



PHCC Luncheon, 12/09/2015 — Houston, TX

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# Common Employment Mistakes in 2015

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# I: Drug Testing Programs

- Employers should review their substance abuse policies to make sure they are clear enough and follow guidelines to insure acceptance by administrative agencies. A quick checklist follows:
  - 1: Written substance abuse policy with a signed receipt by each employee.
  - 2: Claimant must sign form indicating consent for drug test and communication of results to the employer. The policy of course should say that failure to consent to a drug test will result in termination for insubordination and presumption of a positive test.
  - 3: Chain of custody of sample must be documented.
  - 4: Documentation of GC/MS confirmation of positive test.

# I: Drug Testing Programs

- 5: Lab provides documentation that positive sample exceeded standard limits.
- 6: Where possible, consider having a Medical Review Officer (“MRO”) review results and where indicated, the MRO speaks with the employee who provided the sample to determine if there are alternative explanations for the positive result, like taking a prescription medicine.
- 7: All employees must be treated consistently when a positive test result is received. Termination is standard discipline, but some companies provide an option to seek treatment for a first offense.

# I: Drug Testing Programs

- 8: There is no Federal law restricting drug testing in the private sector. About a half-dozen states and some cities, including San Francisco and Boulder, CO significantly restrict or prohibit the right of private sector employers to administer drug tests to employees.\* Such laws of course do not limit the application of the Federal Department of Transportation mandatory drug testing rules for specified transportation employees or application of the Drug Free Workplace Act of 1988, which does not require drug testing, but does require a substance abuse policy by Federal contractors and grantees.

# I: Drug Testing Programs

- 9: Some states have decriminalized or even legalized marijuana. Note that it is still illegal in most other states under Federal law. Further, even if it is legalized, like alcoholic beverages, the use of this drug is still prohibited when it could be present in an employee's system during work hours. dozen states have laws allowing "medical" marijuana. As of April 1, 2015, the following states permit "recreational" use of marijuana, which is of more concern for employers: Alaska, Colorado, Oregon, Washington and District of Columbia.\*

# I: Drug Testing Programs

- \*CMG has prepared a list of states and some localities with statues regarding employment and drug testing, smoking, marijuana use, paid sick leave, bullying, LGBT protection and use of credit reports for employment purposes. See “Select Presentations” on the USB flash drive that EASA will mail to all convention attendees following the convention. Since these laws can change quickly, CMG recommends checking with your local counsel for review of employment policies on a regular basis to ensure continued compliance.

## II: Tobacco Use in the Workplace

- A: ACA and Smoking
  - 1: This has brought attention to the smoking issue. This has brought attention to the smoking issue.
  - 2: ACA allows insurers to raise smokers' insurance premiums up to 50 percent over those paid by non-smokers.
  - 3: No federal law that protects smokers
  - 4: Smokers have higher absenteeism, take additional breaks to smoke that reduces their amount of actual work time and increases health care costs. The health care issue becomes more severe as smokers age.

## II: Tobacco Use in the Workplace

- B: Complications
  - 1: More than half the states and DC have laws protecting smokers.\*
  - 2: It is easier to restrict smoking in the workplace and using a “campus” approach, than to totally ban smoking during non-work hours.



## II: Tobacco Use in the Workplace

- B: Complications (Cont)
  - 3: Hiring – promoting the employer’s non-smoking workplace may discourage smokers from applying to work at such employers.
  - 4: HIPAA prohibits employer group health insurance plans from charging employees more for coverage because of a “health factor,” which includes health status, medical condition and claims experience, among other things. There is some flexibility for employers to charge a higher premium if tied to a non-smoking program as part of a wellness program providing a reward for participation in the form of a reduced premium for not smoking.

