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Monthly Program & Luncheon



TOPIC: Services Offered to Employers and Employees

WHEN: Thursday, June 4, 2009

TIME: Lunch served from 11:30AM to noon;
Program from noon to 1:00PM

WHERE: 1300 George Bush Drive and Holik Drive,
College Station Conference Center Room 101

COST: \$10/member & first time guest
\$15/non-RSVP guest

SPEAKER: **Shawna Rendon** - Texas Workforce Solutions
Shawna has been with Workforce Solutions Brazos Valley Board for 6 years serving as a Workforce Professional. She is responsible for the management of the child care management program as well as the budgeting and expenditures of a 10 million dollar annual budget. She graduated from Texas A&M with a BA in English and a minor in Business. Prior to her time with WSBVB, Rendon worked in the HR/Payroll field for 3 years.

DESCRIPTION: Texas Workforce Commission (TWC) is the state government agency charged with overseeing and providing workforce development services to employers and job seekers. For employers, TWC offers recruiting, retention, training and retraining, and outplacement services, as well as valuable information on labor law and labor market statistics. **Shawna Rendon** of Texas Workforce Solutions will talk to members of Brazos Valley Human Resources Management Association (BVHRMA) about the importance of Workforce services in the region. All services provided to employers as well as the customers of the Brazos Valley will be presented.

General eligibility, legal and age requirements, employer benefits, WorkInTexas.com and many other services offered to employers and employees will be addressed.

NOTE: *This program has been approved for 1.0 (General) recertification credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute. Please be sure to note the ***program ID number on your recertification application form. For more information about certification or recertification, please visit the HR Certification Institute website at www.hrci.org.*

*****If you would like to count this program as 1.0 recertification credit towards your PHR, SPHR, or GPHR, please be sure to pick-up your receipt for this meeting, the program ID number will be listed on the receipt. You will need to pick-up your receipt on 06/04/09 between 11:30 and 1:00 PM**

MENU: Baked potato bar, with chopped beef & BBQ sauce, white rolls, tossed salad, tea.

RSVP: rsvpprograms@gmail.com by noon on Tuesday, June 2, 2009. *Please reply by the deadline to ensure that the appropriate number of meals are ordered.*



Mark Your Calendar!
BVHRMA July 2009 Program

Please join us on July 2, 2009 when **Thom Holt** of Fairwinds gives us a presentation about **Performance Based Management**.

SHRM & Other Events

Please visit the web addresses listed below for more information about these events.

Texas Higher Education Human Resources Association 2009 Conference

"The Heat is On: Cooling the Climate with HR Strategies"

<https://test5.peopleadmin.com/applicants/jsp/shared/frameSet/frameSet.jsp?time=1241810438602>

June 14 – 16, 2009

San Antonio, TX

2009 SHRM®

Annual Conference & Exposition

<http://shrm.org/conferences/annual/>

June 28 – July 1, 2009

New Orleans, LA

BVHRMA Business Seminar

<http://www.bvhrma.org>

July 16, 2009

Workforce Solutions-Bryan, TX

This seminar has been pre-approved for 6.5 hours for HRCI re-certification!!

**** (Register by July 1- pay only \$75!!
Register *AFTER* July 1- \$99)**

PAYMENT METHOD

Please remit payment by Check or Money Order in **U.S. funds** payable to:
Brazos Valley Human Resource Management Association

HR Southwest

HR Rocks!

<http://www.hrsouthwest.com/>

October 13 – 16, 2009

Fort Worth Convention Center

Fort Worth, TX

REGISTER NOW!

**** (Indicate our Chapter number- #0330 during registration & our Chapter will get credit!) ****

June is:

National Rose Month
National Dairy Month
Great Outdoors Month
National Safety Month
Potty Training Awareness Month
Zoo and Aquarium Month
National Iced Tea Month

Diversity Dates

5– World Environment Day
14 – Flag Day
19 – Juneteenth
21 – Father's Day and
1st Day of Summer

Legal Briefs

Welcome to Legal Briefs for HR, an update on employment issues sent to over 4000 HR professionals, in-house counsel and business owners to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted on my firm's website at www.munckcarter.com under E-Newsletter. Welcome to new subscribers who attended my speeches for Odyssey One Source and the Fort Worth chapter of the National Association of Women in Construction!

