IQRM

… a Smarter Way to Manage Risk

# Employment Practices Liability

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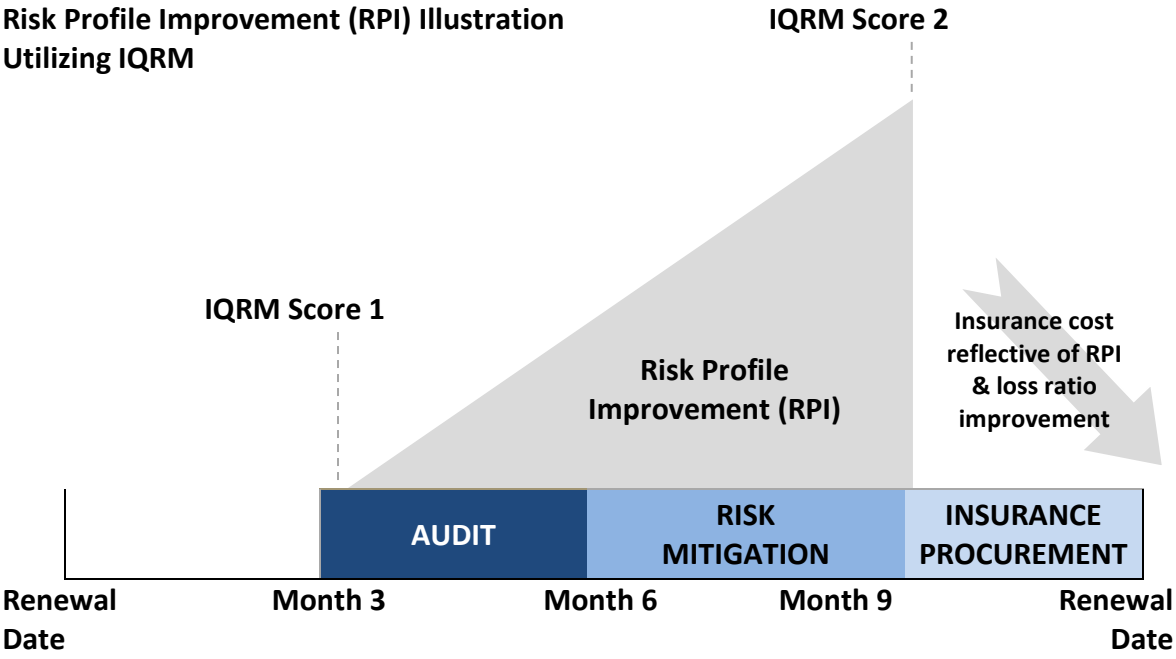
# Introduction

**IQRM – Intelligence Quotient for Risk Management™**

IQRM™ is a quantifiable risk assessment tool consisting of a systematic method to better understand the risk issues facing your organization. It also benchmarks performance against ideal industry standards and facilitates the design of risk control and mitigation strategies. Each module has been crafted by one or more Subject Matter Experts.

The IQRM is an integral piece of the Kaufman Dolowich & Voluck, LLP Beyond Insurance® Process as it measures exposures and determines the general effectiveness of strategies to manage risk. Most importantly, the IQRM facilitates Kaufman Dolowich & Voluck, LLP ability to improve your organization's risk profile.

**Risk Profile Improvement (RPI) Illustration Utilizing IQRM**








*Patent Pending*

**Specifically, the IQRM modules facilitate your ability to:**

1. Become better educated about risk issues facing your organization;
2. Benchmark performance against ideal industry standards;
3. Consider "Best Practices" to control and mitigate risks;
4. Access reference resources to gain further knowledge of the implications of the risks;
5. Design an Action Plan to improve the IQRM Score;
6. Have a positive impact on business performance by taking an enterprise-wide solutions approach; and
7. Leverage the IQRM improvement process to achieve positive results in the insurance marketplace.

**Scoring Process**

The IQRM is designed to evaluate your organization's management of risk. The scoring system determines **effectiveness through the assessment of policies, procedures and controls.**

When evaluating risks based on the criteria contained in the Risk Check Survey, you should consider the following in determining effectiveness:

**Activities** – tasks and actions that create or implement risk management policies, practices, procedures and programs.

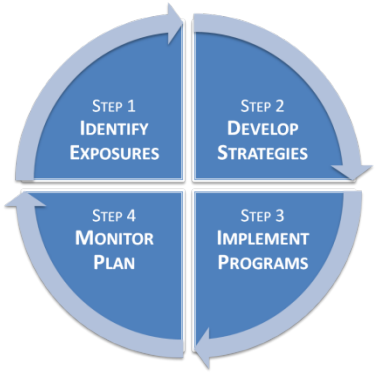
**Behaviors** – actions and conduct that affect performance -- positively or negatively.

**Internal Assessments** – risks that have the potential to cause loss, peril, or vulnerability; or that create opportunities for organizational success.

**Internal Controls** – internal processes, assessments and framework for ensuring compliance with program goals.

**Outcomes** – qualitative and quantitative measurements and metrics that assure the achievement of risk management and organizational goals and objectives.

The IQRM, as part of the Beyond Insurance Process, is taken seriously by the underwriting community because it documents an understanding of risk and activities that improve your organization's risk profile thereby reducing claim frequency and severity. The following represent a few quotations from regional and branch managers of national insurance companies.



*"Because of the Beyond Insurance process, we can quickly make informed decisions on risk selection and pricing; and offer the insured our most favorable terms and conditions."*

*"The Beyond Insurance process offers a more in depth understanding of an insured's operations and exposures. It also enables us to gain comfort with the risk, and more of a willingness to accept the risk."*

*"The comprehensive risk strategy employed through the Beyond Insurance process embodies the concepts of intimacy, intensity and integrity. The process greatly clarifies risk acceptance and pricing decisions by us, and allows more comfort and flexibility in program design."*

*"We have great faith in the Beyond Insurance approach. It leverages all elements of the Risk management Process (diagnosis, design, implementation and monitoring) which invariably leads to a more rational and efficient allocation of our financial and human capital."*

*"The Beyond Insurance process quantifies both the hard and soft costs affecting customer margins, provides a much higher degree of satisfaction and retention, and greatly clarifies risk acceptance and pricing decisions by us."*

**Kaufman Dolowich & Voluck, LLP is confident that you will find great value in the IQRM process!**

# Subject Matter Expert

**Philip Voluck**, who is rated AV® Preeminent™ by Martindale-Hubbell, has concentrated his practice for the last 36 years in the area of employment practices liability, with a particular emphasis on defending and resolving claims of unlawful harassment, employment discrimination and wrongful discharge. His practice includes representing insurance carriers and their insureds as well as private companies before many federal and state courts and most federal and state agencies, including the United States Equal Employment Opportunity Commission and the United States Department of Labor. Philip has also litigated employment claims in courts and agencies in New York, New Jersey, Delaware, Indiana, Florida, Ohio, Kentucky, and California.