## II: Tobacco Use in the Workplace

- B: Complications (Cont)
  - 5: Possible racial or national origin discrimination claims because poor and uneducated and some ethnic groups smoke at a much higher percentage. This has not been an issue to date, but with the numbers of employers pushing no-smokers hiring policies, this could pop up.
  - 6: Another possible discrimination claim under the ADA because smokers have higher claims experience with serious illnesses.
  - 7: Every employer has to consider: It is possible that there are some great employees out there who are simply addicted to smoking and does your business want to pass on the benefits due to the possible negatives?

# III: Sexual Harassment

- A: Transgender Cases
  - 1: EEOC filed suit against two private employers for firing transgender employees as sex discrimination.
  - 2: The private-sector lawsuits are part of its ongoing efforts to implement the Strategic Enforcement Plan it adopted in 2012, which lists as a top enforcement priority: “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”

# III: Sexual Harassment

- B: Recent Dallas EEOC Victory
  - 1: Jury Awarded \$499,000 Against EmCare in EEOC Sexual Harassment and Retaliation Case. Case also alleged that physician outsourcing group fired two employees for reporting sexually charged environment.
  - 2: The jury of two women and four men awarded former Executive Assistant Gloria Stokes \$250,000 in punitive damages based on the claim that she was sexually harassed by her supervisor, the division CEO, Jim McKinney.

## III: Sexual Harassment

- B: Recent Dallas EEOC Victory (Cont)
  - 3: The EEOC filed suit on behalf of Bonnie Shaw, an EmCare credentialer, and Luke Trahan, a recruiter, based on **retaliatory discharge**. The jury awarded Shaw and Trahan \$82,000 and \$167,000, respectively, to compensate them for lost wages and benefits as a result of having been fired for reporting and opposing a sexually hostile work environment within the AnesthesiaCare Division of EmCare.

## IV: Violence in the Workplace

- A: Virginia Tech, Columbine and Sandy Hook were incidents of mass murder. What is sometimes overlooked is that every location was also a workplace. Some of those killed were employees.
- B: Very important to screen new employees carefully. Most employees with violence problems were like that when you hired them.

# IV: Violence in the Workplace

- C: Most acts of violence are tied to psychological problems, family disputes and interpersonal disputes. Therefore, it is critical that supervisors observe their employees continually. Watch out for:
  - 1: Employee is going through separation, divorce, child custody or support, or similar situation.
  - 2: Employee has had an argument or appears to be agitated with managers or other employees.
  - 3: Employee has been in a disagreement with a client representative. (Watch out for the representative returning with violent intent, as well.)
  - 4: Employee's appearance changes. They stop dressing neatly. They look like they are not feeling good or getting adequate sleep.
- D: Employee Assistance Programs, "EAPs," can provide economical and quick help to employees before a violent outburst occurs.

## IV: Violence in the Workplace

- E: An Incident with a Violent Employee, Vendor, or Client
  - 1: Heroism is highly discouraged. Call the police if weapons are involved, or if a violent incident is likely.
  - 2: Based on various expert opinions, avoid touching an employee or client who is upset.
  - 3: Strength in numbers. When no weapon is evident, several managers coming forward and confronting a violent employee or client sometimes has a calming effect.



## IV: Violence in the Workplace

- E: An Incident with a Violent Employee, Vendor, or Client (Cont)
  - 4: Telling someone to “calm down” is the single best way to make someone more angry. Speak in a calm, even voice. Look at the person and acknowledge their humanity. If appropriate, you may want to mention the large number of witnesses or the presence of a video camera.
  - 5: If you have the opportunity, experience has shown that same sex and same ethnicity match-ups sometimes help to defuse the situation.
  - 6: When employees are being disciplined, it is recommended that two managers meet with the employee. This format also helps to avoid violence because literally, the employee is out-numbered.

