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SEXUAL ORIENTATION DISCRIMINATION

11th Circuit affirms stance on sexual orientation bias, sex stereotyping

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently upheld its interpretation of whether claims based on sexual orientation, gender identity, and sex stereotyping are permissible under federal employment discrimination laws. The decision provides Florida employers valuable guidance on managing sexual orientation and gender identity issues in the workplace.

Facts

Jameka Evans, a gay female, filed a complaint against her former employer, Georgia Regional Hospital. She alleged that she was discriminated against and harassed in a variety of ways during her tenure at the hospital. She claimed the discriminatory actions were motivated by her sexual orientation and the way she presented herself. Specifically, she contended that the hospital discriminated against her because she behaved in a masculine—rather than a feminine—manner.

Because of defects in Evans' complaint and the fact that federal employment discrimination laws lack language indicating that sexual orientation is a protected characteristic, the district court dismissed her claim. She appealed to the 11th Circuit.

Opinion of the appellate court

The 11th Circuit reaffirmed its position on whether sex-stereotyping claims and sexual orientation discrimination claims are actionable under federal antidiscrimination laws. The court held that sex-stereotyping claims are actionable but claims based on sexual orientation are not.

First, the court held that sex-stereotyping claims are viable in the 11th Circuit. The premise of sex-stereotyping claims is that when an employer discriminates against an employee because she does not act in accordance with her gender, it is a form of gender or sex discrimination. Sex and gender are expressly protected under Title VII of the Civil Rights Act of 1964. Thus, when an employer discriminates against a female employee for not acting feminine or a male employee for not acting masculine, it engages in a form of sex discrimination. The court noted, however, that Evans' complaint did not contain enough facts to support her allegation. The court sent the matter back to the district court so she could amend her complaint.

The court held that Evans' claim that she was discriminated against because of her sexual orientation was properly dismissed because it could not

be asserted under federal antidiscrimination laws. Citing past precedent, the court held that sexual orientation is not a protected characteristic under federal law. Further, the court held that just because gender nonconformity and sex-stereotyping claims are permissible under federal law does not mean that claims based entirely on sexual orientation are permissible given how protected characteristics are defined in the statute. The court noted that over the years, Congress has considered many bills that would have protected individuals from discrimination based on sexual orientation, suggesting Congress did not contemplate sexual orientation discrimination claims when it enacted the Civil Rights Act in 1964 and amended it in 1991. *Evans v. Georgia Regional Hospital, Charles Moss,* No. 15-15234 (11th Circuit, 2017).

What does this mean for employers?

The status quo for sexual orientation discrimination and sex-stereotyping claims in the 11th Circuit remains intact with this decision. Employers should be cognizant of the line between those two types of claims. Make sure that your policies—and the application of your policies—are consistent with the court's interpretation of the law. Note that some municipalities have provisions that forbid sexual orientation discrimination, so make sure you are in compliance with those laws as well.

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FAMILY AND MEDICAL LEAVE

Unforeseeable leaves of absence under the FMLA: FL employer shows what not to do

by Tom Harper
The Law and Mediation Offices of
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Many Florida employers require employees to use paid time off (PTO) in conjunction with Family and Medical Leave Act (FMLA) leave. That means that depending on how much PTO an employee has in her "bank," her FMLA leave could be "with pay." Under FMLA regulations, such a policy is legal. However, in a recent decision, the 11th Circuit viewed an employer's e-mails reminding an employee of her PTO use as evidence that the employer discouraged her from taking FMLA leave. Read on to see what happened.

Background

Jill Diamond is a licensed clinical social worker who began working for Hospice of Florida Keys, Inc. (HFK), in 2011. HFK provides at-home healthcare services for Monroe County residents who have been diagnosed with serious or terminal illnesses. Diamond was the only full-time social worker. HFK employed two part-time social workers. The social workers' duties included preparing care plans for patients, making financial and psychosocial assessments of patients and their families, implementing bereavement programs for surviving family members of patients, and coordinating volunteer services for patients.

