

The Advisor Lookout®

... Useful Information for the Business Owner

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Off the Clock...or Not?



The line between work and play isn't so straight anymore.

Thanks to our ever changing and fast growing technology, new lawsuits are causing employers to compensate for the free “off the clock” labor. Numerous claims have been brought against Fortune 500 companies alleging that non-exempt employees have not been paid for their “off the clock” duties. These cases serve as a reminder that non-exempt employees who respond to text messages and e-mails after normal working hours must be paid for their overtime.

One case, in particular, is a lawsuit against T-Mobile. The lawsuit claims that the wireless carrier required employees to answer any client related issue at any time of the day with out being paid overtime. The employees were given smart phones and instructed to respond to all text messages and e-mails at any time throughout and to also be on conference calls during lunch and “off” times. According to the complaints, these were non-exempt employees eligible for overtime, according to the Fair Labor Standards Act.

Off the clock work can take on many forms and here are ways to reduce your risk:

- ◆ Implement a firm “off the clock” policy requiring employees to report all time worked throughout the day.
- ◆ Train supervisors to never request employees to work after business hours.
- ◆ If issuing blackberries or remote access technology to non-exempt employees, consider providing an acknowledgment form noting their obligation to report all work time.
- ◆ Conduct annual audits of payroll practices to ensure that all policies and procedures are updated to adapt to technological or other changes which might have an impact on wage and hour implications.

View the EmployShare VIDEO at www.employshare.com

Benefits Plans Audits: New Tips

The IRS has never looked too kindly on tax-withholding errors on benefits— even accidental ones. IRS audits of employee benefits plans have significantly increased in the past few years, particularly with the introduction of the Employee Plan Team Audits. On the other hand, the agency recently revamped its correction procedures to make it easier for sponsors of retirement plans to correct errors and speed up the IRS audit process.

Common errors found in all plan types include failures to follow the plan document's terms on plan eligibility, eligible compensations, vesting, and contribution and benefit limitations. Make sure that pre-tax contributions have actually come out of employee's paycheck.

The plan documents should spell out the exact method used for cashing out early and taking out loan against retirement account, making sure proper taxes are deducted. Plan documents must match your system of moving funds to an IRA or another employer's plan when employee leaves.

Under the IRS's Employee Plans Compliance Resolutions System, you have two years to correct significant errors affecting taxes, eligibility, and/or benefit levels. The process is as follows:

1. Request determination letter from IRS
2. Certify in the request that your firm made an honest mistake
3. Outline proposed corrections
4. Receive favorable IRS ruling
5. Implement change

It pays to check your retirement plan documents as soon as possible and to make any need corrections. (information provided by HR Morning Network, Aug 2009)

7 Documentation Pitfalls

Often times managers wear several hats throughout the day. With all this responsibility, it is no surprise some tasks are pushed to the side.

Documentation is a task that should be a priority every day. We live in a world of lawsuits and one of the most common reasons a case is won or lost is based on documentation.

Here are some ways to make sure your documentation is always clear, concise, and consistent.

Always outline company expectations. When documenting, always describe specific expectations so employees understand specifically what is expected of them. When recorded, the employee understands what is required and if ever the company finds itself in a court case, the evidence is in the documents.

Always state specific changes employees need to make. If a change in conduct needs to be made, always leave a paper trail. Give detailed examples focusing on employee's behavior so the employee understands what is not working.

Include both sides of the story. There are always two sides to a story and a good documentation includes both records. By doing so, this opens up the lines of communication to solve the problem and if you end up in a court battle it shows the manager made a good-faith effort to resolve the problem.

Outline the plan. Map out specific goals and how the employee is going to get there. If an employee wants to increase productivity, good documentation lists the steps needed to reach the end result. (Continued on next page).



Employee Benefits: A Legal Landmine



Employee incentives are an excellent way to retain and motivate employees but often times employers can run into compliance problems with the feds.

Here are three popular benefits that present a legal liability and ways to avoid future problems:

1. Wellness programs

Companies have long had an interest in keeping their employees healthy, productive and satisfied. While every employer wants to promote healthier lifestyles for its employees, some initiatives violate the Americans with Disabilities Act. The discriminatory aspects of employer wellness programs have caught the eye of the Department of Labor and lawyers and here is a way to avoid such accidental discrimination.

Example: A company unveils an on-site exercise program. Employees who participate are eligible for gift cards, cash bonuses and vacations.

Problem: The company has several disabled employees who are physically unable to participate in the new program and therefore cannot benefit from the rewards.

Solution: If the wellness program includes features that every employee can not participate in, then offer supplemental programs where these employees can receive rewards. For instance, attending a class on the benefits of doing cardiovascular exercises permitted by their disability.

2. Domestic Partner Benefits

Employers compensate employees through more than just wages and salary, providing benefits such as health insurance and dental care. An ever-growing number of employers, including the majority of Fortune 500 companies, further extend these benefits to an employee's same-sex partner and the partner's children.

Federal income tax laws do not treat domestic partner benefits the same as benefits offered to married couples. This means that the employee must pay tax not only on the premium paid for the benefits, but must include the portion of the cost of the benefits paid by the employer as taxable income.

The exception is for partners who are legal dependents, as identified by the IRS. In order to be a legal dependent, a partner must live in the same household as the employee, and must receive over half of his or her support from the employee. The other exception is if the partner is recognized as a spouse or the benefits are protected under the state law, as in MA, CT, and VT.

The rule for flexible spending accounts (FSA's) are even more restrictive in terms of pre-tax reimbursements for health services received by a domestic partner. FSA's **may not** reimburse employees for domestic partner medical care or for care of a domestic partner's dependent. However, if the domestic partner meets the criteria of a dependent, an employer may reimburse the partner's medical expenses.

To get around these restrictive rules, many employers require the employee to pay the entire cost of their partner's coverage. Some firms balance this out by adjusting the employee's compensation to cancel out the difference.

3. Employee Referral Programs

The Equal Employment Opportunity Commission has already addressed the problems that accompany word of mouth recruiting. According to the EEOC, employee referrals can limit workplace diversity and increase the risk for discrimination because employees tend to only recommend colleagues of the same race, gender and ethnicity.

The potential legal problem for companies that do extensive hiring based on employee referrals, even in cases of accidental discrimination, are a lawsuit or fine from the EEOC. The EEOC compliance manuals now recommend that most firms cut back on the employee referral programs.

If your company has no intentions of scraping its employee program, make sure to measure employee diversity and encourage all participation throughout the company. (information found in HR Morning Network, July 2009)

Please contact EmployShare with your benefits compliance questions. We can advise you on record keeping, federal and state regulations related to benefits, testing your plans, tax issues related to your fringe benefits, discrimination issues and voluntary correction programs. We can issue policy letters on your behalf, work with you to develop internal administrative procedures for managing each of your benefit programs and provide relevant information to your staff. EmployShare will keep you up-to-date on statutory changes affecting your benefit plans and programs.

(7 Documentation Pitfalls continued)

List consequences of improvements that are not made. When documenting, list possible consequences if employee fails to meet criteria. Use "may" rather than "will" when listing consequences.

Establish time frame. Managers should always note a realistic time frame in which improvements should be met. If document lists an exact time frame then it must be followed and both manager and employee are on the same page.

And...follow up on documentation. The follow up is the most crucial part of the documentation process. The most successful managers use the follow up to determine progress, offer feedback and to make further recommendations for continued improvement. (reprinted from HR Morning Network, July 2009)

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