BEST PRACTICES IN

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Use Caution When Reclassifying Employees

Those who are wise will learn lessons from those who came before. Northwestern Mutual Life Insurance Company is one from whose experience you may benefit. A $200 million lawsuit filed by three former employees who claim their employment status was misclassified will, at a minimum, cost the company considerable money to defend. If Northwestern loses the lawsuit, it will cost considerably more, and the company's reputation may be tarnished either way. If you are considering reclassifying employees as exempt employees or as independent contractors, remember: While your company is reacting to economic hard times, your employees are doing the same.

Bad Economy Increases Wage and Hour Disputes

As an employment law attorney with Rutter Hobbs and Davidoff (www.rutterhobbs.com), Wendy E. Lane is familiar with disputes over employee classification, like the one in the Northwestern case. The economy has created what she calls a "double perfect storm" in wage and hour litigation.

"When there are layoffs, as has been the case recently, employees may become desperate as they run out of unemployment coverage and they can't find new employment," she says. "Adding to the problem, there may be a bad taste left in employees' mouths about the way they were terminated. What you end up with is employees who want some sort of payback from the company that let them go."

One lawsuit from one individual may be more of a nuisance than a catastrophe. But a truly disgruntled former employee may take the situation to an extreme—a class action suit. Most of the time, lawyers will take such a case on contingency, so there is no disincentive for filing suit, Lane says. And plaintiffs' lawyers love class actions, because if they win, they get part of the overall settlement rather than of just one individual's settlement.

"The bigger the company, the bigger the potential class," she says. "It's a potential land mine for employers."

Truly Independent Contractors?

"Lots of employers are tempted, now more than ever, to classify their workers as independent contractors because they think it will eliminate unemployment insurance, workers' compensation, or meal and rest break issues," Lane says.

"It's very attractive to employers to not have to worry about employment issues by classifying somebody as an independent contractor."

However, misclassification comes at a price. "The Northwestern lawsuit illustrates one of the two different types of misclassification we see a lot. The issue in that case is whether employees were misclassified as independent contractors."

The caution for you: Look very closely at who is classified as an independent contractor, calling on your plan's counsel or other appropriate expertise as you make the decision.

If you have some independent contractors working for you and you have a signed agreement to that effect, you have more work to do. Lane says, "The law is much more complex than that.

"In California, there are up to six different agencies, including the Internal

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Revenue Service (IRS) and the Employment Development Department, which will look at whether a company is properly categorizing its workers as independent contractors versus employees. The IRS looks at up to 20 different factors to make their determination as to whether a worker is properly classified."

Lane illustrates some of the factors involved in deciding whether a worker is an independent contractor by describing a plumbing problem.

"You call in a plumber to come to your house. The plumber tells you what time he's going to be there. He'll tell you how he's going to fix the toilet, what tools he'll use for the job, and what he's going to wear while fixing it. The plumber is a true independent contractor and not an employee of the homeowner," she says.

"Those are some of the same factors a business needs to look at to determine whether a worker is an independent contractor or an employee. For example, do you provide the worker with a work space, tell them when to work and what to wear, or provide them the tools to get the job done?"

Exempt or Nonexempt Employee?

"The other area of concern is misclassification of nonexempt employees as exempt," says Lane. "Again, it is very tempting to classify employees as being exempt because then they're not subject to the laws regarding meal and rest periods and overtime pay requirements.

"But there are considerable limitations on which employees can be designated as exempt under the various exempt classifications."

Just one of many misclassification pitfalls that companies fall into is the temptation to categorize as exempt any employee who has "supervisor" in his or her title.

"In the grocery and retail industry, we've seen allegations of employees who are designated as exempt supervisors," Lane says. "These employees claim that they are misclassified, that they should not be exempt because they did not regularly and customarily exercise discretion and independent judgment. They then claim that they failed to receive meal or rest breaks because they always had to be on call to unlock cash registers for their employees if they need an override."

When employees are happily employed, they may not complain. But upon termination, the same employees may claim to have been misclassified and seek pay for overtime or meal periods for their period of employment.

"Class actions are filed every day, based on facts like these, in many different industries. Not just retail, but in restaurants, financial institutions, and sales and delivery companies. We've seen this situation sweep through companies ranging from Walmart to FedEx to Starbucks."

Consider Necessary Changes

Lane recommends often taking a careful look at job classifications, especially any time you make a big change.

"If there has been a big shake-up at the company, if new positions have been created, if there have been layoffs, if you've established new positions that didn't exist before, or if you've transferred people from one position to another, you should definitely review your job classifications.

"Any time those things occur, I think it is best to consult with counsel, or at least become very knowledgeable about the law before you take action. It is easier to prevent problems if you know what you're getting into in advance," she says.

She also recommends frequent reviews of employee handbooks. "Handbooks should be reviewed every year for changes in company practice and changes in the law."

What can you take away from Lane's expertise?

- Have a written contract. "In an independent contractor situation, having a very clearly written contract that fulfills the various factors that are going to be examined by a court or a government agency is critical."
- Understand that having a piece of paper whereon you and the employee agree to a contractor relationship is not enough. "It's good to have in writing, but a lot of factors determine whether or not it is valid."
- Do internal audits. "Look at who is classified as exempt and nonexempt to make sure they are properly classified."
- Consult with an expert in these matters, Lane says. "There is something to the adage that an ounce of prevention is worth a pound of cure."

