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# HR Compliance Library

*Ideas & Trends*

## INSIDE THIS ISSUE

### MISTAKES

## Mistakes by HR reps can be particularly costly for employers

Employers rely on human resources professionals to administer workplace policies and ensure the company's compliance with applicable laws, but who makes sure that HR reps themselves comply? A Master's degree and HR certifications will only go so far, and wise employers (and in-house counsel) will see to it that their HR reps fully appreciate the potential impact of their day-to-day interactions if an employer is later accused of improprieties. In many cases, avoiding a costly trial could be a simple matter of an HR professional carefully thinking through the consequences of an action before taking it. Below are some real-life examples of such missed opportunities and suggestions for improvement.

**Hazarding a guess can be a hazard.** When asked why a company decided a long-time employee could no longer perform her cleaning duties, an HR specialist said: "I don't know why. I think she's probably older now." A court found this to be direct evidence of the employer's age bias (*Dupont v Allina Health System*). Suggestions:

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### ACA

## Groups, law firms, employers weigh in on employer mandate delay

On February 12, the Internal Revenue Service issued final regulations implementing the Patient Protection and Affordable Care Act's (ACA) employer shared responsibility provisions (also known as the employer mandate). The final regulations give medium-sized employers (50-99 full-time employees) until 2016 to comply with the mandate and provide significant transition relief for both medium-sized and large employers (those with 100 or more full-time employees). Benefits and trade groups, law firms, and employers have all weighed in on the employer mandate delay, and reactions have been mixed.

- Plan ahead. Try to anticipate what might be asked before a meeting and think about the answers you might give. Imagine what your answers would sound like to a jury.
- Don't guess. If someone asks why a company is taking an action and you do not know, it is okay – even preferable – to simply say you will look into it.

**Don't stray from an interview plan.** A nurse who did not complete her application process claimed that an HR rep spent much of a job interview discussing her pregnancy and deterred her from completing the process by saying she would not be hired while she was pregnant. This was enough to avoid summary judgment (*Di Gioia v Independence Plus, Inc.*). Suggestions:

- Prepare questions in advance. Tailor questions to job requirements and do not stray into areas prohibited by discrimination and other laws.
- Avoid making promises. In some cases, comments made by HR reps in interviews about the prospect for long-term employment have been held by courts to give rise to implied contracts altering the at-will employment relationship.

**Emails can come back to haunt you.** On the same day a restaurant server was terminated, a senior benefits specialist sent an email to a third-party provider asking how to exhaust the server's short-term disability leave, stating "we are wanting to exhaust her STD so that we can terminate her according to the terms of our policy. Help!" Based on that and the allegation that another HR rep told the server she had returned to work prematurely, a court found evidence of retaliation against the employee for exercising her STD rights (*Spahic v Gaylord Entertainment Co.*). Suggestions:

- Before hitting "send," recognize that the intended recipient may not be the only one who ends up reading your email, and reread it to see how it might appear to a third party. Recognize that while memories of the context fade, emails can last forever and could be interpreted differently once the context is lost. Also

note that personal email accounts may also be subject to disclosure in discovery.

**Doing half the job is like not doing it at all.** Although a sales rep complained to HR about a supervisor's sexual harassment, and workers interviewed by HR confirmed his remarks on her breasts, the employer found the allegations unsubstantiated. A court found its investigation lacking because it did not interview all witnesses and further found its conclusions questionable (*Miles v Wyndham Vacation Ownership*).

- Fully investigate complaints. Be responsive to employees who complain of discrimination, retaliation, or other misconduct and take them seriously. Adequately investigate allegations and draw objectively reasonable conclusions.
- Properly enforce policies. Having a policy prohibiting sexual harassment and telling employees how to report it will not help in court if the policy is not enforced properly. Draw reasonable conclusions from the investigation and impose an appropriate level of discipline for misconduct.

### Suggestions for improving HR performance

There are many other examples of when an HR representative's action or failure to act increased an employer's exposure to liability, including: pressuring employees to sign agreements or questionable waivers (such as a statement that sex was consensual); failing to translate important information for non-English speakers; providing negative references; failing to maintain documents while litigation is ongoing; making statements to an applicant that imply he or she has a job before they actually do (possibly leading an applicant to turn down other jobs); and failing to enlist an independent investigator when a personal friend is accused of wrongdoing.

