

The Amerisc Corp.

777 Zeckendorf Blvd. • Garden City, NY 11530 • (516) 745-7500

BENEFITS ADMINISTRATION

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In...



Employers cannot cut retiree health benefits as employees become eligible for Medicare, a federal court has ruled, rejecting a proposed EEOC regulation allowing employers to coordinate retiree health benefits with Medicare. The ruling affirmed an appellate court's decision that held that letting companies provide retirees age 65 and older health benefits that are inferior to those younger retirees receive violates the Age Discrimination in Employment Act (ADEA). Many companies are now evaluating the costs of benefits for Medicare-eligible retirees to determine if they will continue offering them.



The Supreme Court recently ruled that workers can bring age discrimination claims against employers with policies that adversely affect older workers. The decision might impact sponsors of cash balance and other hybrid plans. Plan sponsors could face liability if an employer's benefit plan design results in greater benefits to younger employees — even if older employees cannot show evidence of discriminatory intent. Even if your company's practices appear neutral, it's wise to reexamine policies for negative effects on older employees.

FMLA Compliance: What Employers Need to Know

More than a decade after Congress approved the ground-breaking Family Medical Leave Act (FMLA), the number of employees taking advantage of the federal protection continues to increase — while employers report ongoing challenges with leave-tracking and compliance.



FMLA requires employers to provide up to 12 weeks of unpaid, job-protected leave to employees for the birth or adoption of a child, for a serious medical condition, and to care for a family member with a serious medical condition. Employees must request leave in advance or provide notice as soon as possible following an unforeseeable medical absence.

Employers may require medical certification to verify the condition, and must notify employees whether their leave is FMLA-protected. Companies must also keep track of all FMLA leave that workers use. In a recent survey by *Employee Benefit News*, 44 percent of respondents reported that they are in compliance with FMLA. Experts contend that figure is excessive, as many employers don't really understand what full compliance entails.

If your employees are taking leave under FMLA, or thinking of doing so, here's what you need to know about your responsibilities:

Don't diagnose. The Department of Labor (DOL) defines a "serious health condition" as any condition that involves medical treatment and requires absence from work for more than three days. In addition to more typical physical ailments and conditions requiring hospitalization, more employees are requesting extended medical leave for behavioral health and stress-related issues.



**EMPLOYEE
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529 Savings Plans: *Great Benefit at a Low Cost*

For years you've been encouraging your employees to save for retirement. But what about other savings programs? The growing popularity of 529 College Savings Plans provides employers the chance to offer employees a valuable benefit at virtually no cost. Take a closer look at this savings benefit to decide if it's right for your company.

529 Savings Plans are education savings plans designed to help families set aside funds for future college costs. Named after section 529 of the tax code, these plans are generally sponsored by individual states. Most states work with independent investment management companies to run the program and provide participants with investment options.

Plans are usually categorized as either savings or prepaid tuition plans, although some have elements of both. Under a prepaid tuition plan, you lock in future tuition rates at in-state public colleges. Recent tax law changes now permit higher education institutions to offer their own 529 prepaid programs, allowing employees to target tuition prepayment to the sponsoring institution. And unlike education IRAs, 529 plans have no income limits restricting eligibility. That means your hourly employees, salaried employees and executives can participate.

Tax benefits. 529 Savings Plans provide tax-free investment growth. An employee can contribute up to \$11,000 per beneficiary each year (regardless of relationship or state residence), and possibly more under an accelerated gifting mechanism. Conservative, moderate and aggressive investment options are available within 529 Plans. Participants may switch investment options within the same plan once per year. This type of account will grow larger than an identical taxable account. And for estate planning purposes, these assets are removed from the contributing employee's estate.

