



## Compliance & Culture Newsletter

*"Most people don't need a boss. They need someone to listen to them."*

- Maurice Mascarenhas

# August 2010

This issue discusses:

### Editor's Column: The Big HR Show



Since I hadn't been to a SHRM convention in a number of years, I felt it was my duty to attend one since it was occurring here in San Diego. After poring through the workshops, speaking to dozens of HR professionals and vendors, and roaming the entire exhibit hall, here's what I observed:

- HR is BIG business. There are approximately 10,000 attendees and the convention takes up the entire San Diego Convention Center (which is quite large). There were more than 150 concurrent sessions over the four days of the convention. The keynote speakers were Al Gore and Steve Forbes, (neither of which I had any interest in listening to- and neither of whom have anything to share about HR. Just ask the folks who heard them!). Other well-known names included Marcus Buckingham, Dave Ramsey, and David Ulrich.
- I'm sure many of the attendees were there to earn up to 29 recertification credits in one lump toward their PHR, SPHR, or GPHR certifications (60 are required every three years).
- The convention discussed a wide variety of subjects, broken down into:
  - Employment law and legislation
  - Strategic management
  - International management
  - International HR
  - Total rewards
  - Personal and skilled development
- The breadth of workshops offered was as broad as the HR experience itself: Everything from hiring employees to letting them go and everything in between. Frankly, I didn't see much new except everybody's increased panic on how to manage healthcare benefits.
- For an HR professional to attend the program it cost at least \$1,200 in registration fees, plus \$750 on room and board, and \$500 in plane fare unless they drove here. This expense alone rules out many small company practitioners.
- The company size of attendee broke down this way:
  - Fewer than 100: 16.59%
  - 101-499: 22.90%
  - 500-999: 12.25%
  - 1,000-9,999: 27.09%
  - Greater than 10,000: 21.80%



When it comes to the "weight" of the total employee population, companies with more than 1,000 employees dwarfed the conference.

I spent time going through the enormous vendor floor. According to SHRM, there were more than 565 executive exhibitors in a variety of groups:

- Compensation and benefits
- Employee relations
- Employee selection/staffing
- Health, wellness, and safety
- HRM services
- HR information and systems
- Training and Development

By far, the largest vendors were the recruitment sites (Monster, Yahoo, HotJobs, etc.) and the Payroll/PEOs vendors (ADP, Ceridian, PayChex, etc.).

In trying to get a sense of where the "buzz" was, the longest line I witnessed was roughly 30 women waiting for Erik



Estrada's (yes, that Erik Estrada from CHiPs) autograph.

Experts were doing live presentations to small audiences, some with very interactive screenings of their programs, and there were surprisingly large number of educational providers. All in all, the experience reminded me very much of the last convention I attended in San Diego.

The reality is that most of the companies in the HR That Works range of 15-500 employees get very little play at this conference. There's certainly plenty geared toward large organizations. I can see every reason why vendors have an incentive to focus there. Not a single vendor said that they focus on smaller employers.

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

Most of the companies that use our program don't send their employees off for MBA programs, buy FMLA tracking software, use elaborate employee incentive programs, recruit globally, or need an elaborate performance management system. What these companies do need is to be great at HR basics -- the blocking and tackling stuff:

- Hiring the right people
- Knowing how to make them productive
- Making sure that you can keep productive and trustworthy employees
- Training them to ratchet up their performance
- Getting them to play team ball
- Keeping your managers and employees from doing anything stupid that would get you sued

I came away from this convention ever more assured that we're going down the right path by focusing on the needs of companies with 15 to 500 employees. Let me know how we can help your company!

### ADEA Claims: What's Reasonable?

In light of recent U.S. Supreme Court cases, the EEOC has proposed regulations to address the scope of the "reasonable factors other than age" (RFOA) defense available to employers under the Age Discrimination Employment Act (ADEA). According to the EEOC, there are six non-exhaustive factors to consider in determining whether an employment practice is reasonable.



1. Where the employment practice and manner of its implementation are common business practices.
2. The extent to which the factor is related to the employer's stated business goals.
3. The extent to which the employer took steps to define the factor accurately and apply it accurately and fairly (e.g., training, guidance, instruction of managers).
4. The extent to which the employer took steps to assess the adverse impact of its employment practices on older workers.
5. The severity of the harm to the individuals within the protected age group, in terms of both the degree of injury and number of persons affected adversely, and the extent to which the employer took preventative or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps.
6. Whether other options were available and the reasons the employer selected the option it did.

The EEOC said that it also looks into whether supervisors (a) have unchecked discretion to assess employees subjectively; (b) evaluate employees based on factors known to be subject of age-based stereotypes; and (c) receive guidance or training about how to apply the factors and avoid discrimination. To avoid unnecessary disparate impact and other discrimination type claims, consider these factors whenever you make an employment-related decision, especially if you terminate a group of employees.

