successful programs have proven valuable for other reasons:

- Reducing costs and lost work time related to short term disability;
- Reducing costs and lost work time related to Workers' Comp injuries;
- Improving productivity;

- Creating a positive, healthy workplace culture; and
- Demonstrating the employer's concern for its employees.

### **Key Elements for a Successful Program**

All successful wellness programs have several common traits. You may find lists that include five, seven or even 12 key elements. It is desirable to have as many attributes working to support your program as possible, but we have found four absolutely essential components:

- Well-designed year-round strategy that incorporates a variety of activities;
- Effective, well-executed communications plan;
- Meaningful incentives that drive employee engagement; and
- Visible support from management at all levels.

### **The Wellness Plan**

A good plan will be systematic, with goals and objectives. Those goals and objectives will help determine which activities will be included in the program. Also, the choice of activities should consider what employees will enjoy doing and find worthwhile. The plan should include activities that make employees aware of their need to make improvements, and increase their readiness to do so. It should include activities that educate employees about how to make changes, and activities that encourage them to practice new behaviors.

### **Communications**

The message should be concise and clear. Employees should know the benefits of becoming engaged, how to be engaged, and how to track it. The message should be appropriate, friendly, and positive. Messages that are too clinical or demanding will be intimidating for some employees.

The media are the channels of communications that you can use to reach your employees. Every workplace is unique. You may use emails, newsletters, flyers, postcards, paycheck inserts, bulletin boards, departmental meetings, or memos. Use any and all media that gets your employees' attention.

### **Incentives**

Incentives can be used to drive engagement rates of 85% or higher. Your incentives need to match the goals of your program, your culture, and the actions required to earn the incentive. Some of the more significant incentives are in the form of benefits impact, such as a lower deductible or lower premium or employer contribution into an HSA or HRA. There are tax implications, and some things an employer should not do to avoid HIPAA and ADA issues.

### **Management Support**

Management support may begin with simple environmental adjustments and grow to more policy and culture changes, including compensation and benefit strategy. Managers who most actively promote wellness to their employees should be rewarded for doing so.

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## **Considering a Safe Harbor 401(k) Plan**

It may be advantageous for a plan sponsor to consider adopting a safe harbor design for its 401(k) plan. Adopting a safe harbor 401(k) plan design permits an employer to essentially avoid discrimination testing (the testing is deemed met). Remember, this testing limits highly compensated employees' contributions based upon non-highly compensated employees' contributions. By making a safe harbor contribution, highly compensated employees can defer the maximum amount allowed by their plan and Internal Revenue Code limits, without receiving any refunds. General rules for all safe harbor contributions include:

- Safe harbor contributions are 100 percent vested.
- There may be no allocation requirements imposed on safe harbor contributions, such as a 1,000-hour service requirement or a last day employment rule.
- Safe harbor contributions may be used toward satisfying the top-heavy plan minimum contribution requirement.
- All eligible participants must receive a written notice describing the applicable safe harbor provisions between 30 and 90 days before the beginning of the plan year. This notice must be provided for each year the plan will be safe harbored.

Generally, there are two types of safe harbor contributions: the nonelective contribution, which is a 3 percent contribution to all eligible participants, or a matching contribution to participants who are contributing to your plan.

There are two options from which to choose for the matching contribution: the basic or the enhanced match. The basic safe harbor matching contribution is defined as a 100 percent match on the first 3 percent of compensation deferred and a 50 percent match on deferrals between 3 percent and 5 percent of compensation. Alternatively, the employer may choose an enhanced matching formula equal to at least the amount of the basic match, e.g., 100 percent of the first 4 percent deferred.

That said, employers wishing to explore a safe harbor solution should also be aware that it may entail more cost if their present contribution structure is less than the required safe harbor required structure.

To learn if a safe harbor feature is appropriate for your plan, contact your plan consultant.

## the workplace HELPLINE – Question of the Month

### Email Subject:

What is the proper process for layoffs?

### Full Question:

We are entering our slow season and we need to lay people off (at least temporarily). We want to make sure that we do it properly. Can you tell us the proper process for layoffs, both temporary and permanent?