Under current law, beneficiaries can receive money withdrawn for qualified education expenses free from federal taxes. The sunset date of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) on December 31, 2010 could change this. Before EGTRRA, funds in a section 529 plans grew tax-free, but beneficiaries had to pay ordinary income taxes on the earnings portion of withdrawals. Unless Congress



removes the sunset provisions of EGTRRA or renews the act, section 529 withdrawals would return to their pre-EGTRRA tax status. This would be a politically unpopular move, however, thanks to the popularity of section 529 plans and rising tuition costs.

Most states exempt qualified withdrawals for state income taxes and some allow full or partial deductions for contributions. If the withdrawal is not used for higher education purposes—universities or vocational/technical schools—the earnings are taxed as ordinary income and a penalty is imposed. However, most plans allow participants to select a new beneficiary if the intended recipient does not attend college.

Employees can also choose automatic, regular deposits through payroll deductions, typically at no cost to the company. Payroll deductions can also reduce the cost of investing, as many fund companies will waive sales commissions and lower other expenses for those investing through payroll deduction. For companies, the plans are easier to manage than 401(k) plans because the contributions are after-tax, and there are no income eligibility rules. Best of all, unlike with a 401(k), the employer doesn't have to do any IRS 5500 reporting.

Key Issues in Choosing a 529 Plan

- * Eligibility requirements
- * Tax benefits/liability on contributions and qualified withdrawals
- * Contribution limits
- * Sales fees or fund expenses
- * Investment options and asset allocations
- * Surrender or penalty fees
- * Transfer of benefits or beneficiary changes
- * Historical investment returns
- * Qualifications of plan managers
- * Other benefits for state residents and/or non-residents



Selecting a 529

Before scrutinizing fund managers and what they have to offer, a company must first assess its own employee demographics. A good starting point would be to collect information on the number of employees per state, their average salaries and general classifications of employees (married vs. single, age ranges). Then obtain data on all relevant 529 plans (plans within each state in which the company has employees).

The only notable differences among state plans are the tax benefits and the plan fees. Be sure to examine the impact of these factors on participant assets — it may be far greater than you realize. Since tax benefits,

HRAs vs. HSAs:

What's Right for Your Company?

As consumer-directed health plans gain prominence in the health care market, employers are looking for reliable information about their options. Among the most talked-about offerings are Healthcare Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs). Here are the basics on HRAs and HSAs, and what to consider when determining which alternative best meets your company's needs.

HRAs are employer-established arrangements to reimburse employees for medical and dental expenses not covered by insurance. They generally combine a high-deductible health plan (HDHP) with an employer-funded account. Contributions are tax-free, with no maximum, although employers usually set their contributions below the annual deductible of the accompanying health insurance. HRA coverage may extend to long-term care and health insurance premiums, at the employer's discretion. Employees may carry over any unused balances, though employers may limit the aggregate rollovers. Funds in HRAs typically remain with the employer when the employee leaves the company.

HSAs are employee-owned accounts linked to a qualified 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 medical expenses in retirement. Contributions are usually limited to 100 percent of the deductible on the account owner's HDHP, but employees may carry over the full amount indefinitely. HSAs are fully portable, so employees can maintain an account if they change jobs to another employer.

While HRAs and HSAs share similar, if not identical, elements, there are some key differences:

Portability. Unlike HSAs, HRAs are not the personal property of employees, who will in most instances lose any unused funds once they change jobs. While both HRAs and HSAs have positively influenced employee health spending behavior, HSAs present better financial incentives because they are employee-owned.

Employer account funding. HSAs must be funded with cash in a qualified account, while many HRAs are "paper accounts" only, and

accumulated balances will revert back to the employer. With HRAs, companies have more control over the account and typically are not required to fund the account outside of general assets.

Account contributions. HRAs allow employer contributions only, while HSAs permit employees to supplement employer contributions — up to aggregate annual limits. HSAs thus allow workers to fund the difference between their account balance and their deductible with pre-tax dollars.

