Gentle Readers

Special Reports for HR Professionals 2002

Collection of email reports.

GENTLE READERS: Special Reports for HR Professionals - 2002

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Gentle Readers,

Happy New Year to each of you. We hope this year will bring you everything you would like to have both professionally and personally.

Bill Truesdell
Editor

IN THIS REPORT (Report #209, 1/4/2002)
---------- (Sent to over 1,500 subscribers)

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1. NEW PRODUCTS AVAILABLE IN HR WEB STORE

With the beginning of a new year, we have searched out and obtained some outstanding new products for you. We are sure you will agree. And, our best selling products are still a hit with HR Professionals. Be sure to stop by the HR Web Store soon and see for yourself. www.hrwebstore.com

- "Federal Contracting Made Easy" (Book) by Scott A. Stanberry, CPA
  All you need to know so you can become a federal contractor in the lucrative world of government procurement. You can even learn how to improve your profits and get paid more quickly.

- "Staff Files" (Software) from Atlas Business Solutions, Inc.
  A comprehensive electronic filing system designed for all your personnel information requirements. Works on almost any Pentium PC. (We now offer a range of HRIS software products for small and medium-sized employers, in a very affordable price range.)

- "Visual Staff Scheduler Pro" (Software) from Atlas Business Solutions, Inc. A sophisticated program with a wide range of capabilities that works on nearly any Pentium PC. It is designed to accommodate the customization most employers need. (This is the newest offering in the "scheduling software" category.)

- "Gentle Readers - 2001" (Binder)
  A complete collection of all our 2001 Special Reports for HR Professionals. Stay current on the latest news and developments in the world of HR management. If you missed any issue during the year, you'll want to have a copy of this collection on your book shelf.

- "Creative New Employee Orientation Programs" (Book)
  Best practices, creative ideas and activities for energizing your orientation program. Hundreds of unique ideas from

corporations, universities and training consultants. Dozens of customizable game sheets, checklists and curriculum aids. Management orientation ideas and activities.

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2. CALIFORNIA RULES FOR SEXUAL HARASSMENT STRICTER THAN FEDERAL

California's Fair Employment and Housing Act (FEHA) makes employers strictly liable for harassment by a supervisor according to the California Court of Appeal for the Third Appellate District. (Department of Health Services v. Superior Court (McGinnis), Cal. Ct. App., No. C034163, 11/29/01)

The Court said that because FEHA provides strict liability, the Department of Health Services cannot use the defense available under federal law since 1998 to defend against a harassment suit from one of its employees. In federal case law, according to the U.S. Supreme Court, there is a defense referred to as Ellereth/Faragher. If a supervisor is accused of harassment and no tangible employment action is taken against the accuser such as firing or demotion, an employer can defend against the claim by showing that it exercised reasonable care to prevent and promptly correct sexually harassing behavior, and the plaintiff unreasonably failed to take advantage of corrective or preventive opportunities provided by the employer.

For California employers it is certainly a warning that liability grows out of any managerial misconduct of a sexual nature. Until there is a contrary ruling from the State Supreme Court, or new legislation to modify the current ruling, employers would be wise to be sure they:

1) Have a well written policy against sexual harassment explaining what behavior is unacceptable and that the company will not tolerate any behavior contrary to the policy.

2) Conduct regular management training sessions that include reviews of the anti-sexual harassment policy and how every management person is individually responsible for his or her actions.

3) Encourage employees to report such unacceptable behavior by using the company's internal complaint procedure. Be sure to allow complaints to be made to any management person, or the HR office. Don't require employee complaints be filed with the immediate supervisor. In sexual harassment complaints it is frequently the immediate supervisor who is causing the problems.

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3. EEOC RELEASES INITIAL DATA FROM FISCAL YEAR 2001

The Equal Employment Opportunity Commission (EEOC) has released preliminary data on its activities during fiscal year (FY) 2001 which ended on September 30, 2001.

A total of 80,840 new charges were filed with the federal agency during the course of the year. Race complaints continue to lead the list by frequency (35.8%). Sex/Gender complaints came in second place at 31.1% Retaliation complaints amounted to 25.3% of the total.

22.1% of the 90,106 complaints resolved during the year were classified as "merit resolutions." Those are judged to have been favorable outcomes for the charging parties (employees). 57.2% of the same total were found to have "no cause," meaning the complaints could not be substantiated by the agency's investigation. The remaining 20.7% of resolutions were "administrative closures" which includes cases that have timed out and requests for immediate closure and issuance of a "right to sue letter."

From October 1, 2000 through September 30, 2001, the EEOC filed 425 law suits and resolved another 346 litigation cases. Benefits from the agency's litigation during the year resulted in monetary awards or settlements of $47,285,127.14. An additional $247,781,184 was collected by the agency through its administrative enforcement actions including conciliation agreements with employers and others. So, the total amount collected by EEOC during the year was just shy of $300 million.

According to the agency, its inventory of pending charges has dropped to a 20-year low.

Gentle Readers,

The U.S. Supreme Court has ruled this week that injuries and disabilities are not the same under the ADA as it is written. Another Clinton Administration last-minute-rule has been overturned by the Bush Administration. Federal Contract Officers may no longer reject a contractor because personal judgment concludes the contractor has not met all obligations under federal laws and regulations.

Bill Truesdell
Editor

IN THIS REPORT (Report #210, 1/11/2002)
---------- (Sent to over 1,500 subscribers)

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1. BUSH REVOKES CLINTON RULE ON FEDERAL ACQUISITION

The Bush Administration has announced it will publish new rules that will eliminate the highly controversial attempt by President Clinton to control government contracting through a requirement for total compliance in all areas of employee management and other non-procurement demands. Notice of the new rules was published in the Federal Register on December 27, 2001 and became effective the same day. [Federal Register: December 27, 2001 (Volume 66, Number 248)]

Under the Clinton rules, any federal contractor could be rejected by a single Contracting Officer for failure to maintain a "satisfactory record of integrity and business ethics includ(ing) satisfactory compliance with the law including tax, labor and employment, environmental, antitrust, and consumer protection laws." Clinton's action was taken following a February 1997 promise to the AFL-CIO by then-Vice President Al Gore to require government contractors to have a satisfactory record of labor relations.

Clearly, too much power was delegated to individual Contracting Officers with no provision for appeal or review.

The Federal Acquisition Regulatory Council conducted public hearings in June 2001, on the proposal to revoke President Clinton's requirements.

In its actions the FAR Council has removed the "contractor responsibility rule" and all rules that would have made it impermissible for contractors to recover any costs associated with assisting, promoting or deterring unionization or those associated with civil or administrative proceedings where the government charged a

contractor with violating a law or regulation. According to the FAR Council, "the current regulations governing suspension and debarment provide adequate protection to address serious threats of waste, fraud, abuse, poor performance, and noncompliance."

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2. WHAT'S THE FUTURE FOR HR TECHNOLOGY?

Vince Ceriello and Rob Thurston have just published an article on HR.com entitled, "Application Service Providers: What's Behind the Curtain?" They make several predictions about the use of technology in management of the HR function in American organizations. Here are some highlights:

- Outsourcing will continue to grow and then decline. It will become more cost effective for many organizations to bring some, if not all, HR functions back onto the employer's payroll. The trick is in doing a proper analysis.

- will eventually consist of a few major players. Application Service Providers (ASPs) will continue to grow in number to serve the market some say will reach into the $11 billion to $23 billion range by 2003. Consolidation and bankruptcies will adjust the number of ASPs downward.

- The Internet will continue to expand. Wireless technology is the largest growing area of new service offerings.

- Gen X and Gen Y users will emerge with different needs. Employers will need to address each individually.

- TeleWork will be the norm. Many reasons will direct a surge in working from home ... some say 40 - 50% of the workforce within 10 years.

- Technology will level the playing field. Technical advances will continue to develop and the result will be fewer HR staff handling service technology.

- HR people will finally begin thinking as strategic contributors and managing their organizations as profit centers.

And, more. If you want to see the complete article and learn more about the reasons behind these predictions, go to www.HR.com and search on the article title. These are not whimsical predictions, but solid forecasts from some very serious HR professionals.

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3. SUPREME COURT SAYS INJURIES ARE NOT ALWAYS DISABILITIES

By unanimous vote, the U.S. Supreme Court this week restricted the definition of "disability" under the Americans with Disabilities Act (ADA), excluding injuries that leave workers partially incapacitated.

The case was Toyota Motor Manufacturing, Kentucky, Inc. v. Ella Williams (00-1089). You can read the entire seven-page opinion written by Justice Sandra Day O'Connor by going to: http://supct.law.cornell.edu/supct/html/00-1089.ZO.html

According the ADA, a physical impairment that "substantially limits one or more ... major life activities" is a "disability." Ella Williams sued Toyota, her employer, for failure to provide reasonable accommodation as required by the ADA because she suffered from carpal tunnel syndrome and other related impairments.

Following her physician's diagnosis of her medical condition, Ms. Williams was restricted by the doctor from lifting more than 20 pounds or from "frequently lifting or carrying of objects weighing up to 10 pounds," engaging in "constant repetitive ... flexion or extension of [her] wrist or elbows," performing "overhead work," or using "vibratory or pneumatic tools." When confronted with these medical restrictions, the company assigned Ms. Williams for the next two years to various modified duty jobs. During this time she experienced some absence from work due to medical leave and eventually filed a claim under the Kentucky Workers' Compensation Act. The claim was settled and Ms. Williams returned to work, but was unsatisfied by the company's efforts to accommodate her work restrictions. She was assigned to two of four tasks that allowed her to meet the medical restrictions. Some time later, the company reviewed its job task assignments and decided people in Ms. Williams job assignment must be able to rotate through all four of the tasks in the job design. Absence from work increased and eventually Toyota terminated Ms. Williams for poor attendance.

Ms. Williams claimed she was "disabled" under the ADA because of her physical impairments substantially limiting her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working, all of which she claimed constituted major life activities under the ADA.

The Court wrote, "Merely having an impairment does not make one disabled for purposes of the ADA...We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term. It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment."

Injuries are therefore not always disabilities under the ADA and employees may not always be entitled to reasonable accommodation under the ADA requirements. Employers would be well advised to work with their Management Attorneys on a case-by-case basis in determining which circumstances constitute a disability, and therefore, require the employer to offer reasonable accommodation to any worker.

Gentle Readers,

This week, we tell you a bit about how federal employees are protected against illegal discrimination and how they must handle complaints when bad things happen. Do you want some proof that well-treated workers are better for a business than poorly-treated workers. Princeton University offers us some compelling data. Finally, we are excited to announce two of our more popular books are now available in e-book format.

Watch for next week's issue of Special Report for HR Professionals to learn how the U.S. Supreme Court has determined that the EEOC can legally sue employers even though the employee is bound by an arbitration agreement.

Bill Truesdell
Editor

IN THIS REPORT (Report #211, 1/18/2002)
---------- (Sent to over 1,500 subscribers)

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1. FEDERAL EMPLOYEES FACE DIFFERENT RULES ON DISCRIMINATION

From time to time, we get questions from federal employees asking about the rules for handling complaints of discrimination within the federal agency structure. To be sure, they are quite different from the rules private employers and their workers must follow.

o EEO Protections

The protections for federal workers are at least as great as those offered to private sector employees. Sometimes, they can be even more protective. For example, by Presidential Executive Order (E.O. 13145) use of personal genetic information is not permitted in employment decisions within the federal government. The same protections are not offered by federal law to those in the public sector. Some states have passed legislation that prohibits use of genetic information in employment decisions, however.

Under federal law it is prohibited to discriminate against either job applicants or employees on the basis of race, color, religion, sex, national origin, disability or age. Anyone who files a complaint or participates in an investigation of an EEO complaint, or who opposes an employment practice made illegal under any of the statutes enforced by the Equal Employment Opportunity Commission (EEOC), is protected from retaliation.

Beyond those basic protections, other federal provisions offer protection from discrimination in employment on other bases including sexual orientation, status as a parent, marital status, political affiliation, and conduct that does not adversely affect the performance of the employee.

> The Civil Service Reform Act of 1978 (CSRA), prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation.
> Executive Order 13087 (which amends Executive Order 11478) was signed on May 28, 1998, to provide a uniform policy for the federal government to prohibit discrimination based on sexual orientation.
> Executive Order 13152 (which also amends Executive Order 11478) was signed on May 2, 2000, to provide for a uniform policy for the federal government to prohibit discrimination based on an individual's status as a parent.

o Complaint Handling in the Federal Government

Employees or job applicants who believe they have been illegally discriminated against by a federal agency may file a complaint with that agency. Specifically, the complaint should be filed with the EEO Counselor at the agency within 45 days of the discriminatory action. If the agency offers counseling or ADR to resolve the problem, counseling must generally be completed within 30 days and Alternative Dispute Resolution (ADR) must be completed within 90 days. If either of these approaches is attempted and is unsuccessful the complaint can then be filed with the agency.

The agency must conduct an investigation of the complaint and must be processed under the Merit Systems Protection Board (MSPB) procedures if it contains one or more issues that must be appealed to MSPB. All other cases, once the investigation is completed, the complainant may request a hearing before an EEOC administrative judge or an immediate final decision from the agency. Decisions from administrative judges must be issued within 180 days. The agency has an additional 40 days to issue a final action decision following the judge's decision.

Each agency has the prerogative to establish its own investigation processes and requirements. Some agencies require written affidavits from complainants, witnesses, and managers. Others will accept oral input and investigation summary notes. Often, agencies contract with external consulting organizations and attorneys to provide investigation services as they are needed.

If you are a federal employee with a problem you think might be illegal discrimination, contact your agency's EEO Counselor to discuss what

procedure you should follow to get the problem corrected. For more information about general requirements for federal workers go to the EEOC web site at www.eeoc.gov .

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2. NOW THERE IS EVIDENCE THAT MORALE CAN IMPACT BOTTOM LINE

You've heard it said for years on end. If you treat your employees well you will find they work harder. And, if you mistreat workers you will discover they will figure out how to get even. The Equity Theory of management has held that position ever since it was first formulated.

Now, a couple of researchers at Princeton University's Industrial Relations Section have offered an analysis of the impact labor disputes at Bridgestone/Firestone's Decatur, Illinois factory had on tires accused of causing multiple highway deaths on SUV's.

The study is prepared as a working paper by Alan B. Krueger and Alexandre Mas and can be found at www.irs.princeton.edu in the "Working Papers" section of the site.

Firestone ran 11 North American tire production plants, including the Decatur, IL plant, which manufactured a large number of P235/75R15 tires. The plant's labor contract expired on April 1, 1994, and employees worked without a contract for three months. The company insisted on moving from an 8-hour to a 12-hour shift that would rotate between days and nights, as well as cutting pay for new hires by 30 percent.

In July 1994, the Decatur plant began a severe labor strike. Almost immediately after 4,200 employees went out on strike, the company began hiring replacement workers. In May 1995, the union offered to return to work without a contract. The company said it would retain the replacement workers and recall the striking workers as needs arose. A final contract, which included provisions to recall all strikers, was not settled until December 1996. This case represents one of the largest uses of permanent replacement workers in the nation's history.

The results proved fatal according to the study. "We estimate that more than 40 lives were lost as a result of the excessive number of problem tires produced in Decatur during the labor dispute (1994-1996)," the report concludes.

Other study findings included:

- Firestone tires made in Decatur during the labor dispute were 376% as likely to prompt a complaint to the National Highway Transportation Safety Administration than tires made in other Firestone plants. At times of labor peace, Decatur tires were 14% less likely to prompt a complaint.

- Customers with tires made in Decatur during the dispute were more than 250% as likely to seek compensation from Firestone for property damage or injury blamed on faulty tires than were customers of tires made there during more

peaceful times.

- Tires made in Decatur during the dispute did worse on laboratory stress tests that Firestone conducted when the tires were produced than those made at other times or in other plants.

- Monthly data suggest that the production of defective tires was particularly high around the time wage concessions were demanded by Firestone in early 1994 and again when large numbers of replacement workers and permanent workers worked side by side in 1996.

"It appears likely to us that something about the chemistry between the replacement workers and the recalled strikers ... created conditions that led to the production of many defective tires."

Bridgestone, the Japanese parent of Firestone closed its Decatur tire plant last month (December 2001). This study suggests that squeezing workers, even in an age of weakened unions, can be bad management, especially when employers abruptly change the rules.

The total cost to Firestone for the defective tire problem created in Decatur has yet to be acknowledged. It will likely run into the hundreds of millions of dollars. Now, there is a BIG impact on the bottom line ... all due to employee morale.

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3. TWO POPULAR TITLES NOW IN E-BOOK FORMAT - DOWNLOAD NOW!

Secrets of Affirmative Action Compliance (5th Edition) is now available in e-book format (PDF) so you can carry it with you on your computer where you may need it most. It can be ordered on CD-ROM from www.hrwebstore.com in the HR Books & Manuals department for $49.95 plus postage. Or, you can get a download file from www.eBooks.com for the same $49.95 price. You will find it at: http://www.ebooks.com/items/item-display.asp?IID=19780 This is a special price, half off the hard copy version of the same book. Whether you wish to download or get a CD-ROM containing your copy of this wonderful reference, you will be glad you ordered before your organization is audited by the U.S. Department of Labor. The hard copy price is $99.95. Get the one reference book being used by thousands of employers around the country to help them successfully meet their affirmative action obligations.

"Breakthrough Technical Recruiting" is the second title we have made available in e-book format. Our hard copy price for this publication is $49.95. But, now you can get an electronic PDF format copy for only $39.95. You can download it directly from www.eBooks.com and pay on-line. Simply go to: http://www.ebooks.com/items/item-display.asp?IID=19788

Don't forget to visit the HR Web Store to see all the latest additions to our professional HR management offerings. To remain professional we all have to continue learning about new developments in the field.

We offer you some of the best available resources for continuing professional development. Come visit us at www.hrwebstore.com .

Gentle Readers,

The U.S. Supreme Court offers some guidance to employers in two specific decisions. And, the old question of California overtime computation continues to surface.

Bill Truesdell
Editor

IN THIS REPORT (Report #212, 1/25/2002)
---------- (Sent to over 1,500 subscribers)

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1. SUPREME COURT SAYS EEOC CAN SUE IN SPITE OF ARBITRATION REQUIREMENT

On January 15, 2002, the U.S. Supreme Court issued its decision in the case of EEOC v. Waffle House, Inc. (99-1823). You will find the full 45-page opinion at
http://www.supremecourtus.gov/opinions/01slipopinion.html

Why is it important? Well, the Court has now said that it is OK for the Equal Employment Opportunity Commission (EEOC) to sue an employer for illegal discrimination even though the employee involved was bound by a requirement to arbitrate the dispute rather than take it to court. The EEOC action can be independent of employee action.

Here's how it all started. Eric Baker went to work for Waffle House Inc., a restaurant in Columbia, SC in August 1994. Within a month after he was hired, Mr. Baker, who had a seizure disorder, suffered a seizure at work. He was fired shortly afterward. He filed a complaint with the EEOC claiming a violation of the Americans with Disabilities Act (ADA).

Though generally supportive of arbitration requirements in recent case rulings, the Court this time overruled the U.S. Court of Appeals for the Fourth Circuit in Richmond. The Appellate court had said the EEOC was barred from seeking a court remedy because that wouldn't give enough credence to the arbitration process.

After an investigation and an unsuccessful attempt to conciliate, the EEOC filed an enforcement action against Waffle House in the Federal District Court for the District of South Carolina. The employee was not a party to that case. The company argued that the Federal

Arbitration Act (FAA) required the employee to use the designated arbitration process in this instance and that the EEOC had no standing to interfere with that requirement.

The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement. When he was hired, Baker had signed an agreement that he would submit any employment dispute claims to arbitration.

The employer also argued that the EEOC could prosecute its claim only with Baker's consent, since it sought back pay, reinstatement, and other remedies available under the ADA.

In writing the majority opinion for the Court, Justice Stevens said, "Baker has not sought arbitration of his claim, nor is there any indication that he has entered into settlement negotiations with [Waffle House]...The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC."

Justice Stevens continued, "The text of the relevant statutes provides a clear answer to that question. They do not authorize the courts to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case."

While the Court was split in its opinion by a 6-3 vote, Justice Thomas represented the minority opinion when he wrote that the EEOC should have no actionable authority that the employee does not already possess.

Finally, the majority opinion stated that the EEOC is not bound by the limitations placed on an employee by an arbitration agreement. The ADA "specifically grants the EEOC exclusive authority over the choice of forum" it wishes to use in seeking remedy to a specific situation.

Bottom line...having employees sign arbitration agreements does not guarantee an employer there will be no suits by the EEOC independent of any employee participation.

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2. ANOTHER CALIFORNIA OVERTIME QUESTION - DOES THE EMPLOYER HAVE A CHOICE?

QUESTION:
At the HR Web Store web site it says about California overtime: "Over 8 hours in a day and/or over 40 hours in a week must be paid at 1.5 times the normal hourly rate."

When my employer read this he took the "and/or" part of this as to mean that overtime was not mandatory over eight hours in a day but as the employer he has a choice to pay over 40 hours in a week instead. Does that make sense? I'm wondering if this is worded correctly. I've been telling him that the rules changed Jan. 1, 2000 and it is mandatory to

pay overtime over 8 hours in a day and that our bookkeeper isn't doing this properly.

Please advise. Thank you!

ANSWER:
If your employer is covered by one of the Industrial Welfare Commission (IWC) Wage Orders that requires daily overtime, there is no option. You will find the rules for overtime posted at your place of employment in the IWC Wage Order. California law requires that they must be posted in every workplace. Failure to post can result in a fine of up to $7,000. The "and/or" means just that. Overtime must be paid for over 8 hours in a day if it is worked, or for over 40 hours in a week if it is worked and not paid under the 8-hour rule. If both daily overtime and weekly overtime are earned, both must be paid. Unfortunately, the employer does not get to choose, but rather must follow the rules outlined in the Wage Order.

Failure to pay can result in an order to pay back overtime for 3 or more years, plus fines and penalties levied by the Labor Commissioner.

More information is available from the California Industrial Relations Department, Labor Standards Enforcement Division (Labor Commissioner). You will find their telephone number in your local phone directory under "State Government Offices" in the government pages section.

If you would like a copy of the Wage Order that applies to your establishment, you can download it in PDF file format from the HR Web Store at www.hrwebstore.com . Go to the "FREE Stuff" department and look for Wage Orders. Most are about 20 pages in length, and all pages must be posted for employee reference. (We suggest stapling them together as a book before posting.)

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3. FRONT PAY NOT INCLUDED IN FEDERAL PENALTY CAPS

The U.S. Supreme Court has excluded front pay awards from being classified as compensatory damages and therefore, subject to the cap provided in the Civil Rights Act of 1991 (CRA '91). Appellate Courts had held differing opinions on this issue.

Front pay, of course, is the amount of money one would have earned from the time of payroll separation to achieving a new job placement or, under Title VII of the Civil Rights Act of 1964, reinstatement to the old job. In some circumstances, front pay means the same thing as back pay. Regardless of the differences in definition, it represents the amount of money needed to compensate an injured party from the judgment date until the "reinstatement" date, or in lieu of reinstatement.

The Sixth Circuit Court of Appeal in Hudson v. Reno (130 F. 3d 1193, 1997) said that front pay was subject to the cap written into CRA '91.

In Pollard v. Du Pont (532 U.S. 00-763, 2001) the Supreme Court said front pay is not an element of compensatory damages, but rather a replacement for the remedy of reinstatement in situations where reinstatement would be inappropriate.

Computed as actual damages, front pay can run into huge amounts considering the possibility that an employee may not be able to find work for a long time, or may be incapable of working due to the damages suffered through the illegal discrimination.

While this may be of more interest to attorneys than to HR managers, it is still necessary to keep in mind that impact on the "bottom line" can be significantly affected by even one of these case decisions with large monetary awards. The best solution to the problem? Management training is the answer. Every management person should understand the financial impact to the organization of illegal discrimination. Decisions made by organizational managers can be very expensive if they result in illegal discrimination against employees.

Gentle Readers,

George Chaffey brings us the wisdom from his legal observations of the EEOC and OFCCP this week. It is also interesting to note that the debate about validity of disparate impact claims under the ADEA may be nearing an end.

Bill Truesdell
Editor

IN THIS REPORT (Report #213, 2/1/2002)
---------- (Sent to over 1,500 subscribers)

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1. HISTORY PREDICTS FUTURE OF AFFIRMATIVE ACTION

At last week's quarterly meeting of the Silicon Valley Industry Liaison Group (SVILG) George Chaffey, a nationally recognized attorney with Littler Mendelson, summarized the history of affirmative action in America and extrapolated the program's future.

Chaffey, who began his legal career in Mississippi during the early days of the Civil Rights movement, said we are just now entering the third era in civil rights law in this country.

