Volume 7 : Issue 3

HR PROFESSIONALS MAGAZINE™

www.HRProfessionalsMagazine.com

Rising Stars in Labor and Employment Law

SHRM-Atlanta Conference March 29-30

J. Robert Carr,
J.D., SHRM-SCP
Senior VP, Membership and External Affairs
Society for Human Resource Management

Human Capital **Management Strategy**

Understanding the Labor Participation Rate

HR's Voice Needed Now More Than Ever

NEED A KILLER BUSINESS TAX EXEMPTION?

Last year, the Internal Revenue Service declared **identity theft protection** could be **classified as a non-taxable benefit**. You can now deduct the cost of offering protection, not only to your employees but also to your customers.

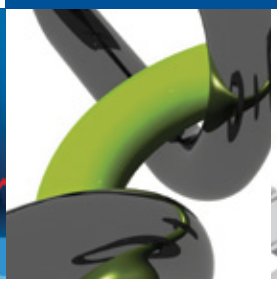
Identity Guard® Business Solutions offers a turn-key suite of services that give you frontline defense of every keystroke, corporate credit card transaction, and password — not to mention "black market" data monitoring and so much more.

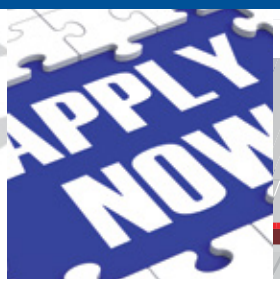
Contact Your Broker Today or Visit IdentityGuardBusiness.com

IDENTITY GUARD®
BUSINESS SOLUTIONS

Contents

Bringing Human Resources & Management Expertise to You





www.**HR**ProfessionalsMagazine.com

Editor
Cynthia Y. Thompson, MBA, SHRM-SCP, SPHR

Publisher
The Thompson HR Firm, LLC
HR Consulting and Employee Development

Art Direction
Park Avenue Design

Contributing Writers
Austin Baker
J. Robert Carr
Laura K. Clayman
Frank L. Day, Jr.
Harvey Deutschendorf
Paula Hayes
Kim Hodges
Howard B. Jackson
Kim LaFevor
Gerald Laurain
Jo Nisewanger
Angie Sewell
Greg Siskind
Robin Banck Taylor
Jodi D. Taylor
Richard Works

Board of Advisors
Austin Baker
Jonathan C. Hancock
Ross Harris
Diane M. Heyman, SPHR
Terri Murphy
Susan Nieman
Robert Pipkin
Ed Rains
Michael R. Ryan, PhD

Contact HR Professionals Magazine:

To submit a letter to the editor, suggest an idea for an article, notify us of a special event, promotion, announcement, new product or service, or obtain information on becoming a contributor, visit our website at www.hrprofessionalsmagazine.com. We do not accept unsolicited manuscripts or articles. All manuscripts and photos must be submitted by email to Cynthia@hrprosmagazine.com. Editorial content does not necessarily reflect the opinions of the publisher, nor can the publisher be held responsible for errors.

HR Professionals Magazine is published every month, 12 times a year by the Thompson HR Firm, LLC. Reproduction of any photographs, articles, artwork or copy prepared by the magazine or the contributors is strictly prohibited without prior written permission of the Publisher. All information is deemed to be reliable, but not guaranteed to be accurate, and subject to change without notice. HR Professionals Magazine, its contributors or advertisers within are not responsible for misinformation, misprints, omissions or typographical errors.

Features

WEB EXCLUSIVES
2017 Economic Outlook Under the Trump Administration by Gerald Laurain
http://hrprofessionalsmagazine.com/web-exclusive-2017-economic-outlook-under-the-trump-administration/

Employee Benefits

Employment Law

Labor and Employment Law Rising Stars

Industry News

stay current
Follow Us!

Next Issue

Talent Management and Recruiting and Employment Law and Employee Benefits Update – Ads and Articles due by March 10

note from the editor

Great planning session recently with Lisa and Keith May and Daphne and Alan Large in our home. Lisa is Senior Vice President, and Daphne is the President/CEO of Data Facts, Inc. They are charter sponsors of HR Professionals Magazine and have been on our back cover since we launched the magazine in 2011. They also sponsor our monthly webinars on HR strategic leadership. We sincerely appreciate their sponsorship!

It is an honor to feature Dr. J. Robert Carr, J.D., SHRM-SCP on our March cover. Dr. Carr is Senior Vice President, Membership and External Affairs at SHRM. You can read about his many accomplishments at SHRM and during his fantastic career in his profile on Page 5. You can also read about SHRM's Principles for the 21st Century Workplace in his excellent article on Page 8. I feel strongly that it is HR's responsibility to be advocates for workplace issues. I hope you will join us on March 13-15 as we hear great presentations from subject matter experts on public policy issues that impact our workplace at the SHRM Employment Law and Legislative Conference in Washington, DC. The most exciting part of this conference is visiting your state legislators on Capitol Hill and discussing these issues. With a new administration in the White House, this is a great opportunity to discuss new policies with your senators and congressmen and let them how these policies will impact your workforce. Follow me on Twitter @cythomps for up-to-the-minute coverage!

Sign up for our RSS News Feed to receive up to the minute HR Alerts on changing legislation affecting our workforce. www.HRProfessionalsMagazine.com.

We are featuring Rising Stars in Labor and Employment Law in our March issue. I know you will enjoy reading about these attorneys who are 40 or under and have practiced 10 years or less and are already top performers in their industry. Please take the time to congratulate those you know who made this prestigious list. We hope you will call on them as you begin to navigate the new legal issues arising from the new administration. Two of our rising stars have contributed articles in this issue. Don't miss Frank Day's article on updating your employee handbooks on Page 10, and an article by Jodi D. Taylor on Page 44 on recent court decisions regarding background search authorization in online employment applications. They are already subject matter experts!

It is exciting to be a media sponsor for the 27th Annual SHRM-Atlanta HR Conference on March 29-30 again this year. We are looking forward to seeing our friends in Atlanta! There will be 27 innovative, career-advancing educational sessions and two thought-compelling keynote presentations. Participants can earn up to 9 HRCI and SHRM recertification credits. We will bring you the exciting details in real time on Twitter, Facebook, and LinkedIn. If you are not currently following me on social media, I encourage you to do so. Don't miss any of this exciting coverage!

Mark your calendar for March 23rd, as we will be presenting our monthly webinar sponsored by Data Facts. I will be presenting a rec-cap of the SHRM Employment Law and Legislative Conference for those who were unable to attend. Watch your email for your invitation! If you are not currently on our email list, please let us know, and we will be happy to add you. Don't miss this opportunity to obtain complimentary HRCI and SHRM recertification credits!

Cynthia Y. Thompson, MBA, SHRM-SCP, SPHR | Editor
cynthia@hrprosmagzine.com
www.hrprofessionalsmagazine.com
Twitter @cythomps

Bob CARR

Carr received a B.A. in economics from Morehouse College, a J.D. from Columbia University Law School and an LLM (Master of Laws) degree from Georgetown University Law Center.

J. ROBERT CARR, J.D., SHRM-SCP, SVP Membership and External Affairs

As Senior Vice President, Bob Carr leads SHRM's Membership and External Affairs business unit. He is responsible for the development and execution of a comprehensive communications strategy that engages and informs a variety of critical SHRM stakeholders, including members, policymakers and other government influencers, media and staff.

Carr previously served as SHRM's Chief Professional & Business Development Officer, where he oversaw the society's professional development program. Additionally, he played a key role in the organization as its first Chief Human Resource and Strategic Planning Officer. Carr returned to SHRM from the National Bar Association, where he served as Executive Director.

As former Director of the Human Resources Group at AARP, Carr led all major organizational development activities, human resource and diversity management. Prior to joining AARP, he was Senior Director of Human Resources and Strategic Planning for the Association of Trial Lawyers of America (now the American Association For Justice). He also led the HR function for Howard University and Howard University Hospital in Washington, D.C.

Carr served in government as Deputy Counsel to the Ethics Committee of the U.S. House of Representatives and as Deputy Counsel in the Office of the Solicitor, U.S. Department of Labor.

Currently, Carr serves as a director on the boards of the Council for Global Immigration and HR People & Strategy, SHRM affiliates. He was also appointed as a member of the Congressional Hispanic Caucus Institute Advisory Council. Carr is a member of the State Bar of Georgia, the Bar Association of the District of Columbia, and the U.S. Supreme Court. He is active in a number of legal and professional societies, including the American Bar Association, the National Bar Association and the American Society of Association Executives. Carr also served on the Conference Board Council of Human Resource Executives. ■

FISHER PHILLIPS LLP 2017

RECOGNIZED BY

Best Lawyers

Fisher Phillips

FISHER PHILLIPS LOUISVILLE

Fisher Phillips is one of the largest labor and employment law firms in the country with more than 350 attorneys in 33 offices nationwide, including Tennessee, Kentucky, Florida, Georgia, and Mississippi. Some of the most talented and experienced attorneys come to the firm to handle challenging cases involving workplace issues faced by employers and HR professionals. Fisher Phillips attorneys specialize in all areas of labor and employment law and have the experience and resolve to achieve your desired results in court, with employees and unions, and with competitors.

TOM BIRCHFIELD is the managing partner of the Louisville office, which he helped open for the firm in 2009. Prior to 2009, he was the chairperson of the labor and employment practice group of a large regional law firm. Tom has represented employers exclusively for over 25 years in federal and state courts and before various administrative agencies throughout the nation. Tom assists employers with their employment practices liability prevention efforts by conducting training, counseling, reviewing and revising policies and preparing severance agreements. Tom also represents companies in collective bargaining, arbitrations and proceedings before the National Labor Relations Board.

GEORGE ADAMS is a partner in the Louisville office, where his practice is devoted exclusively to advising and representing employers regarding labor and employment law issues. For 17 years, George has helped employers in many states develop strategic plans to effectively comply with and manage local, state and federal employment laws, and provides day-to-day advice regarding wage and hour issues, discrimination and harassment claims, FMLA and ADA compliance, the WARN Act, and many other issues. Although he has represented employers in many state and federal courts and administrative agencies, George has helped many more employers avoid litigation and reduce the risk of legal liability through sound policy development and training. He also represents and counsels employers during union campaigns and elections, in addition to providing training and advice to help employers avoid such situations by educating their employees.

RAY HALEY III is a partner in the Louisville office and has practiced labor & employment law for more than 30 years. He represents employers in a variety of industries including healthcare, manufacturing, transportation and rehabilitative services. Ray's representation of clients involves defense of all forms of civil rights and wrongful discharge claims in state and federal courts, as well as arbitration of labor disputes. He regularly advises clients concerning compliance with virtually all employment-based state and federal mandates, union related matters and state and federal wage and hour advice and litigation.

JEFF SAVARISE is a partner in the Louisville office and chair of the firm's automotive manufacturing practice group. Jeff has served Toyota manufacturing's national outside labor and employment counsel for over 20 years. Jeff practices exclusively in the areas of labor and employment law on behalf of employers, where he handles cases in a number of state and federal jurisdictions. He also provides a variety of preventative maintenance and employment training programs especially geared to the automotive industry. Jeff received the "Distinguished Alumni Award" given to alumni of the University of Akron Law School who have demonstrated significant achievement in the field of law and have made significant contributions to their community.

CRAIG SIEGENTHALER is a partner in the Louisville office. He has appeared in federal and state courts defending clients in class action litigation involving wage and hour matters, as well as other employment law based claims. Craig represents corporate entities and management in employment litigation in federal and state courts and in administrative proceedings before the Equal Employment Opportunity Commission (EEOC) and state agencies. He has counseled companies regarding employment issues, including legal compliance, policies and procedures, restructuring, job accommodations, leaves, non-compete agreements, employment contracts, and layoffs and related severance programs.

REACHING *NEW* HEIGHTS

EMPOWER YOURSELF AND JOIN US FOR *SOAHR 2017,* SHRM-Atlanta's 27th Annual HR Conference. Participate in two days of cutting-edge educational sessions and two keynote presentations designed to strengthen your business acumen and leadership capacity.

- ***NEW:*** Additional networking opportunities with an opening night welcome reception
- Over two dozen sessions covering Business Acumen & Strategy, Employment Law & Legislation, Talent Acquisition & Retention and Total Rewards
- Opportunity to earn up to 9 SHRM PDC and HRCI CEUs
- Jam-packed Resource Partner Showcase filled with new products and solutions to streamline your work
- Complimentary professional headshots

SOAHR

SHRM-ATLANTA HR CONFERENCE 2017

MARCH 29-30, 2017
COBB GALLERIA CENTRE
ATLANTA, GA
#SOAHR17

Register by 3/17 for the lowest rates!
SHRMATLANTA.ORG

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

HR's Voice is Needed Now More Than Ever

What SHRM is Doing and How You Can Help

By J. ROBERT CARR, J.D., SHRM-SCP

There is an old but true saying in Washington, D.C: You are either at the table or on the menu. The Society for Human Resource Management (SHRM), the world's largest HR professional society, is at the table—from state houses to Washington's halls of power to global gatherings such as the Business 20.

Advancing the interests of the HR profession and advocating for effective workplace public policy is one of SHRM's most enduring missions. Now that work has never been more important.

The HR Group that Government Calls First

More than 30 years ago, SHRM picked up its Ohio roots and settled in Alexandria, Va., just nine miles from Capitol Hill. The reason was simple, according to SHRM former president and chief operating officer Ron Pilenzo, who ushered the move: "We wanted to be near think tanks and government," he said. "We wanted to be the group that the federal government would call first on HR issues."

Today, SHRM is that undisputed group.

In 2016, the U.S. Congress and federal agencies reached out to SHRM more than 130 times on workplace issues, including employment and labor, civil rights, health care, tax and benefits, workplace flexibility and more.

Over the same period, SHRM participated in 19 public policy forums, including congressional and regulatory hearings and agency roundtable discussions.

More than 1,000 individual SHRM members advocated on behalf of the HR profession, conducting face-to face meetings with their legislators on Capitol Hill, in state capitols and in district offices across the nation. And Members of Congress received nearly 20,000 letters from SHRM members on workplace issues.

This is only the start. Our SHRM Government Affairs team of 12 staffers, including 6 registered lobbyists, works full-time and often around-the-clock to stay on top of the issues that affect you and your organizations. On any given day, you can find the SHRM team advocating public policy positions in the halls of Congress, in state legislatures and before federal regulatory agencies and federal courts.

We can attest that HR's voice is heard—in Washington and beyond. That voice is more critical now than ever before.

Today's Issues are HR Issues

In our current social, political and economic climate, some of the greatest debates and biggest news headlines affect the workforce and workplace. Health care and paid leave. The digital economy. Global skill shortages and the movement of employees at a time of lingering un- and under-employment.

These are just a handful of "issues of the day" that are *our* issues.

What's happening? Why are we seeing HR issues emerge as part of national conversations? And when did the intricacies of traditional HR matters like health care, pay, leave and benefits go mainstream?

The short answer is that the world of work is changing, and the basic employee-employer compact that was built for business in the 1960s is starting to show its age.

More people are turning to new employment models like freelancing and the sharing economy and to the use of technology to disrupt traditional industries and organizations. We see companies forced to quickly adapt to shifting demographics, automation and other trends—or failing to do so and suffering. In the midst of this, governments are trying to get ahead of—or at least catch up to—all of this change.

The proposed changes to the FLSA overtime rule is only one example of how policymakers have tried to grapple with larger social and economic trends through regulation and legislation. You can be assured that with a new U.S. Presidential Administration and the 115th Congress there will be more to come.

HR Public Policy in a New Washington

From the earliest days of the Trump Administration and the new Congress, HR issues came to the fore. The President has issued Executive Orders focused on reducing regulations, curtailing immigration and revisiting controversial regulations issued during the Obama administration. Congress promises action this year on health care, immigration and other workplace issues.

Take health care. At press time, President Trump had issued an Executive Order directing federal agencies to take administrative action to dismantle the Affordable Care Act (ACA). Congress is moving forward to replace or reform the ACA, and on the table will be the employer and individual mandate, the excise tax on high-value health care plans and insurance market reform. More than half of all Americans get coverage through their employers, and SHRM members and HR professionals are the ones who design and implement these benefit plans for employees and their families. So healthcare is our issue.

SHRM believes that health care reform should expand access to coverage, including strengthening and improving the employer-based health care system, and supports reforms that lower health care costs and improve access to high-quality and affordable coverage.

Immigration is another perennial issue in the spotlight. We live in an increasingly complex, interconnected, global world, and employers need access to the best talent worldwide. This makes immigration an HR issue. SHRM and our strategic affiliate, the Council for Global Immigration, support an immigration system that allows employers to recruit, hire, transfer and retain global employees and ensure America remains competitive.

Don't forget paid leave. Over the past several years, states and localities have created a confusing and conflicting patchwork of mandated paid sick leave laws and, most recently, mandated paid parental and maternity leave. Meanwhile, President Trump proposed a paid maternity leave proposal during his campaign.

SHRM believes that the United States must have a 21st Century workplace flexibility policy that meets the needs of both employers and employees. Rather than a one-size-fits-all government mandate, policy proposals should accommodate varying work environments, employee representation, industry type and organizational size, and they should encourage, not force, employers to offer paid leave to their employees. SHRM will be working with Members of Congress and others to advance this type of proposal in 2017.

SHRM Principles for the 21st Century Workplace

As SHRM President and CEO Hank Jackson has said, "It's time for a candid conversation about our evolving workplace—and no one is better qualified to lead that discussion than HR professionals."

This is why SHRM is calling on elected representatives, the new Administration and government officials to embrace three core principles when creating policies for the 21st Century workplace:

- **BE INNOVATIVE:** The 21st Century workplace provides employers and employees the flexibility to address how, when and where work is accomplished and allows for the design of employee benefit programs that attract and retain employees while managing the fiscal realities of modern business.

- **BE FAIR:** The 21st Century workplace provides fair employment practices in hiring, training and compensation, regardless of non-job-related characteristics, and encourages practices that meet the goals of the organization and the needs of its employees.

- **BE COMPETITIVE:** The 21st Century workplace gives employers the ability to attract, recruit, hire and train talent, as needed, to remain competitive in a global economy.