In the summer of 2013, Diamond's parents began having health problems. Her parents lived in Central Florida, about 150 miles away from her. Diamond began taking long weekends to visit them and help with their medical problems. From June 2014 to February 2015, she asked for and was granted several days of medical leave to care for her parents.

Like many Florida employers, HFK had a written policy that required employees to take earned PTO hours concurrently with FMLA leave. As a result, HFK had a standard policy of sending employees written notices to warn them when their PTO balance was low and that the exhaustion of PTO, along with absences, could adversely affect their job and benefits. The notices did not mention FMLA leave at all.

After taking FMLA leave, Diamond often received notices from HFK warning that her PTO balance was low. According to the employer, its standard practice was to notify employees when their PTO balance dropped below 16 hours, regardless of whether they had taken FMLA leave. Sound familiar? The memo to Diamond stated:

> This memo . . . is to caution you about the request for and use of PTO and allowing your PTO account balance to become zero or near zero. *No additional hours of PTO . . . will be approved without sufficient balances to cover such leave. . . . The exhaustion of PTO, along with absences[,] can also adversely affect full[-]time or other position status and benefits.* [Emphasis added.]

In March 2014, Diamond began feeling pressure from HFK about her time off. She learned that her mother was seriously ill and asked to take off March 21 and March 24, a Friday and Monday, to help her parents. Her request was granted. But while she was off, the HR manager sent a memo asking her to provide an updated medical certification from a healthcare provider stating that one of her parents had an FMLA-qualifying health condition.

When Diamond came back from the long weekend, HFK's CEO warned her that if she worked for another company while she was off, she would be out of a job. On March 28, a new HR manager, Michelle Chennault, sent Diamond an e-mail requesting "documentation to support your unscheduled leave beginning on Friday, March 21, 2014." In addition to requesting an updated

certification, Chennault's e-mail asked Diamond to provide other documentation "to support the need of intermittent use of FMLA [leave] when a 30[-]day advance notice is not provided," such as travel or healthcare provider receipts. Chennault told Diamond that supporting documentation would be required if she took FMLA leave with less than 30 days' advance notice. According to Diamond, she had never been asked to provide travel receipts or similar documentation before.

Diamond's mother was hospitalized on March 28, 2014, a Friday. The following Monday, Diamond submitted two FMLA leave requests to care for her parents. Her requests, which covered days before and after weekends in April, were granted. She was off work from April 2 to April 7 and returned to work a day early.

Diamond asked Chennault for clarification of which receipts HFK needed. Chennault wrote in an e-mail that HFK was requesting "proof of need," which "can

ASK ANDY

Internal investigations: duty to investigate and confidentiality

by Andy Rodman
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Q *A female employee recently complained about sexual harassment allegedly perpetrated by her male supervisor. She told HR that she doesn't want an investigation conducted or any action taken and that she wants the matter to remain strictly confidential. She resigned the next morning before HR decided how to handle the complaint. Should HR still investigate the allegations?*

A It is not uncommon for an employee to bring a complaint to HR's attention and ask HR to do nothing about it. Do not listen to your employee. *All* complaints should be investigated, even if the employee resigns immediately after raising them.

You may ask why. Well, for starters, if the complaining employee files a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) or brings a lawsuit and you never investigated the allegations, you probably won't have the facts necessary to defend your company against the claim. And there is a good chance that neither the EEOC nor a jury will readily accept your explanation that "she resigned the next morning."

Also, remember that you have a duty to *all* of your employees, not just the employee who complained. For example, if there is merit to the employee's sexual harassment claim and you ignore the complaint because she insists on inaction or resigns, you expose the company to potential liability for *future* conduct the alleged perpetrator takes against the complaining employee (if she remains employed) or other employees.

