

# Up\*link<sup>®</sup>

The Peoplelink Online Newsletter

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## Raising the Bar in Staffing Since 1987



## 9 Productivity Tips from People Who Write About Productivity Ron Friedman



In recent years, work has become infinitely more complex.

Technological innovations have led to round-the-clock work schedules and mounting expectations. Our assignments have grown more collaborative, requiring more coordination, conference calls, and meetings. We now face an endless barrage of distractions, from the vibrations and alerts on our smartphones to the breaking news stories and viral videos awaiting us at our desks.

Now, more than ever,

we need strategies for being productive. But where do we start?

**1. Own your time.** Our most satisfying work comes about when we're playing offense, working on projects that we ourselves initiate. Many of us know this intuitively yet continue allowing ourselves to spend the vast majority of our days playing defense, responding to other people's requests.

Many of the experts interviewed believe that top

performers take steps to ensure a favorable offense-to-defense ratio. Tom Rath, author of *Are You Fully Charged?*, recommends blocking out time to work away from email, programming your phone to only ring for select colleagues, and resisting emails first thing in the morning until you've achieved at least one important task.

**2. Recognize busyness as a lack of focus.** There's a satisfying rush we experience

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# THE RIGHT WAY TO FIRE SOMEONE

You've decided it's time to let the low performer on your team go. You've covered your bases in terms of documentation, and you've coordinated with HR. But now you have to have the dreaded conversation. What's the best way to deliver the news? Who should be in the room with you? What do you say and not say? And how do you tell the rest of the team?

### What the Experts Say

"Firing is the single most difficult thing we ask leaders to do," according to Dick Grote, a management consultant in Dallas, Texas, and author of *How to Be Good at Performance Appraisals*. "Even when the business justification is clear, you're sitting down and telling someone that he's no longer getting a paycheck and that when he wakes up in the morning, he has no place to go. That's tough." But firing is a necessary evil, says Jodi Glickman, author and founder of communication consulting firm Great on the Job. "As the manager, you have to bear in mind what's right for the company." You have to focus on the fact that "the firing makes good business sense and hopefully is in the best interest of the person and your team going forward." While it will never be easy to deliver bad news, here are some tips on how to manage the process.

### Don't drag your feet

The prospect of firing someone you've worked with for years — particularly someone you know well and respect — is daunting, but you mustn't let your personal agony delay the conversation, says Glickman. "When the bad outweighs the good and when the employee is causing more problems than he or she is solving, it's time for that employee to go," she says. Of course, firing should be

documentation process is cumbersome, stay focused. "Managers rarely regret acting too quickly on a termination, but they have regretted waiting too long," says Grote. If you're still having trouble mustering the courage to act, think about your team. After all, they're "the ones who are picking up the slack and maybe working longer hours because the person [you need to fire] is not doing his job correctly."

decisions — but you're asking if there's any reason you shouldn't go ahead with your plan to fire Louie on Tuesday morning," he says. First, you want to ensure that an HR rep is able to attend the meeting, since it's legally practical and more comfortable to have someone else in the room. Second, the HR department can offer "a fuller picture" of the employee's extenuating circumstances. "In this litigious society, HR is your ally in filling in any blanks." HR might tell you, for instance, that Louie's pension vests on Wednesday, so firing him Tuesday might be viewed as suspect in court. Or HR might tell you that Louie's wife starts cancer treatment on Monday afternoon, in which case firing him Tuesday could be seen as inhumane.

### Keep it short

The words you use to terminate an employee should be simple and to-the-point. Don't waffle. "Go somewhere private and then lead with the punch line," says Glickman. She suggests you begin by saying, "I have some bad news for you. Today is your last day here." Then state the reason for termination in one simple sentence. "Be transparent," she says. "We've let you go because you didn't meet your sales targets" or "You've not been a good

### Principles to Remember

#### Do:

- Enlist HR to help you manage the process and answer questions as they arise
- Show compassion for your fired employee — if you genuinely believe he has talents that could be useful elsewhere, offer to serve as a reference or provide other help
- Communicate the news to your team in person but do not divulge the details behind the decision

#### Don't:

- Delay in terminating a poorly performing worker when the cost of keeping that worker is greater than the disruption of letting him go
- Waffle or be long-winded — the words you use to fire someone should be simple and to-the-point
- Expect HR to do your dirty work — after you've told the person he's fired, stay put and be prepared to answer questions as they arise

the final step in a fair and transparent process that began long before the actual termination talk — and there should be a trail of paperwork to prove it. Even if the

### Make HR your ally

Before you schedule the conversation, Grote suggests double-checking your plans with HR. "You're not asking for permission — you're the boss; you make the

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# Bright Ideas

## 3 TIPS FOR DEALING WITH THE INEVITABLE DEPARTURE OF KEY EMPLOYEES *Peter Gasca*

Previous generations had very defined expectations about work and careers. When they were young, they were expected to go to school or learn a trade, then work in the same job their entire career – and most of them did.

Generation X was one of the first generations to buck this trend. We had the same expectations – to go to school or learn a trade, then work in the same job our entire career – but we did not. Instead, we moved from company to company and even changed careers once or twice.

Future generations of business professionals entering the workforce now have altogether different expectations, namely that they will go to school or learn a trade, but they are not expected to work in the same job or even stay in the same profession throughout their careers.

This evolution of attitudes is important, because for the next decade or two, we can expect that this generational mix of career expectations will be represented in and influencing our workplaces, with older workers expecting focus and loyalty while younger workers expect choice and flexibility.

While businesses continue

to evolve themselves in order to retain key employees, the fact is that this trend of regular off-boarding is not likely to change. At no time is this trend better demonstrated than in January,

after all year-end quotas are met, bonuses paid and equity options vested, when we see more and more employees leaving for new opportunities.

Businesses therefore should be prepared to deal with this paradigm shift, and rather than ignoring or taking offense at an employee leaving, look to make the experience positive for you and your team with these tips.

### 1. Plan ahead of time.

First and foremost, all management teams need a plan to deal with the departure of an employee, critical or otherwise. It starts with having a thorough job description for each position in your organization. Beyond the job description, employers should document and regularly update ongoing tasks and responsibilities of each employee, as well as key personnel, customers and vendors that the employee interacts with daily. Having and updating this information often ensures that you are not rushing to compile it as your employee is walking out the door.

