HR Alabama

Volume 3 ◆ May, 2013

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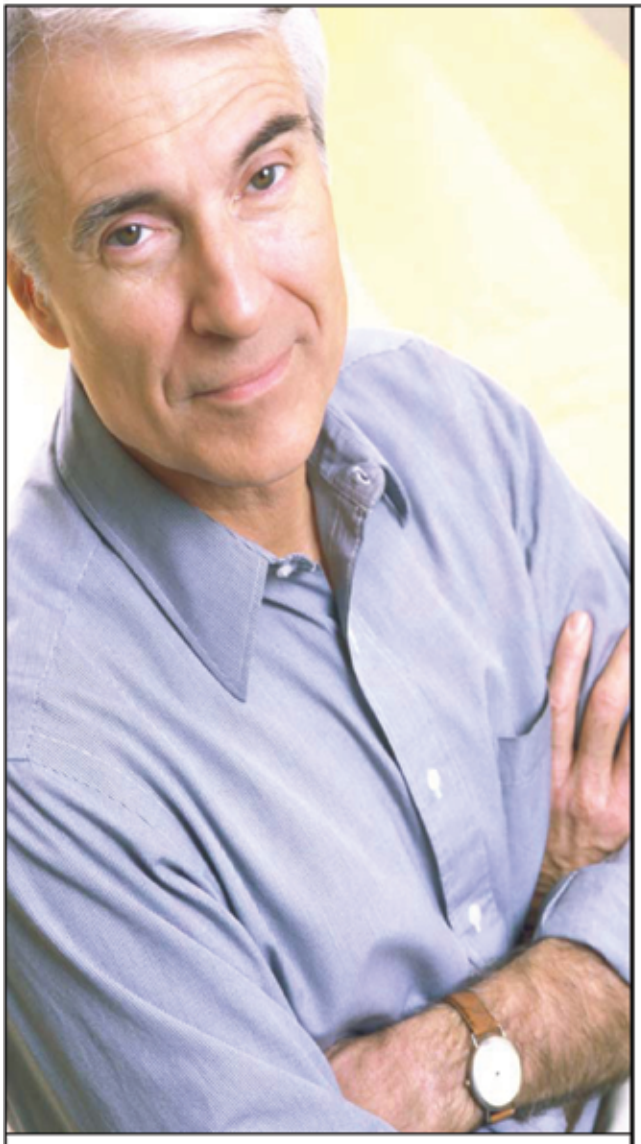

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HR Alabama
Volume 3, May, 2013

About HR Alabama
Volume 3, May, 2013

HR Alabama magazine is published annually by the SHRM Alabama State Council, an affiliate of the Society for Human Resource Management. The publication is a volunteer effort that endeavors to provide HR professionals in Alabama with useful, thought-provoking information and ideas. HR Alabama is distributed free of charge to SHRM-Affiliate chapter members and non-chapter affiliated SHRM members throughout Alabama.

HR Alabama and the SHRM Alabama State Council would like to thank the many fine professionals that contributed their time to contribute articles, the advertisers without whom HR Alabama would not be possible, and our partner the Anniston Star, a unit of Consolidated Publishing Company. Special thanks to Anniston Star staffers Demetrius Hardy, who handled advertising and Patrick Stokesberry, who did the graphics and layout.

All positions and opinions expressed in the articles are those of the authors, and do not represent the views of the SHRM Alabama State Council or SHRM. Please feel free to send your feedback or comments (positive, or not-so-positive!) to any of the contributors, or to the Editor.

If you are interested in contributing to the 2013 edition of HR Alabama, contact Steven Smith. For advertising information, please contact Paula Watkins.

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HR Alabama is available for download in PDF format at:*http://al.shrm.org/*. Then click on "About Us" for links to the 2011, 2012 and 2013 issues.

We hope you enjoy the magazine!

Respectfully,

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- Baldwin County SHRM *(Daphne)*
- Birmingham SHRM
- Calhoun County SHRM *(Anniston)*
- Cullman Area - SHRM
- East Alabama SHRM *(Auburn/Opelika)*
- Escambia County SHRM
- Marshall County HR Management Association
- Mobile SHRM
- North Alabama Chapter of SHRM *(Huntsville)*
- Northwest Alabama SHRM *(Winfield)*
- SHRM - Montgomery
- Shoals Chapter- SHRM *(Florence)*
- Tennessee Valley Chapter of SHRM *(Decatur)*
- Tuscaloosa HR Professionals
- Wiregrass HR Management Association *(Dothan)*

The Alabama SHRM State Conference and this magazine are the State Council's only revenue generating projects. The proceeds from the conference and magazine are used to financially assist the chapters with Human Resource Certification Institute (HRCI) training, bi-annual Hill visits to Washington DC to talk with the Alabama delegation about issues that impact HR and travel expenses to attend SHRM Leadership Conferences.

This is the third edition of HR Alabama magazine and it has grown tremendously. I want to thank all the sponsors and advertisers for making this magazine possible; without them we would not be able to produce such quality work. The Anniston Star has done a remarkable job as well. Paula Watkins, Steven Smith and all the sales team are to be commended for all their hard work. Paula and Steven's leadership is what made this magazine possible.

Pam Werstler, SPHR
Alabama SHRM State Council Director

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NOT JOB DESCRIPTIONS AGAIN!

by Paula Watkins, SPHR

Job descriptions are boring to read and boring to write. They are definitely not the favorite assignment in the HR department. Lately, however, there have been some interesting lawsuits and court decisions that should have HR paying a little more attention to the details related to the "essential job functions."

The force behind the renewed interest in job description review and revamping is the Americans with Disabilities Act Amendments Act (ADAAA). President George W. Bush signed the ADAAA into law on September 25, 2008. The ADAAA was passed in an effort to reinstate the breadth of coverage originally intended by Congress when it passed the ADA. Subsequent to passing the ADA, the Supreme Court and lower courts narrowly defined "disability" and related terms. This resulted in fewer persons having protection under the ADA. The ADAAA made it much easier for an individual to meet the definition of disability, to be protected from discrimination, and to be entitled to reasonable accommodations.

The key difference between the ADA and the ADAAA is that the focus of disability nondiscrimination law was shifted from analyzing whether a particular individual's impairment is, or is not, a disability to determining whether a "covered entity" (i.e., employer) has complied with its obligations to provide equal opportunity. The focus changed from the individual to the employer. It is largely a waste of time arguing about whether or not an employee or candidate is actually disabled. The courts and the Equal Employment Opportunity Commission (EEOC) have been making inquiries about whether the employer has met its obligations under the act and whether discrimination has occurred.

Previous to the ADAAA, the concentration was on the "physical requirements of the job." The ADA simply stated that a "disability" was a physical or mental impairment that substantially limits one or more "major life activities" of the individual. Therefore, job descriptions began to add sections listing requirements to walk, bend, stand, lift, reach, grasp, or climb. Durations, frequency, and weight lifting requirements were plugged into the physical requirements sections of the job descriptions.

Under the ADAAA, an employee or candidate has an impairment that qualifies as a disability if it substantially limits the ability of the individual to perform a major life activity as compared to most people in the general population. Impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting. Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. In other words, impairment can be short-lived. Decisions about whether or not an impairment substantially limits a major life activity must be made without regard to mitigating measures other than eyeglasses or contact lenses. In evaluating whether a person has a disability, it must be without consideration of a cane, a walker, hearing aids, and the like.

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protection, HR professionals went into a kind of self-protection mode by expanding the laundry list of essential functions. Essential functions of a position are those fundamental duties that are intrinsic to the position and are the reason for which the position exists. A function is essential if the position actually requires the employee to perform the function and if removing the function fundamentally alters the position. Some of the suggestions for building accurate and detailed essential function analyses that can stand up to scrutiny include:

- Begin by making a list of job duties with the percentage of time spent performing each duty.
- Create an exhaustive list of the essential tasks and responsibilities that the individual who holds the job would have to perform, with or without reasonable accommodation, to be qualified for the position. These items should be job-related and consistent with business necessity.
- Mark the functions and tasks that cannot be eliminated from the job, those that are essential. Use current and past incumbents as a gauge. Think about the consequences if particular functions or requirement were not included. Can marginal functions be assigned to other staff or can the marginal duty be redesigned or performed in another manner?
- List tools and equipment used such as computers or fork lifts. Is use frequent, often, or occasional?
- List physical demands. Is the demand frequent, often, or occasional?
- Can physical appearance be an essential job function? How accommodating can an employer be about religious dress (i.e., Abercrombie & Fitch), editorial style buttons (i.e., Starbucks), or clothing (i.e., Burger King)? Does banning tattoos discriminate against felons for whom the EEOC has provided recent protection guidance?
- Outline mental demands such as problem solving, writing, planning, supervising, decision-making, organizing, interpreting data, handling stress, and their frequency. Is communication with the public a mental or physical requirement?
- Note the working conditions such as indoor/outdoor, extremes of cold or hot, noise levels, fumes/odors, humidity, dust, and working at a height.
- Include personal protective equipment (PPE). Some individuals cannot tolerate respirators, for instance.
- Provide required licenses and certifications.
- Add any further knowledge, skills, and abilities required for the position with a justification of why each is required. Relate the requirement to the major responsibilities of the job.

It may seem ridiculous to the extreme, yet job descriptions should include whether or not attendance is as an essential job function. For example, attendance may be essential to providing uninterrupted service to customers and clients: absence can cause an increase in workload to others and can increase the cost of overtime or result in hiring temporary labor. A recent court case (EEOC v. Ford Motor Company) involved the request by an employee with an impairment to work from her home. The employer was able to demonstrate that the job the employee held could not be performed from her home based upon a job description. There is ample case law that working from home may be a reasonable accommodation, but business necessity should usually trump the convenience of the employee.

In a number of significant court decisions, requirements to work rotating shifts and overtime have become central to each side's case.

The outcomes varied and hinged heavily upon how the company presented the essential job functions. In Feldman v. Olin Corporation, David Feldman worked the swing shift, rotating day, afternoon, and midnight shifts for many years. He also worked overtime. He was diagnosed with fibromyalgia and sleep apnea in 2002. He successfully bid on a straight-day job and submitted a no-overtime medical restriction in 2005. In 2007, job restructuring put him right back into rotating shifts. Olin decided it didn't have any straight-day shifts and laid him off on the day he submitted a physician's note restricting him from the rotating schedule. Feldman filed with the EEOC. Despite the claim by Olin that overtime and rotating shifts were essential functions of the positions in question, overtime was not listed as a requirement in the written job descriptions for those positions. Olin even claimed all of their positions required it and, therefore, they should not be expected to list it in each job description. Overtime, however, was listed as a requirement in some job descriptions. Feldman also proved that some positions rarely worked overtime. The courts did not agree with Olin that overtime was an essential job function.