The first era of civil rights law lasted 25 years from 1964 to 1989. Legislators and courts developed programs and definitions for equal employment opportunity (EEO) that became the foundation of federal employment affirmative action during the same period. The first era was characterized by passage of the Civil Rights Act of 1964, recognition of a segregated society, sexist job titles, development of the Uniform Guidelines on Employee Selection, court determinations for definitions of illegal employment discrimination, and use of race- or gender-conscious selection criteria in affirmative action programs. States rights were the rallying call used to prevent changes to societal segregation in many areas of the country. Three Supreme Court decisions during this time helped to further define EEO and affirmative action.

- Griggs v. Duke Power Co. (401 U.S. 424, 3 FEP Cases 175, 1971) Established the legal theory of employment discrimination we know as "disparate impact."

- United Steelworkers v. Weber (443 U.S. 193, 1979) Decided that Title VII allows for voluntary, private, race-conscious programs aimed at eliminating racial imbalance in traditionally segregated

job categories.

- Johnson v. Santa Clara County Transportation Agency (480 U.S. 616, 1987) Endorsed giving preferential treatment to protected groups if they are underrepresented and if the affirmative action plan is voluntary.

The past 12 years, from 1989 to the present, represent the second era in civil rights. During this time, affirmative action plans were sometimes drafted with overt preferences based on race or gender. Diversity programs blossomed. Reverse discrimination lawsuits became common. And, the U.S. Supreme Court struck down job preferences in the Croson case. (Richmond v. J.A. Croson Co., 488 U.S. 469, 53 FEP Cases 197, 1989) During this period, affirmative action programs were used to undermine EEO through inappropriate use of goal achievement requirements.

Equal Employment Opportunity was being molded and defined during these two eras. As we begin the third era, Chaffey says there is virtually no remaining basis in law for giving race preferences under the principle of EEO. He predicts that the foundation provided by 37 years of legal testing will support ongoing use of non-preferential affirmative action programs for federal contractors.

Even if some local entities may not have yet realized that quotas are illegal, they will soon modify their requirements or surely face sanctions from court challenges.

In concluding his presentation, Chaffey outlined four issues the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) will be addressing this calendar year.

1) Functional AAPs - Charles James, head of the OFCCP, has announced that new directives will be issued within the month.

2) Evaluating the Equal Opportunity Survey - Charles James indicates the agency is still evaluating the use and value of the EO Survey. The EO Survey is among a list of 21-most-important items for review in the Office of Management and Budget (OMB). Even though it is a high priority, Chaffey doesn't expect any actions in the near future.

3) Applicant Issue - Who is an applicant? Finding a proper definition is a job being done by a task force containing representatives from both government and industry. Last Fall, Charles James expected the task force to complete its work by early this year. Now it seems the job will take a little longer. OMB has ordered that the Uniform Guidelines on Employee Selection (41 CFR 60-3) be updated and republished. It was supposed to have happened before the end of 2001, but is now expected sometime in the current calendar year.

4) Increase in Technical Assistance and ADR - Alternative Dispute Resolution. Chaffey says the EEOC will return a portion of its budget to ADR underwriting even though it did not receive any additional funding for the current fiscal year. (You will recall that the EEOC stopped its funding of external mediators about

eighteen months ago. Ida Castro, then Chair of the EEOC, said it was a service that could not be pursued in light of the budget restrictions Congress imposed. Cari Domingues, current Chair of the EEOC has promised to fund ADR out of current budget levels.)

For more information, or to ask for legal help in the areas of EEO or affirmative action, contact George Chaffey at Littler Mendelson by email at gchaffey@littler.com .

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2. SUPREME COURT TO HEAR CASE ON ADEA DISPARATE IMPACT

The U.S. Supreme Court has agreed to hear a case that could determine if the Age Discrimination in Employment Act (ADEA) can support disparate impact claims, a subject that has been long debated and the source of mixed decisions in various Circuit Courts of Appeal.

In 1993, the Supreme Court expressed its doubts that disparate impact was a valid claim under ADEA in its Hazen Paper Co. v. Biggins (507 U.S. 604, 61 FEP Cases 793, 1993) decision. Then, the court said, "we have never decided whether a disparate impact theory of liability is available under the ADEA...and we need not do so here."

According to BNA's EEOC Compliance Manual, the Second, Eighth, and Ninth circuits have allowed ADEA disparate impact claims, while the First, Seventh, Tenth, and Eleventh circuits have not.

The case up for current review is Adams v. Florida Power Corp., (U.S., No. 01-584, cert. granted 12/3/01). A group of 117 former Florida Power Corp. employees lost their jobs in various corporate reorganizations during the 1990s and sued the company for age discrimination under the ADEA using a disparate impact theory. They claim more than 70% of workers selected for separation from the payroll were age 40 or over.

Their case was overturned by the Eleventh Circuit's ruling that disparate impact claims are not valid under the ADEA.

Therein lies the opportunity for the U.S. Supreme Court to end this battle once and for all. We should expect an opinion to be issued later this year.

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3. AN EASY WAY TO IMPROVE EMPLOYEE ATTENDANCE AT WORK
By Ron Moore

Over the years I have worked with several companies on attendance policies and issues. It is easy to say that employees and employers interpret the sick leave and attendance policies very differently. Workers often are accused of abusing sick leave by using them as "just days off." Some workers confuse accumulated sick leave as an opportunity to take those few "guiltless" days off and they don't understand why they fall in trouble with existing attendance policies.

Well these issues will be an on going-battle for management over the years. Training and honest open discussions with employees will help these matters. But what about rewarding people for good attendance? Management spends a lot of time fixing, correcting, or solving the problems, which is only about 1 or 2% of what is going on. They forget to stop and praise the 98% of things going right.

At one company I helped create an attendance reward system called the "Tough Team". To make the tough team you had to have perfect attendance, with no exceptions, for the purpose of this reward. Funerals, worker compensation injuries, or other reasons were not accepted excuses for the purpose of this award.

We set up the program for quarterly awards and a yearly award. Every employee who had perfect attendance for a calendar quarter got to attend a special lunch with the manager. These lunches were a badge of honor. A large poster on the employee bulletin board featured every employee's name with a red light or green light indicating if they had made the "Tough Team" for that quarter. It also showed where they stood for the year.

The yearly winners received a special custom-made jacket indicating they were a member of the "Tough Team". Each year a new style and design was created. Employees who got these jackets wore them proudly. To go an entire year without missing a day's work is really a feat and this program brought attention to the company recognizing the positives.

The program does have some cost associated with it. But, ask yourself how much does absenteeism cost you in lost production and decreased morale? This visual reminder and reward system is a way to send a positive message to employees and improve attendance. Both are win/win situations for management.

Ron Moore is the President of National Resource & Training Services (www.nrts.org) and the co-founder of the American Training & Seminar Association (www.AmericanTSA.com) and American E-Books (www.AmericanE-Books.com). He is a Certified Professional Trainer and a Certified Seminar Leader. He can be contacted at rmoore@AmericanTSA.com.

Gentle Readers,

Be sure to stop by the HR Web Store to look at the new products recently added. They could literally be life savers.

This week, OFCCP's latest results and the best employers in private and public sectors are named by CAREERS & the disABLED magazine. Is your organization on the list?

Bill Truesdell
Editor

IN THIS REPORT (Report #214, 2/8/2002)
---------- (Sent to over 1,500 subscribers)

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1. NEW SAFETY RESOURCES ADDED TO HR WEB STORE

We are continuing to focus on the needs of HR professionals and in our search for new products that will address those needs we have expanded our offering and created a new Safety Resources department.

Natural disasters, terrorist activities, and everyday accidents can threaten life as we know it. When we become separated from our normal supply lines and lose access to power and other utilities it is essential that we have supplies of food and water available that will sustain us through the initial disaster.

So, we now bring you five choices for survival kits. Would you think it wise to invest $17.95 for a three-day supply of food and water? That's all it takes to buy The Ark III that even comes with a blanket to help preserve body heat. Food and water are packaged in containers approved by the U.S. Coast Guard and have a 5-year shelf life, so you don't have to replace them every six months as you might expect with other food and water products.

Planning for safety of a group at work or your family at home? Consider one of the following kits that offer much more than just food and water.

- Small Business (or Family) Emergency Kit
  Up to 5 people for 3 days

- Group Support Kit
  Up to 10 people for 3 days (More than 500 items)

o The Traveler Survival Pak
  1 person for 3 days

o Outdoor Environment Protection Kit
  1 person for 6 days or 2 people for 3 days

You can review the contents of each kit at the HR Web Store Safety Resources department. Go to www.hrwebstore.com .

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2. OFCCP POSTS RESULTS FOR MOST RECENT FISCAL YEAR

The Office of Federal Contract Compliance Programs (OFCCP) has released statistics on its performance during the fiscal year ended September 30, 2001. While the number of compliance reviews rose during the year, the number of employees impacted by those reviews jumped markedly.

Number of Compliance Evaluations Completed (13% increase over FY2000)	4,716
Number of Compliance Checks (2% less than FY2000)	2,459
Number of Corporate Management Reviews (14% less than FY2000)	36
Workers in Facilities that were Reviewed (17% increase over FY2000)	1,741,845
Number of Debarments (In the previous 4 years, from 1997 through 2000, there were zero debarments.)	1

The agency collected $28,975,000 in a total of 210 agreements. Part of that amount, $9,036,000 came from back pay agreements. The work load was handled by 774 total staff, down 4% from the previous year. Compliance Officer head count fell from 453 to 444 in FY2001.

OFCCP has been allocated $77.1 million in the proposed 2003 budget, a fairly consistent number of dollars compared to the current budget. It will actually support fewer agency workers, however, due to the federal pay increases being implemented this year.

Charles James, the agency's director has said he expects there will be a shift towards more contractor education and support of self-regulation among contractors. "Self-monitoring is more efficient than enforcement," he has said.

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3. CAREERS & THE DISABLED NAMES TOP 50 EMPLOYERS

Readers of CAREERS & the disABLED magazine were asked to name the employers, both in the private and public sectors, for whom they would most like to work ar that they believe would provide a progressive environment for people with disabilities. The employers, listed according to the frequency they were cited by respondents include:

1. IBM

2. Microsoft
3. Marriott Hotels
4. United Parcel Service
5. Ford Motor
6. McDonalds
7. JC Penney
8. Federal Express
9. TRW
10. Siemens
11. EDS
12. Lockheed Martin
13. Dell Computer
14. Alstom Power
15. Neiman Marcus
16. Freddie Mac
17. Apple Computer
18. General Motors
19. Wal-Mart Stores
20. Procter & Gamble

The top 20 Government Agencies listed by readers as most supportive of people with disabilities included:

1. Federal Bureau of Investigation (FBI)
2. Central Intelligence Agency (CIA)
3. Social Security Administration (SSA)
4. U.S. Department of Defense (DOD)
5. Internal Revenue Service (IRS)
6. National Security Agency (NSA)
7. Department of Veterans Affairs (VA)
8. U.S. Department of Labor (DOL)
9. U.S. Department of Justice (DOJ)
10. Natioal Park Service (NPS)
11. U.S. Department of Health & Human Services (HHS)
12. U.S. Navy
13. U.S. Postal Service
14. U.S. Army
15. National Aeronautics & Space Administration (NASA)
16. National Credit Union Administration (NCUA)
17. U.S. Department of State
18. U.S. Department of Agriculture
19. Federal Reserve Bank
20. Federal Aviation Administration (FAA)

You can find the balance of the Top 50 Companies list in the Winter 2001/2002 edition of CAREERS & the disABLED. For a subscription go to www.eop.com .

Gentle Readers,

There are some new items for concern to California employers. And, any employer subject to federal HR management laws should visit a new DOL web site.

Bill Truesdell
Editor

IN THIS REPORT (Report #215, 2/15/2002)
---------- (Sent to over 1,500 subscribers)

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1. DOL OFFERS OUTSTANDING ELAWS WEB SITE

Just when you thought the government couldn't do anything right, the U.S. Department of Labor (DOL) offers a wonderful web site with information for both employers and workers. Naturally, focus is on federal labor laws, but those are important considerations in today's American workplace.

The service is called "elaws" which stands for "employment laws assistance for workers and small businesses." If you think about how you might organize such a web site to allow easy access to information about the many federal laws and regulations governing employment, you might find DOL's solution unique. We were impressed by the ease with which we were able to "drill down" to the information we sought in our trial runs.

The opening page gives users two options for entry. The first is for folks who already know what they are looking for. The second is for people who need help finding what they need. Each of those two options is subdivided into two more categories. People can see a full list of subjects (what DOL calls "advisors") or search using key words to get to the subject they wish. Or, workers can begin at the question stage from the employee perspective. Finally, employers can ask questions about employer issues of importance.

The DOL admits that it has not completed work on the site. There are still some laws yet to be added to the list of explanations. Yet, it is remarkably comprehensive right now.

Suppose you want to browse through employer issues. You will find six major subject headings: General Business Issues; Workplace Safety; Human Resources; Mine Safety; Employing Veterans; and, Federal Contracts. Click on any one of them and you will find a brief

description of the category and a long list of key words that will each lead the searcher to specific information about the words.

Information on the site is written for workers and managers, not lawyers. A great deal of thought has gone into preparing and editing this information.

This site goes to the top of our list for government-generated web locations of significant value. You may find it helpful as well.

Go to: www.dol.gov/elaws/ , and be sure to bookmark it.

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2. CALIFORNIA HR PROFESSIONALS MUST PREPARE FOR BAN ON SSNs

The California Legislature passed a bill (SB 168) last year that was signed by Governor Davis in October. It will go into effect on July 1st of this year. It makes illegal any public display of social security numbers (SSNs).

Specifically, the new law prohibits businesses from posting or displaying SSNs on employee identification badges. It is permissible to print SSNs on documents mailed to a customer if the SSN is required by law or if the document is a form or application.

As of July 1st, individuals may no longer transmit a SSN over the Internet unless the connection is secure or the SSN is encrypted. Also prohibited will be requirements that individuals use a SSN to log onto an Internet site unless the SSN is accompanied by a password or other authentication device.

At the moment, there are more questions than answers about how employers may or may not use SSNs of their employees. For example, what about W-2 forms or employee paychecks? Can SSNs even be used as a primary employee identification number for payroll systems?

According to the Society for Human Resource Management, Peter Isberg, chairman of the American Society for Payroll Management, wrote a letter to the California Attorney General requesting clarification on these questions. The Attorney General declined to respond saying that his office can "only prepare opinions for public officials."

It seems, nobody yet knows how employers should be preparing to deal with these new limitations. We suggest you schedule a meeting with your senior management and your management attorney to discuss this specific subject and request legal guidance from your attorney. Do it soon so you will have time to implement whatever plan you devise.

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3. CALIFORNIA EMPLOYER FACES FELONY CHARGES IN EMPLOYEE DEATH

California has logged its first felony charge against an employer under AB 1127. A Yolo County grower whose employee was killed in an accident involving a combine is being held accountable.

This will be the first case under the new California Labor Code Section 6425 provision that makes a willful violation of a Cal/OSHA standard by a person who controls a workplace subject to prosecution as a felony. The violation carries penalties of up to three years imprisonment and a $250,000 fine for an individual, and up to a $1.5 million fine for a corporation that employs a convicted manager or supervisor.

This new law has changed such a violation from a misdemeanor to felony status. Fines and jail time have been substantially increased under the new law which has been in effect since January 1, 2000. Cal/OSHA has drawn criticism from organized labor and others for failing to refer more cases for criminal enforcement.

Although there are about 50 farm workers killed each year in California, the construction and transportation industries have posted greater numbers of fatalities.

Now, more than ever, it is unwise to ignore OSHA safety requirements. Do so, and you could find yourself in jail.

Gentle Readers,

This week we tell you about some new resources offered by the EEOC and offer some suggestions about effective ways to combat problems of deficient employee ethics.

Bill Truesdell
Editor

IN THIS REPORT (Report #216, 2/22/2002)
-------------- (Sent to over 1,500 subscribers)

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1. EEOC POSTS PSAs ON ITS WEB SITE

The Equal Employment Opportunity Commission (EEOC) has created some Public Service Announcements (PSAs) to coincide with the Winter Olympic Games. They are exceptionally well done, bridging the subjects of sports competition and employment competition.

Chosen as an appropriate theme of these messages is "Freedom to Compete," underscoring the value of free and open competition in the workplace. The agency hopes to shine a national spotlight on its mission of fostering such equality in American enterprise.

Featured in these PSAs are:

- Jennifer Rodriguez, Olympic speedskater
- Joshua Sunquist, Paralympic hopeful
- Lloyd Ward, U.S. Olympic Committee CEO

The spots run from 15 seconds to a full minute. You may view them at www.eeoc.gov/psa/index.html . You will need to have a copy of Real Player on your PC when you call up the files.

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2. JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY

As part of its mandate under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) requires public and private employers, unions and labor organizations to submit reports indicating the composition of their workforces.

These reports are known as Standard Form 100 reports and are represented by designations such as EEO-1 for the private sector, EEO-4 for the public sector, and EEO-3 for unions and labor organizations.

All private employers with 100 or more employees and federal contractors with 50 or more employees must file an EEO-1 each year.

In 2000, the latest summary data available, nearly 40,000 employers with more than 53 million workers filed EEO-1 reports.

Confidentiality provisions governing release of these data prohibits release of individually identifiable information. However, data in aggregated format for major geographic areas and by industry group for private employers are available.

You will find tables of the new 2000 data along with data for years 1999 and 1998 on the EEOC web site at www.eeoc.gov . Data is shown by sex and by each of the nine EEO-1 job categories. You can find results by state totals, national totals and by Metropolitan Statistical Area (MSA).

We looked at California and San Francisco results and discovered the following increases in representation, as examples:

California (Changes from 1999)

- Total Women + .4%
- Women Officials & Managers + .2%
- Total Minorities +1.4%
- Minority Officials & Managers +1.3%
- Minority Professionals +1.5%

San Francisco (Changes from 1999)

- Total Minorities +1.3%
- Minority Officials & Managers +1.9%
- Minority Professionals +1.5%

Naturally, where some categories increase, others must decrease. That's why the reports are so interesting.

You can find industry results accumulated by SIC codes as well.

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3. TRUST IS DOWN. TALK IS CHEAP.

It seems the Enron scandal has had an impact in workplaces across the country. According to the Wall Street Journal "a deep cynicism has settled over corporate America as many employees in a variety of businesses wonder how much, if at all, they can trust their top bosses." (2/19/02)

Trust is an elusive commodity. It is easy to lose and very difficult to regain.

Arthur Brief, a professor at Tulane University's Freeman School of Business, has found through his study of business ethics that many managers forget their personal values when they are at work. In a 1996 study, for example, he was surprised to find that 47% of about 400

executives surveyed were willing to commit fraud by understating write-offs that cut into their companies' profits.

"People in subordinate roles will comply with their superiors even when that includes wrongdoing that goes against their individual moral code," says Mr. Brief. "I thought they would stick with their values, but most organizations are structured to produce obedience."

What can HR professionals do to influence this situation? Begin working with your senior executives to help them understand every organization will have some degradation of trust as a result of the Enron debacle. Every senior executive in America has been tainted to some small degree by the problems all American workers are reading about in their daily papers.

Combating that suspicion requires some careful planning. Talking about the company's ethics policy isn't enough. Employees believe what they see happening around them. If they see people rewarded for challenging unethical behavior or are themselves rewarded for raising questions about appropriateness of some decisions, they will begin to believe that your executives are willing to do as they say everyone else should be doing. Take every opportunity to reinforce the idea that one standard applies to everyone in the organization, regardless of salary level. That will be your quickest road to employee trust. Prove to them by demonstration that ethics are important. Let people know when a decision is made NOT to do something because it just isn't the right thing to do. We can all choose to be ethical.

Gentle Readers,

While we were sleeping ...

We have reached a very quiet period. State and federal legislatures continue their debates on various proposals that will impact human resource management professionals. Yet, no revelations have been forthcoming in the past week. Court rulings continue to yield new guidance for employers.

Bill Truesdell
Editor

IN THIS REPORT (Report #217, 3/1/2002)
---------- (Sent to over 1,500 subscribers)

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1. SHRM NAMES NEW CEO

Less than a month after the resignation of Helen Drinan as President and CEO of the Society for Human Resource Management (SHRM), the organization named Susan R. Meisinger to the position. Drinan had been in the job about one year when she resigned because of what she characterized as serious differences of opinion with the Board of Directors about the organizations direction.

SHRM is the world's largest human resource management association, representing more than 165,000 human resource professionals in more than 70 countries.

Meisinger was selected by a unanimous vote of the Board at its regularly-scheduled meeting February 21-22, 2002. She has been a member of senior management with SHRM since 1987, most recently as Chief Operating Officer (COO).

Prior to joining the SHRM staff, Ms. Meisinger served as Deputy Under Secretary of Labor for Employment Standards Administration (ESA). She also served as special legal counsel for the Associated Builders and Contractors in Washington, DC.

She received her bachelor's degree from Mary Washington College and a law degree from the National Law Center of George Washington University. She is a member of the District of Columbia Bar Association. She has also achieved certification as a Senior Professional in Human Resources (SPHR) through the Human Resource Certification Institute.

Her appointment begins today, March 1, 2002.

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2. CALCULATING OVERTIME FOR WORK THAT SPANS TWO DAYS

With California's requirement to pay daily overtime for work over eight hours, it is easy to be confused in computing the pay an employee is due, especially if that non-exempt employee works around the clock.

Here's the scenario...

There is an emergency and the employee has to work 27 continuous hours, overlapping into another day. How should the pay be calculated?

Assuming that there is no overruling union contract and the employer does not have an approved alternate work schedule program, the pay would be computed as follows:

(Employee is normally scheduled to work 8:00 a.m. to 5:00 p.m. and the workday is defined as 12:01 a.m. to 12:00 midnight. The employee is non-exempt and must be paid for overtime.)

1st 8 hours in the workday
8:00 a.m. to 12:00 noon (1-hour meal period unpaid)
1:00 p.m. to 5:00 p.m. 8 hours @ straight time
Hours 9-12 in the same workday
5:00 p.m. to 9:00 p.m. 4 hours @ time and one-half
Hours 13-14.5 in the same workday
9:30 p.m. to 12:00 midnight (30-min meal period unpaid)
3.5 hours @ double time
Hours 15.5-23.5 in the second workday
12:00 midnight to 8:30 a.m. (30-min meal period unpaid)
8 hours @ straight time
Hours 23.5-27 in the second workday
8:30 a.m. to 12:00 noon 3.5 hours @ time and one-half

Total hours actually worked = 27. Total equivalent straight-time hours earned = 34.25.

Remember that for every additional four hours of work the employee is entitled to a 10-minute paid relief period, and for every six hours of additional work (or more), the employee is entitled to a 30-minute unpaid meal period.

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3. SUPREME COURT EASES ROAD TO DISCRIMINATION SUITS

In a new ruling, the U.S. Supreme Court has made it a bit easier for employees to bring lawsuits against their employers. The case is Swierkiewicz v. Sorema N.A. The ruling says the worker does not have to present direct evidence of discrimination at the time of the lawsuit in order to argue against summary dismissal requested by an employer.

This represents a reversal of the U.S. Court of Appeals for the Second Circuit in New York. Justice Thomas wrote that, "It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered."

Some evidence of age, gender or race discrimination is often difficult to document at the time a complaint is filed. It is only through discovery allowed during the legal process that such evidence is usually uncovered. To dismiss a case before that discovery process has taken place is inappropriate according to the Court.

This ruling proclaims that the prima-facie requirement is a standard for evidence, not for contesting a motion to dismiss a complaint.

From now on, employers will likely have to deal with more lawsuits without the option of obtaining a summary judgment to dismiss. That will raise the cost of handling discrimination suits.

It is just one more argument for spending the monetary resources "up front" in training managers and the general employee population to prevent illegal treatment of workers and avoid legal complaints.

Your legal advisor can give you more information or you can get a copy of the ruling from www.supremecourtus.gov .

Gentle Readers,

Finding the right government-sponsored program to support your employment efforts can be daunting. This week we tell you about a couple of programs that just might save you some money. And, a new book that can help you get a grip on your power tools.

Bill Truesdell
Editor

IN THIS REPORT (Report #218, 3/8/2002)
---------- (Sent to over 1,500 subscribers)

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1. MARCH IS NATIONAL WOMEN'S HISTORY MONTH

"Women Sustaining the American Spirit" is the theme for National Women's History Month 2002. The observance was initiated by the National Women's History Project (NWHP) to promote gender equity through education about the lives and accomplishments of women.

This year, the NWHP is honoring six women whose achievements have paved the way for a larger sense of possibility in the America of the 21st Century: Alice Coachman, Dorothy Height, Dolores Huerta, Gerda Lerner, Congresswoman Patsy T. Mink, and Mary Louise Defender Wilson.

