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California Employment Law Letter

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EMPLOYER LIABILITY

Who is the employer? The devil is in the documents

by Katharine Essick
Sedgwick LLP

This recent disability discrimination decision from the California Court of Appeal underscores the need to clearly identify the legal employer of your employees, which may not be limited to the company identified on their W-2s. All documents issued to employees, including handbooks, benefits documents, and disciplinary communications, should clearly and consistently identify the proper employer, as a pair of alleged employers learned when they attempted to have a lawsuit under the Fair Employment and Housing Act (FEHA) dismissed.

Apparently straightforward case for dismissal

Adolphus Morgan sued two companies in the AT&T corporate family under the FEHA. Morgan, an engineer, took a leave of absence because of work-related stress. When he returned to work, he requested a transfer to a different department in a different location, but his request was denied. He claimed that he was placed on a performance improvement plan (PIP) under a new supervisor, who continued the same pattern of conduct that had caused his work-related stress in the first place.

Morgan took a second leave of absence and filed a workers' compensation claim. He continued to request a transfer as a reasonable accommodation and submitted a physician's note supporting his ability to perform the essential functions of his job if he was given a transfer. Instead, he was terminated for failing to return to work after he was cleared by a doctor.

In a complaint filed in state court, Morgan claimed that AT&T discriminated against him based on his disability (work-related stress). He argued that when he requested reasonable accommodations (a transfer after he returned from disability leave and a continuation of his second disability leave), AT&T failed to engage with him in the required "interactive process" to identify an accommodation and instead fired him in retaliation for his complaints and accommodation requests.

The AT&T companies asked the trial court to dismiss Morgan's lawsuit. Among other evidence, they presented documents to show that his job performance was unsatisfactory and he was fired because he failed to return to work from a nine-month discretionary leave even though his physician certified that he had no work restrictions. But the AT&T companies also asserted that neither of them was Morgan's employer, and neither was therefore a proper defendant to his lawsuit.

The companies claimed that Morgan's true employer was Pacific Bell. In

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support of their request for dismissal, each AT&T company submitted a declaration from a current employee who stated that his or her employer was a separate corporate entity from Pacific Bell, was never a parent company of Pacific Bell, never employed Morgan, and "played no role in any employment decisions regarding" him.

The AT&T companies presented other evidence in an attempt to establish beyond a shadow of a doubt that Pacific Bell was Morgan's true employer and the only proper defendant. For instance, Morgan testified at his deposition that he understood when he was hired in 1996 that he would be working for Pacific Bell when he saw his employment application, which had a Pacific Bell logo above the words "A Pacific Telesis Company." When he accessed his employer's intranet and printed a description of an available manager position in support of his request for a transfer, the notice stated the opening was with "Company: Pacific Bell Telephone." Finally, the companies pointed to Morgan's W-2 forms, which identified "Pacific Bell Telephone Company" as his employer.

The trial court dismissed Morgan's lawsuit against AT&T, finding he was unable to establish that he had been an employee of either AT&T company he sued. In making its ruling, the trial court relied on the W-2s that identified Pacific Bell as the employer as well as letters indicating that Pacific Bell was merely doing business as "AT&T California," which Morgan hadn't named as a defendant. The trial court found that the use of a fictitious name ("AT&T California") didn't create a separate legal entity, and even if Morgan had evidence that the defendants were corporate parents of Pacific Bell, he hadn't submitted any evidence that they had enough control over Pacific Bell to allow them to be sued in its stead. Morgan appealed.

The most important factor is the right to control the means and manner of the worker's performance.

Confusion in the documents

Because the trial court determined that Morgan was unable to present a single fact that might persuade a jury that AT&T was his employer, the court of appeal engaged in the usual process of reviewing the entire record to see if there was any evidence that could, if believed, prove that either AT&T company was Morgan's employer and therefore a proper defendant.

Since many documents were submitted to establish Morgan's poor performance and detail the communications with him about his leave of absence, the record was rife with corporate documents that suggested an "AT&T" company was his employer. Six letters written by a member of the employee relations department that dealt with his disability leave and eventual termination identified his employer as "AT&T California (Pacific Bell Telephone Company)." AT&T also submitted his performance reviews, which identified different "AT&T" companies throughout the documents.

Moreover, the PIPs that AT&T applied to Morgan when he returned from his first disability leave were titled "AT&T Performance Plans." A final performance review that incorporated the PIPs was titled "AT&T Achievement and Development (2008)" and contained an AT&T logo.

