

SPECIAL REPORT

Top 10 Best Practices in HR Management For 2010



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Introduction

The role of Human Resources is changing as fast as technology and the global marketplace. Historically, the HR Department was viewed as administrative overhead. HR processed payroll, handled benefits administration, kept personnel files and other records, managed the hiring process, and provided other administrative support to the business. Those times have changed.

The positive result of these changes is that HR professionals have the opportunity to play a more strategic role in the business. The challenge for HR managers is to keep up to date with the latest HR innovations—technological, legal, and otherwise.

This special report will discuss the top 10 best practices in HR management for 2010—in other words, how HR managers can anticipate and address some of the most challenging HR issues this year. This report will give you the information you need to know about these current HR challenges and how to most effectively manage them in your workplace.

#1 Pandemic Flu Management, FLSA, and FMLA

According to the Centers for Disease Control, the H1N1 flu virus is a new flu virus of swine origin that first caused illness in Mexico and the United States in March and April, 2009. Illness from the new H1N1 flu virus has ranged from mild to severe. While most people who have been sick have recovered without needing medical treatment, hospitalizations and deaths from infection with this virus have occurred. The symptoms of H1N1 flu virus in people are similar to the symptoms of seasonal flu and include fever, cough, sore throat, runny or stuffy nose, body aches, headache, chills, and fatigue.

The H1N1 flu virus spreads in the same way that regular seasonal influenza viruses spread, mainly through the coughs and sneezes of people who are sick with the virus. But it may also be spread by touching infected objects and then touching your nose or mouth. People infected with seasonal and H1N1 flu shed the virus and may be able to infect others from 1 day before getting sick to 5 to 7 days after. This can be longer in some people, especially children and people with weakened immune systems and people infected with the new H1N1 flu virus.

In the event of pandemics, businesses play a key role in protecting employees' health and safety as well as limiting the negative impact to the economy and society. Planning for pandemic influenza is critical.

Create a Response Plan

It is very important that employers create a response plan. Divide the company into logical divisions (such as departments), and charge each of those divisions with

conducting planning sessions and table top exercises. Have them contemplate worst-case assumptions, such as if 30 percent of department employees are sick. Then have them think through what they would need to do to keep the department going—who is essential, who will do their work if they are out sick, what equipment you have to fix, what can slide—and create a response plan. Then integrate all of the department plans into one big companywide response plan.

List the contact information for key members of your pandemic flu recovery team, such as the pandemic flu plan administrator and various flu recovery team members. Also explain when plan activation and deactivation will occur, such as when federal, state, or local public health authorities issue an alert concerning a pandemic flu outbreak and/or employee absenteeism from flu exceeds or is expected to exceed a certain percentage or number of employees. Note who will be responsible for activating and deactivating the flu plan as deemed appropriate.

Point out who will develop or obtain materials covering the signs and symptoms of influenza, modes of transmission, personal and family protection and response strategies (e.g., hand hygiene, coughing/sneezing etiquette, contingency plans), and resources for obtaining countermeasures, such as vaccines and antiviral drugs.

At the outbreak of pandemic flu or when a pandemic flu alert is posted, note that this person will distribute the pandemic flu educational materials to all employees. Develop an information platform, such as a hotline and/or dedicated website for communicating pandemic flu status and actions to employees, vendors, suppliers, and customers inside and outside the worksite in a consistent and timely way.

Explain where the following supplies will be kept to prevent and control the spread of the flu virus at the facility:

- ◆ Hand sanitizer
- ◆ Disinfectant (for work surfaces and equipment)
- ◆ N95 face masks
- ◆ Nitrile gloves
- ◆ Tissues
- ◆ Receptacles for used supplies

Tips for Managing Pandemic Flu Outbreaks

Here is a list of tips for managing pandemics:

- ◆ Place your employee workstations more than 3 feet apart from one another so that transmission of the virus between people sitting at their desks will not occur.
- ◆ Conduct meetings via conference call to avoid transmission of the virus.
- ◆ Encourage the use of e-mail rather than in-person communications.
- ◆ Encourage your employees to get a seasonal flu shot, and provide flu shots at your workplace, if possible, to help protect your employees from seasonal flu.

- ◆ Encourage your employees to get the H1N1 vaccine. Vaccines are available in a combination of settings, such as vaccination clinics organized by local health departments, healthcare provider offices, schools, and other private settings, such as pharmacies and workplaces.
- ◆ Consider what your policy on business travel will be. Do you have expatriates? They may want to come back to the United States. Do you have employees who regularly travel to countries with high infection rates? They may not want to take those business trips any more and you may not want them to. Develop a plan for continuing business using conference calls, video meetings, e-mail, and faxes.
- ◆ Encourage your employees to wash their hands often, for at least 20 seconds at a time, with soap and water, especially after they cough, sneeze, or touch a doorknob, controls on shared equipment, or other surfaces touched by many people. If some of your employees are not near water, provide them with an alcohol-based (60 percent to 95 percent) hand sanitizer.
- ◆ Tell your employees to avoid close contact with people who are sick. When they are sick themselves, tell them to keep their distance from others to protect further spread of the virus.
- ◆ If your employees get the flu, or feel achy and feverish, tell them to stay home from work and social gatherings.
- ◆ Provide your employees with N95 face masks if they have to come in contact with others.
- ◆ The flu virus can live for 48 hours on a surface. Commercial disinfectants and bleach (dilutions as low as 1 part to 10 parts) can be used to kill the virus on a workstation.
- ◆ Educate your employees about antiviral drugs. Antiviral drugs are prescription medicines (pills, liquid, or inhalers) that fight against the flu by keeping flu viruses from reproducing in your body.
- ◆ Employees should talk to their healthcare providers to ensure adequate access to their medications.

Pandemic Flu and the Fair Labor Standards Act: Q&As

The U.S. Department of Labor (DOL) has provided the following answers to your questions on pandemic flu and the Fair Labor Standards Act (FLSA). **Note:** State law may differ from federal law.

How many hours is an employer obligated to pay an hourly paid employee who works a partial week because the employer's business closed?

The FLSA generally applies to hours actually worked. It does not require employers who are unable to provide work to nonexempt employees to pay them for hours the employees would have otherwise worked.

How many hours per day or per week can an employee work?

The FLSA does not limit the number of hours per day or per week that employees ages 16 years and older can be required to work.

Can an employee be required to perform work outside of the employee's job description?

Yes. The FLSA does not limit the types of work employees ages 18 and older may be required to perform. However, there are restrictions on what work employees under the age of 18 can do. This is true whether or not the work asked of the employee is listed in the employee's job description.

As part of your prepandemic planning, you may want to consult your Human Resources specialists if you expect to assign employees work outside of their job description during an influenza pandemic. You may also wish to consult bargaining unit representatives if you have a union contract.

If individuals volunteer their services to a public agency, are they entitled to compensation?

Individuals who volunteer their services to a public agency (such as a state, parish, or city or county government) in an emergency capacity are not considered employees due compensation under the FLSA if they:

- ◆ Perform the services without promise, expectation, or receipt of compensation. The volunteer performing such service may, however, be paid expenses, reasonable benefits, or a nominal fee;
- ◆ Offer their services freely and without coercion; *and*
- ◆ Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer.

If individuals volunteer to a private, not-for-profit organization, are they entitled to compensation?

Individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious, or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Where employers are requested to furnish their services, including their employees, in emergency circumstances under federal, state, or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on disaster relief services are counted as hours worked for the employer under the FLSA.

May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?

Yes. An employer may encourage or require employees to telework as an infection control strategy based on timely information from public health authorities about pandemic conditions. Telework may also be a reasonable accommodation. Of course, employers must not single out employees either to telework or to continue

reporting to the workplace on a basis prohibited by any of the Equal Employment Opportunity (EEO) laws.

Do employers have to pay employees their same hourly rate or salary if they work at home?

If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, you must pay the same hourly rate or salary.

If this is not the case and you do not have a union contract or other employment contracts, under the FLSA, employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay nonexempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

In the event an organization bars employees from working from their current place of business and requires them to work at home, will employers have to pay those employees who are unable to work from home?

Under the FLSA, employers generally only have to pay nonexempt employees for the hours they actually work, whether at home or at the employer's office. However, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. When not all employees can work from home, we encourage you to consider additional options to promote social distancing, such as staggered work shifts.

Are businesses and other employers required to cover any additional costs that employees may incur if they work from home (e.g., DSL line, computer, additional phone line, increased use of electricity)?

Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act (ADA).

**Pandemic Flu and the Family Medical Leave Act:
Q&As**

DOL has provided the following answers to your questions on pandemic flu and the Family Medical Leave Act (FMLA). (**Note:** State law may differ from federal law.)

Must an employer grant leave to an employee who is sick or who is caring for a sick family member?

An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons, which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

Workers who are ill with pandemic influenza or who have a family member with influenza are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA. Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

What legal responsibility do employers have to allow parents or care givers time off from work to care for the sick or children who have been dismissed from school?

Covered employers must abide by the FMLA as well as any applicable state FMLA laws. An employee who is sick, or whose family members are sick, may be entitled to leave under the FMLA. There is currently no federal law covering employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents that have been dismissed from school or child care.

However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

Is an employer required by law to provide paid sick leave to employees who are out of work because they have pandemic influenza, have been exposed to a family member with influenza, or are caring for a family member with influenza?

Federal law does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu, or are caring for someone with the flu. Certain state or local laws may have different requirements, which should be independently considered by employers when determining their obligation to provide paid sick leave.

If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect, or the employer to require, the substitution of paid sick and vacation/personal leave in some circumstances.

May employers send employees home if they show symptoms of pandemic influenza? Can the employees be required to take sick leave? Do they have to be paid? May employers prevent employees from coming to work?

It is important to prepare a plan of action specific to your workplace, given that a pandemic influenza outbreak could affect many employees. This plan or policy could permit you to send employees home, but the plan and the employment decisions must comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about decisions made under this plan or policy at the earliest feasible time.

Your company policies on sick leave, and any applicable employment contracts or collective bargaining agreements, would determine whether you should provide paid leave to employees who are not at work. If the leave qualifies as FMLA-protected leave, the statute allows the employee to elect, or the employer to require, the substitution of paid sick and vacation/personal leave in some circumstances.

When making these decisions to exclude employees from the workplace, remember that you cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership, or veteran status. However, you may exclude an employee with a disability from the workplace if you:

- ◆ Obtain objective evidence that the employee poses a direct threat (i.e., significant risk of substantial harm); *and*
- ◆ Determine that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

Yes. However, employers should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for employees to get appointments with doctors or other healthcare providers to verify they are well or no longer contagious.

During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom-free before it allows the employee to return to work. Specifically, an employer may require the above actions of an employee where it has a reasonable belief—based on objective evidence—that the employee's present medical condition would:

- ◆ Impair his ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, *or*
- ◆ Pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

In situations in which an employee's leave is covered by the FMLA, the employer may have a uniformly applied policy or practice that requires all similarly situated employees to obtain and present certification from the employee's healthcare provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work.

If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.

May employers change their paid sick leave policy if a number of employees are out, and they cannot afford to pay them all?

Federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. Employers should consult state and local laws.

In addition, you should consider that if your workforce is represented by a labor union, and the collective bargaining agreement covers sick leave policies, you may be limited in either the manner in which you change the policy or the manner of the changes themselves because the collective bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave.

Your sick leave policy also has to follow the requirements of the FMLA (if your employees are covered by the Act), and it must be consistent with federal workplace antidiscrimination laws, such as the ADA.

If an employer temporarily closes his or her place of business because of an influenza pandemic and chooses to lay off some but not all employees, are there any federal laws that would govern this decision?

The federal laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, or disability may apply. Other specific federal laws that prohibit discrimination on these or additional bases may also govern if an employer is a federal contractor or a recipient of federal financial assistance. You may also not discriminate against an employee because the employee has requested or used qualifying FMLA leave. In addition, you may not discriminate against an employee because he or she is a past or present member of the United States uniformed service.

Some employees may not be able to come to work because they have to take care of sick family members. May an employer lay them off?