Succession planning also requires that you have an ongoing process for monitoring and replacing employees, especially key employees, in the off

chance they depart quickly and unexpectedly.

Planning ahead of time for the inevitable challenge of a departing employee not only makes the process easier, it allows the departing employee to leave quickly without lingering and creating an atmosphere among the remaining team that could ultimately hurt motivation and productivity and threaten security.

### 2. Embrace change.

Entrepreneurs need to adopt the expectation that it is not a matter of “if” but “when” a key employee will leave. Fred Wilson, a successful venture capitalist and founder of Union Square Ventures, certainly is no stranger to the fast-paced and high-turnover world of technology startups. As someone who has millions of dollars invested in companies, one would think that he would cringe at the thought of the disruption caused by the departure of key team members.

Instead, Wilson encourages entrepreneurs to embrace change, saying, “(E)very departure is an opportunity to rethink the role and the organization. You can’t find an exact replica of the person who has left. But you can find a person who will bring different things.”

### 3. Never burn a bridge.

It is natural to feel disappointed, upset and even betrayed when an employee leaves, especially if you have put any amount of effort into training, nurturing and trusting that employee. Instead

of allowing the employee to leave on a sour note, embrace his or her new opportunity and support the move. By making the already uncomfortable task of leaving easier, you create a brand ambassador for your company who can spread the gospel of your culture and ultimately attract new talent.

Additionally, treating departing employees with the respect they deserve encourages them to cooperate and work with you and your team to make certain that their responsibilities and institutional knowledge are transitioned during and even after their departure.

In the end, employees leave for any number of reasons. Perhaps they have outgrown the opportunities or seek more responsibilities than are available at your organization. Perhaps they are seeking to strike out on their own and start their own business. Perhaps your culture did not evolve or mature the way they anticipated. Or, perhaps they simply seek a change of scenery for their family.

Whatever the reason, entrepreneurs need to understand that employee off-boarding is not only a regular part of business these days, but also that it could create positive opportunities for both you and your departing team member.

And who knows, maybe after gaining valuable training, experience and life skills at another’s expense, they can return and add even more value to your organization. ☺

# Meet **JEAN SMITH** » » »

## Branch Manager

### McHenry & Hampshire, IL

#### » How long have you been in the staffing business?

Eight years.

#### » What was your first job? What do you remember most about it?

My first job was working as a cashier at a grocery store. The store's customers were primarily the elderly and I loved talking to them while I checked out their groceries. I even had a few that would wait in my line just to chit chat with me.

#### » Who was the worst boss you ever had and why?

I worked short term at an

actuarial firm. My boss was non-existent with no communication or direction, which is why the job was short term.

#### » What motivates you each day to sell and service your clients?

I am self-motivated to do a great job and feel accomplished at the end of the day. This applies to my clients, employees, co-workers and everyone I come in contact with.

#### » What are some of your long-term goals?

Live by the ocean during the winter months and in Chicago during the summer.



» What makes Peoplelink unique, from your perspective? The two offices I manage each feel like a family to me. Every employee contributes equally, and it's a pleasure to work with them. I maintain the small company environment. I learned this from my RVP, Yvonne Graff.

» What makes you successful as a Manager? I have an upbeat attitude and I believe everyone's thoughts and beliefs have value. I listen without judgment and focus on a solution that best fits for everyone involved.

» What is the best advice you could give to other Peoplelink staff members? Don't take anything personal. We deal with such a wide range of people from all walks of life. We need to treat each one with respect and leave any negative emotion with the person sending it out.

» What is your favorite movie? I love all movies, even the cheesy Lifetime movies.

Book? I am an avid reader of primarily non-fiction, but I love a good novel every now and then

too. Drink? – hands down a good craft beer.

» If you could have any car you want, what would it be? I always wanted a Mercedes convertible, but now I think the Tesla.

» What is your home city? What is the greatest feature about your home city? My home city is River Forest, Illinois. Many homes were designed by the great architect Frank Lloyd Wright.

» How do you unwind when you're not at the office? I read or take my Bernese Mountain dogs for a walk. Also, I have recently taken up golf.

» What do people like most (least) about you? I think what people like most about me is my attitude and that I'm talkative; which is probably what they don't like about me as well, since I can interrupt because I get so excited to share my thoughts. Must be from growing up in a family of 8 kids.

Anything else you can think of? This is the first time I have actually been short on words.



## That's Where Peoplelink comes in.

Since 1987, we've been making history by bringing together great employees and employers throughout the country.

### How do we do it?

- By hiring the best internal staff.
- By implementing the best processes.
- By working harder to deliver outstanding results.

**It is through this three-fold approach to staffing, that we can truly help you achieve success.**

*For more information, call Jeannine Victor at 574.232.5400 x 261.*

# SHRM Research Spotlight:

## Employee Recognition

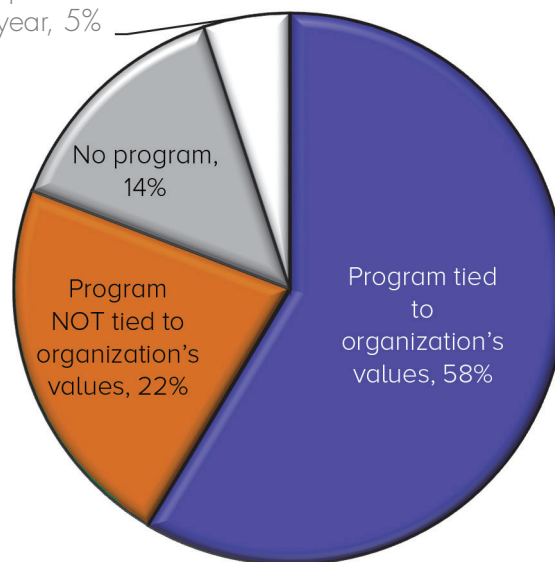
[www.shrm.org/research](http://www.shrm.org/research)

### Key Findings:

- Most organizations (80%) have an employee recognition program. More than one-half (58%) provide recognition that is tied to their organization's values, and HR professionals at these organizations are more likely to give higher ratings to their overall recognition efforts and service anniversary programs.
- Employee recognition can help meet human capital challenges. Especially when employee recognition is tied to the organization's values, it can have a positive impact on employee engagement (90%), happiness (86%) and relationships (84%), as well as add humanity to the workplace (85%).
- The most common negative feedback from employees about service anniversary programs was an inadequate reward selection (32%). This was followed by the anniversary program lacking impact (30%), and being inconsistent (25%) and impersonal (20%).
- Creating a more inspiring experience (35%) was the top advice from HR professionals for improving service anniversary programs. Other suggestions were to have more participation from senior leaders (22%), managers (21%), colleagues and work friends (19%), and to provide better quality award choices (22%).