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Initiative, Incentives for Preventive Healthcare Seen as Remedy for Costly Medical Claims

Who: Orange County Library System

What: Promotes employee health and wellness

Results: In 2009, 167 employees completed a health risk appraisal: 60% of program participants increased their knowledge of healthy behaviors, 38% enrolled in a diet modification program, and 34% enrolled in an exercise program.

The Orange County Library System (OCLS) may not be able to single-handedly curb rising healthcare costs, but it can have a pronounced impact on employees' health and wellness and take steps to lower costly medical claims over the long term.

Employee Awareness

OCLS, which consists of a main library and 14 branches throughout Orange County, Florida, promotes health and wellness to its 420 employees in a variety of ways. "We have over the past several years tried to look at ways we can have an influence on our employees' health and an impact on our health insurance claims," says Human Resources Manager Carla Fountain, SPHR.

The best way to accomplish that, she says, is for the organization to increase employee awareness of health issues and ways to improve their health. "If you're aware of what your overall health issues are, that's the first step to making changes in lifestyle."

The organization pays 100% of healthcare premiums for employees and hosts a health, wellness, and safety fair every June at its main facility.

In conjunction with the fair, OCLS offers health-related activities throughout the month, such as Zumba® (an aerobic/dance fitness program), tips for properly washing hands, and massages by students from a local massage school. "They get practice, and our employees love it," Fountain says.

In late winter, OCLS hosts an on-site event where healthcare professionals check the weight, blood pressure, cholesterol, glucose, and body mass index (BMI) of interested employees at no cost to them, according to Fountain.

Results of the tests are printed out for the individual within about 5 minutes, and a nurse meets with small groups of employees to discuss—in general terms—what the results mean. For example, the nurse might say to the entire group, "If your cholesterol is over 200, you might be at risk for some health issues," Fountain says.

Employees are given a link to a health-risk appraisal (HRA) offered through The Prevention Plan™ program from U.S. Preventive Medicine®.

Under the program, those completing the HRA get feedback on their overall health, issues they need to focus on, and ways to address those issues, she says. They have the option of receiving regular phone calls from a healthcare coach. "An employee can get as much as or little one-on-one coaching as they desire."

Even those who do not choose the coaching option have online access to a variety of health-related programs, including back pain management, cholesterol management, depression management, diabetes prevention, exercise and activity, skin cancer prevention, weight management, and smoking cessation, she says. Employees log in their progress toward individual goals.

Incentives Awarded

The length of each online program ranges from 6 and 16 weeks, and employees earn points for their participation and are entered into contests for prizes. They are also awarded points for getting annual health screenings, she says.

In addition, employees can receive up to a full day of paid time off for their participation. Those who complete the biometric screenings and take the HRA are eligible for 4 hours off from work, Fountain says.

They earn another 4 hours of paid time off if they fully participate in the rest of the program, such as getting annual exams and participating in an exercise program.

This year 167 OCLS employees completed an HRA, 60% of program participants increased their knowledge of healthful behaviors, 38% enrolled in a diet modification program, 34% enrolled in an exercise program, and 9% lost weight. The organization expects to lower medical claims in the long term, according to Fountain.

Start Slowly

If your organization is interested in launching a health and wellness initiative, Fountain recommends starting slowly. "It doesn't have to be very fancy or involved. You can start simple—even just offering the screenings one year and building from one year to the next on what you've done," she says. "… All the bells and whistles don't have to be there from the start."

Before selecting a vendor to provide an HRA and related services, she says it is important to meet in person with the vendor "to see that they are sincere about helping your employees" and to "see what kind of reporting mechanism they have, so you will understand how the program will be monitored" and what types of aggregate results will be available to you.

Also, be sure that the product is intuitive and user-friendly. This will help ensure that employees use it.

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Health Insurance Reform Requirements

Employers with 50 or more employees would be required to offer health insurance to their employees or to pay a fee that would help cover the cost of making coverage affordable to the uninsured and small businesses under President Barack Obama's "Stability & Security for All Americans" health insurance reform plan.

Insurance companies would be prohibited from denying coverage because of preexisting conditions, dropping coverage when people are sick, and imposing annual lifetime caps on benefit payments, according to an overview of the plan from the White House. In addition, the plan would ensure that all Americans have access to free preventive services under their health insurance plans.

Breach Notification Required Under New Regs

Healthcare providers, health plans, and other entities covered by the Health Insurance Portability and Accountability Act (HIPAA) must notify individuals when their health information is breached, under new regulations from the U.S. Department of Health and Human Services (HHS). The regulations implement provisions of the Health Information Technology for Economic and Clinical Health Act, which was enacted as part of the American Recovery and Reinvestment Act of 2009.

In cases where a breach affects more than 500 individuals, the covered entity must promptly notify the affected individuals, the HHS secretary, and the media. In other cases, the breach must be reported annually to the HHS secretary.

Employer Tips For Flu Season

Encourage hand washing. Allow sick employees to stay home without fear of losing their jobs. Frequently clean commonly touched surfaces such as workstations, countertops, and doorknobs. Those are some of the actions that the Centers for Disease Control and Prevention recommends that nonhealthcare employers take to decrease the spread of seasonal flu and H1N1 flu.

