



## February 2012

### Editor's Column: Align Human Resources with Corporate Strategy



If HR wants to "earn a seat at the table," it has to justify its worth. For the most part, corporate executives view HR as an administrative function, not a strategic one. In most cases, this view is accurate. However, let's assume for a moment that you want your HR department to be seen as strategic rather than merely

administrative; in other words, HR should or help produce a profit, not just spend money. Here's what it takes to align the HR function with corporate strategy:

1. Realize that how you run the HR function will have a significant impact on the execution of corporate strategy. Jack Welch famously used the HR function to drive profits at GE for many years.
2. Recognize that most small to medium-sized businesses don't have much HR expertise. How many of those folks wearing the HR hat have made the effort to obtain their PHR or SPHR designation -- the benchmark of a "serious" HR executive? A company without this expertise would be wise to seek it out, either through a part-time consultant or HR executive.
3. Make sure the company is hiring only the best. In each one of Jim Collins' books (*Good to Great*, et. al.) he emphasizes the most important function of management is to put the right person on the right seat of the bus. Is this happening at your company? How is HR helping managers hire great employees?
4. Focus on boosting employee productivity without increasing the already high level of stress. How do you maintain a corporate culture in the process? In this squeeze economy, everyone is being asked to do

more with less. To what degree have you helped the management team generate increased productivity?

5. Make sure that the best stay on board. Survey after survey indicates that as the recession eases, more and more employees are looking to move elsewhere. Many companies only have to lose a few critical employees to have a significant bottom-line impact. To what degree are you using available resources to make sure your best and brightest remain?
6. Be aware that *hiring*, *productivity*, and *retention* are the greatest concerns of many HR professionals and CEOs I've spoken to because they flow through directly to the bottom line. Employers also tend to be concerned about training initiatives (especially low-cost ones), teamwork, motivation, letting go of poor performers, and compliance concerns. How is HR helping you meet these goals more effectively than the competition?
7. Finally, don't forget the never-ending challenge of benefits management. How can you help reduce the overall cost of employee benefits, while improving employee health?

Of course, your company might have specific strategic objectives of greater importance. If so, work on those first. HR That Works Members should use the Strategic HR Tools area of the Web site to make sure that HR gets a seat on the bus.

"All anyone asks for is a chance to work with pride."

- W. Edwards Deming

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## Full Employment for Criminals: The State of the Law

Many of us behaved during our juvenile and adolescent years because parents and authorities told us that any transgression would "go on our permanent record." This was usually followed by the reminder that "the world needs ditch diggers, too." It turns out that few convictions pose an insurmountable obstacle to a career, including the practice of law -- as I learned when an acquaintance with a breaking-and-entering conviction was admitted to the bar.



The government has an interest in preventing people, including criminals, from being unemployable. However, there have been so many cases involving employment of criminals recently that now is a good time to review the employment law regarding criminal acts.

**Disparate Impact on Minorities.** Because African-Americans and Hispanics have a higher conviction rate than other ethnic groups, a blanket no-conviction policy might result in the disparate exclusion of minorities from the workplace. Minority applicants screened out by these policies have the right to sue under Title VII and most state acts, including Michigan's Elliott Larsen Civil Rights Act [ELCRA], even if there were no intent to discriminate. Although most cases have applied this doctrine to misdemeanors, the law has expanded to include felony convictions. The foundational cases during the 1970s and 1980s involved manual jobs for which the applicant pools represented a cross-section of the entire population. However, the U.S. Supreme Court has ruled that "figures for the general population might not accurately reflect the pool of qualified applicants." In the Information Age, it would be interesting to see if the EEOC can produce data that African-Americans or Hispanics with college degrees have more convictions proportionately than their nonminority comparables.

EEOC policies disqualify those with convictions (and poor credit scores). The EEOC requires employers to give individualized attention to each conviction, weighing: (1) the nature and gravity of the offense; (2) the time that has passed since the conviction or completion of the sentence; (3) and the nature of the job. This can be time-consuming and costly, especially for large companies such as Walmart, which make thousands of employment decisions on an ongoing basis. However, less-costly, bright-line policies might result in litigation.

