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## How Government Bailout Requirements Affect *Your* Company

Your company is not a recipient of the government's \$700 billion Troubled Assets Relief Program (TARP), so the bailout's rules don't impact you. Or do they?

Before you decide, we encourage you to understand the requirements and their impact on executive compensation. Some of the requirements bring long-standing pay issues into sharper focus, and many experts believe all companies should expend some effort to understand them.

The National Bureau of Economic Research finally confirmed in December 2008 what many businesses and individuals already knew—that the U.S. economy had been in the throes of a recession since December 2007.

One result of the recession was the failure and, in some cases, the subsequent rescue of some very large, very old investment firms and banking institutions. Those firms taking the government up on its offer of financial help obviously must adhere to the rescue package's requirements.

However, the impact of the fall 2008 bailout of financial companies by the United States government may reach farther than only those firms directly affected.

Researchers at Equilar ([www.equilar.com](http://www.equilar.com)), an independent provider of executive and director compensation data and research, say that other companies are also examining the compensation-related provisions of TARP, and some are changing policy in its wake.

Speaking at a recent seminar, Equilar's Alex Cwirko-Godycki explained the four major ways the government's bailout

of financial companies affects executive compensation.

"TARP includes a reduced cap on tax deductibility under 162(m), elimination of golden parachute payments; no compensation that rewards unnecessary risk or excessive risk, and clawback policies," he says.

Legally, only those firms participating in the bailout program are required to make changes. However, the Securities and Exchange Commission (SEC) recommends that all companies consider the requirements. "These provisions will most likely serve to accelerate trends that are already under way," Cwirko-Godycki said.

### Section 162m Limitation

For tax deductibility purposes, Internal Revenue Code Section 162m limits cash compensation to \$1 million annually. Pay above \$1 million is deductible only when it is performance based.

"But, for companies participating in the bailout, the cap has been lowered to \$500,000," says Cwirko-Godycki. "The issue is that in many of the large companies, about 74 percent of CEOs already receive compensation above this 162m limit—that's their base salary.

"So it remains to be seen whether salaries at financial firms will drop to \$500,000.

"There probably will be a lot of pressure to bring them down from their current levels. But as we know when we look at the financial sector, salaries oftentimes can be much smaller than they are in

(continued on page 2)

other sectors; most of the pay is tied to bonuses, which is where excessive risk comes in.”

### **Elimination of Golden Parachute Payments**

“Golden parachutes” are negotiated contracts that sometimes provide astonishing amounts of money to an executive who is terminated. News of the astonishing amounts can make its way to the public or, at the very least, to the company’s shareholders.

Due at least in part to recent resulting public and shareholder outcry about such severance packages, TARP addresses these contracts, requiring that companies taking advantage of the government bailout eliminate golden parachute payments.

Cwirko-Godycki says the recent trend is away from such payments and, where they are still in effect, toward transparency: “There has been a number of high-profile cases already where executives have declined their severance packages or been forced to reduce them.

“AIG is probably the most notable. Its CEO rejected a \$22 million package, and its CFO was forced to give up a \$10 million severance package.

“At Fannie Mae and Freddie Mac, the U.S. government blocked severance packages for former executives there.

“And at Wachovia, its former CEO received a relatively small cash severance when he retired in June 2008, and its current CEO is no longer eligible for severance.

“We’ve seen a number of companies, in their proxy disclosures, amending their current plans or employment agreements and eliminating some of these provisions. There are a lot of agreements outstanding—standing incentive plans—that

need to be amended to fit into the bailout program.”

### **Determining Unnecessary And Excessive Risk**

“The next topic is probably the most difficult to address and is perhaps something that every company will start to consider, whether or not they participate in the bailout program,” says Cwirko-Godycki. “It is that companies need to create incentive plans that do not promote or force executives to take unnecessary and excessive risks.”

Just what is an unnecessary risk? Each compensation committee will need to make that determination, and Cwirko-Godycki says that process should be under way now.

For those companies participating in the bailout, meetings should be taking place between the compensation committee and the chief risk officer. Cwirko-Godycki says this should be done “on a regular basis to make sure that, as situations change, the plans are not generating a situation where people might take excessive risks.”

Equilar reports that a few companies have already begun to change their incentive plans to reflect this more conservative approach.

“Alleghany, an insurance company, is basically saying they are already setting incentive plan targets, using growth risk management goals that avoid incentivizing excessive risk that may be associated with higher goals,” Cwirko-Godycki explains.

That requires explanations to shareholders, who might be expecting higher performance levels.

“The director of Corporate Finance with the SEC says this is the biggest issue he believes will extend to all companies—that all companies should reexamine incentive packages in light of potential risk taking that might be involved,” Cwirko-Godycki says.

### **Including Clawback Provisions**

A clawback provision allows a company to recover compensation from an executive when he or she commits some kind of misconduct, or a company restates its financial results. “Clawbacks have developed into a big topic,” Cwirko-Godycki says.

“Every year for the past few years we’ve done a study of the Fortune 100, looking at the prevalence of companies with publicly-disclosed clawback policies. We’ve seen a substantial increase in the last few years, from just over 1-in-5 companies, to now almost 65 percent in 2008.

“The interesting thing to note is that this is not just a phenomenon driven by disclosure, although the SEC’s new disclosure rules ask companies to talk about clawbacks. The majority of these policies that we’re seeing show an adoption date—when the date is disclosed—after 2006.

“This is a practice that has been gaining momentum all by itself, apart from Sarbanes-Oxley or TARP. It may accelerate because of some of the current issues, but it is a big topic for companies already.”

