

A Publication Dedicated to Employers' Current HR Issues & Solutions

The **BOTTOM** LINE

Volume 4

- Plan.*
- Prevent.*
- Protect.*

*What You Need
to Know About
New DOL Safety Regulations*

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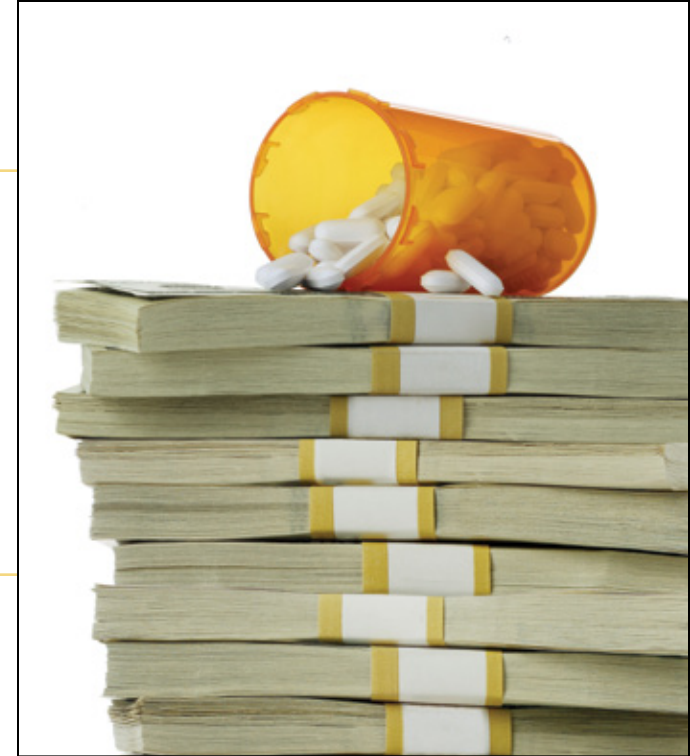
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PLAN. PREVENT. PROTECT.

What You Need to Know About New DOL Safety Regulations

In May, the U.S. Department of Labor (DOL) announced a new strategy that will shape how it enforces workplace laws and regulations. With this strategy, called *Plan/Prevent/Protect*, the DOL will take a much broader view of employer compliance and may require employers to do the same, by forming comprehensive, long-term compliance action plans. In doing so, *Plan/Prevent/Protect* shifts the responsibility for ensuring compliance from its investigators to employers.

Employers already struggling to keep up with regulations from the DOL's Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), Office of Federal Contract Compliance Programs (OFCCP) and Wage and Hour Division (WHD) may feel overwhelmed by this new strategy. Employers will have greater compliance obligations under *Plan/Prevent/Protect*.

A Shift in Thinking about Compliance

Understanding how *Plan/Prevent/Protect* affects companies requires taking a step back, because it isn't your standard-issue "Send this notice or submit this form by this date" type of compliance requirement. Instead, *Plan/Prevent/Protect* obligates employers to create a *culture of compliance* in their workplace. It's not about avoiding violations; it's about actively protecting workers' safety, rights and benefits in the workplace.

Previously, the DOL's enforcement activities engendered a "catch me if you can" culture in some workplaces, according to Deputy Labor Secretary Seth Harris. While many employers strove to genuinely protect workers, others corrected workplace violations only when caught and cited by the DOL, either out of a failure to comprehend the requirements or in some cases, out of blatant disregard for the rules. These neglectful employers weighed the cost of compliance against the penalties for noncompliance and then calculated their chances of getting caught — calculations that ultimately infringed upon workers' rights and safety.

Moving forward, the DOL won't allow them to continue such calculated noncompliance. In fact, the new strategy will require them to not only remain fully compliant but also to *prove* how they achieve compliance. And if they can't provide proof, companies will be subject to DOL citations even when no substantive violation exists.

The DOL's Vision for Plan/Prevent/Protect

While the DOL has not yet published regulations to help employers understand how *Plan/Prevent/Protect* should be implemented (those may be months away), here's how the DOL describes its vision for the strategy:

- **Plan:** The DOL will propose a requirement that employers and other regulated entities create a plan for identifying and remedying risks of legal violations and other risks to workers—for example, a plan to search their workplaces for safety hazards. The employer or other regulated entity would provide its employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.
- **Prevent:** The DOL will propose a requirement that employers and other regulated entities thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be merely a paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the *Plan/Prevent/Protect* compliance strategy.
- **Protect:** The DOL will propose a requirement that the employer or other regulated entity ensures that the plan's objectives are met on a regular basis. Not just any plan will do. The plan must actually protect workers from violations of their workplace rights.

In short, the three steps of the *Plan/Prevent/Protect* strategy will require companies to prove that they take a proactive approach to preventing noncompliance rather than reacting to incidents of noncompliance as they occur. The DOL has stated that employers will have flexibility in how they structure their plan, but that compliance as an end result is non-negotiable.

Enforcing Workplace Rules with Limited Resources

One of the primary reasons behind the DOL's shift in strategy is that the DOL is simply unable to monitor all the potential compliance violations that could threaten workers' safety or rights. Although the DOL has several thousand inspectors—and due to a push from the Obama Administration, it is hiring more—those inspectors are tasked with ensuring compliance for 140 million workers at more than 9 million workplaces. According to the DOL's Spring 2010 Regulatory Agenda Narrative, the DOL identifies employers as "the first and most important line of defense against violations of the law that threaten workers' safety, health, wages, benefits, equal employment opportunity and fairness in the workplace."

