

The Voice

of the Nebraska Grocery Industry

October/November/December 2017







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University of Nebraska Gets Grant to Reduce Allergen Recalls

Food allergen experts at the University of Nebraska have received \$20,000 for work to reduce undeclared allergen recalls.

The Food Allergy Research and Resource Program (FARRP) at the University of Nebraska – Lincoln's Food Science and Technology Department was awarded the money by the Food Marketing Institute (FMI) Foundation.

They will identify root-cause labeling errors and recommend best-practice procedures for manufacturers, suppliers and retailers to reduce such recalls. Susan Borra, executive director of the FMI Foundation and chief wellness officer for FMI, said undeclared allergens are the leading cause of US food recalls.

"The FDA has stated that Reportable Food Registry reports of undeclared food allergens increased from 30% to 47% during the five year period from 2009-2013. The FMI Foundation is proud to support research which aims to improve public health efforts nationwide." The research

– led by Steve Taylor, professor and co-director of the program; Joe Baumert, associate professor and co-director and Jamie Kabourek - will evaluate and classify the last two years of Food and Drug Administration (FDA) and US Department of Agriculture (USDA) allergen recalls. This will be done based on explanations from the manufacturer and the regulatory agencies. Dr. Taylor said FARRP will survey the best practices used by manufacturers on an international scale.

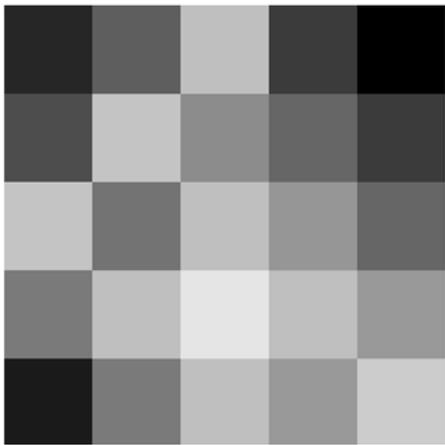
"By focusing on how primary root-cause errors occur and identifying appropriate preventive measures, food allergen recalls can be reduced, thus creating better protection for food allergic consumers, decreased food waste and reduced economic burden for suppliers, manufacturers and retailers."

Preliminary findings will be presented at the annual Safe Quality Food International Conference in Dallas on 7-9 November 2017. FARRP also intends to submit a paper for peer-reviewed publication.

OSHA Requires Electronic Reporting Of Injury Data by December 15, 2017

The December 15, 2017 deadline for large employers (250 or more employees) and small employers (20-249 employees) in certain "high hazard industries" (grocery, specialty food stores, wholesale trade, and warehousing and storage, are considered high hazard) to submit injury and illness data on Form 300A to OSHA by December 15. We have been tracking closely the Trump Administration's treatment of OSHA's new E-Recordkeeping and Anti-Retaliation Rule, and while there have been plenty of signals that this rule is due for an overhaul, or even possibly to be rescinded, it appears that the initial data submission deadline of December 1st is going to stand.

Therefore, if employers have not already done so, they should immediately evaluate whether the rule applies to any or all of their workplaces, get familiar with and set up an account in OSHA's Injury Tracking Application (the portal that receives injury data), and submit covered 2016 OSHA log injury data by December 15, 2017. To file online, go to <https://www.osha.gov/injuryreporting/ita/> Log in if you have an account or you can create an account from this page.



Altria

Avoiding an Equal Pay Act Claim

Courtesy of UNICO

Recently, three female employees filed a class action lawsuit against Google alleging that the tech giant discriminates against female employees by failing to pay them the same compensation paid to male employees performing substantially similar work under similar working conditions. Earlier this year, the Office of Federal Contract Compliance Programs (OFCCP) investigated Google's practices and made a preliminary finding of pay discrimination, a claim that Google is disputing. The recent lawsuit adds more fuel to the fire.

In this case, these employees claim that female employees are systematically paid less than their male colleagues because the company assigns them titles or levels with lower compensation ceilings and fewer advancement opportunities. Additionally, they accuse Google of promoting fewer women and promoting them more slowly than men with similar qualifications.

While this case is based on violations of the California labor code, federal law prohibits employers from using sex as a basis for compensation (The Equal Pay Act of 1963 (EPA) and Title VII), and state equal pay, labor, and/or anti-sex discrimination laws prohibit basing the rate or amount of an employee's pay on their sex. Because equal pay claims often go hand-in-hand with Title VII or state sex discrimination claims, failing to provide equal pay for substantially equal work can be costly for employers, financially, legally and culturally.

Equal Pay Claims

The EPA (29 U.S.C. §206(d)), generally applies to employers subject to the Fair Labor Standards Act (FLSA) and prohibits wage discrimination on the basis of sex for jobs performed under similar working conditions that require equal skill, effort and responsibility. In this context, pay includes salary or wages; overtime pay; bonuses; stock options; profit sharing plans; life insurance; vacation and holiday pay; cleaning, gasoline, hotel accommodations, or other travel allowance policies; and benefits.

Employers may pay workers differently if the difference is based on a factor other than sex, or if the employer pays employees based on a seniority system (time on the job), merit system (exceptional performance), or an incentive system that pays employees based on the amount or quality of work they perform or produce.