To understand the point, consider the following scenario: You're sitting in a courtroom as the complaining employee's attorney tells the jury:

> Ladies and gentlemen, you have seen evidence that Jane Smith told HR that Supervisor Sam groped and fondled her repeatedly. HR admittedly ignored Jane's complaint simply because she resigned the next morning. Over the next three weeks, Supervisor Sam groped and fondled my client, Paula Plaintiff. If only HR had taken Jane's complaint seriously by investigating her allegations and disciplining or terminating Supervisor Sam, then I would not be speaking to you about my client. The psychological harm suffered by Paula Plaintiff easily could have been avoided if HR had just done its job.

But what about confidentiality? Should you comply with an employee's insistence on confidentiality? No. It's very difficult, if not impossible, to conduct a thorough sexual harassment investigation without disclosing to others (at a minimum, the alleged perpetrator) the name of the complaining employee and the specific allegations. When responding to the complaining employee's request for confidentiality, it's best to explain that confidentiality will be maintained to the extent possible and that information will be disclosed to others only on a "need-to-know" basis. The explanation may prompt the employee to withdraw her complaint, but move forward with the investigation. If litigation ensues, you'll be happy you did.

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Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

AGENCY ACTION

BLS figures show work stoppages down during recent decades. The U.S. Bureau of Labor Statistics (BLS) announced in February that there were 15 major work stoppages involving 99,000 workers during 2016. Private industry organizations accounted for more than 94% of the 1.54 million total days idle for major work stoppages in effect during 2016. Over the past four decades, major work stoppages declined approximately 90%. The period from 2007 to 2016 was the lowest decade on record, averaging approximately 14 major work stoppages per year. The lowest annual number of major work stoppages was five in 2009. In 2016, the information industry had the largest number of workers involved in major work stoppages, with 38,200. Educational services were the next largest industry, with 33,600, followed by health care and social assistance, with 12,100 workers. In 2016, the largest major work stoppage in terms of number of workers and days idle was between Verizon Communications and the Communications Workers of America union, which involved 36,500 workers. That work stoppage accounted for 1,204,500 total days idle.

New voluntary self-identification of disability form approved. The federal Office of Management and Budget (OMB) has approved a new form for workers to self-identify disabilities. No changes have been made to the form except for a new expiration date, which is now January 31, 2020. The Office of Federal Contract Compliance Programs (OFCCP) requires federal contractors to ask workers to voluntarily identify if they have a disability. Federal contractors need that information to measure their progress toward achieving equal opportunity for people with disabilities. In announcing the new form, the OFCCP reminded employers that ensuring equal employment opportunity is the law as well as good for business. The agency also reminded employees that the form is voluntary and can't be used against them or shared with supervisors or coworkers but that it enables contractors to measure their progress toward equal employment opportunity.

Earnings decrease reported. Real average hourly earnings for all employees decreased 0.5% from December to January, seasonally adjusted, according to figures from the U.S. Bureau of Labor Statistics (BLS). The decrease was attributed to a 0.1% increase in average hourly earnings combined with a 0.6% increase in the Consumer Price Index for All Urban Consumers. Real average hourly earnings for production and nonsupervisory employees decreased 0.4% from December to January, seasonally adjusted. This result stems from a 0.2% increase in average hourly earnings combined with a 0.6% increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers. ✤

include food receipts in the city where your parents reside, anything from the hospital with dates you were out (discharge papers), [or] any receipts for lodging, food or gas in the vicinity of your parents' home." On April 8, Chennault wrote the following statement to Diamond in her response:

> *Your continued unpaid time away from the workplace compromises the quality of care we are able to provide as an organization*. We understand that family emergencies arise and time away is occasionally necessary. [The] FMLA is designed to help you with that, but there are requirements for approval of FMLA [leave] without notice. The documentation we have requested to certify your time away starting March 21, 2014[,] is necessary. Please provide documentation for previous days in which FMLA [leave] was requested without 30 days' notice in March 2014 up to April 7, 2014[,] before close of business Friday, April 11, 2014. [Emphasis added.]

