Diversity & Inclusion Symposium and Human Resources Conference

CHARLESTON MARRIOTT-TOWN CENTER
APRIL 9-10, 2019
It is my honor as the Chairman of the West Virginia Chamber of Commerce’s Human Resources Committee to welcome you to our 2019 Human Resources Conference.

The West Virginia Chamber of Commerce represents thousands of employers throughout the State of West Virginia. We are the voice of business in West Virginia with member companies located in all 55 counties around the state. Our members employ over one-half the state’s workforce. The Chamber staff and dedicated volunteers work diligently year-round to provide our members with valuable information, resources and timely updates on a wide variety of topics of interest to the employer community.

This year’s HR Conference includes our inaugural Diversity & Inclusion Symposium. We are honored to have Dr. Steve Robbins speak on the topic of “Unintentional Tolerance”. This symposium will also address the important issues of cultivating diversity and inclusion within our workforce.

Recent changes in West Virginia law will affect employers and employees alike. The legalization of medical marijuana continues to advance in West Virginia. Recent court rulings have brought renewed attention on our state’s Right-To-Work law. We are fortunate to have guest speakers at this year’s conference who will address the practical impact of these laws and policies on human resource professionals.

Our HR Conference will also address a variety of practical issues facing employers throughout West Virginia, such as pay equity audits, change management, employee offboarding practices, apprenticeships, and performance improvement actions. This year’s edition of the HR Journal includes useful articles on each of these important topics. I hope you will find the materials published in the HR Journal helpful in your work as human resource professionals.

We are excited to present a wide range of topics and speakers during this year’s HR Conference. We are also pleased to share with you the thoughtful and timely articles published in this year’s HR Journal. As you will hear and read — 2019 will be a BIG year for employers in West Virginia!

Mark Carter is the Labor Practice Group Chair at Dinsmore & Shohl LLP. He is also the Chairman of the West Virginia Chamber’s Human Resources Committee.
The West Virginia Chamber of Commerce would like to thank you for attending the 2019 Human Resources Conference, the foremost conference on human resources and employment. This conference brings together legal professionals, expert HR practitioners and safety experts to discuss key issues facing businesses in the Mountain State. We are also excited that this year’s conference will feature the West Virginia Chamber’s inaugural Diversity & Inclusion Symposium.

This conference has been approved for up to 10.0 SHRM credits and 12.0 CLE Credits for West Virginia, including 3.6 credits for the Elimination of Bias and 7.2 credits for Office Management! HRCI Credits; and CLE Credits for OH, PA, and KY are pending!

AGENDA
Tuesday • April 9, 2019

10:30 AM  REGISTRATION OPENS

12:00 – 12:45 PM  LUNCH AND WELCOME
Steve Roberts, West Virginia Chamber of Commerce
Mark Carter, Dinsmore & Shohl LLP

12:45 – 2:45 PM  Diversity and Inclusion: “Unintentional Tolerance”
Dr. Steve L. Robbins

2:45 – 3:00 PM  BREAK

3:00 – 4:00 PM  Women & Leadership: The Art of Navigating Headwinds
Anna Dailey, Dinsmore & Shohl LLP
Susan Lavenski, Charles Ryan Associates, LLC
Michelle Foster, The Greater Kanawha Valley Foundation

4:00 – 5:00 PM  50 Ideas for Cultivating Diversity and Inclusion in the Workplace
Ashley Hardesty Odell, Bowles Rice LLP
Jill Rice, Dinsmore & Shohl LLP
Monte Williams, Steptoe & Johnson PLLC

5:00 PM  RECESS UNTIL 10:00 AM ON WEDNESDAY
AGENDA
Wednesday • April 10, 2019

9:30 AM  REGISTRATION OPENS

10:00 – 11:00 AM  Conducting Pay Equity Audits
   Jill Hall, Jackson Kelly PLLC

11:00 AM – 12:00 PM  Change Management: Leading Successful HR Transformations
   Chris Haver, WVU Medicine

12:00 – 12:45 PM  LUNCH
   Five-Diamond Employer Awards

12:45 – 1:45 PM  Marijuana in the Workplace: “A Hazy Issue for Employers”
   Jan Fox, Steptoe & Johnson PLLC
   Mark Dean, Steptoe & Johnson PLLC
   Zach Bombatch, Steptoe & Johnson PLLC

1:45 – 2:45 PM  ROOM 1
   Break Out Sessions
   Attend One:
   The Top Five Priorities for an HR Department of One
   Allison Williams, Steptoe & Johnson PLLC
   Wendy Adkins, Jackson Kelly PLLC

1:45 – 2:45 PM  ROOM 2
   Break Out Sessions
   Attend One:
   What If You Don’t “Like” an Employee’s Social Media Content?
   Ashley Hardesty Odell, Bowles Rice LLP
   Gabriele Wohl, Bowles Rice LLP

2:45 PM  BREAK

3:00 – 4:00 PM  ROOM 1
   Break Out Sessions
   Attend One:
   Employee Offboarding Best Practices
   Rick Wallace, Littler Mendelson, PC

3:00 – 4:00 PM  ROOM 2
   Break Out Sessions
   Attend One:
   Building Your Talent Pipeline Through Apprenticeships
   Lucinda Curry, Robert C. Byrd Institute

4:00 – 5:00 PM  ROOM 1
   Break Out Sessions
   Attend One:
   Problem Resolved: Performance Improvement & Corrective Action
   Eric Kinder, Spilman Thomas & Battle, PLLC

4:00 – 5:00 PM  ROOM 2
   Break Out Sessions
   Attend One:
   Right-to-Work in West Virginia: What’s Next?
   Mark Carter, Dinsmore & Shohl LLP
   Anna Dailey, Dinsmore & Shohl LLP

5:00 PM  ADJOURN
Wendy G. Adkins is a Member in the Education industry group at the Jackson Kelly law firm, focusing primarily on employment, commercial litigation, education, and real estate. She practices out of Jackson Kelly’s office in Morgantown, West Virginia.

Wendy is passionate about her legal practice, her clients, and anything involving West Virginia University – both her undergraduate and law degrees are from WVU. Wendy most enjoys guiding her clients through their thorniest legal issues. She always has her clients’ best interests in mind and understands the toughest part of her job is providing the best legal advice, even when that guidance is not necessarily what the client hopes to hear. This is not always easy, but it allows her to guide her clients to the best outcomes.

Zachary Bombatch is an associate with the law firm of Steptoe & Johnson’s Southpointe PA office. Labor and employment law is the primary focus for Zack’s practice and he helps clients in a variety of industries navigate the regulatory and statutory framework. Zack counsels clients on the potential domino effects that employment actions and policies can have on both business operations and employee morale, making him a trusted advisor.

