

Employee Benefits Report

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Administration

July 2008

Volume 6 • Number 7



How to Spot and Stop FMLA Abuse

In the 15 years since it became law, the Family and Medical Leave Act has proved to be a double-edged sword for employers. On one hand, it has helped organizations establish a family-friendly environment. On the other, it has introduced administrative worries and costs, chief among them FMLA abuse.

The FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave in any 12-month period for the birth or adoption of a child; to care for a sick child, parent or spouse; or when an employee has a serious illness. The law applies to your business if you employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

The question is, when is leave legitimate and when is it not? Forty-two percent of human resource professionals surveyed said the potential for or suspicion of abuse by employ-

ees causes “extreme difficulty” in administering intermittent FMLA leave, according to a study by WorldatWork, a Scottsdale, Ariz.-based human resource association.

Be an abuse detective

Although most employees use FMLA leave appropriately, there are always going to be some who “work the system,” according to Beverly Kish, SPHR certified director of human resources at National Flight Services.

You’ll pick up on abuse best if you monitor leaves for patterns that might indicate fraud. Here are the common abuse patterns, according to Kish:

- ★ **The Long Weekend.** Do absences come on Mondays or Fridays? The FMLA shouldn’t be a long weekend program.
- ★ **The Annual Illness.** Do employees take FMLA the same week every year or always seem to have that medical flare-up between Thanksgiving and New Years?
- ★ **The Perfect Fit.** Do employees have exactly 12 weeks of health problems every year?
- ★ **The Free Pass.** Do employees use FMLA requests to save them from violating attendance policies?

An ounce of prevention

What can you do if you suspect FMLA abuse? You certainly

This Just In

The Internal Revenue Service is allowing employers to accelerate contributions to health savings accounts for employees whose medical care expenses exceed what the employer has contributed to the HSA so far this year. The hope is this will ease employees’ concerns about exhausting their accounts if they incur big medical bills before employers make all of their contributions.

The final rule, which went into effect in April, applies to HSAs that are not part of Section 125 programs, in which employees make pretax contributions to their accounts. Benefit experts say accelerated employer contributions to HSAs that are part of Section 125 programs already are permitted.





Retain Top Talent with Supplemental Executive Retirement Plans

Yes, there's a recession out there, but attracting and retaining top talent remains a major business challenge. One way to win the battle is by offering high-level executives a non-qualified deferred bonus plan, such as a Supplemental Executive Retirement Plan (SERP) or Section 162 life insurance policy.

In many ways an executive bonus plan resembles a qualified retirement plan, but it differs dramatically in its participation, funding, vesting and non-discrimination requirements. A qualified plan, such as a 401(k), for example, has rules and restrictions prohibiting "highly compensated" executives from saving as much as they may want to be financially secure in retirement.

Here's the reasoning behind these bonus plans: Most employers ordinarily strive to provide at least 60 percent of the final three-year average of salary and incentive compen-

sation to employees in retirement benefits. But highly compensated employees often face reverse discrimination due to qualified plan limitations that restrict the amount of compensation that can be considered in retirement calculations. A SERP is a great way to battle this reverse discrimination.

Non-qualified SERPs allow your company to provide benefits exclusively to your key employees on a selective basis. You decide who participates, what benefits will be provided, and how and when benefits will become vested.



If created correctly, a SERP is considered a "Top Hat" plan and therefore exempt from many ERISA requirements. A plan qualifies as a Top Hat plan if it is created for the purpose of providing benefits to a select group of top management or highly compensated employees. You must notify the Department of Labor in writing within 120 days of the adoption of the plan.

SERPs are relatively easy and inexpensive to set up and administer. Your company and the key employee enter into an agreement that says the you will pay the employee a certain amount of money, either over a period of time or in a lump sum, upon death, retirement or termination of the plan. The executive does not make contributions to the plan. When it comes time for the SERP benefit to be paid, the executive receives taxable ordinary income and your company receives a tax deduction.

