

OCTOBER 2, 2020

## WHAT'S INSIDE

- 2 Sharpen Your Judgment**  
Younger candidate was just a 'better fit': Age bias?
- 3 Employment Law Update**  
Employee may have been denied promotion due to race, court says
- 4 Answers to Tough HR Questions**  
How should we adjust performance reviews?
- 6 What Would You Do?**  
Hard-working employees want raises, but there's no money

## HRMORNING

### Keep Up To Date with the Latest HR News

With HRMorning arriving in your inbox, you will never miss critical stories on labor laws, benefits, retention and onboarding strategies.

HRMorning, part of the *SuccessFuel* Network, provides the latest HR and employment law news for HR professionals in the trenches of small-to-medium-sized businesses. Rather than simply regurgitating the day's headlines, HRMorning delivers actionable insights, helping HR execs understand what HR trends mean to their business.

## Why it's essential to reevaluate benefits during the pandemic

### ■ *Childcare assistance becomes most wanted perk*

It's been six months since the coronavirus pandemic brought life – and business – as we know it to a grinding halt.

Employers were forced to adapt overnight, moving office operations into workers' homes.

Everything about remote work was a challenge, from technology issues to parents preoccupied with children at home. And COVID-19 has impacted much more than work location.

back into the office, most are taking the opposite approach.

Two-thirds of employers expect this remote work shift to be permanent, at least on a part-time basis. Companies that once disallowed telecommuting are realizing employees can still get the job done at home.

A few major companies have gone as far as declaring a permanent, full-time remote work policy. Employees at Twitter, Shopify and Zillow can choose to never return to the office, even once the pandemic is a distant memory.

But remote work isn't the only

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

### ■ **Permanent telecommuting**

While a handful of businesses have slowly but surely brought employees

## DOL updates FFCRA after court ruling

### ■ *Agency announces new definition of 'healthcare provider'*

In response to a federal court ruling back in August, the DOL has announced some regulation changes to the Families First Coronavirus Response Act (FFCRA).

The biggest update involves a new definition of what constitutes a healthcare provider.

healthcare workers to be anyone who is "capable of providing healthcare services."

Furthermore, the workers must be "employed to provide diagnostic services, preventive services or treatment services."

Another provision of the FFCRA the DOL adjusted was that employees don't need to provide documentation before taking leave – they may provide it as soon as it's practical.

*Click: [bit.ly/FFCRA565](https://bit.ly/FFCRA565)*

### ■ **Two new provisions**

The FFCRA allows employers to exempt certain healthcare workers from taking leave under the act, and the DOL adjusted the definition of

# Pandemic ...

(continued from Page 1)

pandemic-related decision employers have to make.

### Reallocation of benefits

In the current business landscape, so many benefits employers offer simply don't make sense anymore. Additionally, new needs are popping up as a result of COVID-19. A major benefits shake-up is in order.

Here's how Kayla Lebovits, CEO and founder of Bundle, a provider of employer subsidized virtual childcare and education, came to that conclusion.

Like many companies out there, Bundle quickly adapted to working in the midst of a pandemic.

Employees were given flexibility – they could work whatever hours worked for them, as long as their assignments got done.

As a mother herself, Lebovits knew

firsthand how challenging it can be to juggle child care and work. Even those without kids have other home responsibilities they're dealing with.

But Lebovits realized some bigger changes were needed when it became clear that the pandemic rendered many once-popular benefits irrelevant.

Perks that Bundle offered its employees, like gym memberships and transportation stipends, weren't being used in the new coronavirus world.

Not only that, but new needs were cropping up. Lebovits recognized one of those major gaps as childcare assistance. Even before the virus, it was a challenge for working parents.

"I think we're going to see a big shift, and more employers will be offering childcare benefits," Lebovits predicts. "I think it'll become a major staple, like health care."

Some companies have taken a step in that direction by offering assistance with daycares or nannies, but Bundle has a slightly different approach of offering both clients and employees a virtual learning experience.