Essential job functions now may require the inclusion of such requirements as proper dress, travel, flex shifts, night shifts, and overtime to be considered, but they must be defensible and consistently applied. They must be work-related and linked to business necessity. Terri Kallail v. Alliant Energy Corporate Services, Inc. is a success story for a company prevailing in doing just that. Terri Kallail was a diabetic dependent upon insulin. Her position as a resource coordinator required she work rotating shifts, which negatively impacted managing her blood sugar levels. Kallail's physician recommended that she work only day shifts. Alliant declined, stating that the resource coordinator's essential job functions required rotating shifts. She was offered other positions, which she declined. She was provided light duty. She failed to win a supervisor position and again requested a permanent day shift. She was offered reassignment, which she declined and subsequently filed suit against her employer.

The issue was never about whether Kallail was disabled. The disputed point was whether she could perform the essential functions of her job, with or without reasonable accommodation. The 8th Circuit Court determined that the rotating shift was an essential function of the resource coordinator job. First, it was listed as an essential job function of the position in the written job description. The company presented several business reasons for having rotating shifts as an essential job function:

- Familiarization with all geographic territories in the service area;
- Enhanced training to handle emergencies more effectively;
- Knowledge of all personnel;
- Enhanced non-work life of resource coordinators by sharing the less desirable shifts.

These two cases demonstrate the importance of making a careful evaluation of each position description. The preparation of accurate, justifiable job functions can lay good foundational work for ADAAA claims. But, the most important purpose for ensuring solid job descriptions is to communicate the entire scope of the job to the applicant, transfer candidate, or employee. While lawsuits and EEOC claims may motivate us to muddle into the ennui of job descriptions, when it comes down to it, it is just plain good practice.

Paula Watkins, SPHR is vice president, human resources for Lyons HR, based in Gadsden, Alabama.

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TESTIFYING
Before Congress . . . Why?

by Juanita Phillips, SPHR

In May 2012, I had the opportunity to testify before the U.S. Senate HELP Committee at a hearing on "Beyond Mother's Day: Helping the Middle Class Balance Work and Family". This is the Health, Education, Labor and Pensions Committee, previously chaired by Senator Ted Kennedy, currently chaired by Chairman Tom Harkin (D-IA) and Ranking Member Mike Enzi (R-WY). The related legislation was the Healthy Families Act, a bill that would require companies to provide seven days of paid sick leave on top of current time-off programs. Previous hearings had covered other aspects of the discussion about this proposed law, and the hearing in May was set to address the people side of the subject of workplace flexibility.

I guess you could read two different questions in the title of this article. You could read it as "Why bother to testify before Congress?" Or you could read it as "Why did I testify before Congress?"

Why Testify Before Congress?

Let's address the first question: *Why testify before Congress?* Groups of Alabama HR Professionals travel to Washington, DC a couple of times every year to visit with our Congressmen and women to talk about current issues, learn their perspectives on these issues, and provide a professional Human Resource perspective to them. Selected SHRM members around the state also serve as members of the state's Advocacy Team (the A-Team), providing a personal contact as the face of HR to each Congressman or woman at home in their district. Members in Alabama SHRM chapters regularly write letters and make calls to provide feedback and input to our Members of Congress. It is more than fair to say that HR Professionals in Alabama are very involved legislatively. So why are SHRM members in Alabama willing to be involved in this process?

One reason is that these activities keep us on the cutting edge of being informed regarding cur-

Juanita Phillips, SPHR, Co-Legislative Director for SHRM Alabama State Council, testifies before Congress

In order for our Congressmen and women and their staffers to think of us when perspective or input is needed, we have worked through the years to build relationships with them both in DC and at home in their own districts here in Alabama.

rent legislative issues, enhancing our value to our employer and to our workforce. Another reason we are involved legislatively is that we want to be part of the solution to the issues we face within the Human Resources industry in an effort to become strategic partners within our own organizations and within the community. Sometimes unintended consequences of bad or poorly written laws lead to complaining or indifference, so by having this input on the front end, we are able to take ownership of these consequences and are able to provide the appropriate input for clear, concise and well-written legislation.

Above and beyond these reasons, our legislative efforts provide needed and welcomed perspective to our Members of Congress. Who better than HR to give Congress a clear picture of how legislation affects or will affect our workforce and our company as well as the communities in which our organizations are located? At the intersection of the best interests of employees and employers, the Human Resources profession is the hub that connects these intersections of interest together. Congress needs the expertise of HR and as an HR Professional, we want them to utilize this relationship and perspective.

In order for our Congressmen and women and their staffers to think of us when perspective or input is needed, we have worked through the years to build relationships with them both in DC and at home in their own districts here in Alabama. The hope is to develop relationships through which our input is valued, making us a resource where Members and staffers can turn when general HR perspective or local perspective is needed as legislation is being written or acted upon. When staffers need to gather details or stories of real-life impact from their district, we want them to think of us as an articulate, accurate, and reliable resource. Every time HR is asked to be a resource, the success of our efforts is reaffirmed. A great example of the fruits of this effort was the May 2012 Senate hearing where a Human Resource representative was asked as a witness for this important Senate Committee hearing. It is worth every effort to try and make a difference.

Why Me?

The other component of the question in the title is 'why me' – why was I asked to testify?

To set the stage, the structure of a Senate Committee hearing is that the majority party gets to have three witnesses, and the minority party is allowed one witness. In the case of this hearing, the majority *(Dem)* had two witnesses presenting the overall need for flexible workplace practices, particularly for mothers, including paid sick time; their third witness was a young mother who testified regarding the difficulties in her life resulting from the lack of flexibility from her employer. As the minority's *(Rep)* one witness, Senator Enzi sought someone who could present evidence that good employers in this country are indeed providing successful workplace flexibility practices, and would be hampered from doing so should the government try to mandate how it is done. The goal was for the committee to hear that setting requirements (such as implementing seven days of paid sick leave into law) would bring down

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Juanita Phillips, SPHR with Chatrane Birbal, with SHRM and another witness.

Juanita Phillips, SPHR and Rep. Martha Roby after testifying before Congress

the level of workplace benefits currently offered by many good companies, while also taking away their ability to provide additional benefits in ways that are tailored to what their employees want and value. The point also needed to be made that if the law is indeed written so as to add the paid sick leave in addition to what a company already offers, the additional cost would come from raises, bonuses or from fewer hires – in other words, the money for increased paid leave would have to come from somewhere within the budget of the organization.

This question has an easy answer. I am privileged to practice HR in a company whose standards of excellence permeate everything about the company -- our workforce, our services, our practices, and our reputation. The topic of the Senate HELP Committee hearing was workplace flexibility. We are very much an example of workplace flexibility that works. This is the reason I received a call from Senator Enzi's office regarding the possibility of my testifying before the committee. Named the 2nd Best Small Company to Work for in the U.S. in 2011 ad 2012 by the Great Place to Work Institute, my company provides a showcase of flexible workplace practices and a great platform from which to persuade Congress not to interfere by passing laws that would work against our ability to provide true flexibility in the workplace. I was asked to testify, and accepted.

The Hearing

Each witness was required to submit a written testimony prior to the hearing. The hearing opened with statements from the majority and minority leaders, followed by a five-minute opening statement from each witness. The three majority witnesses spoke first, and I spoke last. The Senators asked questions of all the witnesses based in part on the previously submitted written statements and partly based on the conversation as it took place during the hearing. When asked,

I mentioned that, should the law pass as currently written, companies such as ours would be forced to add paid sick leave on top of what is currently provided, which in our case allocates dollars to benefits that our employees would not choose. We have more employees who don't use the paid time off they already have; so allocating dollars to more time off was of no practical benefit to them. I also shared my belief that if the government would instead provide rewards to companies for providing solid flexible workplace benefits, more companies would do the same. I also shared that if they must pass such a law, the language should be changed to exempt companies that already exceed the leave requirements as outlined in the bill. I enjoyed the opportunity to talk with Senator Enzi after the hearing regarding the differences in our perspectives about the bill and about the approach that I think would be likely to result in more workers throughout the U.S. enjoying more flexibility in their own workplaces.

Conclusion

A fun story from my experience is that our company President told me he would love to have a photo from the hearing and I told him I didn't know if that would be allowed, but that I would try. It turned out that cameras were allowed after all. My husband was allowed to attend the hearing and had a camera, so we were all set. In fact, several photographers were set up to video record the hearing when we arrived. During the filming of the hearing, my husband noticed that one of the photographers was videoing only me. He spoke to the photographer after the hearing, asking who he was videoing for, and we were surprised to learn that

he was there on behalf of my company . . . my boss had secretly hired a local photographer to video the entire hearing for him. So he got his photo all right! In fact, he posted my five-minute opening statement on our company portal page for our employees, engendering pride among them that we are involved and are working to make a difference.

I truly enjoyed the opportunity to do this. I felt I accomplished my purpose, which was to speak to the Senate Committee members on behalf of SHRM about the need to move toward a 21st century approach to workplace flexibility, and on behalf of my company in terms of our hope that Congress will not interfere with the successful workplace flexibility practices we already provide. I appreciated the fact that SHRM connected me with Senator Enzi's office, provided me with detailed information about the Healthy Families Act, an overview of the process, assistance in the writing of my statement, and attending the hearing itself.

I encourage Alabama SHRM members and you, the reader, to heighten your awareness of what is happening legislatively and on the regulatory front. Be active in SHRM and in your local SHRM chapter. Get out and do things – network – volunteer – give yourself opportunities to grow. Be involved legislatively and make your voice heard. Join your efforts with ours in making HR a resource to Congress as we face inevitable change in the years ahead.

Finally, let me add the following wish. All of our Human Resource careers include a lot of varied experiences. My wish for you is that somewhere in your career you have the pleasure of working for an uncommonly good company. They are out there. May we know them; may we be them; may we help create them.

REDUCING the Chances of LITIGATION In Hiring Practices

by Denny Smith

Companies must be able to defend hiring practices when challenged. The best way to meet these requirements is to use selection tools whose contents are demonstrated to represent actual job tasks.