### **Avoiding Future Problems**

While recent economic woes have certainly impacted the companies utilizing TARP, most companies are not subject to its requirements.

Even so, now may be an excellent time to think through the reasoning behind these provisions and give some consideration to how they could provide a needed system of checks and balances for any executive compensation program. By doing so, you may head off future problems.

For more information on this topic, go to [hr.blr.com](http://hr.blr.com).

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## Paid Time Off for Volunteerism Gets Employees Active in Communities

Paid time off for performing volunteer service is one of the perks offered to employees of Lexmark International, Inc., and one way that the company demonstrates its commitment to corporate citizenship.

Formalized in 2004 to promote and support ongoing employee volunteer efforts, the Volunteer Time Off (VTO) Program and a Volunteer of the Year award are aimed at encouraging employees “to give back to the communities where they live and work by sharing their time and talent,” says Corporate Citizenship and Inclusion Specialist Juli Gaworski. “Work-life balance is critical to the success of Lexmark. Employees who are happy at work simply perform better and stay loyal to their employer. Today, people have less time to volunteer with organizations they are most passionate about, and the VTO Program encourages employees to take that time on Lexmark time.”

### How It Works

Lexmark ([www.lexmark.com](http://www.lexmark.com)), which provides printing and imaging products, solutions, and services to businesses and consumers, promotes corporate citizenship among its 14,000 employees worldwide. In the United States, about 20 percent of the company’s 3,000 employees here participate in the VTO Program, according to Gaworski.

“Lexmark’s Volunteer Time Off is formalized in the United States only,” she says. “However, many Lexmark facilities around the world take pride in supporting local nonprofits and schools through employee volunteer efforts.”

Under the VTO program, full-time employees are entitled to take up to 24 hours of paid time off each calendar year for volunteering. Part-timers qualify for up to 12 hours. “Employees can use the time off in half-day or full-day increments,” Gaworski says.

There are no minimum service requirements for eligibility. “Volunteer Time Off eligibility starts from day of new-hire orientation,” she explains. “It is considered an employee benefit in addition to annual vacation time and four ‘personal choice holidays.’

“Many employees work long hours and simply cannot justify more time away from their families to do volunteer work,” Gaworski says. “By offering VTO, employees can give back to their communities and organizations in a meaningful way during work hours. In turn, the organizations receive more time and talent from our very skilled work force.”

### Variety of Opportunities

Lexmark employees participate in a variety of volunteer opportunities. While some work at animal shelters, others volunteer in local schools or with after-school programs, according to Gaworski. “Many employees will use VTO to help out a child’s school or chaperone a field trip. Pretty much any type of activity that you can imagine is represented.

“We do not prequalify the organizations prior to allowing for VTO to be used,” she says. “We do state in the guidelines that VTO cannot be used for religious promotion or running for public office, but these are the very minimum restrictions.”

The program has been “very well” received by employees. “Many employees are still quite surprised that they have 3 full paid days off just to volunteer,” she says.

Lexmark gives employees an even greater incentive to volunteer by awarding \$250 grants to nonprofit organizations where its employees volunteer 40 or more hours annually.

Most employees seek verbal approval from their managers to request participation in the VTO program, but

**Who:** Lexmark International, Inc.  
**What:** Provides paid time off for U.S. employees to perform volunteer work  
**Results:** 20 percent of U.S. employees participate in the program. Greater work-life balance; higher employee satisfaction.

Lexmark hopes to increase the numbers of employees who use an online application that is being made more user-friendly. “Most employees work directly with their managers to take time off, and are not taking time to complete the formal online application,” Gaworski says. “We hope our new online process will be easier to use and promote formal reporting of hours.”

Since 2004, an increasing number of employees have volunteered in their communities, which translates to business advantages for Lexmark. “We know that volunteerism leads to more employee satisfaction and a better work-life balance,” she says.

The VTO Program was one of several work-life programs cited when Lexmark was named a winner of the 2008 Alfred P. Sloan Award for Business Excellence in Workplace Flexibility.

### Tips to Consider

The success of a volunteer-time-off program hinges on executive buy-in, according to Gaworski. “This is a top-to-bottom approach that must have buy-in from the executive level. If resistance is met at a manager level, the employee must feel that the company fully supports the program.”

Here are two more tips to help ensure success:

- 1. Explain the benefit clearly.** Create a written policy detailing eligibility requirements and the number of paid hours or days employees are entitled to take off for volunteerism.
- 2. Make participation easy.** Consider using an online application and tracking process that is user-friendly and promotes administrative efficiency.

## Final Rule Expands FMLA for Military Families

A final rule published by the U.S. Department of Labor is aimed at clarifying workers' and employers' rights and responsibilities under the Family and Medical Leave Act (FMLA) and expediting implementation of a new law expanding FMLA coverage for family members of military personnel (*Federal Register*, Volume 73, Number 222 (11/17/08)).

"[T]he final rule provides needed clarity about general FMLA rights and obligations for both workers and employers," said U.S. Secretary of Labor Elaine L. Chao.

For detailed coverage on the new FMLA regs, see our FMLA Alert on page 6.

## Bill Addresses Pension Issues in Lagging Economy

Modifications to pension distribution requirements for senior citizens and businesses and technical corrections to the Pension Protection Act of 2006 (PPA) are among the measures included in legislation that recently passed in both the U.S. House of Representatives and the Senate.