For his part, Morgan didn't dispute that he was initially hired by Pacific Bell, but he claimed that he worked for AT&T as well as "SBC." He submitted to the trial court 41 documents that he received from the AT&T companies or their attorneys during the course of his employment. Among them were

performance reviews with "AT&T" captions, documents that referred to "AT&T" goals, and forms acknowledging review of "AT&T" courses and training materials.

After he filed a workers' comp claim based on his work-related stress, an area manager who completed the "Employer" section of the claim form identified Morgan's employer as "AT&T." Correspondence about the claim came from the "AT&T Integrated Disability Service Center." A letter explained that he might be entitled to benefits under either the Pacific Telesis disability benefits plan or the AT&T disability income plan.

At his deposition, Morgan testified: "At the time I left AT&T, they wasn't sure who was really in charge of the company. It was a longstanding joke between people who work there. We started out SBC, went to AT&T. . . . [It] all depends [on] who you talk to on what day."

Closing the door to an early exit

The FEHA doesn't define "employer." The courts will examine whether the company that is alleged to be the employer has day-to-day authority over matters such as hiring, firing, directing, supervising, and disciplining the employee. The courts have identified many other relevant considerations, although the most important factor in identifying the employer is the extent to which it has the right to control the means and manner of the worker's performance.

Because the identification of the employer is so fact-intensive, it's difficult to secure an early dismissal of a lawsuit rather than being forced to prove a defense at trial. Under FEHA, any person or entity that is identified as the employer on an employee's W-2 forms is presumed to be the employer. Pacific Bell, not AT&T, was identified as the employer on the W-2 forms issued to Morgan. Nevertheless, it was possible for him to overcome the presumption that Pacific Bell was his employer by presenting other evidence. The trial court found that multiple documents submitted by both Morgan and AT&T at least raised a question about whether AT&T, not Pacific Bell, was his employer.

The court of appeal also noted that the AT&T companies' declarations didn't address the employment status issues in any meaningful way. For example, although there was evidence that "AT&T California" was another name for Pacific Bell, the companies failed to explain the relationship between them and "AT&T California," and they didn't deny that one of them was also known as "AT&T California." And although the companies denied that they were the same entity as Pacific Bell, they didn't deny that they were the same as the various "AT&T" entities identified in the documents reviewing Morgan's work performance. They didn't explain which manifestation of AT&T reviewed Morgan's performance, the relationship between them and the AT&T entities identified in the performance review forms, or why his

BREAKING NEWS

New arbitration class action ruling by sharply divided California Supreme Court

by Mark I. Schickman

In the latest of an ongoing series of rulings on employment arbitration, the California Supreme Court addressed whether a judge or an arbitrator should decide if an arbitration may proceed as a class action. In *Sandquist v. Lebo Automotive,* the court found, in a rare 4-3 decision, there is no clear-cut rule, and class action status can be ruled on by either a judge or an arbitrator, depending on what the arbitration agreement says.

The arbitration agreement in the *Sandquist* case was ambiguous and didn't make clear who was to decide the issue. The court therefore relied on a basic principle of contract construction: Any ambiguity is construed against the drafter. Because the employer drafted the agreement, the court adopted the interpretation requested by the employees. Since the employees wanted the arbitrator to make the class action determination, the court ruled in their favor.

The important takeaway for employers is, draft your arbitration agreements with great care and attention. The California Supreme Court has granted employers wide latitude in drafting arbitration terms, but at a price, so be careful when you use that power. If you want California law to be applied, if you want the decision to be appealable, or if you want an arbitrator to decide the threshold issues, it's important to say so. All ambiguities in the agreement will be decided against the drafter.

A fuller discussion of this important new decision will appear in our next issue. But remember the key point: The California Supreme Court has given employers the benefit of being able to draft a wide range of arbitration provisions as well as the burden of being responsible for all ambiguities. So draft carefully!

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performance for Pacific Bell was reviewed on AT&T forms that made no reference to Pacific Bell.

The companies' declarations also didn't discuss any of the factors that identify a true employer—including the right of control. Instead, they merely denied involvement in any employment decisions involving Morgan. The companies didn't deny that they established the disability leave program under which he was fired or that his work performance was reviewed under their standards. All they offered were legal conclusions from employees who weren't legal experts that the companies weren't Morgan's "employers" under FEHA. That wasn't enough to entitle them to a dismissal of the case under FEHA, especially since "AT&T" was identified throughout their employment documents.

In other words, the court of appeal explained, the corporate documents revealed "unresolved questions about who employed [Morgan] when he was terminated." The court therefore reversed the judgment in favor of the AT&T companies and sent the case back to the trial court. *Morgan v. AT&T Communications of California, Inc.* (California Court of Appeal, 6th Appellate District, unpublished 7/19/16).