Several regulations have been developed to protect certain classes of job candidates who may otherwise be ignored or discriminated against in the hiring practices of American businesses and industries in Alabama. Some regulatory examples include: Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; the Civil Rights Act of 1991; and the Americans with Disabilities Act of 1990. The Uniform Guidelines on Employee Selection Practices (1978) provides direction on further compliance with the intent of these Acts. These guidelines also outline the factors that must be considered when hiring from a pool of prospective candidates for a position within the organization.

Companies must be able to defend hiring practices when challenged. The best way to meet these requirements is to use selection tools whose contents are demonstrated to represent actual job tasks. A content-referenced selection assessment program presents documentation that is tailored to specific tasks for a particular job and specific items in the assessment. With this in mind, how does a company gain assurance that it is using this type of selection process?

Selection procedures developed with the best of intentions can be challenged and may be shown to have adverse impact. If an employer can show, however, that the test meaningfully satisfies some business purpose and it can be shown that there is not a reasonable alternative that accomplishes the same goal without having adverse impact, an employer should be able to escape liability. Recently, I spoke with David Middlebrooks, a labor and employment attorney in Birmingham, Alabama, about the importance of the validation of selection tools. We discussed the importance of the use of selection tools to serve a meaningful purpose in supporting the selection of persons who will be successful on the job despite the possibility that some selection tools may have adverse impact. He pointed out that section 703(h) in Title VII of The Civil Rights Act provides that it is not "an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, it's administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." With a sound understanding of this provision, employers may find it beneficial to work with suitable professionals skilled in the design of tests to achieve results that suggest the ability to perform the job for which the person is being considered.

Fortunately, companies across Alabama (as well as throughout the United States) have discovered that there are a number of WorkKeys Services Centers throughout the state. According to American College Testing (ACT), 20 community colleges in Alabama provide these services. Approximately 200 employers around the state have conducted WorkKeys profiles. The WorkKeys Job Profiling System is designed for employers to create the needed link between work tasks and the skills needed to accomplish those tasks. An individual assessment system constructed around the requirements of the Uniform Guidelines helps the company identify prospective employees whose skills match those required by the job to be filled.

How The System Works

A company invites a certified ACT WorkKeys Job Profiler to visit the company and develop a skills profile of a particular job in the company. This skills profile can be used for new positions, positions that are difficult to fill, or positions that experience frequent turnover. In these situations, the company usually has spent thousands of dollars in the search, interviewing, hiring, and training processes only to continually repeat the process when the next hire does not work out. In addition, the company's other employees may have to pick up the slack while a new employee is being screened and trained. Disgruntled employees are not as productive as satisfied employees and they may not be as efficient when doing the work of another employee. This can lead to a pre-mature burnout. Safety related issues when the company does not have adequate personal resources in place from constant turnover could also be a potential issue.

Finding The Right Employee

The job of profiling begins with the professional job profiler taking a company tour to see the employees at work in the job being profiled. The Job Profiler observes, asks questions, and sometimes takes notes on the tasks being performed. Next comes a session with incumbent workers who are doing the job being profiled (referred to as subject matter experts – SMEs). Incumbent workers know the job best and can identify all tasks that are critical to performing the job. The job profiler carefully guides the SMEs through the ACT process of developing an accurate task list that identifies the tasks critical to the performance of that particular job.

The SMEs are then led through a process of assigning a rating of Importance to each task. The Job Profiler processes this information and develops a criticality score for each task, resulting in a reordering of the tasks from the most critical to the least critical. From this final task list, SMEs are then guided though a process of relating each task to one of several skills. They also identify a level for each skill, altogether assuring the company of having content-based selection criteria.

A completed job profile provides a basis for conducting skill assessments for job candidates. Job candidates are given assessments in the same skill areas that have been identified as critical for the profiled job. The company uses the results as one factor in the hiring decision because selecting candidates who have demonstrated the skills needed to do the job is a critical step in selecting candidates who can learn the job and are more likely to stay in the job once hired. Using the ACT WorkKeys Job Profiling and Assessment system gives the company a tool where the selection procedure is representative of the content of the job.

The link between the assessments and the job profile provides a solid foundation for hiring decisions. Including this activity in the company's hiring process also results in a data retention policy showing the company's compliance with the Uniform Guidelines on Employee Selection Procedures (1978) and greatly reduces problems with litigation. Hiring decisions using this process are not based on seniority, race, nationality, sex, religion, or disability; rather, decisions are based on demonstrated skills. If candidates demonstrate they have the basic skills for the job that has been profiled, then it's a safe bet they can perform the necessary duties of the role once given appropriate training.

Ultimately, the final outcome of implementing this process should produce a cost savings within the hiring practices of the organization. The cost of developing a job profile and providing assessments is a fraction of the cost of continually searching and re-hiring to fill a position, and miniscule compared to the cost of litigation. Implementing the appropriate selection tools that are in compliance with current laws and standards will ensure that the organization can avoid the chances of litigation and be able to defend their processes should these processes come into question in a court of law.

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INCONSISTENTLY

Applied Employment Policies and Procedures:

How They Can Negatively Impact

OFCCP AUDIT FINDINGS

by Amy R. Mullican,
Dyas Human Resource Development

THE NEED FOR CONSISTENCY

As government regulations and reporting requirements have increased, Human Resource departments' associated responsibilities have also grown. Indeed, Human Resource departments have evolved into the hearts and nerve centers of their companies. Gone are the days where the "Personnel Department" was merely an office where applicants went to interview or employees picked up their paychecks. Today's HR department is a dynamic balance of infrastructure management. A fully functional HR department may facilitate everything from policy development and implementation, to benefits, payroll, employee information management, employee complaints, unemployment claims, training, and even company recreational activities. On top of all that, HR departments are tasked with fulfilling reporting requirements to company management and government agencies such as the Office of Federal Contract Compliance Programs (OFCCP). Consequently, it can be challenging to ensure procedural and administrative consistency in all employment decisions.

The vast majority of contractors do not intentionally unlawfully discriminate when making employment decisions. However, inadvertent though they may be, inconsistently applied standards and procedures will be used by OFCCP as evidence of unlawful discrimination in the decision-making process. Making sure you have non-discriminatory policies and procedures, and that they are uniformly followed and consistently documented, can mean the difference between an audit with no violations, one with technical violations and pesky reporting requirements, or one with discrimination findings requiring back pay and interest, salary adjustments, and job offers as positions become available. An OFCCP audit resulting in a finding of discrimination may also result in extensive company training, revisions to HR operating procedures, and cumbersome, time-consuming reporting to the OFCCP well into the future.

AREAS OF CONCERN

What are some of the inconsistencies contractors are guilty of and what are the ramifications? Since OFCCP adopted their Active Case Enforcement Procedures in 2010, compliance evaluations have become more stringent in both the review process and their findings. Recent OFCCP compliance evaluations have resulted in the following as being some of the recurring problems:

1. Application and Selection Procedures

One of the most common missteps by contractors is not implementing uniform application and selection procedures. Regardless of the application system used, contractors should establish detailed application, screening, interview, and selection steps for Human Resources and hiring managers to follow. In an OFCCP audit, a statistical analysis will be conducted on applicants, hires, promotions, and termina-

tions to determine if there are indicators of adverse impact against a group of applicants or employees. Keep in mind the OFCCP also has the latitude to review individual employment decisions. If there are red flags in your hiring activity, OFCCP will determine at which step, or "gate," in the employment process the potential problem occurred. Even if the potential problem is narrowed down to a particular step, it will still generate a request by OFCCP for copies of job descriptions and basic qualifications for the positions in question, plus all employment applications, interview notes, tests and test results (if tests are used), applicant flow logs, reasons for non-hire (applicant dispositions), and an explanation of what caused the disparity. OFCCP will also request a written explanation of your application and employment processes and check behind you with interviews of managers, new hires, and applicants to see if any artificial barriers to employment were created. If you state in your explanation that everyone must complete an application to be considered, but OFCCP discovers missing applications for the position in question, your entire employment process will come under scrutiny. At a minimum, you will be cited for recordkeeping violations. More importantly, missing records can potentially be used against you to support a discrimination case. Unless there is some evidence that the missing documentation was the result of forces beyond the control of the contractor (e.g., the result of computer system malfunction, force majeure, etc.), OFCCP will infer that missing documentation is unfavorable to the contractor. This makes defending your position much more difficult.

2. Interviews

Interviews are another critical part of the employment process. Many times, the decision to hire a person comes down to the results of their interview. In an audit with hiring or promotion disparities, OFCCP will review your interview procedures,

forms, questions, applicants' answers, interview scoring or evaluation, and the point in the hiring process that the interview occurs to determine if the interviews were conducted consistently. Being able to demonstrate that the interview process is objective and quantifiable and that the standards and processes are applied uniformly is extremely important. A lack of interview documentation, or documentation that reveals inconsistency, will be used by OFCCP to prove a discrimination violation.

During a recent audit, OFCCP determined that a contractor had discriminated against minority applicants in the interview process, citing an inconsistent interview system and lack of documentation. The interview forms contained subjective and non-quantifiable factors, such as "candidate appearance." In that case, the company was unable to provide any specifics as to what constituted acceptable appearance, that the requirement was job related, or that the criterion was consistently applied. Many interview forms were not filled out completely. In addition, the company could not substantiate that interviews occurred at a prescribed point in the employment process. Moreover, there were applicants who had a disposition of "poor interview" but their interview forms were missing, so there was no record to explain why they received a "poor interview" disposition in the applicant log.

3. Disposition Codes

Similarly, accurate disposition codes are extremely important when trying to defend a hiring decision. They should not be applied arbitrarily or as an after-thought because inaccurate disposition codes can be interpreted as unacceptable record-keeping or even as misrepresentation. For example, OFCCP is wary of an applicant flow log with the disposition of "hired more qualified applicant" assigned to every applicant not hired. While this may very well be true, OFCCP will use the qualifications

of the person hired to set the bar and will compare these to the qualifications of the non-hired applicants. These applicants usually end up being part of the affected class in a discrimination case.

4. Employment Testing

Employment tests can also pose particular problems for companies if they are not job-related or administered uniformly. OFCCP will conduct an analysis to determine if the test is causing the disparity or is a contributing factor. If you use employment tests to determine if an applicant is suitable for a position, remember that the test must be job-related and applied uniformly, and all tests and results must be maintained. It is best to have the test validated before using it and if there is a passing or minimum score you must not deviate from it. If you hire someone who did not pass, OFCCP will use their score as the standard, or they may challenge the very use of the test, especially if it is not validated.

