TEXAS

Part of your Texas Employment Law Service *Vol. 29, No. 7*
July 2018

Michael P. Maslanka, Editor • FisherBroyles, LLP
Mark Flora, William E. Hammel, Coeditors • Constangy, Brooks, Smith & Prophete, LLP
Jacob M. Monty, Coeditor • Monty & Ramirez, LLP

Podcast
Is your engagement problem really a hiring problem?
ow.ly/UP9o30kpqhE

Evaluations
How to take implicit bias out of performance reviews
bit.ly/2Jy0YmC

Social Media
5 tips for drafting brand-friendly social media policy
bit.ly/2JDa8dC

Find Attorneys
To find the ECN attorneys for all 50 states, visit
www.employerscounsel.net

UNEMPLOYMENT COMPENSATION

Some Texans on unpaid medical leave may qualify for jobless benefits

by Jacob Monty
Monty & Ramirez, LLP

An individual must be deemed "unemployed," "eligible," and "not otherwise statutorily excepted or disqualified" to receive benefits under the Texas Unemployment Compensation Act. In light of a recent Texas Supreme Court decision, individuals on unpaid medical leave—even if they're protected by the Family and Medical Leave Act (FMLA)—may qualify for jobless benefits, assuming they meet all the unemployment compensation law's eligibility requirements. By no means does this suggest that Texas law entitles all individuals to receive unemployment benefits while on FMLA leave.

In the following case, the court analyzed whether a former employee fit within the unemployment law's definition of the term "unemployed" and answered in the affirmative. While there's no guarantee that every single individual on unpaid FMLA leave requesting jobless benefits will receive them, the court's decision has made it easier for individuals to demonstrate that they're qualified.

Legal struggle among the courts

Julia White worked as an assistant emergency management coordinator for Wichita County. At some point, she went on FMLA leave for severe anxiety and depression. The county continued to provide her benefits during her unpaid leave. Before returning to work, however, she filed a claim for unemployment benefits with the Texas Workforce Commission (TWC). The TWC determined that White qualified as "unemployed" under the Unemployment Compensation Act. If she could meet the Act's other requirements, the agency would grant her benefits.

Wichita County appealed the TWC's determination. After holding a hearing, the commission's appeal tribunal upheld the decision. A Texas trial court reversed the tribunal's holding, and the Texas Court of Appeals in Fort Worth affirmed the trial court's reversal. The fundamental inquiry posed by the courts was whether an individual who is on unpaid FMLA leave could categorically fit within the Act's definition of the term "unemployed." The issue eventually made its way to the Texas Supreme Court.

In its far-reaching decision, the state's highest civil court held that individuals on unpaid leave, even if they're protected by the FMLA, could satisfy the unemployment law's definition of "unemployed." Individuals on leave who qualify as unemployed still have to meet all of the law's requirements to be eligible for benefits.

Absurd and nonsensical results?

In siding with the trial court, the court of appeals determined that the

protections offered by the FMLA and the unemployment law are "categorically different." The court reasoned a ruling that individuals on FMLA leave are entitled to receive jobless benefits would produce absurd and nonsensical results. The supreme court disagreed, opining that the appellate court's absurdity analysis was "premature."

The supreme court emphasized that it wasn't concluding that *every* individual on FMLA leave is entitled to receive unemployment benefits. Rather, the court was simply shedding light on the issue of whether those individuals would be able to satisfy the unemployment law's definition of the term "unemployed." The court's decision is limited in some respects. To receive unemployment benefits, individuals on unpaid medical leave must not only qualify as "unemployed" but also satisfy the eligibility requirement. *Texas Workforce Commission v. Wichita County.*

Bottom line

Although the supreme court's ruling is somewhat limited, it has far-reaching implications for employers. To protect against issues arising from the interplay between employee leave laws and unemployment claims, you should contact an employment law attorney for guidance.

