EMPLOYEE ENGAGEMENT: LEGAL ISSUES AND PITFALLS

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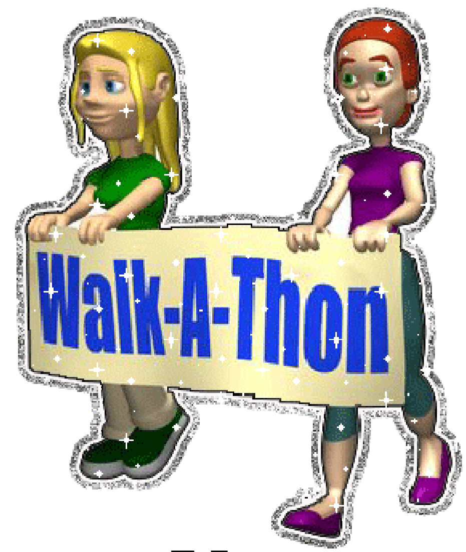
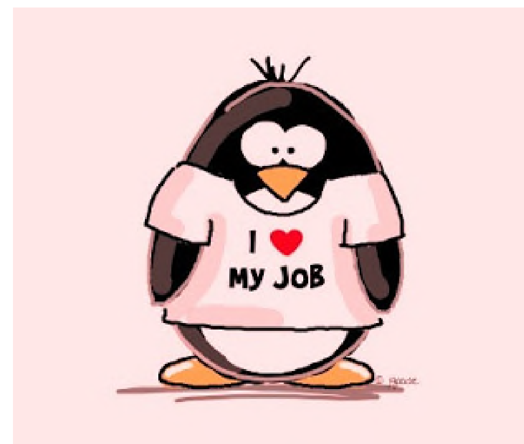
Corporate Philanthropy and Volunteerism can be Important Parts of an Employee Engagement Program

- Matching contribution programs
- Employee service days
- Walkathons
- Mentoring, tutoring programs



Rationale Behind Employee Engagement Programs

- Part of corporate culture
- Attractive to employees and recruits
- Employee morale and teambuilding
- Public relations benefits to company
- Improve relations with the community



Major Issues Associated with Employee Engagement Programs

- Tax issues for the company and the employee
- Liability exposure for the company
- Employment-related issues

Matching Contribution Programs – Different Models

- Allow employees to participate in determining company charitable contributions
- Company or company foundation matches employee charitable contributions
- Match volunteer service with dollars – “Dollars for Doers”

Issues Related to Matching Programs

- Tax consequences to employees – income to employees?
- Possible employee benefit issues
- Possible abuses
  - Is the employee benefiting economically from the match?
  - Need for process and some due diligence
  - Proper documentation

Special Issues When Match Made from Company Foundation

- "Incidental and tenuous" exception to self-dealing rules
- Foundation can't pick up an employee obligation
- Can't pay for employee's football tickets

Matching Internationally

- AML/OFAC issues
- Practical difficulties with foreign matching
  - Language issues
  - Verifying foreign charities can be time consuming
- Use of international donor advised fund
- If through foundation, then need to exercise expenditure responsibility or do an equivalency determination

Using the Company Foundation to Match Contributions to Foreign Charities

- PRIVATE FOUNDATION DISTRIBUTION RULES
  - Private foundations are required to make annual “qualified distributions” equal to 5% of their assets
  - Grants to “non-charities” are deemed to be taxable expenditures subject to penalty taxes unless expenditure responsibility is exercised

Grants to Foreign Charities

- Grants to foreign charities will be deemed qualified distributions and will not be treated as taxable expenditures if:
  - The foreign charity has been recognized by the IRS as a 501(c)(3) public charity
  - The donor foundation makes a good faith determination that the foreign grantee is the equivalent of a U.S. public charity by either:
    - Exercising expenditure responsibility, or
    - Making an equivalency determination

