2015 HUMAN RESOURCES CONFERENCE

Sheraton Chicago O’Hare
October 22-23, 2015
Welcome Letter
October 22, 2015

To Conference Attendees –

Welcome to NCFC’s fourth annual Human Resources Conference and thank you for joining us!

This year’s conference features sessions on Affordable Care Act requirements, cyber security, employee performance reviews, and compliance with federal employment laws. We hope conference sessions and networking opportunities assist you in your day-to-day human resources challenges. Please feel free to suggest topics for future conferences.

We hope to see you in Phoenix February 10 through 12 for NCFC’s 87th Annual Meeting and Legal, Tax and Accounting Conference.

Regards,

Chuck Conner  
President & CEO  
NCFC

Marlis Carson  
Senior Vice President & General Counsel  
NCFC
Agenda
THURSDAY, OCTOBER 22

12:00-1:30 pm  
Networking Lunch  
Myrick’s  
Sheraton O’Hare

2:00-3:00 pm  
ADA Claims “Primer” for Employers  
Dan Hall and Liz Ortega-Schwarz, GROWMARK, Inc.

3:00-4:00 pm  
Cyber Crime Trends—a State of the Union  
Mark Eich, Clifton Larson Allen, Minneapolis

4:00-4:15 pm  
BREAK

4:15-5:15 pm  
Don’t Become EEOC’s Next Press Release—An Overview of the Commission’s Strategic Enforcement Plan  
Joe Bontke, U.S. Equal Opportunity Commission, Houston

6:30 pm  
Networking Dinner  
Nick’s Fishmarket  
222 W. Merchandise Mart Plaza, Suite 135  
*Please meet in the lobby at 6:15 to walk to the restaurant, located 0.2 miles from the hotel*

FRIDAY, OCTOBER 23

7:30-8:00 am  
Breakfast

8:00-9:00 am  
NLRB Update  
John Kuenstler, Barnes and Thornburg, Chicago

9:00-10:00 am  
ACA Reporting Compliance—Form 1095-C and the Cadillac Tax  
Tim Goodman, Dorsey and Whitney, Minneapolis

10:00-10:30 am  
Group Roundtable Discussion

10:30-10:50 am  
BREAK

10:50-11:50 pm  
Best Practices for Employee Performance Reviews  
Mike Droke, Dorsey and Whitney, Minneapolis  
Tedi Roach, Pacific Northwest Farmers Cooperative, Genesee, ID
Attendee List
<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Company/Office</th>
<th>Address</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
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ADA Claims “Primer” for Employers
Daniel S. Hall, Deputy General Counsel, GROWMARK, Inc.

Dan reports to the Vice President and General Counsel, Brent Bostrom.

Dan received his undergraduate degree from Western Illinois University in 1981, and his law degree from the University of Illinois in 1984. He became Deputy General Counsel in 2006 after serving as Assistant General Counsel since 1999. Prior to GROWMARK, Dan worked for 11 years at the IAA Office of the General Counsel (1986-1997) and 2 years with the law firm Heyl, Royster, Voelker & Allen (1997-1999). Prior to joining the staff of the IAA, he practiced at a private law firm in Peoria, Illinois from 1984-1986. Dan was appointed Corporate Compliance Officer for GROWMARK, Inc., GROWMARK FS, LLC, and Seedway, LLC in 2003, and he held that position until December 2009.

Courtney Kahle, Staff Attorney, GROWMARK, Inc.

Courtney recently joined the legal staff at GROWMARK. She received her JD in 2015 from the Loyola University Chicago School of Law. Prior to joining GROWMARK, she was a law clerk at Horwood Marcus & Belk. Courtney received her B.S. in Kinesiology in 2010 from the University of Illinois at Urbana-Champaign.
ADA COMPLIANCE PRIMER

2015 NCFC
Human Resources Conference
October 22-23
Sheraton O’Hare
Rosemont, IL

PRESENTED BY:
Daniel Hall, GROWMARK, Deputy General Counsel
Courtney Kahle, GROWMARK, Staff Attorney

ADA OVERVIEW

- ADA is a civil rights law that prohibits discrimination on the basis of disability.
- ADA Amendments of 2009 - increased number of “disabled”.
The Americans with Disabilities Act (ADA)
+ Gives federal civil rights protections to individuals with disabilities.
+ It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications.

The ADA prohibits discrimination against individuals with disabilities through the following five titles of the Act:
+ **Title I** - Employment; covers all employers with at least 15 employees.
+ **Title II** - State and Local Government; covers all programs, services and public activities.
+ **Title III** - Public Accommodations; Restaurants, stores, and places of public business.
+ **Title IV** - Telecommunications; Every state must have a message relay service – 711.
+ **Title V** - Miscellaneous Provisions.
**ADA HISTORY**

- The ADA was signed into law in 1990.
  - Divided into Titles
- Amended in 2009.
  - Made several significant changes (including changes to the definition of the term “disability.”)

**ADA & EMPLOYMENT**

- Prohibits “discrimination against qualified individuals with disabilities - someone who with or without reasonable accommodation, can perform the essential functions of the employment positions that such individual holds or desires.”
- No employer shall discriminate against any qualified individual with a disability in regard to any aspect of employment, including:
  - Recruitment, Application Process
  - Hiring
  - Leaves, Layoffs
  - Training, Job Assignments
  - Promotions, Compensation
  - Benefits, Employer-sponsored events
  - Discharges
WHAT DOES THE ADA REQUIRE?

- The ADA prohibits discrimination against qualified individuals with disabilities.
- Employers must provide reasonable accommodations to qualified individuals with disabilities.
- Unless Employer can show an undue hardship.
- Individual states can have stricter requirements – said requirements still apply.
- It is not enough for an employee to simply be considered “disabled” within the meaning of the ADA. The individual must be a qualified individual with a disability.

1ST STEP: ARE THEY QUALIFIED?

- In the hiring process you must determine if the applicant is qualified to hold the job “but for” the disability.
- Current employees becoming disabled most likely always satisfy this test.
- The Analysis is much harder in the “hiring” situation.
- Make sure that the “essential functions” of the job are listed in a job description.
2ND STEP: ARE THEY DISABLED?

What is a “Disability”? 
+ An individual who:
  + Has a mental or physical impairment that substantially limits one or more of life’s major activities.
  + Has a record of a substantially limiting impairment (although not currently limiting, e.g. cancer in remission).
  + Is regarded by the employer as having such an impairment.

Note: A diagnosis of impairment does NOT necessary mean a “disability”.

What does “substantially limits” mean?
What is “Substantially Limited” in a Major Life Activity?
Unable to perform a major life activity; or
Significantly restricted in the condition, manner, or duration of performing the activity compared to most people in the general population.
Under 2008 Amendments – it is easier for a person to be deemed disabled.
Major Life Activities.
2ND STEP: ARE THEY DISABLED?

- Basic actions that the average person in the general population can perform with little or no difficulty, including:
  - Breathing
  - Ingesting
  - Sensing
  - Thinking
  - Reading
  - Speaking
  - Interacting With Others
  - Learning
  - Other Major Life Activities

- Temporary or short-term conditions are not covered.
- The ADA generally does not apply to temporary or short term conditions unless the condition is expected to last several months.
- However, ADA now extends protection to individuals with episodic impairments or conditions in remission (if the impairment substantially limits a major life activity in its active state).
  - Cancer in remission
  - Multiple sclerosis
  - Asthma
  - Migraines
3rd Step: Essential Functions

Does the disability prevent the employee from carrying out the essential functions of the job?

<table>
<thead>
<tr>
<th>Disabilities</th>
<th>Jobs</th>
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<td>Blindness</td>
<td>Call Center</td>
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<td>Deafness</td>
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<tr>
<td>Wheelchair</td>
<td>Manager</td>
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<td>Mental Illness</td>
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<td>Epilepsy</td>
<td>Attorney</td>
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<tr>
<td>Broken Limb</td>
<td>Company Nurse</td>
</tr>
<tr>
<td>Pregnancy</td>
<td>Security Guard</td>
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</tbody>
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4th Step: Reasonable Accommodations

- Employer has the obligation to engage in interactive discussions with the employee regarding what the “Reasonable Accommodation” might be.
- Cost (i.e. “reasonableness”) is relative to the size of the employer.
- The employee does not get to choose their accommodation.
4TH STEP: REASONABLE ACCOMMODATIONS

Examples of Reasonable Accommodations
- Provision of alternative parking arrangements.
- Adjustment of job application process.
- Alteration of available facilities.
- Provision of an alternative work material.
- Provision of qualified reader, writer, sign language interpreter, or other assistant.
- Acquisition of alternate devices, adaptive equipment, or assistive technology.
- Modification to policy, procedure, rule or practice
- Restructuring of the job.
- Providing an alternative work area.

RECOMMENDATIONS FOR EMPLOYERS

- The employer is not responsible for providing accommodations for physical or mental impairments that they are unaware of.
- An employer can require that an individual does not pose a direct threat to the health and safety of the individual or others in the workplace.
- The ADA does not interfere with the employer’s ability to hire the best candidate, but prohibits the employer from discriminating against a candidate due to a disability.
**RECOMMENDATIONS FOR EMPLOYERS**

- Be Proactive!
- Review employee handbooks and/or policies.
- Train supervisors and managers.
- Take action any time an employee has:
  - Difficulty performing his or her essential job functions;
  - Has restrictions but requests to return to work.
- Maintain a written description of the substantial ("essential") functions of the job when entering the hiring process for a position.

**RECOMMENDATIONS FOR EMPLOYERS**

- Identify reasonable accommodations and speak with applicants regarding any potential accommodations which would enable the applicant to perform the essential functions of the job.
- Create a process to assist in determining whether an accommodation creates an undue hardship and a committee to help determine alternate accommodations if one particular accommodation is deemed an undue hardship.
- Inform ALL applicants of what the application process entails and ask whether they will need any accommodations.
DO'S AND DON'TS

☒ Employers may NOT ask questions that will reveal the existence of a disability BEFORE making a job offer.

☒ However, if the disability is obvious or has been voluntarily disclosed by the individual, the employer may ask if the disability will impose difficulties in performing specific job tasks.

DO'S AND DON'TS

☒ Further, these types of questions and medical exams ARE permitted AFTER a job offer has been given but before the individual begins work.

☒ Maintain:
  ♦ Proper auxiliary aids and services.
  ♦ Staff education/training.
  ♦ Implement an online interface for accessibility.
  ♦ Ensure policies and procedures are not discriminatory.
RESOURCES

- ADA - www.ada.gov
- EEOC - 1(800)669-4000 voice 1(800)669-6820 (TTY) and www.eeoc.gov
- DOJ (Office on the ADA) - 1(800)514-0301 voice and 1(800)514-0383 (TTY) and http://www.justice.gov/crt/disability-rights-section
- Job Accommodation Network (JAN) - 1(800)526-7234

QUESTIONS?

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Cyber Crime Trends
--a State of the Union
Mark Eich, CPA, CISA, Principal, CliftonLarsonAllen

Mark Eich is Principal in charge of the Information Security Services Group at CliftonLarsonAllen. He has over 27 years experience in auditing and technology consulting. In this position, he has actively led many IT audits and security assessments for clients in a range of industries and with a diversity of operating environments. Mark leads a team of technology and industry specialists in an efficient approach to provide security analyses that are balanced with business needs. Information security assessments include network penetration services, internal network security assessments, incident response and electronic forensics services, IT audits and SSAE 16 (formerly SAS70), information security policies and procedures assessment/consulting and PCI compliance.
Cyber Crime Trends
2015 Update

3 Questions

• What are hackers doing?

• Who is hacking us?

• How do they do it?
Themes

- Hackers have “monetized” their activity
  - More hacking
  - More sophistication
  - More “hands-on” effort
  - Smaller organizations targeted

Mitigation Themes

- Employees that are aware and savvy
- Networks resistant to malware
- Relationships with banks maximized
What are they doing?

- Organized Crime
  - Wholesale theft of personal financial information

- CATO– Corporate Account Takeover
  - Use of online credentials for ACH, CC and wire fraud

- Ransomware

Black Market Economy - Theft of PFI and PII

Active campaigns involving targeted phishing and hacking focused on common/known vulnerabilities.