It depends. If an employee is covered and eligible under the FMLA and is needed to care for a spouse, daughter, son, or parent who has a serious health condition, the employee is entitled to up to 12 weeks of job-protected, unpaid leave during any 12-month period. Some states may have similar family leave laws. In those situations, covered employers must comply with the federal or state provision that provides the greater benefit to their employees.

In lieu of laying off employees in this situation, we would encourage you to consider other options, such as telecommuting, and to prepare a plan of action specific to your workplace.

What types of policy options do employers have for preventing abuse of leave?

Both the FMLA and the ADA affect the provision of leave.

Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. In addition, employers may require employees to provide:

- ◆ Medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter, or parent, including periodic recertification;
- ◆ Second or third medical opinions (at the employer's expense);
- ◆ Periodic reports during FMLA leave regarding the employee's status and intent to return to work; *and*
- ◆ Consistent with a uniformly applied policy or practice for similarly situated employees, a fitness-for-duty certification. (**Note:** Employers should be aware that fitness-for-duty certifications may be difficult to obtain during a pandemic.)

The FMLA also allows the employee to elect, or the employer to require, the substitution of paid sick and vacation/personal leave in some circumstances.

Under the ADA, qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer's sick leave policies as "reasonable accommodations." These are modifications or adjustments to jobs, work environments, or workplace policies that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities.

#2 Health Care in 2010

Pay Attention to GINA: She's Officially Here

GINA is the Genetic Information Nondiscrimination Act enacted in 2008. The employment title of GINA, which incorporates procedures and remedies found in federal civil rights law, was effective November 21, 2009.

As genetic testing for predisposition to such diseases as cancer, Alzheimer's, and others has become more widely used, legislators like the late Senator Ted Kennedy (D-Massachusetts) wanted to encourage people to take advantage of the technologies. But lawmakers feared that test results would be used unfairly. For example, an

employer or insurer learns that a participant has a high genetic risk of developing an illness and uses that information to deprive the person of benefits—or to refuse to hire him or her. GINA's purpose, then, is to prevent the spread and misuse of such information.

A genetic test is defined as one involving analysis of DNA, RNA, chromosomes, proteins, or metabolites. Blood tests, tests for viral infection, cholesterol level, or the like don't count—nor does information that an individual currently has a disease, his or her age or gender, or data regarding a test for drug or alcohol abuse.

Who Is Covered, and What Should They Do?

GINA's employer requirements apply to all of these: Private employers with 15 or more employees, certain public sector employers, and employment agencies and labor organizations. By November 21, 2009, employers should have updated their EEO policies to reflect the ban against discrimination with respect to genetic and family medical history information as defined by GINA. Also, never ask potential hires who may have a disability anything about their family medical history or require them to undergo genetic testing.

Under the ADA, however, you can require medical exams of all applicants *after* you have offered them positions. Some observers have pointed out that GINA and ADA requirements should be clearly distinguished from each other. That is, the disabilities of some candidates are readily discernable or can be revealed, while those same individuals' genetic histories or predispositions will not be visible.

A notable rule exception for employers: If a health plan participant wants a medical procedure that requires a genetic test, either the employer or the insurer may request information about the test to OK the procedure.

GINA's Adverse Impact on HRAs

GINA contains the latest generation of rules meant to protect the privacy of health information. Observers have noted since the law's enactment in 2008 that the disclosure of individuals' private genetic information is not anything close to widespread—yet. However, lawmakers were concerned that the number of frequently conducted genetic tests will increase exponentially in the near future, and they were thinking ahead.

In the meantime, as GINA's rules are currently written, they directly collide with another, perhaps equally valuable, growing trend. Increasingly, health-risk assessments (HRAs) are a vital part of forward-thinking employers' wellness programs. And GINA makes such assessments much more difficult.

According to the ERISA Industry Committee (ERIC), the success of wellness programs depends on HRAs, which typically include questions about participants' family medical histories. After all, when combined with any individual's current health, his or her risk of predisposition toward a life-threatening illness is key to determining what kinds of behavior changes might offer protection. And, ERIC says, wellness programs are employers' only tools for containing runaway healthcare costs.

But here's the problem: If providing all requested information on an HRA, including family medical history, would lead to any kind of incentive or reward for participants, proposed regulations for GINA prohibit the arrangement. The idea seems to be that "bribing" employees with a reduction in premium or deductible if they

provide private genetic information is unacceptable. So how do employers save their wellness programs?

ERIC and employment attorneys have some advice. First, understand that family medical history questions cannot be asked if any sort of participation in the wellness program can lead to a reward—even if the reward has nothing to do with filling out the HRA. Clearly, then, employers have two choices: Ask the questions—and get them answered—but offer no rewards for program participation. Or, remove all family medical history questions from your HRA and include planned incentives and rewards for program participation.

Or, says ERIC, break the process into two parts: Design an assessment/program that includes genetic information, but not rewards, and also one that does not include genetic information, but does offer rewards. Still another alternative is to offer a financial incentive, but separate it completely from the health plan/wellness program, and make it taxable.

As detailed above, many provisions of GINA really hem employers in. But even such a strict law has some loopholes, so here's a sampling of escape clauses that might come in handy.

- ◆ Regarding collecting family medical history in health risk assessments for wellness programs, some experts stress that collecting the information before employees are officially enrolled in your health plan means it could be used for “underwriting” purposes—a big no-no. So, some have suggested that if you collect it after open enrollment—and don't tie it to a health plan reward—you may be in compliance.
- ◆ But remember the rule that a wellness program that offers no incentives/rewards usually garners 50 percent participation, while one that does contain rewards boosts participation to 80 percent.
- ◆ If you gain an employee's genetic information totally by accident—you overhear a conversation, the employee discloses it when you didn't ask for it, the information comes to you as part of an accommodation request, and other instances—you're off the hook.
- ◆ You're also in the clear if you must ask for—or you inadvertently receive—family medical history when processing a request for leave under state or federal family and medical leave laws.
- ◆ You cannot be liable if you acquire such genetic information in the course of a law enforcement or forensic investigation.
- ◆ If there are toxic substances in your workplace (or you believe there might be), you can use such private data for genetic monitoring of the biological effects of the substances, provided you notify employees in writing.

Health Risk Factors Impact Employee Productivity

A study published by StayWell Health Management researchers and John Riedel in a *Journal of Occupational and Environmental Medicine (JOEM)*, Volume 51, Number 3, March 2009) article, based on data from 106 companies, representing responses from 772,750 employees, ties health risk factors to productivity in a quantifiable manner. This study establishes a significant link between employee health and the ability to perform effectively on the job. The article is titled “Use of

a Normal Impairment Factor in Quantifying Avoidable Productivity Loss Because of Poor Health.”

According to Riedel, “Intuitively, we know that keeping employees healthy is the best way to reduce healthcare costs, and there’s a large body of research in the industry demonstrating this is true. But until now, we haven’t had as much data showing that people who have healthy lifestyles with few risk factors are significantly more productive in the workplace than people with high numbers of health risk factors.”

The study compared the responses of people regarding how health problems affected their ability to perform their job duties with the number of health risks that were identified through health assessment (HA) and biometric screening, to get a reasonable estimate of the impact that a healthy or unhealthy lifestyle has on productivity, according to Jessica Grossmeir, director of research for StayWell Health Management (www.staywellhealthmanagement.com).

The HA that was used is StayWell’s and consists of close to 50 questions regarding demographics, chronic conditions, lifestyle, health behaviors, healthcare utilization, psycho-behavioral factors such as readiness to change, drug and alcohol use, and ergonomic issues, according to the article. The HA also included a measure of presenteeism, which asks respondents to report how health problems limited their job performance over the past year, using a 0–10 scale, according to the article. The time frame of the study covered HAs filled out by employees from January 2005 to December 2007.

The 10 health risk areas covered in the study were: alcohol, back pain, blood pressure, cholesterol, driving, physical activity, stress, tobacco use, weight, and mental well-being (e.g., depression).

Some study findings included:

- ◆ A strong association was found between the number of health risks and productivity loss, ranging from 3.4 percent for those with one of the assessed health risks to a 24 percent productivity loss for people with all these health risks. This means that people with the most health risks had almost seven times more lost productivity while at work than those with no health risks.
- ◆ Researchers found that ongoing back pain was responsible for 5.7 weeks of lost productivity each year, representing a 10.9 percent differential between employees at risk and those not at risk for back pain.
- ◆ Mental well-being and stress accounted for 2.4 and 1.1 weeks of lost productivity, respectively.
- ◆ Researchers identified a normal impairment factor (NIF), which represents the amount of on-the-job productivity loss that cannot be mitigated through health management interventions that address the health risks measured in the study.
- ◆ An employee in the NIF group with low health risks experiences an average of \$1,472 per year in lost productivity, while a more typical employee with three health risks averages \$5,952. The researchers estimate that if 100 people with three health risks were to eliminate just one health risk, this would translate to productivity gains worth \$149,400 for the employer.

"These [the study's] results support the contention that helping employees reduce the number and severity of health risks may be a sound economic choice for an employer," according to the article.

Cutting Healthcare Costs

Knowing that healthcare costs will not decrease in coming years, the challenge for employers becomes learning how to keep the increases to manageable levels.

There are a variety of strategies for cutting program costs. Among these are making changes in the areas of plan design, financing, purchasing, vendor management, care management, pharmacy, and retiree medical management. Consider the following specific steps for cutting program costs:

HSAs. Health savings accounts (HSAs) are a cost-effective way to co-fund health care. HSAs are designed to help individuals save for future qualified medical and retiree health expenses on a tax-free basis.

Network management. Also recommended are high-performance networks where experts analyze cost and practice patterns, weeding out from the network specialists who cost much more than others. These are specialists who tend to order more tests and require more doctor visits than others. By removing them, the total cost of health care for employers decreases.

Surcharges. Another strategy for cost-cutting is introducing "dependent surcharges." These are charges levied by companies to cover employees' working spouses who could be covered under their own plan. The surcharge creates an incentive for the spouse to switch to his or her own plan.

Volume discounts. Joining a coalition of employers that leverages volume to purchase health coverage on a group basis can also help employers reduce costs. Volume purchasing power when negotiating with community providers leads to lower overall costs.

Consumer-driven health care. In order to curb rising healthcare costs, more employers are implementing consumer-driven healthcare plans (CDHPs). Dozens of concepts can hide under the trendy title of consumer-driven healthcare plans, from smoking-cessation, weight-loss programs, and health club memberships to three-tier pharmacy plans. But here is a definition offered by the Washington, D.C.-based National Business Group on Health: "Most plans include cost-sharing provisions, high deductibles, a health reimbursement account or health savings account (HSA), and tools and resources to help workers become more educated healthcare consumers."

BLR® asked Steve Kraus, principal-in-charge of Deloitte Consulting's Human Capital practice and leader of the study, for his reaction to that definition. He generally agreed with it, stressing that plans vary widely from employer to employer. The core principle, Kraus says, is "enabling employees to understand the true cost of healthcare services and the options available to them for receiving care while requiring [them] to take on increased financial responsibility for managing their health care."

These are the basic features, Deloitte Consulting's Steve Kraus reports, for each participant in a CDHP.

- ◆ A fixed annual allowance to cover “wellness benefits” preventive care, such as physical exams and health screenings.
- ◆ Enrollment in a high-deductible medical plan, such as a \$1,500 deductible with coverage by a preferred-provider organization.
- ◆ In larger companies, those with at least 1,000 employees, an employer-funded health reimbursement account (HRA), say, of \$1,000, for use in covering the deductible.
- ◆ In smaller companies, an HSA that acts like a 401(k)-type retirement plan. Employees save their own money, which may be fully or partially matched by the employer.
- ◆ With either HRAs or HSAs, the employee pays \$500 of his or her own money for the rest of the deductible. In theory, participants are more likely to ask a healthcare provider whether a test or treatment is really necessary or whether it can be obtained less expensively.
- ◆ Unspent funds in both HRAs and HSAs can be rolled over from year to year.

