

Up*link®

The Peoplelink Online Newsletter

IN THIS ISSUE »

- The Worldwide Employee Engagement Crisis (1)
- From the President's Desk: Leadership Lessons from 10 Wildly Successful People (2)
- Bright Ideas When You Should Worry About Failure, and When You Shouldn't (3)
- Meet Stephanie August (4)
- Staffing Statistics (5)
- HR News (8)

Raising the Bar in Staffing Since 1987



The Worldwide Employee Engagement Crisis *Annamarie Mann and Jim Harter, Gallup*

The world has an employee engagement crisis, with serious and potentially lasting repercussions for the global economy.

Though companies and leaders worldwide recognize the advantages of engaging employees – and many have instituted surveys to measure engagement – employee engagement has barely budged in well over a decade.

Gallup has been tracking employee engagement in the U.S. since 2000. Though there have been some slight ebbs and flows, less than one-third of U.S. employees have been engaged in their jobs and workplaces during these 15 years. According to Gallup Daily tracking, 32% of employees in the U.S. are engaged – meaning they are involved in, enthusiastic about and committed to their work and workplace. Worldwide, only 13% of employees working for an organization are engaged.

Why Aren't the Numbers Moving?

With so many organizations focusing on engaging their employees, the question is: "Why aren't engagement levels across the world increasing?"



Many different factors can lead to stagnant levels of engagement. Executives can find clues to answer this question for their company among the various ways organizations provide employee engagement data.

Gallup sees a clear divide emerging within the engagement industry. On one end of the spectrum are scientifically and experientially validated approaches that lead to changes in individual and business performance, supported by strategic and tactical development and performance solutions

that transform organizational cultures. Though these approaches require more intentionality and investment, companies that use them are more likely to see increases in employee engagement.

At the other end of the spectrum are invalidated, unfocused annual surveys. Much like a traditional employee satisfaction survey, this type of survey usually measures a multitude of workplace dimensions that often

CONTINUED ON PAGE 6



LEADERSHIP LESSONS FROM 10 WILDLY SUCCESSFUL PEOPLE

Harvard Business Review

While catching up on my holiday reading, I came across a piece in the Harvard Business Review quoting 10 of their most “wildly successful people.” While you might argue whether they are “wildly successful,” there are some great ideas here to consider.

The novelist

Salman Rushdie on productivity: “I’ve always told myself to treat it like a 9-to-5 job... It doesn’t matter whether you’re feeling good that day. I don’t think writers or artists can afford to have a ‘creative temperament’ or to wait for inspiration to descend. You have to simply sit there and make yourself do it. Once your mind understands it has no excuses, it’s remarkable how it begins to play along.”

Actress and producer

Goldie Hawn on dealing with difficult colleagues: “Is it wonderful working with someone who’s gifted and talented and amazing and receptive? Yes. But some actors aren’t that generous. Some are temperamental. [So] you hold your tongue. You be patient and try to understand. If you get agitated, you’ll screw yourself up... You want to be able to think clearly, and the only way to do that is by getting quiet and knowing that you can’t change someone else but you can certainly

change you.”

Former U.S. Senator and peace negotiator

George Mitchell on resolving disputes: “First there has to be a certain level of knowledge about the history and nature of the conflict... The second thing you need is a recognition that the people involved must own the resolution because they’re the ones who will live with the consequences... Third, you must really have deep reservoirs of patience and perseverance... Fourth, you have to gain the best possible understanding of the bottom line, or basic objectives for each party... Finally, you have to be willing to take a risk when it’s warranted.”

Tennis pro

Andre Agassi on managing emotions: “I’ve seen people use emotion, positive or negative, as a tool and it works for them. But typically, the more you can remove emotion, the more efficient you’ll be. You can be an inch from winning but still miles away if you allow emotion to interfere with the last step. So you have to accept: the weather, heat, rain, stops and starts, the line calls, whatever your opponent is giving you, however tired or injured you are. There are so many things that can distract you from taking care of business.”

Oscar-winning

producer Brian Grazer on delegation: “Because I started at the bottom, I know all the little things that have to happen and I can sense when I’m being bullshitted. You have to know the weeds, to have lived in them, to delegate. I wouldn’t want to be a leader who had never lived in the weeds.”