How *Plan/Prevent/Protect* Will Shape DOL Agencies' Regulations

The *Plan/Prevent/Protect* strategy will affect how all of the agencies under the DOL—including the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division (WHD), among others—enforce the regulations under their jurisdictions. In its Spring 2010 Regulatory Agenda, the DOL indicated that as part of the Department's *Plan/Prevent/Protect* regulatory and enforcement-strategy, agencies will be proposing regulations:

- **A new Injury and Illness Prevention Program, regulated by OSHA,** will require employers to provide their employees with opportunities to participate in the development and implementation of an injury-and-illness-prevention program. The rule will be designed to address the needs of special categories of workers, such as youth, aging and immigrant workers.
- **OSHA is also considering a new rule to address infectious diseases in the workplace.** If implemented, this rule would require employers to establish a comprehensive employee infection-control program that meets guidelines from the Centers for Disease Control and Prevention and other industry best practices.
- **A new WHD proposal would require employers to provide workers with basic information about their employment, including how their pay is calculated.** Also, an employer wanting to exclude workers from coverage under the Fair Labor Standards Act (FLSA)—for example, by classifying them as independent contractors—would be required to disclose that information to the workers and retain it so that it can be given to WHD enforcement agents who might request it. This proposed requirement appears to apply not only to independent contractors but also to any employees an employer wishes to classify as exempt from the DOL's minimum wage and/or overtime requirements. The WHD's Notice of Proposed Rulemaking (NPRM) is expected to address this detail, which could affect recordkeeping requirements for millions of employers.

HOW EMPLOYERS SHOULD RESPOND

Until the DOL issues details on its *Plan/Prevent/Protect* strategy, employers won't know exactly what they'll need to do to comply. However, according to Paul DeCamp of the employment-law firm Jackson Lewis, "Prudence dictates that employers operate under the assumption that the new requirements DOL imposes will be enforced. In order not to be caught flat-footed, employers should take a very close look at their policies and practices in the areas within DOL jurisdiction, particularly with regard to wage and hour and occupational safety and health issues. Conducting a detailed compliance review and implementing a carefully considered remediation plan before DOL arrives at the front door will pay substantial dividends in the long run by improving compliance, reducing or eliminating future violations and demonstrating good faith in the eyes of the DOL enforcers."

Many small companies, even ones fully committed to protecting their workers' rights and safety, are likely to find these steps prohibitively costly and time-consuming. While preventing violations is rarely more costly than dealing with them after they've occurred—especially when intangible costs like employee morale, productivity and external reputation are considered—companies may be looking for ways to reduce the burden of the *Plan/Prevent/Protect* strategy. Fortunately, employers who work with a Professional Employer Organization (PEO) will have a partner in the compliance process.

PEOs like ADP TotalSource® can help employers comply with the DOL's new enforcement strategy. As one of its core service offerings, ADP TotalSource takes a proactive approach to compliance, working with its client partners to identify areas of noncompliance and create a plan to repair them. To make this happen, ADP TotalSource assigns each client a Human Resources Business Partner who can assess the organization's wage and hour practices, analyze exempt/nonexempt classifications within the employer's workforce, update job descriptions as necessary to reflect proper exempt/nonexempt status, provide guidance and recommendations on wage and hour issues and help implement necessary changes driven by compliance requirements. In addition, each ADP TotalSource client is assigned a Risk and Safety Specialist who performs workplace safety reviews, makes recommendations based on federal and state OSHA requirements, helps develop a customized safety manual, provides accident-investigation and loss-analysis guidance and even coordinates online and on-site safety training/evaluations. This integrated, forward-looking approach to compliance is precisely the type of guidance small employers will need when the DOL implements *Plan/Prevent/Protect*.

Under *Plan/Prevent/Protect*, employers will be accountable for finding and fixing areas of noncompliance, a significant increase in responsibility for small- and medium-sized businesses. Building the right plan and implementing it correctly will be critical—and far easier to attain with the help of an experienced outsourcing partner. ■



Understanding the New Americans with Disabilities Act

Twenty years ago, the landmark *Americans with Disabilities Act (ADA)* was passed by Congress and signed into law by President George H.W. Bush. This Act was designed to prohibit discrimination based on disability, and it imposed responsibilities on employers to accommodate workers and candidates with disabilities. As a result of the Equal Employment Opportunity Commission's (EEOC) interpretation of the law and a series of court cases over the past two decades, the application of certain ADA provisions had been narrowed since the Act took effect.

In 2008, however, Congress passed the *Americans with Disabilities Act Amendments Act (ADAAA)*, which broadens the scope of what is considered a disability and what accommodations employers need to make for disabled workers, with the stated goal of returning to the spirit of the original ADA. In late 2009, the EEOC proposed changes to its regulations under the ADA to implement the ADAAA.

FAST FACTS: WHAT YOU NEED TO KNOW ABOUT THE ADAAA

Name:	The Americans with Disabilities Act (ADA) Amendments Act (ADAAA)
Effective Date:	January 1, 2009 (not retroactive); EEOC Notice of Proposed Rulemaking (NPRM) published September 23, 2009
Key Provisions/Purposes:	Requires the definition of "disability" to be construed in favor of broad coverage



WHAT'S A DISABILITY... AND WHAT'S NOT?

Under the 1990 ADA, the definition of “disability” had three main parts.

A disability was defined as:

- An impairment that *substantially limits one or more major life activities*;
- A *record* of such an impairment; or
- Being *regarded as* having such impairment.

The EEOC’s proposed regulations maintain that basic definition of a disability but broaden how some terms, including those italicized above, are interpreted.

SUBSTANTIALLY LIMITS:

The new proposed regulations make it much easier for an individual to assert that he or she is “substantially limited” by a disability. Previously, the EEOC’s interpretation of the ADA required that an impairment had to “significantly” or “severely” limit a major life activity to meet the EEOC’s standard, but the new regulations broaden the “substantially limited” term so that “a[n] impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability.” In short, the ADAAA indicates that the definition of “disability” is to be construed in favor of broad coverage and should not demand substantial analysis.

MAJOR LIFE ACTIVITIES:

The ADAAA spells out, and the EEOC expands upon, two non-exhaustive lists containing activities and functions that are considered major life activities.

- The first list includes activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working.
- The second list includes major bodily functions, such as those of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

Impairments need to affect only one major life activity to be considered a disability.

MITIGATING MEASURES:

Previously, the beneficial effects of mitigating measures (i.e., the extent to which treatment or assistance could offset the limitations of an impairment) were allowed when considering whether an impairment was a disability under the ADA. However, under the ADAAA and the EEOC’s proposed regulations, these effects are not to be considered, except in the case of ordinary glasses or corrective lenses. For example, a person with epilepsy whose symptoms are well controlled by medication would still be covered as having a disability because the effects of his or her medication would not be considered.