- Target
  - Goodwill
  - Jimmy Johns

- University of Maryland
  - University of Indiana

- Anthem
  - Blue Cross Primera

- Olmsted Medical Center
  - Community Health Systems
Black Market Economy – Stolen Card Data

• Carder or Carding websites

• Dumps vs CVV’s

• A peek inside a carding operation:

  http://krebsonsecurity.com/2014/06/peek-inside-a-professional-carding-shop/

Black Market Economy – “Carder Boards”

• Specializing in anonymous purchases
Black Market Economy – “Carder Boards”

• Customer service oriented!

Latest News

Awesome new bases uploaded to shop:
1. Neo-Fresh USA4
2. Neo-Fresh USA5
3. Neo-Fresh USA6
4. USA-HQ-Quality2
5. USA-HQ-Quality1 - bulk sale $8 per piece

Enjoy

GREAT OFFER!
ADD NOW $1000 OR MORE ON YOUR ACCOUNT VIA BITCOIN AND GET
10% BONUS!!
OFFER IS VALID IN THE NEXT 30 MINUTES

Take me to the Add Funds page   No Thanks

Black Market Economy – “Carder Boards”

• Easy to use!
Credit Card Data For Sale

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<tr>
<th>Dumps</th>
<th>US</th>
<th>EU</th>
<th>CA, AU</th>
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Corporate Account Takeover

- Catholic church parish
- Hospice
- Collection agency
- Main Street newspaper stand
- Electrical contractor
- Health care trade association
- Rural hospital
- Mining company

- On and on and on and on.................
CATO – 3 Versions

1. Deploy malware – keystroke logger

2. Deploy malware – man in the middle

3. Recon / email persuasion

Multi-Factor Authentication Solutions

• MFA is critical

• Silver bullet?
V3 Case Study – Please Wire $ to....

- CEO asks the CFO...

- Common mistakes
  1. Use of private email
  2. “Don’t tell anyone”


CATO Defensive Measures

- Multi-layer authentication
- Multi-factor authentication
- Out of band authentication
- Positive pay
- ACH block and filter
- IP address filtering
- Dual control
- Activity monitoring
Ransomware

- Malware encrypts everything it can interact with
  - V1: Everything where it lands
  - V2: Everything where it lands plus everything user has rights to on the network
  - V3: Everything where it lands plus everything on the network

- CryptoLocker / Cryptowall

- Kovter
  - Also displays and adds child pornography images

Ransomware

May 20, 2014 – Ransomware attacks doubled in last month (7,000 to 15,000)

http://insurancenewsnet.com/oarticle/2014/05/20/cryptolocker-goes-spear-phishing-infections-soar-warns-knowbe4-a-506966.html
Ransomware

• Zip file is preferred delivery method
  – Helps evade virus protection

• Working (tested) backups are key

The Cost?
Norton/Symantec Corp:

• Cost of global cybercrime: $388 billion

• Global black market in marijuana, cocaine and heroin combined: $288 billion
Who?

- Chinese
  - State sponsored
  - Goal is to supplant US as #1 economic power
- Russians
  - State “protected”
  - Goal is simpler, steal money
- Copycats
  - Koreans, Africans, others use the tools of the Chinese and Russians

How do hackers and fraudsters break in?

- Modern hacking relies on malware
- Social engineering
- Drive by surfing
  - Infected websites
- Easy password attacks
Social Engineering

“Amateurs hack systems, professionals hack people.”

Bruce Schneier

Pretext phone calls

Building penetration

Email attacks

Pre-text Phone Calls

• “Hi, this is Randy from Fiserv users support. I am working with Dave, and I need your help...”
  – Name dropping
  – Establish a rapport
  – Ask for help
  – Inject some techno-babble
  – Think telemarketers script

• Home Equity Line of Credit (HELOC) fraud calls
• Ongoing high-profile ACH frauds
Physical (Facility) Security

Compromise the site:

- “Hi, Joe said he would let you know I was coming to fix the printers...”

Plant devices:

- Keystroke loggers
- Wireless access point
- Thumb drives (“Switch Blade”)

Email Attacks - Spoofing and Phishing

- Impersonate someone in authority and:
  - Ask them to visit a web-site
  - Ask them to open an attachment or run update

- Examples
  - Better Business Bureau complaint
  - Microsoft Security Patch Download
Email Phishing – “Targeted Attack”

Your current bill for your account is now available online in My Verizon
Total Balance Due: $2335.58

Keep in mind that payments and/ or adjustments made to your account after your bill was generated will not be reflected in the amount shown above.

View and Pay Your Bill
Want to simplify your bill? You can:
view your bill online via My Verizon

Strategies to Combat Social Engineering

- (Ongoing) user awareness training
- SANS “First Five” – Layers “behind the people”
  1. Secure/Standard Configurations (hardening)
  2. Critical Patches – Operating Systems
  3. Critical Patches – Applications
  4. Application White Listing
  5. Minimized user access rights
     - No browsing/email with admin rights

Checklist

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10 Key Defensive Measures

Attacks are Preventable!

- Intrusion Analysis: TrustWave
- Intrusion Analysis: Verizon Business Services
- Intrusion Analysis: CERT Coordination Center
- Intrusion Analysis: CLA Incident Handling Team
Strategies

Our information security strategy should have the following objectives:

- Users who are more aware and savvy
- Networks that are resistant to malware
- Relationship with our FI is maximized

Ten Keys to Mitigate Risk

1. Strong Policies -
   - Email use
   - Website links
   - Removable media
   - Users vs Admin
   - Insurance
Ten Keys to Mitigate Risk

2. Defined user access roles and permissions
   - Principal of minimum access and least privilege
   - Users should **NOT** have system administrator rights
     - “Local Admin” in Windows should be removed (if practical)

Ten Keys to Mitigate Risk

3. Hardened internal systems (end points)
   - Hardening checklists
   - Turn off unneeded services
   - Change default password
   - Use Strong Passwords
   - Consider application white-listing

4. Encryption strategy – data centered
   - Email
   - Laptops and desktops
   - Thumb drives
   - **Email enabled cell phones**
   - Mobile media
Ten Keys to Mitigate Risk

5. Vulnerability management process
   - Operating system patches
   - Application patches
   - Testing to validate effectiveness –
     - “belt and suspenders”

6. Well defined perimeter security layers:
   - Network segments
   - Email gateway/filter
   - Firewall – “Proxy” integration for traffic in AND out
   - Intrusion Detection/Prevention for network traffic, Internet facing hosts, AND workstations (end points)

7. Centralized audit logging, analysis, and automated alerting capabilities
   - Routing infrastructure
   - Network authentication
   - Servers
   - Applications
Ten Keys to Mitigate Risk

8. Defined incident response plan and procedures
   • Be prepared
   • Including data leakage prevention and monitoring
   • Forensic preparedness

Ten Keys to Mitigate Risk

9. Know / use Online Banking Tools
   • Multi-factor authentication
   • Dual control / verification
   • Out of band verification / call back thresholds
   • ACH positive pay
   • ACH blocks and filters
   • Review contracts relative to all these
   • Monitor account activity *daily*
   • **Isolate the PC used for wires/ACH**
Ten Keys to Mitigate Risk

10. Test, Test, Test
   - “Belt and suspenders” approach
   - Penetration testing
     ◊ Internal and external
   - Social engineering testing
     ◊ Simulate spear phishing
   - Application testing
     ◊ Test the tools with your bank
     ◊ Test internal processes

Questions?

Hang on, it’s going to be a wild ride!!

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***

(612)397-3128
Don’t Become EEOC’s Next Press Release
Joe Bontke is the outreach manager and ombudsman for the Houston District office of U.S. Equal Employment Opportunity Commission. Joe has been in the field of Human Resources & Civil Rights for the past 27 years and has experience in employment law and adult education. With a Bachelor's in Philosophy and a Masters in Education, he has been a Human Resources Director, a Training Coordinator for the American Disabilities Act (ADA) Technical Assistance Center for Federal Region VI, was appointed as Assistant Professor at Baylor College of Medicine and recently has been named Chair of the Governors’ Committee for People with Disabilities by Governor Rick Perry. Using his entertaining style, Joe has educated groups throughout the country and most recently, his work at the EEOC has enabled him to empower employers and employees with the understanding they need to work effectively at their jobs. Joe’s philosophy of education is - that 90% is knowing where to find the information ... when you need it.
Don’t become the EEOC’s next press release
An Overview of the Commission’s Strategic Enforcement Plan

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EEOC carries out its work through its headquarters offices in Washington, D.C. and through 53 field offices serving every part of the nation. (with only 2200 employees)
EEOC Cases Filed By District – FY 2015

Protected Federal Categories

- Race
- National Origin
- Color
- Genetic Information
- Religion
- Disability
- Sex
- Age <40
Obligations of Employers

- Make the workplace free of unlawful discrimination, harassment and retaliation

- Promptly and confidentially investigate complaints of discrimination, harassment and retaliation

- Where discrimination, harassment and retaliation may have occurred, take prompt and appropriate remedial action (i.e., discipline commensurate with the offense)
Survey Question:

Over the past 12 months, has your company focused more effort on retaliation prevention?

A. Yes  
B. No  
C. I’m not sure

Top EEO Risk Area - Retaliation

- **EEOC Charge Stats**: 37,836 retaliation charges received in 2014, forming 38.1% of all charges. *For third year running, the #1 most common basis for an EEO charge!*

- The underlying claim of harassment or discrimination doesn’t need to be proved.

*Most managers and supervisors don’t understand retaliation risks!*
EEOC Strategic Enforcement Plan (SEP)

Nationwide Priorities:

1. Eliminating systemic barriers in recruitment and hiring.
2. Protecting Immigrant, migrant, and other vulnerable workers
3. Addressing Emerging Issues
4. Enforcing the Equal Pay Laws
5. Preserving Access to the Legal System
6. Combating Harassment
I. Eliminating Barriers in Recruitment and Hiring

Barriers:
- Exclusionary practices and policies
- Steering individuals into jobs based on protected category
- Restrictive application processes
- Use of screening tools with adverse impact

Background Checks

- Why is the Commission interested in this?
  - Using blanket policies may adversely impact certain protected groups
  - Reports contain errors

- Disparate Treatment

- Adverse Impact:
Background Checks

- Two circumstances employers will meet “job relatedness and consistent with business necessity”
  - The employer validates the criminal conduct screen for the position in question
  - The employer considering at least
    - 1) the nature of the crime,
    - 2) the time elapsed, and
    - 3) the nature of the job,

Background Checks

- Must show job relatedness and business necessity \(^{(\text{Green v Missouri Pacific Railroad})}\)
  - 1 The nature and gravity of the offense or conduct;
  - 2 The time that has passed since the offense or conduct and/or completion of the sentence; and
  - 3 The nature of the job held or sought.
- Some level of risk is inevitable in all hiring. It’s ultimately about risk management
- Must accurately distinguish between those applicants who pose an unacceptable risk and those who do not (be careful of blanket exclusions)
Arrests

- An arrest does not establish that criminal conduct has occurred
- Final dispositions are often not reported
- An arrest should not be the reason for the employment decision, but the underlying conduct may be a reason, if objectively known

Top reasons employers use CRIMINAL BACKGROUND CHECKS

Source: SHRM 2010
CRIMINAL BACKGROUND CHECKS
WHY DOES THE EEOC CARE?

Discrimination based on RACE or NATIONAL ORIGIN

• Intentional Discrimination - Disparate Treatment
• Unintentional Discrimination – Disparate Impact

DISPARATE IMPACT
Criminal Background Screening

• Step 1: Did the policy disproportionately screen out applicants based on race, national origin or another protected factor?