Documentary filmmaker

Ken Burns on heroic leadership: “We choose leaders abysmally today. We expect perfection, and when we don’t find it we lament the absence of heroes. But heroism, by the very definition that came down from the Greeks, is a negotiation between strengths and weaknesses. Maybe I’m being glib when I say that people like the Roosevelts and Lincoln couldn’t make it past the Iowa caucuses, but it would be very difficult for them to succeed in this environment.”

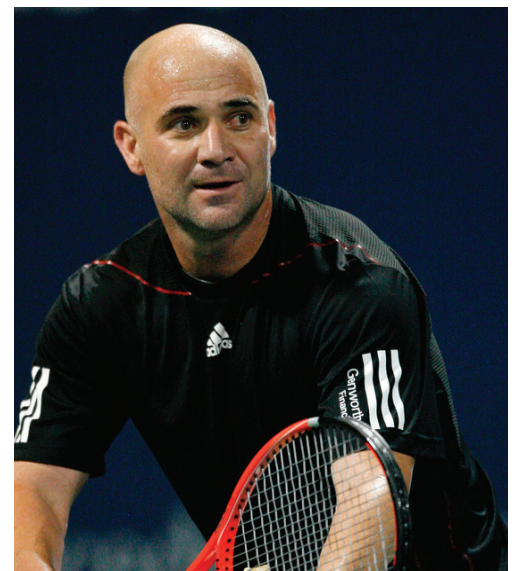
Dancer and choreographer

Bill T. Jones on self-doubt: “I’m depressive. Six years ago I didn’t know if I had the stuff to stay alive. So what do you

do? One way through is to keep working. Going to therapy is another. So is looking into the eyes of the people who love you. For me, that’s the man I married, Bjorn [Amelan], as well as my associate artistic director Janet Wong, who whenever I’m despairing looks at me in a way that says, ‘Why are you indulging in this? It’s not who you are. We have work to do.’ Doubt is fought by love and commitment to something bigger.”

News anchor

Katie Couric on authenticity: “A morning show... allows for casual conversation and interaction that makes your essence particularly obvious. I think that was one reason I was successful in the morning. People felt they were getting the genuine article. I was the same off-camera



Agassi

CONTINUED ON PAGE 7

Bright Ideas

WHEN YOU **SHOULD** WORRY ABOUT FAILURE, AND WHEN YOU **SHOULDN'T** *Art Markman, HBR*

We all fail, all the time. We might miss a call with a client because of an emergency work meeting, or miss that meeting because another project has suddenly become urgent. And then we (or our families) get sick, and we have to shift priorities around again.

These unsystematic failures are benign, though. They reflect that all of us have limited resources. There simply is not enough time, energy, or money, to do everything you want to do all the time. Part of being a responsible adult is learning to make tradeoffs: balancing your conflicting goals and trying to get as much done as you can in the time you have.

Unsystematic failures can also help you calibrate the right approach to the specific tradeoff between effort and accuracy. If you fail occasionally, you're probably hitting the right balance. If you fail too often, you're probably not putting in enough effort. If you never fail, then chances are you are spending too much time on most of your projects, because in general, the longer you work on a project, the better it gets. By polishing a particular project to a high gloss, you're giving yourself less time for other things that require your attention. The trick is to figure out how much effort is enough for each project, so that over time, you manage to take care of most of the things you need to do and do them well enough.

The thing you really need to watch out for is *systematic failure*.

Systematic failure happens when there's a particular goal you want to achieve, but never get to.

Maybe it's a major achievement, like writing a book or applying for a fellowship. It could be an important daily goal, like exercising or eating healthier.

No matter what it is, the causes of systematic failures usually boil down to some combination of these three factors:

1. SHORT-TERM PRESSURES VERSUS LONG-TERM GOALS.

This is the most obvious culprit. Most of us are drawn to achieve pressing short-term goals rather than put time into long-term projects. Lots of research suggests that our brains are wired to prefer tasks that pay off in the short-term rather than those whose benefit is long-term.

For example, many people have told me that they would like to write a book, but have never managed to do it. The reason for this failure is that there are always other tasks that require their attention in the moment, and so they fail to make progress on the book.

