



July 2010

Editor's Column: Faking It



I just listened to a great [Freakonomics podcast](#), in which the authors discussed “faking it.” Everything from saying, “I’m sorry” to “I love you,” as well as “Yes, I’m happily married with kids and I play golf” in order to land a sales job. Of course, there’s a fine line between innocence and manipulation when we fake it. We figure that it’s OK to lie about family life because if it helps you to get the job, you know you’ll perform when you get there and then your employer will have no regrets. So what’s the harm? We say we’re sorry, even though we don’t mean it because we still want the other person to like us – and, in the end, we want to be able to like ourselves.

One of my favorite questions when I’m recruiting someone is, “What felt unfair to you in your last job?” This is where “faking it” meets the road. How we respond to this question provides a good measure of our integrity or personal culture. Will we always answer with 100% honesty? Really? Even if doing so could hurt you or someone else? Is brutal honesty always worth the price paid?

Of course, where to draw this line is never the same for two people. In large measure, it’s about having enough self-confidence to handle things in a way that would make you proud – to perhaps mitigate, but at the same time accept, any discomfort the honest answer might cause.

Unfortunately, there’s a lot of faking it in the workplace, caused by any of Maslow’s Hierarchy of Needs: Survival, security, belonging, ego gratification, and self-actualization. It’s easy to see how we might lie for survival purposes (“I really need this job”). However, it’s more difficult to justify faking it for self-actualization (“This little white lie might spur this person toward positive action”).

As the podcast noted, everybody fakes it. In the end, nobody is responsible for the consequences of our faking it except us. Even if the outcome is positive, it can put a dent in our soul, somehow cheapening the experience. The end, of course, does not always justify the means.

So what lesson can we learn? Create a work environment that diminishes the need for faking it. It’s about communicating expectations, ethics, vision, and the other variables that come in to play. In *Four Arguments*, Don Miguel Ruiz says that we need to be impeccable with our word – without exception. As a manager, we don’t BS people hoping we can gain their loyalty or productivity. On the other hand, if people aren’t performing on the job, we need to be honest about saying so, despite the fact that this might not feel fair to the other person. As employees, we can be honest about our

commitment to an organization, our work ethic, and our long-term plans. We can make sure that we don’t place ourselves in situations or with companies where we can’t be honest.

One of the podcast authors asked what would happen if we had a “National No Faking It Day,” where people decided to be brutally honest for 24 hours. In response, the other authors predicted “a jump in the homicide rate.”

In the end, the authors thought that, in order to survive, we need to fake it. For example, it probably wouldn’t make sense for a manager to say exactly what’s on her mind at the moment she’s upset with someone she dislikes. We might not want to speak truthfully about how we feel about a client while they’re in front of us. Or we might not want to punch that guy in the nose – even if he deserves it.

Finally, bear in mind that we have been conditioned to believe that we should “fake it until we make it” by pretending that we like an unpleasant person or situation until we really do or the problem goes away.

FMLA Clarification Ensures All Caregivers the Right to Family Leave

All families, no matter what they look like, are protected by the Family and Medical Leave Act (FMLA). “Workplaces have changed over the last ten years and how we view families has evolved as well,” said DOL Secretary Solis. That message was solidified when the department announced this week that an employee who assumes the role of caregiving for a child is entitled family leave regardless of their legal or biological relationship to the child. This clarification of the law is a victory for many non-traditional families, including families in the lesbian, gay, bisexual, and transgender community, who have often been denied family leave. The FMLA allows workers to take up to 12 weeks of unpaid leave during any 12-month period to care for loved ones or themselves.

[Read the News Release here.](#)

[Read the Administrator's Interpretation here.](#)

“The things to do are: The things that need doing, that you see need to be done, and that no one else seems to see need to be done.”

- Buckminster (“Bucky”) Fuller
Inventor and futurist

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We have also provided you with the [Form of the Month](#)

Ex-Felons: What's Their Story?

In my workshops, I joke that it “only takes one felon to ruin a day.” This isn't funny, especially if such a person has victimized you. Unfortunately, despite the recommendation that employers should do criminal background checks on all employees, most still don't, either because they think that bad things only happen to other companies or they claim that they don't have the time or money. This is a huge mistake. Remember, felons have sold drugs, defrauded, robbed, assaulted or killed people, embezzled, or engaged in many other criminal acts. I'm not saying that you should never hire ex-felons. I have some printing company clients who run their presses 24/7. Most of their third shift have criminal records. At least they know what type of person they're dealing with!



Remember this too: If you use a temporary firm, recruiter, leased employee, etc. make sure that whoever provides you with this person has done their criminal background checks.

Consider using HR That Works partner www.globalhrresearch.com for your criminal background checks.

