

HUMAN RESOURCES 21

Business Intelligence for 21st-Century Human Resources, Benefits and Compensation Executives

Hidden risks in Supreme Court age-bias ruling

April 25, 2005
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◆ *Experts say old policies could trigger new exposures*

Plaintiff's attorneys all over the country are grinning like Cheshire cats now that the Supreme Court has expanded legal protection for workers over 40 years of age.

The media tend to focus on outright discrimination cases, like the 56-year-old fired by a North Carolina company two weeks after a supervisor told him, "You're too damn old for this kind of work."

POWDER-KEG ISSUES

But the real gold mine for lawyers in this new ruling isn't stuff that's been illegal all along. It's all the new exposure your company may face, from policies or

procedures with a "disparate impact" on anyone over 40. Some examples:

- Work rules, shift assignments or even locations that penalize older workers.
- Employee benefits that favor younger workers or those with families. Age-based insurance rates, co-pays or deductibles may be seen as unfair.
- Hiring policies or procedures that result in a younger workforce, out of proportion to the number of older candidates in the pool.

These powder-keg issues put HR between a hard place and a rock. How do you balance legitimate business need with
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Court: Out-of-state telecommuter must pay state tax on full income

In a case that could spread nationwide and affect your ability to recruit or retain telecommuters, New York has ruled that a Nashville man owes state income tax on his entire salary.

Thomas Huckaby, a computer programmer, dutifully paid New York state tax on the income he earned while working on-site at his employer's office. That amounted to about 25% of his salary.

STATE TAX COPS WANT MORE

Not enough, said the revenue-hungry New York state tax department, which insisted that Huckaby owed tax on 100% of the salary earned from his New York job. State taxes totalled \$4,300 including

penalties and interest. The Court of Appeals upheld the ruling.

The case has broad implications for HR because:

- Telecommuting is a hot trend. Some 12.4 million people telecommuted daily in 2004, up from 8.8 million in 2003, according to the International Telework Association and Council.
- You'll probably need to offer telecommuting as an option— and higher taxes can be a sticking point.
- You'll likely need to revisit the way you withhold and pay over state taxes, or consider treating telecommuters as independent contractors.

We'll keep an eye on this for you.

BENEFITS, COMP & HR MISCUES

In this regular feature we show how improper benefits, compensation and HR practices led to costly fines and lawsuits against companies.

◆ TRANSFERRED ACCUSER CRIES 'RETALIATION!'

After a female employee lodged a sexual-harassment complaint against her manager, she was transferred to another location.

Even though she went to a parallel position, it was still considered an act of retaliation by the courts. For one thing, she didn't ask for the transfer. Also, her manager was not disciplined.

The EEOC filed a lawsuit on behalf of the woman. The employer settled, agreeing to pay \$65,000, educate its managers about sexual harassment and post notices about employee rights in all its locations.

Cite: EEOC v. All Risk Insurance.

◆ BAD RECORDKEEPING

A company that deducted 15-minute breaks from hourly employees' pay

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AGE DISCRIMINATION

Hidden risks ...

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the natural desire to be fair to everyone concerned? Even the Supreme Court case was based on management's legitimate desire to make pay scales competitive and more attractive to younger workers.

COMPETITIVE PAY UNFAIR?

The city of Jackson, MS, gave raises to everyone on the police payroll. Those with less than five years of tenure received proportionately greater raises than those with more seniority. Nearly all the officers over age 40 had more than five years of service.

The older police officers brought suit under the Age Discrimination in Employment Act (ADEA). The case reached the Supreme Court after two lower courts held that the law required they must prove *intentional* discrimination.

That's a narrower interpretation of the ADEA, compared to Title VII of the Civil Rights Act of 1964, which allows women, blacks and other groups to prove only that a company's behavior or policy had a "disparate impact" on them.

The Court held that Congress intended that the ADEA offer the same protection as Title VII (both laws use identical language) and ruled that older employees can sue based on "disparate impact."

