

WELLNESS WORKS

TOBACCO-FREE EMPLOYEES - ARE YOU SENDING THE RIGHT SMOKE SIGNALS?

Many employers recognize the benefits of having a non-smoking workforce. Even so, the direct and indirect costs of tobacco use may surprise you! According to the National Business Group on Health and the Centers for Disease Control and Prevention:

- The annual cost of tobacco use is about \$3,400 per smoker or about \$7.18 for each pack of cigarettes sold
- Businesses pay an average of \$2,189 in Workers' Compensation costs for smokers, compared with \$176 for non-smokers
- On average, smokers miss 6.16 days of work per year due to sickness (including smoking-related acute and chronic conditions), compared to non-smokers, who miss 3.86 days of work per year
- Employees who take four 10-minute smoking breaks a day actually work **one month** less per year than workers who don't take smoking breaks

Why is quitting smoking and remaining a non-smoker so hard for so many people? The answer is nicotine. Nicotine, found naturally in tobacco, has been shown to be as addictive as heroin or cocaine. As with most chemical addictions, over time, a person becomes more physically and emotionally dependent on nicotine. Studies have shown that if smokers are to break the habit for good they must deal with both the physical and mental dependency issues.

On the following page are some ways you can send the right messages to your employees about quitting.



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PROVIDE HEALTH INSURANCE COVERAGE OF MEDICATION AND COUNSELING

Research shows that insurance coverage increases the use of effective treatments and the number of successful attempts at quitting. Consider eliminating or minimizing co-pays or deductibles for counseling and medications. Even small copayments reduce the use of proven treatments. Typically, adding this type of coverage to your plan is not costly and lets your employees know that you care about their well being and are designing their benefits to align with your corporate wellness goals.

PROMOTE STOP-SMOKING RESOURCES

Willis HRH has a partnership with Free & Clear, the national leader in evidence-based tobacco-cessation programs. Free & Clear's *Quit for Life* program can be accessed via phone and internet. Participants can take advantage of a private, online community, quitting guides, recommendations on a personalized stop-smoking plan, free nicotine replacement therapy (patch/gum) mailed directly to their homes and unlimited toll-free access to Quit Coaches, who provide a personalized approach to cessation. This program yields impressive success rates of over 40% when most quit-smoking programs claim less than half that rate of success. You can also promote the free, national "quit" line available through 1-800-QUIT-NOW or 1-877-44U-QUIT (or visit the government site by [clicking here](#) to learn more).

LET YOUR EMPLOYEES KNOW YOU SUPPORT THEM

Only about 4% to 7% of people are able to quit smoking on any given attempt without the use of medication or other assistance. Research has also shown us that smokers are twice as likely to be successful in quitting smoking when they use counseling and nicotine replacement products. We know that multiple attempts at quitting are important and often necessary for smokers to find the way that works best for them and to remain non-smokers for life.

Does your smoking cessation program allow people to make multiple attempts in various ways? What works for one person may not work for another. Let your employees know that you recognize how difficult quitting smoking is and that you care about them and are giving them many different opportunities and resources to help in their struggle to quit. Make sure your company supports their efforts by making your worksite smoke free and by enforcing tobacco-use policies.

USE INCENTIVES - WISELY

Your employees may be more motivated to change their behaviors when they are offered incentives or disincentives. Charging smokers more or discounting non-smokers for their health insurance benefits has become a popular incentive strategy among employers. Plan your incentive strategy thoughtfully and consult your internal legal counsel about the HIPAA compliance implications and state laws. For a group health plan to maintain a premium differential between smokers and non-smokers and not be considered discriminatory, the plan's non-smoking program must meet the HIPAA non-discrimination requirements for wellness programs. [Click here](#) to learn more about states that have specific laws that prohibit employers from discriminating against current or prospective employees based on their use of tobacco.

Working towards a tobacco-free workforce often requires careful planning, promotion, policy changes and additional resources. Willis HRH has the guidance and tools to ensure your efforts are successful. To learn more about helping your employees with smoking cessation and to access additional information, contact your local Willis HRH service team.

Quitting smoking is easy. I've done it a thousand times.