In equal pay cases, an employee's job content, not job title, is evaluated to determine whether a violation occurred. The Equal Employment Opportunity Commission (EEOC), federal courts, and/or state regulators or courts will likely look at the job duties

female employees are performing and compare those to the job duties male employees are performing to ensure there is no disparity in pay. This could include an analysis of the following:

- Tasks performed for positions;
- Level of skill involved, including any required education or experience, ability, training or special licensure;
- Level of effort involved — both mental and physical;
- Level of responsibility and accountability for employees in those positions;
- Working conditions;
- Worksite location.

Don't Be Like Google

Whether the class action case against Google will be successful remains to be seen. Regardless of the outcome, employers may take a proactive approach to avoid violating the EPA, applicable state equal pay laws, or state or federal anti-sex discrimination laws to prevent OFCCP audits and lawsuits. A proactive approach would include an audit of current practices in the following areas:

- Recruiting and hiring and how pay is assigned to job classes;
- Career training or opportunities for advancement for employees (including how openings are advertised to employees);
- Performance evaluations;
- Pay raise or bonus decisions;
- Compensation (such as starting salary, benefits, bonuses, shift differentials, overtime, separation pay, and stock awards or other deferred compensation);
- Supervisory training; and
- Job duties and current job descriptions to ensure proper employee assignment.

Employers should work with counsel or a trusted consultant to ensure the audit process is smooth and the process and findings are well documented. Should an employer find that there is a pay inequity as the result of an audit, then it should act quickly to rectify the issue. Employers cannot reduce the wages of one sex to equalize the pay for the other sex. Instead, the gender experiencing the inequity should have their pay raised to be comparable to the other sex.

continued on page 34

At A Glance: Nebraska's Rankings In Competitiveness Studies

Courtesy of Nebraska State Chamber of Commerce

Over the decades, Nebraska's business leaders, chambers of commerce, lawmakers and governors have worked hard to improve our state's economic competitiveness. While there is still much work to be done, Nebraska has become recognized nationally and globally for its pro-business climate. Below are recent comparisons in which Nebraska has performed well:

- Best In U.S. - Regulatory Climate (Forbes, 2016)
- Best In U.S. - Retirement Environment (LPL Financial, 2017)
- 3rd Best - Best States For Business (Forbes, 2016)
- 3rd Best - Top States For Millennials (MoneyRates.com, 2017)
- 4th Best - Combined Business Climate Rankings (Ball State University, 2016)
- 5th Best - Affordability (U.S. News & World Report, 2017)
- 5th Best - America's Happiest States (WalletHub.com, 2017)
- 5th Best - Education System (CNBC, 2017)
- 5th Best - Unemployment Tax Burden (SBE Council, 2017)
- 5th Best - Business Incentives (Pollina Corporate, 2015)
- 6th Best - State Fiscal Solvency (George Mason University, 2017)
- 6th Best - Business Friendliness (CNBC, 2017)
- 7th Best - Quality Of Life (Forbes, 2016)
- 7th Best - Best States To Find A Job (U.S. News & World Report, 2017)
- 7th Best - Legal Climate (U.S. Chamber Institute for Legal Reform, 2017)
- 9th Best - Business Costs (Forbes, 2016)
- 9th Best - Retail Electricity Prices for Residential Users (U.S. Dept. of Energy, 2017)
- 10th Best - Best States For Lowest Mortgage Debt (Experian, 2016)
- 10th Best - Best States In Which To Retire (Bankrates.com, 2016)

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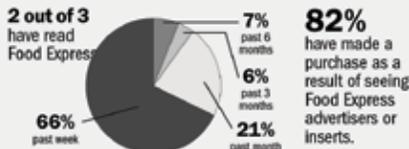
300,477 total per week Food Express deliveries for January, 2017

The Food Express subscriber & non-subscriber section wraps advertiser inserts and includes food editorial, feature stories, recipes and other diet information.

Publishes every Wednesday

Source: The Consumer Preference Online Panel Study © 2016 by The Omaha World-Herald. All Rights Reserved.

Food Express gives you **100% Omaha** Metro coverage: Distribution in all Douglas and Sarpy County Zip Codes and select Zip Codes in Cass, Washington & Saunders counties.



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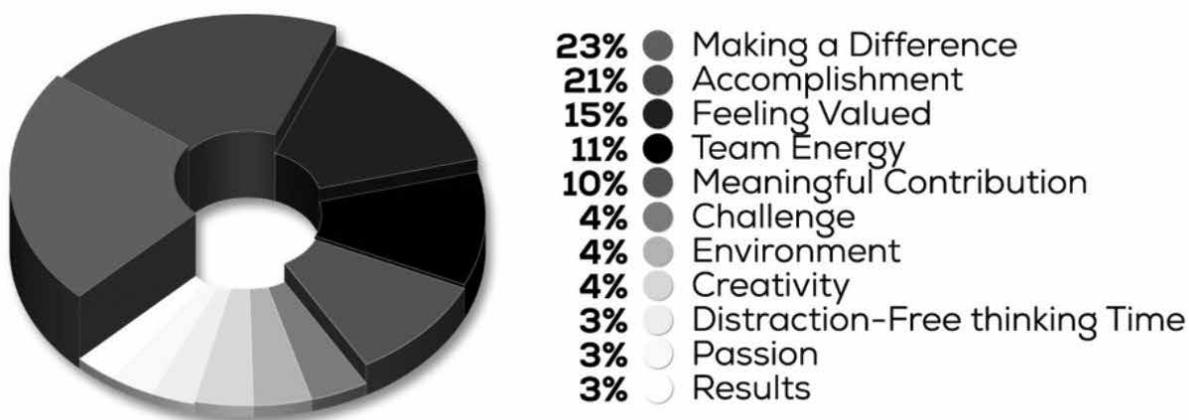
Turning on Employees' Motivational Switch

Courtesy of UNICO

When we feel inspired, we turn on our motivational switch. We engage. We want to learn and do more. We care more deeply. We impact others. We are connected. We feel energized! And this inspires us to do even more.

