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Common Mistakes to Avoid in Broad-Based Variable Compensation Plans

As the economy crumbled around our collective feet, the proper design of a compensation program may not have seemed like a priority. But with more candidates than jobs available and the U.S. unemployment rate determined to break into double digits, you may be surprised to learn that compensation programs continue to play a vital role in the success of many businesses.

BLR® spoke with Janet Koechel of JFK Consulting (www.jfkconsulting.net), a compensation expert who has been helping clients craft effective compensation programs for over 25 years.

“Even in a bad economy, it is still a popular way, and a good way, to control payroll costs, because it is linked to company performance,” Koechel reports. “If the company performs, variable pay plans pay out. If it doesn’t, unlike Wall Street investment banks, it typically doesn’t pay out.”

Companies already using variable pay for their sales and executive staffs may believe they can simply tweak existing programs a bit for nonsales, nonexecutive employees.

Koechel urges a deeper thought process. The plan’s effectiveness will depend on whom it targets and how well you draw a line of sight from each group’s duties to the company’s success. She gave some insight into what to do, and particularly what not to do, when designing these important plans.

DON’T: Make Rewards Too Small

“When designing bonus plans for nonexempt or hourly groups, the amount has to be large enough to catch their attention and be meaningful,” Koechel says.

“When bonus plans were first rolled out to lower-level employees, they were as little as 1% to 3% of pay. If you’re making \$30,000, that’s not enough. One of things I like to do is to set the incentive higher. I recommend companies tell hourly employees that if they meet their productivity goal, they get the equivalent of 2 weeks’ pay. That’s almost 4%, and people like it. The amount has to be enough that people will think about how they can perform in order to get it.”

DO: Educate Employees About Their Personal Impact

Commonly, employees who have no direct executive or sales impact have a difficult time seeing how their individual performance plays a part in the company’s success. This is where it is important to draw a line of sight. “It’s very important when you’re designing one of these plans that you be cognizant of employee education about the plan,” says Koechel.

“Teach the employee how they can impact the performance measures you set. If you’re an executive, you understand EBIT (earnings before interest and taxes); but if you’re an administrative assistant, you might not, nor would you feel that you could have an impact on that.

“One of the ways people handle this is to have tiers in the plan. The plan may have a corporate funding trigger, that says the plan will pay out if the company earns, for example, 10% more in EBIT than last year,” Koechel continues.

“Then you might divide people into teams, by department, hourly status, or

(continued on page 2)

another way. Conduct training to teach the employees how they can impact the bottom line by being productive, by showing up for work, not goofing off, monitoring use of supplies, that kind of thing. Educate the employees on how they can personally impact these corporate measures.”

DON'T: Create Unintended Contracts

“One thing [some] companies do is quote the components of the incentive plan in the employment offer letter,” explains Koechel. “That ends up creating a contractual agreement, and if the company changes or cancels the plan, they can be sued. I have seen this happen.

“Never put the details of a bonus plan in the employment letter. You can state that the employee is eligible for an incentive plan, and that information regarding the plan will be provided separately,” Koechel says.

She recommends that details of the plan be documented in a document similar to a summary plan description. “I typically do this when I’m designing an incentive plan, and I have the legal people look it over. I include a management disclaimer, saying that management has the right to amend or terminate the plan at any time.”

DO: Document Terms Of the Plan

When Koechel creates a summary description of the incentive plan, there are several key items she includes. The plan, she says, should always have a beginning and an end date, often a fiscal year or a calendar year.

“It should define who is eligible, what the components are of the plan, and the criteria for earning the bonus. Include language about what happens

if an employee retires, becomes disabled, or passes away during the course of the year.

“You need to have good documentation,” she adds. “I’ve worked with companies when there was a lawsuit, and someone requests the organizational chart from 1995 because they need to know who Suzy’s supervisor was then and what incentive plan she was covered under.” Creating new plan summary documents for each year and maintaining them properly could make the difference in a lawsuit.

The right to change or terminate the compensation plan is especially important in two situations, Koechel says. One is when there is a flaw in the plan’s design that can result in an unintended windfall for the covered employees.

“For example, if there was a short supply of something, and the salesperson began stockpiling it and then sold it and made a killing on it,” she says.

The other situation can have the opposite result. “Maybe the corporate trigger threshold was too high. Sometimes, it’s the economy, or a hurricane ... or 9/11 that prevents people from reaching their goals. Sometimes things are just out of your control.”

DON'T: Be Too Quick to Abandon the Plan

When employees fail to meet the mark, whether it’s due to a disaster of some kind or incorrect measures, don’t be too quick to scrap the plan, Koechel contends.

“One of the biggest faux pas companies make is to cancel the plan because it didn’t pay out the first year. In that situation, companies worry that employees won’t be motivated.

