

**EDITOR'S COLUMN:
WHAT MAKES SENSE NOW?**

Here's what I'm doing with my employees to manage more effectively in this economy.

These ideas make sense for your organization, no matter its size or industry:

Be very clear with workers about how the business makes and keeps money. Although I've always had open-book management, to help employees understand the numbers that much better, I had them watch the HR That Works *The Accounting Game* Webinar. You might want to have at least your management team do the same thing.



Refocus your objectives. This is a good time to reestablish your core values. In our recent webinar, *The Integrity Dividend*, Cornell University professor Tony Simons advised members to focus on no more than three to five core values. Make these points memorable and brand them as often as possible. Then ask a simple question: How does this activity help or hinder moving toward these values?

Increase your productivity. Eliminate any time wasters. Whether it's a MySpace chat or shopping online, there's simply no time for it in today's workplace. We're tightening up our standard operating procedures, job descriptions, benchmarks, and 90-day game plans. If you're an HR That Works member and haven't yet done so, please watch my Training Module on Performance Improvement.

Work on your business. In my business, the summer months are generally slow. Every year, we use it to work "on" the business. Right now, we're all having an early summer and I believe that smart companies will use the slowdown to strengthen their operations. As the economy recovers, your company will be better positioned for growth and prosperity.

Live up to your commitments. Tony Simons reminded us about the risks associated with making "casual commitments." In my workshops I talk about the trap of heroes being over committed. When we over-commit, we produce a lie and then the drama begins. So, be clear about what you're committed to, don't over commit — and then walk the talk.

Create some positive dramas. Lord knows we've had enough of the negative ones! Don't allow your business to wallow in some collective pity party. Create a fun committee. Have a creativity day. Let your employees' kids do artwork that can be displayed in one of your hallways. Create some "positive energies" and you'll get some positive results!

"[If] there was ever a time to underscore the importance of HR, it has arrived. And sadly, if there was ever a time to see how few companies get HR right, it has arrived, too ... If their company is in a crisis — or their own career — perhaps they've at last seen the light. HR matters enormously in the good times. It defines you in the bad."

Jack Welch,
Business Week

This issue discusses:

- [Editor's Column: What Makes Sense Now?](#)
- [Employee Free Choice Act on Hold – for Now](#)
- [Paying On-Call Time](#)
- [Opinions That Matter](#)
- [DBTAC Southwest ADA Center Publishes Handbook](#)
- [How to Give Your Troops a Motivational Talk](#)
- [Health Care Coverage and Work Comp Leave](#)
- [EPL Risk Triple Header](#)
- [Case Studies](#)
- [June Webinar](#)

We've also provided a hyperlink to [Form of the Month](#).

EMPLOYEE FREE CHOICE ACT ON HOLD – FOR NOW

It looks like the Employee Free Choice Act won't make it to a Senate vote for at least a while. This is good news for employers and employees alike. We'll let you know if it looks like the bill comes up for a vote again in the near future.

PAYING ON-CALL TIME

The DOL has created an online tool to help determine when you have to pay for "On-Call Time." [Click here](#) to learn more.

OPINIONS THAT MATTER

The CDC states: Human cases of swine influenza A (H1N1) virus infection have been identified in the United States. An investigation and response effort surrounding the outbreak of swine flu is ongoing. What can you do? Learn about it by going to the [CDC Web site](#). You might also want to share this information with employees. Employers can learn more about their obligations for a potential flu epidemic [here](#).

DBTAC SOUTHWEST ADA CENTER PUBLISHES HANDBOOK

You can view an excellent summary of disabilities laws written in plain English [here](#).

HOW TO GIVE YOUR TROOPS A MOTIVATIONAL TALK

Most leaders and managers are not natural presenters. When speaking to employees, keep these tricks of the trade in mind:



- **Be clear about the goal for your message.** Try to drive home one to three points at the most. Anything more won't be memorable. You can support this by putting up a visual summary of the points you want them to remember.
- **Connect with individuals.** When President Obama gives a talk, he will focus on making eye contact with one person at a time. Rotate around the room and make sure to give your attendees a few moments of your time.
- **Start by building consensus.** Make statements that you can see people agreeing with. Once you have everybody nodding their heads in agreement, then you can tackle more difficult subjects.
- **Give concrete examples.** For example, instead of saying "Bob and his team have been doing a great job," say "When Bob was able to push that project through on time despite all of the challenges his team faced, it was a big win for the company,

resulting in a \$100,000 on-time performance bonus."

