HR COMPLIANCE LIBRARY
Ideas & Trends

SEPTEMBER 2, 2015
ISSUE NO. 774

INSIDE

Wolters Kluwer

EMPLOYEE RELATIONS

Employer branding versus employee rights: knowing where to draw the line

Today employees and the public are generally aware of product branding and a company's need to protect its brand in the marketplace. But how far can an employer go in prohibiting employee activities that it regards as potentially damaging its brand in the public's eye? That was the question addressed by the D.C. Circuit in *Southern New England Telephone Co. v. NLRB*. The appeals court ruled that although Section 7 of the NLRA protects the right of employees to wear union apparel at work, under the "special circumstances" exception to that rule, AT&T lawfully prohibited publicly visible employees from wearing "Inmate/Prisoner" shirts.

Understanding the AT&T case

As part of a public campaign to put pressure on AT&T during contentious contract negotiations, the union representing AT&T technicians distributed T-shirts to its members. The front of the shirt said "Inmate #" and had a black box beneath the lettering. The back of the shirt said "Prisoner of AT$T," with several vertical stripes above and below the lettering. The shirt contained no reference to the union or to the ongoing labor dispute.

Under AT&T's appearance standards, publicly visible employees are required to present a professional appearance at all times and to refrain from wearing clothing with "printing and logos that are unprofessional or will jeopardize" the "Company's reputation." Under this policy, AT&T banned employees who interact with customers or work in public from wearing the union T-shirts. It issued one-day suspensions to 183 employees who did not comply with the directive to remove the shirt.

In response, the union filed an unfair labor practice charge contending that AT&T infringed employees' Sec. 7 rights by suspending the employees. Finding that "the totality of the circumstances would make it clear" that a technician wearing the shirt was an AT&T employee "and not a convict," the NLRB majority found that the prohibition violated the NLRA.

"Special circumstances" doctrine. The Supreme Court has long recognized, since *Republic Aviation Corp. v. NLRB*, that under the "special circumstances" doctrine, a company may lawfully ban union messages on publicly visible apparel on the job when it reasonably believes the message may harm its relationship with its customers or its public image. The "special circumstances" exception is designed "to balance the potentially conflicting interests of an employee's right to display union insignia and an employer's right to limit or prohibit such display," the D.C. Circuit observed. "Special

circumstances" include "protecting the employer's product" and "maintaining a certain employee image."

When a company issues dress and grooming policies, its strongest position is to communicate and justify dress and grooming requirements based upon objective job requirements. A strong connection between dress or grooming and job performance will place the company in the best position to defend the policy to employees and third parties.

Unreasonable application. In this case, the appeals court determined that the Board applied the "special circumstances" exception in an unreasonable way. The appropriate test for "special circumstances" is not whether AT&T's customers would confuse the "Inmate/Prisoner" shirt with actual prison garb, but whether AT&T could reasonably believe that the message might harm its relationship with its customers or its public image. To resolve this case, it was enough to ask the question: "What would you think about a company that permitted its technicians to wear such shirts when making home service calls?" Consequently, in the *Southern New England Telephone* case, the appeals court ruled that the Board should have held that "special circumstances" applied.

The Look Policy. But just how far can an employer take its dress code in attempting to establish its brand? Retailer Abercrombie & Fitch required employees in its stores to comply with a "Look Policy" intended to promote the Abercrombie brand. Accordingly, employees were required to dress in clothing consistent with clothes that Abercrombie sold in its stores. While the policy prohibited employees from wearing black clothing and "caps," it did not explain the meaning of the term "cap."

Because Abercrombie claimed it did very little advertising through traditional media outlets, it contended that its Look Policy was critical to the health and vitality of its "preppy" and "casual" brand. It argued that a sales-floor employee who violated the Look Policy by wearing inconsistent clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position, and ultimately damages the brand."

However, in *EEOC v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court held that the retailer's refusal to hire a Muslim applicant because her headscarf conflicted with the store's "Look Policy" violated Title VII. In Abercrombie, a practicing Muslim woman applied for a sales position. Her interviewer was concerned whether her headscarf was a forbidden cap, which would conflict with the retailer's Look Policy. Indeed, a district manager told the interviewer that the applicant's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise.