First established by Congress as National Women's History Week in 1981, the observance was increased to the full month of March in 1987. Consult NWHP's web site, www.nwhp.org/whm/themes/themes.html to learn more about this observance, this year's honorees, for a free copy master to use in recognition activities, or for links to other sites on women's history.

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2. NEW ALLIANCE BETWEEN OSHA AND HISPANIC CONTRACTORS

This week (March 5, 2002), the Organizational Safety and Health Administration (OSHA), a portion of the U.S. Department of Labor, signed an agreement with the Hispanic Contractors of America, Inc. (HCA) to promote safe and healthful working conditions for Hispanic construction workers. The agreement calls for effective safety and health training and increased access to safety and health resources in Spanish.

OSHA Administrator said of the agreement, "This alliance will greatly expand OSHA's reach in our effort to provide safety and health information and training to Spanish-speaking workers and employers. We wanted to join with others who share our concern and are committed to reducing injuries and illnesses among Hispanic workers."

Under the alliance, HCA and OSHA will:

- Identify existing safety and health resources available for Spanish speakers and stimulate the development of additional publications and audio-visual products.

- Jointly disseminate safety and health information through conferences, events, community-based activities and electronic media.

- Work with community and faith-based organizations and other leadership groups to build safety and health awareness within the Hispanic community.

- Encourage bilingual individuals in construction to take OSHA's train-the-trainer class so they can teach the 10-hour and 30-hour construction safety and health outreach courses in Spanish.

- Promote and encourage HCA members to participate in OSHA cooperative programs such as compliance assistance, consultation and mentoring.

OSHA and HCA are forming a joint steering committee to implement the alliance. The steering committee will draft procedures for the alliance and develop methods to track, analyze, evaluate and share information on the alliance's activities.

The signed agreement is available on OSHA's web site at www.osha.gov .

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3. CALIFORNIA EMPLOYERS OFFERED FINANCIAL SUPPORT FOR RETAINING WORKERS

California's Employment Development Department is coordinating a program available to employers who face the prospect of workforce reductions due to the economic downturn. Consider the following scenario...

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Due to the sagging economy, an employer with 100 employees finds it necessary to lay off 20 employees. However, rather than lay off these employees, the employer participates in the Work Sharing program offered by the state. The employer keeps all 100 workers on the payroll but reduces their workweek from five days to four days, thereby achieving the same desired 20 percent reduction in payroll. All 100 employees continue to earn wages for four days and also are eligible for Work Sharing benefits for the fifth (nonworking) day. The employer retains all trained staff and, when business improves, the employees resume their five-day work schedule.

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California offered the first Work Sharing program in the country, beginning in 1978. The objective of the program is to help employers avoid some of the burdens that accompany a layoff situation. If employees are retained during a temporary slowdown, employers can quickly gear up when business conditions improve. Employers are spared the expense of recruiting, hiring, and training new workers. Employees are spared the hardship of total unemployment.

Employers are eligible for this program if they:

1) Have a minimum of two employees, comprising at least 10% of their regular workforce or a unit of the workforce, that is affected by a reduction in wages and hours worked.

2) The reduction in wages and hours worked also must be at least 10%.

If you would like more information, contact:

EDD Special Claims Office
P.O. Box 269058
Sacramento, CA 95826-9058
(916) 464-3300

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4. POWER TOOLS FOR WOMEN

You've read her articles in THE ADVANTAGE and Special Reports for HR Professionals for the past several years. Now, Joni Daniels has published a book designed to help women understand and cope successfully with the difficulties of modern life.

Classified as "Career/Self Help," she uses her experience and wonderful sense of humor to construct easily-used advice for every reader. Her metaphor makes sense. She believes that anyone who understands the basic language of interaction can succeed at relationships and job performance.

Here is the Table of Contents:

Chapter	Title
1	The Toolbox: Portable Power
2	What to Pack
3	The Safety Goggles: Creating Your Vision of Success
4	The Electrical Sensor: Following Your Intuition
5	The Demolition Hammer: Breaking the Rules
6	The Tape Measure: Learning to Set Limits
7	The Power Saw: Cutting Away the Relationships that Hold You Back
8	The Power Drill: Getting the Right Information
9	The Soldering Iron: Making and Maintaining Connections
10	The Power Sander: Using Your Schmoozing
11	The Battery Pack with Recharger: Replenishing Your Energy


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  12         The Voltage Meter:  Getting Accurate Feedback
  13         Duct Tape:  Planning for Plan B
  14         Get a Grip:  Use Your Tools
  15         Mastery:  Nailing it Down
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Get your personal copy for only $13.95 at the HR Web Store. Go to www.hrwebstore.com/products/PowerTools.htm .

Gentle Readers,

This week the U.S. Supreme Court gave employers some good news about FMLA notification requirements. And, we mention a growing problem in our country ... identity theft. Finally, we want to thank you, our readers, with a special discount coupon offer.

Bill Truesdell
Editor

IN THIS REPORT (Report #219, 3/22/2002)
---------- (Sent to over 1,500 subscribers)

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1. WHEN BAD THINGS HAPPEN TO YOUR GOOD NAME: ID THEFT

In the course of a busy day, you may write a check at the grocery store, charge tickets to a ball game, rent a car, mail your tax returns, call home on your cell phone, order new checks or apply for a credit card. Chances are you don't give these everyday transactions a second thought. But someone else may.

The 1990's spawned a new variety of crooks called identity thieves. Their stock in trace are your everyday transactions. In each transaction you share some personal information: your bank card number, your Social Security number (SSN), your name, address, and telephone number.

Identity thieves take your personal information without your knowledge and, all too often these days, uses that information to open new credit card accounts in your name. The problem is becoming such a major issue, you may discover some (or many) of your employees are experiencing personal problems as a result of identity theft. The Federal Bureau of Investigation (FBI) says it is the fastest growing crime category today. Some estimates claim that the problem grew at a rate of 2000% last year. Why? Few people get caught. And, it's lucrative.

Now there is a new Federal government web site available to help people who have had their personal information stolen. It is sponsored by the Federal Trade Commission and offers Americans who are victims of identity theft a chance to use a new procedure to notify businesses that they are not responsible for new debts being accumulated in their name.

At www.consumer.gov/idtheft you will find several resources to help yourself and your employees should this ever happen. A 34-page booklet

in PDF format is available that explains the problem and what individuals can do about it to help themselves. The booklet contains an "ID Theft Affidavit" which is a new device to alert businesses that recently opened accounts do not belong to the person named as the owner. You can go right to the ID Theft Affidavit if you wish. Simply point your browser to www.consumer.gov/idtheft/affidavit.htm and you will be able to download the PDF version of this document.

Once completed, the affidavit should be mailed or FAXed to the business or financial institution with whom new accounts have been opened in your name. More and more businesses are agreeing to accept these government-sponsored affidavit forms as the days go on.

You can also make this resource available to your employees by giving them the ID Theft toll-free telephone number at 1-877-438-4338. By spreading the word and taking action, people can help keep their personal credit ratings in the healthy range.

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2. SPECIAL DISCOUNT COUPON AS THANK YOU FOR OUR SUBSCRIBERS

We thank you for being one of our subscribers. Some of you have been with us since we began publishing our newsletter, THE ADVANTAGE, over 14 years ago.

As our way of saying thank you for your loyalty, we are offering you a special discount coupon that will give you a 10% DISCOUNT ON ANY PURCHASE OVER $50 IN THE HR WEB STORE. Your purchase will be covered by our 100% satisfaction guarantee. If you don't receive exactly what you expect, we will refund your purchase price if you return the product to us within 30 days. While we don't refund shipping/handling costs, you will receive a refund for any sales tax you paid.

We will do everything we can to assure that your shopping experience is a positive one.

We have recently added many new products to the HR Web Store. Among them you will find these new items:

- HR Mugs
- Resume Maker software
- Power Tools for Women
- OSHA Recordkeeping Answer Book
- Many others

Here is how you can use your Current Subscriber Special Coupon:

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- Select the items you wish to purchase, load them into your shopping cart and proceed to checkout
- At the checkout screen enter the following Coupon Code:
  1016211101
- Click "Recalculate" and your discount will be applied to your purchase of $50 or more.

We hope you will visit us soon and come back often. Things are always changing and being added to the HR Web Store. We know you will discover some resources that are just what you need.

Hurry. This coupon will expire on April 30, 2002. And, it is only for you, our subscriber. If you have friends or colleagues who would like to be added to our subscriber list, please ask them to register for their own copy of our newsletters and Special Reports for HR Professionals at www.hrwebstore.com/newsletr/subscribe.htm . They will receive their own special discount coupon as a new subscriber.

Thanks again for being one of our subscribers.

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3. FMLA RULING EASES EMPLOYER BURDEN

This week the U.S. Supreme Court made it a bit easier for employers who must deal with the Family and Medical Leave Act (FMLA) requirements. In a 5-4 decision, the court nullified the Department of Labor (DOL) regulation that requires employers to notify their workers when time off begins to count against FMLA's 12-week leave entitlement.

The case was Ragsdale, et al. v. Wolverine World Wide, Inc. (U.S. 00-6029, 3/19/2002) which you can find on the web at: http://www.supremecourtus.gov/opinions/01slipopinion.html

It involves a factory worker, Tracy Ragsdale, with the Rockford, MI shoemaker, Wolverine World Wide, Inc. Nearly a year after beginning work, Ms. Ragsdale was diagnosed with cancer. The company provided a union-negotiated benefit by holding her job for her, and paid her health benefits for six months while she was on leave of absence due to her health condition. After 30 weeks, Ms. Ragsdale asked for more time to complete her medical treatment. The company refused and fired her when she didn't return to work as scheduled.

She sued, claiming that the company hadn't notified her that her initial 30-week leave would be counted against her FMLA benefit. Employer notification that time off will be counted against FMLA's 12-week benefit allowance is required under DOL regulations (29 CFR 825.700(a)).

In writing for the majority, Justice Anthony Kennedy said the Labor Department's regulation altered the law's thrust because it "relieves employees of the burden of proving any real impairment of their rights."

In conclusion, the Court said, "[The DOL Regulation] is contrary to the Act and beyond the Secretary of Labor's authority."

Employers appear to be "off the hook" for notifying employees of their leave counting against FMLA requirements. Until the dust settles, you might want to discuss your approach to the issue with your management attorney.

Gentle Readers,

This week, leading our topics ... a big one ... the OFCCP's newly released Directive 254 describing the approval process for Functional AAP requests.

Bill Truesdell
Editor

IN THIS REPORT (Report #220, 3/29/2002)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP RELEASES DIRECTIVE ON FUNCTIONAL ESTABLISHMENTS

With no fanfare, the Office of Federal Contract Compliance Programs (OFCCP) posted Directive Number 254 on its web site last Thursday. Long awaited, this new Directive outlines the procedures to be used by contractors when requesting advance approval for use of functional affirmative action plans. This completes one of the three major objectives set by Mr. Charles James, Sr. when he took over as Deputy Assistant Secretary of Labor for the OFCCP.

All federal contractors should be aware of the directive and its guidelines for requesting approval from the Department of Labor. For a copy, go to: http://www.dol.gov/dol/esa/public/media/reports/ofccp/directive/02aapdir.htm You can also get a copy of the agency's highlights of the new directive by going to: http://www.dol.gov/dol/esa/public/media/reports/ofccp/directive/02faap.htm

As with most of these types of things, there are many questions raised by the document. They will have to be answered as time goes on.

The directive came about because of the November 13, 2000 finalization of Federal regulations related to affirmative action plan development (65 Fed. Reg. 68022; 41 CFR 60-2.1(d)(4)). The new regulations authorize federal contractors for goods and services to use functional establishment structures in constructing their affirmative action plans (AAP) if they receive advance approval from the Deputy Assistant Secretary (DAS) of Labor, OFCCP. The problem for contractors since November 2000, has been an absence of direction on how to request and receive approval for using functional AAPs. Now, the rules have been published. Here is what you must do to obtain government approval of your functional AAP establishment:

1) Submit a written request to the DAS explaining why you believe using a functional AAP would be most appropriate for your particular

corporate structure. Designate a corporate-level contact person who has the authority, resources, and support of top management to ensure effective implementation of the functional AAP. Give the contact person's telephone number.

2) Submit your request at least 120 days prior to the expiration of the current corporate headquarters AAP.

3) OFCCP will respond to your request within 2 weeks.

4) OFCCP may schedule a meeting or conference call to discuss the request. You will have to notify OFCCP of the names and positions of everyone you will have participating in the discussion(s).

5) Be prepared to discuss the following information with the OFCCP:

- Location of facilities where employees perform their duties.
- Details of how the company is organized within each functional or business unit.
- The reporting hierarchy within each functional or business unit.
- The total number of employees in your workforce.
- The total number of employees within each functional or business unit and the name of the managing official for each functional or business unit.
- The total number of employees not covered by functional AAPs that are covered in establishment-based AAPs.
- A description of the recruitment, hiring, and promotion process for each business unit.
- Any other information you can use to help OFCCP understand your organizational structure and need for a functional AAP.

After the OFCCP receives your request, even though it promises a response in two weeks, there is automatic approval if the agency hasn't taken action within 120 days. And, approval of functional AAPs can be cancelled with 90 days written notice. Approval for functional AAPs will expire after 5 years. Request for renewal for another 5-year term will be automatically approved if OFCCP doesn't specifically reject it within 60 days of receiving the extension request.

It sounds fairly simple.

Yet, there are some questions generated by the new directive. For example:

1) Will the Agency begin approving Standardized Affirmative Action Format (SAAF) programs once again? These were national agreements with large employers allowing one AAP format to be used in every establishment operated by that contractor. AT&T, General Motors, and Hewlett-Packard were among the few companies that used to have SAAF agreements with OFCCP. Shirley Wilcher, the immediate past national director of OFCCP, issued an order to cancel all SAAF agreements. The new Functional AAP Directive goes to lengths to explain SAAF is not the same as Functional AAP. Are SAAFs alive and well?

2) The Directive says a contractor may possibly have both Functional AAP(s) and geographic establishments. What happens when:

- Remaining employee headcount at some physical locations falls below 50 workers. Roll them into the Headquarters AAP?
- A contractor has no remaining employees at any location because they are all covered by Functional AAPs?

3) The Directive goes to lengths to explain that the Agency is not giving up its right to conduct a compliance evaluation in any way it wishes. Does that mean OFCCP will visit a physical location and insist on auditing all of the AAPs represented at that location? If so, one scheduling letter could gain them access to multiple AAPs, unlike in the past.

We don't have the answers yet. It's all too new. We suggest that you work with your local Industry Liaison Group to raise these or similar questions in discussions between contractors and OFCCP officials.

It is a sure bet that the outcome of these probes and responses will be either clarification or chaos.

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2. NEW EEOC COMMISSIONER SWORN IN

On March 7, 2002, Leslie E. Silverman was sworn in as a Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC). She will serve the remainder of a term expiring on July 1, 2003. Ms. Silverman was nominated by President George W. Bush on February 11, 2002, and unanimously confirmed by the U.S. Senate by a voice vote on March 1, 2002.

Ms. Silverman's work experience in labor and employment law includes positions in both the public and private sectors. Since 1997 she has served as labor counsel of the Senate Health, Education, Labor and Pensions Committee. From 1990 to 1997, she was a litigation and employment law associate for Keller and Heckman, a Washington, DC-based law firm.

Her educational background includes a law degree from American University and a masters degree in labor and employment law from Georgetown University Law Center. A native of Massachusetts who currently resides in Northern Virginia, Ms. Silverman attended the University of Vermont as an undergraduate.

The EEOC is currently composed of Chair Cari M. Dominguez, Vice Chair Paul Igasaki, and Commissioner Paul Steven Miller. Ms. Silverman's appointment leaves only one vacant seat on the five member panel. President Bush has nominated Naomi Churchill Earp to fill the remaining seat. He has also nominated Donald Prophete to serve as General Counsel. If approved by the Senate, Ms. Earp's term would expire on July 1, 2005. Mr. Prophete is an employment lawyer for the Sprint Corporation.

Additional information is available at the Commission's web site: www.eeoc.gov .

Gentle Readers,

Two new U.S. Supreme Court cases and rising Workers' Compensation insurance premiums in California capture our attention this week.

Bill Truesdell
Editor

IN THIS REPORT (Report #221, 4/5/2002)
(Sent to over 1,500 subscribers)

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1. CALIFORNIA WORKERS' COMPENSATION BILL SIGNED

California Governor Gray Davis signed a new Workers' Compensation (WC) bill (AB 749) on February 15, 2002, that will increase employer's workers' compensation premiums approximately $3.5 Billion. The law becomes effective on January 1, 2003, with some provisions becoming active in 2004 and 2005.

The premium increases will be paid out in the form of higher WC benefits for temporarily and permanently disabled workers. Starting in January next year benefits will increase from $490 to $602 per week. In 2004 that amount will go to $728 per week and in 2005, it will increase to $840 per week.

The cost-of-living adjustment for life pensions and permanent total disability claims is uncapped and retroactive for open claims.

While experts claim the new law's provisions for cost control are weak, there was some effort made to address escalating expense associated with WC cases. One such provision will give employers with designated health care organizations (HCO) control over an injured employee's treatment for 180 days rather than the current 90-day limit. If employers do not use an HCO they will be limited to 30 days of control.

Employers in the state have experienced a 77% increase in WC premiums since 1998.

If you think your WC premiums are high now, wait until the new law kicks in at the beginning of each of the next three years. Even before these provisions become effective, certain employers have seen WC premiums skyrocket. For example, in the horse racing industry, WC insurance premiums currently run $43 for every $100 of payroll for stable hands and exercise riders. The cost to insure jockeys is $94 per ride. Harness racing drivers are paid $20 per start or 5% of the purse. WC insurance premiums to cover every harness racing driver

start is now $68. These rates are about double last year's rates and have yet to reflect the impact of next year's increases.

HR professionals should be sure to discuss these developments with organizational financial officers so proper budget planning can accommodate next year's premium increases. It might also be a good time to discuss with your WC insurance carrier any programs they have that could help reduce case costs for your workforce.

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2. DISCRIMINATION COMPLAINT CAN BE TIMELY EVEN IF ...

Title VII of the Civil Rights Act of 1964 requires that a charge of employment discrimination be filed with the Equal Employment Opportunity Commission (EEOC) within a fixed time after the alleged discrimination occurred. It also requires that the charge be in writing under oath or affirmation. An EEOC regulation permits an otherwise timely filer to verify a charge after the time for filing has expired.

On March 19, 2002, the U.S. Supreme Court decided the case of Edelman v. Lynchburg College (No. 00-1072) in which the question of EEOC's regulation was put to the test. It passed.

Edelman was denied academic tenure by Lynchburg College. He faxed a letter to the EEOC claiming that the College has subjected him to gender-based, national origin, and religious discrimination. He made no oath or affirmation. The EEOC advised him to file a charge within the applicable 300-day time limit and sent him a Form 5 Charge of Discrimination, which he returned 313 days after he was denied tenure. When the College claimed Edelman's claim was not timely, he sued. The lower court decided, and the Fourth Circuit affirmed, that Title VII's plain language foreclosed the relation-back regulation. The court reasoned that, because a charge requires verification and must be filed within the limitations period, it follows that a charge must be verified within that period.

Writing for the Supreme Court, Justice Souter said there is nothing plain in reading "charge" to require an oath by definition. Title VII nowhere defines "charge." It merely requires a charge be verified, without saying when. It does provide that a charge be filed within a given period, without indicating whether it must be verified when filed.

"Moreover, there is no need to resolve the degree of deference reviewing courts owe the regulation because this Court finds that the rule is not only reasonable, but states the position this Court would adopt were it interpreting the statute from scratch."

The EEOC's policy of accepting charges in any written form is acceptable. The entire opinion is located at:
http://www.supremecourtus.gov/opinions/opinions.html

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3. UNDOCUMENTED ALIENS NOT ENTITLED TO BACKPAY

In a separate case, the U.S. Supreme Court has ruled that undocumented aliens are not entitled to backpay awards even if they suffer dismissal from employment for illegal reasons.

Decided on March 27, 2002, the case of Hoffman Plastic Compounds, Inc. v. National Labor Relations Board (No. 00-1595) held that federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act (IRCA), "foreclosed the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States.

The company, Hoffman Plastic Compounds, Inc. hired Jose Castro on the basis of documents appearing to verify his authorization to work in the United States. Subsequently, it laid him and others off after they supported a union-organizing campaign at a company plant. The National Labor Relations Board (NLRB) found that the layoffs violated the National Labor Relations Act (NLRA) and ordered backpay and other relief. At a compliance hearing before an Administrative Law Judge (ALJ) to determine the amount of backpay, Castro testified that he was born in Mexico. He also said he had never been legally admitted to, or authorized to work in, this country, and that he gained employment with the company only after tendering a birth certificate belonging to a friend who was born in Texas.

Justice Rehnquist wrote for the Court, "As a matter of plain language, Sur-Tan, Inc. v. NLRB [467 U.S. 883] [expressly limits] backpay to documented alien workers..." That previous ruling "forecloses the backpay award to Castro, who was never lawfully entitled to be present or employed in the United States."

Obviously, employers must continue to meet requirements for Form I-9 collection of worker documents. For a complete copy of the Court's opinion go to: http://www.supremecourtus.gov/opinions/opinions.html

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Gentle Readers,

Ergonomics and earthquakes take center stage this week.

Bill Truesdell
Editor

IN THIS REPORT (Report #222, 4/12/2002)
---------- (Sent to over 1,500 subscribers)

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1. OSHA ANNOUNCES NEW ERGONOMICS PLAN

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced last Friday, April 5, 2002, that it is implementing a comprehensive plan designed to dramatically reduce ergonomic injuries in specific industries. The plan includes industry-targeted guidelines, tough enforcement measures, workplace outreach, advanced research, and dedicated efforts to protect Hispanic and other immigrant workers.

According to Elaine, S. Chao, Secretary of Labor, "This plan is a major improvement over the rejected old rule because it will prevent ergonomics injuries before they occur and reach a much larger number of at-risk workers.

OSHA Administrator John Henshaw said his agency will immediately begin work on developing industry and task-specific guidelines to reduce and prevent ergonomic injuries, often called musculoskeletal disorders (MSDs), that occur in the workplace. OSHA expects to begin releasing guidelines ready for application in selected industries this year. OSHA will also encourage other businesses and industries to immediately develop additional guidelines of their own.

Ergonomics eTools are currently available on the OSHA web site for the following industry applications:

- Baggage Handling
- Beverage Delivery
- Computer Workstations
- Grocery Warehousing
- Hospital
- Nursing Home
- Poultry Processing
- Sewing [English]
- Sewing [Spanish]

We followed OSHA's web site to its page on Ergonomic Solutions for Computer Workstations. They call their information eCATs, meaning electronic Compliance Assistance Tools. eCATs are designed to assist employers develop a comprehensive safety and health program. This particular eCAT has information about:

- Workstation
  - Chair
  - Monitor & Document
  - Keyboard & Mouse
- Work Process
- Environment
  - Lighting
  - Glare

There is also a workstation checklist provided to help employers determine if workstations are set up to prevent MSDs and other ergonomics-related injuries. The checklist is quite comprehensive, including items on working conditions, seating, keyboards and other input devices, monitors, etc.

These new guidelines have been created around the concept of voluntary compliance. OSHA will be monitoring how employers adopt them. However, OSHA's budget has not been increased for its monitoring or enforcement efforts.

Business groups have generally applauded the new plan, although according to the Wall Street Journal (4/9/2002), some have expressed concern that the agency might beef up enforcement efforts. Unions and Democratic lawmakers criticized the rules. Senator Edward Kennedy said the plan "shows that when it comes to protecting America's workers, this administration's goal is to look the other way and help big business get away with it." AFL-CIO President John Sweeney called the new program "a meaningless measure that yet again delays action and provides workers no protection against ergonomic hazards." He said labor would continue to pressure Congress to pass legislation that would require the Labor Department to issue binding regulations.

For the latest information about OSHA guidelines and eCATs visit their web site at: http://www.osha.gov/index.html .

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2. APRIL IS EARTHQUAKE PREPAREDNESS MONTH

The California Governor's Office of Emergency Services has declared April California earthquake preparedness month. Everyone knows Californians are crazy for living in earthquake country. You never know when "the big one" will come. That uncertainty leaves many people with a false sense of security because it hasn't happened yet. Somehow, we conjure up illogical support for our denial that it will happen to us.

The Office of Emergency Services (OES) has developed a web site that contains a wealth of information about how to prepare schools, homes and workplaces for the disaster we all know is going to come eventually. There are tips for preparing children, tips for the

physically challenged, tips for the elderly, and even tips for pet owners.