Section 162: fast and easy

One popular type of SERP is a Section 162 life insurance plan. Under this agreement, the employee purchases a cash-rich insurance policy and names himself as owner. This policy may be issued on a single insured basis or a joint insured basis, such as a husband and wife together. The employee controls the policy, including the death benefit and the cash value.

Your company pays the premiums, which are fully tax-deductible as a business expense, and are considered compensation to the employee. Because the premiums are

SERP benefits for employers:

- ✓ Helps recruit, reward and retain key employees
- ✓ Allows the company to single out plan participants
- ✓ Places no restrictions on company's ability to determine individual benefit levels
- ✓ Lets company continue existing retirement plans without change
- ✓ Has minimal filing and reporting requirements

SERP benefits for employees:

- ✓ Increased retirement income
- ✓ No change in current compensation
- ✓ Survivor benefits during employment and/or retirement based on plan design
- ✓ The opportunity to receive additional or accelerated benefits upon a change in corporate control or ownership

Section 162 benefits for employers:

- ✓ Premiums are tax-deductible
- ✓ Can cover highly compensated participants
- ✓ No maximum or minimum contribution requirements
- ✓ No IRS approval required
- ✓ Administrative expenses are nominal
- ✓ Plan may be terminated at any time, pursuant to the agreement
- ✓ Plan design is simple and straightforward
- ✓ Golden handcuffs are created when using a restricted bonus arrangement

Section 162 benefits for employees:

- ✓ The employee owns the plan
- ✓ The plan can be designed to meet personal needs
- ✓ The employee's income tax costs can be covered by an additional bonus
- ✓ Tax-free income can be received from the plan via withdrawals and loans
- ✓ The employee has control over the plan, including beneficiary selection and asset allocation



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ly want to be cautious about taking adverse action against an employee who appears to have fraudulently obtained FMLA leave or misused legitimate FMLA leave, but you can create an environment where abuse becomes more difficult, according to Matthew E. Johnson, an attorney with the labor law firm of Halleland, Lewis, Nilan & Johnson. Here's how:

- ✦ Adopt a written policy that clearly defines FMLA policies and prohibits employees from engaging in certain conduct while on FMLA leave.
- ✦ Request a second medical opinion concerning the employee's condition, as permitted by FMLA regulations.
- ✦ Insist that employees acknowledge in writing that they have received the policy. You don't want employees to be able to plead ignorance later.
- ✦ Let it be known that you're willing to question the employee with the goal of obtaining an admission of wrongdoing, or as an alternative, obtaining information (that doesn't violate HIPAA regulations) from private investigators or outside sources.

- ✦ Make it clear that FMLA time runs concurrently with sick leave, vacation, paid time off, short-term disability or workers' comp, for example. This may deter some who don't really need the leave.

- ✦ Brief employees on the consequences of ignoring FMLA deadlines and requirements. Bottom line: Most employees use FMLA benefits properly, but there's plenty you can do to curtail abuse. ■

The Upside of FMLA

FMFLA may cause administrative headaches but it has increased employer awareness of work/life issues in general and dependent care needs in particular. "It was a turning point in how workers looked at the workplace," said Deven McGraw, policy counsel at the National Partnership for Women & Families, an advocacy group in Washington.

Providing employees with unpaid, job-protected leave after the birth of a child or to take care of a serious medical issue has also engendered greater employee loyalty.

Employers say the law has achieved its primary goal of providing a structure

in which employees feel comfortable taking time off without fear of losing their job. Before the law's adoption, people would be reluctant to take time off out of concern for losing their job or having the leave held against them, said Bill Falvey, benefits manager at law firm Morrison & Foerster L.L.P. in San Francisco.

Employers say the law also enables employees to take care of personal issues and then return to work without those issues hanging over them.

"When they do come back they are a better employee and can concentrate on their work," Falvey said. "You have a better workforce." ■

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considered taxable income to the employee, often the employer will "double bonus" the employee to cover their added tax expense.

The policy's tax advantages include tax-free accumulation, tax-free income through loans and withdrawals and tax-free transfer at death.

If the employee is also a stockholder of the company and his/her tax bracket is less than the corporate tax bracket, the 162 is very attractive to the employee-stockholder who wishes to withdraw profits from the corporation.

