Volume 7 : Issue 4

HR PROFESSIONALS MAGAZINE™

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Highlights of 2017 SHRM **Employment Law & Legislative** Conference

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Cammie Scott, **SHRM-SCP, SPHR** Chair, 2017 ARSHRM Conference & Expo

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About the instructor:

Cynthia Y. Thompson is Principal and Founder of The Thompson HR Firm, LLC, a human resources consulting company in Memphis, TN. She is a senior human resources executive with more than twenty years of human resources experience concentrated in publicly traded companies. She is also the Publisher | Editor of *HR Professionals Magazine,* an HR trade publication distributed to HR professionals in Tennessee, Alabama, Georgia, Kentucky, Mississippi, and Arkansas. The mission of the publication is to inform and educate HR professionals. Cynthia has an MBA and is certified as a Senior Professional in Human Resources by SHRM and HRCI. Cynthia is a faculty member at Christian Brothers University in Memphis teaching Human Resource Management. Cynthia also teaches online HR Certification Exam Prep Courses for HRCI and SHRM. She is a sought-after speaker on HR Strategic Leadership.

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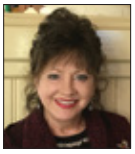

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Contents

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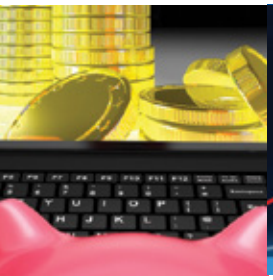

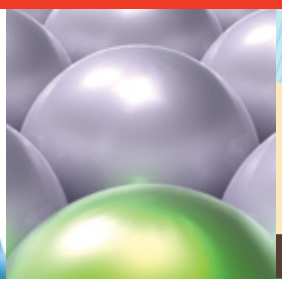

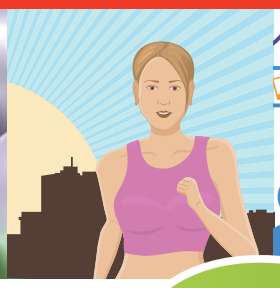

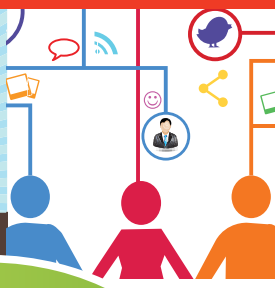

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Next Issue

Employment Law and Employee Benefits Update – Ads and article due by April 10

note from the editor

Great seeing Lisa Horn, SHRM Director Congressional Affairs, and Mike Aitken, SHRM VP Government Affairs, at the 2017 SHRM Employment Law & Legislative Conference in Washington, DC, March 13-15.

If you ask me what was the most exciting thing I remember about the 2017 SHRM Employment Law & Legislative Conference, I would have to say the weather. Winter Storm Stella dumped three to five feet of snow in the northeast while we were in DC. We traveled in sleet and ice by bus to the opening reception at the Smithsonian National Museum of African American History and Culture. The weather did not daunt anyone, and the conference sold out this year! The good news is everyone was already there before Stella arrived, and she left before we did on Wednesday, leaving behind only about four inches of snow. Actually, it was pretty exciting for this Memphis girl who rarely sees this much snow! Another memorable event was visiting the museum. It was a very emotional event that I highly recommend for everyone.

I was expecting a very exiting conference this year with the change in administrations in the White House, and I was not disappointed! It is hard to top Mike Aitken's and SHRM CEO Hank Jackson's presentation on the Washington Outlook for HR Public Policy. Mike is SHRM VP of Government Affairs, and his information is so pertinent and descriptive of the current legislative environment and its impact on Human Resources and our workforce! Kudos to Mike and his team for again putting together such an excellent conference! It remains my favorite of all the SHRM conferences. This is an experience every HR professional should have at least once in their career. But, I warn you - it's addictive!

You will enjoy the pictorial highlights of the Conference in this issue. The trip to Capitol Hill on Wednesday was just fabulous. SHRM Advocacy Teams visited with senators and staffers from Alabama, Tennessee, Georgia, Kentucky, Arkansas and Mississippi. The reception sponsored by SHRM's Advocacy Team on Tuesday evening was also a hit. HR professionals enjoyed mingling and discussing the political changes and the new regulatory agenda for 2017 and meeting the SHRM Government Affairs team.

Now we look forward to the 2017 spring SHRM Conferences. We are proud to be media sponsors for the MSSHRM State Conference & Expo in Tupelo April 3-5, the ARSHRM State Conference & Expo in Hot Springs April 5-7, and The TNSHRM Strategic Leadership Conference in Nashville April 21. We are also media sponsors for the SHRM Talent Management Conference & Exposition in Chicago April 24-26 for the first time! We are also covering the TPMA (Tennessee Personnel Management Conference) in Chattanooga April 19-21. Can you say "WOW?" I will bring you real-time coverage from each of these conferences on Twitter, Facebook, and LinkedIn. Please follow me on Twitter at @cythomps. We will also have highlights of these excellent conferences in the May issue. So you will not miss a thing!

Our monthly complimentary webinar sponsored by Data Facts, Inc. will be on April 25th at 2 PM. The topic will be announced by email. Please mark your calendars and plan to join us! You will earn 1.00 SHRM PDC and 1.00 HRCI recertification credit. Watch for your email invitation! If you are not on our distribution list, you can opt in on our website, www.hrprofessionalsmagazine.com, in the upper right hand corner.

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Cammie SCOTT

Cammie graduated with honors from the University of Arkansas with a Master of Science in Industrial Engineering and even served as President of the Industrial Engineering Honor Society and the Student Chapter of the Institute of Industrial Engineers. She began an enjoyable and challenging career in Industrial Engineering before her focus shifted to employee benefits and the field of human resources.

CAMMIE SCOTT, SHRM-SCP, SPHR
Chair of 2017 ARSHRM Conference & Expo

Cammie Scott is currently serving as Chair of 2017 ARSHRM Conference & Expo. In 2015 she was named Northwest Arkansas SHRM (NOARK) Human Resource Professional of the Year. She has also served as the Legislative Affairs Chair for NOARK, where she created a program entitled "Advocacy in Action'. This annual educational event averages 41 federal, state and local legislators and over 250 attendees. Cammie holds many certifications including Registered Employee Benefits Consultant (REBC), Senior Professional In Human Resources (SPHR) 2011, and Society of Human Resource Management Senior Certified Professional (SHRM-SCP) 2015.

Cammie founded her agency, CK Harp & Associates, in booming Northwest Arkansas and directs her staff in strategic planning to develop her clients' people, policies and processes. She has served as the President of the Northwest Arkansas Association of Insurance and Financial Advisors and as an Advisor to the State of Arkansas NAIFA. She graduated form the Leadership in Life Institute in 2006 where her success with LILI led her to become Chair of the Board. Cammie has earned numerous sales and productivity awards. She obtained her Life Underwriter Training Council Fellow (LUCTF) in 2000, and became a Registered Health Underwriter (RHU) in 2001.

Geoffrey Chaucer's "And she would gladly learn, and gladly teach," describes Cammie Scott. Her peers know that she likely knows the answer to their human resources and operations management questions, and she is just a call or text away. ■

ARSHRM 2017

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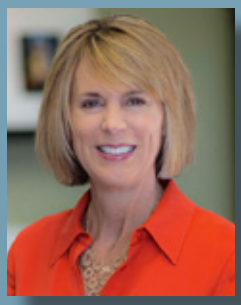
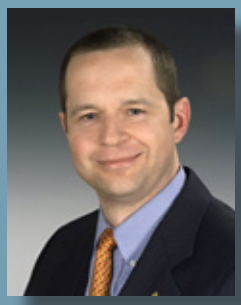
The Employee Experience that Matters

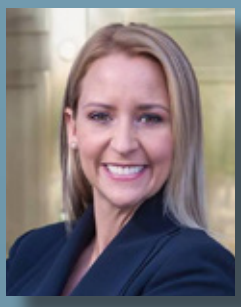


Elise Mitchell
Leading Thru the Turn



John Stolk
Improvement At the Speed of Thought

Kathleen McComber
Self-Aware Leadership



Leslie Rutledge
Role of the State Attorney &
Your Role in HR Leadership

Select your sessions from these three learning tracks:

BUSINESS

-New Form I9: *Shelia Moss*

-Employee Leaves of Absence: *Andrew Malahowski*

-Best Places to Work: *Judith Tavano*

-Millennial Majority: *Judith Tavano*

-HR Consultant: *Travis McNeal*

TEAMWORK

-Your Career Legacy: *Shelia Pierson*

-Field Presence: *Wes Booker*

-Legendary Leader-The Art of Successful Transition: *Cindy Christopher*

-Letting Culture Lead: *Geena Miller / Sheerah Davis*

-Mindful Leadership: *Pandit Dasa*

-Brain Business: *John Stolk*

LEGAL/COMPLIANCE

-LGBTQ: *Michelle Kaemmerling*

-Managing a Retirement Plan: *Kellu Majden*

-Ask Attorney Panel: *Amber Wilson Bagley / Cindy Kolb / Jess Sweere*

-Arkansas Legislative Updates: *Tim Hutchinson / Jeremy Hutchinson*

-NLRB: *Bruce Cross*

-The Privilege of Doing Business with the Federal Government: *Abtin Mehdizadegan*

-Workplace Safety Primer: Neemah Esmaeilpour

-Ask Attorney Panel: Medical Marijuana: *Wayne Young / Stuart Jackson / Rick Rodrick*

1 & **2** Hank Jackson, president and CEO, SHRM; and Michael P. Aitken, vice president, Government Affairs, SHRM, presented the Washington Outlook at the Welcome Breakfast on March 13.

3 & **4** Ana Navarro, CNN political analyst and GOP strategist; and Sally Kohn, CNN political commentator and Daily Beast columnist, were the Luncheon & General Sessions keynote speakers on March 13. **5** Chris Wallace, award-winning veteran journalist and host of "Fox News Sunday", was the keynote speaker for the Breakfast and General Session on March 14. He discussed what America will look like under our 45th president and what business organizations and individuals can expect from his administration. Photo by USAToday.Com.

6 Chai Feldblum, commissioner, U.S. Equal Employment Opportunity Commission, was the keynote Luncheon and General Sessions speaker on March 14. She discussed the latest developments in equal opportunity policy, recent guidance and promising practices to combat workplace harassment, as well as the outlook for the commission and its priorities. **7** Michael Beschloss, presidential historian, NBC News and "PBS News Hour" contributor, was the keynote speaker for the Closing General Session on Tuesday. He spoke about the hidden side of important personalities and behind the scenes developments that may soon have a major impact on your life. **8** Bob Carragher, SHRM senior state affairs advisor, spoke on March 12 to SHRM state council legislative directors about the impact of federal legislation on state legislation.

9 Joseph L. Beachboard, shareholder, Ogletree, Deakins, Nash, Smoak & Steward, P.C., Torrance, CA, spoke on the most important decisions from the Supreme Court on March 14. **10** Jonathan Segal, partner with Duane Morris LLP, Philadelphia, PA, spoke on state and local trends and what they mean for multi-state employers on March 13. He also spoke on the clash of rights and legal risks you may face when religion surfaces in your workplace on March 14. **11** Tammy McCutchen, shareholder with Littler Mendelson, P.C., spoke on what employers can expect from the U.S. Department of Labor's Wage and Hour division over the next four years.

12 J. Robert Carr, J.D., SHRM-SCP, SHRM senior vice-president, membership and external affairs; and Jeff Pon, Ph.D., SHRM-SCP, SHRM chief human resources and strategy officer, attended the conference. **13** Fred Bissinger, regional managing member of the Nashville, TN, office of Wimberly Lawson, addressed a question to Michael Beschloss during the Closing General Session on March 14.

14 Members of the ARSHRM Advocacy Team enjoyed breakfast together on March 14. **15** Lawrence LeBlanc, a member of the TNSHRM Advocacy Team met with Virginia Heppner, Health Professional Staff Member for U.S. Senator Lamar Alexander (R-TN), on Capitol Hill March 15.

16 SHRMGA Advocacy Team members met with U.S. Congressman John Lewis (D-GA) on the Capitol Hill visit March 15. **17** ALSHRM Advocacy Team members met with U.S. Senator Richard Shelby (R-AL) on the Capitol Hill visit March 15. **18** ARSHRM Advocacy Team visited with U.S. Senator Tom Cotton (R-AR) on Capitol Hill on March 15.

Ten Things Every HR Professional Should Know About the Future of Talent (Tools Edition)

By MARCUS BUCKINGHAM

It's a challenging and dynamic time to be in charge of talent. Challenging because labor is a seller's market, with the U.S. nearing full employment and a generation willing to leave jobs at the drop of a hat. Dynamic because that generation is one of four in the workforce right now, and 100% penetration of the mobile phone is opening up new technological possibilities in every sphere, including the talent space.

To try to make sense of this whirlwind, I'd like to tackle specific challenges and opportunities facing today's talent leaders one at a time. In future pieces, I'll address the changing roles of coaching, learning, data, organization design, and more, but for right now I'd like to focus on talent tools, which are so numerous and complex that even the analysts can't sort them all out, much less a busy HR pro.

I offer ten observations about where we have been, where we are, and where we are going — or at least should be going.

1. Talent management tools have focused on serving the needs of HR.

This may seem like a good thing. And it is. HR needs tools that help to move talent in and then move it around. And we should continue to expect innovation in this space, with better, faster, higher quality tools. But let's be clear. Talent management tools are created by HR and for HR. This leads to my second point.

2. Talent management tools are *not* built for nor willingly used by team leaders or team members. Nor should they be.

Here's a sentence you've never heard: "I've got a brand new team. I can't wait to get them on my HRIS!" These tools are not supposed to be used

by the team leader, so don't try to make them do it. It's making a category error, like expecting a train to take you right to your doorstep. The train does an important job. But it's not a car. Trying to make it one will serve everyone badly.

3. For your team leaders and members, you need Talent Activation tools.

These represent the next phase in talent tools. The focus of Talent Activation tools is on increasing engagement, retention, and performance in real time, in the real world. If talent management tools are your train, these are your car. They are where the rubber meets the road.

4. Talent Activation tools are built for the team leader, not for HR.

Why? Because performance and engagement don't come from an HR mandate or even an executive one. They only come from the interaction of team leader and team member, on a real team doing real work. *The primary metric to assess these tools is voluntary usage.* If your team leaders don't want to use your tool, then the team leaders aren't wrong; your tool is wrong.

5. Any good Talent Activation tool must allow the team leader to create his or her teams.

Most tools are deployed against the static boxes on an org chart. Every team leader knows that those are not the place where the real work happens. It happens on cross-functional teams, project teams, teams the organization probably doesn't even know exist. Everything we do with our talent — development, recognition, goals, engagement, performance ratings, diversity and inclusion — is deployed against org structures that don't reflect real teams. The only plausible sources of truth about what teams are getting work done are the leaders of the teams. So empower them to create their own in your system, and deploy your tools against those.

6. To be useful, your Talent Activation tool must help the team leader answer three questions.

These are not HR questions. They're the real-world questions every team leader needs to know the answers to:

- What are the strengths/capabilities of my people?
- What are my people doing right now, and how can I help?
- How are my people feeling right now, and how can I help them feel better?

In fact, when you break it down, every movie you've ever seen about a team, from *Apollo 13* to *Ocean's 11* to *The Avengers,* basically follows this pattern of inquiry. Our storytellers instinctively know what teams are about. It's time our talent tools did, too.

7. Talent Activation tools can't just be empty tech.

They have to be infused with content that is personalized and relevant to the user. From Netflix to Alexa to the smart lock on my door, I've come to expect that every piece of tech I use today knows me. If my HR tech — whose sole purpose is to know and help me — treats me as a faceless cog in the machine, it'll never get anywhere.

8. Talent Activation tools have to be integrated to be used.

The current crop of tools that we see in the world of Talent Activation are single point solutions. They're siloed. Which means that the team leader will get buried under their unintegrated complexity. You can't give people a personality tool that's unconnected to an engagement tool, which doesn't relate to the performance management tool, the recognition tool, or the leader development tool. Well, you *can* do that. But nobody will use them voluntarily. HR professionals need to tell providers that they need a unified tool set.

9. Talent Activation tools should be missing something. By design.

I mean they should intentionally leave out something very specific: feedback. We have tools today that will get you feedback on anything from anyone, anytime. But your people don't want feedback. They don't want you to tell them where they stand. They want you to help them get better. They want coaching. Please don't fall for the feedback trap. There is no evidence that it drives performance.