The people who do manage to accomplish

their long-term goals create regular space to make progress on them. For example, almost everyone I know who has completed a book (without hiring a ghost-writer, that is) has devoted blocks of time each week to writing.

2. ENVIRONMENTS THAT ARE HOSTILE TO OUR GOALS.

Without even realizing it, we often do what is easiest to accomplish rather than what we say is most important. Email is a great example. If you are like most people, you keep your email program open at work all day. Consequently, each new message is an invitation to drop what you are working on to check it. It feels like work – and it's much easier than finishing that 100-slide presentation or slogging one more time through a spreadsheet. Simply shutting off email for a few hours a day

can remove this source of distraction from the environment.

To make your environment more congenial, you should put up reminders of the goals you are systematically failing to achieve. Even a Post-It note on your monitor, or leaving a book you intend to read out on your desk, can be enough. Recent research suggests that these simple reminders provide cues that trigger actions, even if you are unaware that you saw them.

3. WORKING FOR TOO LONG.

Many workplaces create pressure to stay at the office for more and more hours, which (paradoxically) creates opportunities for systematic failure. Work is not an Ironman competition where the last person there wins.

Most people have an optimal number of hours they can



CONTINUED ON PAGE 7

Meet **STEPHANIE AUGUST** » » »

Operations Manager

Joplin, MO



» How long have you been in the staffing business?

I joined Peoplelink Staffing Solutions in August of 2012.

» What was your first job?

What do you remember most about it? My first job was at the Dairy Queen in Galena, KS. I loved waiting on customers and to make the perfect ice cream cone.

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

In the last 20 years, I have worked at 2 different jobs. I have learned different things from each boss and never really had

a "bad" one. They each brought something different to the table.

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

I am a people pleaser. I want everyone happy, whether it be at work or at home. I have a great relationship with my clients. In order for our clients to be happy, they need to be serviced in a very timely manner and we do that.

» What are some of your long-term goals? My long term goals would be that my leadership continue to grow in the different areas that Peoplelink

has to offer and for our office to be #1!

» What makes Peoplelink unique, from your perspective?

From what I hear, a lot of the other staffing agencies do not conduct personal interviews anymore. I can't imagine sending an employee to a job whom I had never met. We need to know who we are sending to our clients. Our hiring process is much more in depth than other agencies.

» What makes you successful as a Manager?

What makes me successful as a Manager is having a great team, and I do. We all work together very well. I am also very competitive. I don't like to lose and I like to be the best. If I'm not, I will do what it takes to get there. I think this will help our team grow and be very successful.

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

This is a tough business. You deal with so many different people with so many different values every day. Maintaining composure and professionalism

on a daily basis is a must. At the end of the day, you will be much more at peace with yourself knowing you handled yourself in a professional way.

» What is your favorite movie? I like the oldies, Footloose, Dirty Dancing, Grease
Book? anything Ann Rule **Drink?** red wine.

» If you could have any car you want, what would it be? A new Shelby Mustang.

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

My home town is Galena, KS. The greatest feature is that it is a small town. I am still very good friends with about six of my high school friends.

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

I have started running and love it. It is my "Me time."

» What do people like most (least) about you? I would like to think that I am very easy to talk to and always there to help. I also have a positive personality. I honestly don't know what people like least about me. I think that would depend on who you ask! 🧩

Let's Connect

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World: 431 East Colfax Ave., Suite 200
South Bend, IN 46617

We look forward to
working with you!

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

More US employers to hire temps in 2016

- Staffing Industry Analysts

US employers' plans to hire temporary workers in 2016 are a bit more optimistic than they were heading into 2015, according to CareerBuilder's job forecast for 2016. The forecast's survey found nearly half of employers, 47%, plan to hire temporary or contract workers in 2016, up slightly from 46% in last year's survey.

Additionally, 58% of these employers plan to transition some temporary or contract workers into permanent roles in 2016.

The survey also found that 36% of employers plan to add fulltime, permanent headcount in 2016, unchanged from the 2015 survey, which ranked as the best outlook since 2006. Ten percent plan to decrease staff levels — up from 9% last year — while 45% anticipate no change and 9% are unsure of plans.