Bottom line

A company that isn't the true employer of an employee under FEHA is entitled to a judgment in its favor in a lawsuit. Many companies operate through a series of interrelated parents and subsidiaries, often with common management, a single HR department, and identical policies. If the companies don't clearly identify the specific employer and maintain separate management of the day-to-day activities of employees, then it's more likely that multiple entities will be named in a lawsuit by a former employee. Employers that operate through multiple entities must be sure to accurately and clearly identify the proper employer in all employee documents, including every form, letter, and handbook.

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WAGE AND HOUR LAW

Not fair: Del Mar Fairgrounds employees claim entitlement to overtime pay

by Mathew A. Goodin
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Both federal and state law requires employers to pay employees overtime. However, the laws are very different, and each contains many exemptions. Some of the more common exemptions, such as those for professional, administrative, or executive employees, are similar under both laws. But even then, there are critical differences. On the other hand, some of the exemptions are industry-specific and unusual. In the following case, the court examined whether employees who worked for a California state agency that owned and operated the Del Mar Fairgrounds in San Diego were exempt from California and federal overtime laws.

Employees not amused about failure to pay overtime

Jose Luis Morales and 177 other similarly situated employees sued their employer, California's 22nd District Agricultural Association (DAA), alleging they weren't paid overtime as required by state law under Labor Code Section 510 and by federal law under the Fair Labor Standards Act (FLSA). The DAA is a California public agency that owns and manages the Del Mar Fairgrounds and the Del Mar Horsepark. The employees assisted the DAA with amusement and seasonal operations. They were limited to working 119 days during a calendar year and were internally referred to as "119-day employees."

The trial court granted the DAA's motion to dismiss the state-law overtime claim on the grounds that California's overtime laws do not apply to public employees. After a jury found in favor of the DAA on the FLSA claim, the employees appealed.

Were employees exempt under FLSA's 'amusement exemption'?

Like California law, the FLSA requires employers to pay overtime wages unless employees are properly classified as exempt. However, the FLSA requires overtime pay for a workweek longer than 40 hours and contains no daily overtime requirement. One of the FLSA exemptions is the amusement exemption, which applies to any employee of an establishment whose primary business is to provide amusement or recreation.

The amusement exemption has two main elements:

(1) The business must qualify as an "amusement or recreational" establishment.

(2) It must not operate for more than seven months in any calendar year, or its average receipts for any six months may not exceed 33⅓ percent of its average receipts for the other six months in the same year.

The parties agreed that the DAA met the receipts test, and their primary dispute was whether eligibility for the exemption turns on the nature of the employer's activity or the work performed by the employees. Finding no California authority on the issue, the court looked to federal law.

The court observed that several circuit courts of appeal have held that eligibility turns on the employer's principal or primary activity, and it found this view to be persuasive. In determining whether the DAA was primarily an amusement establishment, the court looked to its primary purpose, services and activities it offers incidental to its recreational facilities (such as shops or restaurants), and its revenue sources.

The court had little trouble concluding that the primary purpose of the DAA is to provide amusement or recreational services, including the San Diego County Fair, the Del Mar National Horse Show, and hundreds of interim events such as flower shows, bridal bazaars, and dog and cat shows. As a result, the court affirmed the jury's verdict that the employees were exempt from the FLSA's overtime requirements.

Should state-law claim be dismissed because DAA is a public entity?

Before trial, the DAA filed a motion to dismiss the employees' state-law overtime claim on the grounds that California's overtime laws do not apply to public entities like the DAA. The employees challenged the dismissal of this claim on appeal.

California law requires overtime compensation for any work in excess of eight hours in one workday and any work in excess of 40 hours in one workweek. Under well-established authority, California's general statutes do not apply to public entities unless they are expressly included by the statute; however, for an entity to be excluded, it must be found that applying the statute to the entity would affect its governmental purpose or function.

The court noted that the Industrial Welfare Commission has a specific Wage Order regulating the amusement and recreation industry. The Wage Order applies to "all persons employed in the amusement and recreation industry" and limits them to an eight-hour workday or 40 hours per workweek but contains a number of exceptions, including an exemption for "employees directly employed by the State or any county, incorporated city or town or other municipal corporation, or . . . outside salespersons."

Because it was undisputed that the DAA is a state entity expressly formed for the purpose of providing fairs, expositions, and exhibitions, the court concluded that public employees in the amusement and recreation industry are exempt from state overtime requirements. *Morales v. 22nd District Agricultural Association,* Court of Appeal, 4th District, Case No. D067247, July 13, 2016.