**Note:** At press time, the bill was awaiting then-President George Bush's signature.

The Worker, Retiree, and Employer Recovery Act of 2008 (H.R. 7327) provides for a 1-year moratorium on required minimum distributions from individual retirement accounts and defined contribution plans for 2009, according to the Senate's Committee on Finance.

In addition, the committee reports that the legislation includes the following provisions:

- A requirement for plans falling below a set target funding percentage to fund up to the specified

amount for a given year—instead of 100 percent

- The ability of multiemployer plans to elect to freeze their current funding certification based on the previous year's level (for plan years starting between October 1, 2008, and October 1, 2009)
- A 3-year extension—from 10 to 13 years—of the current funding improvement or rehabilitation period for multiemployer plans

"This vital legislation addresses the immediate needs of workers, retirees, and businesses hit hard by the financial and economic crisis facing our country," said Sen. Edward Kennedy (D-Mass.), chairman of the Senate Health, Education, Labor and Pensions Committee.

"With trillions of dollars in retirement savings in serious jeopardy, the relief in this bill will help Americans weather the storm until the economy begins recovering," Kennedy stated.

## Advance Copies Of 2008 Form 5500 Available

Advance informational copies of the 2008 Form 550 annual return/report and related instructions were recently released by the U.S. Department of Labor's Employee Benefits Security Administration, the IRS, and the Pension Benefit Guaranty Corp.

The advance copies, schedules, and instructions can be downloaded at [www.efast.dol.gov](http://www.efast.dol.gov) (click on "Forms, Instructions and Publications").

Changes to the Form 5500 are outlined under "Changes to Note" in the 2008 instructions. They include:

- New actuarial schedules replace Schedule B (Actuarial Information); Schedule SB will now be used by single-employer and multiple-employer plans, and multiemployer and certain money purchase plans will use Schedule MB.
- Multiemployer defined benefit pension plans generally must file

## IRS Update

### Mileage Rates Down From 2008 Adjusted Rates

The Internal Revenue Service's (IRS) optional standard mileage rates for 2009 are higher than the rates for the first 6 months of 2008, but lower than the rates for the second half of that year.

The rates are used to calculate the deductible costs of operating a motor vehicle for business, charitable, medical, or moving purposes.

Each fall, the IRS updates the mileage rates for the next calendar year. In the midst of skyrocketing gas prices last summer, the agency took the unusual step of making a mid-year adjustment to the rates.

For 2009, the standard mileage rates for the use of an automobile, van, pickup truck, or panel truck will be 55 cents per mile for business miles driven—up from 50.5 cents per mile for the first half of 2008 and down from 58.5 cents per mile for business miles driven from July 1, 2008, through December 31, 2008.

The 2009 standard rate for computing deductible medical or moving expenses is 24 cents per mile, compared with 19 cents and 27 cents, respectively, last year. The rate for providing services for a charitable organization is set by statute and remains at 14 cents per mile.

additional information as attachments to the Schedule R (Retirement Plan Information).

- Certain plans with less than 25 participants at the beginning of the plan year may continue using the voluntary simplified reporting option for the 2008 filings.

## The *LaRue* Decision and 'Missing' Participants: Impact for 401(k) Plan Sponsors, HR, Participants

by Paul J. Schneider, Paisner~Litvin LLP

The recent decision of the U.S. Supreme Court in *LaRue v. DeWolff, Boberg & Associates Inc.*, 128 S.Ct. 1020 (2008) is a landmark ruling that will be referenced in employee benefits law textbooks for years to come.

James LaRue filed a suit, alleging that by failing to execute his investment selection, DeWolff (his employer) and its retirement plan (Plan) breached their fiduciary duties. Under the Employee Retirement Income Security Act of 1974 (ERISA), Section 502(a)(2), he subsequently sought to recover the amount he lost due to that failure. Ultimately, it was the Court's decision to side with LaRue, not the Plan.

As a result of the Court's ruling, any single participant in a defined contribution plan now has a cause of action under ERISA if fiduciary misconduct causes a loss to his or her account. This brings to light the need for greater care to be taken in how plan assets are invested and administered and, even more important, the need to ensure that missing participants are being managed throughout the life cycle of the plan.

### Risks of Missing Participants

Missing participants present a risk for potential fiduciary liability that was largely overlooked before the ruling. In order to avoid this increasingly detected risk, plan administrators must:

- Maintain proper communication of required information.
- Ensure a valid investment election is always on file and in effect.
- Manage appropriate death benefit distribution to beneficiaries.

The plan administrator's obligation to meet communication requirements for all participants is a challenge, especially for the "missing."

While participants are active participants, communications may be made in electronic form as long as the general participant population has access to computers. But once a participant is no longer active, notices must be sent in hard copy. This becomes difficult when the record keeper or third-party administrator (TPA) no longer has a current address for an inactive participant.

The second area of potential risk involves the investment of plan assets. Virtually all 401(k) plans rely on ERISA Section 404(c) to insulate plan fiduciaries from responsibility for a participant's investment selections. However, in order for fiduciaries to be protected, it is required that each participant has a valid investment election in effect. For active participants, the investment election may be made electronically, and the participant can be reminded periodically to make sure that the election is up to date. However, this notification cannot be accomplished if the participant is missing. Potential for fiduciary liability arises even though the plan fiduciary may think that he or she is protected.

A third area of potential risk relates to death benefit distributions. One of the principal reasons inactive participants go missing is that they have died and the plan was not notified. Under all 401(k) plans, the death of the participant is a distribution event. This means that the plan administrator has an obligation to locate the deceased participant's beneficiary and to make a distribution of the deceased participant's account to that beneficiary. This obligation will not be satisfied if the plan does not know that the participant has died. Thus, if the participant's account diminishes in value between the date of death and the date when the death benefit is eventually

paid, it may be the plan administrator who is liable for that loss.