As a nonpartisan organization, SHRM works with Republicans, Democrats and Independents. We do not have a Political Action Committee and do not financially contribute to political campaigns or endorse candidates for political office.

SHRM is for effective workplace policy, and we urge you to join us.

We Need Your Help

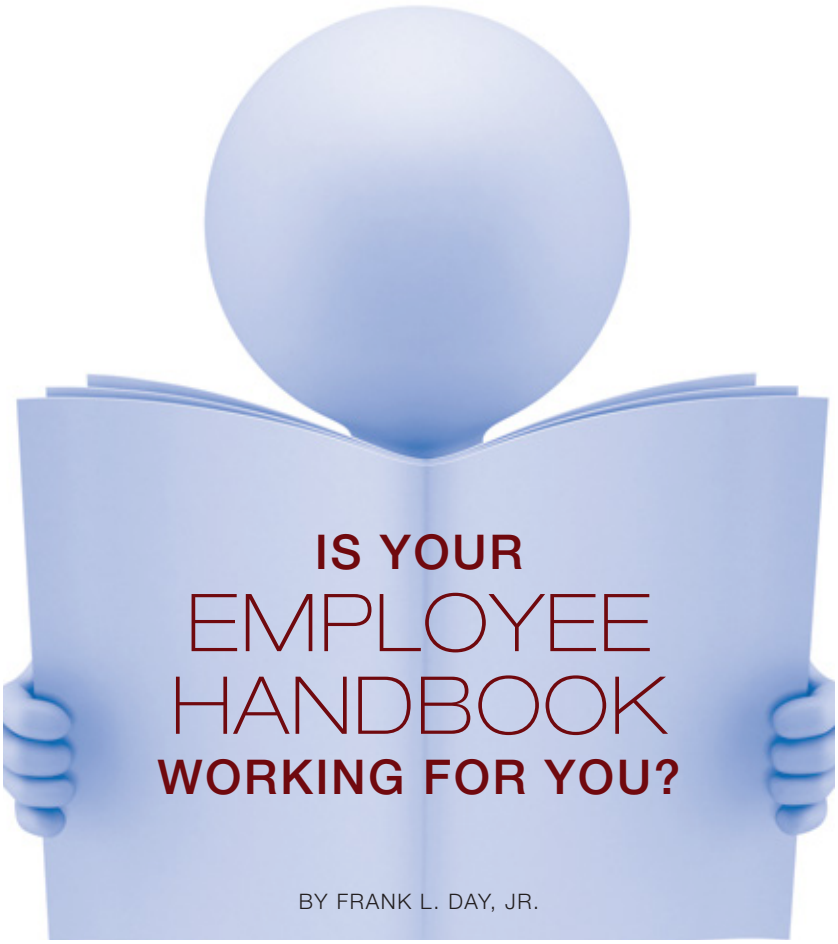
As an HR professional doing your best to comply with various federal and state laws and regulations, how many times have you thought, "What were the policymakers *thinking* when they enacted this law?" Or you may have wondered if they had any input at all from those who would be affected most.

You can make a difference by giving policymakers your advice on what makes the workplace work.

Join the more than 9,000 SHRM Advocacy Team members who advance our profession in their home states and on Capitol Hill. And connect to our online HR Policy Action Center to get alerts, easily connect to your Members of Congress, submit feedback on breaking issues and more. Visit advocacy.shrm.org.

SHRM's strength—and the power of our voice—lives in our community. I invite you to join us.

J. Robert Carr is Senior Vice President, Membership and External Affairs at the Society for Human Resource Management, the world's largest HR professional society.



IS YOUR EMPLOYEE HANDBOOK WORKING FOR YOU?

BY FRANK L. DAY, JR.

Employee handbooks are not legally required, but they can be very helpful to employers when utilized correctly. A handbook should set forth company policies, the terms and conditions of the employment relationship, and describe the employer's expectations. In short, it should set the tone for the employment relationship. A good handbook is one that reflects the values of the organization and is tailored to meet its needs.

One purpose of an employee handbook is to protect the company from legal claims by confirming that the employer follows the law. A handbook cannot serve this purpose if it is not kept compliant with the changing laws and regulations. Companies are now subject to more than 100 federal and/or state laws, making it infeasible to have written policies addressing them all. In fact, employers should only adopt written policies that they intend to manage because a policy that violates the law is far worse than having no written policy at all. At a minimum, employers should conduct annual compliance reviews paying particular attention to the following areas:

1. DISTRIBUTION

The best employee handbook in the world is of no value if the employer cannot prove that it was distributed. Employers must consider how they will prove employees received the handbook and should ensure they receive a written acknowledgment of receipt regardless of whether the handbook is distributed electronically or in paper form. These acknowledgments should be kept in a location where they will be accessible in the future.

2. DISCLAIMERS AND AT-WILL EMPLOYMENT

In some states, including Tennessee, a handbook is generally not considered a contract of employment unless the employer includes language that expressly offers a term of employment rather than employment-at-will. However, laws vary, and some state laws may treat handbooks as contracts of employment. To help avoid this, a handbook should contain a clear and conspicuous disclaimer stating that it does not create a contract of employment. The handbook should also make clear that the company's employees are at-will. It is a good idea to place the at-will statement in the front of the handbook on the same page as the disclaimer.

3. EEO POLICIES

There are many separate EEO concerns that should generally be addressed in an employee handbook and reviewed frequently for compliance and needed changes to reflect recent legal developments:

a. General nondiscrimination pledge

Employers operating in more than one state should ensure that their EEO pledge covers all protected groups identified in the various state and local laws and regulations, which may protect classifications that are not protected by federal law.

b. Reasonable accommodations

Americans with Disability Act (ADA) regulations require employers to make accommodations for disabilities they know about. If an employer's policy clearly indicates a willingness to make such accommodations, and an employee does not disclose a job-related disability needing accommodation until after the termination of employment, the policy statement could be useful in defending against any ADA claim the employee may bring.

c. Complaint procedure

The employer must ensure that its complaint procedure is actually used and meets the organization's needs. The complaint process should permit employees to make complaints of unlawful discrimination, including harassment, and identify multiple individuals/positions to whom a complaint can be made, to enable employees to bypass, a supervisor, who may be the subject of the complaint.

4. SOCIAL MEDIA AND THE NLRB

Employers should frequently review social media policies to ensure they are not in conflict with federal labor laws. In recent years, the National Labor Relations Board (NLRB) has found many such policies unlawful

because they interfere with the right of employees to engage in "protected concerted activity." Recent decisions have reiterated that policies should not be so broad that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.

5. WORK RULES AND THE NLRB

The NLRB also recently has found several common types of employer work rules unlawful. Employers should review their work rules or standards of conduct to ensure that the rules do not infringe on protected activity or serve to "chill" any employee from exercising those rights. Examples of rules the NLRB has found unlawful include rules requiring employees to treat each other respectfully, prohibitions against solicitation that are not limited to specific working areas and/or during work hours, and confidentiality requirements prohibiting employees from discussing working conditions, wages, work hours or benefits of employment.

6. BENEFITS AND MISCELLANEOUS POLICIES

As with EEO policies, there are many legal issues related to benefits. The following are some of the most essential that should be reviewed regularly:

- The handbook should speak in terms of coverage and not in terms of particular benefits. If particular benefits are discussed, an employer runs the risk that it will be required to provide those benefits, even where the carrier has denied coverage.
- The handbook should explicitly state that all coverage is subject to the terms, conditions, restrictions and other eligibility requirements set forth in a plan document.
- The employer should reserve the right to modify, amend or terminate any benefit plan at any time and for any reason. If this language is not included in the handbook, employers run the risk that ERISA may require advance notice before any change can be made and/or prohibit certain changes from being made at all.

Other policies that should be reviewed regularly include workplace violence policies that may be impacted by varying and frequently changing state concealed weapons laws; leave policies that may be impacted by state and local laws requiring paid sick leave; and "bring your own device" policies that may raise wage and hour, privacy and other issues.

While these are just a few of the troublesome areas, all employers should annually review their employee handbooks to ensure compliance or reach out to their favorite employment attorney to assist in the review.

Frank L. Day, Jr.
FordHarrison
fday@fordharrison.com
www.fordharrison.com

2017 SHRM LEARNING SYSTEM

for SHRM-CP/SHRM-SCP

PREPARING YOU FOR SUCCESS
On The SHRM Certification Exam

Prove you're ready to commit to your career by earning your SHRM Certified Professional (SHRM-CP®) or SHRM Senior Certified Professional (SHRM-SCP®) credential.

With the 2017 SHRM Learning System, you can create your personalized path to success on the certification exam. Choose a learning option that best meets your needs:

Self-Study Program

Instructor-Led Programs

- » 3-DAY IN-PERSON SEMINAR
- » 7-WEEK OR 9-WEEK VIRTUAL SEMINAR
- » SHRM EDUCATION PARTNER PROGRAM

Organizational Training & Development Programs

Get Started Today

shrmcertification.org/learning/hrpros

SHRM®
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

17-0179

#hellowork

"I can't believe they pay me to do this."

It's a beautiful thing when people love what they do. ADP provides easy and accurate payroll and HR solutions so your workforce can spend less time wondering about their paychecks and more time loving how they earn them.

Visit adp.com/hellopayroll and see how we can bring humanity to your workforce to make work larger than a paycheck.

A more human resource.℠

Payroll | HR Solutions | Love of Work

5th Circuit Broadens Exceptions to At-Will Employment

By ROBIN BANCK TAYLOR

On August 8, 2016, the Fifth Circuit Court of Appeals recognized a new public policy exception to the at-will employment doctrine, allowing a former employee to sue his employer for terminating his employment for legally storing a gun in his car on company property in a publicly-accessible parking area.

In *Swindol v. Aurora Flight Sciences Corp.,* 832 F. 3d 492 (5th Cir. August 8, 2016), plaintiff Robert Swindol parked his car in the Aurora Flight Services parking lot with his firearm locked inside. When Aurora's management learned that Swindol had the firearm in his car, they fired him for violating a company policy prohibiting firearms on company property. Also, the company held a meeting where the human resources manager informed employees that Swindol was a "security risk" and to call the police if he was sighted near the facility.

Swindol filed suit, claiming wrongful discharge and defamation. Mississippi has a little-known gun owners protection law that prohibits an employer from maintaining or enforcing a policy that prohibits a person from storing a firearm in a locked vehicle in any parking lot, garage, or other designated parking area open to the public: Mississippi Code Section 45-9-55(1). Swindol argued that he was wrongfully terminated because this statute prohibits enforcement of the Aurora company policy prohibiting firearms on company premises.

As there were no controlling precedents concerning whether this statute created an exception to the at-will employment doctrine, the Fifth Circuit certified the question to the Mississippi Supreme Court. In March of 2016, the Mississippi Supreme Court recognized that the statute creates an exception to the at-will employment doctrine. Following the Mississippi Supreme Court, the Fifth Circuit found that "Swindol [had] stated a claim for wrongful discharge under Mississippi law."

This case serves as a general warning and reminder to employers to use caution when maintaining or enforcing policies contrary to state statutes. In particular, Mississippi employers may not discharge an employee for possessing a firearm in his or her personal locked vehicle in the absence of one of the exceptions noted in Mississippi Code Section 45-9-55. And considering that over 20 states have passed similar so-called "parking lot" or "guns in trunks" laws, at-will employers outside of Mississippi may also want to carefully consider the outcome in *Swindol* and any potential liabilities created by their own firearm policies.

Robin Banck Taylor, Managing Shareholder
Ogletree Deakins - Jackson
Robin.taylor@ogletreedeakins.com
www.ogletreedeakins.com

THE JOINT EMPLOYER (R)EVOLUTION?

By HOWARD B. JACKSON

INTRODUCTION

The concept of joint employment has been around for a long time. It is recognized in a variety of legal settings, including discrimination law, Family and Medical Leave Act law, the Fair Labor Standards Act, and with regard to the National Labor Relations Act. In recent years, it has received particular attention from the National Labor Relations Board ("NLRB" or "Board").

In summary fashion, the concept of joint employment can be described as follows. Where two or more separate entities jointly establish or control the terms and conditions of employment, such entities may be considered equally as "employers" of the employee(s) at issue. And as "employers," certain legal obligations attach.

THE PREVIOUS NLRB STANDARD

In the context of labor law - as governed by the National Labor Relations Act and administered by the NLRB - the determination of joint employer status is significant because where joint employment exists, ***both*** employers have bargaining obligations with a union that represents the employees. That can be very attractive for unions, and very undesirable for employers.

The question of whether joint employment exists commonly arises where one employer contracts with another employer for certain services. A case that involved those circumstances, and illustrates the Board's previous long-standing approach to the question, is *Southern California Gas,* 302 NLRB 456 (1991). Southern California Gas, a utility, contracted with another employer for janitorial services. The employees of the janitorial service were represented by the Service Employees International Union ("SEIU"). Southern California Gas terminated the contract with the janitorial service, and the SEIU filed charges with the Board alleging a variety of unfair labor practices, and contending that Southern California Gas was a joint employer of the janitorial service employees.

Using language that was often cited in subsequent NLRB and court decisions, the Board commented on the joint employer analysis as follows: "An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally, a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *Id.* at 461.

THE BOARD SHIFTS ITS POSITION

On August 27, 2015, the Board issued a new decision in *Browning Ferris Industries of California, Inc.,* 362 NLRB No. 186 (2015). Via that decision the Board significantly altered its test for joint employer status, such that joint employment will now be found in more circumstances.

The Board summarized its new test as follows. The first question – discussed in more detail below - is whether there is a "common law employment relationship" between the employer and employees in question. If such a relationship exists, the next issue is "whether the putative joint employer possesses sufficient control over the employees' essential terms and conditions of employment to permit meaningful collective bargaining."

With respect to whether there is a "common law employment relationship," the Board wrote that it would look to common law principles of agency. In general, under those principles an employee "is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." If this sounds familiar, it should. The fundamental analysis is similar to that utilized when considering whether someone is an employee or an independent contractor. The Board recognized in its decision that this is at times not an easy determination to make, and that it will involve fact-specific analysis.

In a comment that provides insight into how the Board will view certain arrangements, the decision quoted the following from a classic text on agency law: "[i]f the work is done upon the premises of the employer with his machinery by workers who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants

of the owner..." The problem this language presents for businesses is that it casts a very wide net, by describing literally thousands of circumstances wherein manufacturers and others utilize on-site employees from temporary employment agencies.

The Board also emphasized that the right to control material aspects of employment, whether exercised or not, is probative of joint employer status. For example, the ability to reject employees, or to demand their removal, even if not exercised, tends to establish joint employer status.

Assuming that common law employment status does exist, the Board will then review the second prong of joint employer status by inquiring whether the putative joint employer possesses sufficient control over terms and conditions of employment to permit meaningful collective bargaining. The following are examples of terms and conditions of employment that are commonly subjects of collective bargaining: hiring, firing, discipline, pay and benefits, hours and scheduling (for example, the starting and ending time of shifts), work processes (e.g. the speed at which the production line runs), training and safety.

An employer who controls such terms and conditions, or who has the right to control them, with respect to persons employed by a contractor is likely to be found a joint employer of the contractor employees. As a result, that employer will now be required to bargain over those terms and conditions that it controls or has the right to control.

> "a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful."

Interestingly, the Board noted more than once that "a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful." This raises a likelihood of bargaining posturing, and possibly NLRB litigation, over whether or not a given employer does or does not possess sufficient control to bargain over a given term or condition of employment.

THE MCDONALD'S CASES: WOULD YOU LIKE A UNION CARD WITH THAT BIG MAC?

In a move that would stretch the joint employment concept much farther, the Board has brought many cases (which were consolidated for hearing) against McDonald's and various of its franchisees, alleging that McDonald's and the franchisees are joint employers. The Administrative Law Judge assigned to the cases has conducted months of hearings. As of the writing of this article, no decision has been issued.

The theory behind the Board's allegation of joint employer status is that by virtue of franchise requirements, McDonald's effectively controls many terms and conditions of employment. For example, the franchisee may be required to be open certain hours, which controls when employees work. The franchisee is required to make food in a certain way, guaranteeing a consistently produced product at McDonald's from Bakersfield to Baltimore. This impacts how employees do their work. Franchisee employees are also required to wear uniforms, and follow other rules and procedures so that operations conform to those expected of a franchisee.

Do such franchise requirements fall within the *Southern California Gas* view - that an employer who contracts for services has the right to expect the services to be performed, safely and properly, and by monitoring and requiring such does *not* become a joint employer? Or do franchisor requirements placed on franchisees constitute control over terms and conditions of employment such that franchisors *should* be found to be joint employers? The Board has clearly been pursuing the latter approach by pursuing the *McDonald's* cases vigorously.

ROUND AND ROUND SHE GOES AND WHERE SHE LANDS NOBODY KNOWS

The *McDonald's* cases remain pending. When a decision does issue, it could certainly be appealed. Meanwhile, the new administration under President Trump will, sooner or later, appoint two new members of the five-member National Labor Relations Board to fill the current vacancies.

What is an employer to do? Franchisors and franchisees will most likely continue using the business model they have used for decades. And in view of the election results, it appears likely that any attempt at significantly disrupting that business model via expansion of the joint employer doctrine would soon be rejected or overturned in some manner.

As for other circumstances that involve multiple employers, those who may consider themselves in the grey area under the *Browning-Ferris* decision and a potential union organizing target may want to closely examine how their relationships with temporary services or other contract employer agencies are structured. It may be that some steps can be taken to reduce the likelihood of a joint employer finding.

Howard B. Jackson, Attorney
Wimberly Lawson
hjackson@wimberlylawson.com
www.wimberlylawson.com

FUTURE WORKFORCE:

What can we do to prepare the next generation of talent for automation, disruption & the gig economy?

By AUSTIN BAKER

I have fond memories of visiting ice cream stores growing up, sitting down and enjoying a scoop. Now I hear advertisements for frozen yogurt robot franchises that can be strategically placed on sidewalks outside of traditional retail. I wonder if this automation will take hold and eliminate entry level retail jobs. Recently, when I needed a custom Excel program, I logged in to a freelance site, posted the need, and got a program in my hands in about 48 hours. This transaction represented typical freelancer, gig economy experience where I never met the programmer face-to-face, but his rating was great on the site, he delivered a quality program on time, and was reasonably priced. We all watch with curious fascination as driverless cars are piloted in several cities. The TN Workforce Disruption Index, published by the TN Economic and Community Development Department, predicts 50% of jobs have a high probability of automation in TN.