1. **This Little Piggy** - Here are just a few of the websites that may become useful to you as we all watch and hold our breath as the swath of H1N1 (swine flu) expands. For workplace safety advice, go to www.osha.gov/Publications/OSHA3327pandemic.pdf. For medical information, including the locations of reported cases, go to www.cdc.gov/swineflu/. Dust off your FMLA policy and take note of the changed definitions (underlined below) that took effect on January 16. For example, a serious health condition may qualify under "continuing treatment" if it lasts more than three consecutive, full calendar days and also involves at least two in-person health care provider visits within the first 30 days of incapacity OR one in-person health care provider visit within the first seven days of incapacity plus a regimen of continuing treatment. Where FMLA does not apply, take a look at your absence control and paid time off policies and be mindful that unpaid leave for many folks is a big incentive to come to work sick, which you do not want them to do. And don't forget the FLSA regulations that limit your ability to dock exempt workers' salaries when they are absent without jeopardizing the exemption.
2. **A Different Kind of Swine** - Heads up, employers in IL. The IL Supreme Court held that under the state anti-discrimination law, an employer is strictly liable for the hostile environment created by a supervisor, even where the alleged victim did not work for the harasser and he had no authority to affect the terms and conditions of her employment. *Sangamon County Sheriff's Dep't v. IL Human Rights Commission* (IL S. Ct. 4-09). In this case, a male sergeant/supervisor sent a female records clerk a letter, purportedly from the state health department, informing her that she had a communicable disease. He claimed it was a practical joke, but the court was not amused and said "Not only are supervisors the 'public face' of the employer, but employers are in the best position to train supervisors and make them aware of the law prohibiting sexual harassment." Most employers are mindful of the potential for strict liability where the supervisor harasser engages in the *quid pro quo* variety of harassment (i.e., conditioning term(s)

of employment on receipt of sexual favors), but all should note the trend at the state level to use that same standard (rather than a negligence standard) when the harassment is of the hostile environment variety. In any case, your best offense and defense is to [1] have a well-written and widely disseminated policy that prohibits such behavior; [2] include a procedure for reporting violations in the policy that does not force the alleged victim to start the process by reporting it to his or her supervisor; and [3] train your staff on this issue, especially your managers and supervisors.

3. **Thank You, Supremes!** - The days when Texas employers muttered "Why bother?" when asked if they would try to enforce a noncompete against a former employee are becoming a faded memory. In late 2006, the Texas Supreme Court put on their practical hats by holding that a noncompete could become enforceable when the employer provided the trade secrets or special training which served as consideration for the employee's promise not to compete. Before then, if the employee's written promise to not noncompete and the employer's offer of secrets/training didn't occur at the same time, there was no enforceable noncompete. Now, fast forward to April 2009 for more good news. A tax manager tried to get the noncompete he'd signed with his former employer declared unenforceable by pointing out that the agreement did not expressly state that he would be provided with confidential info. The court took a dim view of this argument and pointed out that [1] the nature of his duties as tax manager required that he be given access to all sorts of company and customer confidential info; and [2] in his employment agreement, he promised that he would not use or disclose confidential information obtained while he was employed. That promise made no sense unless he was, in fact, given confidential info. The Court sided with the employer and explained that the employer's implied promise in the employment agreement to provide confidential info was good enough and the parties had entered into an "otherwise enforceable agreement" which is one of the requisites for enforcing a noncompete restrictive covenant in Texas. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding* (TX S. Ct. 4—09) Take that, tax man!
4. **A Taxing Situation** - Employers with employees serving in the U.S. military who are offering those employees gap pay (i.e., the difference between their civilian and military paycheck), take note. The IRS changed the rules regarding tax treatment of these payments, eff. January 1, 2009. These payments are wages for income tax purposes, but employers are not required to withhold and remit social security and Medicare taxes (FICA). Ers will put the amount of payment in Box 1 of the ee's Form W-2. These amounts are subject to withholding for federal income tax and should be reported on Form 941. The ee who receives these payments will report them on Line 7 of Form 1040. If the ee is receiving large sums over time and is worried about accruing a big tax bite, he or she can make quarterly estimated tax payments. The IRS suggests using the Electronic Federal Tax Payment System (EFTPS) to facilitate that process.
5. **Third Time's a Charm?** - There is another delay in implementation of a regulation intended to force certain federal contractors and sub-contractors to enroll in E-Verify and begin using it within 30 days of being awarded a contract. The rule was to take effect on January 15, but has been pushed to February 20, May 21 and now to June 30. In the meantime, there is activity at the state level relating to E-Verify as follows:
 1. The Rhode Island Superior Court has upheld the Governor's right to require that all persons and businesses, including grantees, contractors and their subcontractors and vendors doing business with the state use E-Verify to verify employee eligibility to work in the U.S.

