

# WHAT'S WORKING in

# Human Resources™

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JULY 7, 2015

## WHAT'S ONLINE

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If you haven't been to our website recently, here's exclusive online content you've been missing:



### Employment Law Update for Managers

on the tricky legal issues supervisors face daily.



### Compliance Checklist

to ensure you're in compliance with employment law.

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## New rulings: 4 updates your FMLA notices need now

### ■ Ways to avoid an expensive court battle

There have been a number of recent court rulings that contradict many things employers have come to understand about FMLA notice administration.

The recurring theme in each case: There are commonly missed elements employers need to make sure they're including in FMLA notice practices.

Here are summaries of four recent rulings and what employers can do to avoid a lengthy court battle:

#### 1. Avoid email alone

In *Gardner v. Detroit Entertainment LLC*, an employer was

sued for failing to provide a proper FMLA notice to an employee who was ultimately terminated for her absences.

Gardner was fired after she failed to comply with her employer's request for recertification.

But the company claimed it sent proper notice to Gardner – via email – requesting recertification, and she never responded to it.

**What the court said:** Essentially, the court ruled that email wasn't an acceptable channel for FMLA notices.

The court said because the company couldn't prove that Gardner

*(Please see Notices ... on Page 2)*

## New type of ACA lawsuit targets employers

### ■ Cutting hours to avoid insurance mandate may prove costly

Warning: Cutting workers' hours so you don't have to offer them health insurance may be a costly move.

Employees of Dave & Buster's just filed a class action lawsuit against the restaurant chain, alleging it interfered with their ERISA rights by reducing their hours below 30 per week to avoid the ACA's insurance mandate.

#### A lot of eyes on this case

ERISA states it's illegal to take an adverse action against employees "for

the purpose of interfering with the attainment of any right ... under the plan."

While ERISA typically relates to retirement plans, attorneys questioned if this language could be used to trigger lawsuits regarding medical plans – and we're about to find out.

If this case is allowed to proceed, expect a glut of similar lawsuits to hit courts very soon.

**Cite:** *Marin v. Dave & Buster's Inc.*, U.S. Dist. Ct., S.D. NY, No. 1:15-cv-03608, Filed 5/8/2015.

## FMLA ADMINISTRATION

### Notices ...

(continued from Page 1)

had actually received the notice, the court was “bound to accept Plaintiff’s version of the events.”

#### 2. Avoid snail mail alone

In *Lupyan v. Corinthian Colleges*, the plaintiff sued, claiming her employer never sent her an FMLA notice.

But the company claimed it sent a notice via the U.S. Postal Service.

**What the court said:** The court refused to dismiss the case and said without some form of “verifiable receipt,” all the plaintiff had to do was deny she’d received the notice, which she did.

This ruling negated the commonly used “mailbox rule,” where a letter delivered to the post office or postman was said to have reached its destination for FMLA purposes.

**Key takeaway:** Both of these rulings prove the only foolproof method for defeating a claim that FMLA notices weren’t received is a method that includes “verifiable receipt” – such as certified mail, employee signatures, etc.

Email and standard mail simply can’t be relied upon to defend lawsuits.

#### 3. Detail consequences

*Wallace v. FedEx. Corp* centered on what firms are required to include in their FMLA communications.

Wallace was fired for not returning certification forms within 15 days. She then sued the company for FMLA interference.

The company argued because she didn’t return the certification she wasn’t eligible for FMLA protections.

**What the court said:** The employer failed to explain the consequences (i.e., termination) of not returning the FMLA certification. Therefore, the company was in the wrong.

#### 4. Include essential functions

In *Budhun v. Reading Hospital*, an employee filed an FMLA interference suit because the company filled her position with another employee.

Reading argued that, based on a fitness-for-duty exam, Budhun couldn’t perform all the job’s essential functions, so she didn’t have a case.

**What the court said:** A company can require fitness-for-duty exams addressing essential functions, “but only if the employer provides a list of essential functions to the employee” when it notifies the worker he/she is eligible for leave. Reading didn’t do that, so it lost.