A full two-thirds of c-suite executives believe that 40% of the Fortune 500 companies will not exist in 10 years. However, 9 in 10 said they are hopeful about the future of technology in their businesses and 6 in 10 said they are not worried about automation threatening their business. "We learned that even during these times of political and economic uncertainty and technology, American and European executives are cautiously optimistic," said Christian Ofori-Boateng, CEO of ChristianSteven Software, which conducted the research on over 500 executives. "Some fear competition from a new market disruptor or automation, but most are hopeful about the role technology will play in their businesses moving forward."

I believe that many of these c-suite hopes are centered around automation and gig economy trends that they hope will be driven from within their companies. I also believe that large companies, if not adapting quickly are more likely to be disrupted from the outside, rather than to institute their own demise or radical change initiatives. These corporate trends and executive sentiments leads me to believe that the success of communities in the next 10 years will be largely correlated to embracing and preparing for workforce shifts around the three major trends of gig economy, industry disruption, and work automation. Recent conversations with several local and state legislators as well as education leaders and policy advocates point to an unfortunate lack of awareness and strategy to help our workforce prepare for the new economy. Most HR professionals are perplexed and concerned that employees are increasingly ill prepared for the new jobs of today and tomorrow. Consequently, more than 16,000 jobs went unfilled in one year in one community our team surveyed. There is a disconnect.

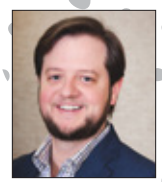
How can we better prepare for the changes ahead?

We need to do several things as HR and industry leaders to prepare our workforce for tomorrow. The future success of communities as well as companies is tied to our ability to adapt and enact these changes in the next 5-10 years. The first thing we need to do is consider untapped and developing talent outside of our companies as a community resource and potential asset that industry collectively invests in and develops together. The second thing we need to do is participate in and lead industry research to use as a basis for engagement with workforce and education leaders. The third major thing we need to do is advocate for increased industry collaboration in educational outcomes.

1 Treat untapped and developing talent as a community asset. Beyond the well-trained talent in our companies, there is an entire pool of talent in our pipeline that is developing and another that has otherwise been forgotten and untapped. If you were to add up all of the partial completers for high school and college in your community you would be surprised at the number. In the Greater Memphis area there are over 350,000 individuals in this category. Yet the strategies to reach and reengage them are fragmented, lack warm handoff among agencies and non-profits, and in many cases, are not anywhere close to the scale needed to serve this population. Our statistics also show the largest under 18 percentage of population of any major metro are in the United States, so that is a large pipeline of developing talent. This presents an almost unfathomably large opportunity for training these individuals in a shortened runway system that breaks the norms of our current education and workforce systems today. Are you looking at your emerging and untapped talent as a "hunter/gatherer" HR professional or a newer age "farmer" and how many emerging training programs do you have ongoing relationships with as a HR professional? Reframe talent outside of your organization as "untapped" and measure your success by your engagement with these developing groups, and you will see short and long term results that are more sustainable and community conscious.

2 Lead and participate in real time labor market industry research. Job posting channels are ever changing and one of the key changes that is happening behind the scenes is the aggregation and anonymization of labor data from various job posting sites. This creates data sets that can be built into real time labor market reports. There are factors that the data set has to account for, such as duplicate postings, and the providers are getting better at doing this, but there are still some employer behavioral and technology integration changes necessary. We also need to get better as HR professionals at forecasting and gathering our future competency inventories into more meaningful and actionable data sets, and to compliment this data with relevant training information. One recent report predicted that all future jobs would require employees with extraordinary IQ's, which is an unsettling futurist' view of our artificial intelligence and automation trends. Other reports point to emotional intelligence (EQ) as the dominating factor of success. These reports, if left incomplete and without data and industry roundtable conversations to supplement them, will not help our untapped and developing talent and the systems that support them be uninformed about viable careers and skills needed to be employable. At the end of the day, I believe that HR needs to be the messenger and change agent that drives us forward and we need to speak with proper data behind our messages.

3 Advocate for increased industry collaboration in educational outcomes. Collaboration with our educational partners that are engaged with untapped and developing talent is the new litmus test for the future success of communities. When we put supply and demand in the same room for structured learning, then we produce better outcomes. HR professionals expecting talent to appear out of the black box of education will lead to increased frustration. We need to advocate and participate in learning outside of our organizations to help it keep pace with the increasing pace of change in industry. We are now in an outside-in HR phase where we are HR leaders inside our companies and industry and educational leaders outside of our corporate walls. Part of this collaboration needs to include non-traditional training grounds such as incubators and partial completer programs that are disrupting and supplementing traditional training and education in an important and needed way. Our future scorecards as organizations and as educational/training providers should encourage and support this collaboration. New and emerging talent is being trained and retrained as we speak, let's make sure HR is a part of that, or we will all be left behind.

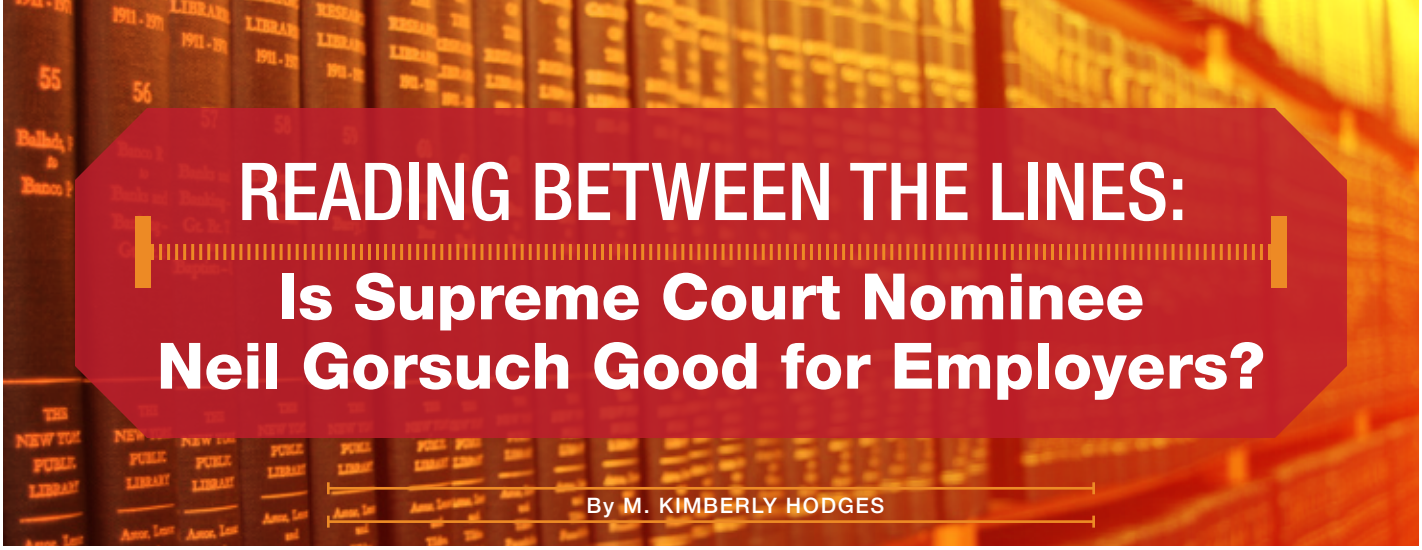


Austin Baker

ABOUT THE AUTHOR

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

For more information, call Baker at 1-866-822-0123, visit www.hro-partners.com, or connect with the company at www.facebook.com/hropartners, http://www.linkedin.com/in/jaustinbaker or http://twitter.com/jaustinbaker



READING BETWEEN THE LINES:

Is Supreme Court Nominee Neil Gorsuch Good for Employers?

By M. KIMBERLY HODGES

No sooner had President Trump announced his nomination of 49-year old Tenth Circuit judge, Neil Gorsuch, to the United States Supreme Court, than speculation began as to what his elevation to the high court would mean for businesses and employers. Gorsuch is a jurist with an ivy-league pedigree and a reputation for being a persuasive writer who leaves behind the complex legal jargon typically found in federal court opinions. A solidly conservative judge with more than ten years of experience on a federal appeals court, Gorsuch has a large body of published opinions which employment lawyers have quickly begun to mine for clues as to what kind of Supreme Court Justice he would be if confirmed.

Gorsuch's interpretation of employment law does not fit neatly within either a conservative or liberal ideology. A review of his opinions shows he typically applies the law fairly and consistently, utilizing a direct writing style easy to comprehend for lawyers and non-lawyers alike. Although many characterize Gorsuch as pro-employer, it is difficult to reconcile a strong leaning in either direction with his written opinions. He has both affirmed and reversed summary judgment to employers, affirmed successful employee trial verdicts and awards of attorneys' fees, and written an opinion concluding that plaintiffs may not maintain an employment discrimination action under Title II of the ADA. However, there are some aspects of his prior rulings which have garnered particular interest.

LESS DEFERENCE TO EXECUTIVE BRANCH AGENCIES?

One consistent theme in Judge Gorsuch's judicial record is his dislike of so-called *Chevron* deference, which stems from a 1984 Supreme Court opinion in *Chevron v. Natural Resources Defense Council* that says courts should grant wide leeway to executive branch agencies when they reasonably interpret ambiguous law. Under this doctrine, so long as the agency has not interpreted a statute in an unreasonable manner, federal courts will defer to the meaning the agency assigns to it. Conservatives have said this principle gives too much power to the executive branch. Others are alarmed that it would be a way for courts to routinely rule against the party in power. Gorsuch, who is famously a "textualist," believes in a strict reading of a statute and has said the world would be just fine without this concept. "There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* . . .permits executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design," Gorsuch wrote. "Maybe the time has come to face the behemoth."

In one particular case, *Trans Am Trucking v. DOL Administrative Review Board,* Judge Gorsuch disagreed with his colleagues who ruled that the company violated whistleblower provisions of the Surface Transportation Assistance Act (STAA) when it fired an employee who abandoned cargo after being told to work in unsafe conditions. Gorsuch's sharply worded dissent took the majority to task for permitting the Department of Labor a loose interpretation of a purportedly vague portion of the STAA, subsequently deferring to the agency's interpretation under *Chevron.* Gorsuch used the case as a vehicle to make a broader point about the court's role in interpreting legislation, specifically, that courts should not look beyond the law as written to determine legislative purpose. "It is our obligation . . . not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood," he wrote. "Whatever the case, it is our job and work enough for the day to apply the law Congress did pass, not to imagine and enforce one it might have but didn't."

SUPPORT FOR MANDATORY CLASS ACTION WAIVERS?

Gorsuch's wariness of agency overreach might come into play very early and very publicly in his high court tenure on the issue of mandatory class action waivers. Agreements requiring employees to submit workplace claims to an arbitrator instead of a court have become increasingly commonplace. These agreements are favored by employers because they lower the cost of litigation and introduce much-welcomed efficiency to the resolution of employee disputes. Over the past six years, a series of victories at the Supreme Court cited the "liberal federal policy favoring arbitration agreements," making the use of mandatory arbitration agreements a safer and more predictable practice.

However, mandatory arbitration agreements by themselves do not protect employers from the expense of a class or collective action. Consequently, rather than simply requiring employees to bring workplace claims through arbitration instead of court, employers have regularly incorporated into their agreements class and collective action waivers in which employees agree not to pursue claims against their employer on a class or collective basis. The result is that an employee's only recourse is limited to single-plaintiff arbitration hearings.

The National Labor Relations Board (NLRB) disfavors class action waivers. It reasons that class and collective action waivers violate Section 7 of the National Labor Relations Act because they interfere with workers' rights to engage in concerted activity for their mutual benefit and protection (in this case, class or collective action litigation).

The federal appeals courts are split over the issue of whether to allow mandatory class action waivers and, given the significance of the topic, it was not surprising when the Supreme Court took up this dispute. Many legal observers have opined that the eight justices currently seated on the court will split on the issue in a 4-4 tie. However, now the Supreme Court has decided to delay taking up this issue until the 2017-2018 term when, presumably, Gorsuch

will have been confirmed and can participate in the ruling. If Gorsuch is confirmed to occupy the critical ninth seat on the bench, his presence would break the expected tie between the current justices and bodes very well for employers.

The case is not a slam dunk for employers, though. Although Judge Gorsuch is largely employer-friendly and has shown he is generally skeptical of the power of administrative agencies, he has consistently upheld decisions issued by the NLRB. Some of these decisions have aided unions and some have aided employers, so this pattern does not necessarily reveal any anti-employer (or anti-union) leaning. No matter what happens, there is no question that this will be a closely watched issue, as it promises to be one of the most significant employment law decisions in years.

THE END OF THE *MCDONNELL DOUGLAS* FRAMEWORK?

Although Gorsuch's employment discrimination opinions don't offer much in the way of prediction, they are remarkable for their apparent disdain for the *McDonnell Douglas* burden-shifting framework. The Supreme Court decided *McDonnell Douglas Corp. v. Green* in 1973, in which it established the test for plaintiffs who only have circumstantial evidence of discrimination. In most cases of alleged discrimination, the employee does not have "direct" evidence, such as evidence of supervisor telling a female employee she has been refused a promotion because of her gender. The vast majority of cases are instead based on circumstantial evidence, for example, evidence that only male employees were promoted. The *McDonnell Douglas* framework is currently used by courts to evaluate these types of cases. Under this test, a plaintiff has the initial burden of establishing a prima facie case of discrimination by showing:

(i) she belongs to a protected class, such as a racial minority or a qualified individual with a disability; (ii) that she was qualified for the employment benefit at issue; (iii) she suffered an adverse employment action; (iv) she was treated less favorably than others outside her protected class.

If the employee can meet this relatively easy burden, the burden then shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action, such as a lack of qualifications for the promotion. If the employer does this, the burden then shifts one final time to the employee, who must show that the employer's legitimate reason is false or a "pretext" for discrimination.

This has long been the established test for evaluating employment discrimination cases based on circumstantial evidence. However, Gorsuch disfavors it. For example, in an age discrimination case, he criticized the test for "improperly diverting attention away from the real question posed by the [Age Discrimination in Employment Act] — whether age discrimination actually took place — and substituting in its stead a proxy that only imperfectly tracks that inquiry."

Notably, Gorsuch is not the only critic of *McDonnell Douglas.* But as a potential Supreme Court Justice, he may become one of the first critics of the test to be in a position to actually change or eliminate it. Gorsuch has never stated what framework he would prefer or how he might revise the *McDonnell Douglas* test. Nevertheless, any revision of it, no matter how small, could cause a significant change in how employment discrimination lawsuits are prosecuted and defended.

Kimberly Hodges, Shareholder
Ogletree Deakins Memphis
kim.hodges@ogletreedeakins.com
www.ogletreedeakins.com

Understanding the Labor Participation Rate

By RICHARD WORKS and ANGIE SEWELL

Economists use labor market data to evaluate how well an economy is using its most valuable resource—its people. Some people, however, argue that official measures are restrictive and do not adequately capture the breadth of labor market issues. To address the concerns with employment numbers, the Bureau of Labor Statistics provides alternative measures of labor underutilization published monthly in *The Employment Situation.* This article will discuss the most common statistics: the labor force participation rate and the unemployment rate. Collectively, these will provide a picture of the labor market situation. In addition, this article will discuss how HR activities may improve employment statistics, and thus the economy. Please note, any suggestions made in this article only reflect the opinion of the authors, and not necessarily the position of their respective employers.

What exactly makes up the unemployment and labor force participation rates, and what do they actually mean?

The labor force participation rate is the proportion of the civilian noninstitutional population that is working, or looking and available for work. Table 1 provides the statistics for December 2016. The labor force participation rate is calculated by dividing the labor force number (159,640,000) by the civilian noninstitutional population number (254,742,000). This produces the rate in decimal format. The unemployment rate, on the other hand, is the number of unemployed individuals as a percentage of the labor force. Therefore, the unemployment rate is calculated by dividing the unemployed number (7,529,000) by the labor force (159,640,000). A lesser-known statistic is the employment-population ratio. This is calculated by dividing the employed individuals (152,111,000) by the population (254,742,000) in the example from Table 1. In like manner, one could calculate the unemployment-population ratio by dividing the unemployed individuals by the population, which would be 2.9% for December 2016.

Table 1. Employment status of the civilian noninstitutional population,[1] December 2016

Category	Number (thousands)	Percent
Population (P)	254,742	
Labor Force (LF)	159,640	62.7% of P
Employed	152,111	59.7% of P
Unemployed	7,529	4.7% of LF
Not in labor force	95,102	

[1] Persons 16 years or older residing in the U.S. not in correctional facilities, long-term care hospitals, or nursing homes, or on active duty in the military.
Source: U.S. Bureau of Labor Statistics

What people are counted in these statistics? Individuals are considered employed if they perform any work for pay. The unemployed are those without work, but who make themselves available and are actively seeking employment. Actively looking for work may consist of contacting employers or employment centers to inquire about vacancies, submitting resumes or applications, and having interviews. Any means of active job search qualifies an individual to be counted in the labor force. Individuals who are unemployed and not looking for work are not considered to be in the labor force. These individuals may be students, retirees, or those with family responsibilities preventing them from being in the labor force. Some may also simply not want to work, or may be discouraged by thinking there is nothing available for them due to various factors. Common factors may include a lack of experience or training, prior prolonged periods of unsuccessful job searches, and discrimination.

What is the primary source for the underlying data that make up these statistics? Each month, the Census Bureau conducts the Current Population Survey, which consists of a 60,000-household sample that is representative of the United States population. This sample roughly consists of 110,000 individuals. A quarter of the sample changes on a monthly basis, such that no household is interviewed more than four consecutive months. This results in 75 percent of the sample remaining constant from month to month, and half of the sample remaining constant from year to year. All interviews follow the same procedures, and the status of an individual is determined by how they respond to a specific set of questions. Once the data is collected, the responses are weighted to population estimates from the Census Bureau. These procedures reduce the possible sampling error so that the total unemployment picture is not distorted.