• Step 2: Is the exclusion job-related and is there a business need related to the job in question?
Common Inaccuracies in CRIMINAL RECORDS

- Wrong Person
- Multiple Reports of the Same Incident
- Uncorrected Identity Theft
- Arrests Dropped For Innocence
- Expunged Records Still Appear

“Do Not Apply with Any Misdemeanors/Felonies”

“BLANKET BANS”

“No Felonies or Misdemeanors Allowed”

“No Arrests”

“Spotless Criminal History”

“No Misdemeanors No Felonies”

“Must Not Have Any Convictions. PERIOD.”
CRIMINAL BACKGROUND CHECKS

**Individualized Assessment**

Consider each person's record based on the potential risk in the particular position.

**Mitigating Factors**

- Marriage
- Education
- Successful Employment History
- Age at time of release or conviction
- Rehabilitation Efforts

---

BE MINDFUL ABOUT STEREOTYPES!

Only one of them is a convicted felon.
Background Checks (best practices)

- Eliminate policies or practices that exclude people from employment based on any criminal record.

- Train decision makers about Title VII and its prohibition on employment discrimination.

- Develop a Policy

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

Target:
- Disparate pay
- Job segregation
- Harassment
- Human Trafficking
- Discriminatory Language Policies
Veterans: Employment

- As of 2013, there were 21.6 million veterans in the U.S.
- 2.4 million veterans have served during the Gulf War II period. 17% of these veterans are women.
- As of the end of Fiscal Year 2013, Gulf War II veterans are experiencing significant unemployment rates: Example: 18-24 year old male Gulf War II vets: 29% (non-vet males of same age: 17%)
- Unemployment rates for veterans generally – about 8%

Post-Traumatic Stress Disorder & Traumatic Brain Injury

- Approximately 5000 combat deaths Iraq and Afghanistan
- 30,000 suicides each year – 20% veterans
- State of Minnesota study of returning Guard troops:
  - 25% ran red lights
  - 25% drove down center of road
- DOD lists approximately 32,000 casualties (Iraq/Afghanistan)
- 2008 study - 300,000 vets with PTSD and 320,000 vets with Traumatic Brain Injury
- VA estimates approximately 400,000 vets Iraq/Afghanistan have PTSD
- PTSD: Vietnam = 30%, Iraq/Afghanistan = 20%
- 19% of soldiers Iraq/Afghanistan sustained brain injury from explosive device
- Limited Traumatic Brain Injury is not the result of overt trauma, and the soldier may not even be aware of the injury
- Limited Traumatic Brain Injury and PTSD exhibit similar symptoms
Veterans: Disabilities

- Gulf War Veterans are more likely to report a service-connected disability than other veterans (26% versus 14% for all veterans). About 3 million veterans have service-connected disabilities.

- Unemployment rates for all veterans — those with disabilities and those without — are about the same — about 8%.

- Unemployment rates for Gulf War II veterans with and without disabilities are about the same — about 12%.

Post-Traumatic Stress Disorder & Traumatic Brain Injury

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### Post-Traumatic Stress Disorder & Traumatic Brain Injury

- **Possible Symptoms:**
  - Short-term memory loss
  - Lack of concentration
  - Trembling
  - Irritability
  - Restlessness
  - Sensitivity to noise
  - Heightened sense of suspicion

- **Possible Accommodations:**
  - More written instructions
  - More reminders
  - Organizers
  - Allow to tape meetings
  - Reduce distractions
  - Allow I-pod/MP3 Player
  - Natural light
  - Break large assignments into smaller ones
  - **Not an exhaustive list** (see *Accommodating Employees with PTSD* and *Accommodating Employees with TBI*, Office of Disability Employment Policy, Veterans' Employment and Training Service)
“Presumed PTSD”

Veterans advocacy organizations and media reports have indicated a bias against veterans in the form of a presumption that they have mental health issues, such as PTSD.

3. Emerging Issues

- Issue 1 - ADAAA
- Issue 2 - LGBT Coverage
  - Coverage under Title VII provisions—sex stereotype analysis
- Issue 3 – Pregnancy
  - Intersection of the ADAAA’s new coverage implications and the Pregnancy Discrimination Act
Leave as a Reasonable Accommodation

• Why is the Commission interested in this?
  ◦ How does an employer look at intermittent or indefinite leave under the ADA?
    • FMLA v ADAAA (rigid v adaptable)
  ◦ Current Guidance:

Leave as a Reasonable Accommodation

• Undue Hardship Considerations

  i. the nature & cost of the accommodation;
  ii. the overall financial resources
  iii. the overall size of the business of a covered
  iv. the type of operation or operations
LGBT Coverage

New area of enforcement for the EEOC

Attempt to conform sex coverage to other forms of coverage: e.g., Race, National Origin, Age, Disability, and Religion
Gender Stereotyping

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court found that actions taken because of sex stereotyping are actions made on the basis of gender and therefore violate Title VII.

The EEOC takes the position that transgender discrimination is sex discrimination because it is based on gender stereotyping.

May be helpful to review these policies:
- Harassment
- Codes of conduct
- Dress codes and appearance standards
- Background and security clearance
- Changing ID cards, names, personnel records
- Non-disclosure of medical information
- The use of restrooms, locker rooms and other gender-specific facilities
Transgender Coverage

- Sex discrimination claim exists if the employer discriminates...
- because the individual has expressed gender in a non-stereotypical fashion
- out of discomfort because the person has transitioned or is in the process of transitioning;
- because the employer simply does not like that the person is identifying as a transgender person

*Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012)

Frequently Asked Questions

Q) Is a transgender individual required to inform an employer or prospective employer about his or her birth gender?

A) No. Possible Exception: security clearance
What about bathrooms?

- Access to adequate sanitary facilities required for all employees.
- Once transitioning employees begin living and working full-time in the gender that reflects his or her gender identity, employers should allow access to restrooms and (if provided to other employees) locker room facilities consistent with his or her gender identity.

Changes to Enforcement of the Pregnancy Discrimination Act

PDA keys on the ADA for accommodations

Because the ADAAA provides far broader coverage now, PDA coverage is extended

Pregnant women whose pregnancies pose limitations now covered in addition to women with pregnancy complications.
4. Enforcing Equal Pay Laws

The next Equal Pay Day is April 12, 2016.

This date symbolizes how far into 2016 women must work to earn what men earned in 2015.

Gender Issues in the Workplace

- **Pay Disparity**
  - Lilly Ledbetter Fair Pay Act
    - Extends the filing date for pay disparity cases
  - Title VII of the Civil Rights Act of 1964
    - Connect pay disparity to gender
  - Equal Pay Act of 1963
    - Skill, effort and responsibility
    - No connection to gender necessary

- **Caregiver Discrimination**
Caregiver Discrimination

- Caregivers care for children, the elderly or people with disabilities

- Women comprise approximately 50% of the U.S. workforce, and women with small children are twice as likely to be employed as they were thirty years ago

- Women are denied hire or denied promotions because employers assume a woman with care giving responsibilities will not be reliable on the job
  - The assumption is: with women, it's family first and career second, and with men, it's career first and family second

Caregiver Discrimination

(Motherhood Penalty)

- Motherhood penalty - when controlling for qualifications, childless women and fathers are generally rated significantly higher than mothers on competency, work commitment, promotability, and hiring recommendations.
5. Preserving Access to the Legal System

Policies or practices that:
- are retaliatory
- require overly broad waivers
- require settlements that prohibit filing with the EEOC or cooperating with our investigations or prosecutions
- result in record keeping violations

6. Preventing Workplace Harassment Through Systemic Enforcement and Targeted Outreach

Harassment is unwelcome verbal or physical conduct—usually it is severe and pervasive

- It is not simply teasing,
- offhand comments, or
- Minor isolated incidents

Best practice: Implement a general harassment policy in addition to your sexual harassment policy
Wellness Programs

- An employee wellness program, also called a “worksite wellness program,” promotes & supports the health, safety, & well-being of employees.

Wellness Program Risks

- Required medical exams
- Asking disability- or GINA-related questions
- Penalties/Incentives for participation
- Women, people over forty more likely to have more health problems
- Racial minorities more prone to obesity, diabetes, and hypertension
- All implicate disparate treatment/impact concerns
The Digital Age

Welcome to the Virtual World of:

- **“Friends”**: Facebook & Instagram
  - Mostly social, but growing business network
- **“Connections”**: LinkedIn
  - “Facebook in a suit”
- **“Followers”**: Twitter
  - Instant messaging on steroids

HOT TOPIC – Interference in Union Organizing Activities or “Concerted Actions”

**Employee Rights Under the National Labor Relations Act**

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

**Under the NLRA, you have the right to:**
- Organize or refrain from organizing your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join, or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, hours, and other terms and conditions of employment or the terms of organizing with your co-workers.
- Discuss your wages and benefits and other terms and conditions of employment or the terms of organizing with your co-workers.
- Take action with one or more co-workers to improve your working conditions by among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

**Under the NLRA, it is illegal for your employer to:**
- Prohibit you from talking about or soliciting for a union during non-work times, such as before or after work or during break times, or from distributing union literature during non-work times, in non-work areas, such as parking lots or break rooms.

**Under the NLRA, it is illegal for a union or the union that represents you in bargaining with your employer to:**
- Threaten or coerce you in order to gain your support for the union.
**NLRB VIEW**

Monitoring employee’s social networking activity has the potential of creating a chilling effect on the employees’ communications regarding the terms and conditions of their employment, in violation of the NLRA at 29 U.S.C. § 157.

**When It Becomes Illegal**

- When employers base their hiring decision on an applicant’s protective status
- When information discovered leads to employer’s knowledge of information that would be illegal to use against an applicant in a hiring decision
  - i.e. discovering an applicant was arrested and using that to disqualify
  - Things you cannot ask in an interview are the same things employer cannot research
Promote yourself on the Internet.

Create and establish an online presence — look better to HR directors, loan officers and romantic prospects.

- Get your own online presence easily.
- Establish yourself online without the trouble and cost of learning any code, creating your own site or paying for Web hosting.

- Monitor and manage your reputation.
- Keep tabs on how you look from a personal, web-based dashboard — get alerts when content about you appears on the Internet.

- Track your online popularity.
- Gauge your visibility and search activity — learn how many people are looking for you, how often, and from what location.

Call us toll-free today for a free consultation: 888.919.9312

On California-based reputation updates are available 24/7 and typically return results in an average of 10 seconds.

How big an online presence do you want?
What is truth?

Finished files are the result of years of scientific study combined with the experience of many years of experts.
Finished files are the result of years of scientific study combined with the experience of many years of experts.
Is your perception …. Sometimes your truth?

• Sometimes we have to take another look at what we think we know

Any Questions, Comments, Concerns or Complaints

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or

EEOC Training Institute
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NLRB Update
John F. Kuenstler, Partner, Barnes & Thornburg LLP, Chicago

John F. Kuenstler is a partner in the Chicago office of Barnes & Thornburg LLP and a member of the Labor and Employment Department.

John dedicates his practice exclusively to the representation of employers in labor and employment and business matters. He counsels and represents a diverse client base on a national and regional basis in virtually all aspects of labor and employment law, including defense of wrongful discharge, discrimination, sexual harassment, retaliation, Title VII, ADA, ADEA, Section 1981, FMLA, FLSA, ERISA, USERRA, WARN and OSHA claims in federal and state courts and administrative agencies, as well as collective and class actions.

John routinely represents management’s interests in workplace tort, breach of contract, non-compete, non-solicitation and other restrictive covenant cases. He is experienced in various forms of alternative dispute resolution, helping clients avoid the costs of prolonged legal disputes.

In addition to his litigation practice, John also represents clients at all levels of administrative proceedings, including matters before the EEOC, NLRB, OSHA, and DOL. For clients with organized workforces or those striving to remain union free, John acts as the lead company negotiator for collective bargaining, defends employers in union grievance hearings and arbitrations, helps craft union avoidance campaigns, and counsels on a range of issues that can arise under the NLRA.

John has guided employers through workforce reorganizations, reductions in force, mass layoffs, plant closings, wage and hour investigations, and whistleblower claims, avoiding litigation through proactive responses and creative business strategies. He provides counseling on matters such as employment practice audits, effective human resources strategies and reviewing and drafting employment policies, social media policies, handbooks, employment contracts, independent contractor agreements, employee leasing agreements and severance agreements. To assist in effective implementation of best practices policies, John provides training and seminars to managers on all matters that impact the employment relationship.

