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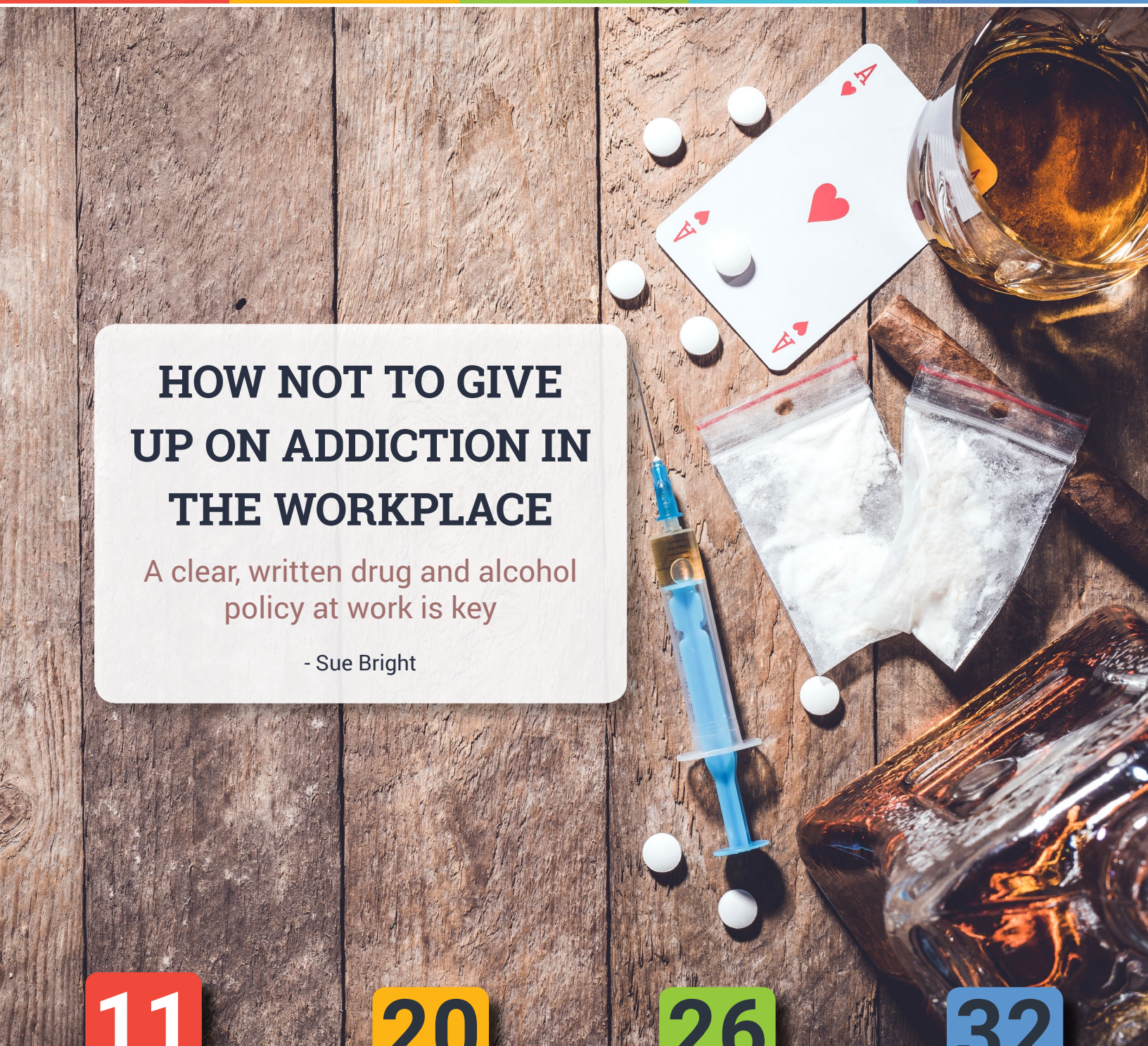
# HR Legal & Compliance Excellence



## HOW NOT TO GIVE UP ON ADDICTION IN THE WORKPLACE

A clear, written drug and alcohol policy at work is key

- Sue Bright

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# EDITOR'S NOTE

Are you aware that drug and alcohol misuse costs the US upwards of $600 billion annually? *(Source: National Institute on Drug Abuse)*. Or that 70 percent of Americans with addictions are employed? *(Source: National Council on Alcoholism and Drug Dependence)*

With those startling statistics, it is very likely that you have employees working for, or alongside you that may have a problem with drugs and/or alcohol. In fact, 24 percent of workers admit to drinking during the day at least once in the past year. Drug or alcohol addiction among Americans is more common than one may think.

This month's cover article, ***How Not To Give Up On Addiction In The Workplace*** by Sue Bright, highlights the importance of having a written substance use and abuse policy that prohibits using drugs or alcohol during work hours. Catch up with this article if you need to learn on how to re-integrate employees to work after completing treatment, and return-to-work agreements. Cybersecurity is a prevalent issue that has received increased attention in many companies lately. And no wonder, since it's continuously been a hot topic brought to the spotlight by the significant data breaches of the past few years. The good news is that there are plenty of solutions that can help stop cybercriminals in their tracks. The bad news is that many companies don't take the necessary precautions because they lack proper cybersecurity practices.

Read Kim Del Fierro's article, ***How To Incorporate A Culture Of Cybersecurity Into Your Business?*** to know the top 3 steps to follow in order to prevent cybercrimes at your workplace. The article also talks about how to build a security culture within your organization and also invest in solutions that can minimize or stop threats completely.

With longer days, warmer temperatures and school vacations, the summer months often present unique issues for employers when it comes to dress codes, social events, time-off and protecting workers from the heat, among other things. It is important to communicate the summer dress code policy to all employees and train supervisors. Beth P. Zoller, in her article ***Best Practices For Summer Workplace Challenges,*** shares a set of best practices to handle these issues in order to make the workplace more productive and efficient, as well as minimize the risk of employer liability.

Due to its increasing importance most companies today perform background checks on employees at the outset as part of the application / new hire process. Spencer Waldron's article, ***Background Check: How Much Do You Really Want To Know?,*** lists down the key factors employers should consider with respect to continuous screening of employees.

This is not all! This month's issue of **HR Legal & Compliance Excellence** is packed with top trending topics in the legal and compliance arena, and infused with information on new polices and laws to arm you and your employees to stay compliant and safe.

Happy reading and do not forget to mail us your feedback!

Have a say?
Write to the Editor.

**Debbie Mcgrath**
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# How Not To Give Up On Addiction In The Workplace

## A clear, written drug and alcohol policy at work is key

By Sue Bright

It is estimated that drug and alcohol misuse costs our nation upwards of $600 billion annually, according to the National Institute on Drug Abuse (NIDA). And according to the National Council on Alcoholism and Drug Dependence, 70 percent of Americans with addictions are employed.

With those startling statistics, it is likely that you have employees working for, or alongside you that may have a problem with drugs and/or alcohol. In fact, 24 percent of workers admit to drinking during the day at least once in the past year. It is more common than one may think.

Some key indicators may include:

- Frequent tardiness
- Unexplained absences or "emergencies"
- Using sick days and calling in with multiple unplanned
- Last minute absences and any emergent patterns such as sick days consistently falling after payday, or on Mondays and Fridays.

Their work may begin to suffer and projects may be delayed or turned in incomplete. You may notice mood or behavior changes, isolation and avoidance of other co-workers, and physical symptoms such as falling asleep on the job, having bloodshot eyes or smelling like alcohol. If you have a personal relationship with the employee and know what they like to do for fun, you may notice these hobbies are changing or being lost.

I strongly recommend that all employers have a clear, written drug and alcohol policy in place that is supportive and written in a way that employees with addiction problems feel safe to come forward. Upon hire, employees should be asked to read and sign an agreement that they understand the policy. I recommend that the policy outline whether or not alcohol can be served at company functions. If it is served, provisions should be made for safe use as well as providing accommodations for employees in recovery.

