North Country Human Resources Association, Inc.

Society for Human Resource Management (SHRM) Affiliated Professional Chapter #0559
Serving North Country HR Managers since 1998
Website: http://northcountryhra.org

Newsletter – September 2009

2009–2010 Board of Directors

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September Member's Meeting

DATE:	Tuesday, September 22, 2009
SITE:	Best Western, Watertown
TIME:	11:30 AM
TOPIC:	H1N1- What HR Professionals need to know
SPEAKER:	Faith Lustik, Health Planner Jefferson County Public Health
MENU:	Lunch Buffet
COST:	$15.00 Paid Members $17.00 Potential Members & Guests $5.00 Non-Dining Members
RSVP:	Cherie Moore – Treasurer cherie.moore@na.manpower.com **by 4 PM Wednesday, September 16, 2009**

September's Topic… With the new H1N1 virus continuing to cause illness, hospitalizations and deaths in the US during the normally flu-free summer months and some uncertainty about what the upcoming flu season might bring, it's timely for HR professionals to make themselves aware of the most current and appropriate information. What do you do when an employee comes to work with influenza-like illness symptoms in a community where novel influenza A (H1N1) virus is circulating? How can you prevent significant absenteeism in the workplace during an outbreak? Faith will share the most current information with us.

Cancellations:
We will make every effort to cancel the RSVP if given reasonable notice of cancellation. If NCHRA is charged for the meal, then you are responsible to pay for the meal.

Name tags will be provided at the door to help every one get to know their fellow members. Please remember to return them before leaving.

Remember…

- Bring your business cards with you to the monthly meetings to share and network with other members.
- At each meeting NCHRA Members can enter their business card in the door prize drawing for a free meal at the next meeting.
- The *"Sally Kafka Memorial Membership Drawing"* held in June 2010 awards a one year paid membership to the winner. Those members with perfect attendance at the monthly meetings (Sept-June) will be eligible for the drawing.

Message From The President

It's that time of year again when we kick off the start of another year of the North Country Human Resource Association. As your new President I welcome the new Board members and look forward to working with them to make this an exciting year for our membership. Lisa Storey is our Vice President, Cherie Moore is Treasurer, Cathy Porter is Secretary and Jeanette Hinkal, Lisa Bowhall and Luanne VanBrocklin are Board Members. Please congratulate them on their new roles and don't hesitate to contact them if you have ideas, concerns or feedback.

I want to say thank you to Gil Pearsall for being the NCHRA President for the past three years. Under his leadership the membership grew to 80+ members and he introduced the idea for an annual conference which has been a success every year. He is leaving some big shoes to fill but the new Board is up to the task and will make him proud. Gil will remain active on the Board as Past President; however, Margaret LaVancha, Connie Baltz and Tracy Mead have ended their Board positions after giving their time and talents on so many levels. Margaret served three years, two of those as Vice President. Connie served two years, both as Secretary. Tracy served one year as Treasurer. On behalf of NCHRA, a sincere thank you goes to all of them for their active participation and dedication.

As a potential new member or a past member, I welcome you to join or renew your NCHRA membership and attend our general meetings to network with human resource professionals from across the region and benefit from informative presenters. We are planning a wide variety of topics for our monthly meetings based on the feedback we've received in the past. We'll continue to meet on Tuesdays at the Best Western so get our meeting dates (listed in this newsletter) on your calendar so you won't miss out.

Our June 2009 conference went very well. The theme was Inspiring You for 2009. Although attendance was a bit down from prior years, the feedback was very positive in all areas. Of particular note was the "nice mix of presenters and topics" as well as "All 3 speakers provided useful information that can be used at work". When you get comments such as "I cannot think of anything" that would improve the conference, then you know you've done well. Thank you to the Conference Committee for all your efforts that resulted in a great conference. It will be hard to top it in June 2010!

Our first meeting for this year will be on September 22 with Faith Lustick from the Jefferson County Public Health Department. Faith has been asked to share with us what it is we should know as HR about H1N1. She promises a very informative and timely presentation that I'm sure all of us will benefit from. As HR we need to consider the health of our employees and what we can do to avoid a pandemic.