In addition to the headscarf, Abercrombie has used its "Look Policy" to justify not hiring individuals because of tattoos, body piercings, and weight. Abercrombie has previously been taken to task for marketing campaigns that perpetuate racial stereotypes by avoiding Asian and African-American models.

Takeaway for employers

Employers have a recognized interest in ensuring that employees who deal with customers promote a good public image. When a company issues dress and grooming policies, its strongest position is to communicate and justify dress and grooming requirements based upon objective job requirements. A strong connection between dress or grooming and job performance will place the company in the best position to defend the policy to employees and third parties.

So what factors should an employer consider in developing a dress code?

- **Business justification**–The key factor in determining whether a personal appearance and dress code is justified

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HR Compliance library—Ideas & Trends (USPS 680-810)(ISSN 0745-0613), a Wolters Kluwer editorial staff publication, is published monthly by Wolters Kluwer, 4025 W. Peterson Ave., Chicago, Illinois 60646. Periodicals postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: SEND ADDRESS CHANGES TO HR COMPLIANCE LIBRARY—IDEAS & TRENDS, 4025 W. Peterson Ave., CHICAGO, IL 60646. Printed in U.S.A.

is the nature of the work performed by the individuals to whom the code is applied. For example, it is more reasonable for a department store to set certain appearance standards for its sales personnel than for a machine shop to establish appearance standards for its workers.

- **Privacy**–Requiring a specific type of dress or personal appearance may be an intrusion into the personal lives of employees.
- **Safety**–Another factor that employers should consider when establishing dress codes is safety. For example, most employers require employees to wear hard hats when on a construction site because of the danger of heavy, falling objects.
- **Morale**–Beards and hair styles have been a problem for some employers in the past. Absent justification for the restrictions, no-beard and hairstyle policies can cause disruption and morale problems. They may even cause the good, creative, and independent employee to leave.
- **Legal compliance**–Dress and appearance policies and regulations bring on legal responsibilities. For example, an employer can't use a dress policy to justify its refusal to accommodate the religious practices of job applicants or employees. ■

Source: *Article written by Ronald Miller, J.D. and originally published in the August 5, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

BENEFITS

Vehicle-related benefits continue to rank high with employees

Powered by signs of an economic recovery, automobile allowances continue to be popular employee benefits programs for United States companies according to a new survey, "Vehicle-Related Benefits Programs" by WorldatWork and underwritten by Runzheimer International. WorldatWork conducted the 2015 survey of its membership to better understand the prevalence and perceptions of vehicle-related benefits programs. WorldatWork conducted similar vehicle-related surveys in 2011 and 2008.

"Inconsistent fuel costs have done little to sway corporate America's opinion on vehicle-related programs. We're witnessing companies continuing to use a combination of automobile perks as employee benefits and as effective tools to satisfy top talent," said Lenny Sanicola, practice leader at WorldatWork.

Nearly 9 of 10 (89 percent) organizations surveyed offer a car allowance, company car, fuel reimbursement or other vehicle benefit to at least some of their workforce. While vehicle allowance has increased to 69 percent since 2011, the overall allowance has decreased significantly from 76 percent in 2008. Vehicle-related benefits programs were most prevalent in the United States (74 percent), followed by Canada (24 percent), Western Europe (21 percent) and United Kingdom (20 percent). While domestic programs remain stable, international vehicle benefits programs have slightly increased since 2011.

A few additional highlights from the 2015 survey include:

- 70 percent of respondents report fuel or mileage reimbursement as the most common vehicle related benefit. While 69 percent of those surveyed report car allowance as the most popular program.
- Similar to findings in 2008 and 2011, in 2015, 75 percent of organizations offer a car allowance to executives while 66 percent provide executives with a personal vehicle. Fuel for mileage reimbursement is widely eligible among sales professionals (49 percent) and employees with a bona-fide business need (69 percent).
- Four percent of companies report vehicle benefit programs are believed to have a positive impact on employee satisfaction.
- Two-thirds of organizations (66 percent) always or sometimes promote their vehicle-related programs as a key employee benefit to attract new employees. ■

Source: *WorldatWork.*

BENEFITS

Benefits remain a key tool for recruitment and retention

In spite of major changes in the health care landscape, small-business owners looking to recruit and retain top employees still need to pay close attention to their benefits offerings. According to the *2015 Aflac WorkForces Report for Small Businesses* released by Aflac, a majority of workers employed in small businesses are willing to consider a job with slightly lower pay but better benefits, while half of potential job-changers say improving their benefits package could keep them right where they are.