As long as an employee is willing to get help, I believe they should be granted a leave of absence to seek treatment and rehabilitation without being concerned about losing their job. The stigma associated with addiction continues to keep employees from seeking professional help. A survey from the Partnership for Drug-Free Kids showed that 20 percent of employees believed if they sought coverage for treatment they would be passed over for a promotion or be fired.

Employers should promptly and properly address potential issues with employees they suspect of improper substance use as outlined in their drug and alcohol policy. Be careful in maintaining boundaries; don't offer to lend the employee in question money, cover up for him or her, or delegate their work to another employee. Supervisors should gather evidence, document all performance problems, schedule a face-to-face meeting to discuss concerns with HR present and plan for denial, a common reaction to confrontation.

Unless the employee was obviously intoxicated on the job, the supervisor should keep the focus on the declining job performance rather than any potential substance use or misuse. The sooner you proactively address the issue, the better. The longer an addiction goes untreated, the more risk and legal liability you incur. According to NIDA, people with a substance use disorder are four times more likely to be involved in workplace accidents.

The employee should be strongly encouraged to utilize Employee Assistance Program (EAP) services if the company offers them. Small companies may not have an EAP but they can still assist employees by maintaining a current list of local resources available in the community. The HR professional at a small company may choose to belong to a reputable networking group of behavioral health professionals in their area so they can reach out for referrals when necessary.

If the employee was under the influence at work, an employer could consider a professional intervention, during which colleagues and other people important to the employee in question encourage him or her to get professional help. Note that a certified interventionist should lead the intervention, never the supervisor or another employee. It is helpful for employers to offer comprehensive insurance benefits that cover all stages of treatment for substance use disorders, including detox, residential care, outpatient care and individual counseling.

When an employee is returning to work after completing treatment, schedule a return-to-work Meeting to meet face-to-face prior to the date (or on the first day) the employee returns to work.

Employees may be concerned about confidentiality, how other employees may treat them when they return, or be unsure about expectations around job performance. On the other hand, supervisors may be concerned about the employee's ability to re-integrate into the workforce and be uncertain about how to best support the employee. This meeting allows the supervisor, employee and HR to discuss any changes that may have happened during their absence, remind the employee that he or she has been missed and is valued, and discuss any fears the employee has about returning.

Establish a return-to-work agreement (RTWA). This is a written document that outlines expectations for the employee when they re-enter the workforce. The expectations may include complying with a drug-free workplace, when and how performance will be reviewed, consequences of poor performance, as well as consequences of a relapse. It should include the acknowledgement that if the employee cannot meet these standards, the failure to do so can be grounds for termination. This will help the employee stay accountable.

Be aware of signs of "workaholism." We oftentimes see individuals in recovery substituting one addiction for another, whether that's gambling, relationships, overeating, or work. The employee could over-work to escape challenging emotional situations and painful feelings. Take steps to manage the employee's job stress and support them in taking time to "recharge."

Be supportive of their daily recovery maintenance, within reason. If the employee has a recovery related activity they are involved in and get a lot out of, consider making an accommodation for them to attend if their work schedule conflicts with it. Support them in their recommended prescription for treatment. Their residential treatment stay may be followed by a longer length of outpatient or aftercare.

These are oftentimes offered afterhours to accommodate for working schedules, but if the employee needs to leave slightly early to get to their appointment on time, work together on creating an agreement so they can come in early to make up that time or find another solution that works for both of you. This can be discussed during the return-to-work meeting and during on-going supervision. Continued engagement in recovery activities and therapy will result in a greater likelihood of sustained sobriety.

• • •

**Sue Bright** is the Executive Director at New Directions for Women (NDFW). Prior to NDFW, Bright served as Vice President of patient services and quality at Livengrin Foundation in Bensalem, Penn. Bright specializes in intake and admissions, and clinical services. She has tremendous experience developing relationships with private insurers, working collaboratively with staff to ensure growth and to develop quality measures that track the success of services over time.

Would you like to comment?

# ACA-Related Data: New Insights On Retention, Benefits, And Gender Equity Challenges

## How employers can leverage their own ACA data

By Michael Showalter

While Affordable Care Act (ACA) compliance and reporting can be challenging for employers, the law's requirements have also led to better management of complex workforce data and new insights. By aggregating data from the unrelated payroll, benefits administration and HRIS systems required to actively manage the ACA, employers now have new ways to look more deeply into workforce data to improve operational strategies. This article, which is based on our annual analysis of compliance, benefits, and workforce data covering millions of lives at employers across a broad spectrum of industries, outlines several areas where employers can leverage their own ACA data.

### Identify Savings Opportunities and Future Costs to the Company

Our 2018 analysis found that Millennial and Gen Z employees are currently less likely to be eligible and enroll in employer-sponsored health insurance coverage than employees from older generations. And, when they enroll, Millennials and Gen Z workers are more likely to choose benefits with a lower actuarial value, meaning the benefits are cheaper and their chosen insurance plans cover a lower percentage of their medical costs – resulting in short term cost advantage for employers. However, as these two generations age and become a greater percentage of the workforce, they will impact your organization's bottom line as their need for more and better coverage grows.

Across the board, only 26% of eligible Gen Z employees and 68% of Millennials are enrolling in employer-sponsored coverage versus 75% of Gen X employees. Because some Millennials and most Gen Z employees are still eligible to be covered under a parents' health insurance plan, many are not enrolling in their own employer-sponsored benefits. In the next five years, however, nearly one in five employees enrolled in family health coverage will have a Millennial or Gen Z dependent age out of parental coverage – potentially resulting in a hit to employers' budgets through increased enrollment of these younger workers.

### Make Decisions About Pay-Based Premiums

With ACA-related compliance data, employers that are considering a pay-based premium approach now have easier access to benefit eligibility and

enrollment information by pay grades, allowing them to make better informed decisions about their plan offerings.

For example, in 2017, the average monthly employee premium cost share for individual coverage was $130/month and $375/month for family coverage. An employee making 100% of the Federal Poverty Level (FPL - $12,060 annually in 2017), would pay an average of 13% of their wage for employee-only coverage and an average of 37% of their wage for family coverage premiums. That's a lot of money to spend on health coverage alone and, as a result, many lower-income employees may opt to decline participation in your organization's sponsored health benefits. This can be an issue when it comes to employee retention, as our data also reveals that employees who are enrolled in employer-sponsored plans stay at their jobs longer than employees who are not enrolled.

More specifically, employees making less than 100% of the FPL who are enrolled in their employers' health plan have an average tenure three times greater than the average tenure of those who don't enroll in employer benefits. In other words, there is a strong link between retention and healthcare benefits for lower-paid employees. Yet these employees (who are typically the most likely to interact with customers) are also least likely to enroll in employer healthcare benefits.

Some employers have switched to wage-based premiums to help their lower-paid employees pay less toward health coverage than their higher-paid colleagues. To build health benefits strategies that meet the needs of individuals at all salary levels, employers should look at their current offerings and enrollment by pay grade and consider whether a pay-based premium model makes sense.

## Spot Equity Issues

Gender and pay equity issues can lead to lawsuits and a major hit to your brand and company morale. Many employers may not even be aware of equity problems, as they are not always easy to spot.

These equity challenges can exist beyond pay. For example, our analysis found that, in 2017, more male workers were eligible for ACA coverage than female: 78% of male employees were eligible, while only 71% of female employees qualified for health benefits under ACA regulations. Despite the difference in eligibility, once offered, enrollment in employer-sponsored benefits is relatively similar across genders, though women are more likely to opt for plans of higher actuarial value than their male counterparts.

By aggregating ACA workforce data monthly, employers can generate the data necessary to identify potential equity issues and can then work to resolve them.