- Mark Twain

LEGAL AND COMPLIANCE

CMS: NEW GUIDANCE ON MSP REPORTING REQUIREMENTS

CMS (Centers for Medicare and Medicaid Services) has issued new guidance and model language regarding obtaining individual Medicare Health Insurance Claim Numbers (HICNs) and/or Social Security Numbers (SSNs) for group health plan (GHP) reporting. But even the new guidance is not without gray areas.

BACKGROUND

Since January 1, 2009, the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) has required that insurance companies, TPAs, and those self-funded plans that also internally administer claim payments report specific information about Medicare beneficiaries who have other group coverage to the federal Department of Health and Human Services (HHS). ([Click here](#) to read an article that provides additional information.) However, this was easier required than complied with.

DATA COLLECTION PROBLEM

The law says that “Responsible Reporting Entities” (RREs – typically insurance companies and TPAs) are required to report data necessary to identify Medicare beneficiaries for whom a group health plan (GHP) is responsible for paying primary to Medicare. RREs are generally obliged to verify the Medicare Health Insurance Claim Number (or HICN) for a given Medicare beneficiary, or determine whether or not an individual is a Medicare beneficiary if the individual furnishes his/her Social Security Number (SSN).

Some RREs have advised CMS that they are “having difficulties” in obtaining either the HICN or the SSN from some of their insureds. Although we strive to avoid cynicism, the difficulty in obtaining SSNs is something many Willis HRH clients have understood for a long while – and seems like a problem that might reasonably have been foreseen by the government. In any event, CMS has issued the new guidance to help address this problem.

CMS EXPLAINS THAT PARTICIPANTS SHOULD COOPERATE

Essentially, the model language explains MSP (Medicare Secondary Payer) requirements to the participant population and requests everyone’s cooperation with the data collection process. Specifically, subscribers and dependents are told that they should furnish either their HICN (or SSN if they do not have an HICN available) as requested by their group health plan RRE.

Although the document specifically allows individuals to refuse to provide the information, it is not without language that communicates a veiled threat to anyone who actually declines. By refusing to share his or her HICN or SSN, the document states: “I may be violating obligations as a beneficiary to assist Medicare in coordinating benefits to pay my claims correctly and promptly.”

The good news is that the form provides an avenue for entities subject to MSP requirements to more easily comply with CMS data collection efforts. In fact, the new CMS guidance states that, even if an individual refuses to provide the necessary information (after the RRE has communicated the obligation to share HICN or SSN using the model CMS language), CMS will consider the RRE compliant if:

- A signed copy of the model language in the format provided is obtained (even if the individual is later discovered to be a Medicare beneficiary)
- With respect to that same individual, the RRE has the model language (with the picture of the Medicare ID card) re-signed and dated at least once every 12 months

CMS tells the RRE that it must carefully retain all documentation.

The guidance also notes that this process does not in any manner provide a “safe harbor” to any RRE attempting to use it to avoid furnishing MSP data about an individual known to the RRE to be a Medicare beneficiary. Some employee benefits experts speculate that CMS could develop a system to track and monitor individuals who decline to share information as a safeguard to ensure that no employer is actually using participant “refusals to comply” as convenient cover for entities interested in side-stepping otherwise applicable MSP duties.

[Click here](#) to read the model language. Additional guidance can be viewed by [clicking here](#).



MASSACHUSETTS HEALTH CARE REFORM ACT - THREE YEARS LATER

Health Affairs, a leading journal of health policy, was founded to support independent research on health care issues. According to its recently published report, “**Update on Health Reform in Massachusetts**,” the recession and increasing health care costs may be negatively affecting the Massachusetts Health Care Reform Act.

The good news is that, at less than 3% (compared to the national average of about 15%), Massachusetts also has the lowest percentage of uninsured residents in the U.S. This is attributed in part to the state mandate that requires residents to have coverage or pay a tax penalty. According to a survey of about 4,000 adults, the percentage of people able to visit doctors and dentists has increased. The reform efforts have not completely resolved health coverage concerns. The report notes that there has been an increase in the number of residents who are having problems paying medical bills despite the new reform efforts. In addition, the report indicates that there has been an increase in the number of people who avoided care due to costs. The Massachusetts program is also struggling to manage cost-related concerns.

The success (or failure) of Massachusetts’ reform measures is important. Given the current administration’s push to pass federal health care reform legislation this year, the Massachusetts plan may be a model for health care reform.