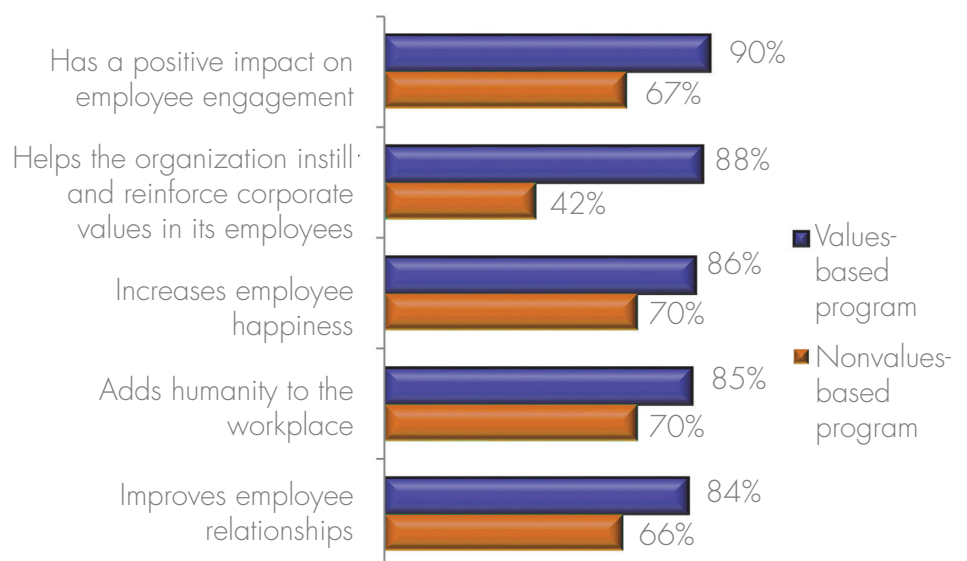
### Prevalence of Employee Recognition Programs

Plan to implement within a year, 5%



*n* = 823

### HR Professionals Report Positive Effects of Employee Recognition Programs



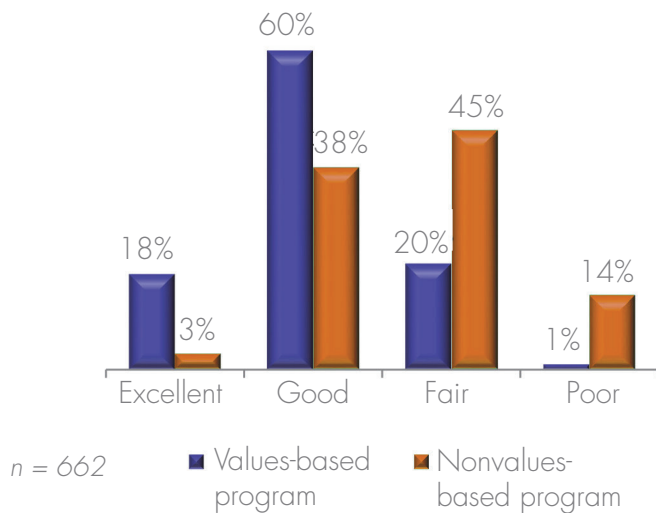
*n* = 641-645

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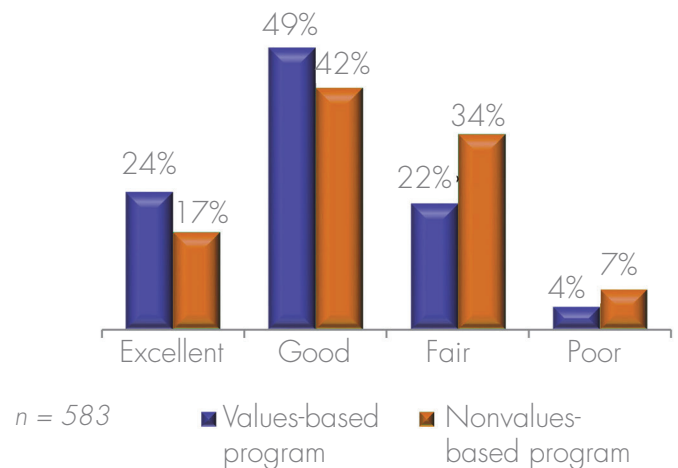
## SHRM Research Spotlight: Employee Recognition

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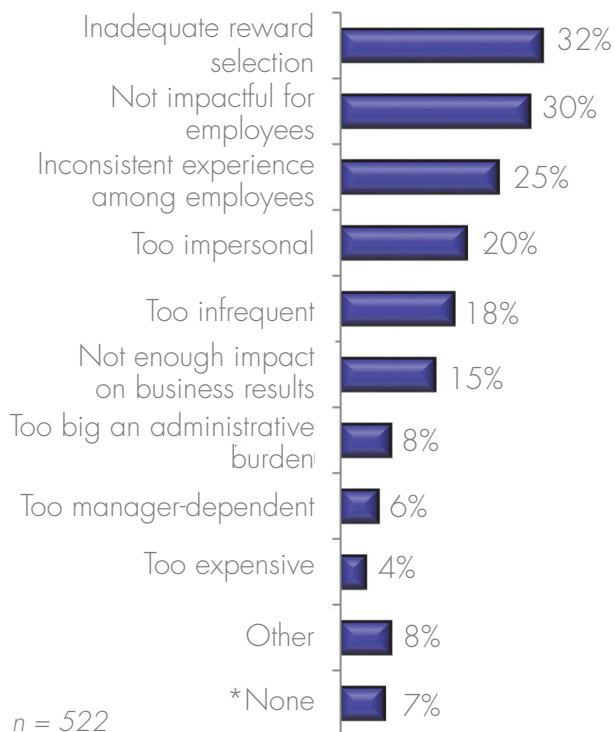
### HR Professionals' Rating: Overall Recognition Efforts



