

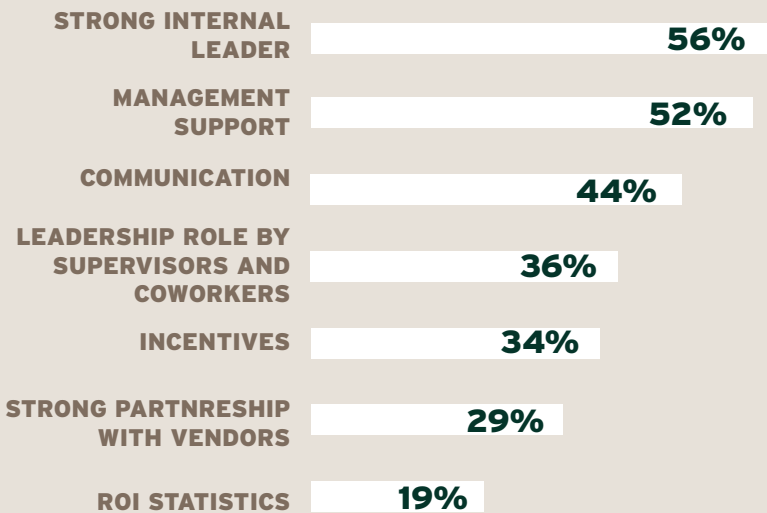
# WELLNESS

## MOVING WORKSITE WELLNESS TO SENIOR LEADERSHIP'S URGENT LIST

The main problem with gaining senior leadership support for a corporate wellness program is that while they generally believe it is important, it rarely rises to the level of urgent – which, in short, means that it will never get to the top of their to-do list. Leadership opinions on wellness vary from open enthusiasm to obvious opposition, with most falling somewhere in between. But the numbers make clear that if a wellness program is to work in an organization, leadership and management support are critical.

While various factors contribute to a meaningful wellness program, management leadership was once again reported as the key contributor to program success, and in higher numbers than last year. Management support and communication also remain high on the list.

### FACTORS FOR SUCCESS



Respondents with Program (%) Reporting Important Factors for Program Success



#### WELLNESS

Moving Worksite Wellness to Senior Leadership's Urgent List 1

#### HR CORNER

Employer Pays High Price for Acting on Stereotype 4

#### LEGAL & COMPLIANCE

EEOC Issues GINA Poster 6

COBRA Extension Bill Introduced 6

Supreme Court Delays Decision on San Francisco Employer Contribution Mandate 7

Family and Medical Leave Act (FMLA) Expanded – Again 8

Stricter Penalties for Group Health Plan Violations 9

Workplace Adoption Benefits 10

#### NEWS

Massachusetts: Fair Share Contribution Requirement Clarifications 10

#### YOU BE THE JUDGE

Is a Death That Results From Leaping From a Moving Car During an Argument an "Accidental" Death Within the Meaning of an AD&D Plan? 12

WEBCASTS 14

CONTACTS 15

## LEADERSHIP NOT ON BOARD

Beyond the urgency factor, senior leadership support is usually incomplete or absent altogether for one of three reasons.

**THEY UNDERESTIMATE THEIR INFLUENCE.** While many leaders understand that healthy employees are more productive, they fail to realize how much their words and actions can influence employee behaviors and lead to better results for both the wellness program and the company.

**THEY DON'T KNOW HOW TO HELP.** The wellness idea sounds good in theory but they need ideas and guidance on specific things they can do to facilitate change.

**WRONG APPROACH = WRONG RESULT.** If your leadership is focused on financial outcomes, make sure you focus on the potential cost savings and research studies that showcase the success of worksite wellness. If your organization's leadership is part of a family-owned business, they may respond better to stories of real people whose lives have been changed by wellness. Know your audience and approach them based on their point of view.