10. When you serve the team leader, you serve HR.

Counterintuitively, you will serve HR most effectively by serving the team leader first. Because if your Talent Activation tools serve the team leader, they will be used. If they're used, you will get data on:

- Which teams *really* exist in your organization
- The strengths and capabilities of people *right now*
- What people are actually working on *right now*
- Where engagement is at *right now*

The best way to get accurate, meaningful, real-time, real-world insights into what your teams are doing is to give your team leaders the right tools and let them go.

I have accused HR professionals of mistakenly using talent management tools in the Talent Activation space, but in truth it's very understandable that they have. For one thing, Talent Activation tools are new on the scene, and we're all learning what they're capable of and what they should be. And what's more, it's in the interest of those who make the talent management tools to imply that their wares will address those broader talent issues. But it's not in the interest of HR, and it's certainly not in the interest of team leaders and team members. Talent management tools have their place, but that place is not in team leaders' hands. Instead, leave talent management to the HR professionals, but give Talent Activation — the driving of engagement, retention, and performance — its due by putting the right tools in the hands of the people who can use them most effectively: your team leaders.

Marcus Buckingham, creator of StandOut and founder of The Marcus Buckingham Company, powered by ADP, is a leading expert on Talent, 'strengths revolutionist', and Co-Head of the ADP Research Institute. His industry leading stewardship on performance and engagement is transforming Talent and pioneering a whole new world of work.

ESSENTIALS FOR MAKING SOUND TERMINATION DECISIONS

By BUD HOLMES

Because most individuals are hired as "at will" employees, many employers believe they are free to make termination decisions without the threat of later being held accountable for their decisions. As most HR Professionals know, however, it's not that simple.

Over the years, courts have significantly eroded the "at-will employment" doctrine. In addition, federal and state statutes have created various categories of protected employees, specifically prohibiting certain forms of employment discrimination. As a result, the vast majority of all termination decisions are subject to some form of review by outside third parties, including arbitrators, state and federal court judges and juries, and the Equal Employment Opportunity Commission (EEOC).

As a result, it's important for employers to take great care when making termination decisions, to improve their ability to withstand any subsequent review. This article discusses a few general practices and considerations that will help employers make better termination decisions, *i.e.,* decisions that will appear reasonable and justified in the eyes of those reviewing them in the future.

Prior to making any termination decision, employers should ask these specific questions:

1. Will the termination decision be consistent with company policy?

2. Is the employee in a federally protected category due to his or her race, color, sex, pregnancy, age (40 or over), genetic information, religion, veteran status, disability, national origin, citizenship, etc.?

3. Is there proper documentation for the decision?

4. Were all facts pertinent to the termination decision investigated in a fair and objective manner?

5. Was the employee forewarned of the possible consequences of his or her poor performance or misconduct?

6. How has the company treated employees with similar issues in the past?

7. Have options other than termination been considered?

If the above questions are properly considered prior to making a termination decision, the risk of having an EEOC claim or lawsuit filed regarding the decision should be reduced.

Documents Important to Supporting Termination Decisions

Proper documentation is vital to making sound termination decisions. Recent surveys indicate that juries strongly believe that before an employer terminates an employee, the employee should receive fair warning of the consequences of his or her poor performance or misconduct. Thus, proper documentation of an employee's work performance and misconduct should be an important factor in making termination decisions that can withstand outside scrutiny from third parties.

Performance Evaluations

Employers need to consistently provide employees with realistic feedback regarding their work performance. When preparing performance evaluations, it is important to be open, honest, and frank, ensuring not to "sugarcoat" poor performance. If performance evaluations are properly prepared, they should provide important documentation necessary to explain and support termination decisions.

Disciplinary Warnings

Effective disciplinary warnings/documents are equally important. Disciplinary warnings/documents should be written in a way that the reasons for the discipline can easily be understood by anyone reading them, including outside third parties. Company rules or policies that have been violated should be specifically identified in the warning/document. Finally, it is important that all disciplinary warnings/documents maintain a professional non-abusive tone.

Job Descriptions

Having well-written, accurate and thorough job descriptions, often provides essential support or justification for a termination decision. This is particularly true when an employee is terminated for poor work performance or being unable to perform his or her job.

Employee Handbooks

Employee handbooks are also extremely helpful, as they typically include important company policies relating to the employer's expectations concerning employee conduct and work performance. In addition, employee handbooks contain the company's policies and procedures relating to employee discipline and termination procedures. If these policies and procedures are consistently followed when making termination decisions, they will provide additional support for the employer's decisions.

Decision Making Process

Prior to making a final decision relating to the termination of an employee, the following steps should be taken:

- Involve human resources and/or an employment attorney.
- Get approval/concurrence of at least two managers.
- Complete administrative details relating to the final paycheck, termination notice, COBRA, and so forth.
- Decide who should conduct the termination meeting.

Termination Meeting

Once the termination decision has been made, a termination meeting should be held with the employee. The proper execution of this meeting is an important step in the termination process and maintaining the appearance of a reasonable and justified termination decision. During the meeting, the person conducting the meeting should:

- Be honest;
- Get directly to the point;
- Communicate the basis of the termination;
- Not argue or apologize, avoid hostility, at all times behave professionally; and
- Not encourage hope that company might change decision.

Additionally, when the violation of a specific work rule or company policy is the basis of the termination decision, the work rule or policy violated should be referenced during the meeting. When appropriate, the employee should be shown where the work rule or policy is included in the employee handbook.

Conclusion

There is no one correct way to bulletproof termination decisions, as each situation presents different sets of issues and problems for the employer. When all else fails, remember to always take the time to be thorough, get all the facts, carefully review the employee's personnel file and review relevant company rules and policies. If the termination decision process follows these basic rules and the general practices described above, it should help reduce the number of EEOC claims or lawsuits filed against a company as the result of its termination decisions.

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PENSION DE-RISKING: What Is It and Why Is It So Popular?

By DOUGLAS DAHL II

With increased business costs, overseas competition and worker mobility, U.S. employers have sought all sorts of ways to minimize risk in their businesses, including changes to employee benefits. In the healthcare space, this has resulted in the prominence of consumer-driven healthcare (e.g., high-deductible health plans and health savings accounts). In the retirement plan space, most notably, this has led to the continuing and rapid decline in private defined benefit pension plans. According to recent numbers published by the U.S. Department of Labor, from 1978 to 2014 the rate of defined benefit pension plan offerings decreased by approximately 80%. Despite this decline, there are still roughly 45,000 defined benefit plans in the United States today. This article discusses the various ways in which employers seek to decrease the risk associated with these plans and what HR and benefit professionals should know about the process.

Defined Benefit Pension Plans vs. Defined Contribution Plans

In general, defined benefit pension plans are plans that offer participants a defined benefit at retirement age. For example, under a defined benefit plan, a participant may have accrued a benefit of $1,000 per month beginning at retirement age. This benefit is owed to the participant irrespective of whether the plan's assets can cover plan liabilities. The participant's benefits are not held in an "account" in the plan. Rather, benefits are paid from the general pot of assets held in trust for all plan participants. Ultimately, the plan sponsor is on the hook for properly funding the plan, investing the assets, and ensuring that participants receive the promised benefits.

This is in stark contrast to the defined contribution model (e.g., a 401(k) plan), which, instead of promising a defined benefit at retirement age, simply offers a defined contribution by the employer while the participant is actively-employed. For the vast majority of defined contribution plans, once the employer's contribution is made, it is the participant's responsibility to invest the assets and ensure that these assets will be sufficient to fund the participant's retirement.

De-Risking to Lower Costly Sponsorship of Defined Benefit Plans

Employers that sponsor defined benefit plans also incur significant costs in maintaining the plans. Unlike defined contribution plans, defined benefit plans are expensive to maintain and often require significant actuarial work, as well as per-participant premium payments to the Pension Benefit Guaranty Corporation (PBGC), the federal agency that partially insures pension benefits in the United States. As a result of these economic realities, employers have sought to reduce their financial obligations and exposure under defined benefit plans by engaging in what is referred to as "pension de-risking." Pension de-risking can take many different forms, but all are designed to reduce the financial risk associated with defined benefit plan sponsorship, often in anticipation of eventually terminating the plan.

Two Sides to Pension De-Risking

Pension de-risking can generally be approached from two different sides, the asset side and the obligation side. The asset side focuses on managing the investment risk of pension plan assets by aligning the investments more closely with plan liabilities. The obligation side, which this article focuses on, involves reducing the overall financial obligation borne by plan sponsors. Three of the most common de-risking strategies on the obligation side include freezing the plan, offering lump sum buyouts and purchasing annuities.

Plan Freezing

When someone refers to a "frozen" defined benefit plan, that person is referring to a plan that has been closed to new participants and/or a plan under which no additional benefits can be earned. The term "frozen" is used because although nothing in the law requires an employer to continue allowing benefits to accrue, participants' benefits under a defined benefit plan can never be reduced or cutback. A plan undergoes a "soft-freeze" when the plan is closed to new participants or when benefit accruals cease for some but not all participants. In a soft-freeze, at least one group of participants continues to accrue benefits following the freeze. A plan undergoes a "hard freeze" when the plan is closed to new entrants and rehires and when no additional accruals can be earned under the plan. In general, a hard freeze stops a plan's liabilities from continuing to increase.

For HR and benefit professionals who are involved with freezing a defined benefit plan, one of the most important aspects is proper communication to affected participants. While amending the plan to reflect the freeze may be relatively simple, communicating exactly what the freeze means to a particular group of participants can be challenging. Plan freezes are often the source of confusion among participants. In addition, pension laws require that a formal notice go out to participants in advance of any changes that will result in a significant reduction in future accruals. Companies may wish to send along an informal Q&A document, in addition to the formal notice, to address some of the questions that participants will likely have.

Reducing Future Liability with Lump-Sum Buyouts

The second, common pension de-risking strategy involves lump-sum buyouts. With this strategy, a defined group of participants is given the option during a specific time period to receive their accrued benefits in one lump-sum payment, as opposed to a monthly annuity for life. This strategy reduces the number of plan participants and removes the liability associated with paying lifetime benefits for this group under the plan. This strategy also reduces the premiums payable to the PBGC, which are calculated on a per-participant basis.

For HR and benefit professionals involved in a lump-sum buyout, again communication is important for a number of reasons. First, participants likely only have a limited period of time during which to elect the lump sum. Once the window closes, the ability to receive a lump sum goes away. Therefore, making sure participants are fully aware of when the window opens and closes is very important. Second, participants need to understand the effect

of a lump-sum payment (i.e., full payment of their benefit and no future payments) as well as their right to waive the lump sum and receive monthly annuity payments according to the plan. Third, a number of administrative tasks need to be accomplished in order for a lump sum to be elected. If these tasks are not completed before the window closes, the participant may have missed the opportunity. For example, election forms need to be properly completed and received by the plan sponsor. For married participants, this includes securing the signed and witnessed consent of their spouses in order elect a lump sum payment in lieu of a joint and survivor annuity.

Liability Transfer to Annuity Providers

The final common, de-risking strategy involves the purchasing of annuities from an insurance company. Under this strategy, the plan sponsor selects a group of participants and transfers the plan's liability to make annuity payments for this group to an insurance company. After the annuities are purchased, the individuals are no longer participants in the plan. Similar to lump-sum buyouts, this strategy not only transfers benefit liability but it also reduces the PBGC premium payments and other costs attributable to each plan participant. However, unlike lump-sum buyouts, purchasing annuities for a group of participants involves an extra layer of concern for plan sponsors because the selection of the annuity provider is a fiduciary act that must be made in the best interests of plan participants. In other words, the annuities purchased must retain all the same rights and features of the participants' accrued benefits, and the party responsible for selecting the annuity provider must take steps to obtain the safest annuity available. Once the plan's liabilities for the select group are transferred to the annuity provider, the participants generally lose the protection of assets held in trust as well as protections under applicable pension law.

HR and benefit professionals will likely be involved in the administrative process of transferring liabilities and participants to an annuity provider, and due care should be taken throughout. The ability of the annuity provider to ensure that participants' accrued benefits are appropriately accounted for in the annuities purchased depends very much on the quality and completeness of the information transferred from the plan to the provider. HR and benefit professionals can add value to the process by identifying any errors or holes in the information being transferred and attempting to correct the incorrect or missing information. In addition, these professionals can help ensure that plan participants understand the change to how their benefits will be provided, as well as whom to contact in the future regarding any questions.

Final Considerations for De-Risking

It is important to point out that decisions to de-risk – in terms of whether it makes financial sense for an employer – depend a lot on the interest rate environment and how a reduction in pension liabilities will be treated from an accounting perspective on the employer's books. Despite a decrease in the number of active pension plans, pension plan de-risking activity continues to rise. Once an employer decides to engage in a de-risking strategy, HR and benefit professionals who understand de-risking and the importance of communication throughout the process will be in good position to help their employers navigate the process.

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Close the Loop on Your Recruiting Strategy with Thorough Background Screening

By LISA P. MAY

HR Professionals and hiring managers know that finding the best, most qualified, motivated person to fill an open position is integral to a successful business. Choose wrong, and your company can be out a great deal of money. Forbes.com estimates a bad hire costs 30% of the position's first year's salary. A few of those each year can REALLY damage the bottom line, especially for smaller organizations.

So, what can you do to minimize making the wrong turn down the path of the recruiting and interviewing journey? Close the loop on your recruiting strategy with thorough background screening!

Here's how.

At the top of the loop, you have recruiting tools:

Resume and application. An applicant's resume and application create a starting point, and answer several broad questions. Do they match the position you are seeking to fill? Do their experience, education, and strengths give you confidence they would be a proper fit, and perform productively?

The resume isn't going to convince you to hire someone but will show you whether or not they deserve an interview.

Interview process. Meeting face-to-face (or increasingly via video) gives those involved in the hiring decision a chance to eyeball the job seeker. Grooming and dress come into play, as well as his or her mannerisms. The picture gets more fleshed out during the interview with their answers to the questions, their attitude, and engagement. Do they make eye contact? Are they super nervous, or calm and cool? Do they provide concrete answers, or respond with a bunch of fluff?

Many times, the above tools are all the hiring team considers before reaching their decision.

Unfortunately, this leaves the loop wide open for costly, frustrating results brought on by good interviewers, but not-so-great employees.

Close the loop!

Background screening tools help Hiring Professionals close the loop on strategic hiring in 3 specific ways.

Verify claims. Sure, an applicant can say they were a rock star at their last job, but did they really perform that well? Did they even work there? Background screening connects the dots between the resume, the interview, and reality.

Give insight. A sharp suit, nice haircut, and shined shoes are impressive. So are polished, smooth answers to your interview questions. But how will the job candidate perform day-to-day? Can they handle deadlines, and deal with stress? Are they hiding a dangerous background? Are they a drug abuser? None of these issues are fully addressed without the help of a background screening process.

Address company culture. Serious conflicts arise in workplaces that hire people who don't fit into the culture of the company. Negative, disruptive additions to the working environment have far-reaching consequences. From the loss of productivity to excessive turnover, companies suffer in measurable and indirect ways if they fail to take their culture into account.

Closing the loop in your hiring process takes a few key tools that afford insights that help make better, smarter decisions.

Tools to use:

First, remember that all background screeners are not created equally. It's imperative to choose a professional, experienced background screening company. Companies that cut corners may return inaccurate or incomplete information. In addition, you may be led down a path of non-compliance that ends up getting you sued for negligent hiring practices!

Work with an organization that is certified by the National Association of Professional Background Screeners (NAPBS), and that has licensed Private Investigators on staff. Ask your Account Executive about compliance issues, and the types of screening other clients in your industry employ. If he or she pushes you toward just using an instant criminal search, or, if you can't get a live human on the phone to ask your questions, mark them off your list.

Assessment testing. Definitive checks (which we will cover later) are important to determine a job seeker's fit and qualifications that pertain to the position. Assessment tests dig deeper into his or her core values. Will the employee steal? Which ones are the most dependable? Are there any anger issues, or other negative behavior traits? Using assessment tests during the hiring process helps companies weed out the candidates who are not a good fit, and focus resources on more promising applicants.

Criminal history. Uncovering past criminal behavior is key to protect the safety of your workplace. Build a screening process consisting of county, state, federal, and database searches to maximize your insight into an applicant's background.

*note: make sure to follow EEOC guidance on using criminal records in hiring, to protect your company from discrimination lawsuits.

Employment/education. Faking work history and falsifying education records are key areas where applicants frequently mislead employers. It seems like every other week the news is covering a high-ranking employee who has faked his degree! Education and employment verifications shed light on the potential employee's experience and training, and verify or nullify the claims they make on their resumes and during interviews.