5. Inaccurate Job Titles

Once a person is selected, the on-boarding process must also be consistent. One of these processes is job title assignment. Assigning inaccurate job titles or assigning them inconsistently can cause major headaches. Incorrect titles may cause or mask substantive compensation issues or may just cause a question-generating nuisance during an audit. For example, if you are conducting an internal pay analysis as part of your monitoring obligations, you could miss a pay disparity between individuals or groups performing the same job duties but assigned different titles, if pay is tied to a job title or classification. Conversely, employees in the same job title performing at different levels or working in different disciplines, e.g., assigning the broad title "Engineer" instead of Chemical Engineer versus Industrial Engineer, or Engineer I versus Engineer IV, will generate a request for additional documentation in an audit if there are pay differences. Incorrect job titles may also mask or create placement goals if their associated labor statistics are used in determining availability. One way to help avoid these situations is to develop and make use of written job descriptions. They help define job titles and duties so that employees can better understand what is expected of them.

6. Inconsistencies in performance appraisals

Performance appraisals are a double-edged sword. Appraisals can be a great tool for letting an employee know what is expected of them. In an audit, they can be used to support why an employee is paid at a particular grade level or salary, or to justify a promotion, demotion, or termination. However, when not done timely or consistently on all your employees, performance appraisals can be used against you in a discrimination case. An untimely appraisal or one accidentally skipped can very easily lead to a discrimination finding requiring a pay adjustment, back pay with interest, adjustment to retirement pay, and pay dates adjusted retroactively.

An example of how performance appraisals can be used by OFCCP is found in a recent audit that resulted in a pay discrimination finding based on

During a recent audit, OFCCP determined that a contractor had discriminated against minority applicants in the interview process, citing an inconsistent interview system and lack of documentation. The interview forms contained subjective and non-quantifiable factors, such as "*candidate appearance*."

race. The minority employee, who earned less than the nonminority employee in the same job title, had been at the company and in the job title longer. The company stated that the reason the minority earned less was because he was a poor performer. OFCCP then requested both employees' performance appraisals. However, the company was unable to provide two of the minority employee's last four appraisals. Plus, the appraisals that were in his file showed satisfactory ratings. Interviews with managers and coworkers did not reveal that the minority employee was a poor performer. Due to the lack of documentation to support the company's position, they were required to adjust the minority employee's pay and provide back pay with interest for a two-year period.

Performance appraisals, if done properly and consistently, can provide support for terminations based on poor performance. If, however, an employee is terminated for poor performance and the appraisal does not support this, OFCCP would require you to rehire the person and make any date and pay updates accordingly. It is much more difficult to prevail in a termination discrimination charge based on performance if performance appraisals are not consistently conducted or if they are missing.

7. Compensation

Perhaps one of the most critical areas requiring consistency and uniformity is in compensation. Inconsistency in the implementation of pay practices and variables is usually the biggest problem in compensation cases. With the February 28, 2013 rescission of the 2006 Compensation Standards and Voluntary Guidelines for Self-Evaluation and the simultaneous release of Directive 307, the OFCCP has a renewed focus on finding and remedying discrimination based on pay and other forms of compensation. The Agency stated it does not intend to replace the old standards with any formal rule, but will instead rely on materials "such as compliance manuals, directives and training to inform contractors and compliance officers' on processes governing pay investigations going forward. They state their approach to investigating and enforcing non-discrimination in compensation will follow Title VII principles, and are committed to using a case-by-case investigative approach employing the following five principles:

1. Determining the most appropriate and effective approach from a range of investigative and analytical tools;

2. Considering all employment practices that may lead to compensation discrimination;

3. Developing appropriate pay analysis groups;

4. Investigating large systemic, smaller unit and individual discrimination; and

5. Reviewing and testing factors before including them in the analysis. [2]

2 See OFCCP's website at http://www.dol.gov/ofccp/regs/compliance/CompGuidance/index.htm; and Directive 307, http://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm,

In light of this, it is recommended that contractors implement a comprehensive compensation system for how employees are paid that is uniformly applied regardless of race, ethnicity, gender, or any other protected status. There is no one compensation plan that is acceptable to the OFCCP. Rather, the OFCCP is looking to see that whatever system is used, whether formal or informal, and whether it is non-discriminatory and uniformly applied. During an audit or in the event of a complaint, you should be prepared to provide at a minimum the following compensation information to OFCCP:

- What your compensation system is and how it is applied;
- Position descriptions or written summaries;
- Justifications for each pay difference, especially where an employee has more time or comparable time with the company and is paid less;
- Explanation of how placements are determined for each employee, i.e., type of job/title, geographic location, shift, department, etc.;
- How starting pay is determined; (OFCCP Notice of Final Rescission)
- How raises are determined and calculated, e.g. are they tied to performance appraisals and calculated based on a particular rating?
- How bonuses are calculated;
- How any other forms of compensation are determined;
- Who has the final approval for pay increases, merit increases, bonuses, and other benefits and perquisites.

Though the first half of OFCCP's 2012-13 fiscal year has been relatively quiet on the scheduling front, expect this to change since the rescission of the Compensation Guidelines. Now that these have been rescinded and Directive 307 has been issued, changes in the OFCCP Scheduling Letter Itemized Listing can't be far off. Even if the scheduling letter does not change this fiscal year, expect more detailed compensation information requests after the desk audit submission.

"DO AS I SAY, NOT AS I DO"

As a final note, remember that not all OFCCP reviews are "created equally" (i.e., conducted consistently). Be prepared that what's expected of the goose does not necessarily apply to the gander. OFCCP reviews do not necessarily proceed consistently or uniformly, either between offices or years. This inconsistency may be attributable to skill level of the Compliance Officer, new focus areas of the Agency, program plan management, administration changes, etc. Ultimately, the audit process is often a test in patience and adaptability for the contractor. You must rely on the quality of the information contained in your records to defend your company's position during an OFCCP investigation. Stressing the importance of consistency and uniformity in application of standards and procedures across all levels of a contractor's organization may save some headaches during an audit, and may ensure that simple laziness or poor recordkeeping does not become evidence of something much worse down the road.

The National Labor Relations Board:

WHETHER UNIONIZED OR NOT

Your Policies May Be at RISK

by Gerri L. Plain, JD, PHR

Section 7 of the National Labor Relations Act (the Act), protects employees who engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 157.

Employers know that they must comply with the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Department of Labor (DOL). However, most employers with a non-union environment may be surprised to know that the National Labor Relations Board (NLRB) also has jurisdiction and enforcement power over them. In fact, the NLRB has broad jurisdiction over private employers, including non-profits, manufacturing, retail businesses, private learning institutions, and health care facilities, whether employees are part of a union or not. The NLRB does not have jurisdiction over state, federal or local governments, agricultural employers, or employers subject to the Railway Labor Act.

A common misconception is that this definition only applies to union activity; however, this section protects conduct of employees acting individually or together for mutual aid or protection. Concerted activity is any circumstance where individual employees seek to initiate, induce, or prepare for group action. In part, employees should have the ability "to discuss and complain about their individual circumstances including their wages, hours, and working conditions with other employees and to disclose, discuss and complain respecting those matters to labor organizations and to the public." Echostar Technologies, L.L.C. and Gina M. Leigh, NLRB Case No.: 27-CA-066726 (Sept. 20, 2012). Discussions regarding pay, hours of work, safety, workload, or other terms and conditions of employment are considered protected activity. Under the Act, it is unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158. The standard applied by the NLRB is whether a rule "reasonably tend[s] to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 824 (1998). "Chill" is defined by the Board as bringing about caution or timidity. Echostar. If the rule explicitly restricts the employee's rights, the rule or provision is unlawful. If there is not

an explicit restriction, one of the following must be present for a violation: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (D.C. Cir. 1999).

Over the past several years, the NLRB increased protection for employees and prohibited overly-broad employer policies and handbook language. This article will take a look at some common sample provisions many employers include in their policies or handbooks. However, the NLRB found these provisions violate the Act and were therefore deemed unlawful.

1. As to Social Media (blogs, forums, wikis, social and professional networks):

You may not make disparaging or defamatory comments about the Company, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their products/services.

Employers would argue that this policy seeks to avoid disrespectful conduct or conflict among co-workers being aired in public on social media forums. So quite often today, individuals post everything on Facebook or Twitter, including complaints about their employer or those around them in the workplace. The NLRB contends this policy does not make any exception for comments that are protected by the Act. Late last year, the NLRB reviewed and held this provision and a similar provision unlawful.

On September 20, 2012, in the Echostar case, the NLRB found this policy unlawful because the policy may chill an employee's exercise of Section 7 rights. Eight days later, the NLRB found a similar

policy prohibiting disrespectful or other language that injures the image or reputation of the company unlawful. Knauz BMW, NLRB Case No.: 13-CA-046452 (Sept. 28, 2012). The Board held that this policy could prohibit employees from objecting to "working conditions and seek[ing] support of others in improving them." Knauz BMW. Relying on Knauz, in December 2012, the Board found Dish Network Corporation's policy prohibiting disparaging or defamatory comments unlawful. Dish Network Corporation, NLRB Case Nos: 16-CA-62433, 16-CA-66142, and 16-CA-68261.

It is less likely that the NLRB will find a rule encouraging polite, courteous and friendly behavior unlawful. If you have a policy prohibiting disparaging, defamatory, or disrespectful commentary, make sure to provide an exception that the policy does not apply to comments concerning terms and conditions of employment. This exception should be contained within the policy itself and not a separate savings clause provision.

2. You may not participate in online commentary regarding the Company, its employees, officers, directors, vendors, customers, partners, or affiliates, with Company resources and/or on Company time, without specific authorization.

Let's be honest: employers want to ensure employees are efficient and productive while working. However, the Act allows for employees to engage in concerted protected activity during work breaks or other non-working hours, including before and after work. In both the Dish Network and Echostar cases, the NLRB found a blanket prohibition against engaging in activities with Company resources or on Company time is unlawful.

3. You understand that the terms of your employment, including compensation, are confidential between the employee and the Company.

Disclosure of these terms to other parties may constitute grounds for dismissal.

