

EDITOR'S COLUMN:
UNDERSTANDING SUCCESS

Malcolm Gladwell's third book, *Outliers*, focuses on the origins of success. Gladwell brings home lessons that should be remembered. Think about how these factors might apply to you or your company:



1. **There's no substitute for hard work.** Although much of the book teaches how circumstance and nurturing have a big impact on success, the one common denominator is willingness to put in the hard work. No athlete, businessperson, musician, or anyone else succeeds without hard work. One of my favorite sayings in the book is an ancient Chinese one, "No man who rises before dawn 365 days a year fails to make his family rich." (I can honestly say that I do this at least 300 days per year, so I'm getting close!).
2. **The 10,000 Hour Rule.** If you want to be great at something, or at least be known as an expert, you need to study this subject for at least 10,000 hours. This holds true whether in business, law, medicine, technology, sports, music, etc. One of the downsides associated with letting more experienced employees go is losing their store of wisdom and expertise. If you're in a "no choice" situation, at least try to have the departing employees provide you as much of their stored wisdom in writing as possible
3. **The importance of cultural norms.** For example, many Asians are accomplished in math not because of their IQ — but due to their work ethic: how their numbering system works, the precision required to grow rice, and of course, willingness to attend school an extra 50 days a year. What is the work norm at your company? Punching the clock or making sure things get done?
4. **The need for opportunity and encouragement.** Many successful people have been in the right place at the right time. Perhaps they were just born at the right time. Perhaps others saw their innate talents and helped to nurture them. The bottom line: no one succeeds alone. We all need encouragement and nurturing. This becomes a real challenge when companies are shutting down on communications and training.
5. **Once you're smart enough — you're smart enough.** As Daniel Goleman wrote in his book about emotional intelligence, "It's just not IQ that matters." An individual's ability to deal with emotions and have practical insight is just as, if not more, important than IQ. After a certain point (roughly 130 IQ), the additional IQ points don't make folks any more successful. Same would hold true for skill

"Instinct is the gift of experience. The first question you have to ask yourself is, 'On what basis am I making a judgment?' If you have no experience, then your instincts aren't any good."

Malcolm Gladwell,
Outliers

This issue discusses:

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- [Preventing Sexual Harassment Claims](#)
- [EFCRA Re-Introduced to Congress](#)
- [Airline Must Pay Whistle-Blower Who Raised Safety Concerns](#)
- [Fitness for Duty Exams](#)
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We've also provided hyperlinks to [Forms of the Month](#).

6. **Pedigree matters — to a degree.** As with IQ, going to good schools matters. Going to top ten schools doesn't matter nearly as much. Just as opportunity, encouragement, support, and other "external" factors impact on the propensity for success, we should not overlook these factors when assessing someone's potential. Perhaps there is great potential right under your nose; they just haven't had the right circumstances to show their true mettle. This is one reason that I stress the importance of character assessment, skill testing, and other tools to get past your initial "impressions" about someone's potential.
7. **The importance of expressing yourself.** This discussion first came up in a risk management context in which Korean airline pilots were causing crashes because subordinates were intimidated about contradicting their superiors — even in the face of a disaster. Based on my litigation experience, CEOs are the last ones to know the truth until they're in the middle of a trial. Here's the point: we must "invite" subordinates to bring us their ideas, to break past the Culture of Silence. At the same time, subordinates must have the courage to speak up when appropriate.

8. **Meaningful work.** One of my favorite quotes from the Gladwell book is, "Hard work is a prison sentence only if it doesn't have meaning." I work hard, but I love the work that I do. It provides me the three factors that Gladwell says are to essential to our work: autonomy, complexity, and meaning.
- Autonomy gives us a sense of responsibility for the work that we do.
 - Complexity allows us to grow and learn; and
 - Meaning lets us realize the impact of our work.
 - Collective Learning

The lack of opportunity for autonomy, complexity, and meaning will continue to deprive employers of excellent workers who find it more meaningful to work for themselves. To what degree are you allowing your employees autonomy, complexity, and meaning in their day-to-day activities? How can they get that from you greater than by working on their own or for someone else?

In conclusion, there's no substitute for discovering the formula for success at your company!

PREVENTING SEXUAL HARASSMENT CLAIMS

By now everyone should know that sexual harassment is against the law, causes lawsuits, and ruins careers. Nonetheless, managers, employers, and employees continue to engage in it all too often. Roughly \$50 million was paid in sexual harassment cases according to the EEOC in 2007 — and that doesn't include hundreds of state court verdicts. As a reminder, here are the basics of sexual harassment prevention:



- A publicly articulated policy that's acknowledged by the entire workforce.
- A message from the top that sexual harassment will not be tolerated.
- Training for managers and employees on sexual harassment — what it is and how to prevent it. HR That Works users have these Training Modules available to them 24/7.
- Don't assume who can be considered a harasser or a victim. For example, 16% of sexual harassment claims were filed by men last year. Sexual harassment law also includes conduct engaged in by independent contractors, customers, and clients.
- The definition of sexual harassment continues to broaden. If it has anything to do with sex, you can consider it to be sexual. And since our culture is obsessed with sex, you can rest assured that stupid and misguided conduct in this area will continue.