Motivated team members understand how to turn on their motivational switch.

They understand that no one else can motivate them; they must do that for themselves. They have chosen to play "all in." The things we love bring us joy, and we generally do them well. That is why we are driven to find what we love and value in our work. We align it with our own joy. We asked hundreds of highly motivated and not-so-motivated people what motivates them. Here are their responses:



After sorting through all that data, one thing became clear:

We are all motivated differently, and our motivations change with time and priorities.

Some of us are motivated by the desire to make a difference in other people's lives, while others are motivated by pride or a desire to outperform the competition. Regardless of what turns on our motivational switch, what is most important is knowing how to do it. Trying to motivate another person is an impossible, never-ending task, so in order to inspire and ignite, leaders need to understand the motivation behind their goals and those of their team as well as how their work and their team's work contribute to the vision of the company.

Leaders need to understand the motivation behind their goals and those of their team.

Inspiring leaders who help people connect the dots between what they do and the "why" help them turn on their motivational switch, regardless of their work product.

Highly competent people make a leader's life undemanding. When their people are competent, it becomes easy for leaders – and customers – to recognize them. This acknowledgment of their performance encourages an even higher level of performance, which activates their pride. As pride grows, it turns on their motivational switch.

Leaders must be intentional in their approach to understanding what motivates each team member and then leading with connection and inspiration. Understanding their own motivations – and those of the people around them – helps leaders take action and sustain it. One thing our motivational switch research made clear was that, more often than not, people are motivated by making a difference in another person's life. Conversely, most leaders thought their team members were motivated when they felt valued. They did not realize that their people were driven by making a difference in another person's life!

Leaders must be intentional in understanding what motivates each team member and then leading with connection and inspiration.

Myth: “I’m motivated when I make a difference, and my team is motivated when I am making them feel valued.”

Understanding what motivates people is as simple as asking. When leaders ask, they are often surprised. What they think may motivate an individual could be far from what the truth.

After understanding individual team member's motivations and helping them connect those motivations with their jobs, leaders must align individual and team goals with the motivations of their people. If not everyone is in alignment, the team will likely be unhappy. Many of the people polled in the motivational switch research were motivated by the desire to help another person and touch lives. This reason is probably why the strongest teams are those with high trust: They have each other's backs. This makes sense if you look at many of the team-building exercises used today; the successful programs are those that rely on teamwork and discourage working in a vacuum.

Leaders must align individual and team goals with the motivations of their people.

Think of your best leaders. They saw your potential and pushed you toward it.

Even if you disliked it at the time, it was a gift that made a difference in your life. Make your team one of the lucky ones. Be the leader who cares about them and their growth. Be intentional in your approach. Develop a mindset of inspiration, discipline and engagement. Create an environment that pushes them to think and play differently.

Good leaders know that pushing people out of their comfort zones is the only way to help them reach their potential and truly shine. They know that progress does not happen inside the status quo – for individuals or for teams. Leaders must build a platform that engages people so they find the courage to venture out and stretch. Be that leader.

Good leaders know that pushing people out of their comfort zones is the only way to help them reach their potential.

Nebraska Food News...People-Places-Things

The new **Fareway Meat Market** opened Wednesday, November 15th in Lincoln. Fareway CEO Reynolds Cts sleek, modern finishes. But they'll also feel transported back in time, as all of the employees wear '50s-style uniforms, with white shirts, black ties, black pants and soda jerk hats. The store offers a full-service meat department that includes seafood, a packaged-meat section, a selection of artisan cheeses, wine and craft beer, and other specialty and exclusive items. Cramer said the meat market, which is just the second one the company has opened, is a good way to introduce Lincoln to the Fareway brand. Fareway's other meat market is in Omaha, where it also has full-service grocery stores. The store is open 9 a.m.-8 p.m. Monday-Friday, and 8 a.m.-8 p.m. Saturday. It's closed Sundays.

Henderson Food Mart is excited to announce that Julie Smith has accepted the position of Store Manager, Julie has lived in the Henderson community with her husband Russell for 13 years and has worked at the Henderson Food Mart for the past 4.5 years. Julie is looking forward to serving store customers with all their shopping needs.

Patrick's Market located in downtown Omaha at 1416 Howard Street, closed at the end of September. Owner, Patrick Andersen said industry changes, especially online grocery delivery, have hurt the small brick-and-mortar grocer. "We've been doing it for 10 years now, and business just isn't there for it to be comfortable," he said. The store opened in 2007. The space is now for

lease and has seen "incredible interest" from office and retail tenants, restaurants and even other grocery stores, said Barry Zoob, senior vice president of Colliers International in Omaha.