REGARDED AS:

The new interpretation of “regarded as” having a disability is different from the original one. That’s because an individual no longer must demonstrate that the employer believed his or her impairment (or perceived impairment) substantially limited performance of a major life activity. However, an employee would not be regarded as disabled if an impairment is transitory (lasting or expected to last six months or less) and minor.

Under the ADAAA, an employer would regard an individual as having a disability if the employer took an action prohibited by the ADA (e.g., discriminatory failure to hire, termination or demotion) based on an individual’s impairment or an impairment the employer believed the individual had.

If an employer takes an employment action against an individual either because of symptoms resulting from an impairment or the individual’s use of a mitigating measure (treatment or assistance) for an impairment (even if the employer is unaware of the underlying impairment), the employer is regarding the individual as having a disability, and the individual may be covered under the ADAAA. For example, an employer who does not hire a candidate because she takes an antidepressant medication regarded her as having a disability, even if the employer doesn’t know that the medication is used to treat major depression.

Generally, employers are required to provide reasonable accommodation to allow an employee with a disability to perform the essential functions of his or her job, unless the accommodation would cause the employer “undue hardship.” However, the EEOC’s proposed regulatory changes based on the ADAAA clarify that individuals covered only under the “regarded as” prong of the definition of disability are not entitled to reasonable accommodation.

IMPAIRMENTS THAT CONSISTENTLY MEET THE DEFINITION OF DISABILITY:

In addition to broadening the definition of disability through the interpretation of these terms, the ADAAA lists (non-exhaustively) several impairments that will be consistently considered disabilities, including autism, cancer and mental health disorders such as major depression and bipolar disorder. Also, the ADAAA and EEOC specifically state that an impairment that is episodic or in remission still meets the definition of disability if it would substantially limit a major life activity when active. However, the EEOC’s proposed regulations generally restrict temporary, non-chronic impairments of short duration with little or no residual effects (like seasonal influenza or a joint sprain) from being considered disabilities.

DETERMINING WHEN AN IMPAIRMENT SUBSTANTIALLY LIMITS THE MAJOR LIFE ACTIVITY OF WORKING:

Prior interpretations of the ADA required that the employee demonstrate his or her inability to perform a “class” or “broad range” of jobs in order to prove substantial limitation in the major life activity of working. Under the EEOC’s proposed regulations, when an impairment substantially limits an individual’s ability to perform or meet the qualifications for the “type of work” at issue, it is considered to limit the major life activity of working and is therefore a disability. Type of work may include food-service or clerical jobs, or it may be determined by a job’s requirements, such as repetitive bending, reaching, manual tasks, or prolonged sitting or standing.

COMPLYING WITH THE ADAAA: HOW ADP TOTALSOURCE® CAN HELP

Employers charged with discriminatory practices under the ADAAA can face expensive, time-consuming lawsuits. Even when these cases are resolved through mediation or settlement, the time required can be debilitating. In cases where plaintiffs are awarded remedies or punitive damages, employers’ costs can run into the millions of dollars, making compliance with the ADAAA critical. However, employers who partner with a Professional Employer Organization (PEO) like ADP TotalSource have resources to help maintain compliance and avoid discrimination claims.

ADP TotalSource’s Human Resources Business Partners provide guidance and recommendations for ADA issues (such as how to determine if a condition is a covered disability or what constitutes reasonable accommodation). ADP TotalSource also offers training on the ADA/ADAAA and reasonable-accommodation concerns and can provide guidance on complex situations, including how to navigate legislative requirements when the ADA/ADAAA, FMLA and Workers’ Compensation matters exist for the same case. Finally, ADP TotalSource can assist employers with leave administration and assistance with the return-to-work process.

Maintaining compliance with disability-discrimination laws is critical if employers want to achieve the goals of reducing the risk of litigation and enhancing their long-term reputation as an employer of choice. Understanding how current laws are applied and enforced is the first step to achieving those goals. ■

READY OR NOT? 2011 OPEN ENROLLMENT

It's the start of the school year, football season, holiday shopping and—for those companies with benefit plans that operate on a calendar-year basis—Open Enrollment. Open Enrollment is the time of year when employee anxieties run high and HR morale can be low. Even with all the information distributed to employees, there seem to be more questions than answers. Whether your organization is large or small, pressure often falls on the HR staff to educate employees on plan changes, enrollment instructions and deadlines *and* answer everyone's benefit-related questions, with askers ranging from the CEO to the new employee who just started last month. While Open Enrollment can be a stressful time, it doesn't have to be. Prepare now for a successful 2011 Open Enrollment.

01

Plan Ahead.

Ever heard "It pays to plan ahead?" This saying could be the campaign slogan for Open Enrollment. The sooner you start planning, the better off you'll be. It's important to start thinking about the enrollment process as far in advance as possible. Ask yourself:

- What are my organization's changing needs?
- How will our carrier negotiations align with our plan needs?
- What can we do better than last year?

02

Understand How to Educate Your Workforce.

Education and communication are critical components of the enrollment process. Your employees need to understand what benefit plans are available to them; when, how and if they need to enroll in benefits; and how to make smart health-care choices for themselves and their families. You must communicate early, often and through various channels to get these messages across. It's not only important to educate employees on what medical benefit plans are available to them (for example, a PPO and an HMO); you also need to make sure they understand what kinds of benefits are available to them aside from the standard medical, dental and vision benefits. Studies show that voluntary benefits, like supplemental life, pet or cancer insurance, can increase employee morale, loyalty and productivity.

03

Leverage Technology and Information.

In today's 24/7 society, employees are short on time and attention. Employees and their spouses expect to find information—including answers to their benefits questions—instantly and effortlessly. An online enrollment portal gives employees anytime access from their homes or offices to check their benefits eligibility or plan information and change benefits elections in an instant. While enrollment forms or the telephone may be the only enrollment options for some employees, you can leverage technology to enroll other employees who have Internet access.

A very important but very time-consuming part of the education process is answering employee questions. To get employees the information they need without burning the midnight oil, understand your employee population. Do they have computer access? Post Open Enrollment FAQs on your company's network or intranet site. Are they scattered throughout different locations? Host a Webcast instead of on-site meetings. Can your employees call an employee help line to get answers to their benefits questions? Make sure your staff is trained and well-versed in your benefits and common employee concerns. Understanding your population and how to meet its education needs will help drive a successful Open Enrollment.



