



BV-SHRM NEWSLETTER

CHAPTER NO. 0330 ♦ JANUARY 2015

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MONTHLY PROGRAM & LUNCHEON

HOSTED BY: BV-ASTD

TOPIC: What HR Development Professionals Need to Know About Organizational Systems Theory

WHEN: January 8, 2015

TIME: 11:30: Lunch, Networking, & Announcements
12:00 Program

WHERE: **Hilton Garden Inn**
3081 University Dr. (east side of Highway 26, across from Veteran's Park)

COST: \$14/ BV-SHRM or ATDBV member
\$17/ non-members
Note: The guest price is now \$15

SPEAKER: **Dr. Bryan Cole**

RSVP: Please **RSVP by noon, Friday, January 2** to
<http://fs16.formsite.com/bvastd/form774879743/index.html>

SPEAKERS BIO

Dr. Bryan R. Cole

Dr. Bryan Cole is Professor Emeritus in the Department of Educational Administration and Human Resource Development at TAMU. During his 41 years with A&M, Dr. Cole served in numerous professional capacities including Associate Dean of the College of Education. He is a 4 time recipient of the TAMU Association of Former Students Distinguished Achievement Award in Teaching and served as Co-Chair of the TAMU Vision 2020 Mid-Term Review. He also currently serves on the Board of Directors for St. Joseph Health System. Dr. Cole is a retired Colonel in the U.S. Army and a Vietnam veteran. He received his B.S. from the U.S. Military Academy at West Point and his M.Ed. and Ph.D. in Educational Administration from TAMU. Dr. Cole is married to Wanda Kay Cole, his wife of 48 years. They have two adult children, Keith and Allison and three grandchildren.



MEMBER NEWSLETTER

LEGAL BRIEFS

Welcome to Legal Briefs for HR, an update on employment issues sent to over 5000 individual HR professionals, in-house counsel and business owners plus HR and legal professional organizations (who have been given permission to republish content via their newsletters and websites), to help them stay in the know about employment issues. Anyone is welcome to join the email group . . . just let me know you'd like to be added to the list and you're in! Back issues are posted at www.munckwilson.com under Media Center/Legal Briefs and you can also join the group by clicking on "Subscribe."

I'm wishing you and yours a happy, healthy and super fun holiday season! In the spirit of jolly old Saint Nick, let's check out who has been naughty and nice . . .

- 1. Wait For It** - The Supreme Court announced its unanimous decision this past Tuesday in the case involving nonexempt workers in an Amazon warehouse who were required to go through a security check at the end of their shift but not paid for the time spent doing so. In the first round, at the district court level, the court found that the time was not compensable because it was "preliminary or postliminary" activity which is expressly excluded from "hours worked" by the Portal-to-Portal amendment to the FLSA. The second round, at the 9th Circuit Court of Appeals, went to the employees because the court said the security check was necessary to the principal work and primarily for the employer's benefit, so the time in line should be on the clock. The final word came from the Supremes, who agreed with the district court's view and said the 9th Circuit did not apply the correct test. They explained that the security check was not a principal activity of the job they were hired to perform. Further, the security check was a postliminary activity that was not an "integral" or "indispensable" to the principal activity (warehouse work) being done by the employee plaintiffs. Whether the check tended to benefit the employer did not matter. *Integrity Staffing Solutions v. Busk* (U.S. Dec. 2014). This finding will also apply to preliminary (i.e., before work begins) tasks, so long as they do not comprise either principal activities or activities that are integral and indispensable to the principal activity.
- 2. Heads' Up, Federal Contractors** - New rules that apply to federal contractors who are subject to E.O. 11246 and prohibit employment discrimination based on sexual orientation or gender identity will take effect April 8, 2015 (120 days after their publication in the Federal Register). To see the rule, FAQs and related info, go to <http://www.dol.gov/ofccp/LGBT.html>. These rules implement E.O. 13672, which was signed by President Obama last July. Even though these rules were published as "final" on December 9, the OFCCP announced a 60-day comment period on the rules in the Federal Register in December 8. Apparently the agency had planned to bypass the normal agency rule-making procedure but bowed to pressure from Republican members of Congress by adding the comment period. So, if someone makes a really good comment, will the final rules become un-final? We shall see.
 - 1.** You may also want to comment on pending rules that will implement the mandates contained in E.O. 13665, including a ban on covered contractors discharging or otherwise discriminating against employees and job applicants who discuss, disclose or inquire about compensation. This ban does not apply to employees who become privy to co-workers' compensation as part of their duties, such as those who work in human resources. The Notice of Proposed Rulemaking was issued by the OFCCP on September 15 and the comment period will close on December 16. Go to <http://www.dol.gov/regulations/index.htm#open> for links to speak your mind!
 - 2.** OFCCP is considering a modification to its current practice of issuing Courtesy Scheduling Announcement Letters in large batches, twice per year. The new approach may be smaller batches being sent out more frequently during the year. Stay tuned.
- 3. She's On Board** - The seat on the National Labor Relations Board which will be vacated by Nancy Schiffer on December 16 will be filled by Lauren McFerran, a fellow Democrat. Ms. McFerran was confirmed by the Senate on December 16. This appointment ensures that the NLRB will maintain its 3-2 Democratic majority. President Obama retracted his first pick, Sharon Block, who was one of several unconstitutional "recess" appointments per the *Noel Canning* decision, after Republicans strenuously objected to her candidacy.