Failure to comply with any of these requirements can and will result in a fiduciary liability, particularly if the account balance is adversely affected.

### Risk Management— Locating Missing Participants

With the *LaRue* decision confirming the potential for having fiduciary liability arise from the existence of missing participants, plan sponsors and administrators must give some serious thought as to how to better manage the risks associated with missing participants.

The best method of risk management in this area is to periodically review the plan's participant database in search of "missing" participants and to take immediate steps to locate those individuals. It is well known that the longer a participant has been removed from his or her employer, the harder it is to have accurate contact information, and the harder it is to find that participant if current contact information is not available. Keeping track of participants must be done on a routine basis in order to be successful. To manage risk, it is critical for plan sponsors and administrators to adopt procedures that will minimize the number of missing participants.

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## FMLA Final Rule Poses New Year Challenge

In the midst of economic uncertainty, HR professionals face another formidable task in the new year—updated policies and procedures related to final U.S. Department of Labor (DOL) regulations covering the Family and Medical Leave Act (FMLA) and new military family leave entitlements for employees.

DOL's 750-plus-page final rule goes into effect January 16, 2009. The rule is aimed at helping employers and employees better understand their FMLA rights and responsibilities and speeding implementation of military family leave provisions included in the National Defense Authorization Act, which was enacted in January 2008. The rule also contains technical changes reflecting U.S. Supreme Court and other court decisions.

### Impact on Employers Is Significant

"The impact of the final FMLA rule cannot be overstated. Employers will need to reconsider all of their leave policies and practices and make significant changes to avoid costly FMLA violations," says Susan Schoenfeld, J.D., BLR legal editor and FMLA expert. "This will require employers to devote time and resources to understanding the new rules and changing their FMLA leave administration programs."

The revisions affect 10 policy areas: (1) serious health condition, (2) intermittent leave, (3) employee and employer notice, (4) light duty, (5) perfect attendance awards, (6) medical certification, (7) fitness-for-duty certification, (8) military caregiver leave, (9) leave for qualifying exigencies for families of National Guard members and reservists, and (10) revised forms.

### Regulations Address Problematic Areas

The final rule provides clarification on several issues that employers have

been grappling with, such as intermittent leave provisions, according to Tasos C. Paindiris, managing partner of the Miami office of Jackson Lewis ([www.jacksonlewis.com](http://www.jacksonlewis.com)) and the southeast regional coordinator for the law firm's Disability Leave and Health Management practice group.

Under existing regulations, "employers' rights to obtain medical information about specific absences are very limited for intermittent leave," Paindiris says. "A lot of employers have been concerned about abuse of intermittent leave or their inability to confirm the need for intermittent leave."

However, DOL's "new and improved" medical certification forms allow employers to request more information from an employee's doctor and provide more information to the doctor, such as a list of essential job functions, he says. Due to privacy concerns, the employee's direct supervisor is not allowed to contact the doctor—only an HR professional, a leave administrator, or a management official may do so.

The previous form merely asked the doctor about "the expected frequency and duration of absences," but now more specific questions can be asked, such as—in the case of intermittent leave—how many days and hours per week and which days of the week an employee will have to be absent, Paindiris explains.

Despite the changes, Paindiris expects that intermittent leave administration will continue to be a challenge. "I think intermittent leave will still be a problem for employers to administer and that's because of the nature of what it is."

### Notice Provisions, New Forms

Notice requirements have changed for both employees and employers, and employer notice requirements are

included in a "one stop" section of the final rule.

Employees now have 5 business days to furnish medical certification from a healthcare provider and up to 15 days to respond to all requests for certification. Until the required certification is provided, employers may "deny" FMLA leave—rather than "delay" it, as in the past.

Employers have more time to respond to an employee's request for leave—5 days instead of the previous 2 days, absent extenuating circumstances.

Two new notice forms replace the previous rights and obligations form—one addressing the employee's eligibility for FMLA leave, and the other specifying that the leave will be designated as FMLA leave, Paindiris says.

In cases of unforeseen leave, employers can require employees to follow the employer's specific notice procedures. In the past, employees could simply call their supervisor, according to Paindiris.

This provision is important for employers who use third-party administrators to manage employee leaves of absence, because they can now require that employees call the third-party administrator, he says.

### Protection Expanded for Military Caregivers

DOL's new FMLA regulations implement a requirement in a 2008 law expanding FMLA protections to a spouse, child, parent, or next of kin caring for a covered service member with a serious injury or illness incurred while on active military duty. Such family members are entitled to take up to 26 weeks of FMLA leave in a single 12-month period.

The same law also permits families of active-duty National Guard members or reservists to take FMLA leave to

*(continued on page 9)*

## Wellness Need Not Be Expensive

Barbara Oberman of Barbara C. Oberman Insurance Services says that one employee can, in a single afternoon, locate more than enough resources to create an effective, inexpensive wellness program.

"The difficulty will be in identifying which sources to use, because there are so many available," she says. Start with your medical insurer. Take a look at state and city (local government) websites.

"And don't forget some of the food companies. A number of them have really excellent newsletters and wellness programs you can use," she says. "Dole ([www.dolenutrition.com](http://www.dolenutrition.com)) is one; Kraft ([www.kraft.com/brands/healthandwellness](http://www.kraft.com/brands/healthandwellness)) is another; and Campbell's Soup ([www.campbellwellness.com](http://www.campbellwellness.com)) has one, too.