(continued)

The tentative meeting schedule for the rest of the year is below. As always, any ideas or suggestions are appreciated. We rely on your feedback as a guide for topics for our meetings. I look forward to seeing each of you in September and over the upcoming year. Enjoy what's left of our summer!

Please do not forget to send your RSVP to Cherie Moore no later than Wednesday, September 16, 2009 by 4 PM (cherie.moore@na.manpower.com).

Kathleen Scheible, PHR
President, North Country Human Resources Association

2009-2010 Meeting Dates

October 2009 – June 2010 meeting dates for your calendar. The specific meeting times and topics will be announced soon. All meetings will be held at the Watertown Best Western.

	Tentative Topics
Tuesday, October 20, 2009	Background Checks & Article 23
Tuesday, November 17, 2009	FLSA: Common Employer Mistakes
December 2009	No meeting scheduled
Tuesday, January 19, 2010	Social Service Benefits
Tuesday, February 23, 2010	Wellness, Part 2
Tuesday, March 23, 2010	Update on National Health Plan
Tuesday, April 20, 2010	EEOC: EEO-1 Reporting
Tuesday, May 18, 2010	To be determined
Tuesday, June 8, 2010	4th Annual NCHRA Conference

New York State Minimum Wage Poster

As you know, the federal minimum wage increased on July 24, 2009 from $6.55 to $7.25 per hour. This will also result in a corresponding increase in the New York State minimum wage from $7.15 to $7.25.

There is no requirement to issue a new federal minimum wage poster since the original poster issued back in 2007 is still good. However, the NYS Department of Labor has issued an updated minimum wage poster. You must display the new minimum wage poster in a conspicuous location at each NYS work site to allow both employees and applicants the opportunity to review it. Failure to display the poster may result in a fine from the Department of Labor. A copy of this poster is made available to you later in this newsletter.

North Country Human Resources Association Inc.

P.O. Box 8302, Watertown, NY 13601

Society for Human Resource Management (SHRM) Affiliated Professional Chapter #0559

Serving the North Country HR Managers since 1988.

MEMBERSHIP APPLICATION FOR 2009-2010

Web Address: http://northcountryhra.org/

Professional Member Dues: **$35.00 one year – non refundable if approved - due with your application.** ☐

$60.00 two years – non refundable if approved -due with your application. ☐

Associate Member Dues: **$20.00 one year – non refundable if approved - due with your application.** ☐

$35.00 two years – non refundable if approved - due with your application. ☐

Membership in NCHRA is contingent upon approval of Board of Directors.
Applicants will receive notification of membership decision.

Name: ____ (Membership is individual-not transferable)

Home Address: ____

Phone: ____

Company: ____

Address: ____

Email Address: ____________________________ Company Web Site: ______________________

Telephone: ____________________________ Fax: ______________________

Title: ____

Function(s): ____

____

Renewal Membership ☐ New Membership ☐

Are you a SHRM member? Yes No Do you have a certification? SPHR PHR GPHR

Do you know of anyone you would like to refer to NCHRA? ____________________________

Internal Use Only

Application / Payment submitted on:

Type of Membership: Professional ☐ Associate ☐ Student ☐ Honorary ☐

Membership expires: 2010 ☐ 2011 ☐

Form of Payment: Personal Check ☐ Business Check ☐ Cash ☐

Date Board approved:

Date Notification sent:

2009-2010 Membership Renewal

The membership year runs from September to August. Annual membership dues are payable to NCHRA and mailed to:

Cherie Moore
NCHRA
PO Box 8302
Watertown NY 13601

A one-year professional membership is $35 and two-year is $60.
A one-year associate membership is $20 and two-year is $35.

Remember: there is a meal price difference for members and non- members so it's to your advantage to get your membership in early!

Types of memberships:

PROFESSIONAL MEMBERSHIP: Professional Members shall be limited to (a) those individuals engaged in Human Resources or Industrial Relations functions; (b) the teaching, administration or management of Human Resources; (c) individuals who previously served in those positions.

ASSOCIATE MEMBERSHIP: Individuals who do not meet the qualifications of the other classes of membership, but who demonstrate a bona fide interest in human resource management and the mission of the Chapter. Associate members may not vote or hold office in the Chapter.