NOT QUITE 20 QUESTIONS ON THE COBRA SUBSIDY

The IRS recently updated its question and answer guidance on the COBRA subsidy, adding 19 new Q&As that address a variety of issues. The most significant addition to the guidance states that, when reviewing employers’ subsidy reimbursement claims, the IRS will give some deference to an employer’s conclusion that a termination was involuntary. Otherwise, the new Q&As mostly confirm previous statements from IRS representatives.

The IRS guidance is available online by [clicking here](#).

INVOLUNTARY TERMINATION DETERMINATIONS

Employers generally are required to extend the COBRA subsidy to certain individuals who have COBRA coverage due to an involuntary termination of employment, and they can take a credit against their payroll taxes to reimburse themselves for the subsidy, but only to the extent that the subsidy is required by law. If an employer voluntarily provides the subsidy to an individual who does not qualify for it, the employer is not entitled to reimbursement for those amounts through the payroll tax credit. For the subsidy to be required (so that the payroll tax credit is available), an involuntary termination of employment must occur.

In many cases, it is not clear whether a termination is voluntary or involuntary, and the employer must make a judgment call whether to extend the subsidy. If the employer decides against providing the subsidy, an appeal to the DOL for expedited review is available to the individual. If the employer decides to err in favor of providing the subsidy, it will take the credit against its payroll taxes and the IRS may eventually question whether the employer was entitled to that credit. There have been concerns that, when the IRS reviews claims for the credit, it will not err in favor of providing the subsidy, will

determine that a termination was voluntary, and will require the employer to repay the credit claimed in connection with that termination (and, potentially, to pay penalties).

The IRS first addressed these concerns by providing guidance on the meaning of involuntary termination, but it quickly became clear that no amount of guidance could cover every – or even most – terminations. The involuntary termination guidance and the dilemma facing employers who claim the payroll tax credit are explained in Willis HRH *Employee Benefits Alert*, Vol. 2, Issue 5. To address this problem, Willis HRH's National Legal & Research Group, along with other industry leaders met with IRS and Treasury officials and requested that regulators adopt a “reasonable interpretation” standard of compliance. The IRS's new guidance states that the IRS will use such a standard rule when determining whether an employer is entitled to the payroll tax credit. Specifically, the IRS says that it will not challenge an employer's conclusion that a termination was involuntary if the employer's determination “is consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance.” While adoption of this standard is gratifying, it appears only in the informal, nonbinding guidance posted on the IRS website. Given that IRS review of claims for the payroll tax credit may occur years after the initial decision by the employer, more formal guidance upon which an employer could rely in the face of a payroll audit would be welcome.

Before getting too comfortable in these situations, however, employers should remember that they are obligated to create and retain extensive documentation supporting their decision to extend the subsidy to a particular individual. Among other things, the documentation must include “an attestation by the employer of involuntary termination for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.”

THE OTHER 18 Q&AS

The new IRS guidance confirmed or clarified several issues, including:

- **MORE ON INVOLUNTARY TERMINATION**
An individual hired for a limited period of time (e.g., a seasonal worker or teacher hired for a single school year) may be involuntarily terminated when the employment ends as scheduled. If the employee works to the end of the scheduled period and is willing and able to continue employment, the failure of the employer to offer additional work is considered involuntary termination for purposes of the COBRA subsidy. In addition, an elected official is involuntarily terminated at the end of his or her term in office unless the elected official is eligible to run for reelection, but chooses not to do so. An involuntary termination of employment also will be deemed to occur when a member of a military reserve unit or the National Guard who is employed by a civilian employer is called to active duty, even if the employer treats the employee as taking leave rather than terminating employment.
- **PRE-TAX COBRA PREMIUMS**
Allowing an individual to pay his or her 35% share of COBRA premiums on a pre-tax basis under a cafeteria plan or from a health reimbursement arrangement will make the individual ineligible for the COBRA subsidy with respect to those premiums. Premiums that are paid with pre-tax amounts are considered employer-paid for purposes of the COBRA subsidy. Therefore, the individual receiving the coverage has not paid 35% of the COBRA premium, which is a prerequisite for receiving the subsidy.
- **ELIGIBILITY FOR OTHER COVERAGE**
Becoming eligible for (or covered by) TRICARE health coverage does not eliminate eligibility for the COBRA subsidy because TRICARE is not considered to be group health plan coverage for COBRA purposes.
- **NO INDIVIDUAL INFORMATION REPORTING OF COBRA SUBSIDY**
Employers will not be required to report the COBRA subsidy amounts that are applied to an individual to either the individual or to the IRS on Form W-2, Form 1099 or otherwise. Employers claiming the payroll tax credit will report subsidy amounts in aggregate, of course, and are required to keep documentation supporting the credit claimed, which will include the subsidy applied to individuals.
- **WHO CAN CLAIM THE PAYROLL TAX CREDIT**
The IRS specifies in the new guidance that, when COBRA coverage is provided by a plan maintained by more than one employer (including a plan maintained by a controlled group of companies), the employer that sponsors the plan is not necessarily the one that is entitled to claim the payroll tax credit. In these situations, the credit generally can only be claimed by the entity who is “the former employer of the employee on whose involuntary termination of employment the individual's eligibility for the subsidy is based.”