## STUDY SUCCESSFUL WELLNESS PROGRAMS WITH STRONG LEADERSHIP SUPPORT

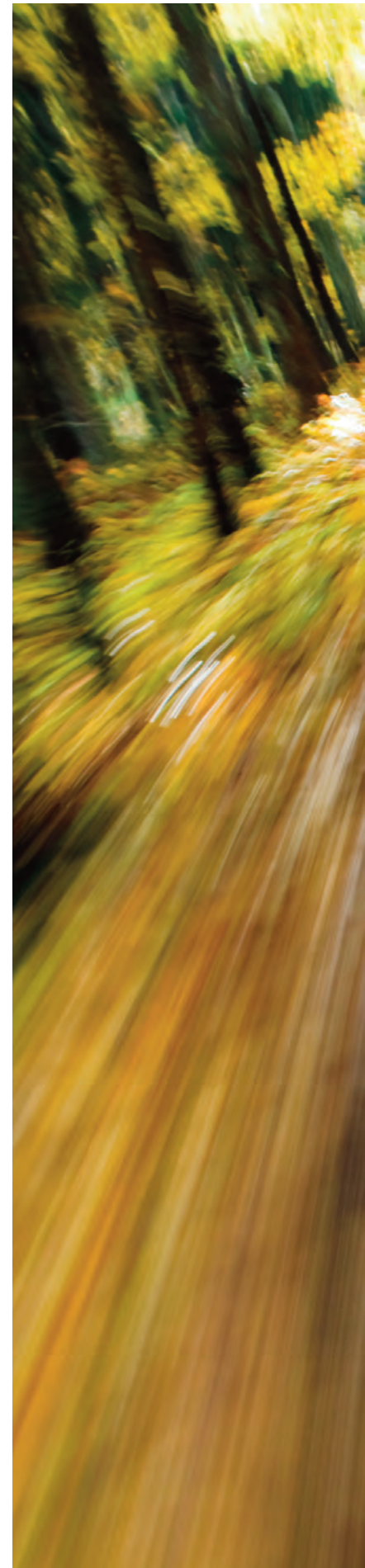
If your organization personifies senior leadership support for worksite wellness, count your blessings. Noteworthy examples include the Principal Financial Group, where recently retired Chairman, President and CEO J. Barry Griswell not only supported the company wellness program, but even more importantly, led by example. Due in part to a conversation with the company's wellness program manager, Griswell embarked on a personal wellness program focused on healthy eating and regular physical activity that resulted in a single-year 51-pound weight loss, as well as substantial improvements in his cholesterol values. Prior to his commitment to a healthier lifestyle his doctor was recommending cholesterol drug therapy for Griswell, but the turnaround in his cholesterol levels made that no longer necessary. In an act of encouragement and inspiration for employees at Principal Financial Group, Griswell openly shared his results with them.

A Willis client, The Medical College of Wisconsin, also exemplifies senior leadership support. T. Michael Bolger, President and CEO, appeared in a video created for new employee orientation describing the wellness program. He kicked off the video with an overview of programs available and closed with a personal invitation to each employee to get involved. Jason Morgan, wellness coordinator at the college, shared a few of the many comments he has received in response to the video.

- "I love the fact that Mr. Bolger is providing a message to the employees regarding wellness. It shows that MCW really cares about its employees and their overall health and well being."
- "Seeing the video with our President and CEO really encouraged me to begin a wellness program of my own. I will certainly take advantage of the many programs that are offered here at the Medical College. Thank you!"

Based on surveys conducted at the conclusion of various programs, Morgan estimates that 15-20% of respondents indicated that the video was a contributing factor in their decision to participate.

The Medical College is a recent recipient of a Gold Well Workplace designation from Wellness Councils of America. Senior leadership support is a key criterion in earning this



award and with this type of demonstrated support its no surprise MCW was awarded this honor.

If you believe substantive support by your organization's senior leaders is lacking, don't despair. You have plenty of company. Below are suggestions about how to cultivate stronger support from senior leadership.

## FOSTER GROWTH THROUGH EXAMPLE

Rather than trying to convince leaders of the value of wellness, operate on the assumption that they "get it" and engage them in conversation about how they can contribute to the program. Summarize specific examples like the ones referenced above and share them with your leader. Do they think ideas such as these would work in your organization? Then, encourage leaders at all levels to "walk the talk" since employees routinely look to their supervisors as examples of corporate culture. If possible, have leaders share their personal health goals and struggles, and especially their successes, including unexpected benefits to their lifestyle (i.e., started training for a marathon, more energy to play with grandkids, able to take hiking vacations, knocked eight strokes off their golf game, etc.).

## KEEP IT SIMPLE

Sometimes it's as simple as asking. Don't expect leaders to come forward and offer ideas on their own; most are simply too busy with other matters. Make it easy for them to get involved and you may be surprised how willing they are to help. Here are some ideas to get you started:

- Draft a kick-off communication piece (e.g., memo or email) and ask them to send it out under their signatures.
- Encourage them to demonstrate visible support for wellness events by making personal appearances.

- Incorporate a video message or written statement by leaders, which can be used in new hire orientation. These pieces can also be posted to the company intranet and public websites.
- Have them sponsor or lead a health challenge team. For example, challenge all associates to maintain their weight over the holidays, or commit to physical activity at least three days a week.
- Have leaders within your organization ask employees to commit to a personal health goal and kick off the campaign by publicly announcing their own.
- Invite them to attend a wellness committee meeting or a recognition lunch for the wellness team members.
- Have your communications team interview them for an article about how they've overcome a personal health challenge. This could also be published in the company newsletter and posted to internal or external websites.

## WATCH YOUR WELLNESS PROGRAM – AND ORGANIZATIONAL PRODUCTIVITY – GROW

Once you've gotten leadership engaged, make an effort to regularly reconnect. Share updates about the program. Periodically forward articles about other programs that showcase senior leader involvement as a reminder of the need to stay engaged. Thank your leaders for their efforts and if possible provide some direct feedback that reflects improvement in program participation or other metrics that demonstrate success as a result of their actions. Share information such as the metrics above from the 2008 Willis Health & Productivity Survey.

Gaining senior leadership support may seem like a formidable task, but if you approach it gradually and logically, it can be accomplished. Changing individuals' attitudes and behaviors about wellness issues takes time and often meets with strong resistance. Having senior leadership on board – and leading by example when possible – can go a long way to making wellness an integral part of your corporate culture.