Go to http://www.oes.ca.gov/CEPM98.nsf/htmlmedia/resources.html

You will also find a "Company Action List" designed to help executives and HR professionals get themselves ready and reduce injuries. As all California employers know, having a written safety plan that includes earthquake preparedness is a requirement of Cal-OSHA regulations. Failure to maintain and properly implement that safety plan can result in fines exceeding $70,000 in some cases.

One key preparation step involves proper stocking of safety supplies. Every employer should have on hand enough food and materials to allow employees to survive for at least 72 hours without external support.

If you want to get your organization ready, visit the OES web site to print a copy of the Action List ... and then follow it. Your second stop on the Internet should be at the HR Web Store to order emergency food and supply kits from our Safety Resources Department. They come prepackaged with supplies to last the necessary 72 hours. When you need them, you will be glad that you have them on hand. Don't be caught wishing you had taken the step and ordered your safety supplies. Do it today. Right now!

Go to http://www.management-advantage.com/products/safetyresources.htm Your friends and coworkers will thank you. And so will your boss if s/he happens to be at work on the day "the big one" hits. While you're shopping, consider picking up a couple of the smaller kits for your home and car. The trouble with disasters is that they don't come at convenient times. Being ready can help you survive an otherwise dangerous situation.

Oh, ... and those of you outside California might want to have some emergency supplies on hand as well ... just in case of tornado, hurricane, or flood. Those tend to happen regularly in some parts of the country.

Gentle Readers,

VETS-100 reporting and nursing home compliance results reports head this week's list of information.

Bill Truesdell
Editor

IN THIS REPORT (Report #223, 4/19/2002)
-------------- (Sent to over 1,500 subscribers)

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1. VETS-100 REPORTING WILL BE MORE COMPLEX

Every time someone in the federal government wants to know something about the American workforce, it is necessary to follow a complex set of rules that provide for public notice prior to taking action on the new data requirement. There are so many of these types of proposed data requirements it is hard to keep track of all the ideas government employees develop for changing employer tracking and reporting demands.

One such change has been entered into the federal regulations relating to VETS-100 reporting.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) contains affirmative action and reporting requirements for Federal contractors and subcontractors regarding several classes of protected veterans. One VEVRAA requirement is that covered Federal contractors and subcontractors file an annual Federal Contractor Veterans' Employment Report (VETS-100). Prior to 1998 contractors were required to show in their VETS-100 report the number of protected veterans in their workforce by job category, hiring locations, and number of new hires, including protected veterans hired during the reporting period covered by the report. The amendments to the VETS-100 reporting requirements made by the Veterans Employment Opportunities Act of 1998 (VEOA) included the addition of a requirement that the maximum number and minimum number of persons employed during the reporting period be included in a VETS-100 report.

Regulations implementing these requirements were written with the following language. "The minimum and maximum number of employees reportable at each hiring location during the period covered by the report (one year) must be determined as follows: Contractors must review payroll records for each of the pay periods included in the report. The minimum number of employees is the total number of employees paid in the payroll period in which the contractor had the fewest number of employees. The maximum number of employees is the

total number of employees paid in the payroll period in which the contractor had the greatest number of employees."

It sounds simple enough. Yet, those words created a new need for contractors to analyze every payroll period in the year and extract from that analysis the maximum and minimum numbers called for in the regs.

The Veterans' Employment and Training Service then published a request for comments on this new employer burden. Word went out on March 7, 2002, that the agency wanted input about the requirement and any modifications employers might suggest to the regulations. The comment period closed on April 8, 2002.

So far, there has been no indication of consensus among contractors regarding the data reporting requirement. It seems this one slipped under the radar screen of many contractors. The Society for Human Resource Management (SHRM) recognized what was happening and submitted a response to the agency on behalf of its members. In general, SHRM called the need to report minimum and maximum employee numbers burdensome. Camille A. Olson, co-author of SHRM's comments said the requested data "would require an employer to perform a calculation for every single payroll period throughout the year." She continued, "Neither DOL nor VETS have articulated the purpose for which this additional information is required."

Stand by, all you federal contractors. We'll let you know the outcome of this exercise as soon as it is publicly available.

For more information about VETS-100 reporting go to:
http://www.dol.gov/dol/vets/public/contractor/main.htm

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2. NURSING HOME INFORMATION ON WEB

Elder care is growing in importance with employees these days. Employers are receiving more and more pressure to include elder care in health insurance packages and leave of absence policies.

In recent weeks, controversy has arisen over the availability of information about nursing home violations previously reported on the web by Medicare. In 1998, Medicare began posting information about violations resulting from regular state inspections of care facilities. Congressional investigators discovered that the list of 85,000 violations posted on the Medicare site do not include an additional 25,000 violations of health standards arising from complaints from the public.

Medicare officials have said that the additional violations were left out because they could not verify whether some violations were already included in the annual data it did report. They expect to revise their web site, including the additional reports by late April of this year.

In the mean time, the House Committee on Government Reform has set up a temporary, searchable web site at www.house.gov/reform/min to give the public access to the missing records.

Medicare's site is titled "Nursing Home Compare" and can be found at www.medicare.gov/NHcompare/home.asp . Until the consolidation of information is complete, the House Committee advises people looking for information about nursing homes to check both web sites.

Some of the resources available on the Nursing Home Compare site include:

- Special Note to Nursing Homes
- Nursing Home Publications
- Nursing Home Checklist
- Nursing Home Related Sites
- Nursing Home Compare Questions and Answers
- Centers for Medicare and Medicaid Services
- About Nursing Homes
- About the Residents of Nursing Homes
- About the Nursing Home Inspection Results
- About Nursing Home Staff
- Specific search results for nursing homes found in specific geographical locations throughout the country

If you have employees who might be interested in such information, you can tell them of the upcoming consolidation and caution them to look at both databases in the mean time.

Gentle Readers,

Family feuds get in the way of progress on developing an applicant definition. Outside pressures mount to force OFCCP to issue new round of EO Survey documents to federal contractors.

Bill Truesdell
Editor

IN THIS REPORT (Report #224, 4/26/2002)
---------- (Sent to over 1,500 subscribers)

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1. DEFINITION OF APPLICANT STILL ONLY A HOPE

The OFCCP family (Office of Federal Contract Compliance Programs) is feuding amongst themselves. The cause of the arguments appear to be serious differences of opinion regarding the definition of job applicant that will be used by federal contractors in their affirmative action programs.

Charles James, director of the OFCCP, admitted to the internal agency wrangling when he spoke to the American Association for Affirmative Action's annual conference in Chicago on April 5th.

This is a major change in Mr. James' original optimism from when he took office last June. At that time, he said he thought a new definition of applicant could be developed and published by the end of last year. He now admits he was naive to believe the task could be completed in such a short time.

The matter is further complicated by the need for OFCCP to reach agreement with the Department of Justice and the Equal Employment Opportunity Commission (EEOC) on the ultimate definition. Over a year ago, the Office of Management and Budget (OMB) instructed EEOC and OFCCP to revise portions of the Uniform Guidelines on Employee Selection Procedures (41 CFR 60-3) that were codified in 1978. At that time, an applicant was defined as anyone "who has indicated an interest in being considered for hiring, promotion, or other employment opportunities." Since then, changes in technology have made that definition obsolete. Today, employers are barraged by unsolicited resumes and responses to job postings from people who are not even remotely able to show qualifications for the job opening. Under the current government interpretation, federal contractors would have to invite all of those people to identify their sex and race/ethnicity. Doing that, even in the world of today's technology, can be considered an undue burden on the employer.

Based on public comments made to date by Cari Dominguez, Chair of the EEOC, she is fairly clear about the definition she would like to see published by the government. Yet, it appears she won't even be invited to the table for a conversation until the OFCCP can get past its version of sibling squabbling and refocus on the objective, which is to publish a new definition that can be supported by both employers and the enforcement community. It is possible OMB will have to bring some leverage to the process in order to force OFCCP into a conciliation agreement on the subject.

For the moment, contractors should continue documenting their own definitions of applicant and inviting self-identification from everyone who meets those definitions.

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2. OFCCP UNDER FIRE FROM WOMEN'S GROUPS OVER FAILURE TO ISSUE EO SURVEY

According to the Bureau of National Affairs, Inc. (BNA), the OFCCP (Office of Federal Contract Compliance Programs) is about to be sued by Shirley Wilcher immediate past director of that agency. Ms. Wilcher invented the Equal Opportunity Survey (EO Survey) and drew heated objections from employers and professional HR management groups including the Society for Human Resource Management (SHRM). During her administration, Ms. Wilcher was never able to demonstrate that the EO Survey produced reliable results that could be used in selecting federal contractors for compliance evaluations. She was able to maintain the requirement within the EO Survey that contractors divulge detailed compensation data for their organizations.

Now, Ms. Wilcher as executive director of Americans for a Fair Chance, an advocacy organization on affirmative action and equal opportunity, said the equal opportunity surveys must be used by the current agency administration. She and others have suggested they will bring legal action against the OFCCP if it doesn't re-start the EO Survey program.

OMB (The Office of Management and Budget) has responsibility for clearing all administration requests for data collection from American citizens, including employers. At the beginning of this year, OMB included the EO Survey on its list of most burdensome regulations that should be rescinded or changed.

Ms. Wilcher obviously objects to OMB's position, and to Mr. Charles James delaying any further the issue of more EO Surveys to federal contractors. James has said he wants to be sure he understands what value the EO Survey offers before he spends more taxpayer money to issue and collect added information from contractors...especially if it may never be used.

The fight continues. Ms. Wilcher is escalating it and we may yet see the battle fought in federal court. In the mean time, OFCCP has not issued any statement that it has, or will soon, send out more EO Surveys to contractors.

Gentle Readers,

The Supreme Court offers guidance on seniority systems and the ADA, OSHA announces a new committee on ergonomics, and some insight into EEOC's new web resource on ADR for the federal sector.

Bill Truesdell
Editor

IN THIS REPORT (Report #225, 5/10/2002)
---------- (Sent to over 1,500 subscribers)

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1. SUPREME COURT BACKS SENIORITY SYSTEMS IN ADA CASES

On April 29, 2002, the U.S. Supreme Court issued its ruling in the case of US Airways, Inc. v. Barnett (U.S., No. 00-1250). In it the Court said there is a "rebuttable presumption" that an accommodation request under the Americans with Disabilities Act is unreasonable if it conflicts with seniority rules for job assignments.

Briefly, the case involved an employee, Barnett, who injured his back while a cargo handler for US Airways, Inc. He transferred to a less physically demanding mailroom position. His new position later became available to seniority-based employee bidding under US Airway's seniority system, and employees senior to Barnett planned to bid on his job. The company refused his request to accommodate his disability by allowing him to remain in the mailroom, and he lost his job. He then filed suit under the Americans with Disabilities Act of 1990 which prohibits an employer from discriminating against "an individual with a disability" who with "reasonable accommodation" can perform a job's essential functions, unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business."

The Court found that altering a seniority system would result in an "undue hardship" to both US Airways and its nondisabled employees, the District Court granted the company summary judgment. The Ninth Circuit reversed, holding that the seniority system was merely a factor in the undue hardship analysis and that a case-by-case, fact intensive analysis is required to determine whether any particular assignment would constitute an undue hardship.

In its opinion, the Supreme Court held that "an employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an 'accommodation' is not

'reasonable.' However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case."

It appears that employers may now rely on legitimate seniority systems in their weighing of requests for accommodation under the ADA. As always, however, we caution you to check with your legal advisor before implementing such decisions.

You can find the complete case opinion at:
http://www.supremecourtus.gov/opinions/01slipopinion.html

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2. OSHA FORMS ADVISORY COMMITTEE ON ERGONOMICS

On April 30, 2002, John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, announced formation of the National Advisory Committee on Ergonomics.

The committee will advise on a number of issues involving information on various industry or task-specific guidelines; identification of gaps in the existing research on ergonomics and the application of ergonomic principles to the workplace; current and projected research needs and efforts; methods of providing outreach and assistance that will communicate the value of ergonomics to employers and employees; and ways to increase communication among stakeholders on the issue of ergonomics.

"Our four-pronged approach for continuing and accelerating the reduction of ergonomic-related injuries and illnesses in the workplace -- guidelines, research, outreach and assistance, and enforcement -- will benefit from the experience and expertise of the members of this committee," said Henshaw. "I expect the committee to be a valuable resource in helping OSHA accelerate the decline of these types of injuries."

Not everyone was pleased with the announcement, however. Peg Seminario, director of safety and health at the AFL-CIO in Washington, DC has been quoted as saying, "We think the committee is redundant and unnecessary." The labor organization says it believes this new committee will simply be a forum for people opposed to ergonomics to express their views and question the science of ergonomics.

Anyone interested in becoming a member of the new committee may submit a nomination or self-nomination by June 17, 2002. Nominations may be sent electronically from the OSHA web site at http://ecomments.osha.gov . They may also be FAXed to OSHA Docket Office at (202) 693-1648. Or, they may be mailed to U.S. Department of Labor, OSHA Docket Office, Docket NACE-2002-1, Room N-2625, 200 Constitution Ave., NW, Washington, DC 20210. The phone number to use for questions is (202) 693-2350.

You can find the announcement about the new committee at:
http://www.osha.gov/media/oshnews/apr02/trade-20020430.html

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3. EEOC CREATES NEW WEB SITE FOR FEDERAL SECTOR ADR

The Equal Employment Opportunity Commission (EEOC) recently unveiled its new web resource for federal sector agencies. The subject is Alternative Dispute Resolution (ADR) programs available to employees in those agencies.

The site is located at: http://www.eeoc.gov/federal/adr/index.html

According to the EEOC, this new resource is designed as an information source for federal agency managers and workers alike. It is supposed to help agencies improve their internal ADR programs and to model federal efforts based on success the EEOC has had in the private sector with its ADA program.

EEOC is expanding the use of ADR in the federal sector through piloting the use of a number of types of ADR in the hearings units of its field offices to determine which types are most efficient and cost effective at the hearings stage of the federal sector complaint process. EEOC is also offering mediation at the appellate stage of the federal sector complaint process through the Federal Sector Appellate Settlement Team (FAST) Pilot Program.

The new Federal Sector ADR Web Page contains specific information for individuals and federal agencies, including details on pilot programs and contacts. Among the information links available are:

- ADR Fact Sheet
- ADR Questions and Answers
- ADR Program Development and Review (includes types of ADR techniques, sample ADR forms, guidance on program development, and ADA/Rehabilitation Act accessibility issues)
- ADR Clearinghouse (includes statutory and regulatory documents, sources and training for neutrals, training for managers, ethical standards and confidentiality, ADA/Rehabilitation Act mediation standards, and ADR video tapes)

Federal agencies wishing more information can contact the Commission at fed.adr@eeoc.gov .

Gentle Readers,

Big news this week. The HR Web Store announces its introduction of new Continuing Education Courses in electronic format. All work can be completed over the Internet and by email.

Bill Truesdell
Editor

IN THIS REPORT (Report #226, 5/17/2002)
---------- (Sent to over 1,500 subscribers)

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1. NEW CONTINUING EDUCATION PROGRAMS ARE NOW AVAILABLE

The Management Advantage, Inc. is pleased to announce the unveiling of two new self-study continuing education programs for managers and supervisors. These two are the first in a series of courses designed by Jane E. Henderson, Ed.D. and Wayne D. Ford, Ph.D.

They are available for download at www.hrwebstore.com .

Dr. Henderson has a vast amount of experience in industrial training, organizational development, team development and executive coaching. She has taught thousands of managers and supervisors how to do their jobs more effectively and improved efficiency of employer organizations at the same time. She is an expert in Internet-based learning programs having taught instructor-led programs for the University of San Francisco and Golden Gate University for many years. She is committed to development of half-day programs that can be used by any manager over a weekend, or even during an evening after work.

Dr. Ford is an expert in team development and management training programs. He has held management and executive-level positions in several industries including construction, health care, law enforcement, and government. He has over 36 years of management experience and is able to convey first hand those keys to management success every participant seeks.

The first two programs being offered have been selected in response to requests we have received. "It seems the greatest interest among new supervisors and managers is in developing personal leadership skills and learning how to motivate their work teams," said Dr. Henderson. "Those are critical skill areas for every manager and supervisor."

Each of the programs will require between three to four hours of study. When participants are finished studying the material and have completed the final exercise, they will email that to the HR Web Store where it will be reviewed by Dr. Henderson or Dr. Ford.

Upon completion of each course, participants will receive a Certificate of Completion with notice of Continuing Education Credits awarded for their efforts.

"Continuing Education Units are becoming more important to supervisors and managers because of recertification requirements," according to Dr. Henderson. "And, many new supervisors and managers have discovered they need training in how to do their new jobs but employers are not always offering to help."

That's where these new programs can help. Employers can enroll as many people as they like. Individuals can enroll themselves as a matter of personal development and skill building.

The initial series of courses will include:

- Leading to Your Best Advantage
- Motivate Your Team to Peak Performance
- Recruiting the Right People to Your Best Advantage
- Resolving Performance Issues
- Addressing Sexual Harassment Issues
- Communicating to Your Best Advantage
- Developing the Potential in Others

Additional courses will be added as student needs dictate.

>Leading to Your Best Advantage

Learn about:

- New Thinking About Leadership
- Your Personal Leadership Scope
- Taking Your Organization's "Temperature"
- Survey for Personal Feedback
- Defining a Leader's Role
- Leadership Self-Assessment
- Creating and Sharing the Vision
- Personal Action Planning

>Motivate Your Team to Peak Performance

Learn about:

- How to be an Effective Motivator
- Avoiding Ineffective Motivation
- How to Motivate Individuals Within Your Team
- Motivating Cross-Functional Teams
- Matching Leadership Roles to Team Behaviors
- Directive Versus Collaborative Leadership
- Case Study

Each of these courses will earn participants .3 Continuing Education Units. More importantly, they will earn additional knowledge and skills to help them be more effective on their jobs.

Registration fee for each course is only $49.95 plus the cost of any related text book. Often, one text book can be used for two or more courses, saving money for students. Text books are available in downloadable format as well as in hard copy.

The best part ... students can study these materials and complete the programs on their own time, at their own pace, and in the comfort of their own homes. There are no travel costs or late night drives to classroom facilities many miles away. All inconvenience has been removed from these programs. All control is left in the hands of the students.

We encourage all employers to think about their management team and how many supervisors and managers have attended management skills training. If the answer is, "not many," these programs offer an excellent, low-cost way to provide supervisors and managers with the information and skills they need to excel in today's business world.

To learn more about these programs, please visit our web site at www.hrwebstore.com . On the first page you will see a link to Continuing Education Programs. We look forward to serving you and your staff.

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2. EEOC ISSUES GUIDELINES ENSURING INFORMATION QUALITY

The Equal Employment Opportunity Commission (EEOC) has issued "Guidelines Ensuring Information Quality" to meet an obligation under the Treasury and General Government Appropriations Act for Fiscal Year 2001, Section 515(b). The intent is to ensure and maximize the quality, objectivity, utility and integrity of information disseminated by the Commission.

Information subject to these new guidelines includes statistical information prepared for public dissemination and reports, studies and summaries prepared to inform the public about the impact of the Commission's programs or for use in formulating broad program policy.

"Quality" is a statutory term that collectively comprises the terms of utility, objectivity, and integrity. The new guidelines will apply to information the EEOC disseminates on or after October 1, 2002.

One outcome of this new set of guidelines will be the expansion of EEOC information on its web site. As time goes on, the Commission expects to convert most of its print documents to electronic format and add them to the web site for easy access.

To achieve its commitment to objectivity the EEOC has pledged to produce information in the following ways:

- Based on reliable, accurate data
- From surveys using methodologies that are consistent with generally accepted professional standards for all aspects of survey design and implementation
- Compiled using statistically sound procedures implemented by qualified professional staff

- Resulting in analytic reports prepared using sound statistical and analytic methods and by staff knowledgeable about the data sources and models used
- Identifying data sources for EEOC publications as a whole or for individual tables

The plans also call for ensuring integrity of EEOC administrative information by using rigorous controls that have been identified as representing sound security practices.

Part of the procedural guidelines include methods for individuals in the public to change information the Commission collects if that information is shown to be incorrect.

For additional details about the new guidelines visit the EEOC web site at www.eeoc.gov .

Gentle Readers,

This week, a reminder to get ready for new California requirements about handling of Social Security Numbers that will be going into effect on July 1st; a new program for VDT ergonomics in California; and, some political pressure to approve use of compensation time in the private sector.

Bill Truesdell
Editor

IN THIS REPORT (Report #227, 5/24/2002)
-------------- (Sent to over 1,500 subscribers)

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1. CALIFORNIA LAW ON USE OF SSNs BEGINS ON JULY 1st

A reminder for all California employers that S.B. 168 becomes effective on July 1, 2002. The primary purpose of the new state law is to prevent identity theft. (Civil Code, Sections 1785.11.1 - 1785.11.4, 1785.11.6, 1798.85, and 1785.15)

There are four primary restrictions to use of employee Social Security Numbers by employers:

1) No person or entity shall print an individual's SSN on materials that are being mailed to the individual;
2) No person or entity shall publicly post SSNs;
3) No printing of SSNs on password cards for access to products and services;
4) No transmitting numbers over the Internet unless they are encrypted.

There are three exceptions that will relieve most employers when emailing SSNs for group benefits and other employment-related matters. The first exception is that the mail item may contain a SSN if the number is required by law. The second says that if an employer has already been using SSNs prior to July 1, 2002, it may continue to do so if three conditions are met: (1) the use of the SSN is continuous and does not stop for any reason; (2) the individual employee has been provided with an annual disclosure commencing in the year 2002 advising the employee of the right to stop the use of their SSN; and (3) if a written request is received from the employee to stop the use of the SSN, the employer shall stop within 30 days.

Well...

If only one employee asks you to stop using his/her SSN on other than legally required documents, your systems of information tracking and reporting will have to accommodate that request by allowing for some other identification number.

It only takes one person's request to throw your mechanized systems into disarray. Now is the time to confirm with your Information Technology folks that your systems are capable of deleting SSNs from employee reports if that becomes necessary due to an employee request.

Remedies for situations involving employers who do not follow the new requirements will be found in state court through civil actions.

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2. ERGONOMICS PROGRAM FOR VDT OPERATORS IN CALIFORNIA

California's Department of Occupational Safety and Health (Cal/OSHA) has prepared a four-step "Ergonomics Program for Employers with Video Display Terminal (VDT) Operators." The program includes:

- Step One: Evaluate the Work
  Use the program's "VDT Checklist" to determine your current status in each of the following areas:
  > VDT Operations
  > Lighting and Glare
  > Workstation Seating
  > Screens, Keyboards, and Work Surfaces
  > Work Practices
  > VDT Accessories

- Step Two: Consider Your Options
  Review a list of options in each of the areas you have evaluated.

- Step Three: Develop a Plan
  If you decide you need to make some changes, develop a schedule for implementing each of the changes.

- Step Four: Implement and Monitor Your Progress

Why should you care? Consider the impact you could have on your Worker's Compensation injury rates and expense. You may discover that you can save a considerable amount of money by using preventative programs such as this to address your employee safety issues.

For a complete copy of the Cal/OSHA ergonomics program go to: http://www.dir.ca.gov/dosh/dosh_publications/ergonomic.html

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3. PRIVATE SECTOR COMP TIME MOVING IN CONGRESS

The House Workforce Protections Subcommittee heard testimony on May 15, 2002, concerning use of various flexible work schedules used by public sector employees, and how such benefits could be employed in the

private sector. This hearing was the second in a series designed to lay the groundwork for future consideration of legislative proposals to provide greater scheduling flexibility for private sector workers.

Called the "Working Families Flexibility Act (H.R. 1982), if approved, this legislation would amend the "Fair Labor Standards Act of 1938." At issue are permissible federal work schedules. A 1998 survey conducted by the Office of Personnel Management (OPM) found that 92 percent of federal agencies reported offering flexible work schedules, and 79 percent reported offering compressed work schedules.

One key component of the proposed bill would allow private sector employers to offer workers compensating time off in lieu of paid overtime. For almost 20 years, public sector workers have enjoyed this alternative. It is not available under the current labor laws.

Two states have recognized the importance of granting compensatory time off not only to public sector employees but to those working in private industry. Michigan and Washington have acknowledged the important role that compensatory time off plays in the workplace.

Opponents of the proposal suggest there are serious problems with forced use of comp time by employers, employer reliance on preset minimum staffing levels to deny access to comp time without meeting the FLSA's standard of "undue disruption," and a lack of clarity as to the appropriate remedy for employer violations of a comp time system.

As with many issues in Congress today, debate appears to be split along party lines with Republicans favoring passage of these changes and Democrats arguing that they are "simplistic notions" that may well not work in the private sector even though they work in the public sector.