Jacob M. Monty is the managing partner of Monty & Ramirez, LLP, and a coeditor of Texas Employment Law Letter. He can be reached at jmonty@montyramirezlaw.com. ✤

WORKPLACE ISSUES

Employee loans: regrettable mistake or mutually beneficial perk?

by Jacob Monty
Monty & Ramirez, LLP

We've all experienced unexpected financial difficulties. Some of us default to loans to get out of such a jam. Employees often turn to their employers for loans, but many employers feel uncomfortable about lending money to workers. After all, you run the risk of never seeing the money again, and your HR department will certainly counsel against making the loan. Surprisingly, however, the benefits that come with loaning employees money far outweigh the risks.

Some things to keep in mind

Put it in writing. Establishing a formal loan policy for your company could go a long way toward ensuring stability and success. Setting clearly defined terms and conditions for employee loans will minimize the risks associated with a loan program, and using promissory notes that define repayment terms and methods of payment will protect you and reduce the chances of losing the money.

Set the bar. If you're considering loaning money to your employees, be sure to offer only the amount you can afford to lose. Set a maximum amount that won't hurt your company, and establish the length of the repayment term.

Stay in the legal zone. If you deduct loan repayments from employees' paychecks, be sure that you don't violate any state or federal wage and hour laws. For example, it's illegal to pay an employee less than minimum wage after you've deducted loan repayments from his paycheck. And it's absolutely necessary to have employees authorize any deductions from their paychecks in writing.

Consider the tax implications. The IRS carefully scrutinizes employee loans, so make sure employers aren't offering tax-free compensation. Loans aren't taxed, so keep careful records of any loans to employees and their repayments.

Clarify the nature of your loan program. It's absolutely crucial that exigency be standard. You don't need to know exactly why an employee is requesting a loan—often, the reason is very personal. However, you should make it clear that loans are only for emergency situations, and employees requesting one must affirm their need.

Bottom line

Loaning money to employees may seem a little risky, but sometimes it may be necessary to improve workforce morale, maintain loyalty, and even boost efficiency and productivity. Consider an employee who cannot borrow from his employer. He may have to resort to a payday lender or a title loan provider, which is an expensive and stressful option. In today's tight labor market, the perk of being able to go to your employer when you're having money trouble is a real benefit employees appreciate.

Jacob M. Monty, the managing partner of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He can be reached at jmonty@montyramirezlaw.com or 281-493-5529. ✤

ARBITRATION

High court upholds arbitration agreements that bar class actions

In recent years, one of the most highly disputed issues in employment law circles was whether an employer could require employees to waive their right to participate in a class action lawsuit and instead submit employment-related disputes to binding arbitration. Such a requirement has become a common condition of employment contracts, typically entered into at the beginning of an employment relationship, and/or as a condition of continuing employment.

Among the federal courts of appeals that have considered the enforceability of such agreements, roughly half said they were allowable and half said they weren't.

Interestingly, in a new decision, the U.S. Supreme Court was similarly split, with the five conservative-leaning justices ruling in favor of the agreements and the other four dissenting. Let's take a look at the rationale for the ruling and what it means for you.

Some background

The case required the court to reconcile provisions of two competing laws—the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA).

Before the passage of the FAA in 1925, federal courts were historically reluctant to enforce arbitration agreements. The FAA recognized such agreements as legally binding and made arbitration awards enforceable the same as judgments entered by any court of law.

The NLRA wasn't passed until 1935. In addition to granting workers the right to collectively bargain and form unions, the law protects their right to engage in "other concerted activities." This term has historically been interpreted broadly to allow employees to advocate for each other in matters relating to their terms and conditions of employment. The right to engage in concerted activity under the NLRA can't be waived.

The legal issue for the Court to decide was whether participation in a class action lawsuit qualifies as "concerted activity" that is protected by the NLRA. The answer to that question would determine whether arbitration agreements in which employees waived their right to bring or join in a class action lawsuit are enforceable.