- Once you're notified of sexual harassment, engage in a prompt and thorough investigation. As always, if you have any doubts about how to handle the matter, contact an experienced employment law attorney immediately.
- Finally, guard against possible retaliation claims. Claimants will be highly sensitive to any criticism and instances of poor performance must be specifically documented. Any termination within three months of a complaint is almost always regarded as retaliatory.

HR That Works members should take advantage of the sexual harassment training videos and other tools to prevent these destructive claims.

EMPLOYEE FREE CHOICE ACT RE-INTRODUCED TO CONGRESS

After months of speculation regarding when the Congressional debate over the Employee Free Choice Act (EFCA) would begin, this controversial legislation was reintroduced March 10th in both the United States Senate (S. 560) and the House of Representatives (H. 1409). As reported in previous updates and E-Mail Alerts, EFCA would eliminate secret ballot union elections, dramatically change the process by which a first collective bargaining agreement is negotiated, and significantly increase the penalties employers face for unfair labor practices without imposing stiffer sanctions for labor unions. For more information on EFCA, please contact your local Worklaw Network firm representative. HR That Works users should read the extensive report on the EFCA found in the Special Reports section.

Article courtesy of the Worklaw® Network.

AIRLINE MUST PAY WHISTLE BLOWER WHO RAISED SAFETY CONCERNS

OSHA has ordered Southern Air Inc., a cargo airline headquartered in Norwalk, Conn., to pay more than \$400,000 in lost wages, back pay, damages, and legal fees to compensate a flight crew member who was terminated for raising safety concerns protected under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).



The employee was terminated in April 2008 after twice complaining to management about inadequate rest breaks and being required to work hours in excess of those allowed under FAA rules. The employee then filed a whistleblower complaint with OSHA's Boston Regional Office.

fees and back pay of \$1,485 per week, plus interest, from April 7, 2008, through the date of payment. The company was also ordered to post the FAA whistleblower poster and an OSHA notice to employees about their whistleblower rights.

After finding merit to the complaint, OSHA issued a Notice of Secretary's Findings and Preliminary Order directing Southern under FAA rules. The employee then filed a whistleblower complaint with OSHA's Boston Regional Office.

FITNESS FOR DUTY EXAMS



1. Employers send employees to take fitness for duty exams for a number of reasons, including:
 2. A return to light duty or full duty after being out on a Workers Compensation claim.
 3. As a pre-hire medical examination to learn if they're able to do the job with or without limitations.
 4. To see if they're fit for duty after returning from family medical leave for a serious medical condition.
 5. To help manage a disability accommodation issue.
 6. If the employer suspects that the employee is unable to perform their job safely or productively, either because they're under the influence or for some other medical reason.

The employer should pay for this exam, as well as for the employee's time in taking it. When requesting fitness for duty exams, always provide the physician with a copy of either the employee's job description or their essential job functions. In general, fitness for duty exams should be limited solely to the medical information necessary to see if the employee is fit for duty. For example, if they've had a shoulder injury, no medical information should be forwarded about a family history of diabetes.

Perhaps the most difficult area to define is when you suspect that there's "something wrong" with an employee and then take the risk of asking them to have a medical examination. As long as the employer is "reasonable" in their concerns or suspicions, the employee would be insubordinate for not taking the exam and be subject to discipline or termination. Courts have ruled that it's reasonable for employers to request fitness for duty exams when employees engage in outbursts and other

erratic behavior, threats of violence, continued insubordination, a history of stress-related absences, appearing hung over, intoxicated, or high on the job, falling asleep at work, complaining of dizziness, and other activities.

To read the DOL's position on Pre-Hire Exams go to <http://www.eeoc.gov/policy/docs/preemp.html>

As always, employers should involve legal and medical experts when making these difficult decisions. If HR That Works members have a question about the legitimacy of a fitness for duty exam, don't hesitate to contact the free attorney Hotline.

APRIL WEBINAR



HR That Works users, mark your calendars for April 14th @ 2:00 pm EST. The topic is "*The Integrity Dividend*" Our guest

speaker is author, Tony Simons.

