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Focus

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The Benevolent Employer Can Come out on Top

By Laura R. Studen
and Nancy A. Newark

Instead of looking at the employee-employer dynamic as a financial arrangement, employers should cultivate a relationship. If an employer expends resources on fostering a positive relationship with its workforce, research shows the company will benefit in the long run.

While federal and state laws tell employers a number of things they *cannot* do, they generally only establish a threshold regarding what an employer *can* do. By building on what you *can do* in your workplace, you can enhance the employer-employee relationship. Research shows economic incentives are not what employment relationships are judged on. Rather, trust is the primary indicator of employee satisfaction.[1] Trust in the workplace is comprised of three elements, credibility, respect and fairness.

Doing things right can only increase the credibility of your management team. Be proactive and keep accurate records. Invest in the hiring process and hire selectively – you'll decrease your turnover. Don't wait for employees to bring "issues" forward. Do your own investigation. Employees don't need to use the words (Family and Medical Leave Act) "FMLA" to trigger an employers' responsibility for designating the leave as protected FMLA leave. Until you tag it "FMLA leave," it doesn't count against the FMLA's 12 weeks of protected leave.

Keep a master calendar or docketing system. Different statutes have different requirements, time-lines, and responsibilities. Under FMLA, an employer can ask for doctor's clearance to return to work, under the (Americans with Disabilities Act) ADA, you can't. FMLA allows for 12 weeks of leave, the ADA does not specifically limit it. Docketing statutory protections, reasonable requests for information, due dates, and other triggering events in one master calendar helps avoid confusing these issues.

Laura R. Studen is a partner in the Labor, Employment, and Employee Benefits Group.

Nancy A. Newark is an associate in the Labor, Employment, and Employee Benefits Group.

Employees are entitled to a copy of their "personnel file." The personnel file includes all information used in making employment, promotion, transfer, compensation or discipline decisions. Does the employee's supervisor have additional documents? Keep medical information in separate, confidential files.

Despite our best efforts, we all make mistakes. Focus on the cause, not the effect. For instance, if you overpay an employee, do not spend the effort trying to get it back. Document the mistake and inform the employee of the error, but don't chase the funds. Instead, focus on instituting processes to avoid the mistake from happening again.

Building a relationship requires cooperation and respect. Under FMLA and Massachusetts' Small Necessities Act, employees are entitled to time off from work to attend to different issues. The time can be intermittent – one morning off per week to attend to the care for a sick parent. Open up a dialogue with your employees to create a schedule that works for both of you. Make your goals clear, and ask what you, as the employer, can do to assist him/her in getting the job done. Create a record of the essential job functions, necessary accommodations, medical restrictions. Creating an understanding and a record can only help you in the future.

Know that other individuals may view your records at some point. Be clear and concise. Spend time refining to remove slang, abbreviations and anything that may be misconstrued. Also, destroy drafts.

Always be fair. In some instances, an employer must hold open an employee's job for a "reasonable period of time." Under the FMLA, an employee is entitled to 12 weeks per FMLA per year. Would giving the employee an extra week hurt?

Employers of temporary and part-time employees are still responsible for complying with all the laws governing the employment relationship. The employee, however, may not be eligible for the same benefits. To be eligible for FMLA leave, an employee must have worked at least 1250 hours

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How The New Tax Law Helps You Save For College (and Private School, too!)

By Joel D. Wine

Joel D. Wine is an associate in the Tax and ERISA Group.

For many families, saving for college is one of the largest financial challenges they face. These families will want to take notice of the significant improvements the New Tax Law makes to college savings programs.

Qualified Tuition Plans

There are two types of qualified tuition plans (commonly known as 529 Plans): state sponsored savings plans and prepaid tuition plans. Withdrawals from a savings plan can be used at any college or university accredited for federal student aid. Prepaid tuition plans offer credits only at participating schools.

