



Human Resource and Management Services

May 2008

HUMAN RESOURCE EXCHANGE

Human resource issues and topics impacting employers

◆ FROM PERSONNEL LEGAL ALERT ◆ “Misclassification of employees as independent contractors”

... The IRS delivered a major blow to FedEx. An audit of the delivery giant's 2002 practices revealed that pickup-and-deliver owner-operators should have been classified as employees for federal income tax purposes... The IRS anticipates assessing the company tax penalties of \$319 million plus interest for 2002. Audits for subsequent years are pending.

Two months prior to that, a federal judge in Indiana granted class status to more than 20,000 FedEx Ground delivery drivers nationwide in a consolidation of lawsuits filed under ERISA. The drivers seek benefits for which they were denied for being improperly classified...

Around the same time, FedEx contended with claims under California state law that drivers were entitled to be reimbursed for various work-related expenses. ...It's estimated that the drivers will receive between \$13million and \$14million.

(Editors note – FedEx got hit by the IRS, ERISA, and by the state of California. Let's not forget that Wage & Hour will not be far behind. The quadruple whammy! It's hard to imagine such a big company to not have someone with the gumption to say "Hey, I don't think this is right the way we're classifying our drivers." Oh well, let's see how much their rates go up because of this.)

◆ FROM HR COMPENSATION & BENEFITS ◆ “Paying cash for wellness participation”

Pepsi offered a \$75 MasterCard prepaid debit card to any employee who participated in a health assessment. It worked: 70% of the 33,500 employees participated.

For employees who needed follow-up help, the company offered \$100 to workers who attended classes on smoking cessation, diabetes management, high-risk maternity, or depression.

For every \$1 the company invests, it sees a \$1.50 to \$2 return.

◆ FROM HR SPECIALIST EMPLOYMENT LAW ◆ “Cultural fit at Google may be code words for age bias”

Brian Reid was over 50 when he went to work for Google. Reid formerly was a Stanford professor with a doctorate in computer science.

Two years later, he was terminated because, as he was told, he wasn't a good 'cultural fit'. Reid sued, alleging age discrimination.

Reid's lawsuit pointed to comments from bosses that his ideas were 'obsolete' and 'too old to matter'. He was called 'slow', 'fuzzy', 'sluggish', and lacking 'a sense of urgency'. Plus, the kicker, 'an old fuddy-duddy'.

Always the scientist, Reid presented statistical evidence that the older an employee was at Google, the lower his performance rating and bonus. That, coupled with the age-related comments, was enough to earn Reid a trial.

◆ BLR Compensation ◆

“Do employees receive higher pay 'by association'?”

... Employees who are members of associations earn higher salaries, like their jobs more and are happier people than non-members.

The report, "Where the Winners Meet: Why Happier, More Successful People Gravitate Toward Associations,"... was based on a study of 1,200 American adults.

Specifically, it found that association members earn, on average, \$10,000 more per year than non-members with the same education levels and job types. Association members were also much more likely (by a 19% margin) to report that they are "very satisfied" with their jobs than non-members.

The report found, however, that it wasn't necessarily association membership that leads to success for an individual, but success in one's profession which increases the likelihood of an individual joining an association.

"The report's findings help associations leverage the fact that they are the meeting grounds for successful people to come together within their industries and professions to network and exchange ideas," Dr. Arthur J. Brooks, the Institute's director, said in a press release. "Associations can use this insight to attract and retain high-value members and then provide those members with opportunities and environments that continue to enhance their success." ...

◆ FROM HR HERO ◆ “Pets in the office”

According to the U.S. Humane Society, there are approximately 65 million dogs in 39% of U.S. households.

With such a high number of furry friends in our homes, it's hardly surprising that taking our dogs to work has become a growing trend. According to a 2006 survey conducted by the American Pet Products Manufacturers Association (APPMA), nearly 1 in 5 U.S. companies allow pets at work.

At a time when there is an increased emphasis on balancing work-life issues, establishing a pet-friendly policy is one way for employers to help employees maintain a healthy work-life balance. Small to medium-sized businesses, particularly technology firms and creative agencies, have been the most receptive to allowing dogs at work. This is due in part to the fact that the fewer employees you have, the easier it is to reach a consensus on an appropriate workplace policy.

... The APPMA survey indicated that having pets in the workplace offers a number of benefits, such as creating a more productive work environment, lowering stress and anxiety, improving overall emotional and physical health, decreasing employee absenteeism, and making employees more willing to work overtime.

(Editor's note – we've already drafted a policy that states that if a dog relieves him/herself, the first offense is a Written Warning. The second time a pet relieves him/herself, then the pooch is 'terminated'.)

◆ **A REAL LIFE SITUATION** ◆

Situation: A female employee was having difficulty in performing the duties of her position. She would make a lot of errors, transpose numbers and letters on correspondence and other records, and she would not finish most of her duties which led the company to think that she was not able to multi-task.

After several months and after several documented conversations concerning her performance, the decision was made to terminate her employment.

Two weeks after she was terminated, the company received an EEOC charge stating that the employee felt she had been discriminated against because of her disability, ADD (Attention Deficit Disorder).

Observation: The company never knew of the employee's alleged disability, so it was obvious that the company never made a decision on a condition in which it knew nothing about.

But was it the company's responsibility to see if possibly there was a medical condition causing all of the errors? The answer is no, it is the employee's responsibility to notify the company of any condition that may have an impact on the employee's performance.

In the absence of any documentation, in the absence of any physician statement indicating such a disorder with correlating limitations (if any) or accommodations necessary, then the company can only expect out of the employee what it would expect out of every employee, namely, do the job, do it

according to standards and expectations identified, or suffer the consequences.

To do otherwise, namely, to think an employee has a disability, would be to possibly protect the employee under ADA guidelines where no such protection is necessary.

In this particular case, the employee never made reference to any medical condition, so the case was resolved in favor of the company.

FEATURED SERVICE ADA Training

The Americans with Disabilities Act (ADA) protects employees from having an organization base an employment decision on the disability.

Many companies, however, do not have a full understanding of what 'protected' means.

In addition, since the law was passed, several court cases have come to light that have convoluted the meaning of a disability, and as a result, employers are having a tougher time determining whether an accommodation is necessary and in determining whether an accommodation that has been identified is reasonable.

HR&M can help in understanding ADA better, from defining what 'protected' means, to determining, based on the size of the organization, whether an identified accommodation is reasonable or not.

Contact HR&M for assistance.

◆ **REMEMBER! WE CAN HELP!!** ◆

Consulting on performance, attendance, FMLA, Wage & Hour, management accountability, and other unique issues is just one of the areas of our expertise.

We also provide:

- **supervisory/management training**, ranging from brown bag luncheon training to ½ or full day sessions
- employee **handbook** development
- responses to **discrimination charges** and **unemployment claims**
- **on-line performance review** forms and processes
- **guidance** and consultation on **coaching, counseling, and disciplining** in employee relations matters
- **succession** and **strategic planning** programs
- **consultation** on issues regarding attendance and performance and guidance on terminations
- development of OFCCP compliant **Affirmative Action Plans**