SCHECHTER BENEFITS ADVISORS | UNCOMMON SOLUTIONS to Design, Educate & Manage

HR&BENEFITS UPDATE March/April 2015

The Buzz Around Unlimited PTO

HUMAN RESOURCES

As the economy improves and the competition for talent increases, employers are looking for new methods to retain and attract top professionals. As a result, some American companies are now offering employees unlimited paid time off (PTO). Less than 1 percent of employers nationwide have adopted the policy[1], but the concept of unlimited PTO or "endless summer" is getting more and more attention.

What Are the Benefits?

Companies that have embraced unlimited PTO programs have seen positive results, including:

- Reduced administrative burden on HR
- Greater engagement of employees who enjoy the freedom and trust such policies convey
- Higher productivity among employees who are able to take time off as needed to recharge

Unlimited PTO policies are most successfully implemented in performance- and results-driven company cultures with strong management teams. Employees who thrive in this environment are team oriented, take ownership of their assignments and deadlines and are more inclined to finish or transition projects before taking a few days off. This sense of accountability mitigates abuse of the program. In addition, managers take on the responsibility to allocate time off consistently and fairly. They also encourage employees to utilize the PTO benefits available to them.

What to Do Before You Offer Unlimited PTO

Endless summer does have its challenges. Managers need to ensure the policy is applied equitably, and teams need to coordinate to provide adequate coverage consistently. Companies will need to analyze the impact on employees transitioning from accrual-based PTO, assess their receptiveness to an unlimited policy and anticipate concerns. Unlimited PTO may not be conducive to all industries, company cultures and jobs. Companies with a high number of non-exempt employees and industries such as manufacturing and sales may have difficulty switching to an unlimited PTO program.

Any company considering a transition to unlimited PTO should take the following steps:

- Consider the industry, culture and positions within your company
- Solicit feedback from employees
- Design a program that works for your company
- Train managers
- Establish strong recruitment and performance management programs
- Communicate the new plan to employees

There are pros and cons to any new company program. Each company needs to decide which PTO program is most suitable for its employees and management team. What is clear is that employees who are able to refresh and recharge are more likely to be happier and more productive in the workplace.

1 Joanne Sammer. "Unlimited Paid Time Off: A Good or Bad Idea?" *Society for Human Resource Management*. Dec. 15, 2014. www.shrm.org/hrdisciplines/benefits/articles/pages/unlimited-pto.aspx.
Alison Griswold. "The Pros and Cons of Unlimited Vacation Policies." *Business Insider*. Dec. 5, 2013. www.businessinsider.com/pros-and-cons-of-unlimited-vacation-2013-12.

Preparing for a Partial Plan Termination

RETIREMENT

The IRS is actively pursuing plans that may have experienced a partial plan termination. A partial plan termination may have occurred if you had a substantial reduction in your workforce. Information on your Form 5500 filing may indicate a possible partial plan termination and may cause the IRS to investigate to ensure that proper procedures are being followed. The determination of a partial termination is a facts and circumstances test, but there are a few factors which serve as good indicators.

The first factor is the population of affected participants. If it is a class of participants, there is a chance of the reduction being viewed as a partial termination. More commonly, the percentage of participants being affected will be scrutinized. Per internal IRS guidelines, a 20 percent reduction is generally considered "significant." Some ERISA attorneys state that a more conservative threshold is a 15 percent reduction in workforce. The percentage is determined by looking at the number of participants terminated by corporate action compared to all pre-corporate action vested and non-vested participants.

Voluntary terminations (terminations occurring in the normal course of business) and terminations due to death, disability or retirement are typically not included in determining the percentage reduction.

Another factor considered is the period over which the terminations occur. The IRS generally includes all employer terminations within a rolling window unless the terminations can be proven to be unrelated to one another. In other words, the IRS will consider all terminations to be in accordance with a single downsizing plan unless proven otherwise. In addition, separate reductions in workforce may be combined in the determination of a 20 percent reduction.

In the event that a partial termination has occurred, all affected participants, or those who can no longer participate in the plan, must become 100 percent fully vested in their accounts on the effective date of the partial termination. All other non-affected participants continue to participate in the plan in accordance with the plan's vesting provisions. If an absolutely definitive determination of a partial termination is desired, a plan sponsor may file a Form 5300 with the IRS, although this action is not required.

If you suspect that a partial plan termination has occurred or may occur, contact your plan consultant.

What should be considered when terminating a long-term employee for performance issues?

HUMAN RESOURCES

Question: In considering the termination of a long-term employee, we want to make sure that the bases are covered. The employee assumed a new role in February 2014 and since then several performance issues have arisen. Some of these issues have contributed to financial penalties for the organization. The employee has been coached on specific and broad issues as well as expectations. What should be considered?

Response: If there is no employment contract with the subject employee guaranteeing a specific amount of time of employment or otherwise governing disciplinary action or termination, in an at-will employment relationship, an employer certainly can discipline or discharge an employee for unsatisfactory performance or conduct including errors or actions that resulted in financial loss to the company, if it is consistent with employer policy and practice to do so. Indeed, an employer is within its rights to terminate any at-will employee for legitimate, non-discriminatory and non-retaliatory reasons (i.e., where the decision is not based on an employee's membership in a protected class, such as race, religion, national origin, gender, age, disability, etc.), and this would include seeking to discipline or dismiss an employee whose unsatisfactory performance has caused problems to business operations and cannot be tolerated. Keep in mind that a decision to discipline or terminate employment on this basis needs to be consistent with employer policy and past practice in similar situations (if any) to avoid discrimination claims. Although prior documentation of performance issues (such as written warnings) is not required (unless you have a progressive discipline policy that provides for such warnings prior to termination), you should document the misconduct and/or policy violation involved here and the reasons for disciplinary action. You indicate that the employee in question was previously counseled about performance and expectations, and it appears that he failed to make and sustain the requisite improvement necessary to retain his job. As noted, if discharge at this juncture is appropriate, consistent with policy and practice, and not in violation of any contract, to our knowledge the employer is within its rights to go forward with it. Any disciplinary action or discharge should be documented internally and such documentation should be placed in the employee's personnel file.