# HR CORNER

## EMPLOYER PAYS HIGH PRICE FOR ACTING ON STEREOTYPE

Even in today's modern times, it's not uncommon for employers – especially those in traditionally male-dominated industries – to have concerns about the safety of pregnant employees. Although this may be understandable, it's important to check preconceptions about the physical capabilities of pregnant women at the company door – or, as in one employer's case, at the dock.

### WHAT HAPPENED

Fullerton, CA-based SASCO Electric, Inc., maintained a 70-foot yacht, *El Navegante*, to entertain customers and business associates. For four months of the year, the boat was docked in Mexico, where it picked up company guests for short- and long-term cruises. The boat was captained by Martin.

In 2003, Martin hired Sheila to work as a deckhand on the *El Navegante*. Sheila had substantial experience working on large and small boats, and she was a licensed merchant marine. After just a few months on the job, Sheila was promoted to second captain.

Around that time, Sheila also got married. SASCO's president personally congratulated Sheila on both her promotion and recent marriage, joking that "whatever you do, don't get pregnant." One month later, Sheila notified Martin that she was pregnant.

As Martin would later reveal through court testimony, he believed that women with small children would not be interested in working on boats, especially for long cruises. He also had concerns that a boat was an unsafe environment for a pregnant woman, and that Sheila's desire to work on the *El Navegante* for as long as possible during her pregnancy was "cavalier." Martin decided that for safety and liability concerns, he would not allow Sheila to accompany him on the boat's upcoming cruise to Mexico.

Before telling Sheila that she wouldn't be working the cruise to Mexico, Martin asked her to get a doctor's release confirming that she could work without risking her own safety "or the safety of others," meaning the fetus. Before Sheila could submit the requested release, Jordan sent Martin an email stating that because of "budget constraints," the company could afford to have only Martin and a deckhand on board for the Mexico trip, and that Sheila was being permanently laid off.

A few weeks later, Martin sent Sheila an unsolicited letter of recommendation that heralded her as "the hardest working, responsible, boat savvy individual to work with me during my 17 years on this vessel." In conversations with other SASCO employees after Sheila's termination, Martin admitted Sheila had been laid off because he was concerned about her ability to work safely on the boat while pregnant.

## COMPANY HELD LIABLE FOR BIAS

Sheila filed a complaint with the California Department of Fair Employment and Housing (DFEH). The DFEH's investigation revealed that, despite the company's claim that Sheila was laid off because of budgetary constraints, Martin hired two independent contractors to crew the trip to Mexico along with his regular deckhand. The male contractor hired to fill Sheila's position had little prior boat-handling experience and was objectively less qualified than Sheila.

After a three-day administrative hearing, the DFEH found SASCO liable for pregnancy discrimination. It awarded Sheila back pay and \$85,000 for the emotional distress she suffered following her termination. The agency also imposed a \$25,000 administrative fine on the company. SASCO appealed to the California Court of Appeals. The court sided with the DFEH and upheld the award to Sheila and the agency's fine in *SASCO Electric v. Cal. Dept. of Fair Employment and Housing*, Cal. Ct. Appeals (Dist. 4), No. D053492, (2009).

## SAFETY CONCERNS AND PREGNANT EMPLOYEES

Blanket prohibitions against pregnant women working in certain jobs or performing certain kinds of work are a form of pregnancy discrimination under both state and federal law. This is true even if the job is in an industry traditionally considered rugged or hazardous.

**Blanket prohibitions against pregnant women working in certain jobs or performing certain kinds of work are a form of pregnancy discrimination under both state and federal law. This is true even if the job is in an industry traditionally considered rugged or hazardous.**

However, there will sometimes be legitimate safety concerns regarding pregnant workers, such as when toxic materials are present in the workplace or when the job in question ordinarily requires heavy lifting. In such cases, employers should prepare a list of essential job functions and potential workplace hazards, and then ask pregnant employees to obtain medical verification that they are capable of performing the job functions and working in that specific environment.

Employers in traditionally male-dominated industries and occupations are wise to take extra care in articulating, objectively, which safety concerns affect pregnant women, since outsiders may have an easier time believing that these employers maintain stereotypically biased views about the limitations of pregnant employees.

## PRACTICE TIP

Both state and federal law prohibit employers from maintaining blanket "fetal protection" policies based on the idea that certain types of work are presumptively unsafe for pregnant women. Each employee's case must be individually evaluated.

*Article provided by BLR.*

# LEGAL & COMPLIANCE

## EEOC ISSUES GINA POSTER

When Congress enacted the Genetic Information Nondiscrimination Act (GINA), both the DOL and EEOC were given enforcement and regulatory authority. DOL rules generally govern group health plans, while the EEOC generally enforces GINA from an employment perspective.

Under new EEOC rules, employers will have to post a notice that their workplaces do not discriminate on the basis of genetic information. That requirement is effective November 21, 2009. **Click here** to visit the Equal Employment Opportunity Commission website and view the EEOC poster that will fulfill the GINA requirement. Employers also have the option of simply downloading a “supplement” containing updated GINA language and posting that alongside the current version of their required EEO Law poster. **Click here** for the supplement.

Employers should take the appropriate steps to make sure their nondiscrimination policies generally incorporate genetic protections as well. Moreover, as noted above, GINA also applies to group medical plans and primarily affects health risk assessments in that respect. Please see our **recent Alert** for details.

