

Spotlight: Human Resources

New federal legislation creates greater risk of employment discrimination suits against employers

By WILLIAM W. FLOYD
and ARLENE PRATER
Best Best & Krieger LLP

Employers can no longer leave the past in the past, as personnel actions and decisions made years earlier can now be used to file discrimination lawsuits due to the passage of the Lilly Ledbetter Fair Pay Act of 2009. As a result, employers will likely be subjected to an onslaught of employee discrimination lawsuits.

Lilly Ledbetter worked as a manager for Goodyear Tire and Rubber Co. for many years in Alabama. The company's pay practice was to grant increases based on performance. Based on her performance ratings, Ledbetter often received

smaller increases than her male counterparts. Over time, this resulted in Ledbetter being paid considerably less than the male managers with whom she worked.

After retiring from Goodyear, Ledbetter filed a discrimination claim with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that the pay disparity between her and her male coworkers was based on gender. She eventually filed suit under Title VII of the Civil Rights Act of 1964. A jury awarded her in excess of \$200,000 in back pay and more than \$3 million dollars in punitive damages. Although the trial court reduced the jury's award to approximately

\$350,000, the employer appealed the decision and the appeal worked its way up to the U.S. Supreme Court.

The Supreme Court ruled that Ledbetter's claim of discriminatory pay was not valid because the decisions that she was complaining about had taken place more than 180 days before she filed her claim with the EEOC. Ledbetter's claim was barred by the statute of limitations under Title VII.

As a result of the Supreme Court decision, Congress passed, and President Obama signed, the "Lilly Ledbetter Fair Pay Act of 2009," essentially reversing the effect of the court's decision. The act significantly limits the appli-

cation of the statute of limitation periods under Title VII, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). In the case of pay discrimination, this new law provides that the statute of limitations begins to run again with each paycheck, rather than only when the allegedly discriminatory pay decision was made. This significantly increases the exposure for potential damages that an employer faces in a Title VII, an ADA or an ADEA lawsuit. The effective date of the act is retroactive to May 2007.

While California's employment discrimination law, the Fair Employment and

Housing Act, generally has longer statute of limitation periods than federal employment discrimination laws, it remains to be seen what influence or effect the act will have on the application of state law limitations periods.

What can employers do? Employers can avoid liability by ensuring that decisions on compensation and working conditions are made based on measurable and well documented nondiscriminatory factors. Supervisors and managers should be trained to properly evaluate and document employee performance. A complete review of compensation practices with the assistance of legal counsel is especially advisable given the pub-

licity the Ledbetter case and the subsequent legislation has created.

Although this new law has significantly expanded potential employer liability, employers following sound employment and compensation practices stand a very good chance of successfully defending any claim that may come their way.

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What are employers to do about social media?

By DENNIS ELLMAN
Special to the Daily Transcript

Recently, a national football league all-star was fined \$2,500 by his team for tweeting about the poor quality of training camp food. Paula Abdul tweeted to her world that she wasn't returning for the new season of American Idol. An employee of a highly reputable nonprofit organization announced on her public Facebook site that she had spent the weekend drinking like crazy and was too hung over to make it to work on Monday. A couple of Domino's employees faced an investigation for criminal charges for a video they posted on YouTube showing them altering the food they prepared.

According to Kristina R. Haymes, an attorney with Brown Law Group, today's technology allows virtually anyone easily to post a message, picture, audio and/or video to his or her social networking page, blog or other Web site.

"In this constantly changing new world, where individuals have the ability to disseminate information about their employers to a potentially worldwide Internet audience," she said. "Employers need to evaluate their existing technology policies and, where necessary,

implement new policies and strategies."

Employers could face liability

Haymes noted that the Web 2.0 environment has given rise to a new potential liability for employers. For companies that have internal Internet forums, or sponsor corporate blogs, employers need to be aware that they, "may have responsibility and hence liability for the messages posted on its message boards or intranet where there is an expectation that the employer has knowledge, or should have knowledge of content," according to Haymes. This is particularly true where employees are using employer-supplied technology at the employee's place of business.

It's important for employees to recognize the public nature of their social networking and the potential consequences at work. Company policies should remind employees to act responsibly, be kind, represent the company well and also prohibit illegal activity.

"California is an at-will employment state," Haymes said. "This means that an employer may terminate an employee for no reason at all or any reason that is not unlawful or discriminatory. Similarly, as long as its decision is not based upon discriminatory factors, an

employer is free to hire or refuse to hire whomever it pleases."