On April 10, Diamond responded by telling Chennault that she had reviewed all the FMLA paperwork given to her and HFK's policy and could not find any mention of documents needed for leave requested without 30 days' notice. She also told Chennault that she did not believe her leave was negatively affecting her work and asked how her absences were "compromising the quality of care [HFK] provides." Within two hours, Chennault informed Diamond that her time off had been approved as family and medical leave. Chennault began the e-mail by stating, "Let me be clear, we are not in any way attempting to deny your request for FMLA [leave]."

The documents requested by HFK had nothing to do with whether Diamond had a legitimate need for leave.

Two weeks later, Chennault responded to Diamond's request for clarification of how her absences were harming patient care by stating:

> As for quality of care suffering: repeated instances of care plans not being updated on a timely basis and an instance of a patient . . . without a care plan have been documented. Time sheets with visits are not being completed in a timely manner as determined by your supervisor. The bereavement group (a responsibility in your job description) had to be coordinated and facilitated by the social work supervisor. *These are document[ed] examples of "quality of care" suffering due to repeated "emergent" leaves of absence*. [Emphasis added.]

On April 30, 2014, HFK terminated Diamond's employment. Chennault gave Diamond a memo titled "Facts Regarding Termination." The memo noted that Diamond did not update her care plan notes and left the building during a state survey without authorization on April 29. (HFK had a written policy stating that during a state survey, employees could not leave without checking with the clinical director.) The termination memo also said that two of Diamond's patients had not had social work

contact since March and that they were supposed to have contact every two weeks.

Diamond sued HFK for interfering with the exercise of her FMLA rights and retaliating against her for exercising her FMLA rights. After both sides conducted months of discovery (pretrial fact-finding), HFK filed a motion asking the federal court in South Florida to dismiss the case.

Judge James Lawrence King agreed with HFK and entered an order dismissing both of Diamond's claims, finding that her interference claim failed because she did not show she suffered prejudice (harm) as a result of any interference. After all, HFK granted all her requests for leave. Over 18 months, HFK approved 15 different requests for FMLA leave. Her retaliation claim also failed because she did not establish that the reasons for her termination were pretextual (i.e., the reasons were untruthful).

Diamond did not quit there. She appealed to the 11th Circuit. A three-judge panel had a different view of her case, reinstated both of her claims, and said a jury should hear her case.

Court's decision

First, the appeals court explained that unlawful employer interference with FMLA leave "includes not only refusing to authorize FMLA leave (which [HFK] did not do), but also 'discouraging an employee from using such leave.'" The appeals court pointed out that *the motive* of the employer is not relevant to FMLA interference claims under current law. Looking at Chennault's April 8, 2014, e-mail, the appeals court disagreed with Judge King and ruled that a jury could interpret the e-mail as a warning that taking additional FMLA leave could put Diamond's employment in question.

The court also considered HFK's requests for extra documents other than the medical certification from Diamond's parents' doctor. Noting the language in the FMLA regulations, the court stated:

> When an employee takes unforeseeable FMLA leave (less than 30 days' notice), the employee must notify the employer as soon as practicable in compliance "with the employer's usual and customary notice and procedural requirements for requesting leave," and the employee must "respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying."

However, the documents requested by HFK had nothing to do with whether Diamond had a legitimate need for leave or whether she had given reasonable notice to the employer. Rather, the court thought the food and travel receipts were used to determine whether Diamond was being truthful about her need to help her sick mother. The appeals court viewed the requests as evidence that HFK tried to discourage Diamond from taking FMLA leave.