"The Affordable Care Act has enabled more Americans to obtain health care benefits, but it has not reduced the overall costs or the health care concerns of the majority of employees," said Aflac Senior Vice President, Chief Human Resources Officer Matthew Owenby. "Offering robust benefits, including major medical and voluntary insurance, remains an important factor for small businesses to keep employees happy while increasing growth opportunities."

Employees confirm role of benefits in job decisions. With the U.S. Bureau of Labor Statistics' July 2015 unemployment rate at 5.3 percent, small businesses realize the battle for talent is getting tougher. As a positive sign of their hiring ambitions, the Aflac study found more than one-third (34 percent) of decision-makers expect to hire full-time employees, while 28 percent believe they will hire part-time employees in the next 12 months. Continuing to offer benefits to recruit and retain employees is important to meeting workers' preference for strong benefits packages. According to the study:

- Almost 6 in 10 (59 percent) workers at small companies are at least somewhat likely to accept a job with slightly lower pay but better benefits;
- Nearly half (49 percent) of small-business employees who at least somewhat agree they'll be looking for jobs in the next year also say improving their benefits package is one thing their employers could do to keep them in their jobs; and
- Almost 9 in 10 (87 percent) employees at least somewhat agree they consider voluntary insurance to be part of a comprehensive benefits program.

Small-business owners appear to be listening. While their top business objective in 2015 continues to be controlling costs, the 2015 Aflac study found that the percentage of small-business employers offering voluntary insurance to employees compared to 2014 has increased from 18 to 22 percent, a move that may be leading to more satisfied employees.

Compared to those not offered voluntary benefits at work, small-business employees enrolled in voluntary benefits are more likely to be very or extremely satisfied with their jobs and their overall benefits packages as well as are more likely to believe the benefits package offered by their employer meets their family needs well:

- 74 percent are very or extremely satisfied with their jobs (17 percent more than those not offered voluntary benefits by their employer).
- 71 percent are very or extremely satisfied with the benefits offered by their employers (48 percent more than those not offered voluntary benefits at work).
- 73 percent report the benefits package offered meets their current family needs very or extremely well (40 percent more than those not offered voluntary benefits on the job).

"As competition for top employees heats up, employers know they need to ante up when it comes to compensation packages. It seems that health care benefits, both major medical and voluntary benefits, are prime areas to upgrade in order to lure and hold onto top talent," Owenby said. ■

Source: *Aflac.*

VETERAN EMPLOYMENT

Department of Labor opens 2015 VETS-4212 filing period

The VETS-4212 reporting cycle for 2015 is now open, and the filing deadline for the reports is September 30. Filing information is available on the DOL's Veterans' Employment and Training Service (VETS) website at http://www.dol.gov/vets/vets4212.htm.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 38 USC Section 4212(d), requires federal contractors and subcontractors subject to the Act's affirmative action provisions in 38 USC Section 4212(a) to track and report annually to the Secretary of Labor the number of employees in their workforces, by job category and hiring location, who belong to the specified categories of veterans protected under the statute. Generally, the reporting cycle begins annually on or around August 1 and ends September 30.

Regulatory changes. The reporting form for this requirement is administered by VETS. Previously, the required forms were the VETS-100 and VETS-100A forms, depending on the dollar amount of the relevant government contracts and whether those contracts were entered into on or after December 1, 2003. The two forms had been necessary due to significant changes to VEVRAA made by the Jobs for Veterans Act of 2002 (JVA) that apply to contracts entered into on or after December 1, 2003.

In the September 25, 2014 edition of the *Federal Register*, VETS published a final rule (effective October 27, 2014) amending its regulations at 41 CFR Part 61-300 which set forth the 38 USC Section 4212 reporting obligations of federal contractors (79 FR 57463-57476). The final rule rescinded the agency's regulations at 41 CFR Part 60-250 which had established the VETS-100 reporting obligation and revised the regulations at 41 CFR Part 61-300 which required the VETS-100A report.

VETS rescinded the regulations at Part 60-250 because they were obsolete. Contracts subject to the pre-JVA standards no longer exist, either because they have been modified, rendering them subject to the JVA standards, or have since ended, VETS noted in the preamble to the final rule, explaining that the Federal Acquisition Regulations (FAR) generally limit the length of government contracts to a maximum period of five years.