### Employment Litigation in the News

A review of employment cases during one recent month included these topics:

1. Public policy violation/whistleblower	10. Trade secret/non-competition agreements
2. Breach of contract/implied covenant	11. Workers compensation/OSHA
3. Fraud	12. Independent Contract
4. Defamation	13. Respondeat superior
5. Wage/hour	14. Privacy
6. Discrimination	15. Arbitration
7. Harassment	16. Attorneys and attorneys' fees
8. Retaliation	17. Statutes of limitation
9. Interference with contractual relations	18. And others

Here are a few recent employment litigation-related headlines:

- *Sales Representatives \$480,000 Wrongful Termination Award is Affirmed*
- *Evidence Supported Whistleblowers' Discrimination Claim, but Not Sexual Harassment*
- *Undocumented Workers Had Standing to Assert Violation of Prevailing Wage Law*
- *Employee Who Was Threatened and Assaulted by Co-Workers Stated Wrongful Termination Claim*
- *Employer Could Recover Training Costs from Employee, But Can't Recover Same from Final Check*
- *Housekeeper's Award of \$70,000 in Unpaid Wages Affirmed*
- *Employee Who Provided Customer Service and Training Related to Company Software Not Exempt from Overtime*
- *Employer Bears Burden of Showing Reasonableness of Layoff Criteria in Age Discrimination Case*
- *\$1.8 Million Judgment Affirmed in Favor of Employee Discriminated Against on the Basis of Race and Gender*
- *Employee Who Requested Medical Leave for Depression While Working for Another Employer May Have Been Improperly Terminated*
- *Court Upholds \$1.088 Million Verdict in Favor of Terminated Italian National*

These are just a few example of the numerous, off-the-wall HR exposures your business might face. None of these companies ever planned on getting in the headlines — at least not like this! As you can see from many of the titles, employment practice claims might not be frequent: but when you face one, they tend to be severe. By the way, I didn't list headlines about case verdicts favoring employers. Although these are rare, they still end up costing companies tens of thousands, if not hundreds of thousands of dollars, just to be "right."

## A Change of Schedule Can Create a Reasonable Accommodation



In [Colwell vs. Rite Aid Corporation](#), defense counsel posed a unique argument that the court quickly dismissed. Essentially, a clerk at Rite Aid suffered from glaucoma and asked that she have her shift changed from nights to days since she felt it was dangerous to drive at night, given her vision problems. The

manager refused to make the requested accommodation, saying it would not be fair to the other employees who would, of course, also prefer the day shift over the night shift. There were also concerns that seniority and other factors justified not providing her the requested accommodation.

In a last-ditch effort to convince the court in the reasonableness of their denial, Rite Aid argued that she was fine while she was at work, where she did not need an accommodation, and that the act of getting her to work was not their problem. As you can imagine, the court made mincemeat of this argument, essentially saying that changing someone's work schedule is a reasonable accommodation.

Here's the specific language of the ADA:

"The term 'reasonable accommodation' may include a) making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities; and, b) job restructuring, part-time, or modified work schedules (emphasis added), reassignment to a vacant position, acquisition; or modification of equipment or devices; appropriate adjustments or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities."

As a side note, the employee quit, claiming a "constructive discharge: because of the failure to accommodate." Although the court agreed with her accommodation argument, it did not agree with her constructive discharge case because she made little effort to resolve the accommodation issue.

Remember this: A company must engage in accommodation unless it creates an "undue burden." The courts have reminded us that this does not mean an inconvenience for the employer; it means an "undue burden" – a standard that Rite Aid could not meet. When discussing the breakdown in the interactive process which led to the workers constructive discharge, the court reminded us that, "A party who fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility ... the last act in the interactive process is not always the cause of a breakdown ... the court must examine the evidence as a whole to determine whether the evidence requires a finding that one party's bad faith caused the breakdown."

*Lesson:* Don't forget about the ADA language set forth above. The effort to make these accommodations is an employer's obligation unless it results in an undue burden. Don't give up on the interactive process. Employers run into trouble when they presuppose that something would be an undue burden to the company. Our advice is that unless safety, security, or other critical issues are involved, you should let the employee attempt the accommodation and only then determine if it is an undue strain on the employer.

## Beware of Classifying All Managers in All Locations as Exempt

In [Arenas vs. El Torito Restaurants](#), a California appellate court ruled on the possibility of a class action lawsuit for the misclassification of all managers at the El Torito restaurants as exempt.

Although the court gave a lengthy analysis about the appropriateness of the class action case, for our purposes, what's important was that it warned employers that just because managers might be exempt at one store they might not be exempt at another store. It depends on the circumstances.