The plaintiffs didn't win their case: The city showed that to be competitive, it had to raise salaries. But the "disparate impact" standard the court used opens the door for more lawsuits. Some predict a 20% increase. Experts say a big percentage of these cases will go to trial, rather than get an early dismissal through summary judgment.

Nightmare scenario: Even the threat of lawsuits can cost big money. Harold Goldner, an attorney from Philadelphia and specialist in employment law, predicts the plaintiff lawyers who pursue Title III real estate "redlining" cases using dummy candidate pools will target businesses the same way.

"They'll send in a wave of applicants with identical credentials, 40% of whom are over 40. If only one in 10 of your new hires is over 40, you're exposed to a potential lawsuit," he says.

HOW TO PROTECT YOUR COMPANY

Employment law experts like Goldner recommend taking the following steps:

- Make sure you have written EEOC policies that are properly aligned from the standpoint of age, race and sex.
- Train HR gatekeepers and managers so they know and implement age-neutral hiring and firing practices.
- Review *all* company policies to ensure you are not unknowingly increasing your exposure to liability. Justify all your policies and corporate behaviors on a basis other than age.
- Pay particular attention to potential for age discrimination in pay and promotion practices.

Cite: Smith v. City of Jackson, No. 03-1160, U.S. Supreme Court. Info: www.goldnerlaw.com

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Quiz: USERRA

How well do you know the Uniformed Services Employment and Reemployment Act? Can you answer the following true-or-false questions correctly? See answers below.

1. Under USERRA, an employee has the right to reemployment after taking leave for military service if she provides written notice in advance of her leave.
2. Employees are covered under USERRA until they have missed more than five years of cumulative military service while with one particular employer.
3. After returning from military service, an employee has one year to apply for re-employment.
4. Employees must be offered their old jobs back, regardless of the circumstances of their discharge.
5. Even if a worker elects not to continue employer-sponsored health coverage during her military leave, she has the right to be reinstated upon her return, with no waiting period or provisions.

Quiz answers

1. False. Employees may provide either written or verbal notice of an impending military leave.
2. True. After an employee has been away on military leave for more than five years of cumulative time, the employer is no longer obligated to hold the job open.
3. False. According to USERRA, returning employees must make a "timely" application for re-employment.
4. False. USERRA covers employees who are discharged under honorable conditions only.
5. True. However, she will not be covered for injuries or illnesses connected to military service.

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HR LEGAL NEWS

Before firing, question *any* employee's protected status

◆ ALL WHISTLE-BLOWERS ARE PROTECTED FROM RETALIATION

Most executives understand the categories – age, race, gender, disability, nationality, religion – that define protected classes of employees. But not as many seem to appreciate how retaliation applies to people outside of protected classes as well as those inside.

'YOU WON'T LIKE MY TESTIMONY'

Bank executive Phillip Woodend saw what he thought was gender discrimination against a female colleague. Concerned the bank could be the target of a lawsuit, Woodend went to senior management.

He told his employer's top execs they wouldn't like what he had to say if he was called to testify in a lawsuit against

the bank. Management's response: Fire Woodend for poor performance. The action came despite a satisfactory performance review and pay raise just six weeks before the comment.

Woodend filed a lawsuit claiming he was fired in retaliation for engaging in protected activity. This case settled before it got to court: The employer agreed to pay \$262,500, train its executives in antidiscrimination practices and post notices of employee rights throughout the bank.

Top management may have overreacted to what it perceived as Woodend's threatening comment. But it should have kept in mind that speaking out in defense of a protected employee automatically casts the speaker – in this case, Woodend – into protected territory.

Cite: Woodend v. Bank of Oklahoma, No. 03-CV-657, N.D. Okla.