Figures 1 and 2 show the labor force participation rate and the unemployment rate, respectively, from 2001 through 2016. The data show that the labor force participation rate experienced a slow but steady decline. However, there appears to be two separate periods: Figure 1 shows that the second period (2009-2016) had a more drastic decline when compared to the first period (2001-2009). The labor force rate decreased 2 percent between January 2001 and December 2008, and 4.5 percent between January 2009 and December 2016. In much the same way, the unemployment rate during this pivotal period drastically increased from 5 percent in April 2008 to 10 percent in October 2009. No doubt the subprime mortgage financial crisis of 2008 and subsequent recession had an adverse effect on both the labor force participation and unemployment rates. Toward the end of the Obama administration, unemployment levels were back to the levels seen in the Bush era.

Figure 1. Labor Force Participation Rate

Source: U.S. Bureau of Labor Statistics

Figure 2. Unemployment Rate

Source: U.S. Bureau of Labor Statistics

While ending unemployment levels were fairly equal between the Bush and Obama administrations, labor force participation declined. To compare the stats, labor force participation was 67.2 percent in January 2001 with 4.2 percent unemployment, and 62.7 percent in December 2016 with 4.7 percent unemployment. A high participation rate with a low unemployment rate suggests a strong job market, because people are either working or looking for work, with few unemployed. However, labor force participation has been on the decline for a decade, and a continuation is expected. Current labor force projections suggest a declining participation rate through 2024. Table 2 shows projections for aggregate sex and select race categories. Data show that overall participation is expected to be 62.1 percent in 2018 and decrease to 60.9 percent six years later. The decrease is expected to be larger for men than for women, and larger for Whites when compared to Blacks, Asians, and Hispanics.

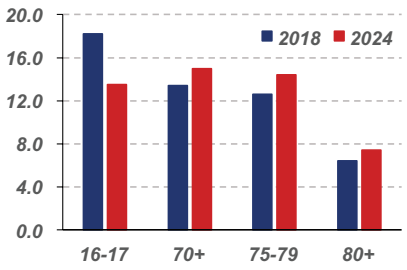
Table 2. Labor Force Participation Rate projections (in percent)

Category	2018	2020	2022	2024
Aggregate	62.1	61.7	61.3	60.9
Men	68	67.4	66.8	66.2
Women	56.6	56.3	56.1	55.8
White	62.2	61.7	61.2	60.8
Black	60.7	60.4	60.1	59.7
Asian	63.4	63.2	63.1	63
Hispanic	66.1	66.1	66	65.9

Source: U.S. Bureau of Labor Statistics

Aggregate age categories show that young people are expected to have a substantial decrease in labor force participation. Projections suggest individuals between 16 and 17 years old are expected to have a participation rate of 18.2 in 2018 and 13.5 in 2024 (see Figure 3). The fluctuation for individuals in their prime working ages varied in the lower percentages, and therefore was not included in Figure 3. If the Trump administration wants to improve the overall outlook, it may need to focus on increasing the number of people employed to decrease the unemployed population. On the other hand, projections for older individuals suggest an increase in labor force participation. Individuals between 75 and 79 years of age are expected to increase their labor participation from 12.6 percent in 2018 to 14.4 percent in 2024. Even individuals 80 years of age and over are expected to increase. Research suggests this will stem from delayed retirements.

Figure 3. Labor Force Participation Rate projections by select age group



Source: U.S. Bureau of Labor Statistics

Some age groups are projected to stay constant or slightly increase. Individuals between 24 and 54 are projected to have steady participation between 2018 and 2024, and individuals between 55 and 69 should experience a slow increase (additional projections are available at BLS.gov). However, the most important factor is jobs. Without an increase in jobs, an increase in labor participation will only increase the unemployment rate. In addition, potential workers should prepare for the changing job market. For HR professionals, additional outreach activities may increase awareness of job openings to talented individuals within the community. For example, interested graduates may be available, but unaware of opportunities within an establishment. Enhanced communication is mutually beneficial. On the other hand, firms often struggle with efficiency and funding: little money to employ, to provide attractive benefits, and to address market competition. Thus, hiring of illegal or undocumented aliens appears to be incentivized. Therefore, sustainable job creation strategies should also benefit employers.

According to the 2016 Jobs Outlook Survey conducted by the Society for Human Resource Management, 58 percent of HR professionals were confident in the job market and expected growth. The Society's employment indicators anticipated a net of 41.7 and 26.2 percent of manufacturers and service-sector companies, respectively, to add jobs in January 2017. However, HR professionals report facing challenges with recruiting conditions and talent management. The indicators suggest recruiting difficulty increased in the services sector, but dropped in the manufacturing sector, with new-hire compensation declining for both. In addition, compensation costs increased for civilian and private industry workers in December 2016, according to the January release of the Employment Cost Index. Collectively, these data suggest expected job growth from HR professionals combined with increasing costs to employers and more difficult talent management.

So what gives? With the new administration's ambition to add jobs, employers may face increased costs that could jeopardize operations if demand for goods and services is not increased to offset higher wages. Likewise, if employment is made available without anyone willing or qualified to fill the vacancy, another level of complexity is added. However, HR professionals seem confident in the job market ahead. The collective goal of everyone should be to address the issue with declining labor force participation as part of job creation strategies. But what can we do? The authors propose corporate social responsibility efforts connected with schools (high schools, colleges, trade schools, etc.). This will expand awareness of employment opportunities with qualified people. In addition, these efforts may encourage the current workforce to increase productivity. However, there still exists potential tax and health care issues that are beyond our control. These may be a focus of the new administration.

Dr. Richard Works, Economist
Bureau of Labor Statistics – Washington, DC
works.richard@bls.gov
www.bls.gov

Angie Sewell, SPHR, SHRM-SCP
Lonza, Inc. – Charleston, TN
angela.sewell@lonza.com
www.lonza.com

Six Tips

to Help Employers Maintain I-9 Compliance

By JULIE HENDERSON

"I-9 Compliance" is a term commonly used to explain the employer's requirement to verify an individual's employment eligibility in the United States.

Businesses need to make certain they avoid I-9 errors and are in full I-9 compliance, or they could pay dearly in hefty fines to ICE. Penalties for technical violations, which include failing to produce a Form I-9, range from $110 to $1,100 per violation.

I-9 errors are among the worst possible paperwork errors for employers today. An analysis of nearly 800 audit cases ICE completed since October 2010 shows that roughly half of the companies fined were not specifically penalized for hiring illegal immigrants, but for problems with the employment verification paperwork they are required to fill out for new hires. With the government stepping up its enforcement of I-9 compliance, it is not advisable for businesses to take the chance that their employment eligibility verification paperwork is inaccurate and non-compliant.

Here are 6 valuable I-9 tips to implement into your process to maximize your company's compliance.

{1} Understand your state's laws concerning I-9.

Each state has their own laws governing I-9 and E-Verify requirements. Some states only require businesses of certain sizes to comply, while other states require every single employer to comply. This can get confusing, but failing to keep up with your state's laws is no excuse during an ICE audit.

EXAMPLE:

Tennessee: As of January 1, 2017, private employers with 50 or more employees under the same FEIN are required to use the federal E-Verify employment verification process. This applies to employees working in or outside the state of Tennessee. (Source: tn.gov)

As a contrast, Mississippi's law is quite different.

Mississippi: all employers must participate.

Penalties for non-compliance include the cancellation of public contracts, ineligibility for public contracts for up to three years, and a private employer may have its business license revoked for up to one year. In addition, an "employer" is defined as a person or business who is required to issue a Form W-2 or Form 1099 to any employed or contracted individual in Mississippi, meaning that employers are required to verify independent contractors as well as traditional employees.

It's critical for employers to understand their individual state's I-9 and E-Verify laws, and keep up with changing requirements.

{2} Make certain you are using the most updated version of the form.

The I-9 form gets a refresh every so often, and it's the employer's responsibility to make certain their form is not outdated. Failing to do so can have big consequences during an audit. The latest version of the form is required as of January 22, 2017, which is version 11/14/2016 N.

Businesses must make certain they are using the correct version of the I-9 form, or be subject to fines for non-compliance during an audit. Check your forms often, and change them out as soon as new ones become available.

{3} Strictly adhere to signing timelines.

Each newly hired employee should complete and sign Section 1 of the I-9 form no later than the first day of employment. "First day of employment" refers to the first day of work in exchange for pay or other remuneration. Employers or their authorized representative must complete Section 2 by physically examining evidence of identity and employment authorization within 3 business days of the employee's first day of employment. (Source: uscis.gov)

This is a big deal, and where many businesses get into trouble. Forgetting to get the signature, which is easy to do because of all the other new hire paperwork that is required, can lead to non-compliance, even if the employee is authorized to work in the U.S!

EXAMPLE:

Taylor Lightning Company. None of their roughly 35 workers were illegal immigrants. However, some of their employees had not filled out i-9s, and some of the forms that were completed were missing information or weren't dated within three days of a new employee's hire. Immigration and Customs Enforcement officials mandated that because of these errors on the workers' employment eligibility forms the company would still have to pay a $13,300 fine.

{4} Conduct internal audits consistently.

Smart employers don't wait until they are audited to gather information and identify holes in their processes. Annual audits of your I-9 processes with assistance from your employment attorney are just good business. Closely review a random sampling of I-9s, looking for errors, dates that don't match, or outdated forms. Put together a game plan for handling any process weaknesses moving forward.

{5} Correct any errors or omissions as soon as possible.

Mistakes happen, especially with processes as complex and ever-changing as I-9 and E-Verify. If your audits reveal errors, document your efforts to correct these as thoroughly as possible, under the watch of your attorney. Transparency is key to correcting errors and omissions in an efficient, compliant manner. In addition, put measures in place that minimize these from happening again.

{6} Follow form storage and retention policies.

Storing I-9 forms properly can keep employers out of hot water during audits. Whether on or off-site, it is required that employers store every form for a period, even if the employee no longer works there.

The good news is they can eventually be thrown out. The rule is this: Forms must be kept for either three years after the date of hire, or one year after the date the person leaves employment, whichever is longer.

EXAMPLE:

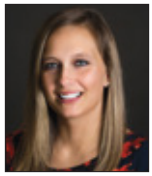
Paul leaves his job after eighteen months. Adding a year to that would be 2.5 years. The employer must keep Paul's I-9 for 3 years because that is the longer time. Clear as mud, right?

Storage and retention rules are one of the main reasons employers choose an automated system to handle the I-9 procedure.

With the current hiring climate and the huge fines that loom, it's essential that businesses perform a review of their current I-9 and E-Verify practices. Compliant standards must be consistently maintained. Having stringent measures in place can help the business avoid costly I-9 errors and huge fines.

The information contained in the article is not legal advice and is for informational and/or educational purposes only.

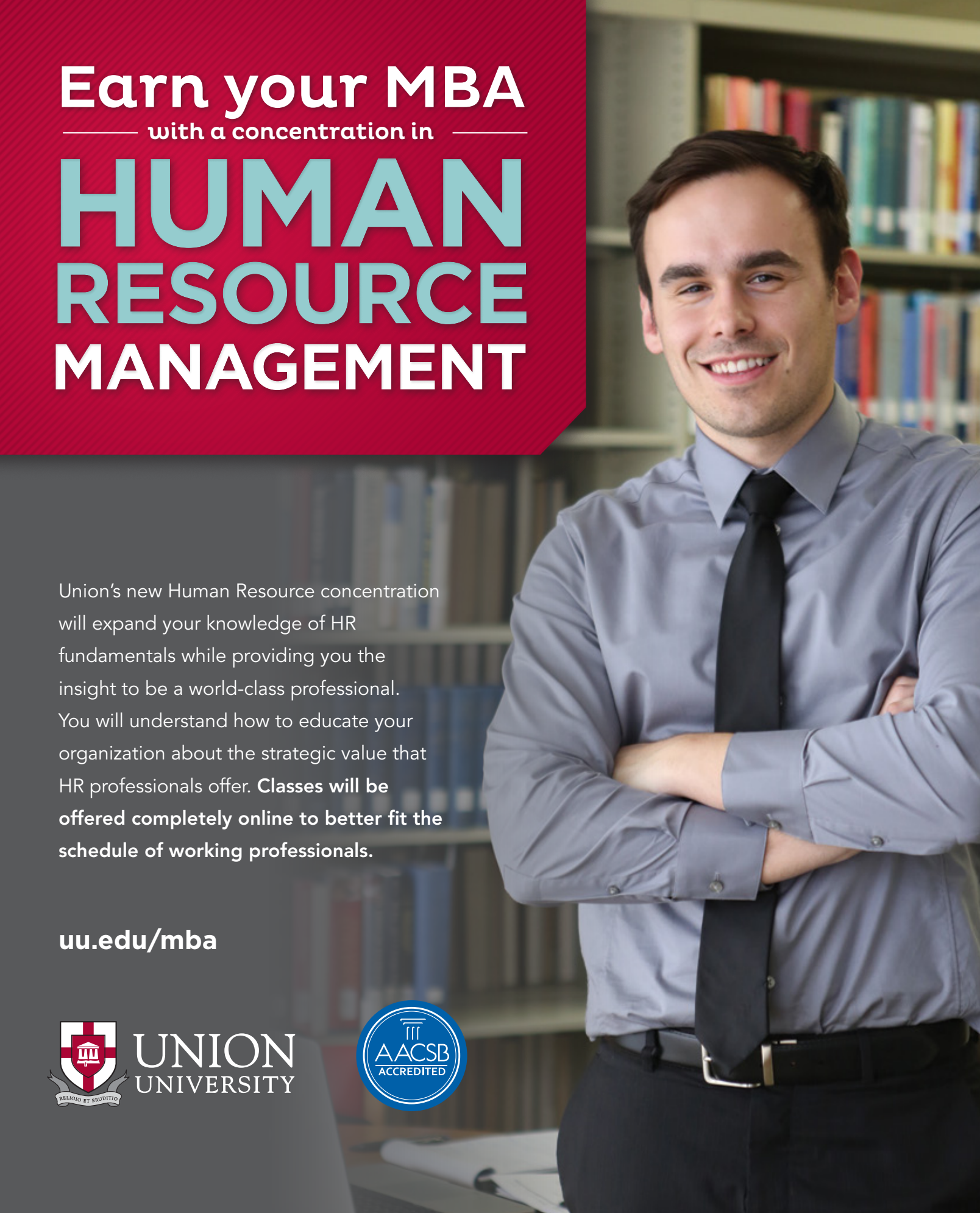
Julie Henderson
Director of Sales
Data Facts, Inc.
jhenderson@datafacts.com
www.datafacts.com



Earn your MBA

with a concentration in

HUMAN RESOURCE MANAGEMENT



Union's new Human Resource concentration will expand your knowledge of HR fundamentals while providing you the insight to be a world-class professional. You will understand how to educate your organization about the strategic value that HR professionals offer. **Classes will be offered completely online to better fit the schedule of working professionals.**

uu.edu/mba

UNION UNIVERSITY

RELIGIO ET ERUDITIO

AACSB ACCREDITED

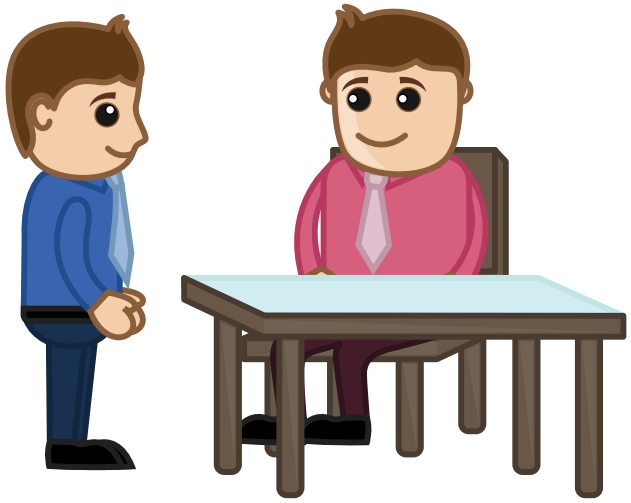
EXCELLENCE-DRIVEN | CHRIST-CENTERED | PEOPLE-FOCUSED | FUTURE-DIRECTED

Consistency is Key... But Maybe Not

By LAURA K. CLAYMAN

Consistency [k*uh* n-sis t*uh* n-see] (noun): steadfast adherence to the same principles, course, form, etc., as defined on Dictionary.com. To use it in a sentence: HR professionals know that consistency is key. If an employer develops company policies and strictly follows those procedures, then the company will avoid many allegations of discrimination and unfair treatment…right? The Equal Employment Opportunity Commission (EEOC) recently issued guidance titled "Employer-Provided Leave and the American with Disabilities Act" to remind us that – in the context of extended leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) – *consistency* without *individual consideration* can land an employer in some serious hot water.

The EEOC enforces Title I of the ADA which prohibits employment discrimination on the basis of disability. Any employee with a disability should be provided with access to leave on the same basis as all other similarly-situated employees. In addition, employers must grant



reasonable accommodations to employees with disabilities in order to allow them to perform their job duties. The EEOC specifically considers employer-provided leave, extended beyond the parameters of other mandated leave (i.e. FMLA) or voluntarily provided leave (i.e. sick, vacation or PTO time), to be an appropriate reasonable accommodation under the ADA.

The EEOC states that "the purpose of the ADA's reasonable accommodation obligation is to require employers to **change the way things are customarily done** to enable employees with disabilities to work. Leave as a reasonable accommodation is consistent with this purpose when it enables an employee to return to work following the period of leave." Whether to continue leave after all options have been exhausted (sick time, vacation, FMLA) must be made on a case-by-case basis. The ADA requires that employers engage in an interactive discussion to determine when an employee will be able to return to work.

It is a common practice for employers to create "maximum leave policies" (also called no fault, neutral, or blanket leave policies). These policies usually serve as a clear roadmap to guide supervisors, managers, and HR in administering leave without favoritism or discrimination. If an employee is out longer than the policy allows, that employee is subject to termination. These policies are intended to do several things: help avoid discriminatory treatment, ease administration, and give a clear cut off for benefits and termination. A typical maximum leave policy will state that an employee is only allowed to take a maximum of 12 weeks leave within a 12-month period (in compliance with typical FMLA job protections). If the employee is unable to return at the end of that leave, he or she is automatically terminated. The EEOC provides another example with a policy that permits employees to have no more than 5 unplanned absences during a 12-month period.