These are other features that either the insurer or the employer may add:

- ◆ Third-party-provided pharmacy benefit management
- ◆ Disease management, usually by nurse practitioners, for such chronic conditions as asthma, diabetes, heart disease, or cancer
- ◆ Wellness benefits, such as a gym on the premises, and weight-loss and smoking-cessation programs
- ◆ Behavioral health benefits that especially target depression

Use a variety of methods. Not surprisingly, the experts maintain that no single method will reduce costs dramatically. Rather, implementing a variety of methods can help employers save money over the long term.

Best Practice: Health Benefit Cost-Cutting Is Working

The pressure of a faltering economy seems to be having a positive effect on employee appreciation of their benefits, says a new survey from Workscope, Inc. Nearly 75 percent of the 787 HR professionals surveyed report that their employees are more appreciative now of their employer-provided benefits than in the past.

As a result, companies have been able to engage their employees on a wider range of health benefit plans and options. For example, nearly 50 percent of small and mid-sized firms, and nearly two-thirds of large companies, now offer CDHPs and high-deductible health plans (HDHPs), according to the survey. The last year saw a 10 percent increase in the adoption of these plans by employees.

Employee engagement in these new health benefit options and health/disease management programs is enhanced through the use of incentives and decision support tools in many companies, according to the survey. About two-thirds of the companies use tools to help employees make informed decisions about participating in a CDHP or HDHP, and 40 percent use incentives to encourage employee participation in a health/disease management program.

Roughly half of the companies are communicating the real value of their benefits through the use of total benefit statements. Nearly 35 percent of the responding companies said they are outsourcing open enrollment. The practice is more common in large organizations.

Best Practice: 'Shopping Around' for Insurance Benefits

Looking for ways to cut insurance and benefits costs is nothing new for HR. In recent years, the rising cost of health care has prompted many employers to search for more cost-effective medical insurance plans. However, the recession makes it that much more important, according to Theodore D. Lanzaro Jr., CPA and managing partner of Lanzaro CPA, LLC (www.lanzarocpa.com).

Lanzaro says employers should "shop around" all of their insurance and benefits costs, including health care; disability, life, and dental insurance; and administration of their 401(k) plan. "You could be reducing your costs by shopping the administration around or tweaking the program." Many vendors do not inform customers about new products that are more cost effective—until asked to do so, explains Lanzaro. "Keep in mind that people don't always sell you what's best for you."

The first step is to examine your existing—and other—insurance to evaluate whether your current plan provides "the right amount of insurance" for your employees. For example, "it doesn't pay to have disability insurance that only covers 20 percent of your income," Lanzaro says.

Next, he recommends asking for "apples-to-apples" comparison quotes—the cost for each vendor to provide identical coverage. Otherwise, it may be difficult to evaluate how good a deal you would be getting if you switch to another plan. A cheaper alternative might end up costing you more in the long run if the plan reduces benefits to employees because they may resent the changes.

Lanzaro offers some additional suggestions:

- ◆ **Do not eliminate insurance and benefits altogether.** Otherwise, top performers might leave to find employment—and benefits—elsewhere, he says. "It, ultimately, is more expensive to rehire and retrain people than to pay benefits for the ones you already have."
- ◆ **Research plans only from reputable providers.** An insurance company with "mediocre credit" might give your employees a hard time when it comes to paying claims, Lanzaro says.
- ◆ **Approach existing vendors.** Products change yearly, but you might not hear about the most cost-effective options unless you ask about them, Lanzaro says. "In a lot of cases, if you're not saying that the cost is bothering you, then you're not hearing what they've got."
- ◆ **Do your homework.** Be proactive by researching alternatives before being asked to do so, he recommends. "Look at all of your alternatives, and don't be afraid to talk to a lot of people," such as vendors and other HR professionals, he says. "If you're not talking to a lot of people, you may be getting sold what's the best for the salesperson, not necessarily what's best for you."

Best Practice: Encouraging Better Health Through Cash Incentives

As the largest healthcare system in the state of Indiana, employees probably have accessed Clarian Health resources and staff at its various locations. "But what we'd really like to do," says James Wide, a Clarian employee in the Public Relations department, "is to keep people from coming in."

While it may seem counterintuitive to discourage customers, community health has long been a goal of Clarian's, and it is deeply integrated into the corporate culture. "If you have a disease or an injury, we have the best of the best that can assist you," Wide says. "But what we really want to do is to stop you from getting to the point where that's what you need." One way that Clarian has traditionally cared for the public health is go out into the community, offering health screenings and other resources.

"The initiative is called Call to Change," Wide explains. "We were doing a lot of screenings, offering health information, and trying to help people in our communities to be very preventative. We spent a lot of resources doing that. But when we stepped back and looked at ourselves—we have 13,000 employees in downtown Indianapolis—we realized we had more work to do there. So we instituted the same Call to Change amongst our employees."

Wellness Track, officially launched in January 2009, became the official means through which Clarian employees could make lifestyle changes that would ultimately benefit their health. The program focuses on five areas that, when controlled, offer the greatest health benefits: smoking cessation, body mass index (BMI), blood pressure, glucose levels, and "bad cholesterol," or LDL.

Awareness is often the first step toward better health, so Clarian employees are encouraged to complete a health risk assessment. The encouragement comes through communication about the importance of being healthy—and through cash.

Thus was born the Wellness Track incentive program, which officially launched in January. Employees can receive up to \$30 per paycheck, or \$720 a year, for addressing their health issues. When an employee stops smoking, an extra \$5 appears in the biweekly paycheck. The same is true when he or she is addressing LDL, glucose, and blood pressure. And an extra \$10 can be had by addressing one's BMI.

Has it worked? "Oh, yeah," says Wide. "We have a 90-some-odd percentage of compliance with the health risk assessments. Several of our employees have been profiled in our local newspaper because they have made changes.

"For instance, our patient visitor reps greet patients at the hospital entrances. That's one of those jobs where you're sitting down a lot. At our Methodist Hospital, a few of those employees decided that, during their 15-minute breaks, instead of just walking around talking with people, they would create something they call the Methodist Mile. They track a mile, and they'll walk on their breaks.

"They've lost weight and other health issues have changed. That's just a small thing, and that's what we want people to know: you don't have to do it overnight, and it doesn't have to be big changes. Small lifestyle changes are what it's all about."

While financial incentives are integral to the Wellness Track program, Wide says the main emphasis is on individual health.

"Obviously, there is a financial incentive," he says. "But the bigger thing is lifestyle change. We're pushing healthy aspects of everything, from meals in our cafeterias, to making accessible everything you need to make changes.

"We have Weight Watchers® At Work, health centers in our facilities, various classes on nutrition, and many [other programs]. We profile success stories in our company newsletter, too. That's encouraging to others.

"People see the changes in their coworkers and decide they're ready to make a change. You hear them talking, 'Did you see her? What's she doing? I want to do it, too.' These are regular folks we see every day, not Hollywood people, just every day people. We have one woman who, because of the changes she's made, is now off diabetes medicine and is controlled by diet instead."

Healthcare Reform

President Obama is working with Congress to pass comprehensive health reform in 2010 in order to control rising healthcare costs, guarantee choice of doctor, and assure high-quality, affordable health care for all Americans. The details of the reform efforts change on a daily basis.

According to the Obama administration, rapidly escalating healthcare costs are crushing family, business, and government budgets. Employer-sponsored health insurance premiums have doubled in the last 9 years, a rate 3 times faster than cumulative wage increases. The United States spent approximately \$2.2 trillion on health care in 2007, or \$7,421 per person—nearly twice the average of other developed nations.

Americans spend more on health care than on housing or food. If rapid healthcare cost growth persists, the Congressional Budget Office estimates that by 2025, \$1 out of every \$4 in our national economy will be tied up in the health system. This growing burden will limit other investments and priorities that are needed to grow our economy.

Rising healthcare costs also affect our economic competitiveness in the global economy, as American companies compete against companies in other countries that have dramatically lower healthcare costs.

Wellness Programs

There is little question that employers can have a positive impact on employee behavior. Done well, employer-sponsored wellness programs have been successful in helping employees make better choices. Some such activities are full-blown programs. Others are small, finite activities that are part of overall HR and safety. Wellness programs include:

- ◆ Exercise and fitness
- ◆ Smoking cessation
- ◆ Blood pressure management
- ◆ Weight management
- ◆ Stress management

- ◆ Cholesterol management
- ◆ Nutrition

Best Practice: Employer's Wellness ROI Gets Healthier

In its fifth year of receiving a National Business Group on Health (NBGH) award, Quest Diagnostics was honored with the highest level, the 2009 Best Employers for Healthy Lifestyles Platinum Award for its HealthyQuest program that emphasizes health literacy and education for employees. The program also has the metrics in place to measure the company's success in producing healthy outcomes.

The most important goal for a program like this is assisting employees in improving their health, but HealthyQuest also produced a return on investment (ROI), according to an analysis completed by Thompson Reuters in 2008. It is about \$4.80 for every \$1 invested in the program.

Quest Diagnostics, a provider of diagnostic health testing, information, and services for patients and their physicians, with headquarters in Madison, New Jersey, has approximately 40,400 employees in the United States eligible for wellness programming and approximately 2,000 patient service centers nationwide.

The challenge of providing a comprehensive employee wellness program with many locations and a large staff has been met with a corporate wellness program design complemented by decentralized, local event planning and initiatives by volunteer Health Promotion Teams at business locations as part of the HealthyQuest wellness programming, explains Dori Bontempo-Ziegler, HealthyQuest manager.

"We have created teams with over 500 employee volunteers who are passionate about a specific area of wellness and motivated to help their colleagues improve their health. For example, the Smoking Cessation Team and leader are often former tobacco users who joined the team to help themselves and others to quit smoking. Local team leaders take part in national teams on their specific topic, and learn from each other regarding best practices," Bontempo-Ziegler says.

"There will always be some percentage of people who will take action based on HRA (health risk assessment) results, but to be able to have a [volunteer] team in place to provide motivation, resources and encouragement introduced a new level of personal health improvement," she explains.

Teams and their initiatives and events are available to both employees and their spouses or partners. Using the tobacco cessation program as an example, Bontempo-Ziegler explains that team leaders and their teams put together different events during the Great American Smokeout and World No Tobacco Day, as well as supporting employees and family members who chose to participate in the free tobacco cessation program. American Cancer Society "lunch and learns," raffles, and other competitions have supported the cause and helped to motivate participants, comments Bontempo-Ziegler.

Quest Diagnostics work locations became completely smoke-free as of April 2009, even on the grounds, so the Cessation team plays an even more important role going forward. Employee tobacco usage dropped to 12.7 percent in 2008, and it is estimated that about 38 percent of the 3,600 individuals who have enrolled in the smoking cessation program since its 2005 launch have quit smoking.

Another major focus of HealthyQuest is weight loss and control, and in 2008, the company launched its "Shrink for Health, HealthyQuest Weight Loss Challenge." During the year, 2,525 employees completed the program and reported a cumulative weight loss of 5,804 pounds. Participants gained an understanding of the importance of maintaining a healthy weight and making a commitment toward a healthier lifestyle.

In addition to receiving support from the team that focused on this area of wellness, the participants also found a great motivator in Bill Germanakos, a former sales representative who became the company's director of Employee Wellness Initiatives after winning the 2007 season of the NBC television program, *The Biggest Loser*®.

He lost 164 pounds or 49.1 percent of his body weight and has kept it off. "It's a tremendous opportunity for me to go in person to business units to speak about health and wellness through weight loss," says Germanakos.

#3 Paid Leave Initiatives

Since 2007, a growing number of states and at least one city have passed laws to allow employees to have or use paid leave for family and medical needs. For example:

- ◆ California has become the first state to provide paid time off for workers to provide care for a child, spouse, parent, or domestic partner with a serious health condition, or to bond with a new child (newborn, adopted, or foster-care child).
- ◆ The District of Columbia entitles employees covered by the District Family and Medical Leave Act to paid sick and "safe" leave for use under certain circumstances.
- ◆ Maryland law requires that employers with 15 or more employees that provide paid leave allow employees to use their paid leave (sick, vacation, or compensatory time) for the illness of an immediate family member.
- ◆ Washington state has passed a law (currently scheduled to become effective in October 2012) requiring paid family leave, administered under a state-run insurance program. Under the law, employees are entitled to up to 5 weeks' paid family leave because of the birth of a child, in order to care for the child, or because of the placement of a child with the employee for adoption.
- ◆ New Jersey provides eligible employees with up to 6 weeks of temporary disability benefits while taking leave under the state family leave law or the federal FMLA to care for a family member with a serious health condition or to care for a newborn or newly adopted child during the first 12 months following birth or placement for adoption.
- ◆ The city of San Francisco approved a ballot measure that requires employers to provide paid sick leave to employees in the city.