Drug screening. Drug-addicted employees cause disastrous, immeasurable damage to a company's bottom line. Drug users are more likely to miss work, steal, cause conflicts, and perform below par than their non-drug-using counterparts. Pre-employment drug screening needs to be part of every hiring process.

Conclusion:

A well-defined hiring policy isn't simply finding a candidate, reviewing their resume, and interviewing them. Closing the loop with a thorough background screening process is vital in maintaining high-quality hires. By taking the time to design a compliant policy, find a reputable background screening partner, and commit to consistency, organizations will be rewarded with high-performing new employees, low turnover, and reduced workplace conflicts.

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The NLRB:
Relief for Employers Ahead?

By JOHN D. DAVIS

The Board: Looking Ahead

Currently, the five-member National Labor Relations Board (the Board or NLRB) consists of only three members: two Democrats and one Republican. The two vacant seats will be filled by President Trump, giving Republicans majority control of the Board. Additionally, President Trump has appointed the Republican member of the NLRB as Acting Chairman. So, it is fair to assume we will have a Board that will be friendlier in general to employers when it comes to National Labor Relations Act (the Act or NLRA) issues. This does not mean, however, that employers should expect **immediate** relief from what some would consider overreaching decisions by a Board controlled by President Obama's appointees. Here are three areas of interest in which we think the pendulum will start to swing back toward center.

Will the Term "Protected Concerted Activity" Be Scaled Back?

Recently, the National Labor Relations Board seems to be focusing more on violations of the NLRA involving non-unionized employees. That's right, non-union employees as well as employees represented by a union are protected by the Act. Under Section 7 of the Act, employees have a right to engage in "concerted activities for the purpose of … mutual aid or protection" or "protected concerted activity." Protected concerted activity involves two or more employees taking action for their mutual aid or protection regarding terms and conditions of their employment. The Board's concept of the type of conduct protected by Section 7 is broader than you might expect.

For example, an employee at a used car dealership complained to his manager about how sales commissions were being calculated. Later, the owner asked the employee to come to a meeting in the sales manager's office. During the meeting, the employee lost his temper and began yelling at the owner calling him a "f##king mother f##ker," a "f##king crook" and an "a##hole." He also told the owner he was "stupid" and stood up during the meeting, pushed his chair aside and warned the owner that if he was fired, the owner would "regret it." The employee was terminated by the owner for his conduct at the meeting. After reviewing the facts, the Board concluded that the employee's conduct was protected by Section 7 of the Act and it was against the law for the owner to fire him.

In a similar case, an employee of a catering company became upset because he thought a supervisor had been disrespectful of his co-workers. The employee posted on Facebook that the supervisor was "a nasty mother f##ker," a "loser," and said "f##k his mother and his entire f##king family." When the posting was brought to the attention of the employer, the employee was fired. The Board found that the employee's Facebook posting was not so egregious as to lose protection under Section 7 of the Act. The Board ordered the employer to reinstate the employee and pay him full back pay.

Employers must be very careful how they deal with situations that could involve an employee engaged in protected concerted

activity under the National Labor Relations Act. However, chances are we will not see the extreme examples of conduct being considered "protected" once Trump appointees start to take control of the NLRB.

. . . chances are we will not see the extreme examples of conduct being considered "protected" once Trump appointees start to take control of the NLRB.

Easing Back on Social Media

For many employers, social media issues proved to be a harsh introduction to the NLRA and the Board a few years ago. Under President Obama's administration, employers were hammered over social media policies that at first (and second and third) glance seemed reasonable. Employers were also left to interpret a sometimes contradictory memo on social media policies issued by the General Counsel's office in 2012. We anticipate a more reasonable approach to social media policies in the future that balances legitimate business concerns and employee rights under the NLRA. To be safe, employers can always adopt social media policies that have gained approval by the Board in the past, such as Walmart's social media policy which was referenced in the General Counsel's 2012 memo.

Examining the Joint Employment Doctrine

Another issue making headlines at the Board has been the joint employment doctrine. Under recent Board decisions, a company that may only have potential control over a group of employees (without ever exercising that control) could be found to be an "employer." Why does this matter? It is simple -- it could subject those companies to certain obligations and actual liability under the NLRA for actions taken by another company that in fact exercises control over the employees. We anticipate the pendulum swinging back to require actual exercise of control to some degree over a group of employees before "joint employment" comes into play in the NLRA context, a view that is more consistent with joint employment doctrine in other areas of the law.

*****

While relief from some of the NLRB's actions over the past few years may not be immediate, employers (union and non-union) should be able to look forward to a more conservative approach to a variety of issues.

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University of Memphis SHRM Student Chapter Case Competition Champions

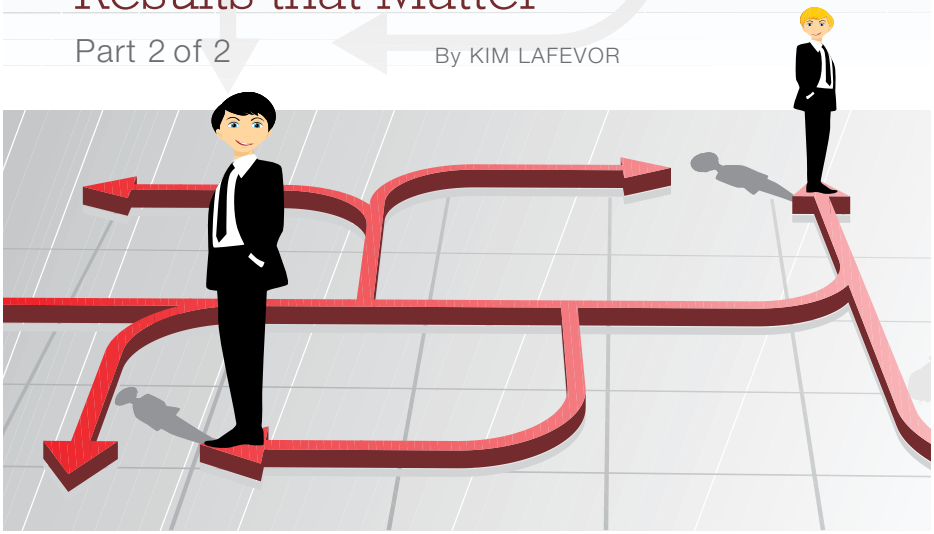
The University of Memphis SHRM Student Chapter recently won the Central Division of the SHRM National Case Competition in Houston, Texas. Team members include Tyler Stegall, SHRM Student Chapter President, Tiyana Childres, SHRM Chapter Vice-President, and SHRM Student Chapter Board Members, Tori Hill, Alexis Smith, Patrick Crowder, and Kenneth Moment. Faculty advisors are Dr. Kathy Tuberville and Dr. Carol Danehower.

What's in Your Human Capital Management Strategy?

The Game Plan, the Path, and Achieving Organizational Results that Matter

Part 2 of 2

By KIM LAFEVOR



Drawing a Picture of an Effective Human Capital Management Strategy

I think we would all agree that in today's current business climate and notable variance among adopted business practices, there remain opportunities for the design and implementation of more robust human resource models of performance management. However, we have to start thinking about performance management in a much broader framework of operational performance and business outcomes. In practice, current employed organizational approaches generally treat performance management as a distinct process managed apart, but parallel to, organizational processes. Performance Management is not an appendage. It is not tied to business practices that only HR needs to think about and have responsibility. Herein is the problem. While there is a gap that exists between current performance management practices and their affiliation to desired organizational key performance indicators, there lacks a good game plan for an effective Human Capital Management Strategy. It is a necessary means to a desired end in performance management and organizational performance.

When we think about performance management and the key drivers of human capital effectiveness, it does include HR practices, such as recruitment and retention initiatives, talent development, international workforce planning and global mobility, elevated levels of employee engagement, enhanced organizational change agility, and a pipeline of mission-critical talent. However, there often remains some disconnect between these initiatives and actions and a connection to the bottom line. There is a need for congruency between human resource practices and accountability for organizational key performance indicators (KPIs).

What's the recipe for an effective Human Capital Management Strategy? Figure 1 depicts the four primary components of a comprehensive human capital management strategy: 1) performance leadership, 2) performance management, 3) employee engagement, and 4) culture of accountability (see Figure 1). This holistic view provides for a more complete identification of the needed characteristics of human resource practices that directly connect to organizational outcomes. This represents a shift from the historical literature that describes loosely connected integration of human practices to one that involves and interdependent set of transformational practices (Liff, 2015).

Poor management practices can cost businesses billions of dollars each year. According to one recent Gallup survey, one of the most critical decisions an organization can make is in the selection of managers with the right knowledge, skills, and abilities to execute such an integrative system. This research concluded that managers are responsible for as much as 70% of variance in employee engagement towards organizational goals. Only three in ten managers have basic or advanced talent management skills, yet these small groups of managers are responsible for 48% of higher profit (Beck & Harter, 2014). By selecting managers that have the right fit, it can provide a clear path for organizational operational and strategic goals to be met, create and administer human resource policies that will enable employee engagement and establish a culture of accountability through communicating and measuring employee performance against key performance indicators and business outcomes. Therefore, performance leadership is the first of the primary components of an effective human capital management strategy (Beck & Harter, 2014; Groscurth, 2015).

Human resource systems must work in tandem to realize both operational and strategic goals (Gurbuz & Mert, 2011). Human resource policies should support culture, mission, and business plans of the organization. There should exist well-designed performance standards and human resource practices that institute individualized training plans to achieve identified goals, continuous feedback, and consultation when performance does not meet expectations. Rewards, inclusive of merit, benefits, and promotion, should be leveraged to continuously reinforce excellence in performance. Employees should be involved in decisions that affect them to solidify higher levels of engagement.

These aforementioned human resource practices work interdependently to contribute to favorable levels of employee engagement. This is an underlying distinctive competency that contributed to a fundamental difference between organizations that excel compared to those with lackluster or underperforming outcomes. Employees define and enable organizations towards goal attainment. While every organization has operational data and strategic objectives by which success It has been estimated that as little as 30% of employees are actively engaged and committed to organizational success. When organizations can increase these levels of engagement, organizational performance can also be improved. While 30% of employees are engaged, 70% of employees are disengaged, either not engaged or actively disengaged, resulting in lower levels of performance or disruptive performance (Beck & Harter, 2014; Adkins, 2016).

Finally, creating a culture of accountability is realized when an organization is anchored on performance leadership, performance management, and employee engagement human resource practices that are measured against key performance indicators (KPIs). To achieve higher levels of accountability, these measures must be tied directly to an employees work and defined outcomes. Performance targets should be clear and have at least one single point of accountability, and be relevant and attainable by those tasked with the tasks (Ridler, 2014).

Figure 1-LaFevor's Human Capital Management Strategy

The above figure below depicts such a model that demonstrates the direct relationship of performance leadership, performance management, employee engagement, but embedded in a culture of accountability. These factors each in isolation are important, but independently not sufficient in that they are not coordinated and synchronized and aligned to optimally deliver established business goals. There is an interdependent nature of performance leadership, performance management, employee engagement, and a culture of accountability in any robust Human Capital Management Strategy (HCMS).

Charting the Path-Developing an Effective Human Capital Management System

To achieve such an integrated and interdependent system, there must be full support of an organization's board of directors who are thoughtful and rational about their human capital strategy, executive leadership fully committed to the idea of human capital as a strategic asset, an establishment and ongoing measurement of human capital performance standards that tie human resource practices to organizational business outcomes, and managers who embrace the idea of that performance should directly tie in measurable and meaningful ways to organizational performance (Zhu, Cooper, Thomson, DeCieri & Zhao, 2013).

Over the past 25 years, research examining strategic human resource management and its effects on organizational performance has provided important linkages. While this research has contributed to a greater understanding of this relationship, it has lacked some theoretical logic and empirical evidence (Kaufman, 2012; Piening, Salge & Baluch, 2013; Kramar, 2014). These findings do suggest methods in which managers can improve financial performance through improving employee's experience through various HR practices. These solutions are marginalized without understanding the broader framework of the overall human capital management strategy. Each of these elements of human resource design and measurement must work in tandem to optimize outcomes. What will be your approach?

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Are State Sponsored Insurance Plans as Good as Employer Coverage?

Yes, in fact it might be better……

By KERSTIN NEMEC and TIM NORWOOD

State Sponsored Insurance Plans provide quality health coverage to 1 in 5 Americans. It has long been the cornerstone of coverage for those who may need it most: children, the disabled, and the elderly.

While these plans still provide coverage to this vulnerable population, the enactment of the Affordable Care Act became a game changer for our nation's state sponsored health insurance program. By increasing the income limits for eligibility, the ACA paved the way for states to expand their coverage to previously excluded working adults and their children. Great news, right?

Not so fast. Are the plans cut-rate programs with limited benefits, no participating doctors and hospitals in limited neighborhoods?

No, they are not.

Thanks to Medicaid expansion in 2013, an additional 11 million working adults and their families are now receiving comprehensive affordable, quality health care. The program's mission of providing health services to Americans has evolved in several key areas:

• **Access to Care:** The vast majority of expanded states contract their plans to Managed Care Organization (MCO's), like Kaiser, Anthem, Blue Cross, and many others. While these plans may be financed publicly, care is provided in the private marketplace. Over 75 percent of all beneficiaries are enrolled in managed care served by private insurers. MCO choices are usually available in each state, and employees can compare quality rankings from the National Committee on Quality Assurance (NCQA). Many of the rankings are on par with private commercial coverage and in some states even higher.

• **Expanding Who Can Be Covered:** Many employees who previously could not be covered are now eligible in expanded states. A typical household of four, with total income less than $35,000 could eligible in expanded states. This equates to over 40 Million households in the United States.

• **Coverage for Hard Working Americans:** The majority of state plan enrollees in expanded states work full time, generally in Industries such as restaurant and food services, construction, schools, hospitals, grocery stores, home health care services, and department stores.

• **Cost Efficiency:** Coverage is generally FREE (a few states charge a small premium).

• **Out of Pocket Expenses:** Most state plans have NO deductibles, and very low copays. This is especially important as employer plan deductibles rise each year. On average, the Kaiser Family Foundation reports employees pay an average of $2,295 per year before insurance kicks in. That's a heavy financial burden.

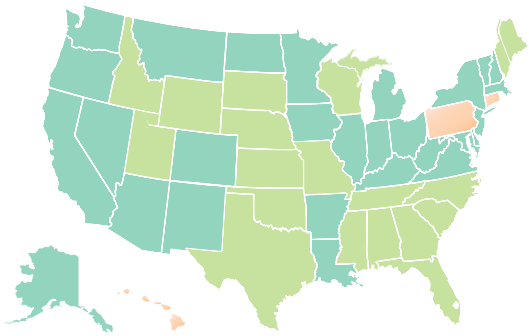
• **Covered Services:** Benefits are comprehensive and similar to employer provided benefits. In all states, services include:

Inpatient Hospital Services
Outpatient Hospital Services
Physician Services
Lab and X-Ray
Pediatric and Family Nurse Services
Home Health Services
Early and Periodic Screening, Diagnostic, and Treatment
Birth Center Services
Additional services generally include vision, dental, and prescription drug.

The new administration has called on lawmakers to reform the health care system to "expand choice, increase access, lower costs, and at the same time, provide better health care." Medicaid expansion in the states shown below has done just that. If your business operates in one of these states, wouldn't it make sense to give your employees the opportunity to learn about and enroll in this valuable, quality coverage?

So, What's Next?