In addition to his litigation practice, Philip advises clients on many day-to-day workplace issues such as employee discipline and discharge and how to prevent claims from arising. Philip also brings a keen perspective to advising clients and insureds on how to present as insurable risks when applying for coverage or renewing EPLI policies.

Philip is frequently tapped by national media for his employment law insights and presents speeches, seminars and training sessions before many business and trade associations. Additionally, he is a published author of numerous articles on diverse employment law and professional liability topics. He was the Chair of the Professional Liability Underwriting Society's (PLUS) Mid-Atlantic Chapter from 2007 to 2009. PLUS is an international organization that is recognized in the industry as the primary source of Professional Liability educational programs and seminars. Philip also Co-Chaired the PLUS Professional Risk Symposium for several years. He has also sat on the PLUS Content Committee, which selects topics and speakers for the PLUS International Conference.

Philip obtained his Juris Doctor from Georgetown University Law Center and his Bachelor of Science in Industrial and Public Relations from Cornell University. He has a long history of community involvement, particularly with The Children's Hospital of Philadelphia (CHOP) and the Philadelphia Volunteer Lawyers for the Arts. He may be reached at PVoluck@KDVlaw.com or 215-461-1100 x5224.

**Gregory Hyman** has substantial litigation and counseling experience representing both private and public employers in Pennsylvania, New Jersey, and Delaware. For over 20 years, Mr. Hyman has been defending employers in employment practices liability cases, including discrimination, harassment, wrongful termination, retaliation, defamation, breach of contract and class action wage and hour cases before state and federal courts, administrative agencies and arbitration tribunals. His litigation practice also includes professional liability defense for attorneys, accountants, architects, insurance agents, brokers, title agents and real estate agents; directors and officers liability; and school law.

In addition to his litigation practice, Mr. Hyman counsels employers on all workplace issues and best practice, employment policies, restrictive covenants, severance contracts and compliance with federal and state employment and wage and hour laws. He assists employers in connection with hiring, discipline, and termination decisions and in implementing policies and strategies to prevent claims by drafting and reviewing handbooks and conducting training sessions on equal employment opportunity and sexual harassment.

Mr. Hyman, who is a frequent presenter on employment-related topics and in the area of legal malpractice, received his Juris Doctor with honors from Temple University and his Bachelor of Arts magna cum laude from George Washington University. He is a member of the prestigious Council on Litigation Management (CLM), the Professional Liability Underwriting Society (PLUS), the Pennsylvania Institute of Certified Public Accountants (PICPA), the American Bar Association (ABA), the Montgomery County Bar Association, and the Burlington County Bar Association. He may be reached at GHyman@KDVlaw.com.

# The Issue

A current area of concern for all types of businesses is Employment Practices Liability. Employment Practices claims are among the most costly and time-consuming losses facing businesses today. They present a serious risk to your business' financial stability, good will and reputation. With record unemployment rates across the country, employees increasingly fight for legal recourse against what they perceive to be unfair or inconsistent treatment by their employers. This marks an escalating trend in the field of Employment Practices Liability. In the past twenty (20) years, employment litigation has risen drastically; more than 60% of US companies are sued by employees or former employees each year. As the economy worsens, these numbers continue to climb. In 2015, over 14,000 employment lawsuits were filed in federal courts.

Allegations are made daily against employers for everything from discrimination, sexual harassment, retaliation, wrongful termination to denial of overtime, employee misclassifications and other assorted wage and hour violations. Terminated employees, angry, and unable to find another job, increasingly look for someone to blame and (hopefully) pay. Their former employers are their first targets, as witnessed by the dramatic increase in employment-related lawsuits over the past 5-10 years. The laws protecting the rights of applicants and employees have grown, creating new and often novel causes of action and broader remedies for employees.

The risks are rising steadily. **Statistics show that companies are more likely to face an employment practices claim than any other general or professional liability claim.** No industry is exempt. Manufacturing and Industrial Companies face the same exposures as Service and Retail Companies. The state and federal agencies charged with responsibility for ensuring compliance with workplace laws do not discriminate against who they pursue. A number of enforcement agencies, the U.S. Equal Employment Opportunity Commission (EEOC) in particular, are benefitting from increased budgets, allowing them to hire more investigators and litigators.

Most employers with at least 15 employees are covered by federal discrimination laws (20 employees in age discrimination cases; 50 employees in FMLA cases). Most state employment discrimination laws require even fewer employees. Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, training, wages, and benefits. Employers should have at the very least a passing familiarity with the following:

**Title VII of the Civil Rights Act:** Prohibits employment discrimination on the basis of race, color, religion, sex, or national origin ("Title VII").

**Age Discrimination in Employment Act:** Prohibits employment discrimination against individuals 40 years of age and older ("ADEA").

**Fair Labor Standards Act:** Establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for businesses ("FLSA").

**Family and Medical Leave Act:** Entitles eligible employees of covered employers (50 or more employees within a 75 miles of the worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year) to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave ("FMLA"). Private employers not covered by the FMLA may be covered by state family and medical leave laws.

**Americans with Disabilities Act:** Prohibits employment discrimination on the basis of disability. The **Americans with Disabilities Amendments Act** significantly expanded its coverage and the definition of "disability" ("ADA").

**Pregnancy Discrimination Act**: Prohibits sex discrimination on the basis of pregnancy ("PDA").

**Wrongful Discharge:** Allows an otherwise at-will employee to bring a cause of action against his former employer, alleging that his discharge was in violation of state or federal antidiscrimination statutes, public policy, an implied contract, or an implied covenant of "good faith and fair dealing."