04

Learn from Past Experience.

Asking yourself, "What can we do better than last year?" can help you create a strategic enrollment plan to improve on last year's Open Enrollment experience—for you and your employees. As you look back, you may be surprised to realize that prior years' enrollment data is a gold mine: It can educate you on your employees' preferences and motivators, as well as what benefits they value, by job title, region or other helpful categories.

Trend data is also very valuable, so look at your data from two or three years ago. How have employees' benefits selections changed during that time? Did they choose plans that offered more choice or lower per-pay costs? Did dependent enrollment increase? How many employees actively enrolled (vs. allowing their benefits to roll over from year to year)? That's powerful information for future action. Then think of the tactics you used last year to reach your benefits goals. Did your communication and education plans support what turned out in the data? Revise your plans to reach this year's goals accordingly.

05

Consider the PEO Advantage.

Open Enrollment can be a hectic time for organizations, especially smaller companies with limited resources. By joining a Professional Employer Organization (PEO) like ADP TotalSource®, you can outsource many of your HR, benefits and payroll functions and continue to focus on developing your business. ADP TotalSource delivers powerful reporting tools that improve decision making and oversight, flexible support models that accommodate your organization's unique needs and direct access to trained professionals able to answer your HR questions. As plan sponsor of the ADP TotalSource Health and Welfare Plan, ADP TotalSource takes care of all plan administration, including negotiating with insurance carriers, updating the plan document to ensure it is compliant with all applicable laws and handling all plan-enrollment issues.

Aside from administering many of the labor-intensive tasks that keep your HR practitioners from other important priorities, ADP TotalSource will also improve your employees' benefits experience. Your employees will have access to Fortune 500® quality benefits with multiple plan options and easy-to-use tools and resources, including a streamlined online enrollment system. They'll also have access to a knowledgeable and responsive Employee Service Center, a hotline that can answer their questions about their pay and benefits. Finally, they'll also receive valuable perks such as a rich discount program. ■

TRAINING EMPLOYEES For a Harassment-Free Workplace

In the workplace, certain situations are guaranteed to make employers look back and think, “Why didn’t I plan ahead? This problem could have been avoided so easily.” Workplace harassment lawsuits fall into this category, presenting an ongoing, costly challenge for employers of all sizes in all industries. While some employers neglect harassment prevention because it’s a big investment, they’re taking a shortsighted approach. According to Todd Van Dyke at employment-law firm Jackson Lewis, the cost for a company to have a third party conduct an in-house investigation of a legitimate harassment complaint runs from several thousand dollars to tens of thousands of dollars. It may be expensive, but it would be money well spent. A good investigation can prevent a lawsuit, which can easily cost six figures.

Fortunately, there are proactive measures organizations can take to protect themselves and their employees against harassment in the workplace. Specific, customized and effective training is one of the most critical elements of a harassment-prevention plan.

The Case(s) for Harassment Prevention

In the late 1990s, U.S. Supreme Court rulings in three landmark employment-law cases established guidelines for employers to avoid harassment charges. In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court’s decision set forth two key principles:

1. When a supervisor engages in sexual harassment that causes an employee to suffer a “tangible employment action” (that is, a “significant change in employment status,” such as hiring, firing, promoting, failing to promote, reassigning with significantly different responsibilities or a decision causing a significant change in benefitsⁱⁱ), an employer is **automatically liable**.
2. When sexual harassment does not cause a tangible employment action to the employee, an employer may claim an **affirmative defense** — the company can avoid liability or reduce their damages — if it can prove that:
 - a. the employer exercised reasonable care to prevent and promptly correct harassing behavior; and
 - b. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.

Further, in *Kolstad v. American Dental Association*ⁱⁱⁱ, the Supreme Court ruled that “employers who engage in **good faith efforts** to comply with the law are afforded a ‘safe harbor’ in which they ‘may take refuge from punitive damages liability.’”^{iv}

What do these landmark rulings mean to employers who want to avoid adverse decisions in harassment suits or, better yet, avoid those suits altogether? These guidelines require employers to implement preventive anti-harassment measures; ensure all employees, supervisors and leaders understand their zero-harassment policy; and provide and train employees on an effective harassment-complaint policy.

Although Faragher, Ellerth and Kolstad all dealt with sexual-harassment cases, the Equal Employment Opportunity Commission (EEOC) has clearly stated that the same standards apply to all types of prohibited harassment.

Reading Between the Lines: Training Isn’t Optional

Numerous harassment cases since the *Faragher, Ellerth and Kolstad* decisions have illuminated how these guidelines should be applied in the workplace, highlighting the importance of training. Although having an anti-harassment policy is important, that alone won’t exempt an employer from liability. Employers must also show that they conducted training on the policy and complaint procedures.

In *Mays v. Music City Record Distributors, Inc.*^{iv}, Music City Record Distributors (MCRD) claimed an affirmative defense under *Faragher* and *Ellerth*; their employee handbook included a policy prohibiting sexual harassment and outlining a harassment-complaint procedure. However, Mays (the plaintiff) had not received a copy of the handbook when she was hired, and her supervisor had not been informed of the policy or trained on how to handle complaints. The Tennessee Court of Appeals decided that MCRD was not able to satisfy the first prong of the affirmative defense (which requires that an employer exercise reasonable care to prevent and promptly correct harassing behavior) by simply adopting a reasonable sexual-harassment policy. According to the court’s decision, proper implementation of the policy is required as well.

By contrast, in other cases since the *Faragher, Ellerth and Kolstad* decisions, employers that faced harassment claims and periodically conducted thorough and relevant harassment training were exempted from liability and/or received reduced punitive damages.

Assess Your Liability

The EEOC and state and local Fair Employment Practices agencies reported 93,277 discrimination charges in FY 2009, including charges of race, sex, nation of origin, religion, age and disability discrimination.