For more information go to:
http://edworkforce.house.gov/issues/107th/workforce/comptime/comptime.htm

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Gentle Readers,

Is there such a thing as FREE? The California Employment Development Department thinks so. It's offering free publications to employers. Have you heard about the hottest new employment tactic...getting interns to pay for their job experience? Then there's the transition to permanent mediation efforts by the California DFEH. Some interesting stuff this week.

Bill Truesdell
Editor

IN THIS REPORT (Report #228, 6/7/2002)
---------- (Sent to over 1,500 subscribers)

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1. FREE PUBLICATIONS AVAILABLE FROM CALIFORNIA EMPLOYMENT DEPT.

California's Employment Development Department (EDD) offers many free publications that can benefit employers. Among them are the following titles you may find interesting:

- California Sign Language Interpreter Referral Agencies Resource List (GCEDP)
- A Guide to Planning Accessible Meetings (DE8380)
- Language Guide on Disability: A Primer On How To Say What You Mean To Say (DE6031)
- The Ten Commandments of Communicating with People with Disabilities
- Supervising Adults With Learning Disabilities

The department requests employers to allow six weeks for delivery of their publications after an order is placed. To order, write to:

California Governor's Committee
For Employment of Disabled Persons
P.O. Box 826880, MIC 41
Sacramento, CA 94280-0001

In your request, state the title you wish and the number of copies you need up to 200 copies per title. They will be mailed to the address you specify in your request.

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2. CHARGING INTERNS FOR THEIR JOB EXPERIENCE?

On June 4, 2002, the Wall Street Journal ran a story about interns

who pay for the privilege of working for employers over the summer months. According to the article, 13 interns with one placement program each paid from $650 to $1,600 for their internships.

You may have already guessed that these programs are being developed and promoted by various universities or their affiliates. Students are registered in the program during the summer and sometimes are required to attend weekly seminars related to their intern assignments.

One such program is run by the Public Leadership Education Network in Washington, DC. The network, PLEN, prepares young women for leadership roles.

It seems too good to be true. Get an eager, bright employee for the summer and it won't cost you a thing as the employer. Well... as with most such things, it probably is too good to be true.

University career centers are split on their opinions of these programs. Some say the experience for young people is worth its weight in gold. Others say they don't encourage their students to pay for internships. There are plenty of opportunities available where students can work for no pay or receive some pay and gain the same experience. Some students have said they believe pay-for-your-internship programs are scams. In most such programs the students receive college credit for having participated.

Be careful to check your state requirements related to minimum wage payments. In California, for example, it is illegal to have someone performing work that benefits the employer without paying that person minimum wage or more. (There are some specific exemptions to that requirement having to do with training programs for the disabled. Eligible employers must meet certain requirements and receive advance approval from the Labor Commissioner before paying less than minimum wage.)

As always, we recommend that you check with your labor or management attorney to determine what eligibility you may have in your state before embarking on a sponsorship for one of these internship programs.

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3. CALIFORNIA DFEH OPENS THREE MEDIATION OFFICES TO COVER STATE

California's Department of Fair Employment and Housing (DFEH) has announced the opening of three offices to provide mediation services on employment discrimination complaints. One office will be in San Diego serving Southern California and the other two will be in Santa Clara and Fresno serving Northern California.

DFEH has been experimenting with third-party mediation for a year. It's pilot program began in May 2001.

On May 21, 2002, the Department announced the awarding of contracts to mediators in three of its regions. Two mediators have been contracted to provide services in Santa Clara, three have been signed up for San Diego and one has been selected for Fresno.

According to the DFEH, this is the first state-wide program of its kind in the country. Employees with complaints of illegal job discrimination have only been able to seek Department resolution in the enforcement process. Of course, with a "Right to Sue" letter, they are entitled to prosecute their case in state court. Now, with this new program, employers will find they have an option not available in the past. Employers can elect to mediate a resolution to the complaint, and in doing so, keep the issue and themselves out of court.

Andrea Rosa, Deputy Director of the DFEH, is in charge of the mediation program. For more information, visit their web site at www.dfeh.ca.gov

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Gentle Readers,

Two new Supreme Court decisions will hold your interest this week. A new study points out the value of written policies even in the smallest of employer organizations.

Bill Truesdell
Editor

IN THIS REPORT (Report #229, 6/14/2002)
---------- (Sent to over 1,500 subscribers)

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1. SUPREME COURT SAYS TIMELY FILING AT EEOC CAN INCLUDE INCIDENTS OLDER THAN 300 DAYS.

Under Title VII of the Civil Rights Act of 1964, an employee "shall" file an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days after an "alleged unlawful employment practice occurred." In the case of National Railroad Passenger Corporation (Amtrak) v. Morgan (U.S. No. 00-1614, 6/10/2002) the employee filed a charge of discrimination and retaliation with the EEOC against his employer and cross-filed with the California Department of Fair Employment and Housing (DFEH). He claimed that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment because he was Black.

Some of the alleged discriminatory acts occurred within 300 days of the time that Morgan filed his EEOC charge, and many took place prior to that time. The District Court granted Amtrak summary judgment in part, holding that the company could not be liable for conduct occurring outside of the 300-day filing period. The Ninth Circuit reversed, holding that an employee may sue on claims that would ordinarily be time barred so long as they either are "sufficiently related" to incidents that fall within the statutory period or are part of a systematic policy or practice of discrimination that took place, at least in part, within the period.

Justice Thomas delivered the opinion of the Court. He said a "Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same

unlawful practice and at least one falls within the filing period...Hostile work environment claims are different in kind from discrete acts. Because their very nature involves repeated conduct, the 'unlawful employment practice, cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Determining whether an actionable hostile environment claim exists requires an examination of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Morgan presented evidence that managers made racial jokes, performed racially derogatory acts, and used various racial epithets. Although many of these acts occurred outside the 300-day filing period, it cannot be said that they are not part of the same actionable hostile environment claim.

So, what has this case taught us?

HR Lesson #1: Be aware that old problems sometimes don't go away. If you have ongoing hostile environment problems, the sooner you get them fixed the better.

HR Lesson #2: Be sure your managers are well trained. Most companies these days "assume" that managers understand EEO laws and workplace behavior requirements. That is not necessarily the case, however. The Amtrak case involved managers directly participating in the illegal behavior. It's better to budget some money for ongoing training than to be caught having to fund large court case settlements or judgments.

HR Lesson #3: Have a qualified management attorney on call who can advise you about such situations. In today's world there is no way you can avoid the expense for quality advice. It will always be cheaper than penalties levied later on.

To read the opinion go to:
http://www.supremecourtus.gov/opinions/01slipopinion.html

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2. SUPREME COURT SAYS EEOC REGULATIONS ON ADA SAFETY ARE VALID

We all know it is not OK to make employment decisions, including work assignments, based on sex. You will recall the Automobile Workers v. Johnson Controls, Inc. (499 U.S. 187, 202, 1991) was concerned with paternalistic judgments based on the broad category of gender, while the EEOC has required that judgments based on the direct threat provision is founded on individualized risk assessments.

A new U.S. Supreme Court decision released on June 10, 2002 supports the Equal Employment Opportunity Commission (EEOC) regulations and guidelines in this arena. The case is Chevron U.S.A. v Echazabal (U.S. No. 00-1406, 6/10/2002). In this instance, Mr. Echazabal worked for an independent contractor at one of Chevron's oil refineries until Chevron

refused to hire him because of a liver condition -- which its doctors said would be exacerbated by continued exposure to toxins at the refinery -- and the contractor employing him laid him off in response to Chevron's request that it reassign him to a job without exposure to toxins or remove him from the refinery.

Echazabal filed suit, claiming, among other things, that Chevron's actions violated the Americans with Disabilities Act of 1990 (ADA). Chevron cited an EEOC regulation permitting the defense that a worker's disability on the job would pose a direct threat to his health. The District Court granted Chevron summary judgment, but the Ninth Circuit reversed, finding that the regulation exceeded the scope of permissible rulemaking under the ADA.

In its decision, the Supreme Court held that the company could rely on its decision in Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc. (467 U.S. 837, 843) as long as it makes sense of the statutory defense for qualification standards that are "job-related and consistent with business necessity." In the case of Echazabal, Chevron reasoned that it had no choice but to bar the employee from toxic environments because of its risk of doing otherwise and violating the Occupational Safety and Health Act of 1970 (OSHA).

Justice Souter wrote for a unanimous Court, "The ADA was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. This sort of sham protection is just what the regulation disallows, by demanding a particularized enquiry into the harms an employee would probably face." He also said that the company's claim the employee could be harmed if he continued in the toxic environment reasonably fell within the general "job related" and "business necessity" standard.

Chevron was right in refusing to allow the worker further exposure to toxins.

There is clearly need to evaluate each instance of employee job assignment when it is based on health or safety to be sure it meets the legal standards of "job related" and "business necessity." And, to do that evaluation, you know you need to have the assistance of your management attorney.

For a full copy of the case opinion go to:
http://www.supremecourtus.gov/opinions/01slipopinion.html

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3. NEW STUDY SHOWS STRUCTURED HUMAN RESOURCE POLICIES ARE CRITICAL

By Vicki Kaman, Anne M. McCarthy, & Mary L. Tucker

A new study has been released by the Management Department of Colorado State University. It concludes that government compliance and employee communications are significantly enhanced by structured human resource management policies and practices. The study is titled, "Human Resource Practices that Establish Expectations and that Support Employee Responsibility in Small Service Firms."

Bureaucracy has almost become the equivalent of a four-letter word in business. Yet, perhaps without realizing it, modern-day managers owe a debt to Max Weber (1947) and his treatise on the benefits of formalization of rules, policies, and procedures. While we praise the informality of entrepreneurial firms, as well as their ability to make decisions without a lot of "red tape," that same informality can lead to treating people inconsistently. In an era, of "equal, but not the same," managers need to be increasingly careful that they are accommodating but fair in their treatment of employees. Employers need to document and communicate expectations as well as establish systems that ensure consistency and compliance with employment laws. At the same time, managers need systems that respond to the employees' needs, encourage employees to take responsibility for their work lives, and benefit the organization.

Some of the study's findings include:

- Attracting Qualified Employees - Organizational size is significantly related to concern over attracting qualified employees, indicating that this is more of a concern for larger firms.

- Motivating Employees - Organizational size is also significantly related to concern about motivating employees.

- Turnover - Organizational size is not significantly related to turnover.

- Absenteeism - Size demonstrated a significant positive relationship to absenteeism that did not persist when the HRM practice composites were added.

- Litigation - Organizational size is significantly and positively related to litigation against the firm brought by employees.

By encouraging employees to participate actively in the firm, to take more control of their performance, and to engage in two-way communication, the message is conveyed that management values and trusts its workers.

For more information about the study, contact Dr. Anne McCarthy, Associate Professor of Management, Colorado State University. Her email address is: mccarthy@lamar.colostate.edu .

Gentle Readers,

Please read item #1 to learn how you can unsubscribe to this FREE newsletter service using our new automated procedures. Then read about how individuals and organizations will soon have the right to challenge government data used to support new regulations.

Bill Truesdell
Editor

IN THIS REPORT (Report #230, 7/12/2002)
---------- (Sent to over 1,500 subscribers)

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1. NEW DISTRIBUTION SYSTEM FOR THE ADVANTAGE

This is the first issue of our Special Reports for HR Professionals that is being distributed by our new automated Majordomo email system. Due to our growing subscriber list we have found it necessary to automate the subscription and removal process. Briefly, here is how it works:

New subscribers can register their email addresses and receive a copy of our FREE publications by going to www.hrwebstore.com/newsletr/newsletr.html . Completing the subscription form is all that is required. Once submitted, new subscribers will receive confirmation from the system that their email address has been successfully added.

If you wish to discontinue your subscription, please take this one simple step: Send an email message to majordomo@management-advantage.com and place in the body of the message the following: "unsubscribe theadvantage (your email address)." Do not use the parentheses or quotation marks. No other message is required. Your address must match the one you used to subscribe. If it does, you will be automatically removed from our subscriber list.

PLEASE SAVE THESE INSTRUCTIONS FOR FUTURE REFERENCE.

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2. AAP EMPLOYERS STILL WAITING FOR APPLICANT DEFINITION

One of the most important issues facing affirmative action employers (federal contractors) is that of how to define a job applicant. It is important because once an individual has been identified as an applicant, federal regulations require the contractor to make note of the race and sex of that person.

When the Uniform Guidelines on Employee Selection Procedures were first created in 1978, they were endorsed by the Equal Employment Opportunity Commission (EEOC), the Civil Service Commission, the Department of Labor (Office of Federal Contract Compliance Programs - OFCCP), and the Department of Justice. They were officially published in Chapter 41 of the Code of Federal Regulations (CFR) as 41 CFR 60-3. While the regulations themselves don't actually define "applicant," the Questions and Answers that were published at the same time are designed to help employers understand the government's intent.

Question 15 in that list asks: "What is meant by the terms 'applicant' and 'candidate' as they are used in the Uniform Guidelines?" The answer is:

"The precise definition of the term 'applicant' depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.

"The term 'candidate' has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines.

"A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex, or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process."

You can find BOTH the Uniform Guidelines and the Questions and Answers at the HR Web Store. They are FREE as downloads. Go to www.hrwebstore.com and look in the "What's New?" department.

The Office of Management and Budget (OMB) has directed the EEOC and Department of Labor (OFCCP) to refine the definition of "applicant." Several deadlines have come and gone, and still we have no definition update. The current three-month extension was just granted by OMB and is due to expire on September 30th. Will the new definition be ready by then? We doubt it.

You can expect a more likely scenario will go something like this:

We must get past the Congressional elections in November and allow new members of Congress to learn about their oversight committee responsibilities. That will take us to the first quarter 2003. If you're holding your breath in anticipation of an earlier release of the definition, let it out and breath normally. Nothing happens quickly these days.

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3. NEW FEDERAL LAW LETS BUSINESSES CHALLENGE DATA UNDERLYING REGULATIONS

Have you ever heard of the Federal Data Quality Act? Not many folks have, actually. It was passed 18 months ago amid all the noise associated with the myriad of government-appropriations at the time. It becomes effective on October 1st of this year.

Signed by President Clinton, the law will require government agencies to ensure the quality of the data they use when issuing new rules, regulations and studies. For the very first time, anyone will be able to challenge the data used in formulating government regulations, rather than simply challenging the laws themselves. Some are speculating that business interests will quickly take advantage of this new opportunity.

Companies that believe some costly federal regulations are based on worthless data are cheering according to the Wall Street Journal (7/5/2002). Liberal activists, who think the act strikes a blow to public access to information, are jeering.

Topping the list of shots some business groups are preparing to fire are those associated with clean-air regulations and climate changes. Last year the U.S. Supreme Court declared U.S. industry didn't have legal grounds to challenge the Clean Air Act of 1997. Now, it looks like those interests supporting the challenge will be back to question the underlying data supporting those regulations implementing the act.

The act charged the Office of Management and Budget with the job of creating guidelines for data quality that agencies would use as a pattern for customizing those guidelines to their own organizations. Agency guidelines must be approved by OMB and be in place by October 1, 2002.

The law also states that agencies must provide a way for groups affected by the data to contest it if they believe it to be unsound. In order to ask for a correction, the person or group must be identified as one who is affected by the information. If the agency refuses to correct the information, the affected party can sue.

Naturally, we are watching this new development with interest in how the U.S. Department of Labor will promulgate its rules for handling such data challenges. One major area of concern for all affirmative action employers is design of the EEO File from the Census 2000 data. If that file matches U.S. Census rules for designating multiple-race categories we will see one result. If the concerned agencies decide to continue using existing single-race categories for affirmative action

purposes there will be a different result. In any case, it seems, the outcome will be challenged by someone or some organization.

Be aware, that Human Resource professionals will be impacted by this change in government procedures as much or more than by any other change in recent times.

Gentle Readers,

We've located an outstanding new book on African American history with emphasis on Thurgood Marshall. It also contains a wealth of information about today's African American culture. There are references for holidays, celebrations, as well as the legal history all lawyers will find interesting. Check it out. It's only a click away.

Bill Truesdell
Editor

IN THIS REPORT (Report #231, 7/19/2002)
---------- (Sent to over 1,500 subscribers)

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1. NEW AFRICAN AMERICAN SOURCEBOOK RELEASED WITH TRIBUTE TO THURGOOD MARSHALL

Summer time is an excellent time to catch up on reading all those books you have wanted to get to for so long. Well, now you can add another excellent volume to your list and to your library.

The "African American Sourcebook: A Tribute to Thurgood Marshall" is a useful document for organizations, groups, and individuals to celebrate a unique aspect of American history-African American heritage. It was written initially for the Federal Judiciary under contract with the Employee Relations Office of the US Administrative Courts in Washington, DC. This office distributed the source book to the 94 Federal Courts to celebrate African American history in February 2002. The source book profiles Justice Thurgood Marshall; contains a legal analysis of civil rights issues involving race relations; has a directory of African-American judges on the Federal bench; and it offers cultural items and ideas for celebration activities. The Source book is a tool that demonstrates value for diversity by increasing knowledge and improving relations among people from diverse groups.

If you have any interest in African American history, legal history or the U.S. Supreme Court, you will want this new volume as part of your personal library.

See a complete table of contents at:
http://www.hrwebstore.com/products/Marshall.htm

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2. OFCCP TO MODIFY SELECTION PROCESS FOR CONSTRUCTION CONTRACTORS

The Bureau of National Affairs reports (Employment Discrimination Report, 7/10/02) that the Office of Federal Contract Compliance Programs (OFCCP) will change its selection process for construction contractors. This follows an audit of the agency by the Department of Labor's Inspector General.

The audit indicated a need to "establish and apply neutral selection criteria" for reviewing construction contractors. In addition, the OIG called upon OFCCP's district and regional offices to document "each step" of the selection system.

Three recommendations came out of the audit, all of which have been agreed to by the OFCCP. (Is this like a conciliation agreement for the OFCCP?)

- Develop and disseminate guidance to district and regional offices regarding use of sources for selecting construction contractors for review;
- Determine and specify in writing what neutral criteria will be applied at each step of the selection process; and
- Document the "rationale for compliance review selection decisions and provide direction to field personnel in the directive on the selection procedures."

An estimated 100,000 construction contractors are subject to EEO and affirmative action obligations as a result of holding federal contracts.

OFCCP said it generally agreed with and would follow the audit recommendations.

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3. VACATION TIME

There will be no issue of Special Report for HR Professionals for the next two weeks because we are going to be away on vacation. We wish all of you a pleasant summer. We'll be back in August with more HR news and updates.

Gentle Readers,

Congress is ready for its summer recess, many state legislatures are looking toward the end of their sessions for the year, and the U.S. Department of Labor has yet to announce its plans for distribution of this year's EO Survey of federal contractors. All-in-all, a fairly quiet time for HR professionals.

Bill Truesdell
Editor

IN THIS REPORT (Report #232, 8/2/2002)
-------------- (Sent to over 1,500 subscribers)

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1. NEW EEDS LISTS HIT OFCCP FIELD OFFICES

The Office of Federal Contract Compliance Programs (OFCCP) national office has released to all its field offices the new EEDS lists for use in selecting compliance review targets. EEDS is the Equal Employment Data System report that is extracted using EEO-1 report filings from federal contractors. This new list is based on EEO-1 reports filed for the year 2000.

OFCCP is required to maintain a non-biased selection process when it picks contractors to be audited. The EEDS system was invented as a tool for accomplishing that objective. Each year, the EEDS data is updated with new EEO-1 filing information. There is a lag of between one and two years between EEO-1 filings and their use in new EEDS audit selection lists. That is due to the processing time required. Naturally, any list that has aged two years will have errors on it. Some federal contractors will no longer be in business and some will have given up their federal contracts. Others will be new to federal contracting during the most recent two year period and will not yet have been added to the list.

From this point on, contractors will be selected from the new list.

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2. QUESTIONS ABOUT OVERTIME IN CALIFORNIA

Question: Can an employer in California require employees to work overtime? If the employee says yes, he or she will work overtime as requested, and then doesn't show up to work, can he or she be written

up on a disciplinary action? If so, must there be a written policy stating this?

Answer: California's Industrial Welfare Commission has issued 17 Wage Orders, each applying to a different industry or occupation set. Wage Order #4 (Professional, Technical, Clerical, Mechanical and Similar Occupations); Wage Order #8 (Agricultural Product Processing After Harvest); and Wage Order #13 (Agriculture Food Processing on the Farm) all have a provision that prohibits employers from disciplining workers for refusing to work more than 72 hours in any one workweek. The remaining Wage Orders have no limitation.

So the answer is dependent upon which Wage Order your organization is subject to as a California employer. If you run an office operation in the service sector you are subject to Wage Order #4 and may not require people to work more than 72 hours per week.

If an employee is lawfully directed to work overtime and refuses or doesn't report as scheduled, the employer may take disciplinary action against that person.

Question: If an hourly employee works on a holiday and he does not work 40 hours in that week, must he be paid time and a half?

Answer: I have to make some assumptions about your situation. For example, I assume you are a non-union employer (this employee is not covered by a union bargaining agreement); the employee is classified in a non-exempt job (because you said he is being paid hourly); and, you have no policy that would provide premium payment for someone working on a company holiday.

In California only actual work hours qualify for use in computing overtime. If your employee gets paid straight time for the holiday because of your company policy, and works on that day as well, he should be paid the straight time for the holiday plus straight time for actual hours worked. Unless those actual work hours cause him to go over the 8-in-one-day rule or over 40 for the week there would be no overtime requirement for the day. If your policy does not call for holiday pay (worked or not), the employee should be paid only for actual work hours without extra pay for the holiday.

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3. UPDATE ON EO SURVEY FROM OFCCP

While there has been no official word from the Office of Federal Contract Compliance Programs (OFCCP) about additional mailings of the mandatory EO Survey, word on the street would indicate that a new distribution is generally expected this year.

The most likely scenario would have the survey mailed to contractors around Labor Day. How many will be sent out is still a question.

To date, the OFCCP has continually stated that it is still "analyzing" the data from returns of its January 2001 distribution of 49,000 survey documents. There has been no indication yet of the manner in which

OFCCP plans to use the compensation and employee data submitted through the earlier survey. As of this time, OFCCP has not indicated that it is using the survey results to target contractors for compliance audits. These surveys were distributed only to non-construction contractors subject to affirmative action regulations at 41 CFR 60-2. Construction contractors are subject to a different set of requirements outlined at 41 CFR 60-4.

Modifications to the regulations that became effective in December 2000 codified the annual mandatory pay survey dubbed the "Equal Opportunity Survey (EO Survey)." Controversy over the value of information collected by the EO Survey began when it was first proposed and continues to this day. Employers have strongly opposed the collection of compensation data required by the survey saying it has no realistic value in portraying their non-discriminatory compensation programs. Employee advocacy groups have generally supported the survey saying that employer disclosure of compensation data is necessary to assure non-discrimination.

Gentle Readers,

The EEOC has just released its first CD-ROM containing all seven volumes of its technical assistance manuals. While thinking of compliance, consider the possible ramifications of Congress' action to restore investor confidence. Employers may find some impact down the road.

Bill Truesdell
Editor

IN THIS REPORT (Report #233, 8/9/2002)
---------- (Sent to over 1,500 subscribers)

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1. GUESS WHAT THE NEW SARBANES-OXLEY ACT OF 2002 HAS IN IT

Amid great controversy, President Bush signed into law the Sarbanes-Oxley Act of 2002 at the end of last month. Congress passed the new law in an attempt to restore investor confidence amid flagging stock market results and a host of well-publicized corporate scandals.

Most of America believes the new law tightens accounting practices in an attempt to prevent future corporate misbehavior. While that is true, it is also true that controls included in this legislation extend well beyond accounting. Many of them will impact HR managers and business managers. Here is a brief summary of what you can expect to become common knowledge in the future ...

- Whistle blower protection for employees of publicly traded companies who provide information or assistance in certain qualified investigations. Protections are enforced through Department of Labor complaint filing or action in federal court.

- Criminal penalties for retaliation against anyone who acts as a whistle blower against wrongdoing in a publicly traded company.

Blowing the whistle is protected if the disclosure alleges mail fraud, wire fraud, bank fraud, violation of any Securities and Exchange Commission rule or regulation, or any violation of federal law relating to fraud against shareholders.

The new law applies to public companies registered under Section 12 of the Securities and Exchange Act of 1934, or those required to file reports under Section 15d of that Act. It applies to officers,

employees, or agents of those public companies ***AND*** to contractors, and subcontractors of those public companies.

The new law also will protect Securities Analysts employed by brokers or dealers or their affiliates who present adverse, negative, or otherwise unfavorable research reports that may adversely affect an investment banking relationship between the securities issuers and the brokers or dealers.

Individuals who intentionally retaliate against a protected employee can be fined or imprisoned for not more than 10 years.