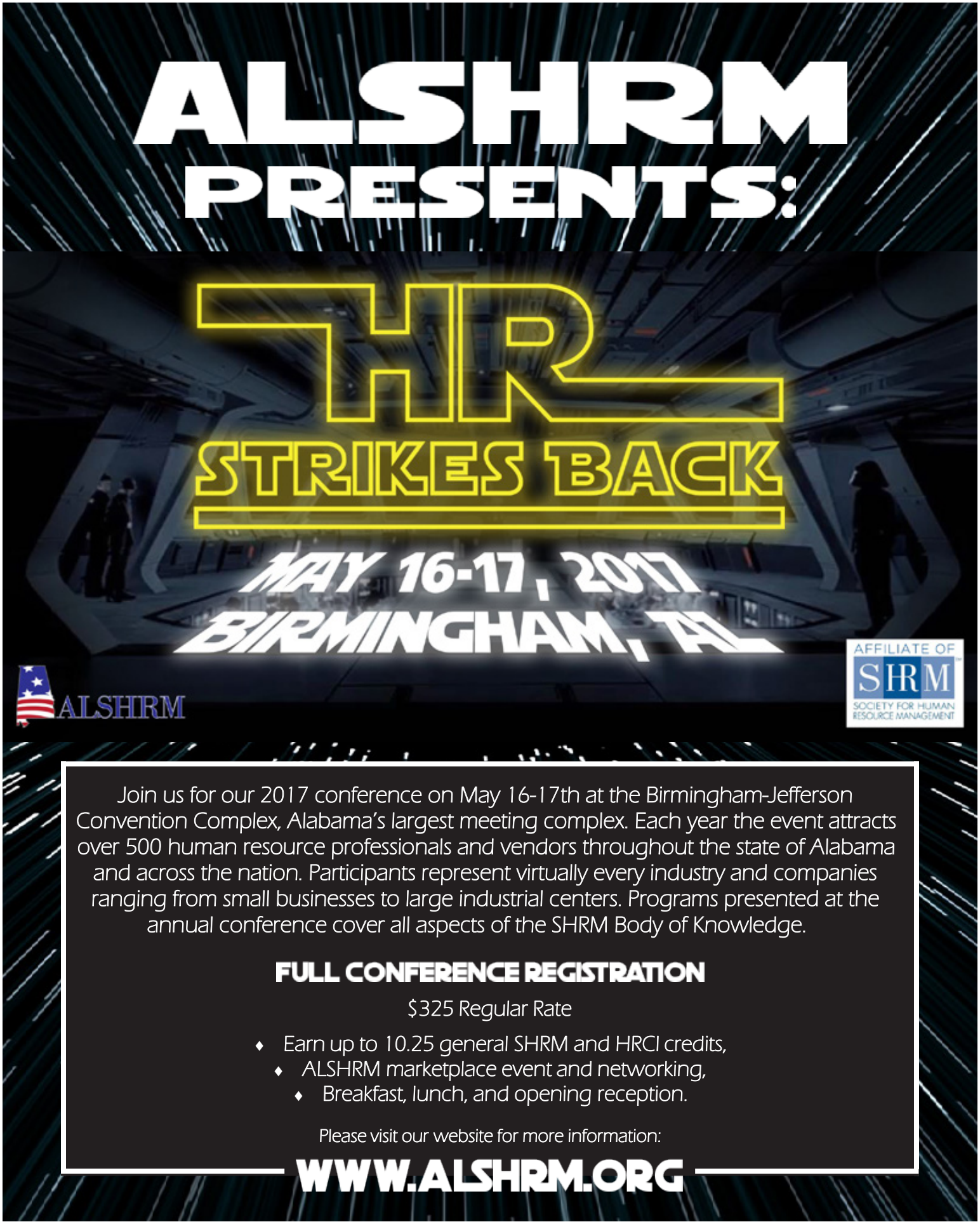
The entire country is watching Washington D.C. to see what will happen next with healthcare legislation. We do know at this time that any proposed changes will not go into effect until 2020 and that there is also discussion about Americans that are utilizing state health insurance plans such as expanded Medicaid be allowed to stay on those programs after 2020. So, for the next 2.5 years, it is imperative for those employees that are potentially eligible to be educated on these programs and give them the option to take advantage of these cost savings opportunities that make a significant difference to them and their families.



1	Adopted Expanded Coverage
2	Not Expanding Coverage at this time
3	Adopted Expanded Coverage but not Applicable

Kerstin Nemec
President
Med-Enroll, Inc.

Tim Norwood
Executive Vice President
Med-Enroll, Inc.



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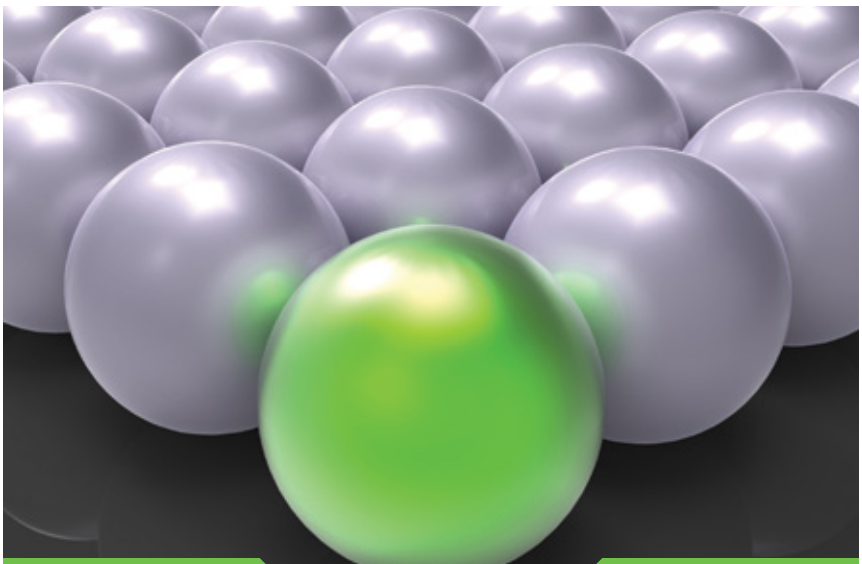

The Leadership of Discipline

By JANIE WARNER

Employee discipline is arguably one of the more difficult tasks supervisors, managers, directors and executives must tackle. For a variety of reasons, the process is daunting, distracting and dreaded. Discipline requires us to step outside of our comfort zone and confront employees for acts of omission and commission in order to maintain order in the workplace. While it is necessary, it certainly is not enjoyable.

Employees hear "punishment" when employers say the word "discipline." But what if the word "discipline" could have a *positive* connotation? What if, rather than dreading a confrontation with an employee over an infraction, we were able to look forward to interacting with our direct reports and working toward a solution we could both live with? And what if we approached employee discipline as an imperative of true LEADERSHIP?

The term *discipline* comes from "discipulus," the Latin term for "pupil." The term is also the origin of the word "disciple" – a follower. When we look at the term in this light, it's obvious that as leaders, we should take disciplinary action as a form of mentorship – or training and teaching - rather than as a form of punishment for misdeeds.

As leaders, our jobs are to use the tools at our disposal in an effective manner to guide our organizations toward the achievement of our corporate mission. Our mission statement answers the question, "Why does our organization exist?" Ultimately, all the work we do, all the decisions we make, and all the actions we take should be in pursuit of achieving our mission.

Even discipline.

So how do we, as leaders, go about changing the perception of discipline from a punitive action to a positive initiative? Let's consider three options.

1. **Less talking and more LISTENING** – It seems intuitive that when speaking with an employee we would actually hear what they are saying. However, we often do all the talking. We look at the discipline process in a linear progression. Employee messes up. Manager finds out. Manager completes a disciplinary action form. Manager meets with employee and tells employee, "You messed up." Manager metes out punishment. Manager tells employee (sternly) "Don't mess up again or there will be more punishment." Employee signs form and walks away embarrassed, discouraged and, very often, angry.

   What if when the manager heard about a problem, they immediately spoke to the employee? What if instead of accusations and punishment, the manager asked: "What happened? Do you think it could have been prevented? If yes, how? What did you learn from this mistake? Is there anything I, as manager, could have done to prevent this? What do you think the organization can do to help others avoid the same mistake?"

   If discipline is about discipleship, then what are we teaching our followers in our disciplinary protocol? Are we creating resentful, fearful subjects? Or are we allowing then to talk through the problems so that they truly learn something in the process?

2. **Share the WHY** – Not every employee will understand every policy. While they most likely know what to do and what not to do, they will not always understand the importance of the policy/rule/guideline in terms of the work. For example, every employee knows that attendance is important. They know being tardy is a no-no. But often, employees are perplexed when they are willing to "make up the time" and their supervisor is still pushing for being present and being on time. The manager should explain how customers are directly affected when employees are not where they are supposed to be at the time expected. An inconvenienced customer is an unhappy customer, and unhappy customers will not return to our business, as well as spread the word to others. Explaining the "why" is often the first step to true understanding by the employee. This can be a great teaching moment! If the manager doesn't understand the why, it is imperative he or she learns BEFORE the disciplinary meeting. Otherwise, the employee will be left just feeling punished.

3. **Highlight the MISSION** – As stated earlier, everything we do in management is geared toward the achievement of our corporate mission. It is vitally important to tie discipline to specific policy and then to tie policy directly to the mission. If our mission statement is that "We exist to be the best retailer in the southeastern United States," then (using our attendance example again) being at work on time makes our customers happy, and having many happy customers helps us achieve our goal. When employees are constantly reminded of the mission of their organization, they are more likely to start thinking of it before they are in a position to make decisions for their behaviors.

As leaders, when we start seeing our positions as mentors and teachers, we find ourselves more satisfied with our work. Treating our employees as disciples will benefit the entire organization. When we treat them respectfully as students, we can look forward to the excitement of an educated staff who understands their jobs and their mission in a whole new way.

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The Most Successful HR Professionals Have One thing in Common

By AUSTIN BAKER

HR Professionals have been talking about a "seat at the table" so long that it has become cliché. The seat on the executive team and the mutual trust that is developed has been discussed from a variety of perspectives including that of an outsider, perceptions of the profession as a whole, corporate strategic structures, and the peer" C-Level expectations. More and more we are working with professionals who are honing their skills in executive presence, strategic corporate knowledge, financial education and other areas, but one that is often overlooked is that of a person's practice of becoming a trusted advisor.

The Trusted Advisor by David H. Maister, Green, and Galford does a great job of outlining and citing examples of how to build and maintain a trusted advisor status. This applies to both external and internal HR consultants and should be a roadmap for us all in our professional development.

We all would like the benefits of a trusted advisor relationship including being involved when issues begin to form, and the respect that comes with this strategic and close interaction. What we cannot do is overlook the traits that we would attribute to trustworthy individuals such as consistency, honor, not ascribing motive to other's actions, and offering options over judgments and absolutes. Three skills to work on today include asking questions, listening, and understanding the universal laws and dimensions of trust.

ASKING QUESTIONS THAT BUILD TRUST:

Our ability to ask questions in the right way, at the right time, in the right order is crucial to our ability to create trusted advisor relationships. One of my mentors, Bobb Biehl, introduces question asking in the following way. "If you ask profound questions, you get profound answers, shallow questions, shallow answers and no questions, no answers". The Trusted Advisor introduces this skill as having "enough curiosity to inquire without supposing an answer" and later expounds on the topic's importance of order by citing the popular joke where a doctor is questioned by a lawyer in a murder trial.

> "**ATTORNEY:** *Before you signed the death certificate, had you taken the pulse?*
>
> **CORONER:** *No.*
>
> **ATTORNEY:** *Did you listen to the heart?*
>
> **CORONER:** *No.*
>
> **ATTORNEY:** *Did you check for breathing?*
>
> **CORONER:** *No.*
>
> **ATTORNEY:** *So, when you signed the death certificate, you weren't sure the man was dead, were you?*
>
> **CORONER:** *Well, let me put it this way. The man's brain was sitting in a jar on my desk. But I guess it's possible he could be out there practicing law somewhere."*

How often, as HR professionals, do we assume motive in our first question? How does this tone diminish our ability to be trusted? We may even offer a prescriptive answer to solve the problem without diagnosing or helping our "patient" speak to their version of a scenario. Do you have a list of the best questions you have ever heard for each situation you have encountered? Collecting interview questions for candidates has been done forever, but what about collecting the questions for other areas of HR that managers encounter?

Peter Drucker says, "Once the facts are clear, the decisions jump out at you." We can't get the facts without asking questions.

LISTENING FOR THE RESONANCE OF TRUST:

Many executives pride themselves in their ability to read people in various contexts, and it is a primal survival skill as human beings. Science has proven that Oxytocin; the chemical that produces trust in our brains, can

be affected by simply being in the presence of an individual who has more or less trust toward you at the outset of the interaction. More trust produces more oxytocin and less produced less. So first impressions matter more than we ever knew.

Have you ever been listened to intently for a long period of time? It feels so good, lifts the soul, and gives us an opportunity to experience connection. It builds trust too. The Trusted Advisor highlights some of the following practices of good listening: "probe for clarification, listen for unvoiced emotions, listen for the story, summarize well, empathize, listen for what's different, not for what's familiar, spot hidden assumptions, and get rid of distractions while listening."

On the other hand, bad listening destroys trust. Our digital distractions are only exacerbating this problem and it is compounded by less live interaction and more digital communication where no emotion or oxytocin chemicals are present. There is a difference between reading someone's typed account of a story and seeing an edited pic on social media and hearing their story live. The Trusted Advisor lists negative listening traits as interrupting, responding too soon, trying too hard to match the client's points, editorializing in midstream, jumping to conclusions, asking closed-end questions, giving their ideas before hearing the client's, judging, and taking calls or interruptions during a client meeting. Good listening for a long period of time can make us feel tired to our core at the end of the conversation. We need to exercise this skill to become the trusted advisor for our internal or external customers.

Becoming a trusted advisor level HR consultant is an exercise that requires rigor and constant self-evaluation to develop. I believe that it also leads to a happy, healthier career, in which we shed our preconceived judgments, truly empathize and, develop real relationships. One of my friends and mentors says that "true friends are glaringly obvious." Much like the traits of true friends, trusted advisors show up, stay in touch, and help you see around corners. Trusted advisor relationships can be developed in your practice today by practicing these skills.

Austin Baker

ABOUT THE AUTHOR

Austin Baker is the President of HRO Partners, a Human Resources Consulting and Benefit Administration and Enrollment Firm. Austin is on the board of PeopleFirst, a Cradle to Career Talent Pipeline in Memphis, TN and the co-founder of the Memphis Institute for Leadership Education (MILE), which has brought more than 2,400 business leaders and top talent students at the University of Memphis to learn and grow together over the past 10 years.

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TECHNOLOGY: HR FRIEND OR FOE?

BY JOE STUBBLEBINE

As new technology changes the way HR professionals find, hire, and train employees, job seekers reveal mixed reactions as to how far they are willing to let tech take over.

In many ways, technology has made our lives simpler – we wake up to our alarms, grab a cup of our pre-programmed coffee, ask Siri about the day's weather forecast and start our cars remotely before using Bluetooth to dial in to a conference call on our commute.

But at the same time technology has also made our lives more complicated by creating a barrier – albeit in screen form – that often inhibits face-to-face interactions and impedes our ability to read social cues.

Innovations in technology – like video, virtual reality (VR) and artificial intelligence (AI) – are changing the workplace, but at what cost? HR professionals, in particular, are tasked with finding the perfect balance between using technology to support their organization's processes while maintaining the human element that is essential to recruit, hire, and retain top talent.

Beyond recently conducted a national survey of more than 6,000 job seekers to learn more about their preferences surrounding the use of technology in the hiring process, revealing a mixed reaction. Despite respondents not wanting computers to judge their qualifications or make hiring decisions, many see the benefits of incorporating such technologies somewhere in the hiring system, with 73 percent reporting that technology has actually improved the process.

ONE WAY HR PROS ARE LEVERAGING TECHNOLOGY THAT JOB SEEKERS ARE RAPIDLY EMBRACING IS TEXT MESSAGING.

In the past, it was fairly easy to fill most jobs through the "post and pray" recruitment method, or placing a job advertisement online with hopes that candidates with the right qualifications will find it and apply. But as the job market tightens, it becomes more important for recruiters to create targeted campaigns that reach different types of job seekers with different messages at different times. But finding the right candidates means nothing if you can't get their attention. Recruiters will only be successful if they are able to target and communicate with candidates through channels that are convenient for them. Today, that key channel is the text message.

While job advertising is still used to reach active candidates, advancements like text recruiting enable HR professionals to start a conversation with passive or high-demand candidates, for instance nurses are less likely to view job ads. Text advertising starts the conversation and demonstrates interest in a way that candidates respond to.

Another recent survey Beyond conducted found that 73 percent of job seekers want to receive job openings via text, which may be due to the convenience factor – 65 percent of job seekers already use their mobile device at least once a day for job-search purposes, and 78 percent of mobile users check their phones within the first hour of waking up in the morning.

We took that information and applied it to our recruitment strategy, designing text-messaging campaigns that enable recruiters to choose their audience from among our opt-in list of approximately five million professionals. Recruiters then create their message and communicate with only those qualified job seekers in real-time. This real-time interaction with highly qualified candidates fills open positions fast.

Our campaigns are supported by software that enables employers to send their text message to the target group of candidates, then interface with them individually on a desktop. This human element results in more personalized conversations that can decipher a candidate's interest in the job and their relevant skills.