“But you can turn a negative into a positive if you identify where the shortcomings were and really educate employees about how they can reach their goals.

“Use recognition programs,” she says. “For example, let them know the company didn’t meet its goal this year. But the XYZ Department improved by 30%, so you are going to give each member \$100 or something.

“Even if the company didn’t make the bonus threshold, you can sometimes still reinforce the positives and keep the momentum going.”

DO: Encourage Employees To Think Like Shareholders

“It can take a lot of patience to educate average employees so they think like a shareholder and know they can impact the bottom line,” Koechel says.

“Sometimes it’s done by establishing not only corporate metrics, like earnings or profitability, but also team goals or department goals, like staying within budget.”

But once you accomplish that shift in mindset, she contends, you’ll likely find your company is more efficient—no matter the economy.

I’m Underpaid!

Fifty-eight percent of HR and compensation professionals say they are underpaid, but many of them say they won’t be asking for a raise in the near future, according to a recent poll on HR.BLR.com and Compensation.BLR.com.

When asked how they feel about their pay, 38 percent of respondents said they are underpaid but won’t be asking for a raise anytime soon. Another 20 percent said they were underpaid and will ask for a raise soon.

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Resource Group, Partner Benefits Help Create Inclusive Workplace

It's easy for an employer to say that it values a diverse workforce; it's another thing to show that. By earning a perfect score in the annual Human Rights Campaign's Corporate Equality Index survey for the second consecutive year, Diageo (www.diageo.com) has demonstrated its commitment to creating an inclusive workplace for gay, lesbian, bisexual, and transgender (GLBT) employees.

"Diageo not only talks the talk, it walks the walk when it comes to inclusiveness," says Neil Tallantire, who is senior vice president of innovation for the company and leads its Rainbow Network, an employee resource group (ERG) for GLBT employees.

"The incredible support from the highest levels of the company has helped energize Diageo's Rainbow Network. It is great to see the passion of our members as well as the response from all employees to the group's efforts, whether it is a Diageo float in a local Gay Pride parade or an activity that supports our sales team's efforts with gay-owned and operated accounts," he says.

Ivan Menezes, president and CEO of Diageo North America, says "Diageo is committed to maintaining an inclusive workplace, and achieving this [Human Rights Campaign] rating 2 years in a row validates these efforts. We want to be known as an organization where our employees know they can confidently bring their true selves to work every day."

Instilling that sense of worth is vital to the company's culture. "We want our employees to look forward to coming to Diageo when their alarm clock goes off—excited about the new challenges of the day. You don't want someone to hit the 'snooze' [button] because they dread coming to a place that does not realize the value they can contribute to the organization," says Diageo Human

Resources Director, Diversity & Early Career, Danielle M. Robinson, Ph.D.

"Nor do we want people to check their real life at the front door to fit in. Each individual's life experience contributes to our overall diversity of Diageo. Inclusion is important because people that feel they have a voice at the table ... are more engaged employees, which will ultimately result in a more productive workforce."

Rainbow Network Mission

The global spirits, wine, and beer company, whose North American headquarters is located in Norwalk, Connecticut, formed the Rainbow Network in 2007. It was one of the first ERGs to be introduced at Diageo and is one of its most active.

"The group's main mission is to ensure Diageo is an employer that respects, values, and embraces the talents and contributions of all Diageo GLBT employees, and also values the greater GLBT community," says Robinson. "The Rainbow Network acts as a mentoring, advocacy, and support resource for all Diageo GLBT employees, as well as for straight allies including employees with GLBT children and other family members. The ERG also acts as an outreach organization to enhance Diageo's position as a GLBT-friendly and supportive company and employer."

Robinson says it is important to offer employee resource groups such as the Rainbow Network. "We truly believe that employee resource groups are the fuel behind accelerating and embedding the inclusion and diversity mindset further in the organization," she explains.

Other Inclusive Benefits

The company's nondiscrimination policy covering sexual orientation and gender identity, diversity training, and domestic-partner benefits further

Who: Diageo plc

What: Has created an inclusive work environment for gay, lesbian, bisexual, and transgender (GLBT) employees.

Results: Earned a perfect score in the Human Rights Campaign's Corporate Equality Index survey for 2 consecutive years.

demonstrates its commitment to an inclusive workplace.

Benefits are available to an employee's partner or spouse of the same or opposite sex, according to Robinson. "Domestic partner benefits are viewed as an inexpensive option to attract and retain the best employees, and to promote fairness and equality in the workplace, and it aligns with our inclusive workplace."

She adds, "If we want to attract the best talent, then we need to provide benefits that will accommodate everyone's needs."