Prior to the New Tax Law, 529 Plans gave families an opportunity to invest for college on a tax deferred basis. But the New Tax Law allows *tax-free* withdrawals for qualified higher education expenses.

What are qualified higher education expenses? They include tuition, fees, books, supplies, equipment and room and board. The New Tax Law also expands the definition to include expenses of a special needs beneficiary that are necessary to enroll or attend an eligible educational institution.

Neither the owner (the person who sets up a 529 Plan) nor the beneficiary may exercise direct or indirect control over the investments in the plan. However, most savings plans offer significant variety in the allocation of the investment between stocks, bonds and money market funds. Moreover, the New Tax Law allows an account to be rolled over tax-free once a year from one plan to another. This allows families the flexibility to periodically shop for a plan that meets their investment objectives. Many states allow non-residents to invest in their plans.

If seeking financial aid, a savings plan may be better than a prepaid tuition plan. A savings plan is treated as an asset of the owner, not the beneficiary, for the purposes of the Free Application for Federal Student Aid (FAFSA). Therefore, setting up a savings plan with the parent as the owner will generally result in a lower expected family contribution (EFC) than (i) if the student were the owner (a higher percentage of the value would be used for calculating the EFC) or (ii) if the same amount were invested in a prepaid tuition plan (the tuition credits would reduce the cost of the education dollar for dollar).

Coverdell Education Savings Accounts (Coverdell ESAs, formerly Educational IRAs)

Like 529 Plans, these accounts provide tax-free investing for certain educational expenses. Also, as in the case of 529 Plans, the New Tax Law significantly liberalizes their rules:

- The maximum annual contribution is increased from $500 to $2,000 per beneficiary.
- The withdrawals from these accounts may also be used for elementary and secondary (public, private or religious school) education expenses (not true of a 529 Plan).
- Withdrawals may also be used for tutoring, computer equipment, Internet access, uniforms, transportation and supplementary items and services.
- High income couples and individuals may be limited in the amount they may contribute. The phase-out range occurs for joint filers with modified adjusted gross income between $190,000 - $220,000 ($95,000 - $110,000 for single filers). However, even if one is subject to the limitation, a contribution to a child's account may be made by a relative or friend.
- Contributions may be made the same year that contributions are made to a 529 Plan.
- Tax-free withdrawals may be received the same year as the Hope or Lifetime Learning credit is claimed.
- Contributions made before April 15 may be treated as made in the preceding year.

State Law Treatment

State law treatment of college savings programs varies by state. Massachusetts currently excludes from income withdrawals from Coverdell ESAs and defers tax on investments in a 529 Plan. Some states conform to the federal treatment and allow tax-free withdrawals from 529 Plans, and some states allow a deduction for contributions to their state sponsored savings plan (*e.g.*, New York allows a deduction up to $5,000 for single filers, $10,000 for couples filing jointly).

Sunset

As currently enacted, all of the provisions and amendments of the New Tax Law will expire in 2011, and the tax law will revert to the rules that were in effect prior to the New Tax Law. Though the education incentives generally enjoy bipartisan support, it is impossible to predict the exact nature of any future Congressional actions.

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in the 12 months prior to a request. If you determine that it isn't an undue hardship to extend FMLA benefits to this employee, despite him/her not being eligible, do it.

Research shows a strong positive correlation between good workplace practices and productivity.[2] The positive impact continues over the long run and will help you toward your goal – staying productive and profitable by decreasing turnover, increasing employee loyalty, and lowering time missed from work.

Endnotes:

[1] *Levering, Robert "A New Form of Global Competition", Exame, September 2000, Great Place to Work Institute, Inc.*

[2] *Ibid.*

FAS 48: A Securities Trap for the Unwary

By Theodore E. Dinsmoor

Theodore E. Dinsmoor is a partner in the Business Litigation Group.