John was selected as a 2012 BTI Client All-Star by the BTI Consulting Group, Inc., being one of merely 272 lawyers nationwide to receive this recognition. He is a member of the American, Illinois, and Chicago Bar Associations, the Bar Association of Metropolitan St. Louis, and the Society for Human Resource Management.
National Council of Farmer Cooperatives
October 23, 2015

NLRB Update

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Introduction

• Why are we talking about this?
• Because these rule changes are dramatic
• Companies need to be aware of these changes and prepare
The New Rules

- Went into effect on April 14, 2015
- Old rules allowed elections up to 42 days of the representation petition being filed with the NLRB; that is now decreased
- Pre-election hearing is automatically 8 days after petition is filed
- Employer must file a “statement of position” by noon the day before the hearing addressing any challenges to the petition, including the scope of the proposed unit; if it is not raised, it is waived
- Eliminates mandatory 25 days waiting period on who is eligible to vote
- ULP’s filed by a union do not necessarily block an election

The New Rules cont.

- Rule expands information on the “excelsior” list
  - Home phone – new
  - Mobile phone – new
  - Email address – new
  - Work location – new
  - Shift – new
  - Classification – new
  - Name – old
  - Address – old
- This information must be provided within 2 days of the direction of the election
Why do these changes matter?

• Momentum is all on the union’s side
• Union persuasion has already occurred; cards are signed
• Employers have to play “catch up” fast
• Little time for the employer to understand the campaign issues and effectively communicate with employees and persuade them to vote “no”

What are people saying?

• NLRB says these new rules will streamline Board procedures, increase transparency and eliminate or reduce “unnecessary litigation”
• Kate Bronfenbrenner (Cornell ILR) said: “Delay hurts, because [the employer] can fire one more worker, or engage in five more captive-audience meetings or three more supervisor one-on-ones per person.”
• Organizers from Chicago Alliance Charter Teachers explained that eliminating the delays from legal challenges makes organizing easier, you do not have to tell workers to “hang in there.”
Has there been a real impact?

- Yes
- Study compared NLRB docket activity before and after the new rules became effective:
  - 222 representation cases were analyzed from April 14 – June 5, 2015 and the same period in 2014
  - Median number of days from petition to election declined by 35 percent from 38 to 24
  - Of the 71 elections actually held, unions won 62 percent
- Conclusion: employers have two weeks less to fight a union petition
- For the unprepared employer, this can be the difference of winning and losing

Why did this happen now?

- Obama’s payback for union support in two elections
- An effort to reverse the decrease in union membership
- Consistent with other pro-union labor initiatives
  - Email communications (Purple Communications, Inc.); can use employer email system on non-working time
  - NLRB joint employer ruling
  - New overtime regs are coming
  - DOL memo on independent contractors; most workers are employees
  - Micro-units (Specialty Healthcare); community of interest vs. overwhelmingly community of interest
Growth of American Workforce

1956 - 69,409,000
2014 - 156,200,000
Greater than 100% Increase

Union Membership Decline

1956 - 17,490,000
2014 - 14,600,000
Union Membership Decline

<table>
<thead>
<tr>
<th>Year</th>
<th>Union Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955</td>
<td>38.0% Union</td>
</tr>
<tr>
<td>1983</td>
<td>20.1% Union</td>
</tr>
<tr>
<td>2000</td>
<td>13.4% Union</td>
</tr>
<tr>
<td>2008</td>
<td>12.3% Union</td>
</tr>
<tr>
<td>2010</td>
<td>11.9% Union</td>
</tr>
<tr>
<td>(Private Sector) 2012</td>
<td>6.9% Union</td>
</tr>
<tr>
<td>2012</td>
<td>11.3% Union</td>
</tr>
<tr>
<td>(Private Sector) 2014</td>
<td>6.6% Union</td>
</tr>
<tr>
<td>2014</td>
<td>11.1% Union</td>
</tr>
<tr>
<td>(Private Sector)</td>
<td>6.6% Union</td>
</tr>
</tbody>
</table>

Union Win Percentage

- 2004: 58%
- 2005: 61%
- 2006: 62%
- 2007: 60%
- 2008: 67%
- 2009: 69%
- 2010: 68%
- 2011: 64%
- 2012: 63%
- 2013: 64%
- 2014: 69%
US Labor Union Organizing Activity in 2014

- Union membership in the private sector stayed flat, BUT, unions are becoming more active in the private sector
- There were more union representation elections during the first six months of 2014 than in the same time period in 2013
- AND unions won a larger percentage of these elections.
- Unions won 72% of elections of 1-49 workers
- 60% of elections of 50-99 workers
- 79% of elections of 100-499 workers
- 54% of units over 500 workers.

Union Organizing Timeline

<table>
<thead>
<tr>
<th>Grassroots Organizing (Union Blitz)</th>
<th>Card Signing</th>
<th>Petition</th>
<th>Election</th>
<th>Campaign</th>
<th>Bargaining</th>
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</thead>
<tbody>
<tr>
<td>You are here</td>
<td></td>
<td></td>
<td></td>
<td>April 14, 2015-New election rules will cut campaign time in half</td>
<td></td>
</tr>
</tbody>
</table>
NLRB’s Continued Crackdown
On Non-Union Employer Personnel Policies

NLRB Handbook Rules:

- Confidentiality Policies
- Behavior Policies – Conduct Towards Company Supervisors
- Behavior Policies – Conduct Towards Other Employees
- Rules Regulating Third Party Communications
- Rules on Use of Company Logos, Copyrights, and Trademarks
- Rules Restricting Photo/Video Recordings
- Rules Restricting Employees from Leaving Work
- Conflict-of-Interest Rules
- E-Mail Policies
NLRB Overview

• Over the last few years, the NLRB has been extending its reach to impose its powers on NON-UNION employers, including employers who have never had to deal with “union issues.”

• Why? → Less than 7% of private sector workers belonged to a union in 2014.
What’s At Stake

• Unfair labor practice charges.
  – Backpay
  – Notice posting
  – Lawyer fees and lost time!

• Overturned union election results (if we win).

Section 7 of the National Labor Relations Act (NLRA)

• “Employees shall have the **right** to:
  – self-organization;
  – form, join, or assist labor organizations;
  – bargain collectively through representatives of their own choosing; and
  – **engage** in other **concerted activities for the purpose** of collective bargaining or other **mutual aid or protection** . . . .”

• **NLRB has been taking an expansive view of Section 7 in order to infringe on non-union work places.**
Confidentiality Policies

• The NLRB says:
  – An employer’s confidentiality policy that either specifically prohibits employee discussions of terms/conditions of employment—or that employees would reasonably understand to prohibit such discussions—violates the NLRA.

• For example, the following Rules have been found to be unlawful:
  – Do not discuss customer or employee information outside of work, including phone numbers and addresses.
  – Sharing conversations overheard at the work site with your co-workers, the public, or anyone outside of your immediate work group is prohibited.
  – Discuss work matters only with other employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places.

• The above Rules fail to clarify, expressly or contextually, that they do not restrict Section 7 activity.

Confidentiality Policies

• The NLRB says:
  – Broad prohibitions on disclosing “confidential” information are lawful so long as they do not reference information that would reasonably be considered a term/condition of employment, because employers have a substantial and legitimate interest in the privacy of certain business information.

• For example, the following Rule has been found to be unlawful:
  – Never publish or disclose the Employer’s Confidential Information. Confidential Information means all information in which its loss, undue use, or unauthorized disclosure could adversely affect the Employer’s interests.

• The above rule would reasonably lead employees to believe that they cannot disclose information about wages and working conditions, because it might adversely affect the employer’s interest.
Confidentiality Policies

• Rules will likely be lawful if they:
  – Do not reference information regarding terms/conditions of employment;
  – Do not define “confidential” in an overbroad manner; and
  – Do not otherwise contain language that would reasonably be construed to prohibit Sec. 7 communications.

• Examples of lawful Rules:
  – No unauthorized disclosure of “business secrets” or other confidential information.
  – Unauthorized disclosure of confidential information not otherwise available to persons or firms outside the Company is cause for disciplinary action.
  – Do not disclose non-public, proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.

Confidentiality Policies

Banner Health System, 358 NLRB No. 93 (2012)

• Employer violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing it while the investigation was pending.

• The Board held: “[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights”.
Confidentiality Policies

**Banner Health System, 358 NLRB No. 93 (2012)**

- The employer had the burden to first determine whether, in any given investigation:
  - (1) witnesses needed protection;
  - (2) evidence was in danger of being destroyed;
  - (3) testimony was in danger of being fabricated; or
  - (4) there was a need to prevent a cover-up.

- The Board found that the general assertion of protecting the integrity of an investigation “clearly failed to meet” that burden.

---

Confidentiality Policies

**Banner Health System, 358 NLRB No. 93 (2012)**

- The decision applies equally to unionized and non-union settings.

- The decision is **not** a total prohibition on asking employees for confidentiality during an internal investigation.
  - Employers who do ask for confidentiality must establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a cover-up, or further another legitimate business interest.

**Compare with EEOC’s position to keep harassment investigations as confidential as possible.**
Confidentiality Policies

First Transit, Inc. (April 2, 2014)

• At issue in this case were provisions prohibiting the disclosure of the following:
  – “any company information,” including wage and benefit information;
  – statements about work-related accidents to anyone but the police or company management; and
  – “false statements” about the company.

• In addition, there was a policy barring participation in outside activities that would be “detrimental” to the company’s image.

Confidentiality Policies

First Transit, Inc. (April 2, 2014)

• What did the NLRB have to say about these policies?
  – **ALL OF THEM ARE UNLAWFUL!!!**

• Why?
  – The language in the policies could be viewed as “chilling” the employees’ Section 7 rights.
Behavior Policies – Conduct Towards Company & Supervisors

• The NLRB says:
  – Rules prohibiting employees from engaging in disrespectful, negative, inappropriate, or rude conduct towards the employer or management will usually be found unlawful.
  – Rules that ban false statements will be unlawful unless they specify that only maliciously false statements are prohibited.
  – Rules that limit conduct towards the employer or management may be unlawful.

• The NLRB says:
  – Rules requiring employees to be respectful and professional towards clients or competitors, but not to the employer or management, likely will be lawful.
  – Rules that prohibit conduct that amounts to insubordination would also likely be lawful.
  – Rules that prohibit an employee’s criticism of an employer’s policies or treatment of employees in a public forum will likely be unlawful.
Behavior Policies – Conduct Towards Company & Supervisors

• The following Behavior Policies have been found to be unlawful:
  – Be respectful to the Company, other employees, customers, partners, and competitors.
  – Employees shall not make defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees, or management.

• Employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

Behavior Policies – Conduct Towards Company & Supervisors

• The following also was found to be unlawful:
  – Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative, is prohibited.
  – Chronic resistance to proper work-related orders or discipline, even though not overt insubordination, will result in discipline.

• Because they ban conduct that does not rise to the level of insubordination.
Behavior Policies – Conduct Towards Company & Supervisors

• The following rules have been found to be lawful, as they restrict or limit conduct only towards customers, competitors, etc.:
  – No rudeness or unprofessional behavior toward a customer, or anyone in contact with the Company, is permitted.
  – Employees will not be discourteous or disrespectful to a customer or to any member of the public while in the course and scope of Company business.

• Similarly, rules that require employees to work together in a civil manner have been found to be lawful:
  – Each employee is expected to work in a cooperative manner with management/supervision, coworkers, customers, and vendors.

Behavior Policies – Conduct Towards Company & Supervisors

• Additionally, context matters in terms of Behavior Policies.
• While normally a ban on disrespectful behavior towards management would be unlawful, if the context limits the rule to only serious misconduct, it might be lawful.
• The following rule was found lawful in Tradesmen International, 338 NLRB 460 (2002), because it was contained in a larger provision that focused only on serious misconduct:
  – Being insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, coworker, customer, or vendor will result in discipline.
Behavior Policies – Conduct Towards Company & Supervisors

Laurus Technical Institute and Joslyn Henderson
(June 13, 2014)

• The provision at issue:
  – a “no gossip” policy which prohibited employees from “participating in or instigating gossip about the company, fellow employees or customers.”