The final rule revised the Part 60-300 regulation to require contractors and subcontractors to report the specified information for protected veterans in the aggregate rather than for each of the categories of veterans protected under the statute. It also: (1) renamed the required annual report, "Federal Contractor Veterans' Employment Report VETS-4212", (2) revised the definitions of some terms used in the regulations; (3) revised the text of the reporting requirements clause included in government contracts and subcontracts, and (4) revised the methods of filing to allow for electronic filing.

Form approval. On November 19, 2014, the Office of Management and Budget (OMB) approved the VETS-4212 form for use through November 30, 2017. On July 28, 2015, VETS sought approval of a non-material change to the VETS-4212 form because the contractor responsible for receiving the report form changed their physical address and VETS updated its web addresses and email information. Also, VETS requested approval to discontinue the VETS-100A form because it has been replaced by the VETS-4212 form, and therefore, no longer has practical utility for the agency. The OMB approved this request the following day. 2015 is the first year of implementation for the VETS-4212 form. ■

Source: *Written by Cynthia L. Hackerott, J.D.*

COMPENSATION

U.S. companies planning similar pay raises for 2016

Pay raises for U.S. employees are expected to hold steady in 2016, according to a survey by Towers Watson. The nationwide survey of more than 1,100 U.S. companies also found that employers continue to reward their best performers with significantly larger pay raises as they look for ways to retain top-performing talent in a tightening labor market.

The survey, conducted by Towers Watson Data Services, found that virtually all respondents (98 percent) are planning to give employees raises next year and are projecting average salary increases of 3.0% in 2016 for their exempt nonmanagement (*e.g.,* professional) employees. That's the same increase these employees received this year and in 2014. Employers are also planning 3.0% salary increases for nonexempt salaried and nonexempt hourly employees. Executives and management employees can expect increases that will average 3.1% in 2016. The number of companies that are giving raises has risen steadily since the recession in 2008.

"To a large extent, 3% pay raises have become the new norm in corporate America. We really haven't seen variation from this level for many years," said Sandra McLellan, North America practice leader, Rewards, at Towers Watson. "While most organizations are finding the talent they need at current salary levels, we are seeing more employers prioritizing how their salary budgets are being spent, especially in light of their ongoing difficulty in attracting and retaining top performers or employees with critical skills."

Indeed, the survey also found that exempt workers who received the highest performance ratings were granted an average salary increase of 4.6% this year, about 77 percent larger than the 2.6% increase given to workers receiving an average rating. Workers with below-average performance ratings received salary increases of less than 1%.

"We've seen many companies make dramatic changes to their approach to performance management, including eliminating formal performance reviews or taking a 'ratingless' approach to reviews. Many organizations are rethinking whether linking base salary increases primarily to last year's performance makes sense or if this should be the role of short-term-incentive and bonus programs," said McLellan.

In fact, the survey also revealed that more employees are becoming eligible to receive annual and short-term incentives, and more are also receiving awards. More than eight in 10 (85 percent) exempt employees received a bonus this year, up from 81 percent in 2014. Meanwhile, 87 percent of exempt employees were eligible to receive an annual or short-term bonus this year, up slightly from 86 percent last year.

"It's no longer all about base salary. While our research consistently shows the importance of pay when employees decide to stay or leave an organization, we also know their decisions are not just about the money. Opportunities for career development, learning development and challenging work are top drivers of retention. It's the value of the total package — compensation, benefits and nonmonetary rewards — that makes the difference. As a result, companies are paying closer attention to understanding how employees value these elements," said McLellan. ■

Source: *Towers Watson.*

IMMIGRATION

Should more foreign workers be employed in the U.S.?

Should the U.S. government raise the cap on H-1B visas and allow more foreign workers to be temporarily employed in the U.S.? Twenty-seven percent of employers say yes with more than half of these employers expressing concern over a widening talent gap and citing the residual benefit of furthering progress in STEM-related fields (science, technology, engineering and math). The national survey, which was conducted online by Harris Poll on behalf of CareerBuilder from May 14 to June 3, 2015, included a representative sample of 2,321 hiring managers and human resource professionals across industries and company sizes.

Should the U.S. government raise the cap on H-1B visas and allow more foreign workers to be temporarily employed in the U.S.? Twenty-seven percent of employers say yes.