In light of the recent EEOC guidance, maximum leave policies should be used with **extreme** caution, as the ADA requires employers to make exceptions to those for reasonable accommodation, if necessary. Employers are still allowed to have these types of policies, but the danger lies in that serving as the end of the discussion. Employers must engage the employee in an "interactive discussion" if the employee (with a condition falling under the ADA) wishes to extend that maximum leave period, or has additional unplanned absences. The interactive discussion is the back-and-forth meaningful conversation about what the disabled employee requires to be able to perform his or her job and how long the employer is able to hold the job open before meeting the threshold of undue hardship. In that case, the employer must discuss with the employee how much additional leave he or she may need beyond the expired maximum leave period. At that point, the employer makes the determination whether it would be a hardship to allow the employee the additional time to recover.

If a company maintains a maximum leave policy, communication issues are likely to arise. Employees may be confused by standard forms provided to those going out on FMLA, i.e. Notice of Eligibility and Rights & Responsibilities (FMLA) Form WH-381 and Designation Notice (FMLA) Form WH-382. These forms are necessary, but can lead employees to believe that there is no possible extension of the leave end date set forth on the notice. Employers should provide additional paperwork and communicate to employees that they should ask for additional leave as soon as possible if they feel that it is a reasonable accommodation. As a best practice, employers should initiate this conversation even if the employee makes no mention of an extension of leave. It is the employer's responsibility to meet the EEOC requirements under the ADA, not the employee's.

An employer is allowed to ask for additional medical documentation specifying the reason for the additional leave and the expected amount of time needed. There is no clear guidance on when extended leave crosses over into undue hardship for employers; however, it has been established that an employee's request for **indefinite** leave will always be considered an undue hardship.

If an employer takes the EEOC's words to heart, and *consistently* begins an interactive discussion when an employee is unable to return to work after exhausting all other employer-provided leave, then the goal of administering leave policies without discrimination or unfair treatment will still be attainable.

Laura K. Clayman
Client Resource Team - Senior Advisor
laura.clayman @regions.com
www.regionsinsurance.com

Do employee benefit laws remind you of alphabet soup?

Regions Insurance is here to provide meaningful solutions that best support your organization's goals. Our employee benefit advisors and law-trained professionals can help develop the right plan of action and break down all the confusing laws and regulatory acronyms so you're not left staring at a bowl of alphabet soup.

Tom Hayes
Employee Benefits Practice Leader
tom.hayes@regions.com
479-684-5259
www.regionsinsurance.com

REGIONS
INSURANCE

The Coverage You Need.
The Guidance You Trust.℠

Find Regions Insurance offices in Alabama, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, South Carolina, Tennessee and Texas

Labor and Employment Law Rising Stars

We are proud to present the 2017 Rising Stars in Labor and Employment Law submitted by our sponsors.
These attorneys are 40 or under and have practiced law 10 years or less.
They are already top performers in their respective firms.

Ogletree Deakins

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters. Premier client service, as outlined in the firm's Client Pledge, is one of the firm's top priorities and a cornerstone of its core values. *U.S. News – Best Lawyers®* "Best Law Firms" has named Ogletree Deakins a "Law Firm of the Year" for six consecutive years. In 2017, the publication named Ogletree Deakins its "Law Firm of the Year" in the Labor Law - Management category. Ogletree Deakins has more than 750 attorneys located in 50 offices across the United States and in Europe, Canada, and Mexico. The firm represents a diverse range of clients, from small businesses to Fortune 50 companies.

Audrey M. Calkins
MEMPHIS OFFICE

Audrey represents clients in various types of litigation in federal and state courts and administrative agencies. Her intellectual property experience assists clients with matters involving non-competition, trade secret, and non-solicitation disputes. Audrey also represents clients in cases involving areas such as Title VII, ADEA, FLSA, ADA Title III, and comparable state statutes.

Lisa Scatamacchia Lewis
MEMPHIS OFFICE

Lisa served as a judicial staff attorney for the Eleventh Circuit Court of Appeals. She also served as a mediator at Fulton County State Court and interned at the Health Law Partnership Clinic, a clinic that provides free legal services for children of low-income families.

Zachary W. Hoyt
MEMPHIS OFFICE

Zachary is a former Assistant County Attorney for the largest county in Tennessee. He also had externships with Judge Bernice Donald on the Sixth Circuit, the U. S. Attorney's office, and the EEOC, in addition to interning in the legal departments of Pinnacle Airlines and ALSAC/St. Jude Children's Research Hospital.

Blythe Lollar
JACKSON OFFICE

Blythe is a litigator who devotes a substantial amount of her practice to defending employers and management in a variety of legal claims including wrongful termination, harassment, discrimination, retaliation, and wage and hour claims. She serves on the Women in the Profession Committee of the Mississippi Bar Association and is actively involved with the Young Lawyers Division.

Fisher Phillips

Fisher Phillips is one of the largest labor and employment law firms in the country with more than 350 attorneys in 33 offices nationwide, including Tennessee, Kentucky, Florida, Georgia, and Mississippi. Some of the most talented and experienced attorneys come to the firm to handle challenging cases involving workplace issues faced by employers and HR professionals. Fisher Phillips attorneys specialize in all areas of labor and employment law and have the experience and resolve to achieve your desired results in court, with employees and unions, and with competitors.

Courtney Leyes
MEMPHIS OFFICE

Courtney Leyes is an attorney with the Fisher Phillips Memphis office, where she represents employers throughout Mississippi and the greater Memphis-metropolitan area. She has experience in various aspects of labor and employment law, including employment discrimination and harassment litigation, particularly in federal jury trials. Courtney has also represented employers in several Fair Labor Standards Act collective actions over the past couple of years, and on wage and hour issues in both the court system and before the Department of Labor's Wage & Hour Division. She has been listed in Mid-South Super Lawyers Rising Stars since 2014.

Gabriel McGaha
MEMPHIS OFFICE

Gabriel McGaha is an attorney with the Fisher Phillips Memphis office, where he represents clients on a variety of employment-related matters, including those involving harassment, discrimination, and retaliation claims. He has significant experience preparing matters for litigation, as well as serving as lead counsel at trial.

Robert W. Ratton III
MEMPHIS OFFICE

Robert W. Ratton III is an attorney with the Fisher Phillips Memphis office where he advises clients in employment law matters related to Family and Medical Leave Act, Fair Labor Standards Act, and Equal Employment Opportunity Commission. Rob has tried over 30 jury trials to verdict and has represented clients in front of state and federal courts at both the trial and appellate level.

Laurel Cornell
LOUISVILLE OFFICE

Laurel Cornell is a partner in the firm's Louisville office. Her practice involves representing employers in litigation of employment disputes involving Title VII, the Kentucky Civil Rights Act (KCRA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). She also has extensive experience advising and representing employers in administrative actions across the country. Laurel is the former vice chair and chair of the Louisville Bar Association's Labor & Employment Section.

FordHarrison

FordHarrison is a U.S. labor & employment law firm with more than 200 attorneys in 29 offices, including four affiliate firms. The firm is committed to adhering to the FH Promise, which guides how the firm delivers legal services and works with its clients. FordHarrison attorneys represent employers in labor, employment, immigration and employee benefits matters. Through its global practice group and membership in the global employment law firm alliance, Ius Laboris, FordHarrison provides multinational companies with a broad range of services related to labor and employment law throughout the world. For more information, visit fordharrison.com and iuslaboris.com.

Frank L. Day, Jr. – Counsel
MEMPHIS OFFICE

Frank Day devotes his practice to helping clients accomplish business objectives through employment law litigation and counseling. Frank has successfully represented national retailers, health care providers, and various other public and private employers. Frank earned his J.D. from the University of Memphis School of Law.

Russell W. Jackson – Counsel
MEMPHIS OFFICE

Russell Jackson represents management in employment-related matters on federal, state, and local levels. Russell's representation includes claims relating to discrimination, harassment, retaliation, wrongful discharge, restrictive covenants, wage and hour violations, unemployment compensation, and other aspects of the employee-employer relationship. Russell earned his J.D. from Case Western Reserve University.

Timothy F. Kennedy – Counsel
MEMPHIS OFFICE

Tim Kennedy focuses his practice on advising clients on legal issues pertaining to retirement plans, health and welfare benefits, executive compensation arrangements, and fringe benefits.

His experience includes assisting employers in complying with the Internal Revenue Code and ERISA. Tim earned his J.D. from the University of Virginia School of Law.

Katie Parham – Senior Associate
MEMPHIS OFFICE

Katie Parham concentrates her practice on representing management in employment matters before administrative agencies and in employment litigation in both state and federal court.

Katie has represented companies in a variety of industries, including healthcare, manufacturing, retail, and education. Katie earned her J.D. from the University of Tennessee College of Law.

Joshua J. Sudbury – Counsel
NASHVILLE OFFICE

Josh Sudbury handles employee-relations problems. He frequently defends employers in federal and state court against claims of discrimination and harassment, retaliatory discharge, and alleged wage/hour violations. Josh also represents management in collective bargaining and unfair labor practice cases before the NLRB. Josh earned his J.D. from the University of Memphis School of Law.

Allison M. Cotton – Senior Associate
NASHVILLE OFFICE

Allison Cotton concentrates her practice on the representation of employers in labor and employment matters. She routinely advises employers on the drafting and enforcement of policies and avoidance of claims of discrimination, harassment, retaliation and violations of state and federal employment law statutes. Allison earned her J.D. from the University of Tennessee College of Law.

Loren J. Beer – Counsel
ATLANTA OFFICE

Loren Beer provides comprehensive labor and employment law counsel to clients of all sizes, from Fortune 500 corporations to mid-market companies to entrepreneurial start-ups.

She represents companies in a variety of industries, including health care, corrections, banking, hospitality and retail. Loren earned her J.D. from the University of Florida College of Law.

Patrick H. Ouzts – Counsel
ATLANTA OFFICE

Patrick H. Ouzts is a member of FordHarrison's airline practice group and he focuses his practice on helping human resource leaders and in-house lawyers with employment-related issues, including employee discipline and discharge, accommodations and leave, allegations of discrimination, harassment, and retaliation, and policy review. Patrick earned his J.D. from Georgia State University College of Law.

Patrick L. Ryan – Counsel
ATLANTA OFFICE

Pat Ryan is a member of FordHarrison's wage and hour practice group and concentrates his practice on class action litigation, arbitration, counseling, and government investigations. He has extensive experience in handling litigation brought under the FLSA and state wage and hour laws and regulations. Pat earned his J.D. from the University of Georgia School of Law.

Henry F. Warnock – Counsel
ATLANTA OFFICE

Henry Warnock devotes his practice to employment litigation and traditional labor law. Henry defends employers in discrimination and retaliation cases involving the FLSA, FMLA, ADA, and Title VII. Henry also guides clients through all facets of traditional labor law. Henry earned his J.D. from the University of Georgia School of Law.

Loren C. Locke – Senior Associate
ATLANTA OFFICE

Loren Locke focuses her practice on the representation of employers and employees in issues related to business immigration. She works directly with both individual foreign nationals and their employers to help them obtain a variety of nonimmigrant and immigrant visas. Loren earned her J.D. from William & Mary School of Law.

Jessica L. Asbridge – Associate
ATLANTA OFFICE

Jessica Asbridge focuses her practice on the representation of management in both traditional labor and employment matters. She defends employers in relation to discrimination, harassment, retaliation and wrongful termination actions in the federal and state courts and before administrative agencies. Jessica earned her J.D. from Indiana University, Maurer School of Law.

R. Brian Spring – Associate
ATLANTA OFFICE

Brian Spring advises employers in employee benefit and tax related matters involving the design, implementation, and operation of qualified plans, health and welfare plans, and fringe benefits.

Brian also has experience counseling clients in all aspects of executive compensation matters. Brian earned his J.D. from Mississippi College School of Law.

Wright Lindsey Jennings

Wright Lindsey Jennings' Labor and Employment team has management-oriented practices addressing all aspects of the employee/employer relationship. The team has extensive experience litigating and arbitrating employment and civil rights claims, in addition to state law claims. Our attorneys defend clients in multi-plaintiff, collective action and class action lawsuits, as well as Department of Labor and EEOC investigations. WLJ's team provides advice and counsel to clients regarding a variety of day-to-day matters, such as employment agreements and disciplinary issues, and represents clients in labor arbitrations, union elections and contract negotiations. Despite our collective litigation and arbitration experience, we place a premium on preventing employee claims that could lead to administrative investigations and litigation. We do this in part by offering employee and manager training on a variety of issues and by providing free educational resources to our clients through quarterly newsletters, employment law luncheons and website articles.

Neemah A. Esmaeilpour
ARKANSAS

Neemah A. Esmaeilpour represents employers and professionals in a variety of employment matters. His practice includes a focus on employment-based immigration with an emphasis on petitions for foreign-born physicians, academics and researchers. Neemah's other areas of practice include discrimination, minimum wage and overtime, employee leave, employment contracts, severance agreements, covenants not to compete, unemployment claims and EEOC/DOL investigations.

Cross, Gunter, Witherspoon & Galchus, P.C.

U.S. News has named Cross, Gunter, Witherspoon & Galchus, P.C. (CGWG) a leading Labor and Employment law firm in the state of Arkansas for 2017. We are proud to have seven attorneys selected as *Best Lawyers,* including CGWG Director Carolyn B. Witherspoon as "Lawyer of the Year" in Employment Law. CGWG's team of attorneys are highly adept in handling a wide range of labor and employment defense matters, including discrimination litigation, collective bargaining, benefits advice, employment contracts, complex immigration matters, development of constructive employee relations, and the development of company employment policies and procedures. Preventive law strategies and exceptional educational programs are hallmarks of CGWG's services.

Gregory J. Northen
ARKANSAS

Gregory J. Northen practices labor & employment defense before state and federal courts and agencies. He also assists clients with the ever-changing regulatory landscape. Greg currently serves as Chair of the Arkansas Bar Association's Young Lawyers Section, and he has been named a "Mid-South Super Lawyers Rising Star" since 2014.

Abtin Mehdizadegan
ARKANSAS

Abtin Mehdizadegan joined Cross, Gunter, Witherspoon & Galchus, P.C. in 2013 and has focused his practice on traditional management-side labor and employment defense. He is active in the Firm's litigation practice and, outside of the courtroom, enjoys advising clients about how to develop creative solutions to mitigate and minimize liability.

Jennifer S. P. Chang
ARKANSAS

Jennifer S. P. Chang is an Associate with Cross, Gunter, Witherspoon & Galchus. She completed her studies at the University of Southern California School of Law and the University of California, Berkeley. Jennifer assists with state and federal litigation, and advises and trains clients on various labor and employment issues.

The Kullman Firm

The Kullman Firm has exclusively represented management in labor and employment matters since 1946, including matters relating to Title VII, the ADA, ADEA, FMLA, FLSA, OSHA, ERISA, COBRA, OFCCP, NLRA, WARN and other federal and state employment laws. The Firm represents clients in a wide range of industries, which provides it with a sound understanding of the general business practices of a vast array companies. With this experience, the Firm is able to provide proactive legal advice to help clients achieve their business goals while complying with applicable law.

Martin J. Regimbal
MISSISSIPPI

Martin J. Regimbal exclusively represents employers and has litigated matters brought under Title VII, the FLSA, ADA, FMLA, ADEA, WARN Act, and other federal and state statutes. Mr. Regimbal has been recognized as a 2014, 2015 and 2016 Rising Star in Labor and Employment by *Mid-South Super Lawyers Magazine.*

Littler Mendelson, P.C.

Littler is the largest global employment and labor law practice, with more than 1,000 attorneys in over 60 offices worldwide. Littler represents management in all aspects of employment and labor law and serves as a single source solution provider to the global employer community. Consistently recognized in the industry as a leading and innovative law practice, Littler has been litigating, mediating and negotiating some of the most influential employment law cases and labor contracts on record for over 70 years. Littler Global is the collective trade name for an international practice, the practicing entities of which are separate and distinct professional firms. For more information, visit: www.littler.com.

Matt Gallagher
MEMPHIS OFFICE

Matt Gallagher is an associate in Littler's Memphis office. He represents employers in federal and state courts, as well as in proceedings before administrative agencies such as the EEOC and the NLRB. He has significant experience in healthcare, hospitality, manufacturing and transportation. Matt may be reached at mgallagher@littler.com.

Shella Neba
ATLANTA OFFICE

Shella Neba is a shareholder in Littler Mendelson's Atlanta office. She concentrates her practice in the areas of employment litigation, employee benefits and employment practices audits. She has litigated cases involving discrimination and harassment in the workplace, civil rights matters, wage and hour compliance, and violations of employment statutes. Shella can be reached at sneba@littler.com.

Jay Inman
LEXINGTON OFFICE

Jay Inman represents employers in a full range of labor and employment law matters. He has represented clients at various stages of litigation, securing dismissal of matters on summary judgment or other dispositive motion, and to handling appeals of trial-court decisions.

Baker Donelson

BAKER DONELSON

Baker Donelson's labor and employment attorneys are in all of the Firm's ten Southeastern states and Washington, D.C. Backed by more than 800 lawyers and public policy advisors, the attorneys offer litigation defense services for administrative and court proceedings at the federal and state level, advice on pre-litigation strategies to reduce legal risks, policy analysis and drafting, compliance audits, management training and labor negotiation. We are part of a Firm culture that promotes diversity, inclusion and a sincere appreciation for creative approaches to problem-solving, and we apply those same principles to our client relationships. We are proud to have been listed among FORTUNE magazine's "100 Best Companies to Work For" for seven consecutive years, something few other law firms have attained. Many of our offices consistently rank as a Best Place to Work in their cities and states, as well.

Marcie Kiggans Bradley
CHATTANOOGA OFFICE

Marcie Kiggans Bradley specializes in employee benefits and primarily assists clients with matters related to ERISA, non-ERISA employee benefits, employment, e-discovery, construction and general commercial litigation matters, trying cases to conclusion or resolving them through alternative dispute resolution. Mrs. Bradley represents several national insurers in all aspects of litigation in state and federal courts at all levels throughout the Sixth Circuit. She regularly defends them against ERISA and non-ERISA disability, life, health and accidental insurance claims.