The following statistics are relevant:

- ✓ **$50,000:** Average out-of-court settlement cost for employment related cases.
- ✓ **$1 Million:** Amount awarded in 12% of all discrimination cases.
- ✓ **46%:** Amount of employment cases that result in a plaintiff verdict when taken to litigation.
- ✓ **6 out of 10:** Number of employers that have faced an employee lawsuit within the past 5 years.
- ✓ **$125,000:** Average defense costs for an EPLI case through trial.

Jury verdicts for employment discrimination claims continue to pound the business community. The "Award Mean," as described by *Jury Awards Trends and Statistics*, places plaintiff verdicts at $463,022. 2015 Thomson Rheuters Publications. In 2015, the EEOC secured $525 million dollars of monetary relief secured from employers. This the highest level of monetary relief ever obtained by the Commission through the administrative process. This is nearly $229 million more than was recovered in FY 2014.

**BOTTOM LINE:** You must take preventive measures to avoid claims and have a structured protocol for dealing with them efficiently when they do arise.

The EEOC is responsible for enforcing federal laws that make it illegal to retaliate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The EEOC continues to process record numbers of Charges of Discrimination. Nearly 90,000 charges were filed with the agency in 2015.

**Sexual harassment** continues to plague the business community. The EEOC received 26,396 sex harassment charges in 2015 alone. In Employment Practices Liability cases where plaintiffs are awarded compensation, 29% contained allegations of sexual harassment with a median award of $150,000. *Jury Award Trends and Statistics*, 2014 Thomson Rheuters Publications. Plaintiffs have a 50% "recovery probability" for sex discrimination.

Studies show that in 2015 **age discrimination** had the highest median award. *Jury Award Trends and Statistics*, 2015 Thomson Rheuters Publications. Age related claims continue to rise dramatically. In fact, the number of age discrimination charges filed with the EEOC has increased by 50% since 2000. One reason is because people are living longer. The average American's life expectancy is at an all-time high and has steadily increased over the past decade. Because employees are living longer, they often work longer in order to save for retirement. Also, a majority of the "baby boomer" generation is at the retirement age. The lingering economic distress further compounds the issue, leaving employees with short fall retirement accounts and forcing many to stave off retirement until after an economic recovery. In anticipation of this likely increase in age discrimination, the EEOC is expected to focus on strengthening ADEA enforcement. To this end, the EEOC issued regulations limiting the ability of employers to defend age claims in a disparate impact context by claiming "business necessity." *See 42 U.S.C. §2000e-2(k)(1)(A)(i).* In fact, a few years ago, the EEOC issued new regulations designed to ensure ADEA compliance. *29 C.F.R Part 1625: Age Discrimination in Employment Act 29 C.F.R Part 1626: Procedures--Age Discrimination in Employment* Act. These ADEA claims frequently produce favorable plaintiff verdicts because jurors can relate to them easily. Most people believe that age discrimination occurs and older workers are often treated unfairly.

**Pregnancy discrimination** has become more prevalent. As a result, in 2014, the EEOC issued guidance stating that the PDA requires employers to provide accommodations to pregnant employees (even without an underlying medical condition) if they provide accommodation to non-pregnant employees, such as employees with disabilities under

the ADA or on-the-job injuries. The EEOC outlined potential reasonable accommodations, such as allowing a pregnant worker to take more frequent breaks, to keep a bottle of water at a work station, or use a stool.

The largest increase in employment claims has been **retaliation** eclipsing race discrimination. The U.S. Supreme Court's 2006 decision in *Burlington Northern v. White*, 548 U.S. 53 (2006), "opened the floodgates" for retaliation charges and lawsuits by making it easier for employees to file these claims. To advance such an action, an employee need only show that he/she was engaging in a "protected activity" – i.e., attempting to exercise their rights in the workplace by filing a statutorily protected claim. The fact that a retaliation claim can be brought by a disgruntled employee without an underlying discrimination claim brings exposure to all employers. Just a mere employee complaint can trigger this exposure.

Discrimination is but one component of the workplace woes employers face. Attention to the payment of overtime, classification of employees as "exempt" or "non-exempt" and compliance with child labor laws is critical. **The U.S. Department of Labor ("DOL")**, which enforces both the **FLSA** and **FMLA**, has benefitted from annual budget increases. According to the DOL's Wage and Hour Division ("WHD"), enforcement priorities are to ensure that the most **vulnerable workers** are employed in compliance with wage and hour laws. Vulnerable workers are most frequently employed in high-risk industries, specifically industries with subcontracting, franchising, temporary employment, independent contracting, and other contingent workforce characteristics. Vulnerable workers also include **young workers, agricultural workers, workers with disabilities**, and those workers employed in statutory programs for which there is no private right of action. Employers fail to classify such workers as employees, leaving them without critical benefits, protections and disparate wages.

In FY 2016, WHD will continue its focus on independent contracting and the misclassification of employees as independent contractors. The WHD has also announced that public awareness and outreach programs to workers are targeted to worker populations and industries in which workers are reluctant to report violations. Outreach is designed to reduce the perceived risk of filing a complaint with WHD and to increase the benefit to employees and their co-workers of reporting violations. Employees and worker advocate groups are encouraged to report violations of WHD laws through a variety of means.

According to DOL, **overtime violations** continue to be the most common cause of employee underpayments. As a result, DOL has been very focused on overtime regulations in the recent past. In fact, on May 18, 2016, the DOL issued its final rule to the FLSA overtime regulations on salary thresholds for exempting workers. Those who earn salaries of less than $47,476 a year will automatically qualify for overtime pay of

time-and-a-half if they work more than 40 hours a week. Previously, those who earned more than $23,660 were exempt from overtime pay. Additionally, highly compensated employees ("HCE") who pass a minimal duties test are exempt. Under the new rule, the salary minimum for HCE increases $100,000 from to $134,004. The new rule will affect 4.2 million workers and goes into effect on December 1, 2016. Expanded investigations of overtime complaints are anticipated, particularly in key high-risk industries, which will allow WHD to pursue corporate and enterprise-wide settlements and litigation when the agency identifies patterns of **"off-the-clock"** and "misclassified 541" violations, which represent the most common reasons for overtime violations. Additionally, WHD aims to prioritize increasing civil monetary penalties for minimum wage and overtime violations under the FLSA and FLSA recordkeeping provisions.