4. **Oh Baby** - That shriek you heard on Monday, November 17 was from employers reading about a \$185 million punitive damages award made to an employee who claimed she was subjected to pregnancy discrimination by her former employer. The plaintiff claims she was encouraged to step down from her store manager position after disclosing she was pregnant and was later demoted and then discharged when she returned to work after giving birth. The employer claimed she was a poor performer and \$400 went missing from the cash register on her watch. Guess who the jury believed? *Juarez v. AutoZone Stores, Inc.* (S.C. Cal Nov. 2014). The underlying compensatory award was \$872,719. Since the punitive award is more than 200 times the compensatory amount, it will likely be reduced. In a related development, the Supreme Court heard oral argument on *Young v. UPS* on December 3 and should soon issue their opinion as to whether the 4th Circuit Court of Appeals was correct in its holding that UPS did not violate the Pregnancy Discrimination Act by refusing to acquiesce to plaintiff's demand for accommodation of her pregnancy because the law calls for nondiscrimination and not for preferential treatment.
5. **Don't Mess With Texas (and 16 other states)** - Seventeen states sued the U.S. in a Texas federal court, claiming that President Obama's executive order on immigration is unconstitutional because the White House violated the Administrative Procedure Act and requirements which govern promulgation of implementing rules. The states who jumped on this bandwagon include AL, GA, ID, IN, KS, LA, ME, MS, MT, NE, NC, SC, SD, TX, UT, WV, and WI. The Texas Attorney General's statement on the filing of this lawsuit can be seen at <https://www.texasattorneygeneral.gov/oagNews/release.php?id=4898>.
6. **Check It Out** - This is the story of the EEOC coming after BMW Manufacturing Co. over its use of criminal and credit history as part of pre-employment background checks. The EEOC claims the employer's use of those reports has a disparate impact on black job applicants and employees, citing its own Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Under Title VII. The EEOC alleges that the way BMW uses those reports is neither job-related nor consistent with business necessity. BMW pushed back by asking EEOC to produce information on its own use of those reports in hiring employees to work at the EEOC. A Magistrate Judge sided with the EEOC but was reversed by a District Court judge who found that the EEOC had not met its burden of showing why its objections to this discovery request were proper. The EEOC had argued that the jobs at the EEOC for which these reports were a hiring factor were not similar to the jobs at BMW, therefore the EEOC's practices were irrelevant. The judge was not buying it and said that BMW did not have to take the EEOC's word on that issue. *EEOC v. BMW Manufacturing Co. LLC* (D.S.C. Dec. 2014).
7. **Are You Secure?** - The HIPAA security rule requires certain policies and safeguards to ensure that protected health information (PHI) does not fall into the wrong hands. And being a nonprofit agency that provides mental health services to the uninsured and under-insured will not get you any slack, if your security efforts are found wanting. On Dec. 8, the Department of Health and Human Services slapped a \$150K fine on such a nonprofit in Alaska, citing their failure to follow basic tech practices like updating software, using firewalls and monitoring. Malware entered the agency's system and the PHI of more than 2700 patients was put at risk. Simple lesson? If you've got PHI, you better get your security procedures and systems in order, no matter who you are.
8. **IRS' Annual Gift** - The new standard mileage rates for the deductible cost of operating a motor vehicle are here. Effective 1-1-15, the rate for using a car, van, pickup or panel truck will be 57.5 cents/mile for business miles; 23 cents/mile for medical or moving purposes; and 14 cents/mile for charitable service purposes. You can check out the entire description at IR-2014-14 which is posted at <http://www.irs.gov/uac/Newsroom/New-Standard-Mileage-Rates-Now-Available;-Business-Rate-to-Rise-in-2015>.
9. **Stocking Stuffers** - A few gentle reminders for this time of year:
 1. **Holiday Parties** - Make it known in advance, by policy and example, that harassment and substance abuse are not OK at work or work-related events, such as the holiday party. Limit the amount of alcohol served and/or the timeframe for serving booze. Stop serving well before the party ends (and not at all to those who are under age). Provide nonalcoholic drinks, as well as stick-to-your-ribs noshes that will slow absorption of the hooch. Plan ahead for alternative transportation (e.g., taxi, designated driver, the options at item 9.4, below), if needed, and designate someone to be on the look-out for those who partied too hearty. If you've had trouble in the past, plan a different type of event that does not revolve around an open bar. Skip the mistletoe. And the drinking games.
 2. **For a Good Cause** - The season brings out a desire to help others, via volunteer activities for various nonprofit groups. "Voluntary" is the key word here, since mandating employee involvement (even for a really good cause) will make the activity compensable under the FLSA for your non-exempt workers. And employers generally are not allowed to volunteer their employees for unpaid services which are the same or similar to the employees' normal duties.
 3. **Focus** - Encourage safe driving habits to avoid problems with drunk drivers, wintry weather and folks who are distracted behind the wheel.