We found that text-message campaigns have a 97 percent open rate – far greater than most email campaigns. Did you know that the open rate for email is 17 to 20 percent? One text campaign, for example, was sent to a mere 330 candidates, but because it was precisely targeted using keywords, job titles and candidates' geographic locations the campaign resulted in five hires.

WHILE THEY EMBRACE TECHNOLOGY AS A RECRUITMENT TOOL, JOB SEEKERS ARE CONCERNED THAT IT COULD NEGATIVELY IMPACT THE INTERVIEW PROCESS.

In fact, the majority of respondents (56 percent) said technology has already made the interview process too impersonal, with more than half reporting that commonly used video applications like Skype interfere with a hiring manager's ability to accurately evaluate a candidate's soft skills. As video becomes common place and new technologies such as virtual reality (VR) and artificial intelligence (AI) make their way into the interview process, job seekers are even more anxious about advanced technologies' roles in determining if they get hired.

According to the survey, 76 percent of job seekers believe VR job simulations will become common in the interview process, but 67 percent also said requiring these simulations would deter candidates from applying.

Respondents who would not participate in a VR simulation believe that it wouldn't accurately reflect their ability to perform their job (53 percent). When it comes to a more intellectual evaluation, job seekers don't think AI can get it right, either. Of the skeptics, nearly 70 percent of respondents said that AI is dangerous and will likely result in formulaic hires that may leave great candidates without job offers.

DESPITE THEIR HESITATION TO EMBRACE TECHNOLOGY IN THE INTERVIEW PROCESS, JOB SEEKERS WELCOME TECH'S ABILITY TO IMPROVE THEIR INDIVIDUAL SKILLSETS.

Of those who see the benefits of tech in the hiring process, 70 percent believe answering questions from a lifelike robot via AI could help them prepare for an interview, and 58 percent said the greatest benefit of VR simulations is that they can offer a firsthand glimpse into the job to make sure it aligns with the candidate's desired role.

Job seekers are scared by the possibility of a computer interviewing them or making the hiring decision.

Most job seekers still believe human evaluation is critical in hiring, with 73 percent saying in-person interviews will not become obsolete. But that's not to say that tech won't play a major role in the future of the interview process – the majority of respondents believe VR has legs in areas beyond hiring and recruitment. More than 80 percent of survey respondents agreed that VR simulations should be used in educational and training sessions, 71 percent think these applications would be beneficial in providing virtual office tours, and 69 percent think VR simulations should be used in virtual job descriptions.

While not every industry would benefit from this kind of technology, respondents stated that those in the fields of technology (66 percent) and manufacturing (54 percent) would benefit most from VR simulations.

HR PROFESSIONALS ARE BEST SERVED BY EMPLOYING TECHNOLOGY THAT COMPLEMENTS THEIR FACE-TO-FACE HIRING PRACTICES – FOR NOW.

Job seekers are scared by the possibility of a computer interviewing them or making the hiring decision. And probably with good reason, as computers often contribute to a less personal experience. At the same time, people have come to embrace technology in many areas of the job search, with most people searching for jobs almost exclusively online, relying on computers and algorithms to match them with ideal opportunities. While it's likely that one day most job seekers will accept technology's place at the interview table, today companies that are eager to employ tech in the interview process would be wise to include an option for some old-fashioned personal interaction.

Joe Stubblebine, Vice President
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No Spring Break from Seasonal Employee Labor Laws

By GABRIEL P. MCGAHA

Spring has certainly sprung, and as seasons change, employees begin to hire seasonal employees. But before packing the sunscreen and heading for the nearest beach, make sure your seasonal employee policies do not go on spring break.

For employers, the term "seasonal employee" can be relative, depending on the goods and services a business offers as well as geographic location. In any case, hiring seasonal employees can present some significant legal issues for the unwary. To avoid these pitfalls, employers should periodically "clean up" and "dust-off" their seasonal-employee policies to ensure that they are in compliance with applicable state and federal laws. Below is a ten-point spring-cleaning checklist that will always be in season.

1. Are Your Employees Legally Authorized to Work in the United States?

Under the Immigration Reform and Control Act of 1986 (IRCA), employers are required to verify that **all** employees, including seasonal workers, are authorized to work in the United States. Proof of this verification is made through Form I-9. As part of the verification process, employees must present documentation establishing his or her identity and right to work in the U.S. Acceptable forms of documentation include passports, driver's licenses, social security cards, permanent resident alien cards, and birth certificates. Apart from birth certificates, employers should request the original identifying documents. With President Donald Trump announcing that immigration enforcement will be a priority during this Administration, taking this simple step will help minimize the risk of an enforcement action against your company or organization.

2. Have Your Seasonal Employees Been Informed in Writing of the Limited Duration of Their Employment?

While most seasonal employees understand that they have been hired for a limited time, it is advisable to specify the limited duration of their employment in writing before they begin working. Employers should also require seasonal employees to acknowledge, in writing, that they are "at-will" employees and that their employment may be terminated with or without cause at any time, even before the end of the season.

3. Are You Aware of Restrictions Related to the Employment of Minors?

When employers hire minors for seasonal employment, they should review applicable federal and state laws to ensure that these laws are not being violated. For example, both the Fair Labor Standards Act (FLSA) and the Tennessee Child Labor Act (TCLA) prohibit anyone under the age of 18 from working in certain hazardous occupations. Examples of these occupations include logging or sawmilling, motor vehicle driving, operating power-driven bakery machines, and brick manufacturing. State laws may also be more restrictive than federal laws as it relates to employment of minors. For example, in Tennessee, when school is in session, 16- and 17-year-olds may work between 10 p.m. and midnight no more than three nights a week (Sunday through Thursday), so long as a parent or guardian provides the employer with a signed and notarized statement of consent. A comparable restriction for the same age group does not appear in the FLSA.

4. Have You Misclassified a Seasonal Worker as an "Independent Contractor"?

Independent contractors provide their services on a contract basis. True independent contractors are *hired* by companies or organizations, but they are not *employed* by them. For example, when an employer sets an individual's work hours, pays by the hour, directs and controls how an individual's work is to be done, and when there is little to no investment by the individual nor any significant chance for the individual to have profit or loss, the individual is almost certainly an employee, not an independent contractor. An independent contractor is a person, business or corporation that provides goods or services to another entity under terms specified in a contract or within a verbal agreement. Unlike an employee, an independent contractor does not work regularly for an employer, but works as and when required, during which time he or she may be subject to the law of agency. Independent contractors are usually paid on a freelance basis. When an organization hires an individual who meets the definition of an independent contractor, the organization is required to report compensation of at least $600 using Form 1099-MISC.

5. Are Your Seasonal Workers Receiving Proper Overtime?

Most seasonal employees perform jobs that are covered by the FLSA. As a result, these employees must be paid the federal minimum wage or the minimum wage that was set by their state or local jurisdiction, whichever is higher.

Employers are required to pay these seasonal workers overtime pay at a rate of one-and-a-half times their regular rate of pay for hours worked over 40 in a work week. This applies whether the employee is a temporary or seasonal employee or a full-time regular employee. In some rare instances, certain retail or service employees who are paid by commission could be exempt from overtime pay.

6. Are Your Seasonal Employees Eligible for Healthcare Benefits Under the Affordable Care Act?

Under the Affordable Care Act (ACA), applicable large employers (ALEs) are required to offer health insurance to their full-time employees. An organization is considered an ALE if it has 50 or more full-time employees. However, seasonal workers who work 120 days or less during a year, are not counted as employees for purposes of determining whether a company is a large employer. Generally, employees are considered "seasonal" under the ACA if the expected duration of their employment is six months or fewer, and the job they are performing starts and ends around the same time each year. Although seasonal workers may not be counted in determining whether a company is an ALE, these individuals may, nonetheless, be eligible for healthcare coverage under the ACA when employers use a monthly measurement period to count their full-time employees. (Note: As the debate over the future of the ACA continues, it is possible that these provisions could soon be amended, replaced or wholly abrogated. Please consult your legal counsel for future updates.)

7. Are You Aware of the Seasonal Employee Litigation Landmines?

It is important to remember that federal, state, and local anti-discrimination, harassment, and retaliation laws are equally applicable to seasonal employees. Therefore, employers should be no less diligent in addressing allegations of discrimination, harassment, and/or retaliation involving seasonal employees. Similarly, as noted earlier, subject to very narrow exceptions, seasonal employees are equally entitled to overtime pay under the FLSA. To avoid potential litigation landmines, it is imperative that employers train seasonal employees on the organization's standards, policies and procedures, and that the employer applies them equally among their entire respective workforces.

8. Are Seasonal Employees Included in Your Benefits Policies?

Employers should periodically review their employee-benefits plans and policies to determine whether seasonal employees qualify to participate in them. Even if certain benefits plans were not *intended* for seasonal workers, if a seasonal worker is able to meet the eligibility requirements and seasonal workers are not explicitly excluded from them, an employer could become obligated to allow the seasonal worker access to those benefits.

9. Is Your Organization's Confidential Information Protected?

The transient nature of seasonal employment makes the need for employers to protect their confidential and proprietary information particularly relevant. If the seasonal employee will have access to such sensitive information, prudent employers should consider providing non-disclosure/confidentiality agreements for seasonal employees to sign before they begin working. To ensure that the agreements are reasonable and within the scope of what they are intended to protect, employers should engage legal counsel to prepare and/or review them. Agreements that are overbroad, unreasonable, and/or unduly burdensome may be deemed unenforceable.

10. Does Your Organization Take Precautions When Hiring "Unpaid Interns"?

Under the FLSA, employers are required to compensate employees who are "suffered or permitted to work," with few exceptions. One of these narrow exceptions allows a business to hire an "unpaid intern," provided certain qualifications are met. While the FLSA's "unpaid intern" test is determined on a case-by-case basis, generally, an individual must work primarily for his or her own educational benefit, and not perform functions solely or substantially for the benefit of the business. If the individual performs routine operations for the business and the business is dependent on that work, he or she is probably an employee and must be paid in accordance with the general FLSA minimum wage and overtime standards. Employers should be sure to seek guidance before retaining seasonal interns.

The ability to hire seasonal employees provides a tremendous benefit to employers looking to keep pace with their seasonal demands while remaining efficient. By consistently following the best practices discussed above and ensuring that the demand for labor never outweighs the necessity of compliance with applicable labor laws, employers will significantly minimize their legal risk. Employers who are unsure of their legal obligations with respect to seasonal employees should consult an experienced labor and employment attorney.

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BATHROOM BATTLES

By MARTIN J. REGIMBAL

Gender identity and the rights of transgender individuals with regard to bathroom use have been major topics of discussion nationwide for many months now and the state of the law seemingly in constant flux. In May 2016, under the Obama administration, the Department of Education and Department of Justice jointly issued a directive to schools receiving federal education funding to allow transgender students to use bathrooms and changing facilities corresponding with their gender identity, as opposed to their birth or "biological sex." According to the agencies, Title IX, which prohibits sex discrimination in education and education-related activities but does not expressly list "gender identity" or "transgender" as protected categories, covered discrimination on the basis of gender identity. However, by August 2016, a federal district court in Texas had issued a nationwide injunction preventing the Obama administration from enforcing the directive, citing the agencies' failure to allow a notice and comment period necessary for new regulations and holding that the plain meaning of the term "sex" as used in Title IX meant an individual's biological sex as determined at birth. Expectedly, the DOJ appealed the decision.

The DOE and DOJ directive was also consistent with the Equal Employment Opportunity Commission's guidance issued a few days earlier. The EEOC's guidelines followed its position that Title VII, which prohibits sex discrimination in the workplace but also does not expressly identify "gender identity" or "transgender" as protected categories, prohibited discrimination against employees on these grounds and prohibited restrictions on the ability of transgender employees to use restrooms that match their gender identity. The guidance adopted and tracked federal court opinions and prior EEOC decisions in which the courts and the EEOC had concluded that transgender individuals are entitled to Title VII's anti-discrimination protections, and that denying transgender employees access to a restroom that matched their gender identity is unlawful sex discrimination under Title VII.

Also in 2016, the United States Court of Appeals for the Fourth Circuit ruled on a transgender student's challenge under Title IX to a school district's policy barring him from using the boy's bathroom. In finding for the student and his right to use the bathroom associated with his gender identity, the Fourth Circuit, unlike the Texas federal court, held that Title IX's language regarding the meaning of the term sex was actually ambiguous and, therefore, that the DOE's and DOJ's directive was entitled to deference. That decision did not stand unchallenged for long, with the United States Supreme Court deciding in early August 2016 to stay the Fourth Circuit's decision while it decided whether to accept an appeal of the decision from the school board.

This flurry of activity in 2016 was recently matched by actions of the Supreme Court and the Trump administration in February and March of this year. On February 10, the DOJ withdrew its appeal of the nationwide injunction issued by the Texas federal court. Less than two weeks later, the DOE and DOJ under the Trump administration jointly released a new directive, specifically eliminating the Obama administration's directive. The new guidance, however, did not issue a new view or policy of the underlying issues; rather, it's purpose was limited to revoking the Obama administration's directive and indicating that individual states and local school districts have the right to create their own policies with regard to transgender bathroom use.

The Trump administration's guidance was followed less than two weeks later by the Supreme Court announcing that it would not hear oral argument in the appeal of the Fourth Circuit case, which had been scheduled for March 28. Instead, the Supreme Court sent the case back to the Fourth Circuit for further consideration in light of the Trump administration's elimination of the Obama administration's guidance to which the Fourth Circuit had given deference.

Currently, 12 states are considering legislation to restrict bathrooms and changing facilities to a person's birth sex, Alabama and Tennessee among them. However, 13 states already have passed laws providing protection to transgender students who wish to use the bathroom and changing facilities associated with their gender identity, and at least two, New York and Connecticut have already come out deriding the Trump administration's actions. How this will continue to play out in the states is unknown, but most people are familiar with the dispute in North Carolina over the issue, that has for more than a year resulted in a contentious back and forth between the governor, the state legislature and the Charlotte city council.

But, where does all of this activity leave employers? In a state of uncertainty. Although the Trump administration's directive leaves it to the states to adopt their own transgender bathroom policies, the directive was silent as to the EEOC's position regarding gender identity and transgender as protected categories under Title VII. Meaning, absent withdrawal of the EEOC's guidance or clarification of position under the Trump administration, the EEOC when investigating charges of discrimination will continue to recognize sex discrimination claims based on gender identity and transgender issues and investigate the same, and federal courts when hearing legal claims premised on such theories of sex discrimination may continue to rely on the guidance in determining whether actionable discrimination has occurred.

For employers who already implemented policies allowing bathroom use based on gender identity, the latest developments, while suggesting that the EEOC under the Trump administration may continue the rollback of the Obama administration's position on gender identity and transgender issues, do not indicate a clear go ahead to reverse such policies. Nor do the latest developments, however, provide employers who have not yet adopted such policies with much comfort while the EEOC continues to adhere to its guidance on the issue and the federal courts potentially give them deference. While the proper bathroom policy under Title VII remains unclear, one thing is for certain, prudent employers will continue to make employment decisions based on performance and other business-related factors as opposed to sex, no matter how it is defined.

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MEMPHIS BUSINESS JOURNAL

Best of the Bar Awards

The Best of the Bar honored the top legal minds in the Memphis area including attorneys who serve in private firms or for a government entity or a nonprofit, as well as those who work as in-house counsel for a local company or corporation. Best of the Bar winners were selected by a panel of judges and weighed based on legal excellence in service to their firm, organization or company; service to their profession; and community involvement.

Courtney Leyes

Courtney Leyes, attorney with Fisher Phillips, was presented with the 2017 *Memphis Business Journal* Best of the Bar, Ace Associate award. Leyes was recognized at the second annual *Memphis Business Journal* Best of the Bar awards ceremony, which took place March 7 at Opera Memphis. Leyes was one of five finalists in the Ace Associate category.

“We are extremely proud of Courtney for receiving this prestigious honor," said Jeff Weintraub, managing partner of the Fisher Phillips Memphis office. "Being regarded as one of the top attorneys in the Memphis legal community is an incredible distinction and further demonstrates Courtney’s strengths and abilities as an exceptional attorney.”

In her role as associate, Leyes has represented employers in litigation related to discrimination and harassment in the workplace, particularly in federal jury trials. Leyes also has experience representing employers on wage and hour issues in both the court system and before the Department of Labor’s Wage & Hour Division. Specifically, she has represented employers in several FLSA collective actions over the past couple years. Leyes has been listed in *Mid-South Super Lawyers Rising Stars* since 2014 and is AV Peer Review Rated by Martindale-Hubbell.

