

A Publication Dedicated to Employers' Current HR Issues & Solutions

# The **BOTTOM LINE**

Volume 5

## HEALTH CARE REFORM UPDATE: AN EVOLVING LANDSCAPE



PROPER DOCUMENT  
RETENTION: ARE YOU  
PROTECTED OR EXPOSED?

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# HEALTH CARE REFORM UPDATE: AN EVOLVING LANDSCAPE

When it comes to recent developments regarding health care reform, many small-business owners would place themselves in the “I know it’s important, but I can’t keep up” category. It’s no surprise. Small and medium-size businesses rarely have in-house legal, tax and ERISA or benefits experts to stay on top of the constant stream of related information. And the regulations that govern how the Patient Protection and Affordable Care Act (PPACA) is administered are evolving. The Department of Health and Human Services (HHS), in conjunction with the Internal Revenue Service (IRS) and Department of Labor (DOL), is releasing new rules each month, and effective dates and deadlines are approaching quickly. Many changes affecting employers go into effect with the first plan year that begins after September 23, 2010 – for many employers, that means the plan year beginning January 1, 2011 – and the penalties for noncompliance can be high.

## What Changes Are Taking Effect, When

Over the past several months, the HHS, IRS and DOL have provided new information about some of the first provisions to take effect under PPACA. To understand health care reform and what it means to you and your organization, you must first understand what laws are changing, when the laws are effective, what type of plan is affected, and what you need to do to remain compliant. Some of the following standards apply to all plans, while others apply only to non-grandfathered plans.

**EFFECTIVE DATE: PLAN YEARS BEGINNING ON OR AFTER SEPTEMBER 23, 2010**

GF?*	NGF?*	For most employers, these changes affect plans starting January 1, 2011.	
✓	✓	<b>Dependent Eligibility</b> – The regulations mandate that all health plans cover dependents under the age of 26, regardless of student status, marital status, residency, financial support, dependent status for tax purposes or other criteria. (Grandfathered plans may require proof that the adult child not be eligible for other employer-provided coverage.) A special 30-day enrollment period is required to allow dependents who previously lost eligibility (because they exceeded the plan’s age limits) to enroll.	
✓	✓	<b>Annual/Lifetime Limits</b> – Annual or lifetime limits on essential health benefits are prohibited, although restricted limits are allowed through plan years beginning before January 1, 2014. A special 30-day enrollment period is required to allow eligible employees and dependents who previously lost eligibility (because they reached the plan’s annual or lifetime benefit maximum) to enroll.	
✓	✓	<b>Pre-Existing Condition Exclusions</b> – Plans may not exclude individuals or coverage for specific benefits from the plan because of a preexisting condition. Coverage for certain conditions may still be universally excluded, however. 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.	
✓	✓	<b>Rescissions</b> – 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.	
✗	✓	<b>Patient Protections</b> – Health plans with a network of providers must allow any in-network provider to be selected as an individual’s primary-care provider, pediatrician or gynecologist (as long as that provider agrees to the designation) 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. And preventive care must be covered at 100%, with no co-pay or co-insurance costs to participants.	
✗	✓	<b>HHS External Appeals Process</b> – The regulations mandate that consumers have an opportunity for external review of denied claims. Consumers may seek an external appeal of their claims following a denial of an internal appeal to their health care provider.	
✗	✓	<p><b>Nondiscrimination Requirements</b> – Discrimination in favor of highly compensated individuals with respect to either eligibility to participate or to benefits is prohibited.</p> <ul style="list-style-type: none"> <li>• <b>Eligibility Test.</b> For a plan to be considered nondiscriminatory with respect to eligibility to participate, it must meet one of these three coverage tests:                             <ul style="list-style-type: none"> <li>– 70% of all employees benefit under the plan.</li> <li>– 80% of eligible employees benefit under the plan.</li> <li>– 70% of all employees are eligible. The plan benefits a nondiscriminatory classification of employees.</li> </ul> </li> <li>• <b>Benefits test.</b> For a plan to be considered nondiscriminatory with respect to benefits, it must provide the same benefits to both highly compensated and non-highly compensated employees.</li> </ul>	<p><b>Who is a highly compensated individual under the health care reform’s nondiscrimination requirements?*</b></p> <ul style="list-style-type: none"> <li>• One of the company’s five highest-paid officers.</li> <li>• A shareholder owning more than 10% of the company’s stock.</li> <li>• One of the top 25% highest-paid employees.</li> </ul> <p><small>*Different from Section 125 testing.</small></p>
✓	✓	<b>Small-Business Tax Credit</b> – Employers with 25 or fewer full-time equivalent (FTE) employees with average annual wages of less than \$50,000 may be eligible for a tax credit (determined on a pro-rata basis) on employer contributions to purchase health insurance for employees.	

\*Grandfathered Plans \*\*Non-Grandfathered Plans

**EFFECTIVE DATE: JANUARY 1, 2011**

GF?*	NGF?*	For most employers, these changes affect plans starting January 1, 2011.
✓	✓	<b>Value of Health Benefits on W-2 Forms</b> – Starting in tax year 2011, the Affordable Care Act requires employers to disclose the value of the benefits they pay for each employee’s health-insurance coverage on the employee’s annual Form W-2. The amount to be reported is subject to IRS regulations that are expected to be issued in 2011. The information shown on the W-2 is for informational purposes only and will NOT subject the employee to an increased tax liability. The IRS has indicated it will defer the reporting requirement for 2011.
✓	✓	<b>No Reimbursement for OTC Drugs Without Prescriptions Under FSA, HRA or HSA</b> – Over-the-counter medicines are no longer eligible for reimbursement under a flexible-spending account, health-reimbursement arrangement or health-savings account without a doctor’s prescription. Insulin remains reimbursable.
✓	✓	<b>Higher Penalty on Withdrawal of HSA Funds for Non-Medical Expenses</b> – The regulations increase the excise tax for non-medical HSA distributions from 10% to 20%.
✓	✓	<b>Small-Employer Wellness Grants</b> – The regulations create a \$200 million, five-year program to provide grants to small employers with fewer than 100 employees for wellness programs focused on efforts such as nutrition, smoking cessation, physical fitness and stress management. Administered by HHS, grants will go only to wellness initiatives launched after March 23, 2010, the date PPACA was enacted.
✓	✓	<b>New Federal Voluntary LTC Program Established (CLASS Act)</b> – Open only to workers, the voluntary long-term-care-insurance program requires participants to pay a monthly premium; after five years, they will become eligible for a cash benefit of at least \$50 a day that can be used to offset the cost of long-term-care services. The implementation of this provision may be delayed to 2012 or later.
✓	✓	<b>Automatic Enrollment of New Hires</b> – Employers with 200 or more full-time employees must automatically enroll new employees in a default medical plan, unless the employee opts out. Regulatory guidance on how this requirement should be implemented has not yet been released.