## COBRA EXTENSION BILL INTRODUCED

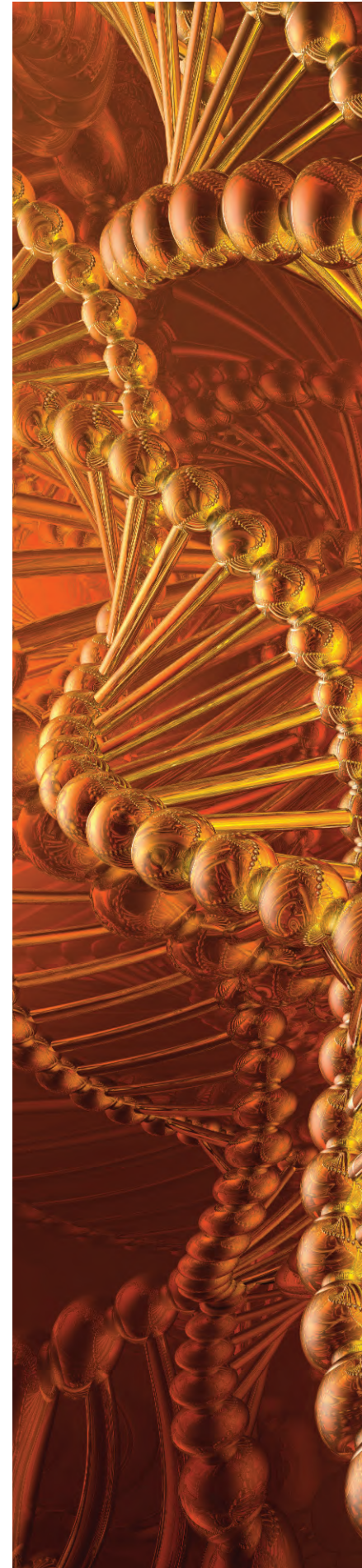
Representative Joe Sestak (D-PA), a member of the House Education and Labor Committee, has introduced the Extended COBRA Continuation Protection Act (H.R. 3930). The proposed measure would amend the American Recovery and Reinvestment Act of 2009 (ARRA) to extend the eligibility period and maximum period for COBRA premium assistance. (Many current ARRA requirements are slated to expire at the end of the year.)

Among its numerous provisions, the original ARRA law limited eligibility for the nine-month government-paid subsidy to individuals involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009 and who lose health coverage during that period. If enacted, H.R. 3930 would extend the ARRA COBRA subsidy eligibility to those who are involuntarily terminated between January 1 and June 30, 2010 and increase the maximum period of assistance from nine to 15 months.

Legislative observers note that while Sestak’s bill could be enacted into law on its own merits, it will more likely be tacked on as part of comprehensive health care reform legislation. H.R. 3930 might also be added to different legislation with good prospects for passage – such as legislation to extend unemployment benefits and other expiring provisions of the stimulus legislation.

Sestak’s H.R. 3930 centers on ARRA-related COBRA requirements. By contrast, the House’s primary health care reform proposal (H.R. 3962, or the Affordable Health Care for America Act), includes a different provision to extend the duration of COBRA coverage. In its current form, H.R. 3962 would simply extend the duration of COBRA without the government-paid premium subsidy.

Willis’ NLRG will closely monitor developments related to these bills and publish additional information as needed.





## SUPREME COURT DELAYS DECISION ON SAN FRANCISCO EMPLOYER CONTRIBUTION MANDATE

Last summer the Golden Gate Restaurant Association (GGRA) filed a petition with the U.S. Supreme Court regarding the legality of the employer spending requirement in the San Francisco Health Care Security Ordinance (HCSO). In response, the Court has asked the solicitor general (the entity responsible for supervising and conducting government litigation in the Court) to file an opinion on the federal government's views on the case. The Court will make a decision on the GGRA's petition following a review of the solicitor general's opinion.

### BACKGROUND

In addition to establishing a health care program, San Francisco's HCSO requires that medium and large businesses make certain minimum contributions toward their San Francisco employees' health care. Under the minimum contribution provision, an employer may either contribute at least a minimum amount to a medical plan (or other health benefits) or pay that amount into the publicly available program established by the HCSO.

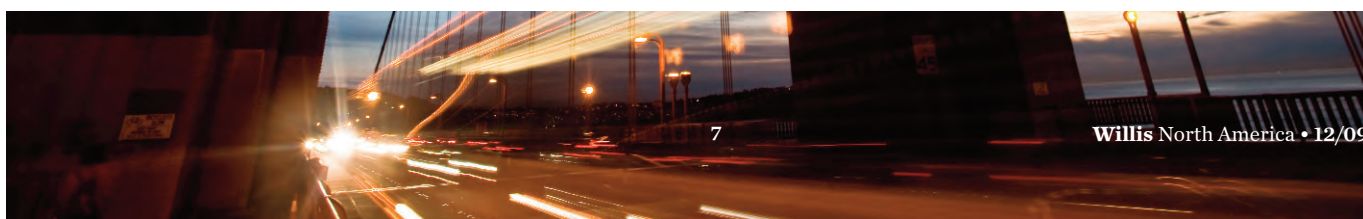
The GGRA sued the city before the HCSO became effective in a bid to prevent the employer mandate from going into effect. The Ninth Circuit, however, ruled that the mandate could go into effect while the case was under consideration, and the city began enforcement on January 9, 2008. The Ninth Circuit later ruled that ERISA does not

preempt the requirement. (As a general legal doctrine, federal preemption refers to those instances when federal law overrides state law.) It is that decision that the GGRA asked the Ninth Circuit to reconsider. For more information about the HCSO and the lawsuit, please see Willis' [\*Employee Benefits Alert #125\*](#).