Zachary Busey
MEMPHIS OFFICE

Zachary Busey is licensed to practice in Tennessee, Mississippi, and Arkansas federal courts. As a member of the Labor & Employment Group, he represents employers in a wide range of employment law matters, including claims of harassment, discrimination, wrongful termination, and wage and hour violations. He partners with employers to develop and implement policies and training programs aimed at reducing their exposure to litigation and liability.

Nakimuli Davis-Primer
JACKSON OFFICE

Nakimuli Davis-Primer focuses a large portion of her practice on representing employers before the Equal Employment Opportunity Commission, defending employers in Title VII, Section 1981 and ADEA lawsuits related to harassment and discrimination in the workplace, and training and advising clients on employment related issues. She also monitors and assists employers with unemployment claims and drafts employee handbooks and other documents.

Michael Ewing
NASHVILLE OFFICE

Michael Ewing advises employers on nearly all aspects of workplace law, including responding to and preventing allegations of discrimination, harassment and retaliation, navigating accommodation requests, wage and hour issues, and leaves of absences, developing effective HR policies and procedures, managing employee performance and conduct, protecting trade secrets and proprietary information, drafting and enforcing restrictive covenants, improving his clients' workplace cultures and otherwise helping organizations comply with the requirements of labor and employment law.

Adam Gates
JACKSON OFFICE

Adam Gates represents a wide variety of clients, including manufacturers, health care facilities, food processing plants and trucking companies. He advises his clients on day-to-day personnel issues, helps them operate in a way that minimizes exposure, defends them against charges of discrimination filed with the EEOC, and handles various matters in litigation and arbitration.

Jennifer Hall
JACKSON OFFICE

Jennifer Hall is a shareholder licensed in both Mississippi and Tennessee, Jennifer assists clients in areas including single plaintiff and multi-plaintiff discrimination defense, employee classification issues, retaliation defense, state employment law issues, and wage and hour matters. She frequently represents employers before the Equal Employment Opportunity Commission, Department of Labor and Mississippi Department of Employment Security, and in federal and state courts.

Jesse Harbison
NASHVILLE OFFICE

Jesse Harbison is an employment associate in Baker Donelson's Nashville office, where she helps advise clients on matters of state and federal compliance, including ADA and Title VII. Jesse also helps defend clients against charges of discrimination and retaliation.

Whitney Harmon
MEMPHIS OFFICE

Whitney Harmon represents employers and management clients regarding all aspects of employment law, with an emphasis on the Fair Labor Standards Act, the Family Medical Leave Act, and discrimination, harassment and retaliation claims. She has extensive litigation experience representing clients in employment matters before the Equal Employment Opportunity Commission and in various state and federal courts.

Christie Hayes
JOHNSON CITY OFFICE

Christie Hayes has extensive experience in the area of workers' compensation issues, as well as experience counseling clients on a multitude of federal and state employment laws, including the ADA and FMLA. She defends employers against employment discrimination claims before the EEOC and THRC and performs training for employers in the areas of discrimination and harassment prevention, drug-free workplace, union avoidance and similar issues.

Drew Hutchinson
JOHNSON CITY OFFICE

Drew Hutchinson concentrates his practice in the areas of labor and employment law and commercial litigation. He advises employers on a wide range of employment-related and general business topics and has experience in mediating, arbitrating and litigating claims based on the Civil Rights Acts, FMLA, ADA, ERISA and state-specific employment laws.

Adria Jetton
JACKSON OFFICE

Adria Jetton is a litigation associate who assists clients with labor and employment, long term care and product liability matters. Ms. Jetton helps defend manufacturing and food processing plants against charges of discrimination filed with the EEOC and other single plaintiff matters. She also helps defend drug and medical manufacturers against allegations of defective products.

Levy Leatherman
NASHVILLE OFFICE

Levy Leatherman defends clients accused of violations of Title VII, the Americans with Disabilities Act, the FMLA, ADEA and others, as well as in labor matters governed by collective bargaining agreements. A sizable portion of his practice is devoted to counseling and training employers and their employees on compliance with state and federal laws. This includes areas such as sexual harassment training, policy and procedure manuals, and employment and non-compete agreements.

Megan Sutton
NASHVILLE OFFICE

Megan Sutton defends local, regional and nationally-known employers against workers' compensation retaliation claims, as well as against allegations of age, race, sex, national origin and disability discrimination under Title VII of the Civil Rights Act and under the Tennessee Human Rights Act. Ms. Sutton also advises employers on the Family Medical Leave Act (FMLA), the Fair Rights Credit Reporting Act (FRCA) and the Fair Debt Collection Practices Act (FDCPA), and defends them in court when necessary.

Jodi Taylor
ATLANTA OFFICE

Jodi Taylor practices employment law, construction law and general business litigation, and has tried jury and bench cases to verdict in both federal and state courts. Jodi focuses on the construction and transportation industries, and her practice ranges from providing general employment advice and counseling to handling employment discrimination charges and/or lawsuits, claims arising under ERISA, and enforcement of restrictive covenants.

Burch, Porter & Johnson, PLLC

Burch, Porter & Johnson provides comprehensive legal services across a wide range of litigation, business and transactional practice. The firm's clients span a broad spectrum: from multi-million dollar corporations seeking counsel to negotiate complex transactions to individuals dealing with the most sensitive personal issues. From its inception, the firm's focus has been on client service – providing specialized expertise, value, responsiveness and practical solutions to address our clients' needs. Clients have counted on the firm's experience, its commitment to service, and its tradition as a leader in business and community affairs for more than a century.

Gary Peeples
MEMPHIS

Gary Peeples' practice focuses on civil litigation, including labor and employment law. A graduate of Vanderbilt University Law School, he has experience in all phases of litigation and defends companies large and small in state and federal court and in administrative matters. A significant component of his practice involves advising employers on how to comply with federal and state law.

Tannera Gibson
MEMPHIS

Tannera Gibson is a native Memphian whose practice focuses on employment law and general civil litigation, including personal injury and medical malpractice. Prior to graduating from the University Of Memphis Cecil C. Humphreys School Of Law, she received a B.S. in Computer Science from the University of Memphis, and worked as a software analyst. Ms. Gibson is an active member of the community who maintains a solid pro bono practice.

RAINEY • KIZER
REVIERE & BELL PLC

Rainey, Kizer, Reviere & Bell, PLC

The Firm provides its clients top-quality legal advice and representation in the areas of company policies and practices, discrimination claims, workers' compensation, and civil rights. The attorneys practicing in these areas have many years of experience in defending employers against claims of racial and sexual discrimination, sexual harassment, ADA and FMLA violations, wage and hour violations, wrongful awards of unemployment compensation, retaliatory discharge, and workers' compensation. The members of the Firm's Employment Law group also have extensive, specific experience in defending governmental entities against employment law claims and serving governmental entities' unique employment law needs.

Matthew R. Courtner
JACKSON OFFICE

Since beginning as an associate with Rainey, Kizer, Reviere, & Bell PLC in January 2011, Matthew R. Courtner has gained significant experience representing employers in litigation before the Tennessee Human Rights Commission and EEOC, as well as in Tennessee federal and state courts. Matthew has represented employers on various employment law claims, including THRA, Title VII, ADEA, FMLA, and ADA claims. Matthew also has assisted employers in drafting handbooks and counseling on issues before litigation arises. Matthew was recently selected by Super Lawyers as a 2016 Mid-South Rising Star.

Adam P. Nelson
JACKSON OFFICE

Adam P. Nelson began his career as an associate with Rainey, Kizer, Reviere & Bell, PLC in 2014 after graduating Magna Cum Laude from the University of Memphis, Cecil C. Humphrey's School of Law. In addition to his tort practice, Adam has gained significant expertise defending and protecting employers' interests in workers' compensation cases before the Tennessee Claims Commission, as well as in numerous trial courts and the Court of Workers' Compensation Claims.

Brandon W. Reedy
JACKSON OFFICE

Brandon W. Reedy joined Rainey, Kizer, Reviere & Bell, PLC in 2013 after a two-year clerkship with the Tennessee Court of Appeals. Along with his insurance defense practice, Brandon has represented the interests of employers statewide on a variety of workers' compensation claims, including defending employers in state trial courts and the recently established Tennessee Court of Workers' Compensation Claims.

Steve Gilliland
Keynote Speaker

Pandit Dasa
Keynote Speaker

ARSHRM 2017

LEGENDARY LEADERSHIP

POWER OF THE PAST ★ FORCE OF THE FUTURE ★ APRIL 5-7

BE LEGENDARY!

Join Arkansas SHRM for 3-days of acclaimed speakers, renowned sessions, and remarkable fun!

Don't Delay! Register Today!

www.hr2017.org

Early Bird Registration until 2-28

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

AR SHRM Arkansas SHRM State Council, Inc.

Presenting Sponsor

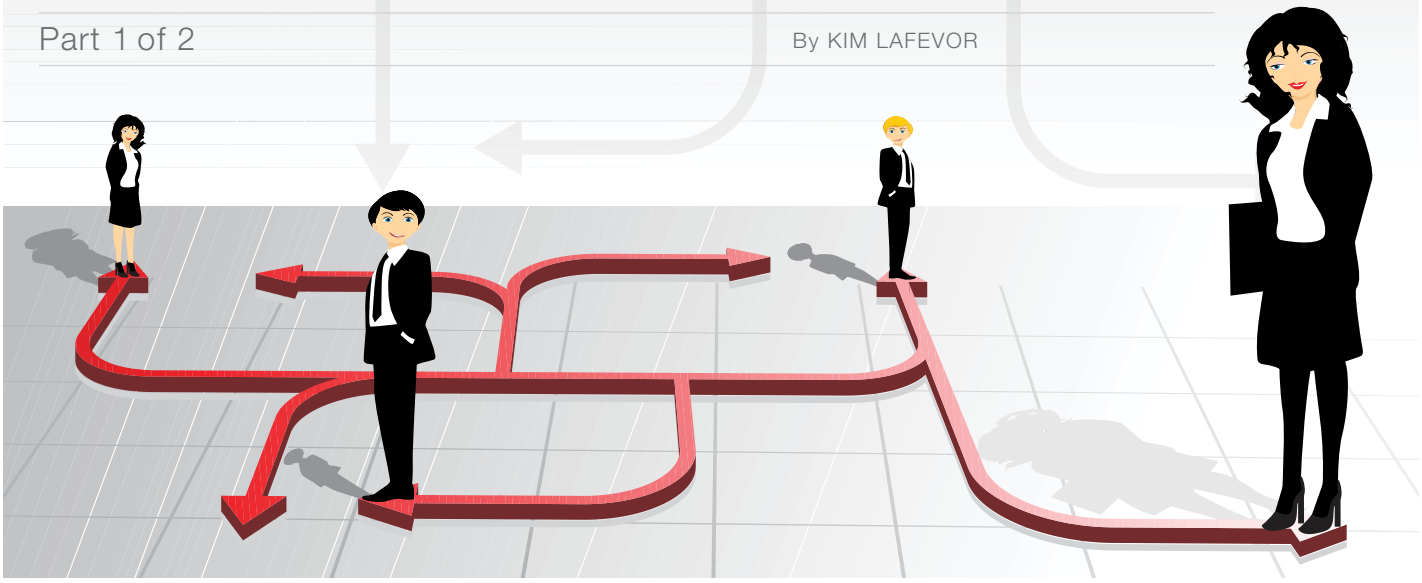
DELTA DENTAL®

What's in Your Human Capital Management Strategy?

Driving Business Solutions with Performance-Based Outcomes

Part 1 of 2

By KIM LAFEVOR



Are We Satisfied with our Business Outcomes?

Are you fully satisfied with the level of performance you see in your own organization? Does your organization have what it takes to perform at the highest level within your market segment? Would it surprise you to learn that if you answered these aforementioned questions to the affirmative, your organization would be on a short list? We have all heard it said that if we do not like the results we are getting in our organizations, change our approach. We have also heard that one step from insanity and chaos is doing the same thing repeatedly and expecting a different result. If we know this, are we using this knowledge to challenge ourselves to reflect and assess our chosen business practices and identify how to improve?

There is a great deal of hype in today's business landscape about one emerging business trend or another that promises to deliver better results, but are we tempted to buy in to these new models and techniques or do we step back and place these ideas in a broader perspective? Some assert the key to operational is performance-driven leadership. The suggestion of this premise is that organizations can perform at the highest level possible to the extent the organization is being steered in the right direction in its market space and people are managed in a way that motivates and inspires them to act favorably in that given direction. But not everyone agrees with this contention and that business success is fundamentally about how work gets done and what is measured. To this point, there are those that believe that the quality framework of an organization's policies and practices and the extent to which they are universally and consistently applied result in a performance management culture. Yet, others, find that the level of employee involvement and level of engagement contributes to favorable outcomes, while others maintain that business success is essentially dependent upon meeting operational and financial targets, as well as the ability of the organization to establish, track, and provide a continuous feedback loop for ongoing improvements to these metrics. While these aforementioned divergent views contribute to differing operational and strategic approaches chosen by organizational leaders, the reality is that any of these absent another presents limiting views.

After all, as business professionals and HR managers we can all agree on one aspect of operating a business---we want continuity and sustainability. In other words, we want to see our organizations thrive. We want to draw upon our skill sets and serve an instrumental role in navigating our organization in a way that leverages its core competencies for a distinct competitive advantage. I think we can all easily agree that no one wants to be associated with mediocrity. *This is different and distinct from those that accept mediocrity in their own individual performance, but that is beyond the scope of this article and can be saved for another review.* Rather, we all want to be associated with excellence and the "winning team." If one wants to test this theory, just watch what happens in collegiate and professional sports when fan bases miraculously grow exponentially when a given team is winning or conversely wanes when a team is having a lackluster season. Therefore, although divergent views about what constitutes a path for a successful organization exist, everyone has the same desire for organizational success (Risher, 2015).

What are Performance Driven Organizations?

Reality is that performance-driven businesses require more than one quick fix or another, they require a comprehensive solution. And, sometimes, this means getting back to the basics of what we know are solid business practices, and in some instances strategically replacing or refining others. This suggests that we must consider the integrative nature of our business practices and what are the key drivers of human

capital effectiveness. If we subscribe to this holistic solution, then we have to ask ourselves one more fundamental question: Do we have a Human Capital Management Strategy (HCMS)?

As HR professionals and managers in the workplace, when we think about performance management, we typically think of historical models and their related integrative systems that include performance standards, performance measurement, quality improvement processes, and measurement of progress in their utilization. Such an approach does not fundamentally address the interdependent nature of human resource practices and measureable business outcomes. Too often, CEOs also fail to realize at the center of this debate are managers who are engaged in a philosophical battle about whether human resource practices should focus on performance or accountability (Mann & Darby, 2014). Is this a trick question? It should not be. In reality, it is both. This is like asking someone if they are *'compliant'* or *'committed'* to their work responsibilities. Are employees just doing what we ask them to do only while we are looking? Or are employees doing what we need them to do in our absence? We all know we want employees to be both taking responsibility for their assigned work tasks, but also actively engaged in ensuring the work reflects the impetus of the organization's mission and values. We want to see the demonstration of an unwavering commitment by an organization's employees to ensure the work is of the highest quality, produces the most favorable outcomes, and instances where it does not, recommends solutions and actions to make it so (Ellis & Normore, 2015; Smythe, 2008). However, what are we doing to make sure we drive *'commitment'* to the right business outcomes? It is not a simple undertaking.

What does an Effective Human Capital Management Strategy Look Like?

A truly effective Human Capital Management Strategy calls for a comprehensive and integrated approach to all business practices. If we know that there is a much larger framework from which to build our human capital management strategy, the question becomes what does it look like? There should be a game plan, a charted path on how to get there, and a clear idea of what success looks like so we will know when we have arrived. In the second of this two-part article next month, I will describe four key components of a well-designed and comprehensive human capital management strategy. We will also examine how to implement this holistic approach in your own organization to drive improved operational performance.

Dr. Kim LaFevor, DBA, SHRM-SCP, SPHR
Dean, College of Business
Athens State University
General Motors Labor Relations (ret)
kim.lafevor@athens.edu

PREVENTING WORKER RETALIATION

BY JO NISEWANGER

According to the Equal Employment Opportunity Commission, in 2015 alone, there were more than 50,000 charges of discrimination filed in the United States. More than 39,000 of those charges were in whole or in part, claims of retaliation. Filing a charge takes minimal effort on the part of the employee, and requires very little detail be provided. The only items necessary are a brief description of the alleged violation, the date it occurred, and information about the employer. The employee does not need to provide any evidence, and the charge itself can contain even less words than this paragraph.

Employment Practices Liability Insurance (EPLI) coverage often comes with a relatively large deductible, and it is not uncommon to find them at $25,000 or even $50,000 for smaller businesses. Consider then, that defense of a discrimination and retaliation allegation, regardless of the validity of the claim, can potentially cost employers upwards of $25,000 per instance in legal fees alone. This cost can realistically exceed six figures once investigative hours, loss of productivity and potential turnover have been factored in.

Most human resource professionals have been there before. There is a particularly troubling employee who, when hired, seemed to be a great fit culturally and professionally, but as time progresses, appears to be backsliding into negative behavior. There is increased tension amongst the team, and it is not long before a divide has occurred between staff members and management alike. Sides have been chosen. Blame has being assigned. Finally, a formal complaint has been lodged with HR by the very employee who is at the center of the turmoil. For businesses who have multiple job sites, it may be the first time human resources is becoming aware of any issues, as management may have been attempting to resolve the issue on their own.

The complainant lobs many serious allegations at seemingly every member of the team, from the manager to the housekeeping staff. The employee has meticulous notes, and uses trigger words such as “discrimination” and “hostile work environment” in their complaint. It is not hard to see that an EEOC charge may be in the near future if this is not handled in a prompt, thorough and impartial fashion.

A study conducted by Kibeom Lee & Michael Ashton in 2012 demonstrated that some individuals are more prone to seeking revenge than others, and specifically narcissists often feel as though they are entitled to be treated better or more fairly than others. Individuals whose character fits this mold will tend to be easily offended by any transgression, whether perceived or real. As such, narcissistic employees will find it particularly intolerable if the employer does not pay for having neglected or mistreated them. Consequently, employees who are disgruntled or who feel that their concerns are not given the appropriate amount of attention may seek revenge, or what they perceive as justice, on an employer, making claims of discrimination where there was none.