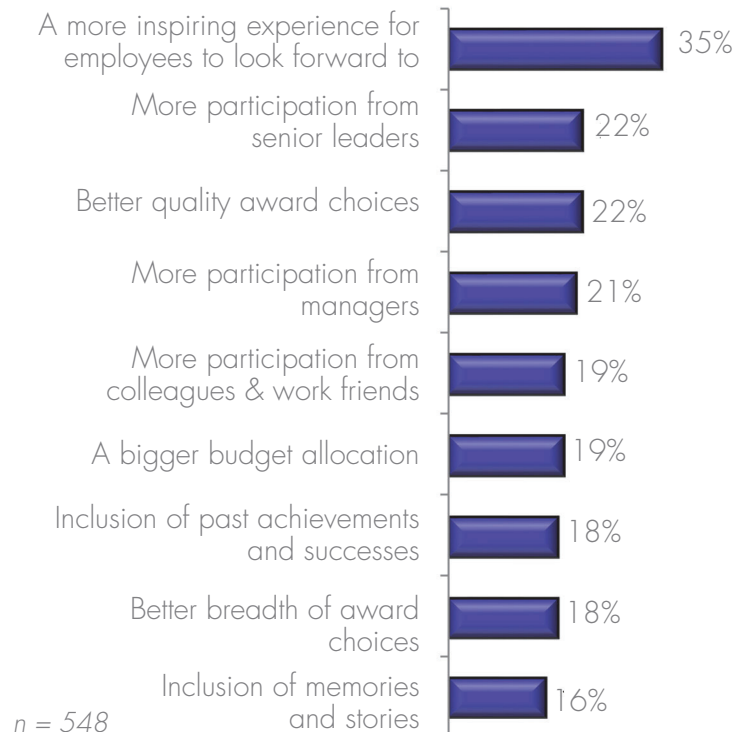
### HR Professionals' Rating: Service Anniversary Program



### Negative Employee Feedback: Service Anniversary Programs



### HR Professionals' Advice: How to Improve Service Anniversary Programs



Note: Percentages may not equal 100% due to multiple response options or rounding. An asterisk (\*) indicates the option was developed from open-ended responses.

**Methodology** A sample of HR professionals with a title of manager or above was randomly selected from SHRM's membership database. Overall, 823 responses were received. Data were collected in January and February 2015. The full findings are available in the *SHRM/Globoforce Employee Recognition Programs—2015*.

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## SHRM Research Spotlight: Employee Recognition

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### Which of the Following Tactics Do You Believe Will Be Most Effective in Attracting, Retaining and Rewarding the Best Employees in Your Organization? HR Professionals' View

	Currently	Next 10 Years	Difference in Percentage Points
Creating an organizational culture where trust, open communication and fairness are emphasized and demonstrated by leaders	33%	27%	-6
Providing employees with opportunities for career advancement	29%	29%	0
Demonstrating a commitment to the professional development of employees (e.g., training, educational support)	24%	22%	-2
Providing employees with the latest tools and technology to maximize work efficiency and effectiveness	21%	14%	-7
Offering a higher total compensation package than organizations that compete for the same talent	18%	15%	-3
Having jobs designed to provide employees with meaningful work that has a clear purpose in meeting the organization's objectives	18%	17%	-1
Providing flexible work arrangements (e.g., flextime, telework, compressed workweeks)	17%	23%	6
Creating a stimulating and attractive organizational culture	16%	15%	-1
Providing employees better opportunities to use their skills and abilities	15%	15%	0
Providing employees with job security	13%	9%	-4
Creating an organizational culture where employees are encouraged to make decisions and take risks	11%	14%	3
Implementing policies that support workers across life phases (e.g., parents of young children, phased retirement)	11%	18%	7
Having a strong employee recognition program	11%	11%	0
Developing human capital management skills at all levels of the organization	11%	16%	5
Developing the capability of our internal HR staff/function	8%	7%	-1
Establishing the organization as a financially stable organization	8%	9%	1
Creating a highly inclusive culture that uses diverse perspectives to optimize organizational performance	7%	9%	2
Implementing policies to find and recruit the most skilled global workers	4%	6%	2
Demonstrating the organization's commitment to corporate social responsibility and sustainability	3%	4%	1

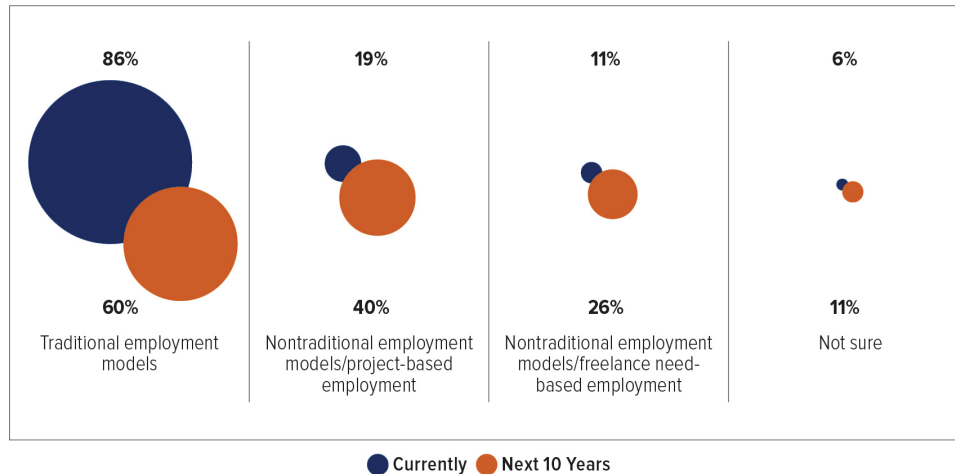
Note: Currently n = 360; Next 10 Years n = 345. Percentages do not equal 100% due to multiple response options. Respondents could select up to three options.  
Source: Business and Human Capital Challenges Today and in the Future (SHRM, 2015)

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## SHRM Research Spotlight: Employee Recognition