### WHAT THIS DECISION MEANS

Given the nature and the timing of the Court's decision, the delay may be due in part to what is happening on Capitol Hill regarding health care reform. The Court's decision to hear the case may be affected by what reform measures are adopted.

It could take several months before the Court issues a ruling on whether or not it will hear the GGRA's petition. In the meantime, the Ninth Circuit's decision upholding the employer spending requirement remains in effect. The city therefore retains the authority to enforce the requirement, including any penalties for noncompliance. Since the HCSO compliance deadlines have been in place since 2008 and most employers are complying with the ordinance's requirements, this recent development should not affect employer plans.



# FAMILY AND MEDICAL LEAVE ACT (FMLA) EXPANDED – AGAIN

President Obama recently signed into law the Fiscal Year 2010 National Defense Authorization Act. Among its many provisions, the new law expands FMLA's exigency and caregiver leave provisions for military families. (These are the same FMLA provisions that were established in January 2008.) The January 2008 FMLA changes introduced two types of military leave for FMLA eligible employees:

- Up to 12 weeks of exigency (emergency) leave for urgent needs related to family members (spouse, child or parent) due to the call to service of a member of the National Guard, Reserves or as a retired member of the regular armed forces
- Up to 26 weeks of unpaid caregiver leave during a single 12-month period for an employee to care for a family member (spouse, child, parent or next of kin) who was a covered service member of the armed forces, National Guard or the Reserves with a serious injury or illness incurred in the line of duty while serving on active duty

## THREE SIGNIFICANT CHANGES

Currently, the FMLA does not permit family members of the regular armed forces to take exigency leave. However, the act now expands this leave benefit to include the urgent needs of *family members of covered active duty service members* – not just Reservists and National Guard members.

Under the law, qualifying exigencies include:

- Short-notice deployment
- Attending certain military events
- Arranging for alternative childcare
- Addressing certain financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities

*Note:* Under the FMLA, the term “active duty” is now amended to read “covered active duty,” which includes duty during the deployment of the service member to a foreign country. Thus, the Authorization Act amends the FMLA to permit family members to take leave for exigencies occurring during deployment of an armed forces member to a foreign country. In this situation, the term exigency has not yet been defined.

Additionally, the FMLA provisions expand the military “caregiver” leave. Previously a covered service member was limited to a current member of the armed forces, National Guard or Reserves. However, the act amends the FMLA by redefining “covered service member.” For purposes of caregiver leave, a covered service member now includes a veteran who is undergoing medical treatment, recuperation or therapy for a serious illness or injury and was a member of the armed forces at any time during *the five years preceding the date* on which the veteran began treatment, recuperation or therapy.

Finally, the newly amended FMLA expands the definition of serious illness or injury to include an aggravated illness or injury. Thus the definition is expanded to include not only a serious illness or injury that was incurred in the line of duty while on active duty but also *one that existed before the beginning of the service member's active duty and was aggravated* by service in the line of duty while on active duty.

## EFFECTIVE DATE

Although the Authorization Act does not include an effective date, it should be presumed that the new FMLA provisions are effective immediately. One exception exists with the provision relating to veteran caregiver leave, which requires action by the Secretary of Labor before becoming effective.

Employers covered by the FMLA may want to take the following steps:

- Revise FMLA policies and procedures including request, eligibility, certification and designation forms
- Update employee handbooks which contain FMLA rights and obligations
- Watch for new posters to replace the current poster

## STRICTER PENALTIES FOR GROUP HEALTH PLAN VIOLATIONS

Although the Internal Revenue Code imposes an excise tax on employers for failure to comply with various federal group health plan mandates (including, for example, IRC Sections 4980B, 4980D, 4980E and 4980G), the IRS has never provided a method for self-reporting the excise tax. Nor has the agency aggressively imposed any tax as part of its audit processes. As of January 1, 2010, both are going to change.

Last month, the Treasury issued final amendments to the Excise Tax Regulations, which include provisions for employers sponsoring group health plans to report and pay excise taxes when failing to fulfill certain federal group health plan mandates (unless corrected in a timely fashion). Penalties and interest will accrue for failure to file an excise tax return and pay the excise tax on or by the due date, unless failure is due to reasonable cause and not willful neglect. Other important rules apply.

*Details outlining requirements for self-reporting of the excise tax are addressed in [\*\*Willis EB Alert Vol. 2, No. 11.\*\*](#)*



# WORKPLACE ADOPTION BENEFITS

Adoption benefits are sprouting as relatively low-cost perks that spread goodwill among working parents. Companies offer adoption benefits for recruitment and retention purposes and to equalize benefit levels between workers who adopt and those who receive insurance coverage for prenatal care and delivery.

