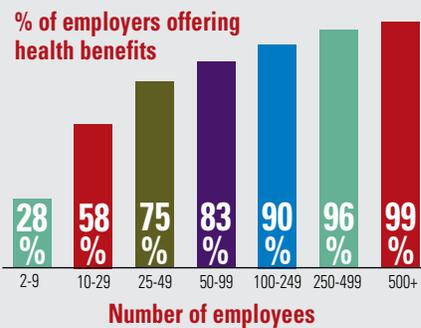


## SNAPSHOT

### For health coverage, staff size matters

The larger the employer, the more likely it is to offer health insurance benefits.

Source: U.S. Department of Health and Human Services, 2012



## Supremes define 'supervisor' in bias cases ...

In a major victory for employers, the Supreme Court has ruled 5-4 that, in Title VII discrimination cases, only someone with the power to take “tangible employment action” can be considered a supervisor. The June 24 decision in *Vance v. Ball State* will make it harder for employees to sue for supervisor bias, a claim that carries strict employer liability.

According to Justice Samuel Alito, who wrote the majority opinion, a supervisor must have the power to take a “tangible employment action” such as to “hire, fire, demote, promote, transfer, or discipline.” Now, anyone without that authority will be

considered a mere co-worker in cases brought under Title VII.

The question in *Vance* was simple: Just who is a supervisor? Must it be someone with real authority? Or can it simply be someone who is in a position to direct the employee’s work? Previously, most Circuit Courts of Appeal—and the EEOC—have taken the latter position.

It’s an important distinction. By law, employers are presumed liable for a supervisor’s actions. However, they only have a duty to promptly respond to and address the problem if the alleged offender is a co-worker.

*Continued on page 2*

## What’s News ...

### Consider Roth 401(k) as retirement benefit option

It may be time to talk to your fund administrator about adding a new feature to your company’s portfolio of retirement benefits: The option for employees to transfer 401(k) funds into a Roth 401(k). It’s a hybrid of a basic 401(k) plan and wildly popular Roth IRA accounts.

**The advantage for employees:** Although they’ll pay taxes on transfers now, the funds will be available tax-free when they reach retirement age. Paying the taxes sooner rather than later will save big bucks for many employees.

Tax rules that kicked in this year allow employees to transfer funds into Roth 401(k) accounts. Discuss your options for offering this benefit with your retirement fund provider. Find details online at [tinyurl.com/rothFAQs](http://tinyurl.com/rothFAQs).

### Retention tops HR execs’ list of future challenges

Fifty-nine percent of HR executives rate retaining and rewarding the best employees as HR’s biggest challenge over the next 10 years, according to a poll by the Society for Human Resource Management. Developing the next cadre of organizational leaders was the only other issue that more than half (52%) of the execs rated a top concern.

Creating a culture that attracts great employees came in third (36%), followed by remaining competitive in the talent market place (34%).

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## ... and set stricter standard for retaliation

The Supreme Court on June 24 ruled that employees can only win retaliation lawsuits if they can prove that their employer retaliated solely because of the employee’s protected activity. The 5-4 decision in *University of Texas Southwestern Medical Center v. Nassar* was another significant victory for employers that should limit liability—and could lead to fewer retaliation lawsuits.

The questions before the Court:

- Must an employee prove his protected status or activity was the only reason he suffered retaliation? That’s the “but-for” standard: But for the protected status or activity, would the employer have retaliated?
- Or, can protected status or activity be just one of many motives for the retaliation? That’s a “mixed-motive” argument.

**The case:** Dr. Naiel Nassar, a Muslim physician at the University of Texas Southwestern Medical Center, complained that his boss subjected him to unreasonable scrutiny because of religious and ethnic bias.

Meanwhile, Nassar wanted out. He got a new job at Parkland Hospital in Dallas, which has a close relationship with Southwestern Medical Center. After accepting the offer, Nassar sent a letter to Southwestern Medical Center attributing his departure to “the continuing harassment and discrimination against me by [the supervisor].” Word of the letter quickly spread at both the university hospital and Parkland.

A few days later, Parkland withdrew its employment offer, leaving Nassar unemployed. He sued, alleging

*Continued on page 2*

## Supervisor bias

(Cont. from page 1)

**The case:** Maetta Vance, a black catering worker at Ball State University, claimed her “supervisor,” Shaundra Davis, harassed her because of her race. The university argued that Davis was in fact just a co-worker. The 7th Circuit Court of Appeals sided with Ball State, noting that the university had disciplined Davis for her harassment. Therefore, it wasn’t responsible for her actions.

In her appeal to the Supreme Court, Vance argued that Davis *was* a supervisor because she could direct Vance’s daily activities, a standard several circuit courts have adopted.

The Supreme Court majority didn’t buy it. The court held that “there is no evidence that [Ball State] empowered Davis to take any tangible employment actions against Vance.” (*Vance v. Ball State University*, 11-556, U.S. Supreme Court, 2013)

## ‘But-for’ retaliation

(Cont. from page 1)

Southwestern Medical Center had arranged to have the offer pulled in retaliation for Nassar’s bias complaints. A jury awarded him more than \$3 million in damages.