"The next step is for the person at the top to devise a letter to all employees, explaining that they have made a commitment to the health of their employees and families, that the company is embarking on a strategic mission to get everybody on board to improve their health," Oberman explains.

"Offer various options. Even one small step forward can bring huge results. For example, create a walking club. Appoint a team captain; and 3 to 5 days a week that person would organize everyone who is interested [to meet] in the lunch room or in front of the building to go for a walk. You can create teams and contests. Give everyone an odometer. Just keep it simple in the beginning."

### ABOUT THIS NEWSLETTER

*This newsletter is devoted to sharing compensation and benefits ideas that have worked for HR professionals striving to make a strategic difference in their companies. If you have a story you'd like to share, send us a fax at 860-510-7224.*

*If you have a question about one of the newsletter stories or want more information, call 800-727-5257, ext. 2194, or e-mail [equayle@blr.com](mailto:equayle@blr.com).*

# Benefits Corner

## Small Employers Can Create Wellness Programs, Too

Keeping employees healthy is a high priority at some of America's largest companies. Not only do healthy employees feel better and produce more work, they submit fewer claims to their health insurers, which could result in lower insurance premiums. Ask anyone in one of Corporate America's large employee wellness departments and they'll tell you: Investing in the health of your employees is an investment in the future of your company. But isn't the investment too great for a *small* company to make?

"Employers of any size can benefit greatly by making a concerted effort to introduce a wellness program, and it does not have to be expensive," says Barbara Oberman of Barbara C. Oberman Insurance Services ([www.bobermaninsurance.com](http://www.bobermaninsurance.com)). When Oberman works with a company, she includes an examination of their wellness program as part of her services.

A good, cheap wellness program requires commitment from the top of the company and an overall strategy. "A good wellness initiative requires a commitment from top management, who should lead by example," Oberman says. "We spend so much more time with our employers than we do with our spouses or kids, so the employer really has an excellent opportunity to share information and get employees engaged in programs that are going to benefit them. But the CEO, owner of the company, or other person in charge really has to be committed."

Part of the strategy should be creating a wellness culture, Oberman says, something even the smallest company can do. Rather than implementing a few seemingly unrelated programs, she recommends working toward a culture that engages employees in a whole new way of thinking. This requires much more than simply replacing doughnuts with fruit at company meetings or offering discounts at a local gym, although both are great ideas.

"Company leaders," she says, "should be the ones articulating the message to employees, that they are personally committed to bringing health and wellness to the company." Don't be put off by the old leading a horse to water axiom. "Unless you're leading them there, you don't have any hope of getting them to drink," Oberman says. "The treadmill can be sitting there next to your bed at home, but unless you're motivated and committed to using it, it's not going to work."

Start small, and build up, recommends Oberman. "It's like looking at an elephant," she says of the process toward better health. "Where do you begin? You've heard the expression that a journey of 1,000 miles begins with a single step. It isn't really a thousand-mile journey, but it can look like that. So start really simply, just introducing the culture. You can get remarkable results."

## Encouraging Better Health Through Cash Incentives

**Who:** Clarian Health  
**What:** Created Wellness Track, encouraging employees to take charge of their own health using financial incentives  
**Result:** Compliance with the first step, a health risk assessment, is over 90%; many employees have quit smoking, and many have lost weight.

If you happen to be in the state of Indiana, and you're feeling ill, chances are good you'll find the help you need at one of Clarian Health's locations. As the largest healthcare system in the state, Clarian has the resources and staff to put you on your way to better health. "But what we'd really like to do," says James Wide, a Clarian employee in the Public Relations department, "is to keep people from coming in."

While that may seem counterintuitive to discourage customers, community health has long been a goal of Clarian's, and it is deeply integrated into the corporate culture.

"If you have a disease or an injury, we have the best of the best that can assist you," Wide says. "But what we really want to do is to stop you from getting to the point where that's what you need." One way that Clarian has traditionally cared for the public health is go out into the community, offering health screenings and other resources.

"The initiative is called Call to Change," Wide explains. "We were doing a lot screenings, offering health information, and trying to help people in our communities to be very preventative. We spent a lot of resources doing that. But when we stepped back and looked at ourselves—we have 13,000 employees in downtown Indianapolis—we realized we had more work to do there. So we instituted the same Call to Change amongst our employees."

Wellness Track, officially launched in January 2009, became the official means through which Clarian employees could make lifestyle changes that would ultimately benefit their health. The program focuses on five areas that, when controlled, offer the greatest health benefits: smoking cessation, body mass index, blood pressure, glucose levels, and "bad cholesterol," or LDL.

### Financial Incentives Prove Popular

Awareness is often the first step toward better health, so Clarian employees are encouraged to complete a health risk assessment. The encouragement comes through communication about the importance of being healthy—and through cash.

Initially, the team that created Wellness Track discussed using a penalty system for employees who don't address their health issues. "That was discussed, but never finalized," says Wide. "We did focus groups, and that was one of the things the employees decided; they said they definitely wanted to take control of their health, but they would much rather get money put into their paychecks for meeting goals, instead of having it taken away for not meeting them."

Thus was born the Wellness Track incentive program, which officially launched in January. Employees can receive up to \$30 per paycheck, or \$720 a year, for addressing their health issues. When an employee stops smoking, an extra \$5 appears in the biweekly paycheck. The same is true when he or she is addressing LDL, glucose, and blood pressure. And an extra \$10 can be had by addressing one's BMI.