This allows parents to leave their child in front of the computer for a few hours, where the child can learn and be fully engaged, allowing the parent to work uninterrupted.

### Other new perks

Emily Muhoberac, COO at Sapper Consulting, suggests a few other benefits changes to make right now.

1. **Amp up your health plan.** Good health care is more important than ever. Check that your employees have access to things like telehealth.

2. **Student loan repayments.** During this global crisis, so many are struggling to pay bills – student loans especially. By adding this perk, you can help ease your employees' financial burden.

3. **Entertainment and food services.** Instead of gym memberships, try picking up the tab for Netflix subscriptions or delivery services like Instacart and Postmates.

Info: [bit.ly/perks565](https://bit.ly/perks565)

## 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.*

### ■ Younger candidate was just a 'better fit': Age bias?

"Hi, Lynn, how's it going?" Company attorney Eric Bressler asked HR manager Lynn Rondo as he took a seat in her office.

"I'm fine," Lynn replied. "But I have the feeling you're here with bad news."

"Unfortunately, yes," Eric said with a frown. "We're being sued by Eve Hartley. She's saying her age is the reason she wasn't promoted."

### Passed over several times

Lynn let out a sigh. "I can't say I'm surprised. Eve was very unhappy when we told her we went with Marcus instead."

"I know you didn't pick Marcus just because he's younger," Eric said. "Can you tell me why you went with him?"

"He was just the better fit," Lynn replied. "It's hard to explain, but during his interviews, I just felt like he'd do better at the job than Eve."

"The issue is," Eric said, "Eve has several years' experience needed for the job, and she's tried a few times to get this promotion. A court might think we're passing her over because of her age."

"That's just not true," Lynn said. "Again, Marcus was the better fit. He just happened to be a lot younger."

"We'll fight this, then," Eric said.

When Eve sued for age discrimination, the company fought to get the case dismissed.

Did it win?

■ *Make your decision, then please go to Page 4 for the court's ruling.*



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# Employee may have been denied promotion due to his race, court says

### ■ Decision-maker later fired for making unrelated racist remarks

When an employee loses out on a promotion, it can be hard to pinpoint why.

But one was certain his race had something to do with it, and after initially losing in district court, the 4th Circuit revived his case.

### Less experience, more pay

Robert Gary, an employee at Facebook, didn't receive the promotion he wanted.

Instead, it was given to a white employee that Gary trained. This employee had less experience than Gary and also earned a higher raise.

Gary sued for racial discrimination. The company argued Gary didn't receive the promotion because he "lacked initiative and communication skills."

A district court sided with the company, saying Gary and his white co-worker weren't similarly situated enough to compare.

But on appeal, the 4th Circuit reversed the decision, siding with Gary.

The 4th Circuit pointed out that the manager who decided not to promote Gary had been investigated and fired for using racial slurs. One could reasonably conclude this manager didn't promote Gary due to his race, the court said.

This case is an important reminder for employers that discriminatory remarks made by a manager – even one who is disciplined and terminated for their actions – can lead to legal trouble.

*Cite: Gary v. Facebook, 8/26/20.*

# 5th Circuit: Termination of employee who reported harassment wasn't retaliation

### ■ Worker fired for policy violations, not harassment complaint

The timing of terminations can result in lawsuits – especially if the employee recently engaged in protected activity.

But in a recent case, a court decided a worker who reported sexual harassment wasn't fired in retaliation.

### Fired after report

Lashawnda Brown worked as an assistant manager at a Mississippi Walmart.

She claimed to have been harassed by her project manager. Brown reported this several times, including once on Walmart's ethics hotline.

Not long after her report, Brown was fired. Walmart claimed she

violated two separate policies regarding employee discipline and customer shoplifting.

Brown sued, claiming she was fired in retaliation for her sexual harassment complaint, but the 5th Circuit disagreed.

The court said the company presented a valid, nondiscriminatory reason – the policy violations – for firing Brown. There was no violation of the Civil Rights Act in Brown's firing, the 5th Circuit said.