Court: Transfer to higher-stress, lower-pay job was not retaliation

◆ SIX MONTHS BETWEEN FMLA LEAVE AND TERMINATION WAS ENOUGH

If you must fire someone who took FMLA leave, how long a gap should there be between the leave and the termination to erase even the suggestion of retaliation? While there's no exact answer, this case sheds some light.

Service manager Charles McBurney was out of work for two months on FMLA leave following emergency surgery and a delayed recovery.

When McBurney returned to work, someone else was in his position, so he was given a parallel job in Quality Control with the same pay and benefits.

McBurney didn't like the new job. He asked for his old job back, but his request was denied. Six months later the quality control job was eliminated and McBurney was transferred to yet another

job with lower salary, longer hours and more stress, but an opportunity to make more money through commissions.

LOOKING FOR A CAUSAL CONNECTION

McBurney burned out, broke down and was granted another FMLA leave. But when his 12 weeks of leave ran out and he failed to return to work, his employment was terminated.

He filed a lawsuit claiming his transfer to the lower-salary job was in retaliation for his first FMLA leave. But a court found in favor of the employer.

In reaching its decision, the judge noted that a six-month gap between the leave and the transfer was too long to look like they were connected. Usually, courts look for a two-month-or-less gap as a sign of a causal link between events.

Cite: McBurney v. Stew Hansen's Dodge City, Inc., No. 04-1354, 8th Cir.

CASE – If You Were The Judge...

Based on the facts presented below, how do you think the courts ruled?

◆ WAS EXTRA SCRUTINY DISCRIMINATION?

HR Director Ann Sullivan sat down with General Manager Frank Abrams in a conference room.

"Frank, I just got off the phone with one of the managers. He's called a lawyer and is suing us for discrimination, specifically 'gender stereotyping,'" said Ann.

"Let me guess, it's Mike, er, Michele Mittler," said Frank. "What's his, um, her beef?"

"Michele says that we discriminated against her by denying her a promotion," said Ann. "She says we made our judgments based on stereotypes."

"Look, to do that job, Michele needs to earn the respect of the front-line workers. She needs to have some 'presence,' some ability to command their respect," said Frank. "But she doesn't. We tried her at supervisor – on probation. She doesn't project her voice. She doesn't seem confident. And sure enough the guys don't respect her."

Documented thoroughly

"Do you think the fact that she's a pre-operative transsexual influenced your decision?" asked Ann.

"Absolutely not," said Frank. "The last time we failed to promote someone, it was a young man who didn't project the right attitude. He needed time to grow up."

"Yeah, but did you videotape him on the job, record his conversations, and subject him to the same level of scrutiny as Michele?" asked Ann.

"We wanted to document this case thoroughly," said Frank. "So we went the extra mile."

"If I were to guess, that's not how a jury will see it," said Ann. "I think they'll say you singled Michele out."

Michele sued the company. Did the company win?

See the decision on page 8 to learn how the courts ruled.

HIRING STRATEGIES

Study: Perks for part-timers will have high payoff

◆ FIRMS FIND BENEFITS LURE ENERGETIC YOUNG PART-TIMERS ONTO PAYROLLS

Growing numbers of employers are finding ways to extend medical, retirement and other benefits to part-time workers in order to attract and retain this growing segment of the U.S. workforce.

Some reasons for this trend:

- In 2003, part-time workers made up 23.5% of the U.S. workforce, up from 19.5% in 1993, according to the U.S. Bureau of Labor Statistics (BLS).
- Only one in five part-timers has access to medical coverage, according to a March 2004 BLS survey.
- As Boomers reach retirement age, experts say most will want to continue working part time – and access to health insurance will be important.

These factors add up to an important competitive advantage for employers who adapt their compensation and

benefits programs to accommodate part-time employees.

THE STARBUCKS MODEL

Perhaps the most widely known example of the payoffs from offering part-time workers perks traditionally given only to full-time workers is Starbucks, the Seattle-based coffee merchant.

The coffee chain offers medical, 401(k) and stock-purchase plans, along with a pound of coffee a week, to part-timers who log at least 20 hours a week. Starbucks, in common with other employers, requires part-timers to contribute to health insurance premiums.

