

In This Issue

- San Francisco Workers Granted Paid Sick Time
- Family Deductibles That Permit HDHP Coverage
- Clear SPDs Required
- Elder Care Benefits
- California Modifies Sexual Harassment Training
- Eligibility and Severance Agreements
- Improving HSAs and Other Employee Benefits

San Francisco Workers Granted Paid Sick Time

This November in California, San Francisco became the first jurisdiction in the country to require paid sick leave for employees. The ordinance will take effect in the first quarter of 2007.

Employees covered by the ordinance are full, part-time, and temporary employees. Employers subject to the ordinance include anyone who employs or exercises control over the wages, hours, or working conditions of any individual working within the boundaries of San Francisco.

For every 30 hours worked, an employee will accrue one hour of sick time. Those employed on or before the date the ordinance takes effect will begin to accrue sick time as of the ordinance's effective date. Those employed after the ordinance's effective date will begin to accrue sick time 90 days after beginning employment. Employees may carry over their sick time from year to year but there are accrual limits. Employers with less than 10 employees must allow each employee to accrue up to 40 hours of paid sick time. Those with 10 or more employees must allow employees to accrue up to 72 hours. Although accrual of sick time is permitted, the employer is not required to compensate employees for their accrued time if employment is terminated.

Employees can use their sick time when they are not at work due to their own illness or injury or medical appointments. Additionally, employees may use the sick time to care for a family member who is ill or injured or to take a family member to his or her medical appointment.

Before the ordinance's effective date, the San Francisco Office of Labor Standards Enforcement will provide a sample notice that employers can use to meet posting requirements.

Additional information can be found at: [www.sfgov.org/site/uploadedfiles/election/Candidates & Campaigns/PaidSickLeave.pdf](http://www.sfgov.org/site/uploadedfiles/election/Candidates%20&%20Campaigns/PaidSickLeave.pdf)

It appears that 2007 could be a busy year for employers in San Francisco as they may also have to deal with the Health Access Program. This is a health care ordinance which requires businesses to make contributions to employee health care. The Golden Gate Restaurant Association is suing the city in federal court in an effort to stop the ordinance from going into effect: currently the outlook is uncertain.

Family Deductibles That Permit HDHP Coverage

Health Savings Accounts (HSAs) can only be offered in conjunction with high deductible health plans (HDHPs), but the definition of an HDHP can be confusing. This article explains the requirements that family deductibles must meet in order for health coverage to qualify as HDHP coverage.

To have HDHP coverage, the annual deductible for family coverage must be no less than \$2,200 in 2007. So, with only an exception for preventive expenses, the HDHP cannot pay any benefits for any family member until the expenses incurred by all family members have reached at least \$2,200. HDHP coverage must have an out-of-pocket maximum for family coverage that is no greater than \$11,000 for 2007. Between these two amounts, the plan can impose whatever cost-sharing arrangements it deems appropriate. If a plan has individual deductibles, the annual deductible amount is the lesser of the overall family deductible or the individual deductible multiplied by the number of family members.

Example: A plan has a family annual deductible of \$10,000. It also includes an individual deductible so that benefits will be paid at 80 percent for that family member's expenses once he or she has incurred \$2,200 in covered expenses. Benefits are paid at 100 percent when out-of-pocket expenses (including deductibles) reach \$10,000. Coverage under this plan qualifies as family HDHP coverage.

With this plan, an employee electing self plus spouse coverage would have a \$4,400 annual deductible: $\$2,200 \times 2 = \$4,400$. An employee electing coverage for himself, his spouse, and his child would have a \$6,600 annual deductible: $\$2,200 \times 3 = \$6,600$.

Clear SPDs Required

The standard of review used by the court is important to the ultimate outcome of a case. A “de novo” standard — meaning court review that starts from the very beginning as a fresh consideration of the matter that does not consider prior decisions — is generally more favorable to the person bringing the lawsuit. The United States District Court for the Central District of California recently determined that the “de novo” standard of review would apply in a case involving a claim for LTD benefits [*Luck v. Metro. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 67508 (C.D. Ca. 2006)].