## Partnering with a Professional Employer Organization (PEO): A Collaborative Approach

In this uncertain, quickly changing environment, small employers need a guide. PEOs can relieve small businesses of the compliance and administrative burden that comes with health care reform, allowing them to focus on their core competencies and build their businesses. For example, ADP TotalSource® has been working since the inception of the health care reform legislation to ensure that we have the most up-to-date information on reform guidance. As an organization consisting of more than 200,000 worksite employees, we have contracted with some industry-leading consulting and legal firms that also advise Fortune 500® companies. But ADP TotalSource’s expertise isn’t exclusively on the large-employer level. Because we work with thousands of small- to medium-size businesses nationwide, we’re focused on issues that may be specific to those businesses.

The primary question small businesses are asking about health care reform is: How is health care reform going to affect my company? By using the resources of a trusted PEO such as ADP TotalSource to help manage the complexity of health care reform, small businesses can maintain focus on their future success. The ADP TotalSource integrated HR management solution is driven by a powerful combination of benefits expertise, marketplace insight and exceptional client service. ■

# Proper Document Retention: Are You Protected or Exposed?

Document retention is a critical but often overlooked obligation of employers. And the consequences of failing to properly retain documents can be dire. One employer was recently fined more than \$1 million for violating immigration laws, including improper recordkeeping. In another case, failure to maintain proper and accurate business records led to criminal penalties. In *People v. Saxton*, 2010 NY Slip Op 6011, 1 (3d Dep't 2010), a New York State appeals court affirmed the jury conviction of the former executive of a small, failing business on several criminal counts, including failing to properly and accurately maintain business records.

Yet the proliferation of forms and records electronic or otherwise over the past decade has left many employers with file boxes and drawers of paper, back-up tapes, electronic messages and the like. Employers know that the retention of documents not otherwise necessary to conduct business is both expensive and inefficient.

These examples show the need for a carefully planned, uniform document-retention policy for the systematic retention and destruction of documents.

## What is a document-retention policy?

A document-retention policy ensures that documents are retained only so long as they are (1) necessary to conduct the employer's business, (2) required to be kept by law and (3) relevant to a pending legal claim or lawsuit. Consistent with the policy, procedures should be established so that documents are filed in an organized manner and, as appropriate, destroyed.

## Should the policy be in writing?

Yes. A document-retention policy should be in writing so there is no question about which documents should or should not be maintained and destroyed.

## How long should employment records be maintained?

There are many documents that should be covered under a document-retention policy, including employment and nonemployment records (such as accounting, insurance and tax records). With respect to employment records, recordkeeping requirements are imposed by many federal laws. An employer's document-retention policy must comply with these laws, which are outlined in the next two pages.

## Federal Anti-Discrimination Laws

Pursuant to Equal Employment Opportunity Commission (EEOC) regulations, the general rule of thumb is that employers must keep all personnel or employment records for one year from the date of their creation. The more customary approach, however, is to maintain all of an employee's personnel records during his or her employment and retain them for one year from the date of separation, whether voluntary or involuntary. Examples of personnel or employment records include application forms and records concerning hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeships.

But some laws have special rules. Under recordkeeping requirements for the Age Discrimination in Employment Act (ADEA), employers must keep all payroll records for three years. Additionally, employers must keep on file any employee-benefit plan (such as pension and insurance plans) and any written seniority or merit system for the full period the plan or system is in effect and for at least one year after its termination.

Similarly, under Fair Labor Standards Act (FLSA)—recordkeeping requirements that are applicable to the Equal Pay Act (EPA)—employers must keep payroll records for at least three years. Employers also must keep for at least two years all records (including wage rates, job evaluations, seniority and merit systems and collective-bargaining agreements) that explain the basis for paying different wages to employees of both genders in the same establishment. The federal Lilly Ledbetter Act of 2009 gives current and former employees in some circumstances the right to sue for events that occurred more than two or three years prior to the filing of their claim, but it does not require employers to retain documents for any particular period of time. Some employers, however, have chosen to retain employment records for longer periods because of the potential for claims under the Act.

## Pay Records

As noted above, the retention of pay records gets special attention by some federal laws. That is certainly true with respect to the FLSA. Employers must keep certain records for each nonexempt worker under the FLSA. The FLSA requires no particular form for the records but does require that they include certain identifying information about the employee and data about the hours worked and wages earned. The law requires this information to be accurate. The following is a listing of the basic records an employer must maintain:

- |  |  |
|--|--|
| 1. Employee's full name and Social Security number.  | 8. Total hours worked each workweek.                           |
| 2. Address, including ZIP code.  | 9. Regular hourly pay rate.                                    |
| 3. Birth date if younger than 19.  | 10. Total daily or weekly straight-time earnings.              |
| 4. Sex and occupation.   | 11. Total overtime earnings for the workweek.                  |
| 5. Time and day of week when employee's workweek begins.   | 12. All additions to or deductions from the employee's wages.  |
| 6. Hours worked each day.  | 13. Total wages paid each pay period.                          |
| 7. Basis on which employee's wages are paid (e.g., "\$9 per hour," "\$440 a week," "piecework"). | 14. Date of payment and the pay period covered by the payment. |

Employers must preserve for at least three years payroll records, collective bargaining agreements and sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piecework tickets, wage-rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the DOL's representatives, who may ask the employer to make extensions, computations or transcriptions. The records may be kept at the place of employment or in a central records office. Employers must also keep basic records for exempt employees, including contact information, Social Security number, basic employment and earnings records, and additions to or deductions from wages paid.

## Immigration

Maintaining immigration records is of particular concern for employers because those records are frequently a target in government investigations. Employers must keep I-9 Forms published by the Department of Homeland Security, Citizenship and Immigration Services for three years after the date of hiring or one year after the date of an employee's termination, whichever is later. Failure to do so can result in civil and criminal penalties.

Employers using the H-1B or H-1B1 visa classifications to hire nonimmigrant foreign workers in specialty (professional) occupations are required to maintain documentation to meet their burden of proof with respect to the validity of the statements made in their Labor Condition Application (LCA) and the accuracy of the information provided.

Employers of temporary nonagricultural workers under the H-2B visa program are not subject to any post-entry (H-2B) program-specific recordkeeping, posting or notice requirements; however, the recordkeeping, posting or notice requirements of any other laws applicable from DOL to the employment would apply.

## Workplace Safety

Safety records have recently come under intense scrutiny in light of the Gulf Coast oil spill. Employers must maintain specific records of job-related injuries and illnesses. The Occupational Safety and Health Administration (OSHA) Form 300 is a required injury/illness log, with line entries for every recordable injury or illness. Such events include work-related deaths, injuries, and illnesses other than minor injuries that require only first aid and do not involve medical treatment, loss of consciousness, restriction of work or transfer to another job. Each year, an employer must also conspicuously post in the workplace an OSHA Form 300A, which includes a summary of the previous year's work-related injuries and illnesses. Employers must also record on the OSHA Form 301 individual incident reports that provide the details of each specific recordable injury or illness.