  • NLRB affirmed an ALJ ruling which held that “the language in the no gossip policy [was] overly broad, ambiguous and severely restrict[ed] employees from discussing or complaining about any terms and conditions of employment.”

  • The Board also affirmed the finding that the gossip policy improperly restricted the employees’ rights to concerted action under Section 7 of the National Labor Relations Act.

Behavior Policies – Conduct Towards Other Employees

• The NLRB says:
  – Employees have a right to argue and debate with each other about unions, management, terms/conditions of employment, etc.
  – Protected concerted speech will not lose its protection even if it includes abusive and inaccurate statements.
  – Rules that prohibit “negative” or “inappropriate” discussions among employees, without further clarification, will likely be unlawful.
  – Although employers are entitled to have anti-harassment rules, they cannot be so broad as to prohibit vigorous debate or comments about Section 7-protected subjects.
Behavior Policies – Conduct Towards Other Employees

• The following rules have been found to be unlawful because employees would reasonably construe them to encompass protected activity:
  – *Don’t pick fights with coworkers online.*
  – *Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments.*
  – *Do not send unwanted, offensive, or inappropriate emails.*

• The following rules have been found to be lawful considering they require respectful behavior towards customers or competitors only, they do not mention management or the company, and employees would not believe they prohibit Section 7-protected activity.
  – *No harassment of employees, customers, or facility visitors.*
  – *No threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.*
  – *Rule appearing within section on unlawful harassment and discrimination: No use of racial slurs, derogatory comments, or insults.*
Behavior Policies – Conduct Towards Other Employees

*Hills and Dales General Hospital (April 1, 2014)*

- At issue in this case were the following three paragraphs in the employer’s Values and Standards of Behavior Policy:
  
  1. A paragraph prohibiting employees from making “negative comments about our fellow team members,” including coworkers and managers;
  2. A paragraph requiring employees to represent the employer “in the community in a positive and professional manner in every opportunity;” and
  3. A paragraph prohibiting engaging or listening to “negativity or gossip.”

- What did the NLRB have to say about these policies?
  
  – **ALL OF THEM ARE UNLAWFUL!!!**

- Why?
  
  – The language in the policies could be viewed as “chilling” the employees’ Section 7 rights.
Rules Regulating Third Party Communications

- **The NLRB says:**
  - Handbook Rules that reasonably could be read to restrict comments with the media, government agencies, and other third parties (e.g., unions) about wages, benefits, and terms/conditions of employment will be unlawful.
  - Company media policies must be written carefully to ensure rules are not read to ban employees from speaking to media or other third parties on their own (or other employees’) behalf.

- The following company media policy was found to be unlawful because the phrase “company matters” could be construed to encompass employment and labor concerns:
  - Employees are not authorized to speak to any representative of the media about company matters unless so designated by HR.

- The following was found to be unlawful because it could be understood to apply beyond just media comments speaking to the employer’s official position:
  - Employees are not authorized to answer questions from the news media. When approached for information, you should refer the person to the Media Relations Department.
Rules Regulating Third Party Communications

- Media contact rules will be lawful when they clearly specify that employees should not speak to media on behalf of the company, as opposed to speaking on their own behalf.
  - The company will respond to the news media in a timely and professional manner only through designated spokespersons.
  - It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry.

Rules on Use of Company Logos, Copyrights, and Trademarks

- The NLRB says:
  - Handbook rules cannot prohibit employees’ fair protected use of such property.
  - Employees have a right to use a Company’s name and logo on picket signs, leaflets, and other protest material.
  - A broad ban on such use without clarification will generally be found unlawfully overbroad.
Rules on Use of Company Logos, Copyrights, and Trademarks

• The following rules were found to be unlawful because they contain broad restrictions that employees reasonably could construe as limiting fair use of intellectual property:
  
  – Do not use any Company logos, trademarks, graphics, or advertising material in social media.
  
  – Do not use other people’s property, such as trademarks, without permission in social media.
  
  – Use of the Company’s name or other information in your personal profile is banned. In addition, it is prohibited to use the Company’s logos, trademarks, or any other copyrighted material.

• The following rules were found to be lawful:

  – Respect all copyright and other intellectual property laws. For the Company’s protection, it is critical that you show respect for laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including the Company’s copyrights, trademarks, and brands.

  – To minimize risk of a violation of law, you should provide references to the sources of information you use in your online communications. Do not infringe on the Company’s logos, brand names, taglines, slogans, or other trademarks.
Rules Restricting Photo/Video Recordings

• The NLRB says:
  
  – Employees have a Section 7 right to photograph and make recordings in furtherance of protected concerted activity.
  
  – Rules placing a total ban on such photography or recordings, or banning use or possession of cameras or such devices, are unlawfully overbroad where they could reasonably be construed to prohibit such activity on non-work time.

Rules Restricting Photo/Video Recordings

• The following rules were found to be unlawful:
  
  – *Taking unauthorized pictures or video on company property is prohibited.*

  – *No employee shall use any recording device, including, but not limited to, audio, video, or digital for the purpose of recording any employee or Company operation.*

• The following blanket restrictions also were found to be unlawful:
  
  – *A total ban on use or possession of personal electronic equipment on Company property.*

  – *A prohibition on personal computers or data storage devices on Company property.*
Rules Restricting Photo/Video Recordings

• While employers may limit such activity to only non-work time, they must carefully define what that includes. For example, the following rule was found unlawful, because “on duty” could be construed to include meal and break time:
  – Employees are prohibited from wearing cell phones, making personal calls, or viewing or sending texts while on duty.

Rules Restricting Photo/Video Recordings

• Rules will be lawful where their scope is appropriately limited. For example, if the Company has an obvious, strong privacy interest to protect, a no-photography rule might be lawful.

• Rules might also be lawful when considered in context with the whole provision. The following rule was found lawful since it was located in the media policy provision and following instructions on how to deal with reporters on premises:
  – No cameras are to be allowed in the store or parking lot without prior approval from the corporate office.
Rules Restricting Employees from Leaving Work

• The NLRB says:
  
  – Rules regulating when employees can leave work are unlawful if employees reasonably would read them to forbid protected strike actions and walkouts.
  
  – If a rule makes no mention of “strikes,” “walkouts,” “disruptions,” or the like, employees will reasonably understand the rule to pertain to employees leaving their posts for reasons unrelated to protected concerted activity. Such rules likely will be found to be lawful.

• The following rules were found to be unlawful:
  
  – Failure to report to your scheduled shift for more than three consecutive days without prior authorization or “walking off the job” during a schedule shift is prohibited.
  
  – Walking off the job is prohibited.
Rules Restricting Employees from Leaving Work

- The following rule was found to be at least partially lawful, considering it fails to use terms like “work stoppage” or “walking off the job”:
  - Entering or leaving Company property without permission may result in discharge.

- However, the above requirement to obtain permission before entering the property was found to be unlawful, because employers may not deny off-duty employees access to nonworking areas except where sufficiently justified by business reasons.

Conflict-of-Interest Rules

- **The NLRB says:**
  - An employee’s right to engage in concerted activity is strongly protected, even if that activity is in conflict with the employer’s interests.
  - If an employer’s conflict-of-interest rule would reasonably be read to prohibit such activities, the rule will be found unlawful.
  - Where a rule clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity.
Conflict-of-Interest Rules

• The following rule was found to be unlawful:
  – Employees may not engage in any action that is not in the best interest of the Company.

• The rule is phrased broadly and does not include any clarifying examples or context to exclude Section 7 activity.

Conflict-of-Interest Rules

• The following rule was found to be lawful:
  – Do not give, offer or promise anything of value to any representative of an outside business that sells or provides a service to, purchases from, or competes with the Company. Examples of violations include holding an ownership or financial interest in an outside business and accepting gifts, money or services from an outside business.
E-Mail Policies

• The NLRB says:
  – Employees who have been given access to their employer’s e-mail system for work purposes also must be able to use the e-mail system to engage in statutorily protected discussions about terms and conditions of employment during nonworking time (e.g., union organizing), unless the employer can show that special circumstances justify specific restrictions.

E-Mail Policies

• The following communications policy was found to be unlawful:
  – Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry cellular telephones and/or other Company equipment is provided . . . to facilitate Company business.

  – Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with . . .
    • Activities on behalf of organizations or persons with no professional or business affiliation with the Company; and
    • Sending uninvited email of a personal nature.
E-Mail Policies

- Accordingly, employers need to evaluate their current e-mail policies to ensure that they are consistent with NLRB precedent.

- Employers will have to revise handbook rules and other policies that prohibit employees, who have already been granted e-mail access, from using electronic communications systems for non-business purposes.

- Employers can still conduct regular e-mail monitoring; however, they should avoid any targeted monitoring of union activities.

- While an employer may be able to justify a complete ban on non-business use of company e-mail under special circumstances, the Board indicated that it anticipates such special circumstances to occur in rare cases.
Concluding Remarks

- Other big ticket items include social media policies and dress code policies.
- It is imperative to review your rules and policies to evaluate whether any updates are needed.
- When practical, be specific with definitions and give examples of conduct being proscribed.
- Consider the use of a “savings clause.”
- Keep abreast of NLRB developments.

Questions?
ACA Reporting Compliance
Tim Goodman, Partner, Dorsey and Whitney, Minneapolis

Tim Goodman’s practice focuses on assisting employers with executive compensation, health insurance, and employee benefit plans. Tim assists a broad array of employers, with a special focus on assisting cooperatives, agribusiness companies, tax-exempt organizations (primarily hospitals and health care entities), Alaskan Native Corporations, and governmental entities (primarily Indian tribes). This includes assisting employers on health care reform, wellness plans, and other welfare issues and welfare plan matters (including cafeteria, dependent care, education assistance, health FSAs, HRAs, HSAs, parking, and tuition plans), and severance. With respect to health care reform, Tim advises employers on the new fees imposed on employer health plans (the patient-centered outcomes research (PCOR) fee, the transition reinsurance fee, and the employer shared responsibility (play or pay) fee) and the new requirements ranging from coverage of adult children and the summary of benefits coverage to essential health benefits.

Tim advises employers on qualified and nonqualified retirement plans (including pension, defined benefit, 401(k), 403(b), 457(b), and 457(f) plans, and section 409A). Tim has worked with employers on a range of retirement plan matters, including Roth contributions and in-plan Roth conversions. Employers also turn to Tim for advice on executive compensation and deferred compensation programs (including excess plans, SERPs, and other deferred compensation). His assistance includes advising employers on responding to benefit claims, answering questions regarding the extension of health coverage under COBRA and state law, drafting employee communications, complying with fringe benefit rules, payroll reporting of benefits, USERRA and HEART, complying with the HIPAA privacy and security rules, and addressing worker classification.