I grew up with a mother who always told me to never, ever discuss my salary with anyone. The NLRB disagrees with my mother. This provision plainly prohibits employees from discussing a term and condition of their employment with co-workers or those outside the workplace, including Board agents. Because of the overbroad restriction of confidentiality, the NLRB found this policy violates an employee's Section 7 rights and is therefore unlawful.

4.The Communications Department is responsible for any disclosure of information to the media regarding Company.

You have the obligation to obtain the written authorization of the Communications Department before engaging in public communications regarding the Company or its business activities.

This policy requires an employee to seek authorization from a specific department prior to speaking publicly or with the media about the Company. The NLRB holds that requiring an employee to seek authorization interferes with Section 7 rights because an employee has the right to go outside the employer-employee relationship to seek assistance. Echostar. The Act protects an employee who wishes to make his or her complaints or comments regarding terms and conditions of employment public. Additionally, it is well-settled that an employee who wishes to speak out publicly, including to the news media, about a labor dispute is entitled to do so. Therefore, an employer cannot require the employee to get permission to speak publicly about the company.

Once again, this policy does not differentiate between communications that are protected and unprotected, such as statements that are maliciously false. Remember to keep your policies from being overly broad or over-reaching.

5. The General Counsel (or a supervisor) must be notified of any government agency communication concerning the Company. If phone contact is made, provide the individual with General Counsel's name and number, but do not engage in any further discussion without immediately notifying a supervisor.

This policy seems innocuous—one office in an organization is charged with responding to government agency inquiries and supervisors are kept aware. However, the NLRB found employees may construe this provision as limiting communications with all governmental agencies, including NLRB agents. Because employees have the right to participate in Board investigations or

I grew up with a mother who always told me to never, ever discuss my salary with anyone. The Nation Labor Relations Board disagrees with my mother.

contact the NLRB individually, the NLRB deemed that this provision interferes with employees' Section 7 rights and is therefore unlawful. Likewise, the Board found unlawful a similar policy stating "[i]f law enforcement requests an interview or information regarding an employee, whether in person or via email or phone, the employee should contact the security department (or management), who will handle the contact with law enforcement. DirecTV U.S., NLRB Case No.: 21-CA-039546 (Jan. 25, 2013).

In the Echostar matter, the Board's opinion states this issue would be alleviated by adding in a statement that employees have a right to communicate respecting their own matters.

6. The Company has a right to investigate matters involving suspected or alleged violations of company policies, practices, expectations, and any applicable law or other behavior associated with employment.

You are expected to cooperate fully with Company investigations. You are also expected to maintain confidentiality and answer questions truthfully, completely and to the best of your ability.

At issue with this policy is the mandate to maintain confidentiality in an investigation in all circumstances. The NLRB feels that there must be a balancing test: the employer must determine whether a need for confidentiality exists because witnesses need protection, there is a risk of evidence being destroyed, testimony may be fabricated, or a need exists to prevent a possible cover up. Banner Health Sys, NLRB Case No.: 28-CA-023438. If the employer determines its investigation is at risk without confidentiality, then and only then may the employer require employees not to discuss the investigation with each other.

This blanket prohibition against confidentiality made orally during an investigation also may violate an employee's Section 7 rights. Banner Health Sys. In Banner Health, a human resources consultant "routinely asked employees not to discuss the matter with their coworkers" during the investigation. The Board found that the statement "had a reasonable tendency to coerce employees" and is therefore unlawful.

Will a Savings Clause in my Handbook Save My Policy?

Many handbooks or policy manuals include a provision that should a company provision conflict with the law, the appropriate law is applied and interpreted to make that provision lawful. This provision is most often found at the beginning or in the introduction of the handbook or manual. However, at least one Board decision held that this savings clause does not save an unlawful policy. Echostar. The rationale behind this decision is that a reasonable employee will not necessarily read the introduction to apply to all the policies outlined in the handbook or manual and this savings clause does not diminish the chill caused by a challenge of the rule. Therefore, a savings clause may not necessarily save a policy that violates an employee's Section 7 rights.

Conclusion

Policy language usually comes into question by the NLRB when an employee incurs discipline or termination as a result of violating one or more of these policies. If the Board finds the policy under which the adverse employment action was taken is unlawful, any discipline is rescinded. This places employers at risk for reinstatement of employees and the financial consequence of possibly paying back pay and lost benefits to the disciplined employee. Additionally, if the Board finds a violation, the employer must post a notice to all employees providing the employees' rights under Section 7 and the company policies that violate the Act.

It is always important to remember that all company policies are construed against the employer. Therefore, your policies should not be ambiguous, overly broad, or over-reaching. The best practice is to keep your policies clear, unambiguous, and expressly state that prohibitions do not apply to protected activities. What do you do if there is a threat of unlawful activity regarding a policy? As a defense, you should retract the offending policy in a timely and unambiguous manner; publish the repudiation to all employees involved; assure employees that, going forward, the employer will not interfere with their Section 7 rights; and, admit wrongdoing. DirecTV.

There are many questions on the horizon regarding President Obama's 2012 recess appointments to the NLRB. Some are calling to invalidate or send back for rehearing all NLRB decisions from January 2012 to January 2013. No matter the outcome, know that if you are a private employer—whether unionized or not—the NLRB may question your policies. Be prepared to ask yourself: can an employee construe my policy to restrain or coerce concerted protected activity? If the answer is yes, then you will want to consider a change to your policy language to avoid the NLRB potentially finding an unfair labor practice.

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INTERVIEW

with WOTC Coalition President,

Paul Suplizio

by Paige Burton

A coalition is defined as a pact made among individuals and groups, during which they cooperate in joint efforts and join together for a common interest. Paul Suplizio, a founder and current President of the Worker Opportunity Tax Credit Coalition (WOTC Coalition) has a clear objective for his group. In this three-part series, Suplizio discusses the history of the group and gives insight into the current projects and what the future holds for the WOTC and their coalition.

The Work Opportunity Tax Credit is an incentive to businesses that encourages owners to hire more employees from specific target groups. The incentive is a tax credit that will, essentially, add money to the bottom line of their company or organization. These target groups include the elderly, the youth, the veterans, and the disadvantaged, to name a few. This credit has proven to be mutually beneficial to the employer and the employee.

In its earliest forms, the WOTC appeared in new legislation under President Jimmy Carter and was called The New Job Tax Credit. Although under a different name, it functioned very similarly to the WOTC. Suplizio claims that during this time many people abused the tax credit, and the law quickly gained a bad reputation with Congress. The WOTC was officially implemented into tax legislation in 1981 during the Reagan Administration.

Unfortunately, the WOTC has an expiration date. When it expires, it requires Congress to vote on an extension. This is where the WOTC Coalition comes into action. Members formed this coalition in the summer of 1980 in order to protect the legislation that controls the Work Opportunity Tax Credit.

In the beginning, those who supported the tax credit began contacting their representative in Con-

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gress with the intention of keeping this tax credit alive. These efforts caused confusion, because there was no one to lead or organize. This is when the idea to form a coalition first appeared.

"A group of us came together in a meeting in down town Washington. We felt we needed a central coordinator, and that is how the President of the Coalition was set up", says Suplizio.

The groups that Suplizio is referring to included many different businesses, associations, and organizations (a full list is provided on their website). The topic of conversation during the WOTC Coalition's initial meeting was how all the different businesses and organizations had some interest in the use and proper application of the WOTC. This would prove to be true, however, only if Congress would enact the WOTC for the purpose in which it was created – to assist the disabled and disadvantaged in finding jobs.

"We needed to be the principle people to look over the design of the tax credit and make sure that it was constantly updated to reflect the needs of those particular populations. What could be done to advise congress about changes that needed to be made so that the program could be run more effectively?", asked Suplizio.

One of the principle characteristics in founding the WOTC Coalition was that it was not to be limited to businesses only. Suplizo says that their coalition wanted to be sure they included everyone who had an interest in the WOTC.

"We wanted to be sure that the other stake-holders and the people that the law represented and on whose behalf the credit was enacted were also involved; the people representing youth, the poor, the elderly and veterans…those people were invited and enthusiastically joined the coalition".

Although the Coalition has been constantly growing over the past three decades, the group still encounters many obstacles while protecting the WOTC, as well as seeing the WOTC used to its fullest potential. When talking about what obstacles the coalition is facing, Suplizio stated that their biggest problem is with large back-logs for processing WOTC request forms for certifications.

"Those requests are not coming back fast enough…. People are going to lose interest in the tax credit if it takes too long getting certifications made in these states", says Suplizio

Suplizio says that the Coalition has tried everything from pressuring the Department of Labor in meeting with The White House, to pleading their case with the tax writing committee. Suplizio is now aware that pleading their case on a federal level in order to get a resolution for these backlogs will provide zero resolution. The Federal Government cannot tell the states how to spend their money, and that is where the problem lies.

"My recommendation is that we go to the state governors. They seem to be quite responsive when they get a complaint from a large business that operates within their state", says Suplizio.

Suplizio is also able to use data on the rate of processing and how that affects each individual state. He mentioned that the WOTC uses this data to call attention to the rate of processing to persuade the governor to supply more resources. Anyone can use this data when pleading their case for the WOTC.

"A group of us came together in a meeting in down town Washington. We felt we needed a central coordinator, and that is how the President of the Coalition was set up", says Suplizio.

Another big problem with the WOTC is the fact that many businesses simply do not know about the WOTC, or how they can benefit from using these valuable credits. This understanding was and is still important to Suplizio, as well as the other members of the colaition. This is hard to accomplish, however, when some businesses and business owners are unaware of it.

So what is in store for the WOTC and the WOTC Coalition in 2013? Suplizio, along with other leaders inside the Coalition, have set forth twin goals for this year. One is to see the WOTC extended. What they would like to see more than the extension, however, is for the WOTC to be made into a permanent tax law.

Currently, the main objective is to encourage Congress to grant a further extension of the WOTC tax credit for at least a period of five years. They are hoping with the latest tax reforms, that it will not only be extended, but be made permanent.

This poses challenges and opportunities for the WOTC Coalition. They are not sure what tax credits that will be extended and which ones will end. This only drives the WOTC Coalition into further action. They are determined to get the WOTC written into permanent tax law.

Coalition members pride themselves on being initiators of action, with the hopes of seeing the WOTC sustained in tax legislation. As of today, the WOTC Coalition feels confident in the work that they are doing using the WOTC.

In 2011 alone, 1.1 million workers, who may have otherwise been left behind in the job market, were placed in jobs. These are efforts and outcomes that the Coalition hopes Congress does not overlook when deciding the fate and prosperity of the Work Opportunity Tax Credit.