Zack actively assists employers with guidance on how to navigate the medical marijuana laws and the impact on not only employment law, but also compliance with industry specific safety regulations.

Zack is a graduate of the University of Pittsburgh, and earned an MBA from Duquesne University and his law degree from the Duquesne University School of Law.

Mark Carter is a partner with the law firm of Dinsmore & Shohl LLP’s Charleston, West Virginia offices. Mr. Carter focuses his practice within the area of labor and employment law and is the Labor Practice Group Chair of the firm. He is a Fellow of the College of Labor and Employment Lawyers, is listed in the Best Lawyers of America and Chambers, America’s Leading Lawyers for Business, and has been rated one of the top ten attorneys in West Virginia by Super Lawyers Magazine nine times since 2007. He is also an international speaker and author.

He received his undergraduate degree in 1982 from The University of Michigan-Ann Arbor where he was a Burnett Scholar and graduated with high distinction. He received his Juris Doctorate from West Virginia University in 1986 where he graduated eighth in his class.

Leeann Cerimele is the Chief Human Resources Officer of West Virginia University Hospitals and West Virginia University Health System. West Virginia University Hospitals is a 690-bed university teaching hospital located in Morgantown, WV. The West Virginia University Health System, the state’s largest health system and largest private employer, is comprised of nine hospitals and has over 18,000 employees. She is responsible for all aspects of Human Resources across the West Virginia University Health System.

Prior to joining WVUHS, Leeann spent sixteen years at the University of Pittsburgh Medical Center (UPMC) in Pittsburgh, PA. She has more than 20 years of Human Resources experience and 15 years operational experience specifically in a health-care setting.

Leeann obtained her Bachelor of Arts in Communications from The University of Pittsburgh and her Master of Arts in Human Resource Management & Industrial Relations from St. Francis College.

Lucinda Curry has more than 30 years of experience in workforce development, enrollment management, and customized training. She has been with the Robert C. Byrd Institute (RCBI) at Marshall University for the last 10 years as the Director of Workforce Development. She leads the Apprenticeship Works program under a U.S. Department of Labor American Apprenticeship Initiative (AAI) grant. Curry holds a master’s degree in non-profit and public agency leadership from Marshall University.

Lucinda Curry is with the national law firm of Dinsmore & Shohl. She serves on Dinsmore’s Board of Directors and is the Managing Partner of the Charleston office. Anna also serves on the Board of Directors for the West Virginia Chamber of Commerce. She has been a West Virginia lawyer for more than 30 years and in that time has a wealth of experience in both federal and state courts and has tried numerous jury trials - both defending companies in employment law cases and suing unions for lost profits resulting from business interruptions. Her clients come from the energy sector, manufacturing and health care. Anna was named Who’s Who in West Virginia Business in 2013 by the WV State Journal and has been recognized by Best Lawyers in America as Lawyer of the Year in Charleston for Employment Law in 2016 and Labor Law in 2015.
Mark Dean is an associate with the law firm of Steptoe & Johnson in Charleston. Mark focuses his practice in the area of labor and employment law. He regularly represents employers — both public and private sector — in defense of employment-related lawsuits in the state courts of West Virginia and the federal District Court for the Southern District of West Virginia, as well as charges filed before the West Virginia Human Rights Commission, the West Virginia Public Employees Grievance Board, and the federal Equal Employment Opportunity Commission.

Mark is a graduate of West Virginia University and the WVU College of Law.

Jan Fox is a member of the Steptoe & Johnson law firm in Charleston. Jan focuses her practice in the area of labor and employment law. She has tried jury, non-jury, and administrative cases, and has argued approximately 65 appeals in the West Virginia Supreme Court of Appeals and the United States Court of Appeals.

Fox defends educational institutions regarding sexual assault of students claiming Title IX violations. She also defends discrimination claims of race, gender, age, disability, religion and national origin in state and federal courts as well as claims brought before the EEOC and state human rights agencies. Jan defends boards of education in negligence, wrongful hiring and supervision, and due process claims in both state and federal courts. She has tried numerous jury cases to verdict in state and federal courts.

Fox is a graduate of West Virginia University and the WVU College of Law.

Dr. Michelle Foster has been the President and CEO of The Greater Kanawha Valley Foundation since February 2016. During her first year at TGKVF, Michelle focused significant efforts on developing an impact measurement framework to help the Foundation and its donors fully understand the social return on their community investments.

Prior to joining TGKVF, Michelle was the CEO of the Kanawha Institute for Social Research & Action, Inc. (KISRA) for 18 years and a chemical engineer at Union Carbide (now Dow) for five years. She has a doctorate in community economic development (CED) and two master's degrees — one in CED and another in engineering management. She is also a certified economic development financial professional and a certified housing development financial professional. Michelle completed additional university-level studies in impact investing at the University of Oxford, Said Business School as well as in nonprofit management and leadership at Harvard University, John F. Kennedy School of Government.

Michelle completed additional university-level studies in impact investing at the University of Oxford, Said Business School as well as in nonprofit management and leadership at Harvard University, John F. Kennedy School of Government.

Jill Hall is a Member with Jackson Kelly in the Banking and Health Care industry groups, focusing primarily on labor and employment, ERISA litigation, and employee benefits.

Hall has extensive experience at both the state and federal level in the areas of employment law and employee benefits, the Employee Retirement Income Security Act of 1974 (ERISA) and ERISA litigation. She has written extensively about these areas of the law and is a frequent speaker on employment and benefits-related topics. She also represents employers, insurers, and third-party administrators in all aspects of health and welfare plan compliance and regularly advises clients on the requirements of the Affordable Care Act.

Hall received her law degree from West Virginia University College of Law, having graduated Order of the Coif and a member of Law Review, and graduated summa cum laude from Bethany College in Bethany, West Virginia.
**Eric Kinder** is a Member at Spilman Thomas & Battle. His primary areas of practice are labor and employment law with an emphasis on wage and hour, employee benefits, and ERISA litigation. Kinder has served as lead counsel in defense of employment discrimination complaints and general litigation matters. He is the editor-in-chief of Bloomberg BNA’s treatise on the Age Discrimination in Employment Act. He earned his bachelor’s degree at Cornell University School of Industrial and Labor Relations and his law degree, *summa cum laude*, at Case Western Reserve University School of Law.

**Chris Haver** serves as the Assistant Vice President of HR Shared Services for the West Virginia University Health System. The West Virginia University Health System, the state’s largest health system and largest private employer, is comprised of nine hospitals and has more than 18,000 employees.

Haver has responsibility for the operations of system-wide HR and Payroll practices. Prior to joining West Virginia University Health System, he worked for Highmark Health headquartered in Pittsburgh, PA. He has more than 25 years of professional experience in HR, IT and Project Management roles. For the past 13 years, he has focused in HR Operations on the design, implementation and operations of HR Shared Services functions. Haver earned his bachelor’s degrees in Mathematics and Computer Science from Saint Francis University.