**Statutory Limitations.** Some states limit an employer's consideration of convictions regardless of ethnicity. Washington and Hawaii prohibit considering convictions

more than 10 years old for everyone. Washington, Pennsylvania, and Wisconsin prohibit employers from making decisions based on felony or misdemeanor convictions unless the conviction is job related. New York does the same, and requires employers to consider the timing of the conviction and the safety and welfare of individuals and the public. Hawaii is the most onerous in this regard, permitting an inquiry about convictions only after a conditional offer of employment, and precluding disqualification unless the conviction relates to the duties and responsibilities of the job.

Although job-relatedness might seem to make sense, managers and business owners face scenarios in which this requirement is unworkable. For example, the best mechanic available might be a convicted rapist, a crime which does not seem to be related to the duties of his job. In another context, must an employer hire a convicted pedophile for a job that does not involve contact with children, and (knowing the recidivism rates for pedophilia), hoping that he won't commit another offense that might connect their business to the sordid news? Are drug convictions ever job related? The unfortunate effect of these laws is to empower convicted criminals to challenge hiring decisions, cast honest business people as evildoers, and put them to an expensive defense.

**Criminal Acts That Did Not Lead to Conviction.** As a former criminal prosecutor, I know that plenty of criminal acts don't result in convictions. Diversion programs exist for offenders under the age of 21 and first-time drug offenders of all ages. If the police engage in an improper search or fail to read arrestees their Miranda rights, evidence is suppressed and the case dismissed. In other cases, witnesses can't be located, or are intimidated (sometimes murdered or are otherwise too fearful to testify). In rare cases, the defendant is acquitted due to insanity, although he or she is not mentally ill, and must soon be released.

However, the behavior leading to the arrest might be significant in making an employment decision. For example, an applicant for a health care position with access to controlled substances might have recently gone through a drug diversion program. An applicant who avoided a home invasion conviction because the police botched a search might have left a career of theft only after learning the police have him under surveillance. If you knew about the home invasion, you would want to keep your distance from the perpetrator. However, many states have laws that effectively bring these people into the workplace.

Fortunately, the Michigan ELCRA is limited to a prohibition against requesting or making a record of a *misdemeanor* arrest that did not lead to conviction. Inquiries about past

*felony* arrests are not mentioned and inquiries about pending felonies are expressly allowed.

Other states grant broader protection: Most states have provisions that applicants need not volunteer information about sealed records (which usually occurs after a diversion program). Colorado and Virginia prohibit disclosures of such sealed proceedings even upon inquiry; and Georgia and Illinois prohibit disqualification from employment based on them. California, Hawaii, Massachusetts, New York, Rhode Island, Washington, and Wisconsin all prohibit employers from asking about or making decisions based on of *any* arrests (felony or misdemeanor) that did not lead to conviction; only California provides an exception for health care employees with access to patients and medication.

Occasionally, court decisions permit employers to drill down and make decisions based on underlying conduct, even where no conviction resulted. However, if you face a hiring decision in one of the states mentioned, do your research to learn about one of these hair-splitting decisions.

**Expunged Convictions.** In Michigan, a conviction can be expunged after five years, if there are no further convictions other than minor misdemeanors. Only one conviction may be expunged. Almost all states provide that once an offense is expunged, an applicant need not identify the prior conviction, even if the response is under oath. Expungement renders the conviction a nullity. In general, sex crimes cannot be expunged. Victims must be notified and may contest expungement of those convicted of crimes related to assault. In general, the prosecutor can contest expungements, which a judge usually grants only after careful consideration.

*Article written and contributed by William Pilchak of Worklaw® Network firm [Pilchak Cohen and Tice, P.C.](#)*

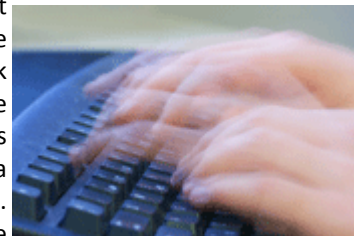
## Drug Testing Protocols Update

The Department of Transportation requires employers to test drivers for drugs -- for good reason. There are highly specific guidelines for employers to follow. Whether you're a DOT candidate or not, these are perhaps the best guidelines you can find and should help you think through your commitment to a drug-free workplace. Note that the laws surrounding DOT testing may not be permissible in all environments. For example, most states now prohibit random drug testing.