Pickrell Locker and Smokehouse opened for business in October. The new store offers a variety of fresh meats, but also something that Pickrell has been without for several years now: groceries. The store will offer traditional smokehouse items, like steaks, chops, burgers and other meats from the animals that are slaughtered, butchered and processed at the facility. Pickrell Locker and Smokehouse will also have a limited lineup of grocery items, Freeman said, including milk and eggs.

Pac N Save celebrated its 30th anniversary in Wayne. Adam(son) & Don(father) Endicott spoke about how important the Wayne community has been to the store over the years.

Osmond grocery store, **Tiger Town Food & Floral Center**, to rebuild after fire. A new store is being built to serve a northeast Nebraska community that lost its local grocery store to fire. Owner James Bessmer said community support helped him decide to reopen in downtown Osmond. State Investigators ultimately determined that the fire was caused by old wiring.

Sargent Corner Market was once again voted the Business of the Year at the Celebrating Sargent banquet hosted by the Sargent Chamber of Commerce. This winning business is a cornerstone to this

community providing services that would otherwise require us to travel thirty minutes to get. The recent expansion to the store also provides needed employment for community growth. They work very hard and donate to our community and school.

R. U. Nuts has increased its product line in the last few years to help compete with increasing competition in the bulk-food industry. Since 2015 it has doubled its trail mix offerings to include 29 varieties. For Over 20 Years, R. U. Nuts had been a leader in Nebraska in the setup and service of bulk nut, candy, trail mix, coffee, and many other item displays. They currently serve Russ's Market, Super Saver, and Lincoln area Hy-Vee stores.

H&J Grocery in Eustis was going to close when longtime owner, Gregg Wolf, was ready to start a sausage factory and leave the grocery store business. Without new ownership to step up, the store would have closed leaving a void in the community. A group of community members, The Eustis 10, a local investment group, got together and bought the grocery store and the liquor store across the street about five years ago. Through the years they have made improvements to the building. H&J Grocery store has all one can ask for, including groceries, liquor, UPS shipping, a deli and Wi-Fi with a seating area. H&J continues to provide an essential part of rural living while

also playing a role in keeping Eustis a strong and attractive place to live.

The Yelkins are closing **Eagle Grocery**, also known as **Eagle General**, at the end of the year, citing decreased sales and competition from stores in east Lincoln and a new Dollar General in town. Those in the town of Eagle just over 1,000 people knew a change was imminent when the Yelkins placed the building up for sale in October. First, sales dropped as much as 20 percent in the past year following the opening of a new Dollar General in Eagle and increasing competition from supermarkets like Walmart and Aldi in east Lincoln. The building, constructed in 1929, had been a meat market and grocery store. Before opening the current store, the building was home to Lou's Grocery.

The **Canopy Street Market** in downtown Lincoln set to open in May or June of 2018. It is a collaboration between Mark Whitehead of Whitehead Oil, who owns the U-Stop convenience stores, and Jill Moline, who runs three grocery stores in western Nebraska and eastern Colorado.

No Frills Supermarket in Ashland recently presented another area organization with a check for \$1,000 from the Direct Your Dollars campaign. Store Director Jerry Bryceson presented a check to students and the instructor from Open Circle Martial Arts.



NEBRASKA GROCERY INDUSTRY ASSOCIATION, INC.

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**Nebraska Grocery Industry
to Hold
2018 Annual Legislative Reception & Dinner**

Invitations have been forwarded to all state senators and other state officials regarding the Legislative Reception & Dinner that is scheduled for Thursday, January 18, 2018. The Reception will begin at 5:30 with the meal being served at 6:30. The event will be held at the Cornhusker Marriott, 333 S 13th Street, in Lincoln. We urge all members to contact your Senator to invite him/her to sit with you during the Dinner (then let us know so we can arrange seating). If you need to know the name of YOUR senator, call us at 800-433-6742.

**Silent Auction to be held during Legislative Reception
Proceeds to Scholarship Program**

NGIA will hold a Silent Auction during the Reception from 5:30 – 7:00. This fun-filled event has become more popular each year. **All members are encouraged to donate items for the auction!** Items can be forwarded to the NGIA office or they can be left with any one of our board members. Please let us know if you are delivering items to a board member.

UNL Athletes to be Guests

UNL Volleyball and Football players have been invited as our guests. They will pose for photos with members during the reception. The photos will be developed and autographed for members to take home as a memento of the evening. **We encourage you to bring your memorabilia for autographs.**

Registration/Ticket Purchase

The Nebraska Grocery Industry Association will hold its Annual Legislative Dinner at the Cornhusker Marriott located at 333 S 13th Street in Lincoln, NE. Attached please find a registration form to purchase tickets, or you may purchase tickets from any NGIA Board Member or store owner/operator located in Lincoln. Details regarding the event can be found on the attached form.

Room Reservations

We have negotiated a group rate of \$119.00 for the evening of Jan. 18. The room block will be held until **December 21**, at which time all rooms will be released. We encourage you to contact the Marriott directly at 800-228-9290 or 402-474-7474 to make your reservation. Please mention Nebraska Grocery Industry Association when you make your reservation!