STUDENT MEMBERSHIP: Individuals who are actively enrolled in Human Resources or related programs at the college or University level. Student members may not vote and may not hold office in the Association. Student members shall be entitled to full membership without the payment of dues.

SHRM Membership

The Society for Human Resource Management (SHRM) is offering a discounted rate to become a member of SHRM. You can access their membership application online at www.shrm.org and look for "Membership" under "About SHRM". Use the promotional code CHNED to get the discounted rate of $145......a $15 savings. Check out the benefits of becoming a SHRM member while you're online!

Post Conspicuously

New York State Department of Labor

ATTENTION EMPLOYEES

(ATENCIÓN EMPLEADOS)

MINIMUM WAGE INFORMATION

(INFORMACIÓN SOBRE EL SALARIO MÍNIMO)

Effective 07/24/09

Basic Hourly Rate

$7.25 per hour

Overtime Rate

For most occupations, employees must be paid overtime after 40 hours of w or k in a w eek at 1 ½ times their hour ly r ate of pay. For residential employees, the overtime rate applies after 44 hours.

Tips

A specified allowance may be credited toward the minimum wage for tips earned.

Meals and Lodging

A specific credit may be granted toward the minimum wage for meals and/or lodging provided by the employer.

Federal Law

Employees covered under the federal Fair Labor Standards Act must be paid in accordance with State law and also in accordance with higher federal requirements, where applicable.

Other Wage Requirements

A specific amount must be paid, in addition to the minimum wage, for the maintenance of required uniforms.

There are provisions for other supplemental wages in New York State Industry wage orders. These may include a part-time rate, daily call-in pay and a rate for split shift or spread of hours. Whether a par ticular supplemental wage applies depends on the provisions of the industry wage order covering the employment.

For additional Information or to file a complaint

Write or call the Department of Labor, Division of Labor Standards at one of the offices listed below:

A partir del 07/24/09

Salario Mínimo

$7.25 por hora

Pago por horas extras

En la mayoría de puestos laborales, los empleado deben recibir una paga de tiempo y medio de la tarifa regular por hora cuando las horas trabajadas exceden las 40 horas semanales. Los empleados que residen en el sitio de trabajo, deben recibir una paga de tiempo y medio de su tarifa regular por hora en exceso de 44 horas semanales.

Propinas

Se puede acreditar al salario mínimo una cantidad específica por las propinas ganadas.

Comidas y Alojamiento

Se puede acreditar una cantidad específica al salario mínimo por comidas y/o alojamiento provistos por el patrono.

Ley Federal

Los empleados protegidos por la Ley Federal de Normas Equitativas del Trabajo (Federal Fair Labor Standards Act) deben ganar salarios segú n lo estipulan las leyes estatales y en conjun tocon los requisitos superiores federales, segú n convenga.

Otros requisitos salariales

Se debe pagar una cantidad específica, demá s del salario mínimo, por el mantenimiento de uniformes obligatorios.

Existen otras disposiciones sobre pagos suplementarios en las ordenanzas industriales del Estado de Nueva York. Dichas disposiciones contienen una tarifa por trabajo a medio tiempo, trabajo diario casual, turnos divididos o por horas repartidas. Si un pago suplementario es pertinente o no, depende de las disposiciones regentes en el tipo de industria vinculada al trabajo en desempeñ o.

Si necesita má s informació n o si quiere presentar una queja por favor escriba ol llame al

Departmento del Trabajo Divisió n de Normas Laborales a cualquiera de las oficinas siguiente:

State Office Building Campus
Albany, NY 12240
(518) 457-2730

44 Hawley Street
Binghamton, NY 13901
(607) 721-8014

65 Court Street
Buffalo, NY 14202
(716) 847-7141

400 Oak Street
Garden City, NY 11530
(516) 794-8195

75 Varick Street, 7th Floor
New York, NY 10013
(212) 775-3880

109 S. Union Street
Rochester, NY 14607
(585) 258-4550
(Subdistrict)

333 E. Washington Street
Syracuse, NY 13202
(315) 428-4057

120 Bloomingdale Road
White Plains, NY 10605
(914) 997-9521

For additional information:
www.labor.ny.gov

The New York State Department of Labor is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Este empleador participa en el Programa de Igualdad de Oportunidades. Servicios adicionales para personas incapacitadas e instrumentos para ayudarlas estan disponibles a solicitud de dichas personas.