Extended vacancies causing extensive problems. Thirty-six percent of employers said they currently have positions that stay open for 12 weeks or longer. On average, these companies reported losing around $14,000 for every job that stays vacant for this length of time; around 1 in 6 loses $25,000 or more.

Among the challenges employers have faced due to extended job vacancies are loss of revenue (34 percent), lower quality of work due to employees being overworked (36 percent), declines in customer service (35 percent) and work simply not getting done (48 percent).

Crossing borders to fill the gap. Employers struggling to fill high-skill jobs say they are investing more in training and/or importing new talent. Nearly half (46 percent) of employers have hired a low-skill worker and trained them for a higher-skill job within the last two years.

Twenty-six percent of employers said they are hiring workers with H-1B visas this year, which enables them to temporarily employ foreign-born workers for specialized occupations. Thirteen percent of all employers said they tried to hire workers with H-1B visas this year, but were denied, in part, due to the volume of companies applying for them. Others said they didn't apply in time or didn't meet requirements.

Among occupations for which employers are recruiting workers with H-1B visas this year are:

- Software engineers – 19 percent;
- Systems analysts and programmers – 11 percent;
- Database administrators – 9 percent;
- Network administrators – 9 percent;
- Sales and distribution managers – 9 percent;
- Financial analysts – 9 percent;
- Electrical and electronic engineers – 8 percent; and
- Mechanical engineers – 8 percent. ■

Source: *CareerBuilder.*

MARIJUANA LEGALIZATION

It's high time to review drug policies thanks to marijuana legalization trend

Earlier this year, the headline of a Washington Post editorial declared, "Pot is increasingly legal. Employers need to stop screening for it." While the first statement is undeniably true, it's no reason for employers to stop testing employees and applicants for marijuana—even if the employer operates in a state that has legalized medical marijuana or recreational use of the drug. Legalization doesn't remove the many reasons for marijuana screening, which include workplace safety, productivity and health concerns, limiting health insurance costs and protecting your company image.

By the numbers

The marijuana legalization trend began in 1996, when California voters passed Proposition 215, making the Golden State the first in the nation to permit the medical use of marijuana. Since then, marijuana legalization laws have been enacted in large swaths of the country, and the trend is showing no signs of slowing. Today, the situation is as follows:

- 23 states and Washington, D.C., have legalized marijuana in some form, with Alaska, Colorado, Oregon, Washington and Washington, D.C. legalizing recreational use;
- 25 million Americans have used marijuana in the past year; and
- 14 million Americans use marijuana regularly.

Evidence suggests that legalization causes the number of marijuana users to rise. According to Quest Diagnostics,

positive marijuana tests increased 20 percent and 23 percent in Colorado and Washington, respectively, since 2012, the year those states legalized recreational use. Should the current trend of states moving to permit recreational marijuana continue, we could see a substantial rise in use of the drug.

As for the federal level, while it's unlikely we'll see recreational marijuana use legalized nationally any time soon, there is movement on the medical marijuana front. In March, Republican Senator Rand Paul and Democratic Senators Cory Booker and Kirsten Gillibrand introduced unprecedented legislation that would "allow patients, doctors and businesses in states that have already passed medical-marijuana laws to participate in those programs without fear of federal prosecution." Although most experts, including advocates, agree the bill won't be passed due to opposition from many conservatives, it is, as Time magazine noted, a sign that "some of the winds legalization advocates …have been fighting against for decades are now at their back."

Advocates for legal marijuana argue that it should be treated like alcohol, with employees facing no workplace sanctions, provided marijuana is consumed responsibly off the job. So far, however, courts have generally ruled that employers may fire workers for using marijuana, even off-duty and if medically prescribed.

The following data provided by the Drug and Alcohol Testing Industry Association (DATIA) highlight why it believes increased marijuana use is a concern for employers:

- A minimum of 24-hour acute impairment is standard after marijuana use, according to several studies.
- One in 10 marijuana users will become dependent to the point of requiring treatment.
- There is two to five times greater use of other drugs when marijuana is the onset drug.

In addition, according to the National Institute on Drug Abuse, drug abusers are less productive, have increased absenteeism, are more likely to become sick or injured, and are more likely to be a danger to themselves and their co-workers. As a result, employing drug abusers can contribute to making an organization a less attractive and less safe place to work.