Leyes earned her bachelor’s degree from University of Missouri and JD from the University of Mississippi School of Law. She currently serves as advisory team chairman and honor board adviser for the Delta Zeta Chapter of Delta Gamma Fraternity, as well as the mock trial facilitator for Delta Gamma Fraternity’s Living Carefully Program.

Lynn Susser

Lynn Susser, Managing and co-Founding Partner of Siskind Susser P.C. was named the winner of *Memphis Business Journal’s* 2017 “Best of the Bar Private Firm – Small” category on Tuesday, March 7. Susser and four other finalists were included in this category.

"Working in immigration law is immensely fulfilling – albeit a bit stressful at the moment – but generally, a wonderful way to practice law. It gives me the opportunity to meet fascinating people from around the world and help them realize their dreams to live and work in the United States," Susser said. “It’s an honor to be recognized for work that I love especially given the incredible group of finalists.”

As Siskind Susser’s Managing Partner, Susser supervises a wide variety of casework, ranging from employment-based visa work and family immigration matters to political asylum and naturalization. Her business clients include multinational corporations, nurse-staffing agencies, IT companies, small construction-related businesses, manufacturers and small family businesses. She also represents individuals in bringing their closest family members together in the U.S. Susser enjoys volunteering with the Community Legal Center and speaking at local immigrant group meetings.

Susser received her International Business Degree and her Juris Doctorate from the University of Memphis. She is a member of the Memphis Bar Association, the Association for Women Attorneys, the Alliance of Business Immigration Lawyers (ABIL) and the American Immigration Lawyers Association (AILA). Susser served as Chair of the MidSouth Chapter of AILA and on the AILA Board of Governors. Currently, she is the liaison to the Memphis offices of USCIS and CBP. Susser is named in *Best Lawyers in America* for Immigration Law and *Who's Who* for Corporate Immigration.

Melanie Murry

Melanie Murry, University Counsel for the University of Memphis, has been named the winner of the *Memphis Business Journal’s* Best of the Bar awards in the in-house counsel category.

Working with senior institutional leaders, Murry guides the University of Memphis through complex legal regulations, tuition pressures and limited state resources while supporting its academic mission. She is a member of the UofM’s leadership team and leads a staff of three attorneys.

In 2011, Murry was named the school’s Administrator of the Year. Under her leadership, the University’s mock trial team won the national Thurgood Marshall Mock Trial Competition. She graduated from the Tennessee Bar Association’s Leadership Law program and received the National Bar Association Ben F. Jones Chapter’s A.A. Latting Award for Outstanding Community Service. She is a member of the Shelby County Alumnae Chapter of Delta Sigma Theta Sorority Inc. and serves on the board of the Tennessee Shakespeare Company.

Murry earned her bachelor’s degree from Saint Louis University and JD from the University of Tennessee.

DOL Issues Final Regulations on Disability Benefits Claims Procedures

By JENNIFER S. KIESEWETTER

As has been the case for several months now, health care legislation has been front and center. However, the Department of Labor (DOL) has recently issued final regulations impacting health and welfare plans which will become law, and are not up for debate, as are other health care changes. On December 16, 2016, the DOL published final regulations on disability benefits claims procedures for any group plans governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA) that provide for disability benefits (the "Final Rule"). This Final Rule applies to any disability claims filed on or after January 1, 2018, and will apply not only to health and welfare plans that provide for disability benefits, but also any qualified retirement plans that may offer disability benefits.

The DOL originally proposed amendments on November 18, 2015, to align disability benefits claims procedures with those for group health and welfare plans under the Affordable Care Act. The Final Rule, issued just a month later, is substantially the same as the proposed November rule. In revising the claims procedures, the DOL concluded that enhancements in procedural safeguards similar to those required by the Affordable Care Act in group health plans were just as important in the case of claims for disability benefits.

Some key provisions of the Final Rule are:

Independence and Impartiality — Avoiding Conflicts of Interest

Consistent with the Affordable Care Act's claims and appeals' rules, the DOL's Final Rule explicitly provides that the new disability claims and appeals procedures are adjudicated in a manner to ensure independence and impartiality of all persons involved in making such decisions. Thus, under the Final Rule, any decisions regarding hiring, compensation, termination, promotion, or any other similar decisions with respect to employment (including third party claims adjudicators, medical experts, or vocational experts) must not be made based upon the likelihood that those individuals would support a denial of disability benefits. The preamble of the Final Rule notes that this independence and impartiality does not just extend to those who contribute to the final denial decision but also any individual who contributes to the benefit denial process.

Improvements to Disclosure Requirements

Based on its review of claims procedure requirements and its review of litigation trends, the DOL has determined that not all plans are complying with the claims procedure requirements under ERISA as it is currently written. Thus, the DOL has set forth additional requirements, some of which already apply under current law, to reinforce the need to comply with claims procedures in a transparent way and to encourage an appropriate dialogue between a claimant and the plan regarding adverse benefit determinations.

Thus, under the Final Rule, three components are now required: (1) a provision that expressly requires adverse benefit determinations on disability claims to contain a "discussion of the decision," including the basis for disagreeing with any disability determination by the Social Security Administration or other third party disability payer, or any view of health care professionals treating a claimant to the extent the determination or views were presented by the claimant to the plan; (2) notices of adverse benefit determinations must contain the internal rules, guidelines, protocols, standards, or other similar criteria of the plan that were relied upon in denying the claim (or a statement that such criteria do not exist); and (3) consistent with the current rule applicable to notice of adverse benefit determinations at the review stage, a notice of adverse benefit determination at the initial claims stage must contain a statement that the claimant is entitled to receive, upon request, relevant documents.

For example, with respect to the "discussion of the decision," the Final Rule now requires that the adverse benefit determinations contain a discussion of the basis for disagreeing with the views of the health care professionals who treated the claimant or the vocational professionals who evaluated the claimant, when the claimant presents those views to the plan. The Final Rule requires the same when such outside experts' advice was obtained on behalf of the plan, without regard to whether the advice was relied upon in making the benefit determination.

With respect to the disability determination by the Social Security Administration, the DOL decided to limit this scope to the Social Security Administration determinations, as such benefit determinations, definitions, and presumptions are set forth in publicly available administrative law judge decisions, regulations, and guidance, whereas disability determinations under other employee benefit plans are not generally available to the public.

Additionally, the DOL takes the position that the internal rules, guidelines, protocols, or other similar criteria constitute instruments under which an ERISA plan is established or operated, and as such, these documents must be disclosed to participants and beneficiaries.

Right to Review and Respond to New Information Before Final Decision

The DOL believes that a full and fair review entitles a claimant to the right to review and respond to any new information developed by the plan during the pendency of the appeal before rendering the final decision on the disability claim. Further, the claimant has the right to fully and fairly present his or her case at the administrative level with respect to such new information, as opposed to simply reviewing the information after the claim has been denied on appeal.

The purpose of these changes is so claimants have the right to obtain a full and fair review of a denied disability claim by *explicitly* allowing them the right to review or respond to new evidence during the pendency of the appeal, as opposed to after the final decision has already been rendered, as some courts have held under the current ERISA claims procedure regulations. This additional protection, like some of the protections mentioned above, is a direct import from the Affordable Care Act claims and appeals procedures governing health and welfare plans. By importing this language into the Final Rule, the DOL hopes to correct this procedural issue, which the DOL asserts that without it, claimants are deprived of a full and fair review, as required by the current ERISA claims and appeals procedures, when such claimants are prevented from responding at the administrative stage to new information in their case.

Deemed Exhaustion of Claims and Appeals Processes

Like the above key provisions, the "deemed" exhaustion of claims and appeals process provision also tracks the Affordable Care Act claims and appeal final rule. The DOL's Final Rule provides that if a plan fails to adhere to all the requirements in the claims procedure regulations, the claimant would be *deemed* to have exhausted administrative remedies, with a limited exception where the violation on the part of the plan was (1) *de minimis;* (2) non-prejudicial; (3) attributable to good cause or matters beyond the plans' control; (4) in the context of an ongoing good-faith exchange of information; and (5) not reflective of a pattern or practice of non-compliance. Thus, the DOL has adopted a stricter than a mere "substantial compliance" requirement.

Coverage Rescissions — Adverse Benefit Determinations

The DOL's Final Rule amends the definition of an adverse benefit determination to include a rescission of disability benefit coverage that has a retroactive effect, except to the extent it is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage.

With respect to some further guidance about what constitutes rescission of coverage, the DOL has stated that if a plan provides for the payment of disability benefits for a pre-determined, fixed period (such as a certain number of months or until a certain date), the termination of benefits at that set time does not constitute an adverse benefit determination under the Final Rule.

Additionally, the DOL has stated that a retroactive reduction or elimination of disability *pension* benefits in multiemployer plans is not a rescission of coverage. However, a retroactive reduction or elimination of disability pension benefits that results from a finding by the plan that the claimant was not disabled within the meaning of the plan when the disability provisions were reduced or eliminated under ERISA's multiemployer plan provisions would in fact be an adverse benefit determination under the Final Rule.

Culturally and Linguistically Appropriate Notices

The Final Rule requires plans to provide notice to claimants in a culturally and linguistically appropriate manner. Again, like the provisions above, this is imported from the Affordable Care Act's claims and appeals rule. If a claimant's address is in a county where ten percent (10%) or more of the population residing in that county are literate only in the same non-English language as determined in guidance based on American Community Survey data published by the United States Census Bureau, notices of adverse benefit determinations to the claimant would have to include a states prominently displayed in the applicable non-English language clearly indicating how to access language services provided by the plan. Additionally, plans must provide a customer assistance process (such as a telephone hotline) with oral language services in the non-English language and provide written notices in the non-English language upon request.

Moving Ahead

As we are heading into the second quarter of 2017, plan sponsors will want to add this to their "to do" lists in the third or fourth quarter of this year to be up and running for the effective date of January 1, 2018. Plan Sponsors should update any and all relevant ERISA plan documents, summary plan descriptions, wrap documents, claims forms, denial letters, and internal processes and procedures to comply with the Final Rule.

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Is Chronic Heartburn Burning Your Workplace?

By KAREN BOBBITT

An employee calls in sick – she was up late the previous night with terrible pain, almost like a knife in the chest. Fearing a heart attack, she called 911 and, after hours of cardiac testing and monitoring at the hospital, costing thousands of dollars, the diagnosis is an episode of sudden onset gastroesophageal reflux disease, known as GERD.

Days later another employee on an assembly line suffers a severe cut to the hand. While one co-worker rushes the injured employee to the hospital, other employees scramble to cover the workload. During the physical evaluation, the employee reveals he is suffering from extreme exhaustion and that the lack of sleep impacted adherence to safety standards. Uncontrolled stomach pain has made it impossible to sleep unless the employee is sitting completely upright – a common way that many manage sleep-interrupting GERD symptoms. The employee has to file for workers' compensation and short-term disability, while the team leader shuffles schedules for the next four weeks.

These stories demonstrate the potential workplace impact of one prevalent and often under-the-radar disease. Many human resource (HR) professionals do not think much about GERD. Everyone gets heartburn occasionally, right? With gastric acid treatments like proton pump inhibitors (PPIs) – such as Nexium® or Prilosec® – available over the counter, HR professionals might assume the cost of reflux mostly falls on the employee, not the employer. Dig a little deeper, and a more complex picture is revealed.

Understanding GERD

GERD, also commonly known as acid reflux, occurs when acid or other stomach contents back up into the esophagus from the stomach due to a faulty valve. The most common symptom of GERD is heartburn, which, while rarely life-threatening, can greatly reduce a person's quality of life by affecting daily activities, sleep and eating. Those with GERD may have other typical symptoms including abdominal or chest pain, reflux and/or regurgitation and difficulty sleeping. Other atypical symptoms can include chronic cough, sinusitis, asthma, chronic laryngitis/voice disturbances and dental erosion. According to a study in The American Journal of Gastroenterology, if left untreated, GERD can lead to costly, potentially life-threatening conditions like esophagitis, Barrett's esophagus and even esophageal cancer.

And reflux is not a small problem. GERD is one of the most prevalent gastrointestinal disorders. The National Ambulatory Medical Care Survey (NAMCS) estimated GERD may affect as much as 30 to 40 percent of the U.S. population. An article in the American Journal of the Medical Sciences reported more than 80 million Americans experience GERD symptoms at least monthly and 19 million experience daily symptoms.

Assessing the Impact of GERD

When faced with a clinical diagnosis, an HR professional's possible thought is, "How does this affect the health plan?" With skyrocketing health care costs, containing premium increases is a key HR responsibility. The impact of reflux, unlike cancer, is not seen in "shock claims" but instead in the broader health benefit costs. For GERD sufferers, the overall difference in direct and indirect health benefit costs was $3,355 more per employee annually, according to a study in Alimentary Pharmacology & Therapeutics. When GERD affects three to four out of 10 health plan members, as shown in the NAMCS, it's critical to manage the disease to achieve long-term health plan savings.

HR professionals must also factor in the effect of GERD on employee productivity in absenteeism and presenteism. The International Foundation for Functional Gastrointestinal Disorders reports that reflux costs the U.S. nearly $2 billion each week in lost productivity. Employees with GERD may experience 41 percent more sick leave days, according to a study in the Journal of Occupational and Environmental Medicine.

And another study published in Alimentary Pharmacology & Therapeutics showed that 30 percent of GERD sufferers reported reduced productivity. Much of this can be due to symptom severity and instances of nocturnal heartburn, particularly when it interferes with sleep.

The HR Professional's Role

Given the disease's potential impact on the workplace, HR professionals must increase their understanding of GERD to have a greater appreciation of plan enrollees who may be suffering. A quick way to assess this is to run a health plan claims report identifying those costs associated with GERD diagnoses. It is often a top 10 claims cost category alongside more recognized and addressed diagnoses like diabetes and heart disease. A search should include:

ICD-10-CM	Description
K21.0	Gastro-esophageal reflux disease with esophagitis
K21.9	Gastro-esophageal reflux disease without esophagitis
K30	Functional dysphasia
R10.13	Dyspepsia NOS
K44	Diaphragmatic hernia without obstruction or gangrene
R12	Heartburn

The next step is to raise awareness among employees, including offering programs which highlight the prevalence of GERD and the treatment options available. A wealth of information also can be found at www.GERDHelp.com.

For GERD sufferers with infrequent symptoms, their health care provider may suggest simple dietary and lifestyle changes such as:

- Losing weight
- Avoiding "trigger foods" known to cause reflux, such as chocolate, caffeinated beverages and acidic foods like tomatoes and spicy sauces
- Eating smaller, well-timed meals
- Avoiding eating at least four hours before bedtime
- Quitting smoking
- Limiting alcohol intake

Impact of Prolonged PPI Use

When lifestyle changes become impractical or do not reduce symptom frequency or severity effectively, an employee's physician or gastroenterologist may suggest medical treatment. Some GERD sufferers may take over-the-counter or prescription PPIs to control symptoms, but many do not realize that PPIs are approved to be used for just a few weeks, not months or years. Recent research has shown long-term PPI use may be linked with other health issues including:

- Chronic kidney disease (as reported in JAMA Internal Medicine),
- Dementia (as reported in JAMA Neurology),
- As well as increased pneumonia risk, vitamin B12 deficiency and increased risk of fundic gland polyps (as reported in the World Journal of Gastroenterology).

Long-Term Treatment for GERD

Employees with persistent symptoms may need to seek a medical evaluation from a gastroenterologist or foregut surgeon specializing in GERD. This provider can definitively determine if an employee has GERD and the likely cause of it. Often, it's caused by an anatomical defect, such as a hiatal hernia. In these cases, lifestyle changes and PPIs may not provide adequate relief and an interventional procedure may be needed. In fact, a study published in Expert Review of Medical Devices reported that, over time, approximately 17 to 32 percent of GERD patients do not experience adequate symptom relief with lifestyle changes and medication.

Many health plans consider a laparoscopic Nissen Fundoplication to be the "gold standard" for patients with an anatomical reason for their GERD. This surgical procedure developed in the 1950s has given many relief from the bothersome symptoms of GERD and has helped many to get off their PPI medications, but it is linked to long-term side effects like dysphagia (difficulty swallowing), gas bloat and inability to belch or vomit, as outlined in an article in JAMA.

There are a variety of options available for the long-term treatment of GERD. However, health plan medical coverage guidelines do not always feature the most recent advances in technology. Newer, less invasive and very safe procedures have become available, including the TIF® procedure. TIF is an acronym for transoral incisionless fundoplication, and it is performed through the patient's mouth, which means there are no incisions. While under general anesthesia, a special device is inserted and is used to manipulate and recreate the valve between the stomach and the esophagus, correcting the anatomical defect causing symptoms and providing similar benefits as a Nissen surgery but without as many side effects common to that surgery.