**Susan Lavenski** is the CEO and owner of Charles Ryan Associates (CRA), the state’s oldest and largest communications firm headquartered in Charleston, West Virginia. The firm is one of the largest women-owned communications firms in the mid-Atlantic region and has 35 employees.

Lavenski is an expert in issues management and has spearheaded the communications efforts for multimillion dollar statewide transportation campaigns, utility expansion projects, controversial elections and health care certificates of need. She has provide strategy for Fortune 500 businesses and worked with local, regional and national public figures, media representatives, and business executives. Her work has produced results that garnered statewide, national, and international coverage for her clients.

Lavenski has worked at CRA for 19 years and is a graduate of Marshall University, where she received a Bachelor of Arts degree in public relations journalism and a Master of Arts degree in political science with a focus in public administration.

**Ashley Hardesty Odell,** an attorney in the Morgantown office of Bowles Rice, focuses her practice on labor and employment law. She enjoys counseling and advising employers on workplace issues including discrimination and harassment, wage and hourly issues, employee handbooks, workplace safety and employment agreements. Odell also manages litigation matters involving business disputes, commercial collections, property damage and personal injury defense. She serves as Bowles Rice’s Diversity Partner and is a 2019 Fellow of the Leadership Council on Legal Diversity and chair of the West Virginia Chamber of Commerce’s Diversity Working Group. An active member of her community, Odell is involved with many civic and professional organizations and currently serves as board president of United Way of Monongalia and Preston Counties.
**Steve L. Robbins, PhD** was born in Vietnam and immigrated with his mother to the United States where they faced many challenges during a time when there was much anti-war and anti-Vietnamese sentiment. Dr. Robbins uniquely knows how to simultaneously challenge and motivate people with a dynamic use of storytelling, humor and extensive knowledge of pertinent issues and concepts.

Dr. Robbins’ unique, science-based approach to inclusion and diversity uses neuroscience and the science of human behavior to encourage individuals and organizations to be more open-minded, mindful and intentional about inclusion and valuing people for their unique gifts, abilities and experiences.

Dr. Robbins earned an undergraduate degree in communication from Calvin College, and his masters and doctorate in communication science from Michigan State University. The core of his work is about understanding human behavior and leveraging human differences in an ever-changing, fast-paced 21st century world.

**Jill Rice** is a member of the Dinsmore & Shohl law firm and is the chair of the firm’s Government Relations practice group. Jill focuses her practice on government relations, insurance and health care law but litigates on behalf of many sectors. She has extensive legislative and administrative government relations and commercial litigation experience. She has been a registered lobbyist in West Virginia for nearly 20 years and has lobbied on behalf of various businesses and industry sectors.

Jill currently serves as president of the West Virginia Insurance Federation and is the lead lobbyist for the property and casualty insurance industry in West Virginia. She regularly defends insurers in civil and administrative proceedings involving coverage disputes and claims for common law and statutory bad faith.

Jill is a member of the firm’s Professional Development and Diversity committees.

**Richard Wallace** is a Shareholder with the law firm of Littler Mendelson in its Charleston office.

Rick focuses his practice on both employment litigation and traditional labor law. He has experience in all phases of employment litigation in both state and federal courts, and his trial experience includes matters involving race, age, sex and disability discrimination claims; wrongful discharge; workplace harassment; violations of the Uniform Trade Secrets Act; and breaches of the duty of loyalty.

He has served as lead counsel in multiple labor-related litigation matters in federal court and represented numerous employers in proceedings before the National Labor Relations Board, including unfair labor practice proceedings, and unit clarification and representation proceedings.

Wallace is a graduate of the University of Virginia and earned his law degree at the Wake Forest University School of Law.

**Allison B. Williams** is a Member in the Bridgeport office of Steptoe & Johnson PLLC. Clients know soon after meeting her that they are in good hands. William’s calm demeanor puts clients at ease and soothes their worries. She epitomizes the phrase “people hire people they like and trust.” She realizes that when clients hire her, they expect action, which she relentlessly provides. Allison counsels clients on decisions to hire or fire, drafts contracts, disciplinary documentation, separation agreements, and is passionate about helping employers craft strategies to avoid or minimize the impact of litigation. Williams helps anticipate and mitigate future challenges, and if litigation is unavoidable, she is completely comfortable in a courtroom where she plays to her strengths.
Monté Williams is a member of the Steptoe & Johnson law firm in Morgantown. His experience as a former West Virginia State Trooper means he can investigate and evaluate situations quickly and strategically. As the head of the firm’s Oil & Gas Emergency Response Team, Williams uses this level-headed approach to help clients manage rapidly evolving situations as the right people, administrative, legal, and regulatory resources are coordinated. He collaborates with his clients to protect them and fight for the best possible outcome long before litigation is a reality.

Williams is the General Litigation Practice Group Leader, head of the firm’s Oil & Gas Emergency Response Team, a member of the firm’s Coal Emergency Response Team, and a member of the Diversity and Recruiting Committees. He is a member of the Litigation Training Committee which is responsible for identifying and carrying out all internal training of the litigation associates, as well as mentoring associates within the firm.

Gabriele “Gabe” Wohl is a member of the Bowles Rice Labor and Employment Group, and practices from the firm’s Charleston, West Virginia office. She is an experienced attorney who focuses her practice on business litigation and appeals, complex civil litigation and white-collar defense.

Before joining Bowles Rice, Wohl served as an Assistant United States Attorney for the Southern District of West Virginia, where she participated in complex white-collar investigations and prosecutions involving a variety of federal offenses, including fraud, identity theft, worker safety violations and civil rights violations. She also provided civil rights training for the West Virginia State Police Academy. Wohl received the Extra Mile Award in 2017 from the West Virginia Center for Children’s Justice.

Apprenticeship programs have been around for centuries, yet many people continue to have misconceptions about what an apprenticeship is and how it operates in today’s modern workplace.

A registered apprenticeship has two primary elements: on-the-job training and related training instruction. Throughout their apprenticeship, apprentices’ wages increase based on a schedule established by the employer. At the conclusion of their apprenticeships, apprentices earn a valuable credential from the DOL.

More than 1,000 occupations are considered “apprenticeable” by the DOL, everything from a machinist to a beekeeper. Employers with thriving apprenticeship programs come in all sizes as well.

While the process of launching a new program may seem daunting, it’s not as complicated as you might think, especially if you take advantage of resources that are readily available to employers. One important resource is the DOL’s Office of Apprenticeship, which operates a West Virginia office with a staff to assist in the process.

Over the years, colleges and other organizations have emerged to assist companies interested in establishing registered apprenticeships.