## TAX IMPLICATIONS

An “adoption assistance” program is a separate written plan offered by an employer for the exclusive benefit of its employees. The plan (1) provides adoption assistance and (2) meets requirements similar to those that apply to educational assistance programs under the tax code regarding eligibility, principal shareholders or owners, funding and notification of employees. Applicable rules are governed by Section 137 of the Internal Revenue Code.

Favorable tax treatment is not available unless, before adoption expenses are incurred by either the employer or employee, the written plan is in existence and the employee receives notification of the existence of the plan. An adoption assistance program may be part of a more comprehensive benefits plan and is not required to be funded. An employer is not required to apply to the IRS for a

determination that the plan is a qualified program, and the program can be offered through a cafeteria plan.

The IRS requires that the employer’s adoption assistance program not pay more than 5% of its payments during the year to shareholders or owners, or their spouses or dependents. In addition to any job-based benefits, adoptive parents may also receive a significant federal tax credit. States also may provide tax incentives for adoption.

Adopting a child can be prohibitively expensive. Adoptions through private agencies can cost up to \$35,000 per child, depending on the location and type of adoption. International private adoptions tend to cost more than domestic private adoptions, due to travel expenses, visas and other legal requirements. Adoption costs may include application fees and services that the agency provides, such as a home study, medical services for the birth mother and child, legal services, document preparation, advertising and post-placement supervision.

## NEWS

### MASSACHUSETTS: FAIR SHARE CONTRIBUTION REQUIREMENT CLARIFICATIONS

Under the Massachusetts Health Care Reform Act (HCRA), employers with 11 or more full-time equivalent employees in Massachusetts are required to make a fair and reasonable contribution to the health care costs of their employees. The Division of Health Care Finance and Policy (DHCFP) recently issued revised final Fair Share Contribution (FSC) testing rules. The outcome of these tests determines whether an employer is in compliance with the FSC requirements.

The changes are effective October 1, 2009 and will apply to testing periods occurring after that date (the first testing period affected ends on December 31, 2009).

### BACKGROUND

When the Massachusetts HCRA became law in April 2006, its reach was widespread – touching individuals, insurers and employers. Employer requirements included:

- A “fair share” contribution requirement
- A “free rider” surcharge/cafeteria plan requirement
- A health insurance disclosure filing using Health Insurance Responsibility Disclosure (HIRD) forms
- An additional tax filing and form (MA 1099 HC) requirement

For detailed information on these employer requirements, please see Willis’ *Employee Benefits Alert*, Issues [#110](#), [#117](#) and [#122](#).

## FSC TESTING RULES

In 2008, the DHCFP issued final rules that made significant changes to the FSC requirements. These included a change to quarterly reporting (from annual), a definitional change to “full-time employee,” and new standards for measuring what is considered a fair and reasonable contribution. The most recently issued regulations clarify certain aspects of rules first issued in 2008.

To be subject to the law, the employer must employ 11 or more “full-time equivalent” employees in Massachusetts. An employer meets this threshold if the sum of the total payroll hours for all employees in Massachusetts in a calendar quarter, divided by 500, is greater than or equal to 11 (the employer can exclude the payroll hours for a temporary employee if the worker worked fewer than 150 hours during the 12-month period ending with the last day of the applicable quarterly reporting period).

FSC reporting data is collected online every quarter (October 1–December 31, January 1–March 31, April 1–June 30, July 1–September 30). The first quarterly report that employers must file under the new rules will be for the period from October 1 to December 31, 2009.

FSC rules impose two tests: (1) a percentage test and (2) a premium contribution standard.

## PERCENTAGE TEST

Under the percentage test the employer must offer a group health plan (to which it makes a contribution) in which 25% or more of the employer’s full-time employees participate.

The employer includes all full-time employees employed at Massachusetts locations in the calculation but excludes seasonal (as certified by the Division of

Unemployment Assistance) and temporary (explicitly temporary in nature and does not exceed 12 consecutive weeks) employees. An employer can also choose to exclude certain other employees, such as those covered by a multi-employer health plan or a federal contract.

In order to complete the percentage test, the employer must look at the last day of the calendar quarter and identify and record the number of full-time employees enrolled in its group health plan and the number of full-time employees on the employer’s payroll. The employer calculates the percentage of full-time employees enrolled for the quarter by dividing the number of full-time employees enrolled in its group health plan for the quarter by the number of full-time employees for the quarter.

## PREMIUM CONTRIBUTION STANDARD

Under the premium contribution standard, the employer must offer to make a premium contribution of at least 33% of the individual coverage cost under the employer’s group health plan that is available to all of its full-time employees no more than 90 days after the employee’s date of hire.

An employer with 50 or fewer full-time equivalent employees must meet either the enrollment percentage test or the premium contribution standard in order to comply with the FSC requirements. An employer with more than 50 full-time equivalent employees in Massachusetts can only satisfy the FSC requirements for a quarter if it meets *one* of the following tests regarding its Massachusetts employees.