Bottom line

It's important to remember that there are critical differences between state and federal overtime laws. Some employers or employees may be exempt from state law and will be subject only to the FLSA, and vice versa. In addition, state and federal law both contain many exemptions, but the specifics of those exemptions can differ greatly. When you're analyzing whether your employees are exempt or nonexempt, it's important to consider California and federal law. Because this is an extremely complex area of the law, enlisting the assistance of qualified outside counsel is strongly advised.

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PERSONNEL RECORDS

Can dashboard camera video be withheld as a confidential personnel record?

by Karimah Lamar
Carothers DiSante & Freudenberger LLP

A police department tried to block a reporter's access to an arrest video by claiming that the video was part of the police officers' confidential personnel files. What did the appellate court decide about the status of the video?

Public access to video requested and denied

In December 2012, Eureka Police Sergeant Adam Laird arrested a minor. An assisting officer's dashboard camera caught the entire arrest on video. A citizen lodged a complaint about Laird's "handling of the minor." An internal investigation was launched, and Laird was charged with misdemeanor assault by a police officer without lawful necessity. After they reviewed the videotape, both the prosecuting and defense experts determined that excessive force wasn't used, and the charges against Laird were dropped.

Likely skeptical of the determination, a local reporter, Thadeus Greenson, filed a formal request with the trial court for disclosure of the arrest video. He argued that the public had the right to know exactly what happened during the minor's arrest so they could evaluate the

officer's conduct. The city denied the request, claiming the dashboard camera was part of Laird's confidential personnel records. The Humboldt County Probation Department also objected, claiming that Greenson failed to demonstrate good cause that would require it to disclose the dashboard video.

In May 2015, the trial court ordered disclosure of the video, finding it wasn't protected by the *Pitchess* statute, which permits a public safety employer to withhold a police officer's confidential personnel records from public disclosure. The court further ordered that the minor's name be redacted and his features blurred. The city appealed the trial court's decision.

On appeal, the appellate court considered both sides' arguments. Before we get to the court's decision, let's discuss the *Pitchess* statute.

Who or what is Pitchess?

The city claimed that the dashboard camera was a "confidential personnel record" protected from disclosure under "*Pitchess* law," which cannot be circumvented. Under *Pitchess,* a criminal defendant, in limited circumstances, may compel disclosure of the arresting law enforcement officer's personnel file relevant to his ability to defend against the criminal charges. In 1978, the procedures for requesting such information were made into law and dubbed "*Pitchess* motions."

Traditionally, *Pitchess* motions seek information about past complaints involving excessive force, violence, dishonesty, or filing false police reports that are usually found in an officer's personnel records. Under *Pitchess* law, the term "personnel records" refers to files maintained under an individual's name by his employer that contain records related to his employment. Such records usually include information related to advancement, appraisal, discipline, and complaints or investigations of complaints. Those types of records are typically confidential, which is why a *Pitchess* motion is necessary to compel disclosure.

Is an arrest video a personnel record?

The trial court found that the dashboard camera wasn't a personnel record protected by the *Pitchess* statute. The trial court explained that Greenson wasn't seeking confidential citizen complaints and information about the resulting investigation of those complaints. Rather, he was only seeking information that would form the basis of the original complaint against Laird or the delinquency proceedings against the minor.

On appeal, the appellate court found that the arrest video wasn't a personnel record. Accordingly, it never analyzed whether the *Pitchess* statute was relevant. In making its determination, the court analyzed similar cases in which the California Supreme Court considered Public Records Act requests for information about police officers involved in various shootings. In those cases, the supreme court acknowledged that personal information about police officers' names linked to information in personnel records is confidential. However, many records routinely maintained by law enforcement agencies are not personnel records.

For example, the incident reports made after on-duty shootings aren't typically "personnel records." To the contrary, any disciplinary action taken as a result of such a shooting would be contained in the officer's personnel file. The court rejected a broad reading of the statute and found that the video was merely "a visual record of the minor's arrest." Adopting the city's broad reading of the law would improperly sweep all police videos into the protected category of confidential "personnel records."

Despite that finding, the city continued to argue that the *Pitchess* statute applied because the police department could use the video to evaluate whether to institute disciplinary action. Moreover, the video served as the "backbone" of the internal investigation complaint. The court similarly rejected those arguments, largely because they were unsupported by the record but also because the video was generated independently in advance of the administrative investigation.