Among other things, the guidance advises employers to:

- Review or establish an influenza pandemic plan.
- Determine in advance whether the plan has gaps or problems that need to be corrected.
- Educate employees about your influenza pandemic plan and explain what HR policies, workplace and leave flexibilities, and pay and benefits will be available to them.
- Develop flexible leave policies in case workers need to care for sick family members or for their children if schools or childcare programs close.
- Share best practices with other businesses in your communities.

For more information, visit www.cdc.gov/h1n1flu/business.

PPE Standards Updated

The Occupational Safety and Health Administration (OSHA) has issued a final rule revising the personal protective equipment (PPE) sections of its general industry, shipyard employment, longshoring, and marine terminals standards as they pertain to eye- and face-protective devices, as well as head and foot protection. The final rule went into effect on October 9, 2009.

"OSHA is updating the references in its regulations to reflect more recent editions of the applicable national consensus standards that incorporate advances in technology," the agency said in a statement. Among the amendments is a requirement that filter lenses and plates in eye-protective equipment meet a test for transmission of radiant energy, OSHA reports.

IRS Update

Retirement Savings Initiatives

The process for 401(k) plans to adopt an automatic enrollment feature would be streamlined—without the need for case-by-case approval by the Internal Revenue Service (IRS), under a new retirement savings initiative recently announced by President Obama and Treasury Secretary Tim Geithner. Additional provisions include using an automatic increase feature to boost worker contributions from year to year and allowing automatic enrollment in SIMPLE IRAs.

Other initiatives include allowing taxpayers to use their federal income tax refund to purchase U.S. savings bonds simply by checking a box on their tax return, enabling workers to convert their unused vacation or similar leave to 401(k) plan contributions and providing "a plain-English road map" explaining tax-free rollover options for their retirement plans when they change jobs.

Civil Penalties Proposed

Civil monetary penalties of up to $1,100 per day would be assessed against plan sponsors of multiemployer defined benefit pension plans that fail to adopt a funding improvement or rehabilitation plan within a certain time frame, under a regulation proposed by the U.S. Department of Labor (DOL).

The Employee Retirement Income Security Act (ERISA), as amended by the Pension Protection Act, granted DOL the authority to assess civil penalties against plan sponsors required to adopt funding improvement and rehabilitation plans if they do not do so within 240 days of a specified date. The proposed regulation, which outlines the administrative procedures for assessing and contesting those penalties, would become effective 60 days after a final rule is published in the *Federal Register*.

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Experts' Forum

Boosting Employees' Financial 'Health' Pays Off for Employers

by Kristie Howard, Longfellow Benefits

With the adoption of worksite wellness growing as a key business strategy to improve workers' health and productivity, leading employers are already seeing bottom-line benefits from investing to keep employees healthy. As bad news continues to mount on the economic frontand people become more stressed about their personal finances, employers must do more now than ever to help keep employees *financially* healthy.

While "financial health" has received very little attention from wellness programs to date, this is beginning to change. Financial health—or lack of it—can impact employee productivity as much as physical health. Employees who are struggling to pay their bills or anxious about their finances won't be as focused on their work.

The key to better financial health is education. Most people know little about managing credit, budgeting, investing, and insurance. As the current crisis shows, many—maybe most—people spend and borrow too much and save too little. That has to end.

Consider the following statistics about employees' personal financial habits:

- Nearly 25% of workers do not participate in their employers' 401(k) plans. Of those who do, 30% don't contribute enough to take advantage of their employers' full match.
- About 1 in 5 workers who are permitted to do so borrow against their 401(k) plan balances.
- A recent survey found that people spend more time planning their vacations than they spend planning their retirements.
- Surveys of recently retired workers found that as many as 90% continued to work at least part-time. The majority of individuals do so because they need the money.
- One in five mortgage holders has a home worth less than the mortgage on it.
- 30 million American workers—1 in 4—report that they are in serious financial distress and dissatisfied with their personal finances.
- 50% of all workers spend 21 hours per month at work dealing with personal financ e issues.

Research has also shown that health and personal finances are correlated. A large proportion of those who are financially distressed, 40% to 50%, report that their health is negatively impacted by their financial worries and problems, according to Dr. Thomas Garman, president of the Personal Finance Employee Education Foundation (PFEEF). PFEEF estimates the annual cost to an employer for ignoring one worker's financial illiteracy ranges from $750 to $2,000.

More and more employers are taking a strong, proactive approach to help employees better manage their personal finances. In an online survey conducted last year by the Society for Human Resource Management, a random sample of 329 HR professionals was asked whether their companies offered various types of financial management training or services to employees. At the top of the list were one-on-one financial planning sessions, offered by 44% of employers, and debt management, offered by 45% of employers.

Legislation, such as the Pension Protection Act of 2006, has also created a greater awareness of the importance of communicating with employees and providing them with guidance and information. When employees adequately save for retirement because of proper financial education, it helps employers reduce their fiduciary responsibilities as plan sponsors.

So where can employers find experts to provide personal financial planning education and information to employees? You may already have the resources you need.