4. Don't Drive if You're Tipsy, Buzzed or Blitzen - The Texas Department of Transportation has a new program called Sober Ride Sleigh which encourages individuals to give the gift of a safe ride home. During last year's holiday season, from Dec. 1, 2013 to Jan. 1, 2014, there were 2367 DUI-related crashes in Texas resulting in 763 serious injuries and 92 deaths. The good folks at Texas DOT are encouraging smart and safe plans by offering really cool prizes (e.g., Richard Petty driving experience, spa days) for those who take the pledge to have a sober ride this holiday season, at <http://www.holidaysoberride.com/>, and by offering options for sober rides at <http://soberrides.org/>. Please share this info with your work family and friends, so that we can all be together again in the new year. ©

10. **Handy Book** - It's here! Yours truly and a team of attorneys have completed revisions to the Texas Employment Law Handbook, 2014-15 edition. The book is available on-line and as a soft-bound book by calling 1.800.856.6721 or going to www.txbiz.org. The book published jointly by the Texas Association of Business and by Texas SHRM. SHRM (either the national membership or a local chapter membership qualifies) and TAB members enjoy a discounted rate of \$199 while nonmembers pay \$299. Thank you to LB4HR reader **Cathy Phelps**, who suggested that it would be helpful if TAB would post the Handbook's Table of Contents on its website so that prospective purchasers could see what topics are included. Great idea, Cathy, and TAB has followed your suggestion.

11. **Calendar This** - Break out your fresh 2015 calendar and pencil in the 22nd Annual University of Texas School of Law Labor and Employment Law Conference for May 12 and 13. We will once again be at the AT&T Conference Center in Austin and yours truly will present the Federal Regulatory Update on May 12. Would love to see you there!