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NGIA, 5935 S. 56th St., Suite B, Lincoln, NE 68516 or email to rich@nebgrocery.com



SNAP Retailer Notice

On January 17, 2018, SNAP-authorized stores will need to meet new stocking requirements. Most stores are authorized under Eligibility Criterion A. To continue to accept SNAP benefits, a store that is authorized under Criterion A must have a minimum of 3 varieties of staple food items for each of the 4 staple food categories. SNAP-authorized stores must also offer for sale at least 1 variety of perishable foods in at least 2 staple food categories. In total, 36 staple food items are needed.

Staple food category: There are 4 staple food categories: Vegetables or Fruits (V/F); Meat, Poultry, or Fish (M/P/F); Dairy Products (D); and Breads or Cereals (B/C).

Staple food variety: Staple food varieties are different types of food within a staple food category (Ex: Oranges and apples are staple food varieties in the V/F category; and tuna and chicken are staple food varieties in the M/P/F category). Stores need 3 varieties of staple food items in each staple food category.

Stocking unit: In order to count as a staple food variety, there must be 3 stocking units of the staple food. Stocking units are a can, bunch, box, bag, or package that a product is usually sold in (Ex: 3 bunches of bananas = 1 V/F variety).

Perishable Foods: Products that are either frozen staple food items; or fresh, un-refrigerated, or refrigerated staple food items that will spoil or suffer significant deterioration in quality within 2 to 3 weeks

3 Stocking Units of a Staple Food	=	1 Variety of that Staple Food
3 Different Varieties in each of the <u>four</u> Staple Food Categories	<u>including</u>	1 Variety of Perishable Food in <u>two</u> Staple Food Categories
meets stocking requirements		

Please note:

- If your store does not sell food items in all 4 staple food categories (for example, a butcher shop or a bakery), then more than 50% of the total dollar amount of all retail sales in your store must come from the sale of staple foods (for example, meats at a butcher shop, or breads in a bakery). This is Eligibility Criterion B.
- “Staple foods” do not include foods that are hot at the point-of-sale, prepared foods (hot or cold) intended for on-site consumption, or “accessory foods.” Accessory foods include cakes, pastries, potato chips, cookies, soda, or other items that complement or supplement meals.
- These changes to stocking requirements do not change what food is eligible for purchase with SNAP benefits.

For more information visit www.fns.usda.gov/snap/enhancing-retailer-standards-supplemental-nutrition-assistance-program-snap or e-mail RPMDHQ-WEB@fns.usda.gov.

Liability

Personal Car for Business Use

Question: If an outside salesperson uses his own car for business purposes and gets into a car accident, is the company required to cover the cost of damages?

Answer: The answer depends on your corporate policy regarding the authorized use of personal vehicles and the facts and circumstances surrounding the accident. Generally, if employees use their personal vehicles for business purposes then their personal insurance covers the damage should an accident occur. Typically, there is a deductible in the event of a claim. Employees may think employers should pay the deductible if they are using their car for business purposes at the time of the accident. However, employers typically don't provide

reimbursement for deductibles or other costs incurred as a result of an accident because those costs are included in the mileage reimbursement rate. To alleviate confusion, it is best to clearly explain your corporate policy regarding the authorized use of personal vehicles for business purposes in writing in your employee handbook or expense reimbursement policy manual. Be sure to include an explanation of how the mileage reimbursement rate is set. Refer to the IRS website for more information to include in your policy. Include your approach to reimbursements in case an accident occurs. Be sure to include workers' compensation claim filing information in the event that the employee is injured in the accident.

Intoxicated employee dies after holiday party: Is company liable for negligence?

Courtesy of UNICO; by Rachel Mucha

If your company hosts a holiday party so employees can have some fun, can you be held legally responsible when a tragedy takes place because an employee had too much fun?

In *Gillern v. Mahoney*, a company faced this nightmarish situation after its holiday party ended in the death of an employee.

Jacqueline Gillern filed a wrongful death lawsuit against Memorial Sloan Kettering Cancer Center when her husband died after drinking too much at the company's holiday party, which took place off company property.

The plaintiff's husband, John Gillern, was a security guard for the company. He drank for hours, and Gillern was visibly drunk by the end of the party. Gillern passed out, and his co-workers moved him into the hallway and called his wife to pick him up.

Three of Gillern's fellow guards helped lift him into the backseat of his wife's car, where he was placed on his side.

When the plaintiff made it home, she was unable to move Gillern by herself, so she left him in the car to "sleep it off," as his co-workers had suggested. When she checked on him an hour later, she found Gillern dead, wedged between the front and back seats.

Were co-workers negligent?

The official cause of death was alcohol intoxication and positional asphyxia. The plaintiff argued that Gillern's co-workers were responsible in three ways:

- The security guards placed Gillern's body in the car on his side, which was a "substantial cause" of his asphyxiation
- The guards should have foreseen that Gillern's wife was not going to be able to remove her husband from the car by herself, which posed a risk, and

- Gillern's wife was told not to seek medical attention and just let him "sleep it off."

Court dismisses case

While the appeals judge did say the plaintiff adequately argued her case and raised the question of whether the three guards assumed a legal duty of care, the lawsuit was ultimately dismissed.

First and foremost, the court decided that Gillern's death was caused by his voluntary consumption of alcohol.

Secondly, Memorial Sloan Kettering was not liable since the party was not on company property, and it had been completely employee-funded.