2. The Governor of Nebraska signed a bill (L.B. 403) that requires public employers and those who receive state/local contracts or tax incentives to use E-Verify on all newly hired employees, effective October 1.
 3. Texas has a bill pending (H.B. 266) which, if passed, will force government entities and businesses who contract with them to use E-Verify or a similar federal program on all new hires. The Texas AG has opined that the bills presented in this legislative session (unlike the ones in the 2007 session) would likely pass constitutional muster.
6. **Fair WARNING** - An amendment to the Worker Adjustment and Retraining Notification (WARN) Act was filed on April 23 in Congress. If passed, H.R. 2077 would expand notice requirements to include mass layoffs that occur at more than one site of an employer (instead of focusing on the "single site" analysis) and increase penalties from "back pay" to "two times the amount of back pay." You can always find full text and current status of federal bills at <http://thomas.loc.gov>.
7. **More Fun with FMLA** - Two pending bills and a useful court case:
1. **H.R. 2132** (filed April 28) - Would expand scope of FMLA by allowing an eligible employee to use FMLA to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling or grandparent who has a serious health condition.
 2. **H.R. 2161** (filed April 29) - Would nullify certain regulations and revise others; the intent is to undo many of the recent changes to FMLA regulations that favor employers (e.g., waiving FMLA rights as part of a settlement agreement, allowing an employer to have direct contact with employee's health care provider, denying or reducing attendance bonuses where employee took FMLA leave). The bill is not posted on <http://thomas.loc.gov> yet but you can read about it on the website of the bill's author, Rep. Carol Shea-Porter (NH) at www.house.gov. Click on "Representatives" to navigate to her site.
 3. **While You Were Gone** - How many times have you reassigned existing staff or hired a temp to cover for an employee on leave, only to discover that the absent employee wasn't so hot at doing his or her job? If that leave was FMLA, you may have been reluctant to effect a discharge and risk an interference claim, but the 7th Circuit shows that it can be done. In upholding summary judgment for the employer on a claim of FMLA retaliation, the Court said "the fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee" and the fact that he was fired on his first day back from leave did not establish that the leave was the cause of being fired. *Kevin Cracco v. Vitran Express, Inc.* (7th Cir. 3-09).

More Contractor Conundrum - Add Ohio to the list of states that have self-surveyed in order to measure the scope and impact of employers who misclassify their employees as independent contractors. The result? In a 2-18-09 report, the AG's office estimates annual losses to state coffers of \$100 million in unemployment comp payments, more than \$510 million in workers' comp premiums and almost \$180 million in state taxes. Add to that tally more than \$100 million lost by cities/towns in local income tax revenues and \$7.8 million lost by school districts. Those kinds of numbers are getting the attention of state legislators and agency administrators who are struggling with slashed budgets. With no state income tax and a voluntary workers' comp system, Texas employers may be tempted to think compliance efforts won't darken their doors, but the drumbeat has spread from state-level action to a bill filed last year in Congress (See LB4HR #10-2008) that would affect virtually all U.S. employers. H.R. 6111 & S. 3648 are expected to be refiled in Congress shortly.

8. **FAR Out Requirement** - The Federal Acquisition Regulation (FAR) is putting federal government contractors in an uncomfortable role, via language in the final rule for the Trafficking Victims Protection Act (TVPA). The TVPA is meant to stem the tide of human trafficking, whether it be for slavery, sexual exploitation or similar reasons. The final rule says neither contractors nor their employees are to engage in human trafficking or use forced labor, during the term of the government contract and an employee's off-the-clock lapse in judgment, shall we say, may result in revocation of said contract. During the comment period, it was argued that surely the FAR did not mean to encompass employee conduct that occurs after hours and/or off the clock, but FAR nipped that view in the bud by stating that the statute would be inadequately implemented if that interpretation were true "since employee violations are more likely to occur after working hours." To top it off, there is no exclusion for commercial sex acts that are obtained lawfully (think NV brothels) and the final rule requires employers to self-report any violations. For materials on this touchy subject, go to www.state.gov/g/tip/c26189.htm.

Until next time,
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Retirement Plan Sponsors: Could Your 401(k) Benefit from a Roth Feature?

Retirement plan sponsors have a dizzying array of options available to them as they attempt to create a meaningful benefits package for their participants. One optional feature that may be well worth considering is the Roth 401(k). A Roth 401(k) combines features of a traditional 401(k) with those of a Roth IRA. Like the traditional 401(k), the Roth 401(k) allows participants to make contributions via salary deferrals. However, like a Roth IRA, contributions are made on an after-tax basis and participants may take tax-free distributions at retirement, as long as certain holding requirements are met.

The Roth 401(k) was authorized under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") and the IRS issued final regulations for Roth 401(k) plans, effective January 3, 2006. The Pension Protection Act of 2006 ("PPA") made the Roth 401(k) permanent by withdrawing the sunset provision that would have eliminated the Roth 401(k) feature by 2011. If interested, plan sponsors have the ability to amend their existing traditional 401(k) plan to offer Roth 401(k) accounts as an additional option for participants.

