HEFFERNAN INSURANCE BROKERS
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News You Can Use

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AFFORDABLE CARE ACT

Pay Penalty or Buy Coverage, Which Is Better?

AS THE onset of the Patient Protection and Affordable Care Act draws near, the debate among business is about whether it is more cost-effective to provide coverage or incur a penalty.

As you may know, the typical penalty for not providing coverage for your staff if you employ more than 50 full-time workers is $2,000 a head.

On one LinkedIn page, the discussion among insurance professionals turned to this very question, and many of them provided detailed analysis of why it will likely behoove the average business owner to pay for coverage.

Most of the insurance agents on the board chimed in, some with detailed analysis of why it would take "a perfect storm for an employer to find value in taking the penalty over the play [purchasing coverage] scenario."

See '100 Percent' on page 2

Play or Pay – Breaking it down

Cost of providing coverage – Play

Based on a workforce with an average annual salary of $30,000 and a total $500 monthly premium for a "Bronze" plan. All premium payments are made from gross wages on a pre-tax basis, resulting in the following:

Employee's monthly wages: *$2,500*
Maximum monthly contribution by employee: *$237.50* *
Employee maximum annual contribution: *$2,850*
Total annual premium of *$6,000*
Employer's annual pre-tax contribution: *$3,150*

Total annual cost to employer: $2,205/employee**

Cost of paying penalty – Pay

Take the *$2,000* after-tax, per-employee penalty.

Total annual cost to employer: $2,600/employee**

* *Premium cannot be more than 9.5% of gross salary*
** *Based on a conservative 30% tax assumption, according to the author*

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OBAMACARE ALERT

Is an Insurance Exchange 'Train Wreck' on Horizon?

IN A REMINDER of the potential problems ahead as the Patient Protection and Affordable Care Act takes effect, one of the main authors of the legislation has said the health insurance exchanges planned for launch later this year are headed for a "train wreck."

Sen. Max Baucus, D-Mont., chairman of the Senate Finance Committee, said in April that the lack of details coming from the Obama Administration, coupled with the confusion he is hearing from his constituents, leads him to believe that it will not be possible to launch health insurance exchanges in all 50 states on time.

One of the key features of the PPACA, the health insurance market places are scheduled to begin enrolling millions of subscribers in private plans beginning Oct. 1.

The news came in the same week as the Department of Health and Human Services announced that full implementation of the Small Business Health Options Program (SHOP) component of state-based health insurance exchanges run in full or in part by the federal government would be delayed from the start of 2014 to Jan. 1, 2015.

States setting up their own exchanges, like California and Connecticut, will be given the option to similarly delay their own SHOP implementation by a year or open them as scheduled

"I see a huge train wreck coming," Baucus said during a press conference held by HHS Secretary Kathleen Sebelius to discuss President Obama's proposed 2014 federal budget. In particular, he noted, small business representatives have told him they do not know anything about the exchanges.

Delay defended

Sebelius defended the administration's earlier decision to delay for one year a component of the SHOP exchanges for small businesses, calling it a necessity. For 2015, most small-business employees will have to use whatever subsidized insurance coverage is selected by their employers through SHOP.

Under the now delayed SHOP component, starting in 2015 small employers will be able to select a particular level of coverage that they want to offer their employees, and then their employees would have the ability to choose from multiple plans within that level of coverage

For these purposes, a "small employer" is a business that employs not more than 100 employees. ❖

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You Will Not Have 100 Percent Participation in Plan

Using the calculation on page 1, based on an average employee salary of $30,000 the employer would save $395 per employee by providing the basic level coverage, which is Bronze level. You may incur some administrative savings as well, but that's an intangible.

More important for your employees is that any government subsidies they may try to receive to pay for coverage through a health care exchange are based on annual household income. And for families who are right on the cusp of not qualifying, you can bet they'll be paying far more out of pocket (likely in the $10,000 range for family coverage).

Keep in mind that the calculation in the box does not include other taxation savings or credits that may be available.

Other benefits and hidden costs

You should also consider that when you do offer coverage with employees paying up to 9.5% of their pre-tax income for their share of the health coverage, you will not have 100% participation.