She noted that law does not currently require employers to notify individuals that they may review and take action based upon an individual's online profile or information available on the Internet. In fact, a California Appellate Court recently ruled that a high school principal who sent a MySpace posting for republication to the local paper had not invaded the individual's right of privacy even though the author posted the journal entry under her first name only. Even when the author removed the posting six days later, it did not matter — the court held that once something is published on the Internet it is public and no longer private.

Likewise, if negative information about a job applicant (like a criminal record) is readily available on the Internet, employers could face a claim for negligent hiring for failing to run a Google search of a potential hire.

Protecting the company's trade secrets, brand reputation

High-technology employers and others with trade secrets, likewise, should take efforts to guard the secrecy of their confidential proprietary information. The law requires employ-

ers to take reasonable efforts to maintain the secrecy of trade secrets.

"Nondisclosure and confidentiality agreements are useful in this regard," Haymes said. Additionally, employers should use technology to limit employee access. If an employee were to disclose a company's trade secrets on the Internet, for example, and the employer discovers the breach, the employee could be terminated for breaching his or her duty of loyalty, misappropriating trade secrets and potentially breaching any contractual nondisclosure or con-

fidentiality agreements.

If an employer discovers that someone who it suspects is an employee is leaking company trade secrets, confidential information or otherwise engaging in anonymous Internet speech that is illegal or damages the company's brand or reputation, the company has certain remedial options. For example, if an employee is posting information from a work computer, the employer can use its technology to discover the source of information. When the employee posts information anonymously from outside work, however,

the employer's ability to discover the poster will depend upon its ability to prove a prima facie case of a legal claim and the necessity for the disclosure of the anonymous defendant's identity. Without a viable legal claim, employers will not be able to compel Internet service providers to reveal a poster's anonymous identity.

Haymes also noted that employers need to be mindful of employee claims that they are whistleblowers. Internet postings exposing alleged financial wrongdoing by man-

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Bullying not just for the schoolyard

6 steps to creating a healthy workplace, saving your bottom line

By CATHERINE MATTICE
NoWorkplaceBullies.com

A recent study conducted by Zogby International indicated between 54 million and 71.5 million Americans are victimized by a bully at work. Bullies use ongoing negative, aggressive, unprofessional, inappropriate and hurtful tactics against subordinates, peers and even superiors; creating a power imbalance and

inviting serious damaging consequences to targets, witnesses and organizations.

Targets experience distress, humiliation, anger, anxiety, discouragement, hopelessness, depression, burnout, reduced quality and quantity of work, lower levels of job satisfaction, increased absenteeism and turnover and in some cases even Post-Traumatic Stress Disorder (PTSD).

In turn, American businesses spend more than \$180 million annually in absenteeism and turnover (30 percent of the bullied will quit, and 20 percent of witnesses will follow), workers' compensation claims due to stress, reduced quality and quantity of work, lower levels of job satisfaction, communication breakdown and even a bad reputation within the community.

Bullying is not a simple case of a bad behaving employee. It is a systemic problem caused by many organizational factors, including the organization's culture, changes (e.g., downsizing) and bureaucratic management styles.

Identifying, fixing and preventing bullying can make the difference between a successful organization and one that fails. For example, companies that openly promote civility among employees earn 30 percent more revenue than competitors, are four times more likely to have highly engaged employees and are 20 percent more likely to report reduced turnover, according to a study conducted by Watson Wyatt in 2003.

Here are six keys to successful implementation of a healthy, and bully-free, workplace.

1. Use internal communication strategically. Organizational success depends on a climate of fairness and supportiveness; where members are listening and being sensitive to one another's needs and aware of how comments might be perceived by others. Leaders and management can use language to deliver a

healthy culture and encourage open discussions and employee empowerment. Developing rituals and employee reward systems that applaud interpersonal communication skills and compensate positive attitudes will solidify management's intentions.

2. Perform periodic audits of internal processes. Audits offer a comprehensive review of communication patterns that provide information about the structure of the organization, effectiveness of communication, and employee support for the organization, leaders, superiors and each other. This facilitates strategic planning and learning the success with which internal information is conveyed, and of course detects whether some employees feel others are bullies (or bottlenecks, buck-passers, know-it-alls, chronic complainers).

Outside consultants are the most effective people to conduct the audit because organizational members often say things to external auditors that they would not say to internal auditors.