State-mandated paid leave provisions are gaining popularity. As a result, employers should confirm the status of their state leave laws to determine if any paid leave

provisions exist, and ensure that their policies and practices take both state and federal leave laws into account.

#4 Compliance Focus: ADAAA

How the Updated ADA Affects You

The U.S. Equal Employment Opportunity Commission (EEOC) published a proposed rule that would make several significant changes to the definition of the term “disability” under the ADA. The proposed regulations will be finalized in 2010.

The proposal would revise the EEOC’s regulations to conform with the ADA Amendments Act of 2008 (ADAAA), which makes it easier for individuals seeking protection under the ADA to establish that they have a disability. The ADAAA expressly rejected the U.S. Supreme Court’s ruling that an impairment must “prevent or severely restrict” a major life activity (*Toyota Manufacturing Kentucky, Inc., v. Williams*, 122 S. Ct. 681 (2002)). In addition, before the ADAAA was enacted, the courts had narrowed the definition of “major life activity” to activities “of central importance to most people’s daily lives.” The proposed regulations include revised definitions of some key terms under the definition of “disability.” In the Notice of Proposed Rulemaking, EEOC emphasized that:

- ◆ The definition of disability—an impairment that poses a substantial limitation in a major life activity—must be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis;
- ◆ Major life activities include “major bodily functions”;
- ◆ Mitigating measures, such as medications and devices that people use to reduce or eliminate the effects of an impairment, are not to be considered when determining whether someone has a disability; *and*
- ◆ Impairments that are episodic or in remission, such as epilepsy, cancer, and many kinds of psychiatric impairments, are disabilities if they would “substantially limit” major life activities when active.

EEOC says the regulation also provides a more straightforward way of demonstrating a substantial limitation in the major life activity of working, and implements the ADAAA’s new standard for determining whether someone is “regarded as” having a disability.

Under the ADAAA, an individual is “regarded as” having a disability if:

1. An individual establishes that he or she was subjected to an action prohibited under the ADA (e.g., demotion or employment termination), *and*
2. The action was taken because of an actual or perceived impairment whether or not the impairment actually limits or is perceived to limit a major life activity.

Under the amended ADA, evidence that an employer believed an individual had an impairment, along with evidence of an adverse employment action based on that belief, are sufficient to establish that the individual was regarded as having a disability.

In addition, the proposed regulation identifies impairments that consistently will meet the definition of disability:

- ◆ Deafness,
- ◆ Blindness,
- ◆ Intellectual disability,
- ◆ Partially or completely missing limbs,
- ◆ Mobility impairments requiring use of a wheelchair (a mitigating measure),
- ◆ Autism,
- ◆ Cancer,
- ◆ Cerebral palsy,
- ◆ Diabetes,
- ◆ Epilepsy,
- ◆ HIV/AIDS,
- ◆ Multiple sclerosis,
- ◆ Muscular dystrophy,
- ◆ Major depression,
- ◆ Bipolar disorder,
- ◆ Post-traumatic stress disorder,
- ◆ Obsessive-compulsive disorder, *and*
- ◆ Schizophrenia.

Note: The list isn't an exhaustive one, so examples not listed in the proposed regulation could still consistently meet the definition of disability. The proposed regulation also provides examples of impairments that may be substantially limiting for some individuals but not for others. EEOC says that these types of impairments, which include asthma, back and leg impairments, and learning disabilities, may require somewhat more analysis to determine whether they are substantially limiting for a particular individual than those impairments that consistently meet the definition of disability, although the level of analysis required still should not be extensive.

The proposed regulation includes a list of temporary, nonchronic impairments of short duration with little or no residual effects that are usually not disabilities. These include (but are not limited to):

- ◆ The common cold,
- ◆ Seasonal or common influenza,

- ◆ A sprained joint,
- ◆ Minor and nonchronic gastrointestinal disorders, or
- ◆ A broken bone that is expected to heal completely.

Additionally, the fact that an impairment is permanent or of long duration or chronic in nature would not automatically make it a disability if it otherwise does not substantially limit a major life activity.

#5 Compliance Focus: EFCA

The Employee Free Choice Act (EFCA), which may pass in 2010, includes the following elements:

Gives workers the choice of whether to form a union through majority sign-up or through the National Labor Relations Board (NLRB) election process: Both processes already exist under current law, but employers can currently demand a secret ballot election, even if the union presents a majority of signed authorization cards from employees. The EFCA would allow NLRB to certify a union if a majority of employees in a workplace sign authorization cards designating the union as its bargaining representative. NLRB would develop model authorization language and procedures for establishing the validity of signed authorizations.

Guarantees a first union contract through mediation and arbitration: If an employer and a union are engaged in bargaining for their first contract and are unable to reach agreement within 90 days, either party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. If the FMCS is unable to bring the parties to agreement after 30 days of mediation, the dispute will be referred to arbitration and the results of the arbitration shall be binding on the parties for 2 years. Time limits may be extended by mutual agreement of the parties. Under current law, employers have a duty to bargain in good faith, but are under no obligation to reach agreement.

Increases penalties against employers for unfair labor practices: Makes the following new provisions applicable to violations of the National Labor Relations Act (NLRA) committed by employers against employees during any period while employees are attempting to organize a union or negotiate a first contract with the employer.

Mandatory applications for injunctions: Provides that, just as NLRB is required to seek a federal court injunction against a union whenever there is reasonable cause to believe that the union has violated the law, NLRB must also seek a federal court injunction against an employer whenever there is reasonable cause to believe that the employer has discharged or discriminated against employees, threatened to discharge or discriminate against employees, or engaged in conduct that significantly interferes with employee rights during an organizing or first contract drive. The bill also authorizes the courts to grant temporary restraining orders or other appropriate injunctive relief.

Treble back pay: Increases the amount an employer is required to pay when an employee is illegally discharged or discriminated against during an organizing campaign or first contract drive to three times back pay.

Civil Penalties: Provides for civil fines of up to \$20,000 per violation against employers found to have willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive. Under current law, remedies are limited to back pay (minus any additional interim wages the employee did or should have earned), reinstatement, and notice to employees that the employer will not engage in violations of the NLRA.

#6 Increasing DOL and EEOC Enforcement

Discrimination Charge Filings to EEOC Show Significant Increase

EEOC released its fiscal year (FY) 2008 statistics in March 2009, announcing that national workplace discrimination charge filings with EEOC have hit an unprecedented level of 95,402 filings during FY 2008, which ended September 30. This total represents a 15 percent increase from the previous fiscal year, according to an EEOC statement.

Some of the largest increases in filings were in the categories of age (from 19,103 cases in FY 2007 to 24,582 in FY 2008) and retaliation—all statutes (from 26,663 cases in FY 2007 to 32,690 cases in FY 2008), according to the EEOC statement.

EEOC filed 290 lawsuits in FY 2008, resolved 339 lawsuits, and resolved 81,081 private sector charges, recovering approximately \$376 million in monetary relief for discrimination victims and obtaining remedial relief from employers to promote inclusive and discrimination-free workplaces, according to the statement.

The Age Discrimination in Employment Act (ADEA), first enacted in 1967, was given a fresh review by EEOC in July 2009, when EEOC held a public hearing regarding recent developments with ADEA compliance. According to EEOC, in FY 2008, it recovered \$82.8 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation) for age discrimination claims. By way of comparison, in FY 2007, the recovery in monetary benefits for charging parties and other aggrieved individuals was \$66.8 million. Age discrimination charges increased more than 22 percent from 2007 to 2008.

In addition, EEOC leaders are concerned about the effects of downsizing on older workers as a significant number of employers have already had layoffs or are planning reductions in force this year.

"Whether trying to retain or obtain a job, older workers may find themselves susceptible to unlawful age-based stereotypes and discrimination," said Acting EEOC Chairman Stuart Ishimaru. "Employers' conscious or unconscious stereotypes

about older workers may cause them to underestimate the contributions of these workers to their organizations. As a result, older workers may be disproportionately selected for layoffs during reductions-in-force. To make matters worse, evidence suggests that older workers who lose their jobs may have more difficulty finding another job than their younger counterparts, due to age discrimination.”

A new guidance document has been issued by EEOC to better assist older workers being terminated and offered severance packages by their employers. Some packages require employees to sign an agreement that releases liability for all claims connected with the employment relationship.

The document, “Understanding Waivers of Discrimination Claims in Employee Severance Agreements” (www.eeoc.gov/policy/docs/qanda_severance-agreements.html), may be helpful to review as a preventive measure before planning any employee layoffs.

Wage and Hour Division To Add 250 More Investigators

DOL’s Wage and Hour Division (WHD) will be adding 250 investigators, a staff increase of more than one third, says Secretary of Labor Hilda L. Solis. Solis made the announcement after the release of a General Accounting Office (GAO) report that found the department’s system for receiving and responding to wage-and-hour complaints is ineffective and discourages wage-theft complaints. Of the 250 new investigators, 100 will focus on contractor compliance under the American Recovery and Reinvestment Act, the economic stimulus package.

“As secretary of labor, I am committed to ensuring that every worker is paid at least the minimum wage, that those who work overtime are properly compensated, that child labor laws are strictly enforced and that every worker is provided a safe and healthful environment,” Solis said. “The Department’s Wage and Hour Division has already begun the process of adding 150 new investigators to its field offices to refocus the agency on these enforcement responsibilities.

“In addition, under the American Recovery and Reinvestment Act, the agency will hire 100 investigators to ensure that contractors on stimulus projects are in compliance with the applicable laws. The addition of these 250 new field investigators will reinvigorate the work of this important agency, which has suffered a loss of experienced personnel over the last several years.”

For the report, the GAO posed as fictitious complainants and filed 10 common complaints with WHD. The complaints centered on violations related to child labor, minimum wage, last paycheck, and overtime. The GAO found that WHD successfully investigated only 1 of the 10 fictitious cases, correctly identifying and investigating a business that had multiple complaints filed against it by the fictitious complainants. In 5 of the 10 cases, WHD failed to record the complaints in its database. In 2 of the 10 cases, WHD recorded that the employer had successfully paid the employees back wages when, in fact, the fictitious complainants reported to WHD they hadn’t been paid. “I take the issues raised by the GAO investigation regarding past Wage and Hour Division enforcement very seriously,” Solis said.

OFCCP Enforcement Breaks Records

More than 24,500 U.S. workers who had been subjected to unlawful employment discrimination received in excess of \$67.5 million in back pay, salary, and benefits during FY 2008, according to DOL's Office of Federal Contract Compliance Programs (OFCCP). The latter figure is up 133 percent over financial remedies won by OFCCP in FY 2001.

In the past 8 years, there has been a 14 percent increase in the total number of compliance reviews completed, a 92 percent jump in the number of job applicants and employees who financially benefited from OFCCP investigations, and more than \$50 million in additional back pay, salary, and benefits compared to the previous 8-year period, OFCCP reports.

Workplace Injuries Underreported, GAO Finds

GAO has found widespread underreporting of workplace injuries, saying DOL's Occupational Safety and Health Administration (OSHA) should improve its efforts to verify the accuracy of employer-provided injury data.

In a report, GAO said a number of factors may discourage both employers and employees from reporting work-related injuries and illnesses, such as some workers fearing they'd be disciplined. Some employers may also be trying to keep their workers' compensation costs from rising, GAO said. The report identifies a number of factors that may contribute to the inaccuracy of employer injury and illness records, as well as problems with the audits that OSHA conducts to ensure their accuracy.

"Accurate injury and illness records are vital to protect workers' health and safety," said Secretary Solis. "They not only enable OSHA to better target its resources and determine the effectiveness of its efforts, accurate numbers are also an important tool that workers and employers can use to identify hazards in their workplaces."