Product returns are expected in the fast paced economy of the 21st century. Escalating product returns, however, pose a securities trap for the unwary in accounting for the initial product sales. This is because the amount of income booked at the time products are sold, subject to a return privilege, must be reduced by the amount of estimated product returns. Although simple in theory, failure to follow the generally accepted accounting principle for estimating returns, coupled with excessive returns, may violate the antifraud provisions of the federal securities laws.

Are Your Sales Subject to a Right of Return?

Financial Accounting Standards Board Statement 48 ("FAS 48") governs revenue recognition for sales subject to a right of return according to an existing contract, business policy or practice. Even if the contract states that the sale is "final," either business policy or practice may override the contract. Thus, as far as FAS 48 is concerned, it is necessary to look beyond the terms of the sales contract.

Can You Book Revenue on a Sale Subject to a Right of Return?

FAS 48 permits the recognition of revenue from the sale of products, subject to a right of return, if certain criteria are met. These criteria focus on the nature of the sale; the buyer's obligation to pay; the buyer's assumption of risk of loss; the economic substance to the transaction; and your non-participation in the resale of the product. Fortunately, these criteria can usually be determined by objective analysis. However, the last, and perhaps most important, criterion, making a reasonable estimate of future returns requires subjective assessment.

Making a Reasonable Estimate

FAS 48 says you can make a reasonable estimate of returns based on "many factors and circumstances," but it does not identify them; nor, does it tell you how to estimate. Rather, it states certain negative factors that may impair your ability to make a reasonable estimate. "Technological obsolescence" and "changes in demand" are chief among these factors. Obsolescence is a given for many new products, since we are in the midst of a technological revolution.

Change in demand is even more troubling. In a stable market it may be feasible to predict demand with reasonable accuracy. In a volatile market such predictions can be way off. Moreover, when people say that they have no sales "visibility," they may be admitting that they can't reasonably estimate either future sales or returns. FAS 48 hits pretty hard on this last point, by stating that even if you have historical experience with returns for "similar types of sales for similar products," you can't rely on such experience in the face of changing circumstances. Thus, the very economic turmoil created by the technological revolution poses a difficult challenge to anyone trying to make a reasonable estimate of returns.

Adding to the mix, the Securities Exchange Commission ("SEC") has recently addressed the subject by issuing Staff Accounting Bulletin No. 101 ("SAB 101"). SAB 101 is more detailed than FAS 48. It has more reasons why you cannot reasonably estimate returns without providing guidance to estimate returns. To navigate the SEC's thicket requires some sophisticated legal/accounting analysis, which is beyond the scope of this article.

The Legal Consequences for Incorrectly Estimating Returns

Generally, securities fraud law tolerates a range of "reasonable" treatments in the application of accounting standards, such as FAS 48. Thus, incorrect accounting decisions regarding a limited number of sales transactions subject to a right of return don't necessarily amount to fraud. Some courts have said that accounting errors having a 4.2%, or even a 9% impact on revenues are immaterial and don't constitute fraud. Under ordinary economic conditions, returns based upon historical data can be safely estimated. But, in economic downturns, estimating returns becomes more difficult and risky.

No matter how hard you try to estimate returns in a volatile market, you may be wrong and your misstatement may have a major impact on revenues. A 10%+ impact on revenue is generally considered the threshold for materiality; so the risk of a class action securities fraud suit escalates as the impact on revenues increase to 10%+, even if there are other circumstances that may mitigate against any inference of fraud.

Protecting Against a Securities Fraud Suit

If you make an error in estimating returns, don't hide it, as it may imply fraudulent intent. Instead, consider disclosing the error promptly, and the effect of its correction on revenues. Alternatively, if there was no error, but your estimate simply proves wrong in the face of actual returns, consider a restatement of revenues. Either alternative must be carefully considered in terms of both legal and accounting ramifications; and, the disclosure and/or restatement must be carefully prepared to minimize the risk of a class action securities fraud suit.