"On average, the US has added 200,000 jobs each month over the last two years, and we expect 2016 to produce similar results, if not better," said CareerBuilder CEO Matt Ferguson. "The market is also showing signs of broader wage pressure. While

employers have been more willing to pay a premium for high-skill labor, they now have to pay more competitive wages for entry-level positions. Workers are gaining leverage."

Financial services, IT and large healthcare organizations are expected to outperform the national average for employers adding full-time staff. Manufacturing is expected to mirror the national average at 37%.

Of the employers who plan to increase the number of full-time employees in the New Year, the top five areas they will recruit for include:

1. Customer service: 32%
2. Information technology: 29%
3. Sales: 27%
4. Production: 24%
5. Administrative: 20%

The survey also listed five trends to watch in 2016, which include:

- 1. Opening new doors for low-skill workers:** Many employers are concerned with a growing skills gap, 63%, and report extended vacancies within their organizations at 48%. Thirty-three percent of employers plan to hire low-skill workers and invest in training them for high-skill jobs in 2016.
- 2. Hiring younger interns:** To encourage the next generation to pursue STEM-related fields (science, technology, engineering and math) and other in-demand areas, employers are building relationships with students at an early age. One-quarter plan to hire high school students as interns over the next 12 months.
- 3. Increasing wages at all levels:** To retain and attract top performers, 83% of employers plan to increase compensation for existing employees — on par with 82% last year — while 66% will offer higher starting salaries for new employees — up from 64% last year.
- 4. Reaching beyond US borders:** Employers will continue to look at talent pools outside the US to help fill labor deficits; 19% say they will hire workers with H-1B visas in 2016, which will enable them to employ temporarily foreign-born workers for specialized occupations.
- 5. Diversifying management:** Companies are expanding demographics in their company leadership. Fifty-five percent of employers plan to hire or promote more women for management roles, and 53% plan to do the same for diverse workers. Forty-seven percent of employers plan to promote workers under the age of 30 into management roles.

The survey was conducted online within the US by Harris Interactive on behalf of CareerBuilder among 2,338 hiring managers and human resource professionals. It was conducted between Nov. 4 and Dec. 1, 2015.

The Worldwide Employee Engagement Crisis

CONTINUED FROM PAGE 1

have limited alignment with other business objectives and can be difficult to take action upon after receiving results.

Technology also makes it easy to create an “employee survey” and call it an engagement program, which allows a company to fulfill an apparent organizational need and “check a box.” But metrics on their own don’t drive change or increase performance. Many of these survey-only approaches measure employee perceptions and provide metrics instead of improving workplaces and business outcomes.

In reality, when companies focus exclusively on *measuring* engagement rather than on *improving* engagement, they often fail to make necessary changes that will engage employees or meet employees’ workplace needs. These shortcomings include:

- viewing engagement as a survey or program instead of as an ongoing, disciplined method to achieve higher performance
- focusing more heavily on survey data or reports than on developing managers and employees
- defining engagement as a percentage of employees who are not dissatisfied or are merely content with their employer instead of a state of strong employee involvement, commitment and enthusiasm
- relying on measures that tell leaders and managers what

they want to hear – “We’re doing great!” – rather than research-based metrics that set a high bar and uncover organizational or management problems that are hindering engagement and performance

- “feeding the bears,” or measuring workers’ satisfaction or happiness levels and catering

on a close evaluation of the end-game deliverable of an improved workplace and performance.

These flawed approaches pose significant barriers to improving engagement, increasing performance, promoting manager development and achieving lasting change. Companies that base their engagement strategy on a survey or metrics-only solu-

performing organizations, Gallup has identified five best practices that improve engagement and performance:

Integrate engagement into the company’s human capital strategy. High-growth companies have a clear purpose behind their strategy for engaging employees, Gallup research shows. This approach includes

leadership involvement and commitment, a communication strategy, systems that hold leaders and managers accountable for follow-up and for using engagement data, and learning and development that align with the engagement elements. The most effective approach to engagement isn’t “start and stop” – instead, it’s an ongoing process that works alongside regular business activities.