In 2016, RCBI was awarded a $4.9 million American Apprenticeship Initiative grant from the U.S. Department of Labor to expand registered apprenticeships in advanced manufacturing across the country using its collaborative model.
to educate workers and bridge the skills gap in American manufacturing. Apprenticeship Works now has 26 industry partners, including 12 here in West Virginia. The partnership is active in 15 other states, as well, and continues to expand to new states in response to manufacturers’ requests.

Under the grant, Apprenticeship Works provides manufacturers with assistance in setting up a registered apprenticeship program that is customized to meet their specific needs. Our partnership model currently addresses 20 occupations, including machining, welding, industrial maintenance, additive manufacturing and others.

Apprenticeship Works also focuses on bringing new workers into the manufacturing industry through pre-apprenticeships for women, disadvantaged youth and veterans. So far, more than 230 individuals have participated in our pre-apprenticeship programs.

RCBI is proud to participate in this national model that is expanding apprenticeship across the country. We recognize it’s especially important in manufacturing, which faces a widening skills gap in West Virginia and beyond.

We believe apprenticeship has the potential to help close this skills gap. Apprenticeship programs improve recruitment because applicants are drawn to the clear career path provided by apprenticeship. Apprenticeships also foster loyalty among employees, improving retention rates.

There are many other benefits for the employer, as well. Apprenticeship programs standardize training and promote a transfer of knowledge from more experienced employees to newer employees. In addition, some of our industry partners have won new contracts thanks, in part, to their registered apprenticeship programs.

Getting started is easy. For information about developing new skills in your workforce, don’t hesitate to contact the Apprenticeship Works team at RCBI.
Pay Equity: Closing the Gap with Pay Audits

By: Jill E. Hall, Jackson Kelly PLLC

An employment law issue is increasingly demanding attention from employers. Equal pay for equal work among male and female employees is a hot topic, not only among lawyers and legislators but also among employers across industries. As of 2016, median female workers with a full-time, year-round job made 80.5 cents for every dollar earned by male workers. (Source: September 12, 2017 Census Bureau). Although the federal government has done little to strengthen equal pay laws since 2009 when it passed the Lilly Ledbetter Fair Pay Act, bills have been introduced in recent years, including the Paycheck Fairness Act and the Pay Equity for All Act. States and municipalities also are taking matters into their own hands and adopting their own equal pay laws, some of which are quite aggressive. Enforcement of federal, state and local equal pay laws by the Equal Employment Opportunity Commission, among other agencies, also has increased in recent years. Pay audits are increasingly becoming a popular tool for employers to defend against liability for compensation discrimination claims.

The Equal Pay Act, which prohibits discrimination in the payment of wages to employees performing jobs that require "equal skill, effort, and responsibility," is the guidepost at the federal level for employers. The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. To establish a prima facie case of a violation of the Act, employees must show: (1) lower wages were paid to employees of the opposite sex; (2) the employees perform substantially equal work; and (3) the employees perform their jobs under similar work conditions. Significantly, an employee is not required to establish that an employer intended to discriminate among workers with respect to pay.

Pay disparities among employees of the opposite sex may be perfectly legitimate under certain circumstances. For example, unequal pay may be justified when based on: (1) seniority; (2) merit; (3) a system measuring quantity or quality of work; or (4) a differential based on any factor other than sex. It is an employer’s burden to establish that one of these defenses justify any pay disparity among employees of the opposite sex. Importantly, it has become increasingly common for courts to hold that an employer may not base a salary differential on prior salary history when hiring an employee. The rationale behind these holdings is that the goal of the Equal Pay Act is to end the cycle of unequal pay that may otherwise follow an employee from job to job. An Illinois federal judge held differently in a recent case and found that a company’s decision to pay a female employee less than a male peer did not violate federal law when the discrepancy was based on the female employee’s prior salary history. That judge found that the decision based on prior salary was not a factor related to sex. Whether an employer may base a pay disparity on an employee’s prior salary likely will continue to make its way through the courts.

The law in West Virginia closely mirrors its federal counterpart. West Virginia Code section 21-5E-3 prohibits discrimination between sexes in payment of wages for comparable work. A pay differential among sexes is permissible if based on seniority, merit or a system that measures earnings by quantity or quality of production. In West Virginia, employers should note that state law provides that no employee’s wages shall be reduced to eliminate an existing, past or future wage disparity or to effectuate wage equalization. Thus, in the event an employer discovers an unlawful pay disparity between male and female employees performing equal work, reducing the wages of the male employees at issue is not a permissible method of rectifying the disparity.

Pay audits are becoming an increasingly popular tool among employers to protect against liability with respect to gender pay discrimination claims. Conducting a pay equity audit entails more than simply examining compensation packages among a company’s employees. It should also include an examination of the policies, guidelines, and procedures used to determine salaries, as well as an examination of management’s communications with employees and their ability to articulate the reasons for making compensation decisions. An audit also should examine the level of discretion given to managers to make salary decisions.

Pay audits are becoming an increasingly popular tool among employers to protect against liability with respect to gender pay discrimination claims. Employers should consider partnering with legal counsel if they choose to conduct a pay audit to ensure that communications and actions taken during the audit are protected by the attorney-client privilege. Employers also should consider working with an experienced labor economist or statistician to examine pay data.

Once an employer has assembled a team to conduct the pay audit and examined its policies and procedures related to compensation decisions, it should examine all compensation for workers performing equal or comparable work. When assessing whether employees perform substantially equal work, employers must compare actual job duties, not just job titles. In doing so, they should compare the employees’ skill, effort, responsibilities, work conditions and whether the employees work in the same establishment.

If pay disparities are discovered, the employer should then identify any legitimate factors that might explain the disparities. If legitimate defenses to any pay disparity are lacking, the employer should next determine any corrective actions which should not include reducing any employee’s wages to rectify the pay disparity. Finally, compensation policies should be revised to ensure future pay disparities are avoided.

A spotlight will continue to shine on equal pay for equal work. Employers place themselves at great risk when they pay male and female employees performing substantially equal work differently. Fortunately, employers can take steps to shield themselves from liability with respect to pay discrimination claims. Conducting pay audits is an important and relatively simple tool for ensuring that employers’ compensation systems are reasonable and defensible.
PROBLEM RESOLVED:
Best Practices in Documenting Performance Improvement and Corrective Actions

By: Eric E. Kinder, Spilman Thomas & Battle, PLLC

For a busy employer and an overtaxed human resources department, documentation of employee performance is an easy matter to overlook. But this oversight almost always will come back to haunt the company. Without good documentation rules for job performance, an employer may be left vulnerable in a number of critical areas. A few key steps will help any employer prevent potential issues with performance improvement and corrective actions. First, set clear expectations—in writing—for how employees are to perform and conduct themselves in the workplace; this ensures the written expectations are there for all employees to see. Second, determine whether company policies are effective and whether they are being followed as evaluations are reviewed. Third, and hardly the least important, good job performance documentation is vitally important in defending litigation. Many lawsuits are settled on less than favorable terms because the record to justify a discharge simply was not there.