**Key takeaway:** Incomplete FMLA notices can be just as problematic as no notice at all. So be sure to include:

- consequences for not providing adequate certification, and
- a list of essential functions of a person’s job when a fitness-for-duty exam is needed to evaluate his/her ability to perform job functions.

**Info:** [www.dol.gov/whd/fmla](http://www.dol.gov/whd/fmla)

## Sharpen your JUDGMENT

*This feature provides a framework for decision making that helps keep you and your company out of trouble. It describes a recent legal conflict and lets you judge the outcome.*

#### ■ Did this company have to reassign disabled employee?

“How was your vacation?” company attorney Eric Bressler asked HR manager Lynn Rondo.

“Weather was perfect,” she said. “How were things here?”

“Not great,” Eric responded. “Tim Cain is suing us.”

#### ‘Others were more qualified’

“He claims that our refusal to reassign him to the desk job that he applied for after he hurt his back was a violation of the ADA,” Eric continued.

“We didn’t ‘refuse’ to reassign him,” Lynn said. “Once it was determined he couldn’t work in the warehouse anymore, we let him interview for the office job.

“I’m sure he would’ve done a fine job there, but some of the other candidates we interviewed had more office experience and more skills relevant to the position.”

“Well, Tim claims he was qualified to do the job, so we were required to reassign him there instead of letting him go,” Eric said.

“Look, I feel bad for the guy,” Lynn said. “But we gave him a fair shot at the job. And in the end, we had to give it to the best person.”

“Did you explore any other accommodations?” Eric asked.

“Yes, but nothing was going to let him continue working in the warehouse,” Lynn said.

The company fought Tim’s suit, arguing the ADA didn’t require it to reassign him. Did it win?

■ *Make your decision, then please turn to Page 6 for the court’s ruling.*

### WHAT'S WORKING in Human Resources

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## EMPLOYMENT LAW UPDATE

# Federal marijuana law trumps state law, says Colorado Supreme Court

### ■ Ruling: Pot smokers aren't protected in the workplace

Some good news for employer drug policies:

The most pot-friendly state just ruled workers can be fired for smoking pot, even if they do it off-the-job in accordance with their state law.

The ruling finally sheds some definitive light on how employer drug policies jibe with changing pot laws.

### State law can't protect him

Denver native and registered medical marijuana user Brandon Coats sued Dish Network for firing him after he tested positive for pot.

Dish claimed his use of pot, even if consumed legally off-the-job, violated its zero-tolerance anti-drug policy.

Coats claimed Colorado law protects employees from being

punished for “engaging in lawful off-duty activities” – and medical marijuana use is legal in the state.

Who won? Dish – and employers with zero-tolerance drug policies.

The Colorado Supreme Court ruled federal law, which still classifies pot as an illegal narcotic, trumps state law.

So Coats wasn't protected by Colorado's statutes.

Granted, this ruling was made by the Colorado Supreme Court and not the U.S. Supreme Court, so there's a chance that other states may not abide by this decision.

But you can bet they'll look at this as strong precedent – along with similar rulings in California, Oregon, Montana and Washington state.

*Cite:* Coats v. Dish Network, CO Sup. Ct., No. 13SC394, 6/15/15.

# Say what? The NLRB sides with employee who made racist comments

### ■ Board overlooked company's anti-harassment policy

Got a policy prohibiting racist comments in the workplace? Apparently, the National Labor Relations Board (NLRB) doesn't care.

It just gave employees the green light to direct racist comments to fellow workers as long as they:

- aren't paired with violent threats, and
- are made in connection with protected “concerted activity.”

### Yelled at temp workers

Cooper Tire used temporary workers at its Findlay, OH, plant during union negotiations.

Union member Anthony Runion was then caught yelling these remarks at African-American temp workers:

“Hey, did you bring enough KFC for everyone?” and “I smell fried chicken and watermelon.”

Runion was fired for violating Cooper Tire's anti-harassment policy.

The union filed a grievance, alleging his firing violated the National Labor Relations Act (NLRA), which says workers can participate in “concerted activities” to alter work conditions.

The NLRB's ruling: The comments weren't accompanied by violent threats and were made within the context of concerted union activities, so they were protected by the NLRA. Runion then had to be rehired with back pay.