- **Don't rush when you talk.** Silence is one of the greatest tools of a presenter. When you want to make a point sink in, give your audience time for this to happen. You can always add statements like, "Does that make sense?" to enhance the buy-in.
- **Ask if there's a "higher thought."** As the saying goes, "None of us are as smart as all of us." If there is a better idea, you want to invite it so you know about it.
- **Watch your body language.** First of all, make sure you have good posture. Although you don't want to appear stiff, avoid flailing arm or hand gestures.
- **Solicit input from all attendees.** If your goal is to get feedback at the meeting, make sure you solicit it from those who normally sit quietly. Don't allow the conversation to be dominated by the few who always dominate the conversations.
- **Finally, ask for feedback.** If there's no time to do so in the meeting, then make sure you follow up afterward. Ask folks what they got out of the presentation and what they intend to do with it. Then set up a time or other method to obtain additional feedback.

By using these speaking techniques, you can go a long way to improving your leadership presentations.

HEALTH CARE COVERAGE AND WORK COMP LEAVE

Many employers get confused about their obligation to continue health care coverage when someone is out on extended work comp leave. Here are some general guidelines to consider:



Workers comp law doesn't require an employer to keep paying an employee's health care when they're on extended leave due to a work comp injury. An employer may not discriminate against someone on work comp leave. For example, if your practice is to continue health care coverage for two or three months hoping that someone can return to work, you need to maintain this practice with an employee on work comp leave or face a discrimination or retaliation claim.

Be aware of a Health insurance provision that employees must be "actively employed." For example, if they haven't worked for two months, they may not be actively employed. Even though you might have extended their coverage, if they have a significant claim, the carrier may decide to decline coverage, leaving them unprotected because you didn't issue them a COBRA notice. Not a good spot to be in.

Remember, if you have more than 50 employees, the FMLA requires you to maintain extended coverage for at least 12

weeks — but only if there's a reason to believe the employee will be returning to work.

EPL RISK TRIPLE HEADER



According to data from the Bureau of Labor Statistics, the Department of Labor, Jury Verdict Research, and other sources, here's the current state of employment practices liability exposures:

More claims have been filed. As unemployment rates hover around 10%, you can expect close to twice the claims being

filed as when the rate stood at 5%. Many people will view the law as an "out," whether it's to protect an existing job by filing a frivolous complaint or rethinking their employment situation a few months after they've been trying to get a new job.

Jury verdicts are increasing. According to Jury Verdict Research, the verdict figure averages roughly \$270,000, an all-time high. We expect this trend to continue. Remember, damage awards go up as people find it harder to return to work.

The percentage of the employee win rate is up. Traditionally, employees would win roughly 60% to 65% of the cases that went to trial. Approximately 40% of those verdicts are either overturned or reduced on appeal. According to JVR, the employee win rate has jumped to approximately 70%. We would expect that as the courts get more familiar with employment law, the percentage of cases thrown out or reduced on appeal actually diminishes.

There you have it — a triple header of risk. More claims, more expensive claims, and an increasing plaintiff win rate. Imagine your company getting hit with one of these verdicts during these tough times! If it's one of those \$1 million + verdicts, some companies might as well close their doors. Here's what we'd recommend:

Get Employment Practices Liability insurance (EPLI). Despite the rise in exposure, the EPLI market remains soft. Better to buy this coverage now before the underwriting criteria and rates stiffen.

Audit your personnel practices. Get your HR act together when it comes to hiring people the right way, preventing harassment and discrimination, and managing leave and disability claims.

Update your policies and handbook, and let everybody know about it. If you can show an EPL carrier that you have your compliance act together, you might be able to get a reduction on your insurance rate.

Train your managers. All managers should know the basics of discrimination and harassment prevention. Depending on the size of your company, managers should also get ADA (15) and FMLA (50) training.

Train your employees. All employees should know the basics of harassment and discrimination prevention, as well as how to file a complaint. They should also know how to request disability accommodation or FMLA leave.

Conduct a survey. Make sure that employees understand what's required of them and find out if any problems are brewing. We encourage HR That Works members to use the Employee Compliance Survey to help eliminate claims.

Ask for help if you're not sure. These laws are complicated and carry huge risks. Smart companies pick up the phone and speak to an employment law expert to make sure that they get their acts straight. Again, we encourage HR That Works members to use the Hotline Service.

We're the first to acknowledge that you can't run your business if you're always worried about getting sued. We also know it's foolish to take unnecessary risks where the stakes are this high. Follow these steps and you'll reduce the cost of your EPLI premiums, while avoiding wasted time, expense, and drama in the process.

CASE STUDIES

Falsification of Doctor's Note Prevents FMLA Leave



In [Smith v. Hope School](#), the Court of Appeals for the Seventh Circuit held that an employee's falsification of medical paperwork precluded her from being entitled to FMLA leave.