In the end, the watchword for product returns in these troubled times is "look out" – look out for the accounting and SEC standards applicable to estimating product returns; and, look out for actual returns as they occur during the quarterly reporting period. If you're concerned about product returns, then look to appropriate disclosures to protect yourself and your company.

Burns & Levinson LLP is a full-service Boston law firm. We serve our clients, who include major international corporations, regional middle-market companies, emerging growth companies, and individuals, in traditional and contemporary areas of practice.

EPA Appointments Impact New England

by Michael J. Meagher
and Tracy W. Klay

The appointments of Christie Todd Whitman as the national EPA Administrator and Robert Varney as the EPA New England Regional Administrator are expected to have significant impacts for New England businesses. In testimony before the U.S. Senate, Ms. Whitman said she believed environmental and economic goals go hand in hand and that she would continue her record of working to forge strong partnerships among citizens, government and business to produce measurable environmental results towards cleaner air, water and land. Earlier this year she stated, "[b]usiness and industry have come to understand the importance of protecting the health of their employees and of the people who live near their facilities. They know that they can create jobs, earn profits, and be good employers and good neighbors while also being good stewards."

Ms. Whitman is committed to furthering what is called the "National Environmental Performance Partnership System" or NEPPS, which was developed by EPA and the states to improve EPA/State relationships by working together as partners in environmental management. She also believes that NEPPS can serve as a model for how EPA should interact with business and with all the other stakeholders who seek a place at the table in EPA deliberations. Also, because President Bush laid out during the campaign a very clear agenda for reforming brownfields clean-up and redevelopment, Whitman intends to work closely with Congress and all the stakeholders to move this reform plan forward.

In July 2001, Ms. Whitman appointed Robert Varney as new Regional Administrator of EPA's New England office. Mr. Varney formerly headed the New Hampshire Department of Environmental Services to which he was appointed in 1989. He replaces John DeVillars, whose administration had been criticized for uneven enforcement of environmental statutes. Varney has said that his goal will be "to improve the partnership between the EPA and the states by attempting to include environmental and business interests in the development of regulations."

Michael J. Meagher is a partner in the Environmental Group.

Tracy W. Klay is an associate in the Environmental Group.

We believe that Mr. Varney will also seek to involve greater involvement of the regulated community. Speaking of his time at DES, Varney said, "We transformed the agency from a large bureaucracy with very poor communications internally and externally to one that is now regarded as one of the better state environmental agencies in the country, with good stakeholder involvement. We've tried to be very inclusive in the way we've done things. I'd like to think that we now have a solid agency that understands the importance of being inclusive and of reaching out to various interests. We've also tried to provide technical assistance to regulated industries to help people do the right things. We've tried to avoid punitive enforcement by working with people on the front end, and that has proven to be good for public health and the environment in New Hampshire." [1]

Jim Connolly, past co-chair of President Bush's Massachusetts election campaign, who now works closely with Burns & Levinson's clients on government relations issues, says that, "The appointment of both Whitman and Varney is clear evidence that the Bush Administration is committed to developing a close working relationship with businesses in the area of environmental regulation – therefore Massachusetts businesses should be proactive in working with the EPA." Connolly also believes that the EPA will benefit from greater stakeholder involvement.

We share Jim's perspective. Based on our many years of experience interacting with both state and federal environmental regulators on a wide variety of environmental issues, we have discovered the fundamental importance of strong working relationships. These relationships have helped us better represent clients involved in project planning and development, environmental compliance and enforcement, and permit and license procurement. The success in resolving controversial environmental issues comes more easily when a close public-private working relationship based on mutual respect is already in place.

Endnotes:

[1] The Union Leader, June 2001.

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Please address comments and inquiries to Angeline Mistretta at:

BURNS & LEVINSON LLP
Counsellors at Law
125 Summer Street
Boston, MA 02110-1624
Telephone: 617-345-3694
or amistretta@b-l.com

www.burnslevinson.com

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