Use a scientifically validated instrument to measure engagement. Since the engagement industry began in the late 1990s, it has taken on a life of its own. Almost every employee survey, regardless of its purpose, is referred to as an “engagement” survey. But

few instruments have been validated or subjected to academic peer review. As a result, many companies are attempting to increase engagement by focusing on problems that may not affect engagement or by tackling problems in the wrong order.

Understand where the company is today, and where it wants to be in the future. Many businesses seek to chart the same one-, two- or three-year journey to improved engagement. But



to their wants, instead of treating employees as stakeholders of their future and their company’s future

Though most approaches are well-intended, with an ultimate goal of improving the workplace and performance, too many contribute to a status quo that is not helping the business. Businesses must choose among these different approaches, and procurement departments often make decisions based on cost and proposed deliverables rather than

tion can find themselves caught in a “rinse and repeat” pattern, focusing on engagement periodically – usually around survey time. The result is that these companies make false promises to employees, pledging change through intensive communication campaigns but providing little actual follow-through.

Ways to Improve Engagement

By studying and working with highly engaging and high-

CONTINUED ON PAGE 7

The Worldwide Employee Engagement Crisis

CONTINUED FROM PAGE 6

every company's starting point is different, as is its internal capabilities and how fast it can change. After a company takes a baseline measurement, a three-year road map is a recommended strategy; however, it should be based on the company's needs for improving engagement. This approach will help create realistic milestones and actions.


Look beyond engagement as a single construct. Some companies focus on moving the overall engagement number while overlooking the tactical elements that drive improved performance. Engagement isn't determined by an

abstract feeling; it's the result of concrete performance management activities, such as clarifying work expectations, getting people what they need to do their work, providing development or promoting positive coworker relationships. For example, "expectations" are more than a job description. And "doing what you do best" has more to do with productively applying individual strengths than with general competencies.

Align engagement with other workplace priorities. Engagement shouldn't be "something else" an employee, manager

or leader has to do – instead, it should be how work gets done. Engagement is about investing in everyday working moments and incorporating engagement concepts into the workflow, even as businesses change and adopt new initiatives. When leaders prioritize new initiatives, managers may need to reset employee expectations, provide workers with new resources and ensure employees have opportunities to do what they do best.

Creating a culture of engagement requires more than completing an annual employee survey and then leaving

managers on their own, hoping they will learn something from the survey results that will change their daily behavior. It requires a company to take a close look at the critical engagement elements that align with performance and with the organization's human capital strategy. Managers and leaders should keep employee engagement top of mind – because every interaction with employees can have an impact on engagement and organizational performance. 


From the President's Desk »

CONTINUED FROM PAGE 2



Couric

look very far to realize that things could be a lot better, and the reason they aren't is because no one has thought about it enough."

Chess champion Garry Kasparov on coaching and competition: "There's this conventional wisdom that it's possible to give universal advice — a tip. But we're all different. Your decision-making process is as unique as your fingerprints or your DNA. Something that works for you may be counterproductive for me. Some of us are more aggressive; some more defensive. You have to understand who you are, know what you're capable of and what you're not, and then try to construct a game — or a deal or a campaign — in which your superior qualities will be factors and your disadvantages will not be displayed." 

as I was on. When I went to do the CBS Evening News, the format did not allow me to be as relaxed and show my personality. For the most part you're reading lead-ins to other people's stories — 22 minutes in all — and I couldn't relate to the audience in the way I'd been able to in the morning."

Designer Mark Newson on inspiration: "Anger" is probably too strong a word but if we were happy with the way everything was, we wouldn't have anything to do. You don't have to

Bright Ideas


CONTINUED FROM PAGE 3

work each day. For example, I can be productive at work for about 8-9 hours a day. If I spend any more time at work than that, then at some point, I start doing "fake work." I may look busy, but I'm not really making progress on anything. From that point forward, any time I spend at work is taking time away from other life goals.

Get to know your own capacity for work. Then, strive to work while you are at work and not work when you are not. In that way, you can save time and energy for other non-work goals in your life.

The next time you run into trouble, assess whether it's an unsystematic failure — just the result of balancing the tradeoffs of life

(or even unforeseen circumstances that won't happen again) — or a systematic one. Ultimately, the systematic failures in your life are the canary in the coal mine that signals when you need to make a significant change in your actions.