*Cite:* Cooper Tire & Rubber Co. and United Steel, NLRB Div. of Judges, No. 8-CA-087155, 6/5/15.

## COMPLIANCE ALERT

### ■ Restaurant owners jailed for laundry list of violations

Employment law violations can cost employers more than a hefty penalty – they can also land them in prison.

Just ask Miguel and Monica Castro, owners of a Mexican restaurant chain in Ohio that came under investigation by the DOL.

According to the investigators, the Castros hired undocumented workers to avoid complying with wage laws.

The pair also submitted false wage reports so they could pay the workers less than minimum wage and avoid paying overtime.

Now, the Castros must pay \$108K in penalties. Plus, Miguel, as the primary owner, must serve nearly three years in prison. Monica, his wife, got three months in prison for her part in the scheme.

*Cite:* [www.tinyurl.com/dol443](http://www.tinyurl.com/dol443)

### ■ Assumptions about worker's health led to costly EEOC suit

Here's more proof that making assumptions about a worker's health is a quick way to a lawsuit.

Baker Concrete was hit with an ADA lawsuit from the EEOC after firing a disabled employee.

Maria Castillo was the payroll manager for the construction company, and she had asthma. According to the complaint, Castillo asked to work from home for a few days after her asthma grew worse.

Allegedly, Baker refused to let her. Management assumed her request wouldn't prevent future flare-ups, nor allow her to perform her essential duties. So she was fired.

The only problem: Baker made those assumptions without getting a medical certification or looking for other accommodations.

The EEOC sued, claiming ADA violations, and Baker's paying \$58,000 to settle the case.

*Cite:* [www.tinyurl.com/eeoc443](http://www.tinyurl.com/eeoc443)

## ANSWERS TO TOUGH HR QUESTIONS

# Experts give their solutions to difficult workplace problems

*HR professionals like you face new questions every day on how to deal with workplace conflict and employment law. In this section, experts answer those real-life questions.*

### We ban smoking: Should we also ban e-cigarette use?

**Q:** Smoking's banned in our facility, but should we allow employees to use e-cigarettes, vaporizers or handheld smoking devices?

**A:** No. While many states have laws prohibiting smoking tobacco in certain places, e-cigarettes (i.e., vapes, vaporizers, e-hookahs, shisha pens, etc.) are not included within such laws. However, this should not stop an employer from incorporating its own policy prohibiting e-cigarettes, says employment law attorney Adam Kemper ([adam.kemper@gmlaw.com](mailto:adam.kemper@gmlaw.com)) of the firm Greenspoon Marder Law ([gmlaw.com](http://gmlaw.com)).

To be consistent, workplace smoking bans should include e-cigarettes. Inconsistent application of smoking rules can potentially lead to complaints of favoritism, discrimination and unintended endorsements of one product over another.

### 4 fast, effective ways to improve onboarding

**Q:** We keep hearing how important proper onboarding is to new hire retention. Got any quick tips on how to enhance our onboarding/orientation process?

**A:** Yes. There are several ways to help ensure new hires have a positive and memorable onboarding experience, says Tobey Fitch, Head of People at presentation software maker Prezi ([Prezi.com](http://Prezi.com)), such as:

- Make presentations visual,

and avoid lengthy text.

- Lead with the company's goals, strategies and success metrics, not administrative info.
- Keep the expertise level of the audience in mind. Don't talk over their heads, but don't talk down to them, either.
- Create one comprehensive guide that new employees can turn to for all new hire info.

### Explaining little-known rule change for health plans

**Q:** Is it true the feds are expanding the application of the ACA's out-of-pocket cost limit on self-only coverage?

**A:** Yes. The DOL's latest FAQ explained the little-known rule change ([www.tinyurl.com/faq444](http://www.tinyurl.com/faq444)).

New out-of-pocket limits kick in for non-grandfathered health plans in 2016 – the self-only limit rises to \$6,850, and the family limit climbs to \$13,700.

But here's where it gets tricky: The \$6,850 limit will apply to every individual under a plan, no matter the plan type.