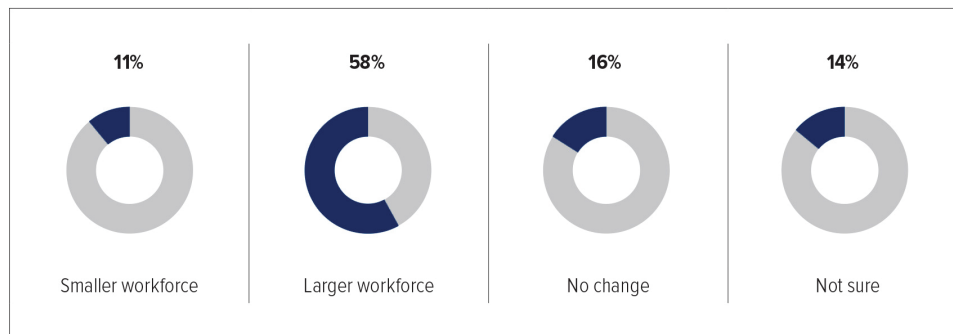
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### What Type of Employment Models Do You Currently Use/Expect to Use in the Future? HR Professionals' View



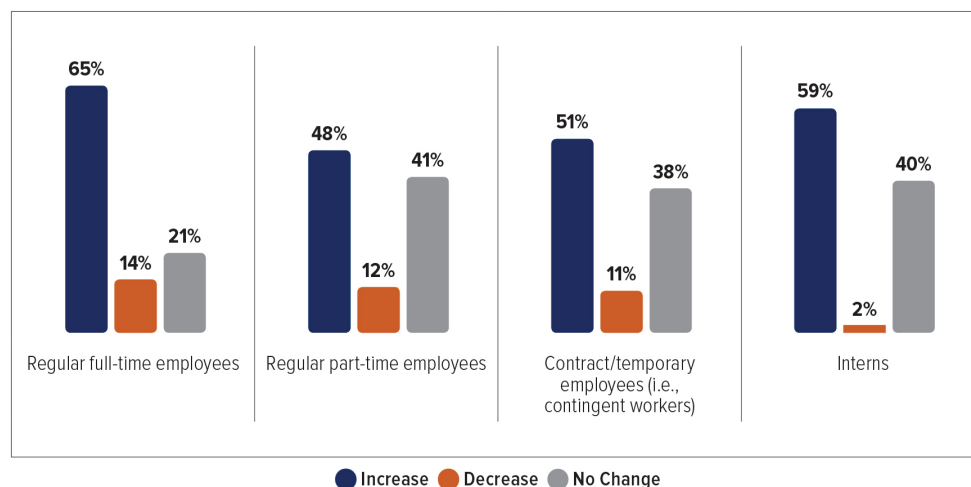
Note: Currently n = 345; Next 10 Years n = 310. Percentages do not equal 100% due to multiple response options.  
Source: Business and Human Capital Challenges Today and in the Future (SHRM, 2015)

### Over the Next 10 Years, How Do You Expect the Size of Your Organization's Workforce to Evolve? HR Professionals' View



Note: n = 366. Percentages do not equal 100% due to rounding.  
Source: Business and Human Capital Challenges Today and in the Future (SHRM, 2015)

### Over the Next 10 Years, How Do You Expect Your Organization's Employment Status to Evolve? HR Professionals' View



Note: n = 217-338. Respondents who answered "not sure" were excluded from this analysis. Percentages may not equal 100% due to rounding. Source: Business and Human Capital Challenges Today and in the Future (SHRM, 2015)



# 9 Productivity Tips from People Who Write About Productivity

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when there's too much on our plate: we feel needed, challenged, even productive. And yet that pleasurable experience is an illusion. It robs us of our focus and prevents us from making progress on the work that matters most.

Sociologist Christine Carter, Ph.D., an expert at UC Berkeley's Greater Good Science Center, put it this way: "Busyness is not a marker of intelligence, importance, or success. Taken to an extreme, it is much more likely a marker of conformity or powerlessness or fear." Instead of viewing busyness as a sign of significance, top performers interpret busyness as an indication of wasted energy.

**3. Challenge the myth of the "ideal worker."** Far too many of us continue to believe that an "ideal worker" is one who works constantly, often at great expense to their personal life, but there's overwhelming evidence to the contrary. Being productive requires recognizing that you can't work for extended periods of time and maintain a high level of performance. As humans, we have a limited capacity for focused attention. And yet, as Brigid Schulte, journalist and author of the *New York Times* bestseller *Overwhelmed*, points out, we have been seduced into thinking that if only we try harder and work longer, we can achieve anything.

Top performers take a different approach. They recognize and honor their physical limitations by getting plenty of exercise and sleep, cycling between 90-minute bursts of focused work and short restorative breaks, and taking time to disconnect from email for

some portion of their off-hours.

## **4. Intentionally leave important tasks incomplete.**

We often race to finish assignments quickly so that we can move on to the next item on our list. But Wharton professor and psychologist Adam Grant



believes resisting this urge can actually make us more productive.

"I used to sit down to write and not want to get up until I was done with a chapter or an argument," Grant told me. "Now I will deliberately leave sentences just hanging in the middle and get up and go do something else. What I find when I come back is that I don't have to do a lot of work to finish the sentence, and now I also have a bunch of new ideas for where the writing should go next." (Note: Hemingway followed the same strategy.)

What both Grant and Hemingway are leveraging is the human tendency to ruminate over unfinished tasks, otherwise known as the Zeigarnick Effect. If you start a project and leave it unfinished, you're bound to think about it more frequently than after it's done.

Instead of aiming to complete important tasks in one sitting, try leaving them incomplete. Doing so will encourage you to

continue thinking about your work in different settings and, in the process, position you to uncover creative solutions.

## **5. Make a habit of stepping back.**

In a knowledge economy, productivity requires more than perseverance — it requires insight and problem-solving. Research indicates quite clearly that we are more likely to find breakthrough ideas when we temporarily remove ourselves from the daily grind. This is

why the best solutions reveal themselves when we step into the shower, go for a run, or take a vacation. Top performers view time off not as stalled productivity but as an investment in their future performance.

## **6. Help others strategically.**

High achievers, Grant argues in his 2013 book *Give and Take*, tend to be Givers — those who enjoy helping others without strings attached. While giving can certainly help you succeed, Grant's data also reveals that helping everyone with everything is a recipe for failure.

So how do you do it right? Top performers, Grant argues, avoid saying yes to every helping opportunity. Instead, they specialize in one or two forms of helping that they genuinely enjoy and excel at uniquely.