In the *Luck* case, because of the late submission of the Administrative Services Agreement (ASA), the court would not consider the ASA as part of the evidence. Without the ASA, there was no language delegating to MetLife the authority to make claim decisions. The plan itself clearly *permitted* the delegation, but did not actually *make* the delegation. While the defendants argued that the SPD language, which stated “MetLife is responsible for determining whether your condition satisfies the plan’s definition of total disability,” was sufficient to give MetLife the discretionary authority to determine benefit eligibility, the court found that it did not. Instead, the court said, “Here, while the SPD confers discretion on MetLife to determine eligibility, it confers no discretion on the insurer to interpret the plan’s terms.”

The defendants had the burden of proving that the plan gave MetLife discretionary authority and they were unable to do so. For plan sponsors, this case serves as a reminder of the importance of plan documents, SPDs, and ASAs. Delegating discretionary authority should be done in a clear and direct manner.

Elder Care Benefits

As longevity increases, baby boomers are finding themselves caring for aging parents, and the pressure on this segment of the workforce is affecting employers. This employee group is increasingly vocal about the challenges of needing to care for elderly parents, who are often living into their 80s and beyond.

When the parents of baby boomers need assistance, the children need the freedom to attend to their parents' needs. That has a direct impact on the baby boomer's employer or business, and the financial cost to the employer is startlingly high. A recent report from MetLife and the National Alliance for Caregiving highlights the financial impact. The survey indicates that employers have absorbed as much as \$34 billion each year in costs directly related to employees caring for aging parents at home. This translates to nearly \$2,100 for each employee who is caring for a parent at home. Employer costs come from many sources — absenteeism, rehiring, training, hiring substitutes, and employees requiring flexible schedules. Interestingly, statistics indicate that 80 percent of caregiving is provided in employees' homes.

Employers need to take some action to protect themselves — and help their employees. The complicating factor for employers is the uncertainty that can govern the relationship, often necessitating transition and flex time. Often, the beginning of maternity leave can be anticipated; conversely an elderly parent's health crisis comes with no warning that will allow for any plan of action, and the complexity with elder care is much greater than what an employer experiences in other family-need situations.

The MetLife report indicates that elder care may become a retention tool for some employers. Effective responses to elder care issues are very similar to employer accommodations for the birth or adoption of a child: flexible work hours and the possibility of telecommuting. Employers may want to help their employees locate helpful services within the community. Services like adult day care and grief support groups may be very beneficial to employees and employers alike.

Employers may also want to consider offering limited legal assistance that would enable employees to receive guidance about wills, trusts, estate planning, living wills, Medicare, Medicaid, and Social Security.

California Modifies Sexual Harassment Training

After several revisions, the California Fair Employment and Housing Commission (FEHC) has approved regulations interpreting AB 1825, California's law requiring sexual harassment training for supervisory employees.

AB 1825 requires employers of 50 or more employees or contractors with a presence in California to provide two hours of sexual harassment training every two years to employees with supervisory authority. The regulations state that there is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

The following summarizes the key provisions in the approved regulations.

Who must be trained?

The approved regulations and a recent law narrows the broad scope of AB 1825. On September 20, 2006, Governor Arnold Schwarzenegger signed AB 2095, which specifies that only supervisory employees physically located in California need to be trained in accordance with AB 1825. The approved regulations are consistent with the clarification to AB 1825.



Is e-learning an acceptable method of training?

E-learning is an acceptable method of training, provided it meets certain requirements. The regulations define e-learning as “individualized, interactive computer-based training.” Willis Training Solutions is an example of e-learning permitted under AB 1825.

For e-learning to be compliant, attendees must have the opportunity to ask questions during the training, and the e-learning program must provide a link or direction on how to contact trainers or educators. The questions must be answered by a person able to provide guidance and assistance on harassment issues, and the person must respond no more than two business days after the question is asked.

What satisfies AB 1825's interactivity requirements?

AB 1825 requires that the training be interactive. The training should include questions that assess learning, skill-building activities that assess the application and understanding of the training content, and hypothetical scenarios about harassment along with discussion questions.

What is the required content of the training?