Finally, the court addressed the plaintiff's negligence argument in the following way:

- Putting Gillern in the car on his side did not directly result in his death – it was just one event in a series of events that lead to it.
- The guards did not assume a legal duty of care because they did not put Gillern in a "worse or different position of danger."
- The advice to let Gillern just "sleep it off" was simply a comment and not an expert opinion.

Even though the company was ultimately off the hook, it was a close call. The initial summary judgment was in favor of the plaintiff. After Memorial Sloan Kettering appealed, the court reversed its decision.

Of course, this all could've been avoided if Gillern had been taken to the hospital. When it comes to employees' safety, it's always best to err on the side of caution.

Cite: Gillern v. Mahoney, NY Supreme Ct., App. Div., 1st Dept., No. Slip Op 06979, 10/5/17.

“Paper Cuts Don’t Scare Me” and Other HR Mantras

Courtesy of UNICO Group

One of the inconvenient truths about HR is that, even in this modern age, there is a lot of paperwork. And a lot of rules about how long employers need to retain said paperwork. Let’s break down some of the most common records and how long you need to keep fighting the paper cut monster with each based on federal rules for most employers. Be sure to check the records retention requirements for your type of business and state rules too.

Another truth about active employee personnel files is that many HR practitioners keep active files with all of the records throughout the individual’s employment, in case there is an employment dispute later. Here’s why:

You need to keep your files for a longer period of time if there is a charge of discrimination filed under Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), or the Genetic Information Nondiscrimination Act (GINA). In the event of a civil action brought by the Equal Employment Opportunity Commission (EEOC) or the Attorney General, you must retain all records related to the charge or action until “final disposition” as defined by the EEOC. The date of final disposition means the expiration date of the statutory period within which the employee may bring an action in a U.S. District Court or, where such an action has been brought, the date on which such litigation is terminated.

One Year/52 Weeks/365 Days Selection and Hiring

However you want to mark time, records related to employee selection and hiring need to be retained for one year after a hire/no hire decision or the creation of the document (whichever is later). So even if you determined a candidate was not a fit for your company, you need to hang on to the resume, application, interview notes, and anything

else related to the hiring process. Do you use pre-employment screening tests? Keep those for a year. Post a job ad? Keep it for a year. The one-year clock starts ticking when the final hiring decision is made or the job requisition is cancelled, so if you have had a long interview process, the retention time will be longer than one year. Qualified federal contractors should retain records for three years. If you are subject to the Department of Transportation requirements for pre-employment drug screening, keep those records for five years.

Promotion, Demotion, Transfers and More

Once you bring an employee onboard, you’ll begin to generate paperwork as part of the normal lifecycle. The federal requirements say you must keep files for one year that are related to:

- Promotion
- Demotion
- Employment Termination
- Transfers
- Performance Evaluations
- Training

Involuntary Employment Terminations

If an employee is involuntarily terminated, their personnel records must be kept for at least one year from the date of employment termination.

Disability Accommodations

Finally, keep requests for reasonable accommodation from employees and applicants and your responses for a full year from the record date or action, whichever is later. (Public employers should retain for two years.)

Two Years/104 Weeks/730 Days Some Compensation Records

If you pay different wages to employees of the

opposite sex in the same workplace, retain all records that explain the rationale for the different wages, including wage rates, performance evaluations, collective bargaining agreements, and merit or seniority system documentation, for a minimum of two years in case of a wage-hour audit or employment complaint.

Three Years/156 Weeks/1,092 Days Payroll Records and Timesheets

Keep basic employee data such as name, address, Social Security number, and so on for a minimum of three years. Compensation records, like amounts and dates of payments, total hours worked each day and workweek, annuity and pension payments, and fringe benefits payments should be retained for a minimum of three years. In addition, employment law experts recommend that employers retain these records for the entire length of employment plus an additional five years regardless of termination reason based on recent lawsuits challenging unequal pay practices. You may want to begin shopping for more filing cabinets.

Form I-9

Hang on to Forms I-9 and copies of all documentation for three years after the date of hire or one year after the date of termination, whichever is longer.

Family and Medical Leave Act (FMLA) Records

If you have FMLA-eligible employees, keep basic payroll and identifying employee data, dates FMLA leave is taken, copies of employee notices of leave, documents describing employee benefits or employer policies and practices regarding taking paid and unpaid leave, hours used with intermittent leaves, premium payments, dispute records and medical certifications or re-certifications for a minimum of three years. Retain all FMLA requests for this time period, even requests that were denied.

Polygraph Test Records

Hold on to the statement concerning the activity or incident under investigation and the basis for testing a particular employee, all of the documents furnished by the examiner, and a copy of the written

notice to the examiner identifying the employee for three years from the date of the exam or from the exam request date if no exam is conducted.

Four Years/208 Weeks/1,456 Days Income Tax Withholding

A pessimist once said that the only two certainties in life are death and taxes. Optimistically, you need to keep records relating to FICA and FUTA income tax withholding for four years from the date the tax is due or paid.