## Improve Retention

Employers can use their transformed workforce data to understand and better support retention efforts. Generally, employees appear to be more likely to stay in a position where their health benefit needs are supported. Not surprisingly, when individuals enroll in employer-sponsored health plans, they are more likely to have a longer tenure. And, when the benefits are richer or include family coverage, they are more likely to stay even longer.

However, the link between benefit enrollment and tenure is stronger in some industries and worker segments than others.

**Michael Showalter** is Executive Vice President of Health e(fx). Before Health e(fx), he served in executive leadership roles at Prime Therapeutics, CIGNA Corporation, and Definity Health.

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## The State of Artificial Intelligence in HR


HR professionals will see explosive growth in their use of artificial intelligence (AI) over the next five years. This growth will not only transform HR technologies but will have a major and perhaps unsettling impact on the workforce. In fact, the study found that nearly twice as many HR professionals envision AI-related technologies causing a net loss in jobs rather than those predicting a net gain. In the meantime, what steps should organizations take? Read our 8 key takeaways.

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## Supporting the Modern Learner


Many of today's organizations suffer from poor learning cultures and inadequate learning and development (L&D) functions. This can be an enormous problem at a time when most executives believe there are skills gaps in today's workforce. This study highlights today's L&D trends and challenges, provides suggestions for how organizations may boost learning effectiveness, and highlights how to help modern learners gain new skills.

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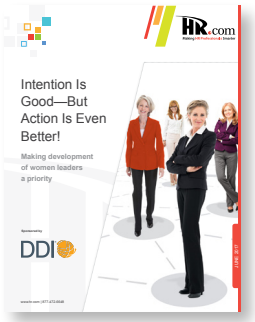
## Making development of women leaders a priority




Few HR professionals believe that gender diversity is a high or very high priority for their CEOs. This finding may help explain why few organizations are accelerating the leadership development of women. Despite the public focus on gender diversity in the workplace, only 27% of HR professionals see commitment to gender initiatives from their CEOs.

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## The Impact of Performance Management on Engagement


Good performance management practices drive higher employee engagement levels. The study found that many employers suffer from low levels of employee engagement, especially when engagement is defined as a willingness to give discretionary effort. It also found that when positive, proactive reasons motivated performance reviews, employees tended to be more engaged and willing to give discretionary effort.

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# Protecting Investments In People And IP While Avoiding Criminal Sanctions

## Key takeaways

By Roxann E. Henry and Eric Akira Tate

A company's intellectual property and employees are indisputably among its most important assets. Ironically, there is an inner tension because they also pose grave threats to each other. The U.S. Department of Justice Antitrust Division is hot to exploit this tension as it once again confirmed in remarks at a healthcare conference on May 17, 2018.[i] This article will examine recent initiatives by the Antitrust Division to prosecute (including criminally) anti-poaching pacts between companies that improperly limit employee mobility, on the one hand, and what employers can still lawfully do within the regulations of the Antitrust Division and other laws to protect their people investments.

"Employees leaving an organization might be replaced physically, however, their skill-sets and knowledge cannot be exactly replaced by the person replacing them… the skill of employees, account for 85% of a company's assets."[ii]

### Antitrust Enforcement

You've invested a lot in your employee base. At considerable cost, you've found the right people, developed and trained them, and disclosed to them some or all of your treasured IP. Now you want to keep some other company from reaping the benefits of your investment. And you know which other companies would be most interested in your employees and would like to protect their investments rather than engage in a bidding war over employees. STOP THERE! That last thought can lead to disastrous consequences. Even if you have no products that compete with another company, that other company can be your competitor for employees. And competition triggers the antitrust laws.

The Antitrust Division of the Department of Justice took by surprise numerous executives and HR staff with its intense campaign against no-poach (*i.e.*, employee non-solicitation) agreements. The Division followed its civil enforcement actions against nine prominent high tech Silicon Valley companies[iii] by creating the Antitrust Guidance for Human Resource Professionals (Guidance), along with the Federal Trade Commission, in October 2016.[iv]

The Antitrust Division's continued focus is expanding further the depth and scope of the antitrust risk related to agreements about employees. Agreements not to compete can subject a company to criminal fines of up to $100 million or double the loss or

gain from the agreement. Individuals involved in such agreements face a statutory maximum of 10 years in jail per agreement. The Guidance explicitly notes the availability of such criminal sanctions. The antitrust laws also provide for victims to sue for treble damages and recover their attorneys' fees. Shareholder suits have challenged boards and executives that do not implement adequate compliance programs or misstate earnings reports due to antitrust violations.

The speed of follow-on consequences from government enforcement is swift. On April 3, 2018, the Antitrust Division announced a civil settlement regarding a no-poach agreement that had come to light in the context of a merger review.[v] Only 13 days later, the first of a number of follow-on antitrust treble damage class action was filed on behalf of the relevant employees. To give some sense of the expectation of the lawyers bringing these claims, $604 million in civil settlements from the earlier follow-on civil cases involving the Silicon Valley companies garnered two of the biggest payouts in class counsel attorneys' fees and costs in federal courts in California in the last eight years, according to Bloomberg Law's Class Action Settlement Tracker.[vi] Those fees present a significant incentive to bring class civil cases.

Recognizing that, until recently, many companies had not appreciated the consequences of no poach agreements, the Antitrust Division explained that it had chosen to proceed civilly, rather than criminally, in this recent matter because the conduct had ended prior to the October 2016 Guidance release. For conduct that continues past that time, the Antitrust Division will not be as generous and will target for criminal sanctions.

Most importantly, in announcing this settlement, the Antitrust Division reiterated, as its officials have done on numerous occasions since last fall, that "it intends to bring criminal, felony charges against culpable companies and individuals" and that the Antitrust Division has instituted "a broader investigation into naked agreements not to compete for employees."[vii]

## Employee Mobility and IP Protection

The Antitrust Division's current focus on anti-poaching agreements is consistent with a growing movement across the country to limit the use of non-competition agreements and restrictions on employee mobility. On April 26, 2018, Congress announced the introduction of a package of bills in both the House and Senate, that included the Workforce Mobility Act of 2018, H.R.5631 (WMA)[viii] and the End Employer Collusion Act, S.B. 2480 (EECA) and a couple of others.[ix]

The WMA would make it unlawful for an employer to enter into a covenant not to compete with an employee and create a private right of action allowing a prevailing employee to collect damages, including punitive damages, and reasonable attorneys' fees and costs. The WMA contains a carve out that expressly permits agreements between an employer and employee barring the employee from disclosing trade secrets.

The EECA would be similar to the WMA, except the EECA would bar any agreement between two employers that prohibits or restricts one employer from soliciting or hiring another employer's employees or former employees. The EECA would offer the same remedies as the WMA but, in its current version, does not include any exceptions whatsoever.

In several states, including Massachusetts, New Hampshire, New Jersey, Pennsylvania, Vermont, and, Washington, similar bills have been proposed and are being considered as well. This is not the first time bills of this nature have been proposed in Congress or state legislatures, and the likelihood of any of these bills passing into law is, at best, uncertain. However, whether or not they ultimately pass into law, they serve as further examples of a greater interest in lessening potential restrictions on employee mobility in the United States.

Courts also appear to be applying greater scrutiny to non-competition agreements. For example, in Delaware, a state long known for having some of the most supportive laws favoring corporations in the nation, recent decisions by state courts may suggest a greater recognition for employee mobility considerations. In *Ascension Insurance Holdings v. Alliant Insurance and Roberts Underwood*, 2015 Del. Ch. LEXIS 19 (January 28, 2015), for instance, a Delaware company sought to enforce a non-competition provision in an agreement that it had signed with a California employee in which the parties had consented to Delaware venue and application of Delaware law for any disputes.

The Delaware Chancery Court, however, declined to enforce the Delaware choice of law provision, holding that California had a greater interest in the action, and California public policy would be violated if Delaware law were applied under which the non-competition provision would be enforceable. More recently, another Delaware Chancery Court in *EBP Lifestyle Brands Holdings v. Boulbain*, 2017 Del. Ch. LEXIS 143 (August 4, 2017), refused to enforce against a California employee a non-competition provision in an agreement where the parties had similarly agreed that Delaware law would apply to disputes.