Plan Requirements

An existing traditional 401(k) plan must make a formal amendment to the plan's documents to allow explicitly for designated Roth 401(k) contributions. Operationally, Roth 401(k) contributions and earnings are maintained in a separate account from the traditional 401(k) contributions and earnings. Plan participants must make an election for a portion or all of their salary deferral contributions to be treated as a contribution to the Roth 401(k) account.

Contributions

Unlike contributions to a traditional 401(k) plan that are made with pre-tax dollars, contributions to a Roth 401(k) plan are made on an after-tax basis. The maximum contribution amount to a Roth 401(k) account is the same maximum as in a traditional 401(k). For the 2009 tax year, federal laws permit a maximum annual contribution of \$16,500 (\$22,000 for participants age 50 and older), although employers may impose a lower limit. A plan participant may make any combination of Roth and/or traditional 401(k) contributions up to that limit.

Employee Roth contributions are eligible for an employer match, but all matching dollars are allocated to a pre-tax account and are not made as additions to the Roth "account". Also, any forfeiture amounts credited to a plan participant are added to the traditional 401(k) account rather than the Roth 401(k) account.

Tax-free Distributions

Like the assets in the traditional 401(k), Roth 401(k) assets accumulate tax-free. However, unlike the traditional 401(k), qualified distributions may be taken tax- and penalty-free from the Roth 401(k) account. Qualification requires that withdrawals are made after the account holder has attained age 59 ½ (or in the event of death or disability) and that a minimum of five years has elapsed from January 1 of the year of the first contribution to the Roth 401(k) account. If both of these requirements are met, the distributions from the Roth 401(k) account will be tax- and penalty-free. Non-qualified distributions (taken prior to satisfying the qualification requirements) of any investment earnings will be taxable and both contributed amounts and any investment earnings may be subject to the 10% early withdrawal penalty.

Rollovers

After the participant has separated from service, distributions from the Roth 401(k) account may be rolled over into another Roth 401(k) or Roth 403(b) or to a Roth IRA. It is important to note, regarding the 5-year holding period, that while moneys transferred from one Roth 401(k) to another Roth 401(k) carry forward the original holding period start date, distributions rolled into a Roth IRA do not – the five year rule applicable to the Roth IRA will restart as of the date amounts are rolled over from the Roth 401(k). In some cases this may not present a problem because the rules for Roth IRAs allow the IRA owner to withdraw his or her “basis” (i.e., the after-tax amount originally contributed to the Roth 401(k)) tax-free, even in the event of a nonqualified distribution. In the case of a rollover of a qualified distribution, the entire amount of the rollover becomes basis in the Roth IRA and can, therefore, be withdrawn tax-free.

No Eligibility Requirements Based on Income Limits

Any employee eligible to participate in the traditional 401(k) is likewise eligible for the Roth 401(k). Unlike Roth IRAs where single individuals with more than \$110,000 in adjusted gross income (married couples who have more than \$160,000 in adjusted gross income) are ineligible for contributions, there are no income limitations on participating in the Roth 401(k). For some plan participants, this fact alone may make participation in the Roth 401(k) more attractive; if they are ineligible to participate in a Roth IRA, the Roth 401(k) may be their only option to save for tax-free distributions.

Required Minimum Distributions

Required Minimum Distributions (“RMD”) are generally required to be taken annually from assets held in a retirement account, starting when participants reach age 70 ½. One exception to this rule is the Roth IRA, which does not require RMDs. However, the Roth 401(k) account does not share in this exception - generally, RMDs must be taken annually as long as there are assets held in the Roth 401(k) account. If the Roth 401(k) holder rolls his/her Roth 401(k) assets to a Roth IRA after separation from service, the RMD rules will not apply (however, the five year holding period for those assets will restart).

Participant Choice

Your plan participants may find making the traditional versus Roth 401(k) decision difficult. Unfortunately, there is no easy answer. Each individual must attempt to analyze the value of receiving a current income-tax deduction when contributing to a traditional 401(k) versus the benefit of contributing to a Roth 401(k) and having the potential for no taxation on future distributions from the plan. Part of the decision hinges on whether personal income tax rates will rise or fall in the future – not an easy forecast to make.

Many plan participants may elect to split contributions between their traditional 401(k) and a Roth account. If an employee qualifies for a Roth IRA, he or she can make after-tax contributions to the Roth and pre-tax contributions to the traditional 401(k). If not, then the plan participant can split contributions between the traditional and Roth 401(k) options.

Implementing the Roth 401(k)

If you decide that a Roth 401(k) plan may be appropriate for your business, you should speak with your current plan provider about implementing this feature for your plan.

Rick Cantu is a Financial Advisor located in Plano, Texas and may be reached at 972-943-7243 or at ricardo.m.cantu@smithbarney.com.

Smith Barney does not provide tax or legal advice, and it is important to consult with a tax or legal advisor before investing.

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Services Offered to Employers and Employees.