Another payoff: Using part-timers can make your workforce more attractive to insurers, who like healthy young workers best. One Portland, OR, firm cut both its co-pays and premiums by 10% when bidding out its health coverage, since most workers were under 30.

Management Notes

◆ FROM CONFLICT TO COLLABORATION

Employers who want to foster better collaboration throughout the organization may want to consider training in conflict management first.

That's because the real problem behind lack of collaboration in team settings is the baggage that employees bring with them, say Jonathan Hughes and Jeff Weiss of the consulting firm Vantage Partners.

For example, someone from R&D will spend weeks trying to get someone from manufacturing to help build a prototype, only to be rebuffed by manufacturing for appearing arrogant and demanding. "Those engineers in R&D expect us to drop everything, forget about our goals and help them!"

Prior history gets in the way

As a result of this "prior history," a company's effort to foster improved collaboration among different parts of the organization through teamwork training, while based on sensible assumptions, may ultimately be misguided.

The most critical collaboration breakdowns occur not on actual teams, but during routine workplace interaction among different groups.

These breakdowns occur months or even years prior to launching an effort at teamwork training. In some cases, existing, ongoing conflicts may sabotage efforts at building teamwork, given team members' hidden agendas.

Right solution, wrong problem

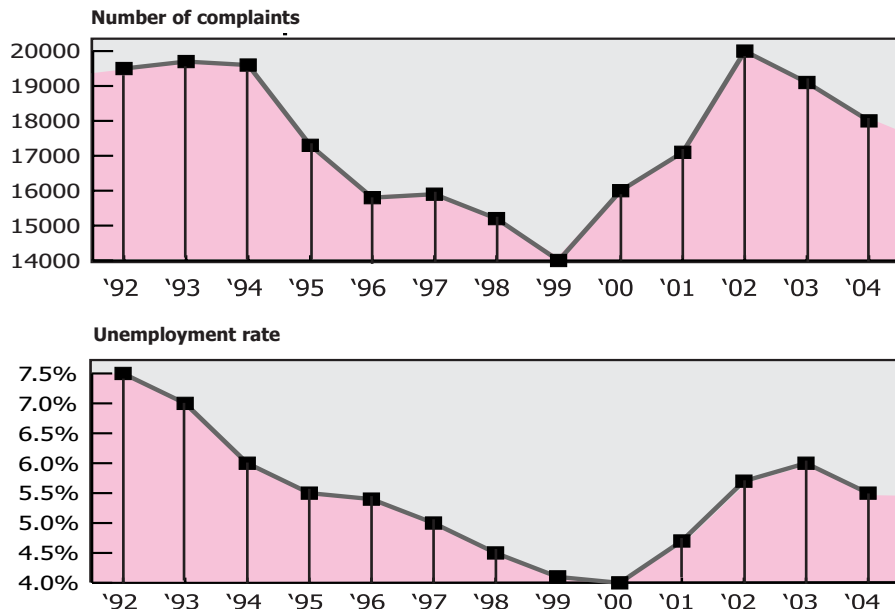
Hughes and Weiss advise HR pros to push back a bit when business leaders try to get HR to run managers through teamwork training. It's no silver bullet.

Sure, aligning around common goals and clarifying roles or responsibilities are good objectives. But team-building workshops are often "the right solution to the wrong problem." *Better:* Spend your scarce training dollars on conflict resolution, helping people with competing objectives and limited resources work better together.

Source: "Want Collaboration? Accept – and Manage – Conflict," by Jeff Weiss and Jonathan Hughes, *Harvard Business Review*, March 2005.

HOW TIMING AFFECTS YOUR LAWSUIT RISKS

Pass the word that timing matters when it comes to taking adverse action affecting your workforce. There's a close parallel between the jobless rate and EEOC discrimination complaints, as reported by the *Kansas City Star*. See related story, page 1.