Diageo's efforts have helped the company build a diverse workforce, increase awareness among managers about the importance of a diverse and inclusive workforce, and raise its corporate brand awareness in the multicultural community. This, in turn, has helped with recruitment, according to Robinson.

Leadership Buy-In Essential

Human Resources can "help start the conversation" about creating an inclusive environment, "but the leaders in the business need to own it," she says. "... If you don't have your leadership supporting the message in their words and behaviors, it is doomed to fail for sure."

Maintaining an inclusive workplace is an ongoing, organizationwide effort. "Maintaining is really up to all employees at all levels," Robinson says. "It needs to be reinforced at every opportunity and understood that any behavior outside of ... [the company's] values is unacceptable."

Principles for Executive Pay

Public companies looking to restore credibility in their executive pay practices and oversight might be interested in five guiding principles recently released by The Conference Board Task Force on Executive Compensation (www.conference-board.org/ectf). The subtext of the recommendations is that, if companies fail to act now, the federal government could mandate more burdensome changes through regulatory and legislative action.

The guiding principles are:

- Establish a clear link between pay, strategy, and performance;
- Provide compensation that is fair, affordable, and clearly aligned with actual performance;
- Eliminate controversial compensation practices that conflict with the notions of fairness and pay for performance, unless there is a specific justification to continue them;
- Demonstrate credible board oversight of executive compensation; *and*
- Foster transparency with respect to compensation practices and appropriate dialogue between boards and shareholders.

Lawmakers Push Gender Equity

Congress is pushing for an update to a decades-old affirmative action goal in federal construction contracts.

Twenty-six lawmakers sent a letter to Secretary of Labor Hilda Solis, saying that “the current goal for the utilization of women within federal construction contracts and subcontracts has not been updated from a level of 6.9 percent of total work hours since 1980.”

The Office of Federal Contracts and Compliance Programs (OFCCP) set the goal in 1980 based on 1970 census data, according to the letter.

“The regulations for federal contractors in the construction industry are out of date and must be updated,” said Rep. Pete Stark (D-California), one of the lawmakers who signed the letter. “Our equal opportunity polices should reflect the progress our country has made, as well as the most up-to-date census data.”

Rep. Rosa DeLauro (D-Connecticut), who also signed the letter, added “Modernizing these contract requirements is a no-brainer. These OFCCP standards are based on 40-year-old data that in no way reflect the considerable progress we have seen in the construction industry over the past 4 decades. These standards should reflect the America of 2010, not the America of 1970.”

The lawmakers are seeking an updated goal and regular reviews of it. “A more appropriate participation goal, based on current workforce demographic data, is both legally defensible and critical to assist women in making more gains in non-traditional fields,” they wrote.

No Texting for Federal Workers

Federal employees are prohibited from text messaging while driving a vehicle that is owned, leased, or rented by the federal government or while driving a privately owned vehicle on official government business, under a recent Executive Order issued by President Barack Obama.

The order also states that federal employees are not allowed to use government-supplied electronic equipment while driving.

In addition to helping save lives and reduce injuries, Obama says the new policy sets an example for state and local governments, private employers, and individual drivers. The order encourages federal contractors to adopt a similar policy.

IRS Update

IRS Rules on Employee Expenses

Employers that reimburse employees for business-related lodging expenses and/or meal and incidental expenses incurred while traveling away from home need to be aware of recent Internal Revenue Service (IRS) guidance addressing substantiation rules for such expenses.

In Revenue Procedure 2009-47, the IRS explains rules under which the amount of an employee’s ordinary and necessary business expenses is considered substantiated under the Income Tax Regulations. The rules look at the amount that an employer, its agent, or a third party provides as a per diem allowance under a reimbursement or other expense allowance arrangement to pay for such expenses.

The guidance also discusses an optional method for employees and self-employed individuals who are not reimbursed to use when computing certain expenses incurred while traveling away from home.

Minimum Distribution Waiver

The IRS recently issued guidance on a provision in the Worker, Retiree, and Employer Recovery Act of 2008 that waives required minimum distributions for 2009 from certain retirement plans.

“The 2008 law waives required minimum distributions for 2009 for IRAs and defined contribution plans, such as 401(k)s, and allows certain amounts distributed as 2009 required minimum distributions to be rolled over into an IRA or another retirement plan,” the IRS explains.

Notice 2009-82 specifies that individuals who have already received a 2009 required minimum distribution generally have until the latter of either November 30, 2009, or 60 days after the date the distribution was received, to roll over the distribution.

The notice also includes two sample plan amendments for use by plan sponsors that want to give participants and beneficiaries a choice between receiving and not receiving distributions that include 2009 required minimum distributions.