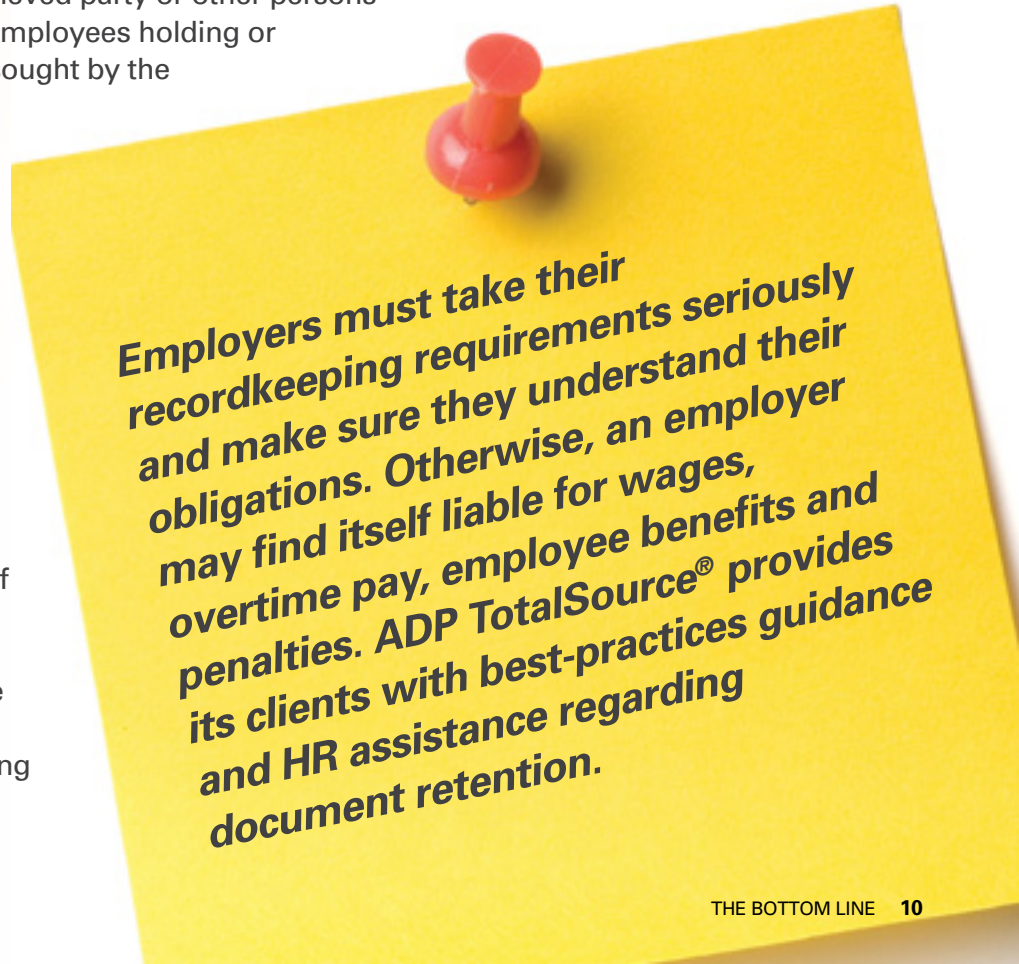
## Federal Contractors

If the foregoing employment laws are not enough, federal contractors have even more document-retention obligations. They are required to maintain any personnel or employment records made or kept by the contractor for a period of two years from the date of the making of the personnel record or the personnel action, whichever occurs later. Contractors with fewer than 150 employees or who do not have a government contract of at least \$150,000 need to keep records for only one year.

## What are your document-retention obligations when a legal claim arises?

A document-retention policy must also apply when a legal claim has been filed against an employer, because there are additional obligations in such situations. The policy should state that the employer will retain personnel or employment records relating to the issues under investigation as a result of the claim, including those related to the aggrieved party or other persons alleged to be aggrieved and to all other employees holding or seeking positions similar to that held or sought by the affected individual(s). These records must be maintained during the entire pendency of the claim, even if the regular retention period (discussed above) has lapsed.

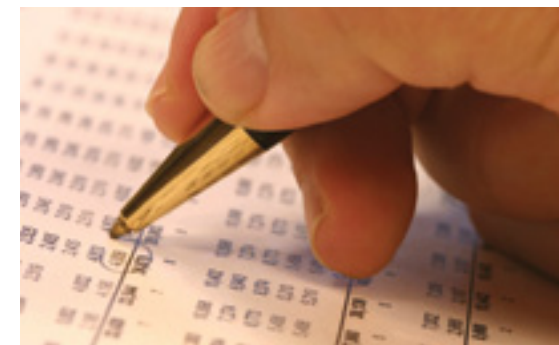
Once a legal claim is filed, these records must be kept until the final disposition of the charge of discrimination or lawsuit, whichever is later. When a charge is not resolved after investigation, and the charging party has received a notice of right to sue, "final disposition" means the date of expiration of the 90-day statutory period within which the aggrieved person may bring suit or, where suit is brought by the charging party or the EEOC, the date on which the litigation is terminated, including any appeals. ■



**Employers must take their recordkeeping requirements seriously and make sure they understand their obligations. Otherwise, an employer may find itself liable for wages, overtime pay, employee benefits and penalties. ADP TotalSource® provides its clients with best-practices guidance and HR assistance regarding document retention.**



# Preventing Small-Business Fraud



For most small-business owners, profitability is always top of mind. Whether it's last month's profit margin or next month's goal, your profitability allows you to cover your costs and invest in growth. In short, protecting your profit is critical to your survival.

So, it may come as a surprise that a significant threat to your profitability could reside within your company: employee fraud. For individual businesses, the Association of Certified Fraud Examiners (ACFE) estimates that fraud costs organizations about 5% of their revenues annually. And small businesses are at a higher-than-average risk: "Thirty-one percent of all occupational frauds were committed against small businesses (the highest rate of any category), and the median loss in those schemes was \$155,000," according to the ACFE's 2010 Global Fraud Study. To reduce or eliminate your exposure to this profit-killing threat, consider the key sources of internal fraud and ways to prevent them.

