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## Raising the Bar in Staffing Since 1987



# Why New Personal Productivity Efforts Don't Stick

*Maura Thomas/Shawn Thomas, HBR*

We all have "productivity systems," whether we design them with intent or just let them grow up around us. A productivity system is simply a collection of behaviors, repeated consistently and in a particular order, plus the tools that support them.

We often hear people say something like, "I don't have a system — it would take too much time. That's time I could use to get things done." But usually this is simply confusing activity for productivity. It's easy to always be "doing," and just "doing" is a system of its own — a reactive one. It results in being constantly busy but not always getting the right things done.

Most productivity habits develop out of necessity, without specific intention. This can leave achievement to chance, which is why there is so much interest in productivity improvement. But changing systems is what's really tricky.

Many people "fall off the wagon," failing to consistently follow the new productivity system they're trying to adopt, despite the fact that they are



putting in the time and effort to consistently practice the new behaviors. Three major factors most commonly impede the long-term reshaping of their productivity system, which in turn impedes their ability to get the right things done:

- Even when they know their old system is inefficient, they remain convinced that certain old habits are necessary for success.
- Their environment is unsupportive of the habits they're trying to cultivate or the tools they're trying to use.
- High levels of stress cause them to overthink their system, and they choke under the pressure.

## Belief in bad habits

In *The Power of Habit*, Charles Duhigg writes that belief is an important ingredient in turning a habit into a permanent behavior. Lack of belief in an effective habit, or misplaced belief in a less effective habit, can lead us astray.

For example, most people have experienced productive periods of uninterrupted work that feel great and lead to a sense of accomplishment, and studies confirm that single-tasking is most effective and efficient. However, task-switching, or doing many things at once, seems like it should lead to

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## TO HOLD SOMEONE ACCOUNTABLE, FIRST DEFINE WHAT ACCOUNTABLE MEANS

At the end of a meeting, most leaders know that they should recap next steps and determine who is accountable for each. As prescribed in the commonly used responsibility models — RACI, RAPID, and the others — accountability should fall to one (and only one) person per item, even if the work involved requires input and contributions from others. Unfortunately, the word “accountable” can mean different things to different people.

Consider this example. During a meeting at a luxury retailer, the executive team decided that the company needed a digital strategy for its China operations. Paul, the head of e-commerce, asked one of his direct reports, Madison, to “please form a team and let us know what we should do.” She was then designated “accountable” for the action item “digital strategy for China.”

But what did Paul mean? Was Madison tasked with forming a team that should develop a consensus view on what the company should do in China, or was she tasked with making the decision and executing? Or was it something else? At the time, no one thought to ask or clarify.

Madison went ahead and formed a team, which had several meetings. Three different approaches were suggested, and after weeks of deliberating the team still disagreed on the one to pursue. So Madison chose her preferred option, which she then relayed to Paul. Another team member — who had strongly backed an

arguments and figure out a resolution. This left Madison completely demoralized; she felt Paul had lost confidence in her managerial abilities and had taken the decision away from her.

Sound familiar? The problem started at the moment Madison was named accountable. What was intended? What actual decision

make the decision however she chooses. She can decide unilaterally. She can call one meeting or 10. She can solicit individual opinions or talk to some team members but not everyone. She controls the process and ultimately owns the final decision.

On the other end of the spectrum is the **team coordinator**. In this

role the accountable person is an equal member of the team with the added responsibility of logistics, such as scheduling and defining the agenda. She’s responsible for ensuring that there is a discussion but not for the outcome,

and she has no more power or authority than anyone else in the room. If the team can’t come to an agreement, she can’t force closure — she must escalate the decision up a level.

In the middle is the **tiebreaker**. In this role the accountable person doesn’t have the absolute authority of an issue owner, but she’s more than just a coordinator. She is responsible for helping the team reach a decision, and in the absence of consensus she should make the final call.



### ISSUE OWNER TIEBREAKER TEAM COORDINATOR

alternative course of action — got visibly upset, accusing Madison of “hijacking” the process and “imposing her view on the group.” Others felt alienated, wondering why their “rights” to being involved in the decision were seemingly ignored by Madison. Some wondered what the fuss was about — the team wasn’t making progress, so Madison simply used her prerogative to make a decision and move forward.

Hearing the dissent, Paul decided to hold a meeting with the entire team so he could hear all the

rights had Paul delegated to her, and was breaking the deadlock within or outside her purview?