YOU BE THE JUDGE



CAN AN EMPLOYER TERMINATE COBRA FOR FAILURE TO RE-ENROLL?

Carole White worked for Kroger Stores, a large national retailer, from June 2004 until November 2004. After Ms. White's employment with Kroger was terminated, she properly elected COBRA coverage. The Kroger plan required its participants, whether active employees or COBRA participants, to re-enroll in the plan each year during open enrollment. Ms. White failed to re-enroll during the open enrollment period and received a document entitled "Confirmation Statement" indicating she had elected "No Coverage." Kroger then terminated her COBRA coverage.

Shortly thereafter, Ms. White fell and sustained medical injuries that required medical attention. As she knew that her coverage under the Kroger plan had been terminated, she did not attempt to submit any claims for those medical services.

Ms. White claimed that she should not have been subjected to Kroger's plan requirement for yearly re-enrollment and filed suit in the U.S. District Court for the District of Utah (*White v. Kroger*, 2007 US Dist. 81470 (D. Utah 2007)), alleging that Kroger violated the statutory provisions of COBRA by terminating her coverage before the 18-month statutory period ended.

CAN KROGER HOLD COBRA PARTICIPANTS TO ADMINISTRATIVE OBLIGATIONS REQUIRED OF ACTIVE EMPLOYEE PARTICIPANTS?

YES. Because the Kroger plan requires COBRA and non-COBRA participants alike to re-enroll each year during the open enrollment period and Ms. White failed to enroll, the court found that her COBRA coverage was properly terminated. The court stated that the hallmark of COBRA is to ensure equal coverage between regular plan participants and COBRA plan participants. The court also noted that the regulations governing COBRA allow a plan to terminate the coverage of a COBRA participant on the same grounds as it would terminate coverage for a non-COBRA plan participant. Thus, active employees and COBRA participants may be held to substantially similar administrative obligations required by a health plan, and failure to fulfill these requirements may provide cause for the termination of COBRA coverage.

Note: DOL COBRA regulations require that a plan sponsor notify individuals when their COBRA coverage ends early (e.g., notification under the DOL rule would be triggered if health coverage terminated early due to a qualified beneficiary's failure to submit timely COBRA premium payment). [See DOL Reg. §2590.606-4] The notice must be provided as soon as administratively practicable after the termination decision is made, must explain why and when COBRA coverage is being terminated, and must describe any rights to other coverage the qualified beneficiaries might have upon termination. Although the court did not examine this notification duty in this situation, employers should be careful not to overlook the DOL's early COBRA termination notice requirement.

NEWS

MANDATORY SICK LEAVE LEGISLATION INTRODUCED

Representative Rosa DeLauro (D-CT) recently introduced the Healthy Families Act (H.R. 2460), a bill that would allow workers at medium-sized businesses to earn paid sick time for themselves and their families. Under the bill, individuals are entitled to up to 56 hours (seven days) of paid sick time. Workers would earn one hour of paid sick time for every 30 hours worked.

Employers that already provide this leave presumably would not have to change their current policies, as long as their employees' existing leave can be used for the same purposes described in the bill. Employers with fewer than 15 employees would be exempt. Employers can require workers to provide documentation supporting any request for leave longer than three consecutive days.