3. Roll out an anti-bully policy. An anti-workplace bully prevention policy must be implemented and include management's commitment and employee responsibilities for maintaining the policy, a training program schedule and a formal grievance procedure that includes investigation of complaints and appropriate disciplinary actions. The policy should also stress the importance of written documentation from all parties involved in any complaints; including target(s), bullies, witnesses and investigators. Of course, the policy is only as effective as management's commitment to it.

4. Conduct management and employee training. Establish training programs for all levels to occur during

See **Workplace** on 14A



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Spotlight: Human Resources

HR Roundtable

Companies engage employees in problem solving

By DOUG SHERWIN
The Daily Transcript

As businesses struggle to survive the recession, many executives are turning to their employees for answers.

Keeping your work force informed and engaged is the best way to get those answers, according to a panel of human resources professionals at a recent *Daily Transcript* roundtable.

"We have employees volunteering opportunities to save money for the organization because they're committed," said Jeff Lindeman, human resources director at the San Diego County Regional Airport Authority. "They want the organization to be successful."

"This is the benefit of having an engaged work force. If you have a disengaged work force, you're reacting. But we have the benefit of working together to produce a result that's beneficial for all parties."

Every month, the airport authority's chief financial officer gives a report to all employees, keeping them informed on the organization's fiscal health.

The economic downturn hit Lindbergh Field a year earlier than the rest of the country with fuel costs skyrocketing. Airport authority officials then curtailed expenses and put on a hiring freeze.

But since employees were actively involved in finding solutions, the airport authority came in well under what had been re-forecasted as a reduced budget, Lindeman said.

Employees of some compa-



All photos by: J. Kat Woronowicz

Anita Ruka (left), human resources director for eBioscience; Pete Kane, HR director for The Burnham Institute for Medical Research; and Pamela Legge, senior vice president of employee benefits for BB&T-John Burnham Insurance, talk about hot topics in human resources during a recent roundtable discussion.

nies agree to take salary reductions to avoid layoffs, according to Pamela Legge, BB&T - John Burnham Insurance's senior vice president of employee benefits.

"That was something that everyone globally agreed upon, but it hit everyone in the pocketbook," Legge said. "So it was something that HR had to come in the back door and try to find ways to give (employees) encouragement with regard to the fact that they still have a job. It's challenging all the way around."

Shari Laughlin, vice president and regional employee relations manager at Branch Banking & Trust Co., said a lot of its clients have

employees who take a one-week sabbatical, while other clients are holding potlucks and barbecues instead of going to a fancy resort for a

helping its employees manage their own health. They encourage workers to eat better and exercise more.

The airport authority has



Anita Ruka, human resources director for eBioscience, participates in a roundtable discussion with a panel of other HR professionals.

company retreat.

The discussion at the roundtable also turned to the health care debate in Washington, D.C. While human resources professionals are monitoring the discussion, they've chosen to focus on what they can control.

Lindeman said the airport authority is taking a preventative approach to health care,

mapped out walking trails near Lindbergh Field, where workers can take a stroll at lunchtime as far as 3 miles. The group's chief executive officer has even joined them for a lunchtime walk.

"We've taken the approach of, what can we do as individuals?" Lindeman said. "We're probably not, as 300 employees, going to influence what

Washington does or doesn't do, what a health care provider does or doesn't do. But we can control what we do.

"We've switched up the food in the vending machines to be healthier items. Why are we paying these premiums on health care when we're putting sugar and chocolate and caffeine in the vending machines? We're making those changes."

Pete Kane, human resources director for the Burnham Institute for Medical Research, agreed that most companies have adopted some form of a wellness program. Burnham has partnered with American Specialty Health, and its subsidiary Healthy Roads. The company provides daily e-mails on healthy lifestyle choices.

"It's a pretty widespread tactic that employers are taking now," Kane said.

Sempra Energy (NYSE: SRE), meanwhile, has partnered with Scripps on an initiative on DNA mapping. The utility offered a free screening of the new program to the first 1,000 employees who signed up, and within 12 hours, all slots were filled. They then offered it to the next 500 at a reduced price.

Another way to better manage health is to get proper breaks from work.

Legge said BB&T-John Burnham Insurance employees must take five consecutive days off as part of their vacation, and vacationers cannot use their computers to prevent working behind the scenes.

"I think it is a very healthy requirement, because people

that take a day here, a day there are not recharging themselves," she said. "To just have that disconnect and not that 24/7 (work) attitude, has really helped, and people have begun to embrace that as, 'That was a really refreshing vacation.'"