## **7. Have a plan for saying no.**

The more commitments we agree to take on, the more likely we

are to experience what author and consultant Rory Vaden calls "priority dilution." This is when the sheer number of obligations we've committed to prevent us from doing the work that matters most.

One method of counteracting priority dilution involves having a strategy in place for saying no in advance, so that you don't have to stop and think about how to phrase your response each time you need to turn someone down. Create an email template, or write out a script that you can use when doing it in person.

When dealing with a manager who is asking you to take on more than is reasonable, think outside the yes/no paradigm. Consultant and writer Greg McKeown recommends having a conversation with your manager and listing all the projects you're currently working on. Indicate which items you think are priorities and invite your supervisor to share his or her opinion. It's a way of illuminating the constraints you're under without ever saying the word "no."

**8. Make important behaviors measurable.** To make progress toward any goal, it helps to track our behaviors. Bestselling author Gretchen Rubin, an expert on happiness and habits, sees monitoring as one of the keys to behavior



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# 9 Productivity Tips from People Who Write About Productivity

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changes, saying, "If you want to eat more healthily, keep a food journal. If you want to get more exercise, use a step counter. If you want to stick to a budget, track your spending."

Marshall Goldsmith, the well-known CEO coach, agrees. Every evening, he reviews a 40-item spreadsheet consisting of every important behavior he hopes to achieve. Among the items: the number of words he wrote, the distance he walked, and the number of nice things he said to his wife, daughter, and grandchildren.

## 9. *Do things today that make more time tomorrow.*

A final theme to emerge is that top performers look for ways to automate or delegate activities

that are not a good use of their time. Vaden suggests asking yourself, "How can I use my time today in ways that create more time tomorrow?"

Evaluating your to-do list through this lens makes it easier to commit to activities that are not immediately enjoyable,

like automating bill paying or creating a "how to" guide for other team members to help you delegate repetitive tasks more easily.

All of these suggestions are useful individually, but they also highlight an important trend.

In the 1990s, being productive mainly required good time management.

Ten years later, the advent of email led to an expanded workday and productivity requiring you to manage your energy, not just your time.



Over the last few years, we have entered a new age in which managing your energy and time is not enough. Today, the magnitude of information rushing toward us from every direction has surpassed our capacity for consumption. No matter how much time and energy you have at your disposal, you can't be productive without mastering the art of attention management.

Resisting the lure of busyness, having a plan for saying no, maintaining a relentless focus on self-directed goals that only you can achieve — these are the skills we need to cultivate in ourselves to succeed, both at work and in life. ☺☺

## From the President's Desk »

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cultural fit here." It's important to use the past tense because it "precludes arguments about second chances," says Grote. "The plug has been pulled." If the employee tries to argue or lashes out at you, try not to get caught up in responding. "It's a natural human thing to want to say 'I'm sorry,'" says Grote. But when it comes to firing a poor performer, he recommends couching your regret in terms where "personal responsibility lies squarely on the individual." He suggests saying something like, "I'm sorry that the situation has gotten to this point."

### Stay in the room

HR may be your ally, but you shouldn't expect it to do your dirty work. While some experts contend that you needn't say anything more or even remain in the room after the initial pronouncement, Grote vehemently disagrees. "Leadership demands compassion," he says.

"You were the agent of a terrible thing that has just happened in this person's life. Don't run away, and don't force HR to pick up the pieces." You should be prepared to "speak as needed and answer questions as they come up." Before the meeting, you need to be well versed on practical matters — the details of the former employee's severance agreement, for instance, and what happens to his benefits and unused vacation time. Of course, there will always be issues you hadn't considered. If something comes up, Grote recommends saying, "Let me apologize, I hadn't thought of that," and then turn it over to HR. But make no mistake: "This is your baby."

### Talk to your team

After the person you've fired has left, Glickman suggests gathering the colleagues affected by the termination to address the matter. "The message should be direct

and straightforward," she says. Do not reveal reasons behind the decision — that's confidential, and besides, "It sets a bad precedent to badmouth a former employee." Recognize that the office rumor mill is likely churning. Grote suggests this script: "As some of you may already know, Diane is no longer part of the organization. I can't go into details because that's confidential information and I want to ensure Diane's privacy. If you have suggestions about how to minimize the impact of Diane's absence, let me know." If you think people will start to worry about their own jobs, you might assure them that the person was fired for cause, that the organization is not eliminating roles. You can also divulge a few details if you want to send a strong message to your team about the fired employee's poor behavior. In this case, Grote recommends saying, "Diane's employment has

been terminated. I'm not going to go into all the details, but I will say that Diane acted in violation of our sexual harassment policy. We do not tolerate that."

### Focus on the future

Terminating an employee is an emotionally draining task, but for the sake of your team, you mustn't wallow. "At this point, it's about forward momentum," says Glickman. "Focus on the now." The firing likely presents short-term challenges for your team — namely more work. "So it's up to you to come up with a strategy for how to manage the workload while you look for a replacement." Acknowledge that there's more work to do in the short term, but talk about a goal. "Say, 'It's going to hurt for three months, but here's the plan,'" she adds. "You want to ruthlessly move forward on the future." ☺☺



Rasheeda lyanda is pictured with Anna Brooke Hodges of the Tupelo branch.

Peoplelink is pleased to announce that Rasheeda lyanda has been chosen as our March *Shining Star* employee. Rasheeda works in the Quality Department of Toyota Boshoku. She previously reported to the Tupelo, Mississippi branch.

Rasheeda has worked as a Quality Inspector at Toyota Boshoku for over a year. Her responsibilities include the 200% and 100% inspection in multiple departments.

Rasheeda's Supervisor, Brenda Godboldo, refers to Rasheeda as a reliable "go to" person who knows all of the processes and can work in any department.

While on the job, Rasheeda enjoys giving advice on defective parts. In her free time, she coaches her daughter's basketball team.

Congratulations to Rasheeda for being Peoplelink's March *Shining Star* employee!

Find your shining star! Contact Peoplelink at 574.232.5400.



## NLRB Narrows Employer Property Rights in Key Solicitation Decision

By Jon Hyman (Workforce.com)

One of an employer's best tools to stave off labor unions and their organizing campaigns is a no-solicitation policy. It keeps employees focused on work during working hours, and keeps non-employees (including, but not limited to, union organizers) off your property and out of your workplace.