Source: Equal Employment Opportunity Commission Data.

EMPLOYEE BENEFITS NEWS

New wellness incentive pays off: Work out, get cash

◆ WHEN IT COMES TO GETTING WORKERS OFF THE DIME, DOLLARS DO THE TRICK

Here's proof that money talks: More companies are offering cash rewards, gift certificates and even lower deductibles for employees who get screened and take part in wellness programs.

The idea is to intervene with people at high risk for costly conditions like diabetes or cholesterol that's off the charts, and get them to take preventive action, like working out.

Trouble is, the people most at risk seem least likely to change their ways – without a strong incentive to do so.

THE CARROT AND STICK APPROACH

Cash incentives are taking hold, both at global companies like Daimler-

Chrysler, and smaller operations like Foote Hospital in Jackson, MI, which began offering a \$190 credit to 800 employees who took action.

Daimler-Chrysler offers its 18,000 salaried employees \$240 per year off deductibles if they get screened. Hourly workers are not eligible; most are covered by union contracts.

Relentless double-digit premium increases have employers looking at nearly any alternative that will relieve crushing cost increases.

One wellness provider, Gordian Health Solutions, has added 22 new clients in just the last six months.

The firm administers health risk assessments and puts at-risk employees on a preventive regimen, including telephone counseling.

More employers boost benefits for workers who adopt children

◆ POLICY SENDS 'FAMILY FRIENDLY' MESSAGE TO EMPLOYEES, RECRUITS

Since 1990 the number of companies offering adoption benefits has tripled, according to Hewitt Associates research.

In 2003, companies offering reimbursement and time off beyond mandated FMLA requirements reached 39%, up from just 10% in 1990.

COURT COSTS, LEGAL FEES

Reimbursement usually covers attorney, adoption agency and court fees. According to Hewitt, the average reimbursement nationwide is \$3,879.

Some companies are more generous. Example: In January of 2005, JP Morgan Chase upped its reimbursement max from \$3,500 to \$10,000.

Borders, the bookstore chain, reimburses 80% of expenses up to

\$3,000 (\$4,000 for a sibling group).

One driver: International adoptions have jumped dramatically in recent years, adding to both costs and legal complications. Parents need more travel time, and want more get-acquainted time upon returning home, especially if the adopted child is three or four years old.

To accommodate this, many firms allow workers to exhaust paid vacation and sick time *before* they file for 12 weeks of FMLA parental leave.

Rita Soronen, executive director of the Dave Thomas Foundation for Adoption in Ohio, says the benefit celebrates the family no matter how it was created.

Thomas, founder of Wendy's, was adopted. He started the foundation to encourage employers to offer aid.

For more info: www.adoptionfriendlyworkplace.org. Source: Adapted from an article in the *Springfield News-Leader*.

Benefits, Comp & HR Miscues

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learned the hard way that it's an unlawful practice.

When wage and hour investigators inspected a telecommunications field office, they found 26 employees had worked more than 40 hours during numerous workweeks – without receiving overtime pay.

In addition to the illegal break deductions, the employer forced some technicians and customer service personnel to work through their unpaid lunches. And it failed to pay for hours worked before and after shifts.

The employer paid \$137,870 in back wages.

Cite: DOL v. Verizon Communications.

◆ HARASSMENT WENT UNHEEDED

For eight years, African-American employees at a small construction firm endured racial slurs, derogatory graffiti and other forms of harassment. When and if they complained, management wrote it off as just part of the company's culture.

Finally, an employee called the EEOC, which launched an investigation and a lawsuit.

The employer settled the case. It agreed to pay 27 current and former workers \$225,000 and adopt a harassment policy.

All it takes is a few bad apples to create an environment considered hostile by the law. As this case shows, when such a culture flourishes under the nose of management, employers pay a steep price.

Cite: EEOC v. J.W. Aluminum.