The airport authority's Lindeman added that financial well being is directly relat-



Shari Laughlin, vice president and regional employee relations manager at Branch Banking & Trust Co., said some clients are holding potlucks and barbecues instead of going to a fancy resort for a company retreat.

ed to physical well being. The organization hosts lunchtime programs where employees can get financial advice.

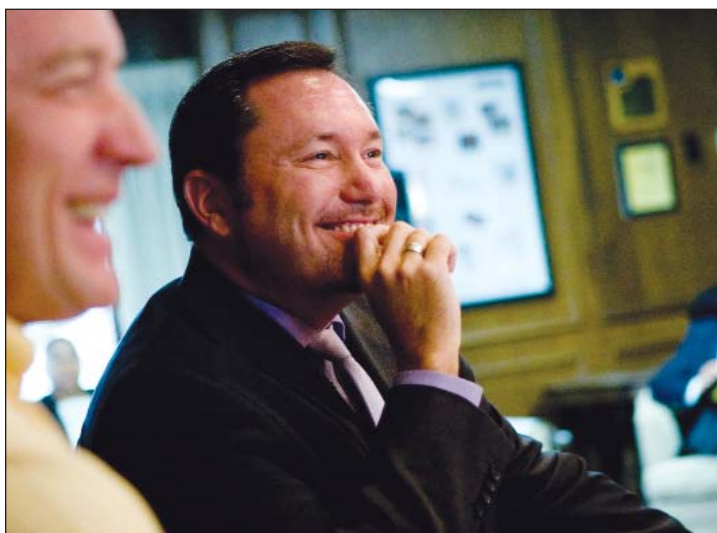
"If you're stressed about your finances, it's having an impact on your health," he said. "By attending our lunch and learn, you get credit in our wellness program that pays you an incentive for achieving certain levels of points in the year. We wrap it all together in one big holistic look at what it is you're doing to maintain your overall health."

The Burnham Institute for Medical Research, likewise, has free luncheon meetings during which employees can learn about their finances or make individual appointments with vendors.

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Bob Duffield (left), human resources business partner for Sempra Energy, said the utility company has partnered with Scripps Health on an initiative on DNA mapping in an effort to help its employees manage their own health.



Jeff Lindeman, human resources director at the San Diego County Regional Airport Authority, said his organization takes the approach that financial well-being is directly related to physical well-being and hosts lunchtime programs on finances for employees.

ROUNDTABLE PARTICIPANTS

Bob Duffield, HR Business Partner
Sempra Energy

Pete Kane, HR Director
Burnham Institute for Medical Research

Shari Laughlin, VP, Regional Employee Relations Manager
Branch Banking & Trust Co.

Pamela Legge, Sr. VP, Employee Benefits
BB&T - John Burnham Insurance

Jeff Lindeman, HR Director
San Diego County Regional Airport Authority

Anita Ruka, HR Director
eBioscience



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Spotlight: Human Resources

Young workers push employers for wider Web access

By **MARTHA IRVINE**
The Associated Press

CHICAGO — Ryan Tracy thought he'd entered the Dark Ages when he graduated college and arrived in the working world.

His employer blocked access to Facebook, Gmail and other popular Internet sites. He had no wireless access for his laptop and often ran to a nearby cafe on work time so he could use its Wi-Fi connection to send large files.

Sure, the barriers did what

his employer intended: They stopped him and his colleagues from using work time to goof around online. But Tracy says the rules also got in the way of legitimate work he needed to do as a scientific analyst for a health care services company.

"It was a constant battle between the people that saw technology as an advantage, and those that saw it as a hindrance," says the 27-year-old Chicagoan, who now works for a different company.

He was sure there had to be a better way. It's a common complaint from young people who join the work force with the expectation that their bosses will embrace technology as much as they do. Then some discover that sites they're supposed to be researching for work are blocked. Or they can't take a little down time to read a news story online or check their personal e-mail or social networking accounts. In some cases, they end up using their

own Internet-enabled smart phones to get to blocked sites, either for work or fun.

So some are wondering: Could companies take a different approach, without compromising security or workplace efficiency, that allows at least some of the online access that younger employees particularly crave?

"It's no different than spending too much time around the water cooler or making too many personal phone calls. Do you take those away? No," says Gary Rudman, president of GTR Consulting, a market research firm that tracks the habits of young people. "These two worlds will continue to collide until there's a mutual understanding that performance, not Internet usage, is what really matters."