## Types of Occupational Fraud

The ACFE breaks down employee fraud into three types:

1. **Asset misappropriations** occur when an employee steals or misuses his or her company's resources. This can happen in many ways:
  - **Skimming:** Employee accepts cash from a customer but doesn't record the sale and pockets the cash.
  - **Cash Larceny:** Employee steals cash or checks from an employer's receipts before they're deposited.
  - **Billing Fraud:** Employee submits fictitious, inflated or personal invoices to receive payment from the employer.
  - **Expense Reimbursements:** Employee falsifies expense reports to receive reimbursement for travel or expenses not actually incurred.
- **Check Tampering:** Employee forges, intercepts or alters a check drawn against his or her employer's account.
- **Payroll:** Employee overpays himself or another employee or adds fictitious employees to the payroll.
- **Cash-Register Disbursements:** Employee voids recorded sales, then pockets the cash.
- **Cash-on-Hand Theft:** Employee steals cash from company vault.
- **Other Theft:** Employee steals inventory or misuses confidential customer financial information.
2. **Corruption schemes** are situations in which an employee misuses his or her influence in business transactions in a way that benefits him or herself or another party. Examples include bribery, extortion and conflict-of-interest fraud.
3. **Financial-statement fraud schemes** involve the intentional misstatement or omission of critical information in the company's financial reports. Employees committing financial-statement fraud may record false revenue, conceal liabilities or expenses, or artificially inflate reported assets.

## Preventing Fraud in Your Organization

One reason that small businesses are particularly good targets for occupational fraud is that they tend to have far fewer anti-fraud controls than larger organizations," says the ACFE. Yet there are several relatively simple, low-cost practices and tools you can implement to prevent fraud from derailing your plans for your business.

### Employment Practices

Ten percent of your employees will never steal from you, no matter the circumstances; 10% will definitely steal from you if given any opportunity to do so; and the remaining 80% could go either way, depending on how they rationalize a particular situation, say Conference Board presenters Craig S. Skulsky of Tobias, Vandeputte & Skulsky, P.C., and Michael A. Campian of B2B CF. How you select and hire employees can help to shift those percentages in your favor.

Know whom you're hiring. Once you've narrowed down a pool of candidates for a position, confirm that the prospective workers' employment and education histories are accurate. Candidates who are willing to falsify their school or work histories to get a job are also more likely to be dishonest once they have the job. Next, call references. Examiners

researching fraud cases often find that fraudsters list references who would never recommend them if contacted; they bank on employers skipping the reference check. Finally, make a job offer contingent on successful completion of a background check. These checks can help safeguard your organization from much larger losses after a fraudulent worker is added to the payroll.

Don't have the time or staff to carefully screen each applicant, when you may have up to hundreds of applicants for every position? ADP TotalSource® provides recruiting and hiring services, including fully compliant online job posting, online skills and behavioral assessments, résumé searching and screening and full-service recruiting (such as behavioral interviews and background checks).

## SMALL-BUSINESS FRAUD ON THE RISE

In a troubled economy, business fraud tends to increase. Why? According to the ACFE, there are two key reasons:

- 1) **Increased opportunity:** As organizations tighten their belts, they reduce controls that can help detect fraud (whether in-house or outsourced).
- 2) **Greater financial pressure:** Fear of layoffs or mounting debts affect more employees, providing motivation for fraudulent activities.

In fact, Duquesne University's School of Business is tackling this topic through a study of small businesses. "Through the survey assessment and by working directly with local small-business owners, we hope to increase their understanding of how their assets are at risk and how they can buffer themselves from the effects of fraud – particularly in tough economic times," says Bob Kollar, director of the School's Master of Accountancy program.



To deter unscrupulous candidates from applying in the first place, advertise that you conduct education, employment, reference and background checks in your job posting. Fraudsters will look for less cautious employers.

### Anti-Fraud Culture

Once an employee is on your company's roster, the culture in your organization can shape how he or she may respond when presented with opportunities to commit fraud. Begin with a code of ethics that generally states your organization's expectation of compliance with all federal, state and local laws and regulations, and then provide guidance on how employees are expected to deal in specific situations ( e.g., dealing with customers or suppliers, accounting transactions, inventory management). Where practical, provide training for managers and employees that covers not only the warning

signs of fraud but also each employee's responsibility in preventing and reporting fraud if they suspect it.

While many small businesses may lack the time necessary to develop a code-of-ethics training, employers that partner with ADP TotalSource have access to resources like TotalSource University – a training and education program that includes more than 100 virtual and classroom courses, plus more than 3,000 on-demand training classes, for managers and employees of all levels.

It's crucial that you ensure employees have a method for reporting fraud. The ACFE

reports that more than 40% of fraud cases are discovered through tips – more than any other method of detection. Anonymous hotlines provide a low-cost, very effective way for people to provide tips, says the ACFE: "Organizations that had fraud hotlines suffered much smaller fraud losses than organizations without hotlines. Those organizations also tended to detect frauds seven months earlier than their counterparts." And when you're publicizing your hotline, don't stop with your employees; customers, vendors, competitors and acquaintances can also be valuable tipsters when fraud is suspected.

## Systems and Procedures

Finally, ensure that employees have fewer opportunities to commit fraud. Setting up systems and procedures that provide checks and balances and transparency can eliminate the temptation to steal by removing the opportunity:

- **Ensure your accounting functions are separate.** Don't allow only one person to collect, document and deposit payments from customers. Carefully control access to check-writing capabilities, like a stamp with your signature, and consider outsourcing part of your bookkeeping function to ensure separation. Scheduled and unscheduled audits can allow you to track the effectiveness of your systems. And require accounting personnel to take at least one week of vacation time during the year, since some schemes require daily or weekly effort to maintain.

Review bank statements, payroll and payment history carefully.

- **Oversee inventory management.** Closed-circuit-camera systems are relatively easy and inexpensive to maintain, but few employers use them. Review tapes periodically, and mention minor details revealed on them to employees involved in managing inventory – a note about proper use of safety equipment can convey that the cameras aren't there for looks alone. And when practical, schedule more than one employee to be present

when shipments of goods are loaded or unloaded. Familiarize yourself with privacy laws before using a surveillance camera. Key considerations include the placement of the camera, the type of workplace and your employees' expectations of privacy.

- **Manage sales staff.** Skimming, misreporting of sales or improperly voided transactions (resulting in employees pocketing cash) are significantly more likely when cash registers aren't sufficiently supervised.

Because small businesses are particularly vulnerable to occupational fraud, especially in a difficult economic environment, it's important that your organization has prevention methods in place. Working with a PEO like ADP TotalSource can provide your company with fraud-prevention resources not available to all small businesses, such as employee handbooks containing ethics policies, thorough and effective recruiting and hiring assistance, and training for managers and employees. ■

**What to do if fraud prevention fails?** Consider fidelity insurance, which can protect your organization if occupational fraud is detected.



# Best Practices for Preventing and Addressing Workplace Violence

Twenty percent of all violent crime in the U.S. occurs in the workplace, injuring more than 2 million workers annually. An estimated 1.7 million employees are injured each year because of workplace assaults. More than 50 million U.S. employees feel they have been bullied on the job.