Regarding Diamond's retaliation claim, the closeness in time between her last FMLA leave request and her termination made the appeals court believe a jury could conclude that her

WORKPLACE TRENDS

Research predicts automation of certain HR functions. A national study from CareerBuilder says that 72% of the employers surveyed expect that some roles within talent acquisition and human capital management will become completely automated within the next 10 years. The rate at which companies with 250-plus employees are adopting automation varies considerably. Although more are turning to technology to address time-consuming, labor-intensive talent acquisition and management tasks, which are susceptible to human error, the study shows a significant proportion continue to rely on manual processes. Thirty-four percent of employers don't use technology automation for recruiting candidates, 44% don't automate onboarding, and 60% don't automate human capital management activities for employees, according to the research. The study, which was conducted online from November 16 to December 1 and included 719 HR managers and recruiters at companies with more than 250 employees across industries in the private sector, shows that most of the automation is centered around messaging, benefits, and compensation.

Study explores why workers join on-demand economy. A new study from financial software giant Intuit Inc., "Dispatches from the New Economy: The On-Demand Workforce," looks at the motivations, attitudes, and challenges of the 3.9 million Americans working in the on-demand economy. The study, which features data from 6,247 people working via 12 on-demand economy and online talent marketplaces, found that people engaged in on-demand work are looking for flexible opportunities to smooth out unpredictable income while also testing ways to build a secure financial future. The findings show that on-demand work is used to supplement existing income, fill near-term financial needs, and build a sustainable future. The study also found that there is general satisfaction with on-demand work.

Research looks at why employees quit. Glassdoor has released a study showing that employees who stagnate in a job too long are more likely to leave their employers rather than move to a new role within the company. The research examined more than 5,000 job transitions from résumés submitted to Glassdoor's job and recruiting site and combined that data with company reviews and salaries shared by employees to understand the statistical impact of various factors on employee turnover. The report also finds high employee satisfaction, better opportunities for career advancement, the quality of an employer's culture and values, and higher pay lead to better employee retention. The report warns employers that employee turnover costs 21% of an employee's annual salary. ✤

UNION ACTIVITY

AFL-CIO leader calls Boeing union vote rigged. AFL-CIO President Richard Trumka spoke out against the union vote at the Boeing South Carolina plant, saying "it was a process rigged against the people who do the work." Boeing announced on February 15, 2017, that 74 percent of the plant's workers who voted in the election voted to reject the International Association of Machinists' bid to unionize the site. The vote "is not the end," Trumka said. "It is part of the resurgence of working families changing the rules of our economy and through unions, creating an America where wages and benefits are strong."

Union leader speaks out against private prisons. Lee Saunders, president of the American Federation of State, County, and Municipal Employees, is criticizing the U.S. Department of Justice's (DOJ) reversal of the Obama administration's decision to phase out the federal government's use of private prisons. He said the new decision "puts corporate interests first." He also claimed that for-profit prisons provide less security at a higher cost to taxpayers. "Private prisons are dangerous and overcrowded, with inexperienced staff and unsanitary conditions," Saunders said. "At all levels of government, we should be phasing them out, not propping them up."

UFCW leader praises immigrant protest. Marc Perrone, international president of the United Food and Commercial Workers Union (UFCW), spoke out in support of the "A Day Without Immigrants" protest held in February in which employees were encouraged to stay home for a day and employers were urged to close to call attention to the role immigrants play. "Immigrants make incredible contributions to our lives, communities, and country each day," Perrone said. He added that "our union family has seen firsthand the damage that irresponsible employers can cause through exploitive labor practices that hurt immigrants and drive down wages, benefits, and working conditions for all workers."

Pilots union criticizes FAA decision. Captain Tim Canoll, president of the Air Line Pilots Association, in February spoke out against the Federal Aviation Administration's (FAA) operational approval of Norwegian Air International (NAI) to fly to the United States. "Given President Trump's stand on U.S. jobs and pledge to put 'America First,' we encourage him to defend a fair marketplace for U.S. workers and bring a quick end to the development of foreign flag-of-convenience airlines," Canoll said. "The first step is to overturn the Obama administration's grant of a permit to [NAI]. NAI's authority permit should be revoked or amended to prevent it from gaining a competitive leg up in the marketplace and threatening the U.S. airline industry, which is vital to our country's economy, defense, and workforce." ✤

leave in March and April 2014 was causally related to her termination in early May 2014. The negative e-mails from Chennault were enough to allow a jury to decide whether Diamond was a victim of retaliation. *Diamond v. Hospice of Florida Keys, Inc., d.b.a. Visiting Nurse Association of The Florida Keys,* No. 15-15716 (11th Cir., January 27, 2017).