How? Say a man's in a family plan with a limit of \$13,000. If he racks up \$12,000 in medical costs, he can only be held responsible for \$6,850 of those charges. The remaining family members could then rack up \$6,150 in out-of-pocket costs before reaching the \$13,000 plan limit.

*If you have an HR-related question, email it to Christian Schappel at: [cschappel@pbp.com](mailto:cschappel@pbp.com)*

## EFFECTIVE COMMUNICATION

### ■ 3 ways to keep productivity high in dog days of summer

Vacations are meant to help people unwind and de-stress. But they can have the opposite effect on those left behind.

The dog days of summer can leave you short-staffed, with overwhelmed employees who are left taking up the slack – if the right system isn't in place, that is.

Here's some advice members of The Young Entrepreneur Council shared with *Small Business Trends* on how they make sure their offices aren't draining those left behind while others are away trying to recharge:

#### 1. Create a project report

Employees should be alerting managers well beforehand of their scheduled time off – that's a given.

But when they do, they should also hand over a list identifying the current status of their projects and what should be delegated to other employees while they're away.

Also, make sure co-workers have their contact info when they're away.

#### 2. Help them stay connected

Of course, you don't want to demand that employees work while they're vacationing. Still, some find it hard to disconnect voluntarily.

For those who want to stay plugged in, help them by giving them any resources or support they'll need to do so.

Believe it or not, they'll be happier – as will those left behind who won't have to take up the slack.

#### 3. Detail job duties

Have each employee document where needed files and/or other resources are located.

It doesn't have to be fancy; an Excel spreadsheet can do the trick.

**Cite:** [www.tinyurl.com/biztrend444](http://www.tinyurl.com/biztrend444)

## WHAT WORKED FOR OTHER COMPANIES

Our subscribers come from a broad range of companies, both large and small. In this regular feature, three of them share a success story illustrating ideas you can adapt to your unique situation.

### 1 Strategy put a halt to sick day abuse

We were having a real problem with employees abusing their sick days.

It was creating a lot of unnecessary work and stress for those employees left to take up the slack.

Plus, it was causing some projects to run past their deadlines.

Our response: We created an absence log.

Once a supervisor noticed an employee was calling out sick

frequently, we'd begin tracking the days the person called out.

Nine times out of 10, a telling pattern emerged.

#### Added documentation

So after an employee's sick days dropped to a certain number, we'd send them a document letting the person know how much time he or she had left.

The document, which had to be signed and returned, also informed the employee that a note

would be required for every sick day moving forward – and it needed to come from a doctor or dentist who treated them for an emergency.

We instantly saw a drastic change in call-outs.

The end result? Not only has attendance improved, but also projects are getting completed on time and employees are less stressed from having to cover for their co-workers.

*(Lesya Myers, benefits coordinator – HR, Illinois Office of Comptroller, Springfield, IL)*

**REAL  
PROBLEMS,  
REAL  
SOLUTIONS**

### 2 Grew applicant pool with old favorite

When we noticed the job market was changing, we knew our recruiting would have to be a little more aggressive to keep up.

In the past, we'd been able to take a more passive approach because there were so many applicants and so few job openings.

As a result, we could put up job postings and expect a decent number of candidates to roll in.

But that wasn't the case anymore,

and we realized our recruitment would need to change, too. Otherwise, we'd miss out on some top-notch applicants.

#### Resurrected forgotten program

One simple move that worked wonders: We resurrected our employee referral program, which had fallen off the radar.

We'd always offered workers a cash bonus if they referred a candidate who got hired, but we stopped promoting it.

That meant workers forgot about it, and those newer to our company (one of the best sources of referrals) didn't even know it existed.

So we focused our energy on re-promoting the program – via email, break room postings and handouts.

It's drumming up new interest in the program, and more employee referrals are rolling in.

Sounds simple, but it's really helped us start to expand our applicant pool.

*(Shawn Hughes, VP of HR, XTRA Lease, St. Louis)*

### 3 Transparency kept rumors from spreading

Our company was about to go through a big transition, and we needed to find a way to communicate it to our workforce.

We wanted to get ahead of the rumor mill.

After all, employees tend to assume the worst when change is coming.