The list could go on, but the point remains the same: even the best HR departments will likely have room for improvement, and there is a lot of value in taking measures to ensure that HR is doing what it needs to do. These could include:

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### *Ideas & Trends*

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## EMPLOYER-PROVIDED BENEFITS

## Employers will continue sponsoring health benefits, but deliver those benefits in new ways

New research from Aon Hewitt, the global talent, retirement and health business of Aon plc (NYSE: AON), shows that the majority of employers plan to continue sponsoring health benefits for active employees and retirees, but will change the way those benefits are managed and delivered in the coming years.

According to Aon Hewitt's soon-to-be-released Health Care Survey of more than 1,230 employers covering more than 10 million employees, 95 percent of employers say they plan to continue providing health care benefits to active employees in the next three-to-five years. However, a growing number plan to move away from their traditional "managed trend" approach, which includes aggressively managing costs through vendor management and employee cost sharing.

Almost 40 percent of organizations expect to migrate toward a "house money/house rules" approach, which requires employees to take a more active role in their health by offering them a few plan options, plus initiatives designed to improve health and reduce costs. Thirty-three percent said offering group-based health benefits to active employees through a private health exchange will be their preferred approach in the next three-to-five years.

**Employers' current and future health strategies for active employees.** "Traditional cost management tactics do not address foundational issues in health care, including worsening population health and misaligned provider payment methodologies," said Jim Winkler, Aon Hewitt's chief innovation officer for Health & Benefits. "Employers remain committed to providing health benefits, but recognize the need for new approaches that fix those problems."

Despite having the ability to direct part-time employees to purchase health coverage through the public marketplaces, Aon Hewitt's survey shows very few employers plan to do so in the near future. Almost two-thirds plan to continue to offer the same level of benefits to part-time employees as they do to full-time employees, with or without an employer subsidy. Just 38 percent plan to offer no benefits to part-time workers in the next three-to-five years.

**Pre-65 retirees.** According to Aon Hewitt's annual Retiree Health Care survey of 424 employers covering 3.8

million retirees, 20 percent said they are favoring moving all or a portion of their pre-65 retiree population to the individual market/state exchanges to purchase coverage in the next three-to-five years. Today, just 3 percent of employers do so.

"Employers will be moving at least some portion of their pre-65 retiree populations to state and Federal exchanges, but they are waiting for these marketplaces to become more robust, competitive and mature," said John Grosso, leader of Aon Hewitt's Retiree Health Care Task Force. "This movement will be slow and methodical, as the public marketplaces evolve and as employers understand the implications of the 2018 excise tax, which will only impact group-based health insurance plans."

**Post-65 retirees.** According to Aon Hewitt, the number of employers offering subsidized retiree health benefits has slowly declined over the past decade, with just 25 percent of large employers doing so today, compared with approximately 50 percent in 2004.

Of those companies that offer health benefits to post-65 retirees, a growing number of organizations now provide or are seriously considering providing health benefits coverage through the individual Medicare plan market. Aon Hewitt's annual Retiree Health Care Survey found that 30 percent of companies have already sourced benefits through the individual market—most through a multi-carrier private health exchange. Of those companies contemplating future changes to their post-65 retiree strategies, two-thirds are considering this approach.

"A growing number of employers are leveraging multi-carrier private exchanges for Medicare beneficiaries because they see the value in both the competitive mix of plans offered and the Medicare-specific navigation and advocacy offered by these private exchanges," said Grosso.

Added Winkler, "The competitive nature of the individual Medicare market has resulted in more moderate year-over-year rate increases than what employers have experienced on their own. As health insurers regain control for creating a competitive market that is accountable to the consumers within it, we expect to see similar cost moderation across the system, including the new competitive markets emerging for pre-65 retirees and active employees." ■

FLU

## NSF International issues workplace flu survey

If you've ever gone to work when you weren't feeling well, you're not alone. According to a new NSF International survey, at least one-quarter (26 percent) of American workers admit to going to work when they are sick.