Is Clarian looking for perfection? No, says Wide. Rather, the incentives are paid when employees progress toward better health. "People worried at first that they would be screened every week, and that it would be this big thing. But it is actually on the honor system. If an employee tells us that his BMI is lower, then that's what we go by." And because an employee has a particular health condition does not mean he is ineligible for the incentives.

"Say you have an elevated blood pressure. What we want is for you to go to your doctor and get that treated," Wide explains. "So, your doctor is aware of it, and you're taking care of it, whether that means medication or diet modification. Whatever it is, you're taking care of it. With that information, you're now eligible for the incentive pay; your numbers are off, but you're getting assistance. It isn't about punishing people for not reaching those marks. Instead, it is about getting you the assistance you need."

Wide doesn't worry that employees may take advantage of this kind of honor system. "We have a culture of transparency," he says. "It really starts from the top. Our CEO is very transparent as far as telling us what's going on in the organization; it's just our culture. We have confidence in our employees."

### Employees Excited Before Beginning

Although the incentive program has begun only recently, the framework has been in place for some time. "We announced this in mid-2007 to get people ready, get them to start making some lifestyle changes," Wide says.

Has it worked? "Oh, yeah," Wide states. "We have a 90-some-odd percentage of compliance with the health risk assessments. Several of our employees have been profiled in our local newspaper because they have made changes.

“For instance, our patient visitor reps greet patients at the hospital entrances. That’s one of those jobs where you’re sitting down a lot. At our Methodist Hospital, a few of those employees decided that, during their 15-minute breaks, instead of just walking around talking with people, they would create something they call the Methodist Mile. They track a mile, and they’ll walk on their breaks.

“They’ve lost weight and other health issues have changed. That’s just a small thing, and that’s what we want people to know: you don’t have to do it overnight, and it doesn’t have to be big changes. Small lifestyle changes are what it’s all about.”

Even though the initial idea of penalizing noncompliance was discarded, Wide says that is not the part of the implementation that he would change.

“That was one of those situations where the news got out before we were finished, and *that’s* probably something we would change. Other than that, the process worked. We went through the employees, we had the focus groups, and we got their input.

“That was a critical piece, because after all, this is their program. I think that if a company doesn’t do that, if it’s just a bunch of administrators sitting around saying, ‘this is what we’re going to do,’ that’s the wrong approach. I think the better approach is to say, ‘this is what we want to do, let’s see how our employees feel about it.’ That was very effective.”

While financial incentives are integral to the Wellness Track program, Wide says the main emphasis is on individual health.

“Obviously, there is a financial incentive,” he says. “But the bigger thing is lifestyle change. We’re pushing healthy aspects of everything, from meals in our cafeterias, to making accessible everything you need to make changes.

“We have WeightWatchers at Work®, health centers in our facilities, various classes on nutrition, and many [other programs]. We profile success stories in our company newsletter, too. That’s encouraging to others.

“People see the changes in their coworkers and decide they’re ready to make a change. You hear them talking, ‘Did you see her? What’s she doing? I want to do it, too.’ These are regular folks we see every day, not Hollywood people, just every day people. We have one woman who, because of the changes she’s made, is now off diabetes medicine and is controlled by diet instead.”

Are there people who do not want to be part of the program? Sure, says Wide. “You’re going to have people who don’t want to be told to do something. But that’s the thing: we’re not telling them, we’re offering them something great. And we’ll be here when they’re ready.”

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*continued from page 6*

manage their affairs—“qualifying exigencies.”

The regulations define qualifying exigencies as (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post deployment activities, and (8) additional activities where the employer and employee agree to the leave.

### **Miscellaneous Provisions Outlined**

Other provisions in the final rule include the following:

- If an employee is taking leave for a serious health condition for more than 3 consecutive days of incapacity plus two visits to a healthcare provider, the two visits must occur within 30 days of the period of incapacity, and the first must occur within 7 days of the onset of incapacity. The regulations also define “periodic visits to a healthcare provider” for chronic serious health conditions as at least two visits per year.
- Employees on intermittent FMLA leave who miss 1 day of a 5-day workweek have used one-fifth of a week of their FMLA leave, Paindiris says. Those who are

*required* to work an additional day of overtime (i.e., a 6-day workweek) and miss 1 day of work have used one-sixth of a week of FMLA. The new regulations clarify that employers may require fitness-for-duty certifications for intermittent leave if the employer has related safety concerns, according to Paindiris.

- Time spent in light-duty work does not count against an employee’s FMLA entitlement, as long as the employee is not voluntarily doing light-duty work. The employee’s right to job restoration is held in abeyance during the light-duty period.

### **What to Do**

HR professionals need to become familiar with the provisions of the final regulations and make sure that supervisors are trained on the new processes, according to Paindiris.

Here is some additional advice to consider:

- **Update applicable documents.** Employers need to make sure their policies, notices, and forms comply with the provisions outlined in the DOL’s final rule, he says.
- **Check applicable state laws.** Many states have FMLA laws that are similar to or the same as the federal law, Paindiris points out. States may revise their laws to reflect changes in the federal law, but in the meantime, employers must compare the federal and state provisions and “rely on whichever law is more beneficial to the employee,” he says. “Some states may issue guidance on how to deal with the transition period.”
- **Stay tuned.** “As with any regulation, there are always going to be terms that are open to interpretation,” he says. In addition, some Democratic lawmakers support expanding FMLA to cover smaller worksites and more circumstances (e.g., when an individual provides elder care or is a victim of domestic violence), according to Paindiris. “There may be more on the horizon, so you definitely need to keep yourself informed on that.”