How ADP TotalSource® Can Help

The law sets a high bar for harassment-prevention policies and training programs, presenting a burden for many small employers. But organizations that partner with a Professional Employer Organization (PEO) like ADP TotalSource have deep resources. ADP TotalSource offers clients a comprehensive Harassment Prevention Program, including a harassment-prevention policy compliant with federal and state law, a formal complaint procedure and a toll-free number for reporting concerns, and harassment-prevention training courses for managers and employees (including courses that are compliant in California). In addition, ADP TotalSource’s Human Resource Business Partners conduct internal complaint investigations, providing guidance and recommendations for resolving issues and helping clients through the difficult discipline/termination process when needed.

If an ADP TotalSource client is charged with harassment and/or experiences retaliation filed with the EEOC or a state counterpart, an ADP TotalSource EEO Specialist will assist in the preparation of a response to the charge at no additional cost*. If the charge proceeds further (e.g., via agency investigation or a lawsuit) so that an attorney is required, the client may be eligible for ADP TotalSource’s Legal Defense Benefit (LDB)* to help cover legal defense fees. In conjunction with ADP TotalSource’s Harassment Prevention Program, ADP TotalSource’s Employment Practices Liability Insurance (EPLI)* policy can cover clients as additional insureds, offering up to \$1,000,000 in coverage per claim.

The popular saying “Hindsight is 20/20” reflects a perfect understanding of an event after it has happened and applies to many workplace harassment lawsuits. Developing a clear, effective, well-communicated harassment policy is fundamental to protecting your company and employees against harassment in the workplace. ■

ⁱ*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

ⁱⁱLotito, M., & Outwater, L. (2005). Jackson Lewis, LLP. The Law of Training: Mounting an Affirmative Defense against Employment Claims. The Job Description, Spring 2005, 25-33.

ⁱⁱⁱ*Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

^{iv}*Mays v. Music City Record Distributors, Inc.*, No. M2006-00932-COA-R3-CV, Court of Appeals of Tennessee, at Nashville (2007).

*Terms and conditions apply to the assistance provided by the EEO Specialist and both the LDB and EPLI.

A High Standard for Harassment Training

To stand up to the scrutiny of a harassment investigation, an employer’s training program must meet a high standard. According to Jackson Lewis, “The training must discuss the proper topics, be delivered to the right people by the right trainers, be of appropriate length, be provided periodically, be documented and be properly presented.”ⁱⁱ

When developing your organization’s anti-harassment policies, ensure that your policies and training programs:

Discuss the proper topics

Focus on federal and applicable state laws and policies. Training sessions should cover harassment based on all federal- and state-protected categories, including race, religion, sex, color, nation of origin, age, citizenship and disability. Additionally, all participants should understand how to file a complaint and be provided a contact sheet that details the appropriate point of contact.

Address your audience

Different employees require different training. Jackson Lewis recommends that employers divide training participants into three groups: executives, managers and all other employees.

Executives need to understand prelitigation strategies, litigation liability issues and the elements of a solid harassment policy.

Managers and supervisors must understand what the harassment policy covers, the seriousness of the policy, their responsibilities when harassment is reported and that retaliation is prohibited. Managers and supervisors are a company’s most important asset in maintaining a harassment-free workplace.

All employees need to be trained on what constitutes harassment so that they behave appropriately and can identify inappropriate behavior around them; they must also understand complaint procedures.

Invest in experienced trainers

Selecting an appropriate trainer is critical to the success of your training program. Attorneys, HR professionals, psychologists and others who know the laws of your state and have practical experience in harassment prevention may be good resources. Jackson Lewis recommends auditing a public training session to preview a trainer’s presentation and assess his or her style.

Health Care Reform Update



Over the past several months, the Department of Health and Human Services (HHS), together with the Internal Revenue Service (IRS) and the U.S. Department of Labor (DOL), has provided new information about some of the first provisions to take effect under the Patient Protection and Affordable Care Act (PPACA), passed in early 2010. It is important that employers are aware of these provisions in order to ensure that their plans remain compliant with changing regulations.

Dependent Coverage to Age 26: Interim Final Regulations Issued May 10

Starting with Plan Years beginning on or after September 23, 2010, all health plans that provide dependent coverage to children must do so for all employees' adult children under the age of 26. When determining eligibility, the plan can't take student status, marital status, residency, financial support, dependent status for tax purposes or other criteria into account. In addition, non-grandfathered plans can't consider an adult child's eligibility for employer-sponsored coverage when determining eligibility, although grandfathered plans are allowed to exclude dependents who are eligible for employer coverage through Plan Years beginning before January 1, 2014. Employers can't charge more

for adult-child coverage or provide coverage with different terms based on a child's age.

Employers must communicate this change in writing to eligible adult children or their parents. Then newly eligible adult children and, in some cases, their parents, must be given a special 30-day enrollment opportunity to enroll for coverage. Employers can use their normal annual open-enrollment period for this as long as the timing meets the law's requirements and the special enrollment opportunity is prominently communicated.

Small Business Tax Credit Guidance Issued by the IRS

Effective January 1, 2010, employers that have fewer than 25 "full-time equivalent employees" and average annual wages under \$50,000 and that provide health-plan coverage under a qualifying arrangement (as defined by the IRS) are eligible to receive a health-insurance federal tax credit. To be eligible, an employer must pay a uniform percentage (at least 50%) of the plan's premium costs for all employees, although certain transition rules apply to contributions made in 2010. Eligible employers may receive a credit of up to 35% of the cost of their employees' health premiums (increasing to 50% of premium costs in 2014). Tax-exempt small employers may receive a credit of 25% of premium costs. The tax credit is a sliding-scale credit based upon the number of full-time equivalent employees and average annual wages paid. Only small employers with 10 or fewer full-time equivalent employees and average annual wages of \$25,000 or less are eligible for the full credit. Employers claim the tax credit on their annual corporate tax filing; for tax-exempt employers, the IRS has indicated that it will provide guidance on how the

credit may be claimed. It's important to note that if the tax credit is claimed, the employer may not claim a deduction for the health premiums paid.