LS-207 (06/09)

Hancock & Estabrook, LLP Labor & Employment Law News

HANCOCK & ESTABROOK, LLP
COUNSELORS AT LAW

Labor & Employment Law News

June 2009

United States Supreme Court Backs Enforcement of Union Contract Requiring Arbitration of Age Discrimination Claims

The U.S. Supreme Court has resolved a long-standing controversy about the arbitration of employment discrimination claims of union-represented employees. On April 1, 2009, the Court held, by a 5-4 margin in *14 Penn Plaza v. Pyett,* that a collective bargaining agreement that "clearly and unmistakably" requires employees to arbitrate claims under the federal Age in Discrimination in Employment Act (ADEA) is enforceable. This ruling reverses a decision of the U.S. Court of Appeals for the Second Circuit which had concluded that enforcement of the CBA was prohibited by the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver, Co*. Although the high court did not overrule *Alexander,* Justice Clarence Thomas, writing for the majority, did call it "a strong candidate for overruling".

With the door now open, whether to arbitrate or litigate employee discrimination claims is a question many organized employers will now face as a matter of labor relations strategy. Although there will be ongoing debate, some employers will seek to negotiate *Pyett*-style arbitration clauses into their collective bargaining agreements to ensure that such claims are subject to arbitration as opposed to a judicial forum. Other employers will resist arbitration preferring instead that such claims be judicially determined. The pros and cons are beyond the scope of this bulletin.

Requirements for an Enforceable ADEA Arbitration Clause

The arbitration clause must be clear and explicit to be treated as mandatory. Indeed, the Supreme Court stated in *Pyett* that an age discrimination arbitration clause will be enforceable only if its terms are "explicitly stated." That is, the language must clearly and unmistakably require the arbitration of age discrimination claims under the ADEA by specifically referencing the statute. It should be assumed that the mandatory arbitration of other types of statutory employment discrimination claims (for example, gender, race or religious discrimination claims under Title VII of the Civil Rights Act of 1964, as amended) under collective bargaining agreements will also require similar specificity in the arbitration article so as to make it clear that the arbitral forum is the exclusive forum for resolving those claims.

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P: (315) 471-3151 • F: (315) 471-3167 • www.hancocklaw.com

Continuing Questions Under Pyett

The Supreme Court did not offer explicit guidance about what would happen if the union withdraws or refuses to arbitrate the individual employee's statutory discrimination claims. However, one view is that the employee will be free to fly solo and arbitrate his/her ADEA claim under the CBA. Another possibility is that the employee will be permitted to sue his/her employer in court to try to vindicate the employee's discrimination claims. This issue may command judicial attention down the road.

However, in *Pyett*, the Supreme Court highlighted a union's duty of fair representation and noted that a union may be liable under the National Labor Relations Act and the ADEA if it fails to pursue a member's contract grievance to arbitration in the face of a mandatory arbitration clause such as that at issue in *Pyett*. Thus, it is likely that unions will be cautious moving forward resulting in an increase in union-supported arbitration of individual discrimination claims where a valid and enforceable arbitration clause exists.

Examine Your Current Agreement

An organized employer should carefully examine each of its labor agreements to determine whether the language clearly and unmistakably includes a mandatory arbitration clause for individual statutory discrimination claims. Unfortunately, the Supreme Court did not provide extensive guidance in *Pyett* to identify the specific contours of "explicit" language in this context. The high court did not do so because the employee conceded the point during argument before the lower courts. The employee therefore effectively forfeited this argument and the Court assumed that the arbitration clause was sufficiently explicit to mandate arbitration. We encourage our employer clients to contact us with any questions regarding their CBAs in this regard.

Future Employer Bargaining Strategy

The *Pyett* decision also confirms that the arbitration of an employment discrimination claim is a mandatory subject of bargaining. Thus, an employer without a mandatory arbitration clause will need to decide whether to bargain with its union for such a clause in the future.

As stated above, whether an employer should seek a mandatory arbitration clause in future CBAs cannot be easily answered yes or no. Although employers often view arbitration as an easier and less expensive means to address employee complaints, such is not always the case. Moreover, the analysis of arbitration versus litigation is dependent upon a number of other factors unique to each employer. An employer is therefore encouraged to consult with legal counsel to determine what strategy best serves the organization. The answer may differ from employer to employer.