Meanwhile, one of the biggest hidden costs of not offering coverage is that it will be harder to attract and retain talent. If you don't offer coverage, there is a greater likelihood of employees jumping ship to competitors that do.

And a word about dependants: Under the law, an employer must also offer coverage to dependants of employees (but not spouses). But, you do have the discretion to contribute nothing to the dependant coverage and still be in compliance. ❖

CONTRACTOR MISCLASSIFICATION

Lessons to Be Learned from an $8 million Lawsuit

In a case that should send a signal to employers that use a large number of independent contractors, an employer has agreed to pay out $8 million to settle charges in a class-action case. And the settlement comes as the Obama Administration continues to fund its crackdown on employers who misclassify employees as independent contractors.

Although the nature of the employees in the class-action case may seem on the surface to mean that it doesn't apply to most businesses, the Penthouse Executive Club case does illustrate the dangers of misclassification. Besides possibly getting you sued by individuals who were allegedly misclassified, unintentional or intentional misclassification can also land you in hot water with various arms of the federal government, resulting in stiff penalties.

In the case at hand, 1,245 class members – all adult dancers at the Penthouse Executive Club in New York City – claimed that they were employees under federal and state laws and had been misclassified as independent contractors.

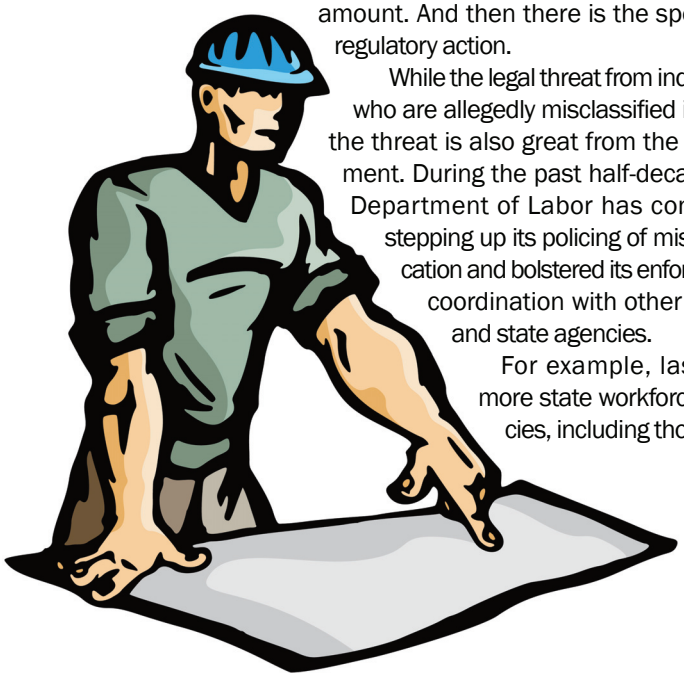
They had alleged, among other things, that the club violated the federal Fair Labor Standards Act by failing to pay them overtime for hours worked in excess of 40 per week, required them to pay a "house fee" that sometimes exceeded $100 per night, and deducted service charges for tips.

The claims also included alleged violations of state wage laws.

In its defense, Penthouse said that the adult dancers were independent contractors and therefore it did not violate any federal or state wage and hour laws, which only cover "employees."

After multiple rounds of discovery of time, payroll and tip allocation records, tax documents and financial records, and depositions of club managers and employees alike, the club and its executives agreed to pay $8 million, which will be paid out to the class members and their attorneys, the latter of which will receive nearly $2.2 million.

And, the employer's costs are even greater than that if you also consider that it will have to pay its own legal team an equal or greater amount. And then there is the specter of regulatory action.



While the legal threat from individuals who are allegedly misclassified is great, the threat is also great from the government. During the past half-decade, the Department of Labor has continued stepping up its policing of misclassification and bolstered its enforcement coordination with other federal and state agencies.

For example, last year, more state workforce agencies, including those from California and Louisiana, signed a DOL memorandum of understanding agreeing to work collectively with the federal government "to reduce misclassification of employees as independent contractors."

Most recently, Iowa signed the memorandum of understanding on January 17, joining those two other states, as well as Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington.