- At least 25% of its full-time employees are enrolled in its health plan for which the employer offers to contribute at least 33% of the individual premium for all of its full-time employees (who have completed 90 days of employment)
- At least 75% of its full-time employees are enrolled in its health plan to which the employer contributes

For purposes of these tests (which remain generally unchanged from the prior rules), “full-time” is defined as an employee who works the lesser of (1) 35 or more hours per week or (2) at least the minimum number of weekly payroll hours required *for any employee* to be eligible for the employer’s full-time health plan benefits. (Note: This is a slightly different definition than what was used in the prior rules as the previous definition did not include the words “for any employee.”)

Employers who fail to make a “fair and reasonable” contribution toward the cost of employees’ coverage must pay an assessment of up to \$295 a year per employee to Massachusetts. An employer’s liability under the FSC rules is determined and paid on a quarterly basis.

## NEW REQUIREMENTS

The new rules impose detailed employer documentation requirements to demonstrate their compliance with the FSC requirements. An employer must maintain documentation about its group health plan and the contributions it makes on behalf of employees. Such documentation includes: “a written plan description for each plan, including a description of benefits; eligibility requirements, and amount of employer contribution; and evidence that the plan was in place during the quarter for which eligibility is determined.”

Documentation also includes “copies of employee handbook or other written communications to employees about the plan or plans, including plan benefits, eligibility requirements, and the employer contributions.”

In order to comply with the premium contribution standard, the premium contribution percentage, the offer to employees and the minimum-hours

requirement for benefits eligibility (for full-time benefits) must all be documented in writing.

The final rules now also allow an employer to comply with the FSC rules using a premium reimbursement arrangement. As defined by the rules, this is an “arrangement under which an employer offers in writing to reimburse its employees for a portion of the premium expense of an individual health plan.” The rules further provide that the employee must pay the entire monthly premium to the carrier and then submit documentation to the employer for reimbursement. The arrangement must also establish a monthly reimbursement limit.

ERISA imposes a broad array of employer reporting and disclosure requirements. Consequently, an employer should be able to satisfy the Massachusetts documentation mandate by using ERISA plan materials already maintained for its health plans. However, employers should still review their current documents to determine if they fully address all of the requirements as dictated by the final rules.

Finally, although Massachusetts authorities indicate that employers may comply with FSC rules by using a premium reimbursement arrangement, employers should take a cautious approach to reimbursing individual insurance premiums. Such an arrangement can raise a variety of compliance concerns including issues arising under HIPAA and other federal laws.



## YOU BE THE JUDGE

### IS A DEATH THAT RESULTS FROM LEAPING FROM A MOVING CAR DURING AN ARGUMENT AN “ACCIDENTAL” DEATH WITHIN THE MEANING OF AN AD&D PLAN?

During a heated argument inside her boyfriend’s SUV, Shirley Bailey opened the passenger door and jumped from the moving vehicle. Although the Ford Explorer was only traveling at a speed of about 25 miles per hour at the time of the incident, Bailey suffered a head wound that caused her death two days later. There was no evidence that drugs, alcohol or a mental illness influenced her fatal act. As an Eleventh Circuit judge later stated, “[Bailey] simply opened the door and jumped out.”

At the time of the incident, Bailey was covered under two accidental death and disability policies through her employer. Peggy Tyler, Bailey's beneficiary, filed a claim for the policies' proceeds with AIG Life Insurance Company, the insurer. AIG refused to pay because, it contended, the deceased had not suffered an injury caused by an "accident" as required by the policies. Tyler then sued AIG under ERISA in federal district court (*Tyler v. AIG Life Ins. Co.*, 273 Fed. Appx. 778, 2008 U.S. App. LEXIS 7450 (11th Cir. Ala. 2008)).

The U.S. District Court for the Northern District of Alabama determined that since neither policy defined what was "accidental" for benefit eligibility purposes, Alabama law applied. Alabama law was appropriate since the policies were both delivered in Alabama, the loss occurred in Alabama and no conflict with ERISA or other federal law existed. In turn, the court interpreted Alabama case law to require two elements in making a determination as to whether the fatal act was intentional or accidental: (1) a subjective element, which asks whether the insured herself had an expectation that death or grievous bodily injury would result from the harmful act; and (2) an objective element, which would ask whether serious injury or death would be clearly foreseeable to any "reasonable person" in the same situation.

Applying this test, the U.S. District Court found that even if Bailey had believed that she would not sustain serious injuries or die, no reasonable person could conclude that jumping out of a moving vehicle without protective headgear would not result in either serious injury or death. Thus, the court held that the action was not "accidental" and accordingly found for the insurance company, prompting an appeal by Tyler to the U.S. Court of Appeals for the Eleventh Circuit.

## **IS JUMPING OUT OF A CAR DURING AN ARGUMENT AN "ACCIDENT?"**

*Yes.* Instead of finding that Alabama law requires both the subjective *and* objective elements, the Eleventh Circuit found that only a subjective test applies. That is, the only question to ask is whether the particular person had an expectation that serious injury or death was "virtually certain" to result from the action.

Since the SUV was traveling at a relatively low speed, the court found that it could not be said that serious injury or death was a virtual certainty to Bailey. She could have reasonably thought that some injury was likely but that serious injury or death was not. Thus, the court concluded that Bailey's death was indeed an "accident."