The Court held that such agreements don't violate the NLRA and therefore are enforceable. In short, it found that the NLRA's "concerted activities" clause was intended to protect employees' freedom of association in the workplace—to collectively bargain and form unions—not their right to pursue collective legal actions against their employers.

continued on page 5

WORKPLACE TRENDS

Study finds link between workers' clothing and chances for promotion. Research from staffing firm Office Team finds that 86% of professionals and 80% of managers believe that clothing choices affect someone's chances of being promoted. The research shows that HR managers say that jeans, tennis shoes, and leggings are more acceptable to wear to work now than five years ago. In the same time frame, employers have become less tolerant of tank tops, tops that expose one or both shoulders, and shorts. The study found that 44% of senior managers have talked to an employee about inappropriate attire, and 32% have sent staff home based on what they were wearing.

Survey finds workers unwilling to pay more for better health benefits. A survey from Willis Towers Watson shows that most U.S. workers aren't willing to pay more for more generous healthcare benefits. However, a majority of U.S. workers say they are willing to sacrifice more of their paycheck for better employer-provided retirement benefits. The 2017 Global Benefits Attitudes Survey, announced in May, also found that while a majority say their benefit packages meet their needs, many want more benefit choice and flexibility. According to the survey of nearly 5,000 U.S. employees, 66% of respondents said they would be willing to pay more each month for more generous retirement benefits, while 61% would give up more pay to have a guaranteed retirement benefit. Only 38% said they are willing to pay more each month for a more generous healthcare plan.

Research shows high cost of low performers. A new study shows that employees who can't keep up with work demands take a heavier toll on business than some may think. Global staffing firm Robert Half asked CFOs to estimate how much time is spent coaching underperforming employees, and their answer showed an average of 26% of working hours. That's over 10 hours of a 40-hour workweek. Finance executives also acknowledged that hiring mistakes negatively affect team morale.

Study finds more than half of workers 60 and over are postponing retirement. A survey from CareerBuilder shows that 53% of workers at least 60 years old say they are postponing retirement, with 57% of men putting retirement on hold compared to 48% of women. CareerBuilder also pointed out that the statistics were based on small base sizes, and therefore caution should be used in interpreting the results. When asked if they are currently contributing to retirement accounts, 23% said they don't participate in a 401(k), IRA, or other retirement plan, a rate even higher in younger adults ages 18 to 34 (40%). ✤

JUST ASK JACOB

When attendance bonuses clash with leave time, who wins?

by Jacob M. Monty
Monty & Ramirez, LLP

Q *Our company recently implemented a weekly attendance bonus based on working the entire work schedule. The policy states employees must be "present" for the entire week and will not earn the bonus if they use vacation or are on any type of leave. Is this policy legal?*

A The weekly attendance bonus your company recently implemented appears to be part of a "perfect attendance" policy. Only employees able to maintain perfect attendance over the course of the week will receive a bonus. Employers should always be careful when implementing attendance bonus policies because they could fun afoul of employment laws like the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA).

The FMLA and the ADA ordinarily prohibit you from enforcing any negative consequences against employees. Employees on FMLA leave who don't receive attendance bonuses are prone to argue that their employer subjected them to negative action by penalizing them for taking the leave. However, amendments to the FMLA in 2009 permit employers to implement perfect attendance awards.

In a document titled "Frequently Asked Questions and Answers About the Revisions to the [FMLA]," the U.S. Department of Labor (DOL) indicates that an employer can "deny a bonus that is based upon achieving a goal, such as hours worked, products sold or perfect attendance, to an employee who takes FMLA leave (and thus does not achieve the goal) as long as it treats employees taking FMLA leave the same as employees taking non-FMLA" leave. The DOL notes that "if an employer does not deny a perfect attendance bonus to employees using vacation leave, the employer may not deny the bonus to an employee who used vacation leave for an FMLA-qualifying reason."

Bottom line. Employers seeking to implement attendance awards programs should follow the DOL's guidance.