The key to good documentation is to track dates and specifics and not rely on vague opinions. Do not rely on generalities or personal, subjective opinions such as “employee has a bad attitude” or “performs poorly.” Instead, note the specific issue: “missed deadline on [this date],” “came in late on [dates],” “rude to co-workers or customers,” or “[name of project] failed to meet standards because …..” and provide the reason. The goal is to provide meaningful information on which the employee can base a change in behavior and on which the employer can base an employment action if necessary.

Also, do not be afraid of sharing positives during the appraisal process. Virtually no employee is all bad. Highlighting things an employee does well, while simultaneously addressing problematic behaviors, will make the evaluation process more of a positive for everyone involved. It is easier to hear constructive criticism from someone who also is acknowledging what you do well. That said, beware of grade inflation in workplace evaluations.

Workplace grade inflation occurs where managers give every employee they supervise above average reviews. The reasons for doing so include wanting to avoid having a difficult conversation with a bad employee, not wanting to “rock the boat,” or simply not having high expectations. The issue is that these evaluations create a terrible record if and when the employer feels it needs to take action with an employee. Imagine trying to convince a jury that a former employee was a routinely poor performer when years of evaluations say “meets or exceeds expectations.” The jury either will think the claim of performance is not honest, or that the process is not fair because the employee never had a warning. Either way, you are looking at a large verdict in the employee’s favor.

It is also important not to neglect high level employees or employees in “creative” positions. These employees need guidance as well (and you need protection if one is not doing his/her job). The failure to document a high earning employee’s performance issues can result in high settlements and jury verdicts.

An effective evaluation should adhere to the employer’s set schedule for evaluations, be done in person, and be as fact-oriented and objective as possible. Bear in mind the performance appraisal process is ongoing, not sporadic. The annual evaluation is part of an employer’s responsibility, but good employers are engaging in periodic documented check-ins to reinforce performance expectations throughout the year. A well-done evaluation should contain no surprises because workplace concerns already have been discussed in the workplace.

What are the risks of failing to properly evaluate employees? Frustration with lost productivity; little to no improvement in your employees; wasted time and resources associated with delays and discharging nonperformers; and legal exposure from a failure to honestly evaluate. All of these risks are easily avoidable.

Performance evaluations are, all too often, supplemented by employee discipline. While discipline has a negative connotation, it is a vital tool because it provides employees with information about how their performance differs from what is expected. Without discipline, which can be as simple as a conversation with an under-performing employee, employees cannot be expected to improve their performance. In fact, many employers are now calling their disciplinary process “coaching” because it is seen as a tool to motivate employees and assist them in performing better, as opposed to being punishment. A properly used discipline system also can improve the morale of better performers by sending a message that inadequate performance is being noticed and steps to address it are being taken so that more work will not pile up on the high performers.

As always, communication is vitally important in the discipline process. Employees should know exactly why they are being “written up” and what they can do to improve. As with performance evaluations, specifics are vastly preferable to generalities. An employee cannot work on “do better” in any meaningful way, but can address “arrive at work on time,” “stop making math errors when closing your register,” or “don’t lose your temper with customers (no matter how annoying they are),”

Consistency is critical in employee discipline. Treat similar infractions similarly. If deviations from past practice are needed, note why. There can be reasons to use common sense, but make sure to note why the circumstances were unusual.

Where employers often go wrong is treating employee discipline as a criminal issue, complete with legal conclusions such as “our employee is guilty of harassment” or not doing anything because it is a “he said/she said” issue. Employee discipline may be held up to a fundamental fairness test, but it is not a criminal proceeding; you do not have to refuse to discipline just because there is a chance the employee did not engage in the inappropriate conduct. Use your best, reasonable decision and respond fairly.

The other common error is that employers all too often ignore unacceptable behavior hoping the problem will eventually just go away. It rarely does. What does happen is that the poor performers feel emboldened to do less and less work, while your good employees get frustrated and leave.

Having a well thought out, written procedure for documenting employee performance and consistently addressing needs for performance improvement and corrective action can improve the overall performance of the workforce, stymie potential discontent among top performers, and help guard the employer against costly wrongful termination litigation. If you’d like help establishing best practices on this or any other human resources, labor law or employment law matter, feel free to contact me at 304.340.3893 or ekinder@spilmanlaw.com.
What If You Don’t “Like” an Employee’s Social Media Content?

By: Ashley Hardesty Odell and Gabriele Wohl, Bowles Rice LLP

There are billions of active social media users in the world right now, including more than 2 billion Facebook users alone (according to Facebook). That is a sizable fraction of the world’s population, and likely includes a majority of employees and job seekers. At this point, not having a social media presence can seem like more of an eccentricity than a passive resistance – like not having a cell phone or driving a stick shift. If you are an employer, an internet search for employees’ or job applicants’ public social media accounts is an obvious screening tool that can be highly (and sometimes unfortunately) revealing. At its most useful, social media will affirm who has the good judgment to not share information that they wouldn’t want an employer to see. At its worst, employees’ and applicants’ social media usage will expose objectionable behavior or content harmful to an employer. Employment actions based on a person’s use of social media can be warranted but can also lead to litigation. This article will provide some explanation and tips for employers to avoid pitfalls of social media monitoring.

What does the First Amendment protect?

There is a common misconception that the First Amendment to the United States Constitution grants every person the right to say, post, or tweet every fleeting thought that comes to mind. The idea that there may be negative consequences to one’s late-night, profanity-laden rants often generates a “freedom of speech” protestation. In reality, the First Amendment does not guarantee anyone the freedom to post. The freedom of speech is actually a broad – but not absolute – freedom from government censorship. Private individuals and employers have no sweeping Constitutional obligation to protect anyone’s speech. This distinction is important because public employers must take a different approach to employees’ speech than private employers.

When can a government employer regulate employee speech?

A public employer, such as a public school or other government agency, is prohibited by the First
Amendment from taking adverse action against an employee because of the employee’s speech. To a point. If a government employee’s speech was made pursuant to his or her employment, then the speech may not be protected by the First Amendment. The government employer must have the ability to evaluate its employees doing their jobs, after all. If the speech was outside of the scope of employment, like an off-hours internet post, then the employee does enjoy some Constitutional protection from censorship, particularly when it comes to matters of public concern. However, the government employer has an interest in efficient and effective operation and can restrict employee speech as necessary to protect that interest. How does this play out? A government employer can take action against an employee when his or her speech is damaging to the mission of the government body. For example, when police officers or public school teachers use Twitter or Facebook to publicly attack a group of people they are entrusted to protect.