Many employers have been left to ask the question, can we lawfully do anything to protect our significant investments in our people who, by the way, often carry with them our most competitively sensitive IP? The answer is YES.

"[W]e are going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the American people. It is essential to our prosperity and it will only become more so in this century."[x]

The vast majority of states in the United States still enforce against employees non-competition agreements that are reasonable in scope. Restrictive covenants with individual employees, less than non-competition agreements, e.g., employee non-solicitation agreements, still appear to be universally enforceable. Employers everywhere are still free to require employees to sign confidentiality and non-disclosure agreements to protect their most sensitive information. The UK concept of Garden Leave seems to be slowly making its way to United States.

Further, it is worth noting that even the Antitrust Division has recognized (as reflected in the excerpt from its 2011 Consent Decree with several high tech companies in the Silicon Valley, that there are situations where employee non-solicitation provisions are permissible, including when:

1. Contained within existing and future employment or severance agreements with an employer;
2. Reasonably necessary for mergers or acquisitions, consummated or unconsummated, investments,

or divestitures, including due diligence related thereto;
3. Reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers;
4. Reasonably necessary for the settlement or compromise of legal disputes; or
5. Reasonably necessary for (i) contracts with resellers or OEMs; (ii) contracts with providers or recipients of services other than those enumerated in paragraphs 1-4 above; or (iii) the function of a legitimate collaboration agreement, such as a joint development, technology integration, joint ventures, joint projects (including teaming agreements), and the shared use of facilities.

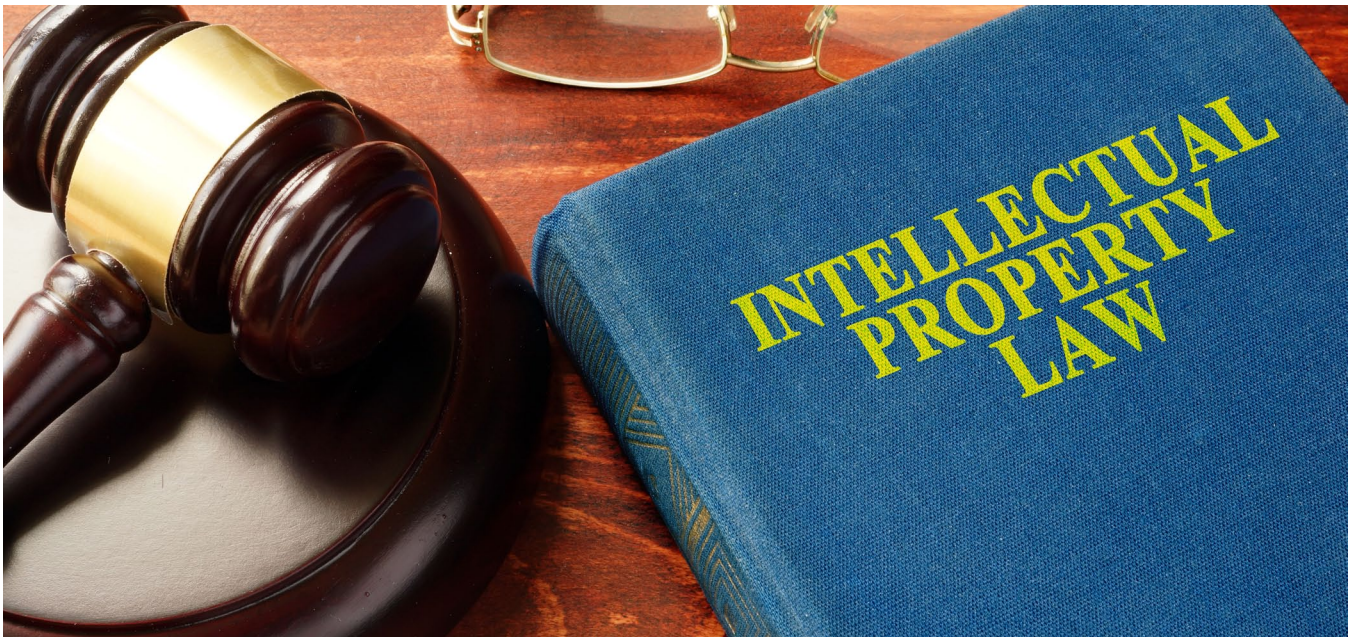
Terms such as "reasonably necessary" may leave room for interpretation, but to date, the Antitrust Division has not focused on challenging employee non-solicitation agreements in any of the above areas. Indeed, the Antitrust Division mentions in its October 2016 advisory guidance that nopoaching agreements that are reasonably necessary to a larger legitimate collaboration between employers, including legitimate joint ventures, are not considered per se illegal under the antitrust laws.

"Half of employees who left or lost their jobs in the last 12 months kept confidential corporate data, according to a global survey … 40% plan to use it in their new jobs."[xi]

In sum, while the need to tread carefully lest the fall into the cross-hairs of the DOJ Antitrust Division, all is far from lost for employers increasingly concerned about how to retain their most prized people and IP assets.

## Takeaways

1. Non-disclosure, non-compete, and non-solicitation agreements with individual employees are aspects of an effective IP protection program and are enforceable in most states.
2. But don't assume that courts will reflexively enforce restrictive covenants simply because an employer and employee agree to them in a contract or that you can avoid antitrust problems just because you explain to the affected employees what you are doing, even if they agree to it.
3. Beware that employee wages are akin to prices for products and services to the DOJ, so entering into non-solicitation and similar agreements (particularly about setting wage rates) with other companies may violate antitrust law.



4. Look at your compliance program to be sure it covers HR issues; include HR personnel in the training and consider whether written materials need updating.
5. Continuing competition won't stem prosecution if there is an agreement on some phase of the process that is not ancillary and required for a legitimate, procompetitive purpose. For example, with agreements to avoid use of certain types of benefits or to set benefit levels, the companies may be vigorously competing for employees, but the conduct could still be criminal.
6. If you find a problem that was not terminated before October 2016, you may want to consider an application under the Antitrust Division's Leniency Policy, which provides for criminal amnesty for the first to disclose an antitrust violation (https://www.justice.gov/atr/leniency-program ).

*Sources*

[i] "*We believe it is important that we use our criminal enforcement authority to police [market allocation agreements among healthcare providers and no-poach agreements restricting competition for employees…]*" https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar

[ii] https://www.educba.com/employee-most-valuable-intangible-assets/

[iii] *U.S. v. eBay, Inc.:* https://www.justice.gov/atr/case/us-v-ebay-inc; *U.S. v. Lucasfilm Ltd.:* https://www.justice.gov/atr/case/us-v-lucasfilm-ltd; *U.S. v. Adobe Systems, Inc.:* https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al .

[iv] https://www.justice.gov/atr/file/903511/download. *The Guidance provides some history on enforcement, details the law and its application, and provides tips to avoid problems.*

[v] https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[vi] http://antitrust.bna/atrc/display/batch_Print_display. *adp (3/22/2018).*

[vii] https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

[viii] https://www.congress.gov/115/bills/hr5631/BILLS-115hr5631ih.xml.

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[x] https://www.justice.gov/sites/default/files/dag/legacy/2010/08/23/intellectual-property-spotlight.pdf.

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# A Global Guideline For Workplace Violence

## How prepared are you?

By Umesh Mehta

According to Occupational Safety and Health Administration (OSHA) publication, under US Department of Labor, workplace violence is violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths.

### Incidences of Workplace Violence in India

**June 2018** - Japanese company's HR head shot at, sacked employee suspected

**March 2012** - Maruti Suzuki's General Manager Human Resources was burned to death in the violence in its car plant here allegedly triggered by workers yesterday for which 91 workers were arrested.