The DOL also signed a memorandum of understanding with the IRS to pool their resources in order to detect misclassification. The IRS is obviously a stakeholder, considering that it will be able to collect additional taxes from companies being pulled up for misclassification.

The president's fiscal 2014 budget includes $14 million to continue combatting misclassification. This comprises $10 million for grants to states for identifying misclassification and recovering unpaid taxes, and $4 million for personnel at the DOL's Wage and Hour Division to investigate misclassification.

What's your liability?

If you use independent contractors, or if your business is built on an independent contractor model, you face misclassification liability not only for unpaid overtime and other types of wage claims, but also for unpaid:

- unemployment taxes,
- workers compensation premiums,
- payroll taxes, and
- employee benefits.

It would be wise to address compliance before getting a letter from your state division of workers' compensation or unemployment, the IRS or your state revenue department that it will be conducting an audit, or from a plaintiff's attorney notifying you of legal action against your company by one or more employees.

You can reduce your risk to misclassification in most instances by enhancing your compliance by using "independent contractor diagnostics" and other means to minimize or eliminate misclassification liability.

You can start the process by restructuring, redocumenting and reimplementing your independent contractor relationships. You can also reclassify your independent contractors if need be.

The process should begin with an evaluation of the extent to which independent contractor compliance should be enhanced, using as a starting point the IRS 20-factor compliance test, which can be found here:

http://www.uschambersmallbusinessnation.com/toolkits/guide/P07_1115

While there is no one-size-fits-all approach or simple fix, and standard or model agreements alone have little value in preventing misclassification liability, enhancing compliance is nonetheless feasible for many businesses.

Don't want until you are hit with a lawsuit or a letter from a regulator. At that point you will be scrambling to mount a defense. Better to take the time now to make sure you are in compliance or to better define your relationships. ❖

WORKERS' COMP

Eight Return-to-work Mistakes to Avoid

ONE OF the keys to reducing the cost of a workers' comp claim is to get the injured worker back on the job as soon as it is physically possible without endangering their recovery.

A solid, well-thought-out return-to-work (RTW) program can reduced workers' compensation, disability and medical insurance costs as well as strengthen morale and productivity. More recently, RTW programs have helped protect employers from lawsuits regarding regulatory non-compliance, particularly related to the Americans with Disabilities Act Amendment Act (ADAAAA).

But there is a right way and a wrong way to return an injured worker back to the job and many employers who wing it can end up making mistakes.

Kevin Ring, director of community growth for the Institute of WorkComp Professionals, says that whether the program is an integrated occupational/non-occupation RTW or a traditional RTW, the economic and legislative landscape poses challenging issues for employers. Here are eight common mistakes:

1. Failure to manage employees covered by ADAAA

The expanded definition of disability under the ADAAA has significantly increased the number of employees who are entitled to accommodations.

The definition of disability is so broad that some labor and employment attorneys advise not to fight whether the employee is disabled but, to engage in a dialogue to find out the limitations and discuss accommodation possibilities.

As a federal law, the ADA supersedes state workers' comp laws, and therefore, its directives provide the floor level protection for disabled individuals.

State workers' compensation laws can provide more protection, but not less. Properly structured, a RTW program can decrease ADA exposure.

2. Insisting employees be released to 'full duty'

Insisting on a return to full duty increases workers' compensation costs and heightens the possibility that the injured employee will fall prey to a "disability syndrome" – the failure to return to work when it is medically possible.

An individual's sense of self-worth and motivation often comes from the ability to be productive.

Instead, find modified work for the injured worker who has not healed properly.

3. Failure to commit needed budget, resources

Some employers bring workers back to work as early as possible to reduce claim costs, but are not committed to a RTW program. Without a planned transition back to full productivity, employees will not build up the tolerance to resume full job duties. Also, the plan needs to deal with potential failures; not every injured worker will return to the pre-injury occupation.

The costs of implementing a program will vary depending upon industry, company size and injury history. Fortunately your insurance carrier, agent and government agencies can usually help guide you through the process.