◆ ILL-COMMISSIONED COMMISSIONS

It's okay to pay on a commission basis – as long as employees earn at least the minimum wage every week.

When DOL wage-and-hour inspectors learned that mortgage processors working for a mortgage broker earned a commission but did not always earn minimum wage, it went after their employer.

The employer paid 59 workers \$67,062 in back wages and agreed to comply with the law in the future.

Cite: DOL v. Tri-State Mortgage.

TRAINING & DEVELOPMENT

Training: Where you can find quick wins, build credibility

◆ HINT: START IN AREAS WHERE THE RESULTS ARE EASIEST TO QUANTIFY

New research confirms what most HR pros have known for years: that *people issues* top the list when it comes to management and employee development challenges.

But when you look behind the numbers, it becomes clear that the way to get the kind of “quick wins” you need is to focus on customer relations and retention.

Training in customer relations comes with built-in advantages:

- Its easiest to link training to measurable improvements in customer retention (and improved profits). You can partner with Finance to establish clear metrics.
- Customer relations is “top of mind” when it comes to what keeps CEOs and other top execs up at night. Improving customer-relations skill sets ranked second only to leadership in a Ken Blanchard Companies survey.

Both these factors make it easier to get top management buy-in for training initiatives, and use quick wins to build the credibility you need to tackle issues that are much tougher to sell, like improving your management team’s leadership skills.

EMPLOYEE DEVELOPMENT WORRIES

The top five headaches in employee development were “soft skills” like management and supervisory skill building, customer relationships, communication, team building and executive development.

Ranking at the bottom – counter to traditional thinking about where people need the most help – are skills directly related directly to job functions, such as sales training or computing.

With this data as background, it may be easier to put together a targeted training and development program, focused on where it hurts most from the CEO’s point of view.

Source: www.kenblanchard.com/news

HIGH ANXIETY: ISSUES THAT KEEP TOP EXECS UP NIGHTS

According to the latest research by Ken Blanchard & Associates, lack of leadership skills gives most company CEOs the heebie-jeebies. You can use this research as ammunition in efforts to fund training & development programs.

Employee development skills	2003	2004	2005
Managing and supervising people	75%	61%	61%
Building customer relationships	51	48	44
Building teams	53	56	40
Developing executives	48	36	32
Developing sales skills	35	31	31
Developing professional skills	19	31	28
Developing IT skills	13	26	23

Source: Blanchard Media Resources.

Managing People

◆ HAVING A DIFFICULT CONVERSATION

You know as an HR executive, there’s no way around it: You’re going to have difficult conversations with people. You may have to deliver bad news to the CEO. Or tell someone reporting to you that they’re just not cutting it.

How can you help ensure you get your message across?

Here are some steps to consider:

Spell out what you want to change

Decide exactly what result you want out of the conversation.

Do you want to make sure a CEO understands the urgency of a situation? Or that an employee understands how mistakes go directly to the bottom line?

Line up the facts, your interpretation of the facts and your recommended actions.

Write it down

Consider writing down exactly what statement you’d like to make as concisely as possible.

Shoot for 30 words or less, something like, “Mr. CEO, our investigation confirms the worst – one executive has a pattern of firing older workers for minor infractions. We need to act now.”

Focus

During the discussion, consider starting with your 30-word statement. Then focus the conversation (in order) on the facts, the interpretation and finally recommendations.

Depending with whom you’re talking, you’ll want to focus more on one of these than the other. For example, with the CEO, you’ll probably want to present the facts, and reserve your interpretation and recommendations until they’re asked for. The key is to have answers prepared ahead of time.

With someone reporting to you, you may want to quickly confirm the facts and then move on to coaching or correcting him or her.

HR MANAGEMENT

Identity theft looms large ... and HR may be to blame

◆ UP TO 70% OF IDENTITY THEFT OCCURS IN HR DEPARTMENTS JUST LIKE YOURS

Large-scale consumer identity theft makes the nightly news, but the real eye-opener is that the bulk of identity theft occurs in the workplace.