**March 2011** - DGM (Operations) of Graphite India Ltd – Powermax Steel division, was killed when some suspended workers staging 'dharna' outside the plant at Bolangir (Orissa) stopped his car and allegedly set it on fire.

**September 2009** - the Vice President (HR) of an auto manufacturing company was killed by a group of sacked workers in his cabin in the company's unit about 20 km from Coimbatore.

**September 2008**- at Greater Noida, the CEO and Managing Director of Cerlikon-Graziano Transmission India Pvt. Ltd was killed by agitating workers.

### Global Guidelines for Workplace Violence

As per OSHA Guidelines *A written program for workplace violence prevention, incorporated into an organization's overall safety and health program, offers an effective approach to reduce or eliminate the risk of violence in the workplace. This should include:*

*(1) Management commitment and employee participation, (2) Worksite analysis, (3) Hazard prevention and control, (4) Safety and health training, and (5) Recordkeeping and program evaluation.*

### Pinkerton on Workplace Violence

Some key aspects to look into while firing an employee or shutting down operations at a site include:

Profiling of individuals before hiring. Conducting background verifications before hiring is the first step towards mitigating workplace violence risk. Frequent unexplained job changes, past violent behavior, etc. show early signs of risks which if undetected, can lead to an untoward incident in future. Besides the basic document related checks, individual's social media profiling can also help to understand his profile to large extent.

Communication: Understanding your employees is very important, organizations should have open and relaxed communication lines. Supervisors should be encouraged to regularly interact with their subordinates, have clear understanding of the personalities

of their team members and immediately report unusual behavior to Human Resource (HR) team.

Geo-political analyses of the location: Conducting thorough threat assessments to find out if any incidences have occurred in the past due to labor unrest, disturbances requiring local law enforcement agencies' intervention, comfort level of locals with various businesses operating in their vicinity and local demographic setup will provide key insights.

Understanding of Labor Union dynamics. Even if firing of employees is desired, it is better to have a team of management representatives to conduct the dialogue, rather than have a single individual conduct the process. In case layoffs or a potentially troublesome termination is scheduled, the company should communicate this to security and even involve the local law enforcement beforehand, to prevent the situation from escalating.

Having employees trained for specialized situations: Though it is primarily a HR matter; however, for events such as conducting layoffs, closure of operations, etc. it is crucial that other staff members like operations head, supervisors and managers are trained on handling such situations. Such trainings should be followed by regular practices through mock drills or scenario based exercises to keep everyone ready for any eventualities. One wrong statement can have significant implications, therefore it is imperative that only trained and responsible members of the management are allowed to interact with employees.

It is of paramount importance to have an effective crises management plan and building evacuation plan in place, in case an incident occurs.

Once the decision has been made, it is important that HR and involved management representative should have clear communication and counselling regarding job compensation and related aspects, with the affected employees.

It is important to have defined programs and policies to build awareness among employees regarding workplace violence. These should be backed by defined channels to report incidences and have an effective grievance addressal system in place.

Finally, all policies and the overall organization environment should promote zero-tolerance regarding harassment and violence. Ensure timely and stringent action against the violators to deter any future occurrence of such issues.

• • •

**Umesh Mehta** is the Executive Director, India at Pinkerton. As the Executive Director, he leads all of Pinkerton India for their Risk Consulting and Investigation practice. Umesh leads multiple teams, which specialize in their core domains of investigations, due diligence, intellectual property rights, security management, and response services.

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# How To Incorporate A Culture Of Cybersecurity Into Your Business?

## 3 steps to follow

By Kim Del Fierro

Cybersecurity is a prevalent issue that's received increased attention in many companies lately. And no wonder, since it's continuously been a hot topic brought to the spotlight by the significant data breaches of the past few years.

The good news is that there are plenty of solutions that can help stop cybercriminals in their tracks. The bad news is that many companies don't take the necessary precautions because they lack proper cybersecurity practices. That leaves them wide open to all sorts of malicious attacks. In prevention, businesses should first build a security culture from within, while ensuring they retain a strong security partner from outside the organization. Here are three steps to create a culture of cybersecurity.

### Aim to Disrupt

If your company's security culture is at a low level, you'll need to put in extra effort to change it for the better. That means you'll have to be disruptive and work on improving the existing cybersecurity mindset of every individual you employ. The ultimate goal of this process is to give the power of knowledge to your employees and spread awareness of the common cybersecurity issues. Without awareness, it's pointless to hold employees accountable for maintaining security.

Humans will always be the weakest link in any system, but that doesn't mean you should give up on cybersecurity education.

### Engage Employees through Education

You can make sure your employees will go through the cybersecurity education process smoothly by making it engaging. Want to teach them all about Business Email Compromise (BEC) and Email Account Compromise (EAC) scams and how to recognize them? Don't settle for a PowerPoint presentation they're sure to forget next month.

Instead, make sure they have something to do while they learn —such as organize a competition or let them try getting into the hackers' shoes. That way, your employees will have a better understanding of what they need to do to maintain security. By helping them learn actively, you will ensure that the knowledge they acquire lasts. No matter how strong your training, remember that it is never foolproof.

### Invest to See a Return

Everything you invest in to improve your company's cybersecurity practices should pay off down the line. If it doesn't, then it's ineffective. However, some things are always worth an investment. For example, creating a secure development lifecycle (SDL) is likely to have good ROI. An SDL will cover all the activities

you need to perform for each system or software release, which can improve the effectiveness of your cybersecurity practices.

On the other hand, using services that prevent threats from ever reaching you can be even more beneficial. This primarily holds true for forms of attack that traditional defenses, such as firewall and antivirus, can't stop. Phishing is the cause of 95 percent of data breaches, and with Area 1 Security's Area 1 Horizon Anti-Phishing Service, you can be sure that any email, web, and network phishing attacks will stop before they become a problem.

We've reached the point where cybersecurity has to become an intrinsic part of all business processes. The organizations that fail to make it so eventually find their weaknesses exploited by cybercriminals. To prevent this, build a security culture within your organization and invest in solutions that can minimize or stop threats completely.

**Kim Del Fierro** is the VP of Marketing for Area 1 Security.

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# Uh Oh. Your Employee Says S/he Was Harassed And S/he Has Recordings

## Top takeaways to ensure your policies are effective

By Janette Levey Frisch

In this article, I want to tell you about a case that just might have something for everyone. The Federal Housing Finance Agency is facing the following allegations: a) sexual harassment by the Director; b) Equal Pay violations; c) retaliation; and d) recordings that reportedly support these allegations. Yowsa!

I know in my head that these things happen all the time. Yet I continue to be amazed, that in light of federal and state laws addressing these issues, that: a) they continue to occur; and b) that many continue to be so blatant about it. The case is ***Grimes v. Federal Housing Finance Agency***. While the Agency may not be in a good place (assuming these allegations to be true) we, as always can learn a lot, so let's get to it…

Here's what went down: Simone Grimes worked for the FHFA in 2015 filling 2 jobs– one that was hers and another to which she was promoted. The first problem: she didn't receive the increase promised to her for the second job. The second problem: Her predecessor in the new job, a man, was paid more than she was (and he was only doing one job, not two). She was told that the Director needed to sign off on the increase.

The next problem: Shortly after Grimes asked the Director, Melvin Watt, to sign off on the increase, he approached her at work functions to tell her he believed there was an attraction between them that needed to be explored. Grimes continued to ask for the increase. She pointed out that she was paid 70 cents per dollar compared to her predecessor. The Agency kept telling her that the decision was Watt's.

In November 2016, Watts asked Grimes to meet. The problem here: Watts insisted that the meeting be at his home. Grimes reluctantly agreed. Watts allegedly told Grimes at that meeting that "I'm guilty of having an attraction to you, that is true," and, "So it makes me more conscious not to leave some impression." He allegedly mentioned opportunities for higher pay, and senior positions, and that he had the power to grant her what she wanted.