Five to 30 Years/At least 260 Weeks/1,820+ Days OSHA Records

OSHA wants you to keep a variety of forms for the present year plus the five preceding calendar years. These forms include:

- Form 101, Supplementary Record of Occupational Injuries and Illnesses (Form 301 replaced this)
- Form 200, Log and Summary for Occupational Injuries and Illnesses (Forms 300 and 300A replaced this)
- Form 300, Log of Work-Related Injuries and Illnesses
- Form 300A, Summary of Work-Related Injuries and Illnesses
- Form 301, Injury and Illness Incident Report

There are some OSHA records that should be retained for 30 years, or 30 years plus the duration of employment. These records pertain to employees exposed to harmful toxic substances or harmful physical agents.

Indefinitely Employee Benefit Records

Records concerning employee benefits and beneficiaries (for example, 401(k) plan records and health and welfare plans subject to the Employee Retirement Income Security Act (ERISA)), Summary Plan Descriptions and other documents that describe your benefits offerings, and COBRA records should be kept for a minimum of six years or indefinitely. The key is to keep them for as long as they may be relevant to a determination of benefit entitlements. While there are no specific

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"Paper Cuts Don't Scare Me"...continued

records retention rules for COBRA events, benefits experts suggest that the ERISA rules may apply. If you are challenged to prove that an employee should have received certain benefits years later, you need to have proof to support the benefits you provided.

Military Leave Records

All records related to military leave of absence and reemployment and employee benefits during or upon return from military leave should take up permanent residence in your file cabinet.

This is not intended to be an exhaustive accounting

of all types of records employers must keep but a representation of the most common employee-related documentation employers are required to retain under federal law for a variety of purposes. Given the volume of documentation associated with the employee lifecycle and doing business, many employers are moving to electronic file storage. In next month's issue, we'll dive into electronic recordkeeping best practices, including security and audit preparation.

Whenever you are in doubt about retaining a document, hang on to it or seek legal advice before you destroy it.



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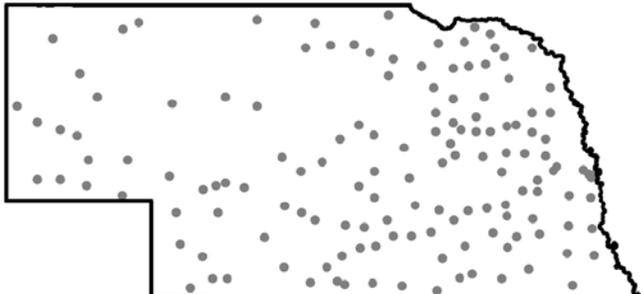
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Preparing for the Unthinkable

Courtesy of UNICO

Sometimes an incomprehensible and unthinkable event causes our entire nation to grieve. The Las Vegas shooting on October 1 was such an event. These incidents also serve as a reminder of the increasing threat of violence and the random nature of the selection of victims, and that active shooter incidents can happen anywhere, at any time.

If you were going to take a group of colleagues out to lunch, you'd ask them to put on their seatbelts when they got into the car. You'd also counsel these same colleagues to get regular medical checkups and to have insurance to protect them from risks. Following the same logic, you should help your colleagues prepare for an active shooter threat in the workplace. Just as putting on a seatbelt doesn't mean you plan to get into an accident, preparing and training for a workplace threat doesn't mean such an incident will occur. You should do **absolutely** everything you can to prevent or stop bad things from happening to you, your company, your employees and your customers.

Here we share the warning signs and motivations for active shooter incidents as well as a brief overview of survival tactics. This information is not meant to be comprehensive, but is intended to raise awareness among employers and HR staff and encourage preparedness and planning for a threatening situation.

Motivation of active shooters and pre-incident indicators

There is a range of reasons and motivations

for active shooter incidents. Experts can, however, identify some trends and indicators. Characteristics may include:

- **Victims:** An individual may feel bullied in an environment (including the workplace) or be involved in a domestic dispute and want to put an end to pain and suffering.
- **Mental illness:** While mental illness alone is not a pre-incident indicator, combined with other pressures it could lower an individual's barriers and justify a violent act in his or her mind.
- **Terrorism-related ideology:** An individual can be working on behalf of an organization, may be a sympathizer who wants to be noticed, or could be a home-grown violent extremist.

Warning signs

Employees typically do not "snap," but display indicative behavior over time and repeatedly. Warning signs may include:

- Increased and unexplained absenteeism.
- A decline in appearance and lack of hygiene.
- Withdrawal from work activities and relationships with co-workers.
- Overreaction and resistance to changes in the workplace.
- Noticeable mood swings.
- Explosive outbursts of anger or rage.
- Unfocused behavior that appears to be due to alcohol or drug abuse.

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Preparing for the Unthinkable”...continued

Discussions of personal or financial problems, suicide, paranoia, violent crimes, or firearms.

One of the most critical things an employer can do is to establish a culture that supports open communication. Intuitive co-workers may notice pre-incident indicators or warning signs and need a clear path to follow to report them.

Surviving an active shooter incident

In the event of an active shooter in the workplace, the three survival strategies are: Run. Hide. Fight.

The best strategy in an active shooter situation is to run. When possible, help others to safety and run to safety. Putting as much time and distance between you and an active shooter is critical. Leave personal belongings and flee the scene. Once you are in a safe location, call 911.

If you cannot get out safely, hide. If the escape route is blocked, find a place to hide, such as an office, that you can secure. Ensure that you have enough room to move. If you cannot lock the door, barricade it with furniture or cables to restrict its movement. Be sure to silence phones and turn off the lights.