In fact, experts at top security consulting firms like Kroll, Inc., say that 50% to 70% of identity theft happens right in the Human Resources department. After all, that's where most of the records are kept and where most firms are vulnerable.

HOW TO PROTECT AGAINST LOSSES

Profit-draining identity thefts present a whole new category of business and financial risk, putting prevention on the HR professional's plate.

To begin with, partner with IT and Finance to develop policies protecting

employee identities and implementing data encryption. Follow with these specific steps:

- Check the backgrounds of anyone with access to sensitive corporate data.
- Make sure suppliers are checked out, especially when outsourcing things like benefits administration. See that they have security over your data, too.
- Upgrade employee ID cards, business cards and name badges to include a current photo.
- Stop using SSNs for identification; advise employees never to carry their Social Security card with them.
- Shred all paper containing confidential data, especially employee records, invoices or statements. Thieves love to sift through company trash.

For additional info: www.kroll.com.
Based in part on an article at www.cfo.com

Six perks you can offer employees that cost the company little or nothing

◆ ONCE YOU HAVE THE ROUTINE OFFERINGS IN PLACE, TRY THESE ALTERNATIVES

You need not be a huge company with thousands of employees to assemble an attractive array of benefits likely to increase loyalty and satisfaction among your employees.

Here are some ideas, most of which can be implemented with a little legwork on the part of HR, and zero outlay in hard dollars:

1. **Discounts with local merchants**, tourist attractions, health clubs and the like. You ought to be able to negotiate a 10% corporate rate just by asking for it. Maybe more if you push harder.
2. **Free pickup and delivery** for laundry, dry cleaning or auto maintenance and repair.
3. **Free lunch-and-learn seminars** presented by local financial planners,

attorneys, healthcare organizations or other professionals who will speak at no charge in order to attract new business.

4. **Prepaid legal services**, covered by payroll deduction. Such services typically cover personal issues like contract review, preparation of living wills (a hot issue after the Schiavo case), and legal representation. Fees typically run \$150-\$250 per month.
5. **Interest-free computer loans**. The employer purchases the computer and the employee repays via payroll deduction. There's an opportunity cost to the company that's recovered as the employee increases job skills.
6. **Company inventory auctions**. Hold a company "yard sale" where you put excess inventory on the block for employees to buy at bargain prices. Let them sell their own stuff, too.

The Workplace

◆ STUDY: FINANCIAL WOES AFFECT PERFORMANCE

If you're like most employers, you've got your share of financially distressed workers.

Up to 80% of financially troubled workers spend time dealing with personal finances instead of working, according to a survey by Virginia Tech.

Not only does performance suffer from time spent talking with creditors, paying bills and tracking finances, but 40% to 50% of financially distressed employees say their health has been affected by their personal finances.

Does this cloud have a silver lining? Perhaps. Workers say they lack the knowledge to make smart financial decisions.

This suggests employer-sponsored financial planning classes might be a win-win for employers and employees.

YOU'RE INVITED...

...to attend two live

AUDIO CONFERENCES

Overtime Regs Update: Sorting Out the Confusion of the Past Year

April 27, 2 p.m. EDT – 60 minutes

Companies are still struggling with the confusing new overtime regs that were published a year ago this month and went into effect last August. Wage & Hour cops are still on an enforcement rampage. Don't get caught in their net. Our speaker will guide you through the most important changes and leave you with a clear understanding of exactly how to comply.

and

How to Discipline 'Difficult' Employees – Without Getting Sued

May 5, 2 p.m. EDT – 60 minutes

You know who they are: the "difficult" employees who make excuses for poor performance and use cracks in the legal system to sue you when they get fired. Make sure that never happens at your company. Learn how your managers can document progressive discipline and bulletproof your company against frivolous lawsuits.