If you, your business, or your organization would like to help the efforts of the WOTC Coalition, Suplizio encourages everyone to immediately write to your State Governor and ask them to support the WOTC. Also, for more information on the WOTC Coalition or for information on how to join, please visit www.wotccoalition.com.

The Fair Labor Standards Act

THE HR LIABILITY ISSUE of 2013

by Kelly Collins Woodford & Thomas J. Woodford

On August 25, 2012, Business Week reported that FLSA lawsuits had reached a 20-year high with 7,064 new federal lawsuits filed in the twelve-month period ending March 31, 2012. New cases keep coming. Why are so many being filed? Three recent examples from 2012 say it all:

1) The Middle District of Florida approved a settlement for two bathroom installers who were not paid overtime. The first received $1,200 in back wages and his attorney received $2,000 in attorneys' fees. The second installer received $450 in back pay and his attorney was awarded $1,000 in attorneys' fees – so $1,650 to the plaintiffs and $3,000 to their lawyers.

2) The Southern District of Alabama approved a settlement of $8,325.17 as back wages and another $8,325.16 as liquidated damages to a "picker" who earned $8 per hour. The attorneys' fee award was $11,707.50.

3) The Middle District of Florida approved a settlement under which the plaintiff received $5,000 on her $31,000 claim for unpaid overtime and $5,000 in liquidated damages. Her attorney received $17,000 in fees and $4,000 in costs.

Even in cases in which plaintiffs recover little money, the plaintiffs' attorneys are entitled to an award of attorneys' fees paid by the employer.

The FLSA requires employers to pay at least the minimum wage for all hours worked and to pay non-exempt employees overtime for hours worked beyond forty in a workweek. The big issues fall into two categories: not capturing all hours worked and mis-classifying employees as exempt from overtime.

I. HOURS WORKED

An hour worked is any time the employee is "suffered OR permitted" to work. If an employee works, and the employer knew or should have known about the work, the employer must pay for that work whether the employer authorized the work or not. Currently, there are two big issues under the hours worked heading: off-the-clock work and meal breaks.

A. "Off-the-Clock" Work

Many companies have put pressure on their supervisors to reduce overtime costs. While those companies may have policies that require hourly employees to record all hours worked, the realities are very different. Supervisors often tell employees not to record time or to clock out and finish up. Some employees "volunteer" to stay late, and the supervisor happily accepts. Some employees ask to work late this week to get time off next week, and the supervisor agrees. Unfortunately, whether "volunteer" or not, or whether the employee asked for the arrangement or not, the employee has worked and must be paid. If an employee starts work before his shift or stays late, the employee is working and must be paid. If the

worker comes in on his day off, she must be paid. If she does work at home, she must be paid. If she works overtime without permission, she still must be paid. Employees who check email after hours on their smart phones are another train wreck waiting to happen.

The Southern District of Alabama in 2012 issued a decision involving a customer service representative for a teleservices company. The plaintiff testified that she could not log into the time-keeping system more than five minutes before the shift, but it took more than five minutes to read the updates she needed to do her job. She testified that many calls received required research to fix but she was only given one minute between calls. If she could not get the research done in one minute; she had to do it "on her own time." She testified: "When she was working before her shift and during lunch, her supervisors would ask whether she was working and whether she was logged-in. She would respond that she was working but was not logged-in, and the supervisors would say "great" or "oh, good." Overall, the plaintiff estimated that she worked an average of sixty minutes of uncompensated time – every week. To top it off, her former manager, who no longer worked at the company, stated that she personally observed the plaintiff working off-the-clock. The former supervisor also stated that other managers were aware of off-the-clock work and the policies prohibiting off-the-clock work were routinely ignored. The company denied all of this, but the conflicting testimony was enough to get a case to a jury.

So what do courts expect of employers? The Northern District of Alabama answered that question in March 2012:

Work Performed

Management has a duty to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has a power to enforce the rule and must make every effort to do so.

HR professionals need to ensure their supervisors understand the difference between the company's need to control costs and the company's duty to pay an employee if the employee works.

B. Meal Breaks

A number of recent cases involve meal breaks, and many of those claims involve time-keeping systems that automatically deduct a set lunch period whether the employee clocks out or not. While technically not unlawful, these systems have generated an inordinate amount of litigation across the country. To be a bona fide uncompensated break, the employee must be completely relieved from duty for at least thirty minutes (that includes no cell phone calls). If the employee does not receive thirty minutes of uninterrupted time, the employee is entitled to pay for the full break.

Some courts are putting the burden on the employer to make sure the automatically deducted break is taken and to capture the time if it is not.

When the Mobile SHRM asked for a title for their October 2012 meeting presentation on wage & hour law, we suggested, only half- jokingly, "The FLSA – The Key to Early Retirement for the Plaintiff's Bar."

Essentially those courts have held that the automatic deduction system is for the benefit of the employer, not the employee, and it is the employer's job to monitor the employee's breaks to ensure the time is taken. Other courts have looked at the "reasonableness" of the systems employers have implemented through which employees can reclaim missed mealtime. The more onerous the burden on the employee (e.g., having to track down the supervisor to approve the request), the more likely the system will be rejected. The easier the system (hitting the "missed lunch" button), the more likely the employer will win.

MISCLASSIFYING EMPLOYEES

A second hot-button issue involves misclassifying employees as exempt white-collar employees, unpaid interns, and outside sales representatives.

A. White-Collar Exemptions

The FLSA allows employers to exempt some employees from the payment of overtime if the employee meets BOTH the salary/fee basis test AND the duties test.

To meet the salary-basis test, the employee must receive a guaranteed payment of at least $455 each week. In 2013, the District of Kansas approved a settlement in which a home health provider agreed to pay a nurse $22,750 in unpaid overtime and an additional $12,250 in attorneys' fees. Hey, she's a nurse; she's got to be exempt, right? Only if her pay meets either the fee or salary test and she was paid an hourly wage. If the guaranteed payment is subject to deduction for reasons other than those specifically listed in the statute, the employee is not exempt.

Being paid a salary is not enough. The reason the employee's job exists – i.e., the "primary duty" -- must be to perform work that falls within the executive, administrative or professional exemption. Just because the employee has a few exempt duties is not enough.

The Eleventh Circuit recently affirmed the dismissal of cases brought by student "externs" against two Florida health care providers who classified workers from a local community college as unpaid interns.

For example, the Southern District of Alabama recently decided a case involving a construction company. The plaintiff was hired as a driver and laborer at $15 an hour. When he logged 55 overtime hours in his first few weeks, the company switched him to salary and stopped paying overtime. He was still a driver and a laborer, not an exempt executive, administrator or professional.

In 2012, the Northern District of Alabama ruled that a case involving a national rental store could go to a jury. The plaintiff was a store manager – the most senior employee in the store. He was paid on a salary basis of more than $455 per week, but claimed that he spent 80-90% of his time on non-management tasks, including manual labor, which involved unloading freight, cleaning the floors and bathrooms, and replacing merchandise on the sales floor. He claimed that, in actuality, he performed very few true managerial duties and that most of the "managerial decisions" were dictated by the company's very detailed management procedures rather than his own discretion. The company said that the store manager supervised employees and had hiring and firing power. The plaintiff testified that he could interview employees and make suggestions as to hiring, but all hiring decisions were made by the Regional Manager who often did not take his recommendation. He also testified that he had no authority to fire an employee. Again he could recommend it, but the Regional Manager did what the Regional Manager wanted.

Alabama HR professionals need to review their exempt positions and ensure that each person classified as exempt actually has an exempt primary duty. If you find that people should be non-exempt or the call is close enough that litigation isn't worth it, fix the problem before the DOL or a member of the plaintiffs' bar comes calling.

B.Interns/Externs

Interns and externs are NOT employees and do not have to be paid minimum wage and overtime IF:

(1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

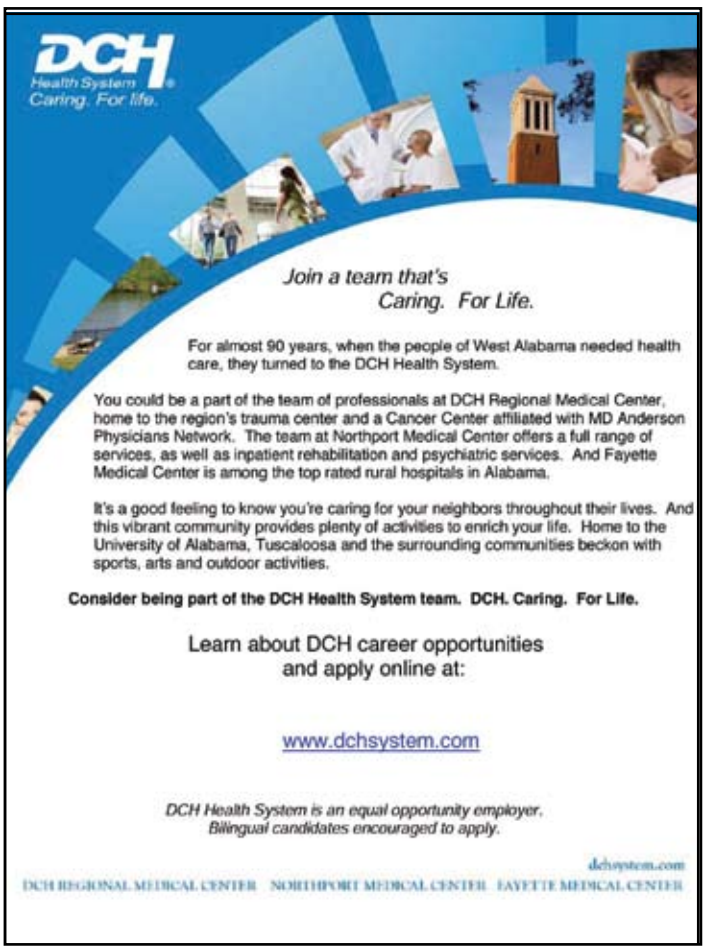
(2) the training is for the benefit of the trainee;

(3) the trainee does not displace regular employees, but instead works under close supervision;

(4) the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;

(5) the trainees are not necessarily entitled to a job at the completion of the training period; and

(6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.