This is, after all, a generation of young people known for what University of Toronto sociologist Barry Wellman calls "media multiplexity." College students he has studied tell him how they sleep with their smart phones and, in some cases, consider their gadgets to be like a part of their bodies. They're also less likely to fit the traditional 9-to-5 work mode and are willing to put in time after hours in exchange for flexibility, including online time.

So, Wellman and others argue, why not embrace that working style when possible, rather than fight it?

There is, of course, another side of the story — from employers who worry about everything from wasted time on the Internet to confidentiality breaches and liability for what their employees do online. Such concerns have to be taken especially seriously in such highly regulated fields as finance and health care, says Nancy Flynn, a corporate consultant who heads the Ohio-based ePolicy Institute.

From a survey Flynn did this year with the American Management Association, she believes nearly half of U.S. employers have a policy banning visits to personal social

networking or video sharing sites during work hours. Many also ban personal text messaging during working days.

Flynn notes that the rising popularity of BlackBerrys, iPhones and other devices with Web access and messaging have made it much trickier to enforce what's being done on work time, particularly on an employee's personal phone. Or often the staff uses unapproved software applications to bypass the blocks.

As a result, more employers are experimenting with opening access.

That's what Joe Dwyer decided to do when he started Chicago-based **Brill Street & Co.**, a jobs site for young professionals. He lets his employees use social networking and has found that, while they might spend time chatting up their friends, sometimes they're asking those same friends for advice for a work problem or looking for useful contacts.

"So what seems unproductive can be very productive," Dwyer says.

Kraft Foods Inc. (NYSE: KFT) recently opened access to everything from YouTube to Facebook and Hotmail, with the caveat that personal use be reasonable and never interfere with job activities.

Broadening access does, of course, mean some employees will cross lines they aren't supposed to.

Sapphire Technologies LP, an information-technology staffing firm based in Massachusetts, started allowing employees to use most Internet sites two years ago, because recruiters for the company were going on Facebook to find talent.

Martin Perry, the company's chief information officer, says managers occasionally have to give employees a "slap on the wrist" for watching sports on streaming video or downloading movies on iTunes. And he says older managers sometimes raise eyebrows at their younger counterparts' online judgment.

"If you saw some of the pictures that they've uploaded, even to our internal directory, you'd question the maturity," Perry says.

It's the price a company has to pay, he says, for attracting top young talent that's willing to work at any hour. "Banning the Internet during work hours would be myopic on our part," Perry says.

But that also means many companies are still figuring out their online policies and how to deal with the blurring lines between work and personal time — including social networking, even with the boss.

"I think over time, an open embrace of these tools can become like an awkward hug," says Mary Madden, a senior research specialist at the Pew Internet & American Life Project. "It can get very messy."

One option is for companies to allow access to certain sites but limit what employees can do there. For instance, **Palo Alto Networks**, a computer security company, recently helped a pharmaceutical company and a furniture maker open up social networking for some employees, but limited such options as file-sharing, largely so that sensitive information isn't transferred, even accidentally.

"Wide-open Internet access is the risky approach," says Chris King, Palo Alto Networks' director of product marketing. However, "fully closed is increasingly untenable for cultural reasons and business reasons."

Flynn, at the ePolicy Institute, says it's important that employers have a clear online policy and then explain it. She believes not enough employers have conducted formal training on such matters as online liability and confidentiality.

Meantime, her advice to any employee is this: "Don't start blogging. Don't start tweeting. Don't even start e-mailing until you read the company policy."

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Submitted by Aerotek Inc.

Fitness Focus: San Diego County Regional Airport Authority wellness program

The San Diego County Regional Airport Authority is an independent, state-chartered enterprise that employs approximately 350 professionals in the airport management industry at San Diego International Airport at Lindbergh Field. The organization has consistently demonstrated a commitment to employee wellness, viewing the program as a method of achieving a sustainable work force. This means the organization invests in preserving employees as business assets, as opposed to managing them as an expense.

One such business practice is employee wellness, which has become a competitive and compelling initiative; our flagship program called Fitness Focus, awards up to \$375 per year to employees for engaging in healthy activities. This includes preventive care, community service and seminars, as well as physical exercise, and is intended to encourage healthy lifestyles and sustain employee productivity. The airport authority's work force is 100 percent enrolled in the Fitness Focus program, with 20 percent claiming awards in 2009. We have plans under way to engage the remaining 80 percent. Each year the airport authority has allocated resources to support employees in pursuit of their health and wellness goals, whether they want to lose weight, reduce stress or simply improve their overall lifestyles.