Benefits on the Web: Why Companies Should And Why the Excuses They Use Not to Aren't Relevant

by Jennifer Benz, Benz Communications

A benefits-enrollment system on the Internet and information on a corporate intranet are not sufficient to engage employees and improve adoption rates in the age of social media. Companies need to get their benefits information to the decision maker, which isn't always the employee, and make sure the information is easy to use and engaging.

A company-developed and controlled website provides the best opportunity for accomplishing these ends.

In addition, social media—blogs, user forums, Facebook groups, and Twitter, specifically—have tremendous potential to engage employees and families in their benefits-selection process. But moving into social media relies on having a strong virtual presence. A branded and accessible website is the best foundation for social media.

Here are four key reasons companies should provide employee benefits via the Web:

- 1. Access.** The most important reason to have employee benefits information online is access for employees, their spouses, domestic partners, parents, and even, sometimes, children—any relation who helps make healthcare and retirement decisions. Companies that keep information hidden on an intranet from these audiences are missing an opportunity to engage those using their programs and driving their costs.
- 2. Branding.** Even a fantastic benefits enrollment platform is limited in terms of branding and unlikely to provide information in a way that engages employees and their relatives in company-relevant issues. Benefits information—and everything promised employees—must be communicated in a manner that is a direct reflection of the company brand. Typically, this is

best accomplished with complete control over a user experience via a website.

- 3. Recruitment and new hires.** Having a benefits package available online for recruits to review and new hires to become familiar with helps attract key talent and eases new hire orientation. Unlike the “experience” garnered from reviewing written material, a website enables a prospective employee to get “inside” and see first-hand the commitment the company makes to its employees. Companies never fail to be surprised at the value this provides.
- 4. Social media.** Social media, from blogs to Facebook to Twitter, have tremendous potential to engage employees and families in healthcare and retirement decision-making. These new tools must be linked to an overall communications strategy and a comprehensive online resource to be effective. A branded company website is the best foundation from which to launch a social media campaign.

Here are three excuses companies use to avoid doing so, and why these excuses are no longer relevant.

It's confidential. In fact, it isn't. Once written materials have been distributed to employees, a company's benefits information is in the public realm. This information is not proprietary nor does it need to be confidential. If there's sensitivity regarding pricing, additional protection may be built in. Personal employee data are not included.

Companies can't let the perceived need for perceived confidentiality prevent them from providing a resource that encourages employees and their families to have information and use it. Nor should these sites be

password-protected. In the time it takes to reset or find a password, an employee could well be lost to any number of social Web distractions such as YouTube or Facebook. Better to make access as simple and painless as possible.

It's all provided in a printed book. Unless a company has some portion of its employee population that absolutely does not use or have access to the Internet, it's time to ditch that big printed book and replace it with a benefits website as well as streamlined printed materials that drive employees to the site. A robust, user-friendly website engages and drives enrollment. It also eliminates the need to justify an annual print budget—and companies gain kudos for being more environmentally conscious.

It's too expensive. With all the efficient Web development technologies available, it's no longer prohibitively expensive to build a company-customized benefits website, no matter the company size. For those companies still printing a large benefits booklet annually, it's likely that a year or two of print budgets would cover the cost of a fully developed website. The results prove it: A benefits website is the most valuable investment a company can make to its communications infrastructure.

◆ *Benz Communications is a human resources communications strategy boutique creating integrated employee benefits communications programs that increase employee understanding, engagement, and satisfaction, and enhance employee recruitment and retention. Its clients include Fortune 500 companies, Fortune 100 Best Companies to Work For, and small- to mid-size companies. Additional information about Benz Communications may be found at www.benzcommunications.com.*



From the Courthouse

Court Tosses Fiduciary Breach Claim Based on Oral Promise

A federal appeals court has ruled that oral statements that would change provisions of an employee benefit plan cannot support a claim for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA).

The court said that ERISA's ban on material misrepresentations by plan administrators should not be stretched to create a way to avoid the requirement that ERISA plan documents be in writing (*Ladouceur v. Credit Lyonnais*, U.S. Court of Appeals for the 2nd Circuit, No. 07-4040-cv (9/30/2009)).

Facts. In 2000, Credit Lyonnais decided to merge its wholly owned subsidiary Credit Lyonnais Rouse into the parent company effective January 1, 2001. Before the merger, two Rouse executives met with the parent company's Human Resources director to discuss the impact of the merger on their salaries and pensions.

While Rouse had no pension plan, Credit Lyonnais did. It is undisputed that Credit Lyonnais agreed to credit years worked at Rouse toward vesting in the Credit Lyonnais pension.

The Rouse executives also contended that they were promised that their years working for Rouse would be used to calculate their pension benefit amount and to determine the funding requirements of the pension plan.

The Rouse executives conceded that there was no written record of the alleged agreement on how pension benefits would be calculated.