Although there are many reasons that people don't stay home when they don't feel well, a majority of Americans indicate the major reason is because of workload. Many have deadlines or are afraid they will have too much work to make up if they take a sick day (42 percent), while nearly as many (37 percent) say that can't afford to be sick and miss work.

One of the more surprising results of the survey concerns how employees feel about co-workers coming into work sick. While 98 percent of Americans surveyed acknowledge that they do judge fellow co-workers who come in sick, their feelings aren't generally negative. In fact, two-thirds (67 percent) of those surveyed consider sick co-workers to be hard workers, and only 16 percent feel that their colleagues who come to work sick are selfish or don't care about the well-being of their co-workers.

Other interesting survey findings about sickness in the workplace include:

- **Expectations from above:** One-quarter (25 percent) of American workers claim that they go to work when sick because their boss expects them to come in no matter what.
- **Pushing through the illness:** Men (33 percent) are nearly twice as likely as women (17 percent) to always go to work through their illness or when sick.
- **Distrust in the workplace:** Thirteen percent of working Americans believe co-workers come to work sick because they don't trust their colleagues to do the job while they are out.

Most Americans appear to be very transparent and honest about how they feel around sick colleagues. A majority (57 percent) would tell a sick co-worker to go home if they thought they were too sick to be at work. If you are sick, try to stay home and rest at the onset of your symptoms. However, if you must go into work, be conscientious of those around you and follow these tips:

- **Eat healthy and take certified vitamins.** Keeping your immune system strong during the winter months is important to help keep colds and the flu at bay. If you do use vitamins, look for those with the NSF certification mark, as these have been tested

to confirm that what's on the label is actually present in the product and that there are no unsafe levels of contaminants such as heavy metals, pesticides and herbicides in the product.

- **Disinfect surfaces.** NSF International germ studies have found that germs tend to congregate in warm, damp and or porous environments. If you're at work, disinfect the kitchen sponge before using by rinsing it, then placing it in the microwave for two minutes, and use paper towels to dry your hands instead of a communal towel. Use an anti-bacterial disinfecting solution or wipe on frequently used items like the keyboard, mouse and phone, and do the office a favor and wipe down the communal printer and copier which might have been frequented by a sick colleague.
- **Avoid going into work when you feel the onset of cold symptoms.** While the inclination might be to power through an illness and go to work when you're starting to feel run down, the best thing to do is stay home. Going to work not only puts your co-workers at risk of getting sick, but may further strain your immune system. If you feel you must work while sick, talk to your boss about handling some projects from home or see if one of your co-workers might be able to help out on a project (you can return the favor for them in the future should they become sick).
- **Don't eat in or use common areas like break rooms and cafeterias.** Try not to sit or stand near your healthy co-workers when you're sick. If you must be in close proximity, be diligent about covering your mouth and nose when sneezing or coughing, and avoid shaking hands, sharing a pen or touching common surfaces like copier control keys as much as possible.

The best thing you can do to protect yourself is take defensive measures during the wintertime. Whether you are sick or currently healthy, prevent the spread of germs and bacteria by washing your hands regularly with soap and warm water for at least 20 seconds. While hand sanitizers are a good tool when you don't have access to running water, they are not a replacement for proper handwashing. ■

**Source:** NSF, *The Public Health and Safety Organization*, [www.nsf.org](http://www.nsf.org).

## HR Quiz

### May an employer ask whether an employee's intellectual disability is causing his performance problems?

**Q Issue:** *Peter, a mailroom clerk, has an intellectual disability and Attention Deficit Disorder. He has performed his job successfully for five years but recently has started making mistakes in sorting and delivering letters and packages. He also appears anxious and emotional. His supervisor, Jerry, noticed these changes soon after Peter moved into his brother's house. Can Jerry talk to Peter about his intellectual disability and his performance problems?*

**A Answer:** Jerry can ask Peter why his performance has declined and may explore ways to ensure that mail is not misdirected. However, Jerry may not ask Peter questions about his intellectual disability unless there is objective evidence that Peter's poor performance is related to his disability.