When you notice a systematic failure in your life, you need to make a change in your behavior. If you don't make a change, you will continue to fail. Finally, if you experience a lot of unsystematic failures, it might be worth rethinking the number of tasks you are taking on. Perhaps you need to offload some responsibilities onto someone else, before you start experiencing more systematic failures. 

Top 10 list of hard-to-fill jobs, according to ASA

By HR.BLR.Com

The American Staffing Association (ASA) has released its third quarter Skills Gap Index, which identifies the hardest-to-fill occupations in the U.S., with the 10 most difficult being:

1. Podiatrists
2. Photographic process workers and processing machine operators
3. Occupational therapists
4. Heavy and tractor-trailer truck drivers
5. Psychiatrists
6. Forest fire inspectors and prevention specialists
7. Internists, general
8. Physical therapists
9. Speech-language pathologists
10. Occupational therapy assistants

During the past quarter, podiatrists, psychiatrists, general internists, forest fire inspectors, and prevention specialists moved into the top 10 list of hardest-to-fill positions, displacing family and general practitioners, microbiologists, surgeons, and nurse practitioners—nonetheless the top 10 list is still dominated by the health care sector.

"Businesses are turning to staffing and recruiting firms to source new talent and for information on strategies to better retain top talent," said Richard Wahlquist, ASA president and chief executive officer. "With more than five million unfilled job openings



in the U.S. today, the ASA Skills Gap Index is an important tool for firms to use to ensure that they are setting wages at competitive levels based on current skills shortages and regional market conditions."

The ASA Skills Gap Index was established by ASA, using a hiring indicator developed by ASA corporate partner CareerBuilder. The hiring indicator measures the level of difficulty to fill a specific occupation based on demand, supply of active candidates, and all individuals working in that occupation. The lower the score, the harder it is to fill that position.

The ASA Skills Gap Index concentrates on hiring indicator scores of 50 or less with a demand of 2,000 jobs or more to determine the top hard to fill occupations. The ASA Skills Gap Index is updated quarterly.

CareerBuilder recently implemented stricter guidelines for its demand data deduplication methodology, resulting in significantly fewer reported job postings on average. This changed the base for the ASA Skills Gap Index, reducing the number of hard-to-fill occupations overall.

Technology can help employees keep their health-related New Year's resolutions

By HR.BLR.Com

It's that time of year again when employees make resolutions to be a better—and healthier—person in the New Year by changing some of their behavior. According to a recent Marist Poll, health-related resolutions ranked at the top with respondents, including losing weight, exercising more, quitting smoking, improving overall health, and eating healthier foods.

New research finds that mobile apps, social media, and Internet resources are the ways to go in 2016 to make keeping resolutions much more doable. Workers can use the Web to learn how to adopt better health habits or turn to social media to find a supportive community for their health goals.

Online and mobile health interventions are getting easier to access, according to an American Psychological Association (APA) press release. In a special issue of *Health Psychology*, practitioners and researchers discuss a range of health behaviors targeted by online and mobile platforms, including smoking cessation, substance abuse, physical activity, sleep habits, stress management, and medication adherence. Interestingly, tanning was included in the list.

"Healthcare costs continue to escalate," said issue co-editor Dr. Belinda Borrelli, professor and director of Behavioral Research of Boston University (BU). "But with increased access to smartphones and the Internet, there is an unprecedented opportunity to use these less-expensive technologies to prevent,

assess, and treat health behaviors across a wide segment of the population never before thought imaginable."

Specifically, according to a BU article, the study collected data on mobile and smartphone ownership, sending and receiving texts, downloading and using apps, using Facebook, and visiting health-related websites. In addition, the study explored the current use, and future willingness to use, electronic (eHealth), and mobile (mHealth) technology.



Using smoking cessation as an example, Dr. Borrelli and her colleagues found that the overall use of these kinds of technologies was high. Although smokers who are not motivated to quit are less likely to use available technology than smokers who are motivated to quit, there was sufficient evidence to justify exploring the use of eHealth and mHealth interventions to encourage cessation for those who are not motivated to quit.