Employers should be cautious about firing protected employees, but when there are clear company policy violations, the courts tend to side with the employer.

*Cite: Brown v. Walmart, 8/14/20.*

### ■ Company paid women less than men, now owes \$105K

It's illegal to pay female employees less than male workers for doing the same job, but one company tried to get away with doing just that.

According to a recent lawsuit by the EEOC, Covenant HealthCare in Saginaw, MI, practiced wage discrimination.

The company allegedly paid a female business intelligence developer a lower salary than two male employees with the same job. This is a violation of the Equal Pay Act (EPA) and the Civil Rights Act.

Covenant HealthCare will pay \$104,707 to the female employee, as well as increase the worker's salary and revise its pay practices in order to comply with the EPA.

*Info: bit.ly/equalpay565*

### ■ Employer out \$43K for firing pregnant worker

When one company fired a pregnant employee because she needed a job accommodation, the EEOC stepped in.

Tennessee-based property management company, Multi-South Management Services, was sued by the EEOC when it fired a pregnant employee with medical complications.

The employee, a four-year veteran with no performance problems, was the community director of an apartment complex when she alerted her employer that she had pregnancy complications and was at risk for pre-term labor.

Instead of offering her a reasonable accommodation, Multi-South fired her. This is a violation of the Pregnancy Discrimination Act and the Civil Rights Act.

Multi-South Management Services will pay \$42,500 in monetary relief to the employee. It also must conduct training to prevent similar discrimination.

*Info: bit.ly/pregnant565*

# ANSWERS TO TOUGH HR QUESTIONS

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.

## How should we adjust performance reviews?

**Q:** A lot of aspects of our current performance review process just don't make sense right now because of COVID-19. How should we adjust our review methods to account for this?

**A:** Now's the perfect time to examine and revise your performance review standards, says leadership expert and author Winston Tan. New skills and attitudes are essential for employees to be successful at work in the midst of the pandemic.

What should employers evaluate now? Adaptability and flexibility. Here are some specific areas:

- Demonstrates the ability to multitask and handle pressure, and
- Remains calm when faced with challenges or lack of resources.

## Should we put a freeze on all terminations right now?

**Q:** We have an employee who's been on a PIP since before

the pandemic started. Her performance hasn't improved at all, despite many warnings. Under normal circumstances, we would've let her go by now, but we're hesitant to do that now – the timing couldn't be worse. Should we avoid terminating until things get a bit better?

**A:** It sounds like you've been very gracious during this situation and have given this employee plenty of chances. Pandemic or not, you should seriously consider letting this employee go, says management expert and author of *Ask A Manager* blog Alison Green.

As a general rule, all employers should be more understanding and flexible than usual during the pandemic.

But if you have a problem employee who wasn't even producing good work beforehand, termination is probably necessary.

It's true that the timing isn't ideal, but it sounds like you've given this a fair amount of thought. It wouldn't be considered heartless to let this employee go after a PIP and repeated warnings.

Typically, you should avoid

terminations now when possible, but that isn't the case here.

## What happens if an employee works after hours?

**Q:** Our employees are currently working remotely. If someone works overtime and doesn't tell us, are we required to pay them?

**A:** The DOL addressed this question in a recent update. Essentially, the FLSA requires employers to pay employees for all work performed, even if it wasn't directed or authorized by the employer.

Employers are expected to do "reasonable diligence" to find out if employees are working outside of their normal hours. This means having staff track and report all hours worked.

However, the FLSA doesn't require employers to "undertake impractical efforts" like tracking employees' use of work devices, to determine if an employee has worked additional hours.

*If you have an HR-related question, email it to Rachel Mucha at: [rmucha@HRMorning.com](mailto:rmucha@HRMorning.com)*

*Sharpen your judgment...*

## THE DECISION

*(See case on Page 2)*

No. The company lost when a court ruled Eve's claim can move forward.