Tim also advises employers by updating them on legislation (such as the Affordable Care Act (ACA or PPACA – health care reform), the Pension Protection Act, the American Jobs Creation Act, the Veterans Benefits Improvement Act, and the Sarbanes-Oxley Act). This includes advising employers on the impact of section 409A on nonqualified deferred compensation plans. Tim also assists employers with new regulations, such as the health care reform regulations, GINA Part I regulations issued by the DOL, IRS, and Centers for Medicare & Medicaid Services; and the GINA Part II regulations issued by the EEOC. In addition to advice, Tim works with employers on taxation of benefits with respect to FICA taxes under section 3121(v)(2), nonresident taxes for work performed in multiple states, taxation of health benefits, and taxation and design of benefits employers provide to same-sex spouses and domestic partners. Tim also works with employers on benefits in M&A transactions and employer securities in retirement plans. Employers regularly have Tim assist them with plan drafting and design, including plan formation, IRS qualification, administration, merger, and termination of employee benefit plans, and the submission of errors under voluntary correction programs including the IRS employee plan correction program (EPCRS) and the delinquent filer program (DFVC).
ACA Reporting: Form 1095-C and Employer Shared Responsibility

October 23, 2015

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Forms and Reporting
Forms 1094 & 1095

• For minimum essential coverage reporting (section 6055)
  – Form 1095-B used by insurers for insured health plan coverage (also, small employers with self-insured plan and other situations)
    • Prepared by insurer or employer and given to employee
    • Use Form 1094-B to send Forms 1095-B to IRS
  – Form 1095-C used by applicable large employers with self-insured plan
    • Prepared by employer or vendor and given to employee
    • Each employer responsible for reporting (each EIN)
    • Note that one entity may file on behalf of others
    • Use Form 1094-C to send Form 1095-C to IRS

• For employer shared responsibility fee (section 6056)
  – Form 1095-C used to report employee eligibility and other information
Forms and Reporting
Forms 1094 & 1095

• Guidance – forms
  – Form 1095-C
  – Form 1095-C instructions (also Form 1094-C)
  – Form 1095-B
  – Form 1095-B instructions (also Form 1094-B)

• Guidance – frequently asked questions
  – Employer reporting on Form 1095-C
  – Form 1095-C and Section 6056
  – Form 1095-C, Form 1095-B and Section 6055
    • https://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055T

Forms and Reporting
Penalties

• Significant reporting penalties (these are distinct from penalties for employer shared responsibility fee – these penalties are under sections 6721 and 6722)
  – Failure to provide timely form with correct information
    • $250 to employee and additional $250 to IRS per Form 1095-C
    • $500 to employee and additional $500 to IRS per Form 1095-C if intentional disregard
  – Deadline generally January 31 for employee and March 31 (electronic filers) for IRS
    • Limited opportunity for extensions
    • IRS will apply good faith standard for 2015, but employer must have been diligent to try to do correct reporting
  – In addition, Form 1094-C signed under penalties of perjury, which has its own significant penalties and potentially could result in imprisonment (very rare)
Forms and Reporting
Form 1095-C

- Form 1095-C
  - Part I – general information
    - Employee information
    - Employer information (employer-by-employer basis - EIN)
  - Part II - offers of coverage to full-time employees
    - Employee offer of coverage on month-by-month basis
    - Line 14 – offer of coverage codes (type of coverage and to whom coverage was offered)
    - Line 15 – employee share of lowest cost monthly premium for self-only coverage
    - Line 16 – safe harbor codes (explaining coverage, absence of coverage, and other situations)
  - Part III – individuals covered
    - Names of employee and dependents covered
    - SSNs of employee and dependents covered
    - Months covered
Forms and Reporting
Forms 1095-C

• Form 1095-C
  – Part II, Line 14 codes
    • 1A – Affordable, minimum value, minimum essential coverage (MEC) provided to full-time employee, plus MEC to spouse and dependents
    • 1B – Minimum value, MEC provided to full-time employee only
    • 1C – Minimum value, MEC provided to full-time employee, plus MEC to dependents (but not spouse)
    • 1D – Minimum value, MEC provided to full-time employee, plus MEC to spouse (but not dependents)
    • 1E – Minimum value, MEC provided to full-time employee, plus MEC to spouse and dependents
    • 1F – MEC not providing minimum value to employee or employee and additional individuals
    • 1G – Offer of coverage to employee who was not full-time employee where employee enrolled in coverage for month
    • 1H – No offer of coverage or offer of coverage that was not minimum essential coverage
    • 1I – Qualifying offer transition relief 2015

• Form 1095-C
  – Part II, Line 16 codes
    • 2A – Employee not employed during month
    • 2B – Employee not a full-time employee enrolled in coverage
    • 2C – Employee enrolled in coverage
    • 2D – Employee in limited non-assessment period
      » Waiting period
      » Initial measurement period and associated administrative period under look-back method
    • 2E – Employee under multiemployer plan (multiemployer interim relief)
    • 2F – Form W-2 affordability safe harbor
    • 2G – Federal poverty level (FPL) affordability safe harbor
    • 2H – Rate of pay affordability safe harbor
    • 2I – Non-calendar year transition relief
  – Line 16 can be left blank if no code is applicable (but consider what is the Line 14 code)
• Form 1095-B
  – Part I
    • Employee information
  – Part II
    • Employer information (employer-by-employer basis - EIN)
  – Part III
    • Issuer (coverage provider) information
  – Part IV – individuals covered (same as Part III of Form 1095-C)
    • Names of employee and dependents covered
    • SSNs of employee and dependents covered
    • Months covered
Forms and Reporting
Examples Regarding Forms Used

• Employer has insured health plan and has 150 employees who were full-time employees for one or more months during year
• Form 1095-B
  – Insurer will send full-time employees Form 1095-B
  – Insurer will send IRS Form 1094-B, which transmits Forms 1095-B
• Form 1095-C
  – Employer will send full-time employees Form 1095-C with Parts I and II completed (Part III blank because insurer is sending Form 1095-B)
  – Employer will send IRS Form 1094-C, which transmits Forms 1095-C

Forms and Reporting
Examples Regarding Forms Used

• Employer has self-insured health plan and has 150 employees who were full-time employees for one or more months during year
  – Plan also covers non-employee directors and individuals who terminated in a prior year and elected COBRA
• Form 1095-B
  – Employer may use Form 1095-B for directors and individuals on COBRA
  – Employer then will send IRS 1094-B for Forms 1095-B
• Form 1095-C
  – Employer will send full-time employees Form 1095-C with Parts I, II, and III completed
  – Employer may use Form 1095-C for directors and individuals on COBRA (alternative to Form 1095-B)
  – Employer will send IRS Form 1094-C, which transmits Forms 1095-C
Employer has self-insured health plan and has 35 employees who were full-time employees for one or more months during the year.
- Plan also covers two non-employee directors and one individual who terminated in a prior year and elected COBRA.

**Form 1095-B**
- Employer will send employees Form 1095-B.
- Employer will send IRS Form 1094-B, which transmits Forms 1095-B.

**Form 1095-C**
- Not used because employer is not subject to employer shared responsibility fee.

**Forms and Reporting Examples – Form 1095-C, Lines 14, 15, & 16**
- Ongoing full-time employee:
  - Employee, spouse, and children enrolled in self-insured minimum essential coverage, minimum value, affordable on 9.5% poverty line basis, all year (Qualifying Offer).
Forms and Reporting
Examples – Form 1095-C, Lines 14, 15, & 16

• Ongoing full-time employee with child born during year
  – Employee and spouse enrolled in self-insured minimum essential coverage, minimum value (may be affordable) all year; child added in July
  – Employee share of self-only coverage is $110/month

• Newly hired full-time employee
  – Employee hired March 15
  – Waiting period: employees eligible on 1st of month after 30 days of employment
  – “Qualifying Offer” made on May 1

Note: No amount listed on Line 15 based on Code 1A
• Newly hired variable hour employee
  – Employee hired March 15, 2015 with variable schedule
  – Employer’s self-insured health plan is a calendar year plan
  – Initial measurement period March 15, 2015 through March 14, 2016
  – No Form 1095-C for 2015 – not (yet) a full-time employee and does not have self-insured health plan coverage

• Newly hired variable hour employee (continued from prior slide)
  – Employee averaged 32 hours a week during initial measurement period
  – No waiting period; employee is eligible first of month following end of initial measurement period
  – Form 1095-C for 2016
Forms and Reporting
Examples – Form 1095-C, Lines 14, 15, & 16

• COBRA – in month in which employee terminates
  – Line 14
    • If covered entire month, use Code 1A or applicable code
    • If elects COBRA (not covered entire month), Code 1E or applicable code
      – IRS FAQ Form 1095-C, Q&A 16
      – Appears contrary to Instructions, p 10, upper left hand column
    • If does not elect COBRA (not covered entire month), use Code 1H
      (same sources)
  – Line 15
    • List cost of lowest self-only COBRA if Line 14 is Code 1B, 1C, 1D, or 1E
      – Instructions, p 10, upper right hand column
      – IRS FAQ Form 1095-C, Q&A 16, Ex 2
  – Line 16
    • If covered entire month, use Code 2B
    • If elects COBRA, use Code 2B
      – Instructions, p 11, explanations of Codes 2B, 2A and 2C
      – IRS FAQ Form 1095-C, Q&A 8
      – Appears contrary to IRS FAQ Form 1095-C, Q&A 16, Ex 2 and Ex 3
    • If does not elect COBRA, use Code 2B (same sources and Ex 1)

• COBRA – in months after employee terminates but in year in which employee terminates (was full-time employee)
  – Line 14
    • If elects COBRA, use Code 1E or applicable code
      – IRS FAQ Form 1095-C, Q&A 16, Ex 2
      – Appears contrary to Instructions, p 10, upper left hand column
    • If does not elect COBRA, use Code 1H
      – Instructions, p 10, upper left hand column
      – IRS FAQ Form 1095-C, Q&A 16
  – Line 15
    • List cost of lowest self-only COBRA if Line 14 is Code 1B, 1C, 1D, or 1E
      – Instructions, p 10, upper right hand column
      – IRS FAQ Form 1095-C, Q&A 16, Ex 2
  – Line 16
    • If elects COBRA, use Code 2A
      – Instructions, p 11, explanations of Codes 2A and 2C
      – Appears contrary to IRS FAQ Form 1095-C, Q&A 16
    • If does not elect COBRA, use Code 2A
      – Instructions, p 11, explanations of Codes 2A and 2C
      – IRS FAQ Form 1095-C, Q&A 16, Ex 1
• COBRA – in year following year employee terminates
• Form 1095-B may be used for former employee
• If Form 1095-C used for former employee
  – Line 14
    • Use Code 1G
      – Instructions, p 12, upper left hand column (coverage of non-employee)
  – Line 15
    • Leave blank because not Code 1B, 1C, 1D, or 1E
      – Instructions, p 10, upper right hand column
  – Line 16
    • Leave blank
      – IRS FAQ Form 1095-C, Q&A 9

• COBRA – in months active employee covered for all or part of month under COBRA
• Different reporting rules apply when COBRA event a reduction in hours rather than termination
  – Assumes the employee not protected by a stability period under the look-back method
  – Line 14
    • Use Code 1E or other applicable code
      – Instructions, p 10, upper left hand column
      – IRS FAQ Form 1095-C, Q&A 17
  – Line 15
    • List cost of lowest self-only COBRA if Line 14 is Code 1B, 1C, 1D, or 1E
      – Instructions, p 10, upper right hand column
      – IRS FAQ Form 1095-C, Q&A 17
  – Line 16
    • If elects COBRA, use Code 2C
      – Instructions, p 11, explanation of Code 2C
      – IRS FAQ Form 1095-C, Q&A 17
Forms and Reporting
Examples – Form 1095-C, Lines 14, 15, & 16

• COBRA – beneficiary elects COBRA (due to divorce, death, etc.)
• Form 1095-B may be used for beneficiary
• If Form 1095-C used for beneficiary
  – Note: Cannot use Form 1095-C without SSN
  – Line 14
    • Use Code 1G
      – Instructions, p 12, upper left hand column (coverage of non-employee)
      – Appears contrary to IRS FAQ Form 1095-C, Q&A 16
  – Line 15
    • Leave blank because not Code 1B, 1C, 1D, or 1E
      – Instructions, p 10, upper right hand column
  – Line 16
    • Leave blank
      – IRS FAQ Form 1095-C, Q&A 9 and Q&A-18

Forms and Reporting
Examples – Form 1095-C, Lines 14, 15, & 16

• Terminated employee who does not elect COBRA
  – Employee waived coverage at open enrollment
  – Employer offered self-insured minimum essential coverage, minimum value (may be affordable) all year
    • Employee contributions set using Form W-2 safe harbor
  – Employment terminated August 15; coverage through term date; did not elect COBRA

Offer satisfies safe harbor (also could leave blank)  
Termed in August; then not employee

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• Terminating employee who elects COBRA
  – Employee and spouse enrolled in self-insured minimum essential coverage, minimum value (may be affordable) all year
  – Employee share of self-only coverage is $110/month
  – Employment terminated July 20; coverage through term date
  – COBRA elected; $300/month for single COBRA coverage

