Monetizing employees may not be illegal, but it's not a good practice

Financial pressure can come from lots of different directions. Surely you're not responsible if employees blow their paychecks and then some on expensive stuff. However, according to the Consumer Financial Protection Bureau, employees can become indebted to their employers for the cost of essential tools and employer-mandated training. Surreptitious data collection, the sale of such data, and the subsequent marketing to employees is yet another problem the CFPB identified.

Debt traps

It's not uncommon for an employer to, say, pick up a new hire's moving expenses and then to forgive the debt ratably over, say, five years. If the employee leaves within this five-year period, they have to pay back the balance. Hiring bonuses sometimes work the same way.

This is acceptable for fringe benefits, since employees are free to turn down the fringe and shoulder the expenses themselves.

Payback agreements for mandated employer-provided training, however, aren't quite the same thing as a voluntary fringe. In one anecdote the CFPB related, a large health care provider required its fully licensed nurses to complete a *company-run* training program for which they would owe $10,000 if they failed to work full-time for the provider.

There are three problems we see right off the bat:

- State payday laws may prohibit these types of deductions, unless employees have consented in advance.
- Apparently, nurses who work part time would be on the hook for the $10,000. We're curious about the criteria used to determine whether nurses work full time or part time.
- $10,000 seems a bit high for a company-run program. We'd be curious to know the fair market value of the program.

A better strategy: Since this is job-related and employer-required, and employees are already licensed, it's possible for this training to fit snuggly into IRC § 162 and its accompanying regulations. Under IRC § 162, you can pick up 100% of employees' job-related educational expenses tax-free and you get a tax deduction for the full amount.

There are drawbacks to educational assistance provided under IRC § 162—principally the education can't qualify employees for new jobs. But if this is a *company-run* training program, we would think it likely the training was tailored to the company's specifications, which would preclude training employees for new jobs.

Marketing mayhem

The CFPB is also focused on the collection, buying and selling of employees' personal data for unrelated marketing purposes.

While the CFPB was concerned with data-collection tools used by platforms employing gig workers, you don't have to look too far to see how this problem can reach right into your workplace. Retirement plans such as 401(k)s, for example, collect a ton of valuable personal information about employees—their names, contact information, Social Security numbers, financial information, investment history, their specific investments, account balances, etc.

Employees at one company alleged their 401(k) plan's third-party record keeper shared their personal information with its affiliates, which then used the information to market profitable non-plan financial products and services, such as IRAs and credit cards, to them. They sued their employer, the plan fiduciaries and the record-keeper, arguing their personal information was a plan asset from which third parties could not profit.

They wanted a federal trial court to prohibit the record-keeper from marketing any more products to them. The third-party provider wanted the case dismissed.

The trial court ruled employees' personal information wasn't a plan asset and dismissed the case. *Court:* Under ERISA, a plan's assets include a plan's investments, but not data. Likewise, ERISA focuses on participants' contributions, but fails to mention data. Employees, therefore, had no case.

The takeaway: It's easy to sympathize with employees—no one wants junk phone calls, emails or texts. You should talk to your third-party providers to assess how or whether they will share employees' personal information. If the information will be shared for nonplan purposes, see if it's possible to negotiate a different outcome. If it's not, be up front and warn employees.

The case is Harmon v. Shell Oil Co.