WHD also seeks additional funding in support of greater FMLA enforcement. FMLA is the primary enforcement statute providing employees with work and family balance when family members require care. The DOL anticipates an increase in complaints to the WHD when FMLA leave is denied or leave takers are discriminated against. WHD want to respond expeditiously to allegations that employees are losing their jobs or denied critical leave. WHD has reengineered FMLA enforcement policies to ensure a more comprehensive approach to compliance.

The best way to avoid becoming one of these statistics is to prepare. Paying a terminated employee money to settle a lawsuit does not necessarily "open the floodgates" to more claims – continuing to deploy and/or tolerate poor employment practices do. Organizations can help avoid claims by training and educating supervisors, keeping all doors of communication open, and preparing written operating and policy protocols for management and hourly staff alike. Avoiding or defeating these claims is an economic necessity for employers of all sizes and types. Without proper preparation, an employer is putting too much at risk.

Best Practices

Engaging in these best practices will help employers effectively reduce their employment-related risks and maintain a more productive and committed workforce.

1. A designated Human Resources ("HR") employee.
2. An ongoing relationship with an experienced Employment Attorney to assist HR in preventing a claim from arising.
3. Effective and lawful hiring procedures, including background checks.
4. A comprehensive Orientation Program for all new employees.
5. Employee Handbook, including:
    - ✓ EEO Policy
    - ✓ Policy Against Harassment
    - ✓ Reporting and Complaint Procedure
    - ✓ Leave Policy
    - ✓ Social Media
    - ✓ Discipline and Termination
    - ✓ Disclaimer
    - ✓ Written Acknowledgment of Receipt
6. Define and enforce policies regarding electronic communications.
7. Annual Managerial and Supervisory EEO Training.
8. Employment Practices Liability Insurance ("EPLI").
9. Documentation acknowledged in writing by employee.
10. Communication, communication, communication.

If litigation arises despite these best practices, it should be resolved as quickly and cost-effectively as possible. The use of counsel specialized in handling employment litigation is essential.

# Risk Check Survey

The Employment Practices Liability Risk Check Survey encompasses the degree to which an organization provides comprehensive policies, programs and training focused on minimizing risk issues in the workplace.

| | |
|---|---|
| **Date:** | |
| **Organization Name:** | |
| **Person Completing Survey:** | |
| **Title:** | |

**IQRM Effectiveness Rating Audit Scoring**

Rate the effectiveness or success of the organization's actions:

- ✓ **1** if the organization's actions are **ineffective**
- ✓ **2** if the organization's actions are **marginally effective**
- ✓ **3** if the organization's actions are **moderately effective**
- ✓ **4** if the organization's actions are **effective**
- ✓ **5** if the organization's actions are **highly effective**

| | Statement | Rating |
|---|---|---|
| 1. | There is a company designated individual that has responsibility for oversight and implementation of all Human Resources issues. | |
| | *Comments:* | |
| 2. | My company has Employment Practices Liability Insurance. | |
| | *Comments:* | |
| 3. | We have an ongoing relationship with an experienced Employment Attorney who advises HR on day to day problems, solutions, and prevention of potential employment litigation claims and with whom we consult of before taking any adverse employment action against an employee who may possess protected characteristics under the law. | |
| | *Comments:* | |

| | Statement | Rating |
|---|---|---|
| 4. | We have an Employee Handbook that is updated annually and distributed to all employees, who sign an acknowledgment form. | |
| | *Comments:* | |
| 5. | The company has an Orientation Program that educates new employees on the company's expectations, policies and protocols. | |
| | *Comments:* | |
| 6. | We screen <u>all</u> prospective employees, by conducting thorough background checks and verifying references. Authorization is lawfully obtained for all employee credit and consumer reports. | |
| | *Comments:* | |
| 7. | Supervisors and managers are trained at least annually in proper interviewing and hiring techniques. Supervisors and managers are also trained at least annually on the administration of the company's EEO policies and procedures and in the various employment laws. | |
| | *Comments:* | |
| 8. | All employees are advised of the company's Complaint and Reporting Procedure, which is also published in the company's Employee Handbook. | |
| | *Comments:* | |
| 9. | The company maintains job descriptions and performance standards and ensures they are current and accurately reflect the requirements of each job. | |
| | *Comments:* | |
| 10. | My company has a formal employee performance review protocol. | |
| | *Comments:* | |

| | Statement | Rating |
|---|---|---|
| 11. | My company maintains a zero-tolerance policy towards discrimination/harassment/retaliation. | |
| | *Comments:* | |
| 12. | The company regularly examines its classification of “employees” and “non-employees” to ensure proper treatment. | |
| | *Comments:* | |
| 13. | The company regularly examines its classification of “exempt” and “non-exempt” employees to ensure proper treatment, such as the payment of overtime when warranted. | |
| | *Comments:* | |
| 14. | The company regularly examines the composition of its work force to ensure diversity. | |
| | *Comments:* | |
| 15. | Supervisors and managers are not allowed to make independent hiring or disciplinary decisions without HR’s review. | |
| | *Comments:* | |
| 16. | My company has a policy addressing how leaves of absence are administered. | |
| | *Comments:* | |
| 17. | We regularly examine all employment posters and notices to ensure compliance with the notice requirements of federal, state, and local employment laws. | |
| | *Comments:* | |
| 18. | We periodically survey our employees to determine employee satisfaction, commitment, and engagement and then use the survey findings to correct problem areas. | |
| | *Comments:* | |

| | Statement | Rating |
|---|---|---|
| 19. | We carefully document all employment-related actions. | |
| | *Comments:* | |
| 20. | The company promptly investigates and attempts to resolve all allegations of harassment or discrimination. | |
| | *Comments:* | |

# Risk Check Indicator

Based upon your response to the Risk Check Survey administered by (Agency Name) on (Date), the Risk Check Indicator for (Client Name) is (Score).