Healthcare Reform Concerns

In their recent Webinar on Healthcare Reform, attorneys Doug Seaton and Emily Ruhsam focus on nine key changes that take effect on January 1, 2011 (for calendar year health plans):

1. Non-grandfathered plans must provide for certain internal appeals procedures (including an external review process).
2. Non-grandfathered plans must cover certain preventative services (i.e., immunization and infant screenings) without cost sharing.
3. Non-grandfathered, fully insured plans must undergo non-discrimination testing (currently a requirement for self-insured plans only). This is similar to the top-heavy discrimination testing for 401(k) plans.
4. Plans that offer dependent coverage must offer coverage until age 26 (grandfathered plans must cover such dependents only if the dependent is not eligible for other employer-sponsored coverage).
5. Prohibits pre-existing condition limitations for children under 19.
6. Abolishes lifetime limits on minimum essential benefits.
7. Prohibits “unreasonable” annual limits on minimum essential benefits.
8. Prohibits recession (cancellation) of participants.
9. Prohibits reimbursement of over-the-counter medications (without a physician prescription through a Health Flexible Spending Account, Health Reimbursement Account, Health Savings Account, or Archer Medical Savings Account).

HR That Works members can watch the Webinar and read the complete report on HR That Works.

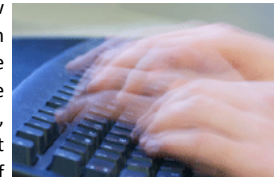
Word of the Month: Ethos

The fundamental character or spirit of a culture; the underlying sentiment that informs the beliefs, customs, or practices of a group or society; dominant assumptions of a people or period.

What is the ethos of your company?

Privacy Rights in Personal E-Mail

In *Stengart v. Loving Care*, the New Jersey Supreme Court held that an employee had a reasonable expectation of privacy in e-mails she sent to her attorney via a personal, password protected e-mail account on a company computer. As part of her employment, Loving Care issued Ms. Stengart a laptop computer. Loving Care's electronic communications policy stated that the company had a right to review and access all material kept on its electronic media systems at any time, with or without warning. The policy also allowed employees to use its servers and computers for occasional personal email or other use.



Ms. Stengart used her company-issued laptop computer to access her personal Yahoo! E-mail account and to correspond with an attorney regarding her allegations of harassment and discrimination by Loving Care. She eventually resigned her position and sued Loving Care. The company hired a computer specialist to retrieve files from Ms. Stengart's laptop. The specialist found her correspondence with her attorney, which the laptop had automatically saved in a “cache” folder of temporary Internet files. Loving Care argued that Ms. Stengart's e-mails were not privileged or confidential because she had no expectation of privacy in communications on its media systems.

The New Jersey Supreme Court disagreed, holding that Loving Care's communications policy was too broad to encompass private, password protected e-mail communications, especially where the content was attorney-client communication. Loving Care's failure to include personal, password protected e-mail in its electronic communications policy specifically, as well as its allowance of occasional personal use created a reasonable expectation of privacy. Although recognizing a company's ability to enact policies that protect its assets, reputation, and productivity, and to ensure compliance with company policy, the court held that Loving Care had no legitimate purpose in reviewing the content of attorney-client communication.

Employer Tip: Although this is a “narrow” decision that applies only in New Jersey to communication with counsel, it sends a clear warning to all employers about diving too deeply into employee e-mails, etc. Employers should also heed a warning that they “specifically include personal, password protected e-mail in its electronic communications policy,” and beware of any “allowance of occasional personal use creating a reasonable expectation of privacy.”

Article courtesy of Pettit Kohn Ingrassia & Lutz.

Failure to Perform Eliminates Right to FMLA Leave



The U.S. Court of Appeals for the Eleventh Circuit (covering Alabama, Florida, and Georgia) has held that an employee does not have the absolute right to commence FMLA leave. In [Krutzig v. Pulte Home Corp.](#), the plaintiff, who at the time was on a performance improvement plan, requested FMLA so that she could have surgery on her foot. On the same day that the plaintiff requested leave, a customer filed a complaint with a company vice-president against the plaintiff. The next day, Pulte Home Corp. terminated the plaintiff, based on her failure to address the issues raised in her performance improvement plan and the complaint made by the customer. The plaintiff sued, claiming that her termination was in retaliation for taking FMLA leave and that her employer interfered with her right to take leave under the FMLA. However, the company vice-president who terminated the plaintiff testified that he was not aware that the plaintiff had requested leave at the time he made his decision. Based on these facts, the trial court granted summary judgment in favor of the employer and dismissed the plaintiff's lawsuit.

The Court of Appeals affirmed the trial court's decision, holding that "[a]s with the FMLA right to reinstatement, the FMLA right to non-interference with the commencement of leave is not absolute, and if dismissal would have occurred regardless of the request for FMLA, an employee may be dismissed, preventing her from exercising her right to leave or reinstatement." The Eleventh Circuit joined the Sixth, Eighth, and Tenth Circuits in holding that "an employee who requests FMLA leave has no greater protection against her employment being terminated for reasons unrelated to an FMLA request than she did before submitting her request."