Acting Assistant Secretary for OSHA Jordan Barab announced that the agency will move swiftly to implement the recommendations made by GAO. Additionally, in response to numerous studies of underreporting and congressional interest, on October 1, OSHA implemented a National Emphasis Program on Recordkeeping. OSHA will send inspectors into worksites across the country to review the occupational injury and illness records prepared by businesses. "Many of the problems identified in the report are quite alarming, and OSHA will be taking strong enforcement action where we find underreporting," Solis said.

Federal Agency Gone

The Employment Standards Administration, known as ESA, was abolished effective November 8, 2009, as part of an effort to eliminate one level of bureaucracy in the U.S. DOL. ESA was the umbrella agency that administered WHD, OFCCP, the Office of Labor-Management Standards, and the Office of Workers' Compensation Programs. Those agencies now report directly to the Secretary of Labor.

Communication About Discrimination Equals Opposition

A recent and unanimous ruling by the Supreme Court (*Crawford v. Metropolitan Gov't of Nashville and Davidson Co.*, Tenn.) underscores employers' obligations not to punish employees who report workplace misconduct. The justices' decision was clear and expected, but it overruled a more puzzling ruling by an appeals court.

Vicki Crawford had worked for a public school system operated by the Metropolitan Government of Nashville and Davidson County, Tennessee, for some 30 years. A rumor circulated in her department that the employee relations director was sexually harassing some of the female employees, so HR began an internal investigation. When asked, Crawford acknowledged that the director had harassed her in several ways; she described instances of the man's offensive behavior. She was one of three women who related similar experiences.

The employer decided that, lacking witnesses to any of the incidents, it could draw no conclusions about the director's conduct. But soon after the investigation, it fired all three women. In Crawford's case, she was accused of embezzlement, a charge the employer didn't pursue. Crawford filed suit for retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII).

Appellate judges for the 6th Circuit (covering Kentucky, Ohio, Michigan, and Tennessee) ruled that because none of the three women had filed a charge with EEOC, and Crawford had only answered questions, she wasn't covered by the anti-retaliation provision of the law. She appealed the ruling to the Supreme Court.

In a colorful opinion by Justice David Souter, who wrote of the "louche goings-on" in the workplace, justices noted that the law protects employees who "oppose" unlawful conduct by their bosses or colleagues. Appellate judges had said Crawford didn't take enough action to be seen as opposing the director's conduct. But the justices agreed that Crawford had done all she needed to do to "oppose." They pointed out that the 6th Circuit's ruling was at odds with one by the 7th Circuit (covering Illinois, Indiana, and Wisconsin) in a similar case, so their ruling straightened out the split.

Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act of 2009 was signed into law by President Obama on January 29, 2009. In practical terms, the law eliminates the time limit within which an employee must file a complaint of pay discrimination as long as he or she continues on your payroll. In other words, if a female employee had a supervisor 10 years ago that made pay decisions based on gender causing her to be paid less than her male counterparts, and that pay inequity was not corrected in subsequent pay increases, each paycheck will start a new statute of limitations.

This means the employee may file a charge of discrimination many years later when she learns of the discrepancy in pay. If that's not enough to cause employers concern, consider that the Ledbetter Act is an amendment to Title VII, the ADA, and the ADEA, effectively extending the statute of limitations for claims of compensation discrimination under all of the major federal civil rights laws.

Supreme Court Ruling Puts Spotlight On Employee Testing

Employers that use tests in their hiring and promotion processes should not automatically disregard the results if a test appears to have had a disparate impact on a protected category of applicants or employees, according to Attorney Joseph A. Saccomano Jr. This is because the Supreme Court recently ruled that an employer needs "a strong basis in evidence" to decide against validating such test results.

After white and Hispanic firefighters performed better than their black co-workers on a promotional test, the city of New Haven, Connecticut, decided to discard the results, fearing that the test had a disparate impact on black firefighters and that certifying the results would lead to litigation, says Saccomano, a managing partner with Jackson Lewis (www.jacksonlewis.com).

However, 17 white firefighters and one Hispanic firefighter who had taken the test filed suit, alleging that the city's decision discriminated against them and violated Title VII and the Equal Protection Clause.

Lower courts ruled in favor of the city. In a 5-to-4 vote, however, the Supreme Court ruled for the firefighters on the Title VII claim, but did not address the equal protection claim (*Ricci et al. v. DeStefano et al.*). "All the evidence demonstrates that the city rejected the test results because the higher scoring candidates were white," the majority opinion wrote. "Without some other justification, this express, race-based decisionmaking is prohibited."

That justification is "a strong basis in evidence," which Saccomano says includes evidence that:

- ◆ The test is not job related.
- ◆ The test is inherently unfair to a particular group.
- ◆ Another test that would yield a less disparate result is available.

Although the Court decision is "more relevant for public employers because they [administer] more civil service tests" and more tests for hiring and promotions, private employers also need to understand the implications of the case, Saccomano says. "If you're going to rely on tests, you have to go to significant lengths to make sure the tests are job-related, all applicants have equal access [to the same information on which the test is based], and the applicant pool is diverse," he explains.

Even if the test results reveal a potential problem, you cannot ignore them "just because you're afraid you're going to get sued," he says. "If you give a test, you kind of have to be prepared to live with it" unless you have strong evidence that there is a problem with the test.

Family Responsibility Discrimination

EEOC has issued enforcement guidance that addresses unlawful, disparate treatment of workers with caregiving responsibilities. Title VII does not expressly prohibit discrimination against parents or other workers with family responsibilities; however, employment practices that discriminate because of sex-based stereotyping or assumptions about caregiving responsibilities may constitute unlawful sex discrimination.

For example, an employer may unlawfully discriminate when it fails to promote a female worker with caregiving responsibilities because it perceives her as more committed to caregiving than to her job, or when it denies a male caregiver parental leave or other benefits routinely granted to female caregivers.

According to the guidance, unlawful sex-based discrimination against a caregiver may include:

- ◆ Employment decisions that discriminate against workers with caregiving responsibilities if the decisions are based on sex, regardless of whether the employer discriminates more broadly against all members of the protected class (e.g., sex discrimination against working mothers is prohibited even if the employer does not discriminate against childless women).
- ◆ Employment decisions or practices based on assumptions or stereotypes about pregnancy.
- ◆ Subjecting a worker to less favorable treatment, despite the absence of a decline in work performance, after the worker assumed caregiving responsibilities. However, employment decisions that are based on an employee's actual work performance do not violate Title VII, even if an employee's unsatisfactory work performance is attributable to the caregiving responsibilities.
- ◆ Denying male employees opportunities that have been provided to working women or subjecting men who are primary caregivers to harassment or other disparate treatment based on unlawful assumptions about working fathers and other male caregivers (e.g., denying male employees' requests for leave for childcare purposes while granting female employees' requests).
- ◆ Adverse employment decisions based on gender stereotypes even if well intentioned and perceived by the employer as being in the employee's best interest (e.g., assuming that a working mother would not want to relocate to another city even if it would mean a promotion).
- ◆ Sex-based harassment of workers with caregiving responsibilities when the conduct is sufficiently severe or pervasive to create a hostile work environment.
- ◆ Retaliating against workers for opposing unlawful discrimination (e.g., complaining to their employers about gender stereotyping of working mothers, filing a charge, or testifying on behalf of another worker who has filed a charge).

EEOC has also issued a supplement to the guidance that provides suggestions for best practices by employers. The suggested practices include ensuring that all job openings and promotions are communicated to all eligible employees (regardless of caregiving responsibilities), monitoring pay practices and performance appraisal systems to ensure that employees are not penalized for their caregiving responsibilities, and developing an effective policy that addresses caregiver protections under the law.

When developing an antidiscrimination policy, employers should check local laws and regulations, as some states and municipalities expressly prohibit employment discrimination based on parenthood or family responsibilities.

White House Council on Women and Girls

President Obama has created the White House Council on Women and Girls (Council). The Council will ensure that agencies across the federal government take into account the particular needs and concerns of women and girls. The Council will begin its work by asking each agency to analyze their current status and ensure that they are focused internally and externally on women.

In particular, the Council will work to enhance, support, and coordinate the efforts of existing programs for women and girls. The Council will also work as a resource for each agency and the White House so that there is a comprehensive approach to the federal government's policy on women and girls. The priorities will be carried out by working closely with the president's Cabinet secretaries and relevant agency offices that focus on women and families.

The Council will also focus on the following areas:

- ◆ Improving women's economic security by ensuring that each of the agencies is working to directly improve the economic status of women.
- ◆ Working with each agency to ensure that the administration evaluates and develops policies that establish a balance between work and family.
- ◆ Working hand-in-hand with the vice president, the Justice Department's Office of Violence Against Women, and other government officials to find new ways to prevent violence against women, at home and abroad.
- ◆ Helping build healthy families and improving women's health care.

#7 Green Movement and Corporate Social Responsibility

Two areas currently getting a lot of media attention that will affect employers in the new decade are the "green" environmental movement and the ethical and social responsibilities of companies and their management to their employees, customers, and communities.

The Green Movement

Best Practice: Commuter Benefits Bring Financial and Environmental Relief

While the definition of the word "green" has expanded in recent decades, if you provide your employees access to commuting benefits, you will actually be using two definitions of the word: helping to keep the environment cleaner and putting some cash back in employees' wallets. Larry Filler, president and CEO of Transit-Center, Inc., says that you can provide commuter benefits at little cost, and that goes a long way toward environmental and employee relations goals.

TransitCenter (www.transitcenter.com) has been around for about 22 years, and was originally intended as a way to reduce congestion in New York City. "There was a lot of driving coming into the central business district of New York, Manhattan really. We were looking for an incentive to get people to commute." The program evolved from transit vouchers of \$15 per month to include other forms of commuting benefits, and from transportation only in and around New York City to cities across the entire United States.

Along with its role as an advocacy group for commuter benefits, TransitCenter is also a provider. TransitChek is the name of their nationally available program. "There are two basic parts of the commuter benefit," says Filler. "There is the transit/vanpooling benefit, which is a tax-free amount up to \$115 a month that employees can use to pay for expenses associated with either transit or vanpooling. The other part is commuter parking. Parking is set at \$220 a month tax-free, to cover the cost of commuter parking."

If you are wondering why the parking benefit, which after all, encourages people to drive, is set at a higher limit than is the transit/vanpooling benefit, Filler explains the history. Originally, the parking benefit was unlimited and there was no transit benefit. By 1993, the cap on parking was set at \$155, and the transit benefit was \$60 per month. The disparity continues, even as the figures are adjusted for the cost of living.

"We've tried to narrow the gap," says Filler. "We've been working the last 2 or 3 years with various members of Congress to equalize the benefits to promote transit over driving, consistently on a federal level." In the meantime, though, the allowable uses of the parking benefit are broader than you might expect. "It includes not only parking at a facility at or near a location where an employee works, but also it includes parking at a facility from which an employee commutes by transit, vanpools, or carpools. That is a result of our hope to support transit and ridesharing."

Best Practice: 'Green' Colors Sustainable Practices at The Standard

When Standard Insurance Company (The Standard) added Zipcars as a benefit for employees, no one was terribly surprised. The Standard is headquartered in Portland, Oregon, where green is considered a primary color.

And while Zipcars are a fun and convenient way for people to reduce their impact on the environment, it turns out that they are only one way The Standard is thinking green in an effort to benefit their communities and their employees.

Carrie Farrar, The Standard's sustainability coordinator, reports that the company also offers a comprehensive alternative transportation program. And while Farrar is responsible for overseeing the 3,400-employee company's sustainability programs, she doesn't do it alone; she has the help of the company's volunteer "green team."

"We have a base of passionate employees who care about sustainability and want to see green initiatives move forward within the organization," says Farrar. "I feel like that's essential to businesses just starting out thinking about sustainability, because there is a group of employees who will be the champions of new programs. They will be the word of mouth, and things really grow when you have an excited group of employees working on these sorts of things."