# INDUSTRY TRENDS

## Commuter Expenses May Mean Higher Wages

That rushing sound you heard the last time you filled your gas tank may have been the collective sigh of relief all around you. At least as of this writing, with the price per gallon of gasoline hovering around \$1.75, people are breathing easier than they were when the price was more than double that amount, just 2 months earlier. Any pressure you may have felt to help employees struggling with the cost of commuting has likely dissipated.

Cynics might say you'd better hold on, because rumblings among gas-producing nations foretell higher prices ahead. If (when?) we are again faced with \$4-per-gallon gas, what will you do to ease the burden on your employees? The TransitCenter

([www.transitcenter.com](http://www.transitcenter.com)), a nonprofit dedicated to encouraging the use of mass transit, weighed in on the question when prices were at their peak.

In its 2008 TransitCenter "Commuter Impact Survey," results found that many companies were considering increasing worker pay, not only to help employees who were tightly squeezed by the high price of getting to work, but also to keep those employees from jumping ship. Two-thirds of employers responding to the survey said they should be leading the effort to ease the burden of commuting costs on their employees. However, 62% of them were concerned that in order to do so, they would need to increase salaries.

Nearly half (43%) said they believe that the costs associated with commuting and employee retention are linked.

"Employees everywhere are feeling the financial pinch from high fuel prices, prompting corporate America to act," Larry Filler, president and CEO of TransitCenter said in October 2008. "The good news is that pre-tax commuter benefits can save each employee hundreds of dollars a year, lowering the amount that employers would have to pay to offset higher gas—and transit—prices."

By the time you read this, gas prices may have stabilized. But just as likely, you and your employees will again be feeling the pinch of soaring prices. A commuter benefit program could make you all feel better.

## NBGH Says Employees Want Your Help to Stay Healthy

Sometimes you may feel as if no one reads the reminders you send out from HR. Even if they are being read, do they cause employees to take action? You may be surprised to learn that most employees do appreciate the health-related missives you distribute. Even more surprising—employees say your communications are helping them to stay healthy.

According to Helen Darling, president of the National Business Group on Health (NBGH), employees are trying to improve their health. In a survey conducted by NBGH in the summer of 2008, 53% of employee/respondents said they had tried to improve their overall health regularly for at least the last year, and another 35% had started within the last year. "So that's 88% of people who are trying to improve their health," Darling noted. "That's very good news for employers because they are paying a lot for benefits and want to see people taking advantage of them."

Darling reported that employees value the communications they receive about ways to improve their health. "We found that employees do value communications from their employer and are taking action as a result," she said. "Half of all employees say healthcare communications they receive from their employer, union, or health plan are either very valuable or extremely valuable."

The survey indicated that a majority of employees would participate in more health-related activities if they were offered. "Employees want to see more health-related activities sponsored by their employers, unions, or health plans," Darling continued.

"Of the 54% of employees who said they would take advantage of health-related activities sponsored by employers, unions or health plans, 59% would get onsite health screenings; 55% would use worksite fitness centers; 53% would enroll in a weight management program; 52% would

participate in a Web-based wellness program; and 52% would see a work-site healthcare provider."

The reason employees said they want to get healthier may be the biggest surprise of all. Darling says that "67% of employees said the reason they would take advantage of these things is that they want to feel better."

"This doesn't sound like big news," Darling comments, "but if you think about it, helping people to understand that one of the biggest benefits to choosing a healthier lifestyle and making different choices is that they're going to feel better, is the challenge. Getting that message across is really important.

"And," she emphasizes, "apart of getting it across is for employees to see it in print. The message is, 'You're not doing it for the company; you're doing it because you're going to feel better.'"

## Obama Presidency Will Likely Increase Employer Obligations

After studying legislative proposals made by President Barack Obama when he was still a United States senator, employment lawyer Philip M. Berkowitz made some predictions in the *New York Law Journal* about what effect the Obama presidency will have on employment law and policy (see "Obama Victory Means Changes for Employers," November 13, 2008). Here are some of the legislative initiatives that Berkowitz predicts President Obama will take to expand current federal employment laws involving compensation and benefits.

### Further Expansion of FMLA

The Family and Medical Leave Act (FMLA) presently covers employers with 50 or more employees. When he was a senator, President Obama proposed that the FMLA be expanded to include businesses employing a minimum of 25 employees.

Then-Senator Obama also proposed that the FMLA be amended to provide (1) leave for elder care and problems related to domestic violence; (2) up to 24 hours of leave each year so that parents can attend the school activities of their children; and (3) up to 7 days of *paid* sick leave per year for each employee. So, employers are advised to prepare for increased responsibilities under the FMLA.

### Crackdown on Misclassified 'Independent Contractors'

Berkowitz notes that President Obama, when a senator, proposed the Independent Contractor Proper Classification Act that would, among other things, eliminate the defense of "industry practice" as a justification for misclassifying workers as independent contractors and require the establishment of a procedure that would enable workers to petition for a determination of their status as employees or independent contractors.

Upon a determination of misclassification by the secretary of the

Treasury, employers would be required to treat the misclassified workers as employees for employment tax purposes. An article in last month's *Best Practices* explains why employer errors in worker classification can be extremely costly (see Issue 749, p.5).

### Elimination of Time Limits Re Discriminatory Compensation

Title VII of the Civil Rights Act of 1964, among other things, makes it an unlawful employment practice to discriminate "against any individual with respect to... compensation... because of such individual's ... sex." Then-Senator Obama cosponsored The Equal Remedies Act of 2007, which would have removed the limits on the dollar amount of punitive damages as well as damages for pecuniary and nonpecuniary losses, in cases brought pursuant to Title VII.