Failure to Investigate Does Not Give Rise to Stand-Alone Retaliation Claim

The U.S. Court of Appeals for the Second Circuit (covering Connecticut, New York, and Vermont) has ruled that an employer's deliberate failure to investigate a complaint of discrimination does not constitute a stand-alone act of retaliation. In [Fincher v. Depository Trust and Cleaning Corp.](#), the plaintiff alleged that she complained to a human resources manager about what she believed was racially biased treatment toward black employees in her department. The plaintiff claimed that the human resources manager told her that he was not going to open up an investigation of her claim of race discrimination. The plaintiff resigned and filed claims under federal, state, and local laws for retaliation.

The Court of Appeals affirmed summary judgment in favor of the employer, finding that the employer's alleged failure to investigate discrimination was not in itself a "materially adverse action" which could subject the employer to retaliation liability. The court noted that under the seminal case [Burlington N. & Santa Fe Ry. Co. v. White](#), "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The court held that an employee's knowledge that her employer has declined to investigate her complaint does not ordinarily constitute a threat of further harm.

The NLRA and Federal Contractors

The U.S. Department of Labor (DOL) has issued a [final rule](#) that requires federal contractors and subcontractors to post a notice advising employees of their rights under the National Labor Relations Act (NLRA), the primary law governing relations between unions and employers in the private sector. This notice advises employees of their rights under the NLRA to form, join and assist a union, and to bargain collectively with their employer. It also lists examples of illegal conduct by employers and unions, and provides contact information to the National Labor Relations Board. Federal contractors and subcontractors must post the prescribed notice conspicuously in plants and offices where employees covered by the NLRA perform contract-related activity, including all places where notices to employees are customarily posted, both physically and electronically. Employers that fail to comply with these notice requirements may be subject to sanctions, including suspension or cancellation of the contract and debarring them from future federal contracts. For more information and to obtain copies of the prescribed notice, visit the [DOL Web site](#).

Above articles courtesy of Worklaw® Network firm [Shawe Rosenthal](#).

Clamping Down On Credit Histories

For many years, we've recommended that employers conduct credit histories on all job applicants and post-hire in specific categories. The fact is, someone with a poor credit history is a greater risk than someone who has a good record. However, to protect workers impacted by the recession, Oregon, Washington, and other states have begun passing laws that narrow the scope of these inquiries. The EEOC is also raising numerous concerns in this area. The Oregon statute limits the inquiry to cases in which a person's credit is "substantially job-related," which is defined as:

- An essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit. Financial information customarily provided in a retail transaction includes information related to the exchange of cash, checks, and credit or debit card numbers.
- The position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.

Click here to see the [Oregon statute](#).

Here's what the EEOC says:

"Pre-Employment Inquiries and Credit Rating or Economic Status
"Inquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question."

Here's some [data gathered in an effort to encourage these regulations](#).

Here's a [suit filed by the EEOC](#). Since at least 2001, the EEOC said, Freeman has rejected job applicants based on their credit history and if they have had one or more of various types of criminal charges or convictions. The EEOC lawsuit charged that this practice has an unlawful discriminatory impact because of race, national origin, and sex, and is neither job-related nor justified by business necessity.

Click here to see the [FTC site on credit rating](#).

The Bottom Line: Asking for credit backgrounds poses risks for employee and employer alike. Make sure that you work with a company such as www.globalhrresearch.com that helps keep you abreast of the rapidly changing legal requirements in this area.

"Son or Daughter" Defined for FMLA Enforcement

On June 22, the U.S. Department of Labor issued an interpretation letter (No. 2010-3) clarifying the definition of "son or daughter" under the Family and Medical Leave Act ("FMLA"), as it relates to whether leave may be taken by employees raising children "in loco parentis" (where they lack a biological or legal relationship to a child). In determining whether an employee is eligible for FMLA leave, the interpretation provides that "the employer may require the employee to provide reasonable documentation or statement of family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship." The letter also states that "regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child."

The letter specifically mentions its application to unmarried partners and same-sex partners, and adds that the fact that a child has a biological parent at home or has both a mother and a father does not prevent a finding that the employee with a non-biological relationship is eligible for FMLA leave.

To read the Opinion Letter go to: http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLA%2010_3.pdf

Form of the Month

Education Reimbursement Agreement (PDF)



Training is the lifeblood of many companies today; everything from extensive on-boarding to paying for expensive MBA programs. To protect from an employee getting educated and then immediately leaving, many companies use a Reimbursement Agreement such as this one. One caveat: Make sure that your state law and contract allows you to offset any monies owed from a final paycheck. Some states, such as California, do not allow a "self-help" remedy. You would have to go to court to enforce the terms of the contract.

(HR That Works Users can access this form in Word format by logging on to the site).