HR professionals must be keenly aware of these new provisions and help their organizations make whatever changes may be appropriate such as addition of this subject to employee and management training programs. All management personnel should be made aware that there are personal criminal penalties associated with employment actions that could be considered retaliatory. They can find themselves in jail for taking retribution against anyone protected as a whistle blower under this legislation.

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2. CIRCUIT COURT OKs UNIONS COLLECTING FEES FROM NON-MEMBERS

In a unanimous decision (11-0), the U.S. Ninth Circuit Court of Appeals has ruled that labor unions may charge non-members at companies where the union has a collective bargaining agreement for the costs of recruiting at competing firms.

The issue was raised by people working in the retail food industry who were not members of the United Food and Commercial Workers International Union (UFCW), an affiliate of the AFL-CIO. They complained that it was an unfair labor practice for the unions to use their dues to pay for the cost of organizing. They said their dues should not be used for political and/or private ideological purposes in violation of the First Amendment and a previous U.S. Supreme Court ruling.

The Ninth Circuit found that the use of dues for costs of organizing at competing companies was consistent with the language and purpose of the National Labor Relations Act (NLRA). The National Labor Relations Board has previously said that organizing is germane to collective bargaining – including organizing competitors.

Protesting workers were represented by the National Right to Work Legal Foundation which has said it will appeal the ruling and ask for review by the U.S. Supreme Court. It says a 1984 Supreme Court decision in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, held that the Railway Labor Act (RLA) did not permit a union to charge non-members for organizing activity outside its bargaining unit. The Ninth Circuit found significant differences between the NLRA and the RLA. Now the Supreme Court may have to resolve the conflict.

(UFCW, Local 1036 v. NLRB, 9th Cir. Mar 25, 2002)

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3. EEOC TECHNICAL ASSISTANCE MANUALS NOW AVAILABLE ON CD-ROM

The Equal Employment Opportunity Commission (EEOC) has just announced the release of a CD-ROM version of its Technical Assistance Manuals. And, they're cheaper than the print version.

There are seven manuals in the set:

- Employer EEO Responsibilities
- Race and Color Discrimination
- Sex Discrimination
- National Origin Discrimination
- Religious Discrimination
- Age Discrimination
- Disability Discrimination

Each volume contains training exercises, practical guidance and copies of EEOC's most important policy interpretations, including information concerning recent important Supreme Court decisions affecting Federal EEO law. The entire set is updated annually to reflect changes in law, court decisions and new EEOC guidance. These materials are useful for employers, human resource/EEO professionals, attorneys, labor representatives and others interested in EEO matters in the private, federal and state and local government sectors.

The hard copy version of all seven manuals costs $199.00. This new CD-ROM version is pre-loaded with an Adobe Acrobat Reader and can be use with Microsoft Windows 95, 98, 2000, Millennium and XP, as well as with MAC computers. Directions are included. Cost of the CD-ROM is $135.00 including shipping and handling charges. An order form is at their site and can be printed for FAXing or mailing in your order.

For more information, visit the EEOC web site at www.eeoc.gov .

Gentle Readers,

Incorporating diversity initiatives into other corporate goals is not always as simple as it sounds. Dr. Billy Vaughn has some ideas that just may help. And, we encourage you to review your status regarding mandatory employee training programs.

Bill Truesdell
Editor

IN THIS REPORT (Report #234, 8/16/2002)
---------- (Sent to over 1,500 subscribers)

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1. MANDATORY TRAINING ... ARE YOU IN COMPLIANCE?

Two issues today resonate through every employment organization in the country. One is safety and the other sexual harassment. In these days of tightened budgets and lower headcount employee training expenses are still the most rapidly cut from organizational plans.

Employers should think carefully, however, before eliminating training programs related to sexual harassment prevention and, in California, for safety-related training programs. The Equal Employment Opportunity Commission (EEOC) has included mandatory employee training as part of every settlement agreement proposed since Cari Dominguez became chair of the Commission. Additional impetus for training comes from the U.S. Supreme Court decisions in Faragher v. City of Boca Raton (524 U.S. 775, 1998) and Burlington Industries, Inc. v. Ellerth (524 U.S. 742, 1998). In these two cases, the Court clarified what employers must do to avoid liability in cases of sexual harassment. Part of that direction involved employee training as part of an implementation plan for a policy prohibiting harassment in the workplace.

Employee training should be provided for all Title VII protections, not just sexual harassment. These include harassing behavior associated with race, color, religion, national origin, gender, and pregnancy. These have all been dictated through various case decisions around the country. Other decisions have held that harassment based on disability is equally illegal and presents guilty employers with liability. What about age discrimination, equal pay and family and medical leave? If employees are being harassed due to one of these issues you may be the unlucky employer who presents the test case. Smart employers will train in all these areas to prevent workplace harassment and contain any potential liability.

Having a policy prohibiting harassment is good. What an employer does with it is even more important, though. Every employee should receive a copy of the policy. Failure to provide a copy of its non-harassment policy to every employee cost Hoffman-La Roche, Inc. one million dollars in a January 10, 2002, Texas appellate court affirmation of an earlier jury verdict. (Hoffman-La Roche, Inc. v. Zeltwanger, 2002 WL 849806)

Once employees have received their copies of the policy, employers should guarantee that they understand its meaning by training all managers and employees in its content and intent. Without records of employee attendance at such training sessions, employers are hard pressed to defend themselves against liability for claims of employee harassment.

In California, every employer with one or more people on the payroll must conduct safety training programs for workers. Employers who have 10 or more employees are required to maintain detailed written records of training sessions conducted, their content and attendance. Finding oneself, after an accident, trying to explain why there had been no employee safety training is most embarrassing and potentially very costly. If management negligence results in serious injury or death of an employee, managers can find themselves facing criminal prosecution and potential prison time.

The moral is simple: Don't cut out training expenses associated with legal compliance. Ultimately, costs can far outweigh the expected savings. HR professionals would be well advised to have a long conversation with their Chief Financial Officers (CFOs) about these requirements.

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2. THE TOP TEN WAYS TO INCORPORATE DIVERSITY INITIATIVE GOALS INTO THE CORPORATE STRATEGIC CHANGE INITIATIVES

Organizations develop strategic plans periodically to stimulate growth and productivity. Like most initiatives, such as Continuous Learning & Team Building, the diversity goals are not included as part of the change strategy. This is a mistake given limited human and financial resources for such time consuming strategic plan implementation. The following is a list of things to consider in incorporating diversity goals into other initiatives.

1. Link the diversity goals to the customer, productivity (e.g., teamwork), and learning components of the initiative.

2. Link the vision of the initiative to the vision for diversity.

3. Link the mission of the initiative to the diversity mission.

4. Link diversity competencies to the competencies identified in the strategic change initiative (e.g., help Spanish-speaking customer's better, which leads to higher satisfaction ratings).

5. Consider the diversity needed to increase the effectiveness of the change initiative.

6. Link diversity recruitment to the change initiative.

7. Consider the consequences of the change initiative on employees across diversity groups.

8. Implement a measurement system to assess the extent that the diversity goals are being met within the larger initiative.

9. Make the link between diversity and the initiative explicit to employees.

10. Describe the benefits of linking the diversity goals to the organizational change initiative.

If you like this lesson, you will gain considerably from attending the Human Relations conference. Check it out at www.diversityuintl.com/seminar.htm.

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visit his page at www.diversityuintl.com/billyauto.htm.

Gentle Readers,

September 11th is just two and one-half weeks away. If you haven't yet considered how you will handle employee requests for commemorating that day, this is the time to do so. And, you will be pleased or upset by the non-announcements coming from the government during last week's National ILG Conference in Kona, Hawaii.

Bill Truesdell
Editor

IN THIS REPORT (Report #235, 8/23/2002)
---------- (Sent to over 1,500 subscribers)

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1. REPORT ON NATIONAL ILG CONFERENCE IN HAWAII

Although we were unable to attend, colleagues report that the National ILG (Industry Liaison Group) Conference in Kona, Hawaii was fun but otherwise of little value. Industry Liaison Groups were created by Ellen Shong Bergman in the '80s when she was National Director of the Office of Federal Contract Compliance Programs. They were intended to offer a forum for contractors and enforcement officials to meet and discuss issues of common interest.

One revelation came out of the meeting between Department of Labor officials, EEOC and federal contractor representatives during the three days in Hawaii ...

The definition of applicant everyone has been waiting breathlessly for during the past 20 years is still not ready for publication. When it is released, according to Cari Dominguez, Chair of the Equal Employment Opportunity Commission (EEOC), it will apply ONLY to INTERNET applicants. Apparently, the Office of Management and Budget only requested a new definition on Internet applicants.

When Charles James, Deputy Assistant Secretary of Labor for the Office of Federal Contract Compliance Programs (OFCCP) was asked if there would ultimately be two definitions of applicant released, he replied that there would only be one definition forthcoming.

The one apparently sure thing contractors can look forward to is release of another round of EO Surveys before the end of this calendar year. The new federal regulations (12/2000) require an annual distribution of the EO Survey to randomly selected contractors. Contractors continue to oppose the survey because it demands submission of compensation data in a form that has little if any value for

discrimination testing. Current plans call for about 49,000 surveys to be distributed later this year.

I guess we should have gone to Hawaii anyway, just for the beautiful scenery.

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2. SEPTEMBER 11th ANNIVERSARY - WHAT EMPLOYEES MAY WANT

We are quickly approaching the first anniversary of the September 11th tragedies. Employees are beginning to think about how they want to observe the solemnness of that occasion.

Last December, President Bush signed a joint resolution of Congress designating September 11 as Patriot Day. Contrary to the belief of many people, it did not establish a new national holiday. It does call on the President to issue a proclamation every September 11 requesting that:

- State and local governments and the people of the United States observe Patriot Day with appropriate events and activities.

- All departments, agencies and offices of the U.S. government and other interested organizations and individuals display their U.S. flags at half staff for the day.

- The people of the United States observe a moment of silence to honor the people who lost their lives in the terrorist attacks of September 11, 2001.

One thing employers can be sure of is that employees will experience strong emotions on the anniversary day. With those "flashbacks" and memories still so fresh in our minds, what should we do to make the day easier for everyone?

Talk with some of your employees to see what they would like to do to commemorate the anniversary day. Consider doing any of the following:

- Allow employees to take the day off. Even if they don't have any remaining paid-time-off credits in their account, you might excuse them for an unpaid day off.

- Allow for a moment of silence during the day to recognize the anniversary and remember those who were lost during the attacks.

- Allow employee expressions of support for the victims and each other through displays of sympathy cards, drawings or other examples of employee contribution to the rememberance.

- Endorse employee participation in constructive, organized community events on that day. Perhaps, pay those who wish to participate.

- Recognize that some individuals may not be able to cope

with the emotional flood on that day. Consider excusing those who are unable to work for that reason.

There are countless other things an employer could do to commemorate the anniversary. If you give it some thought and discuss it with your senior management team and employee representatives, you will likely strike just the right balance for your circumstances. The key is to think through how best to honor those who were lost and our national commitment to personal freedom.

Gentle Readers,

California's legislative session has ended for this year. Hundreds of bills relating to employment issues have been sent to the Governor for his signature or veto. We'll tell you some of what may be coming in the new year to your compliance requirements. And, we share with you a new DOL resource on the web that does a good job of explaining rules about youth employment.

Bill Truesdell
Editor

IN THIS REPORT (Report #236, 9/6/2002)
---------- (Sent to over 1,500 subscribers)

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1. CALIFORNIA LEGISLATURE SENDS OVER 1,000 BILLS TO GOVERNOR

August 31, 2002 was the final day in this year's legislative session for California legislators in Sacramento. They completed their work with over 1,000 new bills being sent to Governor Gray Davis for his signature. The Governor has 30 days from the date each new bill was sent to him to either sign it or veto it. If he fails to sign the bills, they become law as if he had signed them. Nearly all of these proposals will become effective on January 1, 2003.

Many of the new measures will impact employers directly. You can see a complete list of key employment-related legislation awaiting the Governors approval by going to http://www.management-advantage.com//products/California.htm

Here are some highlights:

- SB 1538 would eliminate pre-dispute arbitration agreements in California.
- SB 1471 would make it illegal for employers to have an attendance policy in which discipline or termination might result from an employee's use of sick leave to care for a family member.
- AB 1599 drops the threshold of "40" from age discrimination language. Prohibits consideration of any person's age in employment decisions.
- SB 1661 provides wage replacement through SDI program for employees who cannot work because of an ill family member (including domestic partner) or the birth, adoption or foster care placement of a child, regardless of the size of the employer or the employee's eligibility for time off under CFRA or FMLA.
- AB 2845 requires the longest and most costly rule making in Cal/OSHA Standards Board history, the California ergonomics standard, be reopened and revised by July 2004.

- AB 2989 mandates severance pay of one week's pay for every 12 months of employment to employees who must relocate or are terminated from a qualifying industrial or commercial facility.
- AB 2957 creates a California WARN Act that would apply to employers with 50 or more workers at a single facility. Federal WARN rules apply to 100 or more workers.
- SB 1156 increases costs to the workers' compensation system by as much as #3.4 billion with little consideration of possible system efficiencies. May result in doubling some workers' compensation premium rates.

For more about these and lots of other bills approved by the Legislature, visit our web site report at the HR Web Store. The link is shown above.

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2. DOL OFFERS NEW YOUTH RULES! INTERNET PAGE

The U.S. Department of Labor has developed a new web site that helps young people, their parents and employers understand the federal laws and regulations relating to youth employment in our country. The Department of Labor (DOL) has enforcement authority over the Fair Labor Standards Act (FLSA) that governs such issues as overtime and child labor limits.

If you have ever had a question about work permits or limitations on work assignments for your younger workers, this site will be of great help to you. You will find information about:

- Age Certificates
- Agricultural Employment
- Door-to-door Sales
- Entertainment Industry
- Hazardous Jobs
- Newspaper Delivery
- Wages
- Work Hours
- Work Permits

To find all this and more, go to: http://www.youthrules.dol.gov/

Information is presented in clear, non-technical language and is fairly easy to locate. Links extend from narrative explanations to more detail about certain terms or requirements. The only serious oversight we found was the lack of a search capability. Nonetheless, you will likely find answers you are seeking about youth employment if you wish to look on this new web site.

Gentle Readers,

The EEOC has issued a new handbook to help small employers meet their obligations under federal anti-discrimination laws. Check it out. You may find it helpful. And, mixed motive discrimination cases have more teeth now within the jurisdiction of the 9th Circuit Court. If you don't wish to be bitten, learn more and take action.

Bill Truesdell
Editor

IN THIS REPORT (Report #237, 9/13/2002)
---------- (Sent to over 1,500 subscribers)

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1. EEOC ISSUES SMALL BUSINESS HANDBOOK FOR DISABILITIES ACT COMPLIANCE

The Equal Employment Opportunity Commission (EEOC) has prepared a new handbook designed to help employers with 15 to 100 workers. Its focus is on compliance with requirements of the Americans with Disabilities Act of 1990 (ADA).

The new publication is officially titled "The Americans with Disabilities Act: A Primer for Small Business." Its contents apply to both employees and job applicants. It is available online at www.eeoc.gov/ada/adahandbook.html and requires 19 pages if printed from the downloadable PDF format.

Inside you will find the following information:

- Who is protected by Title I of the ADA
- How to avoid mistakes when interviewing applicants with disabilities
- When an employer is permitted to ask an employee questions about medical condition
- What to do if safety issues arise
- The obligation to make reasonable accommodations to the limitations of qualified applicants and employees with disabilities
- Tax incentives for businesses that hire and retain people with disabilities

Reasonable accommodations are often easy to make and equally as often are very inexpensive. Many cost nothing at all.

In the handbook is information about types of accommodations such as:

- Equipment modifications or additions
- Accessible materials
- Changes to the workplace
- Job-restructuring
- Working at home
- Modified work schedules
- Leaves of absence
- What to do if someone asks for leave related to a medical condition
- Policy modifications
- Modifying supervisory methods
- Job coaches
- Reassignment

Also included is information about safety concerns, drug and alcohol use, and how to handle a charge that may be filed against your business if you are accused of illegal discrimination.

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2. NEW 9th CIRCUIT STANDARD FOR "MIXED MOTIVE" DISCRIMINATION CASES

At least within the jurisdiction of the 9th Circuit Court of Appeals it is easier to win "mixed motive" discrimination cases. It is not clear whether other Circuit Courts will follow along the same path.

A "mixed motive" discrimination case involves a claim of illegal treatment and an employer contention that, regardless of the protected group affiliation, the employee would have been treated the same way because of a specific legal reason.

In the case at hand, Costa v. Desert Palace, Inc. (9th Cir, August 2, 2002) No. 99-15645, Catharina Costa was the only female at a Cesaers Palace Hotel warehouse. When she became involved in an altercation with a male employee, Caesars suspended the male employee for five days and terminated Ms. Costa. The action was taken after an investigation was unable to determine for sure who was at fault.

Ms. Costa sued the company claiming both sex discrimination and sexual harassment. She said her termination was motivated by both her sex and the warehouse fight and that, over the years, she had experienced many instances of different treatment because she was female.

The company defended its actions and Ms. Costa's charges by citing other court rulings that said employees can prove discrimination in mixed motive cases only through use of direct evidence. The appellate court in this case said an employee could prove illegal discrimination with either direct or indirect evidence and was only required to show that it was "more likely than not" an illegal motive caused the termination.

Thus, Costa prevailed.

In the real world, employee discipline is rarely a clearly defined issue. There are, more often than not, complicating factors that intrude on the clarity of the situation. It is for this reason that every employer should have a centralized review of all employee discipline situations before any negative employment action is taken. True it can always be remedied later by returning the employee to the job, making up back pay and through other means. But, after the fact, the damage has already been done to morale and relationships, not to mention possibly setting up a law suit that will be very costly for the employer.

Human Resource professionals are in a unique position to help guide their organizations and management team away from such problems. If you haven't already arranged for HR to review discipline cases before they are implemented, put that on your list of things to do. You can help your employer and your management staff more in this way than by doing any number of other things. It offers HR an opportunity to train managers using real life situations the managers understand.

And, you could save your employer countless dollars in attorney fees and settlement or award costs.

Gentle Readers,

The EEOC has requested postponement of its EEO-1 race/ethnicity category changes until 2004. And, a brief look at two of California's employment compliance requirements.

Bill Truesdell
Editor

IN THIS REPORT (Report #238, 9/20/2002)
---------- (Sent to over 1,500 subscribers)

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1. EEOC REQUESTS ONE YEAR EXTENSION ON EEO-1 RACE REVISIONS

Use of multi-race categories on employer reports to the government are still in doubt. On September 3, 2002, the Equal Employment Opportunity Commission (EEOC) authorized publication of its intent to request a one-year extension of the existing Special Form 100 for private employers known as the EEO-1 Form.

That notice was placed in the Federal Register on September 9, 2002, and can be accessed at http://wais.access.gpo.gov . The EEOC is requesting written comments on or before November 8, 2002.

Until this announcement, the EEOC had planned to revise the EEO-1 Form and implement the new design on September 30, 2003. If this extension request is approved, the new implementation date will be September 30, 2004.

At the heart of the matter is the use of new race/ethnicity codes from Census 2000. Several government agencies are involved in the process of engineering changes to employer reporting of race and ethnicity representation. Some of them are the EEOC, the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor, the Department of Justice and the Department of Education.

This announcement may signal that the government is not yet prepared to alter its requirements for affirmative action plan data analysis. Employers who contract or sub-contract with the federal government are often required to prepare written affirmative action plans (AAP) that involve statistical analyses of their workforce by race and sex. If the EEO-1 report will not change its reporting requirements in the race category configurations until 2004, that leaves us wondering how AAP changes could be implemented before 2004.

In the mean time, the only federally sanctioned data for use in AAP preparation remains the 1990 Census.

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2. CALIFORNIA EVEN HAS RULES FOR EMPLOYER-SPONSORED PARKING

The idea is to encourage employees to take public transportation, bike, walk, or carpool to work. To accomplish that goal, California requires certain employers who pay for all or part of their employees' parking costs to offer them cash in lieu of a parking space.

The intent of the "parking cash-out" law is to reduce congestion and pollution by offering employees the option of "cashing out" their subsidized parking space. The program is monitored by the state Air Resources Board.

If you meet these criteria, you should offer your employees the option of cash in lieu of parking:

- Employ at least 50 people
- Subsidize parking that you do not own
- Can calculate the out-of-pocket expense of the parking subsidies AND
- Can reduce the number of parking spaces without penalty in any lease agreements.

If you think this may apply to your organization, you can get more information from the California Air Resources Board at http://www.arb.ca.gov/ . The Board offices can also be reached by telephone at 916-327-2980.

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3. CALIFORNIA EMPLOYERS MUST GIVE DEPARTING EMPLOYEES A COPY OF "FOR YOUR BENEFIT" BOOKLET

One of the most often overlooked employer requirements in California is that dealing with information that must be given to separating employees. For many years, every employee who leaves the payroll should have been given a copy of the Employment Development Department's booklet entitled, "For Your Benefit." Even if the employee may not be eligible for unemployment insurance benefits because of the reason they left their job, employers must provide a copy of the booklet.

Everyone, whether terminated voluntarily or involuntarily, must be given a copy of this booklet. It has 19 pages of information in its Internet format, slightly more in the print version.

That publication discusses the state's unemployment insurance program and gives contact information former employees will be able to use to file a claim for unemployment.

The publication is available on line at http://www.edd.ca.gov/uipub.htm if you look for "For Your Benefit." You can freely print as many

copies as you wish. You can also obtain a supply of the pre-printed booklets by calling your local office of the Employment Development Department (EDD) or 1-888-745-3886.

Gentle Readers,

In less than two years, California employers will have to allow workers to take up to six weeks of PAID family leave. Employees will pay for the new benefit through payroll taxes. And, the benefit will be available to workers at all employer organizations regardless of how big the employer may be.

Bill Truesdell
Editor

IN THIS REPORT (Report #239, 9/27/2002)
---------- (Sent to over 1,500 subscribers)

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1. CALIFORNIA WILL BECOME FIRST STATE TO OFFER PAID FAMILY LEAVE

A much debated bill has been signed into law by California Governor Gray Davis that will allow employees in that state to take up to six weeks of paid family leave. Up to this point, state requirements in the California Family Rights Act have mirrored federal requirements in the Family and Medical Leave Act. All that will change for leave requests beginning on July 1, 2004.

The Governor signed this new legislation on September 23, 2002 at a ceremony in Los Angeles. Here are some highlights:

- The requirement applies to all employers, regardless of size.
- SB 1661 goes into effect on January 1, 2004 and applies to all leaves beginning on or after July 1, 2004.
- Maximum paid absence under the law will be 6 weeks.
- There is no limit to the number of employees who may request paid family leave at any one time. Employers must grant the leave requests if they are supported by medical documentation.
- Funding the program will be accomplished through a new employee payroll tax.

The program is known as Family Temporary Disability Insurance and its creation was sponsored by Senator Kuehl. To read the entire bill go to: http://www.leginfo.ca.gov/pub/bill/sen/sb_1651-1700/sb_1661_bill_20020830_enrolled.html

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2. STUDY SAYS INTENTIONAL DISCRIMINATION IS WIDE SPREAD

According to the Bureau of National Affairs (BNA) Affirmative Action Compliance Manual (No. 282, 8-30-02), a new study points to one-third of private companies as sites for intentional illegal discrimination.

The study was commissioned by a Ford Foundation grant and was released on July 24. It was performed by Alfred and Ruth Blumrosen, professors at Rutgers University Law School. It was titled, "The National Report: The Reality of Intentional Job Discrimination in Metropolitan America."

The study examined EEO-1 reports filed with the EEOC between 1975 and 1999, comparing individual employers with other employers in the same labor market and industry by occupational category. Over 200,000 mid-to-large-sized private sector employers in metropolitan areas nationwide were included in the study.

Over one-third of those companies studied were deemed to have intentionally discriminated against workers and job applicants. The study defined "intentional discrimination" as the utilization of minorities or females at more than two standard deviations below the standard of utilization within an industry. Under federal law, an employer is presumed to be discriminating at that level of underutilization, although the presumption may be contested by the employer.

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3. EEOC MAY NOT BE SUED BY CHARGING PARTY

The Equal Employment Opportunity Commission (EEOC) may not be sued by a charging party for failure to investigate a complaint.

In an April decision, just released on August 7, 2002, the U.S. Court of Appeals for the Fifth Circuit ruled that Vogel Denise Newsome may not pursue a law suit against the EEOC for failure to investigate her claim of religious discrimination against her employer.

Ms. Newsome has filed similar claims against the EEOC in the past and the Circuit Court ruling said she risks sanctions if she brings any more similar claims in the future.

The Court's ruling said that because EEOC is not a last resort for claims and the charging party is free to file a claim in federal court, an allegedly incomplete investigation does not harm the charging party.