HANCOCK & ESTABROOK, LLP
COUNSELORS AT LAW
SERVING CENTRAL NEW YORK FOR 120 YEARS

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BS&K, PLLC Labor and Employment Information Memo

Electronic Dispatch

Employee Benefits Law Information Memo

May 2009

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IRS AUDITORS IDENTIFY COMMON RETIREMENT PLAN COMPLIANCE ERRORS

The Internal Revenue Service ("IRS") recently published updated guidance intended to help employers and retirement plan administrators keep retirement plans in compliance with the often complex Internal Revenue Code rules that apply to such plans. The IRS guidance identifies compliance errors that have been routinely discovered in IRS audits of all types of retirement plans, including Internal Revenue Code Section 401(k) plans, Internal Revenue Code Section 403(b) plans, and defined benefit pension plans, as well as errors that are unique to each of those plan types. In addition to identifying common compliance errors, the IRS guidance provides tips to retirement plan sponsors on how compliance errors can be avoided.

Compliance Errors Common to All Plan Types

For retirement plans of all types, the number one compliance error discovered by the IRS during a plan audit is the plan sponsor's failure to keep the governing plan document current. As new legislation is passed and as new regulations are adopted, plan sponsors often need to amend governing plan documents to ensure that those documents accurately reflect the new law or regulation. Plan sponsors are given a specific, limited period of time within which required amendments must be adopted and executed. Amendments to reflect discretionary plan design changes desired by the plan sponsor also must be adopted within a limited period of time (generally before the end of the plan year during which the amendment is first effective). If required or desired plan amendments are not adopted and executed on a timely basis, the plan can be disqualified (*i.e.*, lose its tax-favored status).

The next most common compliance error identified by the IRS in audits of retirement plans is the failure of the plan sponsor or plan administrator to follow the plan's definition of "compensation" (or whatever term is used to determine contributions or benefits under the plan). Failing to follow the applicable definition can result in the overstatement or understatement of contributions or benefits. These inaccuracies can lead to an IRS disqualification of the plan.

Other common compliance errors identified by the IRS include:

- Failure to follow the plan's eligibility provisions, including the improper exclusion of eligible employees and the improper tracking of hours of service;
- Failure to make required minimum distributions (generally required following the later of a participant's retirement or attainment of age 70½);
- Failure to limit plan distributions prior to a participant's termination from employment; and
- Failure to provide correct distribution forms, make timely distributions and prepare correct tax reporting of distributions.

Common Compliance Errors Unique to Internal Revenue Code Section 401(k) Plans

The most common failure identified during IRS audits of Internal Revenue Code Section 401(k) plans is the failure to correct ADP and ACP testing failures. Excess elective deferrals and/or excess contributions must be corrected in accordance with the governing plan documents, usually within a limited period of time following the year during which the excess deferrals or contributions are made. Failure to correct any excess on a timely basis can result in the imposition of excise taxes on the plan sponsor and the disqualification of the plan.

This document may be considered "Attorney Advertising" under the rules of some states.
The hiring of a lawyer is an important decision that should not be based solely upon advertisements.

The next most common failure identified during IRS audits of Internal Revenue Code Section 401(k) plans is the plan sponsor's failure to apply the plan's matching contribution formula properly. The IRS indicated that this typically results from the plan sponsor applying the matching contribution formula on a per payroll period basis when the plan calls for the formula to be applied on a plan year basis (or vice versa). Plan sponsors should review the plan's matching contribution formula to ensure that matching contributions are made to the plan on the basis and with the frequency required by the plan.

Other common plan compliance errors include:

- Failure to observe a plan's cap on matching contributions;
- Failure to observe a matching contribution formula's application to catch-up contributions made by participants after attaining age 50;
- Failure to observe maximum deferral percentages under the plan; and
- Failure to follow the terms of an automatic enrollment feature.