To avoid situations like this one leaders need to think about exactly what type of accountability they are offering — or accepting — especially when accomplishing a task that requires group effort.

On one end of the spectrum is the **issue owner**. In this role the accountable person has complete control over an issue or decision. A full team may be assigned to help, but the issue owner can

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# Bright Ideas

## How to Give Negative Feedback When Your Organization is “Nice” *Jennifer Porter*

I was meeting with a client last week, the CEO of a global financial services firm. At the end of our conversation, he asked me what feedback I had for him about his organization. Since this is a firm for which I have deep respect and admiration, I shared a very long list of positive observations on the people, their culture, and their impressive accomplishments. And then I told him that I thought the single biggest opportunity for improvement was to create a more candid and feedback-rich culture. I was happy to hear him respond that he wanted to do exactly that — and I wasn't surprised to hear him say that he didn't know how to begin.

Building candor and feedback into any culture is challenging, but this CEO had a particularly difficult set of issues to address because the predominant descriptors of his current culture are nice, respectful, cordial, warm, relationship-focused, and calm. And while these qualities are real strengths of the organization, they can also create barriers to candor and feedback.

Some of the challenges that this organization faced, like so many other “nice” organizations, include:

- **No one wants to hurt a colleague.** Most leaders believe that they may hurt someone if they share a strong different point of view or critical feedback. In fact, research shows that feedback can cause physical pain. In

most organizations people do not want to hurt each other, and this is all the more true in “nice” cultures.

- **Behavior is expected to be poised, respectful, and professional at all times.** In general, these are wonderful, positive qualities. But learning a new skill (like candor and feedback) is inherently messy. We are all unskilled when we try something new. And this messiness and poor initial skill can easily be interpreted as unpoised, disrespectful, or unprofessional — all of which are unacceptable in a “nice” culture.
- **There are no role models — particularly at the top.** When people in this organization look at their senior leaders, they see very warm and positive leaders who are typically not candid with one another and rarely offer positive or negative feedback. Sure, they say “nice job” and offer praise for a job well done, but they rarely talk specifically about behavior with a developmental lens to help people get better.

- **You don't mess with the culture.** When a culture is known for its niceness, people have pride in it and loyalty to it; the niceness is part of what attracted them to the organization and what retains them. They enjoy the culture, and are typically reluctant to try anything that may jeopardize it. Edgar Schein, the renowned expert on organizational culture and professor emeritus at the MIT Sloan School of Management, says that once cultural norms such as not giving feedback are established, it's easier for people to resist change “by denial, projection, rationalization, or various other defense mechanisms” than to change their behavior.

With these barriers, how can a nice organization create a culture of candid feedback?

It's possible, but it's not easy.

Based on my experience coaching hundreds of executives, I know that leaders

— in nice organizations and even not-so-nice organizations — can create a more candid and feedback rich culture by following these seven steps:

- **Start with yourself.** Since the only one you can actually change is you, focus on that first. Demonstrate you are serious enough about shifting the culture to do the hard work to personally improve. Commit to being better at candor and feedback and share a plan to get there. Tell your team about your commitment and ask for their help. Robert Cialdini's research on commitment and consistency shows that if we publicly commit to a goal we are more likely to honor it because it becomes part of our identity and we dislike operating in ways that contradict that identity. By starting with yourself,

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# Meet **KARA LEMLER** » »

## Corporate Recruiter, South Bend, IN

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

I have been in the staffing business for 9 years.

### » What was your first job?

#### What do you remember most about it?

My first job was in high school at the local pizza place. And what I remember the most is how everyone always told me I smelled good like pizza.

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

I cannot pinpoint the worst boss I ever had because I have appreciated and learned from each one of my bosses throughout my career. I still have many great relationships with previous bosses today.

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

Each and every

one of the employees throughout Peoplelink Group are my customers. What motivates me to service my customers is ensuring they have a positive experience with me and that in one form or another I was able to help them complete their task or answer their questions.

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

My long term goal in the Corporate Recruiter position is to develop the position to the point that myself, and hopefully a few more recruiters, are the "go to" people the branches can truly count on to find the perfect candidates for their openings. This will enable the offices to focus on developing their business. Eventually, I want to grow my position into a department and lead the Peoplelink Group Recruiting Department. I would also love



to build relationships with the Career services departments in each market to get the best of the best graduates.

**» What makes Peoplelink unique, from your perspective?** The way Peoplelink Group partners with their clients far exceeds other staffing services.