The fact that an officer may be part of an internal affairs investigation or related disciplinary procedures at some unspecified point in the future doesn't "transmute arrest videos into disciplinary documentation or confidential personnel information" Unpersuaded by any of the city's arguments, the appellate court ultimately held that the arrest video was not a personnel record. *City of*

Eureka v. Superior Court (California Court of Appeal, 1st Appellate District, 7/19/16).

Bottom line

This case was really a response to what some believe is a growing trend of law enforcement using *Pitchess* to avoid the disclosure of information that should be public information. Even though the court didn't opine on the legitimacy of that concern, this case was about addressing transparency or the lack of it. Police officers will continue to have their confidential personnel records protected from disclosure absent a successful *Pitchess* motion if the information is truly part of the personnel record.

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WORKPLACE ISSUES

7 common traps to avoid when hiring employees

by Michelle Lee Flores
Cozen O'Connor

Love it or hate it, the Internet is here to stay, and employees are particularly empowered by their access to "the law." It's often said that a little bit of information can be a very dangerous thing—and that adage rings painfully true when employees know only a little information about a particular employment issue. Who among us hasn't heard from employees that they "know their rights," even when they may not be aware of the many complexities that go into determining an employer's obligations and limitations?

Hiring new employees provides an endless opportunity for unforeseen mishaps under California and federal law. Every now and again, we can all use a little reminder about some common pitfalls. Moreover, every employer can learn from other employers' experiences, which are often referred to as "horror stories."

1. Don't ask forbidden questions

There is a danger of asking inappropriate questions when you're interviewing job applicants. Hopefully, anyone who interviews candidates for employment knows that he should never ask someone if she is pregnant or disabled, or about her religion, race, or age, for example. Surprisingly, interviewers often do ask such questions or follow a line of questioning that tends to reveal such information.

Either way, obtaining protected information at the hiring stage can lead to liability. Why are certain inquiries off-limits? Considering protected characteristics is illegal under both federal and state law unless it's legally relevant to the job—or, in other words, unless it's a "bona fide occupational qualification."

State law may provide even broader protections to job applicants and employees. For example, California's Fair Employment and Housing Act (FEHA), which includes the state's Americans with Disabilities Act (ADA) "equivalent," includes specific and clear statutory language confirming that employers cannot discriminate, harass, or retaliate against people with actual or perceived protected characteristics or associations with such persons. The ADA provides protection to employees who are perceived to be disabled.

Some of the less obvious questions that can expose your hiring practices to scrutiny, if not lawsuits, may be asked by the interviewer in an innocent effort to "get to know" the candidate. For example, asking a candidate if he runs or practices yoga could be dangerous because it may tend to identify his general health, medical condition, or mental or physical disabilities. Instead of asking, wait to see if the applicant volunteers such information. You may inquire whether an applicant can perform job-related functions with or without reasonable accommodations if there is some concern about his ability to perform the job.

2. Danger lurks when interviewers are uninformed and untrained

Not only can failing to train, educate, and inform interviewers about the types of questions that are off-limits during interviews expose you to liability, but it also might alienate great candidates who are asked inappropriate questions. As a result, you should implement some minimal training or distribute a reminder of topics that should be avoided.

California's Department of Fair Employment and Housing (DFEH), which is the state's equivalent to the Equal Employment Opportunity Commission (EEOC), has published a fact sheet detailing what California employers can and cannot ask job applicants and employees. All employers can use the DFEH publication as a general guide and reminder of appropriate inquiries. The document is readily available on the Internet, so you shouldn't be surprised that applicants may have actually read it before going into an interview.

3. It isn't OK to consider protected characteristics

Some employers, or unskilled or untrained hiring personnel, consciously or subconsciously consider protected characteristics (e.g., a physical or mental disability, sex, age, or veteran status) in weighing a candidate's worthiness for a position. Someone who walks in with a limp may not be disabled. And even if she is disabled,

the applicant may still be able to perform the essential functions of the job, with or without a reasonable accommodation. Maybe the applicant stubbed her toe that morning.

As previously mentioned, the ADA and the FEHA prohibit discrimination and harassment based on actual or perceived protected characteristics or an association with someone in a protected category or who has protected characteristics. Accordingly, if a job applicant in California is perceived as disabled—even if he doesn't actually have a disability—he may have a statutory claim for discrimination against an employer. Be mindful of unlawful bias creeping into your considerations and determinations about who is the "best" candidate.

4. Social media is your frenemy

Some employers search various social media sites to "get to know" job candidates. Many other employers are adamant about not engaging in such practices. This scenario brings to mind the adage "You cannot unring the bell."