| Score | Rating | Description |
|---|---|---|
| 95+ | **Outstanding** | Your organization is an industry leader in how this category of risk is managed. |
| 90-94 | **Very Good** | Your organization is performing at a superior level yet seeks further opportunities to achieve best practices. |
| 85-89 | **Good** | Your organization needs to elevate the management of risk with the goal of achieving best practices. |
| 80-84 | **Average** | Your organization needs to enhance the management of this risk. |
| 70-79 | **Below Average** | Your organization needs to address this risk with a sense of urgency. Key priorities must be identified. Emphasis should be placed on the Risk Check Survey results. |
| Below 70 | **Poor** | Serious compliance and potential legal liability exposures exist. Immediate actions should be taken. |

# Response Rationale

| Statements 1 – 3 |
| --- |
| ✓ *There is a company designated individual that has responsibility for oversight and implementation of all Human Resources issues.*<br>✓ *My company has Employment Practices Liability Insurance.*<br>✓ *We have an ongoing relationship with an Employment Attorney who advises HR on day to day problems, solutions, and prevention of potential employment litigation claims and with whom we consult of before taking any adverse employment action against an employee who may possess protected characteristics under the law.* |

In addition to a general familiarity with state and federal workplace laws, an effective Human Resources ("HR") manager has a true understanding of the organization, its business, workplace culture, products and/or services and the industry in which it operates. Although HR people do not necessarily need to have specific industry experience, it often is easier to communicate when you hire someone from a similar setting, whether it is manufacturing or service/retail. Too many organizations delegate HR issues to the Office Manager. This is not a good practice since the HR function requires many more skills and proper administration of HR issues often avoids litigation. HR personnel usually have been trained in Human Resources and how to deploy their responsibilities.

Still, there are legal consequences associated with most employment law issues which many HR professionals are not experienced or qualified to analyze and resolve. There are so many potential landmines in the workplace and it can be overwhelming for HR to ensure what they are practicing is in fact lawful. When these sensitive situations arise, an organization needs to rely on an Employment Attorney who understands the law and knows how the enforcement agencies act. A good HR Manager knows when to discuss particularly troublesome issues with an Employment Attorney. Such an attorney often acts as a virtual extension of the company's HR department, working hand-in-hand with HR to analyze and resolve a potentially troublesome workplace issue before it evolves into a claim.

More companies are hedging their bets by purchasing Employment Practices Liability Insurance ("EPLI"). An EPLI policy offers insurance protection against claims and lawsuits that are brought against a business, its officers or directors, or its employees and managers. These policies generally cover the following areas:

- ✓ Race, gender, age and other types of discrimination
- ✓ Sexual and other unlawful harassment

- ✓ Wrongful termination or discipline
- ✓ Negligent retention, promotion or hiring decisions
- ✓ Breach of employment contract
- ✓ Emotional distress or mental anguish
- ✓ Invasion of privacy
- ✓ Libel or slander

EPLI is generally written as a "claims made" rather than "occurrence based" policy. Claims made policies cover claims received during the policy period that arise from wrongful acts occurring after the insurer receives notice of a claim during the policy period (or within any extended reporting period purchased at added expense). The timely notification requirement is a challenge because management does not always learn of potential claims brought to supervisors and may reasonably believe that an employee's concerns or grievances have been resolved, only to see them surface later. This why good communication skills, discussed below, are so critical to avoiding workplace claims.

EPLI is intended to protect against the "catastrophic risks" an employer faces in an employment lawsuit. EPLI provides defense for the organization and the employees named as defendants in a lawsuit. It may include coverage for a wide range of monetary damages, including loss of wages and benefits. Most policies cover the cost of investigating, defending and settling claims. Most policies also have exclusions – i.e., losses they will not cover.

| **Statement 4** |
| --- |
| ✓ *We have an Employee Handbook that is updated annually and distributed to all employees, who sign an acknowledgment form.* |

Clear and comprehensive written policies designed to prevent workplace claims are an excellent way to communicate the organization's protocols, procedures, and rules to all employees. The existence of such an employee handbook, especially when signed by an employee, can provide crucial evidence in defending many kinds of employment claims. They are the first line of defense against both the number and severity of employment-related claims, particularly if they contain comprehensive reporting policies for employees. As such, it is suggested that an experienced Employment Attorney be consulted before simply cutting and pasting one from the Internet or using a pro forma document from a networking or industry group.

With the dramatic rise in the use of electronic communications and social media, organizations should also pay particular attention to crafting these policies. Such policies should apply inside as well as outside the actual workplace, when employees take to their

blogs to criticize the organization or inadvertently reveal confidential information. Today's workplace is a virtual one anyway, and attendant policies must reflect this fact. Additionally, it is crucial to ensure compliance with the National Labor Relations Act ("NLRA") while drafting these policies. Recently, the National Labor Relations Board ("NLRB") issued a General Counsel Memo on the topic of social media. Employers must be very careful to ensure that social media policies are not so broad as to "chill" an employee's right under Section 7 of the NLRA to communicate with other employees about their jobs.

| **Statement 5** |
| --- |
| ✓ *The company has an Orientation Program that educates new employees on the company's expectations, policies and protocols.* |

An effective policy of prevention must be accompanied by a formal Orientation Program that communicates to employees a organization's policies, benefits, rules and regulations. It is also the opportunity to explain the organization's zero tolerance for harassment and/or inappropriate behaviors as well as performance expectations. Completion of an Orientation Program should be acknowledged by the employee in writing.

| **Statement 6** |
| --- |
| ✓ *We screen <u>all</u> prospective employees, by conducting thorough background checks and verifying references. Authorization is lawfully obtained for all employee credit and consumer reports.* |

Exposure to costly employment law claims begins with the hiring process. An effective – and lawful – Hiring Program is a must. Managers must be trained regarding what questions to an applicant are lawful and which are not. They must be able to identify those applicants who would fit comfortably within the organization's workplace culture, while avoiding those who may not.

While applicants should be thoroughly vetted, recent regulations promulgated by the EEOC have limited the use of background checks. In 2012, the Commission, in a 4-1 bi-partisan vote, issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e*. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. **Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees?**

   No. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2. **How could an employer use this information in a discriminatory way?**

   There are two ways in which an employer's use of criminal history information may be discriminatory. First, Title VII prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).