Q *We have an employee whose FMLA-approved medical condition changed from requiring her to just have surgery to necessitating that she undergo physical therapy (PT) a few times a week. We asked her to recertify because of the change in treatment. She returned a general note from her doctor stating, "PT is needed and should occur at the discretion of the therapist." It doesn't say how often or how much. May we ask for more details?*

A The current FMLA regulations permit an employer to obtain recertification of an employee's serious health condition no more frequently than the duration of the original certification or every 30 days, whichever period is longer. However, you may request recertification in less than 30 days "if the employee requests an extension of leave, the circumstances described in the previous certification have changed significantly, or the employer receives information that casts doubt upon the employee's stated reasons for the absence or the continuing validity of the certification."

When obtaining recertification, you may ask for the same information that was in the original certification, including (1) the healthcare provider's name, address, telephone number, fax number, and type of medical practice/specialization, (2) the approximate date on which the serious health condition commenced and its probable duration, (3) a statement or description of appropriate medical facts about the health condition for which the FMLA leave was requested (note that the medical facts must be sufficient to support the need for leave and may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment, or any other regimen of continuing treatment), (4) if the employee is the patient, information sufficient to establish that she can't perform the essential functions of her job as well as the nature of any other work restrictions and the likely duration of that inability, (5) if the patient is a covered family member with a serious health condition, information sufficient to establish that he is in need of care along with an estimate of the frequency and duration of the required leave, (6) if an employee requests leave on an intermittent or reduced-schedule basis for planned medical treatment of her own or a covered family member's serious health condition, information sufficient to establish the medical necessity for the intermittent or reduced-schedule leave and an estimate of the dates and duration of the treatments and any periods of recovery, (7) if an employee requests leave on an intermittent or reduced-schedule basis for her own serious health condition, including pregnancy that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for the intermittent or reduced-schedule leave and an estimate of the frequency and duration of the episodes

of incapacity, and (8) if an employee requests leave on an intermittent or reduced-scheduled basis to care for a covered family member with a serious health condition, a statement that the leave is medically necessary to care for the family member, which can include assisting in the individual's recovery, and an estimate of the frequency and duration of the required leave.

Once you make a recertification request, the employee must provide the requested recertification within 15 calendar days "unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good-faith efforts."

Q *We are moving from an accrued paid time off (PTO) policy to an unlimited PTO policy. We are going to require employees to use their accrued PTO before using the unlimited PTO. May we set a date by which all accrued PTO must be used?*

A During the transition period, you may give employees a reasonable period in which to use all of their accrued PTO before the unlimited PTO policy takes effect. If employees choose not to use the accrued PTO during the transition period, you may simply pay them for the remaining time off.

Q *We will be hosting a voluntary "fun run" activity for our employees. Anyone who is interested will meet every week after work to run or walk. May we require the employees to sign a waiver stating we won't be held liable for any injuries or illnesses?*

A You could require employees to sign a waiver, but doing so may not necessarily override legal protections like workers' compensation coverage. Even with a well-written liability waiver, it's impossible to completely avoid liability for injuries or illnesses. But there are advantages to requiring employees to sign a release. For instance, they will be put on notice that they must avoid engaging in reckless and irresponsible behavior that may lead to serious injuries.

A second element to consider is whether the fun run is "work-related." The fact that the event is "voluntary" may limit your liability to some extent. But that may not be enough if your company is substantially involved in putting together the event. Financing the bulk of the event can be one indicator that your company is substantially involved. If the event is found to be work-related, a carefully drafted waiver may not be enough to remove your liability.

Jacob M. Monty of Monty & Ramirez, LLP, practices at the intersection of immigration and labor law. He is the managing partner of the Houston firm and may be contacted at jmonty@montyramirezlaw.com. ✤

continued from page 3

Takeaways

In many industries and among the general workforce, employment agreements are still relatively uncommon. They tend to be used more for high-level and highly paid individuals. However, in our increasingly litigious society, it may be worth considering the broader use of an employment agreement that requires employees both to submit employment disputes to arbitration and to waive their right to pursue class action litigation.

The pros and cons are fairly obvious. Class action lawsuits can last years, and the legal bills can be sky-high. Moreover, they allow one disgruntled employee to file suit and add similar claims by other employees, driving up the settlement value of the case. A plaintiffs' attorney can turn a single client with an unpaid overtime claim into a large, expensive, and time-consuming case pretty quickly.