Qualified expenses. HSAs allow all qualified medical expenses to be reimbursed by the savings account, while the employer defines expenses that qualify for account reimbursement under HRAs. Employers thus can restrict (or expand) the types of medical expenses that are reimbursable.

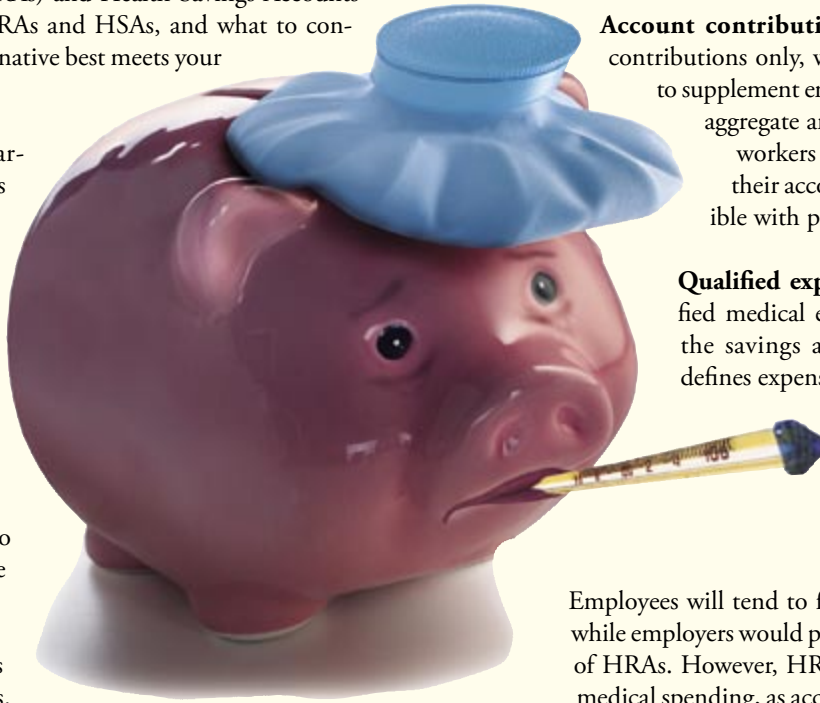
Employees will tend to favor the portability of HSAs, while employers would prefer the control and flexibility of HRAs. However, HRAs may result in less-efficient medical spending, as account balances grow and workers — especially those with large accounts — spend the accumulated totals on discretionary or higher-cost services.

Critics of HSAs question the likelihood of employer cost savings if companies must pay the entire account contribution for every employee, even healthy workers with very few claims. Some view HSAs as more costly because accounts can be used to reimburse expenses not covered by the insured plan, such as insurance premiums and OTC drugs.

The answers lie in plan design. Companies can design HSAs so that the expected decrease in insured medical costs from the HDHP will offset the increase in costs due to account contributions. HDHPs can be structured so that insured costs decrease as a result of increased employee cost sharing and more efficient utilization of medical services.

While HRAs have features that appeal to many employers, given the flexibility allowed in plan design, the advantages offered to employers and employees with HSAs are very compelling. With a well-designed plan and transition strategy, employers can reduce their costs payments while offering employees an innovative solution to meeting health care needs.

If you are interested in learning more about consumer-directed health care plans such as HSAs and HRAs, please contact us. □



Some employers might try to apply their own judgment to decide if a particular condition is serious. But steer clear of diagnosing an employee. Instead, require employees to present a medical leave request form completed by a treating physician. This can help address the criticism that the DOL definition is too vague and opens the door for employee leave abuse.

Notify employees. Employers should designate leave as being covered by FMLA as soon as practicable after an employee has requested the leave and provided any necessary information, generally within two business days of receiving the request. Companies must also give notice to the employee when requiring medical certification and allow the employee at least 15 calendar days following the request to comply.

If an employer fulfills notice requirements and the employee fails to provide proper certification, the company can refuse the request. What comprises adequate notice, however, remains an unsettled question. Companies may want to obtain legal advice to clarify what is considered sufficient notice in their jurisdictions.