According to Grimes, Watts continued to make comments about her looks and her attire and make advances to her. Here's the possible clincher though: Unbeknownst to Watts, Grimes used her cell phone to record many of these conversations, including the November 2016 meeting at his home. Grimes filed a charge in May with the EEOC and wasfiled a lawsuit, alleging equal pay violations, harassment, and retaliation.

Before I talk about the harassment, retaliation, and equal

pay issues, I am expecting that at least one of you is thinking, "Wait a minute. Isn't it illegal to record conversations?" Alternatively, can an employer forbid recordings? The answer to the first question is, "It depends…" A participant in a conversation can record it if the State where it occurs is a one-party consent state. In such states, as long as one party to the conversation consents to the recording it's legal. This conversation took place in Washington, D.C., which, as you might have guessed, has a one-party consent rule.

Can you ban recordings in the workplace? In theory, yes, but only pursuant to a narrowly tailored policy that advances or protects legitimate business interests (e.g. preserving confidentiality of proprietary information), and only if it doesn't violate specific employee rights. Speaking of which: the NLRB takes the position that a blanket recording ban violates an employee's rights under Section 7 of the NLRA to engage in concerted activity "for the purpose of collective bargaining… or mutual aid or protection" (i.e. discussing and aiming to improve work conditions).

There is no indication that the Agency had any such prohibition, and, if it did, Grimes might well be able to argue that the recording was meant to help not only herself but also others (that would depend on a very fact-specific analysis). There's also the question of whether such a ban would include the meeting at Watt's home, since it clearly was not the workplace.

What is the basis for Grimes' retaliation claims? Interestingly, in her complaint, she argues that the harassment, having occurred after she asked for her pay to match that of her male predecessor, was and is retaliation. (Did I mention that Grimes not only still works at the agency, but also is still reporting to the people she alleges have had involvement in this entire scenario?)

Assuming all the allegations to be true, and assuming the recordings bear them out, do I need to say much more about harassment and pay discrimination? Why don't we just move on to the takeaways, hmm?

- As soon as you know or have reason to know of a pay discrepancy, either fix it or, make sure you have a really, really good reason for the discrepancy and document it;
- This should go without saying, but apparently it needs to be said: keep your emotions in check. If an employee is asking for something work-related that is reasonable, grant it or document your justification for not granting it—and don't tie it in with a romantic relationship;
- This too should go without saying: keep work-related issues at work. Avoid meetings alone with employees at home or in secluded places;
- Re-visit any policies prohibiting recordings at work. May sure they advance or protect legitimate business interests and that they are narrowly tailored to protect those interests.
- Monitor compliance with any anti-discrimination and harassment policies;
- Ensure that employees can make complaints or reports about alleged discrimination, harassment or misconduct in confidence and without experiencing retaliation;
- Talk and listen to employees about workplace issues and take their concerns seriously.

These last 3 points will go a long way toward ensuring that your policies and training are actually effective.

Contents of this post are for educational/informational purposes only, are not legal advice, and do not create an attorney-client relationship. Consult with competent employment counsel in the state(s) in which you employ people with your specific questions.

*This article originally appeared here.*

**Janette Levey Frisch** is an Employment/HR Attorney and the Founder of The EmpLAWyerologist Firm.

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# Best Practices For Summer Workplace Challenges

## How to communicate the summer dress code policy to employees?

By Beth P. Zoller

With longer days, warmer temperatures and school vacations, the summer months often present unique issues for employers when it comes to dress codes, social events, time off and protecting workers from the heat, among other things.

A summer dress code is an inexpensive way to improve workplace morale and make employees feel more comfortable when the warm weather hits. It is important to communicate the summer dress code policy to all employees and train supervisors so that they know:

- The employer's expectations;
- When the policy is in effect;
- What is considered acceptable workplace attire (e.g., golf shirts, khakis, sundresses); and
- What is considered unacceptable workplace attire (e.g., beach cover ups, flip flops)

The employer should focus on the need to look professional and appropriate at all times, which may vary based upon the type of workplace and the amount of interaction employees have with clients, customers and third parties. In implementing and enforcing any dress code, an employer should avoid policies imposing unequal burdens on men and women or other protected classes. Otherwise, an employer may face a sex discrimination or harassment claim.

An employer should also recognize that it may be required to provide reasonable accommodations based on a protected class status, such as religion, race or transgender status. The employer should enforce the policy consistently, following up on violations, properly documenting them, providing warnings and imposing discipline if necessary.

### Hygiene and Grooming

During the warm summer months, body odor and other hygiene issues may become more prevalent. An employer should address such issues head on before they have a negative effect on productivity, health, safety and public image. A grooming policy should provide notice regarding the employer's expectations regarding employee hygiene at work. The policy should assure supervisors and employees that any issues will be handled in a sensitive manner so as not to embarrass employees.

Further, an employer should remember that poor hygiene and/or body odor may be related to a disability or a religious belief, and therefore an employer should be prepared to provide a reasonable accommodation.

### Protection from the Heat

The job duties and responsibilities of some employees may require them to spend time working outside. In the summer, hot temperatures can cause employees to develop various heat-related issues including sunburn, heat stroke, heat exhaustion, heat cramps, and heat rash. An employer should take proper precautions to protect the health and safety of employees, as well as comply with the Occupational

Safety and Health Act (OSH Act). An employer that fails to take the appropriate measures to protect employees from the heat may face OSH Act fines and penalties, as well as claims for damages employees suffer while working.

It is critical for an employer to educate employees about how to protect themselves from the heat by wearing sunscreen and drinking water. An employer should also provide breaks, set up worksites in the shade and shut down operations during extreme heat waves. Further, an employer should train all supervisors and managers to recognize the signs and symptoms of heat illness and respond quickly if employees are in distress.

## Employer-Sponsored Social Events

While summer workplace parties or outings, such as company picnics, barbecues or baseball games, may encourage workplace camaraderie, boost employee morale and show appreciation, employers must take steps to decrease the risk of legal liability. To avoid wage and hour claims, an employer should make sure attendance is voluntary, hold events outside of working hours and avoid discussing work-related matters.

Further, an employer should take the proper precautions with respect to alcohol and minimize the risk of any inappropriate behavior or harassment by carefully tracking alcohol intake and having managers and supervisors monitor any unprofessional workplace behavior. The employer should also make sure employees do not drink and drive and consider providing safe transportation home. Further, to reduce the risk of workers' compensation claims, an employer should make sure the outing is in a safe environment.

A prudent employer should take note of the challenging issues the summer may present and develop a set of best practices for handling these issues in order to make the workplace more productive and efficient, as well as minimize the risk of employer liability.

• • •

**Beth P. Zoller** is the Legal Editor for the discrimination, affirmative action, harassment, retaliation, employee privacy, and employee handbooks/ work rules/employee conduct content in the employee management section of XpertHR. Prior to joining XpertHR, Beth practiced law for more than 10 years representing employers with respect to employment discrimination and harassment claims, contractual disputes, restrictive covenant issues, family and medical leave, wage and hour disputes and a variety of other employment-related claims.

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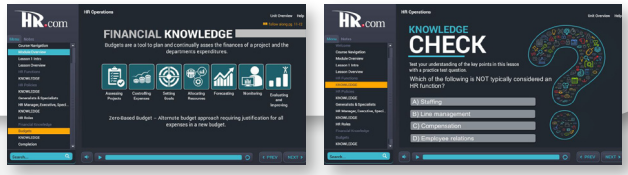


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# Should Employees Be Paid For Wellness Activities?

## What does the DOL Opinion Letter say

By Eric Athey

Over the past fifteen years, wellness programs have generated more than their fair share of litigation and regulatory scrutiny – primarily over the issue of whether they comply with the Americans with Disabilities Act. A related compliance issue that has attracted relatively little attention from courts and regulators is whether, under the Fair Labor Standards Act (FLSA), employees must be paid for time spent participating in wellness-related activities. This question was addressed in an Opinion Letter (FLSA2018-20) issued by the U.S. Department of Labor's Wage and Hour Division on August 28, 2018.