- Check with your employee assistance program (EAP) provider to see what kinds of financial education seminars, online tools, or telephonic support are available. Many EAPs offer telephonic financial and credit counseling to employees and their family members, as well as referrals and/or discounts for face-to-face sessions with Certified Financial Planners (CFPs).
- Most 401(k) providers offer financial seminars focusing on investments, and some will also cover personal-finance topics such as budgeting and credit management.
- Your health plan insurer may offer healthcare cost calculator tools, as well as resources on navigating Medicare and Social Security.
- Ask your employee benefits brokerage/consulting firm if it has CFPs on staff who can help with employee financial education.
- Consider contracting with a third-party vendor specializing in financial education, such as a credit counseling service or financial planning/education firm.

Be sure to do the appropriate background research on any potential vendor. Financial advisors should have all the necessary education, licenses, and certifications. To avoid potential legal trouble, it is a good idea to explain clearly that the employer is not providing its employees with any financial planning advice or recommendations and that employees are free to use whatever resources they want.

By making an investment in employees' personal financial health, employers not only provide an invaluable benefit that can improve the lives of employees, but also the tangible bottom-line results of the company.

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From the Courthouse

Court Upholds COBRA Termination For Paying Premium 1 Day Late

A federal appeals court has ruled that it was OK to terminate an individual's COBRA coverage because a premium payment was 1 day late. The court relied on the fact that the COBRA election form clearly stated the time requirement for paying premiums and the consequences of making a payment that was not on time. In addition, the election notice warned of the potential consequences of waiting to pay on the last possible day (*Harris v. United Automobile Insurance Group, Inc*., U.S. Court of Appeals for the 11th Circuit, No. 08-16097 (8/18/09)).

Facts. "Rix" worked as inhouse counsel for United Automobile Insurance Group, Inc. (UAIG) until he was terminated on May 11, 2007. After the termination, Rix elected COBRA continuation coverage.

Ceridian was employed by UAIG to process COBRA premium payments for the company's former employees who elected COBRA. Sometime in late May 2007, Rix received a letter from Ceridian notifying him of his right to COBRA coverage.

The plan provided that COBRA premium payments (other than the initial payment) were due by the end of a grace period of 30 days after the first day of the coverage period for which a payment was made. Failure to make a payment before the end of the grace period for a coverage period would result in the loss of all rights to COBRA continuation coverage under the plan.

The notice and information sheet attached to the COBRA election form stated that to be considered a timely payment, a premium payment must be postmarked by the U.S. Postal Service on or before the grace period expiration date and received by Ceridian. The notice also provided that late payments could not be accepted and would be returned, resulting in cancellation of the coverage with no possibility of reinstatement.

Included was the following warning: "If you wait until the end of the grace period to pay, you risk not having sufficient time to correct errors, which may or may not be within your control (such as … late/missed pickups by the U.S. Postal Service). In such cases, your coverage will be cancelled with no possibility of reinstatement."

Rix made each monthly premium payment in a timely manner until January 2008. He received the monthly invoice for that period stating that the payment was due January 11, and with a 30-day grace period, the payment would be late if made after February 11. Rix asserted that his wife placed the payment in the mailbox on February 11, 2008, but the envelope was not postmarked until February 12. Rix's wife either inadvertently placed the check in the mailbox after the mail carrier had made his rounds, or the envelope was picked up that day and postmarked a day later. Because the envelope was not received within the period for payment and was postmarked a day after the end of the grace period, Ceridian terminated Rix's COBRA coverage. When UAIG and Ceridian refused to reinstate his coverage, Rix sued.

Ruling. Rix argued that UAIG, as a self-funded plan sponsor and administrator, pays claims when they come due or funds a claims' account at intervals that exceed the time limit for payment imposed on Rix. Because UAIG had more time than 30 days—in fact no set time at all—to pay claims or fund the account, Rix claimed that—under IRS Reg. Sec. 54.4980B-8, Q&A-5—he should be entitled to the same period to pay his premiums UAIG had to pay claims. The court ruled that his provision of the regulation applies only to fully insured plans and not to self-funded plans because there was no arrangement under the terms of the plan setting a time to pay for coverage of non-COBRA beneficiaries.

Rix also argued that his payment should have been considered "made" on the day his wife deposited it into the mailbox, February 11. Using this date, his payment would have been timely. The notice that Rix received, however, clearly stated that a payment would be considered made as of the date that it is postmarked if sent through the U.S. Postal Service.

Additionally, the notice warned Rix of the dangers of mailing payments at the end of the grace period. Rix assumed the risk that the Post Office would not postmark his payment

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The LAW

The Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage may be terminated as of the first day for which timely payment is not made to the plan with respect to the qualified beneficiary. The initial payment for any period of COBRA continuation coverage is due 45 days after the date on which the election of COBRA continuation coverage is made.

Timely payment for subsequent periods of coverage is due 30 days after the first day of that period. Payment that is made by a later date under an arrangement between the employer and an insurance company is also considered to be a timely payment if the plan provides that covered employees or qualified beneficiaries are allowed until that later date to pay for their coverage for the period or if the employer is allowed to pay the insurance company for the coverage by a later date. Payment is considered made on the date it is sent to the plan (IRS Reg. Sec. 54.4980B-8, Q&A-5).

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Benefits Corner

Gatekeeper Approach to Mental Health Care

Worried that the Paul Wellstone and Pete Domenici Mental Health Parity Law, effective on October 3, 2009, will increase the cost of your health care? If so, you may be searching for something—short of dropping coverage for mental health and substance abuse—that can help. The twofold answer may be right in front of you: your employee assistance plan (EAP) and managed care techniques.