Takeaway

When questioned under oath during pretrial discovery, Chennault conceded that although employers can require employees to use PTO concurrently with FMLA leave, the two are unrelated. Thus, if an employee has no PTO remaining, she is nonetheless entitled to FMLA leave. The appeals court picked up on that. The court noted that during the period Diamond asked for leave and received memos about her declining PTO balance, HFK decided to stop sending the memos to employees because it recognized that they could be construed as threats against employees who exercised their FMLA rights, even though they said nothing about FMLA leave. That may be something you should consider.

Note that the appeals court did *not* say, "Diamond wins!" Instead, it resurrected her dismissed case and said a jury should decide whose version of the story to believe.

You may contact the author at tom@employmentlawflorida.com. ✤

IMMIGRATION

Be in compliance with I-9 requirements for remote workers

The Trump administration's aggressive stance on immigration enforcement suggests that employers should be prepared for an increase in workplace audits and document inspections from U.S. Immigration and Customs Enforcement (ICE).

Here are some timely questions—and our guidance—on how best to comply with the requirements of Form I-9 when you have remote workers.

Questions answered

Q *Is it acceptable to use Skype or FaceTime to complete I-9s for remote workers?*

A Unfortunately, no—and U.S. Citizenship and Immigration Services (USCIS) addresses this directly in its FAQ (available at www.uscis.gov/i-9-central). When an employee presents authorization documents required by List A or Lists B and C of Form I-9, these documents must be *physically* examined by the person completing Section 2 of Form I-9. This review must also occur in the presence of the employee. So reviewing or examining these documents via webcam, Skype, FaceTime, or similar remote services isn't permissible.

If you have remote employees who won't report to the physical workplace premises, then you may have a third party act as an authorized representative of the employer to review these

documents and fill out Form I-9. However, this authorized representative *must* be able to physically review the documents. If that isn't feasible, then another representative who can review the documents must be selected.

Q *Are we required to hire a notary public as our authorized representative?*

A When an organization has no authorized representative or agent in the same geographic area as the remote worker, the employer may use a notary public to perform this service. After all, USCIS specifically notes that employers "may designate or contract with someone such as a personnel officer, foreman, agent, or anyone else acting on your behalf, *including a notary public,* to complete Section 2." However, not only are you not required to do so, but a notary may not be the best choice.

First, it's important to understand that the authorized representative serves as an agent of the employer, so if the authorized representative makes a mistake or misrepresentation in verifying documentation or filling out Section 2 of Form I-9, then the employer—not the individual representative—is liable for the mistake. So it's in your best interest to ensure that the person reviewing your employees' documentation and completing Form I-9 is as familiar with the process—and its pitfalls—as you would be if you were completing the form yourself.

Yet some notaries may be no more familiar with the I-9 process than the average layperson—and many are decidedly *uncomfortable* with the process. For example, are you certain the notary is familiar enough with the various List A, B, and C documents to reasonably ascertain their validity if a document other than a driver's license or Social Security card is provided? Can you be certain that a notary, when presented with one of the more uncommon yet acceptable List A documents, won't ask to see a different form of identification with which he is familiar?

Though a notary may often be valuable in his official status as a trustworthy and impartial party, when serving as your *authorized representative,* it's more important that the notary adequately serve *your* needs—in this case, accurate compliance with the I-9 process.

There is no need to have an I-9 notarized—in fact, notaries specifically should *not* affix their seals to the I-9 because they are *not* acting in their official capacity as notaries public. So there's no specific incentive to hire a notary for this task. In fact, some states prohibit or restrict notaries from participating in the I-9 process.