[Click here](#) to see the guidelines. You can find excellent help on creating a drug free workplace [here](#).

## A Good Reason to Limit Internet Access

While doing some SEO homework, I looked at a listing of the [top 500 search terms](#). I don't know about you, but it looks to me that most people waste a lot of time on the Internet, at work and at home. Given the search requests, it's probably not a bad idea to add content blockers. Of course, the challenge is when employees are using their own smart devices (phone or tablet).



Personally, I don't know who has time to spend on this junk! Celebrity gossip, porn, horoscopes, travel and shopping dominate the rankings -- none of which do much to help a business or career. If you have such a habit, drop it! Quit wasting time and spending money you don't have. Instead, focus on improving yourself and saving toward your retirement!

## Social Media and Disgruntled Employees



I watched one public company's stock valuation drop by more than \$1 million in one day due to a social media post that one of its disgruntled employees had placed.

I've seen cases in which employees have cursed at their bosses, spread ill-will about them through the Internet, and literally stuck out their tongues at their employers about working conditions -- and, after their termination, the National Labor Relations Board forced their employers to rehire them.

Here's the point: *You cannot ignore social media risks.* Disgruntled employees can release a barrage of sensitive information and demeaning statements with their employers left feeling helpless. HR That Works Members should check out the Social Media Training Module, which has both a video describing the National Labor Relations Board position on this issue and a sample Social Media Policy. One additional piece of advice: Get your employees involved in creating and enforcing these policies and train your managers accordingly.

## Leave Abuse Results in Lawful Termination



An employee who had a suspicious pattern of using intermittent FMLA leave on Fridays and holidays could not state an FMLA claim after she was terminated for calling for FMLA leave while on a pre-planned trip to Las Vegas. In [\*Crewl v. Port Authority of Allegheny County\*](#), the plaintiff had been certified for (and granted continuously) FMLA leave over a five-year period for migraine headaches and anxiety. A pattern of "Friday FMLA events" emerged (the plaintiff had missed 26 of 52 Fridays) so the employer invoked its right under the FMLA to have the plaintiff submit to a second-opinion medical examination. The plaintiff's doctors were asked whether the leave pattern was consistent with her medical conditions. The doctor providing the second opinion concluded that the nature of the plaintiff's conditions -- unpredictable migraines and anxiety attacks -- was inconsistent with a pattern of onsets on Friday. The doctor also concluded that the plaintiff could control her condition fully with medication. By contrast, the plaintiff's doctors certified that the pattern was consistent with her condition.

Meanwhile, the plaintiff scheduled a trip to Las Vegas, for which she was granted leave until July 2, but denied it for July 3 and 4. She tried unsuccessfully to get someone to cover her other shifts. Thereafter, on July 2 the plaintiff called out sick for the next two days (July 3 and 4). This leave was credited as qualifying under FMLA, and the plaintiff was even granted holiday pay, despite her failure to work the day before the holiday, as required by the collective bargaining agreement. However, the employer later concluded that the plaintiff had used FMLA fraudulently to cover preplanned vacation days and terminated her. She sued, claiming interference under FMLA and retaliation.

The court granted the employer's motion for summary judgment. The court noted that the nature of the employee's condition -- unpredictable migraine onset -- made it clear that when she called in sick on July 2 for a two-day period, the act was fraudulent. By her own admission, she could never tell when a migraine would disable her. In addition, the fact that she called seeking FMLA while on vacation in Las Vegas and remained there through the July 4 holiday established fraud. Noting that FMLA status does not prevent termination of an employee for reasons unconnected with legitimate FMLA leave, the court held that the employer terminated the employee legitimately for fraudulent use of leave.

Article courtesy of *Worklaw*® Network firm [Shawe Rosenthal](#).