### » What is the best advice you could give to other Peoplelink staff members?

Never give up whether you are filling a position, finally getting that new client or your dreams.

**» What is your favorite movie?** My favorite movie is The Notebook although I have many others. Huge Tom Cruise fan so Top Gun is right behind The Notebook. **Book?** Anything by James Patterson. **Drink?** Fireball!

**» If you could have any car you want, what would it be?** I have a Jeep Wrangler Sahara and LOVE it! I would not trade it in for any other vehicle.

### » What is your home city? What is the greatest feature about your home city?

My home town is Bourbon, IN and has only one stop light.

### » How do you unwind when you're not at the office?

When I am not at work I unwind usually with a drink and playing with my 3 rescued dogs: Taffi, Rowen and Monsoon. I love watching and attending sports events as well.

### » What do people like most (least) about you?

I am non-judgmental, fun, outgoing and a good listener. I tell it how it is and not everyone wants to hear that.

**» Anything else?** Something that people do not know about me is that while I was in high school I spent my summers in Washington, DC, working as an intern for Senator Kennedy and played on his office softball team. 🧩

## From the President's Desk »

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We don't advocate for one position versus another. Different issues may call for different meanings of accountability in the same organization. What's important is to ensure that everyone understands what it means in the specific situation — especially the accountable individual.

In the case above, Madison assumed she was a tiebreaker or perhaps an issue owner who could try to build consensus. Some of her colleagues assumed she was a team coordinator, not

authorized to break a deadlock.

So the next time you delegate a task or decision, think about which kind of authority — issue owner, tiebreaker, or team coordinator — you are giving people. Being explicit about not just who is accountable but what type of accountability they have goes a long way toward preventing problems down the road. And if you're the one being handed the accountability baton, make sure you are clear on what you're receiving. 🧩

# Survey says employee attire has become less formal

HR.BLR.COM

Dressing up for work continues to go out of style, new research shows. Half (50%) of senior managers interviewed said employees wear less formal clothing than they did 5 years ago. In addition, nearly one-third (31%) of office workers stated they would prefer to be at a company with a business casual dress code; 27% favor a casual dress code or no dress code at all.

But there are limits to what passes as acceptable office attire. When senior managers were asked about the most common dress code violation at work, wearing overly casual clothing was the top response (47%), followed by showing too much skin (32%).

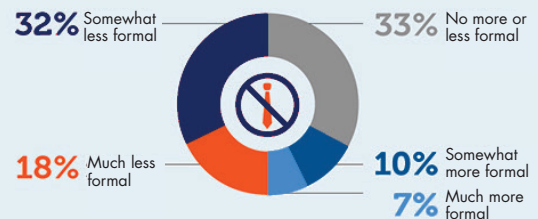
"Employees should take their cues from company guidelines and what others in the office are wearing. Some industries, for example, are more formal than others," said Brandi Britton, a district president for OfficeTeam. "A casual dress code doesn't mean that anything goes. Staff should always look professional and project an image that reflects positively on the business."

## Seven questions employees should ask themselves when choosing what to wear for work:

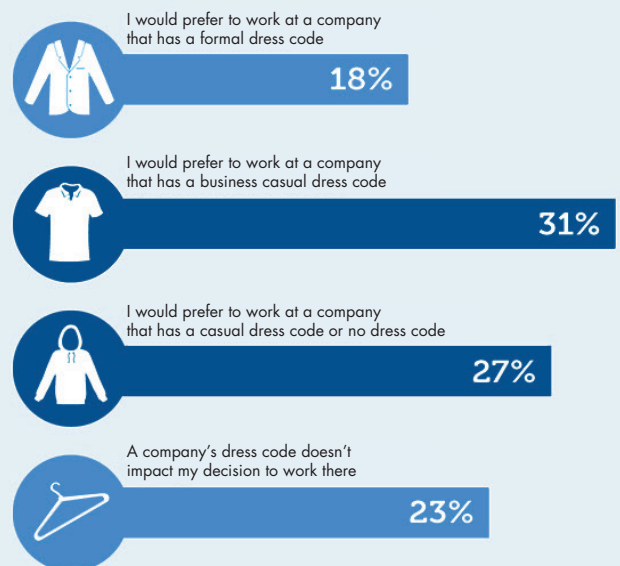
- 1. Does this follow company policy?** If there's a written dress code, abide by it. Also consider what your manager and coworkers wear, and use that information to guide your choices.
- 2. Am I revealing too much?** If you have to ask yourself this question, the answer is likely "yes." Avoid clothes that show too much skin, and err on the side of caution when displaying tattoos or piercings.
- 3. Is this distracting?** Wearing wild or bright prints can attract attention for the wrong reasons. In most workplaces, neutral colors and simple patterns, such as pinstripes, are a safe bet.
- 4. Am I overdoing it?** Take a subtle approach to jewelry, makeup, perfume, and cologne. Also note that unconventional hair colors or styles and unkempt facial hair may be frowned upon at more conservative companies.
- 5. Do I feel confident?** If you're uncomfortable in your outfit, it'll show. Make sure your clothes fit well and don't require a lot of readjusting.
- 6. Will I offend anyone?** Steer clear of wearing apparel with profanity, political statements, or other questionable material.
- 7. Does it pass the final check?** Give yourself a once-over from head to toe. Look out for wrinkled, torn or stained garments and scuffed shoes.