At some El Torito restaurants, many of the managers also did work performed by the staff or busboys. In other larger, busier restaurants, they did less of this work. Employers should determine whether managers are exempt on a case-by-case basis unless there's complete uniformity in operations.

The plaintiff's complaint also lays out the laundry list of exposures employers face by misclassifying managers as exempt; violation of wage and overtime regulations, failure to furnish wage and hour statements, or not providing rest and meal periods.

## Classifying Workers as Independent Contractors: Risky Business

[JustMed v. Byce](#), a decision by the 9th Circuit Court of Appeals, involved whether Byce, a programmer, owned the source code of devices owned by JustMed.

The court ruled that, given the facts of the case, Byce was an employee rather than an independent contractor. If the court had decided that Byce were an independent contractor, he would own the rights to the source code because it was not contracted to be a work for hire. This is one of the risks of using the independent contractor label – something many early-growth employers do to avoid the burden of managing payroll and other functions.

*Lesson:* If you're going to hire an independent contractor to work on a project that you want to own, make sure that the independent contractor agreement contains "work for hire" language in it. Otherwise, it's safer to treat this person as an employee for payroll and other purposes, so that their employment status would make their contribution become a work for hire.

## National Labor Relations Act Turns 75

Whether you love it or hate it, the NLRA created a worldwide watershed in industrial relations. They have put up an [excellent website](#) celebrating the historical event.



### Speaking of the NLRB ...

**On July 1, 2010, the NLRB outlined its plan for considering two-member cases in wake of the Supreme Court's New Process Steel ruling.**

In response to numerous inquiries, the National Labor Relations Board outlined its plans for handling returned cases following the Supreme Court's recent decision in [New Process Steel v. NLRB](#) that the Board no power to decide cases when three of its five seats were vacant. [Editor's note: This decision gave the green light to the process of dismantling the Bush era pro-employer decisions.]

During a 27-month period that ended with the recess appointments of two members last March, the Board operated with two members: Current Chairman Wilma Liebman and former Chairman and Board Member Peter Schaumber. They decided nearly 600 cases on which they could agree, while those remaining were held for additional Board members.

At the time of the June 17 Supreme Court decision, 96 of the two-member decisions were pending on appeal before the federal courts – six at the Supreme Court and 90 in various Courts of Appeals. The Board is seeking to have each of these cases remanded to the Board for further consideration.

Each of the remanded cases will be considered by a three-member panel of the Board, which will include Chairman Liebman and Board Member Schaumber. Consistent with Board practice, the two other Board members not on the panel will have the opportunity to participate in the case if they so desire.

It's unclear at this time how many of the two-member Board rulings not already challenged in the federal appellate courts can or will be contested and how many may now be moot.

For the first time since December 2007, the Board is now at full strength, with the addition of Member Brian Hayes, who was sworn in on June 30. Last week, the Senate confirmed Mr. Hayes and Board Member Mark Pearce. Member Pearce originally received a recess appointment to the Board from President Obama in March, along with Board Member Craig Becker.

The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.

*Lesson:* The NLRA passed, creating the NLRB, 75 years ago to protect employees due to manipulative and abusive employer practices. Like it or not, the Bush administration was the most employer friendly in 30 years; In effect they purposely paralyzed the NLRB by not adding new appointments. Now the pendulum is swinging back. If you're an HR That Works Member, we encourage you to watch the Webinar "Union Organizing and the New National Labor Relations Board: What You Need to Know to Be Prepared."

## Good Ol' Boys Can't Have It Their Way

In [Merritt vs. Old Dominion Freight Line](#) the plaintiff claimed that the company discriminated by refusing to make her a short-haul truck driver. She argued that she was denied positions twice, when she was more qualified than the males who were hired.



Then after suffering an injury on the job, she claimed the company used this injury as an excuse to terminate her as being "unfit for duty."

Unfortunately for Old Dominion, the plaintiff's (male) manager had made frequent statements such as "This is no place for a woman". Eventually the manager, who had already made it known that he didn't like women driving trucks, fired her when she failed the fit-for-duty exam which was used primarily for pre-hire physicals. Not only was the exam far too broad in scope for her injury, the company did not give it to many of the men who suffered similar injuries.

In discussing the return-to-work exam, the court stated:

"We begin by acknowledging that, if indeed, Old Dominion had such a policy (to conduct a full exam of all return-to-work employees) and faithfully abided by it, that fact would, as Old Dominion suggests, be a neutral and legitimate business practice. Old Dominion has understandable safety concerns, especially since its employees are responsible for driving large trucks and carrying heavy freight. A policy of the sort Old Dominion claims to have is sensible, because it helps prevent an injured employee from further aggravating an injury, thereby jeopardizing the eventual recovery; ensure that an employee's job performance is not so impaired as to endanger public safety, diminish employee morale, or generate customer complaints; and limit Old Dominion's workers compensation claims and tort liability. Moreover, it is not to say what policies a company should or should not adopt, if the policies it does adopt are gender-neutral."