Each year the human resources team complements the Fitness Focus program with activities and challenges to further engage employees in healthy lifestyles. In 2008, the organization implemented an internal competition in which employees strived to become the airport authority's "Biggest Loser" and win a Wii Fit. Following the success of the weight loss challenge, and based on data from organization-wide health risk assessments approved and funded by the organization's board of directors, an opportunity was identified to improve

employee Body Mass Index (BMI). The new BMI Challenge is currently on.

In 2008, 78 percent of the work force participated in the inaugural year of health risk assessments in exchange for a tax-deferred deposit into an individual employee's flexible spending account. The data collected from the assessments, including biometric screenings, created a baseline set of data for the airport authority to utilize when crafting future Fitness Focus activities and challenges. The health risk assessments were a "win-win" addition to work force sustainability initiatives: the employee gained valuable feedback about their individual health, and the organization gained valuable data and insight on areas for improvement.

The airport authority offers a Dine and Discuss program, where employees receive a presentation from an industry expert on a wide range of topics during their lunch hour. The varied curriculum helps employees become aware of the relationship between balanced nutrition, adequate physical activity, preventive care and lifetime health.

Fitness Focus is the keystone component stimulating the airport authority's employee engagement in personal health and wellness, resulting in an empowered and productive work force. This program expressly models three of the organization's seven values statements:

- providing a safe, secure, quality oriented, highly efficient environment;
- personal involvement is a job responsibility; and
- that everyone counts and we count on everyone.

The San Diego County Regional Airport Authority's demonstrated commitment to the wellness program results in employees being treated as assets to be valued, appreciated and preserved. It also makes good business sense.

Submitted by San Diego County Regional Airport Authority

Media

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agement in the selling of mortgage-backed securities, for example, could be protected whistle-blowing activity. Thus, as long as the employee is not engaged in a protected activity (e.g., whistle-blowing or union activity), an employer is free to terminate him or her for inappropriate conduct discovered through the Internet, particularly where the employee has violated a company policy. At the same time, companies should ensure equal enforcement of their policies to avoid discrimination claims.

Haymes offered the following employer protocol recommendations:

1. Develop a corporate policy

outlining in detail the company's position regarding blogging and Internet postings, particularly as it relates to the company. The policy should advise employees of the risks and prohibit conduct that:

- Violates security laws
- Discloses the company's intellectual property
- Discloses any other employee's personal information
- Discloses confidential information
- Discusses work-related legal procedures and controversies
- Uses other company's copyrighted materials or intellectual property
- Makes false statement about competitors

Workplace

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new hire training and at scheduled intervals thereafter. At the very least, training should remind employees and managers that they have a responsibility to contribute to achieving a healthy and civil work environment that does not tolerate bullying. Offering conflict management and leadership skills training will complement these trainings nicely.

5. Take grievances seriously and investigate them immediately. When a grievance is filed, the target should present written documentation and precise details of each incident of bullying. Human resources should follow appropriate disciplinary procedures as laid out in the policy, and is encouraged to continue to keep the situation under review.

6. Use 360-degree reviews. A 360-degree review provides

every organizational member with reviews from everyone they work with, including peers, managers and subordinates. This provides an avenue for managers to learn from the people they direct, rather than only those who direct them. If done right, 360-degree reviews receive high employee involvement, have the strongest impact on behavior and performance, and greatly increase effective internal communication.

Bottom line

By addressing workplace bullying and developing techniques for sustainable change, you can increase employee retention and reduce turnover, reduce absenteeism and medical leaves, manage and leverage organizational brand, motivate, inspire and develop staff, minimize workplace politics, improve communi-

Additionally, she noted, companies should make sure their anti-harassment, anti-discrimination and anti-retaliation policies cover Web 2.0 activities and indicate that employees have no expectation of privacy in the use of the company's technology, either at work or outside of work. Haymes recommends that employees be enlisted to represent the company well and to protect the professional image of the corporation. Social media can be a powerful marketing and business development tool if used responsibly.

Ellman is founder of Beck Ellman Heald.

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On a final note, be weary of the anti-workplace bully law in our midst. David Yamada, a professor at Suffolk University, wrote the Healthy Workplace Bill that has been under review in 15 states, including California in 2003. Only the government of Ireland (since as early as 1997), and the province of Quebec, Canada (since 2003), currently have specific laws against the act of bullying at work, but all that is soon to change.

Mattice is owner of NoWorkplaceBullies.com.

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