## Office Dress Codes

**50%** of managers say employees dress less formal than they did five years ago:



Employees weigh in on the type of dress code they prefer:



The most common dress code violations managers see at work:



Don't know/no answer: 3%

# Why New Personal Productivity Efforts Don't Stick

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getting more done; leaving our email open all the time seems like the only way to prevent it from overwhelming us; allowing constant alerts and notifications seems like the only way to avoid missing something important. In the abstract, studies about single-tasking seem logical. But in our own work, we tend to believe that those studies don't apply to us. The persistent belief that multitasking is good — or at least necessary — is difficult to overcome.

One reason for these internal barriers is that we undervalue the achievement and overvalue the importance of the interruption. For example, Joe, a client in one of our trainings, recently relayed a story about a time when he closed his email so that he could finish an important project, and as a result didn't respond immediately to an email from his boss about a client issue. When we asked what happened, Joe said that his boss got the information from a coworker. We asked if he got in trouble with his boss (he didn't), if he finished his important project (he did), and if the project was more important to the big picture than answering that email immediately (it was.) But he believed that he had been "beaten out" by his coworker, as if there were some ongoing

competition for who answers emails the fastest, or as he saw it, "who was the most responsive." Even Joe's boss confirming he made the right decision didn't seem to convince him.

Intellectually, the argument for single-tasking and the studies that support it make perfect sense, but deeply ingrained contrary beliefs and perspectives interfere with our ability to always be productive.

## Habit-hostile environments

In *Smart Change*, professor Art Markman discusses how behaviors are triggered by physical and mental cues: when you engage in a behavior consistently, it becomes "mapped" to certain circumstances and environments. To continue with the example above, another reason it's difficult not to task-switch is that we are conditioned to distraction by our environments, from the smartphones in our hands to the computers on our desks to the open offices that are so ubiquitous today. The average professional is so steeped in distractions all day long that having an opportunity to focus starts to feel weird.

And so it's tough to change a productivity system without changing the environment;

conversely, it's hard to maintain a system that was working if the environment has suddenly changed. For instance, if you switched from an office to a cubicle, you might suddenly find your "habit" of working for long, uninterrupted periods of time replaced with a "habit" of chatting with your coworkers.

It's also hard to maintain a good productivity system if you don't have a consistent environment at all. Your days may all be different. A lack of a stable routine can prevent consistent mapping, making habits harder to form and easier to disrupt. In this case, identifying some consistent cues can be useful. From your daily routine, identify those things that happen with relative consistency, and use them as anchors for new behaviors. This will reduce the likelihood that your new system falls apart.

For example, one component of the productivity system we teach is to keep a running task list that's prioritized by due date and based on the key priorities the user wants to accomplish, not other people's goals. Arriving at the office is the "anchor," the cue that triggers the thought to open the task list and let it dictate the morning's priorities. Then the first 30 minutes of the day are spent working on those priorities, not checking email. On days with early-morning meetings, arriving at the office 30 minutes earlier ensures that time is always available.

## Overthinking and stress

Once a habit has been created, the need for decision making is removed and the behavior becomes automatic. However, if one of the environmental, physical, or mental cues is more

intense than usual, it could erroneously signal to your brain that you're in a novel situation requiring a lot of intentional thought.