Considerations for private employers.

The free speech clauses of the federal and West Virginia constitutions do not apply to private employers. Without the First Amendment analysis that is inherent to government employers, private employers have much wider latitude for disciplining or terminating employees for their social media communications.

However, private employers should be mindful of the general holding in Harless v. First National Bank in Fairmont and its prodigy, that an employer does not have the absolute right to take adverse action against an at will employee if “the employer’s motivation for the discharge is to contravene some substantial public policy principle.…” While the First Amendment may not provide a substantial public policy protecting speech generally on social media platforms, the speech itself may do so. For example, if an employee posts on social media about information relevant to an OSHA investigation, he or she may be engaging in protected whistleblowing activity and should not be disciplined or discharged as a result of those activities. Employers also should be aware that Section 7 of the National Labor Relations Act, which gives employees the right to engage in “concerted activity” for the purposes of collective bargaining. That protected concerted activity could occur over social media, and employers cannot interfere with it.

On the other hand, employers can monitor employees’ social media and take employment action if an employee violates any of the employer’s other policies, particularly anti-harassment and anti-discrimination policies, confidentiality policies, or if an employee publishes statements harmful to the organization that the employee knows are untrue.

Have a social media policy and enforce it consistently.

Employers and human resources professionals are familiar with the common advice to adopt clear policies on various issues and apply them consistently, and the topic of social media is no exception. A social media policy should inform the employee (1) that the employer monitors their public social media platforms, (2) whether social media platforms may be used for business purposes and, if so, the scope of such permitted use, and (3) that use of employer computers and technology should not be used for engaging in personal social media activities. The scope of an employee’s permitted use of social media should be limited to legitimate business purposes, and employees should be reminded that the employer’s other policies apply to their use of social media. The social media policy should specifically acknowledge the employee’s right to protected activity under Section 7 of the National Labor Relations Act. If an employer is considering taking any employment action based on an employee’s social media presence, it should carefully consider whether the employee could argue they are being treated differently than other employees who engage in similar activities outside of the realm of social media.

Quick Tips

To summarize, an employer may have a valid reason to terminate or discipline an employee based on his or her social media content, subject to the caveats above, for:

- Violating the social media use policy;
- Using social media to harass or threaten, or to perpetrate a crime;
- Using social media during work time;
- Tarnishing the employer’s reputation (except when the speech can be considered “protected activity”);
- Lying to the employer (posting pictures of self on a cruise while on sick leave);
- Sharing employer’s confidential information or trade secrets;
- Posting content that is disruptive to government employer’s operations or mission.

An employer may not terminate or discipline an employee based on his or her social media content if:

- The employee is engaging in protected activity (e.g., whistleblowing);
- The employer is not following protocol in social media policy, or not applying policy consistently;
- The employer is retaliating against the employee for reasons unrelated to the content;
- The employer is acting with a discriminatory motive.

Finally, while employers are free to access publicly available social media accounts, they should keep in mind that West Virginia Code §52-5H-1 prohibits employers from requesting or requiring employees or applicants to disclose their usernames and passwords to personal social media accounts, to access their accounts in the employer’s presence, or compel employees to grant access to their accounts.
The topic of implicit bias has earned a healthy amount of coverage in the media in recent years as part of the debate regarding police shootings and racial profiling. It has also permeated high-level conversations about diversity and inclusion in organizations across the United States and its impact on both customers and employees. Unfortunately, some organizations are “all talk and no action” when it comes to implicit bias, paying a modicum of lip service to the topic, but making no real effort to combat its pervasiveness. However, inaction is the catalyst to the proliferation of implicit bias and its negative impacts within an organization. The failure to take meaningful action in response to implicit bias is essentially approval of those negative biases that ultimately impact the hiring, promotion, and compensation of employees.

Implicit bias refers to the unconscious and hidden preferences applied by all humans to nearly every decision they make. Our brains make assumptions about people based on certain characteristics we perceive as good or bad. Certainly, implicit bias exists with respect to the various protected classes identified in the law (i.e., race, gender, religion, age, disability, etc.); however, we also carry biases for somewhat innocuous characteristics such as a person’s height or hair color. For instance, think of the stereotypes about blonde women: “blonde bombshell” or “dumb blonde.” As for height, note the statistic that Fortune 500 male CEOs are on average 2.5 inches taller than the average American male.

These assumptions and preferences – because they are hidden – often have unintended consequences. While we may have no intention of discriminating against people, our implicit biases inevitably impact the way we classify and treat others. And when it comes to race, gender, and other protected classes, these biases are much
more profound. One example involves media coverage during the aftermath of Hurricane Katrina, where a photo of an African American male wading through chest-high waters carrying supplies was described as having looted a store, but a photo of a white couple wading through chest-high waters carrying supplies was described as having found those supplies. Another example comes from the movie *Hidden Figures*, when Katherine Johnson first entered the room with all the white, male NASA scientists and employees, and someone handed her a trash can that had not been emptied the night before, assuming not that she was a brilliant mathematician, but that she was a cleaning lady.

“Mansplaining,” a phenomenon reportedly experienced by many women in which men speak to them in a condescending and patronizing manner, likely results from the prominent “damsel in distress” theme from history and literature. Women also report that men tend to interrupt them more often than their male counterparts in meetings, and that men take or receive credit for ideas proposed by them.

Examples of implicit bias on the LGBT community include the assumption that gay men are always effeminate, or that lesbians are always masculine. Likewise, disabled individuals encounter implicit bias when non-disabled individuals assume they are incapable of performing certain tasks. For instance, the character named Michael Scott in the episode of *The Office* titled “The Injury,” asks a man in a wheelchair how long it takes him to brush his teeth.

In the workplace, implicit bias infiltrates decisions about how work is assigned, how employees are reviewed, and whether an employee is capable of advancement. One recent study on confirmation bias revealed that prospective employees who are African American are measured much more harshly than their white counterparts.

In 2014, an identical writing sample from a fictitious third-year NYU law student named Thomas Meyer was provided to 60 diverse partners in law firms in New York. The writing sample contained certain errors, many of which were objective (i.e., spelling and grammar). Half of the partners were told that Thomas Meyer was white, and half of the partners were told he was African American. The partners were asked to critique the writing sample and evaluate Thomas Meyer’s writing skills. The evaluation and critique of the white Thomas Meyer were much more favorable than that of the African American Thomas Meyer, even though the writing sample provided was identical. The white Thomas Meyer was described as a good writer, with good analytical skills and potential. The African American Thomas Meyer was described as average at best, and “needs a lot of work.” Significantly, the spelling and grammar errors were noted at a much higher rate in the African American Thomas Meyer writing sample. The stark disparities in the evaluations speaks to the reviewers’ confirmation bias. In other words, the reviewers used their evaluation of the African American Thomas Meyer to confirm their biases and assumptions that African Americans perform at a lower level.