The company argued Marcus was simply a better fit, and Eve's rejection had nothing to do with her age. But the court pointed out several issues with this argument.

The "better fit" argument wasn't specific enough, the court said. The company couldn't point to any solid, documented reasons for choosing Marcus over Eve.

Not only that, but on paper, Eve was more qualified for the promotion than Marcus and had three years of relevant experience. The court said these two factors

are enough to move the case forward, and that the company's subjective beliefs about Eve may be true, but it failed to offer a clear, nondiscriminatory reason for not promoting her.

### ■ Analysis: Document clear reasons

Age discrimination claims like this one can be better defended when employers have clear, nondiscriminatory reasons to show courts that age wasn't a factor in the employment decision in question.

Documentation and specificity are key. This company ran into trouble when it was too vague about why it turned down Eve for the job, leading the court to wonder if age was really a factor.

**Cite:** *Cunningham v. East Tallahatchie School District, U.S. Dist. Ct. N.D. of MI, No. 4:19-cv-10, 8/4/20. Fictionalized for dramatic effect.*

# Rebranding our benefits as a total compensation package paid off

### ■ Guided employees to better healthcare decisions

Our benefits programs are some of the most valuable parts of our team members' total compensation package.

So it's important our benefits communications reflect this. They also have to match our high-quality, high-profile corporate brand that attracts so many of our employees in the first place.

We needed a strategically developed benefits brand to form the foundation for long-term employee engagement.

That meant helping employees understand and appreciate our benefits offerings and make better decisions for their own medical and well-being needs.

### Total rewards

Working with our vendor, we developed a new brand to promote our total rewards concept.

We created various categories, grouping benefits into Health, Wellness, Retirement and Perks.

A key objective of the brand was to make it about our team members. We put them at the heart of the brand, using real-life employee images and quotes to help make the benefits even more relatable.

After the hard work of developing the brand and laying the groundwork, we rolled it out, starting with the always critical open enrollment process.

### Keeping messages clear

As we introduced the new brand, we created and shared new open enrollment materials.

We focused a lot of effort on breaking down complex medical

jargon, using different employee scenarios to illustrate concepts and terms and tying them to our offerings.

In addition to all the details about available options, we knew our employees needed ongoing guidance and reminders.

Our new communication platform included clear signposts highlighting the tools and resources available to help them manage their well-being throughout the year.

And we built a framework to automate our messaging schedule to be sure everyone got reminders in plenty of time to take required action or make any benefit changes.

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

### Making the right choice

At the time we rolled out the new benefits brand and communication

strategy, we had a big group enrolled in our HMO or exclusive provider organization (EPO).

We wanted to help educate them about their options and choices available with our high deductible health plan (HDHP) and determine whether it would make sense for their specific situations.

### Big pay off

We believed it was the most financially beneficial choice for most of our team members.

Our strategy of clear messaging and benefits education has really paid off, with many employees deciding the HDHP was the right choice for them and their families.

*(Ryan Ward, VP of HR, Penske Corp., Bloomfield Hills, MI)*

### REAL PROBLEM REAL SOLUTION

### ■ Starting every meeting off on the right foot

Quite frankly, meetings can be morale-killers and time-killers.

Not only do most people dislike attending them, but at our company, it was starting to feel like meetings were only for delivering bad news.

We needed a fresh strategy in order to keep our employees' attention.

### Small, but impactful change

So we asked ourselves: How could we stop people from hating meetings in general and zoning out right away?

It came down to a very simple tweak. We decided to change how the meetings started. Now, at every meeting, all attendees share something good that's happened to them recently.

The only rule? It has to be positive.

It can be anything from a recent win at work to fun personal news, like something relating to their kids or spouse.

And it's been a huge success! Everyone looks forward to sharing and hearing good news.

We've all enjoyed learning more about each other in the process, and we now know what's going on personally and professionally in each other's lives. It's built stronger connections between colleagues.

Bonus: It's done wonders for what comes after in the meeting.

Since we begin on a lighter note, even when we have some not-so-positive things to discuss, everyone handles them a lot better.