As the court stated, the problem with the policy lies not in theory but in practice.

*Lesson:* Whether it's an all-male truck-driving environment or an all-female nursing environment, employers cannot create smokescreens in order to discriminate. In this case, there were no HR checks and balances on the manager's decision to fire the plaintiff. It's a good idea to have a policy, enforce it uniformly, and make sure someone else in the organization (preferably the HR department, if you have one) signs off on all termination decisions.

## DOL Delivers on Promises to Help Workers

Several recent events prove that the U.S. Department of Labor (DOL) is set to deliver on its previous promises that it will go to great lengths to help workers, at the expense of employers.

As we've informed you in previous newsletters, the DOL has received significant funding for investigating employers who misclassify workers as independent contractors or as exempt from the overtime provisions of the Fair Labor Standards Act. A DOL news release issued April 22, 2010, indicated that the DOL has requested \$12 million for this initiative in 2011 alone, and that the department is working closely on these initiatives with the Vice President's Middle Class Task Force. In the news release, Secretary of Labor Hilda Solis vowed to "help middle-class families remain in the middle class."

Just before this, in March 2010, the DOL announced its intent to stop a longstanding practice of issuing fact-specific opinion letters to employers. For nearly a decade, employers with questions regarding federal wage and hour laws could seek the department's opinion on whether they were in compliance, which could serve as evidence of an employer's good faith efforts if they were sued. Now, however, the DOL will only issue opinions that "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision at issue. The DOL contends that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the facts could change the outcome." This position is set forth on the DOL Web site at [www.dol.gov/whd/opinion/opinion.htm](http://www.dol.gov/whd/opinion/opinion.htm). Of course, the net effect of this shift away from fact-specific opinion letters is even less guidance for employers than before.

The department made this announcement about the same time that it issued an opinion letter finding mortgage loan officers non-exempt (despite employers' arguments that they were white-collar administrative employees in accordance with a prior DOL opinion letter issued during the Bush administration, which found such employees exempt).

Also, in May 2010, Secretary Solis signed a Workers' Rights Joint Declaration along with Ambassador Sarukhan of Mexico, committing to "inform Mexican workers in the United States about their labor rights through information sharing, outreach, education, training, and exchange of best practices." This declaration will clearly lead to more complaints, investigations, penalties, and the use of employer resources.

*Lesson:* Collectively, these actions amply demonstrate that the current DOL is preparing (if it has not already begun) to get tough on employers. Consequently, you should redouble your efforts to classify workers properly and make sure that your pay practices comply fully with the law.

Article courtesy of Work law® Network firm Pica Cohen & Tice ([www.mi-worklaw.com](http://www.mi-worklaw.com)).

## Discovering Problems While Employees are on Leave

In responding to HR That Works Hotline calls over the years, one of the greatest concerns employers express involves handling the situation in which a worker is on leave when the employer discovers their inefficiencies, wrongful conduct, etc. The employers worry about the employee's argument that any discipline or termination alleging these deficiencies is really masking retaliation for being on ADA, FMLA, or other types of leave.



In [Schaaf vs. Smith Kline Beecham](#) the United States District Court in Georgia ruled that the plaintiff's management style, as well as deficiencies discovered in her absence, led to her being demoted from regional vice president to a district sales manager while on maternity leave. In a novel argument, the plaintiff's claim went like this: (1) Smith Kline Beecham (SKB) learned of her shortcomings while she was on leave, and (2) the company would not have discovered these derelictions had she not taken leave. Thus, taking leave caused her demotion! In dismissing such nonsense, the court reminded the plaintiff that, "The fact that the leave permitted the employer to discover the problems cannot logically be a bar to the employer's ability to fire the deficient employee." Even though the FMLA leave allowed the employer to uncover prior deficiencies does not mean that the termination was because of the FMLA leave. Most telling in this situation is that the plaintiff had very little evidence to prove the motivation of the employer was discriminatory, other than her demotion while on maternity leave.

*Lesson:* Employers can easily fall into a trap when they discover deficiencies while employees are on leave. If you choose to discipline or terminate the employee because of these deficiencies, you might well face a claim of retaliation – unless you can prove your argument about their deficiencies to a judge or jury.

## Form of the Month

### Two Kinds of HR (PDF)

Which kind are you? Use this form as a "head check" on how you view yourself in the HR role. This holds true for full-time practitioners, as well as for the folks wearing three hats. Even if you do HR part time, your goal should be to do it well.



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