Ask for proper documentation. Many employees present medical leave request forms with incomplete or ambiguous information. For employees with a history of absenteeism or performance problems or who have made multiple leave requests, employers may ask for a second physician's opinion (at the employer's expense) if there is any doubt about the validity of the original request.

Most employee FMLA requests meet reporting requirements and are approved without additional review. However, ongoing research by the Society for Human Resource Management (SHRM) finds that half of surveyed companies believe they have approved illegitimate FMLA requests due to the DOL's broad interpretation of the act. Employers worry that they are forced to approve FMLA time off for employees who might not qualify, and say they must deal with morale problems among workers covering for colleagues who are absent for extended time periods.

Track leave time. Simply recording and reporting instances of FMLA leave is not enough to meet an employer's duties. In addition to notification requirements, companies must track intermittent FMLA leave in the shortest increment of time that their payroll systems use—which may be as small as 15 minutes. Many employers are approving leave under paid time-off programs that should be reported as FMLA leave. If leave is granted but not counted against FMLA requirements, the employee could come back and receive an additional 12 weeks of unpaid leave after depleting paid time-off options. And the overlap between paid time-off programs and paid disability benefits means that few companies are able to determine how much FMLA compliance actually costs them each year.

Track FMLA reforms. In response to concern about workers who abuse their FMLA rights, employer groups have proposed a number of legislative reforms. Proposals include clarifying the definition of "serious health condition," permitting employers to require minimum four-hour increments for FMLA leave and allowing employers to call doctors to verify FMLA claims. The Department of Labor also plans to propose rules to address issues raised by a 2002 Supreme Court decision, which held that employers should not be required to provide an additional 12 extra weeks of unpaid leave as a penalty when they fail to give an FMLA notice to an employee who had taken prior leave (*Ragsdale v. Wolverine World Wide, Inc.*).

In spite of its shortcomings, most companies agree that the FMLA is an important protection for employees who must take extended leaves to deal with medical conditions. And a well-run program is a valuable tool to help you retain valuable, experienced employees. If you're looking to improve FMLA management, start by creating good processes for compliance, investing in a system to accurately track leave and providing ongoing training for managers to ensure that FMLA requirements are applied consistently throughout the company. When it's used according to its intent, both the employer and employee benefit. □

529 PLANS – continued from Page 2

unlike projected investment returns, translate to guaranteed money, investors should be wary of choosing a 529 plan that does not offer tax benefits comparable to their own state plan.

Employers face the challenge of evaluating the trade-offs between opting for just one 529 plan or multiple plans. A benefits advisor can help you devise a 529 plan strategy for your workforce.

A 529 plan that is implemented efficiently and managed well can be a smart addition to your employee benefits package. Not only will your company retain and attract talent, but you will be rewarding hard-working employees and showing consideration for workplace quality of life issues. If you are interested in establishing a 529 College Savings Program, please call us. □



Employees may have more time to spend their FSA benefits, according to the Treasury Department. The new rule allows companies to give workers an additional 2.5 months to spend amounts in flexible spending accounts. Previously, workers with FSAs had to forfeit any amounts they did not use within a year. Providing extra time to pay for medical and dependent care expenses is expected to ease the year-end spending rush prompted by the prior rule. Since the rule does not compel companies to extend the deadline, it's up to employers to initiate the change. For more on the new FSA spending rule, go to www.treas.gov/press/releases/reports/n0542.pdf.



After years of shifting health care costs to workers, employers may be slowing that trend, concludes a new study by Watson Wyatt. Forty-one percent of companies say they are willing to absorb costs themselves, compared with 29 percent last year. For companies that do shift costs, communication is critical, as employers must explain how their benefits are still highly competitive. Be sure to educate workers fully about the impact of cost-sharing decisions on their health benefits.



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