Three Rouse executives who began working for Credit Lyonnais on January 1, 2001, had all resigned by August of that year, expecting that they would be receiving pension benefits based on their years working for Rouse.

However, in April 2002, they were informed that the benefits would be calculated based on their starting date working for Credit Lyonnais.

The company representative stated that it had been decided not to provide the additional funding. The former Rouse executives sued, charging that Credit Lyonnais breached its fiduciary duty under ERISA by misrepresenting how it would amend its pension plan.

Ruling. The question for the court was whether an alleged oral representation that purports to change an employee benefit plan can support a claim for breach of fiduciary duty under ERISA.

The former executives cited cases in which claims based on alleged material misrepresentations about changes in ERISA plans were upheld. The court distinguished these cases because they either involved written representations or did not indicate whether the representations were oral or written.

The former executives also argued that the court had never held that a claim for breach of fiduciary duty under ERISA cannot be maintained without a written document.

While this is true, the court said that it did not have to make such a broad ruling to decide this case. It held only that a party alleging a breach of fiduciary duty *on the basis of a statement purporting to alter the terms of an ERISA benefit plan* must point to a written document containing the alleged statement.

Because an oral statement cannot effect a change in an ERISA plan, the court ruled that there was no reason to give such a statement effect by re-characterizing it as a breach of fiduciary duty.

The LAW

ERISA Sec. 404(a)(1) states that plan administrators have a fiduciary duty to administer a benefits plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and like aims."

In addition, an ERISA benefits plan must be administered for the exclusive benefit of plan participants and beneficiaries.

Given these obligations, plan administrators are barred from making affirmative material misrepresentations to plan participants about changes to an employee benefit plan.

ERISA also requires that every employee benefit plan be in writing (ERISA Sec. 402(a)(1)). As a result, oral promises are unenforceable under ERISA (*Perreca v. Gluck*, 2nd Circuit, (2002)).

To do so would undermine ERISA's framework, which ensures that plans be governed by written documents, and would dilute the protection conferred by the writing requirement, which prevents "employees from having their benefits eroded by oral modifications to the plan."

Warning. The holding in this case does not mean that there is no reason to control what plan fiduciaries say as long as they don't issue written statements.

Oral statements may be the basis for an actual fiduciary breach claim and, in some circumstances, may be used to interpret the meaning of a written provision when the provision is ambiguous.

Don't Forget Dental

Employers often think of their dental plans as very quiet, according to Dr. Alan Vogel of MetLife (www.metlife.com). They don't hear a lot about it, especially when compared to the health plan. What's more, they don't want to hear about it, and that's what they fear will happen if they try to make changes to it. "When we make changes in accordance with our principals of research, market, and cost, we don't get many complaints," Vogel says. "Employees in general look at the changes as a positive."

"Don't be afraid to change, though," Vogel continues. "If you're changing your dental plan, there are ways to avoid noise. One way is through proper communication. Also, when you offer people a plan people value more, they're satisfied."

Vogel suggests spending enough time up front to think through your communication strategy. "Make sure you set up, from early on, indications that the plan is going to change. Prewarn employees that they'll need to read the information you're going to send them. Give them multiple avenues where they can access the information: online, brochures, etc. Don't assume that they'll pick up the changes immediately. Highlight the information that is changing, and give them the reasons for the change."

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.

Benefits Corner

Dental Plans—A Little Long In the Tooth

In the 1950s, life may have been simpler—but dental care certainly wasn't. Some people saw it as a luxury that they couldn't afford. Most people suffered from tooth decay, and dentures became common. Then employers started to offer a new benefit, the dental insurance plan, to help employees take care of their teeth.

Five decades have come and gone, and dentistry has evolved. The impact on the average American mouth has been huge, with lower rates of tooth loss. Interestingly, the evolution seems to have bypassed the average American dental plan. Dr. Alan Vogel, national dental director for MetLife, would like to see that change.

Dental plans, he says, should be based on three things: research, market demand, and cost. By considering all three, Vogel says, the typical dental plan could save money and provide a better product for patients.

Applying accepted research would result in big changes in typical dental plans, says Vogel. For example, plans generally pay for bite-wing X-rays twice a year. In the 1950s when the plans began, that may have been necessary. However, the American Dental Association now bases its recommendation for X-ray frequency on the patient's individual situation.

"They say that once a year is fine, or even less often for people who are healthy and stable. If they're not, then the X-rays should be taken more often. When you start building that kind of research into the plan, you start reducing the costs on services that add no value," says Vogel.

Crown restorations are another example of a big expense with little justification. Plans often pay for crown restoration every 5 years. But, says Vogel, a properly constructed and placed crown typically lasts 10 or 15 years. "Why would a dentist replace a crown if it doesn't need to be replaced? In many cases, you'll find that cosmetics drive the decision. The crown is perfectly healthy, not causing any problems, but the person wants to lighten up their teeth a little more. If you move the frequency for crown replacements from 5 years to 7 or 10 years, you can save a lot of money."