Security and peace of mind

An executive bonus plan rewards key employees and helps the company retain talent. For an analysis of your company's needs, please contact us. ■

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and the provider's actual charges.

If the plan includes a PPO network, how does it interface with the plan? The penalties for employees using providers outside the network can be severe. Network discounts can stretch benefit dollars, but understand how they work.

Does the plan have a good administrator to help you with billing and claim filings? Few HR departments can dedicate the time and resources necessary to reconcile a monthly bill that covers a group of employees with a high turnover rate. There are simply too many changes (terminations, new hires, etc.) between bill issuance and payment due. Solid, proven administrators backed by top-rated insurance carriers will help you deal with issues such as payroll cycle-based billing, missed premiums, and proper enrollment strategies.

A little goes a long way

It may seem as if limited medical plans are new, but in reality, they've been helping employers offer benefits to hourly, part-time and seasonal workers for years.

There are limited medical plans available that offer tremendous flexibility with premiums ranging from \$40 to \$140 per month for employee-only coverage, and they offer the employer the ability to customize a plan to meet their employees' needs.

By offering a limited medical plan geared toward your group's needs, you can provide some coverage for workers who might not qualify for your regular medical plan, or where you cannot afford a traditional medical plan. ■



Is a Limited Medical Plan Right for (Some) Employees?

Is a little health insurance better than none? Limited medical plans are designed to meet day-to-day medical expenses such as wellness visits and prenatal check-ups. While they are not meant to replace major medical plans, they may be the only insurance some employees can get and the only insurance some employers can afford.

Limited medical plans have been in existence for nearly 30 years, but their popularity has significantly increased over the last five years for a number of reasons. These include the movement of employees to part-time work, three to four years of successive double-digit increases in major medical insurance costs, and employers' desire to provide some coverage to employees who are not otherwise eligible for their benefit plans.

Although still a tiny part of the insured market — about one million policies among the nearly 160 million workers who get their insurance from employers — the LMP market is growing at a healthy clip of 14 to 16 percent annually, according to *USA Today*. Large companies, including McDonald's, are climbing aboard.

It's important to know what LMPs are and what they're not. Proponents say the limited plans should not be considered the solution to the problem of the uninsured,

but rather one option to help people get basic medical care. Some patient advocates disagree, saying many of the plans leave policyholders more vulnerable to devastating medical bills than they might think.

Think of a LMP as an option for a subset of your employees — not as a replacement for any major medical health insurance coverage your company already offers.

What's right for you?

Here are some suggestions to help you evaluate the limited medical programs available today.

Does the plan have a pre-existing or time condition limitation? If it does, and you are offering this plan to a high-turnover group, you have greatly reduced the value of the plan to that population. The better limited medical plans do not have pre-existing condition limitations.

Do you understand the benefits and the limits within the benefits? What is



the plan's maximum benefit and what does it take to reach that maximum? If a plan includes a supplemental medical maximum benefit, then understand what the benefit pays for. If it only includes hospital room and board charges, is it really as effective as it initially looks? Make certain that employees understand the plan, what it will and won't do for them.

Does the plan have a co-pay—and if so, is it a true co-pay? If the benefit says "co-pay" and includes language stating that the carrier will only pay up to the usual and customary amount, then the benefit is really a per-visit deductible. In some LMPs, the employee will be billed the difference between the usual and customary amount,

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LMPs vs. HSAs

What's the difference between a limited medical plan and a Health Savings Account? Unlike standalone LMPs, HSAs are employee-owned accounts linked to a qualified high-deductible health plan (HDHP).

HSAs allow companies or employees to make tax-exempt deposits into accounts that workers can use to pay for unreimbursed medical expenses, premiums for long-term care, COBRA, or even for retirement. Employees may carry over account balances from year to

year indefinitely, even when they switch employers.

Because an HSA is linked to a high-deductible health plan, employees will have coverage for catastrophic illness/accident, far beyond the coverage offered through LMPs.

Finally, HSAs are fully portable, so that employees can also shift an account to another employer if they change jobs, while LMPs are typically leave-behind benefits. ■