Employer response to legalization

EmployeeScreenIQ recently conducted their annual background screening survey, and one of the questions asked of the more than 500 participants was how their organization would be likely to react if recreational marijuana were legalized. Among their answers (participants were allowed to choose more than one):

- Continue our drug testing program: 54 percent.
- We don't have a drug testing program: 20 percent.
- Ignore positive tests for marijuana: 12 percent.
- Overlook past convictions for minor marijuana offenses: 10 percent.
- Discontinue our drug testing program: 2 percent.

What's enlightening about these results is how few employers would ignore or overlook positive tests or past marijuana offenses, and how few would end their drug testing programs. Employers appear to be concerned about marijuana use—legal or not.

Perhaps even more eye-opening is what Colorado employers have done since the state decriminalized recreational marijuana use. According to a survey by the Mountain States Employers Council, one in five employers reported they implemented more stringent drug testing policies. Meanwhile only 2 percent relaxed their testing for marijuana, while 71 percent reported that their policies hadn't changed.

"There seems to be a movement toward more testing," Curtis Graves, staff attorney with the Employers Council, told *The Denver Post*. "A lot of people are freaked out about the prospects of employees' legal marijuana use. And given the 20 percent increase in positive marijuana tests in the state, perhaps with good reason."

What the courts have to say

Advocates for legal marijuana argue that it should be treated like alcohol, with employees facing no workplace sanctions, provided marijuana is consumed responsibly off the job. So far, however, courts have generally ruled that employers may fire workers for using marijuana, even off-duty and if medically prescribed.

Colorado again provides noteworthy examples of this trend. Colorado law prohibits an employer from terminating an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours." However, in *Curry v. MillerCOORS*, a Colorado District Court ruled that the protected activity had to be lawful at both the state and federal level. For the same reason, in *Coats v. Dish Network*, the state's courts approved the dismissal of a Dish Network employee who admitted he used medical marijuana off the job but said he was never impaired at work.

Increasingly, workers terminated after using marijuana for medical reasons have made discrimination claims in federal courts under the Americans with Disabilities Act. So far, courts are again siding with employers. For example, in

2012, the U.S. Court of Appeals for the Sixth Circuit sided with Wal-Mart (*Cassius v. Wal-Mart Stores Inc*), which had fired a worker with cancer who had registered with the state medical marijuana program.

Even if the employee alleges discrimination, as in the *Miller-COORS* case, antidiscrimination law does not protect an employee from an employer's standard policies against employee misconduct. As long as employers apply their drug-free policies in a neutral manner, courts have held that banning drug use on the job is not discriminatory.

In short, courts are consistently giving private employers the right to set their own drug policy. Employers with a clear, unambiguous drug policy that is followed fairly and consistently, can terminate an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours.

How should employers react?

With legalization increasing marijuana use, some employers—like those in Colorado—that want to preserve a drug-free environment will simply choose to do more drug testing. However, unlike alcohol, marijuana has a long, residual presence in a person's system, so it may not make sense to terminate people who test positive—especially those with marijuana prescriptions—as a matter of policy. But what certainly does make sense is to take the time to ensure that the drug testing policies protect the organization and suit its particular needs.

Begin with the following:

1. Do review your drug-free workplace policy and substance abuse testing program with legal counsel.
2. Don't stop enforcing the drug policy solely because of state marijuana laws.
3. Do apply the drug testing policies fairly and consistently.
4. Don't terminate or disqualify someone without careful consideration and adherence to policies, particularly in light of medicinal or "legal" recreational use.
5. Do consider the health and safety of all workers in the application of the drug screening policy. ■

Source: *EmployeeScreenIQ.*

HR QUIZ

May an employer ask an employee whether diabetes is causing her performance problems?

Q Issue: *Several times a day for the past month, Claire, the receptionist, has missed numerous phone calls and has not been at her desk to greet clients. Her supervisor, Patti, overhears Claire tell a coworker that she feels tired much of the time, is always thirsty, and constantly has to go to the bathroom. Patti wants to ask Claire if she has a medical condition, like diabetes, that is causing her performance problems. Can she do so without violating the Americans with Disabilities Act (ADA)?*

A Answer: The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require an employee to have a medical examination. In this instance, Patti may ask Claire whether she has diabetes or send her for a medical examination because she has a reason to believe that diabetes may be affecting the receptionist's ability to perform one of her essential duties — sitting at the front desk for long periods of time.