Bottom line

Because of the increase in risk of liability—both in increased fines and enforcement initiatives—employers that regularly hire remote workers should simply ensure that those employees' I-9s are completed with the same level of care that would be taken if the workers were in-house. Depending on your operations, this may mean using a third-party I-9 vendor that provides verification services across the United States, using other qualified authorized representatives in your new hires' locations, or arranging for your new hires to come to the company headquarters for a tour, introduction, and onboarding. ✤

EMPLOYEE BENEFITS

FSAs: two exceptions to 'use it or lose it'

Generally speaking, money contributed to a health flexible spending account (FSA) in any plan year can be used only to reimburse qualified expenses incurred during that year. Money not used to reimburse eligible medical expenses incurred during the plan year is forfeited.

The unused portion of a participant's health FSA may not be paid to the participant in cash or any other benefit. Arrangements outside a cafeteria plan adjusting salary to compensate for health FSA forfeitures may jeopardize the qualification of the FSA because it could be viewed as impermissible risk-shifting.

Forfeitures are calculated after the expiration of an optional "run-out" period (typically three months). While an employer isn't required to offer run-out periods, they allow employees to continue submitting claims for reimbursement during a specified time following the end of the year. During that period, reimbursement is drawn against the prior year's health FSA for claims incurred during the previous plan year only.

Because the "use-it-or-lose-it" rule requires employees to forfeit any money that is left in their health FSA at the end of the plan year, it's the health FSA rule that is most relevant to employees. However, there are two key exceptions employers should be aware of.

Two exceptions

Grace period. An employer may offer employees a grace period of up to two months and 15 days to incur and be reimbursed for qualified medical expenses from their FSAs if the cafeteria plan document provides for that. The grace period, unlike the run-out period, essentially extends the length of the reimbursable year itself rather than merely the period for submitting claims from the previous 12 months.

Carryover rule. In 2013, the IRS gave employers another option. In Notice 2013-71, the agency announced that health FSAs can have up to a $500 carryover of unused amounts from the prior plan year to the next plan year. A health FSA carryover limit may be less than $500, and carryovers are optional. Employers don't need to adopt them. On the first day of the new plan year, the entire carryover amount is available. Note that a participant in the prior plan year need not participate in the health FSA in the new plan year to qualify for the carryover.

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5-18 Ironclad Employment Documentation: How to Legally Support Your Actions and Minimize Risks ✤

Employers must choose one or the other (or neither)

An employer cannot have a health FSA with both a carryover and a grace period. The two health FSA features are incompatible. Therefore, an employer that offers a health FSA with a current grace period must eliminate that period by the same deadline that applies to the carryover.

Which is better?

Readers have asked us whether it's better to offer a carryover or a grace period, and the answer is a firm "it depends." While both grace periods and carryovers tend to reduce the frantic year-end employee rush to spend unused FSA dollars, the grace period merely delays the panic by a few months.

For employers, allowing carryovers (which can continue carrying over year after year) can add to administrative and record-keeping burdens. From the employee perspective, depending on an individual employee's medical spending, it's a toss-up as to whether it's preferable to have $500 to use anytime during the following year (carryover) versus potentially a larger amount that must be used by mid-March (grace period).

Good communication is key

Regardless of whether you adopt a grace period, a carryover, or neither, it's important to educate employees about the importance of accurately predicting their annual out-of-pocket medical expenses. This would include deductibles, copayments, and all anticipated reimbursable expenses. Generally, it's better to underestimate the expenses and pay a little extra tax than to overestimate expenses and forfeit money.

Additionally, to help reduce forfeitures, employees should be notified of their health FSA balances before the plan year ends. Three months' notice should be sufficient, although many employers already provide monthly or quarterly health FSA reports as part of their employee communications. This advance notice period should allow employees time to schedule nonessential medical or other care so that the entire amount in a health FSA can be used. ✤

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