   Second, the law also prohibits disparate impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are "job related and consistent with business necessity" under Title VII to avoid liability.

## Statements 7 – 8

- ✓ *Supervisors and managers are trained at least annually in proper interviewing and hiring techniques. Supervisors and managers are also trained at least annually on the administration of the company's EEO policies and procedures and in the various employment laws.*
- ✓ *All employees are advised of the company's Complaint and Reporting Procedure, which is also published in the company's Employee Handbook.*

Training is becoming a necessary strategy at all levels within your organization. In today's workplace, **EEO Training** is all but required by law. Such training serves to familiarize managers and supervisors with the legal landmines they face and how to work around them, while keeping employees happy and productive. Training should also focus on the use of effective reporting procedures and investigation protocols that address and resolve employee complaints.

An effective training program also fosters **efficient management of claims** that do arise. If managers and supervisors are properly discharging their responsibilities to avoid employment claims – e.g., prompt complaint investigation; contemporaneous documentation; accurate performance reviews; and fair and consistent discipline – claims become that much easier to manage and/or resolve. Supervisors who "shoot from the hip" or act on instinct usually breed claims.

## Statements 9 – 10

- ✓ *The company maintains job descriptions and performance standards and ensures they are current and accurately reflect the requirements of each job.*
- ✓ *My company has a formal employee performance review protocol.*

The lack of communication is the cause of many issues in the workplace. Poor communication may be the most shared problem among all businesses, whether large or small. Most employees, regardless of their position in the organization, often cite communication (from the top down) as an area in their workplace that needs improvement. Good communication skills facilitate trust, knowledge and loyalty. Ambiguous, poorly structured communication erodes trust and motivation. In this technological age, HR must develop appropriate communication skills for the many electronic platforms in place today.

Training is becoming a necessary strategy at all levels within your organization. In today's workplace, **EEO Training** is all but required by law. Such training serves to familiarize managers and supervisors with the legal landmines they face and how to work around them, while keeping employees happy and productive. Training should also focus on the use of effective reporting procedures and investigation protocols that address and resolve employee complaints.

Performance Review training is crucial for good communication and a formal policy and protocol should exist. Employees want and have a right to know "how they are doing." Supervisors that either avoid reviews or complete them without any real thought or outside input are potentially costly liabilities. Review forms that are simply geared to "numbers ratings" have been found to be detrimental in many cases because they often require minimal thought by the supervisors completing them or reveal too little about the employee's performance. A comprehensive, employee signed Job Description not only aids a supervisor in this task but can act as documentation that the employee is aware of the job's responsibilities and in particular, the essential functions of the job.

## Statement 11

- ✓ *My company maintains a zero-tolerance policy towards discrimination/harassment/ retaliation.*

A zero tolerance policy for harassment, discrimination and retaliation is essential to any organization's success in today's workplace. Zero tolerance includes conduct that may not only be unlawful but is simply "inappropriate." While many courts have followed the edict that they are not "workplace police" and that "Title VII is not a code of civility," employers

must determine when to draw the line. Any conduct that interferes with an employee's ability to perform their job should be the primary focus.

| Statements 12 – 13 |
| --- |
| ✓ *The company regularly examines its classification of "employees" and "non-employees" to ensure proper treatment.* |
| ✓ *The company regularly examines its classification of "exempt" and "non-exempt" employees to ensure proper treatment, such as the payment of overtime when warranted.* |

The DOL has sets its formidable sights on "repeat offenders" of the FLSA; the misclassification of employees; and the proper payment of overtime. The DOL has even established a separate web page, entitled the Fair Pay Overtime Initiative designed to help companies understand the DOL's rules regarding overtime and the classification of employees as exempt or non-exempt from the payment of overtime and/or whether an individual is really an independent contractor. Employee misclassification is a growing problem. In 2015, the Wage and Hour Division received over 20,000 cases resulting in over $174 million in back wages for minimum wage and overtime violations under the FLSA. *WHD Enforcement Statistics Page.*

A record-high 8,781 FLSA suits were filed in federal court during the year-long period ending September 30, 2015, according to figures released by the Administrative Office of the U.S. Courts. The data does not reflect how many of the FLSA suits also included state agency law wage and hour claims, and they do not account for wage and hour suits filed in state court. The staggering amount of damage awards over the last several years has been widely publicized. Here are just a few:

- ✓ **Citigroup**: $95,000,000 for overtime violations;
- ✓ **Wal-Mart:** $4,828,442 in back wages and damages to more than 4,500 employees nationwide;
- ✓ **K-Mart**: $3,800,000 in back wages and damages for misclassification violations;
- ✓ **Novartis**: $99,000,000 for overtime violations;
- ✓ **Cintas Uniform Service**: $22,000,000 for overtime violations;
- ✓ **Halliburton Company**: $18,300,000 for misclassification violations;
- ✓ **Farmers Insurance Exchange**: $200,000,000 for overtime violations;
- ✓ **Merrill Lynch**: $43,500,000 for overtime violations.

Perhaps, most problematic is that, today, an FLSA lawsuit is likely to be brought as a class action; that is, on behalf of all similarly-situated employees. Defense costs and possible damage awards can literally cripple a company. There is a two-year statute of limitations (with limited exceptions) for FLSA overtime claims. The DOL has the discretion to go back

three years if there is reason to believe that violation was intentional or the employer is a "repeat violator."

## Statement 14

✓ *The company regularly examines the composition of its work force to ensure diversity.*

A culturally diverse workforce can be a persuasive defense to an employment discrimination claim. A written and publicized policy of inclusion is all but a necessity if an organization truly wants to advance its EEO underpinnings. We live in a mélange millennium in which the growing diversity of our nation's communities must be reflected by the business community. Diversity also makes good business sense. Achieving workforce diversity through pro-active employment practices will help identify new or better ways of serving your customers; better reflect your customer base; and contribute to the image of your company as a good "corporate citizen." Once managers and supervisors get on board, through education and training, they can begin moving forward with diversity initiatives. Nothing is worse than employees feeling that diversity is being unnecessarily imposed upon them. If an organization moves forward to increase diversity without a "buy-in" from management, resistance and push-back will result. Therefore, it is critical to emphasize to staff that diversity is a shared goal that cuts across their company.