Binding arbitration tends to be more efficient and less costly (although it doesn't always work out that way). The proceedings and outcome of the dispute are confidential. Unlike in court, you get to approve the person deciding your case (i.e., the arbitrator). And there is no right to appeal, which can be good or bad depending on how the arbitrator rules but is typically viewed as more favorable for employers than employees.

Ultimately, if you're interested in using arbitration agreements for the first time or expanding them to a broader segment of your workforce, you will need to undertake a careful analysis with the assistance of your employment attorney to determine whether such agreements are right for you. Some of the issues you might discuss include:

- What are your risks for high-stakes employment litigation?
- Are you confident of your employment practices, or are there gaps you just can't seem to get around to filling?
- How disciplined and trained are your supervisors? Do you have loose cannons?
- How confident are you in your wage and hour practices, particularly your classification of employees as exempt from overtime requirements?

The less certain you are about the answers to those and similar questions, the more you may benefit from using employment contracts with mandatory arbitration and class action waivers in your workplace. ✤

AUSTIN LEGAL LIMITS

What does SCOTUS's green-lighting of arbitration class action waivers mean for you?

by Billy Hammel
Constangy, Brooks, Smith & Prophete, LLP

Employee class and collective actions pose a substantial threat to companies of all sizes. Indeed, defending just one class or collective action can be prohibitively expensive, even when you win. Recently, however, in a 5-4 decision in *Epic Sys. Corp. v. Lewis* split along ideological lines, the U.S. Supreme Court effectively approved the use of mandatory class and collective action waivers in arbitration agreements. As a result, in most circumstances, companies may safely require employees (and contractors) to waive their ability to sue in a representative capacity and instead resolve their employment claims separately in individual arbitration. (To read more about SCOTUS's rulng, see "High court upholds arbitration agreeents that bar class actions " on pg. 3.)

Background

Class and collective actions are representative lawsuits in which the named plaintiffs assert claims on behalf of themselves as well as others who are not yet parties to the proceeding. If a class or collective action is conditionally certified, notice is sent to others who are deemed similarly situated to the named plaintiffs. The key difference between class and collective actions is that similarly situated employees who receive notice of a class action are automatically part of the lawsuit unless they affirmatively opt out. Conversely, employees who receive notice of a collective action must opt in and consent to becoming a plaintiff.

While most federal and state equal employment opportunity (EEO) claims can be filed as class actions, collective actions are typically limited to federal wage and hour claims. Fortunately for employers, both class and collective actions can be safely waived. The one "catch" is that mandatory waivers have been approved only in the context of arbitration.

The approval of class/collective waivers is a significant win for employers because it effectively reduces the total number of employees who actually end up asserting claims. In short, because employees agree under the waiver to resolve their claims in individual arbitration, they cannot seek to have the arbitration conditionally certified as a class or collective action. That eliminates the need for notice to other potential claimants and cuts off an "easy" mechanism for more employees to become plaintiffs themselves, either by doing nothing or affirmatively opting in. Ultimately, prohibiting both forms of representative actions results in a substantial reduction in the number of employees who are likely to assert claims, the total amount of damages an employer is exposed to, and the significant costs and defense fees usually associated with defending class and collective actions.

How does Epic affect Texas employers?

While the ruling in *Epic* is certainly one of the more significant employment law developments in years and has the potential to reshape class and collective litigation in traditionally employee-friendly jurisdictions such as California, it doesn't change much for employers with operations only in Texas. The U.S. 5th Circuit Court of Appeals (whose rulings apply to all Texas employers) approved the use of class/collective action waivers in arbitration agreements back in 2013.

Texas employers that already include class/collective action waivers in their arbitration agreements can safely continue doing so. Those that don't may find it a good time to evaluate whether a comprehensive arbitration process that includes class/collective action waivers is appropriate for their organization.

Is arbitration a good fit for your company?