When viewing "public" websites, an HR representative will inevitably see information that prospective employers evaluating applicants wouldn't want to know. For example, an applicant could post a photo of herself crossing the finish line at a breast cancer walk that includes a comment about how delighted she is that she beat cancer three years ago. She may not have been up for any meaningful consideration for the job for legitimate nondiscriminatory reasons. However, since someone who represents the prospective employer knows she was previously a cancer patient, that knowledge could support a claim of discrimination.

5. Make sure your background checks are compliant

More and more, background checks are becoming a minefield for employers. If you're going to conduct a background check—and even when you're using a "background check service"—your HR professionals should have working knowledge of how far back you can go for information about certain types of convictions, if at all, under federal, state, and local law. For example, although employers in general may be entitled to certain records of convictions that are part of the public record, California employers cannot consider certain minor marijuana-related convictions.

6. Don't hire someone before all contingencies are cleared

It isn't uncommon for employers to feel the pressure of business demands and the need to get employees in and working. Supervisors sometimes bring in prospective employees before they clear background checks. Often, prospective employees end up successfully passing the background check and no issues arise. However, there's always a chance that the background check will reveal the employee wasn't truthful on her employment application. Trouble will likely ensue when an employee has already started working for your company and you want to unwind the engagement.

Similarly, some employers bring on new hires before getting the results of their postoffer drug tests, assuming they will clear that hurdle. Sometimes an employee doesn't pass the drug test, though, and problems and potential liability arise.

7. Post all required notices

Employers should be mindful of both federal- and state-required notices about employment and wage-related laws. Even employers with only one employee should know which posters are required and, most important, post them.

Some organizations provide federal and/or state "all-in-one" compliance posters. However, be aware that in California, employers are required to post industry-specific Wage Orders that usually aren't addressed in those all-in-one posters. Furthermore, citywide and

countywide minimum wage requirements have added substantially to the ever-growing myriad of required notices.

Bottom line

Employers must have good practices in place in order to hire qualified applicants. Unfortunately, employers face numerous pitfalls in the hiring process. It is critical that your HR staff know which questions are impermissible during the application and interview process.

Further, you must ensure that your background checks comply with all applicable laws. You must comply with not only federal and state law governing background checks but also with applicable city ordinances. For example, in August 2014, San Francisco adopted the Fair Chance Ordinance, which requires employers to follow strict rules regarding applicants' and employees' arrest and conviction records and related information.

While background checks are useful in weeding out undesirable candidates and may protect you from a negligent hiring claim, you must be sure your company's background check procedures comply with current applicable law. You should have all your new-hire paperwork periodically reviewed by competent counsel to ensure it is compliant.

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ELECTRONIC WORKPLACE

Think before you click: cybersecurity guidance to share with workers

Today's HR professional has a key role in enhancing her company's cybersecurity by educating and training employees about the risks of succumbing to "click bait" on the Internet or otherwise failing to think before they click an online link. Let's look at how you can help your employees become more aware of the hidden dangers lurking in an innocent-seeming e-mail or website.

Training and awareness

Often, the words "training" and "awareness" are used interchangeably, but in the cybersecurity world, they have different meanings. "Training" is instruction on what to do or not do. "Awareness" is a basic shift in a person's subconscious mindset that leads to automatic behavior. The difference is key.

Let's look at an example. Picture your favorite beverage. Chances are, you've seen an advertisement for it somewhere. The advertisement could have been a 500-word essay on the benefits and joys of gulping down the drink. But that's not what the advertisers chose to show you. Instead, they used a picture of an ice-cold bottle, perhaps with adults having the time of their lives. Why?

CALIFORNIA NEWS IN BRIEF

Judge awards $1.47 million in sexual harassment case. The Equal Employment Opportunity Commission (EEOC) reported on July 22, 2016, that a federal judge has ordered Madera-based Z Foods, Inc., to pay $1,470,000 in damages in a sexual harassment and retaliation lawsuit filed by the federal agency. The EEOC had alleged that Z Foods allowed male supervisors to sexually harass a class of female employees and fired male and female employees when they complained about the sexual harassment. The court awarded the maximum amount of damages allowed by statute, offset by a previous settlement. It also ruled that the employees suffered severe emotional distress as a result of the employer's actions.

DOL says Fresno employer failed to pay overtime. An investigation by the U.S. Department of Labor (DOL) has found that Fresno-based JD Home Rentals paid employees straight time for their overtime hours instead of paying them time and a half for each hour worked beyond 40 in a workweek as required by the federal Fair Labor Standards Act (FLSA). In a July 26 statement, the DOL also said the home rental and management company failed to keep accurate records of the hours worked by employees. Most of the affected employees were maintenance workers. The DOL said the company will pay 157 employees $129,719 in overtime back wages and an equal amount in damages, totaling $259,438.