Of course, we all understand that taking care of our environment is a positive thing to do, but Farrar believes there are really two reasons to do so. First and foremost, reducing the impact of businesses (and individuals) on the environment can only contribute to the health of the planet and the people on it. Also important, though, is creating a competitive edge in hiring new employees. Companies like The Standard tend to attract employees who share their vision.

Not only does The Standard's emphasis on green initiatives make it easier to hire and retain like-minded employees, but Farrar believes that employees who are enthusiastic about their company's values produce more and better results.

Green is also a favorite color at The Standard wherever they have employees, Farrar says. "This (kind of movement) is something that's happening everywhere. Portland certainly has a lead on it. But the benefits that we're offering to Portland employees, those are available for the most part to employees across the nation. Of course, that depends on the infrastructure that's available in their city, and we can't really influence that. But where alternatives are available, we encourage them."

Corporate Social Responsibility and Ethics

Why Ethics Programs Fail and How to Help Yours Succeed

Lack of leadership buy-in, limited resources, and a misconception that certain decisions are solely business issues are among the common problems that derail workplace ethics programs, says Dr. Patricia Harned, president of the Ethics Resource Center (ERC). Harned says the generally accepted definition of an effective ethics and compliance program encompasses six key components outlined in the Federal Sentencing Guidelines, used by federal judges to evaluate whether a company has an effective program in place:

1. Written standards of ethical workplace conduct
2. A way for employees to report ethical misconduct anonymously
3. Ethics training for all employees and board members
4. A specific office, telephone line, e-mail address, or website where employees can ask ethics-related questions
5. Evaluation of ethical conduct as part of employees' regular performance appraisals
6. Discipline for those who commit ethics violations

Harned offers a few tips to help HR and ethics professionals work together to promote an effective program:

Establish a Code of Ethics

For senior management and HR executives of many small companies, it may seem a formidable task to undertake the development of a code of ethics. However, constructing one may have long lasting, positive effects on the business culture in your organization. It may also enhance your employees' dedication and commitment to their work and positively influence their behavior in the workplace.

A code of ethics illustrates for customers, employees, and the community your organization's expectations for corporate conduct. The code of ethics becomes the game plan from which employees can develop appropriate business strategies, and managers can implement work policies and procedures.

The basis for the code of ethics should be the standard to which the organization aspires to reach and wishes to be measured against. For example:

“Our organization will put its customers first in respect to both service and the quality of the products that we sell.”

A code of ethics can be specific, denoting purposeful, detailed statements requiring adherence on the part of management and employees. Or, it can be more general. For example:

“We will respect every customer and every employee as a valued and equal individual with whom we interact every day, regardless of the rank of the employee or the amount of the customer's business that we can expect to fulfill. We will stand behind the quality and value of the products that we produce and will be honest and forthright in our communication with customers, employees, and the community.”

One helpful resource that can be used by employers in developing their own code of ethics was developed by the U.S. Department of Commerce nearly a decade ago. This document encourages businesses to “adopt a code of conduct for doing business around the world.” The basic principles suggested by the Department were the following:

- ◆ Provision of a safe and healthy workplace
- ◆ Fair employment practices, including avoidance of any type of discrimination
- ◆ A maintained responsibility for environmental protection and practices
- ◆ Compliance with laws promoting good business practices and ensuring fair competition
- ◆ Maintenance of a corporate culture that respects free expression consistent with legitimate business concerns and does not condone political coercion in the workplace; that encourages good corporate citizenship and makes a positive contribution to the communities in which the company operates; and where ethical conduct is recognized, valued, and exemplified by all employees

Promoting the code. The CEO may introduce the new company code of ethics with great fanfare to all staff at an employee meeting, and HR may post it in prominent areas throughout the firm's location(s). After the initial introduction of the code, it should be presented to all new employees during employee orientation, or even to employment candidates during the recruitment and interviewing process. Senior management should require that each employee review the code of ethics and sign a statement that requires him to agree to follow the code.

Reviewing the code. Once a code of ethics has been put into place, HR executives and senior leadership should review the code on an annual basis and solicit employee feedback with a mechanism such as an anonymous employee survey or discussion facilitated by an objective outside resource. Such practices allow employees to share their experiences with adhering to the code of ethics and their observation of other employees and managers regarding their ethical behavior.

Adjustments and changes to the code may be implemented as necessary to reflect any changes in the firm's structure, business strategies, or in response to changes in the business environment. In addition, regular conversation about the code should be commonplace in department meetings and ongoing employee training. A code of ethics should not be a statement that is developed and put on the shelf. It should become a living document that is followed every day.

Other statements on ethics. In addition to an ethical code, employers may wish to integrate ethics standards into other company messages and policies. The following are some other ethical messages your company might want to communicate in company publications, handbooks, and training and orientation sessions:

- ◆ All company stakeholders (employees, management, stockholders, vendors, etc.) share the common goal of delivering the highest quality product or service on time and on budget.
- ◆ Individuals are responsible and accountable for their actions and behavior as they relate to colleagues and the organization as a whole.
- ◆ Fairness is a company focus requiring commitment and cooperation among all interest groups.
- ◆ Illegal, immoral, and questionable behavior in the workplace will not be tolerated.
- ◆ Good manners and respect for all other employees and customers are expected *at all times*.

It is important to note that just saying that the company is committed to high ethical standards isn't enough; the standards must be communicated frequently, clearly, and consistently.

Best Practice: Building Playgrounds

Organizational leaders and HR executives partner with KaBOOM!, headquartered in Washington, DC, to build playgrounds in communities around the United States, Canada, and Mexico. "We don't build playgrounds by ourselves; we build them in partnership with corporations in communities across the country whose employees provide the sweat equity," explains KaBOOM! CEO Darell Hammond.

"KaBOOM! is the national nonprofit that empowers communities to build playgrounds," its company literature explains. "We passionately believe that play has purpose, and that unstructured play in particular helps make children happier, fitter, smarter, more socially adept, and creative."

In 1995, when Hammond was 24 years old, he read a news article in the *Washington Post* about two children who suffocated and died while playing in an abandoned car with dolls on a very hot day. "I said, 'this can't happen.' And the idea for KaBOOM! was born. There wasn't a playground within miles of where they lived, and we built a playground. This [KaBOOM!] is about giving kids hope, confidence, and the feeling that possibilities exist."

Hammond explains that KaBOOM! always partners with companies that support the playground builds, often financially and always with employee volunteers. KaBOOM! also partners with local nonprofit organizations that provide services to children, which generally own the property where the playground will be located

and sometimes help with fundraising. He notes that the playgrounds are customized, based on the dreams and drawings of local children imagining what their playground could be.

In some cases, corporations provide the entire financial support, but often the cost of the project is supported by a combination of business funding, fundraising by a company's employees, and fundraising and local dollars from the communities in which playgrounds are built. For example, smaller companies may band together through organizations such as Rotary Clubs or Kiwanis to sponsor a playground build.

Best Practice: Food Lion's Nutritional Initiative

Employee wellness and a focus on preventive health measures began in 2002 at Food Lion, LLC, a grocery store chain in 11 southeastern and mid-Atlantic states, and have evolved to become a companywide health initiative for customers and employees. In fact, Karen Peterson, corporate communications manager, notes that in fall 2008, *Health Magazine* named Food Lion one of the top 10 healthiest grocery store chains in the United States.

The latest program, the Guiding Stars Nutrition Navigation System, a new effort that labels food items sold in Food Lion stores based on their nutritional content, was rolled out during summer 2008, first to the approximately 73,000 employees and then to store customers. Many food products (more than 28,000 were evaluated) in the stores receive one, two, or three stars for good, better, and best, depending on nutritional content and based on a rating system following a specific algorithm.

Communication with associates regarding the program rollout included sending out materials to all stores for managers to go over with staff, a brochure, and online materials through the Food Lion associates' website.

#8 Social Networking and Blogging

Social Networking

Recently, employers have recognized that social networking sites such as Facebook, LinkedIn, and MySpace can be useful marketing and recruiting tools. Likewise, employees have increasingly been utilizing social networking sites for a variety of uses, both personal and professional. Although these sites can be beneficial, their use can also have risks.

Discrimination. Some employers review social networking sites as a method of screening applicants. Generally, once an applicant or employee posts something on a public domain, such as a social networking site, an employer is free to view it. However, by viewing candidate profiles, employers may learn more information (e.g., race, disability, age, religion, family/marital status, sexual orientation) than the employer could legally ask about directly.

Therefore, it is critical that employers base all interviewing and hiring decisions on job-related criteria. Employers must also be aware that everything they find on a

social networking site may not be current, accurate, or even placed there by the prospective applicant, as users of these sites sometimes “pretext” or pretend to be someone else.

Background check laws. The federal Fair Credit Reporting Act (FCRA) requires employers to obtain applicants’ consent when a third party conducts a background investigation. Some states also have their own background check laws. It is unclear whether these laws would require consent from an applicant before an employer or third party conducted an Internet search as part of a background check. However, even if not legally required to do so, employers should consider getting consent so that applicants are on notice that the information they post on social networking sites may be reviewed by the employer.

Employers are checking social networking sites. Nearly 27 percent of employers say they check job candidates’ profiles on social networking sites like MySpace and Facebook or use Google to search for online information on prospective employees, according to a survey by the National Association of Colleges and Employers (NACE).

Marilyn Mackes, NACE executive director, says job hunters need to keep in mind that information they have posted online and made public could be viewed by potential employers. Among respondents that reported checking social networking sites or using Google, just 7.4 percent said that it was standard practice and that they conduct such a check on all or most of their job candidates. Slightly more than 41 percent said they check online profiles occasionally, and 35.3 percent characterized their use of this practice as “infrequent.” The 2009 survey included 253 respondents from NACE’s employer membership.

Monitoring employee use of social networking sites. The limited case law in this area does not address social networking in the employment setting. However, the few cases in this area suggest that courts will be reluctant to uphold an invasion of privacy claim (whether based on the federal constitution or state common law) when an employee voluntarily posts information on a public site.

For example, a California state court rejected an invasion of privacy claim by a college student who posted an essay highly critical of her home town on a social networking site (*Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125 (2009)). The student’s former school principal forwarded the post to a local newspaper, which published it. The student and her family subsequently received hostile treatment from community members, including some death threats. The student claimed that the school principal invaded her privacy by sending the post to the newspaper.

The court rejected her claim, noting that she posted the essay on a social networking site available to anyone with Internet access. The court did, however, permit the student to pursue a claim of intentional infliction of emotional distress against the principal.

On the basis of this case, employers should be aware that while it may not be an invasion of privacy to access an employee’s social networking site, actions taken based on the information on the site may lead to liability under other legal theories. Also, some states have laws prohibiting employers from taking adverse action against an employee for engaging in legal activities while off-duty. An employer in a state with such a law may face liability if it takes adverse action against an employee because of the employee’s legal activities shown on a social networking site.

Practice tip: Because this area of the law is in its infancy, employers should consult with legal counsel before taking adverse action against an employee because of his or her posts on a social networking site.

Right to organize. Another possible concern for employers that monitor employee use of social networking sites is the NLRA, which protects employees' right to engage in concerted activity regarding terms and conditions of employment. The NLRA applies to both unionized and nonunionized workplaces. If employees use social networking sites to discuss employment conditions, employers may be liable for an unfair labor practice if they appear to be interfering with those discussions.

Employees' use of social networking sites. Employers may find that employees use social networking sites to post positive information about their organization's products or work culture. Unfortunately, employee posts can also be detrimental to employers. Therefore, employers should have policies in place setting forth their expectations regarding employee's social networking as it relates to the employer. Such policies should prohibit:

- ◆ Harassment of co-workers or customers;
- ◆ Interference or disruption of work because of social networking;
- ◆ Exposing trade secrets or other proprietary company information; *and*
- ◆ Disparaging comments about the company or its employees.

It is also a good idea to train employees on the proper and improper uses of social networking at or relating to work.

Some Social Media Basics Employers Should Know

As companies begin to use social media websites as part of their marketing or communication efforts, Millennials (those individuals born between 1982 and 2001) have already been using social media in their daily lives.