Binding arbitration is the private adjudication of a legal dispute by one or more neutral third parties, typically attorneys or retired judges. The traditionally accepted benefits of arbitration compared to lawsuits include:

- The confidentiality of the proceedings;
- The absence of a jury;
- The degree of control over who is selected as the arbitrator;
- The overall faster average resolution time and limited options for appeal;
- Fewer formalities and technical adherence to rules of evidence and procedure;

- Lower average monetary awards and less likelihood of punitive damages; and
- The ability to require class/collective action waivers.

Arbitration also has its disadvantages, however. Some of the cons include:

- Arbitration agreements must be carefully drafted and can be difficult to enforce, especially in certain jurisdictions.
- There are ways around the confidentiality of arbitration proceedings.
- The loose adherence to the rules of evidence and procedure and limited appellate rights are doors that swing both ways.
- Summary judgment (i.e., the dismissal of the case without a trial) and other dispositive motions are rarely granted.
- Some arbitrators have a tendency to deliver "baby-splitting" awards to keep both sides happy.
- The employer usually pays the costs of arbitration, including the arbitrator's hourly fees and retainer.
- Other parties that have the authority to bring claims on behalf of an employee (e.g., the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL)) usually aren't bound by arbitration agreements.

Ultimately, most companies conclude that arbitration is worth it if they employ at least 50 employees, operate in an industry that's particularly susceptible to wage and hour claims (e.g., telecommunications, retail, or food service), or have an insurance policy that covers the costs and fees of arbitration.

Takeaways

Employers must decide whether to retain or implement an arbitration program after carefully considering the advantages and disadvantages of arbitration, many of which are unique to certain industries. The analysis cannot be made in isolation, though. For example, the ability to avoid one jury trial in an employee-friendly jurisdiction alone may justify the higher cost of arbitrating five single-employee arbitrations in an otherwise employer-friendly jurisdiction. Similarly, preventing *just one* class or collective action can outweigh the increased costs of an arbitration program administered over several years. Regardless, it's critical to accurately quantify your risk and exposure and then run a cost-benefit analysis to determine if arbitration makes sense for your business.

Billy Hammel is a partner in the Dallas office of Constangy, Brooks, Smith & Prophete, LLP. He can be reached at bhammel@constangy.com. ✤

EMPLOYEE BENEFITS

Planning and education are key to successful HSA

Over the past decade, the percentage of employers offering a health savings account (HSA) to their employees has grown dramatically. HSAs are a form of "consumer-driven health plan," a category of employee benefit that strives to place more responsibility on employees to be better consumers of health care. In short, employees pay 100 percent of the deductible under a high-deductible health plan (HDHP). In return, they are given the opportunity to contribute to an HSA, which offers substantial tax benefits.

While most employers provide HSAs as a cheaper alternative to a traditional group health plan, a few offer it as the sole coverage option. Either way, when an employer first adopts an HSA, there's a very good chance it will experience a lot of pushback and confusion from employees. For anyone who hasn't had an HSA before, it's a pretty big adjustment. In addition, the complicated rules regarding who can and can't contribute to an HSA provide lots of ways for both the employer and its employees to make mistakes that could jeopardize the tax benefits HSAs are designed to provide. Let's take a look at those rules and how they can cause unforeseen problems for you and your employees.

Enrollment in HDHP

The first prerequisite for an individual to contribute to an HSA is that he must have health coverage under an HDHP. For individual coverage, that means the deductible has to be at least $1,350. For anything other than individual coverage, the deductible has to be at least $2,700.

There are also other technical requirements for an HDHP to be considered HSA-eligible. For example, the plan must require participants to pay *all* of their medical expenses until the deductible is met. So if the underlying health plan offers copays for office visits or prescriptions, employees won't be eligible to contribute to an HSA—no matter how high the deductible is.

Another important concept is that while an employee needs an HDHP to contribute to an HSA, the opposite is not true. It's possible, for example, for an employee to enroll in your HDHP but contribute nothing to the HSA. It's also possible, depending on how your plan is set up, for your company to contribute to an employee's HSA when the employee is enrolled in an HDHP other than your own.