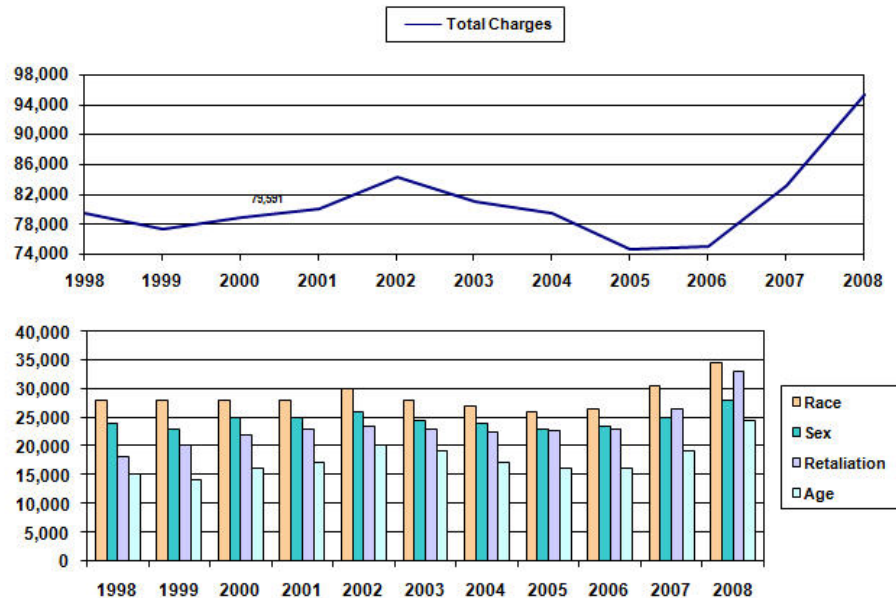
To listen to March 6th's webinar on "*Understanding COBRA Continuation Coverage Assistance Under The American Recovery And Reinvestment Act Of 2009*", [click here](#).

To listen to March 18th's webinar on "*The Accounting Game*", [click here](#).

To watch the video and obtain additional information on the upcoming webinars, please log into HR That Works and go to the Webinar page off the tools menu.

BIAS CLAIMS: UP, UP AND AWAY!

CLAIMS ARE ON THE RISE



Improving employee performance doesn't have to be difficult. Taking these basic steps will guarantee improved employee performance:

1. **Ditch traditional performance evaluations.** They simply don't work. Too much fear and a lack of information results in an uneasy process for both manager and employee.
2. **Separate performance discussions from compensation issues.** It clouds the conversation. In many cases, the employee couldn't care less about the evaluation; they just want to know if they're getting the raise
3. **Establish benchmarks.** How would employees answer these two questions: 1) What's the most important thing you do every day?; and 2) How would you know you were doing well without having to be told or without having to ask? Until you can have this conversation, any rating system is a waste of time.
4. **Have a performance discussion at least every 90 days.** Make sure the employee has a game plan for the next 90-day period. See the Form of the Month, 90-Day Game Plan Worksheet.
5. **Ask people what they've gotten done** — not what they're doing. Performance is about results. In the end, that's all that matters. Then constantly find out how they can get those results more efficiently and with greater quality.
6. **Finally, the time to deal with poor performance is now.** Don't waste time on your bottom 10% of employees. Chances are that they should have been terminated already. Focus on making your best employees even better and then share their best practices with everyone else.

In conclusion, most small and mid-sized companies do a poor job of analyzing, benchmarking, evaluating, and reporting performance. Any effort you make toward this end will be guaranteed to improve your bottom line. HR That Works users should see the Training Modules on Performance Management Improvement and Discipline and Termination.

FORMS OF THE MONTH

MODEL COBRA RECOVERY NOTICES

The American Recovery and Reinvestment Act (ARRA) requires company Group Health plans to notify certain current and former participants and beneficiaries about the reduction in COBRA premiums under the act.

The Department of Labor has created model notices to help plans and individuals comply with these requirements. Each notice is designed for a particular group of qualified beneficiaries and contains information to help satisfy the ARRA notification provisions.

[Notice of Availability of Model Notices](#)

- [General Notice](#) (Full version). Plans subject to COBRA provisions must send the General Notice to all qualified beneficiaries — not just covered employees — who experienced a qualifying event at any time from September 1, 2008 through December 31, 2009, regardless of the type of qualifying event, and who either have not yet been provided an election notice or who were provided an election notice on or after February 17, 2009 that did not include the additional information required by ARRA. This full version includes information on the premium reduction, as well as information required in a COBRA election notice.
- [General Notice](#) (Abbreviated version). The abbreviated version of the General Notice includes the same information as the full version on the availability of the premium reduction and other rights under ARRA, but does not include the COBRA coverage election information. It may be sent in place of the full version to individuals who experienced a qualifying event during on or after September 1, 2008, have already elected COBRA coverage, and still have it.
- [Alternative Notice](#). Insurance carriers that provide Group Health coverage must send the Alternative Notice to persons who became eligible for continuation coverage under state law. Continuation coverage requirements vary among states, and issuers should modify this model notice as necessary to conform it to the applicable state law. Insurers also find the model Alternative Notice or the abbreviated model General Notice appropriate for use in certain situations.
- [Notice in Connection with Extended Election Periods](#). Plans subject to COBRA provisions must send the Notice in Connection with Extended Election Periods to any individual eligible for assistance (or any individual who would be eligible for assistance if a COBRA continuation election were in effect) who:
 - Had a qualifying event at any time from September 1, 2008 through February 16, 2009; and
 - Either did not elect COBRA continuation coverage, or who elected it but subsequently discontinued COBRA.

This notice includes information on the ARRA additional election opportunity, as well as premium reduction information. This notice must be provided by April 18, 2009. (HR That Works Users can access these forms in Word format by logging on to the site).