According to David Bauer, president of Ethos Business Law and a practicing attorney, "Millennials use social media as a communication tool, even more than e-mail. They embrace it; they understand it." This was the opening statement of an August webinar he facilitated with Carol Russell, CEO of Russell Herder. Russell added, "As [more] Millennials move into the workplace, social media is a tool that many use for all communication. If you block the use of social media, you will be stopping communication—period!" In other words, it's better to structure social media use than to forbid employees to use it.

According to a recent survey conducted by Ethos Business Law and Russell Herder, "Eight in 10 respondents believe that social media can enhance relationships with customers/clients and build brand reputation." Many respondents "feel such networking can be valuable in recruitment (69 percent), as a customer service tool (64 percent), and can be used to enhance employee morale (46 percent). The most popular vehicles being used include Facebook (80 percent), Twitter (66 percent), YouTube (55 percent), LinkedIn (49 percent), and blogs (43 percent)."

Whether your organization wants to formally begin to use social media as a marketing, relationship-building, and recruiting tool, or you need to know about social media because your staff may already be using it and mentioning the company or products, here is a brief overview of social media and advice for structuring its use.

Social media websites have been categorized as business-related or consumer-related, but there has been a blending of the categories lately. For example, businesses are beginning to use websites such as Facebook, a site that started as a purely social site frequented by students. LinkedIn and Twitter are other social media websites that businesses use to reach out to stakeholders and prospective customers.

Bauer provided advice regarding social media use. "First, define the strategy for using social media within your organization. This should be formed and defined out of the company's philosophy and culture and where the organization wants to go with social media."

Social media policy. Once you define the strategy, remember that the same basic policies apply in social media spaces as in other areas of your employees' work lives, he explained. Reviewing current company policies regarding e-mail and other forms of communication might be a good place to begin to formulate a social media policy.

When to use a disclaimer. Define for employees how to identify potential conflicts of interest, commented Bauer. Provide examples so employees understand how and when there might be conflicts of interest when they mix business and personal blogs (online, informal journal-type communication), "Tweets" (communications of 140 characters or less) through Twitter, or other types of social media. "When a communication or personal blog is traceable back to the company, it's important to have a disclaimer [noting that this is not the company's opinion, position, etc., but a personal post]," explains Bauer.

Training. Once policies and procedures have been put into place, training every employee in every department at every level of the company is critical and should be ongoing to keep it fresh in employees' minds, notes Bauer.

Blogging

A blog (short for "Web log") is an online journal where the writer posts his or her opinions on the Internet about any topic—including the workplace. Blogging has grown quickly in recent years with regard to both the number of individuals reading and posting to blogs and the number of blogs available on the Internet. There have been a number of highly publicized cases in which employees were disciplined or fired for disclosing confidential or proprietary information about their companies and/or describing their employers in an unflattering light.

Legal considerations. When addressing blogging by employees, employers should be aware of legal issues such as the employee's right to free speech and free association and the right to be free from restriction on off-duty activities. Many states prohibit employers from taking action against employees who engage in lawful off-duty activities. However, blogs can also be used to harass or defame co-workers or others. If the company allows the employee to use company facilities to create or maintain the blog, the company may be liable for the illegal actions of the employee.

In order to prevent inappropriate blogging, employers should consider adding a blogging provision to any existing Internet or electronic communication policy or creating a separate policy on blogging.

Blogging Policy

Issues and questions to consider when formulating a blogging policy include:

- ◆ **Confidentiality.** Describe what obligations employees have to maintain the company's and customers' proprietary information in confidence (including existing policies, contracts, and laws regulating confidential information).
- ◆ **Respect of dignity.** Include a statement that the blogger should respect the dignity of others and refrain from posting personal information about or pictures of co-workers, supervisors, or managers.
- ◆ **Competitors.** May employees use a blog to tout competitors? Criticize competitors? Disparage competitors? Defame competitors?
- ◆ **Identification.** Are employees permitted to reference the company in their blog entries? If yes, employees should be asked to include a disclaimer stating that the blog posting represents their personal opinions and is not the official position of the company.
- ◆ **Business developments/ideas.** If an employer requires employees to disclose all business developments or ideas that are within the scope of the company's business, include such a statement in the blog policy.
- ◆ **Media.** May employees comment to the media about the company's business or about customers? May they publicly criticize customers? Vendors? Co-workers? Supervisors or managers? The company?
- ◆ **Facilities.** May employees use company facilities to develop, design, and maintain their websites/blogs? Are employees permitted to read and post messages to blogs during work time or from the workplace?
- ◆ **Monitoring.** State that the company monitors its facilities, e.g., Internet, computer systems, networks for compliance with this policy, and monitors the use of its name and trademarks on the Internet.
- ◆ **Deleting.** State that the company will delete from its website, files, computer systems, and storage media any unauthorized materials it may find, at any time, and without notice.
- ◆ **Correlate with other policies.** Include references to related policies such as computer and Internet use policies, confidentiality, duty of loyalty, media, harassment, proprietary rights, copyrights, and the like.
- ◆ **Discipline.** What discipline will be imposed if the employee violates the policy? Generally, employers should reserve the right to decide the appropriate level of discipline in any given circumstance, up to and including the immediate termination of employment.

#9 HR Metrics

Metrics are not unique to the HR profession. They are used in almost every area of business, in government, and in education. A metric is simply a way to measure and track key performance indicators. In education, the key metric is often student

performance on standardized tests, which is then used to drive educational priorities to improve performance on the next round of tests.

Metrics are used in Human Resources to measure and track the performance of a company's largest investment, its investment in human capital. More to the point, HR metrics measure the performance of a company's investment in hiring, training, and retaining employees.

What to Measure

Deciding what to measure is very important. Metrics should be tied directly to the business issues facing the company. These might include a need to cut costs because of price competition, improve customer satisfaction, or develop new technology to keep pace with competitors.

To be effective, the metric should not just report results but show a cause-and-effect relationship. In addition, to the extent possible, the HR professional should try to use formulas, ratios, and language commonly used by the organization's other business leaders.

For instance, ROI (return on investment) is universally understood in the business world. A company's investment in human capital (its employees) is usually its largest investment. And the HR professional needs to take the lead in identifying where these resources can best be allocated to meet the company's goals and how to hire, develop, and retain the human capital the company needs to stay competitive now and in the future.

A good metric is one that provides decision makers with the data needed to make fact-based decisions. One example of a metric is measuring turnover in an organization. It is helpful to know what percent of the total number of employees left the company during the year. However, it is probably more useful to know how many of those people left voluntarily as opposed to those who left involuntarily.

When choosing what to measure in your organization, consider the following:

- ◆ Use data that are readily available and can be gathered at regular intervals.
- ◆ Use the ratios, formulas, key performance measures, and language used by business leaders.
- ◆ Include measures of results and quality—don't limit the focus to costs.
- ◆ Tie metrics directly to the key challenges facing the business and the results that must be achieved.
- ◆ Use only metrics that add value in making decisions.
- ◆ Keep it simple. Metrics don't have to be complicated.
- ◆ Identify and compare results to key competitors whenever possible.
- ◆ Measure ROI, cost/benefit ratios, and impact on problems identified by business leaders.
- ◆ Avoid soft metrics based on feelings or intuition about a program, and use hard metrics or data to drive fact-based decision making.

Types of Metrics Available to HR

Metrics generally measure one of the following:

- ◆ Increased job performance (e.g., new recruiting program resulted in new employees with first year job performance ratings that are 30 percent higher than under the old program)
- ◆ ROI (e.g., new commission plan resulted in \$100 of increased sales for each additional commission dollar paid)
- ◆ Impact of a program on revenue
- ◆ Decreased costs

There are a potentially endless number of metrics available to the HR professional. The key is to pick metrics that focus on key issues and tell the story. It may be that a series of single metrics when viewed together tell the story better than a single metric examined in isolation.

Following are some of the metrics the HR professional may want to consider for each functional area of Human Resources:

Metrics for the Recruiting Function

The recruiting or employment area is focused on hiring the employees the organization needs to meet its goals. Measurements include:

- ◆ Time to fill a vacancy
- ◆ Quantity and quality of applications based on recruiting source
- ◆ HR cost per hire
- ◆ Voluntary turnover rate of new hires during first year of employment
- ◆ Percent of new hires performing above average by the end of the first year
- ◆ Percent of new hires performing below expectations by the end of the first year
- ◆ Involuntary turnover rate during the first year of employment
- ◆ Satisfaction of managers with the hiring process based on survey of hiring managers
- ◆ Quality and retention rates of new hires by recruiting source
- ◆ Diversity ratios of new hires

In most cases, no single metric will adequately gauge the performance of the recruiting function. Rather, some combination of the metrics listed above along with others created by the organization will provide the information necessary to measure performance and effectiveness. The use of several individual metrics to measure a function is often referred to as an "HR scorecard" and will provide a more complete story of how the recruiting function is meeting goals.

Metrics for Employee Relations

The employee relations function is different from the other HR functions in that it is a little harder to quantify. However, if the employee relations professionals are

doing the job right, the company should see fewer lawsuits and complaints filed with state agencies, lower settlements when complaints are filed, and better outcomes when there are performance issues and/or conflicts in the workplace.

Some of the metrics that can be used to measure employee relations include:

- ◆ Number of complaints filed by employees
- ◆ Percent of complaints that proceed to a state agency, court, or other external dispute resolution
- ◆ Amount of time taken to resolve an internal complaint
- ◆ Percent of cases resolved with no money paid out by the company
- ◆ Percent of cases where large financial settlements or awards were made
- ◆ Breakdown of the types of complaints made by employees by department (e.g., sexual harassment, race)
- ◆ Costs associated with employee relations as percent of total operating costs
- ◆ Percent of cases where documentation was inadequate
- ◆ Number of sexual harassment complaints
- ◆ Number of complaints of unfair treatment
- ◆ Number of hours spent on training managers on employee relations issues
- ◆ Data from employee surveys on various employee relations issues such as understanding of policies
- ◆ Dollars spent on attorney's fees
- ◆ Dollars spent on attorney's fees as a percent of total employee-relations costs

As with recruiting, companies will probably want to use some combination of these metrics as their employee relations dashboard. Comparisons from year to year will help evaluate the effectiveness of the employee-relations function.

Metrics for Compensation Programs

Compensation programs are all about the numbers and, as a result, metrics are relatively easy to apply. Measurements may include:

- ◆ Compensation costs per dollar of profit
- ◆ Compensation costs per dollar of revenue
- ◆ Analysis of performance and production levels of employees paid in the top 30 percent of their salary range
- ◆ Total compensation costs as a percent of total company operating costs
- ◆ Analysis of compensation levels to the marketplace and key competitors
- ◆ Forecast compensation needs based on future plans
- ◆ Compensation mix, meaning fixed salaries versus performance-driven compensation

Metrics for Training Programs

Training is another area that can be difficult to quantify. However, it may be helpful to look at metrics that target the type of training and what it was intended to accomplish.

For instance, metrics for training programs can include:

- ◆ Cost of sales training as a percent of total sales
- ◆ Increases in hours of sales training compared to increases in sales
- ◆ Changes in performance levels of employees who received training
- ◆ Percentage of employees that cite lack of training or advancement as a reason for leaving
- ◆ Identification of key employees and percent that have received training
- ◆ Percent of performance appraisals that include training goals for employees

Strategic Alignment

The role of HR is changing as fast as technology and the global marketplace. Historically, the HR department was viewed as administrative overhead. HR processed payroll, handled benefits administration, kept personnel files and other records, managed the hiring process, and provided other administrative support to the business.

These functions were viewed as administrative necessities, but not as integral parts of the core business. Today, many of these old administrative functions have been automated and/or outsourced. The positive result of these changes is that HR professionals have the opportunity to play a more strategic role in the business.

Business leaders focus on revenue, profit growth, market share, new products, and increasing capacity. These can all be measured using metrics that describe the current situation, compare current numbers with previous years' or with a competitor's position, and quantify goals and measure progress. By measuring the current situation compared with quantifiable goals, business leaders make data-driven decisions.

In order to be a business leader, the HR professional must utilize a similar approach to decision making, one based on data and facts. Decisions related to the allocation of resources, technology purchases, succession planning, hiring and retention, training, employee performance, compensation programs, and outsourcing HR functions can all be based on data compiled through the use of appropriate metrics.