# WEBCASTS

## RECORD RETENTION REQUIREMENTS

**DECEMBER 8, 2009  
2:00 PM EASTERN TIME**

**Presented by Frances K. Horn, JD, PHR, Senior NLRG Member**

Recordkeeping is a practical necessity for a benefits plan of any size or complexity. The need to maintain records is a hallmark of any plan, fund or program. Many decisions about recordkeeping will be dictated by the nature of the plan, the size of the plan sponsor's workforce, and other factors, including legal rules in the employee benefits area. This session addresses employee benefits and the documents an employer should maintain and the timeframe for maintaining them. It will further outline the requirements to maintain records electronically as well as the requirements for electronic transmission of employee benefits plan documents.

The following topics will be covered during this webcast:

- Records to retain under ERISA
- Records for fringe benefit plans under the IRC
- Recordkeeping under HIPAA, Medicare Part D, FMLA, and the ADEA
- How long to keep records
- Electronic recordkeeping

**Participant Access:**

Advance RSVP is required to participate in this call; [click here](#).

# KEY CONTACTS

## US BENEFITS OFFICE LOCATIONS

### NEW ENGLAND

**Auburn, ME**  
207 783 2211

**Bangor, ME**  
207 942 4671

**Boston, MA**  
617 437 6900

**Hartford, CT**  
860 756 7365

**Manchester, NH**  
603 627 9583

**Portland, ME**  
207 553 2131

**Shelton, CT**  
203 924 2994

### NORTHEAST

**Buffalo, NY**  
716 856 1100

**Cranford, NJ**  
908 931 3005

**Florham Park, NJ**  
973 410 4622

**Morristown, NJ**  
973 829 6374  
973 829 6465

**New York, NY**  
212 915 8802

**Norwalk, CT**  
203 523 0501

**Philadelphia, PA**  
610 260 4351

**Radnor, PA**  
610 254 7289

**Wilmington, DE**  
302 397 0171

### ATLANTIC

**Baltimore, MD**  
410 584 7528

**Bethesda, MD**  
301 581 4261

**Knoxville, TN**  
865 588 8101

**Memphis, TN**  
901 248 3103

**Nashville, TN**  
615 872 3716

**Norfolk, VA**  
757 628 2303

**Reston, VA**  
703 435 7078

**Richmond, VA**  
804 527 2343

**Rockville, MD**  
301 692 3025

### SOUTHEAST

**Atlanta, GA**  
404 224 5000

**Birmingham, AL**  
205 871 3300

**Charlotte, NC**  
704 344 4856

**Gainesville, FL**  
352 378 2511

**Greenville, SC**  
704 344 4856

**Jacksonville, FL**  
904 355 4600

**Marietta, GA**  
770 425 6700

**Miami, FL**  
305 421 6208

**Mobile, AL**  
251 544 0212

**Orlando, FL**  
352 378 2511

**Raleigh, NC**  
704 344 4856

**Savannah, GA**  
912 239 9047

**Tallahassee, FL**  
850 385 3636

**Tampa, FL**  
813 490 6808  
813 289 7996

**Vero Beach, FL**  
772 469 2842

### MIDWEST

**Appleton, WI**  
414 259 8837

**Chicago, IL**  
312 527 6482  
312 621 4843  
312 621 4704

**Cleveland, OH**  
216 357 5921

**Columbus, OH**  
614 326 4788

**East Lansing, MI**  
517 349 3226

**Grand Rapids, MI**  
248 735 7249

**Green Bay, WI**  
414 259 8837

**Milwaukee, WI**  
414 203 5248  
414 259 8837

**Minneapolis, MN**  
763 302 7131  
763 302 7209

**Moline, IL**  
309 764 9666

**Pittsburgh, PA**  
412 645 8537  
412 586 3524

**Schaumburg, IL**  
847 517 3469

## **SOUTH CENTRAL**

**Amarillo, TX**  
806 376 4761

**Austin, TX**  
512 651 1660

**Dallas, TX**  
972 715 2194  
972 715 6272

**Denver, CO**  
303 765 1564  
303 773 1373

**Houston, TX**  
281 584 1672  
281 584 1676  
713 625 1017

**McAllen, TX**  
956 682 9423

**Mills, WY**  
307 266 6568

**New Orleans, LA**  
504 581 6151

**Oklahoma City, OK**  
405 232 0651

**Overland Park, KS**  
913 339 0800

**San Antonio, TX**  
210 979 7470

**Wichita, KS**  
316 263 3211

## **WESTERN**

**Aliso Viejo, CA**  
949 461 3996

**Fresno, CA**  
559 256 6212

**Las Vegas, NV**  
602 787 6235  
602 787 6078

**Los Angeles, CA**  
213 607 6300

**Novato, CA**  
415 493 5210

**Phoenix, AZ**  
602 787 6235  
602 787 6078

**Portland, OR**  
503 274 6224

**Rancho/Irvine, CA**  
562 435 2259

**San Diego, CA**  
858 535 1800  
858 678 2130

**San Francisco, CA**  
415 291 1567

**San Jose, CA**  
408 436 7000

**Seattle, WA**  
800 456 1415

*The information contained in this publication is not intended to represent legal or tax advice and has been prepared solely for educational purposes. You may wish to consult your attorney or tax adviser regarding issues raised in this publication.*