No other 'first dollar' coverage

For the whole premise of an HSA to work, employees must be fully responsible for their health expenses

TRAINING CALENDAR

Call customer service at 800-274-6774 or visit us at the websites listed below.

WEBINARS & AUDIO SEMINARS
Visit http://store.HRHero.com/events/audio-conferences-webinars for upcoming seminars and registration.

8-1 Pay Equity Audits: The Risk of Multi-Million-Dollar Liability Is Real—What to Do Right Now to Correct Disparate Compensation Practices to Minimize Legal Risks

8-2 Convert That Candidate: Sourcing Strategies for Improving Conversion Rates and Reducing Time to Fill

8-3 Form I-9 Recordkeeping: How to Complete, Re-Verify, Store, and Destroy Paper and Electronic Files in Compliance with Federal Law

8-2 Preparing for Active Shooter Scenarios: Strategies that Have Worked for Others

8-7 Multistate Employers' Payroll Tax Pitfalls: 10 Mistakes to Steer Clear of and Practical Strategies for Correcting Missteps Before They Result in Costly Penalties

8-8 Severance Agreements: When to Use Them and How to Draft Them to Limit Company Liability

8-9 Is This Paid Time Off or Not?: Legal Issues to Consider Around Parental and Other Types of Leaves

8-13 Employee Handbooks: Practical Impact of New NLRB Memo and Updates to Make for the Rest of 2018

8-13 Behavior-Based Safety: Understanding Employee Motivations to Build Engagement and Drive Safety Performance

8-14 FMLA Self-Audits: Find and Fix Your Leave Practice Problems Before the Feds Do

8-14 Post-Accident Drug Testing: Avoid Retaliation Claims Under OSHA

8-16 Mental Health and Substance Abuse Benefit Updates: How to Avoid MHPAEA Liability in Light of New Federal Guidance

up to the amount of the deductible. That means they can't have any other "coverage" that would pick up those costs.

In this context, other coverage is defined very broadly. Employees may not contribute to an HSA if they have any of the following:

- Other non-HDHP coverage (including coverage under a spouse's or parent's group health plan);
- Medicare, Medicaid, or Tricare coverage;
- A general-purpose health flexible spending arrangement (but they can have a limited-purpose flexible spending arrangement—which covers only dental or vision expenses—if you offer one); or
- Access to an on-site health clinic or telemedicine services that aren't HSA-compatible (i.e., if services are provided at a cost that is lower than the fair market value). Make sure to discuss their impact on HSA eligibility with your benefits attorney before implementing such services.

Finally, remember that because enrollment in the HDHP and HSA eligibility are separate issues, employees might still enroll in the HDHP even if they're ineligible to contribute to the HSA.

Final thoughts

Employees deciding whether to choose coverage under an HSA need to be educated on—and make their decision after careful consideration of—all the pros and cons. Some key considerations will be how high the deductible is (it can get pretty high), the age and health of individuals to be covered, and whether the employee can afford to put aside extra money each month.

And one final word of caution: It's a bit of a double-edged sword, but HSAs are designed to encourage people to be informed consumers of health care rather than simply agreeing to every test or treatment a doctor recommends without regard to cost. Unfortunately, that aspect can also cause people to delay seeking treatment out of concern over the cost, doing more harm than good in the long run. You can help by educating your employees about the free preventive services provided under your plan and making employer contributions to their HSAs. ✤

TEXAS EMPLOYMENT LAW LETTER (ISSN 1046-9214) is published monthly for $447 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

Editorial inquiries should be directed to Michael P. Maslanka at FisherBroyles, LLP, 100 Highland Park Village, Suite 200, Dallas, TX 75205, 214-559-7210, michael.maslanka@fisherbroyles.com.

TEXAS EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Texas employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Texas does designate attorneys as board certified in labor law.

For questions concerning your subscription or Corporate Multi-User Accounts, contact your customer service representative at 800-274-6774 or custserv@blr.com.

HRhero® a division of BLR BLR®