When considering their eligibility for this tax credit, employers should be aware that premiums taken into account are capped at *average small group market premiums* for the employer's state or local area – a consideration that may affect some employers' eligibility for the credit. The determination of eligibility for the small business tax credit is complex. If you're an employer and believe you may be eligible for the small business tax credit, you should review the IRS guidance and speak with your tax adviser to determine your degree of eligibility, if any. The IRS guidance, including a fact sheet and a list of frequently asked questions, can be found on the IRS Web site at www.irs.gov. It's important to know that, if you're eligible to claim the credit, a partnership with a Professional Employer Organization (PEO) such as ADP TotalSource® will not affect your eligibility to claim the tax credit.

Grandfathered-Plan Guidance: Interim Final Regulations Issued

In mid-June, HHS, the IRS and the DOL issued interim final regulations regarding grandfathered health plans. In general, grandfathered health coverage is coverage provided by a group health plan in which at least one individual was enrolled on March 23, 2010. As long as a grandfathered plan covers at least one person and doesn't make changes that would cause it to lose grandfathered status, it can retain grandfathered status — exempting it from some (but not all) health-care-reform provisions.

The grandfathered-plan regulations outline the changes that would prevent a plan from maintaining its grandfathered status. The regulations indicate that grandfathered status is determined at a benefit-offering level, not an aggregate-plan level. Therefore, if a plan offers employees several different benefit options (i.e., HMO, PPO, POS), each benefit offering must be reviewed on its own to determine if grandfather status is lost. In order to maintain grandfathered status, an employer is essentially locked into its current plan design, carrier and employer contribution rate. Only very minor modifications to the plan are permitted, meaning an employer may not have the ability to make the changes it deems necessary to address current business needs. The changes outlined in the regulations that would cause a plan to lose its grandfathered status include: changing insurance carrier, eliminating or changing any benefit provided under the plan, increasing employee costs such as co-payments and deductibles above certain minimum levels, increasing co-insurance, adding or increasing annual limits or modifying the employer contribution rate by more than 5% from the rate in effect on March 23, 2010. There are some exceptions for collectively bargained plans, small plans (including retiree-only plans) and excepted benefits (such as stand-alone dental and vision plans).

The provisions of the health care reform law from which grandfathered plans are exempt include, among others:

- Coverage of preventive health services at no cost to covered employees/dependents
- Nondiscrimination rules applicable to fully insured plans
- Essential health-benefits-package requirements
- Annual cost-sharing limits
- Certain claims and appeals procedures

However, all plans, including grandfathered plans, are subject to other key health-care-reform provisions, including:

- Coverage of adult children to age 26 (grandfathered plans must meet this requirement only for Plan Years beginning on or after January 1, 2014, if the adult child is eligible for coverage under a non-parent, eligible employer-sponsored health plan)
- No excessive waiting periods
- No lifetime or annual limits on essential health benefits
- No preexisting-condition exclusions
- No rescissions except for fraud or intentional misrepresentations
- Uniform explanation of coverage statements to participants
- Reduction in the cost of insured health care coverage (including rebate requirements)

Some industry experts believe that, because maintaining grandfathered status requires a significant trade-off—employers lose flexibility to modify their benefit plan—fewer and fewer companies will keep their plans' grandfathered status. Although non-grandfathered plans must incorporate some additional coverage provisions as of the first day of the Plan Year (which begins on or after September 23, 2010), many of the health-care-reform provisions apply to both grandfathered and non-grandfathered plans. Some provisions that apply only to non-grandfathered plans, such as no-cost preventive care, have already typically been offered through most large-employer plans. A number of insurance carriers have indicated that they will not maintain grandfathered policies for their group policyholders due to administrative complexities and employers' lacking the flexibility to alter their plan. For small employers, it's especially important to weigh the perceived benefits of maintaining a grandfathered plan against its disadvantages. Also, if you sponsor a fully insured plan, you may want to check with your insurance carrier to determine if it's offering the option of maintaining a grandfathered policy.

Annual/Lifetime Limits, Preexisting-Condition Exclusions, Rescissions and Patient Protections: Interim Final Regulations Issued June 23

In late June, HHS, the IRS and the DOL issued interim final regulations regarding several key provisions under PPACA. These regulations are generally effective for Plan Years beginning on or after September 23, 2010.

Annual/Lifetime Limits — The regulations prohibit annual or lifetime limits on essential health benefits, with restricted limits allowed through Plan Years beginning before January 1, 2014. Individuals who had previously reached a lifetime limit must be notified of the elimination of the limits and be given a special enrollment opportunity. These regulations apply to both grandfathered and non-grandfathered group plans.

Preexisting-Condition Exclusions — The regulations prohibit plans from excluding individuals or coverage for specific benefits from the plan based on a preexisting condition. Coverage for certain conditions may still be universally excluded, however. These regulations apply to both grandfathered and non-grandfathered group plans. No preexisting-condition exclusions are permitted for individuals under age 19 beginning with the Plan Year that begins on or after September 23, 2010. These prohibitions will expand to all individuals in 2014.

Rescissions — The regulations prohibit the rescission (or retroactive cancellation) of health coverage, except in cases of fraud or intentional misrepresentation; even then, plans must give affected individuals 30 days' notice of the rescission. Plans may prospectively cancel coverage for any reason and may still retroactively cancel coverage due to an individual's failure to pay required premiums or contributions. These regulations apply to grandfathered and non-grandfathered group and individual plans.

Patient Protections — The regulations require health plans with a network of providers to allow any in-network provider to be selected as an individual's primary care provider, pediatrician or gynecologist — and require that participants be notified of this right. Also, emergency services must be covered without pre-authorization or network affiliation. When a co-pay or co-insurance is required for emergency care, out-of-network co-pays or co-insurance must not exceed in-network ones. These regulations do not apply to grandfathered plans.

How ADP TotalSource® Helps Clients Manage the Demands of Health Care Reform

ADPTotalSource is committed to keeping our clients informed on the latest regulatory developments and helping them navigate the many changes that will occur over the next few years following the passage of health-care-reform legislation. Employers are faced with a tremendous burden as they work to stay current on developments in health care reform and maintain compliance with changing regulations. ADPTotalSource, as plan sponsor of the ADPTotalSource, Inc. Health and Welfare Plan, provides full benefits administration for the plan, including managing day-to-day plan administration and ensuring that the plan remains compliant with the law. ADPTotalSource delivers a Fortune 500®-caliber benefits plan with administration that maximizes quality, affordability and choice for employees and gives our clients an edge in attracting and retaining talented people, while also allowing clients to focus on their businesses as local and global economies continue to gradually recover. ■





Rising Above the Risks of Social Media

When the social-media revolution first began, employers were concerned that Facebook, LinkedIn, instant messaging and blogs would be distractions to their employees, lowering productivity and causing chaos in the office. Today, however, many forward-thinking companies embrace the power of social-media tools to aid in branding, client development, research and recruiting as well as to improve employee engagement. While social media presents many opportunities to small and large businesses alike, it also presents potential legal battles.

