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Florida
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FAMILY AND MEDICAL LEAVE

Calling all Florida employers: You can't delay designating FMLA leave

by Lisa Berg
Stearns Weaver Miller, P.A.

On March 14, 2019, the U.S. Department of Labor (DOL) issued a new opinion letter addressing whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave. The issue often arises when employees who need time off ask to use their paid leave first and advise the employer that they "decline" the FMLA designation in the hopes of saving their job-protected leave for a later time.

Can employees decline to use FMLA?

Under the FMLA, eligible employees of covered employers may take 12 weeks of unpaid, job-protected leave for specified family and medical reasons. The employer may require, or the employee may elect, to "substitute" (or run concurrently) paid leave with any unpaid FMLA leave.

According to the DOL's regulations, once you have enough information to determine whether an employee is taking leave for an FMLA-qualifying reason, you are required to provide a written designation notice to the individual within five business days, absent extenuating circumstances. Failure to give proper notice may constitute interference with or denial of the employee's FMLA rights.

In the new opinion letter, FMLA 2019-1-A, the DOL opined, "An employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates the need to take leave for an FMLA-qualifying reason, neither the employer nor the employee may decline FMLA protections for that leave." Even if an employee would prefer you to delay the designation, you may not put off marking the leave as FMLA-qualifying.

What this means in the real world

The issues addressed in the opinion letter commonly arise when an employee has more than one reason for FMLA leave. Employees may resist using their FMLA entitlement for an earlier absence because they want to save leave for later ones. The best and most common example is a pregnant employee who takes time off for a different FMLA-qualifying reason, such as to care for another child or a sick parent. Similarly, the employer may prefer not to force the employee to take FMLA leave for every little absence that might qualify.

In that situation, not only *can* you require the employee to use FMLA leave (until exhausted) for all the absences—you are *required* to do so. For employees

AGENCY ACTION

DOL announces new compliance assistance tool. The U.S. Department of Labor (DOL) in February announced the launch of an enhanced electronic version of the Handy Reference Guide to the Fair Labor Standards Act (FLSA). The new online version of Wage and Hour Division (WHD) publications aims to assist employers and workers with a resource that provides basic WHD information as well as links to other resources. The WHD established the electronic guide as part of its efforts to modernize compliance assistance materials and provide accessible information to guide compliance. The tool offers a new design—reformatted for laptops, tablets, and other mobile devices—and provides additional resources and related information, including plain-language videos.

DOL establishes voluntary review program for contractors. The DOL's Office of Federal Contract Compliance Programs (OFCCP) has announced the release of a new policy directive to establish a voluntary compliance program for high-performing federal contractors. The Voluntary Enterprise-wide Review Program (VERP) provides contractors with an alternative to the OFCCP's establishment-based compliance evaluations with a focus on recognizing contractors that demonstrate comprehensive corporatewide compliance and model diversity and inclusion programs. In November 2018, the agency issued a separate directive establishing early resolution procedures to allow it and contractors with multiple establishments to cooperatively resolve compliance reviews while achieving corporatewide compliance with its requirements. The OFCCP expects to begin accepting VERP applications in the fall.

Employers urged to prevent worker exposure to carbon monoxide. The Occupational Safety and Health Administration (OSHA) has issued a reminder to employers to take precautions to protect workers from the serious and potentially fatal effects of carbon monoxide exposure. OSHA says recent incidents highlight the need to educate employers and employees about the dangers of carbon monoxide exposure from portable generators and other equipment in enclosed spaces. Carbon monoxide poisoning often claims the lives of employees when fuel-burning equipment and tools are used in buildings or semienclosed spaces without adequate ventilation. In addition to portable generators and space heaters, sources of carbon monoxide include anything that uses combustion to operate, such as power tools, compressors, pumps, welding equipment, furnaces, gas-powered forklifts, and motorized vehicles. OSHA urges employers to install effective ventilation systems, avoid using fuel-burning equipment in enclosed or partially enclosed spaces, and use carbon monoxide detectors. ✤

who have paid leave available, you may allow them to choose between using it concurrently with FMLA leave or save it for after their protected leave is exhausted, but you may not allow them to use it first and save their FMLA leave for later. That's a big deal because many employers have official policies allowing employees to do just that. You also may grant additional unpaid leave after the FMLA leave expires.

Employer takeaway

Employers are often faced with the dilemma of what to do when an employee doesn't want an absence designated as FMLA leave and chooses to use up other types of paid leave first. Here, the DOL clarified that when *any* absence qualifies as FMLA leave, the employer *must* designate it as such.