Basically, we've found that bad news is easier to swallow when you start with good news as the appetizer.

*(Lisa Tanzer, president, Life is Good, Boston)*

## 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.

### Hard-working employees want raises, but there's no money

#### The Scenario

HR manager Stu Capper was sipping his pumpkin spice latte and admiring his Halloween decorations on his desk when department manager Mary Rodriguez walked into his office.

"Looks like someone's in the fall spirit," Mary commented.

"I'd be spooky all year long if I could," Stu replied. "What's going on, Mary?"

"I wanted to talk to you about raises for my team," Mary began. "Rick and Bill have been asking ... "

"I'm going to stop you right there," Stu said. "The higher-ups have already said we might not have money for raises this year. I don't want anyone getting their hopes up."

"I know it's been a tough year," Mary agreed. "But everyone's worked so hard. It'd be a shame if we couldn't give them the raise they deserve."

#### Showing appreciation

"I hear you," Stu replied. "Everyone's done such a great job with adjusting to remote work and all the other challenges from the pandemic. But if there's no money, there's no money."

"Maybe we can move some money around," Mary suggested. "Or find some other way to show our appreciation."

"I'll get back to you," Stu said.

*If you were Stu, what would you do next?*

#### Reader Responses

**1** Michael Kostrzewa,  
HR director, YRCI, Fairfax, VA

*What Michael would do:* I'd take a closer look at our current pay structure and see if any changes could be made. Often, employees with the most tenure end up receiving the highest pay increases, regardless of performance. I'd try to adjust this practice, ensuring those who worked the hardest receive the raises they deserve – not just those who have the most seniority.

*Reason:* It's important to appreciate good work with pay raises, or else morale will take a serious hit, and employees will eventually leave. I'd move money around and ensure we found enough for our employees, even if it meant taking it from higher-ups' raises. Everyone's hurting right now, so we need to find a way to make

raises work.

**2** Janet Giannetta, chief HR officer,  
RBT CPAs, Newburgh, NY

*What Janet would do:* If raises just weren't in the budget, I'd get creative with how we rewarded our employees. I'd open the question up to the employees asking about raises and see what else we could do for them. If they were unsure what they wanted, I could offer other perks like more paid vacation time.

*Reason:* If there's no money, there's no money – but that doesn't mean we should do nothing for employees. A lot will appreciate the gesture of asking them what they want or offering them sought-after perks like more PTO. It's so important to retain good employees, and going out of our way to solve the raise problem will show our dedication to keeping them happy. A little appreciation can go a long way.

#### HR OUTLOOK

#### ■ 4 things to look for while hiring remote candidates

Hiring looks a lot different now than it did a year ago, and the characteristics of ideal candidates are shifting.

With so many companies still operating remotely, employers specifically want candidates who will be able to get the job done from home.

#### Remote hiring tips

Jessica Mah, CEO of inDinero, found herself needing to adjust her hiring strategy a bit.

Here are four things she made a priority while hiring remotely:

1. **Positive energy.** Passion and positivity is something you really want to look for, especially now. The pandemic has burnt out a lot of employees, so you want to ensure your candidates are excited about taking on something new. Hiring energetic people with positive outlooks will also rub off on your entire team.

2. **Upbeat job postings.** Take a look at your postings and adjust them to make them as exciting and attractive as you can. Give candidates a strong sense of your company culture, which will increase the likelihood of a great fit. You want your culture to sound exciting, and for your candidate to be excited about your company.

3. **Virtual skills.** Even if in-person interviews are safe, stick with virtual ones. It's crucial to see how well candidates can conduct themselves over Zoom and phone calls, since that'll be how they'll communicate if they get the job.

4. **Ability to focus.** Working from home presents many distractions, so it's crucial to find someone who can focus in spite of these. When interviewing, make sure the candidate gives you their attention, and also has a designated work space in their home.

**Info:** [bit.ly/remot565](https://bit.ly/remot565)