The TIF procedure has been largely embraced by the medical community and medical societies such as the American Gastroenterological Association (AGA), the American Society of General Surgeons (ASGS) and the Society of American Gastrointestinal and Endoscopic Surgeons (SAGES). It is also substantially less expensive than a Nissen fundoplication. The 2017 average, unadjusted Medicare reimbursement for the TIF procedure is $4,392.22 versus the Nissen procedure, which can range from $8,573.89 to $33,810.71 – *two to almost eight times more expensive than the TIF procedure* – depending upon the degree of complications (www.cms.gov). More importantly, the cost savings do not compromise outcomes.

Unfortunately, the TIF procedure is not always covered by third-party administrators – greatly limiting options for treatment of GERD. HR and benefits managers should review their plan administrator's Medical Coverage Guidelines to find out which treatments for GERD are covered. If the TIF procedure is not covered, self-funded employers can easily request that coverage for CPT code 43210 is added to the plan. Fully-insured employers can apply pressure to their insurer to add TIF coverage to commercial plans. In addition, employers can direct their employees to GERDHelp.com for more information about GERD, treatments and locating specially-trained physicians.

By understanding GERD and its effect and impact on the workplace, providing the right information and ensuring health plans cover varying treatment options, HR professionals can help their company and fellow employees better manage the impact of this prevalent disease. This helps keep everyone from feeling the workplace burn of GERD on employee productivity and the employers' bottom line.

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What Are Your Options When You Can't Get Your Star Employee an H-B?

By GREG SISKIND

H-1B visas, the workhorse visa category for individuals with university degrees working in specialty occupations, has had a cap on numbers since 1990. That was before the first web sites, flat television screens were only seen in science fiction films and cell phones were called bricks because that's what they resembled in size and weight. Unfortunately, the cap of 1990 is still with us.

Congressman Bruce Morrison, who was the chair of the House Immigration Subcommittee at the time and whose committee shepherded the bill through, told me a few years ago that they never believed we would get close to reaching the cap of 65,000. How wrong he was. Applications for the have exceeded 200,000 in the last few years and when the latest H-1B lottery is held in early April, all expectations are that the numbers will be similar.

With the odds stacked against getting an H-1B approved and the political environment not likely to make expanding the program soon a realistic option, what's an employer to do?

First, it's worth looking at seeing if you can get an H-1B without being subject to the annual cap. Employees that are working at colleges and universities, at non-profit research institutions and at non-profit employers affiliated with colleges and universities or non-profit research institutions are exempt from the cap. Even if you are a for-profit employer, you might still be able to claim exemption from the cap if your employee is working most their hours at an exempt location. For example, if you're a for-profit physician group primarily servicing a teaching hospital, that could be the basis for claiming cap exemption.

Another option is if the employee is working concurrently in cap-exempt employment. So, if your new CEO is also teaching at the MBA program at your local college and the college files an H-1B for her, then your company can file a concurrent H-1B even if the H-1B cap has been hit if the employment with the college is continuing.

There are several other visa categories available that might be a fit and which do not have limits on their numbers or their limits are rarely reached. There are the H-1B cousin categories – E-3 and H-1B1. The E-3 is available to Australians. The H-1B1 is available to nationals of Chile and Singapore. The requirements for each are almost identical to the H-1B and neither category has ever had its statutory limit reached.

The TN visa is available in unlimited numbers to nationals of Canada and Mexico under the NAFTA Treaty. President Trump has suggested that the treaty will be re-negotiated, but for now and probably for a while, the visa categories under NAFTA remain intact. The TN category is limited to a list of occupations that has largely remained the same for a quarter century, but many popular occupations like computer systems analysts, nurses and even lawyers are on there.

Perhaps your company is majority-owned by foreign nationals or has a foreign parent and the nation is one of the 60+ countries that have a bilateral investment or trade treaty allowing for executives, managers and essential skills employees to get E-1 or E-2 visas? The employee needs to have the same nationality as the company and essential skills employees shouldn't be doing jobs that can be filled by local workers. Unlike the H-1B, these visas allow applicants to file directly at a US consulate without having to be pre-approved by USCIS and spouses of E-1s and E-2s can get a separate work card allowing for employment with any employer.

The L-1 visa is also an option for executives, managers and specialized knowledge employees if the company doesn't have a treaty, but does have overseas operations and an employee is being transferred who has been employed by the company abroad for at least a year. Like the E visa, spouses can work. And there's a green card category that is available to many L-1s that has a fast track.

The O-1 visa is available to aliens with extraordinary ability. It's open to individuals in the sciences, arts, sports, education and in business. Applicants must present evidence demonstrating they've reached the top of their field and have had sustained acclaim.

The J-1 exchange visitor visa is available trainees and individuals in that category can receive work authorization for up to 18 months. You'll need to work with an approved exchange program and this visa often comes with a requirement that the J-1 visa holder return to his or her home country for two years when the training is finished. But that requirement can often be waived and spouses of J-1s can get work authorization.

Finally, sometimes it is possible to simply bypass the H-1B visa and go for a green card, particularly if you have a lot of time and if the person you're hiring is not from a country with a long backlog in the green card category selected (this is especially a problem for nationals of India and China).

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When Should You Offer a Severance Agreement?

By MARY E. BUCKLEY

PARTING IS EVER SUCH SWEET SORROW...

Parting ways with an employee can genuinely cause a certain kind of sorrow and pain for employers if the terminated employee decides to sue. A severance agreement can avoid litigation, leading both employer and employee to a smooth exit and new beginning. For a severance agreement to achieve such, it must be drafted properly and tailored to the facts and circumstances of each termination.

I. WHAT IS A SEVERANCE AGREEMENT?

A severance agreement is any contract that is entered into between an employer and a departing employee that compensates the employee for leaving that employment position. A severance agreement is not required in order to terminate an "at will" employee as those employees can resign or be terminated at any time. Absent an employment contract, an employer generally does not have an obligation to pay the departing employee severance or offer a severance agreement. In addition, the departing employee is not required to sign the severance agreement.

However, even though it may not be required by contract, an employer may wish to seek a severance agreement, which provides some type of compensation to the departing individual in exchange for that individual abiding by the employer's limitations on his or her post-employment conduct and/or waiving the right to sue on certain grounds. The aspects of post-employment control and avoidance of litigation are the main reasons an employer would want to use a severance agreement.

II. TO USE, OR NOT TO USE: THAT IS THE QUESTION?

A severance agreement is not appropriate for all employees. The employer needs to look at the employee's duties and responsibilities as well as the circumstances surrounding the termination.

Is the individual in a protected category under a discrimination law? What is the likelihood this person will be replaced by someone not in a protected category? Has the employee recently engaged in protected activity, such as taking leave under the Family and Medical Leave Act (FMLA), filed a workers' compensation claim, complained of sexual harassment, requested an accommodation, or acted as a whistle blower against her employer? As an employer it is important to be aware of these things before terminating someone because if these factors are present, terminating the employee without offering a severance agreement could be costly.

For situations with those complicated factors involved, the employer should consider paying for the peace of mind in avoiding ligation which could arise because the employer terminated the employment relationship. If the situation does present with any of those risk factors above, then a severance agreement should be utilized. This is not as simple as it sounds because the Equal Employment Opportunity Commission (EEOC) has laid out very specific language that can be used, should be used, should not be strayed from, and which will be discussed below.

Other than those certain risk factors mentioned above, there is another reason or circumstance when an employer would want to use a severance agreement – to ensure post-employment control.

Post-employment control occurs with certain common provisions which often are included in severance agreements. The most common limitations on post-employment conduct are non-compete, non-solicitation, confidentiality, disparagement, and no-hire provisions. With these, the employer is buying the right to exercise some level of control over the departing employee's conduct. Some things to consider include: Is what this employee knows, or her job duties and knowledge such that it will be worthwhile to pay for post-employment control? Does this employee know trade secrets, client lists, marketing strategies, or any other information that gives someone the edge over a competitor?

If the answer to any of the above questions is in the affirmative, then paying to get post-employment control through a severance agreement should be utilized. With an executed agreement, the employer has gained some control over the post-employment conduct of the terminated individual regarding such issues. An employer should consider using it with any employee that legitimately has or could have information or knowledge that could be taken elsewhere and used to cause or increase the competition against the former employer.

The severance agreement for Chad in the mailroom will be different than for Mike the C.E.O. A severance agreement is not "one size fits all" and should be specifically tailored to the situation at hand.

If drafted properly, the relationship can be considered to be completely and forever severed, with each party moving on in the world, never again to have to deal with each other; and that is the goal.

III. BEWARE THE IDES OF MARCH!

There are several things to be aware of when it comes to using a severance agreement. As stated above, the EEOC has very specific language that it requires for a waiver or release to be considered enforceable and not "overly broad and misleading." Employee release agreements are struck down as unenforceable by courts when the agreements are not well-drafted. Provisions like non-compete, non-disparagement, or confidentiality, can result in an unenforceable agreement if they are overly broad or infringe on an employee's right to file or otherwise institute a charge of discrimination, to participate in a proceeding with any appropriate federal or state government agency enforcing discrimination or other employment laws, or to cooperate with any such agency in an investigation. Even worse than being unenforceable it can result in liability on behalf of the employer for violating the law in that agreement and any past agreements that used the same language. For example, liability can result if an agreement amounts to denying

employees the ability to fully exercise their Title VII rights by limiting their ability to file charges and cooperate in an investigation. Although, a properly drafted severance agreement can limit the employee's ability to recover damages for any discrimination charge. Because such language needs to be carefully drafted, these agreements should not be pulled off the internet or drafted last minute – to do so could be a disaster.

In addition to those above, there are special requirements, including timing provisions, for people age forty and over that must be followed to the letter. For those employees forty years and over, the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Plan (OWBP) create a Federal minimum amount of time (twenty-one days) that an employee age forty or older must be given when considering a severance agreement. In addition, it also provides for a seven-day window after execution within which the individual can revoke the agreement. There is an extended time requirement (forty-five days) if the employer terminated a group of employees age forty and over. Timing is not the only special provision required for those forty and older. Another provision required for enforcement is that the language be understandable in plain, clear language that avoids complex sentences and legal jargon, such that the person is likely to understand what rights are being waived. There also must be a specific reference to the ADEA or the agreement will not be enforceable. It must advise the employee to consult an attorney. It must not misinform or mislead in any way, nor may it exaggerate the benefits being offered or limitations imposed. It must be in writing and it cannot waive claims that arise after it is signed.

For those workers under forty, there is no statutory minimum amount of time required, but if time is not of the essence, then the employer should consider giving the terminated employee more than a weekend to sign the agreement. Again, severance agreements are not a one size fits all type of contract and must be tailored to the employee being terminated.

Aside from the legal aspects in and of the agreement itself, there is a personal aspect to consider. These agreements are dealing with people and emotions. Handing over a five-page, single-spaced severance agreement to Chad in the mailroom will cause an emotional reaction. The person has just gotten fired. Whether he or she knew it was coming or not, emotions and feelings are involved which an employer should not overlook.

IV. THIS IS THE SHORT AND LONG OF IT.

Severance agreements generally can, and usually will, save an employer time and money. A lawsuit by your receptionist can be just as expensive as a lawsuit by the CEO, in terms of defense costs and disruption. Federal law regarding these types of agreements is constantly changing and severance agreements should be updated regularly to make sure those agreements will be enforceable.

Updating regularly does not mean pulling the latest version from the internet or reading a couple articles on severance agreements. Updating regularly means consulting an attorney and paying the cost to get an agreement that will hold up and save you more cost, time, and frustration down the road. However, even the best drafted severance agreement will not stop an employee determined to sue from suing, but with a properly drafted agreement the situation will not be that of a Shakespeare tragedy.

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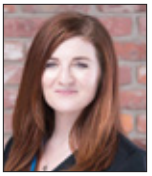

On May 24th, the Mississippi Business Group on Health and the Mississippi State Department of Health will hold another Healthy Workplace Healthy Communities Conference in downtown Jackson, Mississippi at the Marriot Hotel and Conference Center. This meeting will bring together employers, public health, and other community health advocates to learn more about the health connections between workplaces and the communities that their employees and their families live and work.

HEALTHIEST WORKPLACES

This year's event will have presentations on a variety of employer and community efforts which are changing the culture in their communities to being healthier. There are some great examples of employers in Mississippi who have shown excellence in promoting and supporting health in the workplace. Several of these have been finalist and received the Healthiest Workplace Awards. These employers will be sharing their success stories at this year's conference. Some of the innovations by these employers include offering onsite health clinics, support for community health events, and engagement strategies for the employee's families.

Cities and counties are also getting on the wagon by offering improved health benefits, wellness programs, and connecting employees with community resources. Attendees at the conference will hear the reasons why municipalities are promoting both employee and community health to reduce the costs to their organizations and taxpayers alike.

The City of Vicksburg, under the leadership of its Mayor, George Flaggs, has a mayors health council and has recently worked with the Alderman and the leadership team of the city to provide an employee health initiative. The city has partnered with Vigilant Health to provide a population health approach to managing their health plan cost including a near-site clinic and a new wellness program.

> *"The City of Vicksburg is an example of a municipality that is not only focusing on community health but on the health of its employees. We at Vigilant Health are excited to help improve the health of the city workers while connecting them with the physician community and community efforts to help create a culture of health in Vicksburg." Dr. Marshall Bouldin, Medical Director, Vigilant Health*

COMMUNITY & CONSUMERISM

In Charleston, the local hospital worked with community partners to fund the creation of a wellness center which is making a huge impact on the members of Tallahatchie County. What started as a doctoral student's project has become a national story of how vision and partnerships can create healthy spaces in communities to improve the culture of health. Dr. Catherine Woodward will share her story from concept to launch to future activities with this project.

Several speakers will be presenting ideas for improving health and healthcare literacy which is a growing concern in Mississippi. Many Mississippians do not understand healthcare terminology and devalue the importance of prevention and daily lifestyle choices. Information and ideas will be shared to give attendees information and resources to promote good health and healthcare consumerism. Other speakers will address the needs of promoting local and healthy food choices in the workplace and in the community. These include gardening, community supported agriculture, farmers markets along with healthy vending, catering, and smart choices when eating out.

UPROOT MISSISSIPPI

For several years now, many community stakeholders have been working on the Mississippi State Health Improvement Plan, which has been named Uproot Mississippi. One objective is to create a culture of health in Mississippi by advancing the workplace wellness and school health efforts in the state. The key messages for workplaces are that comprehensive programs can improve the health and productivity of employees which reduces cost for both the employer and employee. Healthy workplaces offer places, policies, and programs that support healthy behavior at work and in the community.

A new initiative of the MSBGH and the MSDH is the Recognized Healthy Employer program where employees can complete a best practice survey to see if they qualify by meeting a minimum standard. For those companies that qualify, they can apply for the 3rd Annual Healthiest Workplace Awards which is a collaboration of the MSBGH, MSDH, and the Mississippi Business Journal.

Employers who are healthy, invest in the communities where their employees live, work, and play. They provide funding for community activities and events and provide employee support to volunteerism in the community. They also promote and support other healthy businesses in the community.

> *"In public health, employers are a key stakeholder in helping to create and support healthy communities and a culture of health. The MSDH and MSBGH continue to encourage and provide leadership in helping both public and private employers to follow best practices and evidence-based solutions in workplace wellness." Dr. Victor Sutton, Director, Office of Preventive Health, Mississippi State Department of Health*

To learn more and register for the Healthy Workplace Healthy Communities Conference, please visit www.msbgh.org/events. Employers are vital to Mississippi and its many communities and serve as drivers for both economic development and public health.

NOTES:

8:00 AM – 2:00 PM

Jackson Marriott located at 200 E Amite St, Jackson, MS 39201

Cost: $25 Participant, MSBGH Members are free, $150 Vendor Booth, $500 Event Sponsorship

To Register, www.msbgh.org/events

For more information, contact: Murray L. Harber, Executive Director, MSBGH, mharber@msbgh.org

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Up Close and Personal:

Taking a Look at Workplace Monitoring

By MARY C. HAMM

In **the wake of WikiLeaks' latest release of documents** describing software tools used by the C.I.A. to hack into phones, computers, televisions, and other devices, it seemed like an appropriate time to review surveillance in the workplace. Employers surveil employees for a variety of reasons, including to guard against liability for misconduct and to manage productivity and performance. Unlike the C.I.A, however, employers are not in the business of conducting espionage and should place employees on notice of the ways in which they are subject to observation. Employees generally have no particular expectation of privacy in work-related technology, including employer e-mail, text messages and voicemail, but employers should take certain precautions and clearly explain their policies, especially when employees use their own devices for business purposes and use their employer's devices for personal communications.