While Florida employers now have clarity, employers with operations under the jurisdiction of the U.S. 9th Circuit Court of Appeals (which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) should consult with legal counsel since that circuit has held that an employee can affirmatively decline to use FMLA leave.

You may contact Lisa Berg at lberg@stearnsweaver.com. ✤

RESTRICTIVE COVENANTS

Restaurant no-poaching pledges may not be all they're cracked up to be

by Gregg Gerlach
Gerlach Employment Law, PL

Fast-food chains are feeling pressure from the U.S. Department of Justice (DOJ), various states' attorneys general, and employee class action lawsuits. The restaurants seem to be running away like scared chickens, and perhaps for good reason: They're facing a relatively newfangled threat normally associated with antitrust law, but which looks, head-bobs, and clucks very much like an employment law action.

How no-poaching agreements have worked historically

Many, if not most, fast-food restaurants are franchisees of the corporate named restaurant. Contained in many of the franchise agreements are no-poaching clauses by which the franchisee agrees not to employ anyone currently, or in the last six months, employed by the franchisor or other franchisees, without first obtaining the consent of that current or recent former employer. The effect is that, for example, McDonald's franchise A isn't likely to hire employees working at McDonald's franchise B. Moreover, multiple breaches of the no-poaching provision can lead to the franchisor terminating the franchise agreement.

Most franchisees enter into franchise agreements extending from five to 20 years. The no-poaching clauses are intended to:

- Protect each franchisee's investment in the specialized franchise-specific training that employees receive (which is very easily transferable to another franchise); and
- Allow the franchisees to compete better against other fast-food franchise entities.

Foes say agreements are 'unfair, detrimental'

A 2017 Princeton University study found 32 of the 40 largest fast-food chains use no-poaching clauses in their franchise agreements. The study's authors, along with other employee advocates, argue the agreements are unfair and detrimental to the labor market's competition for workers and suppresses fast-food employees' job opportunities, wages, and benefits. As a result, governmental agencies and others have been targeting the industry and its franchise no-poaching clauses.

Federal agency action. In October 2016, the DOJ, Antitrust Division, and Federal Trade Commission jointly released "Antitrust Guidance for Human Resource Professionals." In it, the agencies said "naked" wage-fixing or no-poaching agreements among employers are illegal under the antitrust laws, and going forward, the DOJ would consider filing criminal felony charges against violators. (The term "naked" means the franchise agreement is separate from or not related to a larger, legitimate transaction, such as an acquisition or a joint venture.)

State pledges. In July 2018, the Washington state attorney general's office received pledges to end their no-poaching agreements from Arby's, Auntie Anne's, Buffalo Wild Wings, Carl's Jr., Cinnabon, Jimmy John's, and McDonald's. Around the same time, 11 other states' attorneys general cosigned letters sent to Arby's, Burger King, Dunkin' Donuts, Five Guys Burgers, Little Caesars, Panera Bread, Popeyes Louisiana Kitchen, and Wendy's, requesting information about their use of no-poaching agreements. In March 2019, Arby's, Dunkin' Donuts, Five Guys Burgers, and Little Caesars settled with the Washington attorney general's office, which included a requirement for the chains to post a notice on their employee bulletin boards until 2020.

Employee lawsuits. Class action suits representing employees of fast-food restaurants have been piling up. The suits are being filed under the Sherman and Clayton antitrust statutes.

Section 1 of the Sherman Antitrust Act (SAA) prohibits any contract or conspiracy that creates a restraint of trade among the states. Section 4 of the Clayton Antitrust Act provides a right for an individual (e.g., an employee) to file a lawsuit for any business or property (including employment) injury sustained because of a business' (e.g., an employer's) violation of Section 1 of the SAA. In such a lawsuit filed against Jimmy Johns, the court said the company has more than 2,700 restaurants in more than 40 states, 98 percent of which are independently owned and operated by separate franchisees, typically with 10-year franchise agreements containing no-poaching clauses.

In 2017, a Florida resident who worked for McDonald's filed a class action lawsuit against the company alleging she had been denied a position at another location that would have offered significantly more pay and better growth potential. The franchise where she sought to be hired, pursuant to the company's no-poaching clause, contacted the franchise where she was working to obtain its consent, but was told no because the employee was "too valuable." Although the court granted McDonald's request for dismissal in part because of an easily correctable pleading error by the employee, the action will proceed.