We wanted to let them know that things were fine, and there was no cause for alarm.

Our biggest fear: People would

start jumping to incorrect conclusions – and then start jumping ship.

#### Better from someone they know

Our solution: HR decided to open up to workers about the transition and where we were in the process.

We came up with a plan for what to tell workers and when.

Then, we asked managers to spread the news – since workers would be more likely to believe someone with whom they've worked closely and built a relationship.

Of course we couldn't give every little detail, but providing regular updates and progress reports kept people in the loop.

Better yet, it kept them from filling in the gaps themselves and assuming the worst.

Overall, it helped keep people calm around the office and prevent groundless rumors from spreading.

And it was a good reminder that a little transparency with employees can go a long way to keep them happy.

*(Jason Gordon, an HR manager for a construction company in CT)*

## NEWS YOU CAN USE

### What new FLSA overtime rules will cost employers

The DOL's changes to the FLSA's overtime exemption rules haven't been made public as of press time (*we'll have a full breakdown when they're released*), but we have an idea of what they'll cost employers.

Oxford Economics, a global analytics, forecasting and advisory firm, has done the math:

- If the minimum salary threshold to be exempt jumps to \$610 per week, it'll cost businesses \$297 million.
- If the threshold rises to \$808 per week, it'll cost \$648 million.
- If it jumps to \$984 per week, it'll cost \$874 million.

And all of that is just in administrative costs – resulting from employers' attempts to keep the changes from wreaking havoc on payroll.

*Info: [www.tinyurl.com/overtime444](http://www.tinyurl.com/overtime444)*

### Lab report: Positive drug tests are on the rise

Here's more incentive to review your drug policies (*see related story on Page 3*): A higher percentage of U.S. workers are testing positive for illicit drugs.

Quest Diagnostics, a clinical laboratory, just released a report stating

that out of roughly 6.6 million tests, 9.3% more workers had a positive urine sample in 2014 than in 2013.

Specifically, positive tests for marijuana, cocaine and methamphetamines all rose – 14.3%, 9.1% and 21.4%, respectively.

*Info: [www.tinyurl.com/quest444](http://www.tinyurl.com/quest444)*

### 4 in 10 CPA-conducted plan audits found deficient

Apparently, hiring a CPA to audit your benefit plans for federal and state law compliance isn't what it's cracked up to be.

The DOL's Employee Benefits Security Administration (EBSA) looked into the quality of CPA audits and found that 39% contained major deficiencies – putting \$653 billion in plan assets at risk.

One piece of advice to come out of the EBSA's report for employers: Find a CPA firm that conducts a lot of audits. The smaller the audit practice, the higher the deficiency rate.

*Info: [www.tinyurl.com/ebsa444](http://www.tinyurl.com/ebsa444)*

### Lighter side: 4 fireable offenses of Twitter users

Ask the Twitterverse for hilarious comments, and it won't disappoint.

The latest query? Explain why you

## WHAT COMPANIES TOLD US

### ACA impact on health plans

What cost control measures have you taken specifically due to the ACA?

Boost out-of-pocket limits

40.6%

Boost in-network deductibles

36.8%

Boost participants' share of premiums

34.5%

Boost copay/coinsurance

27.6%

Boost participants' share of drug costs

27.2%

*Source: Survey of 562 employers by the International Foundation of Employee Benefit Plans.*

What's the biggest cost driver resulting from the ACA, according to employers? Surprisingly, plan design changes aren't public enemy No. 1. It's general administrative costs – cited by 56% of employers.

*Each issue of WWHR contains an exclusive survey to give executives insight into what their peers nationwide are thinking and doing.*

were fired. The results:

- *Kept referring to the boss as What's his Face.*
- *Too many "That's what she said" jokes.*
- *I spelled everyone's name correctly on their Starbucks coffee.*
- *Apparently "sleeping your way to the top" doesn't involve napping.*

*Info: #WhyTheyFiredMe*

## Sharpen your judgment...

## THE DECISION

(See case on Page 2)

No. The company lost when the court ruled: The ADA requires employers to assign employees with disabilities to vacant positions they're qualified for – as long as doing so is reasonable and doesn't create an undue hardship.