Generally, an employer may ask disability-related questions or require an employee to have a medical

examination when it knows about a particular employee's medical condition, has observed performance problems, and reasonably believes that the problems are related to a medical condition. At other times, an employer may ask for medical information when it has received reliable information from someone else (for example, a family member or coworker) indicating that the employee may have a medical condition that is causing performance problems. Often, however, poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.

**Source:** *EEOC Guidance "Revised Questions and Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act."*

## DATING

### Thirty-eight percent of workers have dated a co-worker

An annual survey on office romance conducted by Career-Builder found nearly two in five (38 percent) U.S. workers have dated someone who worked for the same company, and 16 percent said they have done so more than once.

**Love and marriage.** Of those who dated someone from the office, nearly one-third (31 percent) ended up marrying their office sweetheart. Twenty percent of workers who dated someone at the office admitted that at least one person in the relationship was married at the time.

**We'll always have the lunchroom.** Office romances most often start with co-workers running into each other outside of work (12 percent) or at a happy hour (11 percent). Some other situations that led to romance include late nights at work (10 percent), having lunch together (10 percent), and love at first sight (9 percent).

**Our little secret.** While most workers were open about their dating situation, nearly two in five (39 percent) said they had to keep their relationship with a co-worker a secret. Twenty-six percent of respondents who have dated someone

at work said they accidentally ran into co-workers while out socially with their office sweetheart. Of these workers, 43 percent pretended that they weren't dating their co-worker.

#### Tips for navigating a workplace romance:

- **Check the company handbook** – Some companies have strict policies around office romances. Acquaint yourself with the rules before turning a professional relationship into a personal one.
- **Proceed with caution** – Some romances lead into marriage, but others can lead into disaster. Seven percent of workers who have dated a co-worker reported having to leave their jobs because their office romance soured.
- **Compartmentalize** – Keep your work life separate from your home life. Avoid showing PDA in the office and don't involve co-workers in personal disagreements.
- **Think Before You Post** – Be careful what you post on social media. You can end up outing your relationship before you're ready to discuss it. ■

**Positive view.** Many view the delay as positive, providing employers with more time to comply with the various complicated rules. According to Steve Wojcik, vice president of public policy at the National Business Group on Health, “The rule recognizes the variations among employers, industries and employment situations and takes a flexible, common sense approach. We appreciate the flexibility that the rule gives employers of all sizes as we implement the employer mandate.”

Neil Trautwein, at the National Retail Federation, said the administration should get “a gold medal” for “its agility and flexibility” in working with employers.

“I imagine we’ll have some employers in that space who were not offering coverage before and were gearing up to offer it in 2015,” said Edward Fensholt, director of compliance services for Lockton Benefit Group. “They’ll probably be delighted with the delay.”

The National Restaurant Association praised the final rules. “It’s welcome news, as is anything that helps employers figure this out and gives them time to comply,” said Michelle Neblett, the group’s director of labor and workforce policy. Many National Restaurant Association members have employees who work odd schedules and do not receive benefits, and many of these employers do not have systems in place to track worker hours.

**Negative view.** However, not everyone viewed the final rules in a positive light. For instance, Ron Pollack, executive director of the consumer lobby Families USA, said he was “very surprised” by the new postponements. He believes that since most large employers already offer health insurance, the ACA’s requirements are “not that burdensome.” In addition, for workers at large companies that do not provide coverage,

“it’s very unfortunate... that they don’t have a guarantee it will be extended to them for quite some time,” Pollack added.

In addition, many employers have already spent a lot of time and money on trying to begin to comply with the new mandate. Lauren Yurick, a partner and benefit consultant at Benefit Resource Group, noted that “the government seems to have no regard for the lengths that employers have been going to in order to get in compliance. With the threat of more DOL audits, and penalties that will be assessed, our groups in this space have spent countless hours getting their compliance house in order. That often involves a domino effect on their other workforce initiatives and this disruption seems to be given no consideration with these new rulings.”

**Looking toward the future.** While some are glad and some are mad about the employer mandate delay, it is important for employers to look toward the future. “Employers should keep in mind that these transition rules are temporary and limited. So, while putting pay-or-play planning on the backburner until late 2014 (or late 2015 for employers with 50-99 full-time employees) might seem attractive, employers should begin working with trusted advisors now to make sure they are ready when they face the full brunt of these rules,” said Seth Hanft, employee benefits and tax expert at law firm Porter Wright.