## Statement 15

✓ *Supervisors and managers are not allowed to make independent hiring or disciplinary decisions without HR's review.*

While it is necessary to train managers and supervisors in how to avoid all the potential workplace landmines, the training must instill a strict protocol to be followed when a potential performance or disciplinary issue arises. The protocol, in general, is to direct applicants and employees to HR, which is often better trained to handle workplace problems in a neutral, objective and lawful fashion. Funneling employee complaints, for instance, through HR, ensures fair and consistent treatment inasmuch as the protocol is centralized. Similarly, working hand-in-hand with HR for hiring and investigating complaints usually reduces exposure to an employment claims. Such protocols should be embedded within a separate handbook for supervisors and other members of management.

## Statement 16

✓ *My company has a policy addressing how leaves of absence are administered.*

Following the enactment of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) and the resulting expansion of its scope of coverage, more employers are finding themselves regularly confronting the need to make reasonable accommodations for employees with disabilities. There are circumstances when even the most well-intentioned employer may not realize that their obligations are triggered. This frequently occurs when an employee requests a leave of absence, or an extension of a leave of absence to which the employee would not ordinarily be entitled. For this reason, it makes sense for employers to include a leave of absence policy in its employee handbook.

There are several scenarios in which employers unwittingly get themselves into trouble. The first is automatically implementing a "no fault" leave policy. "No fault" leave policies are policies under which employees are automatically terminated after using a certain amount of leave. While having such a policy is not a *per se* violation of the ADA, the ADA requires that such a policy be modified as a reasonable accommodation if an employee with a disability needs additional leave time. That is, if an employee with a disability is unable to return to work before the expiration of a pre-set leave period, the employer must engage in an interactive dialogue with the employee to determine if additional leave can be provided as a reasonable accommodation without creating an undue hardship on the employer. Undue hardship does not equal inconvenience and refers not only to financial difficulty, but also to reasonable accommodations that are unduly extensive or disruptive, or those that would fundamentally change the nature or operation of the business.

Another common mistake employer's make when confronted with the need to make a reasonable accommodation is denying a newly-hired employee a leave of absence. Many employers require employees to work a probationary period before being eligible for benefits, including personal time off. However, there is no probationary period before an employee is eligible for ADA protection. Thus, employers must consider granting a leave of absence to a new employee as a reasonable accommodation, despite any eligibility requirements.

Not extending the leave of an employee who has exhausted FMLA leave (to the extent the FMLA applies) is another sensitive situation commonly faced by employers. If an employee has exhausted all of his or her FMLA leave and is still unable to return to work, the employer may be required to extend the leave period as a reasonable accommodation. In that situation, the employer should clearly inform the employee that he is no longer on FMLA leave and that the leave is not protected under the FMLA as

benefits need only be continued if the benefits have been continued for similarly situated employees on a non-FMLA leave.

Employers should develop a leave policy that is included in the organization's employee handbook. This will ensure that the employees understand how to proceed when requesting a leave of absence and what is expected of them. When in doubt about the use of a leave of absence as a reasonable accommodation, employers should seek legal advice.

| Statement 17 |
| --- |
| ✓ *We regularly examine all employment posters and notices to ensure compliance with the notice requirements of federal, state, and local employment laws.* |

Every employer is required by federal and state law to post certain employee rights and harassment laws. The most commons laws that must be posted include the Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Equal Employment Opportunity (EEO), Fair Labor Standards Act (FSLA), and Occupational Safety and Health Administration (OSHA). Some employers may need to post greater or fewer laws, depending on the nature of the employer's business, the materials the employees may be exposed to, and the number of people employed. Failure to post the employee rights and harassment laws may result in monetary fines.

To comply with the posting requirements, they must be posted in a "conspicuous" place accessible by the employees which, in practice, usually means a break or lunch room, near a time clock, or on a remote job site. There are vendors that have compiled all the necessary postings for each state making it fairly easy to meet the requirements.

| Statement 18 |
| --- |
| ✓ *We periodically survey our employees to determine employee satisfaction, commitment, and engagement and then use the survey findings to correct problem areas.* |

Organizational culture is important in preventing or reducing EPL claims. Most problems can be easily resolved when employees feel valued and know that they can openly approach management with their concerns. Employee opinion surveys are a useful tool in helping management and human resources identify and resolve workplace issues that otherwise would remain undisclosed. Surveys are also beneficial for employers who want to improve job satisfaction, retention and overall working conditions.

Confidential employee survey questions that elicit information about job satisfaction, motivation and morale help employers determine the overall workplace climate. The questions can be nonspecific, such as, "Do you enjoy good working relationships in your department?" or "Do you like coming to work every day?" Additionally, employee opinion surveys are useful for reducing turnover and increasing employee retention. Survey questions that ask about working conditions, effective leadership and satisfaction levels are best for studying turnover and retention. Employee exit interviews are also another form of employee surveys that provide information about why employees leave the organization. Based on the survey results, the employer should take active measures to improve the culture where weaknesses are identified to create a workplace environment of fairness, diversity and open communication.

## Statement 19

✓ *We carefully document all employment-related actions.*

Employment suits are often won or lost based upon documentation – or a lack thereof – by the employer. This is because juries like to see things in writing, which they frequently believe more than oral testimony. Documentation that is contemporaneous with the event affords greater credibility to the reasons provided for disciplinary action or discharge decisions. Documentation also provides roadmaps for preparing your defenses in employment discrimination cases. Documentation provides support for progressive discipline. Failure to follow one step in the progressive discipline process could suggest unfair treatment and may cause problems with your defense.

Although the necessity for documentation is often misunderstood, it is not difficult to document properly. At the outset, "documentation" provided to the subject employee means that the employee has acknowledged its existence in writing. Too many supervisors "document" an issue to themselves or to another supervisor. Employers should keep written records of all warnings, performance problems and disciplinary issues with employees. Always inform the employee of the organization's expectations and/or consequences of continuing misconduct. No special form is required – warnings, performance problems and adverse employment decisions can be documented in memos, e-mails or letters to the employee. A copy of the write-up should be provided to the employee with space to write comments or simply sign an acknowledgement of receipt.