Opinion Letter 2018-20 specifically addresses whether an employer must pay employees for time spent in the following activities:

Biometric screenings (blood pressure, cholesterol levels, nicotine usage) both during and outside of their regular work hours;

Wellness activities such as nutrition classes, employer-facilitated gym classes, telephonic health coaching, participation in Weight Watchers and Fitbit challenges;


Attendance at benefits fairs to learn about employer-provided benefits, financial planning and college attendance opportunities.

The Opinion Letter concludes that employees need not be compensated for participating in the above activities if: a) their participation is purely voluntary; b) they perform no job-related duties while participating; and c) the activities predominantly benefit the employee and not the employer. In concluding that the activities were predominantly for the employees' benefit, the DOL noted that participating employees may enjoy lower health insurance deductibles while also learning how to make "more informed decisions" about non-job related health issues.

Moreover, since employees were relieved of all job duties while participating, they were "off duty" as that term is defined in DOL regulations.

This Opinion Letter is helpful assurance for employers who are considering implementation of wellness programs. If employee participation is strictly voluntary and no work is performed during the course of participating, the time will likely be deemed non-compensable under the FLSA. However, as many employers have learned, it can be difficult to generate strong employee participation in wellness programs. Although paying employees for their participation may not be required by the FLSA, some employers choose to do so as an incentive for participation.

*This article originally appeared here.*

**Eric Athey** is Co-Chair of the McNess Labor and Employment Group. He provides counseling and representation to employers on a wide range of labor and employment matters, including compliance assistance with laws such as the Affordable Care Act, FMLA, ADA, OSHA and wage and hour laws. Eric routinely helps unionized and non-union clients navigate difficult situations involving allegations of discrimination and harassment, as well as labor negotiations and arbitrations, employment contracts, and employment policy development.

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# How To Protect Your Organization From Fraud?

## Implementing clean desk policy in your workplace

By Ann Nickolas

Despite the move towards 'paperless' offices, the volume of paper we use at work is not going down any time soon. Roughly half of Canadian businesses (47% of C-Suites and 60% of small businesses) believe the volume of paper used in their organization will either increase or remain the same over the next year, according to Shred-it's 2018 Security Tracker survey on information security practices.

All the paper we use in the office often ends up as clutter, either stockpiled in drawers or stacked up on employees' desks. However, what you may not know is that a cluttered office not only looks disorganized, but can also have a negative impact on employees' well-being and put your organization at risk of fraud.

Research shows that clutter impacts stress levels, productivity, and mental health. University of New Mexico's Catherine Roster and colleagues (2016) found that cluttered spaces have a direct negative effect on a person's well-being. Clutter also decreases productivity and interferes with people's ability to stay focused. Researchers at Princeton (2011) found that physical clutter competes for one's attention, resulting in less focus on the tasks one needs to do. And messy environments can even harm a person's problem-solving ability. A study out of the University of British Columbia ***(2013) revealed*** that individuals exposed to a disorganized environment showed a reduced ability to complete challenging tasks.

It is clear that an organized and clutter-free work environment helps employees feel better and work more efficiently. However, if that is not enough to convince you, consider this: a tidy office also helps keep your employees and company protected from fraud.

The personal and confidential information found on seemingly harmless slips of paper stockpiled around the office can expose your organization to fraud. Any document that contains personally identifiable information (full names, addresses or ID numbers, for example) or potentially sensitive business information (R&D plans, sales and marketing strategies, intellectual property) could cause harm if it falls into the wrong hands.

Notebooks and post-it notes are common examples of potentially sensitive documents that often clutter the office. Handwritten notes can contain sensitive client or company information, passwords or personal information. Perhaps surprising to some, paper notetaking is still prevalent in the workplace: two-thirds (65%) of Canadians take notes at work in a paper notebook, according to Shred-it's survey. More concerning, over a third (37%) of employees leave work documents or notebooks on their desks after they leave work for the day, and 43% rarely or never shred confidential documents at work when they're no longer needed.

Many other seemingly harmless documents, such as printed presentation decks, receipts and shipping labels, contain sensitive information that can put an organization and its employees at risk if the documents are left lying around the office.

## Establishing a Clean Desk Policy

A Clean Desk policy is an easy way to establish a clutter-free office, ensuring your employees benefit from tidy spaces and your organization is protected from an unexpected data breach.

A clean desk policy requires employees to keep their workspaces clear of sensitive documents when they are not at their desks. In practice, it is simple for employees to implement the clean desk policy through the following three steps:

1. Start each morning by organizing the documents you need for the day and putting away the documents you don't need.
2. When leaving your desk for a break or meeting, take a look to see if any of the papers on your desk contain sensitive information. If so, place them out-of-sight in a folder or storage locker.
3. When leaving the office for the day, file or shred all documents, leaving your desk clear of clutter overnight.

When implementing a clean desk policy in your workplace, make sure to start at the top, as it's important for employees to see senior managers and company leaders following the policy. Once you have the commitment of senior management, we recommend the following tips to ensure everyone follows the policy:

1. **Write it down:** Communicate in writing why the policy is important and what the expectations are.
2. **Provide lockable storage:** Consider purchasing small, lockable storage boxes that fit under desks to easily and securely store sensitive documents.
3. **Remind employees**: Post signage in key areas of the office reminding everyone about the importance of a clean desk.
4. **Appoint monitors**: Request that a manager from each department check everyone's desk at the end of the day to see if they are following the policy.
5. **Reward clean desk employees:** Use your creativity when coming up with individual rewards for following the policy.

To complement your clean desk policy, consider implementing a *shred-it all* policy to eliminate the guesswork of what is and isn't considered confidential by requiring employees to shred all documents after use.

A few simple, yet effective, information security policies can go a long way towards improving the well-being of your employees and reducing your organization's risk of falling victim to fraud.

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**Ann Nickolas**, Vice-President of Shred-it, oversees new business development and account management for customers in the commercial, healthcare, and government verticals. In her role, Ann helps businesses secure their confidential information with products and services, policies and training, that help protect them from the risks, fines, penalties, and loss of revenue that come with an information breach. With a history of senior leadership roles in respected global companies like Compass, Cintas and Coca-Cola, Ann is uniquely positioned to understand the specific information security and privacy challenges in various industries.

Would you like to comment?

# Background Check: How Much Do You Really Want To Know?

## Factors to consider

By Spencer Waldron

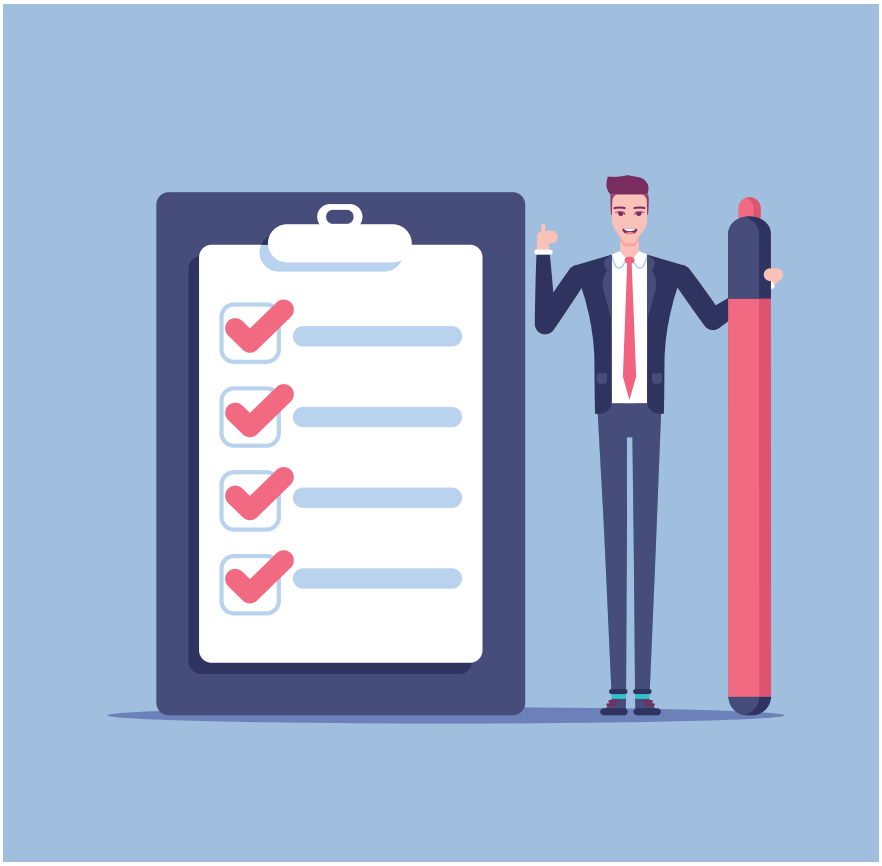
Most companies perform background checks on employees at the outset as part of the application / new hire process. A number of background check companies are now offering "continuous screening" or re-screening services as a risk management tool where background checks are performed on all employees annually or semi-annually.