Electrical contractor pays employees back wages, damages. The DOL announced in early July that Schamber Electric of Corona has paid 158 workers back pay and damages after the agency found the employer had violated the FLSA's overtime provisions by paying the workers straight time for hours worked beyond 40 per week. Specifically, the employer paid some installers on a piece-rate basis without regard for the number of hours they actually worked, resulting in violations when they worked more than 40 hours in a week without overtime. The employer paid other workers hourly rates but paid them straight time even when they worked more than 40 hours. The DOL also found the employer violated record-keeping requirements by failing to accurately record the hours worked by employees each day and each week. ✤

Because the advertisers weren't trying to convince you of the benefits of the drink on an intellectual level. They were attempting to create an almost unconscious response the next time you visit the grocery store. The advertisers weren't trying to educate you; they were trying to change your automatic, almost unthinking behavior. As you may have guessed, the 500-word essay is "training," while the picture is "awareness."

That is not to say training is unimportant. Not at all. It is a necessary part of HR's digital security role, and it makes compliance people happy. However, many of the dangers we discussed in part one of this series are created because employees perform habitual, almost unthinking actions without being fully engaged, not because employees are uneducated. Think of an employee hurriedly clicking through e-mails while worrying about the meeting she must attend in 10 minutes. No amount of training will cause her to pause before clicking a malicious link in a phish-ing e-mail. Her automatic behavior must change before she will slow down and take the time to think.

Changing employees' automatic behavior is a slow and daunting task. We all have experience with short, embedded instructions that we have internalized in such a way that they modify our unthinking actions. Let's look at two examples from childhood (please fill in the blanks):

(1) ____, ____, and _____ before you cross the street.

(2) If you are on fire, ____, ____, and ____.

How did you learn to stop, look, and listen before you cross the street? How do you almost instinctively know to stop, drop, and roll if you are on fire? It wasn't a PowerPoint presentation or a 20-minute training video that seared those instructions into your subconscious. Rather, it was multimodal repetition: You sang a song about the instructions in kindergarten, your teacher told you what to do, there were posters in your classroom, and your parents repeated the advice.

To raise your employees' security posture (and shore up the weakest part of your cyberdefenses in the process), "think before you click" and "when in doubt, shout it out (to the help desk)" need to become as instinctive as "stop, look, and listen." The more often those messages are repeated—with varied methods of delivery—the more likely they will change behavior and improve your security posture over time.

Organizational culture

Your company's culture can substantially help—or hinder—your cybersecurity efforts. Digital security awareness must become a cultural value—part of the daily fabric of company life. That doesn't happen by accident. Rather, companies that have digital security as a core value proceeded deliberately and intentionally.

Like most elements of company culture, leadership sets the tone and agenda for digital security. Thus, company leaders who are (or at least appear to be) invested in cybersecurity send a powerful message to employees. On the other hand, if cybersecurity is a known orphan ignored by company leadership, a cultural change will be difficult, if not impossible, to make.

Friend or foe?

An often overlooked element of a good security culture is employees' willingness to report possible mistakes, particularly their own errors. A digital intrusion or data loss that is detected within hours or days is almost always less damaging than a breach detected months (or longer) after it occurs. Unfortunately, the average time between a digital attack and detection is more than 200 days, and the gap is getting larger.

Since many cyberattacks involve employees in some way, workers' willingness to swiftly report slips and mistakes is vital to reducing the time between a breach and the discovery. Security-conscious companies know that and inform employees that reporting mistakes is unlikely to lead to discipline or termination. Obviously, employees with malicious intent will be subject to severe discipline, but such employees are not likely to report mistakes anyway.

An accidental or unthinking lapse in judgment may result in additional training, but it is often counterproductive for employees to believe that reporting a mistake will lead to more serious consequences. In the end, your company has a choice: Recruit employees as frontline sentinels or discourage them from reporting incidents. The choice you make can have a profound impact on your overall security culture.

Employer policies

Orphaned policies do little to promote cybersecurity. On the other hand, thoughtful policies that align with your organization's demonstrated attitude and priorities are essential to a good security program.

Of course, a compliance element is essential to a good security policy. Whether it's the Health Insurance Portability and Accountability Act (HIPAA), Payment Card Industry (PCI) security requirements, or a regulatory scheme that affects information security, having proper policies in place allows you to stay in compliance.