Workplace violence can affect various aspects of the daily working environment by lowering employee morale, decreasing productivity, increasing errors made by employees and increasing concerns for safety. It also can lead to issues relating to workers' compensation, sick leave and job turnover and may even result in higher insurance premiums and legal costs and awards.



Here are some potential sources of liability for employers that can arise from a workplace violence incident, as well as some best practices for avoiding such liability.

## Common-Law Sources of Liability

### **Negligent Hiring and Retention**

An employer owes a duty of care to those with whom its employees may foreseeably interact as a consequence of their employment. This duty imposes an obligation on employers to hire and retain employees reasonably believed to be safe and competent. Breach of this duty can give rise to a cause of action for negligent hiring or retention.

An employer may have a duty to investigate based on the background of the individual who may be hired or retained. Negligent hiring/retention cases commonly involve employees with criminal records. Employers must consider whether to conduct a criminal-record check and what the consequences are of failing to do so.

### **Respondeat Superior**

An employer may be held liable under the legal doctrine of respondeat superior for violent acts such as assault and battery and those resulting in wrongful death. Under this doctrine, the employer is liable for acts of his employees that are either "within the course and scope of employment," "reasonably foreseeable by the employer" or both.

### **Breach of a Duty to Warn**

A person does not have a legal duty to warn another of impending harm unless there is a special relationship between them. While courts will usually find that employers and their patrons or customers do not have that special relationship, some courts in certain states have found that a special relationship exists between employer and employee. If a special relationship exists, then the employer must have knowledge of a true danger to an identified victim before a court will impose liability.

## Statutory Sources of Liability

### **Title VII**

Title VII protects employees from discrimination on the basis of race, color, sex, national origin or religion. It also prohibits the creation of a hostile environment through threats, intimidations and other violent acts directed at or adversely affecting those in a protected class.

### **Occupational Safety and Health Act (OSHA)**

Pursuant to the General Duty Clause of OSHA, employers have a responsibility to safeguard employees from recognized hazards that may cause serious physical harm or death. Some states have promulgated independent workplace-violence standards.

## Best Practices

### Hiring and Screening Practices

All experts agree that one of the best practices to insure against violence in the workplace is systematically and comprehensively screening all applicants. Proper screening requires that all applicants thoroughly fill out an application. The employer must then conduct a check of the background information provided by the employee.

Interviews are also an important part of the screening process. An interview allows the employer to carefully observe an applicant under a stressful situation. Interview questions should focus on job-related knowledge, skills and abilities. Researchers have found that violent persons will have three key personality traits that employers can look for in an interview. The first is whether applicants have generally a negative attitude. The second is whether the applicant generally feels in control of his life. The third is that violent persons tend to have very little interpersonal sensitivity and do not view social interactions positively. Questions should be designed to elicit information regarding these characteristics.

### Workplace Violence Policies

Employers should adopt a policy prohibiting violence in the workplace. An anti-violence policy should be communicated both in writing and orally. It should give instructions on how to report potentially violent co-workers. The policy needs to comprehensively and clearly notify all employees of what the employer prohibits, including threats, intimidations, stalking and verbal and physical assaults. This policy needs to be implemented with zero tolerance, and violations should subject employees to discipline up to and including termination.

### Training

Training is essential in preventing violence in the workplace. Employers need to train supervisors how to effectively communicate with their employees, resolve conflicts, de-escalate conflicts and recognize violent propensities. A properly trained and careful supervisor can play a large role in keeping employee morale high and inoculating an organization against violence in the workplace.

Although supervisors are usually the first line of defense against violence in the workplace, it is important that employees recognize the warning signs and understand the employer's procedures for reporting potential threats.

### Employee Assistance Programs (EAPs) and Employee Hotlines



EAPs and employee hotlines can provide an important tool in preventing violence in the workplace by allowing employees to voice concerns – to management, if necessary – with some

anonymity and helping to keep the lines of communication open between employees and management.