After suffering a work-related injury, the plaintiff asked for and was given FMLA paperwork, which she gave to her treating physician. When the plaintiff picked up her FMLA paperwork from the doctor's office, she added to the doctor's description of her condition the words "plus previous depression" without the doctor's approval or permission. Her doctor had never diagnosed her with depression. The plaintiff also backdated her portion of the signature line of the FMLA form and completed a separate Attending Physicians Statement in its entirety, listing diagnoses of muscle tension, chronic headaches, and depression.

Upon receipt of the form, the employer called the doctor about the possible alteration, and the doctor's office confirmed the alteration. The employer did not approve the FMLA leave request, and the plaintiff was subsequently terminated for unexcused absences. The plaintiff sued the employer claiming interference with her FMLA rights. The Court held, however, that the employer had not interfered with the plaintiff's rights under the FMLA. Because the plaintiff added an undiagnosed condition to her medical care providers certification form, without the knowledge or approval of her physician, the employer was justified in denying her FMLA leave. The Seventh Circuit limited its holding to more egregious alterations of FMLA paperwork, and did not address the

question of whether other, more insignificant alterations, such as correcting a typographical error or correcting or adding to a portion of the form with the knowledge and approval of a treating physician, would result in a similar ruling.

Bottom line: You now have the right to contact a health care provider's office directly about the authenticity of any medical report. Unlike the rest of the country, California employers should not contact the employee's health care provider directly to verify leave requests.

Paying to Show Up at Election Violates NLRB

In [DLC Corp., D/B/A Tea Party Concerts](#), the NLRB confirmed that it's a violation of the NLRA to pay off-duty employees to come to the workplace in order to vote in an NLRB election. The union sought to represent the employer's stagehands, who worked primarily during the summer months. The union filed an election petition and election dates were designated.

A month before the election, the employer sent a letter to all eligible voters, in which it explained some of the procedures for the upcoming election and why the employer was opposed to the union. In addition, the letter encouraged off-duty employees to come to work and vote in the election and promised that the employees would be paid for four hours on that day. Ten of the 56 off-duty employees requested and received four hours pay for voting in the election. The union lost the election by five votes.

The Board held, under controlling labor law precedent, that a party engages in objectionable conduct by paying employees to attend the election unless the payment is reimbursement of actual transportation expenses. In this case, the employer explicitly offered to provide off-duty stagehands with four hours of pay in exchange for coming in to the polling location to vote. The Board held that the offer was substantial and was not linked to reimbursement for travel or other costs. Moreover, the number of employees potentially affected was not de minimis. A new election was ordered.

Wearing Headscarf Not a Reasonable Religious Accommodation

In [Webb v. City of Philadelphia](#), the Court of Appeals for the Third Circuit held that a Muslim police officer's request to wear a headscarf while in uniform would create an undue hardship for the employer and therefore, it was not religious discrimination to deny her request. The plaintiff, a female police officer, requested permission from her commanding officer to wear a headscarf (a khimar or hijab, a traditional head covering worn by Muslim women) while in uniform and on duty. The headscarf did not cover her face or her ears, but would cover her head and the back of her neck. The police department denied her request based on its directive outlining the appropriate uniforms and equipment to be worn by the officers. Based on the denial, the plaintiff filed a charge of religious discrimination with the EEOC and the Pennsylvania Human Relations Commission. While the matter was pending before the EEOC, the plaintiff arrived at work wearing her headscarf. She refused to remove it when requested and was sent home for failing to comply with the police department's directive. These events were repeated during the next several days. The plaintiff was informed that her conduct could lead to disciplinary action. Thereafter, she continued to report to work wearing the headscarf and was suspended for 13 days. The Third Circuit agreed with the lower court's holding in favor of the police department.

Although Title VII of the 1964 Civil Rights Act prohibits employers from discharging or disciplining an employee based on his or her religion, an employer need not accommodate the employee if it would result in an undue hardship. The police department needed to maintain the perception of impartiality of its work force. Further, uniform requirements are crucial to the safety of officers. The Court held that the City would suffer undue hardship if required to grant the plaintiff's requested religious accommodation.

Bottom line: This court did an excellent job of explaining the factors to consider before declaring that clothing is inappropriate.

Thanks to the Worklaw Member firm of Shawe Rosenthal for helping with these case summaries.

FORM OF THE MONTH

PRIVACY CHECKLIST ([PDF](#))

Privacy is becoming a serious risk management/compliance issue. Use this checklist to consider how privacy implications affect your work environment.

(HR That Works Users can access this form in Word format by logging on to the site).

JUNE WEBINAR



*HR That Works users, mark your calendars for June 16th @ 2:00 pm EST. The topic is **"7 Legal Traps for the Unwary Employer"**. Our guest speaker is HR That Works president, Donald Phin.*

To listen to May 13th's webinar on **"Privacy in the Workplace"**, [click here](#).

To watch the video and obtain additional information on the upcoming webinars, please log into HR That Works and go to the Webinar page off the tools menu.