To learn more about audio conferencing, or to register for this event, call 800-651-7916, or go to www.b21pubs.com

NEWS & IDEAS

CONSIDER EMOTIONS FIRST WHEN COACHING EMPLOYEES

What's the best way to coach an employee who's struggling? Rigid managers apply the same medicine for every problem. Smart ones first understand the employee's "work emotions," then decide on the right action.

If the employee has a positive attitude and is just stuck, you focus on the problems with her work and try to get her unstuck.

But if she's feeling negative about her job, that's the problem and you need to confront it aggressively.

Action step: Always consider employees' emotional perspectives *first* when trying to coach them.

Source: "Motivational Management," by Alexander Hiam. AMACOM Books.

PROTECTION IF YOU OFFER 'AUTOMATIC 401(K)S'

A DC lobbying group is pressuring Congress to make it easier for you to automatically enroll workers in 401(k) plans. Currently only about 8% of companies do it, in large part due to fear of lawsuits.

But if the Retirement Security Project has its way, Congress will pass legislation protecting companies from legal liability if they opt for automatic 401(k) enrollment, as long as the default investment account is invested in a diversified or stable mutual fund.

Is that good news for you? Yes, because it will increase participation in your plan, particularly among young people, who very often never get around to "opting in" to your 401(k) plan.

Under automatic enrollment, when you hire them they're in your program unless they opt out. Most will never get around to opting out, and you'll end up with high participation.

We'll keep you posted.

SURVEY: PAID-TIME-OFF BANKS ON THE RISE

Have you thought about offering employees a bank of paid time-off (PTO) hours they can use for any purpose – vacation, sick days,

personal days, etc. – throughout the year?

If so, welcome to the club. In 2002, only 30% of employers offered PTO banks, according to a survey by Mercer Human Resource Consulting. But by 2004, 42% of employers were offering the benefit.

According to the study, as an added bonus, more firms that offer PTO (24%) allow employees to buy and sell their PTO, up from 15% five years ago.

SHOW US YOUR INSTANT MESSAGE POLICY

If your firm has no written policy covering instant messaging (IM), now is the time to draft one.

Today, more than 90% of employers have Internet policies on what employees may and may not say when they use the company's e-mail system and the kinds of Websites they may access, according to a survey by SurfControl.

Yet, only about half have rules for instant messaging at work.

Although some people believe otherwise, instant messages leave a permanent, time-stamped record of Internet chats. That means things a manager says in an IM chat session may be used against the firm in a lawsuit.

A good IM policy prohibits offensive language and encourages people to IM for business purposes only.

CUTTING DOWN ON UNPRODUCTIVE WORK HOURS

Want to boost productivity? If so, consider targeting communication issues.

That's because U.S. workers, say the biggest productivity-drainers are those involving communication, according to a study by Microsoft.

The workers felt that 16 hours of the 45 average hours per week they work are unproductive because of:

- unclear objectives
- lack of team communication, and
- ineffective meetings.

All were chosen by 32% of survey respondents.

DECISION – If You Were The Judge...

Here's the decision to the case discussed on page 3.

No, the company lost. A jury awarded \$300,000 in damages and \$500,000 in attorney fees.

An appeals court upheld the verdict, saying that gender stereotyping is a valid cause of action under sex-discrimination laws.

The company lost mostly for two reasons:

1. No other supervisor on probation was videotaped on the job or forced to wear a microphone.
2. Issues like "presence" and "command" are vague and can easily be seen as involving stereotypes.

Special treatment

The company made a laudable effort to document its findings during Michele's probation, but it forgot that special treatment in one case can also look like discrimination. All that scrutiny looked like the firm was intimidating the worker.

That's why it's important to have a clear policy with clear definitions.

If the company could show exactly what it meant by "presence," and exactly what criteria it would use to determine it, the company may have fared better in court.

Cite: *Barnes v. City of Cincinnati*, No. 03-4110, 7th Cir., 3/22/05. Fictionalized for dramatic effect.

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