In another study on gender bias, a linguist analyzed the performance reviews of the top performers at nearly 30 different companies and concluded that women receive far more negative criticism, less constructive criticism, and more personality critiques than the male employees. Notably, the linguist found 17 instances where a woman was described as “abrasive,” but that word was not used once in the men’s reviews. Women are disadvantaged when it comes to negotiating and advocating for themselves for fear that they will be characterized as “abrasive” or aggressive.

These studies show that implicit bias impacts the way certain employees are measured and evaluated, which consequently impacts their compensation and advancement within the organization. If diversity and inclusion is truly important to an organization, then it can – and should – take action to counteract the negative impacts of implicit bias. One way to do that is by challenging key stakeholders to evaluate their personal implicit biases.

Harvard University’s Project Implicit created an online implicit bias assessment — available at [www.implicit.harvard.edu](http://www.implicit.harvard.edu) — that measures an individual’s attitudes and beliefs toward various classes of individuals. Recruiters, supervisors, and any person who makes decisions about compensation and advancement of employees in an organization should be required to assess their own implicit biases and engage in open discussion about those biases with the organization’s leadership. Because the first step in combatting implicit bias is acknowledging that the biases exist in the first place.
Update on Right to Work Law in West Virginia

By: Mark A. Carter, Dinsmore & Shohl LLP

On February 27, 2019, in the case of West Virginia AFL-CIO et al v. Governor James Justice, et al., Kanawha County Circuit Court Judge Jennifer Bailey issued a final order upholding the constitutionality of the majority of the State’s right to work law (“Workplace Freedom Act”, W.Va. Code, §21-5G-1, et seq.). However, in an apparent refusal to conform its decision to a state supreme court decision interpreting the same law for the same purpose, Judge Bailey concluded that two sections of the right to work law are unconstitutional.

On March 27 the West Virginia Attorney General filed a notice of appeal to this decision with the Supreme Court of Appeals of West Virginia. On March 29 the Supreme Court issued an indefinite stay of the circuit court’s order prohibiting its enforcement.

At issue in the appeal will be two conclusions of the circuit court. First, the circuit court concluded that the employee right created in the Act, “to refrain from paying any dues, fees, assessments or other similar charges however denominated of any kind or amount to a labor organization or to any third party including, but not limited to, a charity, in lieu of a payment to a labor organization” was unconstitutional.

Second, the circuit court concluded that the prohibition on employers and unions from entering into a contract which requires employees to pay any dues, fees, assessments or other similar charges to a labor organization or a third party as a condition of employment as described in W.Va. Code §21-5G-2 was unconstitutional.

The circuit court reasoned that requiring employees who are not members of a union to pay the union for services rendered to them by the union, or face discharge, does not require them to become union members. These fees are typically called “Agency Fees.” The circuit court held that, in the absence of a collective bargaining agreement, a condition of employment as described in W.Va. Code §21-5G-2 was unconstitutional.

However, and “more importantly”, the circuit court wrote that there is no basis to conclude that the fact that a union has the exclusive right to represent all workers in a bargaining unit – by their own request – means they have a duty to “carry free riders” (Slip Opinion p. 35). This holding effectively concludes that as federal law requires a union to provide all bargaining unit members with collective bargaining services – as the union requested – then the union was victimized by being “forced” to represent non-members, or employees who do not pay for those services; e.g., the “free riders.”

The circuit court’s decision is at apparent and irreconcilable odds with a recent decision by the West Virginia Supreme Court. On September 15, 2017, the West Virginia Supreme Court held that the right to work law is constitutional in all respects and dissolved an injunction entered by the same judge in the same case.

The stay of the circuit court’s order prohibiting its enforcement entered by the Supreme Court has no effect until the appeal of the state supreme court. The Chamber will be monitoring the progress of this litigation and will promptly update its membership upon further developments.

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Top Priorities for an HR Department of One

By Wendy G. Adkins and Allison Williams

When you are a human resources department of one, your priorities are the essentials - wage and hour, disability accommodation, and medical leave. Although employers have faced these fundamental obligations for decades, they are complex and never static. And, if not successfully met, an employer can face significant financial consequences. Below are the top five areas on which you should focus your attention, when you have limited resources and time:

Wage and Hour

If you are not paying your employees properly under state and federal laws, you are doing so at the peril of your business.

a. Exempt v. Non-Exempt Employee Classification

Navigating whether your employees are exempt or non-exempt for overtime purposes, and therefore entitled to overtime, requires a careful analysis and complete comprehension of the Fair Labor Standards Act. FLSA guarantees a federal minimum wage and overtime or “time-and-a-half” for hours worked in excess of forty hours in a workweek. The FLSA, however, exempts certain employees from the overtime obligation. To be exempt, an employee must receive a salary of not less than $455 per week ($23,660 annually) and meet a “duties” test specific to a certain category of employees.

On March 7, 2019, the U.S. Department of Labor announced a proposed rule that would change the minimum salary that “white-collar” employees must be paid to qualify as exempt from the overtime requirements under FLSA. The proposed rule, if it takes effect, would raise the current minimum salary level for exempt employees to $679 per week or $35,308 annually. Employees with total annual compensation of $147,414 (including at least $679 per week paid on a salary basis) — up from the current $100,000 total annual compensation — would qualify for exemption under the test for highly compensated employees. The proposal, however, does not affect the FLSA’s “duties” tests that must also be met.

b. Regular Rate of Pay for Overtime Calculation

Calculating the “regular rate of pay” for those employees who are entitled to overtime is a trap for the unwary and requires employers to understand the interplay between the employee’s hourly wages, non-discretionary bonuses, shift differentials, commissions, per diems and the calculation of over-time payments. On March 28, 2019, the DOL provided notice of proposed rulemaking to clarify and update the regulations governing the regular rate of pay under the FLSA. The notice proposes to clarify the overtime regulations to confirm that several different types of payments are excluded from the regular rate of pay, including tuition reimbursement or repayment programs. The proposed rulemaking will not change the definition of discretionary bonuses, but the DOL will provide additional examples of discretionary bonuses excluded from the calculation of the regular rate of pay. The stated purpose of the proposed rulemaking is to encourage employers to offer additional benefits to employees that they may currently be hesitant to provide due to potential overtime consequences.

c. Tip Credit and Tip Pooling

For those of you in the service industry, tip pooling and tip credits are a place where employers make costly errors, and an area where the rules are in constant flux. On March 23, 2018, the FLSA’s tip pooling provisions were amended, through the Consolidated Appropriations Act of 2018, to permit employers who pay at least the federal minimum wage to require tip pooling among tipped and non-tipped employees when no tip credit is taken. Tip pooling with “back of the house” employees is prohibited, however, when a tip credit is involved. Additionally, employers are not permitted to retain any tips earned by employees regardless of whether a tip credit is taken.