There are ways to prevent formal complaints to human resources from escalating to a formal charge with the Commission, the first of which is to complete a thorough investigation into the allegations with comprehensive documentation. It is important to remember at all times that the primary focus of an investigation into an employee complaint is to determine if the employee has been treated unfairly, not to exonerate the employee or manager accused.

Initial steps that need to be taken at the beginning of any investigative process is to counsel the aggrieved employee by ensuring them that no retaliatory action will be taken against them, and if they believe they are experiencing any form of retaliation then it should be immediately brought to the attention of a member of management, Human Resources or the individual who will be investigating the claim. It is equally important that the accused be made aware in no uncertain terms that any form of real or perceived retaliation must not occur. Retaliation is frequently an independent basis for employer liability, regardless of the merit of any other claims of discrimination or harassment, so ensuring that it does not occur after all warnings have been issued is crucial to success.

Before an effective investigation can take place, there are four essential questions that need to be answered; 1) Who will conduct the investigation? 2) Who will be investigated? 3) What evidence is needed? and finally 4) Who will be interviewed? Once the time has been taken to clearly identify the objective and scope of the investigation, it will be much easier to remain focused on the goal.

As a human resources professional, there are a multitude of responsibilities that demand time in any given day, but setting time aside to focus on the investigation is tantamount to its success. It is important to work quickly while being thorough. As time progresses, it will become increasingly more difficult to collect data and get accurate witness statements. Further, lengthy investigations that seem to have no end in sight may communicate to employees that the alleged misconduct is not important, or not seen as a priority.

When conducting the investigation it is important that the person leading the interview avoid aggressive or confrontational tactics, as it will only serve to create an unproductive environment, which will be counter-productive to the goal. In the case of an employee who has brought multiple complaints about their team to light, it is imperative that witness credibility be assessed during each interview, and creating a high stress environment will make this difficult to ascertain. There are several things to consider during this

stage of the interview process, such as; plausibility of witnesses' descriptions of events, witness demeanor, motivation of any witnesses to fabricate the truth, witness corroboration, and past record of the accused.

Once the interviews have been completed, and regardless of the determination, human resources should begin working with management to arrange coaching and training initiatives for the employees affected. It may be necessary to lead the entire team through a training protocol if the claim had a wide impact. It has been my experience that one of the primary catalysts of these perceived wrongs escalating to the level of an EEOC claim is a lack of management training in conjunction with a lax or non-existent performance management program, therefore implementation of job-appropriate training for management and staff alike should become a priority.

This coaching and training initiative should include a variety of courses including leadership training for the managers on site. Though these training sessions are important to get implemented, it is equally important to maintain training routine basis in order to maintain standards and set expectations of all staff; as well as cover any newly hired personnel that come on board throughout the year. All team members should participate in a conflict management course, as well as a diversity in the workplace training session as a preventative measure. As a human resources professional in a global economy, one must be proactive in diversity and inclusion training with the team from the ground up.

As a part of your new education initiative, and in conjunction with the investigation, measurable and achievable goals need to be put into place for all staff. Weekly check-ins with the team should be considered mandatory for the first 30 days after interviews have been completed. Not only will these weekly check-ins present an opportunity for progressive discipline if improvement is not seen on any issues that were uncovered in the interviews, but they will also demonstrate unequivocally that the allegation(s) that were made are being taken very seriously, and will not be tolerated.

At thirty days out from initial interviews, follow up interviews should be scheduled with the aggrieved team member, as well as any members of the team that were initially interviewed. These follow up interviews should be used to gauge improvement in the situation and relationships amongst the team, measure achievement on any goals that were set, and identify what, if any, training remains to be completed and by whom. This is an opportunity that should be used to discuss with the aggrieved employee if they have perceived any improvements as it pertains to their initial complaint. If their feelings of discrimination have not been improved upon, it may be necessary to ask what solutions they think would be beneficial, and reasonable, in order to resolve the problem.

Weekly check-ins with the manager, and monthly visits will go a long way in fostering an environment that is collaborative and harmonious. These check-ins will also give the staff a scheduled time in which to relay any ongoing or unchanged issues that were initially brought up during their investigative interviews. These monthly visits with the team will serve a variety of purposes, but most importantly they will keep you at the forefront of any issues that may arise, providing opportunity to remedy situations before they have a chance to escalate, thereby keeping you on the offensive instead of the defensive.

Jo Nisewanger, SHRM-CP, PHR
HR Generalist
Tavistock Development Company
jnisewanger@rollins.edu

What HR Professionals Need to Know about the President's Executive Orders

By GREG SISKIND

Barely a week into his new Administration, President Trump has already signed three executive orders on immigration and several other immigration topics are in the news. Here's a run-down of the major changes so far.

Enhancing Public Safety in the Interior - 1/25/17

The first executive order signed deals with Immigration and Customs Enforcement and how removal policy as it affects the interior of the country (as opposed to border enforcement).

- Removes prosecution guidelines set out by Obama Administration emphasizing the removal of serious criminal offenders and instructs ICE to use "all lawful means" to remove everyone that is removable (virtually the entire undocumented population is covered).
- Sets enforcement priorities to be criminal aliens, those charged with crimes not yet resolved, those that have committed crimes that constitute a criminal offense, have committed fraud, abused any federal benefits program, have final orders of removal
- Calls for the hiring of 10,000 more ICE officers
- Re-starts programs to have the states and cities signed up to help enforce immigration laws
- Allows the Secretary of Homeland Security to designate cities as "sanctuary cities" if they are deemed to have a policy of not turning over immigrants to Immigration and Customs Enforcement; such cities may be barred from receiving Federal grants
- Calls for the government to issue regular reports on the number of immigrants committing crimes

Immigration lawyers are already hearing reports of worksite raids being conducted since the order was signed. Such raids largely were replaced by I-9 audits early in the Obama Administration so employers are advised to prepare for the possibility that ICE could conduct an unannounced action at their worksite.

Border Security and Immigration Enforcement Improvements - 1/25/17

The headliner in the second Executive Order is the border wall, but there were other important new policies announced as well.

- Detain all individuals apprehended
- Expedite determinations of claims of eligibility to remain in US for individuals (including children) who claim asylum
- Assign all available asylum officers to the prisons to accelerate the credible fear screenings
- Come up with plan to build a border wall within 180 days
- Take all appropriate action to construct, operate, control or contract with prisons to detain individuals caught entering the US illegally
- Immediately assign all available Immigration Judges to the new border prisons
- Cancels 'catch and release' policy and implement a new policy guidance to "ensure detention of all immigration violators until their removal proceedings are concluded"
- Hire 5,000 more Border Patrol agents
- Every Federal government department head must report within 30 days all aid or assistance to Mexico in the past 5 years (presumably in connection with a plan to make Mexico "pay for the wall"
- Stop "abuse" of "parole and asylum" provisions including limiting the use of parole for humanitarian purposes
- Provide immigration officers training on how to legally and quickly deport unaccompanied minors

Travel Ban - 1/27/17

While the other two Executive Orders were major news, the travel and refugee ban made worldwide headlines and led to massive protests across the United States after it was rolled out without notice. The news media covered the ban extensively including how companies were being impacted. Dozens of major companies across the US criticized the ban and others announced protest actions including Starbucks' plans to hire 10,000 refugees at its stores around the world and Lyft donating $1,000,000 to the American Civil Liberties Union.

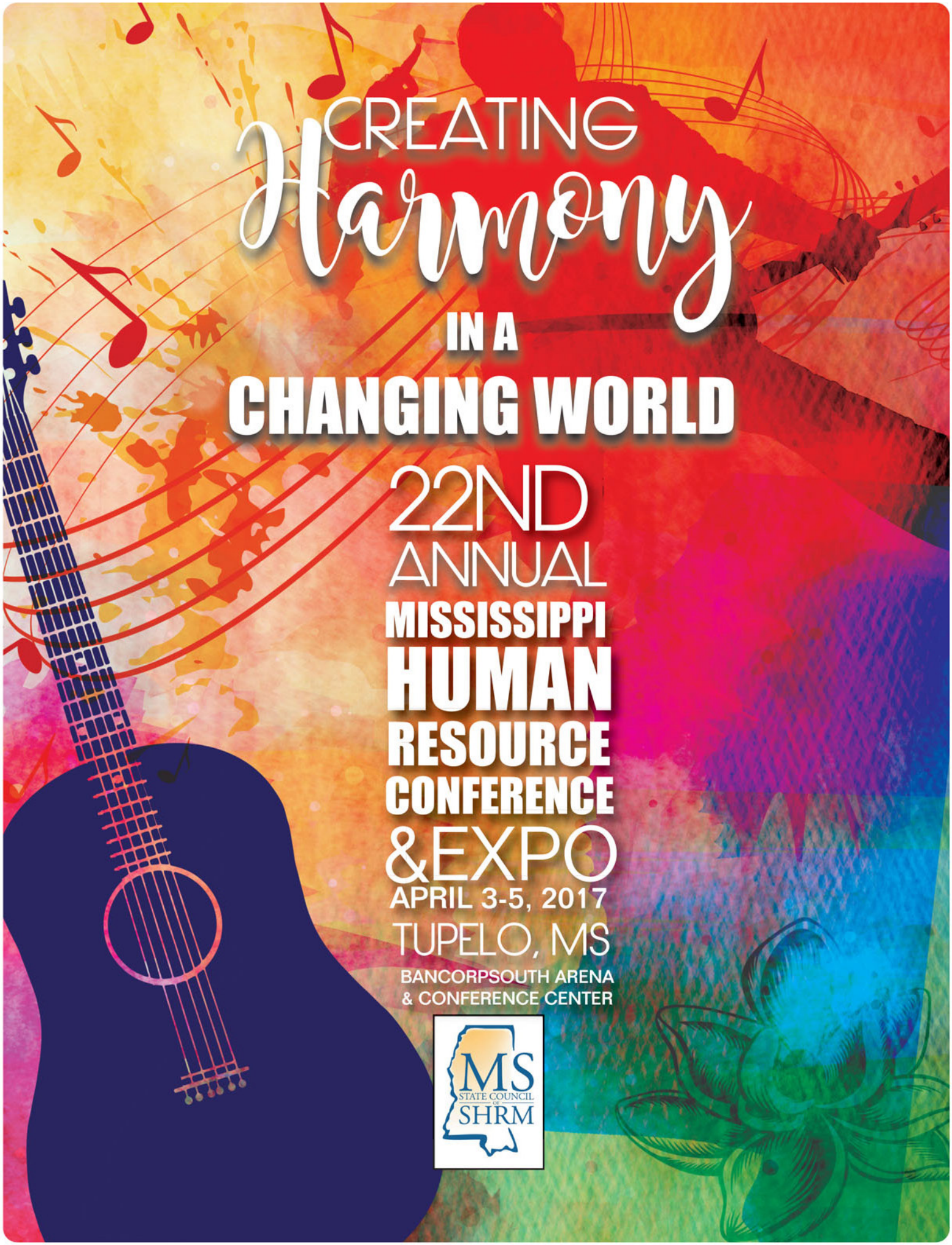
- Suspend the issuance of visas and other immigration benefits for people from Iran, Iraq, Yemen, Libya, Syria, Sudan, and Somalia (the "ban countries")
- Suspend the entry to the US as immigrants or nonimmigrant persons from the ban countries for 90 days
- Demand certain security-related information from all foreign governments within 60 days
- Citizens of the countries that don't comply will be banned from entering the US
- Exceptions can be made on a case-by-case basis for people from banned countries
- Suspends all refugee admissions for 120 days
- Bans Muslim Syrian refugee admissions indefinitely but leaves loophole for Christians
- Limits total refugee admissions to 50,000 (versus the 100,000 already approved for the fiscal year by President Obama
- Expedite completion of the biometric entry/exit tracking system which was approved in 2005 but has never been funded
- Resumes mandatory interviewing at consulates
- Publish semi-annual reports to the American public how many foreign nationals are charged with terrorism-related activities, the number who are radicalized after entry, and the number of acts of violence against committed by foreign nationals.

Dozens of lawsuits have been filed challenging the order. On February 3rd, a district court judge in Seattle issued a nationwide temporary restraining order and as of the time of the writing of this article, an appeals court is weighing the continuation of the order. If they do, travel should continue as before the order until the case is decided on its merits. Many expect the case to eventually be heard by the Supreme Court.

Lawyers are also hearing reports of Global Entry being revoked for both US citizens and permanent residents, something that could be very costly for companies that send employees abroad. Customs and Border Protection is also now regularly seizing phones and laptops and downloading the data on the devices so companies should plan accordingly.

Finally, the Administration is expected to take additional actions on skilled worker programs like the H-1B visa and on the DACA deferred action program which provides nearly three-quarters of a million young people with work cards. But no definitive details have been released.

Greg Siskind
Siskind Susser, PC
Immigration Lawyers
gsiskind@visalaw.com
www.visalaw.com


CREATING
Harmony
IN A
CHANGING WORLD
22ND
ANNUAL
MISSISSIPPI
HUMAN
RESOURCE
CONFERENCE
&EXPO
APRIL 3-5, 2017
TUPELO, MS
BANCORPSOUTH ARENA
& CONFERENCE CENTER
MS
STATE COUNCIL
OF
SHRM

Recent Court Decisions Regarding Background Search Authorization in Online Employment Applications Highlight Continued FCRA Challenges for Employers

By JODI D. TAYLOR

Over the last few years, employers are facing a new type of class action claim - improper disclosure and authorization for background searches during the hiring process. Some courts have found violations are "willfull", exposing the employer to statutory penalties, punitive damages and attorney's fees awards. Online employment applications create nuance regarding whether a web based interface complies with the application regulations. And during the last week of January 2017, two federal courts reached conflicting decisions regarding the issue of what type of injury, if any, is required for plaintiffs to assert proper standing in these cases. What's an employer to do? Read on for information regarding the regulation governing background searches in employment, survey of the current litigation landscape, and quick tips for employers to protect against this new, and growing, litigation trend.

What Does the FCRA Have to Do With Employment?

The Fair Credit Reporting Act, 15 U.S.C. § 1681b(b)(2)(A) prohibits the use of a consumer report for employment purposes *unless*

> (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes.
>
> (ii) the consumer authorized the procurement of the consumer report in writing (which authorization may be made on the document referred to in clause (i)).

In short, applicants must be given notice that the potential employer will run a background report on that individual as part of the application process, and the consumer must provide written authorization allowing the employer to request the background report. However, the disclosure and authorization must be set forth on a separate standalone document, not buried within the application or even included in a listing of other waivers or authorizations.

Increased Litigation Relating to This Issue And Potential For Damages Awards.

Lawsuits against employers alleging these types of FCRA violations have become more pervasive. In April 2015, Whole Foods faced a class action challenge to its employment application in the Middle District of Florida. *Speer v. Whole Food Mkt. Grp., Inc.,* 8:14-CV-3035-T-26TBM, 2015 WL 145698 (M.D. Fla. Mar. 30, 2015). There, the class alleged that Whole Foods's application included a waiver and release of liability on the same form that included the consumer report disclosure in violation of the FCRA. Similarly, in *Walker v. Dollar Tree Stores, Inc.,* the named plaintiff sought certification of a class of employees alleging that Dollar Tree breached the FCRA by including a waiver of liability on its FCRA disclosure and consent form. *Walker v. Dollar Tree Stores, Inc.,* 8:15-cv-1170-T-36EAJ (M.D. Fla. June 9, 2015). *See also Mohamed v. Uber Technologies, Inc. et al.,* Case No. 3:14-cv-05200 (N.D. Ca. 2015).

These cases are generally brought as class actions, and more often than not settle early. The Whole Foods case resolved through an approved settlement between Whole Foods and the class for $803,000.00 after Whole Foods's motion to dismiss was denied. The *Walker* case was dismissed without prejudice shortly after it was filed. It has been reported that Dollar General settled various similar class action suits for large dollar amounts.

While the value in these cases typically arises from their class status, there is potential for statutory penalties, punitive damages and attorney fee awards. Indeed, on January 20, 2017, the Ninth Circuit denied defendant employer's motion to dismiss a class action alleging violations of the FCRA stand-alone background search disclosure requirement. *Syed v. M-I, LLC,* 14-17186, 2017 WL 242559 (9th Cir. Jan. 20, 2017). Going a step further, the appeals court also found that the violation was willful, exposing the employer to statutory damages in the amount of $100 to $1000 per violation, punitive damages, and attorney's fees and costs.

Online Applications.

Many of these cases involve online applications. Given the nature of web-based interfacing, online applications present additional issues in creating "stand alone" disclosure forms. For instance, some applications include the disclosure language within the middle of an online application - although it is listed as a standalone "line item" on the webpage. *See e.g. In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.,* 2615, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2017). Other cases involve a laundry list of terms and disclosures, including the FCRA disclosure language, preceding an "I Agree" button, which is clicked and approved by the applicant. *See e.g. Henderson v. The Home Depot U.S.A., Inc.,* Civil Action No. 1:14-cv-02123 (N.D.Ga. August 7, 2014). While the courts have not yet opined on how language presented in the online application can be "stand alone," best practice is to include the language by itself on its own page or "screen shot".

Conflicting Positions Regarding the Injury Required to State a Claim.

More recently, online retailer Amazon.com and craft store Michaels Stores, Inc. faced FCRA challenges to their online employment application. The Amazon.com FCRA disclosure and consent authorization also included

liability releases and "small print" language regarding arguably confusing information about which agencies were performing employee background searches, five state law notices, and a notice that revocation of consent to a background search may result in termination or refusal to hire. *Hargrett v. Amazon.com,* No. 8:15-cv-2456, 2017 WL 416427, *6 (January 30, 2017). The plaintiffs in the Michaels case allege that the online retailer included its FCRA disclosure in the middle of the application, not in a stand-alone document. *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.,* 2615, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2017).