Do not open the door until you are sure that the person on the other side is a police officer.

If you cannot run or hide and you are in imminent danger, fight. Remember this is a last resort with the goal of incapacitating or subduing the active shooter until the police arrive. Whether alone or in a group, improvising weapons will increase the effectiveness of your efforts. Common improvised weapons include sticks, pipes, lamps, chairs, books, scissors, broken glass, and fire extinguishers.

What employers can do

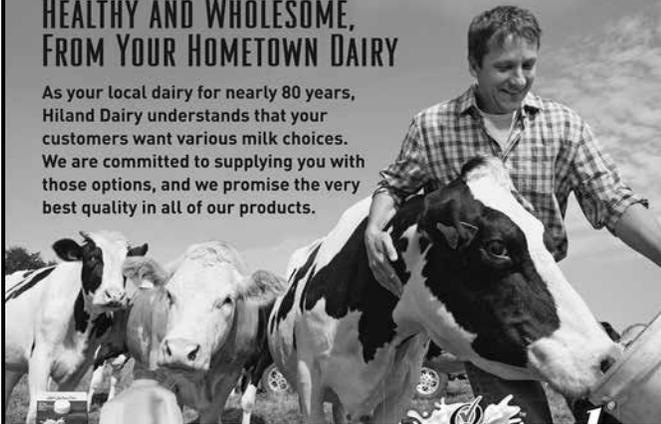
Consider when you were a child in school and participated in drills. If you were in California, you may have drilled for earthquakes. In other states, you drilled to prepare for hurricanes or tornadoes. We all participated in fire drills. The idea is to make the response to a threatening situation second nature so that you just “do” without thinking. The workplace is no different.

Run drills for various threatening situations so that employees know the three-step response of run, hide, fight.

Institute anti-harassment and bullying training to help employees spot situations and report incidents to the appropriate person or department. Establish policies and an open environment in which employees feel comfortable coming forward and reporting incidents of bullying or harassment. It is also important to have a confidential internal process for employees to report suspicious behavior.

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ADA Lawsuit: Can you Force an Unstable Employee to See a Doctor?

Courtesy of UNICO, by Jared Bilski

Here's a tricky scenario for any HR pro: You have reason to believe that an employee, who has suddenly started showing increasingly erratic behavior, is struggling to do her job and negatively impacting her co-workers. What can you do?

Can you require that worker to undergo an independent medical exam before returning to work?

Monroe v. Consumer's Energy tested the legality of such a move. In this case, the long-time employee, Ms. Monroe, suddenly began having trouble focusing and concentrating at work and stopped interacting with her co-workers. She then began accusing those co-workers of tracking her — via a GPS on her car — and doing surveillance by placing listening devices in the office that intercepted her text messages.

For its part, the company investigated these allegations but didn't find any evidence to warrant them valid. The company then asked Monroe to undergo an independent medical exam (IME) to determine if she was capable of performing the essential functions of her job. Eventually, she was placed on leave until the **IME was completed**.

Monroe did undergo **the IME eventually**, which revealed "indications of a high degree of interpersonal sensitivity, tendency toward paranoid thinking and difficulty in interpersonal relationships. This examinee is likely to appear guarded and suspicious of others ..."

The doctor recommended 12 counseling sessions and a reevaluation before Monroe could return to work. Although she eventually agreed to these demands voluntarily, she first filed an EEOC charge against her employer, claiming the mandatory IME effectively regarded her as being **disabled under the ADA**.

What ADA says, doesn't say

In its ruling, the court tackled the "regarded as" disabled claim and applied it to Monroe's situation to determine if the IME was for invalid reasons.

Under the ADA, an employee is "regarded as" being disabled:

"if the individual establishes that he or she has been [discriminated against] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

The court pointed out that when an employer sees health issues that may be adversely affecting a worker's job performance, it doesn't necessarily mean the employer has regarded that worker as disabled. In fact, a request for a medical exam "is not evidence of discrimination because it 'does not prove the employer perceives the employees to have an impairment that substantially limits one or more of the employee's major life activities.'"

In this case, the court said: "Monroe's unusual behavior, including the nature of allegations against her co-workers in her internal complaint, coupled with performance issues would have caused any reasonable employer to inquire as to whether she was still capable of effectively doing her job ... Consumers Energy had a reasonable basis for referring Monroe for an IME to evaluate whether her actions could have been undermining her ability to effectively do her job. Because Monroe cannot show that her IME referral was done for invalid reasons, she cannot establish that it was an adverse employment action or was discriminatory ..."

Key takeaway for employers: The ADA specifically states that you can require a medical exam that is job-related and consistent with business necessity and, as this case shows, if you notice the employee's personal issues are affecting that person or their co-workers, you can require the exam as a condition of returning to work.

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Avoiding an Equal Pay Act Claim...continued

If they have not already done so, employers should implement an equal employment opportunity (EEO) policy that reflects compliance with the EPA, other federal EEO laws, and applicable state laws. Employers should adhere to their EEO policy in day-to-day business practices. Now may be a good time to review existing policy, ensure it reflects current business practices, and train managers and supervisors on it.

In addition to taking the actions noted above, employers can mitigate the risks of these types of negative employment actions by creating a work culture where employees feel valued and respected and know how their work contributions tie to the overall company success. Be that kind of employer.





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