But this process is much slower and less effective than simply relying on your habits. Malcolm Gladwell calls this "choking." In his book *Outliers*, he uses the example of Jana Novotná and her 1993 match against Steffi Graf in the final round at Wimbledon. Near what should have been the end of the tournament, the pressure became too much, and Novotná began to suffer from overthinking. Instead of relying on the muscle memory and mental habits she had developed in countless hours of practice, she began to second-guess everything. And at that level of competition, second-guessing every move is disastrous.

Work can be stressful, and under pressure you may begin to think that although your practiced productivity habits have resulted in success in the past, now perhaps they take too long or aren't appropriate for the current situation. In this case, you might begin to turn every action into a decision. But in fact, these are the times when it is most useful to rely on your system.

True productivity is about achieving your significant results on a consistent basis. To accomplish this, you need to be able to hone your productivity system and ensure that you rely on it consistently. If you aren't always as productive as you'd like to be, or if you're trying to increase productivity throughout your organization, consider whether any of these factors are getting in your way. ☁





you'll be modeling good behavior and demonstrating your commitment to the shift in culture.

- **Ask for feedback and really listen to what you hear.**

Request big picture feedback ("How can I be a more effective leader?") and micro feedback ("What could I have done differently in that meeting so it would have been more productive?"). Listen carefully and openly to what you hear, and be genuinely curious about the other person's perspective. No matter what you hear, do not resist, explain, defend, or push back. You can process it all later and decide what you want to act on, but in the moment just take it all in. And say thank you.

- **Focus on thoughtful, caring attempts to help a person or situation improve.**

Increasing candor and feedback does not give any of us license

to say whatever we want, however we want, whenever we want. This is not about venting or getting something off our chests. The intention in creating a culture of candor and feedback is to help someone else develop and be more effective or to help a conversation, decision, or group be more productive. We share our perspectives in service of the other people, to be helpful. It has nothing to do with us feeling better.

- **Expect and lean into discomfort and mistakes.**

Like learning any new skill, getting better at candor and feedback will be uncomfortable and you will do it unskillfully at the start. We learn by trying, getting it wrong, understanding our errors, and then trying again. Since candor and feedback involve other people, there will likely be misunderstandings, hurt feelings, or other kinds of conflict. Don't expect yourself to skip this part of your learning or for this to



feel natural or easy. Neither will happen. Your discomfort and mistakes mean you're on the right path.

- **Clean up your mistakes once you make them.**

Making mistakes is natural. Not repairing any damage you do is unkind and not leader-like. If you hurt someone, say you are sorry. If you are misunderstood, own your part in the confusion, explain your intent, and apologize for any upset the confusion caused. You'll not only be doing the right thing by owning and cleaning up your mistakes but also sending two powerful messages to your organization: leaders make mistakes when they are learning something new, and they say they are sorry.

- **Understand when not to be candid or give feedback.**

There are legitimate times when candor and feedback are not the right answer. As my colleague Deborah Grayson Riegel said in a recent article, giving feedback is not the right course of action when the aim is to place blame rather than seek solutions;

when you're overly emotional (think HALT — hungry, angry, lonely, tired); when it's focused on personality rather than on behavior; when it's based on hearsay; or when you've given lots of other feedback recently.

- **Adopt a continuous improvement mindset.**

Watch what you are doing well, and learn from that. Notice where you are avoiding candor, venting, or delivering feedback unskillfully, and learn from that, too. Analyze what is working and what is not, then create strategies to improve. Like learning any new skill, it's an iterative and never-ending process. I've yet to meet a leader who believes she is good enough at candor and feedback.

If this sounds like a lot of work, that's because it is. There is nothing easy or simple about becoming better at these crucial leadership skills. As Warren Bennis once said, "Leaders know the importance of having someone in their lives who will unfailingly and fearlessly tell them the truth." Be that person for others. ✂

*Time is the  
scarcest resource and  
unless it is managed  
nothing else can  
be managed.*

— Peter Drucker

# HR News

## Latest FMLA pain: How to handle medical text messages

By Christian Schappel

More employees are communicating with their managers via texts. So what are your managers supposed to do when a text contains possible medical or FMLA-related info?

That's a tricky question, and the answer, quite frankly, depends on two things:

- What your leave policy or call-in policies say, and
- How your managers have treated employees' texts in the past.

Courts will look to both to see what kind of precedent you've set.

Take a recent FMLA lawsuit against Tyson Fresh Meats as a warning on both of these fronts.