The regulations are very specific about the training's content. The training must include:

- A definition of unlawful sexual harassment under the California Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of other forms of harassment covered by the FEHA and discuss how harassment of an employee can cover more than one basis;
- FEHA and Title VII statutory provisions and case law covering the prohibition and the prevention of unlawful sexual harassment in employment;
- The types of conduct constituting sexual harassment;
- Remedies available for victims of sexual harassment;
- Strategies to prevent sexual harassment in the workplace;
- Factual scenarios based on examples from case law, media accounts, and workplace situations illustrating sexual harassment, discrimination, and retaliation;
- The limited confidentiality of the complaint process;
- Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment;
- The employer's obligation to conduct an effective workplace investigation of a harassment complaint;
- Training on what to do if the supervisor is personally accused of harassment;
- The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. The employer's policy or a sample policy must be provided to the supervisors. Regardless of which policy is used as part of the training, the employer must give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

Who can conduct the training?

The training must be conducted by a “subject matter expert” who has legal education, coupled with practical experience, or substantial practical experience in training in harassment, discrimination, and retaliation prevention. The trainer must be qualified to teach:

- What qualifies as unlawful harassment, discrimination and retaliation under both California and federal law;
- What steps to take when harassing behavior occurs in the workplace;
- How to report a harassment complaint;
- How to respond to a harassment complaint;
- The employer’s obligation to conduct a workplace investigation of a harassment complaint;
- What constitutes retaliation and how to prevent it;
- Essential components of an anti-harassment policy;
- The effects of harassment on harassed employees, co-workers, harassers and employers.

What constitutes two hours of training?

Two hours of training means two hours of classroom or two hours of webinar training or, in the case of an e-learning program, a program that takes a supervisor no fewer than two hours to complete.

What training records should be kept?

Employers are required to keep the following records of harassment training:

- Name of the employee trained
- Training date
- Type of training
- Name of the training provider

The training records should be maintained for at least two years.

How should an employer track the training year?

An employer may use one or both of the following:

Individual tracking: An employer may track training for each supervisor measured two years from the date of the completion of the last training for that individual.

Training year tracking: With this method, an employer may designate a specific training year when it trains some or all of its supervisory employees and thereafter trains participants every two years.

Newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions (even if that training falls in a different training year from the date of hire) may be included in the nearest group training year.

Does previous employer training count?

A supervisor who has received anti-harassment training in compliance with AB 1825 within the two years — from a current, prior, alternate or joint employer — need only be required to read and to acknowledge receipt of the employer's anti-harassment policy within six months of supervisory assignment or the employer's eligibility.

Will the approved regulations be retroactive?

The approved regulations are not retroactive. The text of AB 1825 is fairly brief and, in some areas, does not contain significant guidance about how employers must comply with the training requirement. As a result, the regulations were approved by the FEHC to provide additional information to help employers ensure that their employees are adequately trained. The regulations state that employers who have made substantial good faith efforts to comply with AB 1825 before the effective date of the regulations will be deemed to be in compliance.

When do the approved regulations become effective?

If approved by the Office of Administrative Law, it is estimated that the regulations will become effective on or about February 1, 2007.

Willis HR Partner can answer questions or provide additional information regarding AB 1825's training requirements. We will continue to monitor the regulations and provide additional information when the regulations are approved by the Office of Administrative Law.

Eligibility and Severance Agreements

What happens with coverage eligibility when a severance agreement is involved? Following is an actual situation and the legal analysis.

A new employee was continuing health coverage provided by his former employer's plan. Due to a severance agreement with the former employer, he was continuing on the *former employer's* health plan as an active employee with no contribution toward premium. When he elects coverage through his new employer at annual enrollment time, will there be any eligibility issues?

There are some potential dilemmas with the severance coverage and the new employer's benefits.

There are things that plans *must* do and others that they *can* do. For instance, the plan must provide a HIPAA special enrollment right for individuals who lose other coverage. However, the HIPAA special enrollment rules also allow an employer to require a waiver from an employee, stating that he or she is turning down the employer's coverage because other coverage is in place. This waiver requirement can be part of the plan, but it is not required. The plan is not obligated to require an employee waiver, but if it chooses to require a waiver, it can enforce that requirement. Similarly, the plan could require exhaustion of COBRA benefits but is not obligated to do so.