However, an organization that seeks only to check off a box is likely making itself less—not more—secure. Meaningful digital security requires that policies be acknowledged by employees, enforced, and reinforced through training and awareness. Ideally, employees will review and sign off on your company information

policies as part of the onboarding process. Ensuring that significant digital security policies are limited to a few pages will help. If your policies are longer than that, consider giving copies to employees, along with a short summary sheet that employees must sign.

Aligning policies and training is an often overlooked step. Obviously, conflicts between policies and training are bad. A trainer who can't answer basic questions about your policies sends a clear message that the policies are for the shelf, not real life.

Finally, nothing says "we don't care" quite like failing to enforce a policy. From almost any vantage point, an unenforced policy is generally worse than no policy at all. Following through, of course, means imposing consequences. Consequences, however, are not synonymous with discipline. While you should impose discipline, up to and including termination, for repeated or malicious conduct, consequences for less serious issues must be given with an eye toward encouraging employee self-reporting, not deterring it.

Breach response

Often, people think of "security" as a fence around something that is being guarded. In cybersecurity, your "fence" will almost assuredly fail to stop all breaches. Thus, a good cybersecurity program includes four layers of defense:

(1) Protect your system (the fence part).

(2) Detect when someone gets in.

(3) Contain damage.

(4) Respond appropriately and recover efficiently.

Empowering employees to become digital sentinels assists in protection and detection. But HR also has a critical response role. Every meaningful data breach has an HR component. It could be coordinating off-site management of employees working remotely because of a problem with a primary system, pulling in the right employees from across the company to respond to an incident, or simply telling employees what is happening and what they can and cannot say.

A strong response begins with quality preparation. From HR's perspective, preparation includes many tasks. Review your company's incident response, disaster response, and business continuity plans to determine how they affect employees logistically, intellectually, and emotionally. What portions of the plans merit separate HR planning? A preplanned framework for handling employee communications can be a real asset after a cyberattack. While you cannot account for every scenario, talking through the notification process and developing your general message ahead of time will prevent confusion and disagreement after a hack.

Bottom line

We do not intend to pick on HR professionals. We have a similar message for other non-IT personnel, including legal, finance, risk management, operations, and, most important, senior management. Today, good cybersecurity depends on what all employees—not just IT personnel—contribute. Digital threats have moved out of the server room and into every office, cubicle, and lunchroom. So should your response. ✤

WORKPLACE ISSUES

Performance appraisals: the good, the bad, and the ugly

Sooner or later it will be that much-dreaded time of the year when annual performance appraisals are due. To make matters worse, there's always at least one team member who will drag the process out with questions about every single notation on his appraisal. So there you go, headed down the road of conflict.

Remember that one of the main objectives of the performance appraisal process is to develop staff members and improve their contribution to the team. However, in many cases, both the leader and the staff member dread the performance meeting. How can you possibly turn that into a positive? Here are a few suggestions to help you improve your current performance appraisal process while relieving some of the stress the task often inflicts on both parties involved.

Get everyone on board

Ensure you've set clear, measurable goals at the beginning of the appraisal period. Too often the goals

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on performance appraisals are too subjective. Remember the old adage "You can't manage what you can't measure." Team members should ask for clarification on anything that's unclear or vague at the beginning of the appraisal period.

Set aside time to meet regularly with each staff member to discuss performance. Performance meetings need to be focused solely on performance. Don't discuss other issues during a performance meeting or you'll diminish the importance of what you're trying to accomplish. The more you can meet and discuss performance prior to the actual performance appraisal process, the smoother the overall process will go. Once a month is great, but if you can only meet every other month with a solid agenda, that should suffice.

If your manager cannot commit to meeting regularly, that may present more of a challenge and could be an indication of how she feels about the appraisal process. Staff members must push the issue. Your manager will respect staff members who show commitment to self-development because improving performance is high on just about every manager's wish list.

Go over specific performance goals at monthly meetings. Each subsequent meeting will provide an opportunity to gauge the staff member's progress since the previous meeting. Examine how he exceeded the performance goals or what needs to be improved upon to achieve the goals. Staff members should ask specific questions about how they can exceed performance goals.

Document and talk about the staff member's strengths and successes on the appraisal. This will reinforce the good behavior you want her to repeat. At this point, it should be a red flag if you're thinking, "What if the staff member doesn't have strengths and successes to point out?" If that's the case, the employee should already be in the performance improvement process.

Bottom line

When administered correctly, performance appraisals can be a very effective development tool for any organization. If you wait until near the end of the appraisal period to gather your data, far too often you'll really only capture the last few months of the appraisal period. Put in the work early, and the end result will be a smoother process for everyone involved. ✤