## The Million-Dollar Problem with No-Fault Attendance Policies



Verizon has learned the hard way about the problems associated with no-fault attendance policies. The bottom line: *If you have such a policy, you might face unnecessary exposures in enforcing it.* On July 6th 2011, the [EEOC announced that Verizon settled a multi-million dollar case](#) based on the company's no-fault attendance policy. Here's a summary of the settlement:

"Telecommunications giant Verizon Communications will pay \$20 million and provide significant equitable relief to resolve a nationwide class disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced today. The suit, filed against 24 named subsidiaries of Verizon Communications, said the company unlawfully denied reasonable accommodations to hundreds of employees and disciplined and/or fired them pursuant to Verizon's 'no fault' attendance plans."

Then on December 8, 2011, Los Angeles Superior Court approved the \$6,011,190 California Family Rights Act (CFRA) class action settlement in *Dept. Fair Empl. & Hous. v. Verizon* (Seales).

The class action lawsuit began with a more than two-year-long investigation by the EEOC Special Investigations Unit into Verizon's practices under the California Family Rights Act (similar to FMLA). The lawsuit alleges that from 2007 to 2010, Verizon denied or failed to provide timely approval of class members' requests for leave for their own serious health condition, to care for a family member with a serious health condition, or to bond with a new child. The company also allegedly fired some class members for violating Verizon's attendance policy when they missed work for a qualifying reason.

The final settlement will result in payment of \$4,490,041 from the maximum settlement amount to 687 qualified claimants:

- Tier 1: Claimants who experienced improper denial of their application for leave under the California Family Rights Act will receive a check for \$3,000 apiece.
- Tier 2: Claimants who were subject to discipline for poor attendance due to absences under the California Family Rights Act will receive a check for \$6,000 apiece.
- Tier 3: Claimants who were terminated or constructively terminated in violation of the California Family Rights Act will receive a check for \$25,000 or more.

Bottom line: All of your attendance policies are subject to limitations imposed by disability accommodation law and the FMLA. This is how justice works today. Because there isn't enough "juice" in these cases to bring them individually, plaintiffs file them collectively, thus upping the ante. The lawyers get the biggest chunk of the pie (usually in the millions), the regulators get fees and the claimants get \$3,000 to \$25,000 apiece.

## DOT Bans Cell Phone Use in Commercial Vehicles

As of January 3, 2012, a new regulation from the U.S. Department of Transportation (DOT) prohibits drivers of commercial motor vehicles



(CMVs) from using hand-held mobile phones while driving. The prohibition includes periods when the CMV is stationary at traffic lights, stop signs, or in heavy traffic.

CMV drivers may still use a hand-held mobile phone as long as they pull over to the side of or off of a public highway or street where the vehicle safely remains stationary. Additionally, hands-free cell phones such as speakerphones are still permitted while driving as long as the CMV driver can operate the device by pushing a single button which is within his or her reach. If the CMV driver must reach for the mobile telephone on the passenger seat, under the driver's seat, or into the sleeper berth, it's a violation. Moreover, drivers may use a hand-held mobile phone on a public highway or street to contact law enforcement or other emergency services for such purposes as reporting an accident or drunk driver. The new rule doesn't affect communications with a Two-Way Radio/CB because the DOT lacks jurisdiction to regulate such devices.

This ruling follows previous 2010 DOT decision to mitigate risks associated with "distracted driving" by banning commercial drivers from texting while driving. The new restrictions apply to both intrastate and interstate drivers of CMVs. Drivers who violate the new regulations will lose their commercial license and pay a fine of up to \$2,750 for each offense. Employers that require or allow their drivers to use hand-held mobile phones while driving could face a fine of up to \$11,000 for each offense.

Employers should adopt a policy consistent with the new rule and train their drivers on what it does and doesn't permit, as well as the consequences for violations.

*Article written and submitted by Daniel Cohen of Worklaw® Network firm [Pilchak Cohen & Tice, P.C.](#)*

## Form of the Month

### A Dozen Ways to Show Employees You Care ([PDF](#))

Use this form to help strengthen relations with your employees.