More recently, a class action lawsuit filed in federal court in Miami alleged Burger King employees have been denied pay raises and opportunities for advancement because of the no-poaching clauses in their employers' franchise agreements. The plaintiff, earning $10 an hour at one franchise, sought, but failed, to get a higher-paying job at another franchise. He was told by the franchisee where he was hoping to work that his transfer would need to be approved, but then never heard back one way or the other.

Key takeaways for Florida HR pros

- Add antitrust law violations to the arsenal of potential employee disputes and litigation.
- Review your company's other business arrangements, typically not thought of as employment agreements, which may contain restrictions on the hiring of other employers' employees.

REPORTING REQUIREMENTS

EEO-1 filing deadline extended

The Equal Employment Opportunity Commission (EEOC) recently announced that the deadline for submitting EEO-1 reports has been extended to May 31, 2019. The extension was due to what the EEOC called a "partial lapse in appropriations" (i.e., the government shutdown). Typically, EEO-1 reports are due by March 31, and the period during which employers complete the report begins in January. This is a one-time correction under which the survey opens in March with a deadline for submitting the EEO-1 by the end of May.

Employers with at least 100 employees and government contractors with at least 50 employees must submit the employer information report to the EEOC. The EEO-1 involves the submission of workplace data based on race, ethnicity, gender, and job category. ✤

- Because "wink-wink" (unwritten) agreements between two businesses not to hire the other's employees can violate the antitrust laws as much as written agreements do, ensure your company is fully informed of the significant risk of continuing to engage in those kinds of understandings, including possible criminal exposure.
- Seek guidance from your trusted employment law counsel.

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LABOR LAW

NLRB sings a new tune: It takes at least two to tango

by Al Vreeland
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The National Labor Relations Act (NLRA) prohibits employers from discriminating against employees for engaging in protected "concerted activity." Over the years—and particularly during the Obama era—the National Labor Relations Board (NLRB) has interpreted that protection expansively to include social media posts, derogatory statements about coworkers, and negative public statements to the employer's customers. In its first significant decision to curb that expansion of the Act's coverage, the NLRB returned to some of its original decisions and held that concerted activity has to be more than a single employee's personal gripe.

Carry your own bags

Trevor Greenidge worked as a skycap for Terminal One Management at John F. Kennedy International Airport. On July 17, 2013, he was working with three other skycaps outside the entrance to Terminal One when he was approached by his supervisor, Cebon Crawford, who informed him that Lufthansa Airlines had requested skycaps to assist with a soccer team's equipment. Greenidge remarked, "We did a similar job a year prior, and we didn't receive a tip for it." When a van containing the team's equipment arrived and the skycaps were waved over by managers from Lufthansa and Terminal One, they walked away.

The two managers questioned the skycaps' supervisor, who told them they didn't want to do the job because they were anticipating a small tip. Greenidge testified that he was about 50 feet away and didn't hear what Crawford said to the managers. The managers then sought assistance from baggage handlers inside the terminal, who completed a significant share of the work before Greenidge and the other three skycaps helped them finish the job. After the job was completed, the soccer team gave the skycaps an $83 tip.

That evening, the Lufthansa manager sent an e-mail alerting Terminal One managers that the skycaps had provided subpar service to a group the airline considered a VIP client. She questioned why the skycaps "would refuse to provide skycap services to a partner carrier" and stated that "in [her] entire professional career[, she had] never been this embarrassed in front of [a] customer."

After a series of e-mails, the Terminal One manager decided that all four skycaps would be terminated. Greenidge's discharge letter stated:

> You were indifferent to the customer and verbally [made] comments about the job stating you get no tip or it is very small tip. Trevor, you made [these] comments in front of other skycaps, Terminal One Mod [manager on duty] and the Station Manager of Lufthansa.

Greenidge filed a complaint with the NLRB alleging he was fired for engaging in concerted activity when he complained to his supervisor about the anticipated lack of tips from the soccer team in front of other skycaps.

Just having an audience isn't enough

To enjoy the protection of the NLRA, employees must satisfy two elements:

(1) The activity they engage in must be "concerted."

(2) The concerted activity must be engaged in "for the purpose of . . . mutual aid or protection."

Broadly stated, concerted activity is action taken by (1) a group of employees together, (2) one individual who is authorized to act on behalf of other employees, or (3) an individual who is attempting to induce other employees to engage in group activity.