Tyson had a call-in policy that stated: *"All management Team Members are expected to personally call their direct supervisor to report an unplanned absence or to report that they will be late."*

This is not unlike a lot of call-in policies employers are allowed to (and do) tie to their FMLA policies that require employees to call in prior to an absence — even an FMLA-related one. Courts have upheld terminations in which an employee out on FMLA leave was fired for failing to abide by such a policy.

### SUED FOR FMLA INTERFERENCE

There's no ambiguity in Tyson's policy — fail to call in when you're going to be late or absent, and you're in violation.



So why then is a court allowing a Tyson employee to sue for FMLA interference when it's clear that he:

- knew about the policy, and
- failed to call his supervisor prior to taking an FMLA-related absence?

The answer: There was evidence that the employee, a Tyson supervisor named Delbert Hudson, had communicated with his supervisor Hamdija Beganovic via text message on previous occasions when Hudson would be late or absent.

So when Hudson was terminated — for which he later sued — after taking FMLA leave for only texting — and not calling — to say that he would miss work, the court viewed the previous texts as potentially pivotal.

Tyson argued Hudson's FMLA interference

lawsuit had no merit, because he violated the company's call-in policy by not having an actual phone conversation with his supervisor. Ordinarily, that would've been a sound argument.

But the previous texting between Hudson and Beganovic, in the court's mind, may have set a precedent that would nullify Tyson's ability to lean on its call-in policy in this case. The court is now going to let a jury make the call — which means Tyson's in for a costly trial or settlement.

### DOUBLE-WHAMMY

The previous texts between Hudson and his supervisor could come back to haunt Tyson in another way as well.

Tyson argued that Hudson failed to give the company proper notice of his need for FMLA leave.

It turns out all Hudson said in his text to his supervisor prior to missing several days of work was:

*"having health issues, would be out a few days, and needed to see a doctor."*

Then, Tyson provided Hudson with a leave of absence application, on which the company claims he checked the "non-FMLA leave" box.

Part of Tyson's argument to get Hudson's lawsuit tossed is that since Hudson didn't provide info about his health issues via an actual phone call prior to taking leave

— in conjunction with his "non-FMLA" designation on the form — Hudson hadn't properly put the company on notice of his need for FMLA leave. Therefore, he wasn't protected by the law.

To this, the court basically established two things:

- How an employee designates his or her leave carries little weight because the person may not know if his or her leave qualifies for FMLA protections, and
- To a jury, the info provided in the text may have been enough to put the company on notice that the FMLA was in play — if the jury finds that the employee wasn't bound by the company's policy to **call in** with the info.

So, in a nutshell, if it's determined the company's call-in policy was negated by Hudson and Beganovic's previous text, Tyson may not have much of a leg to stand on here.

### MAKE SURE MANAGERS ABIDE

So what can employers learn from this case? If you want an enforceable policy requiring employees to actually call in prior to missing work, make sure your managers abide by that policy as well. That would require making sure managers — and their subordinates — know that texts are not an acceptable means of reporting absences/tardiness.

The second a court sees that texting has become an acceptable means of "calling," it'll take the teeth out of an official call-in policy.



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## Here's why employment law violations are going to start costing even more

*By Christian Schappel*

Recently, the EEOC announced a dramatic increase in its notice-posting violations (they doubled!). Now, the DOL has followed suit, announcing numerous civil penalty increases.

### WHAT'S BEHIND ALL OF THIS?

Back in November, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 was passed. It directs federal agencies to adjust their civil monetary penalties for inflation every year.

So not only are the following penalties increasing this year, expect them to climb every year.

### WHAT'S CHANGING?

The EEOC announced the penalty for violating the notice-posting (a.k.a., "poster") rules under the ADA, GINA and Title VII of the Civil Rights Act will more than double. The maximum penalty is \$525 — up from \$210.

Now, the DOL has released a list of the penalties increasing under its watch in 2016. Some of the highlights include:

- The DOL's penalty for willful violations of FLSA minimum wage and overtime rules will jump from \$1,100 to \$1,894.
- The FMLA penalty for violating the law's posting requirements will increase from \$110 to \$163 for each separate offense.

- OSHA's penalties are rising — with its top penalty for serious violations climbing from \$7,000 to \$12,471 and its top penalty for willful or repeated violations rising from \$70,000 to \$124,709.
- Numerous ERISA penalties will jump — for example, the penalty for not providing a summary of benefits and coverage to affected individuals will increase to \$1,087 from \$1,000, failing to inform employees of Children's Health Insurance Program (CHIP) opportunities will increase to \$110 from \$100 and filing to provide notices to retirement plan participants informing them of automatic contribution arrangements will increase from \$1,000 to \$1,632. Plus, many more.