When a complaint of illegal employment discrimination is filed with the EEOC, the complaining party is always given a right-to-sue letter at the closing of the case. It doesn't matter if the case is closed administratively (because time for investigation ran out, the charging party requested the closure, or some other administrative reason), or because there was a cause finding in support of the claim, or because there was a no-cause finding saying the investigation did not support the charges. All closures result in a right-to-sue letter. Because the individual complainant always has a right to pursue the issue in federal court, the agency can not be challenged for failing to conduct an investigation.

(Newsome v. EEOC, 5th Cir., No. 01-30817, 4/22/02)

Gentle Readers,

It's time again for our annual FREE calendar offer. If you are interested, please send us your request as outlined below. If you are still waiting for the government's new definition of "applicant" the wait isn't over.

Bill Truesdell
Editor

IN THIS REPORT (Report #240, 10/4/2002)
---------- (Sent to over 1,500 subscribers)

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1. FREE 2003 PICTURE CALENDAR OFFER

This has been an eventful year for us all. We are looking forward to 2003 as one of peace and prosperity for all America.

As we have for the past several years, we wish to offer our clients and friends the first opportunity to receive a free copy of our special picture calendar for 2003. This issue will impress you with its spectacular photos of such places as

- Crater Lake National Park, Oregon
- Black Earth, Wisconsin
- Eastern Sierra, California
- Key Biscayne, Florida
- St. Francisville, Louisiana
- Organ Pipe Cactus National Monument, Arizona
- North Shore of Lake Superior, Silver Bay, Minnesota
- Mercer County, Kentucky
- Hillsborough Center, New Hampshire
- Yellowstone National Park, Wyoming
- and several more.

We will gladly send a FREE copy to any US address. All you have to do is ask. Here's how ...

Email us the following information and we will get your personal copy of this gorgeous 8.25" X 8.5" wall calendar on its way to you by first class mail.

Name:
Title:
Organization:
Street:
City:
State:
Zip:

We look forward to receiving your request. However, supplies are limited to 250 copies and we will respond to requests in the order they are received. Don't miss out! Once they're gone we will have to return requests unfilled.

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2. SUPREME COURT BEGINS NEW YEAR ON MONDAY

The 2002 session of the U.S. Supreme Court will begin this coming Monday, October 7th. The Justices have already gathered some attention by announcing they will agree to hear a case having to do with the Americans with Disabilities Act (ADA).

Of particular interest to small business will be the case of Clackamas vs. Wells. When Congress passed the ADA legislation in 1990 it made a concession to the business community to spare employers with less than 15 workers the expense of compliance. What Congress didn't anticipate, however, was the conflicts of opinion that have arisen over how to count the workforce.

In the case at issue, an Oregon medical clinic is run by four physicians. They are each shareholders in the partnership. They claim they should be excluded from any employee count for ADA jurisdictional purposes. If they get their wish, they will not have to comply with ADA requirements because their remaining payroll totals less than 15 people. If it turns out partners must be counted, many law firms, and doctors' practices will find they, too, must comply with ADA requirements. You can imagine that almost all partnerships will be interested in the outcome of this disagreement. As things stand in this case, the Ninth Circuit Court of Appeals has reversed the District Court ruling. The Ninth Circuit says the partners should be counted as employees for determining ADA jurisdiction.

We will have to wait to hear what the Supreme Court decides to do with this one.

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3. WATCH OUT FOR BOGUS HEALTH INSURANCE COMPANIES

If you are dealing with a long-established, reputable health insurance organization you can ignore the rest of this article. On the other hand, if you are just considering employee health insurance programs or securing a new carrier for your policy, you might want to read a bit more.

According to the Wall Street Journal (10/2/2002), "Spurious health-insurance schemes typically mushroom when the economy is suffering, but

it's worse this time. The operators are more sophisticated and increasingly national in reach. And the recession squeezed many businesses already struggling to cope with relentlessly escalating health-insurance costs. The most desperate businesses are easy targets for sales pitches from shady health plans, which promise generous benefits and sharply lower premiums -- but fail to deliver."

You can imagine the problems that result from fraudulent plans and the people who run them. Individual employees often don't realize they have no valid health coverage until they are sick and have bills to pay.

"Beyond shutting down the insurers, there isn't much regulators can do to clean up the mess they leave behind. The assets recovered after these companies are put out of business rarely come close to matching the premiums collected from customers. In addition, safety nets typically established to help policyholders, such as state guarantee funds, aren't available to victims of unlicensed carriers.

What can you do to prevent being sucked into such a nightmare?

Some attention to due diligence investigation is the answer.

- Check out any insurance carrier with your state's insurance licensing office. If they aren't licensed to operate in your state discontinue further consideration of their proposal.

- Ask your Insurance Commissioner if there have been any complaints filed about claim handling procedures. Again, if you discover a history of serious complaints you would be well advised to end your consideration of their proposal.

- Talk with other employers who have contracted with that insurance carrier to determine what their experience has been. Have they received employee complaints from their workforce? Have they had any problems with the company paying employee claims?

A little research can save you and your employees a lot of grief later on.

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4. GOVERNMENT DEFINITION OF "APPLICANT" STILL PENDING

The latest deadline for the government to deliver a fresh definition of "job applicant" to the Office of Management and Budget (OMB) has come and gone without hint of anything new. September 30th was the date. As recently as the National Industry Liaison Group Meeting (ILG) in Hawaii during August, Cari Dominguez, Chair of the Equal Employment Opportunity Commission (EEOC) indicated the work would be completed and delivered to OMB by the end of September. Apparently, there has been another extension granted by OMB for that delivery.

Affirmative Action employers are still waiting for that new definition. For years, the Office of Federal Contract Compliance Programs (OFCCP) has insisted that federal contractors consider anyone who expresses interest in employment to be a job applicant. Employers have strongly disagreed, saying applicants are only those who meet basic job requirements for the opening available.

OFCCP has many open compliance reviews on its books that have not been closed because contractors have refused to sign conciliation agreements that would obligate them to use the government's broad definition of applicant. Those audits have been languishing, some for years. The agency's position on the issue means it can't allow contractors to use more restrictive definitions, but it has no firm legal standing to pursue the matter in enforcement proceedings. Therefore, the audits remain open and unresolved. Contractors just haven't heard any more from OFCCP once they have refused to accept a conciliation agreement that would force them to use the government's definition.

About a year ago, during a presentation to the Northern California ILG, Charles James, Deputy Assistant Secretary of Labor for the OFCCP said he would move to close out those audits that were left open only on the basis of disputes over the definition of an applicant. We now are hearing that the Department of Labor's solicitor is working on developing language for settlement agreements that will allow the agency to begin closing those pending cases. What they will come up with is still in question.

If you are a federal contractor with a compliance evaluation unresolved because of your definition of job applicant, you may be hearing from OFCCP in the near future. If they give you a proposal for a new conciliation agreement, be sure you review its content with your legal advisor who is an expert in AAP regulations.

In the mean time, we are told that the government expects to make use of its latest extension from OMB and now is promising to deliver its new applicant definition by the end of this calendar year. Stay tuned ...

Gentle Readers,

If you have ever wondered how to address the issue of OFCCP jurisdiction over those portions of your company that have no government contract involvement, you will want to learn about the agency's new directive. And, we tell you about some of the thoughts agency director Mr. Charles James shared with an audience of HR and legal professionals last week.

Bill Truesdell
Editor

IN THIS REPORT (Report #241, 10/18/2002)
---------- (Sent to over 1,500 subscribers)

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1. OFCCP ISSUES NEW DIRECTIVE ON SEPARATE FACILITY EXEMPTIONS

The Office of Federal Contractor Compliance Programs (OFCCP) has issued a new Directive on the subject of jurisdictional separation between various contracting and non-contracting pieces of employer organizations.

If you are a federal contractor and have multiple businesses in the enterprise, you may find this new directive of interest.

Traditionally, the OFCCP has claimed jurisdiction over all entities within a contractor's overall organization, even if only one piece of the enterprise was involved in federal contracting. In every instance we know of where the dispute went to court, the OFCCP was victorious in its jurisdictional claims.

While there have been informal methods for negotiating separation of coverage and escape from affirmative action obligations in some rare instances, generally speaking, once one portion of the company decided to seek government contracts that amounted to $50,000 or more and there are 50 or more people on the payroll, all the subsidiary and subordinate corporate entities were deemed to also require affirmative action plans.

If you are in such an organization and wish to keep some of your companies separate from OFCCP oversight you will need to submit a written request to the Deputy Assistant Secretary of Labor for the OFCCP. "The contractor must reasonably demonstrate that its circumstances meet the standards for a separate facility exemption/waiver. OFCCP will not seek to make unduly burdensome information requests in the process of considering an exemption/waiver request. Contractors seeking such an exemption/waiver must be prepared to submit information and materials in support of the request, and that

will allow the agency to understand the rationale for granting its request. Otherwise, OFCCP will deny the request." Exemptions will be granted to relieve employers from responsibility for complying with Executive Order 11246 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).

"OFCCP will act with reasonable promptness in considering a contractor's request for an exemption/waiver. Although no strict deadline can be established for OFCCP's consideration of such requests, in light of their variability, the agency will normally issue a decision within ninety (90) days of the contractor's submission of the necessary information."

According to the Directive, contractors must supply enough information for the Deputy Assistant Secretary to determine whether or not to grant the request. Here are some of the things that will be considered in weighing the request:

- Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

- The extent to which the contractor derives benefits from a Government contract, directly or indirectly, at the facility to be exempted;

- Whether any costs associated with operating the facility are charged to a Government contract;

- Whether working at the facility for which an exemption/ waiver is sought is a prerequisite for advancement in job responsibility or pay at facilities connected to a Government contract; and whether working at facilities connected to a Government contract is a prerequisite for advancement in job responsibility or pay at the facility for which an exemption/waiver is sought;

- Whether employees who normally work at the facility are required to perform work related to a Government contract at another facility;

- Whether the facility regularly or substantially transfers employees to or from facilities at which a Government contract is performed;

- Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

The Directive is Number 260, dated September 13, 2002. It is signed by Charles E. James, Sr., Deputy Assistant Secretary for Federal Contract Compliance. You should be able to get a copy from your local office of the OFCCP.

Now that there is a structured and approved methodology for seeking exemptions from affirmative action coverage you may wish to decide if that is appropriate for your organization.

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2. DIRECT FROM THE OFCCP DIRECTOR - PART 1

Charles E. James, Sr., Deputy Assistant Secretary for Federal Contract Compliance and head of the Office of Federal Contract Compliance Programs (OFCCP), spoke last Thursday at the annual affirmative action compliance conference presented by the National Employment Law Institute. It was in San Francisco and over a hundred attendees listened to the presentation.

Here are some of the highlights as he laid out his view of recent significant developments at the OFCCP after his first year in office.

- Budget - OFCCP still has no budget for fiscal year 2003 which began on October 1, 2002. The agency has implemented a freeze on hiring and expects its count of compliance evaluations to be lower this year as a consequence. The country is working on a war-time foundation and agencies that are not directly involved in waging that war will receive less attention and less budget than those directly involved. The OFCCP has 767 FTE positions authorized. It had 711 people on its payroll as of the end of December 2001.

- Culture Change at DOL - The Department of Labor has been undergoing a culture change. Secretary of Labor Elaine L. Chao has directed her agencies to move in the direction of compliance assistance. OFCCP has allocated about 25% of its budget hours to compliance assistance in the new fiscal year. It will also be putting more compliance assistance information on its web site in the coming months. Approximately 100,000 contractor work sites fall under the OFCCP's jurisdiction.

- EO Survey - The agency is required by its regulations to issue the Equal Opportunity Survey to a portion of its federal contractor audience each year. Evaluation of the survey's effectiveness is still ongoing. There have been no conclusions drawn about the EO Survey's ability to be a better selector of contractors for audit than the current approach using EEO-1 data. It will likely take another three to five months before the agency is ready to issue an announcement of its opinion about the survey value. Mr. James said, "I don't think we can rely on Part C [compensation] data because it is so gross we can get false positives and false negatives from the information submitted." EO Surveys are only sent to EEO-1 contractors, not to those in the public sector or at universities. "It is not our intent that a single contractor should have to complete both the EO Survey and a compliance review in the same year. We have just reviewed the new EEO-1 data and will be identifying electronically which companies are being sent an EO Survey

so they can be excluded from the EEDS review selection system."

- Process Re-engineering - "We want to raise the bar on our investigative skills," said Mr. James. He is looking at the training programs provided to agency investigators to determine if something else is needed.

- Applicant Definition - The Equal Employment Opportunity Commission (EEOC) is lead agency in the committee charged by the Office of Management and Budget (OMB) with updating the definition of job applicant found in the Uniform Guidelines on Employee Selection (41 CFR 60-3). An extension of time has been granted for delivery of that definition. The new deadline is the end of this calendar year. Mr. James said he couldn't answer some of the group's questions because to do so would cause him to speak on behalf of the committee which he didn't feel he should be doing. He said that his current instructions to field offices are that contractors should be gathering race and sex data on job applicants as soon as possible in their employment process. "It makes sense to me that contractors should be able to remove from analysis those people who are not qualified for the job. That would require collection of identifying data earlier in the process [than when someone is determined to be unqualified]." When asked if the government would likely leave the current definition unchanged he said, "Do what is in the best interests of your organization as a contractor."

- Functional AAPs - The new Directive on Functional AAPs has yielded 71 requests for approval. To date, 21 have been granted and another 50 remain in the process for consideration. "There is no EEO-1 report for a functional establishment so we don't know yet how we will select FAAPs for review," according to Mr. James. Until a process is developed that will allow an unbiased selection of FAAPs for review, they will likely be insulated from compliance review scheduling.

- OFCCP Management - The agency is facing a serious problem because 64% of OFCCP managers will become retirement eligible in the next few years. Mr. James has his own succession planning problems.

There is more, but we've run out of room for this issue. Stay tuned and we will share more of what Mr. James had to offer in our next issue of Special Reports for HR Professionals.

Gentle Readers,

We continue with our report on the presentation by OFCCP Director Charles James at a recent San Francisco seminar. We also suggest you take time to review information available on EEOC's web site about the upcoming Census 2000 Special EEO File.

Bill Truesdell
Editor

IN THIS REPORT (Report #242, 10/25/2002)
---------- (Sent to over 1,500 subscribers)

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1. DIRECT FROM THE OFCCP DIRECTOR - PART 2

In our last issue we began a report on the comments offered by Charles E. James, Sr., Deputy Assistant Secretary for Federal Contract Compliance in the U.S. Department of Labor. Here are some additional items he mentioned in his presentation to a group of HR and legal professionals at the National Employment Law Institute affirmative action briefing session on October 10th in San Francisco.

Mr. James has been in his job for just over a year and he spoke on the current status of his agency the Office of Federal Contract Compliance Programs (OFCCP).

- Discrimination Investigations - "I will probably do some things this year that will have the effect of moving us toward larger cases." It is clear that Mr. James believes he will have more impact in the workplace by working to identify and remedy systemic discrimination cases.

- Jurisdiction of OFCCP - Mr. James pointed out that "About a third of compliance review scheduling letters sent to employers are returned to the agency claiming they have no government contracts and we have no jurisdiction. We are accepting the administrative burden of determining that our EEDS list of contractors all have contracts that give us jurisdiction."

- Who to Include as Employees in an AAP - "There is no requirement for contractors to include part time or temporary workers in their affirmative action plans," said Mr. James. The only requirement is for full time workers. "Contractors currently get to determine who is included

in their AAP." He indicated that this is a subject likely to be included in the next regulatory agenda cycle.

- Census 2000 - "I don't even know where the government is going to come out on this issue. From the OFCCP perspective, we aggregate total minorities because it saves labor and gives us numbers we can reasonably analyze." For now, he suggests contractors "wait." Don't do things in anticipation of what the government will decide to do. Until the final decisions are made about the data aggregation to be applied to AAPs, it is best that contractors not spend a lot of money or energy changing their current systems.

It seemed clear that Mr. James is committed to moving the OFCCP in the direction of providing compliance assistance more often than it may have done in the past. Labor Secretary Elaine Chao has made compliance assistance a high priority for all of her agencies. Yet, it is hard to redirect an enforcement agency, or any other organization, when tradition, culture and momentum want to carry it forward on the same old path.

It has only been a year since Mr. James began his new assignment as leader of this enforcement group. Given enough time, it is possible he will have the impact on his organization that he says he wishes to leave behind when he is at the end of his assignment.

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2. CENSUS 2000 INFORMATION NOW ON THE WEB

According to EEOC and OFCCP officials, it is likely that Census 2000 data for affirmative action users will be available in third quarter 2003. As lead agency in deciding how to apply screens and sorts to the general census file, the Equal Employment Opportunity Commission (EEOC) has made a great deal of information about the Special EEO File on its web site. You will find it at: www.eeoc.gov/stats/census/plans.html .

If you visit today, you will discover:

- Introduction to Variables and Values for Census 2000 Special EEO File
- Introduction to Race and Ethnic Data for the Census 2000 Special EEO File
- Occupational Data and Occupational Groups for the Census 2000 Special EEO File
- Census 2000 Special EEO File Crosswalk from Census Codes and 2000 SOC Codes to the EEO Occupational Groups and the EEO-1 Job Categories
- Comment on the Proposed EEO-1 Job Categories and Codes for the Special EEO File
- Overview of Geographic Areas
- Introduction to Tables for the Census 2000 Special EEO File

The Special EEO File will serve as the primary external benchmark for comparing the racial, ethnic and gender composition of an external workforce, within a specified geography and job category, and the analogous external labor market.

Here are some numerical highlights:

- 472 detailed occupational categories, including unemployed for the civilian workforce
- 88 industry groupings
- 12 categories for race and ethnicity for other than Hawaii
- 12 categories for race and ethnicity for Hawaii
- 2 sex categories
- "All Other" designation replaces "Not Elsewhere Classified (NEC)"
- Over 2,000 geographic areas, including those specifically created for this file.

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3. NEW WORKSHOP ON DISABILITIES SHOWS ADVANTAGES OF HIRING DISABLED EMPLOYEES

Talented people with disabilities often bring new perspectives to the workplace. That's the message in management workshops conducted by an organization called Disabilities Unscrambled.

"We believe a fresh, disarming approach is needed to help close the gap between employers and people with disabilities," said Jim Danielson, president of Disabilities Unscrambled. "With the Internet, computers, flexible work arrangements, more diverse management ranks, larger 'mainstreamed' educated population over the last 10 years, we see the opportunity has never been better for firms to reach out and benefit from a largely untapped talent pool. But misconceptions about people with disabilities remain pervasive."

What's unique about this organization and its workshops? Simply this ... All of its instructors have both extensive corporate experience and a disability. They are experienced facilitators and understand both sides of the situation ... the employer perspective because they have been managers themselves, and the employee perspective because they have succeeded in spite of perceptions about their disabilities.

Workshops are tailored to each organization's specific needs, but most can be presented in two to three hours. The organization continues to grow its cadre of experienced instructors and is willing to work with clients in any part of the country.

Affirmative Action employers should pay close attention. Part of the employer's obligation for every affirmative action plan for the disabled involves outreach and recruiting of candidates from the disabled community. Other obligations include counseling for employees on career development, processing requests for job accommodations, and solving problems associated with recruiting and hiring disabled workers.

For more information, contact Jim Danielson at jim.danielson@att.net or visit the company's web site at www.d-unscrambled.com . You may just find the resource you've been looking for.

Gentle Readers,

New product catalogs are available NOW for download. Use them in doing your holiday shopping for colleagues, the boss, and for yourself.

Bill Truesdell
Editor

IN THIS REPORT (Report #243, 11/1/2002)
---------- (Sent to over 1,500 subscribers)

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1. 2003 CATALOG AVAILABLE FOR HOLIDAY SHOPPING

We have just published our 2003 product catalog, just in time for your holiday shopping. It contains well over 80 products every HR professional will find valuable. There are books, software, training materials, continuing education programs, and gifts to fit every budget and interest.

If you are looking for just the right gift for your boss, colleague, or even yourself, you are likely to find what you want in this new product collection.

The catalog is in full color and numbers 37 pages. A convenient order form is enclosed for your convenience, should you wish to FAX your credit card order and receive our fast shipping service.

Get your personal copy by downloading it in PDF format. We even link you to the source for a copy of Adobe's PDF Reader in case you may need it. They are both FREE as downloads. Go to:
www.hrwebstore.com/catalog.htm .

If you download and print your personal copy it will be handy whenever you may need to find a valuable reference product in the future.

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2. DON'T TERMINATE FOR DISCUSSING COMPENSATION IN CALIFORNIA

In this wrongful termination case, the employer discharged an employee, in part because she had participated in a group discussion with other employees about the fairness of the employer's bonus system.

The California Court of Appeals ruling said, "We conclude that the employee had a fundamental right rooted in public policy to join in a

discussion with other employees about whether they were being equitably compensated. Labor Code section 232 prohibits the discharge of employees for discussing the amount of their wages."

The defendant was Covenant Care, Inc., owner of 42 skilled nursing and assisted-living facilities, each of which is supervised by an executive director, sometimes called an administrator. At one of these facilities, Sharon Grant-Burton was hired as the marketing director. She went to various medical centers and promoted the use of Covenant Care's facility for patients who needed skilled nursing services. When a new patient arrived at the Covenant Care facility Grant-Burton handled the admissions paperwork. She was an at-will employee and was not a union member.

At a corporate meeting of the company's marketing directors in Southern California, one of the seven attendees brought up the subject of bonuses. Marketing directors who did not receive bonuses were surprised to learn that the others did.

Six days after the marketing directors' meeting Grant-Burton was fired. The administrator told Grant-Burton that the discharge was based on what Grant-Burton had said ad the marketing directors' meeting. She was also told that she did not have Covenant Care's best interests at heart and was unhappy there. The termination papers indicated that the discharge was based on a violation of company rules.

In its ruling the court said, "While an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." "Further," the court noted, "even though Grant-Burton and the other marketing directors may not have been members of a union or governed by a collective bargaining agreement, their concerted activity -- participating in a group discussion about the fairness of their compensation -- was protected under the National Labor Relations Act."

The company contended it had good cause to terminate Grant-Burton for her allegedly poor performance and unprofessional conduct. The Court of Appeals concluded otherwise. "...we reject Covenant Care's 'good cause' argument on the merits. Although Covenant Care asserts that Grant-Burton was discharged for several legitimate reasons, the record supports that she was terminated, at least in part, because she participated in the discussion about bonuses. That was an unlawful reason."

In California, and perhaps in your state as well, employers may not terminate employees for discussing their compensation with other employees. If the old myth that it is OK to have a company policy to the contrary still survives in your organization, do whatever you must to eradicate it.

(Grant-Burton v. Covenant Care, Inc., 2002 99 Cal. App. 4th 1261 [122 Cal.Rptr.2d 204])

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3. SUBJECTIVE EVALUATION SYSTEM COSTS ONE COMPANY

After a long-term employee became active in a diversity group, his employer lowered his performance evaluations and was unable to support its evaluation and ranking system in a subsequent lawsuit.

Terry Garrett joined Hewlett-Packard (HP) in 1972 as a computer engineer. He had earned a BS in electrical engineering and a MS degree in material science from UC Berkeley prior to his employment. Over many years, in many different jobs, Garrett received regular performance evaluations. His supervisors described him as possessing strengths in the technical arena, a fast learner, and a hard-working, dedicated and dependable employee. Evaluators consistently praised his ease at acquiring new knowledge and adopting new skill sets. He was described as a team player who balanced technical and social interactions well. He moved between production and development teams easily, as he did between research and customer interactions. By all accounts, Garrett's contributions to his projects and the corporation were highly valued.

Beginning in 1990, Garrett's evaluations became increasingly negative. Within six months his ranking dropped from "very good" to "good." He was then demoted.

On April 9, 1990, employees at the HP site where Garrett worked formed a "grassroots" group called Resource Awareness Development and Diversity (RADD), an internal diversity program aimed at promoting the hiring of people of color and fostering relationships with minority firms. His involvement and leadership with this group continued until his resignation from HP in 1994.

In his discrimination lawsuit, Garrett said he was prevented from obtaining equipment for use on his job that was commonly used by other engineers in his work group. He claimed he often did not have access to materials necessary for completing projects rapidly and his performance suffered as a result.

During its argument of this case, HP offered virtually no evidence to support its characterization of its ranking system. It presented no set of objective criteria by which employees are differentiated. "In fact," said the court opinion, "nowhere in the record is it shown how rankings were determined in these (supervisor ranking session) meetings." The company did not contest Garrett's allegation that one of its Division Managers admitted the ranking and evaluation system was wholly subjective. Further, testimony and documentation showed that a younger, white worker hired in 1988 was similarly situated but treated preferentially. Garrett claimed his treatment resulted from his participation in the diversity group and because he was Black.