On the other hand, dental plans typically don't pay for tooth implants, something that patients highly value. Savings gained by changing the frequency of X-rays or crown replacements could be applied to implants, higher plan limits, or other services valued by patients. "Most people say they would rather have implants covered at no additional cost than have the plan pay for a crown replacement after 5 years when it doesn't even need replacing," Vogel says. "When you follow those three ideals—research, market demand and cost—you create a plan that adds greater value to the employee, with lower costs. That's Nirvana, isn't it?"

CIGNA provides a variety of online tools for their employees, such as online quality calculators, so people can shop for medications or services. Your company may not have the budget to offer many of these tools, but with a little effort, you can find resources that will help your employees take charge of their health.

“If you’re a big employer like us you can make a lot of resources available to employees,” Murabito says. “We have it in spades. But if someone is willing to dig a little bit—and I mean only a little—there is plenty of opportunity to be educated about health and health benefits.

Even the smallest employers, through their own health provider, can find ways to access a good bit of information that can help their employees.” In other words, no more excuses!

In fact, you can start by directing your employees to a new tool CIGNA offers to the general public. “We recently launched a new Web-based program, www.cigna.com/learn4yourhealth, that anybody can use,” Barone says.

“Our customers are finding it very popular with their employees because you get immediate gratification. If you take a short little course for 5 minutes, you can get a coupon for all kinds of things like discounts off sneakers, food—you name it.

And that’s available to everyone, not just our clients.”

Provide Year-Round Info

Information you provide may have more impact than what employees find on their own, Barone adds.

“Every company is like a small town; there’s a sense of community you get from your employer. There’s a feeling of comfort that if your employer is providing you with something, it is probably good advice.

“If I find it on my own, I’m not always sure. That’s one benefit of getting the tools through the workplace.”

And with healthcare education, timing is everything. Once a year is not enough to talk about it, Murabito and Barone say. “I would encourage people to make this topic as much of a year-round process as possible,” Murabito says.

“Even if that sounds like too much to bite off, think about touch points during the year, when you can do communications about health. Start small. Go beyond open enrollment time, and pick things up from there.”

Build a Culture of Health

“What we’ve seen here is, once you start to build a culture of health, people take it upon themselves to add to it. We’ve seen lots of situations in our locations where employees have started to do weight loss activities,

sponsor fun runs, walking groups, no smoking groups, all kinds of things. These are not things we’re doing as an employer; they’re doing it themselves.

Provide Resources

“We make a lot of resources available to our employees because it’s our business, because it is important to us, and because we believe it makes sense in terms of our overall employee productivity and employee health,” Murabito continues.

“Without enough information, people develop a mindset that prevents them from making what is really the best choice for them and their family.

“Sometimes employers aren’t as good at giving advice as they should be, or providing it frequently enough. If you take a once-a-year approach to benefits and enrollment, it just doesn’t work.

“Speak to employees frequently, make sure they’re educated throughout the year, so that when it’s time to make a decision, they have the information they need.”

Sounds like healthy advice.

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Q: Flu season is here, and we’re wondering about partial days of sick time. If an exempt employee works for half a day, for example, then leaves for a medical appointment or because of illness, can we reduce his or her pay for the time off?

A: According to BLR’s legal editor, Susan E. Prince, J.D., you can under certain circumstances. There is a difference, she says, between reducing an employee’s paycheck and reducing the number of remaining hours of sick leave.

“The employer may not deduct from an employee’s pay for less than a day’s absence for sickness or disability,” she says. However, if the employee has used up his or her paid sick time under the company’s

leave policy, the employer may deduct from the employee’s paycheck in full-day increments if the employee is out for a day or more due to illness.

If the employee works any part of the day, then the employer may not deduct from the employee’s paycheck. You may, however, reduce the remaining sick time, if there is any, under the company’s leave policy in increments of less than 1 day.

INDUSTRY TRENDS

Economy Has Dual Impact on Healthcare Plans

Early results from Mercer's annual survey on the cost of employer-provided medical plans indicate that the tough economy is impacting the plans in two ways.

As expected, employers are struggling to trim costs through cost-sharing techniques, as they have for the past several years.

Without design changes, Mercer reports, employers would see the cost of their health plans rise by about 9% in 2010.

By implementing cost-sharing and cost-saving activities, though, early responders to the survey report they will be able to hold the increases to about 5.9%.

The second and perhaps less obvious way the economy is impacting health plans is through increased utilization by employees who worry about

layoffs and cuts in coverage. "The economy clearly had an impact on rising healthcare costs," said Linda Havlin, worldwide partner at Mercer.