Common Compliance Errors Unique to Internal Revenue Code Section 403(b) Plans

The most common error identified by the IRS during audits of Internal Revenue Code Section 403(b) plans is the failure to properly apply the "universal availability" rule. The "universal availability" rule" generally requires that, if any employee may make elective deferral contributions under an Internal Revenue Code Section 403(b) plan, then all employees must have the opportunity to make such contributions to the plan (or to another comparable plan). Permitted exceptions to the universal availability rule generally allow an employer to exclude employees eligible under Internal Revenue Code Section 401(k) plans, nonresident aliens, student employees, and employees who ordinarily work less than 20 hours per week. Other employee classifications generally may not be excluded.

Other compliance errors commonly discovered by the IRS during audits of Internal Revenue Code Section 403(b) plans include:

- Failure to properly track and limit catch-up contributions for employees with 15 years of service and/or who are at least age 50;
- Failure to follow applicable controlled group rules (generally requiring tax exempt organizations to take employees of related entities into account when applying the universal availability rule and non discrimination tests to the plan);
- Failure to limit contributions under Internal Revenue Code Section 415 (generally limiting contributions to the lesser of 100% of a participant's includable compensation or $49,000 (indexed)); and
- Failure to prohibit elective deferrals after employment ends.

Common Compliance Errors Unique to Defined Benefit Plans

With respect to defined benefit pension plans, the IRS identified the following as common compliance errors discovered during audits of such plans:

- Failure to use accurate data in calculating benefits (including incorrect dates of birth, incorrect employment dates and incorrect salary histories);
- Failure to observe benefit suspension provisions (including failure to provide required notices and to start and stop suspensions on a timely basis); and
- Failure to commence distributions at the time required by the plan.

Action for Plan Sponsors

Because of the potential adverse consequences that can arise from the failure to observe the complex Internal Revenue Code rules that apply to tax-favored retirement plans (including plan disqualification and the imposition of excise taxes), plan sponsors should periodically review the operation and administration of their plans. The primary goals of such a review are to ensure that plan documents are current with applicable law and to ensure that the plan document and plan administration are in sync.

To avoid the failure to amend a plan on a timely basis, the IRS suggests that plan documents be reviewed at least annually to determine if any amendments are required as a result of new legislation/regulation or as a result of discretionary plan design changes. To avoid errors that result from failing to follow the terms of the plan, the IRS suggests that internal controls be reviewed to ensure that payroll and other administrative practices are consistent with the plan's terms. Plan sponsors also should perform an annual self-audit of the plan, which audit should include spot-checking deferrals, contributions and benefit calculations (as applicable) to ensure that all administrative practices are consistent with the written terms of the plan.

To the extent that the plan document is outdated and/or to the extent that plan administration and plan documents are out of sync, the plan sponsor should take immediate action to correct such failure or failures. Consideration should be given as to whether corrective action should include IRS review and approval under one of the IRS plan correction programs, including the IRS program for late amendments. Taking action prior to an IRS audit should help mitigate the likelihood that the IRS will discover compliance errors during an audit.

If you have any questions about this memorandum, please contact Steve Daley in our Syracuse Office (315-218-8237, sdaley@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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BS&K, PLLC Labor and Employment Information Memo

Employee Benefits Law Information Memo

June 2009

Electronic Dispatch

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REDUCING BENEFIT COSTS REQUIRES CAREFUL PLANNING

In these economic times, it would not be unusual to look at the cost of providing certain benefits and wonder if there is any room to cut costs. Whether an employer can successfully accomplish this without exposing itself to excessive risk requires understanding the nature of protected benefits under the Internal Revenue Code (Code) and the Employee Retirement Income Security Act (ERISA). In this Information Memorandum, we will summarize some of the legal consequences of common benefit reductions.

Accrued Retirement Benefits Cannot be Reduced

Accrued benefits in a tax-qualified retirement plan, such as a defined benefit, profit-sharing, 401(k), 403(b) or money purchase plan, cannot be reduced by amendment. What is an "accrued benefit"? In defined contribution plans, the accrued benefit is the account balance; in defined benefit plans, it is the annual benefit payable at retirement that has already been earned by virtue of, for example, the prior performance of services.