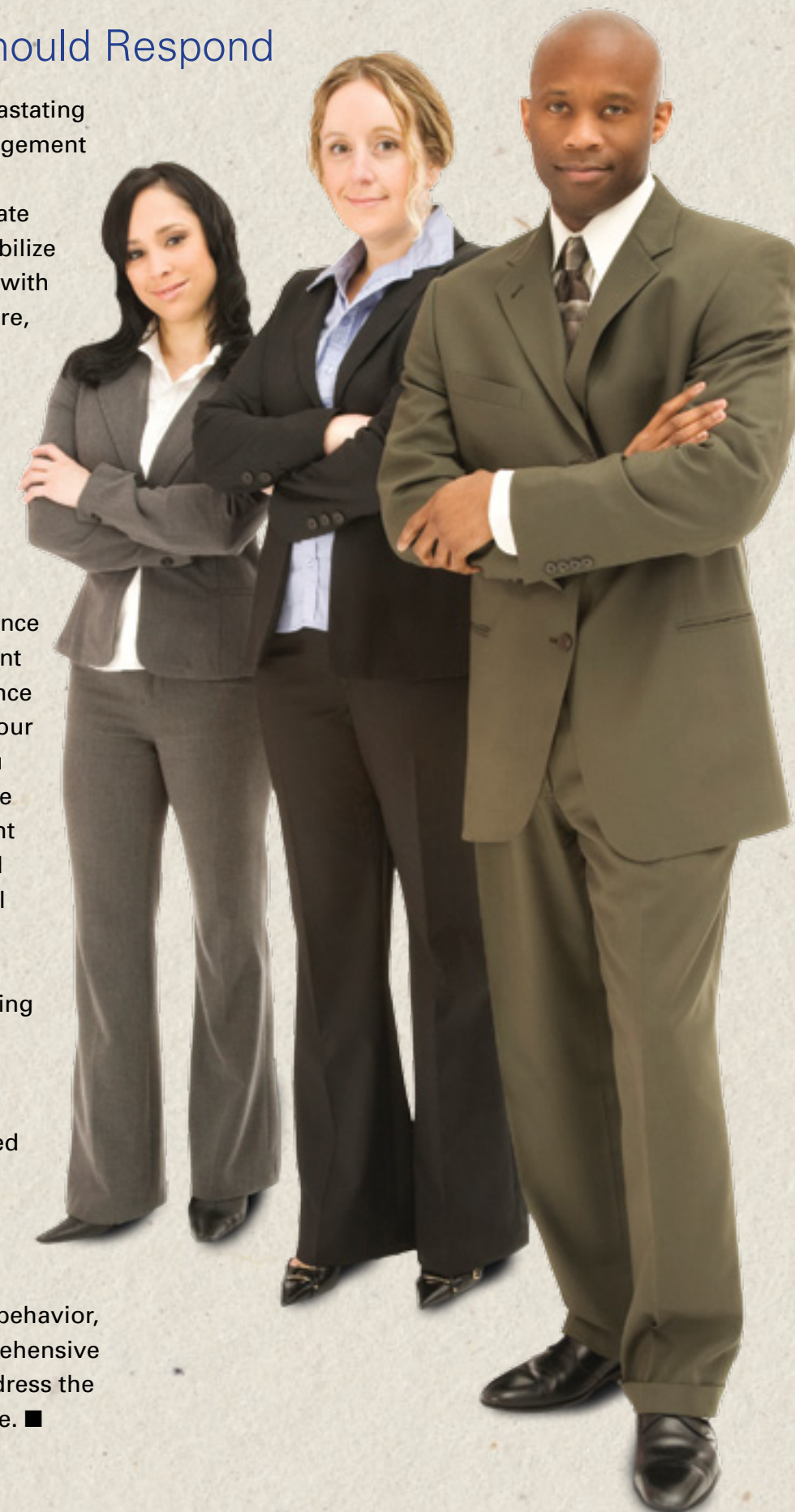
### Termination Practices

Termination is the event most likely to trigger a violent outburst in the workplace. The worst mistake an employer can make is to surprise an employee with a termination. For this reason, terminations need to be planned out and well documented in advance. A surprised employee is one who is likely to respond negatively.

## How Employers Should Respond

Workplace violence may be devastating to a company. A prepared management team can best avoid workplace violence or shoulder its immediate impact and regain control to stabilize the situation and move forward with an effective action plan. Therefore, it is imperative that employers arm themselves with the most effective, preventive and proactive measures to eliminate, minimize or address workplace violence.

ADP TotalSource® provides its clients with best-practices guidance and HR assistance to help prevent and respond to workplace violence incidents. From hiring to firing, our dedicated HR team will help you screen the right candidate for the job by including pre-employment criminal-background checks and drug testing, establishing critical workplace-violence prevention policies in a comprehensive employee handbook and providing expert guidance and support to help you through appropriate discipline and/or termination of problematic employees. Rounded out by manager and employee training on proper conduct and a comprehensive EAP offering to help individuals deal with personal issues that may affect behavior, ADP TotalSource offers a comprehensive solution to help prevent and address the challenges of workplace violence. ■





# Sustainability IS HERE TO STAY

Back in the 1980s and 1990s, a few big companies took a gamble: They invested in the first wave of business technology. These pioneers forged an uncharted path toward goals of improved communication, quality and productivity, and in doing so, they ignited a world-changing technology movement, paving the way for smaller companies to follow. Now it's almost impossible to imagine a world without the computers and networking that are so integral to industry today.

"We're in the midst of another megatrend like the technology explosion of 30 years ago. This time, the issue is sustainability," says Dan Esty, professor and director of the Center for Environmental Law and Policy at Yale University. "A business megatrend is something that transforms the competitive landscape, that so changes how businesses operate and what society's expecting from companies that anyone who doesn't pick up the trend is at risk of losing their position in the marketplace."

How should a small business react, especially when the economy is sputtering and genuinely going green is uncharted territory? First, know that resources to help you achieve your sustainability goals are out there...even if you don't yet know what your goals are. Second, despite popular belief, know that implementing sustainable measures can offer short-term cost savings and increased revenue. The key is learning from what others have already fought to discover.

## Sustainability Defined

**Sustainability** is a new way of thinking about an age-old concern: ensuring that our children and grandchildren inherit a tomorrow that is at least as good as today, preferably better.

*US Environmental Protection Agency*



**"Triple Bottom Line":** one way to categorize a company's approach to sustainability. It's frequently "people, planet, profits" or financial profitability, social equity and environmental sustainability.

## Why Sustainability Matters to Your Business

Dan Esty and David Lubin, co-authors of *"The Sustainability Imperative"* in the *Harvard Business Review*, argue that organizations that ignore the sustainability megatrend are taking a dangerous risk. Like the quality movement of the 1970s and '80s and the technology boom of the '80s and '90s, megatrends "force fundamental and persistent shifts in how companies compete." But how does sustainability make it into the same conversation as the advent of personal computers? It's both cultural and financial, argue Esty, Lubin, and many others.

**Competition for Resources:** As economies in countries like China, India and Brazil explode, competition for virgin resources will continue to increase, driving up costs. Companies that find ways to reduce energy consumption and partner with their suppliers, customers and communities to discover innovative replacement resources – or innovative ways to use less – will have a significant advantage over slower-to-adopt organizations.

**Consumer Demand:** Consumers' awareness of the importance of sustainability has risen astronomically in the past decade, and buyers are becoming more willing to factor sustainability into their purchasing decisions. According to a poll by marketing firm Captstrat, based in Raleigh, N.C., and Public Policy Polling, "83% of respondents believe a commitment to sustainability is very or somewhat important to their purchasing decisions."

**Recruiting and Retention:** Customers care about your organization's sustainability efforts, but so do your current and potential employees. A Johnson Controls study shows that 96-98% of workers ages 15 to 45 want their employer to be environmentally friendly, meaning implementing practices that far exceed what's required for regulatory compliance. Once applicants become employees, encouraging their input into the company's sustainability initiatives is shown to increase employee engagement, as in Intel's "Green Intel" program. Employees at Intel

are encouraged to submit their ideas for making the company's operations more sustainable, and the best ideas are recognized and put into action. Small organizations can start this kind of program easily and inexpensively, reaping employee engagement rewards.

**Productivity:** While rewards from some sustainability efforts are difficult to quantify, organizations ranging from public-school systems to national defense contractor Lockheed Martin are finding that increasing use of natural light and other green building techniques have an immediate and significant impact on productivity, accuracy and attendance of workers.

**Liability:** Wary of lawsuits and damage to their reputations, some banks and insurance companies are avoiding certain decidedly unsustainable industries or companies, as Tom Zeller Jr. writes in *"Lenders Back Off of Environmental Risks"* for *The New York Times*. Furthermore, the FTC released new guidelines in October about how companies should characterize their goods and services, saying, "Companies should avoid unqualified and general environmental benefit claims that are near impossible to prove, such as 'eco-friendly.'"

Fortunately, small businesses can look to their corporate counterparts (as well as their peers) for help. Many organizations have invested heavily in sustainability efforts – some successful, and some not so successful. What lessons can we learn?



## Sustainability From the Ground Up

Suppose we've convinced you that moving to sustainable business model, focused on the Triple Bottom Line of "people, planet, profits," is critical to your company's success. Like most small-business owners, you may still think that becoming sustainable is too difficult to be practical: It requires too much investment, the payoff is uncertain, or, most commonly, you don't know where to start.

**Start Small, Then Grow.** Your business probably didn't develop overnight, and your sustainability efforts don't have to, either. Making small, simple changes can help you realize financial and other gains quickly. New York City bakery Little Cupcake Bake Shop saves more than \$9,000 a year by using ceramic cups instead of paper for customers who dine in. Take-out customers are asked if they want a bag, rather than receiving one automatically, saving the bakery another \$3,500. Easy lighting changes, including installation of a motion sensor in the restroom and compact fluorescent bulbs, required an investment of less than \$200 but save the shop more than \$1,000 per year.