### Response:

Barring any applicable collective bargaining agreements or other employment contracts that govern termination of employment, an employer is generally within its rights to make staffing decisions, including layoff and reorganizational decisions, as it sees fit to maximize effectiveness, productivity, and profitability. The justification for any layoff or reduced capacity decision and the selection criteria must be legitimate and not unlawfully discriminatory. When determining which employees to select to be impacted by such decisions, an employer would be within its rights to use criteria like seniority or tenure, classification (i.e., full/part time), past performance, skill set, value to the employer, flexibility for future roles in the organization, or some combination of these, but it is not required to use all or any particular one. Indeed it is a business decision to determine the criteria to use to make layoff decisions, so long as they are not unlawfully discriminatory or retaliatory. Note, however, that if an employer uses attendance and flexibility as selection criteria, to the extent any employee had unsatisfactory attendance or less flexibility due to things like disability or religious beliefs or other protected class status, it WOULD be unlawful to use these factors in making layoff selection decisions.

The best practice relative to conveying a layoff decision is just to be candid with the affected employees about the layoff decision and why they were selected for impact. Should business needs later justify increased headcount, or if a position becomes available because another employee has voluntarily vacated it, we are not aware of any legal requirement imposed upon an employer to rehire laid-off or terminated employees. Employers generally have the right to hire the best qualified person for a vacant position. Ideally, the employer should be candid at the time of a layoff about whether the impacted employees would be eligible for rehire or not (without making any promises or commitments).

You can always give greater weight or consideration to former employees, which may impact them positively, if they were good performers, or negatively, if they were not, if you choose to make that part of the hiring criteria when there are job openings later on. If a former employee is passed over for rehire and seeks to challenge that decision as discriminatory, if you can articulate a legitimate, nondiscriminatory justification for the decision (i.e., you hired a better qualified candidate), you ought to be able to defend such a claim. However, if you advise any laid-off worker that he/she will be eligible for rehire, and then fail to even consider that person for re-employment without a legitimate justification for the turnaround, it would be more difficult to defend a challenge to the decision.

Ultimately, the best practice is to be very clear with impacted employees at the time of a layoff about whether or not they will be eligible for rehire. If you are, there should be no legal issues associated with not considering and/or not rehiring a laid off employee who was previously advised of his/her eligibility (or ineligibility) for reemployment (and assuming the reason the individual was not eligible for rehire was legitimate, as it should be).

## Compliance FAQ

### **We have a client who is subject to COBRA but has not been sending out the COBRA Initial Notice when an employee was hired or when a new spouse was added to the plan. How should the client fix this?**

A group health plan that is subject to COBRA must furnish each covered employee (and his or her spouse, if any) a written notice of COBRA rights “at the time of commencement of coverage under the plan.”<sup>1</sup> The COBRA Initial Notice must be distributed to new participants (and spouses) within 90 days of the date coverage begins.<sup>2</sup> The U.S. Department of Labor has provided a model notification to use for all employees and spouses covered under the plan.<sup>3</sup>

Plans frequently fail to provide a required COBRA Initial Notice, and that failure can have serious consequences. The Internal Revenue Service (IRS) may impose excise taxes. A court may award civil penalties against the plan administrator and “in its discretion may order such other relief as it deems proper.”

There are penalties that can apply under the Internal Revenue Code (IRC) and ERISA for the failure to provide timely notification. If the failure to provide the COBRA Initial Notice is due to reasonable cause and not willful neglect, and if the failure is corrected within 30 days, then no IRS excise taxes would apply. However, IRC § 4980B(c)(2) states that if the violation is not corrected within 30 days of discovery, then the employer must self-report the violation on IRS Form 8928 and an excise penalty of \$100 per day would be assessed. It also states that the 30-day period begins on the first date any of the people responsible for administering or providing benefits under the plan (and whose act or failure to act caused the failure) knew or by exercising reasonable diligence would have known that the plan failed to provide the notification.

The employer could also potentially be subject to legal action since a lawsuit may be brought by a participant for failure to provide a timely notice. Civil penalties of up to \$110 per day under ERISA are discretionary with the court.<sup>4</sup>

Therefore, if a plan has failed to provide a required COBRA Initial Notice, *it should provide the notice immediately to all individuals to whom the initial notice should have been provided.*

### **Endnotes**

<sup>1</sup>ERISA § 606(a)(1).

<sup>2</sup>29 CFR § 2590.606-1.

<sup>3</sup>U.S. Department of Labor. “Model General Notice.” [www.dol.gov/ebsa/compliance\\_assistance.html](http://www.dol.gov/ebsa/compliance_assistance.html).

<sup>4</sup>ERISA § 502(c)(2).

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