The hospital appealed to the U.S. Supreme Court, arguing that the judge should have told the jury that Nassar had to prove that he never would have suffered retaliation if he hadn’t complained about bias.

The Supreme Court agreed. Justice Anthony Kennedy’s majority opinion stated that an employee “must establish that his or her protected activity was a but-for cause of the alleged adverse action.” The Justices sent the case down to a lower court for resolution. (*University of Texas Southwestern Medical Center v. Nassar*, 12-484, U.S. Supreme Court, 2013)



### GAO: Small business health care exchanges running behind

Small businesses in some states could have a hard time purchasing health insurance for employees this fall, slowing full implementation of the Affordable Care Act on Jan. 1, 2014.

According to the Government Accountability Office (GAO) report issued June 19, some of the state-based insurance exchanges through which small employers are supposed to be able to shop for affordable health coverage may not be open by Oct. 1, as the law requires.

Teething pains are slowing the rollout of Small Business Health Options Programs (SHOP) in 18 states. Most of the operational delays involve setting up SHOP websites and call centers that businesses will use to research, choose and register to buy insurance.

An official from the U.S. Department of Health and Human Services,

which is responsible for SHOP start-ups, said in a statement that he remains confident the SHOP exchanges will open on time.

Read the GAO’s report at [www.gao.gov/products/GAO-13-614](http://www.gao.gov/products/GAO-13-614).

### Bill would make 40 hours the ACA full-time standard

New Senate legislation would redefine the Affordable Care Act’s definition of a full-time employee to someone who works 40 or more hours a week.

The law currently sets the full-time bar at 30 hours per week. It requires companies that have 50 or more full-time employees to provide health benefits next year.

Sponsors of the Forty Hours is Full Time Act (S. 1188) hope it will stop employers from cutting worker hours to avoid having to provide health benefits.

No word on what this means for the 11% of employers that use a standard 37.5-hour workweek.

## Handling pay for Guard and Reserve members

If you have employees away on extended military deployments or who will train for two weeks this summer as members of the National Guard or Reserve, you face tricky HR and pay problems. Here’s what you need to know.

- Employees may use vacation time for military leave.
- Withhold income and FICA taxes from military differential payments made to employees who are absent for up to 30 days. Withhold only income taxes from differential pay paid to employees who are serving for longer periods. You may treat the pay as supplemental wages.
- If your cafeteria plan allows, employees who are away for at least 180 days (or indefinitely) may take qualified reservist distributions from their health flexible spending accounts. Such distributions are fully taxable.

- Benefits such as health insurance provided to employees on military leave must match benefits provided to employees on nonmilitary leave. If leave is for 31 or fewer days, you can’t charge reservists more than the regular amount they pay for their benefits.
- For longer periods of military leave, the law allows reservists and their dependents to elect COBRA-like benefits (i.e., benefits for 24 months at 102% of the premium). *Warning:* This applies to all employers, including small employers that aren’t covered under COBRA. For COBRA-covered employers, COBRA also applies.
- The accrual rate for seniority-based benefits, such as vacation, includes all time spent on military leave.
- Employers’ pension contributions continue during employees’ absence. Employees must be allowed to make up contributions when they return to work.

## HR heavyweights offer advice from SHRM's 2013 conference

The HR Specialist hit the road in late June for the annual Society for Human Resource Management (SHRM) conference in Chicago. Here are some lessons learned:

### HR management

**A numbers game:** "Several new studies have found that CEOs now rate HR analytics as the most important new information source.... With data analytics, you can understand people and what their strengths and weaknesses are and end up with some great results like lowering labor costs and raising productivity." — *Cecile Alper-Leroux, VP of product strategy, Ultimate Software*

### Recruiting & staffing

**Neuroscience & hiring:** "Narcissists make the best interviewees. And the tougher you make the interview, the more narcissists you'll hire.... Also, 67% of your higher performance scorers [in appraisals] are not the real highest performers in the organization. They're often the loudest people who can politicize the best." — *David Rock, director, NeuroLeadership Institute*

**Spotting résumé lies:** "Compared to traditional résumés, LinkedIn résumés are less deceptive about an

applicant's prior work experience and responsibilities. That's because there's more transparency to the process ... others who have worked with them can see [the résumé]." — *Michael Johnson, CEO, Clear Law Institute*

### Employment law: Interns, I-9s, immigration and more

• **Intern liability:** "Many of the interns you're using this summer are not really interns; they're employees.... Employers need to ask themselves, 'Is this something we'd normally hire someone to do?'" — *Michael Cohen, attorney, Duane Morris*

• **I-9 audits:** "Since 2008, we've seen a 600% increase in I-9 random and targeted audits.... Your potential liability can be quite expansive. You really need to pay attention to this." — *John Fay, VP, LawLogix Group*

• **EEOC strategy:** "In the old days, if a company was doing a million dollars' worth of bad stuff, they were under the EEOC microscope. But the EEOC wasn't looking at the smaller cases. Since the new EEOC sheriff came to town, they're prosecuting every case." — *Mindy Chapman, author of the HR Specialist "Case in Point" blog*