Offered coverage

• Beneficiary on COBRA
  – Employee divorces spouse and spouse elects COBRA
  – Employee and spouse enrolled in self-insured minimum essential coverage, minimum value (may be affordable) all year
  – Employee share of self-only coverage is $110/month
  – Divorce on May 15
  – Spouse on employee Form 1095-C for January to May
Forms and Reporting
Examples – Form 1095-C, Lines 14, 15, & 16

• Beneficiary on COBRA (continued from prior slide)
  – Divorce on May 15
  – Spouse elects single COBRA coverage
  – Form 1095-B may be used
  – Form 1095-C may be used if have SSN
  – Spouse has own Form 1095-C for June to December

• Part-time employees (part time entire year)
  – Generally, Form 1095-C does not appear required unless part-time employee enrolls in self-insured health plan
  – Form 1095-C required for:
    • Full-time employees
    • Employees who are not full time for entire year who enroll in self-insured health plan for any month of year
    • In this case:
      – Line 14 would use Code 1G
      – Line 16 blank or possibly 2F, 2G, or 2H because
        » Code 2C indicates not to use that code
        » Code 2B is for non-full-time employee not in plan
        » Code 2A does not apply (was employed)
  – No code for non full-time employee enrolled in plan
  – If health plan is insured and part-time employee covered, insurer should provide employee Form 1095-B
• Common pay master
  – Form W-2 reporting – Employee works for two or more related employers (for example, a hospital and a clinic); employer provides and files one Form W-2 to employee under section 3121(s)
  – ACA reporting – Need to report on an EIN-by-EIN basis; report for entity at which employee works most hours in month (if employee works most hours in January through August at hospital and then remainder of year at clinic, employee receives two Forms 1095-C)
• Common pay agent
  – Form W-2 reporting – Entity (related employer or vendor) serves as common pay agent and provides Forms W-2 on entity’s EIN rather than employer’s EIN under section 3504
  – ACA reporting – Need to report on EIN-by-EIN basis; no allowance made for common pay agent

• Mergers and acquisitions
  – IRS has not issued guidance
  – Whether reporting is required and who has reporting requirement not always clear
    • Example – Stock acquisition of entity that prior to acquisition was subject to ACA reporting (had 50 full-time employee equivalents in prior year); it appears that acquiring entity has reporting obligation for entire year
    • Example – Stock acquisition of small entity that prior to acquisition had only 25 employees; no reporting appears required for period prior to acquisition (after acquisition subject to ACA reporting)
    • Example – Asset acquisition would appear to mean buyer has no reporting obligations, but regulations contain provision on successor employer that is currently reserved
  – Note that Form 1094-C asks about controlled group on month-by-month basis
• **COBRA**
  - Insured health plans have minimum essential coverage reporting obligation under section 6055 including COBRA
    • Reported on Form 1095-B
  - Self-insured plans have same obligation
    • May be reported on Form 1095-C or Form 1095-B
  - Issue – HHS OCR position is that COBRA enrollment information is protected health information (PHI)
    • If providing COBRA enrollment information to vendor to assist with reporting, need to consider PHI issues and enter into business associate agreement with vendor
    • Many vendors do not believe this information is PHI or are not set up to comply with treating information as PHI
    • Note that enrollment information of active employees provided by employer is not PHI based on preamble to HIPAA regulations and it is coming from employer’s payroll rather than health plan

• **Multiemployer plans**
  - Issue – Many multiemployer health plans have declined to provide health enrollment information to employers
    • PHI concerns
    • Administrative burdens
  - Transition relief for 2015 eases Form 1095-C reporting with respect to lines 14, 15, and 16
    • Employer may enter Code 1H on line 14 and Code 2E on line 16 if employer contributes to multiemployer plan for employee under collective bargaining agreement and meets certain conditions for relief
  - Other issues
    • If paid leave or disability leave benefits are provided through union, multiemployer plan may not provide information on hours to determine if employee was full-time employee for month
Forms and Reporting
Form 1094-C

1. **Transmittal of Employee-Provided Health Insurance Offer and Coverage Information Returns**

### Part II: ALE Member Information - Monthly

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Forms and Reporting
Forms 1094-C

- **Form 1094-C**
  - **Part I**
    - Employer information (employer-by-employer basis)
    - Each employer (EIN) must file separate Form 1094-C
  - **Part II**
    - Total number of Forms 1095-C filed
    - Controlled group information
    - Transition relief and simplified reporting (tie to lines 14 and 16 from Form 1095-c)
  - **Part III**
    - Minimum essential coverage offering information (was minimum essential coverage offered to 95% of full-time employees)
    - Full-time employee count
    - Total employee count
    - Transition relief indicator
  - **Part IV**
    - Other applicable large employer members

Forms and Reporting
Deadlines

- **Preparing for reporting**
  - If not already done, now is time to select vendor (if outsourcing)
  - Whether or not outsourcing, review who internally will be working on project (involves HR, Payroll, and Tax) and internal resources prepare for reporting
- **Sending reports**
  - Forms 1095-C and Forms 1095-B are to be provided to employees by January 31, 2016
  - Form 1094-C and Form 1094-B are to be submitted to IRS by February 29, 2016 if filing paper or March 31, 2016 if filing electronically
Contact Information

Tim Goodman
Partner
(612) 340-2825
goodman.timothy@dorsey.com

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ACA Cadillac Tax
ACA Cadillac Tax Overview

October 23, 2015

Tim Goodman
Dorsey & Whitney
(612) 340-2825
goodman.timothy@dorsey.com

Cadillac Tax Overview

• 40% non-deductible tax on health coverage above certain limits
• If value of employer single coverage is $12,200 ($2,000 above limit)
  – 50 employees on self-only coverage equals tax of $40,000
  – 100 employees on self-only coverage equals tax of $80,000
Cadillac Tax Overview

- Cadillac tax is designed to penalize generous coverage
- Effective January 1, 2018
- 40% excise tax on value of employer-provided coverage that exceeds
  - $10,200 for self-only coverage (as adjusted)
  - $27,500 for other than self-only coverage (as adjusted)
  - Several adjustments may apply
- Non-deductible so employers will seek to avoid
- One big caveat – current status of guidance
  - IRS has issued Notice 2015-16, which asks for comments
  - IRS has issued Notice 2015-52, which asks for comments
  - IRS has not yet issued proposed or final regulations
- Code § 4980I

Coverage That Counts

- Cadillac tax covers:
  - Employer major medical plans (insured and self-insured)
  - Employer executive physical plans
  - Employer contributions to HSAs and HRAs
  - Employer contributions to health FSAs
  - Employer on-site clinic services
    - Comments requested on de minimis programs
  - Employer retiree medical coverage
  - Employer agreed to multiemployer plan coverage
  - Employer paid specified disease programs
  - Employer employee assistance plans
    - Comments requested on de minimis programs
  - Employee pre-tax health FSA contributions
  - Employee pre-tax HSA contributions
Coverage That Does Not Count

- Long-term care coverage
- Stand-alone dental coverage
  - Likely both insured and self-insured
- Stand-alone vision coverage
  - Likely both insured and self-insured
- HIPAA-excepted specified disease coverage if paid with after-tax dollars (section 9832(c)(3))
- HIPAA-excepted hospital or fixed indemnity coverage if paid for with after-tax dollars (section 9832(c)(3))
- Certain other excepted coverage

Limits and Adjustments to Limits

- Two annual limit levels
  - $10,200 for self-only coverage (as adjusted)
  - $27,500 for other than self-only coverage (as adjusted)
- Adjustments
  - Cost of living adjustments after 2018 based on CPI
  - One time adjustment if cost of health care between 2010 and 2018 increased by more than 55%
  - Age and gender adjustments if age or gender characteristics of employer’s employees differ from national average
  - Adjustment for individuals in high-risk profession plans
    - $11,850 for self-only coverage (as adjusted)
    - $30,950 for other than self-only coverage (as adjusted)
  - Adjustment for qualified retirees (age 55 or older and not entitled to Medicare) – same as high-risk profession plans
Planning and Preparing for 2018

- Project health plan costs forward to 2018 to 2020
- Consider changes
  - Changes to drive healthier behavior
    - Wellness programs
    - Disease management programs
    - Tobacco cessation program
  - Changes to reduce costs
    - Possibly move exclusively to high deductible health plan
    - Possibly limit scope of benefits
    - Possibly add features that may reduce cost (e.g. telemedicine)
    - Dependent audit
  - Changes to employee cost
    - Possibly decrease employer-paid portion (employees less likely to select)

Contact Information

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goodman.timothy@dorsey.com
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Best Practices for Employee Performance Reviews
Mike Droke, Partner, Dorsey & Whitney, Seattle

Mike Droke is a partner in the Labor and Employment and Ag/Cooperatives groups. He is also co-Chair of the Computer Fraud and Abuse Practice Group, and member of the Privacy Practice Group, Executive Compensation Team, and Electronic Discovery Practice Group. He is currently the Partner-in-Charge of LegalMine, Dorsey's state-of-the-art document review service. He was Dorsey & Whitney Partner of the Year in 2001. He previously served as a Co-Department Head for Labor and Employment, and Partner-in-Charge of the Seattle office.


Tedi Roach, HR Director, Pacific Northwest Farmers Cooperative (PNW)

Tedi Roach is HR Director at PNW. In this capacity, she oversees HR/employment issues such as employment law, creating manuals & handbooks, performance evaluations, salaries, benefits, writing job descriptions, hiring & interviewing practices, discipline, & risk management, assisting the management team with needs as they occur. Tedi uses her HR consulting skills in her role with PNW.

Tedi Roach has owned two locations of Express Employment Professionals, an employment staffing and consulting firm for 18 years. Prior to Express, Tedi worked for First Security Bank of Idaho for over 20 years, reaching the position of Vice President and Manager in Lewiston. From 1986 until a corporate restructuring in 1995, Tedi was responsible for sales, operations and personnel for 8 First Security branches.

Tedi has served on advisory boards for Lewis-Clark State College (LCSC) in Lewiston, ID, encompassing workforce training, career development, the Business Division, & Center for New Directions. She has taught several classes and workshops at LCSC, including Business Ethics, Fundamentals of Management and Human Resource Management, employment related sessions for the Small Business Development Center, and speaks frequently regarding HR and employment issues for client specific sessions, monthly meetings, and classes at University of Idaho.

Tedi received her bachelor's degree from LCSC May 2003 in business and communications, and her masters of science in Psychology with an emphasis in Industrial/Organizational Psychology from Capella University December 2006. She received three staffing industry specific certifications, & her SPHR certification through Human Resource Certification Institute (HRCI), in 2009, recertifying every three years. With the recent change in certification between Society for Human Resource Management (SHRM) & HRCI, Tedi has also received the designation of SHRM-SCP, a senior certified professional of human resources.

Tedi has extensive experience in the HR field, providing consultations including harassment investigations, analysis and assessment of employee actions and performance, preparing and reviewing employee handbooks, conducting performance evaluations, budgeting for and initiating salary and merit increases, audits, conducting salary surveys, and responding to questions regarding performance problems, workers compensation, salary ranges and employment law. Tedi keeps current in HR issues by routinely researching information, oftentimes providing results to clients and other HR professionals.

Tedi and her husband Jay live in Genesee, Idaho, where he owns Roach Construction. In their spare time, which is few and far between, they travel to the Oregon coast for crabbing & clamming with some R&R tossed in, & enjoy spending time & hunting with their children, also known as German Shorthair Pointers.
Performance Evaluations
EVALUATING, GOAL SETTING, & IMPLICATIONS

TEDI ROACH, SPHR, PACIFIC NORTHWEST FARMERS’ COOPERATIVE
MICHAEL DROKE, PARTNER, DORSEY & WHITNEY
What we’ll cover

- Why do performance evals & set goals
- When to do performance evals
- Things to avoid
- The process & preparation
- Goal setting
- Employee Action Plan
- Follow-up
- Considerations for types of performers

Why do performance evals (PE’s)?

- Tool to
  - Inform how they are doing
  - Help them improve
  - Articulate requirements/action plans for growing/expanding
- Better & open communications
- Everyone on the same page
- Clarify processes/procedures for increased understanding
- Review previous goals & set new
- Discuss career opportunities
- Done for them, not to them
Do we really need to do them?