Based on this, Berkowitz suggests that President Obama will likely support passage of the Lilly Ledbetter Fair Pay Act, which, in effect, reverses the U.S. Supreme Court's decision in the case of *Lilly Ledbetter v. Goodyear Tire and Rubber Co.* (127 S.Ct. 2162 (2007)).

In *Ledbetter*, the Court imposed severe time limits on the ability of an employee to challenge longstanding, allegedly discriminatory compensation practices that were not made manifest to the employee until years after they occurred. The Court held that employees filing a pay-bias complaint under Title VII have to abide by the Act's statute of limitations and file such a claim within 180 days after the initial discriminatory decision had been made and communicated to the employee in the form of an unfairly lower paycheck.

The Court rejected Ledbetter's argument that although her claim had been filed years after the initial discriminatory pay decision occurred, her claim wasn't time barred because every new

paycheck she received subsequent to the first intentional discriminatory pay decision constituted a new, actionable act of pay discrimination.

The Lilly Ledbetter Fair Pay Act would clarify that every new paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision constituted a new violation of Title VII. Therefore, a suit such as Ledbetter's would not be time-barred.

### Expansion of Employer Obligations Under WARN

The Worker Adjustment and Retraining Notification Act (WARN) was enacted by Congress in 1988. It currently covers only companies that employ 100 full-time workers or 100 or more full- and part-time employees who work an aggregate of at least 4,000 hours per week, exclusive of overtime. At the time, then-Senator Obama supported the Forewarn Act of 2007, which would apply to employers of only 50 or more employees.

Currently, WARN requires employers to give employees 60 days' advance notice of planned plant closings and mass layoffs. Under the Forewarn Act, supported by President Obama, WARN would be amended so as to require a 90-day written notice of plant closings or layoffs.

WARN has strong penalties for employers that violate its terms. For instance, each employee is entitled to back pay for each day of violation as well as the cost of his or her fringe benefit. The Forewarn Act of 2007 would amend WARN so as to double the penalties for employers that violate its terms.

It is a sad sign of the times that a violation of WARN recently made headlines. A Chicago window-making plant gave its 250 workers only 3 days' warning of their termination and then closed its doors. A tense

(continued on page 12)

occupation of the closed plant by the terminated workers immediately ensued and acquired nationwide attention as a symbol of worker resistance.

### Help for Unions

Berkowitz notes that as president, Barack Obama has expressed an eagerness to see passage of the Employee Free Choice Act (EFCA), which would make it significantly easier for unions to gain representation in a particular company.

Obama also has supported the Re-Empowerment of Skilled and Professional Employees and Construction

Traders Act (RESPECT), which enables more employees to become members of unions in spite of certain supervisory-type activities.

Berkowitz concludes that the president's pronouncements and record as senator "provide ample evidence that he will seek to pass legislation which will substantially shift the ground toward a more union-friendly environment." But he also notes that "with the economy in free-fall, the new president is less likely to focus on issues that upset years of labor-management balance or groundbreaking legislation designed to rewrite the rules of the game."

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## By the numbers...

	Latest Period	Current	Prior Report	A Year Ago	12-Month % Change
CPI-U	Nov/08	212.4	216.6	210.2	1.1%
CPI-W	Nov/08	207.3	212.2	205.9	0.7%
<b>ECI EMPLOYMENT COST INDEX</b>					
Total Compensation	3Q/08	108.7	108.0	105.7	2.8%
Wages and Salaries—Metro	3Q/08	109.0	108.4	105.9	2.9%
Wages and Salaries—Nonmetro	3Q/08	109.9	108.9	106.2	3.5%
Benefits	3Q/08	107.5	107.0	105.0	2.4%
Average Weekly Gross Wages*	Nov/08	\$613.05	\$612.53	\$596.23	2.8%
Average Hourly Wages					
All*	Nov/08	\$18.30	\$18.23	\$17.64	3.7%
Construction	Nov/08	\$22.26	\$22.27	\$21.26	4.7%
Manufacturing	Nov/08	\$17.91	\$17.83	\$17.42	2.8%
Trade/Transp./Utilities	Nov/08	\$16.29	\$16.26	\$15.84	2.8%
Wholesale Trade	Nov/08	\$20.44	\$20.20	\$19.89	2.8%
Retail	Nov/08	\$12.89	\$12.91	\$12.70	1.5%
Financial Activities	Nov/08	\$20.54	\$20.41	\$19.83	3.6%
Other Services	Nov/08	\$15.97	\$15.90	\$15.61	2.3%
Unemployment Rate*	Nov/08	6.7%	6.5%	4.7%	2.0%

\*seasonally adjusted  
(Source: Bureau of Labor Statistics, Washington, D.C.)  
All figures are national.

**CPI-U:** Consumer Price Index for all urban consumers; the newer index representative of the buying habits of about 87% of the total U.S. population. (1982–84=100)

**CPI-W:** Consumer Price Index for urban wage earners and clerical workers; the older index covering only about 32% of the U.S. urban population.

**ECI:** Measures change in compensation per hour worked, including wages, salaries, and employer costs of benefits. (6/89=100)

**Average Weekly Gross Wages and Average Hourly Wages:** Data related to production workers in manufacturing and mining; construction workers; nonsupervisory workers in transportation, public utilities, and wholesale/retail trade; also finance, insurance, real estate, and other services. Accounts for approximately 80% of the total employees on private, nonfarm payrolls.