If the intern/extern does not meet all six requirements, then the intern/extern must be classified as an employee and paid in accordance with the FLSA. For the last few years, we have been preaching doom and gloom on the risks of unpaid interns. The Department of Labor hates them and, outside of established academic programs like nursing and education, rarely finds that an intern falls outside the scope of the FLSA. However, in the last year, the courts have given employers a glimmer of hope.

The Eleventh Circuit recently affirmed the dismissal of cases brought by student "externs" against two Florida health care providers who classified workers from a local community college as unpaid interns. In that case, the Eleventh Circuit found that the student trainees were not employees because the employers' staffs spent time training the students and supervising and reviewing their work, and the students caused businesses to run less efficiently and caused at least some duplication in effort. Similarly, the Southern District of Florida granted summary judgment to a medical facility in three recent cases. Two of the three cases involved externs from medical coding programs and the third involved an externship for a surgical technology student. In each case, the externship stemmed from a specific course of study at a local school, the extern received academic credit, and the extern was required to perform a specific number of externship hours to graduate. In each case the court found that the primary benefit inured to the student who received training that could be used at any employer and that the employer's operation was in some way hindered by the presence of the

extern and the need for the employer's employees to supervise that extern. Importantly, the successful employers were able to show that no regular employees were displaced by the extern and that no employees lost hours to the extern.

If you employ interns, and the interns are not coming from a recognized nursing program, teacher training program, or some other established apprenticeship program that places more burden on your employees to supervise the interns than you receive in benefit from the intern's tasks, pay the intern minimum wage. It will be cheaper in the long run than fighting a wage hour case.

C. Outside Sales

Another hotly contested overtime exemption is the outside sales exemption. Just as paying someone a salary does not make the person an exempt white collar employee, paying someone on a commission basis does not make the person an exempt outside salesperson. To be an outside sales employee, the employee's primary duty must be selling and that selling must be away from a fixed location. One issue that has led to a number of suits is pulling formerly outside salespeople back into the office to save money. If the employee is not making a substantial portion of his sales at the customer's location, and instead does most of his "selling" by phone from an office (home or otherwise), he or she is not exempt.

These are but a few examples of the FLSA cases being brought in Alabama federal courts today. The only common thread among them is that even small amounts of liability to employees can be multiplied greatly by fee awards to the plaintiffs' bar.

Caregiving Education

An Expense or An Investment?

by William G. Nolan

As an HR professional, one of your goals is to manage and provide for the most valuable resource your company possesses - *your personnel.*

Many employee benefits and other Human Resource metrics are expenses to the bottom-line. They cost money and the company payoff is oftentimes hard to measure. One benefit, though, that pays dividends, is teaching your employees how to cope with the challenges they will face when called upon to care for an aging parent or loved one. Providing your employees with the tools they need to deal with these challenges is a cost-effective way for your company to retain its key employees. Your company will improve employee retention and ensure consistent productivity while providing a service that your employees will appreciate.

Let's face the facts: Many of your employees are challenged every day to find solutions to their aging parent's many problems. Government programs for seniors are being cut at an alarming rate. Those that remain are virtually impossible for some seniors to understand. Fortunately our parents are living longer; unfortunately, dementia is an epidemic and people are outliving their life savings. There is often no one else who can care for the 80 year-old widow than her 50 year-old daughter, your valuable employee.

Now add distance to the situation.

What if Mom lives hundreds of miles away from her Daughter, your employee? This means she now has to take time away from her job, spending precious vacation time caring for Mom rather than recharging herself. Even when she is at work, she is on the phone or the internet, searching for answers. This is productivity that is being lost by your company!

How many of your employees are dealing with the following challenges:

- Helping a sick parent find care?
- Helping a recuperating parent who wants to live in their home a little longer?
- Helping a parent manage bank accounts, credit card accounts, SS benefits, Medicare benefits, or VA benefits?
- Helping a mother or father deal with widowhood?
- Helping an older parent downsize from home to assisted living?
- Helping a parent with dementia cope with the loss of capacity?
- Helping a parent transition to a skilled care facility and apply for Medicaid?
- Dealing with the probate of a deceased parent's estate?

The statistics tell the tale: Lost productivity due to demands of caring for aging family members costs U.S. employers more than $17 billion per year.

- 63% (14.1 million) of caregivers of a person aged 50 or older are employed full time (51%) or part time (12%);
- 54% of employed caregivers made changes at work to accommodate caregiving:
- 49% changed their work schedule, went in later, left early, or took time off during the day;
- 11% took a leave of absence;
- 60.5% of employed caregivers are women.

Your employees are distracted, not because they want to be but because a loved one needs help and they need to provide that help. They don't know where to turn for help though. This is the first time many of them have even thought about Social Security or Medicare or VA benefits. They spend hours at home and at work, researching answers. Why? Because no one is providing them the answers they need to be a caregiver.

The problem is: who best to provide these answers? The senior healthcare field is composed of long-term care salespeople, funeral salespeople, home healthcare communities, assisted living communities, Social Workers, RNs, Geriatricians and Neurologists and Elder Law attorneys. It is a very fragmented field and most people in the field only understand their own particular piece of the pie.

There is one source however, that draws from all of these service-providers; that serves as a "General Contractor" who manages all of these sub-contractors. They are sometimes called "Geriatric Care Managers" or "Life Care Planners". Regardless of what they are called, they have one client – the Mom in this example. They do not work for a hospital or a home healthcare agency or a doctor's office. They do not have a conflict of interest. They serve as an advocate for Mom and her needs. They work for no one else.

Using a professional substantially eases the burden on the Daughter in this example, your employee. She no longer has to drive around town trying to find the right facility for Mom. The GCM has already recommended the appropriate place. Daughter no longer has to struggle with a Care Plan for Mom - the GCM has met with her MD and been actively involved in developing that plan. Daughter doesn't have to struggle with pulling together everything needed to complete a Medicaid application; the GCM does this for Mom.

Many families can manage a loved one's care without the involvement of a professional Care Manager though. With the proper guidance, your employees can quickly find the right services without spending hours of otherwise productive time searching for them.

Your company can help your employees deal with the challenges that many of them are facing or will face. Your company can provide this benefit at little or no cost, and the return on investment will be high. Caregiving education topics include:

Facing the Hard Truth that your parent isn't immortal;
Dealing with Difficult Conversations with your parent;
How to manage siblings who might oppose your role as caregiver;
What legal issues must be addressed and when?
What financial issues must be addressed and when?
Is your parent entitled to benefits?
Is/was your father a veteran?
Is there Long-term care insurance in the picture?
What about your parent's home?
Where can your parent live among several states?
What will happen if you predecease your parent?
What is probate and what does it cost?
Can I do it all myself or do I need help?

These topics can be grouped into one-hour "Lunch n Learn" sessions where employees can bring their own lunch and ask questions that will otherwise be researched on company computers and phones during company time. This is valuable advice and you, the Human Resource professional, can provide answers, if not directly then through a professional who works in this specialty area. It will generate goodwill among your employees, it will reduce absenteeism and stress and the best part is that it won't cost you anything to provide it! What more can you ask for from an employee benefit?

All it needs Is a little MORE TWEAKING

Case Study: A Brief Email Exchange Between an HR Director and his Consultant

by John Faure, SPHR and Joe Fehrmann, SPHR

To: Bill Fleetwood
Principal, Idlewild Consulting Partners

From: Bob Welch
Director Human Resources, EC Industries

Dear Bill,

Congratulations! I'm glad that we were finally able to get your consulting contract approved and that we can put you to work on our job evaluation project. I don't think I would ever get that done myself--there's just too much to do around here, especially right now with our annual performance review cycle coming up. Which reminds me of something. You've worked with technical companies before so I'd appreciate your advice. We've had great success with our 10-point rating scale. We're really able to nail performance assessments in a very objective way and I'd like to get even more precise in our ratings. Our engineering supervisors have been bugging me to allow three decimal places in their ratings, so I want to tweak it just a little to get more precise.

I'm thinking that, rather than going to three decimal places, would it make more sense to just change to a thirty-point rating scale for each item? What do you think? I've attached the Performance Review Package document that I have built over the last few years, several completed reviews and some related reports for background.

Bob

To: Bob
From: Bill

Bob,

Thanks for sharing your Performance Review Package. I've seen a lot of corporate appraisal forms and yours is certainly one of the most comprehensive I have reviewed. It's clear that you have put a lot of time into compiling a form that incorporates so many purposes - 360 review, self-review, a sophisticated goal achievement measurement system, corporate values, competencies, employee development, merit increase determination, annual bonus determination and next year's goals, all in one document. And the accompanying 8-page Instruction Guide is certainly an impressive document.

Before responding to your question on the rating scale, I am curious about something: Do you consider the Performance Review to be a useful and effective management tool? How is it viewed by management and associates?

Bill

To: Bill
From: Bob

Bill,

It's very useful! I'm really proud of how we've been able to get just one tool to do so many things, and all in one month! It manages performance because everybody has a minimum of 12 stretch goals (managers have about 20) and that gets people focused on what's most important. There's a whole section for job competencies so each review is tailored to the 10 or so key skills of each job. We also use it to evaluate how well our people are living out our 15 core values, too. I added that section because it seemed to be very important to our executive staff after we had a couple of ethics issues a few years ago. It also forces managers to have a development discussion and sets learning targets with everyone. Those are in addition to the performance goals.

But now that you mention it, our managers do complain a lot about doing the reviews. I think it's because they're still engineers at heart, and they don't like the touchy-feely stuff. They complain a lot about how much time it takes. I used to spend weeks chasing down late reviews until we put in the rule that your own merit increase gets dinged if even one of your reviews is late – that fixed that problem!! It also made sure I accomplished one of my own performance goals, which is a 95% completion rate on the reviews.

I'm sure the managers would stop doing reviews if they had a choice, but we need that annual opportunity for our associates to get feedback. I know our associates want that because in our last employee survey, "I get feedback on how well I'm doing" only got a 1.9 out of 5—pretty bad! So we need the annual review for that feedback.

Bob.

To:Bob
From:Bill

Bob,

It might be a good idea to get some more feedback from associates – and from managers. Given your large average span of control – almost 8 – and the fact that you require 360 feedback with at least 6 respondents for each review and you mandate that all your review meetings be conducted inside a 3-week window each January, it looks to me like all your managers do in January is reviews! I can see why they might complain.

I see that your performance review system is very structured - you mandate the distribution of ratings with a quota for each performance "band", 360s for all, detailed development plans, specific performance descriptor examples, etc., and the overall numeric score is hard linked to a merit salary increase percentage.