If you don't have a bakery, how do you know where to start? Look at your biggest expenses for clues. For example, a supermarket uses most of its energy for refrigeration and lighting – and according to Energystar.gov, a comprehensive lighting retrofit can save 30-50% on energy used for lighting, plus another 10-20% of the energy used for cooling. What could this mean for a grocer? ENERGY STAR estimates that a savings of just \$1 on energy costs is equivalent to a \$59 increase in sales, or a 590% return on investment (ROI).

**Make Your Current Practices Sustainable.** In addition to making your facilities more efficient, look to operations for ways to save. Family-owned furniture manufacturer Taylor Companies has reduced its waste by 90% through recycling, upcycling (transforming a waste product into something of greater use and value) and composting. Taylor donates 76,000 pounds of sawdust to area farms each year, saving them \$4,000 in hauling costs annually.

Partnering with other area businesses can give your waste new life – and offer profits for both parties. Cleveland-area Great Lakes Brewing Co. minimizes waste from not-quite-full bottles of beer (which can't be sold at retail) by partnering with award-winning local dessert shop Mitchell's Ice Cream, which uses the GLBC Porter in its Edmund Fitzgerald Chocolate Chunk Ice Cream.

**Design New Products or Services.**

Where is a need unmet in your industry? FedEx Kinko's developed a way to help customers deliver documents to their destinations faster than ever – and eliminates the carbon footprint of shipping documents cross-country overnight. Customers can bring an electronic file of their document into a FedEx Kinko's on the East Coast and have it digitally transferred to a location on the West Coast. The document can be printed, bound and packaged there, so that instead of traveling 3,000 miles by plane and truck, the document is trucked only the last few miles to its destination.



While FedEx Kinko's is far from a small, local business, its example does translate. California-based GreenDimes earns a profit by freeing customers from the onslaught of unwanted junk mail and planting trees to offset the ones used in the creation of that junk mail. "Everybody gets junk mail, and nobody likes it," says CEO Pankaj Shah.

**Develop Sustainable Streams of Cash Flow.** Focusing on your core competencies, what sustainable services or products would complement your current profit centers? If you can't think of any, consider looking to your employees for suggestions – after all, "people" makes up one-third of the Triple Bottom Line of "people, planet, profits." Highland Brewing Company in Asheville, N.C., offers its employees broad authority and input into how the company runs. Employees can stop the production line if they see a problem, and they're encouraged to propose ways to improve operations. They persuaded the brewery's majority owner and president Oscar Wong to build a tasting room at the brewery, strengthening relationships with the brewery's customers and creating a new source of income.

**Move From "Best Practices" to "Next Practices."** Challenging the assumptions of how your business works is a frightening concept, but it can sometimes open tremendous doors. Terracycle's goal was to recycle or upcycle other companies' waste into something salable at major retailers. When it discovered that manufacturing the recycled goods wasn't profitable, Terracycle carefully considered its strengths. The firm found that while it was weak at manufacturing, its reputation with consumers and its customer base was very strong. So, it switched from being a manufacturing company to a licensing company – a move that proved to be a hard sell to the organization's management team but which ultimately turned Terracycle into a highly profitable company.

**Transitioning to a business model that embraces sustainability requires a significant investment of time and thought. However, your investment can pay tremendous dividends for your organization, your community and the environment. One way to free up resources for a push to sustainability is to consider outsourcing your HR functions to a Professional Employer Organization (PEO), like ADP TotalSource®. Such a partnership allows thousands of small businesses to focus on their core competencies by assuming the administrative and compliance burden of their HR operations. ■**

**Want to know more?**

Request a copy of *Sustainability – The Essential Strategy Needed for Your Business to Survive and Thrive*, an ADP TotalSource whitepaper, by contacting your local ADP TotalSource District Manager.



# Interns and Volunteers: Free Help or Costly Legal Mistake?

The recession and the resulting loss of jobs have prompted people of all experience levels to apply for internships and volunteer positions with companies. Twenty-three percent of full-time hiring managers in the U.S. have seen applications from experienced workers for internships, according to a CareerBuilder® survey conducted this spring. While internships and similar volunteer positions have historically been a way for inexperienced workers to try out an industry and secure experience, they have become the proverbial foot in the door for more experienced workers.

Employers, however, must be aware of the wage-hour laws' impact on such arrangements. Here are the federal rules that govern when employers must pay interns and volunteers.

## Interns

Often, either inadvertently or by design, employers do not treat interns as employees. Instead, interns are frequently labeled trainees, assistants or learners and receive little or no pay for their work. There are circumstances under which individuals who participate in for-profit, private-sector internships or training programs may do so without compensation. Unless a job meets certain conditions, however, interns are considered employees, and for-profit companies must pay them at least the minimum wage under federal and state laws.

The federal Fair Labor Standards Act (FLSA) defines an employee as "any individual employed by an employer."<sup>1</sup> The FLSA definition of *employ* includes "to suffer or permit to work." In 1947, the U.S. Supreme Court held that the FLSA definition of *employ* does not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another<sup>2</sup>. The Court pointed to six criteria that characterize interns or trainees who need not be paid:

- The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainees;
- Trainees do not displace regular employees but work under close observation;
- The employer that provides the training derives no immediate advantage from the activities of the trainees and, on occasion, the employer's operations may actually be impeded;
- The trainees are not necessarily entitled to a job at the completion of the training period; and
- The employer and the trainee understand that trainees are not entitled to wages for the time spent in training.

The U.S. Department of Labor (DOL) has consistently applied these criteria in answering inquiries about the employment status of interns. Accordingly, whether interns are employees under the FLSA depends on the circumstances of their activities. In the context of school-to-work programs, provided the six criteria listed above are met, the DOL says workers will not be considered employees if:

- Educational or training programs are designed to provide them with professional experience in the furtherance of their education; and
- The training is academically oriented for the benefit of the students.

<sup>1</sup> 29 U.S.C. § 203(e)(1).

<sup>2</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148.



The DOL has said that if an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific periods, the interns should be paid at least the minimum wage and overtime compensation for hours worked over 40 in a workweek. If the employer would have hired additional employees or required existing staff to work more hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job-shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs minimal or no work, the activity is more likely to be viewed as a bona fide educational experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship rather than training.

The DOL has also said that internships should be of a fixed duration, established prior to the outset of the internship. Further, unpaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period. If an intern is placed with the employer for a trial period with the expectation that he or she will be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.

Employers should remember that, in addition to federal rules, state rules relating to the employee/unpaid-intern distinction vary. For example, to determine whether an intern is an employee, the California Division of Labor Standards Enforcement (DLSE) applies the six criteria mentioned above. (The DLSE uses *student* synonymously with *trainee*.)