• **Immigration reform:** "This is the best time since 1986 that we will have the opportunity to reform our nation's immi-

gration laws.... Our goal in this process is to try and eliminate the Form I-9. We want to have an entirely electronic, integrated verification system." — *Michael Aitken, SHRM VP of government affairs*

• **Minimum wage:** "I think it's a matter of when, not if. Within the next 18 to 24 months, we'll likely see an increase in the federal minimum wage." — *Aitken*

• **HR's role in teaching the law:** "Managers need to know how to help you. They need to spot [legal] issues. The more your managers know about what you do ... it helps develop their 'Spidey' sense. They need to know they are agents of the company, even if they started as hourly workers." — *Gregory Hare, attorney, Ogletree Deakins*

• **Employee leave:** "Pretend you are going on leave yourself. See how your system works. Your reaction might be, 'I'm in HR. We set the system up, and I'm getting confused. So how can our employees do it?'" — *Heather Owen, attorney, Constangy, Brooks & Smith*

### Benefits

**401(k) mistakes:** "The 401(k) loan is the most dastardly thing.... You've got to say to your employees that there's ... a thousand reasons why you want to avoid it." — *Ric Edelman, CEO, Edelman Financial*



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### Remind all supervisors: Avoid 'English-only' rules

As much as some of your managers may want to, there's almost never a good reason to forbid employees from speaking a language other than English.

Courts take a dim view of such English-only rules. Plus, it's just bad for employee relations.

**Recent case:** A department store manager told six Somali workers who sorted clothes in a basement that they'd be fired if they spoke "even one word of Somali" at work. Luckily for the store, the case didn't make it to court.

After some bad publicity and threats of a lawsuit, the store apologized to the workers and disciplined the manager.

**The lesson:** You must have a clear business reason for requiring employees to speak English only.

There are a few valid exceptions: customer service situations (talking to customers in English) or dangerous conditions (when safety depends

on using a common language).

Make sure language rules don't carry the slightest hint of bias.

### 2 questions bosses should ask before disciplining employees

Prevent employees from filing successful retaliation lawsuits by telling managers to ask themselves these two questions before they discipline employees who've recently filed any internal or external complaints about discrimination, or otherwise engaged in some protected activity:

**1. "Why am I taking this action now?"** Scrutinize the reason and timing of the action. Is there any connection to the person's complaint? If it smells even a bit like retaliation for the complaint, a jury could see it that way, too.

**2. "Would I take this action with my best employee?"** If the answer is "no," you could be open to a retaliation charge. If the answer is "yes," make sure that you document the basis for your decision before proceeding.

## Strategic HR

### Recruit line managers as your project allies

When you want to gain approval for a new HR initiative, enlist a network of line-management allies to champion your case. It's one of the best ways to fast-track your new program—and enhance HR's stature within your organization.

Having line managers' support proves to senior execs that your plan advances the business strategy.

**Tip:** Maintain regular, ongoing contact with managers so they'll be receptive to your plans and be ready to back them.

Take these three steps to pull line managers into your corner before you pitch a project to top executives:

**1. Meet weekly or monthly with line managers to find out their business and HR needs.** If that's difficult to do formally, seek opportunities for

casual conversations.

*Example:* Hold breakfast or lunch meetings with line managers. *Ask:* "What is HR doing well?" "What is it doing wrong?" "What can it improve?" "What are the needs of the business?" "How can this be a better place to work?"

**2. Include one or more line managers in the group that develops your proposal.** Your project needs to make sense to line managers in terms of how they run the business. Otherwise, they might decide to withhold their support.

**3. Make sure it's known that line managers helped** make the project a reality. Give them credit when credit is due. (You can also make sure they're held partly accountable for reaching the project's goals.)

## The Last Word

### Prepare to pay top dollar for top tech talent

Technology salaries jumped by 5% last year, more than they have in a decade, according to a compensation survey by Dice, a career site for technology and engineering professionals.

Average annual salaries for tech professionals increased from \$81,327 in 2011 to \$85,619 last year. At the same time, almost two-thirds of tech pros report they are confident they can find new jobs, even as their current employers are doubling efforts to retain them.

### Why do new employees decide to leave?

Here are the top 10 reasons new hires left their jobs within a year, according to a recent WorldatWork survey:

1. Concerns about the direction of the organization and its leaders
2. Lack of promotional opportunities
3. Opportunity to earn more elsewhere
4. Work/life balance issues
5. Pay is unfair relative to my performance contribution
6. Dissatisfied with job responsibilities
7. Lack of empowerment or influence
8. Workloads are too heavy
9. Pay is unfair relative to others in the organization.
10. Pay is unfair relative to others outside the organization.

### Going, going, gone...

Four items (and one idea) that will have disappeared from U.S. workplaces within five years, according to a poll of 7,000 LinkedIn members:

1. Tape recorders
2. Fax machines
3. Rolodexes
4. Standard work hours
5. Desk phones