Does this level of structure help managers manage?

Bill

To: Bill
From: Bob

Bill,

Well, I think the structure helps. The managers all seemed to want a way to make the numbers work for them without having to spend a lot of time thinking about who's an average performer and who's a top performer. Our aim was to make it as objective as possible. We do put a lot on managers in January, but in my view that leaves them free for the rest of the year to get their department work done without having to worry about personnel issues.

We've always had a lot of structure around here; I guess that's just in our culture since we are engineering-driven. I'm assuming it helps managers manage, but do you think I should look into that?

Bob

To: Bob
From: Bill

Bob,

That might be a good investment of your time, Bill. So, do you want managers to focus on "personnel issues" only in January and not at other times? Do the reviews help you make critical personnel decisions – terminations, promotions, layoffs, etc?

Bill

To: Bill
From: Bob

Bill,

Our discipline and promotion policies both require a review of performance evaluations as part of the decision process for who gets promoted or who gets terminated or laid off. But when you asked that question about "do they help us make decisions" I got to thinking, and did a little research. Here's what I found: 85% of our associates have overall ratings in the "above average" range, 10% are "outstanding," and about 5% are "average." No one is below average! That means that not a single manager is meeting the quota for rating in the needs improvement band. We either have an outstanding workforce or our managers aren't doing their job. I'll admit--we've pretty much had to delay several termination actions until we built up a paper trail.

I've also noticed that our overall scores on the reviews have gone from an average of 82.34 three years ago to 86.09 last year. Our revenue has gone down about 4% a year throughout that time. I don't know whether there's a connection there or not.

Thanks for your help—you've made me realize that we need to do some more management training on how to use the system.

Bob

To: Bob
From: Bill

Bob,

It's time for me to ask you a tough question. ***Do you think that perhaps your system IS the problem?***

HumoR

Just When You Think You Have Seen or Heard it All…

A bit of HR Humor…based on real events…and the names and locations are not revealed to protect both the innocent and the guilty!

compiled by Steven Smith, PHR


BG876

SPOT ON

Early in my career I handled the drug screens for a company that dealt primarily with bilingual candidates. One day I was not able to have an interpreter present, so I had to try and communicate with an individual to tell them to go to the bathroom to fulfill the drug screen. In an effort to communicate this, I began to point at the urine cup and then at the bathroom. The applicant looked very embarrassed and seemed not to understand. Finally, he started to unbutton his pants IN THE OFFICE. He thought I wanted him to do a drug screen on the spot!

JUST WATER PLEASE

One day an applicant taking a drug screen came back out with his cup of very clear liquid. During the paperwork process he told me about what a "water fanatic" he was and how he drank water all of the time. It seemed really important that I understand his love for water. The sample didn't even register on the temperature gauge for a normal sample and was later found by the lab to be pure tap water.

VEGAS STYLE

I enjoyed an inquiry from an employee a few years ago at a previous company about our buffet plan. It took me a bit to figure out that he was actually referring to our cafeteria plan.

MARK YOUR CALENDAR

Back in the day of paper applications, we were astute to ensure that we also collected the EEO details from applicants as they came in to interview. As was common, the form simply said "Sex" and "Ethnicity". The "Sex" section just had a fill in the

blank for applicants to declare their gender. So one of our female applicants that came in, filled out the form and handed it in, but we got more information than we bargained for. When I looked at the "Sex" section, the line simply stated, "Every Tuesday!"

FINGER LICKING GOOD

A company I once worked with had "open interviews" one day per week where screening interviews were held for posted positions. Anyone and everyone who THOUGHT they met the criteria could come in for a brief face-to-face interview. Needless to say, these were often challenging individuals, many unskilled in the interview process. At times, it was like pulling teeth to make an interview go more than 3 minutes. This is where you had to fall back on some of the "typical" questions that you hate to ask, but when all else fails they serve as a fallback.

There was one rather detached gentleman who showed up bright and early one morning…and his interview skills and ability to answer questions were right up there with someone who had "pled the fifth" on the witness stand. To get the party started, the old reliable question was asked: "what is your greatest weakness?"

After an agonizing period of silence and staring at the ceiling, the individual looked at me directly in the eyes, smiled, and said just four little words: "my mother's fried chicken."

At least he was honest!

THE CORNER DRUGSTORE

Another day of screening interviews brought perhaps what was one of the all time best candidate stories. One bright spring morning, a 30-

something young man blustered in with an agenda he made known as he took his seat "I disagree with the drug-free workplace policy you have posted in your lobby" he announced. Cautiously asking why, he then elected to state the following: "I think it is unfair because I am a drug user and depend on certain substances so I can make it through the day… my prior employer did not understand that, so I am no longer employed. As a matter of fact I also sell drugs for extra money and make a pretty good living with that income; except I have no benefits and I hear you have great benefits."

After that statement, I kindly thanked the individual for his interest in the company and noted this was probably not the best environment for him to pursue his dream career and respectfully showed him the exit door. His last comment was "give me a chance, maybe I can lay off using and selling drugs at work and only do it after hours."

Perhaps he should consider a career in the pharmaceutical industry?

BOJANGLES ADDS SPICE

For any individuals who have ever worked in a health care setting, bless you every one. Of course, you could say the same for food service, retail, or just about any other category…but health care settings bring with them so many additional opportunities for HR drama and mayhem. But sometimes, you do have a little fun as well – in unusual ways.

It was with all good intentions that the staff of the health care unit of a small rural facility decided to have a fund raiser for the local community and serve plate lunches to the guards and staff of the prison to raise money for a local charity…very easy and uncomplicated, correct?

Well…when the 3AM call came to the head of HR, it was a different story. It seems the employees were utilizing certain items in the health facility to help prepare the meals…the autoclave and sterilizers to cook the fried chicken and steam the vegetables; the surgical instruments to cut and carve; and the gauze bandages to wrap the eating utensils (thankfully plastic) into nice, neat little bundles. For some reason, facility administration did not look kindly on this unauthorized use of resources, but they did indicate the food was good (they had ordered for themselves a plate lunch at the bargain price of $3.95).

At least they did not try to do drive-through service…

THE DRIVE-IN WORKPLACE

In the dead of winter on a cold, cold Monday evening, the trusty HR "Bat-phone" rang about 5AM

Have a dress code? Have dress code violators? Of course you do. In HR, you have to be the "Fashion Police" much more than you ever wanted to be, and in some cases, see more than you really wanted to experience.

with yet another adventure to reckon with. It seems that one of the warehouse workers on the third shift had been having car problems and needed to do a few quick repairs and chores, such as adding anti-freeze and brake fluid and a few other maintenance-related items. So, he did what any rational employee would do…he pulled his car through the warehouse bay doors, into a warehouse full of combustible materials and chemicals and began working on the vehicle. By the way, he also closed the bay doors - trapping the fumes inside the warehouse as he left the engine running.

When security detected the incident via cameras and reports from other alarmed employees, a scene resembling a keystone cops scenario ensued and the car was immediately disabled and pushed out of the building. The employee was called into the manager's office for counseling and a "what were you thinking?" conversation. The manager remained calm despite the fact that a catastrophe could have easily occurred. The reaction of the employee when told what he did was not only inappropriate but incredibly dangerous was: "It does not say anywhere in the handbook that I CAN"T do that, so what is the problem?"

Needless to say, that person did not become "employee of the month" and wound up having a short tenure in his position.

FULL MOON OR LUNAR ECLIPSE

Have a dress code? Have dress code violators? Of course you do. In HR, you have to be the "Fashion Police" much more than you ever wanted to be, and in some cases, see more than you really wanted to experience.

A warm summer day a production employee came in to file a complaint against co-workers regarding the fact they were complaining about her overly abbreviated blue jean skirt and the fact they told her it was "improper" and not appropriate. She continued to explain that her coworkers told her that when she leaned or bent over, she was exposing herself and that the "full moon" was visible…especially since she elected not to wear undergarments (her choice, she noted…indicating she never wore undergarments as they were too hot and restrictive). She proceeded to note it was none of their business, they should not be looking anyway, and she would dress the way she wanted whereupon she stood up and started to leave, when she accidentally dropped her lunch bag, leaned over to retrieve it, and therefore gave the head of HR a full lunar orbit. After said HR head regained composure, the offending employee was then provided a copy of the dress code (hot off the Xerox) and asked to return home to ensure that the "full moon" became a "lunar eclipse" before returning to the workplace.

Contributors

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Paula Watkins, VP Corporate Human Resources for Lyons HR. Paula received her undergraduate degree from UCLA and her Masters from the University of Missouri-St. Louis. She has been certified as a Senior Professional in Human Resources (SPHR) since 1997 and retains currency through the Human Resources Certification Institute (HRCI). Paula is past director of the Alabama SHRM State Council and served on a national Board of Governors for SHRM. She continues to support her local chapter and the State Council by holding a variety of positions. She is Chairman of the Board for the Anniston Museum Complex; is a graduate of Leadership Calhoun County; served six years on the Chamber of Commerce Board; and is an active Rotarian. Paula has been honored by the Girl Scouts of America as Business Woman of the Year and three times by the Calhoun County SHRM as Human Resources Professional of the Year and with a Human Resources Lifetime Achievement Award.

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Paige Burton is the Director of Public Relations for TaxBreak, an industry leader in tax credit recovery since 1998. Paige attended Jacksonville State University where she studied Mass Communication with a concentration in Public Relations. While at Jacksonville, Paige was very involved with all student media outlets and was the Editor of the Arts and Entertainment section of The Chanticleer newspaper. Paige's work has been published in numerous publications with topics ranging from art to tax credits. In her off time, Paige enjoys spending time with her husband Thad and daughter Lucy Grace.

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Ms. Baker has experience in all aspects of workplace law, including multi-plaintiff and class action litigation. She regularly advises employers on complex issues, including compliance with the FMLA and other employment laws.
Ms. Baker lectures frequently on employment-related topics, including at national conferences sponsored by the Society for Human Resource Management. She was honored by Chambers USA as one of America's best lawyers, selected for Alabama SuperLawyers and the Birmingham Business Journal named her as "Best of the Bar."

Ms. Baker is a member of Society for Human Resource Management (SHRM) and is active locally, serving on Birmingham SHRM's Advisory Council and regularly hosting a BSHRM Senior Leaders Group Forum. Jackson Lewis is honored to be a continuous supporter of SHRM.

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