12. **Stated Differently** - Here are some hot topics for you multi-state employers:
 1. **California (San Francisco)** - Here is corrected info for the new minimum wage rates that will take effect in CA:

San Francisco, CA - \$12.25/hour effective May 1, 2015; \$13.00/hour effective July 1, 2016; \$14.00/hour effective July 1, 2017; \$15.00/hour effective July 1, 2018 (would be tied with Seattle, WA for the highest minimum wage in the U.S., assuming another jurisdiction doesn't raise it even higher before the effective date)
 2. **California (San Francisco)** - The city posted helpful guidance to assist employers in understanding the relatively new Fair Chance Ordinance (aka "ban the box" ordinance) at <http://sfgsa.org/modules/showdocument.aspx?documentid=12136>. The city also enacted a "Retail Workers' Bill of Rights" which takes effect on 7-5-15 and applies to retail establishments with 20 or more employees located in the city. The ordinance requires employers to provide biweekly work schedules at least 14 days in advance and exacts monetary penalties for insufficient advance notice of scheduling changes, plus provides for paid on-call time. For more info see the link at <http://retailworkerrights.com/everything-you-need-to-know-about-san-franciscos-retail-workers-bill-of-rights/>.
 3. **District of Columbia** - The Accrued Sick and Safe Leave Act has been amended and a revised mandatory poster is now available. Some of the changes include immediate accrual of paid leave upon hire (instead of a waiting period) and the addition of tipped employees (who were excluded from coverage under the original version). D.C. has also passed the Wage Transparency Amendment Act which, similar to the federal executive order discussed at 2.1 above, prohibits employers from taking employment action against employees who discuss their wages with others. As with all D.C. enactments, it must be submitted to Congress for their OK before coming law.
 4. **Illinois (Chicago)** - The Chicago Municipal Code was amended to establish a minimum wage for employers of at least one covered employee and who operate a business within the city limits. The current municipal minimum wage is \$8.25/hour but will rise to \$10.00/hour on July 1, 2015. Additional scheduled increases are to \$10.50/hour (7-1-16), \$11/hour (7-1-17), \$12/hour (7-1-18) and \$13/hour (7-1-19). Starting on 7-1-20, changes to the rate will be tied to the Consumer Price Index (CPI) and made on each ensuing July 1. IL state law caps employers' tip credit at 40% of the minimum wage, which means the current max amount is \$3.30/hour and tipped employees must be paid at least \$4.95 hour plus tips. The Chicago ordinance increases the minimum wage for tipped employees to \$5.45/hour on 7-1-15 and to \$5.95/hour on 7-1-16. Starting on 7-1-17, the tipped employee minimum wage rate will tied to the CPI.
 5. **Maryland (Prince George's County)** - Effective 1-20-15, employers with 25 or more full-time employees can no longer inquire about or use a job applicant's criminal record info until after the first interview. This "ban the box" law applies to paid jobs and to unpaid vocational or educational training jobs. There are a few exceptions to the requirement, for organizations that provide services or care to minors or vulnerable adults, where the criminal check

is otherwise required by law and to certain agency and business jobs that are determined, by the county, to involve confidential/proprietary info, access to money or other valuables, or involve emergency management.

6. **Minnesota (Minneapolis)** - Use of electronic cigarettes in indoor public places, including places of employment and restaurants, has been banned. The press release can be read at <http://www.minneapolis.gov/news/WCMS1P-134759>. Similar bans are already in place in other MN cities such as Bloomington, Duluth and Edina and also in Boston, Chicago and Los Angeles.
7. **Missouri (Columbia)** - Effective 12-1-14, both public and private employers operating within the city may not inquire about a job applicant's criminal history prior to making a conditional offer of employment. The ordinance specifically bans employers from doing their own research to obtain this info, such as via websites. Complaints may be filed by applicants and non-applicants alike, for even having the question on your employment application, and the penalty is a fine of up to \$1000 and/or imprisonment for up to 30 days.
13. **For the Birds** - If you like being tweeted and want breaking news on employment law changes (and the occasional random cheer for K-State . . . NYE in San Antonio followed by beating UCLA in the Alamo Bowl!), follow me on Twitter. I'm at @amross.

Until next time,

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Please send information about this organization to:

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