If an employer wants to change the amount of contributions to be made or the rate at which benefits accrue in a retirement plan, it may do so, but only on a prospective basis. A review of the plan document will reveal whether employees have already earned the right to benefits in the current year. For example, a plan may require 1,000 hours of service in a plan year in order for a participant to be entitled to a contribution or an additional benefit accrual for that plan year. A plan amendment eliminating that year's contribution or accrual will only be effective if it is adopted (and, in certain cases explained below, communicated) to participants *before* participants have earned the requisite 1,000 hours of service. On the other hand, a plan that requires a participant to be employed on the last day of the plan year can be amended at any time prior to that last day of the plan year to eliminate the contribution or accrual requirement for the entire year, subject to the notice and safe harbor conditions discussed below.

If the plan terms do not condition the receipt of the year's contribution or accrual on service or employment on the last day of the plan year, then contributions generally must be made and benefits generally must be accrued with respect to compensation earned prior to the effective date of the plan amendment.

In some very limited circumstances, plans that are subject to minimum funding requirements (e.g., defined benefit plans, cash balance-type plans and money purchase plans) may be amended to reduce accrued benefits with the approval of the Secretary of the Treasury.

Reductions in Future Accruals May Require Notice

For defined benefit plans (including cash balance-type plans) and money purchase plans, an amendment to reduce the rate of future accruals, freeze or terminate the plan, or an amendment to "convert" the plan to a profit-sharing plan, generally will not be effective unless participants receive an ERISA "204(h) notice." The 204(h) notice must be provided to participants not less than 45 days prior to the effective date of the amendment (15 days for multiemployer and small plans) and must describe the amendment and its impact on participants. Failure to provide the notice may result in the employer being assessed with an excise tax equal to $100 per participant for each day the notice is delayed.

Changes to 401(k) Safe Harbor Plans are Permitted Under Certain Circumstances

A 401(k) safe harbor plan that uses nonelective contributions to satisfy the ADP test may be amended during the plan year to reduce or suspend the employer's safe harbor nonelective contributions, if certain conditions are met. The employer must have a substantial business hardship and provide a supplemental notice to all eligible employees at least 30 days in advance of the effective date of the amendment (or, if later, the date the amendment is adopted). Employees must be given a reasonable opportunity after the notice is given, and before the reduction or suspension of employer contributions, to change their elective deferrals. The plan must be amended to specify that it will satisfy the ADP test using the current year testing method.

A safe harbor plan that uses the matching contribution method to satisfy the ADP test can be amended prospectively to reduce or eliminate matching contributions under similar conditions.

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The hiring of a lawyer is an important decision that should not be based solely upon advertisements.

Benefit Changes That Can Trigger Vesting

An employer-initiated permanent reduction in force, or cessation or decrease in future benefit accruals that increases the likelihood of a reversion of plan assets to the employer, can cause a partial plan termination that results in all affected participants being fully vested, regardless of their years of service. The termination of a plan, and a complete discontinuance of contributions (as opposed to a temporary suspension of contributions) to a defined contribution plan, also result in affected participants being fully vested. Who is an "affected participant" can depend on the terms of the plan, including when forfeitures occur.

Health and Welfare Plan Changes

In general, health and welfare benefits do not vest, and employers generally have the right to amend or terminate these benefits if the employer has consistently reserved the right to do so. However, these benefits may become vested, and may not be reduced or eliminated, if the employer has promised (e.g., through plan terms or communication), to continue the benefits. Prior to reducing or discontinuing these benefits, employers should evaluate whether they have made such a promise by reviewing plan documents, summary plan descriptions and plan-related communications to participants.

Changes to an employee's premium payment election under a Code Section 125 cafeteria plan is permitted during the plan year if the employer increases the employee's share of the premium cost of a benefit. If the cost to the employee is significantly increased, the employee may revoke his or her election and elect another, similar coverage option that costs less. If there is no other coverage option, the employee may drop coverage.

Conversion to an individual policy of life insurance generally is available if group term life insurance coverage is terminated other than for failure to pay premiums. The employer should inform employees of this right to convert 15 days before or after the date of the termination. The maximum time for conversion is 31 days following the date of the termination.

Collective Bargaining Obligations

Remember that benefits are part of an employee's terms and conditions of employment and, therefore, are a mandatory subject of bargaining where the employer has a represented workforce. Proposed changes to benefits for union employees should be discussed in advance with union representatives.

If you have any questions about this memorandum, please contact Amelia M. Klein in our Albany office (518-533-3217, aklein@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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