Social-networking sites like Facebook, LinkedIn and Twitter have exploded in popularity. In fact, according to the data-tracking site CheckFacebook.com, Facebook has well over 450 million users, with the average user spending 55 minutes per day on the site. As a result, more companies are toughening their rules on how employees use social-networking sites at work. According to a 2010 study by California-based information-technology firm Robert Half Technology, 38% of chief information officers have implemented stricter social-networking policies, while just 17% say they've relaxed the rules. And just as some employers allow their employees to access social-networking sites during work hours, according to Jason Skidmore, Regional Vice President for the firm, 55% ban the use of social-networking sites altogether.



Restricted Access Doesn't Mean Reduced Risk

You may be thinking, "If my employees aren't able to access these sites during work, can I avoid the risks associated with social networking?" Not necessarily. Employees can use social media on the job or at home in ways that pose risks for an employer. In fact, as social-networking sites' popularity grows, so do the risks for employers. According to Internet security firm Proofpoint's recent study of companies with 1,000 or more employees, 17% report having issues with employees' use of social media, and 8% of those companies report having actually dismissed someone for his or her behavior on sites like Facebook and LinkedIn.

Employers face risks when their employees use social media to harass co-workers, criticize the company or its clients, reveal confidential information, endorse products or services without proper disclosure or engage in criminal conduct. Consider the following situations. Is your organization prepared to handle dilemmas like these?

Example 1. A Rough Day at the Office¹

Your employee has had a difficult few months — working long hours, taking on new responsibilities, watching her colleagues lose their jobs. After a particularly trying day, she logs onto Facebook and vents, "XYZ Company is the worst place to work. I've worked 70 hours with no extra pay and my boss is a pervert." If her supervisor posts discriminatory statements regarding the employee's protected status on his Facebook page, and the employee is later terminated or subjected to an adverse employment action, the supervisor's discriminatory statements could be used as evidence that the employment action was motivated by discriminatory animus in a subsequent lawsuit or administrative claim. You could be subject to *Hostile Work Environment and Discrimination Claims*.

Example 2. "So Glad the Deal Is Done!"¹

Your employee has been slaving away for months on a big, confidential deal. He hasn't shared specific information with his family or friends, only that he's been traveling back and forth to L.A. and just got a great "family and friends" discount on his cable services. When the deal is finally complete, your employee tweets (i.e., posts on Twitter), "So glad the deal is done. I need some sleep!" Based on that tweet, someone who knows that your employee handles mergers and acquisitions and represents a particular client may piece together that something important is about to happen. If that person decides to buy a significant amount of stock in one of the companies, your employee and your company could end up in a lot of trouble. You could be at risk for *Improper Disclosure of Confidential and Other Protected Information*.

Example 3. Food Frenzy

Your employee has been working for your small pizza shop for a few months. He shows up on time, goofs around a bit, but gets his work done. Then one night, your neighbor calls you, saying his children showed him a video posted by your employee on YouTube. The video shows your employee sneezing and coughing on the pizzas, dropping them on the ground and sticking the toppings in his nose before placing them on the pizzas, which he then packs in a box and hands to the delivery guy. The video already has 5,000 hits. Your sales drop 20% the next day, and by the end of the week, they're down 50%. You may consider pressing a *Civil Lawsuit*.

These examples show that while some employees may act maliciously, intending to hurt your organization, others can cause harm inadvertently. But before you act, it's important to understand other legal ramifications that could arise after taking adverse employment action. According to workplace-law experts at the law firm of Jackson Lewis, employers need to consider:

- **National Labor Relations Act** – This federal law allows employees to talk about and criticize their employment conditions with co-workers and outsiders.
- **Whistleblower statutes** – Federal and state laws may protect employees who report conditions affecting public health and safety or potential securities-fraud violations.
- **Political activities or affiliations** – Many states prohibit employers from regulating or influencing employee political activities and affiliations.
- **Legal off-duty activity** – In some states, laws protect an employee or applicant from "demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."

- Posting proprietary and confidential company information, discriminatory statements or sexual innuendos regarding co-workers, management, customers or vendors, will not be tolerated.
- If an employee mentions his or her employer, he or she must include a disclaimer stating that any opinions expressed are the employee's own and do not represent the company's positions, strategies or opinions. The policy should specify that these prohibitions apply to postings and blogging occurring at any time, on any computer.
- Employees are expected to behave professionally both on and off duty.
- Company policies governing the use of corporate logos and other branding and identity apply to electronic communications, and only individuals officially designated may speak, either orally or in writing, on the company's behalf.
- Monitoring will occur in order to reduce an employee's expectation of privacy.

If You Can't Prevent the Risk, Manage It

Remember, social media can still be advantageous for your business, but it's critical to be prepared for potential legal pitfalls. You must balance the benefits of social media in the workplace along with the risk. To help mitigate the risk associated with these sites, create a social-media policy that aligns with your organization, its culture and your approach to social technologies. Make sure your policy is straightforward and clear and that your employees fully understand:

PEO Advantage

Partnering with a Professional Employer Organization (PEO) can help you reap the rewards of social-media technologies while mitigating the risk. A PEO can provide a customized employee handbook that includes a policy on branding and the use of social-media sites, among other topics. At ADP TotalSource®, your Human Resources Business Partner can also provide guidance on proper behavior under the policy and make recommendations on counseling and termination decisions when the policy is violated.

¹ Jackson Lewis. "Social Media and the Workplace: Managing the Risks." 9 Mar. 2010. Web. <<http://jacksonlewis.com/legalupdates/article.cfm?aid=1997>>.