Yet, over the past couple of years, the NLRB has narrowed employers' no-solicitation rights. For example, employer email systems must now be open for union-related activities during non-working time.

What about low-tech solicitations? Conventional wisdom used to be that employers could prohibit solicitations in work areas during working time and non-working time. Does this work-area rule still hold?

According to last week's *Dish Network* decision [pdf], the NLRB shifted the discussion from working areas to working time.

In *Dish Network*, the NLRB considered the following no-solicitation policy:

In the interest of maintaining a proper business environment and preventing interference with work and inconvenience to others, employees . . . may not distribute literature . . . of a personal nature by any means, . . . or solicit for any other reason during work time or in work areas except

as specifically authorized in advance by a vice president or higher. Employees who are not on work time ([e.g.] . . . on lunch or break) may not solicit employees who are on work time.

Until recently, I would have told you that such a policy was perfectly legal under the NLRA. Under today's NLRB, however, this policy is a no-no.

*The Solicitation in the Workplace policy is unlawful.*

Its blanket prohibition of all work area solicitations, including those work area solicitations that occur during non-work time, is unlawful. This policy also unlawfully requires obtaining

management's approval before embarking on such solicitations.

So, employers, it's time to dust off your employee handbooks. If you haven't reviewed your handbook in a year or more, this case serves as a good reminder that our labor and employment laws operate in constant flux, and our handbooks must reflect and keep up with those changes. Now, go read your no-solicitation policy (and the rest of your handbook), and call your friendly neighborhood employment lawyer for that update.

## Was employee's nap FMLA protected? How one court ruled

By Christian Schappel, HR Morning

Scorned employees will cry "FMLA protection" for just about anything these days. The question is, when can the argument stick?

The answer, unfortunately, is all too familiar: It depends.

All employers can do is look at what the courts are currently saying, and use their guidance to direct FMLA policies and procedures.

In the most recent case to cross our desks, an employer's smartly crafted policies won the day.

Migraines caused her to miss work

The case involved Jodi Lasher, a registered nurse for Medina Hospital in Ohio.

Lasher suffered from severe, sometimes debilitating, migraine headaches. These migraines had caused her to miss work on several occasions, for which she was issued a written warning. The hospital's management had even received complaints from employees that Lasher had "disappeared" from her unit to deal with her headaches.

Medina hospital did the right thing. It approached Lasher about exploring possible accommodations for her condition. Then, after determining that accommodations weren't applicable to her situation, the hospital's management team recommended that Lasher use intermittent FMLA leave to

job, that is. The procedure required Lasher to let the nurse operations manager on duty, or at the very least one of her colleagues, know when she needed to remove herself from her duties.

Lasher acknowledged that she understood this procedure, and she agreed to follow it in the future.

The hospital approved all of Lasher's FMLA leave requests, including an occasion when she developed migraine symptoms during her shift.

### 'MAJOR INFRACTION'

Fast forward months later, and Lasher had a migraine flare up while on duty. She then left a pregnant patient unattended without informing anyone.

She was then found sleeping in an adjacent vacant room.

The hospital labeled it a "major infraction" of its procedures. It said it created an employee, as well as a patient, safety issue. So it fired Lasher.

She then filed an FMLA interference lawsuit. In essence, she claimed her nap was FMLA-protected.



The hospital filed for summary judgment in an attempt to get Lasher's lawsuit thrown out.

The court granted summary judgement

deal with her condition.

At this point, the hospital laid out a procedure that Lasher was to follow when migraine symptoms flared up — symptoms severe enough to prevent her from doing her

in favor of the hospital, and tossed the suit.

It ruled that for Lasher's FMLA interference claims to survive summary judgment, she had to show:

CONTINUED ON NEXT PAGE



1. she was an FMLA-eligible employee
2. the hospital was an employer as defined under the FMLA
3. she was entitled to leave under the FMLA
4. she gave the employer notice of her intention to take leave, and
5. the employer denied her FMLA benefits to which she was entitled.

Where Lasher's claim fell apart was in satisfying the fourth element of that test. The court ruled Lasher failed to provide notice of her intention to take FMLA leave, despite an established procedure for providing notice that Lasher had agreed to follow.

The court then added:

*"An employee seeking FMLA leave need not mention the statute expressly, but she must convey enough information to apprise her employer that she is requesting leave for a serious health condition that renders her unable to perform her job."*

Even using this somewhat lenient standard, Lasher's actions fell short.

Case closed. Lawsuit tossed.

But before putting a bow on the case, the court pointed out some of the other facts the hospital had on its side. For starters, it had a track record of approving Lasher's prior leave requests without fail. Plus, the hospital itself was the one to suggest Lasher apply for FMLA leave in the first place.

Both of those elements gave Lasher a pretty steep hill to climb to prove that the hospital intended to interfere with her FMLA rights.

## DOL's final overtime rule moves forward: What's next?

By Christian Schappel, HR Morning

Get ready: The DOL's final rule revising the

white-collar overtime exemption regulations has advanced. So employers now have a pretty good idea of when it'll go into effect.

The DOL just sent the final rule to the White House's Office of Management and Budget (OMB). This is the final step before the rule is published and made public for all to see.

If the OMB follows its normal review timeline, it should be approved in four to six weeks (although, it could take months).

So if it sticks to its normal schedule — and there's no reason to think it won't — employers should be able to get eyes on the final rule by early-to mid-May.

## AVOID CONGRESSIONAL ROADBLOCKS

The fact that the rule is already in the OMB's hands means it's most likely to avoid an entanglement with the Congressional Review Act. In fact, the act may very well be the reason the rule was submitted for review much earlier than originally anticipated.

In a nutshell, the act allows Congress to disapprove "major" final rules promulgated by federal agencies — like the DOL. But the disapproval can be shot down by a presidential veto — meaning the FLSA changes were highly unlikely to be challenged during President Obama's tenure.

However, the act states that if a major rule is submitted to Congress with fewer than 60 session days remaining on the legislative calendar, then the next Congress will have a similar 60-day period to consider the rule. And according to recent calculations by the Congressional Research Service, if the

DOL's overtime rule isn't released by the OMB by May 16, the rule will be at the mercy of the next Congress and president.