Continuous background checks are gaining popularity among employers. In theory, this will catch items that were missed during the new hire process as well as criminal events that have transpired since the employee was hired. This is viewed as a risk management tool to protect against employee theft, embezzlement, fraud, violence, etc.

With that said, employers should consider the following with respect to continuous screening of employees:

### You Get What You Pay For

Less expensive background checks oftentimes use an online database, which are notoriously not as reliable as information gathered directly from the source/ courthouse (more expensive).



## Perform a Cost/Benefit Analysis

Currently, there is no empirical evidence that shows continuous screening is advantageous to employers. Whether it is a cost-effective tool, and whether the advantages outweigh the disadvantages, is something very specific to the company, which each employer should analyze.

## Look at Consent/Legal Compliance Issues.

Background check authorization forms should make it very clear that an employee may be re-screened on a regular basis throughout their employment—commonly referred to as "continuous authorization." Although signing an authorization one time at the outset of employment is generally accepted under federal law, it is not necessarily permissible under state or local law. There has been litigation in some jurisdictions—particularly California—as to whether continuous authorizations are permissible, versus authorization must be obtained each time a background check is performed.

## Do You Have the Right Policies and Practices in Place?

Employers need to have clear policies and practices in place for when they get background check reports with criminal history information. Employers should comply with the EEOC guidelines on background checks, state and local fair chance laws requiring individualized assessments of criminal history and the position the employee holds, pre-adverse and –adverse action letters when an employer wants to terminate an employee based on the background check report, etc.

In addition, employers need to be prepared as to how they will handle an employee's refusal to authorize a background check. Is the employee going to be terminated? The employee may claim it is an invasion of privacy. This is an uncharted territory of litigation, which comes with some risk, particularly if the employee is a member of a protected class, which may trigger a discrimination claim.

*This article originally appears here.*

**Spencer Waldron** is an Associate Attorney at Fisher & Phillips LLP. He is an aggressive litigator who has successfully represented clients in mediation, arbitration, in front of governmental agencies, as well as state and federal court proceedings. Spencer has special experience in the areas of wage and hour laws, employee compensation plans, laws regulating drug testing and background checks, and harassment/discrimination claims.

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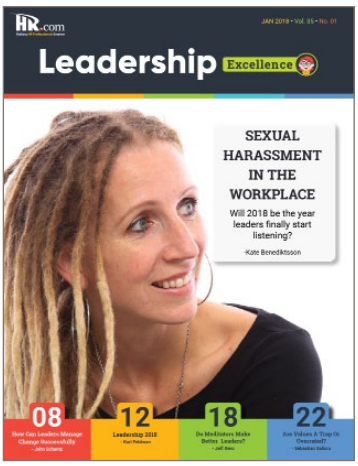


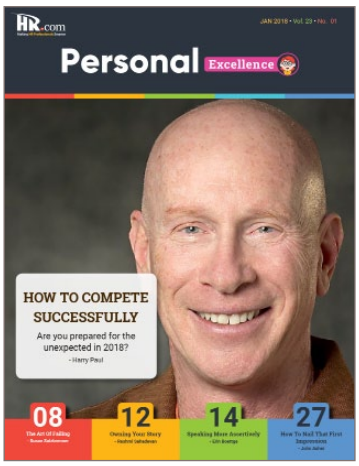


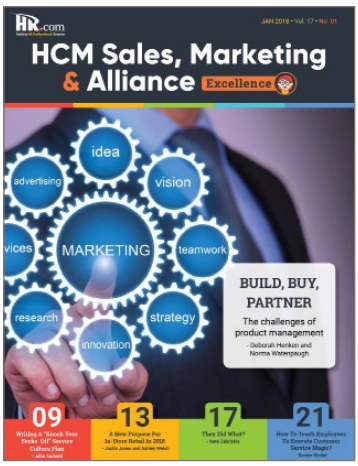



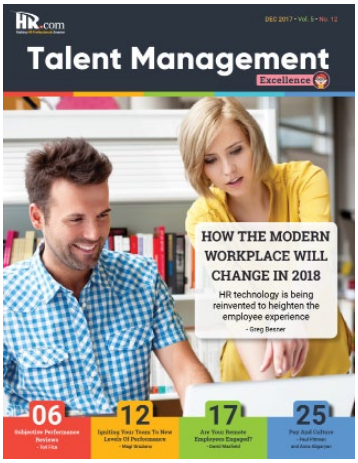


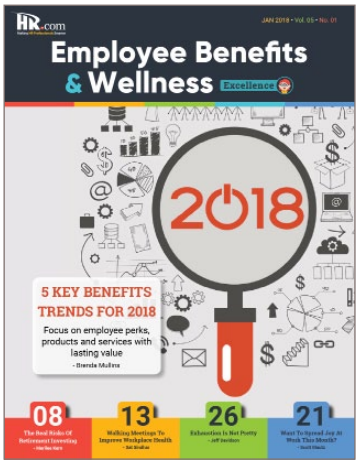


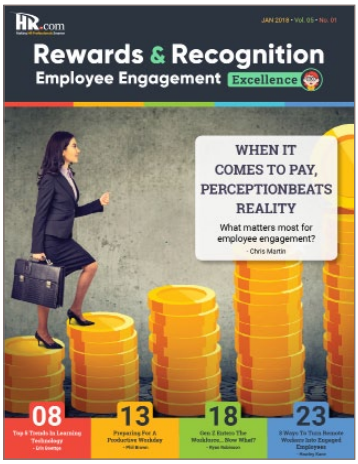



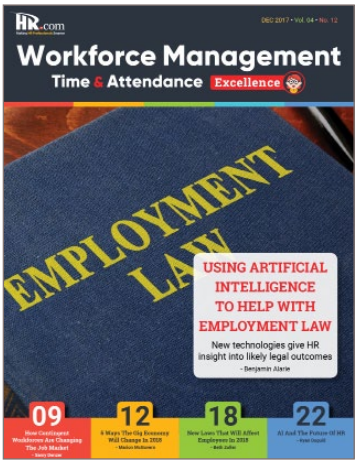




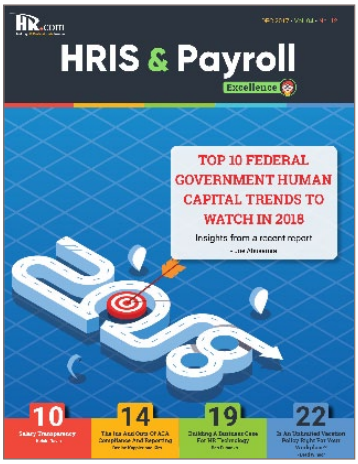


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