Generally, an employer may ask disability-related questions or require an employee to have a medical examination when it knows about a particular employee's medical condition, has observed performance problems, and reasonably believes that the problems are related to a medical condition. At other times, an employer may ask for medical information when it has observed symptoms, such as extreme fatigue or irritability, or has received reliable information from someone else (for example, a family member or coworker) indicating that the employee may have a medical condition that is causing performance problems. Often, however, poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.

Source: *EEOC Guidance: "Questions and Answers about Diabetes in the Workplace and the ADA," reported in Accommodating Disabilities Business Management Guide ¶140,325.*

HR NOTEBOOK

Unemployment unchanged in July

Total nonfarm payroll employment increased by 215,000 in July, and the unemployment rate was unchanged at 5.3 percent, the U.S. Bureau of Labor Statistics (BLS) reported August 7. The number of unemployed persons, 8.3 million, was also unchanged.

Job gains occurred in retail trade (+36,000), health care (+28,000), professional and technical services (+27,000), and financial activities (+17,000). Job gains also occurred in manufacturing (+15,000), food services and drinking places (+29,000), and transportation and warehousing (+14,000). Mining employment continued to trend down in July (-5,000). Employment in other major industries—including construction, wholesale trade, information, and government—showed little change over the month.

Hourly earnings increase 0.1 percent in July

Real average hourly earnings for all employees increased by 0.1 percent from June to July, seasonally adjusted, the BLS reported August 19. This result stems from a 0.2-percent increase in average hourly earnings being partially offset by a 0.1-percent increase in the Consumer Price Index for All Urban Consumers (CPI-U). Real average weekly earnings increased by 0.4 percent over the month due to the increase in real average hourly earnings combined with an increase of 0.3 percent in the average workweek.

CPI for all items rises 0.1% in July

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.1 percent in July on a seasonally adjusted basis, the BLS reported July 19. The indexes for food, energy, and all items less food and energy all rose slightly in July. The index for all items less food and energy also rose 0.1 percent in July. A 0.4-percent advance in the shelter index was the main contributor to the increase, though the indexes for medical care and apparel also rose. In contrast, the index for airline fares fell sharply, and the indexes for used cars and trucks, household furnishings and operations, and new vehicles all declined.

EEOC releases report on the state of the American workplace

The U.S. Equal Employment Opportunity Commission (EEOC), as part of the year-long celebration of its 50th anniversary, recently released *American Experiences versus American Expectations*. The report illustrates the significant changes to the demographics of the workforce since EEOC opened its doors in 1965 as well as the continuing challenges to equal opportunity in employment.

"Despite notable progress in diversity and inclusion in the workplace over the past half century, this report highlights continued job segregation by race and gender, with women and people of color disproportionately occupying lower paying positions," said EEOC Chair Jenny R. Yang.

Beginning in 1966, all employers with 100 or more employees (lower thresholds apply to federal contractors) have been required by law to file the Employer Information Report EEO-1 with the EEOC. In FY 2013, approximately 70,000 employers filed reports indicating the composition of their workforce by sex, race/ethnicity, and major job categories. Observations from the *American Experiences versus American Expectations* report include the following:

- In 1966, African-Americans, Hispanics, and Asian-Americans each made up less than 1 percent of senior-level positions. Since then, the participation rates for all three groups have increased by five to seven times.
- The participation rate of women in the Professionals category has skyrocketed from roughly 14 percent in 1966 to more than 53 percent in 2013.
- Women and minorities remain concentrated, or segregated, in lower paying positions. For example, in 2013: Hispanics composed 20.5 percent of Service Workers and 29.2 percent of Laborers, yet they were only 5.7 percent of Professionals and 7.4 percent of Officials and Managers; and African-Americans composed 23.3 percent of Service Workers and 18.7 percent of Laborers, yet they were only 7.6 percent of Professionals and 6.8 percent of Officials and Managers.

In conjunction with *the report* EEOC has produced a fact sheet highlighting key data points on each demographic group of workers covered in the report. These fact sheets-which include EEO-1 data, EEOC charge and litigation information, and agency outreach activities-are available with the report at www.eeoc.gov/eeoc/statistics/reports/ ■.