4. Shying away as employee may 'get hurt again'

Both employer and employee fear of re-injury often hampers RTW efforts. This of course is a risk, but an even greater risk is having the employee stay at home and become disaffected, thereby extending absence and driving up costs. The right timeline and transitional process for an employee to return to work is best decided on a case-by-case basis.

Guided by the goal of safely returning the employee to their pre-injury job, employers that work closely and stay in touch with the employee, the treating physician and supervisor are most successful.

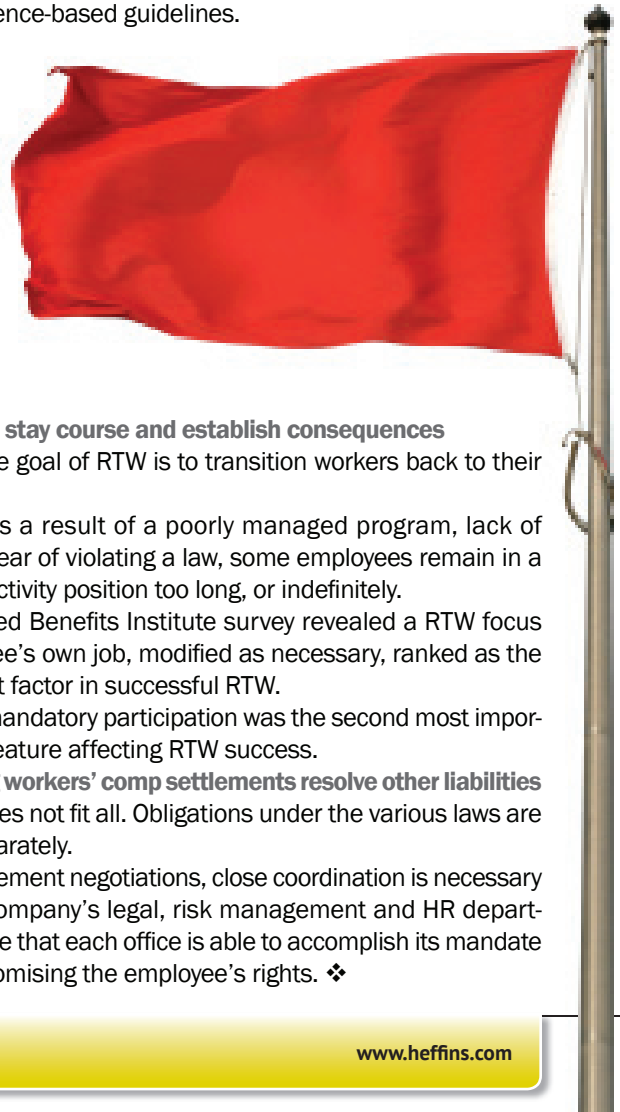
5. Failing to distinguish "light duty" from "transitional work" and "reasonable accommodation"

Occupational RTW assignments are best described as transitional tasks. Limited in duration, such tasks help the injured worker return to full productivity by being progressively adjusted in line with medically documented changes in the employee's ability.

Under the ADAAA, it is permissible for an employer to reserve less physically demanding or "light-duty" jobs for those with work-related disabilities, and these jobs should be distinct from transitional tasks.

6. Relying on the physician to guide the RTW process

While physicians are medical experts, they do not have essential information about workplace policies, job demands and the availability of transitional work. Moreover, if a physician's training is not specifically in the treatment of occupational injuries, they may not adhere to evidence-based guidelines.



7. Failing to stay course and establish consequences

The ultimate goal of RTW is to transition workers back to their pre-injury job.

Whether it's a result of a poorly managed program, lack of knowledge or fear of violating a law, some employees remain in a reduced-productivity position too long, or indefinitely.

An Integrated Benefits Institute survey revealed a RTW focus on the employee's own job, modified as necessary, ranked as the most important factor in successful RTW.

Requiring mandatory participation was the second most important program feature affecting RTW success.

8. Believing workers' comp settlements resolve other liabilities

One size does not fit all. Obligations under the various laws are reconciled separately.

During settlement negotiations, close coordination is necessary between the company's legal, risk management and HR departments to ensure that each office is able to accomplish its mandate without compromising the employee's rights. ❖