The NLRB upheld the dismissal of Greenidge's complaint, stating that although he spoke in terms of "we," he wasn't engaged in concerted activity. Instead, he spoke for himself, not on behalf of others or to engage his coworkers in protected activity. The Board found his complaint about tipping wasn't a group complaint and he wasn't attempting to induce action by other skycaps. Interestingly, his comments did induce other skycaps to act, but his complaint was a personal gripe, according to the NLRB, not a complaint on behalf of others or an intent to motivate others.

In reaching that conclusion, the NLRB overruled a case in which the Obama-era NLRB created more sweeping protections for employee rights. The Board rejected the previous rule that extended blanket protection to employee complaints made in the presence of other employees. Instead, the NLRB stated:

> To be concerted activity, an individual employee's statement to a supervisor or manager must

either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce[,] or prepare for group action.

So what's sufficient?

The NLRB listed five factors to consider when determining whether an individual's actions were a personal gripe or a complaint on behalf of or to induce others:

(1) The statement was made at an employee meeting where there was an announcement regarding wages and conditions of employment.

(2) The decision by the employer affected several employees who attended the meeting.

(3) The employee spoke up not to ask questions but to voice either opposition to or a complaint about the decision.

(4) The employee's comments included remarks about the impact of the employer's actions on other employees, not just on him.

(5) The meeting was the first time employees became aware of the employer's decision, so there wasn't an opportunity for the speaker to communicate about it to other employees before the meeting.

When those factors are considered, an employee who acts alone, without the authority of his coworkers and without an intention to induce others to act, will not be found to have engaged in protected concerted activity, even if his actions take place in front of coworkers. The NLRB also stated that it would reconsider cases in which the Obama-era Board ruled that statements about wages, schedules, and job security were "inherently" protected concerted activity under Section 7 of the NLRA.

Return to sanity

This pullback by the NLRB is good news for employers. The Board has been the go-to agency for employees who believe they haven't been treated fairly but don't have a basis to claim discrimination because of a protected class. To evaluate whether an employee's conduct or comments are protected, you must consider whether he truly spoke on behalf of others or to motivate coworkers to act in support of his position. If neither is the case, the employee's comments are personal and not protected.

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RACE DISCRIMINATION

No Title VII protection so far for people perceived to be black

Are people who appear to be black, Hispanic, or mixed-race—but are not—protected from discrimination under Title VII of the Civil Rights Act of 1964? Three real-life examples provide some insights.

'Struggles of a Black man'

Despite being the son of white Irish parents, British theater director Anthony Ekundayo Lennon appears to be a mixed-race man because of his "high cheekbones" and "curly hair." He drew media attention recently when he claimed that as an actor, he found it easier to pursue nonwhite parts. He also changed his middle name from "David" to "Ekundayo." The criticism increased when he was offered a paid traineeship as a "theatre practitioner of colour," a program designed to give more actors of color a chance for a career in the arts. He acknowledges that he is a white man with white parents but insists he has gone through the "struggles of a Black man."

Lennon's story mirrors that of Vijay Chokal-Ingam, a man of Indian descent (and brother of actress Mindy Kaling), who admittedly "faked being Black" to apply to medical school. He wore his hair more closely cropped, changed his name, and even became a member of black student organizations.

And don't forget Rachel Dolezal, a former local NAACP president in Spokane, Washington, who is white but self-identifies as black (even her closest friends thought she was) . After the story broke, Dolezal changed her name in 2016 to "Nkechi Amare Diallo," which has Nigerian origins.

Lennon, Chokal-Ingam, and Dolezal self-identified as black persons and outwardly appeared, to some, to be black. But would they be protected from discrimination under Title VII? While the Americans with Disabilities Act (ADA) and the Rehabilitation Act explicitly prohibit discrimination against persons "regarded as" having a disability based on that belief, Title VII doesn't contain such language.

What courts say

The U.S. Supreme Court and federal circuit courts of appeals have not yet determined whether a "perceived-as" race discrimination claim would be recognized under Title VII. Although the appellate courts have not yet addressed the issue, a few federal district courts have held that perceived-as discrimination claims are cognizable under Title VII. Ohio, Maryland, and Michigan district courts have allowed national origin "perceived-as" claims to proceed. In the Ohio case, *Perkins v. Lake County Department of Utilities*, the court explained: "When racial discrimination is involved[,] perception and appearance are everything."