The court also said that requiring disabled individuals to compete for positions they're qualified to do – when a disability has forced them from a previous position – falls short of satisfying the ADA's requirement to provide reasonable accommodations to those individuals.

The company fought to get the case thrown out, but this ruling allowed the case to proceed to trial.

But before it got to that point, the company decided to settle – for \$1 million.

### ■ Analysis: If the person's qualified, give 'em the job

This ruling makes it pretty clear: If one of your disabled employees needs a transfer to keep working – and he or she's qualified for one of your vacant positions – give the person the job. That needs to be the case even if another candidate is more qualified for the position.

The only way out of this requirement is proving that offering the job to the disabled individual would create an undue hardship. But that's a hard argument to make if the person's qualified for the job.

*Cite: EEOC v. United Airlines Inc., Crt. of App., 7th Cir., No. 11-1774, 9/7/12; settled 6/11/15. Fictionalized for dramatic effect.*

## A REAL-LIFE SUCCESS STORY

# Found a way to spark young workers to participate in our 401(k)

### ■ Savings tips helped them come up with cash to stash

We wanted to nudge our young employees in the right direction financially by helping them understand how our 401(k) plan would help them save money.

To do that, we used our annual 401(k) meeting as a way to explain the nuts and bolts of our plan and showcase its features to them.

### Focused on the future

During the meeting, we emphasized how generous our company match is – 50 cents on the dollar up to 10% of workers' salaries.

And we gave employees examples of how quickly their accounts will add up if they went the distance.

Case in point: If a worker invested \$2,000 a year in the 401(k) plan for 33 years, combined with our company's profit sharing plan – he/she could probably retire a millionaire!

Then, our in-house benefits team, along with our plan experts, gave a detailed presentation of our plan:

- automatic enrollment for new employees once they log 1,000 hours
- a targeted and diversified investment mix that offers employees the most bang for their buck and helps them meet their individual retirement goals
- an online feature with five investment strategies based on how comfortable workers are with risk: conservative, conservative to moderate, moderate, moderate to aggressive and aggressive, and
- an automatic 1% increase in employee contribution rates (they can opt out if they choose to).

All of these features have ranked our 401(k) plan, along with our

profit sharing plan, in the top 5% of all plans.

### Explained ways to save

For those employees who think they can't afford to invest, we offered simple tips on how they could find extra money to set aside:

- use coupons
- bypass the coffee shop and drink the coffee we provide in the lunchroom
- brown bag your lunch
- nix vending machines for fresh fruits and veggies
- quit smoking! (plunking down \$65 for a carton will yield big results), and
- stock a 12-pack of water and other healthy beverages in the company fridge (to, again, avoid the vending machine).

### Opened the floor

At the end of the meeting, we opened the floor to questions.

We fielded lots of queries and most of them came from our younger employees.

Their eagerness to learn and participate in our 401(k) plan showed us they're not just concerned about kick-starting their careers.

For this group, saving for the future is front and center.

Overall, our education efforts are working. More than 79% of our employees are enrolled in our company's 401(k) plan.

And, many employees are seeing growth of \$3,000 to \$10,000 a year.

*(Tom Schubert, CFO/COO, American Future Systems Inc., Malvern, PA)*

### Case Study: WHAT WORKED, WHAT DIDN'T

## HR OUTLOOK

### ■ Is it time to stop hiring based on 'culture fit'?

Employers spend a lot of time looking for candidates that are a match with the company's culture – but is that mentality blinding them to top talent?

In short: Yes, if your "culture" isn't well defined, says Lauren Rivera, a management professor at Northwestern University's Kellogg School of Management.

### Focusing too much on 'fit'

In an article she penned for *The New York Times*, Rivera warned the concept of company culture has become too vague, and can give managers the idea that they should make hiring decisions based on which candidates they'd rather hang out with.

Rivera researched hiring practices at top banks, consulting firms and law firms by interviewing 120 decision makers and observing recruitment practices over several months.

What she found was focusing too much on whether a candidate was a "good fit" often wasn't used to find someone with similar organizational values. Instead, managers looked for people with similar interests to themselves.