"Among the reasons for rising costs are stress-related illness and layoffs. Actual or feared loss of employer-subsidized coverage makes people think about filling their medications, getting their preventive care and taking care of any elective procedures that they may have postponed.

"It makes perfect sense, but the downside for employers is that it often results in higher underlying plan costs. So, employers have had to work harder than usual to keep the health benefit cost increase for 2010 down. Those organizations hardest hit by the recession are making the biggest cuts."

Finding new ways to share costs can be challenging. Mercer reports that

the median family deductible for in-network services in a PPO, a plan offered by most employers, rose from \$1,000 in 2004 to \$1,850 in 2008.

Survey results show that 18% of employers are eliminating their more-generous health plan options in an effort to steer employees into lower cost options such as consumer directed health plans (CDHPs).

"We're expecting to see a real spike in 2010 in both the number of employers offering CDHPs and in the number of employees enrolling in them, as more employers become comfortable with the concept of offering a high-deductible, account-based plan as one choice or their only choice," said Havlin.

"Employers are seeing them as a way to provide more value to employees while at the same time managing cost," Havlin concludes.

2010 Forecasts Optimistic for Sales Compensation

Even as companies continue struggling to cut costs, many report seeing a light at the end of the economic tunnel. In Watson Wyatt's survey about sales force compensation, there was more optimism among sales executives in August 2009 than was evident in the survey of February 2009.

The vast majority (83%) of companies project revenue growth in 2010, and 16% anticipate increasing their sales force head count.

More than 8 out of 10 (81%) respondents report less than 10% voluntary turnover in the most recent survey, compared with 51% in the February survey.

While the news is positive, Watson Wyatt reports that 60% of sales executives believe that sales force productivity and efficiency are still significant concerns, and 48% say that sales force quota and goal setting are concerns.

In addition, 35% report concerns about morale and motivation among their sales forces, while 40% are concerned about coaching and development of the sales team.

"Optimistic forecasts are good news for sales forces, which can look forward to fewer layoffs and potentially higher compensation," said John Bremen, global director of Sales Effectiveness and Compensation at Watson Wyatt.

"Yet with budgets still tight, many companies will look to get more out of their current salespeople for next year and to align incentives with changing business objectives."

The expectation is that sales incentives compensation plans will see some changes for the coming year. Most (60%) respondents said they plan to change performance measures, 50% plan to change performance measure weightings, and 49%

report they will change the incentive formulae or mechanics.

The survey shows that most companies are doing a good job of aligning pay and performance among their sales staff: 86% of companies said they are able to identify their top performers, and 79% said that those top performers are also their top earners.

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'Comp' Time Can Cause FMLA Problems

An employee is eligible for leave under the federal Family and Medical Leave Act (FMLA) if, among other things, he or she has worked for the employer for at least 1,250 hours during the 12-month period before requesting leave. Whether the employee had done this was the principal issue on appeal for the U.S. Court of Appeals for the 3rd Circuit (*Erdman v. Nationwide Insurance Company*, No. 07-3796 (9/23/09)).

What Happened

"Belinda" began working for the Nationwide Insurance Company in 1980, and she held various full-time positions there during the next 18 years. In 1998 Belinda asked to work part-time so that she could care for her daughter, who was born with Down syndrome. The court tells us that Nationwide granted this request but gives no further details. Four years later, she was allowed to switch to a 4-day workweek. This rendered her nonexempt under the FLSA (i.e., she was entitled to overtime).

According to Belinda's supervisor, "Diana," early in 2002, Belinda regularly worked extra hours outside the office, and Diana allowed her to use them as "comp" time. That is, she allowed Belinda to take extra hours off without pay in return for the extra hours worked outside the office.

Over the next 12 months, the court explained, there were a series of communications between Belinda and her supervisor relevant to the issue of what Nationwide knew or could be presumed to have known about the total number of hours Belinda worked.

Early in 2002, Diana informed Belinda that she should "put in the hours that ... you're supposed to put in and nothing more than that." In September 2002, Belinda e-mailed "Gretchen," who had replaced Diana as her supervisor, and asked her whether she was still allowed to work extra hours for use as comp time.

There is no record of any response by Gretchen. According to Gretchen's subsequent testimony, at a meeting with Belinda in January 2003, Gretchen made no objection to her use of comp time.

In January 2003, Gretchen e-mailed Belinda criticizing her about her work. One of the criticisms was for Belinda allegedly taking overtime without Gretchen's approval. Soon after this, Belinda's part-time position was eliminated, but she accepted Nationwide's offer to work full-time.