In both *Amazon.com* and *In re Michaels Stores, Inc.* the issue of standing -- namely whether the plaintiffs had sufficient injury to state a claim -- was decided at the Motion to Dismiss stage. And both courts analyzed standing under the recent U.S. Supreme Court holding set forth in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 194 L.Ed. 2d 635 (2016). *Spokeo* assessed whether the plaintiff in that case sufficiently presented an injury-in-fact sufficient to establish standing. The Supreme Court decided that to allege injury-in-fact, a plaintiff must articulate a "concrete injury," which need not be tangible. *Spokeo,* 136 S. Ct. at 1549. However, "bare procedural violation [of a statute], divorced from any concrete harm" cannot satisfy the injury-in-fact requirement. *Id.*

Applying *Spokeo,* the District Court of New Jersey in *In re Michaels Stores, Inc.* and the Middle District of Florida in *Amazon.com* reached different conclusions deciding whether an employer's alleged violation of the FCRA is sufficient injury-in-fact to establish standing. The New Jersey Court found that the *Spokeo* factors were not met, holding that, without separate injury, the mere fact that the FCRA may have been violated is insufficient to bring a claim. Accordingly, on January 24, 2017, Michaels Stores, Inc.'s Motion to Dismiss was granted. Conversely, the Middle District of Florida found that plaintiffs did show "concrete injury" through at least three kinds of harm: invasion of privacy, informational harm and risk of harm. On January 30, 2017, Amazon.com's Motion to Dismiss in that case was denied.

What To Do

The litigation on this issue is still in its infancy, however several things are clear: (1) these claims are likely to be brought as class actions; (2) given the class status, settlement values will be increased; and (3) there is uncertainty in whether courts will find violation constitutes an injury *per se* or if plaintiffs must show something more, making it difficult to predict the outcome of success. In light of these factors, here is a list of "take-aways" for employers to consider:

1. Avoid the lawsuit!

The split of authority makes outcome predictability difficult. Class actions increase settlement value. The best advice -- employers should make certain their background search consent forms comply with the FCRA. Even if an applicant or employer files suit, if the consent form is compliant, employers should dispose of the case at the motion to dismiss stage. If there is any ambiguity as to whether the form complies, or if the form is not compliant and the issue becomes whether plaintiff has suffered an actual injury, employers will suffer increased litigation costs at a minimum, and possibly large settlement or verdict amounts if the case is brought as a class and the class is certified.

2. Review Online Applications.

Online applications pose additional difficulties for FCRA compliance. If the disclosure language is included on a page with any additional information, it may be in violation. Accordingly, it is wise to review online application forms and ensure that the disclosure language is on its own page or "form." It probably is not enough that the language is included in its own section of the application that shares the screen with other parts of the application. For the highest level of comfort, the only language visible on the screen should be the FCRA disclosure language.

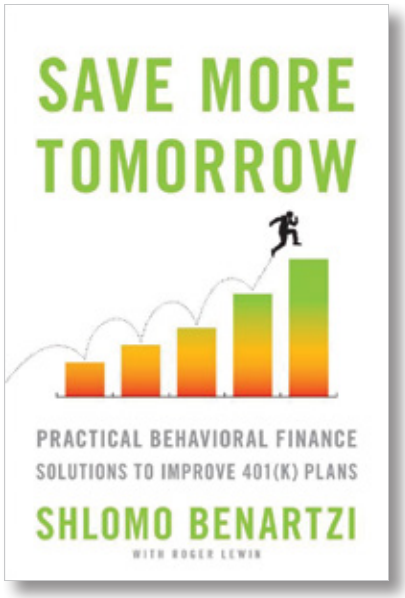
3. Set Clear Policy and Follow It.

The Court in the *Amazon.com* case seemed bothered that the disclosure language included confusing information about which agency would perform the background search, and who might be entitled to the results. Not only should the disclosure language be on a standalone document, but it should also include information that will allow the applicant to determine which entity will be obtaining his or her background information, and any other entities or individuals who may have access to review the results.

4. Early Resolution.

If a claim is brought, and it cannot be easily disposed of by a Motion to Dismiss, early resolution may be the best strategy. Many of these cases are dismissed before an answer is filed, indicating that the parties resolve the matter before the defendant employer entered the case. In class action cases, resolving and dismissing before the parties are required to begin the costly and onerous class discovery process is very beneficial and may be worth what is otherwise considered a premium settlement value. Once a class is certified, the court must approve the settlement, increasing the time and costs to effect the settlement. Also, in those instances, the settlement value will be made public.

Jodi D. Taylor, Associate
Baker Donelson - Atlanta
jtaylor@bakerdonelson.com
www.bakerdonelson



BOOK LOOK

SAVE MORE TOMORROW: Practical Behavioral Finance Solutions to Improve 401(K) Plans

BY PAULA HAYES

How many of us remember the Nike slogan, "Just Do It?" It was coined in 1998 by Dan Wieder, the founder of the ad agency, Wieden + Kennedy. The slogan makes an impact even to this day when we see it printed on sports apparel probably for the simple reason that those three little words emphasize "action." On the flip side, is the "motto" that too many individuals may live by when it comes to making sensible 401(K) investments—"Just Do It *Later!"* Many people are too dismissive, treating 401(K) as an optional investment, underinvesting, or not investing at all. Besides a lack of full knowledge on 401(K) plans, I would venture to say the chief obstacle to rallying people to invest is procrastination. I will admit that I am one of those people who needs to pay closer attention to building a 401(K). With that said, it is not often I come across a book that completely transforms my financial perspective. Without any exaggeration, I can tell you that Shlomo Benartzi and Roger Lewin's book, which is a Wall Street Journal Best Seller, *Save More Tomorrow: Practical Behavioral Finance Solutions to Improve 401(K) Plans,* truly has helped me think about 401(K) investments in a new light.

What is Behavioral Economics?

What is strikingly transformative about this book is that it shifts the focus of the discussion about 401(K) investments past the typical discussions on how to invest toward a fresh set of questions that focus upon the behavioral responses impacting whether one chooses to invest, how much one invests, and how one understands investment. *Save More Tomorrow* uses as its framework the theoretical field of *behavioral finance,* which is a sub-set of a larger spectrum of behavioral economics. In case you're wondering, behavioral economics is the study of how psychological, social, and emotional traits impact a person's economic choices. *The Concise Encyclopedia of Economics* points out the limitations that the traditional model of economics presents, observing that, "Economics traditionally conceptualizes a world populated by calculating, unemotional maximizers that have been dubbed *Homo economicus.* The standard economic framework ignores or rules out virtually all the behavior studied by cognitive and social psychologists" and that "The standard economic model of human behavior includes three unrealistic traits—unbounded rationality, unbounded willpower, and unbounded selfishness—all of which behavioral economics modifies." This is where the field of behavioral economics picks up—it uses psychology and sociology to help determine the types of economic, and in this case retirement investment choices, that a person will make. Behavioral economics, when used correctly, can help individuals overcome a sense of apathy toward making 401(K) investments. Important as well is the role of the employer; companies can use behavioral economics in predictive ways to determine, for example, whether employees should be permitted to opt-in or opt-out of 401(K) plans.

Benartzi and Lewin address three pivotal areas, which they refer to as "behavioral challenges" to investment—"inertia, loss aversion, and myopia." The book's arrangement is comprised of three sections that build progressively from saving, to saving more, to eventually saving smarter. In a nutshell, section 1 deals with embarking upon the decision to enroll in a 401(K); section 2 looks at how to select a suitable rate of savings; and finally, section 3 studies investment decisions.

An Example of Applying Behavioral Economics Taken from Chapter 1

If we look briefly at a first selection, chapter 1, "The Power of the Default Option," the authors explore two highly important concepts, "Auto-Grounded and Auto-Takeoff." Benartzi and Lewin point out that traditional economic theory has been largely incorrect when it comes to explaining and predicting behavioral choices with regard to default options—"According to standard economic theory, defaults should have only a limited effect on people's decisions: theory says that if a default is not aligned with people's preferences, they will choose otherwise." To illustrate the fallacy of this belief that people will "choose otherwise," Benartzi and Lewin use an analogy of how defaults tend to work with regard to organ donations.

Citing a 1993 Gallup Poll, there was a huge discrepancy between how people felt about organ donations, whether they approved of it from a societal and ethical perspective versus whether they registered as an organ donor. The Gallup Poll showed "85 percent of Americans approve of organ donation, and yet only 28 percent actively take the steps to register as a donor." How is the gap to be explained? Benartzi and Lewin conclude that the "choice architecture" has much to do with the behavior choices. Looking comparatively at organ donations internationally, using Germany and Austria as examples, the authors observe that if you give individuals the choice of opting in, even if they approve of organ donations, the statistics show that people do not opt in at very high rates; yet, if people are automatically enrolled in organ donation, and then given the choice to opt out, the vast majority stay enrolled and do not take the choice to opt out.

Using the known theories of behavioral choices with regard to default options, Benartzi and Lewin argue in favor of what they call "Auto-Grounded enrollment" in 401(K) plans as opposed to preferring "Auto-Takeoff enrollment." The difference between the two types is simply this—Auto-Grounded enrollment means that companies automatically make provisions to

enroll employees into 401(K) plans and employees are given the choice to opt out versus the idea of companies giving employees the choice of opting into enrollment. *In other words, change the dynamics of behavioral architecture and companies will find that employee behavioral choices will follow suit.* As the authors argue, "Automatic enrollment in a 401(K) plan (auto-takeoff) gives an immediate and substantial boost to participation." The time it takes an employee to make the decision to enroll, which in some cases can be years, the employee has already lost opportunity for initial growth. Benartzi and Lewin note, "But the fact that participation occurs almost immediately after a new employee joins the company under Auto-Takeoff, rather than after a lag of three to five years, as often happens under the Auto-Grounded system, is important, too. Those 'lost' few years at the beginning of a thirty-five year investment program have a significant financial impact down the line, because of the power of compound growth."

A major selling point is that in each chapter Benartzi and Lewin examine counterarguments letting readers make up their own minds about the effectiveness of applying behavioral economics to 401(K). When discussing the implementation of Auto-Takeoff, the authors note that arguments against a company enrolling employees into a 401(K) and then providing an opt out option include the company being perceived as too paternalistic; and furthermore, if a company has a high-turnover rate it might seem counter-productive. The authors do not stop with offering the counterarguments; they offer solutions to the counterarguments. For example, with regard to high employee turnover rates, they argue a comprised approach—"Offer an Auto-Grounded plan when new employees join, and put in place Auto-Takeoff on people's first anniversary of joining the company."

Virtual Reality is Reality for the Future

Additional parts of this book really dig into the meat of behavioral economics by exploring research studies on subjectivity, the "self," from the enjoyable and exciting perspective of virtual reality. This might seem like pretty abstract material when thinking about how to increase investments, but as the authors argue the emotional level of conceiving of a "financial self" is a key factor in becoming a successful investor. An important term is "temporal myopia," which is defined as the inability to project oneself into the future, or to visualize oneself operating and behaving in certain ways in the future. As Benartzi and Lewin explain, younger individuals experience an "identity gap" and an "empathy gap"; the first is the inability to see how one will need to live in the future (such as making retirement investments at a young age), and the latter is the overvaluation of presently felt emotions and the devaluation of emotions that could be felt in the future. These fluctuations in self, in identity and emotions, impacts whether a person chooses to invest early on in life in a 401(K) or whether one habitually postpones making the investment. To help people move past these subjective distances between present and future, Benartzi and Lewin recommend conceptualizing "two selves," an immediate financial self and a future financial self; and, they reference some pretty amazing research studies that utilize virtual reality tools to accomplish this "twinning" of the financial self. To construct this balancing act between a present self that may not see the immediate need to invest and a future self that requires the security of investment, it requires some degree of imaginative reconstruction to have these two versions of self "meet" in virtual time. Yet, Benartzi and Lewin note, "There is a difference between *knowing* on an intellectual level that one will be old at some point in the future and *feeling* it on an emotional level."

Paula Hayes, Ph.D.
Instructor of English
Southwest Tennessee Community College
http://www.drpaulahayesenglish.org/

Which EQ Assessment Tool is Best?

By HARVEY DEUTSCHENDORF

While there are numerous tests of emotional intelligence tests out there, the ones that have had extensive research behind them, is relatively limited. The consortium for emotional intelligence has come up with a list of assessment tools that have met their criteria of research and study. Evaluating these tools is not an easy task as the technical criteria to establish credibility are complex, difficult to understand and confusing for most people who do not work in the test development area. As someone who is familiar with emotional intelligence, I will give you my take on what I would look for in an assessment tool and attempt to speak to the measures in lay person terms that are easy to understand.

For a Brief Explanation

360—The process of using a measurement to gather feedback not only from the individual but from those that work with her/him. What this typically means is that the tool would be completed by the person themselves as well as those that work with the individual, giving their feedback as how they see the person. For example, the tool would be given to the person's manager, colleagues and those reporting to them. The purpose is to look at how they view themselves as well as how they are perceived by others. Conducting a 360 assessment is expensive and time consuming and is usually only done at the management, executive level. The tool normally used is an individual tool like the EQi-2.0 or Genos that is used for evaluating the individual by others but there are also tools that are specifically created for group use only.

Bar0n Emotional Quotient Inventory

Reuven BarOn was one of the pioneers in developing emotional intelligence measures and came up with one of the first scientifically valid test of EI which was approved by the American Psychological Association. The basis of the BarOn has been adapted and the basis used in developing the EQi-2.O which is currently used. It is still one of the most widely used measures today and is available for individual use as well as 360. It is the one I am most familiar with, am certified to administer and formed the basis for writing my book. It is one of the most comprehensive tools and breaks down EI into a number of categories and sub categories helping us to get a good look at the areas we are strong in and the areas we can do some work on (growth areas). The test results speak directly to us and give us suggestions on what we can do to improve the potential growth areas. Visually, it provides graphs and strong visuals that visual learners appreciate. Because it is self-scoring, the best use of the tool is to provide valuable feedback and information to the person who is taking it. If used for the purposes of making hiring or promotion decisions, there is a danger that the person taking the assessment will not answer honestly but try and determine what the person who will be seeing it wants to hear. This is a Level B tool—Must be administered by a certified practitioner

Emotional & Social Competence Inventory

This one is strictly a Multi-Rater which is used by organizations to help managers and people at higher levels to gain awareness to be able to increase trust, develop better working relationships with those around them and as a result increase performance and productivity. It is developed by the Hay Group and Richard Boyatzis has an extensive background in the area of emotional intelligence with Western Case University. Not having personal familiarity with the tool, I can only comment on the foundation of the work behind which appears quite solid. There is a version of the tool (U), which has been developed for use with University Students.

Genos Emotional Intelligence Inventory

A self-assessment multi-rater tool that was developed by professors at Swinburne University in Australia. There are 70 items and the tool takes about 15 minutes to complete. The visuals in the feedback report are very helpful and give good quality feedback. It is designed specifically for the workplace and use by HR Professionals and researchers. It is designed to be administered only by someone that is certified. As in any self-assessment tool, it works best when used strictly for providing information to the participant and not as a basis for determining whether someone is hired or promoted.

Group Emotional Intelligence Competency

Developed as a group level tool, this was designed to help groups relate to each other more effectively and build their capacity. It has been widely used and measures 57 items which are part of 9 major areas of emotional intelligence. The value of this instrument is in it's ability to provide valuable information for organizations that depend upon a great deal of group work.

Mayer-Salovey-Caruso EI Test (MSCEIT)

Two of three developers of this test are University professors, Mayer and Salovey, who originally coined the term emotional intelligence in 1990. The MSCEIT is the only EI test that is ability based. It is an individual tool and takes 30 to 45 minutes to complete. Since it is designed to test how someone actually uses EI competencies, it can be a more accurate assessment than a self-scoring test which is someone's prediction of how well they would use EI.

Work Group Emotional Intelligence Profile

A self-report that is relatively simple and straight forward compared to other group reports. It has only two major subheadings 1. Ability to deal with own emotions and 2. Ability to deal with other's emotions. A team score can be calculated by adding up all the individual scores divided by the number of group members. Can be used to gain a good snapshot of where a team is at and used for discussions as to how to move forward.

Schutte Self Report EI Test

The test was developed by Dr. Nicola Shutte who has extensive writing and research background. She based the model on the work of EI pioneers Salovey and Mayer (1990) Reports of the test are mixed. It is relatively simple and straightforward for those looking for something that is not very time consuming.

My favorite assessment tool is the BarOn Emotional Quotient Inventory. It is comprehensive and detailed amd gives a lot of good information for further discussion. It is easy to interpret and has good graphics which are appealing to visual learners. It is multi-purpose in that it can be used for both individual and the 360 version.

Emotional Intelligent Assessment tools are useful for gathering information, gaining clarity and a deeper understanding. They are excellent for furthering discussion, but should never be relied upon, or used as a sole source for making decisions.

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

tpma

International Public Management Association for Human Resources
Tennessee Chapter

REGISTER NOW!
April 18-21, 2017

2017 TPMA Conference - Chattanooga, Tennessee

On the Lookout for the Future of HR: Keeping the Public Sector HR Profession on Track

LABOR AND EMPLOYMENT LAW

For more than 35 years, Ogletree Deakins has built on the high standards of its founders and their dedication to exceptional client service. One of the largest labor and employment law firms representing management in all types of employment-related legal matters, Ogletree Deakins has 800 lawyers located in 51 offices across the United States and in Europe, Canada, and Mexico.

Register at www.ogletree.com/our-insights to receive updates on recent developments in labor and employment law.

Ogletree Deakins

Best Lawyers LAW FIRM OF THE YEAR U.S.News LABOR LAW – MANAGEMENT 2017

MEMPHIS OFFICE
International Place, Tower II
6410 Poplar Avenue
Suite 300
Memphis, TN 38119

DATA FACTS℠
Information You Trust

Some things should just go together!

It's estimated that ***50% of I-9s contain errors***. Penalties for non-compliance can add up to ***hundreds of thousands of dollars***! Data Facts' industry-leading technology platform offers complete I-9 and E-Verify capabilities. Combined with our full suite of background screening products, our I-9 and E-Verify solution is just another reason you can count on ***stress-free*** hiring with Data Facts. ***Now that's a combination to sink your teeth into***!

www.datafacts.com

Certified WBENC Women's Business Enterprise

napbs ACCREDITED

Assessments | Criminal Records Search | Credit Reports | Drug Screening | Verification Services | MVR

Delivering Background Screening You Trust.

The First Time, On Time, Every Time!