John Kamilis, LCPC, clinical director of CuraLinc Healthcare (www.curalinc.com), suggests a gatekeeper approach for your EAP, much like the one you may already use with your health plan. The idea is to direct employees concerned about mental or substance issues to the EAP before they seek treatment through the health plan.

"The gatekeeper approach allows us to have an assessment by one of our trained clinicians, who are all licensed mental health professionals, to determine exactly what is going on with the person and determine a course of action that is appropriate. If it is something that we can deflect into the EAP, there is a cost savings for the company, because it is one less person who accesses its health benefits and one less claim filed. Visits with a primary care physician cost a lot more money than they do with a mental-health provider."

Applying this kind of managed care technique can result in reduced pharmacy costs, too, Kamilis says. "Sometimes people are prescribed psychotropic medications that aren't necessarily appropriate. And the literature suggests that a lot of times, these drugs are prescribed through a primary-care physician. Sometimes he or she won't have the training or expertise to diagnose and treat mental health conditions and tend to look at mental health issues as symptomatic, treating the symptoms rather than finding out what is really going on. They may be ordering tests that aren't necessary or prescribing medication that isn't appropriate. All of that adds to the cost of the health benefits."

Mindee Zis, a senior account executive with third-party administrator Allied Benefit Systems, has been recommending a gatekeeper approach to Allied's clients for the last several months. "We're endorsing a gatekeeper model, very similar to a precertification process, whereby a member that needs to seek mental health or substance abuse treatment must first go through the gatekeeper process. The member calls the gatekeeper who then sets up face-to-face sessions through the EAP. If the member needed longer term care than the EAP provides, their advocate (the clinician who first saw that member) would then approve their transition into the health plan. Roughly 60 to 70 percent of all cases can be resolved within five sessions, so most never go to the health plan. Therein lies the savings, because those five sessions are much less expensive than they would have been through the health plan."

Mental Health Savings Through Managed Care

John Kamilis, clinical director of CuraLinc Healthcare, recommends questioning your EAP provider about applying managed care strategies to the EAP. Integration with the health plan is important.

"Working with your EAP to see how it can integrate the health plan with the mental health benefits is a good place to start," he says. "By using managed care techniques like utilization review, concurrent reviews, and things of that sort, the estimates are that people will see little cost increase in their mental health benefits due to the mental health parity law."

Promoting the EAP is important, too. "A lot of people aren't sure of the best approach to take when they have a mental health issue," he says. "They're not getting the best information, and that's where the EAP can help."

Make sure employees know about the EAP and what it can do for them.

"Having a knowledgeable EAP can go a long way toward making sure members are getting the type of care they need," he says. And that can save money.

ABOUT THIS NEWSLETTER

This newsletter is devoted to sharing compensation and benefits ideas that have worked for HR professionals striving to make a strategic difference in their companies. If you have a story you'd like to share, send us a fax at 860-510-7224.

If you have a question about one of the newsletter stories or want more information, call 800-727-5257, ext. 2194, or e-mail equayle@blr.com.

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CASE Study Study Study Study Study

Fee Transparency Is Coming: Better Act Sooner than Later

Who: A 4,500-participant 401(k) plan

What: Hired an independent firm to audit its 401(k) provider fees

Result: Realized $400,000 per year savings from evaluating and renegotiating the plan's fee structure

You're sitting in your office when the phone rings, and your 401(k) provider rep is on the line. "We've reviewed your account and would like to offer you a fee reduction for the coming plan year," he says. "We're going to take 10% off the top because we value your business."

Wow! The 401(k) plan committee members, your boss, and the CFO are all going to be happy. You've heard all the talk about fee transparency, and you've thought about looking into it for your plan, but it never seems to come to the top of the to-do list. Now it won't have to, right?

Not so fast, Pension Manager. It is true that as 2009 draws toward a close, you may see new laws focusing light on fees being paid by participant-directed retirement investment plans, like 401(k)s and 403(b)s. It is also true that if you haven't reviewed that information on your plan lately, you may be paying too much. Unfortunately, the phone call just mentioned won't solve the problem. BLR® asked two experts to weigh in on this increasingly common situation, and both agree that there is more you need to do.

Michael J. Malone, founder and managing director of MJM401k (www.mjm401k.com) sees some real changes coming. His company promoted fee transparency when fee transparency wasn't cool. In fact, he founded the company on it.

"Every dollar of revenue that we take into this firm can only come from one place, and that is from our sending an invoice to our client," he says. "So much of this industry was built on revenue sharing and fees and payments nobody ever sees. In particular, people in a fiduciary capacity don't see it, and we felt that was wrong."

Charles Massimo agrees. He is the president of CJM Fiscal Management (www.cjmfiscal.com), an independent wealth management firm for affluent individuals and corporate clients. He, too, was disenchanted with the status quo in the world of retirement investments.

"There are a lot of things hidden when it comes to investing," he says. "We provide what I feel is a better way and a fairer way for clients to do business."

Legislation Likely by Year's End

The end of 2009 brings with it an increased likelihood of legislation requiring better disclosure of fees paid in 401(k) and 403(b) plans. "There is very strong support for the 401(k) Fair Disclosure and Pension Security Act passed by the House and likely to pass the Senate," says Massimo. The legislation will require pension-investment providers and service providers to disclose fees, broken down by category, on quarterly 401(k) participant statements.