Expenditure Responsibility

- Pre-grant inquiry – limited inquiry concerning potential grantee
- Requires written agreement with grantee that
  - Requires repayment of amounts not used for grant purposes
  - There will be annual reporting
  - Books and records will be made available
  - Prohibits activities not consistent with 501(c)(3) status
- Donor must report expenditure responsibility grants on its annual Form 990-PF

Equivalency Determination

- Grantor private foundation makes a good faith determination that the foreign grantee is the equivalent of a U.S. public charity based on either:
  - An affidavit of the grantee
  - Written advice from an attorney, CPA, or enrolled agent that the organization is the equivalent of a U.S. public charity

Affidavit of Grantee

- Must be in English
- Requirements set out in Rev. Proc. 92-94
- Requires fair amount of information
- Grantee may find it difficult to provide

Opinion of Counsel

- Very expensive
- Proposed regulations permit advice from "any" attorney, CPA, or enrolled agent (not just counsel to the distributing foundation or donee organization) – should lower costs of equivalency determination
- Opens door to possibility of creating a "repository" of equivalency determinations available to any foundation

When to Use Expenditure Responsibility

- Grantee's governing documents are in a foreign language and not easily translated
- Grantee has poor recordkeeping
- Hard to determine whether grantee is a public charity
- One-time grant to grantee
- Need to make grant quickly – e.g., disaster relief

When to Make an Equivalency Determination

- Grantee is a church, school, or hospital
- Grantor anticipates making multiple grants to grantee over a period of years
- Grant is for capital equipment or for endowment
- General support grants, rather than support of a specific program
- Grantee will find it difficult to do annual reporting

Employment Law Risks and Mitigating Measures

Risk Factor 1 = Liability for unpaid wages

- Statutory presumption of employee status
- Class or multi-plaintiff liability

Mitigation

- Presumption rebutted where all of the following apply:
  - ✓ Volunteer/charity event unrelated to company's usual business
  - ✓ Employee participation does <u>not</u> bring direct economic benefit to company
  - ✓ Event takes place outside regular working hours
  - ✓ Employee participation is truly voluntary
  - ✓ Company does not employ and regularly pay workers to participate in event

Employment Law Risks and Mitigating Measures (cont'd)

Risk Factor 2 = Injury to employee

- ➢ Workers' compensation liability
- ➢ Civil liability (personal injury damages)

Mitigation

- Waiver of liability (limited utility) – consider use of electronic signatures
- Insurance
  - ✓ Review company policies (accident, GL, workers' compensation)
  - ✓ Review volunteer organization's policies (accident, GL, workers' compensation)
  - ✓ Procure special event or sponsorship insurance
- Indemnity agreement (utility depends on solvency of volunteer organization)

Employment Law Risks and Mitigating Measures (cont'd)

Risk Factor 3 = Injury to third party caused by employee

- Civil liability (personal injury damages)

Mitigation

- Insurance
  - ✓ Review company policies (accident, GL, workers' compensation)
  - ✓ Review volunteer organization's policies (accident, GL, workers' compensation)
  - ✓ Procure special event or sponsorship insurance
- Indemnity agreement (utility depends on solvency of volunteer organization)
- Volunteer Protection Acts – federal and state

Employment Law Risks and Mitigating Measures (cont'd)

Risk Factor 4 = Injury to third party caused by volunteer organization

- Civil liability (personal injury damages)

Mitigation

- Add company as additional insured under volunteer organization GL policy
- Indemnity agreement (utility depends on solvency of volunteer organization)

Employment Law Risks and Mitigating Measures (cont'd)

Additional considerations

- ✓ No alcohol
- ✓ Does company have "hired and nonowned" automobile insurance coverage
- ✓ Take reasonable precautions (water, adequate security, lighting)
- ✓ Training for volunteers
- ✓ Background checks for volunteers

Tax Issues to Employee

- No deduction for services
- If providing goods or services to employee or reimbursement, need to comply with fringe benefit rules