Even the Department of Justice (DOJ) has gotten in on the act. It's increasing the penalties for employers who knowingly employ an unauthorized worker and employers who commit other immigration-related violations.

Example: The minimum penalty for knowingly employing an unauthorized worker will increase from \$375 to \$539 per worker. And for paperwork violations — like those related to Form I-9 — the maximum penalty is increasing from \$1,100 to \$2,156.

### WHEN DO THE NEW PENALTIES APPLY?

In general, the new civil penalty amounts are applicable to penalties that occurred after Nov. 2 and for which a civil monetary penalty was assessed after Aug. 1, 2016.

# Can noncompensable preexisting injuries be added to workers' comp claims?

By Alyssa A. Sloan

The West Virginia Supreme Court of Appeals recently addressed whether an employee's noncompensable preexisting condition can be added as a compensable component of a workers' compensation claim merely because it may have been aggravated by a compensable injury.

The supreme court decided that such preexisting injuries may not be added as a compensable component of a workers' comp claim for medical benefits, but it went on to find that if the aggravation of a noncompensable preexisting injury results in a discrete new injury, the new injury may be found to be compensable.

## Background facts

In the workers' comp claim before the supreme court, an employee incurred an injury to his thoracic and lumbar spine while he was participating in rescue drills. Thoracic and lumbar strains were the only compensable conditions listed in his claim.

He received conservative treatment for his injuries in the form of a spinal injection, physical therapy, and chiropractic treatment. He was found to be at maximum medical improvement approximately 4 months after his injury in 2012; however, he never returned to work.

Shortly after the claimant was found to be at maximum medical

improvement, his treating chiropractor requested authorization for injections to treat radiculitis, sciatica, degenerative disk disease, and facet syndrome. The request was denied because the injections would treat conditions that were not compensable in the claim.

The denial was protested, and the actual issue litigated before the West Virginia Insurance Commission's Office of Judges was whether the noncompensable conditions should be added as compensable components to the claim.

The evidence before the administrative law judge (ALJ) showed that the claimant had begun treatment in 2004 for lumbar radiculopathy, lumbar disk degeneration, lumbar disk displacement, and lumbar facet syndrome, the exact conditions he wanted to add to the workers' comp claim.

In fact, he had been treated for the conditions by his chiropractor the day before the compensable injury. Even in light of that medical evidence, the ALJ reversed the claims administrator's decision and added the four contested conditions to the claim.

The ALJ relied on workers' comp law from 1977, finding that because the claimant's conditions were aggravated by his compensable injury, they should also be considered compensable in his workers' comp claim. Upon appeal by the employer, the board of review reversed the ALJ's decision and found that the four conditions shouldn't be considered



compensable components in his claim. The claimant appealed the board's decision to the West Virginia Supreme Court of Appeals.

## Supreme court's decision

The supreme court found that the claimant failed to produce any medical evidence that his compensable injury, including his thoracic and lumbar strain, aggravated his preexisting noncompensable injuries. In fact, the only evidence of the impact of his compensable injury on his preexisting injuries was provided by two physicians who concluded that the compensable injury didn't aggravate the preexisting conditions.

Even though it isn't applicable to the claim before it in this case, the supreme court issued a new syllabus point explaining when a preexisting condition will become a compensable condition in a workers' comp claim.

The court specifically explained that a noncompensable preexisting injury may not be added as a compensable component of a claim for workers' comp medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury results in a discrete new injury, the new

injury may be found to be compensable.

The supreme court didn't provide any additional explanation of what would constitute a discrete new injury. However, the court did explain that because the West Virginia Code contains an apportionment statute for determining permanent partial disability impairment that doesn't permit a claimant to receive a permanent partial disability award for a noncompensable injury, it stands to reason that such a preexisting injury cannot be ruled compensable.

## Bottom line

While this decision is helpful to the extent that it provides guidance for self-insured employers and workers' comp claims managers, the court didn't explain how and when the aggravation of a preexisting condition becomes a discrete new injury that rises to the level of compensability.

At this juncture, such a determination would be left to a claims manager based on the medical evidence on record. It's likely that what constitutes a discrete new injury will be litigated in the future before the office of judges, board of review, and supreme court.