- Managers don’t like to do them
- Employees don’t like to do them
- Survey says.....
- Psychologists say.....
- Authors say.....
- Decisions for salary increases may have already been made
- Poor follow-up by managers
- Wait until last minute
- Employees tell manager what they want to hear (or agree with review)
- Why don’t managers save time & just coach regularly!

Do we really need to do them? (The Legal Perspective)

- Key form of documentation
- Employee/Plaintiff’s Lawyers and Juries expect them
- Heavily scrutinized in litigation – if it wasn’t documented, it didn’t happen
- If abolished, what is documented?
- Must be non-discriminatory
- Must be non-retaliatory
- If annual, beware of halo and recency effects
Other types of performance evals

- 360 degree
  - Use has increased over the years
- Self-reviews
  - Initiates conversation
  - Facilitates employee development
  - Employee focuses on what’s important to them
- Performance Preview
  - “Forward thinking”
  - Discuss goals/responsibilities for upcoming year
  - Collaborative

When to do PE’s

- New employees after 3-6 months
- Annually
- Performance issues
- When employees request
Things to avoid

- Bias/prejudice (easy to discriminate here)
- Over emphasizing 1 or 2 duties with high or low performance that sways overall PE
- Holding employee responsible for areas they have no control
- Not allowing them enough time to prep
- You not taking enough time to prep
- Lack of follow-through
- Halo/Recency Effects

Other problem areas

- Supervisor does not define standards/expectations (can imply substandard work is ok)
- Overemphasize something good or bad
- Relying solely on your gut
- Insufficient or unclear performance documentation
- You talk too much!
- “Surprising” employee with problems
- Setting goals not important to the employee
Rating “errors”

- **Similar to Me** – rating high if similar to you, low if differ
- **Positive** – Rating higher than they deserve
- **Negative** – Rating lower than they deserve
- **Halo v. Horn** – Focusing on a single positive or negative trait that clouds judgment
- **Recency** – Rating high or low based on a recent issue
- **Stereotyping** – Generalizing a group, instead of by the individual
- **Contrast** – Making comparisons (to other employees)
- **1st Impression** - Based on your initial judgment of them
- **Central Tendency** - Rating them consistently in the center to avoid extremes
- **Weighting Anomalies** - Accidental over-rating of similar criteria (e.g., attendance, tardiness, and job performance rated equally)
The process: PNW Co-Op Example

- Give employee blank PE form
- Self-evaluation & assessment
- Achievements, short-term & long-term goals
- Educational needs & goals
- Career goals
- Employee Action Plan
- Set meeting date & time with employee
- Review previous PE (if available)
- Review job description
- You complete key responsibilities, expectations, ratings
- You evaluate/assess employee
- You fill in achievements since last PE
- An idea of educational & performance goals for them
- Be objective (unbiased), not subjective (opinions, perceptions)

---

**EMPLOYEE’S NAME:** ______________________________

**DEPARTMENT:** ______________________________________

**JOB TITLE:** ____________________________

**DATE:** _________

**SUPERVISOR’S NAME:** _______________________________

**RATINGS DEFINITION:**

**Outstanding:** The employee consistently far exceeds the necessary job.

**Exceeds Expectations:** The employee exceeds the necessary job standards.

**Meets Expectations:** The employee, because of his/her own efforts, attains all of the necessary job standards.

**Needs Development:** The employee’s performance does not meet one or more of the attainable job standards.

**Unsatisfactory:** The employee’s performance consistently does not meet several of the critical job standards.

**Not Ratable or N/A:** The employee being rated is too new to receive a meaningful rating, or does not apply.

---

**KEY RESPONSIBILITY**

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**RATING:**

- Outstanding
- Exceeds Expectations
- Meets Expectations
- Needs Development
- Unsatisfactory
- Not Ratable or N/A

**COMMENTS:**

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**Prep work**

ACHIEVEMENTS SINCE LAST EVALUATION:
The meeting

➤ You explain the purpose (conduct a PE & set goals)
➤ Facilitate discussion as review each other’s assessments
➤ Come to an agreement & note on PE accordingly
➤ Review their goals
➤ Set action plan based on agreed upon goals
Goal setting

**SHORT-TERM GOALS:**

**LONG-TERM GOALS:**

Goal setting

**EDUCATIONAL NEEDS AND GOALS:**

**CAREER GOALS:**
Goal setting

**SUPERVISOR’S COMMENTS:**

**EMPLOYEE’S COMMENTS:**

---

**Why set goals?**

- **For the company**
  - Helps coordinate what our employees do with overall company strategies
  - Everyone is on the same page, going the same direction
  - Investment (in time/communications) that pays off in higher productivity

- **For division managers & supervisors**
  - Employees know what they are to accomplish & what is expected
  - Easier to work without constant supervision
  - See how they make a difference for the company, our members, clients, & consumers
  - Allows for more empowerment
  - Future PE’s become easier & are done more quickly with set goals
  - Helps identify problem areas (equipment, processes, employee performance issues, etc.)
Why set goals?

- For Employee
  - Know what they are to accomplish
  - Know why they are doing what they do
  - Know how well they need to perform
  - Know if they are meeting standards
  - Able to see their results
  - Identify barriers for reaching their goals
  - Make necessary changes/improvements
  - Builds confidence (& decreases hands-on supervisory time)
What are *your* company strategies?

➤ Have they been passed down from your board?
➤ Has management shared them?
➤ Do the employees know?
➤ Do you know?

*How can you expect employees to go the right direction if they don’t know where to go?*

---

**Action plans for goals**

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<tr>
<td>PERSON(S) RESPONSIBLE:</td>
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<tr>
<td>COMMENTS:</td>
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</table>
Setting performance goals

- Sets the *forward* direction for the employee
- Two primary parts to a goal – Example: “Reduce overall spending by 10%”
  - What they are to accomplish – “Reduce overall spending…”
  - The *criteria* to reach the goal – “…by 10%.”
- Quantifiable or demonstrative (so have a way to measure success)
- Must be individualized
- Share understanding of goals with employee
- Communicate with employee throughout time frame(s)
- Make sure relates to our key strategies & your division/department goals

Employee Action Plan *(Sample)*

<table>
<thead>
<tr>
<th>Goal:</th>
<th>To become certified on forklift</th>
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<tr>
<td>Action Item:</td>
<td><em>Take &amp; pass class at LCSC this fall</em></td>
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<tr>
<td>Start Date:</td>
<td>11-1-14</td>
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<tr>
<td>Person(s) Responsible:</td>
<td>Edgar Employee for class; I.M. Supervisor &amp; CFO to register</td>
</tr>
<tr>
<td>Comments:</td>
<td>Missteps sign-up for this semester; will register Edgar for semester starting 1-21-15.</td>
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Questions to ask

➤ **Intention:** What are you wanting to achieve?
➤ **Specific:** Who? What? Why? Where? When?
➤ **Measurable:** How much? How often? How many?
➤ **Attainable:** Is it achievable? Believable? Realistic?
➤ **Relevant:** Does it fit your needs/wants? Does it help you accomplish ST & LT goals? Does it fit with company strategies?
➤ **Time-based:** When to start? When to end?

---

**S.M.A.R.T. goals**

➤ **Specific**
  - Understand exactly what is expected of them
  - Numbers, percentages, meeting deadlines

<table>
<thead>
<tr>
<th>Goal</th>
<th>To become certified in ESL/ITG</th>
<th>Action Item:</th>
<th>Take &amp; pass class at LCSIC this fall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Start Date</td>
<td>11-1-19</td>
<td>Projected End</td>
<td>12-2-19</td>
</tr>
<tr>
<td>Person(s) Responsible:</td>
<td>Edgar Espinosa for class; I.M. Supervisor &amp; CFO to register</td>
<td></td>
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<td>Comments:</td>
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This is specific, as it names **people** responsible, **class** to be taken, **where** to take it & **when**.
S.M.A.R.T. goals

- **Measureable**
- **Quantifiable**
- May need to be incremental
- You & employee can identify problems as they surface

Measurable, as one can verify whether or not the employee takes & passes the class.

- **Attainable/achievable**
- A stretch, but within reach, are believable, manageable, & realistic
- Neither party should over promise & under deliver

Attainable/achievable as it gives them ample time to complete the training.
S.M.A.R.T. goals

- Relevant
  - Needs to fit their short & long term goals, educational & career goals
  - Needs to fit company’s vision/mission/purpose

**GOAL:** To become certified on forklift

**ACTION ITEM:** Take & pass class at LCSC this fall

<table>
<thead>
<tr>
<th>Start Date</th>
<th>Projected End</th>
<th>Actual End</th>
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<tbody>
<tr>
<td>11-1-19</td>
<td>12-1-19</td>
<td>12-1-19</td>
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</tbody>
</table>

**Person(s) Responsible:** Edgar Employee for class; I.M. Supervisor & CFO to register

**Comments:** Missed sign-up for this semester; will register Edgar for semester starting 1-21-15.

Relevant since we need forklift drivers, the class expands employee’s knowledge, helps reduce unsafe workplaces, which helps us reduce costs for the company, while better educated employees work to fill customer orders (Provide Quality Customer Service).

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S.M.A.R.T. goals

- Time-oriented
  - Gives the time frame to complete the action(s)
  - Keeps everyone on task
  - Can be short-term or long-term
  - Can be incremental
  - May need to be modified if conflicts arise

**GOAL:** To become certified on forklift

**ACTION ITEM:** Take & pass class at LCSC this fall

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**Person(s) Responsible:** Edgar Employee for class; I.M. Supervisor & CFO to register

**Comments:** Mixed sign-up for this semester, will register Edgar for semester starting 3-23-15.

This goal & action plan needed to reset the original time frame – the activity could not be completed on time due to missing the registration time. It has been extended into the following month. The new date needs to be communicated with the employee.
Throughout time frame(s)

- Communicate regularly about progress!
- Talking (formal v. “water cooler” informal)
- They provide reports to you
- Work group/team update meetings
- Update & modify goals
- Ask questions
- “How are things going?”
- “What can I do to help you with...?”
- “What do you need from me?”

Considerations for top performers

- What are their promotional opportunities?
- What education/training do they need to strengthen current knowledge, skills, abilities?
- What responsibilities can be added?
- If no position changes are likely (or not immediate) how do we maintain their current level of performance?
Considerations for satisfactory/meets expectations performers

- What are their promotional opportunities?

- What education/training do they need to strengthen current knowledge, skills, abilities?

- If no position changes are likely (or not immediate) how do we maintain their current level of performance?

Considerations for needs development/unsatisfactory performers

- What performance issues need to be corrected?

- What attributes need to be improved?

- What education/training do they need to strengthen current knowledge, skills, abilities?

- What corrective actions must be undertaken to improve or prepare for termination?
Be a coach!

Lombardi’s Rules of Teaching, Coaching, and Leading

- Be authentic: integrity, predictable, admit to errors
- Earn trust through investment: build trust in themselves
- Use your mission: define & work toward goal(s)
- Create a shared vision: “We can do better”
- Align your values: with practices (policies, procedures, etc.)
- Know your stuff: know it & show it
- Generate confidence: set the stage & give people tools they need
- Chase perfection: settle for excellence
- Live what you teach: live what you coach, & sell what you teach & coach
- Strike the balance: be as close as you can be; & as far away as you have to be

Employees are humans, NOT squirrels & anvils!
References


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Since 1929, the National Council of Farmer Cooperatives has been the voice of America's farmer cooperatives. Our members are regional and national farmer cooperatives, which are in turn comprised of nearly 3,000 local farmer cooperatives across the country. The majority of America's 2 million farmers and ranchers belong to one or more farmer cooperatives. NCFC members also include 26 state and regional councils of cooperatives.

As NCFC works to advance the business and policy interests of cooperatives, it upholds the following core values:

- Farmer ownership and control in the production and distribution chain
- Continued economic viability of America’s farmers, ranchers, and the businesses they own
- Stewardship of natural resources
- Vibrant rural communities

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