Keeping a Watchful Eye on Employees

For many years, employers have used video surveillance to prevent theft and workplace violence and misconduct. Now that computers and electronic devices permeate the workplace, employers monitor employee email and internet usage by, for example, reviewing emails sent to or received from their email systems, examining the websites employees visit using the employer's computers or other devices, and tracking website searches and the amount of time employees spend on the internet while at work. Employers can also install software to monitor when files are renamed, which files are printed, and the keystrokes employees make while using an employer-owned device. Numerous employers use global positioning systems (GPS) to track employees' whereabouts and their productivity.

Assessing the Risks of Monitoring

Employers who engage in such monitoring should be aware of certain laws that could limit their curiosity. The Stored Communications Act ("SCA"), part of the Electronic Communications Privacy Act, is a federal statute that can create a right to privacy for e-mail and other digital communications stored on the internet. 18 U.S.C. § 2701(a). Whether the SCA applies to an employer's actions in accessing personal email or non-public social media posts is an issue that courts continue to debate.

Courts have examined whether an employer's use of passwords to gain access to and monitor an employee's personal internet based e-mail or social media accounts give rise to a claim for unauthorized access under the SCA. *Compare Ehling v. Monmouth-Ocean Hosp. Serv. Corp.,* 961 F. Supp. 2d 659, 667 (D.N.J. 2013) ("[T]he SCA covers: (1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public. Facebook wall posts that are configured to be private meet all four criteria.") and *Pietrylo v. Hillstone Rest. Grp.,* 2009 WL 3128420 (D.N.J. Sept. 25, 2009)

(finding SCA violation after employer accessed private social network chat group without authorization), *with Anzaldua v. Ne. Ambulance & Fire Prot. Dist.,* 793 F.3d 822, 842 (8th Cir. 2015) (holding that a "sent" email was "not stored on the Gmail server for backup protection purposes" and thus did not fall under the protection afforded by the SCA).

Employees have also brought state law privacy claims against employers who reviewed content on employer-owned devices. For these types of claims, courts typically review whether an employee enjoyed a reasonable expectation of privacy and whether the employer's legitimate business interest outweighed that expectation. Most courts have found that an employee has no reasonable expectation of privacy in workplace e-mails when the employer's policy limits personal use or otherwise restricts employees' use of its system and notifies employees of its monitoring policy.

Even if employers are not accessing private social media pages and personal emails, they cannot use information obtained on public social media pages or personal websites regarding an employee's gender, race, religion, disability, age, genetic information, pregnancy, or other protected characteristic in making employment-related decisions.

Tennessee employers should be aware of a law which could impact their ability to use GPS tracking devices. Tenn. Code Ann. § 39-13-606 makes it a misdemeanor to "knowingly install, conceal or otherwise place an electronic tracking device in or on a motor vehicle without the consent of all owners of the vehicle for the purpose of monitoring or following an occupant or occupants of the vehicle." No court has interpreted this law to apply to GPS trackers on employer-owned vehicles, but all employers should obtain consent of the employee when attaching a GPS device to his or her vehicle and notify employees that employer-owned vehicles are equipped with such devices.

Implementing Appropriate Policies

Employers who engage in workplace monitoring should have policies in place to notify employees that certain systems are covered by the policy, that the employer reserves the right to review the employee's activities while using these systems, and that the employee should not use the employer's systems for matters he or she believes are private and confidential. And if employees are using their own phone, tablet, or laptop to access employer information, employers should consider implementing a "bring your own device" policy that sufficiently outlines any employer monitoring.

Monitoring employees is not without risks, but, with careful planning and policy implementation, it can serve legitimate business purposes.

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BOOK LOOK

Out with the **Old Alpha** and in with the **New Alpha**

By PAULA HAYES

With so many messages out there pertaining to leadership, is there really a new way to define it? In spite of my initial skepticism, Danielle Harlan's *The New Alpha,* has convinced me that indeed there is an alternative way of defining (or redefining) leadership, and it is refreshing.

Let's start with the word alpha. So many connotations surrounding this one word. If you are anything like me, when I hear the word alpha, my mind immediately conjures a picture of a litter of puppy dogs where within minutes of being born, one puppy is always sure to emerge as the alpha, or the leader of the other puppies. Or, I picture someone who may exert more overt and aggressive force to "win" in life; one who in their less than tactful efforts to force that "win" borders on becoming a bit of a bully. But are these definitions steadfast? Harlan writes, "So what does it mean to be an Alpha anyway? In astronomy, the brightest star in a constellation is typically called the alpha. Likewise in the animal kingdom, the alpha is the most dominant animal in the group. And so it goes in human affairs that we generally think of influential and powerful people as *alphas.* Let's be honest, though—most of the time we don't like these people…"

The ways that Harlan redefines for us the Alpha leader, it becomes possible really for any of us to transform into an Alpha leader. The Alpha social leadership position is no longer based exclusively on rank, title, hierarchy. The old/traditional model of the Alpha leader often focuses on a set of personality traits, like an abundance of charisma combined with the exertion of willpower to *make things happen,* and this in the end can cause one to ride that thin and precarious line between being a go-getter and being a jerk. Not so with the redefined, new model of the Alpha Leader. There are three guiding principles, or what Harlan calls, "core beliefs" in her model. The first principle is to realize that "each of us possesses the innate potential to make a unique and meaningful impact in the world." In realizing this, the self is fashioned into a tool used to shape, for the better, the lives of others. The second principle is to commit to self-improvement; and, if we really stop and think about it, this makes perfect sense. How can we motivate, mentor, inspire, shape our immediate and extended social worlds, if we do not first have a firm grip on the self? As Harlan puts it, "By working to become the best version of ourselves, we develop the foundational competences that are necessary to effectively lead others." It is really a moral position that the Alpha leader must take; to help others means to *first* help oneself, and to direct others means to *first* direct oneself. The third principle is perhaps the most unexpected of the three; that in order to be truly successful, the real leader has to enjoy life!

What Sets this Book Apart

The structure of the book is important. It has three main sections—*personal excellence, personal leadership, and team and organizational leadership*—and these three sections follow the logic of the three guiding principles. First, one must build the self. Once a strong foundation of self is accomplished and self-improvement has taken place, authentic forms of achievement can begin. Organizations that are strong in leadership will put time, attention, and resources into helping employees gain self-awareness and self-improvement, as healthy, happy, stable employees make for better, more productive teams, and more productive teams in turn create more productive, stable, and stronger organizations; it becomes a chain of internal stability from the level of the individual up through the level of the organization. To accomplish this, Harlan focuses on presenting a strong "developmental framework." Harlan gives the reader lots of questionnaires and trackers so that the principles of Alpha leadership are not just discussed at a theoretical level, but executed in ways that can me measured by the individual, the team, or the company. Additionally, the tools Harlan uses and recommends to track one's leadership progress is based upon data, is highly customizable to the individual's starting point, and emphasizes the role of community. The place of community is invaluable to Harlan's approach; the self does not improve in isolation, but when living in connection with others, and when engaged fully into a community life. As Harlan reminds us, relationship building is fundamental to true success—"A circle of support isn't built up over night. Cultivating and nurturing these relationships requires effort and time." And it includes recognizing the role(s) that others play in our support circle. Knowing the difference between "inspirers, mentors, sponsors, reliables, emotional supporters, true peers, and challengers" and how to respond appropriately to each is essential to building a good personal support system, but it is also tantamount to building a successful team or organization.

The Surprising Turns in the Road

Harlan doesn't give us status quo techniques for mastering leadership. She reminds us life always has surprising turns in the road. For instance, in her section, "Think Creatively," she gives us the example of two mathematics professors, Nicole and Rachel, who put a jazzy spin on giving a presentation. Instead of the tried and true, the expected cliché PowerPoint, or a handout, these two professors wrote a song at a retreat on leadership. Sounds ridiculously simple, right? But simple sometimes opens us back up to the creative side of ourselves. A key element to inspiring and motivating others is to find that creative spot within. Harlan reminds

us, "a recent survey of over 1,500 global CEOS, it's the most important factor required for long-term success in an increasingly complex word." So how do we unleash some of that stored away creativity? Go back to the simple. One suggestion Harlan makes is read poetry! As an English instructor, I really must say, this suggestion was after my own heart! But even I, one who has written and published literary criticism on poetry as well as original poems, found myself scratching my head at the connection between poetry and leadership. Poems have inspired many things in the world, mostly love, or the rejection of love (how many poems exist on this theme, particularly the unrequited? Oh let me count thy ways?); *but, do poems really inspire leaders to inspire others?* Harlan resolves the apparent conundrum this way—"In my opinion, poetry is one of the most important and understood tools in our leadership arsenal. Think about it: it forces you to turn on your intuition and start making connections between things, which is something that highly effective leaders need to be able to do, and it often draws on your emotions (which builds *emotional intelligence*)." My heart was overfilled with joy when I read Harlan's selections of poets she recommended—Lucille Clifton, Dylan Thomas, and Mary Oliver, three of my own personal favorites. The creativity does not stop there; she gives us other unexpected suggestions to increase creativity, such as taking 20 pictures "of things that you think are beautiful" or using the Reddit.com's Writing Prompts and writing a response to one and posting it. Leadership in other words is entirely about connectivity! Be it connectivity to one's environment, workplace, staff, you name it, leaders must connect! And sometimes when those means of connection start to grow artificial and stale, the leaders themselves grow boring, tired, weak, and in some worse case scenarios, even embittered. While creativity may not be the great panacea to the problems of leadership, creativity forces connections between the inner self and the outer world, and that in turn forces leaders to remember their own connections between themselves and others.

In a section, "Practice Gratitude," Harlan offers the example of Patrick, a friend of the author's who had moved to Spain due to his job. While in Spain, Patrick grew increasingly homesick, but instead of wallowing in that negative emotion, Patrick went the other direction with his feelings and engaged in a "gratitude project" where he posted messages on Facebook encouraging others to "accept the differences" between one's expectations and one's reality. By narrowing that emotional space between negative emotions and positive emotions, Patrick was able to become a leader just through Facebook.

It might not seem at first glance like leadership advice—write a song, read a poem, post a gratitude project to Facebook, but these are the unexpected turns in the road that Harlan gives us. There is plenty there to meet the anticipated with the exercises to track self-progress in leadership growth, with the data of research studies. But, it is without a doubt these unexpected turns in the road, the songs, the poems, the social media used to empower and not belittle, that leads me to believe that Harlan really does deliver what she promises in this book—to initiate a movement of communal changers. Since Harlan encourages us to read more poetry to become better leaders (of course, that is not all she has us do), I will leave you with a few lines by the poet Mary Oliver, from a poem entitled, appropriately enough, "The Journey"—*"One day you finally knew/what you had to do, and began."*

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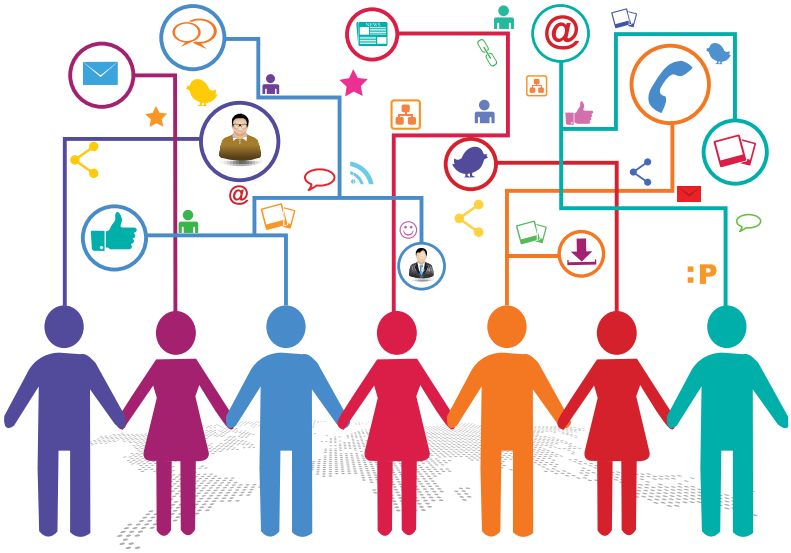
What Tampa's Experience Can Teach Us About Attracting Millennial Talent

BY HARVEY DEUTSCHENDORF

Many organizations and communities are recognizing that their future success depends upon their ability to attract and keep millennial talent. Recently I had the opportunity to go to Tampa and speak with millennials and millennial entrepreneurs who had started successful businesses there. The first thing I noticed about Tampa was the friendliness. I was constantly greeted by complete strangers. When speaking to millennials I often came across the term "emotional connection." This showed up in the way that people who knew each other often greeted each other with hugs. This is what I discovered that millennials are looking for in their workplaces and communities.



An Opportunity to Connect and Make a Real Difference

Unlike large established places with multiple levels of hierarchy, Tampa's millennial business owners talk about the ease of accessing each other. There is a sense that millennials can be part of the action and really make a difference. Even major business owners like Tampa Lightning owner Jeff Vinek are only one or two connections away. Unlike other large places where they felt they simply had to go along with whatever was going on, Tampa gave them an opportunity to get in on the action.

Culture of Collaboration

There is an underlying belief that by working together, everyone can achieve more. Through intense networking and doing business with each other, Tampa businesses both support and rely upon one another. This type of atmosphere is quickly felt by new business owners moving in. Building and maintaining trust are essential. If someone was not a team player and only out for themselves, they would be quickly found out, suggested millennial entrepreneur Roberto Torres.

Sense of Belonging and Opportunity to Shape the Future

Along with the sense of excitement and anticipation of an exciting future, there is also a sense of being part of something bigger. Roberto Torres refers to it as "belonging to a tribe." Unlike older established cities that feel they would have no impact, millennials see Tampa as a place where they can leave their mark, impact their city and create a place that they want to set down roots and raise families. It is a place where they can innovate, create and feel that they belong. One millennial from a large city talked about how difficult it was to make new friends in a big place. She had already made a number of new friends here.

Relaxed, Casual, Vibrant Atmosphere that Welcomes Diversity and Uniqueness

While running a business can be very stressful, the common feeling was that doing so in Tampa did not have the same stress as other regions. The casual relaxed atmosphere even extends to professions known for their conservative traditions such as law. Attorney Brad Barrios, shareholder in a law firm, tells us that even though the vocation of law is very serious, dress restrictions are not as stringent as more traditionally established locales. In all worksites, I witnessed everyone is encouraged to bring their unique selves through their work. No cookie cutter offices here, everyone puts their individual stamp on their spaces as it is their home away from home. Every workplace that I visited had contests, games and a sense that people will work better if they are having fun. This feeling of being unfettered by the traditional restraints of business settings was a common theme of millennial driven businesses.

A Desire to be Socially Responsible and Give Back to the Community

Erin Meagher, millennial CEO, is a prime example of an entrepreneur that feels it is important to give back. Her following free trade practices has allowed workers in places like Fiji to go from coming to work on bicycles to scooters. In her small packing plant, she employs a few individuals with disabilities, including a 55 year old woman on her first job. Erin finds this raises the morale of the staff. Bobby Harris, CEO of a logistics firm, is an active supporter of the Tampa Humane Society. As well as contributing from their company many of the community leaders were generously giving of their own personal time to causes that they believed in. They saw it as their way of giving back and building connections within their city.

Recognizing People and Investing in Their Potential

In all of the diverse businesses owned and managed by millennials, there was a strong sense of involving staff in the decision making and helping them grow to reach their potential. Regular celebrations and acknowledgments of accomplishments are the norm. Whether it is banging a gong to signify that someone has reached a milestone or going out for a beer after work at one of the craft breweries, accomplishments are always recognized and celebrated. While there was a recognition that one needed to work hard to get ahead there was an acceptance of the need for balance and the idea that time spend outside of work has just as importance as on the job.

Harvey Deutschendorf is an emotional intelligence expert, internationally published author and speaker. To take the EI Quiz go to theotherkindofsmart.com. His book *THE OTHER KIND OF SMART, Simple Ways to Boost Your Emotional Intelligence for Greater Personal Effectiveness and Success has been published in 4 languages.* Harvey writes for FAST COMPANY and has a monthly column with HRPROFESSIONALS MAGAZINE. You can follow him on Twitter @theeiguy.

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