If, however, the employer has tolerated other employees who have demonstrated similar actions which led to the proposed discharge here, or issued different disciplinary action first, then if the subject employee is being considered for dismissal, with or without similar prior disciplinary action, the employer should carefully consider the justification and ensure there is a legitimate one to support the differing treatment. In other words, to the extent your organization generally follows a write-up or corrective action plan, for example, then it should be consistent here to avoid possible discrimination claims (again assuming no contractual issues), unless the employer has legitimate non-discriminatory and non-retaliatory business reasons for not following its policies or past practice. Regardless, an employee's tenure with the company does not entitle him to better or more preferential treatment at work, nor does it provide an employee with immunity from the consequences of his actions.

Continued on Page 3

"What should be considered when terminating..." continued from Page 2

When conveying a discharge decision to any employee, it is a best practice for the employer to be candid with the employee about the reason for separation. If the employer provides a vague or false explanation for terminating the employment relationship, and the employee challenges the decision, the employer's credibility may be seriously impaired if it is unable to prove that the explanation it provided was actually the case. Rather, employees should be given an honest explanation of the employer's reason for terminating the employment relationship and such reason should be consistent with employer policy and past practice in similar situations (if any) to avoid discrimination claims (and with applicable contracts, if any, to avoid breach).

In the state where this employee works, final wages are due on the next regularly scheduled payday regardless whether the employee quits, with or without notice, or is terminated.

View more information at: http://www.lni.wa.gov/WorkplaceRights/Wages/PayReq/FinalPay/default.asp

Source: Enquiron HR & Employment Law HELPLINE Services for NFP Clients. www.nfphrhelpline.com. Feb. 2015.

Compliance FAQ

We keep hearing about PPACA reporting and the various forms and code sections that apply. What is each type of reporting for, what forms are used and do the requirements differ depending on employer size and/or whether the plan is fully/self-insured?

There are two reporting requirements, found in two separate sections of the Internal Revenue Code (IRC): Sections 6055 and 6056.

6055 reporting is done using IRS Forms 1094-B and 1095-B, and is meant to assist the government in enforcing the PPACA individual mandate. The individual mandate requires most individuals in the U.S. to buy and maintain a minimum level of health insurance coverage or pay a penalty. 6055 reporting requires any entity (i.e., carrier, self-insured plan) that provides "minimum essential coverage" (MEC) to an individual during a calendar year to report certain health insurance coverage information to the IRS. In addition, the entity must provide the covered individual a written statement describing the MEC.

6056 reporting is done using IRS Forms 1094-C and 1095-C and is meant to assist the government in enforcing the PPACA employer mandate and determining premium tax credit eligibility. The employer mandate requires applicable large employers (ALEs) – those with 50 or more full-time employees (FTEs) and full-time equivalents – to provide affordable, minimum value (MV) coverage to all FTEs (those working 30 hours or more per week) and their dependents or risk a penalty. A premium tax credit is only available to someone who has not been offered affordable, MV coverage by their employer and whose household income falls between 100 and 400 percent of the federal poverty level. The 6056 reporting helps with employer mandate and premium tax credit eligibility determinations by requiring ALEs to report to the IRS whether they offered their FTEs and their dependents the opportunity to enroll in MEC under an eligible employer-sponsored plan, and to provide certain other information. In addition, the ALE must provide FTEs a related written statement describing the coverage offered.

Whether 6055 and 6056 reporting apply to a particular employer depends on employer size and whether the employer's plan is fully or self-insured, as follows:

- **Small employer (less than 50 FTEs/equivalents) with fully insured plan:** 6055 does not apply, since the plan is fully insured, and the insurer is responsible for completing 6055 reporting on behalf of the plan. 6056 does not apply, since the employer is not an ALE. Therefore, there are no reporting requirements for this employer.
- **Small employer with self-insured plan:** 6055 reporting applies, since the employer sponsors a self-insured plan. The employer must complete and file Forms 1094-B and 1095-B with the IRS, and must distribute a copy of Form 1095-B (or a similar employee statement) to all covered individuals. 6056 reporting does not apply, since the employer is not an ALE.
- **Large employer (50 or more FTEs/equivalents) with fully insured plan:** 6055 does not apply, since the plan is fully insured, and the insurer is responsible for completing 6055 reporting on the behalf of the plan. 6056 reporting applies, since the employer is an ALE. The employer must complete and file Forms 1094-C and 1095-C (6056 section only) with the IRS, and must also distribute a copy of Form 1095-C (or a similar statement) to all covered individuals.
- **Large employer with self-insured plan:** Both 6055 and 6056 reporting apply, since the employer is an ALE that sponsors a self-insured plan. The employer must complete and file Forms 1094-C and 1095-C (both sections) with the IRS and must also distribute a copy of Form 1095-C (or a similar statement) to all covered individuals.

Reports to the IRS are due by the last day of February in the year following the calendar year to which the reporting relates. The date is extended to the last day of March if the report is filed electronically. These dates apply regardless of the plan year of the underlying health coverage. In addition, employers must distribute employee statements by Jan. 31 of the year following the year to which the reporting relates (similar to the W-2 requirement). Employers may apply for a 30-day extension for the employee statements.

NFP has several resources to assist employers in understanding and completing the new PPACA reporting requirements. Contact your NFP advisor for more information.

Need more information?

For information on any of the articles in this newsletter, please contact your benefits advisor.

NFP®