Some are just glad that the final rules have finally been released and anticipate more guidance soon. “We were anticipating [the guidance] and they [IRS] indicated there is more guidance to come out in terms of the [employer] reporting rules, which go hand-in-hand with these rules,” says Paul Hamburger, a DC-based partner and co-head of Proskauer’s Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. “So we’ll have a complete picture of what we’ll need to do for 2015 and 2016 once those final employer reporting requirements come out, which they say in the fact sheet will be issued ‘shortly.’” ■

- Auditing for compliance in key areas including: salary administration; recruiting and hiring; orientation; terminations; training; employee relations; and files/record maintenance.
- Requiring HR reps to attend seminars or otherwise reinforce their knowledge of applicable regulations, key issues, and emerging legal trends.
- Knowing the rules is not the same as understanding what compliance looks and feels like. Much like lawyers might observe other litigators in action or practice arguments before associates or mock juries to gauge reactions, HR reps should be required to take steps

to get a real-world feel for the consequences of their actions. For example:

- Practice, practice, practice. Have HR reps practice routine functions where stray remarks or small missteps could lead to big liability.
- Seek feedback. Ask employees to provide anonymous feedback (e.g., through a questionnaire) about how they think the HR department is doing.

Taking these and similar measures will not only reduce an employer’s risk of liability but will also likely instill in employees a sense of confidence in management and improve the company’s reputation in the community and among shareholders. ■

## MOBILE DEVICES

## Study shows 37 percent of mobile users access pay information via device

ADP, a provider of human capital management solutions, has released a new study that examines the use of mobile applications for human resource functions across the United States. The study found that 37 percent of registered mobile users are leveraging mobile HR applications to access their pay information compared to 23 percent who are utilizing desktops and laptops.

*"There are numerous benefits for U.S. businesses adopting mobile technologies, including helping to increase productivity and aid real-time decision-making."*

"There are numerous benefits for U.S. businesses adopting mobile technologies, including helping to increase productivity and aid real-time decision-making," said Roberto Masiero, vice president and head of ADP's Innovation Lab. "The human resources function is a key asset in today's business mobility landscape because of its ability to connect and inform the workforce in an easily scalable way."

The impact of mobile technology on all organizations is already significant. More than half of adults in the United States own a smartphone and many are using them at home and at work. The ADP Research Institute study analyzed a subset of ADP's mobile data across approximately 5,000 organizations reflecting 65,000 individual active mobile users, and identified several key findings.

- Employees value viewing their pay information via a mobile application in real time. Twice as many employees view their pay information as those who view their benefits information on their mobile device.
- Industries operating outside a traditional office want HR information on the go. The study found that certain industries — such as construction, natural resources and mining; manufacturing; transportation and utilities; and the real estate, rental and leasing industries—have approximately a 25 percent higher concentration of employees utilizing mobile for HR functions than any other industry. This increased usage of a mobile application may be explained by the fact that employees in those industries may not typically have access to traditional desktop computers.

- Professional and business services' mobile usage is 20 percent below the average. With greater access to laptops and desktops, fewer employees in this sector are taking advantage of mobile HR applications.

While industries are at different stages in their adoption of mobile HR applications, business mobility will likely become the "new normal." Generation X and Millennials were the first to adopt mobile technologies. The future workforce, Generation C (those born since 1997), is likely to demand mobile technology based on ingrained behaviors linked to growing up with constant access to information wherever their day takes them. Anticipating this shift, companies are already investing in more HR functionality on mobile devices, offering time entry, retirement account management and work schedule viewing as well as company news through mobile applications.

As a leading provider of HCM solutions, ADP has placed significant investment in developing mobile solutions for its clients. Available from both Apple® iTunes and Google Play, the ADP mobile solutions app has been downloaded by over two million users. The company also recently unveiled a tablet version of the mobile solutions app with functionality for managers and business executives.