## V: Ethics Programs

- A: Why have an ethics program?
  - 1: Good for business
  - 2: Helps to encourage employees and vendors to act responsibly

# V: Ethics Programs

- A: Why have an ethics program? (Cont)
  - 3: Reduce legal exposures moving forward
    - In the case of international business, this can reduce risk of FCPA violation actions
    - In the case of government contractors, this may be required, but also helps to reduce risks if voluntarily adopted. For Federal contractors, see Subpart 3.10—Contractor Code of Business Ethics and Conduct, in special addendum and at:  
[http://www.acquisition.gov/far/html/Subpart%203\\_10.html](http://www.acquisition.gov/far/html/Subpart%203_10.html) See also material in “Select Presentations” on the USB flash drive that EASA will mail to all convention attendees following the convention.

## V: Ethics Programs

- B: What does it mean?
  - 1: If it is just some words, it will not help. Must “walk the talk”
  - 2: One of the best ethics policies was ENRON’s!
  - 3: Nike, for instance, currently has one of the most elaborate ethics programs on its corporate website.

## V: Ethics Programs

- C: Starting Point

- 1: Commit to ethical business operations
- 2: Examine the company's mission statement with respect to employees, vendors and customers
- 3: Scale it for your business – Does not need to mirror Nike's of course
- 4: If a government contractor, make sure your policy meets minimum required standards

## V: Ethics Programs

- C: Starting Point (Cont)

- 5: Train employees regularly about ethical compliance issues regarding your business
- 6: When a problem occurs, handle it promptly and consistently
- 7: For larger organizations, having a “hotline” or some type of reporting system is important
- 8: Consult security specialists on improving premises security.

## VI: EEOC Challenges Another Corporate Wellness Program

- *A: EEOC vs. Orion Energy Systems*

- 1: The EEOC sued a Wisconsin employer, claiming the penalty the employer imposed for non-participation in its wellness program was too significant. The EEOC also determined the wellness requirements were involuntary under the Americans with Disabilities Act.

- 2: See

<http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm>

# VI: EEOC Challenges Another Corporate Wellness Program

- B: *EEOC vs. Honeywell*
  - 1: EEOC sued Honeywell in October 2014 in Minnesota asking for a temporary restraining order (“TRO”).
  - 2: Suit alleged that wellness programs sponsored by Honeywell violated both the Americans with Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”).
  - 3: The tests, required by Honeywell in a recent policy change, measure blood pressure, cholesterol and glucose, as well as check for signs that an employee has been smoking.
  - 4: Employees who decline to take the tests could be fined up to \$4,000 in surcharges and increased health costs.



## VI: EEOC Challenges Another Corporate Wellness Program

- B: *EEOC vs. Honeywell* (Cont)
  - 5: A Federal Judge has already refused to grant the TRO in this case, which means Honeywell can keep testing in the meantime.
  - 6: See [http://www.abajournal.com/news/article/eecoc\\_sues\\_honeywell\\_says\\_wellness\\_program\\_medical\\_testing\\_violates\\_ada](http://www.abajournal.com/news/article/eecoc_sues_honeywell_says_wellness_program_medical_testing_violates_ada)
- C: Watch for collision of ACA, ADA and HIPAA in design of wellness plans. It is important to provide alternatives for participants.

## VI: EEOC Challenges Another Corporate Wellness Program

- **D: ACA Requirements**

- 1: Under the ACA, health contingent programs can come in two forms: “outcomes based” and “activity-only.” Activity-only wellness programs require individuals to perform or complete an activity related to a health factor in order to obtain a reward, although a particular outcome is not required. In such programs, an employer must provide a reasonable alternative standard for obtaining the reward to individuals for whom it would be unreasonably difficult due to a medical condition or medically inadvisable to meet the existing standard.

## VI: EEOC Challenges Another Corporate Wellness Program

- **D: ACA Requirements (Cont)**
  - 2: Employers have more latitude in offering incentives for wellness participation and improvement under the health care reform law. The new regulations raise the maximum permissible reward offered in connection with a health-contingent wellness program to 30%. This amount is raised to 50% for programs that seek to reduce tobacco use.