The DOL also issued an opinion letter abandoning the “80/20 rule” that had prohibited employers from taking a tip credit on the minimum wage if the employee’s non-tipped work consumed more than 20 percent of the employee’s work. In a November 8, 2018 opinion letter, the DOL stated that it would not “place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met.” The opinion letter provides guidance to employers regarding what work its tipped workers may perform without losing the tip credit.

ADA and Reasonable Accommodations

If they do not have command over the Americans with Disabilities Act (or its local counterpart, the WV Human Rights Act), employers are flirting with disaster. The most common violations of the ADA involve the interactive process of accommodating employees who meet with definition of an individual with a disability under the statute, or who are returning to work after an extended leave due to a medical impairment.

The law requires employers to engage in the interactive process with employees and provide reasonable accommodations to an employee (or applicant) with a disability unless the employer can show that making the accommodation would create an undue hardship on the employer. Whether an accommodation is reasonable, or creates an undue hardship is a fact-specific analysis and cannot be mechanically applied.

Once notice that the employee needs an accommodation, the employer/HR manager should:

1. Review the job description and essential job duties.
2. Interview the manager to make sure that the job description is up-to-date, and accurately reflects the essential functions of that duty.
3. Engage with the employee and his/her health care provider concerning the nature of the limitation and the proposed requested accommodation.
4. Analyze the employee’s requested accommodation to determine whether (a) it would allow the employee to actually perform the essential function, and (b) whether it would create an undue hardship on the Company.
5. Notify the employee of the decision.
The process outlined above should help to guide you through these issues, but is not a substitute for a competent and solid working-knowledge of this area of the law. If you have questions, or need some out-of-the-box solutions, the Job Accommodation Network (JAN), www.askJAN.org, is also a great resource for employers navigating this territory. JAN offers free, practical guidance to employers on workplace accommodations.

**FMLA and Managing Medical Leave**

Employers who are subject to the Family Medical Leave Act have an obligation to not only provide 12 weeks of unpaid leave to eligible employees, but must also be vigilant in notifying employees when they might qualify for FMLA benefits. Complicating the FMLA is its interplay with the USERRA, the ADA and other state specific leave laws. This area of the law is ever-evolving and requires that HR professionals pay attention to the shifts in the law. Moreover, the law itself lends itself to pitfalls when challenging/confirming medical certifications, working with third-party administrators responsible for managing leave, and combatting leave abuse.

**Top tips for FMLA compliance include:**

1. Make sure your policies and postings are up-to-date and are compliant with the law. These written documents should be accessible to your employees and easy to follow.
2. Train your supervisors to spot FMLA triggers and how to send employees to the appropriate resources.
3. Document the process.
4. Know how to investigate and combat FMLA abuse without violating employees’ rights.

Savvy employers devote substantial time and resources to the onboarding process at their organizations to ensure a hearty welcome and smooth transition into their workforces for new employees. The benefits of such programs are well known: heightened employee retention and increased legal compliance to name a few. Unfortunately, many fewer employers dedicate the same resources to the offboarding process when the employment relationship ends. In fact, studies reflect that only 29% of organizations have a formalized exit management program – and that is a big mistake. Ignoring the offboarding process sets employers up for nasty surprises like litigation or union organizing. Likewise, an exit interview is invaluable in determining what your organization is doing well, resulting in better employee retention and reduced turnover. Simply put, not taking the time to interview a departing employee is a missed opportunity to discover the very type of information that is necessary to ensure your workplace remains healthy and attractive to the best and brightest employees.

**We’ve Reached the End of the Road:**

**But Before You Go, Let’s Engage in Some Offboarding Best Practices**

By: Rick Wallace, Littler Mendelson, P.C.
the former employee may exploit his or her prior position or access to harm your business. For these reasons, it is absolutely critical to have a formal IT and compliance component to your offboarding program. The first step should, quite obviously, be to disable the employee’s logins and access to the company’s physical facilities and IT infrastructure. This entails disabling and collecting all access badges or identification cards, collecting physical keys, disabling account logins, and revoking access to corporate email. Likewise, you should ensure that all mobile devices on which your company’s information are either returned (preferably during the exit interview) or wiped clean by your IT professionals. Finally, make sure that all physical assets like laptops, uniforms, and other company property are collected from the employee. These steps will ensure that your valuable business data is protected and not subject to misuse by the now former employee.

3. Mean what you say, say what you mean – you’ll be held to it.

When an employee is discharged from employment, it is critical that what the employee is told regarding his or her discharge – as part of the offboarding process – actually matches the reasons for the employer’s decision. All too often, an employer will separate an employee for poor work performance or disciplinary problems, but then sugarcoat the reasoning during the exit process and say things like “it’s just not a good fit,” or “we’re going in a different direction.” While it is a natural human tendency to want to avoid hurting another’s feelings, in today’s highly litigious environment, it is critical to be completely forthright with the discharged employee about the true reasons for his or her discharge. If that former employee then turns around and sues the company, the employer will be required to explain why the discharge decision was made in order to properly defend the case. That defense becomes infinitely more difficult when the employer is on record in an exit interview or other departure conversation giving a reason for the discharge that does not match the actual reasons that the employer made a decision. In those situations, juries tend to believe that an unlawful motive (such as discrimination) is the reason for the discharge, because the employer’s stories simply do not correspond. For that reason, always mean what you say, and say what you mean.

4. Consider severance payments and separation agreements.

Employers know all too well the high-cost and disruptive nature of employment litigation from a former employee. As part of any comprehensive offboarding process, there should be a discussion regarding whether it makes sense to offer a severance payment to a departing employee, in exchange for a release of claims. Such a payment and release, eliminates virtually all prospect of future employment-related litigation, allowing true finality for both the employer and employee after the exit. The costs savings and avoidance of administrative disruption are often worth the cost of such a severance payment, so this should be discussed in ALL departures (voluntary, involuntary, cordial, and non-cordial).

5. Avoid drops in productivity or service.

A critical part of the offboarding process is to ensure continuity of the work that was performed by the departing employee. Oftentimes, there is a tendency to “not discuss personnel matters” which results if not giving sufficient information to the organization to plan for and manage employee departures. Offboarding programs need to provide for a formalized process to notify the relevant supervisors and managers to ensure work is covered, make sure voicemails and emails directed to the departing employee are forwarded to an appropriate person for handling to avoid being missed, and ensure that the departing employee has transferred any and all data or knowledge that is necessary for continuity of operations (like upcoming deadlines or necessary institutional knowledge).
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