In the situation described, it seems clear that the coverage from the other employer was not intended to be COBRA coverage (since the person was still on the payroll). Because the severance benefits look like COBRA coverage, the new employer plan could require exhaustion of that coverage before granting eligibility to the new employee. However, the plan must contain this requirement for it to be enforced.

As with so many issues, plan design is critical. If the plan wants to permit immediate entrance into the plan, regardless of a new hire's other coverage, this is generally acceptable. However, the insurer (or

The logo for Willis, featuring the word "Willis" in a large, blue, serif font.

stop-loss carrier) needs to be on board to assure that benefit descriptions do not communicate literal enforcement of the HIPAA standards.

Improving HSAs and Other Employee Benefits

On December 20 President Bush signed the Health Opportunity Patient Empowerment Act of 2006, enhancing Americans' access to and use of tax-advantaged health savings accounts.

The Act makes changes that will permit:

- Transfers of unspent HRA and FSA account balances to an HSA;
- Annual HSA contributions which exceed the HDHP annual deductible;
- Newly eligible employees to have the entire annual HSA contribution in their first year of eligibility (rather than the pro-rata monthly amount);
- Comparable contributions to discriminate in favor of non-highly compensated employees (NHCEs);
- A one-time, trustee-to-trustee transfer from a qualified retirement plan to an HSA.

The Act also requires the publication of the IRS COLA amounts by June 1 each year.

Willis has prepared a more comprehensive description of the Health Opportunity Patient Empowerment Act of 2006. This description is included in *Willis Employee Benefits Alert #91*. Please contact your Willis representative for a copy of this *Alert*.

U.S. Benefit Office Locations

Atlanta, GA (404) 224-5000	Austin, TX (800) 861-9851	Baltimore, MD (410) 527-1200	Birmingham, AL (205) 871-3871
Boise, ID (208) 340-0645	Boston, MA (617) 437-6900	Cary, NC (919) 459-3000	Charlotte, NC (704) 376-9161
Chicago, IL (312) 621-4700	Cincinnati, OH (513) 762-7661	Cleveland, OH (216) 861-9100	Columbus, OH (614) 766-8900
Dallas, TX (972) 385-9800	Denver, CO (303) 218-4020	Detroit, MI (248) 735-7580	Eugene, OR (541) 687-2222
Farmington, CT (860) 284-6147	Florham Park, NJ (973) 410-1022	Ft. Worth, TX (817) 335-2115	Grand Rapids, MI (616) 437-9864
Greenville, SC (864) 232-9999	Houston, TX (713) 625-1023	Jacksonville, FL (904) 355-4600	Knoxville, TN (865) 588-8101
Las Vegas, NV (702) 562-4335	Long Island, NY (516) 941-0260	Los Angeles, CA (213) 607-6300	Louisville, KY (502) 499-1891
Memphis, TN (901) 248-3100	Miami, FL (305) 373-8460	Milwaukee, WI (414) 271-9800	Minneapolis, MN (763) 302-7100
Mobile, AL (251) 433-0441	Mountain View, CA (650) 944-7000	Naples, FL (239) 514-2542	Nashville, TN (615) 872-3700
New Orleans, LA (504) 581-6151	New York, NY (212) 344-8888	Omaha, NE (402) 778-4851	Orlando, FL (407) 805-3005
Philadelphia, PA (610) 964-8700	Phoenix, AZ (602) 787-6000	Pittsburgh, PA (412) 586-1400	Portland, OR (503) 224-4155
Roswell, NM (505) 317-3397	St. Louis, MO (314) 721-8400	San Diego, CA (858) 678-2000	San Francisco, CA (415) 981-0600
San Juan, PR (787) 725-5880	Seattle, WA (206) 386-7400	Spokane, WA (206) 386-7400	Tampa, FL (813) 281-2095
Washington, DC (301) 530-5050	Wilmington, DE (302) 477-9640		

FOCUS is produced by Willis' Legal & Research Group: willis.focusonbenefits@willis.com or 877-4WILLIS (toll-free). *FOCUS* is not intended to provide legal advice. Please consult your attorney regarding issues raised in this publication. Willis publications appear on the internet at: www.willis.com. Copyright © 2007 Willis