The APA press release also reports on other articles in the special issue of *Health Psychology*. One article includes a study of 492 smokers who used an online treatment program to try to quit smoking cigarettes. The study showed that the subjects who actively participated or even just lurked on one of the program's community message boards were more successful at quitting than

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smokers who did not use the online forums.

Another article describes how self-guided, Web-based sessions reduced the severity of insomnia as well as work-related stressors and thought rumination. Another article describes how people who overused tanning beds were more likely, than a control group, to stop tanning after viewing an online educational program about the risks of tanning and having a positive body image without doing so.

Finally, an article in *Tech Times* provides names and information on specific apps that will help workers keep their resolutions. Your healthcare insurance provider may also have its own apps, websites, or a list of resources you can share with employees to help keep them well in the New Year—and keep your company's healthcare costs down.

Make The Right Call On On-Call Shifts

By Mark T. Kobata and Marty Denis

Multiple lawsuits have been filed recently in California against retailers including BCBG Max Azria, The Gap Inc. and Forever 21 alleging that they do not pay their employees reporting time pay when they are required to

report for on-call shifts but ultimately aren't put to work or allowed to work. The lawsuits allege that the retailers tell their employees to consider on-call shifts as regular shifts, but that the employees ultimately don't work the shift and are not paid for their on-call time.

Although it is not required under the federal Fair Labor Standards Act, many states require that nonexempt employees be paid reporting time pay when they are required to report to work but aren't put to work or work less than their scheduled day's work. This reporting time pay compensates employees for the time that they are prevented from obtaining supplemental employment, etc. *Robinson v. BCBG Max Azria Group LLC, Case No. BC597311, Superior Court of California, County of Los Angeles* (Oct. 9, 2015); *Kennedy v. Forever 21 Retail Inc., et al., Case No. BC597806, Superior Court of California, County of Los Angeles* (Oct. 14, 2015).

IMPACT: Retailers or other employers using the practice of on-call shifts should carefully review each state's laws where they do business to determine whether they require payment for such shifts, even if the employee ultimately does not work.

Don't 'Like' Something On Facebook? Too Bad!

By Workforce.com

We all have a presence online these days. For employers, that online presence often reflects a significant investment of time



and money building a positive reputation. So what is an employer to do when a disgruntled employee goes online and begins badmouthing

the employer on Facebook or another social media site? Shouldn't an employer have the right to discipline, or even fire, an employee who criticizes their employer online?

Not according to the National Labor Relations Board. The NLRB views online expressions of dissatisfaction with an employer as potentially protected concerted activity, or the equivalent of a group of employees discussing labor issues. In the case of *Three D LLC v. National Labor Relations Board*, the U.S. Court of Appeals for the 2nd Circuit upheld the NLRB's ruling that employees' Facebook comments calling the employer an "asshole" and complaining about how taxes were withheld from their paychecks could not lawfully be used as a basis for termination. Recognizing that an employee could be disciplined for public comments, the NLRB concluded, and the 2nd Circuit affirmed, that the employees' online comments were protected. *Three D LLC v. National Labor Relations Board*, case number 14-3284 (Oct. 28, 2015).

IMPACT: Employers must be very careful in responding to employees' online activities. While it may be possible to lawfully discipline an employee for an online post, this will likely be the exception and not the rule. So long as an online discussion concerns employees' working conditions, comments on those working conditions likely could be seen as concerted activity protected under the National Labor Relations Act.

And We Have an Early Leader for Worst Employer of the Year

By Jon Hyman, Workforce.com

A federal court judge has ordered a Philadelphia-area publishing company, American Future Systems, to pay its employees \$1.75 million in unpaid wages. The company's sin? It docked its employees for time spent going to the bathroom.

According to the *Philadelphia Inquirer*, "Labor Department filed a lawsuit, saying the company violated the U.S. Fair Labor Standards

Act because employees weren't earning the minimum wage of \$7.25 per hour due to

the company's policy of requiring workers to clock out while they were going to the bathroom or grabbing coffee or a smoke."

In its decision, the court applied a bright-line rule to conclude that whenever a work-break lasts 20 minutes or less, it must be paid, no exceptions. For more on this rule, click here.