**About the study.** The ADP Research Institute used aggregated and anonymous usage data from U.S.-based midsized organizations (50-999 employees) for the month of May 2013. First, to compare mobile and traditional desktop Web usage for the viewing of pay statements, the study leveraged data from approximately 50,000 organizations using stationary Web access, such as desktops and laptops, and more than 25,000 organizations using mobile access to view pay statements. For the comparison, active user rates were determined as a percentage of employees who were registered users and compared across the two channels.

Mobile access usage patterns for both pay and benefits functions were analyzed by industry, focusing on the average number of mobile users per organization and the average number of mobile page views per (active) user. The mobile usage metrics examined usage patterns, leveraging a subset of ADP's mobile data across approximately 5,000 organizations (all between 50 and 999 employees), reflecting 65,000 individual active mobile users. All organizations in the subset offered the capability of viewing at least pay and benefits information, and included employees actively using mobile devices to access this information. The research also included the analysis along industry lines, revealing key differences concerning industry concentrations of users and page views. ■

## HR Notebook

### January unemployment falls below 7%

The unemployment rate declined from 6.7 percent to 6.6 percent in January, while total nonfarm payroll employment edged up (+113,000), the U.S. Bureau of Labor Statistics (BLS) reported February 7. The number of unemployed persons changed little to 10.2 million in January. Since October, the jobless rate has decreased by 0.6 percentage point.

Employment rose in retail trade (+55,000), wholesale trade (+15,000), professional and business services (+19,000), manufacturing (+9,000), and mining (+5,000). Healthcare employment changed little in December (-6,000). Employment fell in December in Information (-12,000) and Construction (-16,000). Employment in other major industries, including transportation and warehousing, financial activities, leisure and hospitality, and government, changed little in December.

### Consumer prices rise .1% in January

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.1 percent in January on a seasonally adjusted basis, the BLS reported. Over the last 12 months, the all items index increased 1.6 percent before seasonal adjustment.

Increases in the indexes for household energy accounted for most of the all items increase. The electricity index posted its largest increase since March 2010, and the indexes for natural gas and fuel oil also rose sharply. These increases more than offset a decline in the gasoline index, resulting in a 0.6 percent increase in the energy index.

### Real average hourly earnings falls 0.3 percent in December

Real average hourly earnings for all employees fell 0.1 percent from December to January, seasonally adjusted, the U.S. Bureau of Labor Statistics reported. This increase stems from a 0.2 percent increase in average hourly earnings being partially offset by a 0.1 percent increase in the Consumer Price Index for All Urban Consumers (CPI-U). Real average weekly earnings rose 0.1 percent over the month due to the 0.1 percent increase in real average hourly earnings combined with an unchanged average workweek.

Real average hourly earnings rose 0.4 percent, seasonally adjusted, from January 2013 to January 2014. The increase in real average hourly earnings, combined with unchanged average workweek, resulted in a 0.4 percent increase in real average weekly earnings over this period.

## Study looks at top staffing challenges companies are facing in 2014

Is the recession really behind us? For many U.S. companies, the answer is no.

Fifty-eight percent of employers said that when it comes to their business, it feels like the recession is not over. Among small businesses with 50 or fewer employees, the number of employers who share this sentiment is 66 percent.

Stagnant or declining sales and human capital issues are among the concerns employers voiced in the study. Sixty-two percent reported that sales did not increase at their companies in the last half of 2013. While the outlook for 2014 is improving, more than half (56 percent) of employers don't expect a rise in sales in the first half of the year.

More than half of employers say they currently have positions for which they can't find qualified candidates. In addition to recruiting high-skill applicants, some of the top staffing challenges companies say they are facing in 2014 include:

- Retaining top talent – 32 percent
- Lifting employee morale – 31 percent
- Providing competitive compensation – 27 percent
- Worker burnout – 26 percent
- Maintaining productivity levels – 25 percent
- Managing organizational changes – 20 percent
- Employee engagement – 17 percent
- Providing upward mobility – 17 percent
- Providing enough training opportunities to employees – 15 percent
- Cutting down on cost-per-hire – 12 percent
- Lack of succession planning – 11 percent
- Limited recruitment budget – 11 percent
- Adapting to new ways to source/recruit candidates – 8 percent ■