The bill also confers a private right of action to recover damages or equitable relief in both federal and state courts. Damages equal to wages, salary, employee benefits or "other compensation" may be recovered. Any actual monetary losses sustained as a result of any violation (up to a sum equal to 56 hours of wages or salary) can be recovered, plus interest, as well as liquidated damages and equitable relief.

Previously, the Healthy Families Act was introduced in Congress and defeated. Prospects for passage have significantly improved, however, due to Democratic majorities in both houses and general support from the Obama administration.



HR CORNER

WORKERS CITE FLEXIBLE SCHEDULES AS BEST SUMMER BENEFIT

Thirty-eight percent of workers say that the summer benefit they would most like to have is a flexible schedule, making it the most coveted benefit, according to a survey by the staffing firm OfficeTeam.

After flexible schedules, leaving early Friday (32 percent of respondents) was the second most coveted summer benefit. Company activities (6 percent) such as picnics and relaxed dress codes (5 percent) were less coveted.

"Employees appreciate flexibility in their jobs because it gives them greater control and enables them to handle other commitments without sacrificing their work performance," said Robert Hosking, executive director of OfficeTeam.

Flexible scheduling is an inexpensive way to keep employees motivated, says Hosking. Hosking suggested that businesses stagger workers' schedules to maximize the total number of hours employees are available to assist customers.

"Companies should pilot flexible schedule programs before rolling them out permanently," Hosking recommended. "This gives businesses time to evaluate the impact on workflow and productivity."

Even if companies aren't able to implement flexible schedules, allowing employees to occasionally leave early on Fridays can have a positive effect on morale, Hosking noted.

"Many workers schedule weekend trips during the summer and appreciate a head start on their travels," he said.

The survey included 457 workers who are employed in an office environment.

This article provided BLR.



WEBCASTS & EVENTS

MAKING YOUR CAFETERIA PLAN COMPLY WITH THE NEW RULES

**JULY 28, 2009
2:00 PM EASTERN TIME**

Presented by Willis HRH National Legal and Research Group

Regulations were issued that affect the administration of employer plans administered under Section 125 of the Internal Revenue Code (cafeteria plans, including premium-only plans, health and dependent care flexible spending accounts, etc.). The regulations clarify many of the requirements for cafeteria plans but also include several new opportunities that add flexibility in plan administration. This session will discuss the changes to the regulations and offer insight into the use of the new rules to make cafeteria plans even more attractive to employers and their employees.

The following topics will be covered during this webcast:

- The changes and clarifications made by the IRS to the cafeteria plan requirements
- The ways the new regulations provide flexibility in the administration of cafeteria plans
- The impact these changes will have on employers and what steps an employer needs to take to comply

Participant Access:

Advance RSVP is required to participate in this call; **click here** to register.



FMLA ADMINISTRATION AND UPDATES

**AUGUST 11, 2009
2:00 PM EASTERN TIME**

Presented by Jennifer Barton, Willis HRH National Practice Leader, HR Partner

Workers are becoming increasingly aware of FMLA protections and, as a result, are asserting their rights through the courts. As a matter of fact, FMLA disputes are among the top five issues that land companies in the courtroom.

Understanding all of the intricacies of the Family Medical Leave Act can be daunting, especially with the new regulations released by the Department of Labor that took effect on January 16, 2009. Whether you are new to HR or are an experienced professional, this webcast is designed to provide the latest information on FMLA compliance.



During this webcast we will explore:

- The latest developments in FMLA
- Practical knowledge to ensure your policies and procedures are in compliance
- The proper usage of FMLA and documenting absences

Participant Access:

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



KEY CONTACTS

US BENEFITS OFFICE LOCATIONS

NEW ENGLAND

Auburn, ME
207 783 2211

Bangor, ME
207 942 4671

Boston, MA
617 557 7517

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

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847 517 3469

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806 376 4761

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512 651 1660

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972 715 2194

972 715 6272

Denver, CO

303 765 1564

303 773 1373

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281 584 1672

281 584 1676

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602 787 6078

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858 678 2130

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415 291 1567

San Jose, CA

408 436 7000

Seattle, WA

800 456 1415

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