How big is the problem of hidden fees? Both experts agree that even a small percentage of your 401(k) assets, even as they provide a nice living for service providers, have a significant negative impact on individual participant accounts. "Just a 2% difference in return or fees over the course of someone's working career could wipe out about 50% of a 401(k) participant's account value over 30 years," says Massimo. "That's just 2%; we've seen (hidden fees resulting in overpayment) of as much as 12%, believe it or not."

Malone says his firm sees the same thing. "Participants don't save enough generally anyway. If you can save 25 or 30 or 40 basis points on assets, at some point in a participant's life that may translate into $200 or $300 a month in retirement income. And let's face it; we all can use a few hundred bucks more in lifetime retirement income."

Use an Independent Third-Party Reviewer

Rather than relying on your current service provider's word that the fees you are paying are reasonable, both Malone and Massimo recommend that you hire an independent third party, rather than your current service provider, to review your overall situation. "Remember, your consultant is the one who chose that plan, and there could be revenue sharing between them. Get a totally independent assessment of your plan," Massimo says.

Malone walked us through this situation with a company that recently engaged his firm to perform an independent review. "They came to us with the idea that it would be appropriate to have somebody review the fees and services of their plan," he says. After gathering the necessary information from the client, MJM401k reviewed their current situation.

"We established what services they were getting, the costs for those services, and how those costs are being paid. In this particular case, and this is not uncommon, the provider's fee for services was the amount of revenue sharing they took in from the various funds they offered to participants." He mentions a variety of fees, often invisible to plan fiduciaries, commonly paid by

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investment funds to the providers, such as 12(b)(1) fees.

While these kinds of fees are not unusual, Malone says, they may no longer be allowed under pending legislation.

"But most providers right now don't make any bones about saying, 'Here are the funds in the plan, and here are the payments that are being made from those funds for service fees.'

"In this particular case, the client had received something like that from their provider, showing all of those revenue sharing payments. But they didn't really have any context to determine whether that was good or bad, right or wrong."

MJM discovered that although the plan's participant count had not changed much over the last 5 years, and the level of service they were receiving had not changed, either, the revenue sharing arrangement had resulted in a dramatic increase in the service provider's level of compensation from the plan.

Results Help in Negotiations

When the results were unveiled to the client, the client requested Malone's help in negotiating with the provider for future services. Simply using the amount of the revenue sharing was no longer acceptable, he says.

Instead, they instructed the provider to give the client a per-participant fee quote.

"Any revenue sharing that came to the plan would pay that fee, and anything left over would be put into an ERISA expense account to be used for audit expenses, legal bills, things like that," he says. "Now we have a discernable, definable record-keeping cost based on the actual work, rather than just the variability of revenue sharing."

That's an important concept if you need to justify plan expenses in the event of an audit or a lawsuit. "If anybody questions the fees, you've got all the data to justify them," Malone continues.

"You're saying that you take it seriously, and there is a process. ERISA is a very process-driven statute, and we went through a process to determine whether or not the fees are reasonable."

Massimo says that now is a better time than later to go through the process. "You want to be proactive, because once this bill passes, you're going to have to make a change. You can wait until it happens and find out you're paying too much because someone sues you, or you can be proactive and do the due diligence now and possibly avoid that."

Malone encourages people to take steps now to review the plan's fees. "Even if it hasn't been done in awhile, don't shy away from doing it. It's an important step, not only to protect oneself from a fiduciary perspective—there is clearly a risk management side to this—but also it's the right thing to do for participants."

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envelope on the same day that his wife deposited it into the mailbox and, accordingly, failed to timely submit payment for his COBRA premium. The court concluded that UAIG did not act improperly in terminating his coverage.

What to do. COBRA administration is a lot simpler if there is a hard and fast way to determine if a premium payment is late. The plan in this case included such a rule and backed it up with the warning paragraph spelling out the consequences of waiting to the last minute to send in a payment.

Q: We have an employee whose 12-week FMLA leave will expire during our open enrollment period.

This employee is likely to be unable to work for a much longer time than the FMLA leave period, and we plan to terminate his employment when the 12 weeks expire.

Must we allow him to enroll for all company benefits, as other employees will be doing?

A: First, a word of caution from BLR's Legal Editor Patricia M. Trainor, J.D. She points out that, with limited exceptions, an employee returning from FMLA leave is entitled to reinstatement to his or her same position or an equivalent position.

You must make sure the reason for the termination is not related to the employee's use of FMLA.

Open enrollment privileges must be extended to employees on FMLA leaves as they are to other employees.

However, FMLA does not require an employer to maintain an employee's nonhealth benefits, like life insurance, during an FMLA leave.

Your existing policies should rule. If employees on non-FMLA leave, paid or unpaid, are entitled to benefits other than group health benefits under the cafeteria plan, says Trainor, then so is the employee on FMLA leave.

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Finally, Some Good News: Many Employers Reversing Cutbacks

In a survey released August 13, 2009, with responses from 175 large employers, Watson Wyatt reported some encouraging numbers. Its survey found that one-third of employers that froze salaries during recent economic ills plan to unfreeze them within the next 6 months. Two months earlier, that figure had been 17%.