Bottom line: The best chance the Obama administration — and the current DOL regime — have of making the FLSA-altering overtime rule stick was to get it on the books before May 16, a deadline they're now well on their way to beating.

## WHEN WILL IT TAKE EFFECT?

Despite some back-and-forth about when it was going to submit the rule to the OMB, the DOL has remained steadfast about one thing:



The rules were likely to take effect 60 days after being published, and that still appears to be the plan.

As a result, employers can expect to have to be in compliance with the rule this summer — most likely by the end of July (but possibly sooner).

Still, there's no way to know exactly what's in the rule until it is approved by the OMB. But chances are the rule won't be too far off from what employers saw in the proposed rule.

Here's a rundown of what was proposed:

- **Drastically increasing the FLSA's salary threshold.** As you know, the current minimum salary a worker has to be paid to be exempt from overtime is \$455 per week or \$23,660 per year. Well, under the proposed rule, it would jump to \$970 a week or \$50,440 per year. The DOL calculated that \$50,440 would equal the 40% percentile of weekly earnings for full-time salaried workers.

- **The highly compensated employee threshold will also climb.** The total annual compensation requirement needed to exempt highly compensated employees would climb to \$122,148 from 100,000 — or the 90th percentile of salaried workers' weekly earnings.

- **The salary thresholds will automatically increase.** For the first time ever, the salary thresholds would be tied to an automatic-escalator. The DOL is proposed using one of two different methodologies to do this — either keeping the levels chained to the 40th and 90th percentiles of earnings, or adjusting the amounts based on changes in inflation by tying them to the Consumer Price Index.

- **No changes to the duties tests have been proposed.** The DOL didn't suggest changing the executive, administrative, professional, computer or outside sales duties tests (see them here) as of yet. However, the agency sought comments on whether they should be changed and whether they're working to screen out employees who are not bona fide white-collar exempt employees. Early indicators were that the DOL would look to adopt a California-style rule in which employees would be required to spend more than 50% of their time performing exempt duties to be classified as exempt.

- **Discretionary bonuses wouldn't count toward salary threshold.** In the proposed rule, discretionary weren't part of a person's salary calculation — but that could change depending on the comments the agency received. Currently, such bonuses are only included in calculating total compensation under the highly compensated employee test. But the DOL said some stakeholders are asking for broader inclusion of bonuses in salary calculations.

# EEOC Fails to Show Employee Qualified for Job

By Candace Embry

The Equal Employment Opportunity Commission (EEOC) is not entitled to a new trial after a jury ruled in favor of the employer on the agency's Americans with Disabilities Act (ADA) claim, the 7th U.S. Circuit Court of Appeals ruled. The EEOC failed to prove an essential element of the claim: that the employee was qualified to perform her job duties.

Margaret Zych filed a charge with the EEOC against her employer, AutoZone Inc. Subsequently, the EEOC filed a lawsuit against AutoZone, alleging that AutoZone failed to accommodate Zych's lifting restriction and that it unlawfully terminated her employment in violation of the ADA. Following a five-day trial, a jury found in favor of AutoZone. The EEOC petitioned the court for a new trial, arguing that the jury's decision was contrary to the manifest weight of the evidence. The district court denied this request, and the EEOC appealed to the 7th Circuit.

Zych worked as a parts sales manager (PSM) at an AutoZone store in Cudahy, Wis. In 2007, she injured her right shoulder at work and underwent two years of physical therapy in efforts to recover use of this shoulder. During those two years, Zych had numerous work restrictions for which AutoZone provided accommodations. In June 2009, Zych's doctor implemented a permanent restriction, whereby Zych could not lift anything with her right arm that weighed more than 15 pounds. Approximately one month later, AutoZone determined that it could not accommodate her permanent restriction and terminated Zych's employment.

In order to establish AutoZone's failure to accommodate the claim, the EEOC

was required to prove that: a) Zych was a qualified individual, b) AutoZone was aware of her disability and c) AutoZone failed to reasonably accommodate her disability. In finding for AutoZone, the jury had determined that the EEOC failed to prove the first element of the claim: that Zych was qualified for her position. Under the ADA, a "qualified individual" is one who, with or without a reasonable accommodation, can perform the essential functions (or fundamental job duties) of the position.

In considering the evidence presented at trial, the appellate court reviewed testimony from former PSMs who had worked at the same location as Zych. One former manager testified that when he accepted the position as a PSM, he understood that it involved heavy lifting. To that end, he testified that lifting and moving were a "regular part" of the job. Further, he stated that a PSM could need to move items at the store and items brought in by customers at least 30-40 times each day. A second former PSM testified that assisting customers required regularly retrieving items from the store, carrying items from the store to customers' cars and even holding items up for customers' inspection. He further testified that many of the items to be carried, such as car batteries, containers of antifreeze and motor oil, brakes, and radiators weighed significantly more than 15 pounds. In addition, PSM job duties included participating when managers organized "planograms," which at times required all products to be removed from the shelves, rearranged and restacked. Moreover, PSMs were expected to participate in "truck days" in which all

employees were expected to lift product from the delivery trucks to restock the store. Finally, AutoZone presented a written job description for PSMs which explained that PSMs were expected to frequently lift items of up to 75 pounds.

The appellate court determined that the jury's verdict was not against the manifest weight of evidence and that from the evidence presented, a reasonable jury could have concluded that heavy lifting was an essential function of the job. Because Zych could not lift more than 15 pounds, she could not perform the essential functions of her role as a PSM. The EEOC made a final argument, attempting to compare Zych to another employee at the Cudahy location who was partially paralyzed and could only lift with his right arm. The appellate court, however, rejected this argument and determined that the employee was not a valid comparator because the employee worked part time and would, therefore, never be alone in the store. Further, although he was partially paralyzed, this employee had no official lifting restriction. Ultimately, the appellate court affirmed the district court's decision to deny the EEOC's petition for a new trial. The court further noted that, although the EEOC presented some evidence inconsistent with the jury's verdict, there was not enough evidence in



its favor to warrant a new trial.

*EEOC v. AutoZone Inc., 7th Cir., No. 15-1753 (Jan. 4, 2016).*

**Professional Pointer:** It is critical that employers draft job descriptions that clearly and accurately represent the essential functions and regular job duties required of a particular role to ensure that an employee's ability to perform and the availability of accommodations are evaluated against the clear expectations and needs demanded by the position.