Measuring Your Results

Don't forget that the quality of results is as important as quantity or cost. Calculate ROI whenever possible to make the business case for HR. Use metrics to identify trends and head off problems on the horizon. Don't be afraid of data or of measuring results. Metrics can add to the HR professional's credibility and garner support for HR programs.

#10 Privacy and Identity Theft

Privacy

Several states have enacted statutory or constitutional provisions guaranteeing their citizens the right to privacy from certain intrusions. In the absence of a state constitutional provision or existing law, however, private employees enjoy relatively little freedom from workplace intrusion. Therefore, private employees must look to common, or judge-made, law to find privacy protections.

There are essentially four common-law privacy claims that are available to private employees. These are:

Intrusion into an individual's private solitude or seclusion. An employee may allege this form of privacy invasion when an employer unreasonably searches (e.g., a locker or desk drawer) or conducts surveillance (e.g., dressing rooms) in areas in which an employee has a legitimate expectation of privacy. An employer's improper questioning of an employee (e.g., sexual habits or orientation) may also give rise to this type of claim.

Note: Under this claim, the employer's intrusion into the employee's private affairs must involve a genuinely private matter and *must* also be of such a nature that a reasonable person would deem the intrusion to be "offensive." Therefore, an employer's receipt of employee test scores after the conclusion of a company-sponsored training session will most likely *not* be judged offensive. However, an employer's unjustified investigation into an employee's *privately* funded and ongoing psychiatric treatment may be viewed as offensive.

Public disclosure of private facts. An employee may claim this form of privacy invasion when an employer publicly discloses private and arguably embarrassing facts about an employee to a wide audience without his or her permission. In order to sustain such a claim, however, an employee must be able to show that the information was genuinely private, the employer's publication of the information was offensive by reasonable standards, and the employee suffered a resulting injury. For example, an employer's communication to employees that a co-worker had undergone a mastectomy might be an unreasonable publication of private facts.

Portraying an individual in a false light. Under this theory, if an employer attributes a false or offensive conduct or characteristic to an employee that is not true (e.g., criminal activity), the employee may claim invasion of privacy.

Use of an individual's name or likeness. When an employer uses an employee's photograph, likeness, or attributes specific statements to an employee without his or her permission, an individual may have a valid misappropriation claim (e.g., the employer publishes an employee's photograph or likeness on company brochures without first obtaining the employee's consent). The overriding principle governing such claims is that an individual has an exclusive right to his or her identity. To prevent such claims, employers should obtain a release from the employee before using his or her name or likeness.

New Federal Privacy Law Barring Genetic Bias

The new Genetic Information Nondiscrimination Act (GINA), discussed on page 9, protects the confidentiality of individual genetic information. Under the law, "genetic information" is defined to include information about an individual's genetic tests, genetic tests of family members, and a disease or disorder in the family. GINA applies to both insurers and employers.

Group and individual health insurers are prohibited from using genetic information to determine insurance eligibility. Increasing an insurance premium based on genetic information is also prohibited.

GINA prohibits employers from discriminating against employees or applicants based on genetic information. The law applies to all public employers, private employers with 15 or more employees, employment agencies, and labor organizations.

Both insurers and employers are prohibited from requesting or requiring individuals to undergo genetic testing. However, an employer can collect information to monitor the biological effects of toxic substances in the workplace if:

1. Written notice is given to the employee;
2. The individual gives written informed consent in advance, or the monitoring is required by law;
3. The individual receives the results;
4. The monitoring is in compliance with federal or state regulations; *and*
5. The employer receives *only* aggregated monitoring results without information about specific individuals. There are other exceptions, including one for bona fide wellness programs that protect individually identifiable information.

GINA also has confidentiality requirements. Any genetic information that an employer lawfully possesses must be treated as a confidential medical record. GINA's requirements for confidentiality are the same as the requirements under the ADA. Therefore, if employers comply with the ADA's confidentiality requirements and keep medical information on separate forms and in separate medical files, they'll be in compliance with GINA.

Covered employers should update their nondiscrimination policies to reflect GINA's provisions. In addition, requests for information from healthcare providers should be reviewed to avoid obtaining genetic information from care providers. Specific language that reminds the provider not to send genetic information can be added, depending on the type of request. The law's provisions for insurers took effect in June 2009 and for employers, in November 2009.

Employer Procedures for Handling Address Discrepancies on Consumer Reports

Under the Fair and Accurate Credit Transaction Act of 2003 (FACTA) Section 113 (15 USC 1681c), two rules dictate how employers must handle address discrepancies on consumer reports.

1. **Section 113 applies to all employers.** When providing a consumer report to an employer (or any consumer report user), a nationwide consumer reporting agency (CRA) must provide a notice of discrepancy to the employer if the address provided by the employer in its request for the report "substantially differs" from the

address CRA has on file. All employers must develop and implement policies and procedures for verifying the identity of the consumer when there is an address discrepancy. These policies and procedures could include:

- ◆ Verifying the address with the consumer about whom it has requested the report
- ◆ Verifying the consumer's identity in accordance with the requirements of the Customer Information Program (CIP) rules
- ◆ Reviewing the employer's own records (such as applications, change of address notifications, customer account records, or retained CIP documentation) to verify the address of the consumer
- ◆ Verifying the address through third-party sources
- ◆ Using other reasonable means

After reconciling the address, an employer must send a confirmed address back to CRA if the following three conditions are met:

- ◆ The employer has formed a reasonable belief that the consumer is, in fact, the same person as the person identified in the consumer report;
- ◆ The employer has a continuing relationship with the consumer; *and*
- ◆ The employer regularly and in the ordinary course of business provides information to CRA.

2. FACTA Section 114 contains additional requirements for financial institutions and creditors. Financial institutions and creditors must also develop and implement a written Identity Theft Prevention Program that is designed to prevent and mitigate identity theft by detecting and responding to red flags that indicate there may be identity theft occurring in one or more of a company's accounts (15 USC 1681m).

Identity Theft

The Federal Trade Commission (FTC) predicts that in 5 years, the majority of Americans will have been victimized by identity theft. Much of the identity theft that occurs in the workplace happens when employees steal personal information of the company's co-workers, customers, or clients via their employer's computer system. Identity theft also threatens enterprise security, enabling corporate espionage and fraud, and theft of hard assets and intellectual property.

Large-scale or frequent identity thefts also results in significant negative publicity, impacting sales, partnerships, and employee recruiting and retention. Therefore, employers need to carefully control access to employee and customer financial information (via password protection); carefully control the transfer of such information; and carefully control the destruction/recycling of company documents.

Employers also suffer other significant costs when their employees experience identity theft. Conservative calculations based on current identity theft figures indicate that an employer with 1,000 employees, who make an average of \$40,000 salary per year, should expect to incur productivity losses of more than \$600,000 per year.

Employers who are concerned about identity theft hire outside consultants to perform a "penetration test" to assess the security of their computer systems. Such consultants will try to hack into your computer system (and will most likely succeed) and in doing so, will discover your weak points and help you fix them.

Identity Theft Law Requires Employer Compliance

A provision of the FACTA states that any employer whose action or inaction results in the loss of employee information can be fined by federal and state government, and sued in civil court. An employee is entitled to recover actual damages sustained if their identity is stolen due to the employer's inaction, or statutory damages up to \$1,000. Employees may also bring class action suits against employers for actual and punitive damages. In addition, federal fines of up to \$2,500 per employee and state fines of up to \$1,000 per employee may also be levied.

Protection as an Employee Benefit

One solution that provides an affirmative defense against potential fines, fees, and lawsuits is to offer some sort of identity theft protection as an employee benefit. An employer can choose whether to pay for this benefit. The key is to make the protection available, and have a mandatory employee meeting on identity theft and the protection you are making available, similar to what most employers do for health insurance.

Most Workers Trust that Employers Protect Personal Info

According to a survey by the American Payroll Association, 88 percent of employees are confident their company protects their personal information from identity theft. The online survey asked respondents: "How confident are you that your employer adequately protects your vital personal information from data breaches/identity theft?" Nearly 40,000 of the 45,180 respondents indicated they were either confident or very confident that their employer adequately protects their personal information.

When choosing the best alternative for protecting your employees and your company from identity theft, consider the four types of protection available:

- ◆ **Computer protection.** Antivirus, antispyware, wireless security etc.
- ◆ **Guidance on protecting against a variety of exposures of personal data** from shredding documents, to opting out of marketing databases, to tracking data in Social Security, driving, medical, and financial databases
- ◆ **Credit monitoring** at varying levels of frequency, sometimes with alert services in the event of credit inquiries or changes
- ◆ **Insurance coverage**, sometimes including assistance with identity recovery activities

A common theme to all of the "state-of-the-art" issues discussed above is the balance between a company's interest in operating a profitable and safe workplace, and the employee's interest in maintaining his or her privacy in an increasingly public world.

When formulating policies that balance the employers interest with the employee's interest in privacy, consider the following suggestions:

- ◆ Create appropriate notifications to employees about what you will monitor and when you will have the right to search or conduct surveillance. Disseminate your policies frequently to reduce employees' expectations of privacy.
- ◆ Tell employees specifically how you will protect their personal health information.
- ◆ Adopt a "minimum necessary" standard for monitoring, searching, or collecting medical information. Avoid using a baseball bat if a flyswatter would accomplish what you want. If you're concerned only about computer visits to porn sites, say so, and don't penalize people who shop online unless you note low productivity.
- ◆ Implement other safeguards, beyond those for personal health information, to protect personal information such as Social Security numbers, home addresses, and other data that can be used in identity theft.
- ◆ Train your supervisors and managers to abide carefully by your privacy policies. For example, remind them not to disclose a subordinate's medical condition to co-workers or other supervisors without the employee's express permission. Tell them to ask HR and/or legal counsel if questions arise.
- ◆ Review not only federal privacy protections but also, more importantly, the laws specific to the states where you do business.

State Data Breach Notification Laws

Most states now have laws requiring employers to give notice to affected residents in the event of a security breach. This is important in the context of personnel records because these records often contain the personal information these laws aim to protect.

Providing notice under these security breach laws is both time-consuming and expensive. One way employers can help prevent identity theft and unauthorized access to confidential records is encryption software. Many state security breach laws provide an exception for records that have been encrypted, or rendered unreadable. The cost of purchasing and installing this type of software may save employers many headaches down the road.

State data breach notification laws started in California, as so many trends, legal and otherwise, do. When most of us were just beginning to worry about identity theft, California passed a "breach of security" law. It required any business or industry that collects personal information about individuals to notify all affected individuals if it learns that those data have been stolen or accessed by an unauthorized person.

Although California's law was passed in 2002, most other states didn't begin enacting similar legislation until 2005 or later. There was a much-publicized trigger: Early in 2005, Georgia-based ChoicePoint confessed that it had inadvertently sold data on approximately 145,000 U.S. consumers to Nigerian thieves during the second half of 2004. However, the company, which conducts background checks and drug tests and verifies identity and credentials for thousands of people, followed the only breach of security law that existed then—California's. Individuals around that state whose data had been stolen were individually notified. That got the attention

of legislators in other states, who have been rushing ever since to put their own notification laws in place.

These statutes cover companies that maintain confidential data containing personal information, including an individual's name accompanied by, for instance, a Social Security number, driver's license number, credit or debit card or financial account information, and access code or password. Once the firm is aware that such data are no longer secure, it must determine whether there is a reasonable possibility that the data will be misused. If that's possible, the company must notify all affected state residents as promptly as possible.

In most states, notice must be given in writing, by telephone, or, if that's the way the firm usually communicates with the consumer, by e-mail. Many statutes provide that if the number of individuals involved makes the notification overly burdensome, or the firm doesn't have enough consumer contact information to handle the task, other media can be used—usually e-mail, posting on the company's website, and notice in major statewide media.

Conclusion

We hope that you have enjoyed this special report, and that you found the information contained in this report useful. BLR strives to provide Human Resources professionals with practical and easy-to-use information on a wide variety of topics. If you would like to see the complete library of publications available through BLR, please visit our website at www.blr.com or call our Customer Service Department at 800-727-5257.