Also, 44% of employers surveyed reported that they plan to roll back salary cuts in the next 6 months, up from 30% just 2 months ago.

And almost one-fourth of employers, 24%, said they plan to reverse reductions to their 401(k) matching contributions in the next 6 months, compared to just 5% in June.

"Some employers are seeing the light at the end of the tunnel and feeling optimistic about the prospect of improved business results," said Laura Sejen, global director of strategic rewards consulting at Watson Wyatt. "However, even as some of the program cuts are rolled back, many employees are facing smaller raises, lower bonuses, and higher healthcare costs."

Health care is one area in which employers do not seem to be planning to reverse their earlier actions. Two-thirds of respondents that increased the percentage employees pay for their healthcare premiums during the economic downturn do not expect to reverse that decision.

In fact, 40% are planning to continue the cost-shifting by increasing the employee share of premiums.

Another 41% said they plan to increase deductibles, copays or out-of-pocket maximums for their 2010 healthcare plans.

Retention of critical employees is rising to the top of the list of employer concerns, with 52% of survey respondents saying they are more concerned about retaining their top performers and critical-skill employees than they were before the economic downturn.

More than 80% of them have increased communication, and 40% have addressed employee concerns about the economy through employee forums like "town halls" or other interactive sessions.

"Even as employers look ahead to an eventual economic recovery, they still face many challenges such as the potential disengagement of top performers," said Brian Wilkerson, global director of talent management at Watson Wyatt.

"Employers can manage this to some extent not only by effectively communicating with employees, but also by ensuring that they are rewarded for the job they do, in particular taking into account how that job might be changing in the current environment."

Will 2010 Pension Limits Decrease?

Low inflation levels for August and September may result in lower limits on 2010 contributions to qualified retirement plans, further complicating participant efforts to rebuild their retirement nest eggs. The limits are calculated based on a statutory formula, using each year's third-quarter consumer price index (CPI-U).

If the resulting amounts are lower than the 2009 limits, employers will be looking to the Internal Revenue Service (IRS) for guidance, according to an analysis by Mercer.

The limits affect plan deferrals, catch-up contributions, plan compensation, Section 415 limits, maximum annuities in defined benefit plans, and compensation used to identify key and highly compensated employees for testing purposes.

Mercer reports that the Internal Revenue Code is unclear about what will happen if the formula results in lower limits. Some believe the limits would then remain at 2009 levels; others say the limits will be lowered.

If the latter is done, there would be adverse consequences not only for participants struggling to rebuild their savings but also for nondiscrimination tests.

If the Section 415 limits for defined contribution plans, plan compensation limits, and defined benefit plan maximums are reduced for 2010, one effect could be a reduction in benefits for some participants. It would be wise to think through the implications of such a reduction with your plan's counsel.

For example, ERISA Section 204(h) requires that pension plans give 45 days' advance notice of a plan amendment to any participant whose future accruals will be reduced by the amendment.

The IRS views annual limit adjustments as plan amendments, which may trigger this notice requirement. If it does, and if yours is a calendar year plan, the notice deadline would be November 17, 2009.

Mercer also suggests that you consider how you will revise any tools you offer participants for calculating their retirement benefits, such as financial planning tools and online benefit calculators.

Consider, too, how you will communicate these changes to participants. It might be an appropriate time to review all of your plan communications in light of this potential reduction as you await the final decision.

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Employer's Mistake in Determining FMLA Eligibility Can Be Costly

As defined by the Family and Medical Leave Act (FMLA), an "eligible employee" entitled to FMLA benefits is one who has worked for at least 1,250 hours during the 12-month period preceding the leave requested (See 29 USCA Section 2611(2)(A).

However, any worker who is employed at a worksite where the employer employs fewer than 50 employees is specifically excluded from FMLA's definition of "eligible employee" *if* the total number of employees employed by that employer within 75 miles of that worksite is fewer than 50.

Therefore, as a result of this exclusion, the employee who works at the worksite of a major employer that is covered by FMLA nevertheless might not be eligible for leave.

A recent lawsuit arose because an employer mistakenly misled an employee by treating him as an eligible employee when he really wasn't. The case made its way to the U.S. Court of Appeals for the 6th Circuit.

"It appears likely that [the employer] was not intentionally or recklessly misleading [the employee]," the court noted. "It simply was mistaken as to how many employees it had near the wastewater plant (where the employee worked)."

The issue in the case was whether the judicial doctrine of equitable estoppel prevented this employer, who misled the employee about his eligibility for FMLA, from subsequently denying those benefits because the employee was really not an eligible employee.

What Happened

Jay Dee Contractors, Inc., was headquartered in Michigan. "Dominic," a mechanical engineer, was hired by the employer in September 2003 and assigned to a wastewater treatment plant in Detroit.

Dominic took medication and underwent treatments ever since being diagnosed as an epileptic as a child, and he continued to have seizures as an adult. Early in 2004, after consulting with a physician, he agreed to have surgery scheduled for October 15 and immediately informed his supervisor.

In September 2004, Dominic sent the employer's president, "Paul," a memo reminding him of the upcoming surgery and his estimate of how much time off he would need.

In response to this, Dominic's superiors met with him and, following that meeting, Paul gave Dominic a form headed "Application for Leave Of Absence Under the FMLA." Dominic filled out the form and returned it.