## Statement 20

✓ *The company promptly investigates and attempts to resolve all allegations of harassment or discrimination.*

A comprehensive anti-discrimination and harassment policy and a well trained work force is the best approach to avoiding claims of discrimination and harassment. However, in the event a complaint is made, regardless of from whom, or how the complaint is made, a prompt and full investigation can often prevent or limit employer liability. Ignoring the complaint or delaying the investigation will only send the message that the company does not take the complaint seriously and result in the employee filing a Charge of Discrimination.

The investigator should preferably be someone in a management or human resources position. If the alleged harasser or discriminator is a high ranking individual whose position would make it difficult to get an objective inside investigator, or if the investigation raises complex factual or legal issues, the organization should consider using someone from the outside.

It is important that the employer thoroughly document the investigation process. The interviewing process should begin with the complaining employee. Ask the employee to prepare a written statement and then follow up with an interview. Find out what happened, in chronological order, by asking open-ended questions (who, what, when, where, how), then follow up with more specific questions. Ask the employee for any documentation, such as notes or pictures, and the names of any witnesses. When interviewing the accused, be sure to explain the purpose of the investigation and that no determination has yet been made. Try to determine the accused's intent. Any witnesses identified by either the complaining employee or accused should always be interviewed (making sure to keep the matter as confidential as possible) and any documentary or physical evidence should be reviewed thoroughly.

The investigation process and the results of the investigation should be documented in a final report which should contain: (1) the time of, and information regarding, the initial complaint; (2) summary of the allegations; (3) summary of the interviews; (4) summary of the investigator's findings; and (5) the remedial action to be taken. The evidence gathered during the investigation should clearly and convincingly establish that actionable harassment or discrimination occurred. If you conclude based on the investigation that misconduct occurred, the accused must be disciplined. Discipline should be consistent with the organization's progressive discipline policy. If, at the conclusion of the investigation, the employer is not clearly convinced that the conduct occurred, a lesser penalty, including a warning and/or counseling, may be appropriate.

The results of the investigation must be communicated, separately, to the complaining employee and accused. If applicable, tell the complaining employee that remedial action has been taken, but do not disclose the specifics. After the investigation is completed, and assuming some wrongdoing was found, the employer should follow up with the complaining employee to make sure that the problem has been resolved and verify that the corrective action recommended was imposed. Any follow up action taken by the employer should be documented and maintained in the investigative file.

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# Risk Profile Improvement Action Plan

**Organization:**
**Score #1:** **Date:**
**Score #2:** **Date:**
**Change (%):**
**Objectives:**

- ✓ (First objective, based on review of Risk Check Survey and Risk Check Indicator)
- ✓ (Second objective, based on review of Risk Check Survey and Risk Check Indicator)
- ✓ (Third objective, based on review of Risk Check Survey and Risk Check Indicator)

| Activity | | | Completion Date | |
|---|---|---|---|---|
| Action Steps | | Who? | Scheduled | Actual |
| 1 | | | | |
| 2 | | | | |
| 3 | | | | |
| 4 | | | | |
| 5 | | | | |
| 6 | | | | |
| 7 | | | | |
| 8 | | | | |

# Resources

1. **US Department of Labor**
   www.dol.gov

2. **Equal Employment Opportunity Commission**
   www.eeoc.gov

3. **US Department of Labor**
   **Employment Standards Administration**
   www.dol.gov/esa/

4. **US Department of Labor**
   **Employment & Training Administration**
   www.doleta.gov

5. **US Department of Labor**
   **Employment Standards Administration**
   **Office of Federal Contract Compliance Programs**
   www.dol.gov/esa/ofccp

6. **US Department of Labor**
   **Employment Standards Administration Wage and Hour Division Compliance Assistance – Family and Medical Leave Act (FMLA)**
   www.dol.gov/esa/whd/fmla

7. **US Department of Labor**
   **How to Comply with Department of Labor Laws & Regulations**
   www.dol.gov/compliance

8. **US Courts**
   www.uscourts.gov

9. **Job Accommodation Network**
   www.jan.wvu.edu

10. **Job Accommodation Network: ADA Links**
    www.jan.wvu.edu/links/adalinks.htm

11. **US Department of Labor**
    **Occupational Safety & Health Administration (OSHA)**
    www.osha.gov

12. **Cornell Law School**
    **Legal Information Institute**
    www.law.cornell.edu/wex/index.php/labor

13. **Jurist Legal Intelligence**
    www.jurist.law.pitt.edu/sg_lab.htm

14. **Society for Human Resource Management (SHRM)**
    www.shrm.org

15. **NOLO (Law Books, Legal Forms and Services)**
    www.nolo.com

16. **SHRM Store**
    www.shrmstore.shrm.org/shrm

17. **M. Lee Smith Publishers**
    www.hrhero.com

18. **Find Law for Legal Professionals**
    www.findlaw.com

19. **Business & Legal Reports (BLR)**
    www.blr.com

20. **US Small Business Administration (SBA)**
    www.sba.gov

21. **US Chamber of Commerce**
    www.uschamber.com

22. **The EPL Book: The Practical Guide to Employment Practices Liability and Insurance**
    Authors: Andrew Kaplan, Rachel McKinney, Beth A. Schroeder, Leonard Surdyk and Gary Griffin.
    www.griffincom.com/fsepl.htm

23. **Employment Practices Liability: Guide to Risk Exposures and Coverage**
    Authors: Britton D. Weimer, T. Michael Speidel, Andrew F. Whitman and Clarence E. Hagglund
    www.amazon.com

24. **Employment Labor Law Audit™ (ELLA®)**
    www.laurdan.com

25. **The Job Description Handbook**
    Author: Margie Mader – Clark
    www.amazon.com

26. **Create Your Own Employee Handbook: A Legal & Practical Guide**
    Authors: Lisa Guerin and Amy Delpo
    www.amazon.com

27. **State by State Guide to Human Resource Law**
    Authors: John F. Buckley and Ronald M. Green
    www.shrmstore.shrm.org
    Item # 48.16030

28. **Human Resource Champions**
    Author: David Ulrich
    www.amazon.com

29. **The HR Scorecard: Linking People, Strategy and Performance**
    Authors: Brian E. Becker, Mark A. Huselid and David Ulrich
    www.amazon.com

# Employment Practices Liability

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