Putting aside the illegality of a policy that docks employees' pay every time they go to the bathroom, who in their right mind would want to work for an employer that tracks their every move within the workplace like tagged wildlife? If an employee is abusing bathroom time (e.g., taking excessive breaks to avoid work, doing a crossword puzzle instead of taking care of business) treat the performance deficiency via counseling or discipline. But, to adopt a company-wide policy that docks employees for their potty time is not just illegal, but a horrendous employee-relations move.



A Legal Top 10 List That Does Not Include Cute Kittens, the Kardashians or Kylie Jenner

By Rick Bell, *Workforce.com*

The parade of top trends to watch for in 2016 has commenced, some of course being more valuable than others.

Employment law firm Littler Mendelson recently released a report that looked at key statistics from the U.S. Equal Employment Opportunity Commission in 2015 and offered a forecast of the top 10 EEOC developments to watch for next year.

According to Littler's research, the EEOC in 2015:

Filed fewer lawsuits; focused on multi-victim lawsuits; and concentrated the majority of claims under the ADA.

"Of the 142 lawsuits filed by the agency during FY 2015, the largest number involved claims under the ADA (37 percent or 53 lawsuits)," Littler noted in a news release.



And now on to Littler's top 10 trends for 2016 (included is the firm's perspective; I'm not nearly that smart):

- 1. Continued Focus on Systemic Investigations.** One significant case to watch is the pending 5th Circuit case, *EEOC v. Bass Pro Outdoor World LLC*, which will determine whether the EEOC can seek compensatory and punitive damages and jury trials based on Section 706 of Title VII or whether the EEOC will be limited by Section 707 of the act that expressly refers to "pattern or practice" actions.
- 2. Potential Effect of *Mach Mining* Conciliation Process and EEOC Investigations.** While the U.S. Supreme Court in *Mach Mining* ruled that judicial review of the EEOC's conciliation efforts would be limited, the court nevertheless held that EEOC "must engage the employer in some form of discussion" to resolve the matter.
- 3. Continued Scrutiny of Hiring Policies and Practices.** While recent litigation has focused on criminal history, the EEOC also has been closely scrutinizing other pre-employment hiring practices that may create barriers for individuals with protected status, including any pre-employment testing engaged in by employers.
- 4. Expansion of Pregnancy Discrimination Claims.** The EEOC's guidance after *Young v. UPS* makes clear that failing to accommodate pregnant employees may expose employers to Americans with Disabilities Act claims based on temporary disabilities caused by pregnancy.
- 5. Evolution of Religious Discrimination Claims.** The scope of reasonable accommodation for religious practices will likely receive more attention over the coming year. Care must be taken with both grooming and appearance policies and issues of requested time off, including breaks for religious practices. In dealing with the latter issue, a case to closely monitor is *EEOC v. JBS USA LLC*, pending in federal court in both Nebraska and Colorado.
- 6. Broad Interpretation of LGBT Rights in the Workplace.** The EEOC has stated in unequivocal terms that it views discrimination based on sexual orientation "necessarily an allegation of sex discrimination under Title VII."
- 7. Ongoing Scrutiny of ADA Claims.** In light of the EEOC's focus on the ADA, employers should closely monitor:
 - Employers with inflexible leave policies.
 - Employers that fail to engage in an interactive process in handling requests for reasonable accommodation.
 - Employer wellness policies that are not viewed as "voluntary" by the EEOC; *EEOC v. Flambeau Inc.* is one pending case to watch closely.
- 8. Increased Attention to Equal Pay.** EEOC chair Jenny Yang has underscored the pay disparity between the average earnings of women and men, and the agency will very likely place increased attention on equal pay issues during the coming year.
- 9. Increased Focus on Investigations in the Absence of Charges of Discrimination.** The EEOC has statutory authority to initiate age discrimination and Equal Pay Act investigations even in the absence of a charge of discrimination. In fact, one of the EEOC's largest pending age discrimination lawsuits, *EEOC v. Texas Roadhouse Inc.*, stems from a "directed investigation."
- 10. Harassment in the Workplace.** The EEOC has established a successful track record in litigating harassment cases over the past fiscal year and has set up a special task force to address the ongoing concern of harassment in the workplace. This provides a clear signal to employers that during the coming year, the EEOC will continue to vigorously investigate harassment charges.