Belinda may have been unhappy about having to work full-time and with Nationwide's subsequent denial of her annual request for an August vacation (she was accustomed to using this time to prepare her disabled child for school). In the next few weeks, according to Nationwide, Belinda engaged in various acts amounting to employee insubordination, something Belinda disputed.

In April 2003, soon after she began working full-time, Belinda submitted paperwork requesting FMLA leave from July 7 to August 29. Human Resources responded to the request by stating, "As far as the FMLA, I probably don't see any problems with this."

On May 9, however, Nationwide fired Belinda because of her alleged behavioral problems. Alleging that she was actually fired for requesting FMLA leave, Belinda brought an action in a federal district court in Pennsylvania alleging, among other things, that she was fired because she requested FMLA leave. Nationwide alleged, among other things, that Belinda had not accumulated sufficient hours to qualify for leave under the FMLA.

What the Court Said

The district court granted Nationwide summary judgment on the issue of how many hours Belinda had accumulated, finding there was no genuine issues of material fact requiring a determination by a jury and the law. The

law is as follows: An employee is eligible for FMLA leave if the employee has worked at least 1,250 hours for the employer in the 12 months before making the request. All work that "the employer knows or has reason to believe... is being performed" counts toward the threshold requirement (see 29 CFR s.785.12). Thus, although the employer does not have actual notice of off-site work, constructive knowledge will suffice.

According to Belinda, in the 12-month period before her asking for FMLA leave, she worked 1,295.25 hours, if one includes the 118.5 hours she worked from home and which she was allowed to use as comp time. The district court counted only 41.50 of the 118.50 hours Belinda worked from home, leaving Belinda 28.75 hours short of the FMLA's threshold requirement.

One of the things that influenced the district court was the fact that her supervisor had informed Belinda that she should "put in the hours that ... you're supposed to put in and nothing more than that." The district court assumed that this meant Nationwide had specifically warned Belinda that she should no longer continue to work outside the office to accrue comp time; therefore, it couldn't be argued that Nationwide had constructive knowledge she was continuing to do that.

The 3rd Circuit disagreed and held that a reasonable jury could decide that the point of the warning was that Belinda should not put in for overtime, but she could still continue to accrue comp time. Therefore, a jury could conclude that Nationwide had constructive knowledge of the hours that Belinda worked at home to accrue comp time until February 10, 2003, when Gretchen for the first time specifically told Belinda that she could no longer use extra hours worked for comp time.

(continued on page 12)

The appeals court noted that counting all the hours Belinda worked at home before February 10, 2003, Belinda was eligible for FMLA leave. So the issue for the appeals court was what Nationwide communicated to Belinda, and it sent the case back to the district court for a jury trial on this issue.

Point to Remember

If the employer had specifically and unequivocally communicated to Belinda early on that comp time was no longer permissible, it would not still be involved in a lawsuit.

Comp Time: An Overview

FLSA permits *public sector* employers to give employees compensatory (comp) time off in lieu of monetary overtime compensation. Comp time must be given at a rate of at least 1½ hours for each hour of employment for which overtime compensation is required.

Private employers are not authorized under federal law to give comp time and must give *monetary* overtime compensation. However, a narrow exception exists for private employers that pay employees every 2 weeks or less frequently. In such cases, an employer may give an employee compensatory time off, provided that the comp time is taken *in the same pay period*. For example, if an employee works 2 hours of overtime in the first week of a 2-week pay period, an employer may give the employee 3 hours (time-and-a-half) time off in the second week of the pay period in lieu of overtime pay.

Officials at DOL's Wage and Hour Division report that most time-off plans violate the law. Therefore, before implementing such plans, employers should submit them to the Division for review.

By the numbers...

	Latest Period	Current	Prior Report	A Year Ago	12-Month % Change
CPI-U	Sept/09	216.0	215.8	218.8	-1.3%
CPI-W	Sept/09	211.3	211.2	214.9	-1.7%
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*	Sept/09	\$616.11	\$617.65	\$611.86	0.7%
Average Hourly Wages					
All*	Sept/09	\$18.67	\$18.66	\$18.21	2.5%
Construction	Sept/09	\$22.66	\$22.75	\$22.34	1.4%
Manufacturing	Sept/09	\$18.34	\$18.21	\$17.84	2.8%
Trade/Transp./Utilities	Sept/09	\$16.55	\$16.56	\$16.27	1.7%
Wholesale Trade	Sept/09	\$20.92	\$21.04	\$20.20	3.6%
Retail	Sept/09	\$13.22	\$13.12	\$13.01	1.6%
Financial Activities	Sept/09	\$20.90	\$20.87	\$20.42	2.4%
Other Services	Sept/09	\$16.42	\$16.30	\$16.22	1.2%
Unemployment Rate*	Sept/09	9.8%	9.7%	6.2%	3.6%

*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.