### Redefining 'fit'

Rivera says companies can prevent this mistake by doing two things:

1. Be clear and consistent about what traits are needed to be a "cultural fit." Ideally, these should be based on data about what values, skills and behaviors are associated with job success and high performance.
2. Give interviewers an idea of how different qualities should be weighed. In other words, what's more important to your organization – a person's skills, personality or work experience?

**Cite:** [www.tinyurl.com/nytimes444](http://www.tinyurl.com/nytimes444)

## WHAT WOULD YOU DO?

Companies face competing agendas when dealing with their employees. They must find ways to inspire their people to excel, while controlling costs and staying within the law. Here we present a challenging scenario and ask three executives to explain how they'd handle it.

### New manager's worried about review with hot-headed worker: Should HR step in?

#### The Scenario

HR manager Stu Capper took a big bite of a sandwich when manager Joe Martin stepped in. Stu gulped his bite down.

"Hey, Joe," he said. "Did you need something?"

"I was hoping you could help me out with an issue," Joe said. "Should I wait?"

#### Can't handle negativity

"No, have a seat," Stu said. "What's the problem?"

"I'm feeling anxious about giving my first performance review as a manager," Joe said. "Especially since it's going to be with Rick."

"Well, for what it's worth, we wouldn't have promoted you if we weren't confident you could handle things," Stu said.

"Yeah, I appreciate that," Joe said. "But Rick's not exactly an easy case to deal with – even if I wasn't new at this. Before he left, Rick's old manager told me how badly their last review went."

"He said Rick reacted really poorly to the review and basically ignored any positive things mentioned," Joe added. "He only focused on the negative remarks, and I'm worried because I know this year's review is going to, again, have some negative points to go over with Rick."

"I understand your concern," Stu said. "That review wasn't the first time Rick's nearly lost his cool. But he's been a loyal worker and has a lot of valuable skills we don't want to lose."

"All right, so what do you think? Is there some way to make this less painful?" Joe asked.

If you were Stu, what would you do next?

#### Reader Responses

##### 1 Bob Cunius, HR director, Times Microwave Systems, Wallingford, CT

**What Bob would do:** For this review, I'd go over Rick's evaluation with Joe ahead of time to help Joe practice discussing the good and bad points.

But going forward, I'd advise Joe to have more regular feedback sessions with Rick. That way, Rick isn't surprised by negative feedback, and they have a chance to work on things throughout the year.

**Reason:** Workers shouldn't be in the dark about their performance. More frequent feedback sessions keep workers informed and help them improve before performance becomes a bigger issue.

##### 2 Carole Sager, HR manager, Production Resource Group, New Windsor, NY

**What Carole would do:** I'd help Joe practice for his review by coaching him

a bit on how to approach Rick about the negative remarks. We'd do a little role-playing and go over the points Joe's worried might set Rick off.

**Reason:** Nobody likes being the bearer of bad news, but it's something a manager must be able to do. Giving Joe some practice can help him get over his nerves and focus on the more important point – finding ways to help Rick improve.

##### 3 Jeannie Zayerz, HR manager, CWD LLC, Carson, CA

**What Jeannie would do:** Joe should get a better idea of Rick's past issues and successes by looking at past reviews. Then, Joe can give Rick a wider overview of his work and focus on positives, like the progress he's made year-to-year, rather than just this year's good and bad points.

**Reason:** Since Rick is already a defensive worker, framing his review in a wider, more positive context can help him see how else he can improve, without immediately putting him on guard.

#### QUOTES

I am building a fire, and every day I train, I add more fuel. At just the right moment, I light the match.

Mia Hamm

Happiness is not something you postpone for the future; it is something you design for the present.

Jim Rohn

Wisdom and penetration are the fruit of experience, not the lessons of retirement and leisure. Great necessities call out great virtues.

Abigail Adams

Don't watch the clock; do what it does. Keep going.

Sam Levenson

Every strike brings me closer to the next home run.

Babe Ruth

The buried talent is the sunken rock on which most lives strike and founder.

Frederick William Faber

Out of difficulties grow miracles.

Jean de La Bruyere