The company's evaluation system was deemed to be subjective, and therefore, it could not be used as support for the actions the company took against Garrett. The subjective evaluation process was judged to be a pretextual method for treating Garrett differently because of his race.

Message for HR professionals in this case: Carefully examine your organization's performance evaluation system. Determine if there are

objective standards against which employees are measured. If employee ranking follows employee evaluations, be sure that there are standards for the ranking process. Making your organization go the extra step or two may seem arduous but will result in your ability to point to your systems as objective.

(Garrett v. Hewlett-Packard Co., 10th Cir., No. 01-1022, 9/25/02)

Gentle Readers,

California employers who may be planning a layoff in early January have things they need to be doing today.

Bill Truesdell
Editor

IN THIS REPORT (Report #244, 11/8/2002)
---------- (Sent to over 1,500 subscribers)

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1. CALIFORNIA EMPLOYERS PLANNING DOWNSIZINGS IN THE NEW YEAR... PAY ATTENTION

On September 21, 2002, California Governor Gray Davis signed into law Assembly Bill 2957. It has come to be known as the State WARN Act. California employers will want to spend a moment to learn about the key provisions of this new law.

It becomes effective on January 1, 2003. "Not a problem," you might say. Yet, if you are planning a downsizing of your workforce on or after the first of the year, you must be thinking about giving notice to workers now.

You are subject to the new law if you:

- have 75 or more employees (Federal WARN Act threshold is 100.)
- will layoff 50 or more people within a 30-day period

If you are a covered employer, you must give 60-days written notice of the layoff to:

- all affected employees at the covered establishment
- the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs

Content of the notice must be the same as required by the federal WARN Act.

You do not have to abide by these new rules if you meet one of the exemption requirements.

- layoffs are caused by physical calamity or act of war
- "unforeseen business circumstances" allowed as an exemption by the federal law are do not offer an exemption under the new state law
- the business is "seeking capital" to continue operations and notice of layoffs would jeopardize its ability to secure that funding

So, what if you forget to give the proper notice, or you don't know about the new requirement? Can anything bad happen?

Yup. Lots of things will happen if you don't give proper layoff notice...and, most of them are bad.

- back pay at the average regular rate of compensation received by the employee during the last three years of his or her employment or the employee's final rate of compensation, whichever is higher. Liability is for up to 60 days.
- the value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan. Liability is for up to 60 days.
- civil penalty of not more than $500 per day.
- "employer" is defined as any "person" who directly or indirectly owns or operates a covered establishment. This may add personal liability to the equation for managers and owners.

With luck, and good management, we will see the frequency of layoffs diminish in the coming months. Nonetheless, be sure your senior managers are aware of the provisions of this new law if you operate within California. And, if you are planning a layoff in early January, be sure you get your written notices out at least 60 days before the layoff date.

For a complete copy of the 4-page law go to:
http://www.leginfo.ca.gov/pub/bill/asm/ab_2951-3000/ab_2957_bill_20020922_chaptered.html

It is now in the California Labor Code, Division 2, Section 1, Chapter 4, Section 1400.

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2. DOL HAS A NEW AGENCY DEALING WITH DISABILITY IN THE WORKPLACE

Employment efforts affecting people with disabilities got a boost this summer with the creation of the Office of Disability Employment Policy (ODEP) within the U.S. Department of Labor. ODEP's mission is to provide leadership to increase employment opportunities for adults and youth with disabilities. It's customers include:

- Individuals with disabilities and their families
- Private employers and their employees
- Federal, state, and local government agencies
- Educational and training institutions
- Disability advocates
- Providers of services and government employers

On the supply side of the labor market, ODEP works to increase opportunities by expanding access to training, education, employment supports, assistive technology, integrated employment, entrepreneurial development, and small-business opportunities. On the demand side of the labor market, ODEP builds partnerships with employers and state and local agencies to increase awareness of the benefits of hiring people with disabilities, and to facilitate the use of effective strategies.

W. Roy Grizzard, Jr., Ed.D. was confirmed by the Senate on July 26, 2002, as the first Assistant Secretary for Disability Employment Policy. "It is important to emphasize that ODEP is an outreach organization," Dr. Grizzard told Ability magazine. "We do not have any regulatory authority or investigative authority. What we do is work with other agencies to examine federal policy as it relates to disability and employment and the impact policy may have on people with disabilities being fully integrated into the workforce."

During the initial year of the agency's existence, it awarded over $20 million in grants throughout the United States. These grants provide for demonstration projects for youth with disabilities, customized employment services for adults and youth with disabilities, and technical assistance resources for the workforce development system. The agency expects to award additional grants in the current fiscal year.

For more information about ODEP, its leadership, mission, and grant programs, go to: http://www.dol.gov/odep/

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3. WORLDCOM TAKING HEAT AS FEDERAL CONTRACTOR

A coalition of labor, consumer and small-business groups asked the federal government to bar WorldCom Inc. from receiving future federal contracts, as a first step toward dissolving the company as punishment for its accounting scandal. (Wall Street Journal, October 31, 2002, by Ryan Dezember and Yochi J. Dreazen)

With corporate and residential customers fleeing after the company's huge bankruptcy filing and recent criminal indictments against a number of former executives, the multi-billion-dollar contracts with federal agencies such as the Department of Defense are important to WorldCom's survival. About $2 billion of the company's $35.2 billion in annual revenue came from the government for voice, data and support services. WorldCom holds more government contracts than any other telecommunications firm.

WorldCom's general counsel, Michael Salsbury, told the WSJ that removing the company from the federal contract-bidding process would ensure that "the government - and ultimately taxpayers - would be forced to pay more and get less." He blasted the Communication Workers of America for trying to push the company out of business to benefit union members at WorldCom competitors.

The General Services Administration (GSA) has said it is reviewing whether WorldCom has met the "responsible contractor" standards needed

to win federal contracts. Their inquiry is continuing. The company hasn't received any new federal contracts since the accounting scandal broke. With permission of the bankruptcy court, the company has hired one of Washington's top lobbying firms to help save its existing contracts and make sure it is eligible for new ones.

Gentle Readers,

This week we look at new state laws affecting employers, court guidance on determining what is a "religious creed," and how the EEO-1 categories may change if the latest proposal makes it to the final approval process.

Bill Truesdell, SPHR
Editor

IN THIS REPORT (Report #245, 11/15/2002)
---------- (Sent to over 1,500 subscribers)

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1. EEOC PROPOSED CHANGES TO EEO-1 CATEGORIES

The Equal Employment Opportunity Commission (EEOC) has posted on its web site a list of categories it may use on future EEO-1 reports. While it retains a total count of 9 categories, four of those groups have been dramatically altered. And, this is still in the proposal stage at the moment.

Here is what is being considered:

Proposed EEO-1 Job Codes	Current EEO-1 Job Codes
1-Officials & Managers	1-Officials & Managers
2-Professional & Related Occupations	2-Professionals
3-Technologists & Technicians	3-Technicians
4-Sales & Related Occupations	4-Sales Workers
5-Office & Administrative Support Occupations	5-Office & Clerical Workers
6-Service Occupations	6-Craft Workers (Skilled)
7-Construction & Extraction Occupations; and Installation, Maintenance & Repair (Craft) Occupations	7-Operatives (Semi-Skilled)
8-Production Occupations; and	8-Laborers (Unskilled)

Transportation & Material Moving
(Operative) Occupations
9-Laborers, Helpers & Material Handler Occupations 9-Service Workers

It is not currently known when a final decision will be made about these category assignments. EEOC has received permission to delay their implementation by at least one year.

For more information, go to:
http://www.eeoc.gov/stats/census/comment.html

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2. TWO NEW STATE LAWS THAT WILL IMPACT EMPLOYERS

NEW YORK:
New York City has protected against religious discrimination for a long time. Now the State of New York has joined the group of states that require accommodation for religious reasons. A. 7340 will make it unlawful for employers to impose circumstances where an employee would have to forgo religious observance as a condition of employment. The new law has now gone into effect.

The new law also clarifies what constitutes an undue hardship for employers, including accommodations that involve a "significant expense or difficulty." Employers are granted an exemption from the law if an accommodation would cause an undue hardship.

Also exempted under the new law is premium pay employees may otherwise have received, if the hours they work weren't due to religious accommodation. This exemption can be nullified by provisions of federal laws or union contracts if treatment of employees is deemed more favorable by their provisions.

NORTH CAROLINA:
S.L. 02-163 becomes effective on January 1, 2003 for most of its provisions. Those include changes to the North Carolina Persons With Disabilities Protection Act including an expansion of workplace accommodation requirements. A provision requiring public entities to make their electronic media accessible will become effective on January 1, 2004.

Dropped from the old law is a requirement that it is unreasonable to request employers to spend more than 5% of a person's annual salary/wages on physical accommodations. The new law contains more general language that says accommodations are required unless they impose an "undue hardship" on the employer.

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3. CALIFORNIA COURT NARROWS DEFINITION OF RELIGIOUS CREED

In a recent California Court of Appeal ruling, the court issued a narrower definition of religious creed that it says should be applied to the state's Fair Employment and Housing Act (FEHA). It also offered

some guidelines to employers that may help in determining if religious accommodation is necessary.

The case is Friedman v. Southern California Permanente Medical Group (No. B150017, California Court of Appeal, September 13, 2002). An employee claimed he was denied a job because he refused to be vaccinated against mumps, a requirement of the job he sought. He claimed the vaccination would violate his vegan beliefs. The court said veganism isn't a "religious creed" protected under the state's FEHA.

FEHA requires employers to accommodate an individual's religious beliefs unless it would cause an undue hardship to the employer. To establish a religious bias claim under the FEHA, the employee must prove that (1) he has a bona fide religious belief, (2) the employer was aware of that belief, and (3) the belief conflicted with an employment requirement.

"Religious creed" is defined by the Fair Employment and Housing Commission as "any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance to that of traditionally recognized religions."

Equal Employment Opportunity Commission (EEOC) guidelines say "religious practices" include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."

The court in this case said it applied a three-factor test to determine if veganism is a religion requiring accommodation:

1) First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.
2) Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.
3) Third, a religion often can be recognized by the presence of certain formal and external signs.

The court determined that Friedman's beliefs may be sincerely held, but that they don't address fundamental or ultimate questions. Then, the court said there seem to be no formal or external signs of a religion present. The court pointed out that vegans don't have any identifiable teachers or leaders, services or ceremonies, structure or organization, orders of worship or articles of faith, or holidays. Therefore, it concluded that veganism is not a religious creed under the FEHA.

Gentle Readers,

Older workers take our attention this week. And, California employers will want to look over this year's legislation to get ready for new requirements in the coming year. If you are certified as PHR or SPHR you will want to review our continuing education programs that have added a course on recruiting this week.

Bill Truesdell
Editor

IN THIS REPORT (Report #246, 11/22/2002)
---------- (Sent to over 1,500 subscribers)

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1. SUMMARY OF NEW CALIFORNIA EMPLOYMENT LEGISLATION

California employers can now get a summary of new laws that will become effective beginning on January 1, 2003. There are eight new requirements in the "Wages, Hours and Labor Standards" category; nine in the "Workers' Compensation" category; two in "Agricultural Employees"; six in "Public Works/Prevailing Wage"; and, three in Occupational Safety and Health."

The report is available for FREE from the HR Web Store. Simply go to www.hrwebstore.com and click on the Legislation button in the right hand menu. You are looking for "2002 Legislative Summary for California Employers."

In addition to identifying the bill number and subject, you will find a brief summary of the bill contents and new requirements. Some of these new laws will require regulations that have yet to be developed. Others are simply new requirements employers must implement.

If you are a California employer, you should print a copy of this report and discuss its contents with your management attorney to be sure you are prepared to meet all of the new legal requirements.

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2. RECRUITING COURSE ADDED TO CONTINUING EDUCATION MENU

This week we have added another course to our menu of continuing education programs written by Dr. Jane E. Henderson. If you are an HR professional who has been certified as PHR or SPHR, you must accumulate continuing education units to renew your certification every three years. These programs from one of the country's foremost educators can move you along that path while providing information and skills you can use on your job.

In the new program, Target Recruitment: Selecting the Right People for Your Organization's Success, you will learn to:

- Identify hiring needs
- Conduct the Capabilities Assessment
- Apply interviewing skills to an interview
- Select appropriate questions to ask
- Use guidelines for conducting a lawful interview
- Conduct a behavior-based interview
- Assess applicants

And, you earn continuing education units (CEUs) that will help you with your re-certification when the time comes. Don't wait until the last minute when you can apply this information on your job today.

Visit the HR Web Store Continuing Education Department at www.hrwebstore.com/products/CEP.htm to see the course listings and register to participate.

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3. MEDICARE RELEASES INFORMATION ON INDIVIDUAL NURSING HOMES

If you are curious about how to judge a particular nursing home, the folks at Medicare.gov have created a database just for you. Medicare released the information on Tuesday, November 12, 2002, and you can find it at: http://www.medicare.gov/NHCompare/Home.asp

The data includes ten quality indicators, such as how many residents are restrained and the percentage who have bed sores. There is also information about deficiencies found during inspections and any complaints that have been filed. Nursing homes must collect such information to take part in the federal Medicare program.

On their web site, there is information about:

- Nursing home comparisons
- Guide to choosing a nursing home
- Nursing home checklist
- Quality measures used to judge nursing homes
- Inspection results from state and federal inspections

- Nursing home staffing information
- Links to state web sites where additional information is available

There are links to nursing home publications, details on data collection and updates, information about Medicare's coverage for nursing homes, and the opportunity to download the new Nursing Home Compare database.

Medicare also offers this information to people who call its toll-free service at 1-800-MEDICARE.

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4. AARP HONORS 15 COMPANIES AS BEST FOR WORKERS AGED 50 & OVER

The AARP has announced its selection of 15 "Best Companies for Workers over 50." This is the second annual search result for the non-profit organization.

"At a time of widespread reports of questionable corporate practices, these companies have shown a better side of business," said AARP President James Parkel, when he announced this year's honorees.

Parkel noted that Bureau of Labor Statistics figures show that while 13 percent of American workers today are 55 and older, that figure will increase to 20 percent by 2015. At the same time, Parkel said, the nation is expected to experience a drop in the percentage of younger workers aged 25 to 44.

This year's Best Companies for Workers aged 50 and over are:

- ABN AMRO North America, Inc., Chicago
- Baptist Health South Florida, Coral Gables
- Prudential Financial Inc., Newark, New Jersey
- Howard University, Washington, D.C.
- QUALCOMM, Inc., San Diego, CA
- CALIBRE, Alexandria, VA
- The Stanley Group, Muscatine, IA
- New York Life Insurance Company, NY
- The Hartford Financial Services Group, Inc., Hartford, CT
- Adecco Employment Services, Melville, NY
- DaVita, Inc., Torrance, CA
- Ultratech Stepper, San Jose, CA
- MITRETEK Systems, Inc., Falls Church, VA
- The Aerospace Corporation, El Segundo, CA
- Principal Financial Group, Des Moines, IA

The complete announcement is available at AARP's web site.
You can access it by going to:
http://www.aarp.org/press/2002/nr092302bc.html

Gentle Readers,

The EEOC is our focus this week. Employers can learn from the agency's experiences and avoid problems that have plagued others in the past. And, watch for changes in regulations, procedures and perhaps, even practices that come about from creation of the new Department of Homeland Security.

Bill Truesdell
Editor

IN THIS REPORT (Report #247, 12/6/2002)
---------- (Sent to over 1,500 subscribers)

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1. FORMER EEOC VICE CHAIR TALKS TO ILG

Paul M. Igasaki, former Vice Chair of the Equal Employment Opportunity Commission (EEOC) visited Northern California on November 13th and addressed a group of federal contractor representatives at the Industry Liaison Group (ILG) meeting held at Oracle's corporate conference center.

Mr. Igasaki's second term ended in August 2002 and he is being considered for reappointment to the one open seat designated as a "Democratic Party" seat. The Commission has five commissioners including the Chair and Vice Chair. Three seats are held by the political party in the White House and the remaining two seats are held by the opposing party.

Here are some of the highlights of Mr. Igasaki's presentation:

- Since September 11, 2001, the number of hate crimes (backlash) reported against Arab Americans and Muslims has increased significantly.
- In the past fiscal year ended September 30, 2002, there were 671 cases of National Origin complaints, more than half of them due to dismissal/termination of the employee.

- From 9/11/01 to 10/11/02 there were 758 complaints filed based on religious discrimination. Many said their employers allowed them facilities at work for prayer until after September 11, 2002 when those privileges were revoked.

Mr. Igasaki said we should "Consider what it is we are defending when we are being attacked (by terrorists). That includes these types of values for equal opportunity."

On the subject of Job Applicant definition, Mr. Igasaki said that it is the agency's position that it is not acceptable to wait until job interviews to begin analyzing for disparate impact. The Commission's Chair, Cari Dominguez, has been quoted as saying, "A click does not an applicant make." She is also reported by Mr. Igasaki to have said, "An interview does not an applicant make." Where does that leave the question of "Who is an applicant?" Mr. Igasaki said, "We are getting ready to prosecute some cases on this issue so we aren't talking about it much right now."

Woody Gilliland, Regional Director of the Office of Federal Contract Compliance Programs (OFCCP), said the EO Survey will definitely be issued before the end of this calendar year. He could not comment on the number of surveys that will be distributed, but did say contractors who receive them can "expect there will be a reasonable amount of time for processing and return."

He also reported that many people have told him they didn't think the OFCCP was doing enforcement work any longer because of its move to strengthen its educational programs. He pointed out that "nothing could be further from the truth." Enforcement continues to be a strong focus at the agency.

The EEOC continues to schedule no-cost employer training programs around the country. The schedule is posted on the agency's web site at http://www.eeoc.gov/initiatives/nfi/scheduledworkshops.html . You can visit to see when a program will be held close to you.

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2. WHAT THE NEW DEPARTMENT OF HOMELAND SECURITY MEANS TO HR

Congress has put the finishing touches on constructing a new cabinet-level department out of an amalgam of administration and congressional proposals. The result will significantly restructure much of the federal government's executive branch.

Here are a few highlights...

- The Immigration and Naturalization Service (INS) will no longer exist in the new scheme of things. It's functions will be split into two separate agencies within the new department...one for enforcement and one to administer immigration and citizenship benefits. At this writing, the new agencies will likely be called the Bureau of Border Security and the Bureau of Citizenship and Immigration.
- The State Department can be trumped by Homeland Security officers if visas are issued at US consulates that Homeland Security

feels are unacceptable. A big demotion for the State Department.

- A total of 22 administrative agencies are built into the new Homeland Security Department including the Coast Guard, Customs Service, FEMA, and the Secret Service.

What does it all mean to HR professionals? You can expect new regulations to follow on the heels of the new department's creation. There will likely be tighter restrictions on processing applications for work authorizations and even current procedures may be disrupted for a while as the new department morphs into existence from its predecessors.

What you won't see is creation of a national ID card. Congress has said these cards are not consistent with a free society. States will retain the authority to regulate ID cards and drivers' licenses.

There may be additional impacts in the near future throughout American workplaces as technology reaches the marketplace. Many advanced technology companies have been involved in developing products for the military that can help detect or prevent acts of terrorism in the general population. Companies with these products are nervous about selling them commercially because of the potential unlimited liabilities, should a terrorist strike again. Congress is working to find a solution to the liability issue. One proposal comes in the form of the Safety Act that would have the government offer insurance against such catastrophic liability. When that issue is finally addressed, look for more technology to begin filtering into your security systems, perhaps even into your HRIS systems.

War has a tendency to accelerate the pace of advancement in technology, in systems applications, and in human interactions. Our current war on terrorism will not likely be any different. There are more changes coming folks.

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3. BIGGEST MISTAKES OF EMPLOYERS WHEN DEALING WITH EEOC

Recently, EEOC Chairwoman Cari Dominguez surveyed Regional Attorneys and asked about the things attorneys and employers do that cause difficulties when attempting to resolve employee complaints. She discussed her findings with the American Corporate Counsel Association on October 21, 2002. Here are the top 8 problem generators and some tips from the Equal Employment Opportunity Commission (EEOC) for how to avoid them.

Problem #1: Not being proactive.
Avoidance Suggestion: Corporate legal departments should self-assess and monitor EEO policies and procedures on an ongoing basis. Attention to such details will signal your commitment to the rights of employees. Make this commitment part of your corporate structure. Don't under resource the Office of Human Resources. Value the staff and their opinions.

Problem #2: Undermining credibility with EEOC by not presenting accurate information, by denying access to information,

by not retaining relevant documents and by not letting EEOC interview relevant witnesses.

Avoidance Suggestion: Recognize that lying to a federal agency can result in perjury charges based on either sworn or unsworn statements. Once an investigation has started an employer has a duty to preserve all documents that are reasonably related to that investigation. It is a felony to destroy or spoil documents once notified of an investigation.

Problem #3: Engaging in delaying tactics.

Avoidance Suggestion: Remember that prompt responses may result in prompt resolutions. If a subpoena must be issued, enforcement of that subpoena in federal court makes the existence of a charge and federal investigation a matter of public record. EEOC may issue a press release, especially if a fee award is issued to EEOC.

Problem #4: Not taking advantage of EEOC's mediation program, not engaging in settlement discussions during the investigation and not engaging in meaningful conciliation discussions after a cause finding has been issued.

Avoidance Suggestion: Taking advantage of the confidential pre-suit settlement opportunities can prevent an EEOC press release.

Problem #5: Not responding appropriately when a problem in the company is discovered.

Avoidance Suggestion: Take advantage of the opportunity to swiftly and decisively eliminate the problem. For example, conduct a meaningful investigation and take effective corrective action to eliminate the problem. Do not let legal maneuvers, or the fact that EEOC is involved, get in the way of doing the right thing.

Problem #6: Retaliating against employees who file charges of discrimination. EEOC takes charges of retaliation very seriously.

Avoidance Suggestion: Train your managers to be VERY careful about actions that could be interpreted as retaliatory once an employee files a charge of discrimination. EEOC will sue in a retaliation case even if it has determined there was insufficient evidence to support the original discrimination complaint.

Problem #7: Not communicating with EEOC when the investigation is ongoing.

Avoidance Suggestion: If you need additional time to respond, make the request and provide a reason. Don't fail to communicate.

Problem #8: Underestimating the Commission and assuming it won't litigate.

Avoidance Suggestion: Help managers understand that EEOC is a law enforcement agency. They are not to be taken lightly. If

a Regional Attorney wishes to authorize a lawsuit, it will move forward with all its unpleasantness.

And, finally, a "tip" directly from the Regional Attorney, EEOC San Francisco District...

Responses to complaints brings into question many issues. "Hr staff's knowledge about the law especially in harassment cases will be at ssue. Are you SHRM certified?"

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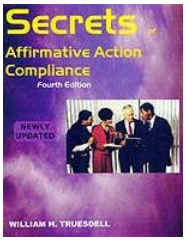

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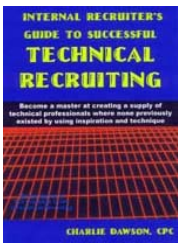

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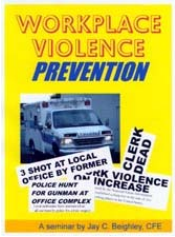

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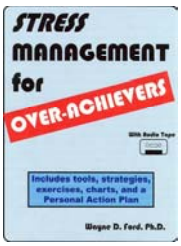

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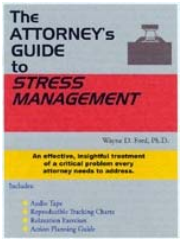

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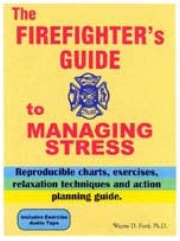

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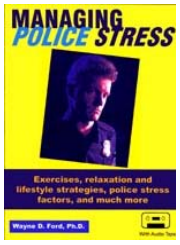

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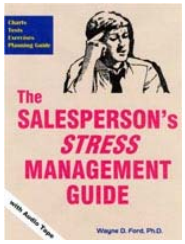

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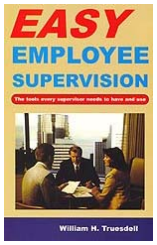

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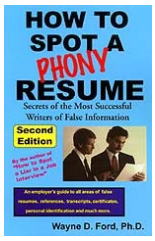

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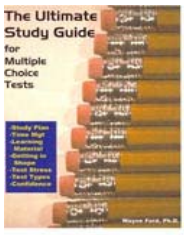

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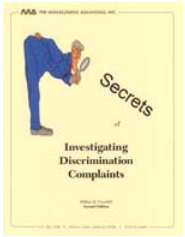

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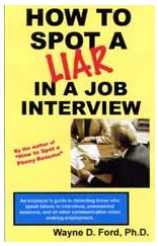

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