However, the majority of federal district courts that have considered the issue (including North Carolina, New York, Kansas, and Georgia) don't recognize perceived-as claims as workable under Title VII. The cases cite *Butler v. Potter,* an Eastern District of Tennessee case, which held that an employee who wasn't discriminated against based on his actual national origin (a supervisor perceived him as being of Indian or Middle Eastern descent) did not have a valid Title VII claim. Courts that don't recognize perceived-as claims generally point to the Act's lack of "perceived-as" language, which is present in other federal antidiscrimination statutes like the ADA and the Rehabilitation Act.

EEOC's take

The EEOC, the agency charged with enforcing Title VII, recognizes that discriminating against someone "because of the perception or belief that [he] is a member of a particular racial . . . group whether or not that perception is correct" is a form of race discrimination. In fact, in September 2006, the agency resolved a potential Title VII lawsuit against a fast-food chain in which a biracial girl was refused an application for employment because she was perceived to be black.

Bottom line

The fact remains that although the EEOC interprets Title VII to prohibit such discrimination, Congress has not amended the Act to include language explicitly prohibiting perceived-as race discrimination. Nevertheless, you should be aware of the existence of such claims and take care to investigate their substance, regardless of the victim's protected status or lack thereof. ✤

EMPLOYER INVESTIGATIONS

Investigation limitations: Consider hiring outside help in #MeToo era

In the era of #MeToo, HR managers are finding that their jobs involve more and more internal investigations. Very few of us entered the field of personnel management because we love questioning alleged victims and suspects. Nevertheless, that is an essential part of addressing internal complaints. So what is an HR manager to do? Well, one poll indicates that the best option may well be to hire outside investigators.

What should an internal investigation look like?

Internal investigations reflect the intersection of the law and HR management. Many aspects of investigations fall within HR's wheelhouse: Managers are uniquely equipped to understand the organization and the interpersonal relationships involved and to gently question alleged victims who come to them looking for solace and support.

Unfortunately, HR managers are not well equipped to handle some of the legal issues that crop up during investigations. Combative witnesses—usually the alleged victim and the alleged harasser—love to throw around legal terms, which often stymies investigators. Witnesses may also refuse to answer questions, not realizing that failing to cooperate is actually insubordination and can be grounds for termination. In those situations, investigators often push too hard—making inaccurate legal assertions—or not hard enough—allowing witnesses to dictate the direction and extent of questioning. Both outcomes are fatal to the success of an investigation.

What to do?

For those reasons—and many more—a poll conducted by the Employment Law Alliance notes that 91 percent of employment law attorneys recommend using outside investigators instead of in-house HR professionals when high-level executives are accused of harassment.

Indeed, the standard of practice is shifting away from conducting internal investigations toward hiring outside investigators. That is true for even large businesses that have the luxury of in-house labor and employment counsel. When senior leadership is accused of misconduct, it is difficult to identify an internal investigator who would not be accused of bias.

However, companies are turning to outside investigators for run-of-the-mill issues as well. Attorneys are especially adept at the type of questioning required in complex harassment claims, which can span months or years and include multiple alleged victims. The skills involved in preparing a case for trial, including strategic thinking, document collection, and interview skills, are well applied to internal investigations.

As with all business decisions, think carefully about your choice of investigator. If a case is likely to result in a lawsuit, you do not want to retain your normal employment counsel. When an attorney conducts an internal investigation, he becomes a witness in the case. And once an attorney is a witness, he cannot reasonably act as counsel in litigation. If you face allegations that merit an attorney investigator, consult with your outside employment counsel and make a strategic decision on how to proceed and whom to use.

What about small businesses?

Lawyers are expensive—no one can reasonably dispute that. Sometimes hiring an outside investigator is simply not in the budget. What do you do then?

As a starting point, invest in a good investigation training course. With the rise in sexual harassment claims flowing from the #MeToo movement, many organizations have developed programs. Do your research, and select a program you trust from a reputable provider.

When it comes time to put your investigatory skills to work, don't be afraid to consult with employment counsel. Unlike having your outside counsel conduct the investigation, this type of conversation will not bar your attorney from representing you in subsequent litigation. Share the allegations with counsel, discuss the list of witnesses you want to meet with and the documents you want to collect, and work together to prepare a list of stock questions. Once your report is complete, ask counsel to review it to identify any possible issues. A small investment during the investigatory stage can often stave off litigation down the road.

