

Welcome to the Fall 2006 edition of the HRS e-newsletter – *The HRedge*.

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Welcome to new clients... Defining the 'Supervisor'...Reservists protected from early withdrawal penalty tax...Employers can Pro-rate Bonuses under FMLA... I-9 Problems are Now Costly...What about Employees with Depression?...What to do with Unused FSA Dollars...Our November Seminar...

Please feel free to talk to any of our consultants for clarification of any information provided and visit our website for details about HRS at <http://www.hrstndassociates.com/>

HRS has the best clients, and these organizations have joined the list...

**Becker WagonMaster, Inc.
Cumberland Valley Motors
Dietrich's Milk Products
Egan Sign
Essick & Barr/The Boothby Group
John's 625 Automotive Service, Inc.
Journal Publications, Inc.
Misco Products
Sabre Systems, Inc.
Shamrock Financial Management, LLC
W. J. Strickler Signs**

'Supervisor' is now Defined

The National Labor Relations Board decisions issued on September 29, 2006 establish that employees who assign other employees to overall duties, are held accountable for directing subordinates to undertake specific tasks, and have the discretion to do so without close direction from management will be recognized as "supervisors."

Employers should scrutinize job descriptions and actual work duties to determine which employees meet the supervisory criteria identified by the Board. We can help you structure job descriptions and how to effectively implement them. This could include advising managers as to their relationship with first line supervision, and advising supervisors how effectively to supervise their subordinates. To ensure that supervisory personnel actually exercise such authority, employers can coach, counsel or discipline supervisors for any failure to properly exercise that authority. The employer also can base performance evaluations on how well they exercise their authority.

In non-union workplaces, employers can spell out the authority to direct and assign work, and the expectation by management that they will be held accountable for the performance of their subordinates. Employers also can advise employees that they meet the criteria for supervisory status, what that means in terms of ineligibility for unionization, and how to respond to signs of union activity.

Active-Duty Reservists no longer subject to 10% Early Distribution Penalty

Military reservists called to active duty can receive payments from their individual retirement accounts, 401(k) plans and 403(b) tax-sheltered annuities, without having to pay the early-distribution tax.

The new Pension Protection Act of 2006 eliminates the 10% early-distribution tax that normally applies to most retirement distributions received before age 59½. Eligible reservists activated after Sept. 11, 2001, and before Dec. 31, 2007 who are called to active duty for at least 180 days qualify for relief from this tax. Regular income taxes continue to apply to these payments in most cases.

This relief is retroactive, so eligible reservists who already paid the 10-percent tax can claim a refund.

Appeals Court Upholds Employer's Right to Prorate Bonus under FMLA

The 3rd U.S. Circuit Court of Appeals ruled that employers may prorate production-based bonuses of employees taking leave under the Family and Medical Leave Act (FMLA).

In Sommer v Vanguard Group, Robert Sommer alleged that the FMLA prohibits employers from reducing bonuses based on hours worked when the targeted hours were missed due to unpaid FMLA leave. In affirming a district court ruling dismissing the claim, the appellate court held that employers are allowed to prorate "production bonuses," even though "absence of occurrence" bonuses, such as those awarded for perfect attendance, could not be reduced.

In late 2000 and early 2001, Sommer took two months unpaid leave under FMLA, claiming "major depression and generalized anxiety." Due to this absence, Vanguard prorated Sommer's bonus under its partnership plan. After Vanguard terminated Sommer in 2004 for misrepresenting his qualifications, Sommer sued. Vanguard established its partnership plan in 1984 to reward employees for personal and corporate achievement. Under the plan, employees working at least 1,950 hours received a full bonus. Those working fewer hours received a prorated bonus. Vanguard's policy specifically stated that "time spent on leave is not considered time worked" and the bonus was "always prorated for leave time" (emphasis in original). The policy made no distinction between types of leave.

Does your organization have production bonuses? If so, review the wording to ensure that the intent of the bonus is clear and can be safely pro-rated. So long as

all types of company unpaid leave are treated equally, prorating a production bonus due to unpaid leave will not violate the FMLA.

19/Immigration Irregularities Now Pose Severe Threat

Several years ago, the worst-case scenario for businesses that hired illegal workers was often a slap on the wrist and a relatively small fine. These days, however, having illegal workers on the payroll could result in an employer's arrest and hundreds of thousands of dollars in seized assets

This is due to a crackdown by the Immigration and Customs Enforcement agency (ICE), which assumed authority over these matters from the U.S. Immigration and Naturalization Service (INS) in 2003. While INS agents generally issued warnings and imposed fines, the ICE has taken a much more aggressive stance of pursuing criminal prosecution of employers.

This change in policy has been largely influenced by the Department of Homeland Security, which has been under tremendous pressure to tighten border control. Hundreds of employer arrests have taken place thus far, a trend that shows no signs of abating. This groundswell has spread to other branches of the legislative and judicial system as well, including new strict state statutes and competitor litigation.

What do PA Employers Need to do for Employees with Depression?

In a decision handed down in August, the, U.S. District Court for the Middle District of Pennsylvania made it clear that depression may have the same protection as any other documented disability.

In *Huffsmith v. Yellow Transportation*, the court determined that the employer was wrong to terminate the employee after he left work early. The employee had provided his employer with documentation of his depression, and requested to leave early one day because his depression had flared up.

The court determined that the employee was qualified to perform his job, with or without reasonable accommodation, as required by the ADA. He had done the job for 15 years, and the only accommodation he requested was to be able to go home early on one day.

The court also determined that the employee's interactions with his supervisor were enough to trigger Yellow's obligation to try to find an accommodation. The court said that notice of seeking an accommodation need only make clear that the employee wants assistance for a disability. "The request does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation,'" the court said.

Depression is a very subjective condition. However, employers must pay attention when an employee with depression states that they are suffering from a flare-up. Such a statement has the legal effect of a formal notice of the condition, triggering the employer's obligation to take seriously a request for accommodation.

Employers have options with unused FSA funds

Flexible spending accounts (FSAs) are reimbursement benefit plans that allow employees to pay for certain medical or dependent care expenses on pretax basis. FSAs must comply with the requirements of Section 125 of the tax code.

Employees determine the amount of their annual FSA account prior to the beginning of each plan year. If the employee does not have expenses to exhaust the account, the unused amounts that are "left over" are forfeited by the employee, under the use-it-or-lose-it rule. The IRS allows employers to add a two and one-half month graced period immediately following the end of each FSA plan year.

Employers may use leftover funds to apply to administrative costs incurred during the plan year or they may credit those leftovers to employees' FSAs in the next year's plan, as long as the employer in no way bases the credit on employees' claims experience, and does not violate the Internal Revenue Code Section 125. A fair and not uncommon practice is to reduce the cost of the next year's participation, essentially 'rolling over' the unused funds toward the following year's total election amount.

November Seminar in Hamburg for our clients and friends...

Join us on Thursday, November 16 at Cabela's for a FREE seminar with breakfast and our "Gold Medal Recruiting" program. The first portion of our program will provide tips on evaluating whether you actually need to add to your staff, or if there are alternatives to get the work done. Then, if hiring is necessary, we'll provide some cost-effective ways to find staff you will actually *want* to hire. Have a general HR question? Join us for the open forum section. We'll send out invites, but you can [click here](#) to request a seat or two as there is very limited seating...

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