On October 5, Paul wrote a letter to Dominic stating that he was to take a week of paid vacation beginning October 11, have the surgery on October 15, and that "[p]ursuant to the Family and Medical Leave Act, Jay Dee Contractors, Inc. will leave [Dominic's] position open for at least 12 weeks from October 18, 2004."

Included with the letter was a form titled "Employer Response to Employee Request for Family or Medical Leave" that summarized Dominic's application, indicated that he was an eligible employee, and confirmed that the company was providing him with FMLA leave.

Four weeks after his surgery, Dominic contacted Paul and told him he was ready to return to work. Dominic went to Jay Dee's headquarters on December 13 to meet with Paul and give him a consent-to-return-to-work letter from his doctor.

However, at the meeting, instead of restoring Dominic to the same or equivalent job as required by FMLA, Paul terminated Dominic.

He explained the firing by stating that the wastewater plant was winding down and no longer needed Dominic's services, and none of the company's other projects needed an additional engineer.

In a federal district court, Dominic alleged Jay Dee's violation of FMLA. Jay Dee moved for summary judgment, arguing that, as a matter of law, Dominic was not eligible for FMLA protection because it employed fewer than 50 employees within 75 miles of Dominic's worksite.

In response, Dominic argued that the doctrine of equitable estoppel applied to prevent the employer from denying his eligibility after having indicated to him at the time of his surgery that he was eligible.

The district court granted the employer's motion for summary judgment and the case went, on appeal, to the 6th Circuit (which covers Kentucky, Michigan, Ohio and Tennessee).

What the Court Said

The appeals court affirmed judgment for the employer. It held that in order to prevail under the doctrine of equitable estoppel, an employee must show:

1. The employer made a definite misrepresentation as to a material fact. (With respect to this misrepresentation, the employee need not show that the employer was aware of the true facts or that the employer intended that the statement be relied upon.)
2. The employee reasonably relied on the employer's misrepresentation.
3. There was a resulting detriment to the employee reasonably relying on the employer's misrepresentation.

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The court held that the employee did show that the employer had made a definite misrepresentation when it gave him written notice that his leave was pursuant to FMLA, but he failed to show that he reasonably relied on the employer's misrepresentation. He couldn't "point to some action or statement that indicated that his decision to have the surgery was contingent on his understanding of his FMLA status," noted the court.

The employee "had already decided on and scheduled the surgery by the time he was informed of his eligibility," the court wrote (*Dobrowski v. Jay Dee Contractors, Inc.*, U.S. Court of Appeals for the 6th Circuit, No. 08-1806, (2009)).

Point to Remember

The court noted that the employee's conversations with his superiors "did not eliminate all confusion over the amount of leave requested."

The employer was indeed confused. As the court noted, "It simply was mistaken as to how many employees it had near the wastewater plant."

Had the employee relied on this mistake, the employer would have lost this case even though it was an honest error—honest but careless.

Furthermore, other courts may have a different notion of what "reliance" means.

For example, it could be argued that the employee relied on having a job when he returned from the surgery.

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By the numbers...

	Latest Period	Current	Prior Report	A Year Ago	12-Month % Change
CPI-U	Aug/09	215.8	215.4	219.1	-1.5%
CPI-W	Aug/09	211.2	210.5	215.2	-1.9%
ECI EMPLOYMENT COST INDEX					
Total Compensation	2Q/09	109.6	109.3	108.0	1.5%
Wages and Salaries—Private Industry	2Q/09	110.1	109.8	108.4	1.6%
Wages and Salaries—Civilian Workers	2Q/09	110.4	110.0	108.4	1.8%
Benefits	2Q/09	110.0	109.7	108.1	1.8%
Average Weekly Gross Wages*	Aug/09	$617.32	$615.33	$612.67	0.8%
Average Hourly Wages					
All*	Aug/09	$18.65	$18.59	$18.18	2.6%
Construction	Aug/09	$22.75	$22.65	$22.16	2.7%
Manufacturing	Aug/09	$18.22	$18.18	$17.75	2.6%
Trade/Transp./Utilities	Aug/09	$16.56	$16.39	$16.21	2.2%
Wholesale Trade	Aug/09	$21.05	$20.84	$20.23	4.1%
Retail	Aug/09	$13.10	$12.99	$12.93	1.3%
Financial Activities	Aug/09	$20.77	$20.66	$20.29	2.4%
Other Services	Aug/09	$16.24	$16.16	$16.10	0.9%
Unemployment Rate*	Aug/09	9.7%	9.4%	6.2%	3.5%

*seasonally adjusted
(**Source:** Bureau of Labor Statistics, Washington, D.C.)
All figures are national.

CPI-U: Consumer Price Index for all urban consumers; the newer index representative of the buying habits of about 87% of the total U.S. population. (1982–84=100)

CPI-W: Consumer Price Index for urban wage earners and clerical workers; the older index covering only about 32% of the U.S. urban population.

ECI: Measures change in compensation per hour worked, including wages, salaries, and employer costs of benefits. (6/89=100)

Average Weekly Gross Wages and Average Hourly Wages: Data related to production workers in manufacturing and mining; construction workers; nonsupervisory workers in transportation, public utilities, and wholesale/retail trade; also finance, insurance, real estate, and other services. Accounts for approximately 80% of the total employees on private, nonfarm payrolls.

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