The Colorado Department of Labor and Employment Minimum Wage Order No. 26 provides that students employed in a work-experience study program are exempt from all of the Order's provisions, including the requirement to pay minimum wage. Consequently, the provisions of the FLSA apply to determinations whether a Colorado worker is an employee.

## Volunteers

Individuals who volunteer or donate their services (usually on a part-time basis) for public service, religious or humanitarian objectives – not as employees and without contemplation of pay – are not considered employees of the religious, charitable or similar nonprofit organizations that receive their service. For example, the DOL has said that members of civic organizations may help out in a sheltered workshop; men's or women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children, or they may volunteer to drive a school bus to carry a football team or band on a trip.

Similarly, the DOL has said an individual may volunteer to drive vehicles or fold bandages for the Red Cross; work with disabled or disadvantaged children; be camp counselors, scoutmasters, or den mothers; provide child-care assistance for needy working mothers; solicit contributions or participate in benefit programs for such organizations and volunteer other services needed to carry out their charitable, educational or religious programs.

Under the FLSA, the DOL states that employees may not volunteer services to for-profit, private-sector employers, but individuals can usually volunteer services to public-sector employers. When Congress amended the FLSA in 1985, it clarified that people are allowed to volunteer at public agencies and their community with but one exception: Public-sector employers may not allow their employees to volunteer, without compensation, additional time to do the same work for which they are employed. There is no prohibition on anyone employed in the private sector from volunteering in any capacity or line of work in the public sector. ■



Employers taking on unpaid interns or volunteers should become familiar with federal and state criteria for deciding whether a worker is an employee and take a hard look at how much work will be performed by their interns. Whether labeled an intern, learner, employee or volunteer, if a worker should have been paid but was not, the employer may find itself liable not only for wages but also for overtime pay, employee benefits, workers' compensation claims, meal and rest periods and penalties.

Compliance with the wage-and-hour laws can be complicated; noncompliance can lead to large penalties, including back pay and overtime. ADP TotalSource® provides substantive advice and counseling regarding wage-hour compliance, including a comprehensive wage-and-hour assessment of a company's pay practices.

# STATE EMPLOYMENT LAW UPDATES

ADP TotalSource® offers clients timely updates, clear action plans and helpful resources that allow ADP TotalSource clients to focus on their business objectives.

The following updates reflect sample developments from April to October 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.

## Connecticut



Connecticut passed a law increasing employment protections for victims of domestic violence. The new law, currently in effect, also requires employers with three or more employees to provide up to 12 days' leave per year to victims of domestic violence under certain circumstances.

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

## 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.

## Illinois



Illinois passed a law restricting some employers from inquiring about an applicant's or employee's credit history, ordering a credit report on an applicant or employee from a consumer-reporting agency or taking any adverse employment action because of the individual's credit history or credit report.

Illinois also passed a law amending its Wage Payment and Collection Act by heightening civil and criminal penalties for violations. The new law more clearly defines employees' rights to seek a private right of action, provides a new administrative forum for claims falling below a certain threshold, provides a new civil enforcement mechanism and expands employees' protection from retaliation. The law takes effect January 1, 2011.

## Massachusetts



Massachusetts passed a law banning questions about criminal history on written employment applications. The ban becomes effective November 4, 2010. The law also creates a new method and database for employers to access criminal records, replacing the current procedure with the Criminal History Systems Board. This becomes effective in May 2012.

The Massachusetts personnel records statute was amended to require that employers' procedures/practices be changed immediately to give notice to employees within 10 days of adding negative information to their personnel records.

## 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.

## 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.

# What ADP TotalSource® Clients Are Saying

## Raising standards while protecting the bottom line – with ADP TotalSource

It's easy for a small company to fall into the trap of being seen as a mom-and-pop shop. This can affect everything from how clients and competitors view a company to how professionally employees behave. Datamark Graphics had handled HR in-house but recognized the need for an HR partner to help increase professionalism, improve efficiency and more effectively compete against large companies. **The company turned to ADP TotalSource.**

**Datamark realized what a lot of small employers know: that HR can be a full-time job and the administrative-burden costs far too much.** As Betty Byers, owner of Datamark Graphics, explains, "Employees constantly have concerns and questions about things you may never have considered. And when there's no dedicated HR team, you can spend your whole day trying to track down the answer." ADP TotalSource provides employees with those answers – and freed up Byers's time and her assistant's as well.

**In order to compete against the "big boys," Datamark Graphics needed to be able to offer Fortune 500®-caliber benefits – on a small budget.** The ADP TotalSource comprehensive benefits program provided the necessary edge. According to Byers, "Not only do we have better medical coverage with a selection of providers, but we also have many other benefits that we never had before, all for less money than I was spending. We just hired a new, highly sought-after production manager. The benefits program from ADP helped seal the deal and make us an employer of choice."

**Compliance issues, particularly as they involve employee relations, also loomed large for Datamark Graphics.** The Company had a situation in which a

## Datamark Graphics

**Industry:** Manufacturing and Printing

**Type of Business:** Provides flexographic printing services – labels, packaging and more – to commercial clients worldwide

**Location:** Asheboro, N.C.

**Number of Employees:** 13

**ADP TotalSource Client:** Since 2007

**Why ADP TotalSource?** "ADP TotalSource is like having a team of five HR experts in the office next door. That's how accessible they are to us. It took me a while to decide to sign on with ADP TotalSource, but I've never regretted it, and I'll never leave them. I know that they have my back – and that lets me sleep better at night."

formerly dependable employee was no longer doing great work, mostly by taking advantage of the collegial atmosphere. Byers says, "If left to my own devices, I probably would have let the situation go on far too long – and that wouldn't have been fair to my other employees. The ADP TotalSource HR team gave me day-by-day advice on how to handle the employee and what to say and do." That compliance expertise is reinforced by training courses on discrimination and harassment that ADP TotalSource provides to Datamark Graphics' managers and staff.

**"Their tagline isn't just a tagline. Bottom line. My team did just get better."** Byers looks forward to reaping even more benefits from the partnership with ADP TotalSource. "The money I save is great, but the intangible benefits are even better. I have freed myself from the burdens of HR, improved my benefits package and protected my company in one fell swoop. We look and act more professional across the board. And that adds up to a huge competitive edge. Look out, big boys, here we come." ■





# ADP TOTALSOURCE<sup>®</sup> SOLUTION

With ADP's dedicated team of experts  
as your partner, you can:

- ➔ Increase employee productivity, which leads to increased profitability
- ➔ Focus on core competencies
- ➔ Reduce administrative burdens
- ➔ Help mitigate risk/liability and protect assets
- ➔ Become an employer of choice

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[www.adptotalsource.com](http://www.adptotalsource.com)**

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