STATE EMPLOYMENT LAW UPDATES

ADP TotalSource® offers clients relief from state-law regulatory burdens, including the legislation shown here. Timely communication, clear action plans and helpful resources allow ADP TotalSource clients to focus on their business objectives.

The following updates reflect sample developments from February to July 2010.

California



Regulatory Development

The Civil Air Patrol Employment Protection Act requires California employers to permit employees who have been working 90 or more days to take a leave of absence to respond to an emergency operational mission of the California Wing of the Civil Air Patrol.

ADPTotalSource Action

Recommended communication to managers, employees and HR personnel; provided a model policy/handbook addendum.

Connecticut



According to the Connecticut Family and Medical Leave Act (CFMLA), the 75-employee coverage requirement may be met by counting out-of-state employees.

Provided an integrated model of federal FMLA and CFMLA policy.

Florida



An amendment to the recently enacted Miami-Dade County "Wage Theft" Ordinance allows private-sector employers doing business in Miami-Dade to keep their existing pay-frequency practices in place.

Alerted employers to the new requirements, the necessary employer actions and penalties for noncompliance.

The Miami-Dade Board of County Commissioners approved a "Wage Theft" ordinance designed to make it easier for employees to take legal action against employers who neglect to pay or underpay them; the ordinance allows the use of the county's police powers to intervene and help recover the due wages.

Recommended that clients undergo a periodic assessment of their wage and hour practices; alerted employees to penalties and damages for noncompliance.

Indiana



The Possession of Firearms and Ammunition in Locked Vehicles Law, effective July 1, 2010, prohibits employers from adopting any policy keeping employees from storing firearms and ammunition out of sight in their locked vehicles; the law protects only individuals who legally possess a firearm or ammunition without a specific federal license.

Offered clients an employee handbook, which contains an appropriate Workplace Violence Prevention Policy and other best practices.

Iowa



The Iowa Worker Adjustment and Retraining Notification Act, effective July 1, 2010, requires employers to provide 30 days' notice before ordering a mass layoff or plant closing.

Alerted employers to the new requirements, the necessary employer actions and penalties for noncompliance; provided access to reduction-in-force checklist.

New York



The New York Department of Labor recently determined that certain deductions from an employee's paycheck are now impermissible; additionally, an employer cannot discipline its employee if he or she refuses to pay back an overpayment or other amounts owed to the employer.

Recommended to employees a periodic assessment of their wage and hour practices; alerted employees to penalties and damages for noncompliance; distinguished between the Department of Labor's previous and current interpretation.

The New York State Worker Adjustment and Retraining Notification Act (NYS WARN Act) took effect February 1, 2009 and requires employers to provide at least 90 days' written notice before ordering a mass layoff, plant closing, covered reduction in work hours or relocation.

Informed employers of the new requirements, necessary employer actions and penalties for noncompliance.

Oregon



Oregon Senate Bill 1045 prohibits employers from considering for employment purposes any information that relates to consumers' creditworthiness, credit standing or credit capacity, unless such information is substantially related to the individual's current or potential job, in which case the employer must provide reasons for their determination in writing.

Outlined the legal requirements and provided best practices when using credit information during background checks.

Wisconsin



Wisconsin passed a law forbidding employers from discriminating against employees who decline to attend employer-sponsored meetings or participate in communications where the primary purpose is to relay the employer's religious or political opinion unless the employer is a religious or political organization or the main content of the communication or meeting is required by law.

Alerted employers to the new prohibitions and provided guidance on how federal discrimination law would interact with the state law.

What ADP TotalSource® Clients Are Saying

Re-engineering for Growth — with ADP TotalSource

For small companies, the ability to respond swiftly to new opportunities and scale up quickly to meet market demand is critical to strategic success. Such is the case with Technology Vision Group (TVG), which provides biotechnology and life-sciences professionals the connections, venues, platforms and access to forge strategic alliances and move their businesses forward.

When TVG found itself in the midst of major internal restructuring and needed to rethink the way they handled HR, they called on ADP TotalSource for solutions. As Victor Quiroz, TVG's Vice President of Operations and Human Resources, explains, "We were transitioning from a more traditional, organic growth model to one that emphasized scalability. At the time, I managed both operations and HR, and I needed to be able to focus on operations."

With ADP TotalSource, Quiroz works with a small team of HR professionals led by Rand Irikat, TVG's assigned Human Resources Business Partner. During the implementation, ADP TotalSource worked closely with Quiroz to ensure TVG's business, HR and compliance needs were addressed. "Along with the enhanced technology, the customer service has been great," Quiroz says. "It's good to know I can pick up the phone to talk to ADP TotalSource on a particular issue while the back-end, day-to-day issues are taken care of. ADP TotalSource delivers a true one-stop shop."

Technology Vision Group

Industry: Managing consulting service

Type of Business: Provides conferences, Web-based platforms and related global-networking venues for the biotechnology and life-sciences industries.

Location: Santa Cruz, CA

Number of Employees: 14

ADP TotalSource Client: Since 2009

Why ADP TotalSource? "ADP TotalSource has given us an integrated HR platform with one central focus, intuitive technology and great back-end support."

With such a small core team, it's essential to TVG's long-term strategic success that the firm is able to attract and retain top talent. Among the key draws: a "rich" employee benefits plan. "Before ADP TotalSource, we offered a single benefit plan with one medical provider. Now we're able to offer our employees a choice of three medical providers — and so far, at a lower cost than was the case before."

The ADP TotalSource co-employment model provides TVG with an additional layer of protection. "Previously we purchased liability coverage from an insurance broker, but that's as far as it went. Now, as ADP TotalSource brings all our employees under their federal tax ID for payroll purposes, they are also assuming some of the liability exposure. Plus, we now have experts on call to help us handle specific employee issues as they come up."

As TVG enters its second year with ADP TotalSource, Quiroz looks forward to continuing — and enhancing — the relationship. "ADP TotalSource really does provide us with a one-stop shop, which is exactly what we need. It's good to know that ADP TotalSource is there for us." ■





ADP TOTALSOURCE[®] SOLUTION

With ADP's dedicated team of experts
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- ➔ Focus on core competencies
- ➔ Reduce administrative burdens
- ➔ Help mitigate risk/liability and protect assets
- ➔ Become an employer of choice

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