Bottom line

Investigations are hard. Complex and high-profile investigations are harder still. Consider whether it is worthwhile to invest in hiring outside counsel to investigate harassment allegations in the current climate. While the financial investment can seem daunting, it often reflects huge savings over the costs of litigation in the long run. ✤

DELAYED RETIREMENT

Know the legal issues you face when employees work past 65

According to the Bureau of Labor Statistics (BLS), about one-third of Americans between the ages of 65 and 69 are still employed. That number has been steadily rising, and it's expected to reach 36 percent over the next five years.

Several developments over the past few decades are contributing to this trend. On the bright side, Americans are living longer, and many simply choose to work longer as a result. On the not-so-bright side, the Great Recession made a huge dent in workers' retirement savings. Many lost their jobs and were forced to take lower-paying positions, which had a negative impact on their retirement accounts. The older they were when the recession hit, the harder it may be for them to make up their losses. Let's look at some of the legal issues you may encounter with these employees.

Mandatory retirement

Long gone are the days when employers could force employees to retire when they hit 65, regardless of their position in the company or the type of work performed. Under the Age Discrimination in Employment Act (ADEA), mandatory retirement is allowed only in very limited circumstances.

First, the ADEA allows what it calls "compulsory retirement" for employees who are 65 or older and were employed as a bona fide executive or high policymaker for the two-year period before retirement. "Bona fide executive" is defined to include "top-level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." A "high policymaker" is someone who plays a significant role in the development of corporate policy, such as a chief economist or chief research scientist. Both exceptions are interpreted narrowly.

A mandatory retirement age also is allowed if it is a bona fide occupational requirement. This exception is very narrow and is primarily available for employees in positions in which safety is of particular concern (such as pilots).

Medicare eligibility

Much confusion abounds about how employees' eligibility for Medicare when they turn 65 affects their entitlement to employer-sponsored health benefits. In addition to the ADEA, employers must satisfy the Medicare secondary payer (MSP) rules, which govern whether their health plan or Medicare is considered primary coverage (when employees have both).

In general, Medicare is considered primary if the employer has fewer than 20 employees, but it is secondary for those that have 20 or more employees. When Medicare is secondary, the MSP rules prohibit the employer from involuntarily terminating an employee's health coverage because he is enrolled in Medicare.

Nevertheless, many employees will choose to drop their health coverage when they enroll in Medicare, and that's fine. Do not, however, pay (or offer to pay) their Medicare premiums after they drop their employer-sponsored coverage. That would be considered an unlawful incentive (for employers with 20 or more employees) for employees to drop their group health coverage under the MSP rules.

Similarly, the ADEA prohibits employers from excluding active employees (or their spouses) from coverage solely because they are Medicare beneficiaries. There is an exception called the "equal benefit or equal cost" standard, but it is narrowly construed and difficult to meet.

HSA contributions

If you offer a group health plan that allows employees to contribute to a health savings account (HSA), you need to have a clear understanding of how an employee's ability to participate in the plan is affected by Medicare eligibility.

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5-3 EEO-1 Report Filing Deadline May 31, 2019: How to Comply so You Don't Get Fined

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5-30 Succession Planning: Do's and Don'ts for Smooth Transitions and Changes from Within

6-6 Form I-9 Recordkeeping: How to Complete, Re-Verify, Store, and Destroy Paper and Electronic Files in Compliance with Federal Law

There generally are two core requirements for an employee to contribute to an HSA:

- They must be enrolled in an HSA-qualified high-deductible health plan (HDHP); and
- They must not have any other "disqualifying coverage."

Because Medicare is considered disqualifying coverage, employees are no longer eligible to contribute to an HSA after they are on Medicare. They may, however, continue to participate in the underlying HDHP.

You may see sources suggesting that all employees who turn 65 are prohibited from contributing to an HSA. That misconception is based on the belief that anyone who turns 65 is automatically enrolled in Medicare (and therefore disqualified from contributing to an HSA). However, automatic Medicare enrollment happens only if the individual has filed for Social Security benefits.

So, in short, employees who work past 65 may still be eligible to contribute to an HSA if:

- They have not filed for Social Security benefits;
- They have not otherwise enrolled in Medicare (or have other disqualifying coverage); and
- They are enrolled in your qualifying HDHP.

On the other hand, once an employee applies for Social Security benefits, she will be enrolled in Medicare and will be ineligible to contribute to an HSA. Remember, however, that even in such a situation, the employee should be allowed to stay on the HDHP if she so chooses.

Final thoughts

As the workforce participation rate for older workers increases, you need to have sound policies for dealing with them in a nondiscriminatory fashion. Get ahead of the game by reviewing your policies, revising any that are noncompliant, and developing new ones if necessary. ✤

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